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BEIJING'S CHALLENGE TO ASEAN AND UNCLOS AND THE NECESSITY OF A NEW MULTI-TIERED APPROACH

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Abstract

This Working Paper examines the South China Sea disputes and primarily focuses on developments since 2013 when the Philippines filed for international arbitration. The first part of the paper examines how the Association of Southeast Asian Nations (ASEAN) and China reacted to the arbitral process and the potential for the Association to undertake an effective and unified position in the future. The second part of the article builds on the analysis by assessing the prospects for, and likely impact of, the long-sought Code of Conduct. In the process, it examines the continued viability of ASEAN's consensus-based decision-making approach, whether and how it could be reformed, and the potential benefits and viability of a new institutional arrangement with membership based on shared values and interests (rather than geography). The paper also argues that to enhance the possibility of redress on the issue, other key stakeholder states (such as Japan, Australia, India, and the United States) will need to be more strongly engaged and support claimant countries through a diverse array of activities. Such activities range from investments in capacity building to the provision of coastguards (if invited) to police and protect resources within the Exclusive Economic Zones of claimant states, as clarified by the July 2016 Arbitral Ruling.

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The South China Sea: Beijing's Challenge to ASEAN and UNCLOS and the Necessity of a New Multi-Tiered Approach

The South China Sea is of critical importance to East Asia and its claimant states due to its natural resources, strategic sea lanes, and associated territorial disputes. The situation has become all the more contentious given China's rapidly rising power and its recourse to "corruption, interference or coercion" of elites and key stakeholder states in recent years.[1] Given the substantive amount of literature regarding earlier developments concerning the role of the Association of Southeast Asian Nations (ASEAN) in connection with the South China Sea territorial disputes, the two sections in this Working Paper will focus primarily on developments since 2013, when the Philippines filed for International Arbitration.

The first section examines how ASEAN and China reacted to the arbitral process, as this has a significant bearing on the past assessments on ASEAN unity, as well as the Association's potential for meaningful action in the future. In the process, the section examines the implications of these reactions and subsequent state behaviours for ASEAN-China relations. The second section builds on this analysis by assessing the prospects for, and the likely impact of, the long-sought after Code of Conduct. This section includes an examination of the viability of modifications to ASEAN's current *modus operandi*, including its practice of consensus-based decision-making, and whether new institutional arrangements and approaches should be considered.

Based on the analysis throughout the paper, it is argued that a multi-faceted, multi-layered, and multi-tiered approach which extends beyond the good offices of ASEAN (and its extra-mural institutions) will need to be developed. This approach must call on international support—diplomatic, capacity building, and an active multi-lateral maritime presence—to potentially get Beijing to reassess its current policies regarding the South China Sea. Even in the hypothetical scenario that such support is possible, the probability of reversing Beijing's recent gains remains extremely low. This analysis is not intended to detract from the critically important functions of ASEAN in Southeast Asia and beyond—particularly in the economic and non-traditional security domains. Rather, the ideas presented in this Working Paper are designed to provide supplementary avenues to enable ASEAN to focus on areas of cooperation where there is a strong consensus to do so, while simultaneously alleviating intra-mural tensions regarding its collective position in the South China Sea.

[1] More specifically, Malcolm Turnbull, the Prime Minister of Australia, stated that '… if we are to maintain the dynamism of our region, then we must preserve the rules-based structure that has enabled it thus far. This means cooperation, not unilateral actions to seize or create territory or militarise disputed areas. This means competing within the framework of international law, not winning through corruption, interference or coercion.' "Keynote Address: Malcolm Turnbull." International Institute for Strategic Studies, Accessed June 25, 2017. http://www.iiss.org/en/events/shangri-la-dialogue/archive/shangri-la-dialogue-2017-4f77/opening-remarks-and-keynote-address-fc1a/keynote-address---malcolm-turnbull-4bbe

The Arbitral Ruling and the Code of Conduct Amidst Rapidly Shifting Dynamics

Since June 2016, three major events have affected the dynamics of the South China Sea territorial disputes: the arbitral ruling on 12 July under Annex VII of UNCLOS, the inauguration of President Rodrigo Duterte just 12 days earlier, and the confirmation of Donald Trump as the 45th President of the United States of America on 20 January 2017. To make sense of the Arbitral Ruling, what it means for ASEAN, and how certain members have reacted, it is insightful to briefly examine these three events in reverse order. In the case of the United States, a key element of the previous administration's "rebalance" with Asia was the Trans-Pacific Partnership (TPP), a free trade agreement with significant political and strategic dynamics. However, President Trump formally (and without consultation with other TPP participant countries) discarded the TPP within three days of taking office. When viewed in conjunction with President Trump's instrumentalist approach to alliance commitments (i.e., that alliance partners should pay more for their security), concerns about the value of the U.S. security umbrella were reinforced.[2] These developments in turn exacerbated President Duterte's scepticism about whether the United States could be a trusted security partner.

Meanwhile, President Duterte was scathing of the United States during his election campaign, and was no less so in the immediate months after his inauguration. In the context of the 2016 East Asia Summit (EAS), and following the public lobbing of profanities against President Obama by President Duterte (e.g., "son of a whore"), Washington cancelled a scheduled one-on-one meeting in Laos between the two Presidents. President Duterte then failed to attend the associated U.S.-ASEAN Summit meeting at the same venue due to a "severe migraine".[3] Relations deteriorated further when, in October 2016, during a state visit to Beijing, President Duterte said he would have a "separation" or "break up" his country's long standing defence ties with the United States and would instead strengthen defence relations with China and Russia.[4] However, since the change in leadership in Washington, there has been talk of a possible "bromance" between the two Presidents. At the surface, Presidents Duterte and Trump may appear to have much in common—including the less than admired aspects of their personalities—but such similarities do not extend to the different "perceptions" each hold about national security, and the respective national interests they represent. While criticism against President Duterte's war on drugs may have driven him to speak out against the "hypocrisy" of the United States and its leadership, he has also been motivated by his own Pre-TPP scepticism on how much he can rely on his country's security alliance with Washington. In the

[2] Watts, Jake M. "ASEAN Tacks Away from Rocky South China Sea Issue; Final Summit Communique Welcomes Beijing's Cooperation on Issues Such as Framework for Maritime Code of Conduct." *The Wall Street Journal*, April 30, 2017.
[3] Wan, William, and Nakamura, David. "After the Slur and the Snub - Finally a Handshake between Obama and Philippines' Rodrigo Dueterte." *The Washington Post*, September 8, 2016.
[4] Heydarian, Richard J. "Philippines' Duterte Seeks Alliance with China but Defence Officials Warn of Strategic Threat." *South China Morning Post*, March 26, 2017; Phillips, Tom. "Has Duterte Really Ditched the U.S. for Beijing's Embrace." *The Guardian*, October 21, 2016.

short-term, President Duterte's approach has delivered tangible benefits, including Beijing's commitment to provide US$24 billion in aid and investment.[5]

Manila's decision to seek recourse to arbitration and regional reactions

One of the key challenges faced by the Philippines regarding its dispute with China, and the extent to which it could depend on its Mutual Defence Treaty with the United States, occurred in 2012 when Beijing asserted control of the Scarborough Shoal—located just 124 nautical miles west of the Philippines Luzon province—and also reinforced Filipino concerns about how much the country could depend on its alliance with the United States. The Philippine military responded by publicly seeking to invoke its security treaty with the United States, but Washington evaded obligations with the statement that "the treaty does not require the U.S. to intervene on behalf of the Philippines over reefs".[6] Given the continued provocations by Beijing during the years that followed, the United States then toughened its position, and indicated publicly, but did not guarantee, that it would help the Philippines in the event that China occupied disputed features.[7] However, this was too little, too late, to stop the tide of scepticism rising within certain quarters of the Filipino elite. Nonetheless, in contrast to Duterte, President Aquino's administration did seek to reinforce relations with the United States leading to the 2014 "Enhanced Defence Cooperation Agreement" (enabling the United States to build and operate facilities on Philippine military bases), as well as a significant increase in the level of U.S. military assistance and aid. Meanwhile, senior officials, military, and analysts inside the United States continue to call for a more robust pledge to defend the Philippines and particularly the Scarborough Shoal.[8]

While Manila's relationship with Washington has historically been a key component of the Philippine Government's strategy vis-à-vis the South China Sea, Manila has also sought to protect its territorial interests through the good offices of ASEAN. Early on, particularly between 1992 and 1995, ASEAN demonstrated a reasonable degree of solidarity regarding Filipino concerns. However, following membership expansion, the East Asian Financial Crisis, and a significant increase in China's economic, political and military clout, such unity dissipated, leading to a stalemate over early negotiations for a Code of Conduct (CoC) on the South China Sea, and the subsequent compromise agreement of the non-binding Declaration of Conduct on the South China Sea (DoC). While various diplomatic and functional approaches, including cooperation with Beijing through joint seismic surveys, were attempted, it became increasingly apparent that the perceived stalemate was being supplanted by the unremitting advancement of Beijing's interests, particularly since 2007.[9]

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[5] Tata, Samir . "ASEAN Neutrality: A Strategic Windfall for China." *Forbes*, February 24, 2017.
[6] "External Affairs, Philippines." *Jane's Sentinel Security Assessment*, January 5 , 2013.
[7] "U.S. Would 'Help' Philippines in South China Sea, Says Navy Chief." *South China Morning Post*, February 14, 2014.
[8] McDevitt, Michael . "Analysis: Is It Time for the U.S. To Take a Position on Scarborough Shoal." *USNI News*, 19 July 2016; Poling. Gregory B,"Have We Already Lost the South China Sea." Asia Maritime Transparency Initiative, Accessed April 22, 2017, https://amti.csis.org/already-lost-south-china-sea/.
[9] Roberts, Christopher B. *The South China Sea Maritime Dispute: Political, Legal and Regional Perspectives* Routledge, 2015..

