

The Southeast Asia Claimant States, ASEAN and the South China Sea Dispute

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Part 1 Policy Approaches of the Claimant States after the Award by the Arbitral Tribunal

The general response by Southeast Asian states to the Award by the Arbitral Tribunal overwhelmingly has been low-key, muted, and in line with recent ASEAN declaratory policy.² The four claimant states may be divided into two groups – the front-line states (Philippines and Vietnam) and the other claimants (Malaysia and Brunei).

Front-line States

The Philippines. The new Philippine Administration issued a statement on 12 July that welcomed the Arbitral Tribunal's Award and called "on all those concerned to exercise restraint and sobriety The Philippines strongly affirms its respect for this milestone decision as an important contribution to ongoing efforts in addressing disputes in the South China Sea."³ The Philippines will replace Laos at ASEAN's next Chair in 2017.

Vietnam. On 12 July a spokesperson for the Foreign Ministry stated: "Viet Nam welcomes the fact that, on 12 July 2016, the Tribunal issued its Award in the arbitration between the Philippines and China. Viet Nam will make a statement on the content of this Award ... Viet Nam strongly supports the settlement of disputes in the East Sea by peaceful means, including legal and diplomatic processes ..."⁴ As of this writing no follow up statement has been issued (19 October 2016).

Other Claimant States

Malaysia. Malaysia's Foreign Ministry issued a statement on 13 July that noted the Arbitral Tribunal had issued an award and stated that Malaysia believed

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² See Carlyle A. Thayer, "After the Ruling: Lawfare in the South China Sea," *The Diplomat Magazine*, no. 21, August 2016. 1-18, http://magazine.thediplomat.com/#/issues/-KN_NWvleCtf3lVXufVR/read.

³ Government of the Philippines, Department of Foreign Affairs, "Statement of the Secretary of Foreign Affairs," 12 July 2016, <http://www.dfa.gov.ph/newsroom/dfa-releases/9900-statement-of-the-secretary-of-foreign-affairs-2>.

⁴ See: Ministry of Foreign Affairs, "Remarks of the Spokesperson of the Ministry of Foreign Affairs of Viet Nam on Viet Nam's reaction to the issuance of the Award by the Tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea in the arbitration between the Philippines and China," 12 July 2016; http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns160712211059. As of 24 September 2016 no follow up statement has been issued.

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that all relevant parties can peacefully resolve disputes by full respect for diplomatic and legal processes, and relevant international law and 1982 UNCLOS. Malaysia believes that it is important to maintain peace and stability through the exercise of self-restraint in the conduct of activities that may further complicate disputes or escalate tension, and avoid the threat or use of force in the South China Sea.

On 14 July Brunei's Deputy Minister for Foreign Affairs gave an exclusive interview to *The Brunei Times* in which he stated:

Brunei Darussalam views the South China Sea as a very important area for maintaining peace, stability and prosperity, especially as much of its trade passes through the South China Sea We are fully committed to ensuring the peaceful resolution of disputes, without resorting to threats or use of force in accordance with universally recognised principles of international law including the United Nations Convention on the Law of the Sea Brunei also remains committed to building confidence and promoting cooperation to address common challenges in maritime issues

Part 2 ASEAN and the South China Sea Dispute after the Award by the Arbitral Tribunal

The ASEAN foreign ministers met in Vientiane for their annual ministerial meeting nearly two weeks after the Award was issued. Kavi Chongkittavorn has made a persuasive argument that "ASEAN's overall position on the South China Sea has been strengthened."⁵ He argues that the outcome of the ASEAN Ministerial Meeting "unexpectedly generates a win-win situation for concerned parties." He notes that with the Philippines' return to the fold, ASEAN's bargaining power has increased and "renewed the process of mending ASEAN-China relations ..."

Kavi's argument is based on an exegesis of four documents adopted at these meetings:

- ASEAN Foreign Minister's Statement on the Occasion of the 40th Anniversary of the Treaty of Amity and Cooperation in Southeast Asia (TAC), (hereafter ASEAN Foreign Minister's Statement on the TAC),
- Joint Communiqué of the 49th ASEAN Foreign Ministers' Meeting, Vientiane, 24 July 2016, (hereafter 49th AMM Joint Communiqué),
- Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea (25 July 2016), (hereafter ASEAN-China Joint Statement on the DOC), and
- Joint Statement of the Foreign Ministers of ASEAN Members States on the Maintenance of Peace, Security and Stability in the Region, (hereafter ASEAN Joint Statement on Peace, Security and Stability in the Region).

