



Padjadjaran Journal of International Law
International Law Department Universitas Padjadjaran

ISSN: 2549-2152, EISSN: 2549-1296

Volume 6, Number 2, June 2022

DOI: <https://doi.org/10.23920/pjil.v6i2.778>

Assesing the Potential Effectiveness of the ASEAN-CHINA Code of Conduct on the South China Sea in Constraining Chinese Aggressive Actions

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Abstract

This article assesses the potential of the Code of Conduct in the South China Sea in constraining aggressive Chinese actions and maintaining the peaceful order of conduct of claimants and countries bordering the highly-disputed South China Sea. Given the recent Chinese aggressive military and pseudo-military moves in the South China Sea to enforce its arguable illegal nine-dash line claim in the South China Sea, there are hopes that the Code of Conduct agreement between China and ASEAN states will provide legal protection and guideline in the dispute management in the South China Sea. Despite this, a closer inspection of the Code of Conduct reveals that one should not have a high degree of confidence in the potential of the Code of Conduct in managing and regulating the conduct of parties in the South China Sea. Seen through realism, especially given the anarchic nature of the international arena and the unclear type of international law that the Code of Conduct will assume, this article concludes that countries, Indonesia especially, should not have a high degree of expectation that the Code of Conduct will act as some sort of legal power that could restrain China from utilizing military and pseudo-military power in enforcing its claim in the South China Sea. Therefore, Indonesia must continue to modernize its armed forces to uphold Indonesian legal claims in the South China Sea and augment its relationship with the United States so that there could be a possibility that the United States would help defend Indonesia.

Keywords: China; Code of Conduct; Dispute; Potential; South China Sea.

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A. INTRODUCTION

The South China Sea is arguably one of the most essential waterways in the South China Sea. More than a fifth of the world's shipping pass through the South China Sea annually,² making their way to the industrial stronghold of China, South Korea, Taiwan, Japan, and many other emerging East and Southeast Asian countries. The South China Sea is also believed to be containing at least 7 billion barrels of oil and approximately 900 trillion cubic feet of natural gas,³ making the South China Sea heavily attractive for countries in the region that have a massive need for energy.

Currently, seven different nations lay claim to at least some parts of the South China Sea: Brunei, China, Taiwan⁴, Indonesia, Malaysia, Vietnam, and the Philippines.⁵ The claims made by ASEAN member states (i.e., Brunei, Indonesia, Malaysia, Vietnam, and the Philippines) are made under the United Nations Convention on the Law of the Sea (UNCLOS), however, and all of them have a prominent international legal basis for their claim. The claims that China and Taiwan make are Increasing the feeling of anxiety toward Chinese intentions in the region. Rather than using the UNCLOS in making its claim, China instead uses a "historical basis" for its claim, using maps that show the extent of Chinese naval trade that dates all the way to make its claim,

China instead uses a "historical basis" for its claim, using maps that show the extent of Chinese naval trade that dates to the late 16th century.⁶

The end result is the very peculiar line on water that China claims to have an "indisputable sovereignty" over.⁷ The official map of Chinese claims (dubbed in the academia as the 'nine-dash line') that was submitted to the United Nations Commission on the Limits of Continental Shelf⁸ includes nearly the entire South China Sea. The line goes from the West of Taiwan, down to the West of the Philippines, North of Malaysian Borneo and Brunei, and cutting through Indonesian claims in the South China Sea before turning north along the coast of Vietnam and ending west of Hainan Island in the Gulf of Tonkin:

² David Uren, "Southeast Asia Will Take a Major Economic Hit If Shipping Is Blocked in the South China Sea" *Australian Strategic Policy Institute*, 8 Dec. 2020, online, Internet, 5 Feb. 2022., Available: www.aspistrategist.org.au/southeast-asia-will-take-a-major-economic-hit-if-shipping-is-blocked-in-the-south-china-sea/.

³ Beina Xu, "South China Sea Tensions" *Council on Foreign Relations*, 14 May 2014, online, Internet, 5 Feb. 2022., Available: www.cfr.org/background/south-china-sea-tensions#:~:text=According%20to%20the%20World%20Bank.

⁴ China and Taiwan claim the same swath of the South China Sea. However, it is the People's Republic of China that are widely-recognized as the only legitimate government of China and the one that is doing aggressive moves in the South China Sea is the Government of the People's Republic of China in Beijing. Therefore, the discussion regarding Taiwan's claim to the South China Sea lays beyond the scope of this article

⁵ *Competing Visions of International Order in the South China Sea International Crisis Group*, vols., Brussels: International Crisis Group, November 29, 2021, online, Internet, 21 Feb. 2022., Available: www.crisisgroup.org/asia/north-east-asia/china/315-competing-visions-international-order-south-china-sea, at 1

⁶ Tom Miller. *China's Asian Dream: Empire Building along the New Silk Road*. London: Zed Books Ltd., 2017, at 203.

⁷ *Ibid*, at 206

⁸ The letter and the map could be found at: The Permanent Mission of the People's Republic of China to the United Nations to Ki-Moon Ban, "Letter by the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations regarding the Submission by the Socialist Republic of Vietnam to the United Nations Commission on the Limits of the Continental Shelf," Letter, 7 May 2009. Available: http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf

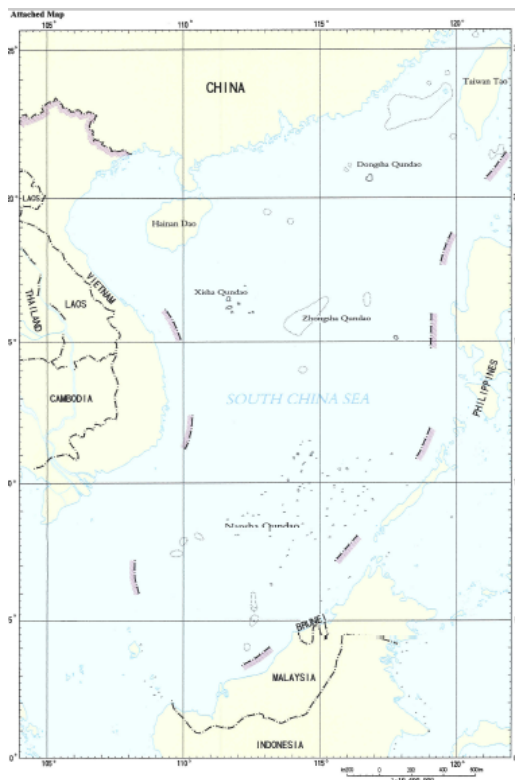


Figure 1: Official Chinese nine-dash line claim in the South China Sea. Source: http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vn_m.pdf

This, of course, does not bode well for China's neighbors in the South China Sea. Rather than using the UNCLOS that China has ratified⁹ as the basis of its South China Sea claim, China instead uses an obscure historical document as the basis of its claim. The nine-dash line, shall it be recognized by the international community, would mean that a vast proportion of Filipino, Malaysian, Bruneian and Vietnamese Exclusive

Economic Zones (EEZ) and territorial waters could be taken away and given to China.

To make matters worse, China has used strong military, pseudo-military, and political methods (i.e., gray zone warfare tactics) to uphold its claim in the South China Sea. In early 2021, China was accused of sending its pseudo-military 'maritime militia' to occupy the Filipino-claimed Whitsun reef.¹⁰ More recently, in December 2021, *Reuters* reported that China had lodged official protests into Indonesian drilling in Indonesian EEZ that overlays with China's nine-dash line.¹¹ Lastly, in 2016, Chinese coast guard ships rammed a fishing boat that was hauled by an Indonesian navy vessel to prevent it from being seized by Indonesia.¹² These and other Chinese actions in the South China Sea rang alarm bells in Southeast Asian capitals regarding Chinese intentions and willingness to use force to uphold its nine-dash line claim.