As the years progressed, ASEAN's position became increasingly fractured over the South China Sea dispute, and this was all too apparent at the July 2012 ASEAN Foreign Minister's Meeting. At the time, Beijing managed to get the Cambodian ASEAN Chair—represented by its Deputy Prime Minister and Foreign Minister Hor Namhong—to block a Joint Communiqué from referencing any Chinese aggression (i.e., the Scarborough Shoal incident) and/or Beijing's activities in Vietnam's Exclusive Economic Zone (EEZ). Other members attempted to devise alternative sets of wording but their contents were rejected (each time Hor Namhong reportedly left the room to consult with Beijing).[10] The ASEAN Ministerial Meeting (AMM, Foreign Ministers) in Cambodia was the first time in history that the Association failed to reach a consensus over a joint communique. A subsequent intervention by Indonesia did lead to a "six-point plan", but this did not deliver anything fundamentally new.[11] In September, the ASEAN members also failed to reach a consensus over Indonesia's submission of its "zero draft COC"[12] and, at the November 2012 ASEAN Leader's Summit, Manila's plea to renegotiate a unified position fell on deaf ears.[13] The combined effect of these three failings was likely "the final straw that broke the camel's back". Consequently, the Philippine government filed its case for international arbitration via the Permanent Court of Arbitration (PCA) in January 2013.

China, via a *Note Verbale* to the PCA, was quick to reaffirm that it would not participate in the proceedings, arguing that it maintained "indisputable sovereignty over the Nansha [South China Sea] islands and its adjacent waters".[14] Beijing further argued that the action "not only violate[s] the consensus enshrined in the Declaration of Conduct of the Parties in the South China Sea, but [the submission is] also factually flawed and contain[s] false accusations".[15] It is important to note here, that Beijing has consistently breached the principles of the DoC and that recourse to peaceful arbitration is a process that has been consented to by all parties who have ratified UNCLOS. Beijing responded by actively seeking to isolate the Philippines from ASEAN and the (then) new Chinese Foreign Minister, Wang Yi, boycotted Manila during a regional diplomatic tour. Beijing also withdrew an invitation to President Aquino to at the Tenth China-ASEAN Expo as a "guest of honour" adding that he should visit "at a more conducive time". The previous year, Beijing had already demonstrated its anger towards Manila through the imposition of informal sanctions against the Philippines banana and tourism industries, following the onset of the Scarborough Shoal incident.[16]

Manila's decision to seek a legal outcome received, at best, muted support from most of the ASEAN members. Neither the ASEAN leaders, via the ASEAN Summits, nor the ASEAN Foreign Ministers,

[10] "Cambodia's Foreign Relations; Losing the Limelight." *The Economist*, July 17, 2012.
[11] Emmerson, Donald K."Beyond the Six Points: How Far Will Indonesia Go?" *East Asia Forum*, July 29, 2012; Saragih, Bagus. "RI Finds Common ASEAN Ground in Sea Dispute." *The Jakarta Post*, July 23 2012.
[12] Emmers, Ralf . "ASEAN Neutrality and Unity over the South China Sea Disputes." in *5th International Workshop on the South China Sea: Cooperation for Regional Security and Development* Paper presented at the Diplomatic Academy of Vietnam and the Vietnam Lawyer's Association, Hanoi, Vietnam. 2013,
[13] Emmerson. Donald K. "Challenging ASEAN: The U.S. Pivot through Southeast Asian Eyes." Global Asia, Accessed March 24, 2012, www.ct2014.com.
[14] Jiemen, Zhao. "Philippines Seeks U.S. Support on Arbitration of Disputes with China." *Xinhua News Agency*, January 29, 2013.
[15] "China Rejects Int'l Territorial Arbitration Initiated by Manila." *Kyodo News*, February 20, 2013.
[16] Esmaquel II, Paterno . "DFA: Vietnam Backs Ph Case Vs China." *Rappler*, August 2, 2013.

via their joint communiqués, provided any direct statement of support concerning Manila's recourse to legal arbitration. As of April 2017, only 8 documents within the ASEAN internet domain (i.e., 'ASEAN.org' domain search) referred to international arbitration by the Philippines, and even low-level discussions—such as the "2nd ASEAN Regional Forum Seminar on UNCLOS"—did not contain any inference of broad collective support for the action. Initially, not even Vietnam was willing to formally endorse Manila's action during the immediate months that followed. Nonetheless, at an August 2013 meeting between the foreign ministers of Vietnam and the Philippines, Foreign Secretary Albert del Rosario stated that Hanoi was very supportive' of Manila's legal move and it was a 'possibility' that Vietnam would participate in the arbitration. Then, in the wake of further provocations discussed below, Hanoi filed a "statement of interest" that highlighted its position on the legalities of Hanoi's claims.[17]

For some ASEAN elite, such as Simon Tay, Chairman of the Singapore Institute of International Affairs (SIIA), arbitration was a development where "others in ASEAN were not consulted on the legal challenge"[18]—an issue that the Singapore government also declared in a press release.[19] However, the Philippines had highlighted the possibility of legal arbitration on many occasions since 1997 including almost monthly statements of intent throughout 2012.[20] Nonetheless, one Malaysian reporter went so far as to claim that "many see Manila's actions as a desperate act—a publicity stunt to regain international prestige following the Scarborough Shoal fiasco in April last year".[21] Such adverse assessments continued and in June 2016, Cambodian Prime Minister Hun Sen lashed out calling the move "politically motivated", and that it was "not about laws", echoing some Chinese propaganda, that it was instead about a "political conspiracy between some countries [i.e., the United States] and the court".[22]

Meanwhile, Beijing claimed that it had achieved a "four-point consensus" from three of the ASEAN States—Cambodia, Laos, and Brunei—in support of, *inter alia*, China's position that the disputes should be resolved bilaterally.[23] Cambodia later denied it had agreed to the consensus.[24] China also

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[17] Thayer, Carlyle A. "Vietnam Files State of Interest with the Permanent Court of Arbitration." *CSIS*, December 15, 2014.
[18] Tay, Simon . "Legal Process, Political Mess." *Today*, January 28 ,2013.
[19] "MFA Spokesman's Comments in Resone to Media Queries on the Philippines' Initiation of Arbitration Proceedings against China under Article 287 and Annex Vii of the 1982 United Nations Convention on the Law of the Sea (Unclos)." news release, March 3, 2013.
[20] "Manila Urges Court Solution to Spratlys Row." *Reuters*, June 3, 1997.
[21] "Has Manila Broken Ranks with ASEAN?" *New Straits Times*, February 6, 2013.
[22] Javid Heydarian, Richard J. "S.E.A. View: Soul-Searching Needed Lest Maritime Disputes Tear ASEAN Apart." *The Straits Times*, June 30, 2016.
[23] In the case of Brunei, its authoritarian and opaque environment has largely enabled it to avoid international scrutiny. However, when it was the ASEAN Chair in 2013, the country also entered into a strategic partnership with China and signed an agreement for joint exploration in the South China Sea with the China National Offshore Oil Company (CNOOC)–a Chinese government owned enterprise (SOE). Roberts, Christopher B. "Brunei in 2013: Paradoxes in Image and Performance." *Southeast Asian Affairs* (2014): 92.
[24] "Wang Yi: Stick to "Dual-Track Approach" When Dealing with the South China Sea Issue." Ministry of Foreign Affairs, the People's Republic of China, Accessed August 22, 2016. www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1384511.shtml. However, one foreign ministry spokesperson for Cambodia questioned the veracity of this stating that there had been no agreement or discussions, just a visit by a Chinese Foreign Minister'. Tang, Siew Mun. "S.E.A. View: Hang Together or Hang Seperately?" *The Straits Times*, May 12, 2016.

sought to pacify ASEAN through various pledges to accelerate the completion of legally binding Code of Conduct (CoC)—a process that Beijing has managed to draw out since 1996.[25] China's strategy and public reassurances toward ASEAN were, at best, highly duplicitous. For example, Beijing did not abstain from further provocations and the Philippines subsequently discovered thirty Chinese fishing boats, two Chinese maritime Surveillance Vessels, and one PLAN warship, close to the Philippine occupied Second Thomas Shoal—105 nautical miles west of Palawan (Philippines)—and China has since maintained a presence there.[26]

During 2014, Beijing shifted its attention to the waters off the coast of Vietnam. Just two weeks before the 2014 ASEAN Leader's Summit, China disregarded the interests of ASEAN when it positioned the HD-981 deep water drilling rig within 119 nautical miles of Vietnam's coast. This decision resulted in active resistance by the Vietnamese coast guard (which Beijing responded with water cannons and ramming of vessels), as well as mass protests where factories were burnt and four workers died.[27] Since 2015, global attention regarding the South China Sea was further augmented by the large scale dredging of environmentally sensitive coral reefs to create seven artificial islands covering a total of 3,200 acres and, in the process, has fundamentally changed the geopolitical landscape of the maritime region.[28] Despite low key media reports about such land reclamation as early as April 2014,[29] the failure of Washington and its allies to prevent these developments further undermined regional faith in the U.S. security umbrella.