The ASEAN Foreign Minister's Statement on the TAC (2016) noted that the TAC "is the key code of conduct governing relations between states" and that all parties including High

⁵ Kavi Chongkittavorn, "ASEAN's Strategies After the PCA Decision," Presentation to International Workshop on The Legal Status of Islands and Rocks in International Law and Practice in the East Sea, co-hosted by Pham Van Dong University and Nha Trang University, Nha Trang, Vietnam, August 18, 2016.

Contracting Parties from outside Southeast Asia should “continue to fully respect and promote the effective implementation of the TAC.”⁶ Significantly, the final point in the ASEAN Foreign Minister’s Statement on the TAC committed the ASEAN Foreign Ministers to “Explore a *legally binding instrument* building upon the TAC for the wider region [emphasis added].”

According to Kavi, the ASEAN Foreign Minister’s Statement on the TAC “jump-started all ASEAN members to work on the content of the 49th ASEAN joint communiqué ... [and] signalled a united ASEAN position on the dispute.”⁷ The South China Sea was addressed in the joint communiqué in a separate section, as is usual. This document included eight paragraphs that closely followed earlier statements. For example, in paragraph 174 the ASEAN foreign ministers expressed their

serious concern over recent and ongoing developments and took note of the concerns expressed by some Ministers on the land reclamations and escalation of activities in the area, which have eroded trust and confidence, increased tensions and may undermine peace, security and stability in the region.⁸

In paragraph 177 the foreign ministers “emphasised the importance of non-militarisation and self-restraint in the conduct of all activities, including land reclamation that could further complicate and situation and escalate tensions in the South China Sea.”⁹ In paragraph 179 the foreign ministers “highlighted the urgency to intensify efforts to achieve further substantive progress on the implementation of the DOC in its entirety as well as substantive negotiations for the early conclusion of the COC including the outline, and timeline of, the COC.”¹⁰

What was little-noticed was that the ASEAN foreign ministers extracted a fundamental section from the Press Statement by the Chairman of the ASEAN Foreign Ministers’ Retreat held in Vientiane in February 2016 and inserted it as the second paragraph of the 49th AMM Joint Communiqué under the heading “ASEAN Community Building”. Paragraph 2 read:

We reaffirm our shared commitment to maintaining and promoting peace, security and stability in the region, as well as to the peaceful resolution of disputes, *including full respect for legal and diplomatic process*, without resorting to the threat or use of force, in accordance

⁶ ASEAN Foreign Minister’s Statement on the Occasion of the 40th Anniversary of the Treaty of Amity and Cooperation in Southeast Asia (TAC),” 24 July 2016, <http://asean.org/asean-foreign-ministers-statement-on-the-occasion-of-the-40th-anniversary-of-the-treaty-of-amity-and-cooperation-in-southeast-asia-tac/>.

⁷ Chongkittavorn, “ASEAN’s Strategies After the PCA Decision.”

⁸ “Joint Communiqué of the 49th ASEAN Foreign Ministers’ Meeting, Vientiane, 24 July 2016,” <http://asean.org/storage/2016/07/Joint-Communique-of-the-49th-AMM-ADOPTED.pdf>. The use of the term “land reclamation” is misleading; see: Carl Thayer, “No, China is Not Reclaiming Land in the South China Sea,” *The Diplomat*, June 7, 2015. <http://thediplomat.com/2015/06/no-china-is-not-reclaiming-land-in-the-south-china-sea/>.

⁹ “Joint Communiqué of the 49th ASEAN Foreign Ministers’ Meeting, Vientiane, 24 July 2016.”

¹⁰ “Joint Communiqué of the 49th ASEAN Foreign Ministers’ Meeting, Vientiane, 24 July 2016.”

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with the universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS) [emphasis added].¹¹

The reference to “legal and diplomatic processes” can be read as an allusion to the proceedings of the Arbitral Tribunal.