However, attempts are made to, at the very least, manage the dispute so that it does not escalate into war. In 2002, China and ASEAN states agreed on the Declaration on the Conduct of Parties in the South China Sea. Among the articles of the declaration, the signatories of the declaration agree to "...undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability..."¹³ Most importantly, ASEAN and China agreed that there needs to be an "adoption of a code of conduct in the South China Sea."¹⁴ Thus, with the negotiation of the Code of Conduct, there are hopes that the Code of Conduct will serve as some sort

⁹ Xinmin Ma, "China and the UNCLOS: Practices and Policies" *The Chinese Journal of Global Governance*. 5.1 (2019), at 2.

¹⁰ Ryan D. Martinson and Andrew S. Erickson, "Manila's Images Are Revealing the Secrets of China's Maritime Militia" *Foreign Policy*, 19 Apr. 2021, online, Internet, 5 Feb. 2022. Available: foreignpolicy.com/2021/04/19/manilas-images-are-revealing-the-secrets-of-chinas-maritime-militia/.

¹¹ Tom Allard, Kate Lamb, and Agustinus Beo Da Costa, "EXCLUSIVE China protested Indonesian drilling, military exercises" *Reuters*, 1 Dec. 2021, sec. Asia Pacific, online, Internet, 5 Feb. 2022. Available:

www.reuters.com/world/asia-pacific/exclusive-china-protested-indonesian-drilling-military-exercises-2021-12-01/.

¹² Lyle J. Morris, "Indonesia-China Tensions in the Natuna Sea: Evidence of Naval Efficacy Over Coast Guards?" *RAND Corporation*, 5 Jul. 2016, online, Internet, 21 Feb. 2022. Available: www.rand.org/blog/2016/07/indonesia-china-tensions-in-the-natuna-sea-evidence.html.

¹³ *Declaration on the Conduct of Parties in the South China Sea*, 4 November 2002, art. 4

¹⁴ *Ibid*, art. 10

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of legal guideline for any interactions between dispute parties in the South China Sea. For example, Naifa Rizani Lardo of the S. Rajaratnam School of International Studies argued that the Code of Conduct would allow the parties to the dispute in engaging in dialogue tranquilly, “despite the power imbalance that existed on the disputed sea.”¹⁵

Despite the optimism in the Code of Conduct, this paper argues that the optimism is misplaced. Far from having the potential in constraining the aggressive moves of China in the South China Sea, this paper would attempt to argue that the Code of Conduct is unenforceable, weak, and is unable to constrain Chinese antagonistic moves in the South China Sea, especially when the circumstances necessitate aggressive Chinese moves in order to protect China’s ‘core interests.’ Using the lens of realism in international relations, one should not expect an unenforceable and weak international legal document to constrain aggressive moves that are made by an emerging superpower, especially if one factors in the fact that the relative power of China is far greater vis-à-vis the other claimants in the South China Sea and the assumption that the international world is anarchic and there are no supreme governmental bodies and world police force that sits above states and could move in to protect other states from any unfair aggression carried out by another power.

In order to present the argument clearly to the reader, this article will proceed as follows. First, an explanation on the Code of Conduct and the history of the Code of Conduct will be provided to familiarize the reader in the short history and nature of the Code of Conduct. Second, the lens of realism will be explained, including the five principles of realism with heavy emphasis on the explanation on the

anarchic nature of the international arena. This is necessary as this article uses realism as its theoretical framework. Next, this article will attempt to analyze and explain the reasons why the Code of Conduct will not prevent and constrain aggressive Chinese moves in the South China Sea. Finally, the article will be concluded and several recommendations that could be taken by Indonesia will be given.

B. Code of Conduct for the South China Sea: Explanation and Short History

The first time a Code of Conduct on the South China Sea was mentioned was during the 1996 ASEAN Ministerial Meeting in Jakarta on 21 July 1996. After several clashes in the South China Sea between claimant states, the Foreign Ministers of ASEAN agreed that a Code of Conduct is necessary to manage the dispute peacefully. In contrast, the final dispute resolution is still being worked out:

The Foreign Ministers expressed their concern over the situation in the South China Sea and stressed that several outstanding issues remain a significant concern for ASEAN. In the spirit of the Manila Declaration on the South China Sea, the Ministers called for the peaceful resolution of the dispute and self-restraint by the parties concerned. The Ministers were pleased to observe that the parties concerned have expressed their willingness to resolve the problem by peaceful means in accordance with recognized international law in general and the UNCLOS of 1982. The Ministers also reiterated the significance of the on-going informal workshop series on Managing Potential Conflict in the South China Sea and welcomed the continuing bilateral cooperation and discussions among the claimant countries. *They*

¹⁵ Naifa Rizani Lardo, “ASEAN Way: Managing Expectation in the Code of Conduct for the South China Sea” *Global: Jurnal Politik Internasional*. 23.2 (2021): 218–235, at 218

*endorsed the idea of concluding a regional code of conduct in the South China Sea which will lay the foundation for long-term stability in the area and foster understanding among claimant countries [emphasis added].*¹⁶

The 1996 joint communiqué resulted in the inclusion of the Code of Conduct in a joint statement during the China-ASEAN summit in Phnom Penh, Cambodia, on November 4, 2002. All the ASEAN member states were represented by their respective foreign minister. China was represented by Wang Yi, then the Chinese Special Envoy to ASEAN and the Vice-Minister of Foreign Affairs. As the output of the summit, China and ASEAN agreed on a Declaration on the Conduct of Parties in the South China Sea. As a reflection of its name, the declaration itself touches very little on how ASEAN member states, particularly Indonesia, the Philippines, Brunei, Malaysia, and Vietnam, could resolve their territorial dispute with one another and with China. Only one article is dedicated to the settlement of the dispute, in which the declaration signatories agreed to

...resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.¹⁷

The rest of the declaration focuses only on dispute management, including, among other things, holding military dialogues, ensuring the safety and security

of navigation in the South China Sea, and cooperation in maritime research.

The Code of Conduct itself is only mentioned briefly in article 10 of the declaration:

The Parties concerned reaffirm that adopting a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, based on consensus, towards the eventual attainment of this objective.¹⁸

That is it. There was no further elaboration on the Code of Conduct, the international legal type of the Code of Conduct, and the enforcement mechanism. As a matter of fact, there was not even a negotiating framework or an agreement to start the negotiations on the Code of Conduct. The declaration only promised that there would be an espousal of a code of conduct sometime in the future, without any agreed-upon time frame or deadline for the negotiation and implementation.

For the next eight years after the 2002 Declaration on the Conduct of Parties in the South China Sea, there were no significant updates on the negotiation of the Code of Conduct or even an update on the implementation of the agreed-upon points of the declaration. In 2011, the ASEAN member states and China agreed on a Guideline to implement the Declaration of Conduct on the South China Sea during the ASEAN summit in Bali, Indonesia. The guideline, among other things, stipulates that involvement in the realization projects should be carried out voluntarily, that the initial activities on the implementation of the 2002 declaration should be confidence-building measures, and that the parties to the 2002 declaration must implement the declaration on a step-by-step basis.¹⁹ The

¹⁶ 1996 Joint Communiqué of the 29th ASEAN Ministerial Meeting, 21 January 1996, art. 11

¹⁷ Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, art. 4

¹⁸ Ibid, art. 10

¹⁹ Guideline for the Implementation of the Declaration of Conduct on the South China Sea, 20 July 2011, art. 1, 2, 4, 5

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Code of Conduct itself is, again, only mentioned very briefly in article 6, in which that “[t]he decision to implement concrete measures or activities of the DOC [Declaration on the Conduct of Parties in the South China Sea] should be based on consensus among parties concerned, and lead to the eventual realization of a Code of Conduct.”²⁰ This is a significant step nonetheless, as it signifies that the result of the implementation of the 2002 declaration will be the Code of Conduct and that all negotiations should be based on the 2002 declaration and the 2011 guideline.