The Arbitral Award and subsequent ASEAN diplomacy: implications and reactions

After the Arbitral process concluded in July 2016, the five Justices unanimously ruled in favour of fourteen of the fifteen claims by the Philippine government. The landmark ruling included the finding that Beijing's nine-dash-line claim had no standing under UNCLOS or on any other basis. The judges also ruled that that none of the features claimed by China and the Philippines in the South China Sea were in fact "islands", and they were therefore not entitled to a 200 nm EEZ but, at most, a 12-nautical mile territorial zone. As a consequence, Beijing's activities in the "Philippines' EEZ"—such as the artificial island construction, its interference with Philippine fishing and exploration activities, and its constructions on non-appropriable "low-tide elevations"—constituted a violation of the sovereign rights of the Philippines.[30] Moreover, Beijing's observance of the decision would necessarily include the abandoning of the facilities it had built on Mischief Reef (deemed a "low tide elevation" and therefore

[25] "ASEAN, China Reaffirm Commitment to Declaration on the Code of Conduct." *Channel News Asia*, July 25, 2016.
[26] Thayer, Carlyle A. "South China Sea Developments in 2013: ASEAN Unity Restored, Sino-Philippine Tensions and ASEAN-China Consultations on a Code of Conduct," in Paper presented at the The 5th International Workshop on the South China Sea: Cooperation for Regional Security Development, Hanoi,Vietnam and the Vietnam. 2013.
[27] Branigan, Tania. "Vietnam and China Trade Accusation over Sinking of Vietnamese Fishing Boat," *The Guardian*, May 28, 2014.
[28] Roberts, Christopher B. "The 'South Sea' and ASEAN: Failing Unity Amidst Beijing's Duplicitious Diplomacy," *NASSP Issue Brief Series* 2, 4 (2016): 9-10.
[29] "Japan to Help Vietnam Enhance Maritime Police Capacity Amid Sea Tensions." *Viet Nam News*,April 8, 2014.
[30] "Press Release: The South China Sea Aribration." (Permanent Court of Arbitration, 2016).

not appropriable). Unsurprisingly, Beijing quickly denounced the ruling as “unjust and unlawful" adding (incorrectly) that the Award was “null and void and has no binding force”.[31]

In the military-strategic realm, China was relatively constrained and it did not resort to previously threatened actions such as the unilateral imposition of an Air Defence Identification Zone (ADIZ). In the context of the United States, Beijing likely wanted to avoid any developments that might make it the centre of debate in America’s then ongoing election campaign. However, Beijing did respond to the ruling by ramping up its already extensive diplomatic campaign (reinforced by “chequebook diplomacy”) to undermine the legitimacy of the Award. Such efforts included an erroneous declaration that sixty countries supported its position; the actual number was thirty-one and this dropped to six after the ruling with most of these being geopolitically insignificant.[32] However, in the context of Southeast Asia, Beijing’s primary strategy was to shift attention away from the Award so that it could principally return to bilateral dialogue and negotiations with the ASEAN claimants.

On balance, the imposition of an “unspoken redline” regarding the mention of the Arbitral Award was relatively easy given Southeast Asia’s economic dependence on China and the associated band-wagoning by at least Cambodia and Laos. Thus, the ASEAN Foreign Ministers made no mention of the Award when they met in Laos two weeks later on 24 July 2016. Through to July 2017, no ASEAN statement at either the Leaders or Foreign Minister’s levels has referenced even marginal support for the Arbitral ruling. Therefore, following the East Asia Summit in September 2016, Chinese state media celebrated this silence as a “diplomatic victory” for Beijing.[33] Nonetheless, several ASEAN states—Vietnam, Malaysia, Singapore, and Myanmar—did provide individual statements that supported legal processes under UNCLOS and broader international law. Meanwhile, Indonesia and Thailand made statements that emphasised self-restraint, but did not directly comment on the ruling itself.[34]

The Arbitral Ruling, together with Beijing’s perception that it had not adequately placated ASEAN, continued to perturb Beijing—more than it publicly acknowledged. The focus of these frustrations and insecurities soon zeroed in on Singapore as, from 5 August 2015, it had assumed a three-year role as “Country Coordinator for ASEAN China Dialogue Relations”. Both before and since, Singapore had been very transparent regarding its disappointment with the slow pace of negotiations for a CoC.[35] However, tensions became visibly public during a June 2016 Special ASEAN-China Foreign

[31] "Who Is Taking Sides after the South China Sea Ruling?" Asia Maritime Transparency Initiative, Accessed February 11, 2016. https://amti.csis.org/sides-in-south-china-sea; Searight, Amy. "Impact of the South China Sea Tribunal Ruling." *Hampton Roads International Security Quarterly* 2017.
[32] Ba, Alice. "Southeast Asia in an Age of Strategic Uncertainty: Legal Rulings, Domestic Impulses, and the Ongoing Pursuit of Autonomy." in *Southeast Asian Affairs 2017*, edited by Daljit Singh and Malcolm Cook, Singapore: ISEAS, 2017.
[33] "'Diplomatic Victory' Reflects Common Choice by China, ASEAN for Peaceful Development," *Xinhua News Agency*, September 10, 2016.
[34] Searight, "Impact of the South China Sea Tribunal Ruling."
[35] "Transcript of Singapore Minister for Foreign Affairs, Minister for Law K Shanmugam's Media Wrap-up at 48th AMM, Related Meetings." news release, August, 6 2015; Au Yong, Jeremy. "Progress on Maritime Code of Conduct Dissapointing: Shanmugam," *The Straits Times*, June 17, 2015.

Minister's Meeting in Kunming. At the meeting, the ASEAN side did not agree to a last minute "10-point consensus agreement" submitted by Beijing, and the ASEAN members also decided not to attend a subsequent "Joint Press Conference". Instead, they formulated an ASEAN-only statement, critical of developments in the South China Sea—including a specific reference to Beijing—that was initially released on the Malaysia Ministry of Foreign Affairs website.[36] Some state-owned media, such as the GLOBAL TIMES, launched a tirade of accusations against Singapore, and within three hours of the statement's release, pressure by Beijing led to a retraction of the statement from the website.[37]

Beijing continued to hold Singapore accountable for the collective position of ASEAN. For example, during the 17th Non-Aligned Summit (NAM) in Venezuela, Laos, as the ASEAN Chair, submitted various ASEAN "consensus paragraphs" on developments in the region that happened to include references to the South China Sea. Contrary to past practice, and without explanation, the text was blocked by Venezuela—who owes a significant amount in financial debt to China. Moreover, the Chinese state-run media (e.g., GLOBAL TIMES) once again launched a tirade against the city-state with one of the more "moderate allegations" being that Singapore had insisted on content that supported the Philippines' South China Sea Arbitration case against China.[38] The evidential connection between these media attacks and the Chinese Communist Party (CCP) was reinforced in November 2016 when, at Beijing's request, Hong Kong customs confiscated nine armoured vehicles that were enroute from Taiwan to Singapore, following training exercises between the two countries.[39]

Beijing's tactics were largely successful. First, immediately after the Arbitral Award, the Philippine Government (and soon to be Chair of ASEAN) set aside the win and called for "restraint" and direct "dialogue" between Manila and Beijing.[40] Second, given this and the events of the past few months, ASEAN refrained from commenting directly about the Arbitral Award and the July 2016 Foreign Minister's Joint Communiqué was reformulated to avoid the fracturing of unity. Thus, without specifically mentioning China, the statement referenced the concerns of "some ministers" about "land reclamations" and the "escalation of activities in the area".[41] However, there was a unanimous reference to the "importance of non-militarisation and self-restraint in the conduct of all activities,

[36] Wee, Teo Cheng. "Singapore Caught in the Middle as China-ASEAN Country Coordinator," *Straights Times*, June 24, 2016.
[37] Beech, Hannah. "What a Retracted Statement Says About China's Growing Power in the South China Sea." *Time*, June 15, 2016.
[38] "Singapore Raises South China Sea Arbitration at Nam Summit of Heads of State Despite Opposition (Translation by the Straits Times)." *Global Times*, September 27, 2016; Ping, Chong Koh. "Envoy Rejects Reports of Singapore Raising Territorial Row," *The Straits Times*, September 28, 2016.
[39] "Singapore: Hong Kong Will Return Seized Armored Vehicles." *Stratfor*, January 24, 2017. While there is some debate over the precise nature of the developments (e.g., whether there was a 'tip-off' by Beijing) that led to the seizure of Singapore's armoured vehicles by Hong Kong's customs agency. However, what is known is that the development was soon followed by a formal protest note from Beijing to Singapore over the vehicles (including their 'alleged' undermining of the One China Principle) and, among other things, Beijing authorised its state media to make adverse references about the armoured vehicles and how they should be destroyed because of Singapore's behaviour on matters concerning the South China Sea and also its relationship with Taiwan. For examples, see: Jun, Ai. "Singapore's Hypocricy Exposed by Seized Military Vehicles." *Global Times*, November 27, 2016; Tiantian, Bai. "Long-Admired Singapore Model Loses Luster for Chinese Goverment Amid Rists and China's Rise." ibid., June 29. 2017.
[40] Lim, Benjamin. "Philippines' Duterte Says South China Sea Arbitration Case to Take 'Back Seat'." *Reuters*, October 19, 2016.
[41] "Press Release: The South China Sea Aribration."

