

ASEAN and Its Partners for Good Order at Sea: Problems and Proposals

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Introduction

The debate on good order at sea has been going on within and without the region for many years. It is however that recent activities in the Southeast Asia seas and oceans have elevated the debate to a whole new level, which deeply involves policy-makers, think-tankers, and academics. It asks for further cooperation between maritime stakeholders and in the meantime raises intricate questions as to how to achieve optimal outcomes. This paper argues that only on a rule-based order enforced by appropriate measures can the Association for Southeast Asian Nations (ASEAN) and its partners achieve a peaceful and secure maritime environment that benefits all. To ensure safety and security amid the shifting balance of power and mounting non-traditional threats, seafarers need legal instruments such as the United Nations Conventions on the Law of the Sea (UNCLOS) signed in, a prospective regional code of conduct between ASEAN and China, and more relevant regional institutions such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP). In this regard, capacity building cooperation is critical.

Contesting “definitions”

The *Council for Security Cooperation in the Asia Pacific (CSCAP)* proposes, “good order at Sea ensures the safety and security of shipping and permits countries to pursue their maritime interests and develop their marine resources in an ecologically sustainable and peaceful manner in accordance with international law. Hence, a lack of good order at sea is evident if there is illegal activity at sea or inadequate arrangements for the safety and security of shipping.”¹ The CSCAP undertaking clearly puts emphasis on the “safety and security of shipping”. A policy paper by the *S. Rajaratnam School of International Studies (RSIS)* of Singapore shares that understanding and adds a few more dimensions by stating that “Good order at sea ensures the safety and security of shipping and permits

countries to pursue their maritime interests and develop their marine resources in accordance with agreed principles of international law. Threats to good order at sea include piracy and armed robbery against ships, maritime terrorism, illicit trafficking in drugs and arms, people smuggling, pollution, illegal fishing and marine natural hazards.”² From African experiences, good order at sea essentially means using laws and law enforcements to combat against crimes such as piracy off the coast of Somalia.³ As a domain of complexity and immensity, good order at sea involves both state and non-state actors and should be viewed from both traditional and non-traditional security perspectives. All the above-mentioned definitions, though having nuances, have one common denominator: international law. In this connection, legal constructs, not political imaginations, should provide the basic tools for good governance in the maritime domain.

Facts on the ground tell a somewhat different story. Countries usually have divergent views about what should not happen. In May 2017, Chinese Defense Ministry said, “The operation by the Chinese military aircraft was professional and safe” and charged that “Recently, the US has been sent military vessels and aircraft to China’s maritime and air space, infringing upon China’s territorial sovereignty and posing a threat to the lives of people from both sides.” The Chinese was of the conviction that “such operations [by the US] are the root of Sino-US military maritime and air safety incidents. Whereas, the US side said “a US Navy P-3 Orion was 240km southeast of Hong Kong in international airspace when two Chinese J-10 fighters carried out an ‘unsafe intercept’.”⁴ The war of words also happened at a number of times before and after that incident when there were near-collision situations between the two countries’ maritime vessels⁵.

The “one same fact, two different stories” pattern has also found its way to the ASEAN audience. The Association has long been mobilizing support among member countries to produce regular factual reports of the seas and oceans as could be seen in its traditional leaders’ joint communiqués. Yet it fell short of noting specific incidents on several occasions since certain member countries might want to shy away from invoking other countries by not pinpointing the facts. In 2012, ASEAN was presented with such challenge when it tried to no avail to arrive at consensus for a shared statement on the situation in the South China Sea. As Cambodia made reservation, ASEAN Foreign Ministers could not even insert a reference of law in the communiqué, thus failing to keep an established tradition.⁶ It is therefore safe to say that views on good order at sea vary, depending on where and under which circumstance a stakeholder stands. In other words, realities stood in stark contrast to ideals.

Tracing the sources

Good order at sea has been challenged primarily because of the fact that although no country claims to stand above law, there are “first among equals” and actors that do not play by the rulebook.

Firstly, unilateral actions hamper efforts to convince the regional community that public goods like Sea Lines of Communication (SLOC) are to be protected by universal principles. When China pulled the oil rig HYSY 981 into the Vietnamese waters in 2014 with a show of an overwhelming force, many would suggest that given divergent national interests and asymmetry of power, the enterprise of international law, especially UNCLOS 1982, should be further promoted.⁷ ASEAN as a whole wishes to manage its relationship with China under the guidance of mutual respect and equality, and therefore such incident is definitely not in the former’s expectation. Unfortunately, even in ASEAN, not every country is committed to the same body of laws. For example, several countries have not ratified the International Convention on Maritime Search and Rescue (SAR) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA 1988). These ASEAN countries might have unique concerns about joining those conventions. It is thus a political decision that they have to make to harmonize national interests with those of the region as a whole.