Despite the calls for a negotiation on the Code of Conduct on the South China Sea in the 2011 guideline, the negotiations only started two years later, in 2013. Even this negotiation did not produce an outcome speedily, and it was not until after the 2016 *Philippines v. China* ruling in the Permanent Court of Arbitration that China agreed to expedite the negotiations on the Code of Conduct.²¹ Ian Storey of Singapore’s ISEAS-Yusof Ishak Institute argued that there are two possible explanations for the expedition of China-ASEAN Code of Conduct negotiations in 2016. The first is that after the 2016 *Philippines v. China* ruling by the Permanent Court of Arbitration, China was eager to be portrayed as a nation that would cooperate and resolve its disputes with other countries in a cooperative and friendly manner.²² The second explanation is that President Rodrigo Duterte of the Philippines sidelined the ruling and strengthened its

relationship with China.²³ Another explanation stipulates that the Chinese unwillingness and unresponsiveness to the Code of Conduct declaration may reflect the Chinese appetite for dealing with the South China Sea issue bilaterally with individual member states instead of multilaterally with the whole ASEAN bloc.²⁴ This is due to the fact that China could use its more prominent relative economic, political, and military position vis-à-vis individual ASEAN states, and, fearful of this, ASEAN states have a desire to deal with China on the South China Sea dispute as a coalition.²⁵

In 2017, China and ASEAN member states finally agreed on a negotiation framework for the Code of Conduct. In the 2017 ASEAN Foreign Minister’s Meeting joint communiqué, the ASEAN member states welcomed the conclusion and the implementation of the negotiation framework for the Code of Conduct that will “facilitate the work for the conclusion of an effective COC on a mutually-agreed timeline.”²⁶ In spite of the spirit of optimism, however, the publication of the communiqué was delayed for almost 24 hours as the ASEAN Foreign Ministers and their counterparts from other nations (including China, the United States, Russia, North Korea, and South Korea) disagreed on the wording of the South China Sea dispute and the North Korean missile tests.²⁷

And yet, there are still some signs of disappointment in the negotiated framework of the Code of Conduct. One of

²⁰ Guideline for the Implementation of the Declaration of Conduct on the South China Sea, 20 July 2011, art. 6

²¹ Ian Storey, *Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea*, Singapore: ISEAS Yusof Ishak Institute, 2017, online, Internet, 6 Feb. 2022., at 3

²² *Ibid.*, at 2

²³ Kishore Mahbubani and Jeffrey Sng, *The ASEAN Miracle: A Catalyst for Peace*, Singapore: National University of Singapore Press, 2017, at. 184

²⁴ Rommel Banlaoi, *The Bilateral Consultative Mechanism on the South China Sea and Philippines-China Relations*, vols., Singapore: ISEAS-Yusof Ishak Institute, 2021, online, Internet, 21 Feb. 2022., Available: [www.iseas.edu.sg/wp-](http://www.iseas.edu.sg/wp-content/uploads/2021/03/ISEAS_Perspective_2021_51.pdf)

[content/uploads/2021/03/ISEAS_Perspective_2021_51.pdf](http://www.iseas.edu.sg/wp-content/uploads/2021/03/ISEAS_Perspective_2021_51.pdf), at 3

²⁵ Bill Hayton, “After 25 Years, There’s Still No South China Sea Code of Conduct” *Foreign Policy.*, 21 Jul. 2021, online, Internet, 6 Feb. 2022., Available: foreignpolicy.com/2021/07/21/south-china-sea-code-of-conduct-asean/.

²⁶ *Joint Communiqué of the 50th ASEAN Foreign Ministers’ Meeting*, 6 August 2017, art. 195

²⁷ Nik Luqman, “ASEAN Summit 2017: A Conclusion to the South China Sea?” *ASEAN Studies Center Universitas Gadjah Mada*, 27 May 2017, online, Internet, 21 Feb. 2022., Available: asc.fisipol.ugm.ac.id/2017/05/27/asean-summit-2017-conclusion-south-china-sea/.

the most prominent points of contention is whether or not the Code of Conduct should be a legally binding document. In this iteration, the Code of Conduct would function as a full-blown international legal treaty that needs to be ratified by each signatory's parliaments. Many ASEAN member states wanted the Code of Conduct to be legally binding. This aspiration is best exemplified by the remarks of Le Luong Minh, the Secretary-General of ASEAN, in 2017, when he stated that the Code of Conduct must be legally-binding to be effective.²⁸ China refused that the Code of Conduct be legally binding to its signatories²⁹ as doing so would constrain Chinese freedom of action in the South China Sea.³⁰ Ian Storey further argued that even though the legal-bindingness of the Code of Conduct remains to be seen as the negotiations are still ongoing, the final output of the Code of Conduct negotiations would likely result in a Code of Conduct that is voluntary and non-binding as China will try to ensure that the Code of Conduct is not legally-binding and constraining its freedom of action in the South China Sea.³¹ As will be explained later in this article, shall the Chinese proposal come to reality, it will almost be impossible for the Code to constrain aggressive Chinese actions.

Other points not included in the 2017 framework include the geographical scope³² and the enforcement mechanism.³³ For the former, Vietnam wanted the Code of Conduct to specifically mention that the Code applies to the Spratly and Paracel Islands. This point is omitted as consensus could not be reached. However, as long as the Code of Conduct applies to the entire South China Sea, this should not present a problem.³⁴ For the latter, the 2017

framework is silent on the enforcement mechanism as ASEAN member states generally "eschew" enforcement mechanism clauses in their agreements and treaties.³⁵ The lack of a precise enforcement mechanism means that the final Code of Conduct would have weaker teeth against breaches of the Code.³⁶

A year later, in 2018, the last update of the Code of Conduct negotiations, the Single Draft Negotiating Text (SDNT), was released. However, it is essential to remember that the SDNT is still subject to revisions, additions, and deletion from the parties. This document will "serve as the basis for adopting a Code of Conduct in the South China Sea."³⁷ The 2018 SDNT reaffirms that the Code of Conduct is not a document that could be used to settle territorial disputes or problems with maritime delimitation.³⁸ The document contains the parties' position in the Code of Conduct negotiations. The SDNT does not have or prescribe any specific binding dispute settlement mechanism on dispute settlement matters.³⁹ Indonesia proposed that a "High Council of the Treaty of Amity and Cooperation" be implemented for any dispute settlement between the South China Sea Code of Conduct contracting parties. However, as of the writing of this article, it is still unclear whether the 'high council' is able to put forward a legally binding dispute settlement ruling or whether the 'high council' is just a mediation venue or a court of arbitration. Indonesia's proposal also does not rule out that the dispute could be referred to as "an appropriate international disputes settlement mechanism," presumably the already-established international legal courts such as the Permanent Court of

²⁸ Quoted in Storey, *Supra* note 21, at 2.

²⁹ *Ibid*, at 6

³⁰ *Ibid*, at 2

³¹ *Ibid*, at 4

³² Hayton, *supra* note 25.

³³ Storey, *supra* note 21, at 6

³⁴ Hayton, *supra* note 25

³⁵ Storey, *supra* note 21, at 6

³⁶ *Ibid*.

³⁷ Carl Thayer, "A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct" *The Diplomat*, 3 Aug. 2018, online, Internet, 5 Feb. 2022., Available: thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/.

³⁸ *Ibid*.

³⁹ *Ibid*.

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Arbitration, the International Tribunal on the Law of the Sea, and the International Court of Justice.

Next, the signatories of the Code of Conduct would be required to protect the marine environment in the disputed area, and signatories should conduct agreements “of a practical nature.”⁴⁰ The role of third parties (e.g., the United States) is less clear, with Brunei wanting to push a resolution on the United Nations General Assembly that supports the Code of Conduct so that all states would accept the Code. At the same time, China intends to limit and even exclude the participation of third parties whatsoever.⁴¹ Another point worth discussing from the SDNT is the discussion of military exercises in the South China Sea. China proposes that all parties must notify the other parties of their military activities.