including land reclamation…".[42] At the February 2017 Foreign Minister's Retreat, a similar formulation was applied in the press release by the Philippines government, as the ASEAN Chair, but the statement was relatively constrained, as all the comments concerning militarisation and land reclamation were placed under the "some ministers' formulation".[43] By the conclusion of the first ASEAN Leader's Summit after the Arbitral Award in September 2016, the ASEAN leaders had also softened their position by repeating the wording at the July 2016 AMM statement including its "some minister's formulation".[44]

The softening of ASEAN's collective position was partly informed by the re-invigoration of Beijing's "Charm Offensive"[45]. At the multi-lateral level, Beijing's first olive branch came four weeks after the Ruling when China and ASEAN announced they were on track to draft the CoC by mid-2017.[46] In addition, it was stated that they had also made progress on a draft Code of Unplanned Encounters at Sea (CUES) as well as an emergency communications hotline for senior foreign ministry officials. Both the CUES and Hotline Agreements were then finalised in time for the 19th ASEAN-China Summit in September 2016.[47] A month later, the Philippines Minister of Defence announced Beijing had withdrawn its Coast Guard from the Scarborough (*Panatag*) Shoal, and that Filipino boats can resume fishing activities following this "welcome development".[48] However, in the case of the Scarborough Shoal, this was not entirely accurate, as credible reports emerged that the Chinese coast guard were back within a month.[49] Since this time, the Chinese coast guard has permitted both Filipino and Vietnamese vessels to fish in nearby waters. Nonetheless, as Bill Hayton identifies, the Chinese Coast Guard has continued to block fishing activities around the Spratly Islands (allegedly opening fire on one Philippine trawler near Gavin Reef on 27 March 2017). Consequently, he adds that "China is not fully complying with the ruling—far from it".[50]

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[42] Ibid.

[43] ASEAN Secretariat. "Press Release by the Chairman of the ASEAN Foreign Minister's Retreat (AMM Retreat)." Accessed May 8, 2017. http://asean.org/press-release-by-the-chairman-of-the-asean-foreign-ministers-retreat-amm-retreat.

[44] ASEAN Secretariat. "Chairman's Statement of the 28th and 29th ASEAN Summits, Vientiane, 6-7 September." Accessed March 18, 2016. http://asean.org/chairmans-statement-of-the-28th-and-29th-asean-summits.

[45] Kurlantzick, Joshua. "China's Charm Offensive in Southeast Asia." Carnegie Endowment for International Peace, Accessed February 22, 2006. http://carnegieendowment.org/2006/09/01/china-s-charm-offensive-in-southeast-asia/979.

[46] Parlima, Ina., Salim, Tama. and Halim, Haeri. "Breakthrough Talks on CoC Draft," *The Jakarta Post*, August 18, 2016.

[47] ASEAN Secretariat. "Chairman's Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations." Accessed September 26, 2016. http://asean.org/storage/2016/09/Final-Chairmans-Statement-of-the-ASEAN-China-25th-Anniversary-Commemo....pdf.

[48] "Chinese Ships No Longer at Scarborough Shoal - Philippines Def Min." *Reuters*, October 28, 2016.

[49] "Something Fishy," *Manila Standard*, November 23, 2016. Within a month, reports started to surface that either the Chinese coast guard had never left or was back. Initially, the face saving statement from Manila was that they were present but were permitting 'small vessels' to fish there. Visperas, Eva. "Only Small Boats Allowed in Pantag." *The Philippine Star*, November 15, 2017. However, by 23 November 2016, reports were surfacing that President Duterte was going to issue an executive order that will make a portion of the Scarborough Shal a 'marine sanctuary and no-fishing zone'–an act designed to provide the Filipino people with the illusion their government has control of their sovereign rights.

[50] Hayton, Bill,"Beijing Shifts Strategy in South China Sea," *Nikkei Asian Review*, July 12, 2017.

Despite the falsehoods behind some, if not all, of Beijing's commitments concerning the South China Sea, by the time of the April 2017 ASEAN leader's Summit in Manila, Beijing's circumstances and approach were so advantageous that it even achieved an endorsement for its actions in the final Chairman's Statement. The document praised "the improving cooperation between ASEAN and China" in the context of "progress to complete a framework for the Code of Conduct in the South China Sea". Regarding the most disconcerting South China Sea developments, the leaders merely stated that "[w]e reaffirmed the importance of the need to enhance mutual trust and confidence, exercising self-restraint in the conduct of the activities, and avoiding actions that may further complicate the situation, and pursuing the peaceful resolution of disputes, without resorting to the threat or use of force".[51] The statement did not contain any reference to previously mentioned concerns by ASEAN such as "land reclamation" or "militarisation"—issues that had been included in a leaked earlier draft.[52] As Evan Laksmana from CSIS Jakarta highlights, internal incongruity over an earlier draft was evident by the unusually long delay in publishing the statement.[53] For example, Vietnam did try to insist on including previous references to "land reclamation and militarisation", but became deeply disillusioned when these words were blocked by certain ASEAN colleagues.[54]

The dissipation of pressure against Beijing, together with an associated deterioration of ASEAN unity, has been reinforced by a perception that, beyond the Korean peninsula crisis, the Trump administration has no strategic plan for Asia, particularly Southeast Asia and the "asymmetries of power are growing day by day".[55] Thus, as Malcolm Cook asserts, "before, most Southeast Asian states wanted to benefit from Chinese regional economic initiatives and from American pushback against China". However, the "second part of this balance is now in question. Hence the pressure to acquiesce to China diplomatically and on security issues is stronger".[56] Most recently, President Trump's dependence on China regarding the Korean peninsula has led to reports that he initially curtailed patrols in the South China Sea through to 24 May 2017, when the first Freedom of Navigation Operation (FONOP) under his administration took place.[57] The impact of these events on regional perceptions has been quantified by a crucial survey undertaken by ISEAS Singapore between 10 and 23 April 2017. Of those surveyed, 71.7 per cent believed that the global image of the United States had deteriorated since the Obama administration and 73.6 per cent indicated that China is currently the most influential country in Southeast Asia, while 74.8 per cent believe this will be the case ten years from now.[58]

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[51] ASEAN Secretariat. "Chairman's Statement 30th ASEAN Summit, 30 April." Accessed April 30, 2017. http://asean.org/chairmans-statement-30th-asean-summit.
[52] Dancel, Raul. "ASEAN Glosses over South China Sea Conflicts in Watered-Down Statement at Summit's End," *The Straits Times*, April 30, 2017.
[53] Watts, "ASEAN Tacks Away from Rocky South China Sea Issue; Final Summit Communique Welcomes Beijing's Cooperation on Issues Such as Framework for Maritime Code of Conduct."
[54] Dancel, "ASEAN Glosses over South China Sea Conflicts in Watered-Down Statement at Summit's End."
[55] Watts, "ASEAN Tacks Away from Rocky South China Sea Issue; Final Summit Communique Welcomes Beijing's Cooperation on Issues Such as Framework for Maritime Code of Conduct."
[56] "Asian Nations Turn to China as Trump Puts America First," *The Asahi Shimbun*, May 2, 2017.
[57] Valencia, Mark J. "U.S. Fonops in the South China Sea: Intent, Effectiveness, and Necessity," *The Diplomat*, July 11, 2017.
[58] Tang, Siew Mun. "How Do Southeast Asians View the Trump Administration?" *ASEAN Focus* 2 (2017): 12-13.

The Limits to ASEAN, the Need for New Institutional Configurations, and a More Assertive Role from Exogenous Actors

Presently, ASEAN has a rather singular focus on the Code of Conduct and the politics of saving face means that any reassurance by Beijing, no matter how cosmetic, is welcomed in that it provides the association with a much-desired ability to publicly declare that it has achieved progress. As noted, the attainment of a Code of Conduct has been a goal of ASEAN since 1992, and active negotiations (initially between the ASEAN members) have been pursued since 1996. In 2000, ASEAN and China each concluded their individual drafts and both sides agreed to exchange the texts with the goal of consolidating them into a single document.[59] However, as the late Barry Wain stated, disunity developed on the ASEAN side with Malaysia supporting China's preference for a non-binding statement which led to the DoC.[60] Despite the principles and guidelines espoused by the DoC, the past fifteen years have demonstrated that the Declaration has had little, if any, positive impact in the management of the dispute.

ASEAN has continued to pursue the goal of a Code of Conduct (CoC) and, in the absence of anything else of substance, has left the distinct impression that rather than the CoC being a *means to an end*, it is perceived as an *end in and of itself*. Nonetheless, within three months of the decision by the Philippines to file for arbitration over the dispute, China's Foreign Minister, Wang Yi, sought to placate ASEAN by stating that Beijing was ready to commence joint efforts with ASEAN toward "a code of conduct in the South China Sea".[61] However, what became 'very low level talks' were likely just a further stalling tactic and arguably, also allowed Beijing to focus on escalating tensions in the East China Sea at the time.[62] Nonetheless, the ASEAN members and Secretariat continued with their (15 year-long) regular assurances that the Association and China are making progress with the realisation of the Charter.