Secondly, it has been a long-time and hard-fought dream for ASEAN to promote open regionalism as it navigates through the push and pull of major powers. To that end, multilateralism is to be promoted. Multilateralism can only be achieved with a high degree of unity among member countries. Or at least, the region must share a sense of trans-nationalism when it comes to certain issues such as combating climate change and organized crimes. Yet there are countries that still prefer bilateral approaches in many instances, including issues discernible to the maritime domain. For example, Prashanth Parameswaran holds a pessimistic view that it is hardly possible to have an Asia Maritime Organization for Security and Cooperation (AMOSC), which could address regional maritime issues in a more system scale manner.⁸

The problem at hand is no doubt the alluring of bilateralism at the expense of multilateral interests. Bilateralism works as far as “purely” bilateral issues are concerned. For instance, demarcation of borders just between two countries and in areas where there are just two claimants. It also applies to realms in which no multilateral mechanisms have been arranged and a bilateral approach is not a breach of international law or regional code of conduct. Any bilateral patrol, for example, between two ASEAN claimants in the Spratlys would complicate the issue if conducted in overlapping areas claimed by more than two sides. Obviously, countries with greater military and economic strength tend to resort to bilateral settings to leverage negotiations and force other states

to accept their terms. That is the reason why the on-going negotiation on joint development between China and the Philippines is drawing a lot of attention. Repercussions of such an arrangement should go beyond the bilateral domain of Beijing-Manila relations even when the proposed area might be not a point of contention multilaterally.

ASEAN advocates for multilateralism because it understands that a whole-of-region approach is necessary for the construction of an overarching security architecture, which will eventually enable good order at sea. If coordinating efforts at regional level are downplayed to give way to unilateral or bilateral arrangements, good order at sea will be an unfulfilled dream. The absence of security architecture is attributed to discrepancies in handling cross-border maritime issues in the region. This is taken advantage of by deliberative actors when they choose to operate in “grey zones” – areas and actions to which international laws and national laws have not given clear guidance, for example, using non-military forces to obtain maritime objectives without causing wars.⁹ ASEAN is trying to catch up with these new realities but it is always easier said than done. The Association is challenged from inside out and arguably its problems are not mainly because of shortcomings in its processes and institutions. As Ankit Panda argues, the problem rather “stems from widely divergent national interests.”¹⁰ The protracted path to an effective Code of Conduct in the South China Sea (COC) is a case in point.

Thirdly, non-state actors, especially ill-intentioned ones such as pirates, crime organizations, polluters, and terrorists, have increasingly threatened Southeast Asia at sea. These troublemakers follow no national or international rules. Ensuring security in the Singapore Strait, the Malacca Strait, and other maritime choke points in Southeast Asia costs ASEAN billions of dollars every year because of the illegal activities by non-state actors¹¹. Half of the world’s piracy attacks now happen off the coasts of Indonesia, Malaysia and Singapore¹². Fishing stock depletion, discharge of pollutants, and illegal plastic dumping in the South China Sea all put pressure on ASEAN and its partners regarding the maintenance of good order at sea.¹³ It is also a popular argument that the maritime sovereignty disputes hinder collaborative efforts in Southeast Asia seas and oceans. Over-sensitive sovereignty concerns explicitly result, *inter alia*, in the lack of marine protected areas (MPAs) both in quantity and quality in this part of the world. The Aichi Biodiversity target of having 10% of coastal and marine areas protected by 2020 would be more difficult for ASEAN countries to meet if no meaningful transnational proposals are to be made.

Fourthly, good order at sea requires laws. However, questions linger as to how likely they will be enforced. The implementation of the Arbitral Tribunal's Award on Philippines vs. China case would raise this inquiry. This is definitely linked to the correlation between power and order. Order might (or might not)

be established and enforced by power. And enforceability is a recurring theme as long as more powerful countries would like to have an “order” that is not necessarily envisioned by legalists. The recent inaction on the part of the Philippines in the aftermath of the Arbitral Award explains why legal actions against great powers are often uphill battles.¹⁴ The persistent and rampant marine pollution in Southeast Asia points to the disregard for international law by many of the maritime users.