Furthermore, suppose a party to the Code of Conduct would like to conduct a military exercise with an external third party. In that case, the exercise will need to be approved by all parties to the Code of Conduct, meaning that a single country could veto other parties’ exercise. This will be useful for China to reject, for example, the Philippines’ military exercise with the United States in the South China Sea. Lastly, on the legal status of the Code of Conduct, there are no references that indicate the Code of Conduct is an international treaty. However, Vietnam proposed that the contracting parties ratify the Code.⁴² As already mentioned, it would be challenging to see Vietnam’s proposal come to fruition

as China has stated its unwillingness to be legally bounded by the South China Sea Code of Conduct.

In 2021, it was reported that the process of the negotiations had reached the ‘preamble’ of the Code of Conduct.⁴³ That is the final update on the negotiation process of the Code of Conduct as of the writing of this article. The opaque nature of the negotiation process makes the public unaware of any updates, progress, and roadblocks in the Code of Conduct negotiations. It makes any high expectation of the Code of Conduct finalized lukewarm in the near future. In June 2021, during a visit to China, Indonesian Foreign Minister Retno Marsudi proposed that the next round of the Code of Conduct negotiations be held in Indonesia.⁴⁴ Chinese Foreign Minister Wang Yi expressed China’s willingness to “actively advance” the Code of Conduct negotiations “to send a clear signal that both sides have the wisdom and capability to resolve the regional issue.”⁴⁵ As of the writing of this article, there is still no fixed timetable for the realization of the Code of Conduct

The Lens of Realism in International Relations

Realism is one of the most dominant traditions in international relations. It is rooted in the numerous assertions and theories posited by the likes of Machiavelli, Thucydides, Thomas Hobbes, and Jean-Jacques Rousseau before being refined by scholars such as Stephen Walt, Kenneth Waltz, and John Mearsheimer.⁴⁶ The reason

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ “Transcript of Minister for Foreign Affairs Dr Vivian Balakrishnan’s Doorstop Interview with Singapore Media via Zoom on the Sidelines of the 54th ASEAN Foreign Ministers’ Meeting and Related Meetings, 6 August 2021” *Ministry of Foreign Affairs of Singapore*, 6 Aug. 2021, online, Internet, 21 Feb. 2022., Available: www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2021/08/20210806-54th-AMM-Doorstop-Interview.

⁴⁴ Aristyo Rizka Darmawan, “Towards a rigorous Code of Conduct for the South China Sea” *East Asia Forum*, 30

Jul. 2021, online, Internet, 21 Feb. 2022., Available: www.eastasiaforum.org/2021/07/30/towards-a-rigorous-code-of-conduct-for-the-south-china-sea/.

⁴⁵ “Wang Yi Holds Talks with Indonesian Foreign Minister Retno Marsudi” *Ministry of Foreign Affairs of the People’s Republic of China*, 14 Jan. 2021, online, Internet, 6 Feb. 2022., Available: www.mfa.gov.cn/ce/cese/eng/wjdt/t1846760.htm.

⁴⁶ Tim Dunne and Brian C. Schmidt, “Realism” in *The Globalization of World Politics: An Introduction to International Relations*. Ed. John Baylis, Steve Smith, and Patricia Owens, New York: Oxford University Press, 2014, at 100.

realism remains one of the most dominant theories in international relations is that realism offers a 'manual' for attaining state interests and maintaining a state's security in a hostile international arena.⁴⁷

Furthermore, realism means analyzing and knowing what may be happening behind the smiles, handshakes, and mutually-approved press releases and statements of world leaders, especially the leaders of great powers.

At its most basic level, realism believes that international politics is a dangerous business as states compete and rival each other for the attainment of power to guarantee their survival.⁴⁸ Countries are forced to do this as no supra-national entity sits above states that could ensure a state's survival in case of an attack. Therefore, the only way to guarantee a state's survival is to "pursue power at each other's expense."⁴⁹ This point is best exemplified in the infamous Melian dialogue during the Peloponnesian War, in which the Athenian forces stated to the much weaker Melian forces that "the strong do what they can and the weak suffer what they must."⁵⁰ In short, the international world is a self-help system. There is no one to guarantee a state's survival and security other than the states themselves. The only way to do that is to have a relatively powerful force in the international system.⁵¹ This does not mean that no state will protect another state. However, they do that out of their own self-interest, not kindness.⁵²

Realism itself rests on five assumptions regarding the international system⁵³:

1. The international system is anarchic, and no authority sits above states

This is perhaps the most relevant assumption to explain why the South China Sea Code of Conduct will not be enough to constrain aggressive Chinese moves to uphold its nine-dash line claim in the South China Sea. This assumption does not imply that the international world is inherently in chaos or disorderly. Instead, it suggests that there is no supreme authority that sits above states that could function as some world government. Therefore, every state is on its own, without anyone to protect them out of kindness, altruism, or a sense of duty.

The absence of a world government would also mean that there are no world policemen that could move in to protect states whenever they are wronged by their counterparts or have their sovereignty and survival violated. John Mearsheimer of the University of Chicago infamously characterizes the '911 problem.'⁵⁴ In a state, whenever a person is in trouble or has their survival and security threatened and violated, they could have just called 911 or the equivalent emergency telephone number in other states. The law enforcement authority would then come and rectify the damages that have been caused, protect the victim, and hold the perpetrator to justice. In contrast, states could not

⁴⁷ *Ibid.*

⁴⁸ John J. Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities*, New Haven: Yale University Press, 2018, at 131

⁴⁹ *Ibid.*

⁵⁰ Suresht Bald, "Melian Dialogue" in *Essential Readings in World Politics*. Ed. Karen A. Mingst and Jack Snyder, New York: W. W. Norton & Company, 2004, at 19.

⁵¹ Dunne and Schmidt, *supra* note 46, at 101

⁵² John J. Mearsheimer, *The Tragedy of Great Power Politics*, 2nd ed. New York: W. W. Norton & Company, 2014, at 45

⁵³ *Ibid.* at 43-44

⁵⁴ Mearsheimer, *supra* note 52

call the world law enforcement and solicit their assistance to protect them from being violated in the anarchic international arena. There is no one to turn to when there is an attack.

How about the United Nations Peacekeeping Force? The UN Peacekeeping force is not equivalent to a world law enforcement. The UN Peacekeeping Operations aims to prevent a conflict between two states from escalating any further, not to protect one party of the conflict from another.⁵⁵ Its deployment would require the consent of all parties to the conflict and the approval of a majority of the United Nations Security Council member, including at least the abstention of the five veto-wielding permanent members of the United Nations Security Council.⁵⁶ Therefore, it would be too slow to protect the security and survival of a state. In addition, since the Code of Conduct involves the agreement of a UN Security Council permanent member, China, the Chinese diplomat in the Security Council could just veto any resolution that stipulates the deployment of a UN Peacekeeping force to halt the Chinese military.

2. Countries, especially great powers, inherently have some sort of offensive military capability.

Although sometimes states would justify the possession of military armament as of a purely defensive nature, there is little doubt that a majority of weapons could also be used for a military offensive. For

instance, a submarine could be used for defensive purposes (e.g., patrolling the coastline, EEZ, and territorial waters). However, it could also be used for offensive purposes to sink enemy ships in the likes of the unrestricted submarine warfare that Nazi Germany and the United States carried out during World War II. Therefore, a state could not have 100% certainty that a weapon that is ostensibly used for defensive purposes will never be utilized for a military offensive.

3. It is impossible to ascertain a state's intentions with 100% certainty.

This is another critical point in our discussion on the potential effectiveness of the Code of Conduct in constraining aggressive Chinese actions in the South China Sea. There is no way of knowing how could a state leaders think and their intentions. Thus, all of us have to guess a state's intentions. It is notoriously challenging to make some sort of predictions in social sciences due to the infinite factors that could alter a pre-determined desired outcome. Oscar Kaplan of San Diego State University aptly describes the difficulty of making predictions in social sciences:

We live in a period of expanding physical and social possibilities. It may be that the unreliability of our predictions is *due more to the chaotic state of human values* than to the accelerated social metabolism so evident all about us [emphasis added].⁵⁷

⁵⁵ "Mandates and the Legal Basis for Peacekeeping" *United Nations Peacekeeping*, n.d., online, Internet, 7 Feb. 2022., Available: peacekeeping.un.org/en/mandates-and-legal-basis-peacekeeping.

