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BEYOND TERRITORIALITY: MANAGING THE MARITIME COMMONS IN THE SOUTH CHINA SEA

by

Prof. Emeritus Dr. Carlyle A. THAYER

School of Humanities and Social Sciences, UNSW (Canberra)
& the Australian Defence Force Academy (ADFA)
Australia

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Beyond Territoriality: Managing the Maritime Commons in the South China Sea

Carlyle A. Thayer^{*}

Introduction

How can East Asian states, particularly South China Sea claimant states, address common security challenges in the absence of a resolution to competing territorial claims? How can a maritime regime be built to promote coordinated efforts in tackling transnational crimes such as piracy and the smuggling of people and goods as well as threats to the maritime environment such as overfishing and oil spills? What are the guidelines required to prevent maritime incidents involving civilian enforcement vessels, warships, military aircraft and research vessels in the South China Sea? Are there mechanisms to ensure navigational safety and coordinated search and rescue (SAR) missions in the area? What are the potential consequences of insufficient cooperation in managing the maritime commons in the South China Sea?

This presentation focuses on the Association of Southeast Asian Nations (ASEAN) and its management of the maritime commons in the South China Sea in three parts. The first part is a stock take of ASEAN and its related institutions and maritime cooperation by focusing on recent developments. The second part looks at ASEAN-centered dialogue and cooperation with external powers. The third part, offers some concluding remarks including policy recommendations

^{*} Emeritus Professor, The University of New South Wales at the Australian Defence Force Academy, Canberra. Contact: c.thayer@adfa.edu.au .

Part 1 ASEAN Stock Take and Maritime Security

ASEAN already has an established a number of mechanisms related to maritime security that are relevant to the management of the maritime commons in the South China Sea. These include mechanisms focused on ASEAN's ten members and ASEAN mechanisms that engage its dialogue partners and a wider circle of interested states.

ASEAN's mechanisms include the ASEAN Ministerial Meeting (AMM) of foreign ministers; the ASEAN Summit of heads of government/state; ASEAN Defence Ministers' Meeting (ADMM), ASEAN Coast Guard Conference,¹ASEAN Maritime Forum (AMF), ASEAN Ministerial Meeting on Transnational Crime (AMMTC), and the ASEAN Political Security Community (APSC) to be formed as part of the ASEAN Community (to be established in late 2015).

ASEAN has also established four important mechanisms with its dialogue partners and other concerned states that include maritime security in their remit: ASEAN Regional Forum (ARF), ASEAN Defence Ministers' Meeting Plus (ADMM Plus), Enlarged AMF, and the East Asia Summit (EAS). The sub-sections below will briefly review each of these mechanisms but first it is necessary to underscore the importance of maritime security to ASEAN.

ASEAN and the ASEAN Community

In 2003, the 9th ASEAN Summit in Bali decided to establish an ASEAN Community of three pillars by 2020: ASEAN Political-Security Community (APSC), Economic Community,

¹ The inaugural meeting of the ASEAN Coast Guard Conference was held in March 2013 in conjunction with Langkawi International Maritime and Aerospace Exhibition, LIMA '13.

and Socio-Cultural Community. In a key development, in November 2004, the 10th ASEAN Summit put maritime security cooperation on the ASEAN agenda with the adoption of the Vientiane Action Programme. Two years later, at the 12th ASEAN Summit in Cebu, this deadline for the ASEAN Community was brought forward to 2015. In 2009 ASEAN adopted the *ASEAN Political-Security Community Blueprint*.

In parallel with these developments the ASEAN Charter came into force 2008. It set up a new structure of decision-making by creating three community councils composed of relevant ministers for political-security, economic and socio-cultural affairs. These three councils are overseen by the ASEAN Consultative Council composed of foreign ministers who report directly to the ASEAN Summit of heads of state/government.