Next, the foreign ministers of ASEAN member states and China issued a Joint Statement on the DOC in which they committed themselves “to the full and effective implementation of the DOC in its entirety and working substantively towards the early adoption of a Code of Conduct in the South China Sea (COC) based on consensus.”¹²

Further, the ASEAN foreign ministers extracted a commitment in the 2002 DOC “to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability”¹³ and inserted it as Point 3 in the ASEAN–China Joint Statement on the DOC to give it renewed emphasis. Point 3 also reiterated that self-restraint included such activities as “refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features ...”¹⁴ This wording could be read as including Scarborough Shoal, which is presently uninhabited.

Finally, to round off ASEAN’s united-front stance on the South China Sea, the foreign ministers issued the ASEAN Joint Statement on Peace, Security and Stability in the Region.

ASEAN’s most recent policy on the South China Sea was contained in the statement released by the chair of the 28th and 29th ASEAN Summits held in Vientiane from 6–7 September. Paragraph 5 of this statement replicated Point 2 in the 49th AMM Joint Communiqué that reaffirmed “full respect for legal and diplomatic processes.”¹⁵ The section on the South China Sea contained eight paragraphs, the first seven of which were word-for-word the same as those in the 49th AMM Joint Communiqué. The eighth paragraph welcomed the adoption of the ASEAN–China Joint Statement on the DOC and the recently adopted joint statement on CUES and Guidelines for Hotline Communications.

¹¹ “Joint Communiqué of the 49th ASEAN Foreign Ministers’ Meeting, Vientiane, 24 July 2016.” The AMM Retreat Press Statement may be found at http://www.asean.org/wp-content/uploads/2016/02/Press-Statement-by-the-Chairman-of-the-ASEAN-Foreign-Ministers27-Retreat_ENG_FINAL-as-of-27.pdf.

¹² “Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea,” Vientiane, 25 July 2016, <http://asean.org/storage/2016/07/Joint-Statement-on-the-full-and-effective-implementation-of-the-DOC-FINAL.pdf>.

¹³ “Declaration on Conduct of Parties in the South China Sea, Phnom Penh, 4 November 2002, http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

¹⁴ “Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea.” These words were taken verbatim from the 2002 DOC.

¹⁵ “Chairman’s Statement of the 28th and 29th ASEAN Summits, Vientiane, 6-7 September 2016,” <http://asean.org/storage/2016/08/Final-Chairmans-Statement-of-the-28th-and-29th-ASEAN-Summits-rev-fin.pdf>.

Part 3 Policy Options for the Claimant States and ASEAN: The Way Forward

The current territorial and maritime disputes in the South China Sea after the Award by the Arbitral Tribunal raise four major issues that must be addressed bilaterally, regionally, and by the involvement of ASEAN's dialogue partners. These four issues are:

- the creation of a rules-based regional order in Southeast Asia's maritime domain and high seas (international waters) in the South China Sea;
- military activities in the South China Sea, including militarisation of features;
- the protection of the marine environment and its ecosystem; and
- rapidly dwindling fish stocks and the impact on human security.

The Award by the Arbitral Tribunal established under the compulsory dispute settlement mechanism in UNCLOS is now part of international case law irrespective of China's rejection of it. Since UNCLOS does not contain any enforcement mechanism, the resolution of maritime disputes in the South China Sea is at an impasse. The longer this impasse remains there is a risk that UNCLOS, the constitution of the world's oceans, will be undermined and a rules-based regional order subverted.

Claimant States

The Philippines. The Philippines should open "bilateral friendly consultations" with China to discuss their maritime dispute. Initially these discussions should focus on what steps can be taken to maintain the status quo, particularly at Scarborough and Second Thomas shoals, how to structure formal diplomatic negotiations on the dispute, and cooperative measures under the DOC. The Philippines should keep all members of ASEAN fully informed of its discussions with China and consult in advance on any policy changes likely to impact on the security of the South China Sea.

The Philippines Government should consult with all relevant stakeholders with an interest in the South China Sea before making unilateral policy changes with respect to the Spratly Islands.

As a matter of priority the Philippines and the United States need to discuss how they can coordinate more effectively their policies on the South China Sea to contribute to regional security and at the same time give reassurance to regional states.

As ASEAN Chair, the Philippines should give priority to advancing ASEAN's unified stance on the South China Sea. The Philippines should also promote internal ASEAN discussions on the implications of the Award by the Arbitral Tribunal on regional security. For example, the Philippines could suggest resurrecting the informal caucus of claimant states to develop policy suggestions for consideration by the other members.