⁵⁶ *Ibid.*

⁵⁷ Oscar Kaplan, "Prediction in the Social Sciences" *Philosophy of Science*. 7.4 (1940), at 493

While it is true that it is possible to ascertain a short-term intention, it would be highly impossible to determine a leader's intentions in 10 or 20, or 30 years from now. As a matter of fact, we do not even know who will be leading China in the next 30 years. Amy Zegart of Stanford University puts the problem with predicting a person's long-term intentions this way:

Getting inside someone's head is tricky, even for them. Consider the following vacation prediction exercise I give my Stanford students to see why.

On a piece of paper, write down what you plan to do for your next vacation. Imagine that we reconvene in a year and compare what you wrote down to what you actually did. How many of you might do something different? Why? [the author added the italics]

At this point in class, hands shoot up. Many admit they probably won't end up doing what they planned because they haven't made the decision yet. Over time, events happen, and preferences change. Students might get a job or lose a job, meet a boyfriend or break up with one, discover a new passion, or suffer a family emergency. They come up with dozens of reasons why their plans probably won't pan out as they expect.

"That's you predicting you," I remind them. It's the best-case

intelligence scenario. Nobody can predict your intentions better than you can. Next [*sic*], I ask them to imagine predicting the vacation plans of the student sitting next to them. "That's so much harder!" someone usually says. Finally, I ask them to imagine what it would be like to predict their neighbor's plans when the neighbor is doing everything possible to conceal or lie about them.⁵⁸

To make matters worse, intentions could change easily as state leaders would always suit their operational intentions according to the conditions of the international environment.⁵⁹ When the strategic environment surrounding a state has turned from friendly to hostile, the state leader would have to adjust its stances accordingly, even though the state leader may exhibit friendly and cooperative intentions before the strategic environment is altered. As an example, even though Putin respected and even showed a collaborative stance towards the North Atlantic Treaty Organization (NATO) shortly after the 9/11 attacks – at one point even asked the Secretary-General of NATO George Robertson, "when are you going to invite Russia to join NATO?"⁶⁰ – Putin turned hostile towards NATO when NATO flirted with the inclusion of Ukraine, a state that Putin determines to be inside the Russian sphere of

⁵⁸ Amy B. Zegart, *Spies, Lies, and Algorithms: The History and Future of American Intelligence*, Princeton: Princeton University Press, 2022, at 81

⁵⁹ Mearsheimer, *supra* note 48

⁶⁰ Elisabeth Braw, "When Putin Loved NATO" *Foreign Policy*, 19 Jan. 2022, online, Internet, 7 Feb. 2022., Available: foreignpolicy.com/2022/01/19/putin-russia-ukraine-nato-george-robertson/.

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influence⁶¹, into NATO.⁶² As a consequence, even though China seems to be enthusiastic about the Code of Conduct negotiations to “send a clear signal that both sides have the wisdom and capability to resolve the regional issue”,⁶³ no one should believe that China intends to uphold this stance long into the future as the strategic environment surrounding China could change.

4. The primary goal of a state, including great powers, is to ensure its own survival

The primary and the ultimate goal of a state is to uphold its survival, defend its sovereignty, and to ensure its security from foreign attacks. While some argue that the state’s goal should be to ensure its citizens’ prosperity, those low-political goals require the attainment of the high-political goal (i.e., the preservation of state survival) to succeed. However, the inverse is not valid. States could still survive even though their citizens are starving, or it is economically decimated. As an example, even though North Korea is in an economic malaise, it could still survive thanks to the strong military and nuclear armaments that it has to safeguard its sovereignty, survival, and security.

Realism does not preclude states from pursuing other non-security goals, such as spreading

human rights. Indeed, the United States of America does this with its military interventions in the Middle East and elsewhere after the 9/11 attacks.⁶⁴ However, states may only do so when the undertaking does not affect the balance of power.⁶⁵ Thus, if the non-security goals conflict with security goals that are essential for preserving its sovereignty and security, then the state will always prioritize the security goals, even if pursuing them would mean the state would have to violate international laws and norms, including human rights. As an example, President Barack Obama promoted human rights a core agenda of his foreign policy during the campaign trail. However, to combat terrorist groups that are seen as capable of attacking the United States, thus endangering US national security, President Obama continued to resort to drone killings against suspected terrorists even though they violate the human rights of the alleged terrorists.⁶⁶

Consequently, even though China may respect the Code of Conduct negotiations at the moment and continue to pay lip service to it, if the Code of Conduct violates China’s so-called ‘core interests’ – a set of fundamental Chinese interests that China will go to war to protect, defend, and uphold⁶⁷ – then China will not let any instrument of international law from standing in its way. (And some

⁶¹ Vladimir Putin, “On the Historical Unity of Russians and Ukrainians.” *President of Russia.*, 12 Jul. 2021, online, Internet, 7 Feb. 2022., Available: en.kremlin.ru/events/president/news/66181.

⁶² Dmitri Trenin, “What Putin Really Wants in Ukraine” *Foreign Affairs.*, 6 Jan. 2022, online, Internet, 7 Feb. 2022., Available: www.foreignaffairs.com/articles/russia-fsu/2021-12-28/what-putin-really-wants-ukraine.

⁶³ Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 45

⁶⁴ For full explanation see Stephen M. Walt, *The Hell of Good Intentions: US Foreign Policy Elite and the Decline of US Primacy*, New York: Farrar, Straus, and Giroux, 2018, at 21-90

⁶⁵ Mearsheimer, *supra* note 52, at 56

⁶⁶ Zegart, *supra* note 58, at 179

⁶⁷ Richard McGregor, *Asia’s Reckoning: China, Japan, and the Fate of US Power in the Pacific Century*, New York: Penguin Books, 2018, at 256

experts at China's public universities and party schools argue that the South China Sea is included in China's core interests⁶⁸). Yes, China may intend to "send a clear signal that both sides have the wisdom and capability to resolve the regional issue"⁶⁹ for now. However, if it stands in the way of China's 'core interests, China will use every means to uphold and safeguard its fundamental interests.

5. States are rational actors.

In order to safeguard and uphold their sovereignty, security, and survival, states will always calculate their every move to ensure that they can efficiently achieve their core interests. They will always think strategically about how to survive in an anarchic international world where there is no one to turn to for help if their counterparts attack them. Mainly, states will always consider the predilections of their counterparts and how their conduct is likely to affect the behavior of those other states.⁷⁰ Lastly, states will always consider the long-term consequences of their actions and the short term and immediate consequences of their activities in the international arena.⁷¹

When seen separately, or when one of the assumptions is removed, no one would think that great powers would act

aggressively towards other states. However, when all of the assumptions and factors are wedded and considered together simultaneously, it creates an incentive and vigor to think that other great powers and states, including China, would behave aggressively towards other countries.⁷²

This brings us to another question: what does realism think of international law? Realists believe that states would only ratify an international treaty only if it is in their best interest to do so, and states view an international treaty as a way to augment their relative power in the international arena.⁷³ Therefore, states use a cost-benefit analysis to determine whether ratifying an international treaty will bring them a net positive impact. In spite of this, when a treaty or international law stands in the way of states from pursuing what they regard as a vital national security interest, then they will do everything in their power to follow the interest, even when the course of action violates an international law⁷⁴. However, almost all states would attempt to justify their actions based on international law to continue to enjoy widespread support,⁷⁵ even if it involves perjury.⁷⁶ As an example of a treaty violation to attain and preserve national security, in 1994, Russia promised that, in exchange for Ukraine giving up its nuclear weapons that were left after the dissolution of the Soviet Union, Russia would "refrain from the threat or use of force against the territorial integrity or political independence of Ukraine" in the 1994 Budapest Memorandum on Security Assurances.⁷⁷ Yet, after seeing the

⁶⁸ Jinghan Zeng, Yuefan Xiao, and Shaun Breslin, "Securing China's Core interests: the State of the Debate in China" *International Affairs*. 91.2 (2015), online, Internet, 21 Feb. 2022., Available: www.jstor.org/stable/24538911, at 260

⁶⁹ Ministry of Foreign Affairs of the People's Republic of China, *supra* note 45

⁷⁰ Mearsheimer, *supra* note 52, at 43

⁷¹ *Ibid.*

⁷² Mearsheimer, *supra* note 48, at 132

⁷³ Uta Oberdörster, "Why Ratify? Lessons from Treaty Ratification Campaigns" *Vanderbilt Law Review*. 61.2 (2008), at 686. In this paper, the term 'realism' is synonymous with 'rationalism'

⁷⁴ Mearsheimer, *supra* note 48, at 159.