ASEAN Ministerial Meeting

The 22nd AMM held in Brunei in April 2013 declared that maritime security, including maritime safety, was crucial to a vibrant, peaceful and stable and resilient Southeast Asia. The Foreign Ministers, therefore, encouraged the strengthening of regional cooperation in maritime security through, *inter alia*, capacity building, exchanging experiences and sharing of best practices by utilizing ASEAN frameworks.

The ASEAN Foreign Ministers also addressed the South China Sea issue. They reaffirmed the importance of peace, stability, and maritime security in the South China Sea. They also reiterated ASEAN's long-standing policy of its collective commitment to fully implement the Declaration on Conduct of Parties in the South China Sea (DOC) "to ensure peaceful resolution of disputes in accord with universally recognized principles of

international law,” including 1982 UNCLOS, “without resorting to threat or use of force, while exercising self-restraint in the conduct of activities.” The Foreign Ministers looked forward to continued engagement with China in implementing DOC in a full and effective manner and the initiations of mutually agreed joint cooperative activities and projects.

ASEAN foreign ministers responded to the extraordinary events of May and the rise of tensions between China and Vietnam over China’s placement of a mega oilrig in Vietnam’s Exclusive Economic Zone, by announcing an important shift in ASEAN’s position on the South China Sea. The 47th AMM, which met in Nay Pyi Taw on May 11, issued a “Statement on Current Development in the South China Sea” that started:

ASEAN Foreign Ministers expressed their serious concerns over the on-going developments in the South China Sea, which have increased tensions in the area.

They urged all parties concerned, in accordance with the universally recognised principles of international law, including the 1982 UN Convention on the Law of the Sea (UNCLOS), to exercise self-restraint and avoid actions which could undermine peace and stability in the area; and to resolve disputes by peaceful means without resorting to threat or use of force.

They reaffirmed the importance of maintaining peace and stability, maritime security, freedom of navigation in and over- flight above the South China Sea as well as the ASEAN’s Six-Point Principles on the South China Sea and the Joint Statement of the 15th ASEAN-China Summit on the 10th Anniversary of the Declaration on the Conduct of Parties in the South China Sea.

They also called on all parties to the Declaration on the Conduct of Parties in the South China Sea (DOC) to undertake full and effective implementation of the DOC in order to create an environment of mutual trust and confidence. They emphasised the need for expeditiously working towards an early conclusion of the Code of Conduct in the South China Sea (COC).

Up until this statement, maritime and territorial disputes involving China and Vietnam were widely viewed as a bilateral matter.

ASEAN Summit

The 23rd ASEAN Summit was held in Brunei on October 9, 2013. ASEAN leaders expressed their appreciation for efforts to strengthen regional maritime cooperation by

leveraging existing ASEAN frameworks – the ARF, ADMM Plus, Expanded AMF and the East Asia Summit.

The ASEAN Summit welcomed efforts by the ADMM Plus to encourage its defence and military establishments “to set up practical measures that reduce vulnerability to miscalculations, and avoid misunderstanding and undesirable incidents at sea.” The ASEAN Summit also endorsed the full and effective implementation of the DOC in its entirety, mutually agreed cooperative activities and projects under the Guidelines to Implement the DOC. And the ASEAN leaders looked forward to intensifying official consultations with China on the development of the COC with a view to its early conclusion. Finally, the ASEAN Summit looked forward to developing a hotline of communication to further enhance trust, confidence and respond to emergency situations at sea, and cooperate in Search and Rescue (SAR) for vessels in distress at sea.

The most recent ASEAN Summit, the twenty-fourth, met in Nay Pyi Taw on May 11. Point 64 of the Chairman’s Statement noted the importance of the Foreign Ministers’ stand alone statement on the South China Sea and repeated verbatim its first paragraph. The 24th ASEAN Summit also adopted the “Nay Pyi Taw Declaration on Realisation of the ASEAN Community by 2015.” This Declaration underscored the concern of ASEAN leaders over current developments in the South China Sea by

calling on all parties to exercise self-restraint and non-use of force, as well as refrain from taking actions that would further escalate tension and to work towards the early conclusion of Code of Conduct in the South China Sea (COC) as reflected in the ASEAN’s Six-Point Principles on the South China Sea.

