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Work on the Code of Conduct for the South China Sea to resume despite (or thanks to?) the COVID-19 pandemic

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The 37th ASEAN Summit held from 12 to 15 November 2020 was largely devoted to the region's gradual recovery from the COVID-19 pandemic. The discussions however also touched upon the South China Sea (SCS) controversies – i.e., disputes over which of the claimant states (including Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam) has sovereignty over the various islands and reefs scattered throughout the SCS. This policy brief offers a reflection on why the ASEAN member states (AMS) felt the pressing need to include the issue on the summit agenda and what implications this may have for the legal framework under which the SCS controversies are to be tackled.

The immediate impetus for bringing up SCS issues is possibly the increased maritime and military activities of China that have been troubling the region in the past months. Despite the 2016 arbitration award of the Permanent Court of Arbitration in the Hague that has rejected China's claimed "historical rights" and asserted that none of the contested islands and marine features are capable of generating exclusive economic zones, China continues to assert its claims over the SCS territory.

For example, in April 2020, a Chinese coastguard vessel sank a Vietnamese fishing boat in the Paracel Islands. Later

in the same month, China sent a Chinese government research ship to conduct a seabed survey of Malaysia's continental shelf where it faced off with a Petronas (Malaysia's state oil company) research vessel. This escalated a standoff over oil and gas exploration involving both Malaysia and Vietnam that had begun in December 2019. Shortly afterwards, China set up two administrative units on the Paracel and Spratly island chains in territory that is claimed by Vietnam. In August 2020, Chinese research vessels operated for a week in SCS waters which the Philippines claims as a part of its exclusive economic zone, and over which a 2016 arbitration award rejected China's territorial claims.

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As these incidents occurred parallel to the COVID-19 outbreak, it has been suggested that China may be exploiting the weak position of the claimant AMS to assert its own claims. Yet, some commentators have observed a rather continuous trend over the past few years of China increasing its activity in the region, without any precise link to COVID-19. Yet, recent head-on clashes with China seem to have prompted the claimant AMS to be more assertive regarding their entitlement to the claimed territories in the SCS, despite potential financial and material constraints due to the pandemic.

For example, Vietnam lodged a diplomatic note of protest with the Chinese government and asserted its own territorial claims and sovereignty over the area. Moreover, being the 2020 ASEAN Chair, Vietnam seems to be pushing for a tougher stance also at the ASEAN level, especially by promoting greater reliance on international law as a framework for the resolution of SCS disputes. Similarly, Malaysia rejected China's "nine-dash line" that China asserted in the 2016 arbitration in a verbal communication to the United Nations, on the grounds that China's claims are contrary to international law and the United Nations Convention on the Law of the Sea (UNCLOS). On the fourth anniversary of the 2016 arbitration award, the Philippines reaffirmed its adherence to the award and designated it as non-negotiable.

The increased potential for conflict has also led to the greater involvement of third parties, especially the United States. From a starting place of being a rather neutral observer, the US has moved to inviting China to respect international law and stop asserting unlawful claims by extra-legal means. In its statement of April 2020, the US Department of State condemned China's sinking of a Vietnamese fishing vessel. In a separate statement in July 2020, it called on China to remain focused on supporting international efforts to combat the global pandemic, and stop exploiting the distraction of other

states to expand its unlawful claims in the SCS. The US added that it would not hesitate to help other countries that come under Chinese pressure.

China's reaction to the allegations of engaging in conduct in contravention with international law may seem rather counterintuitive. Instead of further stoking tensions, China proclaims to concur with the AMS' resolve to find a rules-based framework for co-existence of the claimant AMS and China in the SCS. At the 2020 ASEAN summit on 12 November 2020, Chinese premier Li Keqiang urged speeding up the work on the Code of Conduct for the SCS (COC) that has been stalled due to the pandemic so that it can be adopted even before the initial deadline set for 2021.

The COC is a strategic document to be concluded between ASEAN and China, which envisages a regulatory framework for maritime behavior in the SCS. It aims to prevent skirmishes between the claimant states in the first place, and in case a dispute still arises, to oblige the disputing parties to deal with the issue in a peaceful and amicable manner, especially without resorting to threats or acts of force. Given the sovereignty aspects involved, the negotiations over the text of the COC have lasted for over two decades. In 2018, a single draft negotiating text of the COC was adopted at the 51st ASEAN-China meeting.

The eventual adoption of the COC may inject a new perspective into the SCS dispute resolution landscape. Thus far, China has tried to tackle the frictions mostly on a bilateral basis with the respective claimant AMS. Presumably, this framework gave it greater leverage in negotiations. Also, some of the issues naturally require a bilateral approach, for example, agreeing on the details of resource management between two neighboring countries. However, with the increased frequency of interstate frictions that have drawn the attention of the international

community, a bilateral framework alone may no longer be considered sustainable. To assuage, potentially, suspicion that it keeps asserting its territorial claims against weaker regional players outside the international law framework, China supports the establishment of a regional mechanism under which such bilateral discussions shall take place. Indeed, China seems to have found a compromise between a purely bilateral approach and a traditional multilateral international law approach involving non-regional stakeholders. The aim is to contain the dispute within regional boundaries and prevent intervention especially by the US and other states outside the region. Chinese premier Li Keqiang declared at the recent ASEAN summit that speeding up the negotiations of the COC would demonstrate to the international community that ASEAN and China have the capability of having good control of the SCS and maintaining peace and stability in the region.

Nonetheless, the impact of the COC on the power balance and its potential for finding a solution to conflicting sovereignty claims in the SCS should not be overrated. This is because, as suggested by the draft negotiating text, the COC may not endow the parties with great authority to effectuate change.

First, rather than resolution of disputes, the COC is expected to focus on the creation of an environment conducive to peaceful resolution of disputes and the management of tensions that may result in disputes. Its content is dispute-prevention rather than conflict-resolution. Hence, the claimant states are still expected to find a solution to their territorial claims through general means, ideally through international law and the UNCLOS. Consenting to conflict prevention obligations established in the prospective COC will be without prejudice to any claims and legal positions of the claimant states.

Second, given the sovereignty and economic stakes involved, an agreement on the scope of obligations may not be easy to reach. On the one hand, China seems rather hesitant to confer the COC with fully binding effect and also demands that it reflect regional characteristics. On the other hand, ASEAN is said to be advocating a strictly binding nature for the COC and urging that it be based on international law, especially the UNCLOS.

Yet, despite the seemingly common outward approach by ASEAN, differences exist also in the approach of the respective AMS. In the past, Cambodia and Laos sided with the claims of China rather than the claimant AMS, which prevented ASEAN from reaching a consensus on a joint statement towards the SCS issues. Given the increased assertiveness of the claimant AMS, China may thus look for supporters among those AMS that do not have direct stakes in the SCS but have greater stakes in economic cooperation with China. Yet, some observers noted that this may be the case even of the claimant AMS – that despite their statements, Malaysia and the Philippines may not be that devoted to asserting their territorial claims over China, especially given the potential economic benefits derived from economic cooperation with China or because of the lack of resources to do so. This may complicate finding a common voice as regards the contents of the COC even across the AMS.

Hence, to avoid the COC becoming only a “paper tiger”, the AMS may try to settle some of the disputes first among themselves, and then approach China as a united block rather than as 10 different negotiation parties. The AMS, united as ASEAN, may use such greater bargaining power to ensure that the COC establishes an effective framework under which they can settle any outstanding claims. They may especially wish to insist that the COC be legally binding and establish international law as a general point of reference for the resolution of any future SCS disputes.