⁷⁵ Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, New York: Simon & Schuster Paperbacks, 2017, at 42-45; Mearsheimer, *supra* note 48, at 159

⁷⁶ John J. Mearsheimer, *Why Leaders Lie: The Truth about Lying in International Politics*, New York: Oxford University Press, 2011, at 72-77

⁷⁷ *Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of nuclear weapons*, 5 December 1994, art. 2

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possibility of NATO expansion to Ukraine after the 2014 protest that deposed the pro-Russian Ukrainian President Viktor Yanukovich, Russia immediately invaded the Crimean Peninsula that belonged to Ukraine as accession of a pro-west Ukrainian president could mean that Ukraine could join NATO (not to mention the allegations that the United States was involved in the *coup d'état*).⁷⁸ Yes, the invasion of Ukraine was a violation of the 1994 Budapest Memorandum. However, given the fact that a Ukrainian accession to NATO could endanger Russia's national security, Putin had no choice but to abrogate the 1994 Budapest Memorandum.⁷⁹

After all, who can enforce an international law when it is violated by another state, especially a great power? Inside a state, if one violates a law, he will be arrested by the police and answer for his crimes. Who would do an equivalent activity in the international arena? As mentioned previously, the UN Peacekeeping force could not do this action as deploying them requires the approval of the United Nations Security Council.⁸⁰ In the past, "[i]nternational law did not need police. International law was backed by the very real threat of war" as nations frequently went to war due to the violation of an international treaty (at least as a justification).⁸¹ Do the other signatories of the Code of Conduct in the South China Sea (Indonesia, Malaysia, Singapore, the Philippines, Brunei, Cambodia, Vietnam, Laos, Thailand, and Myanmar) have the pluck and the appetite to go to war against a nuclear-armed superpower due to the

violation of the Code of Conduct? Or, at the very least, will China consent to use peaceful mechanisms for the resolution of dispute, such as the International Court of Justice? These questions will be addressed in the next section.

C. The Potential Effectiveness of the Code of Conduct in the South China Sea in Constraining Chinese Aggressive Actions

1. Legal force of the Code of Conduct

The ultimate way of expressing a state's consent to abide by an international law is through the ratification of an international legal document. Once a legal international agreement has been ratified by all of the parties involved, then the international agreement would be legally binding to the ratifying state as the international agreement would be internalized into national law.⁸² The process of ratification differs from state to state, and the type of international law that needs to be ratified is also different. However, the result will always be the same: an instrument of national law that signifies a state's consent and intention to abide by an international treaty. In Indonesia, for example, the International Covenant on Civil and Political Rights was ratified and internalized via UU. No. 12 Tahun 2005.⁸³ This meant that Indonesia has consented and is willing to be bound by the rules and regulations of the Covenant. Furthermore, given that ratification sometimes goes through a state's democratically elected parliament, a signed international treaty could fail to be ratified if there is a hostile public reception to the signed international treaty.⁸⁴ If this is

⁷⁸ John J. Mearsheimer, "Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions That Provoked Putin" *Foreign Affairs*. 93.5 (2014), at 80-82

⁷⁹ Actually, article 2 the 1994 Budapest Memorandum contains the phrase "... none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations." However, whether the deposal of President Yanukovich is a legitimate threat to Russian security that necessitates the deployment of Russian forces for

the self-defense of Russia is heavily debatable and contestable.

⁸⁰ United Nations Peacekeeping, *supra* note 55

⁸¹ Hathaway and Shapiro, *supra* note 75, at 45

⁸² Malcolm N. Shaw, *International Law*, 5th ed., Cambridge: Cambridge University Press, 2003, at 819-820.

⁸³ UU No. 12 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-Hak Sipil dan Politik), 28 October 2005, art. 1

⁸⁴ Shaw, *supra* note 82, at 819

the case, then the confines of the treaty will not bind the state.

However, China has signaled its disapproval of the ratified Code of Conduct. As explained previously, China does not want the Code of Conduct to be legally binding upon them as it could constrain China's freedom of action in the South China Sea.⁸⁵ Many scholars argue differently on why this is the case. Nguyen Minh Quang of the Netherlands' Institute of Social Studies asserted that China does not want the Code of Conduct to constrain its actions in the South China Sea in "turning the South China Sea into its own private lake."⁸⁶ B. A. Hamzah, the director of the Centre for Defense and International Security Studies at the National Defense University of Malaysia, argued that China views the Code of Conduct as constraining its actions in facing the United States in the South China Sea. In his own words:

Beijing wants the COC [Code of Conduct] to restrain U.S. military adventures in the South China Sea and other areas in the region. China's logic is if the COC cannot keep the U.S. military at bay, why should Beijing ratify it? To China, ASEAN has been working as a proxy for Washington. So, no deal.⁸⁷

According to this logic, it is clear that, Beijing employs a realist view of international relations. To Beijing, the Code of Conduct is just an appendage of US power that seeks to constrain its actions to reach its national rejuvenation. If there is no ratification, then there is no strong argument that Beijing must abide by the confines of the Code of Conduct.⁸⁸ As a consequence, given that Beijing does not

desire ratification that will legally bind Beijing into the confines of the Code of Conduct, China could just disregard the Code at will, and it would receive little punishment. The fact that the Code is non-legally binding means that the Code is nothing more than a suggestion. As mentioned previously, realism argues that when a state's vital national security interests are threatened, the state will utilize all measures to defend and uphold it, even when the undertaking violates an international treaty.⁸⁹ Thus, as China has included its claim in the South China Sea into its 'core interests, one should expect that China would do everything to uphold its claims in the South China Sea, even if the measures violate the Code of Conduct.

And even if Beijing ratifies the Code of Conduct, there is almost no way of enforcing the agreement against Beijing. As Oona A. Hathaway and Scott J. Shapiro of Yale Law School argued, any authorized retaliation for any breaches of international treaty oftentimes favor stronger states over weaker ones.⁹⁰ As a consequence, more helpless and smaller ASEAN states would be powerless to legally punish China (if there is even an authorized punishment against a violator laid out in the Code of Conduct) for its wrongdoing in the South China Sea that breaches the Code. To this day, even after China has ratified the United Nations Convention on the Law of the Sea (UNCLOS) in 1996⁹¹, China continues to violate it by claiming the nine-dash line that goes beyond the confines of what is permissible maritime territorial claims laid out in the UNCLOS and receives minor consequences for it. In 2016, after the Permanent Court of Arbitration (PCA) ruled that the Chinese nine-dash line is illegal and is in violation of UNCLOS in the *Philippines v. China* ruling⁹²,

⁸⁵ Minh Quang Nguyen, "Saving the China-ASEAN South China Sea Code of Conduct" *The Diplomat*, 28 Jun. 2019, online, Internet, 8 Feb. 2022., Available: thediplomat.com/2019/06/saving-the-china-asean-south-china-sea-code-of-conduct/.