ASEAN Defence Ministers' Meeting

The ADMM is ASEAN's highest defence mechanism and was stood up in 2006. It meets annually to discuss and exchange views on current defence and security issues and challenges. During the annual ADMM defence ministers also meet in an informal retreat. The ADMM has quickly evolved. Four years after its founding it began to adopt triennial Work Plans and Concept Papers. The ADMM focuses mainly on non-traditional security issues including Humanitarian Assistance and Disaster Relief (HA/DR).

The ADMM oversees informal meetings of the Chiefs of Defence Forces, senior officials, the three service chiefs (Army, Navy, Air Force), and heads of intelligence. The ASEAN Chiefs of Navy Meeting (ACNM) is the most important defence multilateral body dealing with maritime security.

ASEAN Chiefs of Defence Forces Informal Meeting

The 5th ASEAN Chiefs of Defence Forces Informal Meeting (ACDFIM) was in Hanoi on July 27, 2011. This meeting agreed to meet annually. It adopted the terms of reference for ANCM Guidance for ASEAN Navies' Cooperation and ASEAN Naval Young Officer Interaction. The meeting also agreed to adopt a Two-Year Activities Work Plan (2011-12). It also agreed to study the setting up of hotlines among ASEAN navies and a proposal to "send naval greeting signals at sea" among ASEAN navy ships.

ASEAN Chiefs of Navy Meeting (2001-2013)

The first ACNM was first held in Thailand in 2001 and was titled ASEAN Navies Interaction. It met every two years initially. The objective of the ACNM is "to enhance cooperation and interoperability and regional maritime security and stability through

initiatives” including: dialogue, consultation, conduct of practical activities, and building confidence, trust, and transparency.

For example, In 2011 the ASEAN Navy Chiefs agreed to meet annually and to conduct their first tabletop HA/DR exercise. In 2012 the ACNM conducted two tabletop exercises: military medicine in Tokyo and maritime security in Langkawi.

In July 2012, the Republic of Singapore Navy and Indonesian Navy co-hosted the inaugural ASEAN Maritime Security Information-Sharing Exercise (AMSISX) at the Changi Command and Control Centre. AMSISX was attended by navy chiefs from Brunei, Malaysia and Thailand. The exercise included not only the participants in Singapore but also their respective countries’ operations centres that were linked up through the ASEAN Information-Sharing Portal (AIP). The AIP provides a common platform for all ASEAN navies to share maritime security related information in the region and enhance information-sharing procedures among the ASEAN countries.

The 6th ACNM was held in Brunei in September 2012. It discussed possible areas of cooperation including marine environmental protection, marine scientific research, safety of navigation and communication at sea, and search and rescue. This meeting endorsed a proposal to establish an ASEAN Navy Chiefs Secretariat at Singapore’s Information Fusion Center with priority to maritime cooperation piracy, terrorism, search and rescue. Finally, this meeting endorsed the drawing up of an ANCM Roadmap.

The 7th ACNM was held in Makati City, Philippines in September 2013. It endorsed the continuation of existing bilateral and multilateral joint and coordinated patrols to

address maritime security concerns in waters bordering countries. This meeting also agreed to adopt agreed greeting and communications procedures among ASEAN navies as a confidence-building measure and to maintain direct communications procedures through hot lines to be maintained and regularly updated in the ASEAN Information Sharing Portal hosted by Singapore. By the end of 2013 the ACNM had held three field exercises: ASEAN Militaries HA/DR and Military Medicine Exercise (AHMX); counter-terrorism; and maritime security.