In March 2017, various media reports announced that a draft Code of Conduct (CoC) had been concluded.[63] However, the formal goal of both China and ASEAN was to reach a "framework agreement" by mid-2017. This was achieved in August 2017 but, at the time of writing, few details had been provided.[64] Based on past patterns, it is highly likely that the "framework agreement" will serve as a diversion from the pressure to conclude the CoC quickly. Moreover, it would be advantageous for Beijing to delay the conclusion of the process until a time where a *status quo* CoC would cement China's gains. Therefore, the more important issue is whether the "framework agreement" and/or the

[59] Thayer, Carlyle A. "ASEAN, China and the Code of Conduct in the South China Sea," *SAIS Review of International Affairs* 33 2 (2013): p. 76.
[60] Roberts, 133.
[61] Li, Mingjiang. "Managing Security in the South China Sea: From DOC to COC." *Kyoto Review of Southeast Asia* 15 (2014).
[62] Storey, Ian. "China Runs Rings around ASEAN; Bejing Has Repeatedly Blocked Meaningful Action in the South China Sea Disputes." *Wall Street Journal*, October 2, 2013.
[63] Huang, Kristin. "China and ASEAN Agree on Draft Code of Condcut for South China Sea." *South China Morning Post*, March 8, 2017.
[64] Murdock, Lindsay. "ASEAN 'Framework' on South China Sea Tiptoes around the Real Issue." *The Sydney Morning Herald*, August 7, 2017.

CoC can achieve anything with a significant bearing on peace, stability, and/or cooperation. While the framework agreement may give some further insight as to what is expected in a CoC (if finalised), it is highly unlikely to have any more impact on the behaviour of states in the South China Sea than that either of the 2002 DoC, or the 2011 Guidelines on the Implementation of the DoC.[65] As one ASEAN diplomat stated, the two rounds of negotiations this year have given the appearance of progress but the details were "essentially the same" as the DoC. Additionally, the refusal of Chinese Foreign Ministry spokesperson, Geng Shuang, to confirm if Beijing would support a legally binding code, indicates further the limited effect of a CoC.[66]

ASEAN: Consensus based decision-making and the benefits of an ASEAN-X approach

In agreement with a subsequent call by the ASEAN Secretary General, Le Luong Minh, the CoC will need to be legally binding and UNCLOS should form the legal basis of the instrument.[67] Given the events of the past several years, the Code of Conduct must move beyond a mere *status quo* agreement that protects Beijing's gains, with little redress for the *bona fide* legal entitlements of the other claimant states under UNCLOS. ASEAN will also need to take the lead in addressing punitive elements and/or enforcement mechanisms, together with the geographical scope of the CoC. In the context of the latter, a critical issue will be whether any CoC will address the Paracel Island grouping, which has been claimed by both Vietnam and China—a true test of ASEAN solidarity.[68] However, under ASEAN's current *modus operandi*, the necessary elements of a far-reaching CoC are highly unlikely to be realised. Such a state-of-affairs will continue so long as members like Cambodia and Laos (with the possible additions of Malaysia and Brunei which will be examined further below) bandwagon with China to block key ASEAN statements and initiatives—e.g., preventing any attempts to explicitly refer to the Arbitral Ruling and international law.[69]

Given the developments covered by this article, Indonesia may already be signalling that it understands the limited prospects and/or benefits of concluding a CoC, and therefore, it should be just one component of a much broader strategy. For example, a few days ahead of the April 2017 ASEAN Summit in Manila, President Joko Widodo argued that the states involved in the South China Sea dispute should engage in "concrete cooperation" well before the conclusion of any CoC.[70] However, there has been a perceived shift in Indonesia's emphasis of their foreign policy away from ASEAN, and toward the Indian Ocean Rim Association and/or its bilateral relationships. Indeed,

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[65] ASEAN Secretariat. "Guidelines for the Implementation of the DOC." , Accessed September 9, 2011, http://www.asean.org/wp-content/uploads/images/archive/documents/20185-DOC.pdf.
[66] Mogato, Manuel, Martina, Michael, and Blanchard, Ben. "ASEAN Deadlocked on South China Sea, Cambodia Blocks Statement." *Reuters*, July 26, 2016.
[67] Kapoor Kanupriya, and Mogato, Manuel. "South China Sea Code with Beijing Must Be Legally Binding: ASEAN Chief." ibid., April 28. 2017.
[68] Jennings, Ralph. "Vietnam Will Lose the Most from a Code of Conduct in the South China Sea." *Foreign Affairs*, April 27, 2017.
[69] Mogato, Manuel, Martina, Michael, and Blanchard, Ben. "ASEAN Deadlocked on South China Sea, Cambodia Blocks Statement." *Reuters*, July 26, 2016.
[70] Ibrahim, Zuraidah. "Exclusive: Widodo's Peace Formula for South China Sea." *South China Morning Post*, April 29. 2017.

Indonesia's previous Foreign Minister, Marty Natalegawa, stated that he was "alarmed" by debate in Indonesia concerning the need to prepare for "post-ASEAN diplomacy".[71] President Widodo has since sought to dissuade such perceptions by being more actively engaged in commentary on ASEAN and the South China Sea—e.g., his "peace formula" interview.[72] However, the Association's future capacity to meet the needs of the claimant states and other regional stakeholder countries will be the deciding factor for the long-term relevance of the association beyond the economic and non-traditional security domains (both representing crucial contributions to the region in and of themselves).

Based on these challenges, Southeast Asian analysts and retired diplomats have been calling for change to ASEAN's decision-making system.[73] Indeed, the need to change the consensus-based approach to decision-making has also been recognised within ASEAN. Such a change was the key motivation behind Indonesia's proposal to forge an ASEAN Security Community in 2003 and this was implicit in its subsequent draft Plan of Action for a Security Community in 2004 that followed. Amendments to the consensus-based decision-making approach were also recognised as necessary under certain circumstances by the ASEAN Eminent Persons Group (EPG) report on the ASEAN Charter in 2007. However, these proposals and other key institutional reforms were rejected by countries such as Laos, Cambodia, and Myanmar (then a military dictatorship).[74]

Nonetheless, such institutional reforms continue to be discussed within ASEAN and publicly raised by member governments. For example, in 2016, Vietnamese President Tran Dai Quang stated that "given the new developments we may consider and supplement the principle [of consensus] with other mechanisms'".[75] If ASEAN could move to an ASEAN-X approach (as has occurred in the economic domain), then this could potentially open a path for more proactive diplomacy by a core group of ASEAN states over the South China Sea. This outcome would in turn enable ASEAN to hold a stronger negotiating position with the drafting of a CoC and any other necessary initiatives. Such a shift might then enable the ASEAN countries to finalise the CoC "among themselves and push China to join, rather than having to accept a seemingly endless process of futile negotiations".[76] Under these circumstances, and once ASEAN has finalised the draft, it could bring added pressure by making the draft public and if necessary, consulting (or at least threatening to consult) with Taiwan for Taipei's own agreement to the content. Should Taiwan agree, this would then further affect Beijing's costs/benefits analysis.

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[71] Riordan, Primrose. "Marty Natalegawa Says ASEAN Being 'Torn Apart' as China Gains Upper Hand." *Australian Financial Review*, December 15, 2016.
[72] Ibrahim, "Exclusive: Widodo's Peace Formula for South China Sea."
[73] Chongkittavorn, Kavi. "ASEAN at 50: Carry on Soul Searching?" *Nikkei Asian Review*, April 28, 2017; Barry Desker, "Where the ASEAN Charter Comes up Short." *The Straits Times*, July 18, 2008; Heydarian,Richard J. "ASEAN-China Code of Conduct: Never-Ending Negotiations." ibid., March 9. 2017; Roberts, "ASEAN: The Challenge of Unity in Diversity."; Searight, "Impact of the South China Sea Tribunal Ruling."
[74] Roberts, Christopher B. *ASEAN Regionalism: Cooperation, Values and Institutionalisation,* 117-72. Routledge, 2012.
[75] Wai, Albert. "Vietnamese President Calls for Win-Win Solution to 'Worrying' Disputes in South China Sea." *Today*, August 30, 2016.
[76] Heydarian, Richard J. "Under Duterte, ASEAN Could Cede Clout for Consensus." *Asia Maritime Transparency Initiative*. Accessed April 15, 2017, https://amti.csis.org/duterte-asean-cede-clout.