⁸⁶ *Ibid.*

⁸⁷ Quoted in Hayton, *supra* note 25

⁸⁸ Furthermore, realists believe that conflicts could only be won by power, not arguments

⁸⁹ Mearsheimer, *supra* note 48, at 159

⁹⁰ Hathaway and Shapiro, *supra* note 75

⁹¹ Ma, *Supra* note 9

⁹² Thomas A. Mensah et al., *An Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United*

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China simply ignored the ruling, and it received no substantial consequences for its actions. This should not be surprising, given that China is monumentally stronger than its Southeast Asian neighbors, especially the Philippines, and that almost all ASEAN member states depend on China for its economic and trade relations, it is inconceivable that ASEAN member states could risk a conflict with China to enforce the PCA ruling. Indeed, as President Rodrigo Duterte of the Philippines admitted, the PCA ruling is just “a piece of paper.”⁹³ Perhaps Southeast Asian states now have a more formidable legalistic argument that could be used against Beijing’s illegal claim. However, according to the realist view, what matters in international politics is power, not arguments.

Consequently, given that China has a history of violating a legally binding agreement and receives no substantial punishment for it, no one should have high hope in the non-legally binding Code of Conduct in constraining aggressive Chinese actions in the South China Sea.

2. Cost and Benefit Analysis for China in negotiating and agreeing on the Code of Conduct

After laying out the weakness of the Code of Conduct against China, one must ask the question: What does China gain in entering and negotiating the Code of Conduct? It is essential to know the answer to these questions as, according to realism, states will only join an international agreement if the benefits outweigh the costs. Thus, China must have a huge benefit in joining the Code. One benefit is extremely valuable for

China: reputation. Furthermore, in tarnishing its reputation, China does not have to be legally bound by the Code of Conduct, making China have the best of both worlds.

Negotiating the Code of Conduct could signify to the world that China is willing to resolve the South China Sea dispute peacefully and is dealing the Code of Conduct to manage the conflict and dispute for the time being. Indeed, China itself admitted this. In a high-level dialogue in June 2021 with Luhut Binsar Pandjaitan, the “Indonesian President's special envoy and the country's Coordinator for Cooperation with China,” the Chinese Foreign Minister Wang Yi promised to “... speed up consultations on the Code of Conduct in the South China Sea to *make cooperation the main theme of the situation in the South China Sea* [emphasis added].”⁹⁴ In this iteration, Wang Yi believes that the world’s people must see the countries embroiled in the South China Sea dispute cooperating with one another. In a blunter statement, during a meeting with Indonesian Foreign Minister Retno Marsudi in January 2021, Wang Yi argued that negotiating the South China Sea Code of Conduct would “send a clear signal that both sides have the wisdom and capability to resolve the regional issue.”⁹⁵ This means that China would have a solid argument to retort accusations that it is acting aggressively in enforcing its claims in the South China Sea by arguing that the countries that are involved in the dispute are actively working together to conceive a Code of Conduct that would manage the dispute so that it does not escalate into an armed conflict. Furthermore, China would

Nations Convention on Law of the Sea between the Republic of the Philippines and the People's Republic of China, Permanent Court of Arbitration, 2006.

⁹³ Quoted in “De Lima hits Duterte’s claim vs PH arbitral win over China” *Senate of the Philippines*, 7 May 2021, online, Internet, 21 Feb. 2022., Available: legacy.senate.gov.ph/press_release/2021/0507_delima2.asp.

⁹⁴ “Five Important Consensuses Reached at the Inaugural Meeting of the China-Indonesia High-level Dialogue

Cooperation Mechanism” *Ministry of Foreign Affairs of the People's Republic of China*, 6 Jun. 2021, online, Internet, 8 Feb. 2022., Available: www.fmprc.gov.cn/mfa_eng/wjlb_663304/zzjg_663340/yys_663350/gjlb_663354/2716_663436/2718_663440/202106/t20210607_9168672.html.

⁹⁵ Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 45

be seen as a friendly country that is willing to resolve the conflict peacefully with its much more weaker neighbors, notwithstanding the fact that the then-Chinese Foreign Minister Yang Jiechi remarked in the 2010 ASEAN Regional Forum that “China is a big country and other countries are small countries, and that’s just a fact”⁹⁶, a phrase implying that “smaller powers should recognize that China is big while they are small and comport themselves with appropriate deference.”⁹⁷ Of course, China does not want to be seen as a bully to its weaker neighbors. Thus, China tries to use the South China Sea Code of Conduct negotiations as proof that it is friendly to its weaker Southeast Asian neighbors that have a dispute with China. As a matter of fact, perhaps it is possible that China drags on the negotiations so that it could continue to pretend that it is trying to resolve the dispute peacefully while, at the same time, not adhering to the Code as it is unfinished.

In fact, China could even use the Code of Conduct to go on the offensive against Southeast Asian states that China perceives as violating the Code. In recent years, there are some indications that China is conducting a ‘lawfare’, a strategic usage of law in attaining a country’s interests. According to Paul Charon and Jean-Baptiste Jeangène Vilmer of the French Institute for Strategic Research at the Military School, lawfare is used to limit other state’s course of action and augmenting one’s course of actions.⁹⁸ In the case of the South China Sea

dispute, for example, China is trying to use a “revisionist interpretation” of UNCLOS to serve its interests by trying to ban other states, in particular the United States, from accessing the South China Sea⁹⁹, even though innocent passage is explicitly guaranteed by articles 17, 18, and 19 of UNCLOS.¹⁰⁰

It is possible that China could use the Code of Conduct against ASEAN states. China could, for instance, perceive any drilling measures by the Southeast Asian claimant states as a violation of the Code of Conduct.¹⁰¹ When China finds out that another claimant state is drilling without notifying China (assuming that it is an obligation under the Code of Conduct), then China could retaliate under the auspices of upholding and enforcing the code. China could do this by interpreting specific articles of the Code that would be in favor of its intentions. China could just economically embargo, say, Indonesia, for drilling in the Chinese-claimed EEZ and justify its course of action as just enforcing the code. China will not be hit hard as trade with Indonesia only accounts for a fraction of Chinese international trade¹⁰² while trade with China makes up more than 20% of Indonesian international trade.¹⁰³ This is not a baseless assumption as China has a history of utilizing its trade relations with other countries as a political economic weapon to achieve its goals and retaliate against other countries that are doing things not desirable Beijing.¹⁰⁴

⁹⁶ Quoted in Rush Doshi, *The Long Game: China’s Grand Strategy to Displace American Order*, New York: Oxford University Press, 2021, at 175.

⁹⁷ Lowell Dittmer, “China’s Dream, China’s World” in *China Dreams: China’s New Leadership and Future Impacts*. Ed. Chih-Shian Liou and Arthur S. Ding, Singapore: World Scientific, 2015, at 45

⁹⁸ Paul Charon and Jean-Baptiste Jeangène Vilmer, *Les Opérations d’Influences Chinoises : Un Moment Machiavélien*, Paris: Institut de Recherche Stratégique de l’Ecole Militaire, 2021, at 29

⁹⁹ *Ibid*, at 49

¹⁰⁰ *United Nations Convention on the Law of the Sea*, 1982 (entered into force 16 November 1994), art. 17, 18, and 19

¹⁰¹ This is just an assumption that the Code of Conduct would set specific rules on drilling. Given that the draft of the Code of Conduct is unavailable to the public, there is no way of ascertaining this at the time of writing

¹⁰² “China (CHN) Exports, Imports, and Trade Partners” *Observatory of Economic Complexity*, n.d., Available: oec.world/en/profile/country/chn.

¹⁰³ “Indonesia (IDN) Exports, Imports, and Trade Partners” *Observatory of Economic Complexity*, n.d., Available: oec.world/en/profile/country/idn.