ASEAN Defence Ministers Meeting

The 8th ADMM was held in Nay Pyi Taw on May 20, 2014 on the theme Defence Cooperation Towards Peaceful and Prosperous ASEAN Community. This meeting recorded its support for the “Nay Pyi Taw Declaration of the ASEAN Community by 2015” and pointedly called for the “full and effective implementation” of the DOC and for

all parties to exercise self-restraint and non-use of force, as well as taking action that would further escalate tensions and work towards an early conclusion on the Code of Conduct in the South China Sea (COC) as reflected in the ASEAN’s Six Point Principles on the South China Sea.

ASEAN Maritime Forum

The ASEAN Maritime Forum (AMF) was established in 2010 as part of the *ASEAN Political-Security Community Blueprint*. It was given the mandate to focus on maritime security and safety issues. The AMF focuses on a comprehensive approach to maritime issues (maritime environmental protection and illegal, unreported and unregulated fishing activities, combating sea piracy and armed robbery at sea, illegal logging, human trafficking and illegal drugs trade).

The 3rd AMF was held in Manila in October 2012. Its agenda included: (a) maritime security and cooperation; (b) maintaining freedom and safety of navigation and addressing sea piracy; (c) protecting the marine environment and promoting eco-tourism and fishery regime in East Asia; and (d) the AMF's future work program. The meeting also discussed the need for the AMF to be the venue to discuss maritime issues affecting all three ASEAN community pillars. Therefore the 3rd AMF recommended that the ASEAN Secretariat conduct a study and make recommendations on the potential institutionalization of the ASEAN Maritime Forum.

The 4th AMF was held in Kuala Lumpur in October 2013. This meeting was attended by deputy foreign ministers, senior officials and maritime experts. It discussed in general terms "measures to build trust, ensure an environment of peace, stability and maritime security and safety in the region as well as how to cooperate at sea more effectively."

Part 2 ASEAN-Centred Dialogue and Cooperation

This part provides a stock take of current ASEAN-centred mechanisms for dialogue and cooperation; these include the ASEAN Regional Forum and three mechanisms involving ASEAN and its eight dialogue partners, the ADMM Plus, the Enlarged ASEAN Maritime Forum and the East Asia Summit.

ASEAN Regional Forum

The ARF was established in 1994 as a regional security dialogue forum led by ASEAN foreign ministers. The ARF is expected to progress through three stages: confidence-building measures (CBMs), preventive diplomacy (PD) and "elaboration of approaches to

conflict” (conflict resolution). It was decided that because of the overlap between CBMs and PD these stages could proceed in tandem. At the 20th ARF held in Brunei in 2013 consensus was reached for the ARF to move from CBMS to PD.

Maritime affairs come under the purview of the ARF’s Inter-sessional Meeting (ISM) on Maritime Security. In 2011 the ARF adopted a Work Plan on Maritime Security that set out three priority areas: information/intelligence exchange and sharing of best practices, including naval operations; confidence-building measures on maritime security and capacity-building of maritime law enforcement agencies. A three-year Work Plan (2014-16) was drawn up to reflect these priorities.

At the 5th ISM on Maritime Security held in Seoul in April 2013 it was decided to promote interaction/synergy between the ARF’s ISM on Maritime Security and the ADMM Plus’Expert Working Group on Maritime Security (to be discussed below) by inviting members of the latter to attend sessions of the former.

ASEAN Defence Ministers’ Meeting Plus

The ADMM Plus was established in 2010. It comprises the defence ministers from all ten ASEAN members and eight of its ten dialogue partners – United States, Japan, South Korea, Australia, New Zealand, India, Russia and China.² The ADMM Plus, originally scheduled to meet every three years now convenes every two years. The ADMM Plus is the premier venue for strategic dialogue in defence and security issues among ASEAN and its eight dialogue partners.

² Canada and the European Union are the other two ASEAN dialogue partners.

The 2nd ADMM Plus was held in Brunei in August 2013. The ministers discussed how the defence sector could contribute to addressing new and emerging non-traditional security issues such as cyber security, bioterrorism, transnational trafficking, and pandemic diseases. The ministers agreed that the defence establishment must play a strong supportive role to their civilian law enforcement counterparts.