If China continues to violate the Award through new "land reclamation" activities that degrade the marine environment, illegal fishing, and illegal action by state-flagged vessels, the Philippines should report this to the Arbitral Tribunal for its consideration and action.

Vietnam. Vietnam should confer separately with the other claimants to discuss the implications of the Award on regional security and how ASEAN should proceed. Vietnam

should give its support for an informal caucus of claimant states to develop policy proposals on the South China Sea for consideration by other ASEAN members.

Vietnam should continue its consultations with China on the South China Sea under existing bilateral mechanisms and inform other members of ASEAN of these discussions.

It should promote a strategic partnership with Brunei that includes a provision for cooperation in maritime safety and security in the South China Sea.

Vietnam should continue the gradual modernisation of its armed forces, with priority given to maritime domain awareness, the modernisation of the Vietnam Coast Guard, and continued capacity building. It should seek further assistance from Japan, the United States, and other strategic partners.

ASEAN

ASEAN needs to address both internal issues affecting its unity and cohesion, and external issues relating to its relations with China and other dialogue partners on South China Sea issues. The ASEAN Secretary General should be given specific guidance to undertake a more proactive role on South China Sea matters, including drawing public attention to incidents that lead to increased tensions due to the lack of self-restraint on the part of one or more parties, and military activities that pose a threat to peace and stability.

ASEAN should give consideration to adopting a qualified majority approach to decision-making at working and senior official levels, and retain consensus decision-making at summit level.

The Association should enlist the cooperation of the ASEAN ISIS (Institutes of Strategic and International Studies) network to study and make policy recommendations on (1) cooperative activities under the DOC and (2) defining non-militarisation and the steps to be taken to prevent the militarisation of the South China Sea.

It should take steps to convert the ASEAN Coast Guards Forum into a proactive institution through multilateral exercises, joint patrols, and capacity building through cooperation with dialogue partners.

It should continue to press China to implement fully the DOC and reach agreement on the COC framework during the first half of 2017.

ASEAN should give priority to advancing practical measures with China to implement confidence-building measures identified under Point 5 of the DOC:

- a. holding dialogues and exchange of views as appropriate between their defence and military officials (implementation of CUES and non-militarisation);
- b. ensuring just and humane treatment of all persons who are either in danger or in distress (use of the agreed hotline);
- c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and

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- d. exchanging, on a voluntary basis, relevant information (environmental impact statements related to so-called “land reclamation” and military activities).

Also as a matter of priority ASEAN should advance concrete cooperative measures with China under Point 6 of the DOC:

- a. marine environmental protection (environmental impact statements and the reef ecosystem);
- b. marine scientific research (preservation of the fish stock and endangered species);
- c. safety of navigation and communication at sea (extend CUES to maritime law enforcement agencies such as the Coast Guard);
- d. search and rescue operations; and
- e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms (and illegal, unreported and unregulated fishing).

ASEAN claimant states should move expeditiously to clarify their claims to features and maritime zones in the South China Sea on the basis of UNCLOS and draw on the July 2016 Award by the Arbitral Tribunal where it is relevant (e.g., clarifying which features are islands, rocks, or low-tide elevations). Where overlapping maritime zones are identified, the countries directly concerned should consult and agree to a demarcation of these zones or failing that to agree on provisional measures of a practical nature.

All ASEAN claimant states also should confer bilaterally to exchange their assessments of the implications of the Award on stability and security in the South China Sea. The Philippines, Vietnam, Malaysia and Brunei should consider reviving a caucus of claimant states within ASEAN to reach consensus on the application of international law following the Arbitral Tribunal’s Award to assist consensus building within ASEAN as a whole.

More fundamentally, ASEAN needs to conduct a thorough in-house discussion on what it means to support the peaceful settlement of disputes on the basis of international law, including UNCLOS in light of China’s non-compliance with the Award by the Arbitral Tribunal.

Finally, in order to maintain ASEAN’s centrality in regional affairs, ASEAN needs to work closer with its dialogue partners to improve the efficacy of ASEAN-related multilateral institutions such as the ASEAN Regional Forum, the ASEAN Defence Ministers’ Meeting-Plus, the Expanded ASEAN Maritime Forum, and the East Asia Summit. Also, in ASEAN Plus 1 summit meetings ASEAN should discuss with its dialogue partners how they can continue to contribute to the maintenance of a balance of power in the South China Sea to ensure that Southeast Asia remains a stable and secure region.