¹⁰⁴ Audrye Wong, “How Not to Win Allies and Influence Geopolitics: China’s Self-Defeating Economic Statecraft” *Foreign Affairs*. 100.3 (2021), at 44

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And what are the costs for China in agreeing to the Code of Conduct? Not much. The Code of Conduct itself would lack the necessary legal binding force that could legally bind its signatories. Thus, China would not violate any Chinese law if it breaks the Code of Conduct. (And even if China ratifies the Code of Conduct, the experience with UNCLOS signifies that China is perfectly capable of violating its own domestic law). Furthermore, there is almost no way of enforcing the Code of Conduct when China is committing acts that are in violation of the Code. Given that the 2018 SNTD stipulates that the signatories prefer that dispute settlement utilizes methods ranging from the High Council of the Treaty of Cooperation, other appropriate dispute settlement mechanism, and friendly negotiations¹⁰⁵, the experience with the *Philippines v. China* ruling by the PCA, in which China simply ignored the ruling with no substantial consequences, means that China could just ignore the dispute settlement as laid out in the Code of Conduct. In fact, China could just not participate in the dispute settlement mechanism and there is no way of forcing China to participate, as in the case with the 2016 PCA ruling.¹⁰⁶ It would be just a non-binding agreement, after all. Lastly, as has been mentioned previously, the old way of enforcing a treaty when it is violated is through war.¹⁰⁷ There is no way that ASEAN member states are going to go to war against a nuclear-armed superpower as ASEAN states, even when their strengths are combined, lack the necessary military power to militarily punish China. After all, China and ASEAN have gone to great lengths to enhance their cooperation¹⁰⁸ and those gains could be wiped out. Lastly, a China-ASEAN war could bring other countries into the regional war and open a Pandora's box that could lead to World War III.

Consequently, the benefits of joining the Code of Conduct are immense as it would allow China to tarnish its reputation and tie in the hands of other countries, while the costs are minimal as there would be almost no way of enforcing the Code after China breaches it.

D. CONCLUSION

The South China Sea is heavily important for the world economy due to the vast amount of shipping that goes through there annually, connecting Asia's industrial powerhouse to mature economic markets such as Europe, the United States, and Australia. It is also, however, one of the most volatile maritime waterways in the entire world, as many different countries in the area lay claims to parts of it. The discovery of natural resources in the area made the situation even more complex. Resource-hungry industrial nations bordering the South China Sea would need the resources to fuel their economic growth. However, the problems are made worse as China continues to aggressively assert its claims via military and pseudo-military means in recent years. One solution continues to be advertised by the claimant states throughout the Code of Conduct on the South China Sea.

Despite the optimism that the code would be able to constrain aggressive Chinese actions in the area, this research finds that the optimism is misplaced. The Code is feeble in constraining aggressive Chinese actions as it would be just a non-binding document. The asymmetry of power between China and the other ASEAN claimant states means that the other claimant states would not be able to force China to abide by the confines of the Code. In addition, China could also use the Code of Conduct in pressuring other claimants in the South China Sea.

¹⁰⁵ Thayer, *supra* note 37

¹⁰⁶ Mensah et.al., *supra* note 92

¹⁰⁷ Hathaway and Shapiro, *supra* note 75, at 45

¹⁰⁸ Mahbubani and Sng, *supra* note 23, at 99-114

Therefore, what should Indonesia do? Four recommendations could be given. The first recommendation is to augment the capabilities of the Indonesian armed forces, especially its navy and air force. Despite being the biggest country in Southeast Asia, Indonesia only spends around 0,8% of its Gross Domestic Product or \$9 billion on defense.¹⁰⁹ This is far from the recommended NATO percentage of 2%. And even with that minuscule amount, the total defense budget has to be split between the Ministry of Defense, the Army, Navy, and Air Force. Indonesia must focus on modernizing and expanding its navy and air force. Any military threat would have to go through Indonesian water and sky, making the navy and air force Indonesia's first line of defense against Chinese aggression. The negotiation and the result of the Code of Conduct should not be used as an argument to halt or even reduce Indonesia's defense spending. Indeed, as this article has shown, the Code of Conduct will not constrain aggressive Chinese actions in the South China Sea. Thus, adopting the Code of Conduct must not make Indonesian policymakers lenient and believe that China will not make any military and pseudo-military aggressive moves against Indonesia. The navy and air force will Indonesia's first line of defense in facing any potential Chinese bold moves and it is of the utmost importance that Indonesia modernizes and augment the capability of its naval and air forces.

Secondly, Indonesia must augment its relations with the United States and reduce its dependence on China. According to David Shambaugh of George Washington University, Indonesia is closer to and more dependent on China than the United States.¹¹⁰ This would be difficult for Indonesia to maintain its neutrality as being

dependent on China means that Indonesia would have to align at least some of its policies on China's terms. Furthermore, China would have much leverage that could be used against Indonesia in the event of a China-Indonesia conflict to make Indonesia acquiesce to Chinese demands. Thus, Indonesia could lose a lot in defending its sovereignty. Therefore, Indonesia must improve its relationship with the United States so that when China makes an aggressive move against Indonesia, there is a possibility that the United States will defend Indonesia.

The third recommendation concerns the stipulation of the settlement of disputes in the Code of Conduct. Indonesia will have to continue to push for the inclusion of third-party dispute settlement mechanisms, such as the "high council" or through other already-established international courts. Doing so will, at least, mollify the ability of China to mount coercion against the other claimants in the dispute. If a dispute is being negotiated bilaterally, China could link the dispute to other issues that could affect the more comprehensive bilateral relations, such as trade. China could, for example, force a state to acquiesce to Chinese demands or face retaliation in the form of trade tariffs. If the dispute is adjudicated by a third party (e.g., an international court), the dispute will be isolated into a legal battle regarding the legality of Chinese claims. Indonesia will benefit as its claims are legal under UNCLOS while China is not. The 2016 Permanent Court of Arbitration ruling proves that the Chinese nine-dash line claim is illegal.

Consequently, Indonesia and its fellow Southeast Asian countries would benefit as the court will only look at the legal arguments of both countries.

¹⁰⁹ Aaron O'Neill, "Indonesia - Ratio of Military Expenditure to Gross Domestic Product (GDP) 2010-2020" *Statista*., 19 Jan. 2022, online, Internet, 8 Feb. 2022., Available: www.statista.com/statistics/810421/ratio-of-military-expenditure-to-gross-domestic-product-gdp-indonesia/.

¹¹⁰ David Shambaugh, *Where Great Powers Meet: America and China in Southeast Asia*, New York: Oxford University Press, 2020, at 243

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Indonesia will have a stronger legalistic argument against the Chinese nine-dash line claim. Indonesia's current negotiating position is a step in the right direction. However, as explained previously, arguments do not matter in international politics; power does. Therefore, Indonesia's military must also be strengthened.

The fourth and final recommendation concerns Indonesia's strategy in dealing with the Chinese nine-dash line claim close to the Natuna Islands. As explained in the third recommendation, the Permanent Court of Arbitration has already ruled that China's nine-dash line claim is illegal. This could serve as a *stare decisis* and could be used as a basis for future court rulings. Therefore, if Indonesia and China ever end up on opposite sides of the court, there would be a legal precedent that China's nine-dash line claim is illegal and award the dispute to Indonesia. In addition, in a bilateral dispute resolution, China can link the dispute with other issues in Indonesia's bilateral relationship with China, such as trade. China has an enormous leverage in this regard. For example, China can threaten to boycott Indonesian products if Indonesia does not comply with Chinese demands. Therefore, Indonesia shall do its best to bring the dispute to the international court of justice to blunt the Chinese economic-political power in the dispute resolution. This recommendation is intrinsically linked to the third recommendation. Indonesia will have a stronger legal argument to bring the dispute to the international courts if this mode of dispute settlement is allowed under the Code of Conduct.

While the adoption of the Code of Conduct might bring some kind of relief for those in consternation regarding Chinese aggressive actions, the arguments and evidence laid out in this paper overwhelmingly concludes that we should not have a high degree of confidence in the

Code of Conduct. Even though Indonesians may desire the *status quo* to continue, the recent Chinese provocations and actions may make the *status quo* unsustainable. China believes that the balance of power in the Indo-Pacific region has shifted to its favor, and it is making "more offensive moves."¹¹¹ The Code of Conduct is useless in the face of aggressive Chinese moves. Thus, like it or not, Indonesia will have to accept this new reality and prepare itself to emerge a more assertive and aggressive China.

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¹¹¹ Doshi, *supra* note 96, at 186

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