During 2013 the ADMM-Plus conducted four key exercises: (1) the 1st ADMM-Plus Humanitarian Assistance and Military Medicine Exercise in June; (2) ADMM-Plus Counterterrorism Exercise (CTX) in September; (3) the Maritime Security Field Training Exercise (MS FTX) also in September; and (4) a peacekeeping table top exercise in the Philippines.

ADMM Plus Expert Working Group on Maritime Security

The ADMM Plus work program is currently carried out by six Expert Working Groups (EWG) each co-chaired by an ASEAN member and dialogue partner.³ Maritime issues come under the purview of the EWG on Maritime Security initially co-chaired by Malaysia and Australia. In 2014, Brunei and New Zealand became the new co-chairs.

In late September/early October 2013 the EWG on Maritime Security hosted the inaugural ADMM Plus Maritime Security Field Training Exercise off the east coast of Australia. Fourteen countries participated, twelve of whom contributed ships.

The ADMM Plus Expert Working Groups on HA/DR and Military Medicine held exercises in Brunei in mid-2013. This was viewed by participants as a landmark for cooperation

³ Humanitarian Assistance and Disaster Relief; Maritime Security, Peacekeeping Operations; Military Medicine; Counter-Terrorism and Humanitarian Mine Action.

among defence forces, capacity building, interoperability, and mechanisms for effective response.

Expanded ASEAN Maritime Forum

The 1st Expanded AMF was held in Manila in October 2012. This meeting considered marine connectivity, capacity building, promoting marine environment and maritime tourism. The members discussed the relevance of the United Nations Convention on the Law of the Sea (UNCLOS).

The 2nd Expanded AMF was held in Kuala Lumpur a year later. This meeting considered five topics: maritime cooperation, priorities for ASEAN and its dialogue partners, freedom of navigation, military and law enforcement and the AMF's future agenda. It was also agreed that meetings of the AMF and Expanded AMF would be held back to back.

East Asia Summit

The East Asia Summit is a leaders' forum for strategic dialogue and cooperation on key challenges facing the East Asian region. It was founded in 2005 with a membership of sixteen, the ten ASEAN states and China, Japan, South Korea, India, Australia and New Zealand. Membership now includes Russia and the United States.

The EAS has six priority areas: environment and energy, education, finance, global health issues and pandemic diseases, natural disaster mitigation, and ASEAN connectivity. Nonetheless, leaders also raise other issues of concern. At the 8th EAS held in Brunei in October 2013, for example, in addition to the six priority areas, EAS leaders

discussed nuclear non-proliferation, the Korean Peninsula, developments in Syria and Iran, maritime security and management of disputes in the South China Sea.

With respect to maritime security and cooperation, item 39 of the Chairman's Statement stated:

We emphasised the importance of maintaining peace and stability, ensuring maritime security and safety, and freedom of navigation. In this regard, we noted the contribution of enhanced maritime cooperation to this end. We further called on the parties to explore all mechanisms for the peaceful settlement of disputes, without resorting to threats or the use of force, and in accordance with universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in the region.

Conclusions and Policy Recommendations

This paper has offered brief stock take of current ASEAN and ASEAN-related mechanisms that focus on maritime security and cooperation relevant to the maritime commons in the South China Sea. Four major conclusions emerge:

1. Maritime security initially had no forum within ASEAN but now it has been institutionalized into several multilateral institutions.
2. Discussion on maritime security has moved beyond general discussion to specific proposals and activities.
3. Maritime security was once conceived of as state security it is now being viewed as part of regional security.
4. Maritime security is now formally on the ASEAN agenda at the highest-level.

In light of the stock take I would like to advance seven modest proposals:

First, ASEAN needs to create an effective ASEAN Political-Security Council by prioritizing the objectives of the multiple institutions working on maritime security and streamline their reporting functions. The APSC should coordinate and shape the recommendations

from both civilian and military organisations (such as the AMF and ADMM) before presenting them to the ASEAN Consultative Council and in turn to the ASEAN Summit.