Problematically, even if these institutional reforms could be realised, the current hedging and/or bandwagoning by three of four ASEAN claimant-states—Brunei, Malaysia, and the Philippines—mean that credible ASEAN led action will remain impracticable. In the case of the Philippines, President Duterte has justified his refusal to pressure China with the arbitral ruling or to utilise his role as the ASEAN chair, by arguing that "it's a non-issue, we cannot, on our own, enforce the arbitral judgement" but that "it's only America" and yet "they allowed that [the land reclamation] to happen".[77] However, the Philippines did not actively seek assistance after the July ruling, and neither has the United States publicly affirmed an ironclad commitment to defend, in the very least, Scarborough Shoal. Instead, President Duterte shelved the win and has since lobbied ASEAN to focus on "consensus issues"—such as maritime piracy—and leave the territorial issue to bilateral discussions.[78] Nonetheless, over the longer-term, it will be increasingly difficult for President Duterte to maintain his approach. He is already facing increased political opposition, including conflicting signals by the bureaucracy and the military and even a submission for his impeachment.[79]

The likely policy trajectory of key ASEAN States

The Philippines Constitution contains safeguards to protect the sovereignty of the country, and these safeguards also cover issues such as joint exploration and development of hydrocarbon resources. While President Duterte's administration raised the prospect of joint development, a rising domestic backlash could evolve over the perception that he is "selling Filipino sovereignty to China".[80] As China continues to exploit the goodwill of the Filipino government, such a backlash could turn more nationalistic just as it did with the Arroyo Administration's agreement for a joint seismic survey between 2005 and 2008 that included 24,000 kilometres of Filipino territory that had not previously been claimed by China.[81] In the case of Malaysia, China is now its largest trading partner and amidst Prime Minister Najib's 1MDB corruption scandal, which led to to a lawsuit by the U.S. Justice Department, Malaysia had become even more reliant on Beijing's support.[82] Such support has been forthcoming, given that Kuala Lumpur has actively downplayed Chinese incursions into its territory and through public endorsements of China's behaviour. For example, in the midst of 2013, protests against Chinese "aggression" by Manila and Hanoi, Prime Minister Najib actually commended Beijing for the "remarkable restraint" it had exercised.[83] Nonetheless, as with the Philippines, Malaysia will ultimately be constrained by domestic opinion, and Beijing's exploitation of Kuala Lumpur's goodwill has led to increased opposition amidst certain quarters of its political elite during recent years.[84]

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[77] "Philippines' Duterte Says Helpless against China," *The Guardian*, April 27, 2017.
[78] "Under Duterte, ASEAN Could Cede Clout for Consensus".
[79] "In the Philippines, 'the Punisher' Takes a Beating," *Stratfor*, March 30, 2017.
[80] Ibid.; Diaz, Perry. "Duterte's Bold Move in the Spratlys," *Kabayan*, April 13, 2017.
[81] Roberts, 133.
[82] Ba, 10.
[83] "Stiring up the South China Sea (II): Regional Responses," (Brussels: International Crisis Group, 2012).
[84] See, for example, "Confidential: Strategic Management for South China Sea: Defence and Security Options for Malaysia." Maritime Institute of Malaysia, Accessed July 12, 2016, http://www.mima.gov.my/images/page/research/Strategic_managment_in_the_South_China_Sea.pdf.

The fortitude of the Philippines government, combined with the arbitral win, provided the Philippines with the moral high ground and was generating a significant amount of regional and global pressure against China. However, President Duterte's refusal to apply the legal ruling to pressure Beijing has undermined much of this momentum including Vietnam's planned approach (e.g., a detailed follow up statement on the arbitration) and a pause in Hanoi's own decision to seek legal action. While difficult, reinstating the previous momentum is not impossible. As noted, the current bandwagoning of the Philippines and, to some extent, Malaysia, will be increasingly difficult to sustain in the future. Meanwhile, Vietnam's love-hate relationship with China creates many policy dilemmas. However, the nationalistic fervour of the Vietnamese people (and its government) means that Hanoi will be highly resistant to any compromise regarding its legal entitlements in the South China Sea. Vietnam will continue to proactively resist China's attempts to control its territory and resources, and will utilise whatever means available—through ASEAN or otherwise.

Indonesia, by far the largest country in Southeast Asia, maintains its long-held position that it is not party to the South China Sea territorial disputes. However, whether Jakarta acknowledges it or not, Indonesia's sovereign rights have been challenged by China's 9-Dash Line as it overlaps with the continental shelf and EEZ extending from Indonesia's Natuna Island.[85] As Beijing's confidence grew in recent years, it has been permitting its fishing fleets to infringe on Indonesia's EEZ with the backing of China's coast guard. These activities have led to the public burning of Chinese fishing vessels, and in 2016, the Indonesia Navy opened fire on a Chinese fishing vessel and, in a a separate incident, arrested a Chinese fishing crew. However, China's coast guard forced their release when they rammed the Indonesian ship.[86] In an earlier incident in 2010, the Chinese coast guard threatened an Indonesian Navy ship with "large calibre machine guns … and compelled it to release the boat". Then, in 2013, another Chinese coast guard vessel utilised electronic warfare to jam the communications of a vessel from the Indonesian Navy, and the risk of "force" compelled the Indonesian captain to release the Chinese fishing crew.[87]

While Jakarta has downplayed the seriousness of these and other events (partly due to trade considerations and sensitivities regarding anti-ethnic Chinese sentiments), a noticeable shift in its strategic approach has occurred. Indonesia has since sought to reinforce its naval foothold in the waters around the Natuna Island and has explored the possibility of foreign aid to establish a naval base there. Reports have also emerged, been denied, and then remerged, that Jakarta and Canberra have been considering joint patrols.[88] Most recently, in July 2017, Indonesia further demonstrated the extent of its concerns when it renamed the 'northern reaches' of its EEZ in the South China Sea "as

[85] Roberts. Christopher B. "China and the South China Sea: What Happened to ASEAN's Solidarity?" Institute of Defence and Strategic Studies, Accessed 2005. www.rsis.edu.sg/rsis-publication/idss/681-china-and-the-south-china-sea.
[86] "Indonesia Defence Opening Fire on Chinese Boat," *Daily Mail*, June 20, 2016.
[87] Bentley, Scott. "Shaping the Narrative: New Chinese Documentary Revisits Indonesia and the South China Sea." *The Strategist,* Accessed November 18, 2014. www.aspistrategist.org.au/shaping-the-narrative-new-chinese-documentary-revisits-indonesia-and-the-south-china-sea/ ; "Indonesia: An Emerging Maritime Power," *Asia-Pacific Regional Security Assessment,* Singapore: IISS, (2015):), p.14.
[88] Ba, 9.

the North Natuna Sea".[89] While Indonesia's historical identity as being "nonaligned" (i.e., a founding member of the Non-Alignment Movement or NAM) continues to influence its foreign policy, Beijing's provocations, combined with Indonesia's role in the formation of UNCLOS and associated support for a rule-based order, means that Jakarta may well make significant contributions beyond its historical role as the "first among equals" in ASEAN.[90]

In the case of Singapore, as the ASEAN-China Coordinator, the city-state reinforced perceptions about its actual and potential role as a proactive "regional stabiliser"—i.e., countries that seek a stable and predictable rule-based regional order underpinned by international treaty based law. Further, Singapore maintains very close military relations with the United States—including the rotational deployment of U.S. Navy littoral combat ships—and other countries such as Australia. A broad web of defence relations, both within and beyond the ASEAN member states, have greatly strengthened Singapore's capacity and inter-operability. For example, at a functional level, the May 2016 Australia-Singapore Comprehensive Strategic Partnership brings joint military cooperation to a new level.[91] The extent of the common values and interests shared by the two countries are largely underestimated by the media, academia, and certain quarters of the Australian government. Consequently, regarding the South China Sea, the city-state will also likely seek continued constructive diplomacy and actions moving forward.

Myanmar, meanwhile, holds a deep-seated historical distrust of Beijing as Beijing had, for decades, offered financial and military support to various insurgent groups—e.g., the Burmese Communist Party (BCP) and later the United Wa State Army (UWSA).[92] Therefore, the aforementioned support for the arbitral ruling was not as unexpected as some analysts suggested (notwithstanding Aung San Suu Kyi's recent outreach since 2017). Within certain bounds, Myanmar can be expected to maintain a constructive role (at least diplomatically) over the South China Sea. While Thailand is a traditional ally of the United States, Thailand's future position regarding issues such as the South China Sea will greatly depend on whether it resolves its domestic political problems, and the nature of the government that emerges over the coming years. Equally important will be how the United States engages Thailand; the pressure Washington has applied against the Thai regime in recent years has noticeably pushed Bangkok towards Beijing. Given the positive relationships that Washington maintains with certain regimes in other parts of the world (e.g., Saudi Arabia), the United States may need to be more pragmatic with its expectations in Southeast Asia.

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[89] Allard, Tom. and Munthe, Bernadette C."Asserting Sovereignty, Indonesia Renames Part of the South China Sea," *Reuters*, July 14, 2017.

[90] *Indonesia's Ascent: Power, Leadership, and the Regional Order*, *Critical Studies of the Asia Pacific Series* edited by Christopher B. Roberts, Ahmad D. Habir, and Leonard C. Sebastian, Hampshire: Palgrave MacMillan, 2015.

[91] Australian Department of Defence. "Australia-Singapore Military Training Initiative." Accessed May 6 2016. www.defence.gov.au/Initiatives/SingaporeTraining; Australian Department of Foreign Affairs and Trade. "Joint Announcement: Australia-Singapore Comprehensive Strategic Partnership." Accessed May 6, 2016. http://dfat.gov.au/geo/singapore/pages/joint-announcement-australia-singapore-comprehensive-strategic-partnership.aspx.

[92] Roberts, Christopher B. *ASEAN's Myanmar Crisis: Challenges to the Pursuit of a Security Community* Singapore: ISEAS, (2010).

New directions and avenues for collaboration: from joint coast guard patrols to dialogue between "like-minded states"

Given the above, in the context of the South China Sea, it is argued that there are several Southeast Asian countries that want to be proactive, or are likely to become more proactive, in the future. However, ASEAN's institutions do not provide an adequate enabling environment to address the South China Sea dispute. Therefore, in the strategic domain, those ASEAN states that believe that only a stable rules-based regional order can provide protection from an anarchical environment "where might is right", will need to seek collaboration beyond ASEAN. Possible and practical actions that could have been undertaken—and/or remain a possibility under improved circumstances—would be to invite a coalition of regional and international coast guards to assist with the policing of resources in the Philippines EEZ (subject to invitation and on the basis that Manila did not have the capacity to do so itself). This would have and could achieve several outcomes: first, the action would provide significant deterrence if the United States, Japan, Australia, Indonesia, Singapore, South Korea, India, and/or any other willing states participated in the patrols. Second, such patrols would and could provide added weight to the importance of the ruling, because any counter-measure by Beijing would be clearly in breach of international law and its associated treaty obligations under UNCLOS (even potentially contrary to the "law of war" or *jus ad bellum*). Third, the combined effect of these outcomes would be to, hopefully, force Beijing to readjust the costs-benefits analysis of its current approach.