Seeking solutions

Because of the divergence of national interests, international law and regional codes of conducts should continue to be the guide. The widespread dishonor of these instruments by concerned maritime stakeholders would be tremendously consequential in both near and longer terms. Littoral states in Southeast Asia, their neighbors, and partners should strictly adhere to relevant international laws such as UNCLOS 1982 and other marine-related conventions such as The International Convention for the Safety of Life at Sea, The International Convention for the Prevention of Pollution from Ships, International *Convention* on maritime *search and rescue*, The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, United Nations *Convention* against Transnational Organized Crime, International *Convention* on Oil Pollution Preparedness, Response and Co-operation, and The *Protocol* on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances. Reaching a legally binding COC might be a lengthened process but aiming high should be the right strategy. Semi-closed sea cooperation under Articles 122 and 123 of UNCLOS should be encouraged. More dialogues and exchanges of ideas are not redundancy but rather reinforcement of constructive habits. Delimitation of regional maritime boundaries and/or practical cooperation between littoral states should be conducted on the basis of these critical legal instruments.

Another crucial part of the solution should be collaboration to boost capacity on the ground. Laws cannot be enforced without adequate capabilities. Stakeholders of ASEAN countries and the Pacific nations of Australia, China, Japan, South Korea, and the US can help one another via multilateral proposals such as the Expanded ASEAN Maritime Forum and/or bilateral frameworks as long as international laws apply. Australia’s recent activism in collaborative capacity building with ASEAN countries is a move in that right direction. Outside partners with deep expertise and experience such as the UK, the Netherlands, and Germany also can offer a helping hand. For instance, the Leiden University in the Netherlands, which houses the world’s biggest collection of books and documents about Indonesia, has offered research cooperation with this Southeast Asia’s biggest archipelagic nation.¹⁵ Best practices have been

recommended out of scholarly/policy-related forums as indicated in the case of the recent trilateral conference between the Embassy of the UK, Embassy of Japan and Diplomatic Academy of Viet Nam held in Hanoi in September 2017. Capacity building can also begin with information sharing. An example is ReCAAP can offer timely and accurate information with the Focal Points of Contracting Parties 24/7.¹⁶ Such mode of cooperation should be extended to other areas of interest such as coral reef conservation and plastic dumping prevention. Marine information is often costly.¹⁷ There are, however, a number of other mechanisms that can help ease that burden, namely Maritime Safety and Security Information System (MSSIS), Automatic Intercept Service (AIS), Ship Security Alert System (SSAS), Information Fusion Center (IFC), Control Center (CC). Along that line, ASEAN and its partners should promote and facilitate marine scientific research under Article 239 of the UNCLOS.

Conclusion

Many of the ASEAN countries adopt a hedging strategy with its bigger partners, especially the US and China, and are currently not ready to take the lead in dealing with security challenges to ensure good order at sea. But ASEAN as a group can do more by not leaving the helm in the first place to continue to steer the community ship toward a rule-based order of open, free seas and oceans. More than anyone else, ASEAN must hold high the standards set forth by international law, such as freedom of navigation, maritime safety and security, and at the same time, seek strategic and practical cooperation among member countries and with partners to create an environment conducive to ensure good order at sea. However, ASEAN alone is insufficient to ensure safe and secure maritime commons. Just as importantly, it needs to persuade the US and China to be truly responsible stakeholders and convince middle powers like Japan, India and Australia into reliable capacity builders for the sake of maintaining long-lasting good order in the oceanic domain.

Notes

¹ “Principle for good order at sea”, CSCAP, <http://www.cscap.org/index.php?page=principle-for-good-order-at-sea>, accessed on August 27, 2017.

² Same Bateman, Joshua Ho, and Jane Chan (2009), “Good Order at Sea in Southeast Asia”, *RSIS Policy Paper*, https://www.rsis.edu.sg/wp-content/uploads/2014/07/PR090427_Good_Order_at_Sea_in_SEA.pdf, accessed on August 27, 2017.

³ See, for example, Thomas Mandrup and Vrey Francois, Eds, (2015), *Toward Good Order at Sea: African Experiences*, Sun Media, Stellenbosch University Press.

⁴ Teddy Ng and Kristin Huang, “China dismisses US account of ‘dangerous intercept’ in the South China Sea”, *South China Morning Post*, May 28, 2017 (updated on July 6, 2017),

<http://www.scmp.com/news/china/diplomacy-defence/article/2095988/china-dismisses-us-account-dangerous-intercept-south>, accessed on September 1, 2017.