Second, the ASEAN Defence Ministers need to become more proactive in setting the priorities for subordinate agencies. For example, the ASEAN Chiefs of Navy Meeting should be tasked with promoting greater interoperability among its members to address current challenges to maritime security.

Third, priority should be given to standing up an effective Heads of ASEAN Coast Guards Meeting and quickly developing practical multilateral cooperation to deal with challenges to maritime security. The ASEAN Coast Guards should work cooperatively with the ADMM through the APSC.

The Heads of ASEAN Coast Guards should work out a common position to present at the annual meeting of the Heads of Asian Coast Guard Agencies, an organization that comprises nine ASEAN states (Laos is landlocked) as well as Bangladesh, China, Hong Kong, India, Japan, South Korea, Maldives, Pakistan, and Sri Lanka.

Fourth, priority should be given to institutionalizing and enhancing the role of the Expanded ASEAN Maritime Forum and developing an agenda that addresses the most pressing security issues such as maritime incidents between warships, maritime incidents between civilian enforcement ships and freedom of navigation and overflight. The Expanded AMF should forward its findings and recommendations to the East Asia Summit.

Fifth, in order to address the range of issues impacting on the maritime commons, the regional architecture needs to be streamlined. As the stock take above indicates there is considerable overlap between multiple organisations concerned with maritime security (eg, the ARF ISM on Maritime Security and the ADMM Plus EWG on Maritime Security).

Regional cooperation on maritime security has largely been a bottom up process. What is missing in the regional security architecture is direction from above. The East Asia Summit should become the prime leaders-led forum to consider inputs from the ARF, the ADMM Plus, and the Expanded AMF Plus. The EAS should give top down direction to implement recommendations related to the management of the maritime commons in the South China Sea.

Within the EAS, ASEAN leaders should position ASEAN between the global powers as the brokers of consensus on what form a streamlined regional architecture should take and what policy priorities should be adopted to ensure the security of the maritime commons in Southeast Asia.

Sixth, the management of fisheries in the South China Sea is a key issue affecting regional food security. Already fish stocks are being depleted through pollution and overfishing. There is increased friction between states over fishing rights. The Asia Pacific Economic Cooperation (APEC) forum take the lead in addressing this issue. This is because it is a non-governmental body that includes Taiwan that plays a major fishing role in the South China Sea. A formal liaison mechanism linking APEC to the EAS should be established.

Seventh, ASEAN states should continue to pursue with China the implementation of the DOC and a COC for the South China Sea. It must be noted, however, that ASEAN's energies in working towards a COC in the South China Sea with China are possibly unachievable in the foreseeable future. The COC process has led to divisions within ASEAN and divisions among ASEAN's claimant states. China's assertion of "indisputable sovereignty" over the South China Sea, and its recent unprecedented aggressive assertion of sovereignty utilizing military vessels with unsheathed weapons and military aircraft, is now the major impediment to managing the maritime commons in the South China Sea.

In light of this development ASEAN should draft and ratify a Code of Conduct for Southeast Asia's Maritime Commons. The security of the region's maritime commons is indivisible and International law is universal. In order to develop Code of Conduct for Southeast Asia's Maritime Commons individual member states should resolve territorial and maritime disputes with other members. The recent agreement between Indonesia and the Philippines on demarcating the maritime boundaries in the Celebes and Mindanao seas is a good example.

The proposed COC for Southeast Asia's Maritime Commons would enhance ASEAN's unity and cohesion, promote regional autonomy and ASEAN's centrality in the region's security architecture. The regional Code of Conduct should cover Southeast Asia's maritime commons in a manner analogous to the Zone of Peace Freedom and Neutrality (1971), Treaty of Amity and Cooperation (1976) and Southeast Asia Nuclear Weapons Free Zone Treaty (1995) and be open to accession by ASEAN's dialogue partners.