While these actions constitute a significant departure from the conventional diplomacy of the region, the challenges that are now emerging in the South China Sea are anything but conventional. Should the Southeast Asian claimant states take a more unified position (at least Vietnam, the Philippines, and Malaysia), then this will significantly bolster the level of support they can expect from countries across the Indo-Pacific. For example, seven countries—including the United States, Australia, Japan, and New Zealand—issued strong statements stressing that both China and the Philippines were legally bound by the ruling.[93] A further 33 countries positively acknowledged the ruling and only six directly opposed to it.[94] While this paper has argued that the United States should have taken a stronger position in the South China Sea, it has undoubtedly been the most proactive in protesting China's actions in the South China Sea. Several other countries have engaged the subject and/or made other constructive contributions (such as the strengthening of maritime capacity) and these include Japan and Australia and, more recently, India and South Korea.

In the case of Japan, Tokyo has provided significant support—e.g., diplomatic and material capacity building—particularly to the Philippines and Vietnam. Following the Scarborough Shoal incident and Manila's recourse to arbitration, Japan's Prime Minister, Shinzo Abe, stated that for Japan, the Philippines is a strategic partner with whom they share fundamental values and many strategic

[93] Searight, "Impact of the South China Sea Tribunal Ruling."
[94] "Who Is Taking Sides after the South China Sea Ruling?"

interests.[95] Consequently, Filipino President Aquino vowed that the two countries had committed to a common stand against future aggression in the South China Sea.[96] This commitment was demonstrated by an initial supply of ten patrol boats to the Filipino coast guard.[97] Japan has since enhanced the maritime capacity of the Philippines through the provision of a further two patrol vessels and an offer to lease training aircraft. Japan most recently utilised its Izumo helicopter-carrying warship (i.e., a mini aircraft carrier) to patrol the area, and has included three months of port visits across the ASEAN countries. In the case of Vietnam, in 2014, Tokyo agreed to sell six used maritime surveillance vessels and pledged to sell it six new patrol ships in 2017. Further, Tokyo is significantly raising the level of aid and investment it is providing to the region, thereby counter-balancing Beijing's "chequebook diplomacy".[98]

India is also fast becoming an important supplier of military equipment in the region, particularly with respect to Vietnam, and is also providing diplomatic support through port visits and joint development agreements. Following New Delhi's own frustration with China for not supporting its membership in its bid for the coveted Nuclear Suppliers Group (NSG), India proposed a joint statement with Singapore that China should abide by the International Tribunal order on the South China Sea. While the significant amount of pressure placed on Singapore by Beijing during 2016 may have contributed in its disagreement to the idea, Singapore has sought to actively and responsibly handle the issue and stability of the broader regional order. Nonetheless, this issue, together with territorial disputes with China, China's encroachment on the Indian Ocean (i.e., "string of pearls"), and New Delhi's policy shift from "Look East" to a more tangible "Act East", have all contributed to what appears to be a nascent reassessment over its preparedness to be more involved as a constructive stabiliser on the South China Sea.[99]

In the case of Australia, it has been conducting its own airborne surveillance operations in the South China Sea (and Indian Ocean) since 1980, and has also regularly patrolled the area, even though it does not officially declare these operations as Freedom of Navigation Operations (FONOPs) to challenge China's territorial claims.[100] Nonetheless, the BBC revealed radio interceptions by the Chinese military that are actively challenging Australia's presence.[101] Aside from the United States, both Australia and South Korea also represent potential and/or actual sources of supply regarding high-end military equipment. Most recently, and following economic sanctions from Beijing over its installation of THAAD (a U.S. anti-missile defence system), South Korea entered into an arrangement

[95] "Japan's Abe Vows Sea Help to Philippines Amid China Row," *Agence France Presse*, July 27, 2013.
[96] Ibid.
[97] "PM Abe Confirms Japan's Support for Phiippine coast guard," *Kyodo News*, October 9, 2013.
[98] Jennings, Ralph. "Japan Is Becoming Player in South China Sea Sovereignty Dispute," *Voice of America*, March 20, 2017.
[99] Sundar, Vishwesh. "India's Engagement in the South China Sea." Chennai Centre for China Studies, Accessed April 7, 2017. www.c3sindia.org/india/6033.
[100] "Asia: South China Sea." Low Institute, Accessed May 1, 2017. https://www.lowyinstitute.org/issues/south-china-sea.
[101] "China's 'Great Walls of Sand' in Sea," *The Australian*, December 18, 2015.

to provide the Philippines with an anti-submarine warship for US$100—a token gesture to make the arrangement legally binding (i.e., "consideration") under contract law.[102]

ASEAN has a limited capacity to respond to sensitive geo-strategic issues such as the South China Sea, while the efforts of non-ASEAN states have largely been *ad hoc*. These circumstances have left a critical gap concerning the sustained coordination of maritime collaboration and cooperation. John Blaxland, via the Council for Security Cooperation in the Asia Pacific (CSCAP) and other avenues, has proposed a maritime grouping with the potential to assist with some of the challenges faced in the maritime domain including South China Sea. His proposal is called MANIS, which represents the members of the proposed grouping: Malaysia, Australia, New Zealand, Indonesia and Singapore, and happens to mean "sweet" in Bahasa Indonesia. In the development of his proposal, Blaxland suggests that this smaller grouping will find it easier to garner a consensus and that given certain sensitivities and the history of the region, the initiative should start slowly, with confidence building discussions (Track II and Track 1.5) for eventual functional cooperation on relatively non-sensitive (non-traditional) security matters—e.g., illegal fisheries, irregular migration, transnational crime, and terrorism.[103]

The type of cooperation envisioned is not entirely without precedent. For example, since 2004 there have been the anti-piracy "Malacca Strait Sea Patrol" (MSSP) and the "Eyes-in-the-Sky" (EiS) and air force patrols involving Malaysia, Indonesia, Singapore and more recently, Thailand. Given the continued challenge of piracy and kidnappings in and around Mindanao (Southern Philippines), the Philippines, Malaysia and Indonesia also committed to the Sulu Sea Patrol Initiative (SSPI), which includes "coordinated" air and sea patrols, as well as three-way communication hotlines, and three command in support of intelligence-sharing and other coordination.[104] These activities will assist with the sharing of knowledge (i.e., capacity building) and confidence building between the participating states and militaries. Whether through MANIS, ASEAN, or some alternative means, it will also be crucial to development regimes for the sustainable management of the region's rapidly depleting fish stocks and its environment, including the coral reefs.

Blaxland demonstrates a keen awareness of the perspectives, needs, and sensitivities held by each of the proposed members.[105] Therefore, while the Five Power Defence Arrangement (FPDA) will continue to provide certain benefits for its members, the unacceptability of the FPDA for Indonesia due to its colonial/Cold War heritage means that, in Indonesia's absence, the FPDA cannot achieve the types of activities and outcomes that a new institution such as MANIS could. Blaxland's proposal has much merit, and given the frustrations of some ASEAN states (e.g., Indonesia's "Post-ASEAN diplomacy"), there may now be an unprecedented willingness to commence a new forum for dialogue

[102] " South Korea Gives Anti-Submarine Warship to Philippines, for $100," *Reuters*, April 27, 2017.
[103] The Strategist. "Manis: The Way to Sweeten Regional Cooperation." Accessed May 5, 2016. www.aspistrategist.org.au.
[104] Ba, 11.
[105] Blaxland, John. "Manis: Time for a New Forum to Sweeten Regional Cooperation." in *The Centre of Gravity Series*, edited by Andrew Carr, Canberra: Strategic and Defence Studies Centre (2016).

(as a first step) that can better address geo-strategic challenges. Moreover, given the rapidly evolving regional order, it may now be possible to take the proposal, or some variation thereof, even further than first envisioned. For example, Blaxland highlights the problems of consensus in ASEAN. However, these problems are not only caused by the number of members, but also by the nature of the membership.

A new grouping, such as MANIS, could still function with an expanded membership, thereby enabling greater influence, if its members share sufficient common interests and values—particularly in the international domain.[106] Whether through MANIS and/or some alternative arrangement, a larger dialogue between "like-minded states" could feasibly consist of the MANIS countries together with other 'stabiliser states' such as Vietnam, the Philippines, South Korea, Japan, and India. While such a grouping would, out of necessity, more feasibly start along the lines of a Track 1.5 dialogue, participation could largely be inclusive in nature, with the one potential pre-condition being that all parties to the dialogue adhere to international treaty-based law, and the rule-based order that such law underpins. Over time, the dialogue might evolve into a loose inter-governmental association of states and, if so, this would be reinforced by the establishment of a secretariat that can help with the coordination of activities, reports, and capacity building assistance. Naturally, the development of policies and cooperation regarding the South China Sea would be just one component of a much broader mandate. Should a more formalised grouping emerge over time, then decision-making should be on an opt-in basis (i.e., the Minus-X formula) rather than an absolute consensus and, in the long-term, the members may express a desire to progress toward a majority-based form of voting where it is feasible. Any eventual agreements, treaties and/or other instruments, could be open to accession by other willing states.

