

Revisiting the Need for a Legally Binding Code of Conduct in the South China Sea: Chasing a Moving Target

by Edcel John A. Ibarra

Legal bindingness is one of the most contentious points in the consultations between ASEAN countries and China on a Code of Conduct in the South China Sea (COC). Legal bindingness will differentiate the COC from the nonbinding 2002 Declaration on the Conduct of Parties in the South China Sea (DOC); after all, a legally binding agreement was the original vision of the ASEAN countries when COC discussions with China first started in 1999. In what is publicly known about the Single Draft COC Negotiating Text in the current round of negotiations, legal bindingness is implied in Vietnam's proposal for the COC to undergo ratification and registration with the UN, processes that normally apply only to formal treaties.¹

China's Resistance to Legal Bindingness

China, however, has historically resisted a legally binding COC, which partly explains why the first round of negotiations resulted only in the nonbinding DOC. China's resistance to a binding COC also explains why it delayed restarting COC consultations until 2013.

Nonetheless, there are signs that China is reconsidering this position. In 2019, Foreign Minister Wang Yi expressed optimism that a COC would be completed within three years. He also announced that China supports a COC that has "binding force," recognizing that the COC will have to be "an upgraded and strengthened version" of the DOC.²

Still, whether ASEAN and China can agree on a legally binding COC remains uncertain. China may support a legally binding code only when its own version prevails in the negotiations.

China's proposals include provisions that limit the involvement of countries outside the region in the South China Sea. For example, China proposes that economic activities at sea, including oil and gas development, "shall not be conducted in cooperation with companies from countries outside the region."³ China also proposes that the parties "shall not hold joint military exercises with countries from outside the region, unless the parties concerned are notified beforehand and express no objection."⁴

Legal Bindingness in Practice

Apart from China's resistance, other arguments have been made to downplay the importance of legal bindingness for the COC.

Unlike the EU which has a highly legalistic structure, ASEAN has historically eschewed legalism in managing the affairs of the region. As a result, ASEAN agreements are characteristically informal and ambiguous about their legal bindingness. Few have taken the form of a treaty, but arguably, most ASEAN agreements have been complied with by members anyway. Even ASEAN's founding agreement, the 1967 Bangkok Declaration, is not a formal treaty. A treaty-like foundational agreement, the ASEAN Charter, only emerged forty years later, in 2007.

Still, although voluntary compliance is a norm within ASEAN, the norm may not extend to the ASEAN-China mechanism.

In its position paper on the *South China Sea Arbitration*, China argued that the DOC is a legally binding agreement.⁵ It used this argument to claim that the Philippines is barred from seeking legal recourse through arbitration because the Philippines had bound itself under paragraph 4 of the DOC to settle disputes only through "friendly consultations and negotiations." The Philippines argued that the DOC is not a legally binding agreement.

The arbitral tribunal ultimately found that while the DOC is structured like a treaty, it introduces no new legal obligations and simply reaffirms the parties' existing commitments under international law. Most important, the parties themselves—including China at the time the DOC was being negotiated—did not consider the DOC to be legally binding. Indeed, as noted by the tribunal, diplomats involved in drafting the DOC characterized the document as a political document rather than a legal document.⁶

Moreover, although 1982 UN Convention on the Law of the Sea is a legally binding international instrument, including, by extension, the Award on Jurisdiction and Admissibility and the Award of 12 July 2016 in the *South China Sea Arbitration*, the legal bindingness of the convention and the arbitration mechanism was insufficient to bring China to recognize the legality of the proceedings and the resulting awards. Indeed, China has repeatedly characterized the arbitration as null and void.

Legal Bindingness or Enforceability?

More important than legal bindingness, therefore, is enforceability. A legally binding but unenforceable document is futile. However, the converse—a nonbinding but enforceable document—is not necessarily better. Enforceability depends on the goodwill of the parties, but there is no guarantee that the parties will remain forever good-willed. When goodwill expires, as it likely will when commitments become inconvenient, any party can easily defect. However, parties that renege on their commitments from a nonbinding document cannot be held accountable because noncompliance will have been legal.

Enforceability, then, will be a challenge whether the COC becomes legally binding or not. Some have argued, however, that a nonbinding COC will be the same as the DOC. But nonbindingness is not the sole criterion that will differentiate a COC from the DOC. The DOC is not a perfect political document. Whether binding or not, a COC that tackles issues in the South China Sea with greater specificity than the DOC is preferable.

Legal Bindingness: A Moving Target

In the final analysis, the overarching goal should not be legal bindingness but substantial improvements to the DOC, including a well-specified list of acceptable and unacceptable behaviors in the South China Sea, a clear enumeration of possible repercussions for deviations from international and regional norms, and a concrete and practicable framework for maritime cooperation.

In putting forward these improvements, ASEAN should be careful to include lucid language in the text to minimize room for differing interpretations. Alternatively, ASEAN should consider proposing a quasi-judicial mechanism through which disputes over interpretation may be reconciled.

ASEAN has waited long for a COC, and it must be prepared to wait longer toward a legally binding and substantial document. Still, ASEAN must grab any opportunity that emerges to arrive at a more specific conflict management instrument in the South China Sea, even if it means agreeing to another nonbinding document *for the time being*.

The danger with this position, however, is that ASEAN, China, and the rest of the world have become so fixated on concluding a COC that when any sort of COC finally arrives, the original goal will be thought to have been achieved. This could mean that the COC will be the final document of its kind and that no further negotiations will take place.

But ASEAN can and should try again in the future. The COC, after all, should be a moving target: until an ideal COC is achieved, ASEAN should press on with the process.

Endnotes

1. Carl Thayer, "A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct," *The Diplomat*, 3 August 2018, <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>
2. "Wang Yi Responds to Four Questions on the Consultations on the Code of Conduct in the South China Sea (COC)," Ministry of Foreign Affairs of the People's Republic of China, 1 October 2019, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1685673.htm
3. Thayer, "Closer Look."
4. Thayer, "Closer Look."
5. "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines," Ministry of Foreign Affairs of the People's Republic of China, 7 December 2014, para. 38, https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm
6. South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award of 12 July 2016, ¶¶ 212–18 (Arb. Trib. Constituted under Annex VII to the 1982 UN Convention on the Law of the Sea), <https://pcacases.com/web/sendAttach/2086>

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