⁵ See, for example, “China says freedom of navigation in the South China Sea is important” (2012), *Reuters*, November 30, 2012, <http://www.reuters.com/article/uk-china-seas-navigation/china-says-freedom-of-navigation-in-south-china-sea-is-important-idUKBRE8AT0BE20121130?mod=related&channelName=worldNews>, accessed on September 1, 2017; “No problem of freedom of navigation in the South China Sea” (2015), *The Hindu Business Line*, March 14, 2015, <http://www.thehindubusinessline.com/economy/no-problem-of-freedom-of-navigation-in-south-china-sea/article6993750.ece>, accessed on September 1, 2017.

⁶ The non-issuance of the joint communiqué was unprecedented in the ASEAN’s 45 years of history. See, for example, Erlinda F. Basilio (2012), Why there’s no ASEAN joint communiqué, *Inquirer*, July 19, 2012, <http://globalnation.inquirer.net/44771/why-there%E2%80%99s-no-asean-joint-communiqué>, accessed on September 1, 2017; Manuel Mogato, Michael Martina and Ben Blanchard (2016), “ASEAN deadlocked on South China Sea, Cambodia blocks statement”, *Reuters*, July 25, 2016, <https://www.reuters.com/article/us-southchinasea-ruling-asean/asean-deadlocked-on-south-china-sea-cambodia-blocks-statement-idUSKCN1050F6>, accessed on September 1, 2017.

⁷ See, for example, Paul J. Leaf (2014), “Learning from China’s oil rig standoff with Vietnam”, *The Diplomat*, August 30, 2014, <https://thediplomat.com/2014/08/learning-from-chinas-oil-rig-standoff-with-vietnam/>, accessed on September 4, 2017 and Tran Sy Vi (2014), Oil rig HD 981 incident: From the angle of international law”, *Vietnam Law Magazine*, August 22, 2014, <http://vietnamlawmagazine.vn/oil-rig-hd-981-incident-from-the-angle-of-the-international-law-3588.html>, accessed on September 4, 2014.

⁸ Ankit Panda (2015), “Why hasn’t maritime multilateralism worked in Southeast Asia”, *The Diplomat*, February 24, 2015, <https://thediplomat.com/2015/02/why-hasnt-maritime-multilateralism-worked-in-southeast-asia/>, accessed on September 4, 2017.

⁹ For a more thorough discussion of the concept of “grey zone”, see James Holmes, Toshi Yoshihara (2017), “Five shades of China’s gray-zone strategy”, *National Interest*, May 2, 2017, <http://nationalinterest.org/feature/five-shades-chinese-gray-zone-strategy-20450>, accessed on January 10, 2018.

¹⁰ Ibid.

¹¹ See, for example, Adam Mccauley (2014), “The most dangerous waters in the world”, *Time*, August 15, 2014, <http://time.com/piracy-southeast-asia-malacca-strait/>, accessed on September 8, 2017.

¹² “World’s most dangerous waters” (2014), *CNBC*, September 15, 2014, <https://www.cnbc.com/2014/09/15/worlds-most-pirated-waters.html>, accessed on September 8, 2015.

¹³ See, for example, Lynn Kuok (2017), “South China Sea dispute undermines maritime security in Southeast Asia”, *In Asia – Weekly Insights and Analysis*, August 23, 2017, <https://asiafoundation.org/2017/08/23/south-china-sea-dispute-undermines-maritime-security-southeast-asia/>, accessed on September 4, 2017.

¹⁴ See, for example, Bernoit Hardy-Chartrand, “One year after the South China Sea ruling, a deceiving calm”, *The Japan Times*, July 16, 2017, <https://www.japantimes.co.jp/opinion/2017/07/16/commentary/world-commentary/one-year-south-china-sea-ruling-deceiving-calm/#.WeGdDVuCyUk>, accessed on September 4, 2017.

¹⁵ “RI, Netherlands to further maritime cooperation” (2015), *The Jakarta Post*, February 14, 2015, <http://www.thejakartapost.com/news/2015/02/14/ri-netherlands-further-maritime-cooperation.html> accessed on September 15, 2017.

¹⁶ So far, ReCAAP has 20 countries as contracting parties (14 Asian countries, 4 European countries, Australia, the USA).

¹⁷ See, for example, Miguel Pessanha Pais “Ecosystems: Marine Monitoring is hard and costly”, *Nature*, Vol. 495, No. 174, 2013, at <http://www.nature.com/nature/journal/v495/n7440/full/495174d.html?foxtrotcallback=true>, accessed on September 15, 2017.