The development of maritime capacity in Southeast Asia is also particularly important as it can potentially serve as a critical deterrent against possible Chinese aggression, and as a stabilising force for the full spectrum of the comprehensive security threats facing maritime Southeast Asia. For this purpose, the Obama Administration had previously embarked on two initiatives: The Southeast Asia Maritime Security Initiative (SAMSI) and the Southeast Asia Maritime Law Enforcement Initiative (SAMLEI). In the case of SAMSI, a key purpose has been to address a range of maritime challenges—including China's forcefulness—through activities such as regional maritime domain awareness, senior level engagements, and the expansion of maritime exercises.[107] In the case of SAMLEI, its purpose is to similarly employ capacity building programs, but in this case, to combat non-traditional security concerns such as the "illicit trafficking of goods, drugs, and persons".[108] Aside from the issue of lack of funding,[109] the most disconcerting aspect is that there has not been any further mention of either of the two initiatives by President Trump's administration. For example, the

[106] Roberts, *ASEAN Regionalism: Cooperation, Values and Institutionalisation*.
[107] Parameswaran, Prashanth. "America's New Maritime Security Initiative for Southeast Asia," *The Diplomat*, April 2, 2016.
[108] U.S. Department of State. "Southeast Asia Maritime Law Enforcement Initiative," Accessed April 12, 2015. https://2009-2017.state.gov/r/pa/pl/240798.htm.
[109] Collin, Kow SL."Trump and Southeast Asia: Sustaining the Maritime Pivot." *The Diplomat*, May 6. 2017.

documentation on SAMLEI has been archived. Nonetheless, as noted, other countries are filling this potential gap, but there is room for further investment by Australia, South Korea, India and others in this critical domain. Beyond such contributions, the United States must, as soon as possible, ratify UNCLOS; its failure to do so thus far has undermined its moral authority even though it largely adheres to the Convention's provisions in practice.

Conclusion

Some analysts from China argue that certain ASEAN claimant states have, at some point and in some way, breached the principles of the DoC and/or the provisions of UNCLOS. However, most actions (such as the occupation of maritime features) either occurred prior to the ratification of UNCLOS and the conclusion of the DoC, or have occurred since 2015, and in the face of excessive provocations by Beijing. Thus, there is no basis to a claim that Beijing "justifiably" responded to the provocations of some ASEAN states. For example, as of November 2016, Vietnam is believed to have undertaken 57 acres of land reclamation but Beijing has undertaken 3,200 acres of land reclamation.[110] It is important to note that the Philippines, Vietnam, Malaysia, and Brunei have attempted to reach a diplomatic solution for close to a quarter of a century; rather than a stalemate, such discussions have provided Beijing with the time to develop its maritime capacity (including navy, coast guard and fishing fleets), and then exploit ASEAN's goodwill by asserting near *de facto* control over the South China Sea. Given this, together with the provisions of UNCLOS, the Philippines had the moral authority and a legal right to seek recourse to legal arbitration—not a unilateral action, as it is part of a multi-lateral process that China itself agreed to when it ratified UNCLOS. As to whether the Arbitral Tribunal had jurisdiction over issues raised by Manila, this was for the Arbitral Tribunal to determine, and Beijing has no legal capacity to disagree with such decision, or the ruling that followed.

Given these considerations, the ASEAN members should have collectively supported the decision of the Philippines to seek equitable redress through legal arbitration. Already, the Philippines, Malaysia, and Indonesia have demonstrated a willingness to bring an end to other territorial disputes by volunteering to submit such issues for arbitration by the International Court of Justice (ICJ). Also, Indonesia, as one of the architects of UNCLOS, has much to gain by ensuring regional and global adherence to UNCLOS and its specific provisions regarding archipelagic regimes. For the many smaller countries like Singapore, Brunei, Laos and Cambodia, their own long-term national interests are best protected by a rule-based order underpinned by international law. As Philippine Secretary Alberto Del Rosario stated, "International law is the great equaliser among states. It allows small countries to stand on an equal footing with more powerful states. Those who think "might makes right" have it backwards. It is exactly the opposite, in that right makes might".[111]

[110] "South China Sea: Vietnam Expanding Runway on Spratly Island, U.S. Think Tank Says," *ABC News*, November 28, 2016.
[111] "Full Text: Closing Remarks of DFA Secretary Albert Del Rosario in Last Day of Merits Hearing," *Inquirer*, November 30, 2015.

The South China Sea generates three crucial challenges (realities) for Asia Pacific: (i) that more than a quarter of a century of ASEAN diplomacy at best slowed, but did not prevent, Beijing from realising many of its goals in the South China Sea; (ii) that the "binding" and "final" arbitral ruling has also not led to significant compliance by Beijing with international law or directly constrained its behaviour regarding such matters as militarisation, unilateral fishing bans, and other activities in the South China Sea; and (iii) not even the United States and all its statements and warnings prevented the large-scale construction of artificial islands, and the associated infringement of the "sovereign rights" of the Philippines. Clearly, new approaches are necessary to supplement the current institutions, initiatives, and diplomacy in play. In other words, the choice for all interested parties is stark: either undertake new actions and strategies or accept Beijing's proposition that it has "indisputable sovereignty over the South China Sea" and, at best, hope to get a share of the South China Sea's resources. Should the latter choice be unacceptable, then it will be necessary to adjust ASEAN's current consensus-based decision-making approach. Based on the arguments in this paper regarding the unsustainable positions of Malaysia and the Philippines, together with the likely toughening of Indonesia's position, it is argued that a sub-group of around seven ASEAN members can, in time, negotiate and complete a draft CoC and then present this to Beijing. Nonetheless, should the ASEAN claimant states take more than a few years to come to a common position, then any subsequent stance on the South China Sea may very well be superfluous.

ASEAN's approach on the CoC should simultaneously be supplemented by attempts to create sustainable environmental and fishery regimes and, where appropriate, these should involve other willing parties. Here, the idea of some alternative maritime dialogue should be considered. Only through a new arrangement will it be possible to undertake the kind of actions that could drive Beijing to reassess the costs and benefits associated with its current strategies. Further, dialogue, capacity building, fishing and environmental regimes, maritime protection through joint coast guard patrols, and other actions, could be considered and then put into action. Even the signalling of the possibility of some of these actions may have a restraining effect on Beijing's behaviour. Nonetheless, the success of any new arrangement, including the suggested areas of cooperation, will essentially entail a departure from key aspects of ASEAN's norms and *modus operandi*, including a departure from membership based primarily on geography rather than shared interests. Beijing will do everything within its power to resist such initiatives but, then again, it will also do everything in its power to infringe on the sovereign rights of Vietnam, Malaysia, the Philippines, and Brunei. There are no easy options and all responsible countries, both within ASEAN and across the Indo-Pacific, must be willing to accept short-term political and economic costs for the sake of long-term stability (i.e., collective good) across Southeast Asia and the Indo-Pacific.

In the context of the United States, ASEAN and the broader Indo-Pacific region need to tackle the current uncertainty from President Trump's administration. Here, Asia will need to remain proactive in engaging the United States, and coaching President Trump into adopting more constructive approaches in the economic, political, and military domains—rather than merely leaving it to the

United States to engage Asia. Not only should the region utilise the good offices of Japan, South Korea, Taiwan, and Australia for this purpose, but these countries should also be increasingly proactive in encouraging Washington to develop more sophisticated long-term policies. In the case of Beijing, countries should continue to highlight the costs of China's assertiveness in the South China Sea, including the inevitable "internationalisation of the dispute", damage to its reputation and moral authority, potential economic effects (e.g., investor confidence), and a continuation of accelerated military build-ups and strategic re-balancing. Naturally, there is room for a great deal of nuance regarding what has been suggested, including the order by which such initiatives and strategies are developed and then signalled to Beijing. The nature of such signalling could and should have multiple means and ends, ranging from face-saving private diplomacy to the signalling of "red lines" and clear statements about the actions that will follow, should those "red-lines" be crossed (e.g., an invitation for patrols by an international mix of coast guards within a state's EEZ), together with sufficient transparency to manage expectations (and avoid miscalculations) when such policies are employed.

In summary: the realisation of a "Chinese lake" in the South China Sea is not a pre-determined outcome. However, the claimant states, ASEAN, external actors, and the international community at large, need to determine just how important the issue is and what costs they are willing to impose and absorb should they decide to undertake meaningful action. At the core of this crisis are two inter-dependent considerations: (i) the rights of sovereign states to access their legal entitlements unimpeded; and (ii), whether there should be a rule-based regional order or an anarchical environment, where the only predictable element is the capacity of the powerful to do as they wish. The dangerous precedents set by the combined effect of Russia's unhindered annexation of Crimea and interference in the eastern border provinces of Ukraine, as well as the near complete realisation of China's goals in the South China Sea, are reminiscent of the politics of appeasement by the League of Nations during the inter-war years. History has taught us that that such appeasement, at most, only delays the massive human misery that follows. The role of treaty-based law, together with regimes on issues like the sustainable management of fisheries, will only become more salient as the world falls further into the depths of overpopulation, resource scarcity, and the increasingly dire effects of climate change. Amidst shifting power balances, rising military budgets, and increasing frustration with the United Nations and its Security Council, will Southeast Asia, the Indo-Pacific, and the world be willing to let history repeat itself?

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