

SOUTH CHINA SEA: A MODEL CODE OF CONDUCT

Dr S. D. Pradhan¹

Objective

1. The paper attempts to analyse the recent developments pertaining to the South China Sea, which include both negative and positive aspects and the problems in the drafting of a Code of Conduct (COC) for the South China Sea. While it is assessed that the differences between ASEAN and China remain wide and an agreed COC would be difficult to have, it is concluded that a politically binding COC is needed to maintain peace in the region. In the end, a model COC is placed that can achieve the objective of reformulating the South China Sea dispute into the maritime control issue designed to promote peace, friendship and trade.

Tension generating incidents

2. The recent developments in the South China Sea suggest that despite the signing of the Guidelines for the implementation of the Declaration of Conduct (DOC), the tension generating incidents continue. There has been “a dramatic increase in hostile incidents between maritime forces in recent years” according to a report entitled “Stirring up the South China Sea” prepared by the International Crisis Group.² While in March 2012 the Philippines declared that it would upgrade facilities on Pagasa Island by building a roll-on roll-off dock for ferryboats, which was protested by China, the latter now has declared its intentions to undertake a project to support tourism and fishing by building a supply dock over more than 823 acres of water off Jinqing Island, part of Paracel chain, which is protested by Vietnam.³ The month of April 2012 witnessed a serious incident that could spiral into hostilities. On April 10, the Philippines Navy dispatched the frigate BRP *Gregorio del Pilar* to Scarborough Shoal to investigate the presence of eight Chinese fishing boats. An armed boarding party from the frigate discovered that the fishing boats were in possession of a large illegal catch of coral, giant clams and live sharks. Before the fishing boats could be detained, two China Marine Surveillance vessels interposed themselves between the fishermen and the frigate thus preventing any further action. The Philippines attempted to diffuse the matter by replacing the warship with a Coast Guard cutter. China reinforced its presence with the dispatch of an armed Fishery Law Enforcement Command ship. All of the Chinese fishing boats and their illegal catch left the shoal unhindered. Efforts to resolve this incident through diplomatic means have foundered as both parties claim that the Scarborough Shoal is an integral part of their national territory. An expert Ian Story of the Institute of the South Asian Studies in Singapore has rightly remarked that ‘the rise of incidents such as Scarborough Shoal increases the risk of an accidental clash that could escalate into military or

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² <http://www.usatoday.com/news/world/story26-04-26/south-china-sea-philippines/54566350/1>.

³ <http://www.google.com/hostednews/ap/articlePA?docId=c980ba232e634c378657c6ceb67692d4>.

diplomatic crises'.⁴ It was also circulated in the Internet that China had ordered some military units up to level two of its four level scales in response to the territorial row with the Philippines over Scarborough Shoal. On 11th May, 2012 around 300 protestors demonstrated outside the Chinese Embassy in the Philippines to “bullying” by China. The Chinese official backed newspaper on the 12th May, 2012 accused Philippines of whipping up nationalism through protests and added that military conflict in the South China Sea was possible. China later denied that it is increasing combat readiness.⁵

3. Such tension generating incidents have also taken place involving China and Vietnam. Fishing ban by China, which is an annual feature, was announced by China’s Ministry of Agriculture in the South China Sea on January 12, 2012 from May 16 to August 1. This was protested by Vietnam as this ban adversely affects the Vietnamese fishermen. On February 22, 2012 Vietnam alleged that its fishing craft was shot at and damaged by Chinese Marine Surveillance vessel near Paracel Islands. On March 3, 2012, Chinese authorities detained 21 Vietnamese fishermen and their two boats in waters near Paracel Islands. China demanded \$11000 from them and Vietnam protested against it.⁶ On March 9, 2012 an official from the Hainan Tourism Development Commission announced that his Commission would work with national Administration of China to expand tourist activities in Paracel archipelago.⁷ On March 12, 2012, Vietnam’s plan to send six Buddhist monks to re-establish temples that had fallen into despair on the Spratly Islands was opposed by China.⁸ On March 15, 2012, Vietnam accused China for violating its sovereignty by allowing the China National Offshore Oil Corporation to open bidding for 19 oil exploration blocks near Paracel Islands⁹.

4. The above incidents reflect the intricate dynamics of the South China Sea and do not generate optimism that the current efforts for having a Code of Conduct for the South China Sea could be agreed upon easily. The trust deficit between the ASEAN and China continues to be wide. China despite having signed the Guidelines for the implementation of DOC, continues to make efforts to ensure that the issue is not taken up jointly by ASEAN. The visit of the Chinese President to Cambodia just before the ASEAN Summit was seen as an attempt to ensure that the South China Sea issue was not taken up in the meeting and subsequently it was not included in the agenda. However, the representatives from Philippines and Vietnam raised the South China Sea issue and the need for a binding COC.¹⁰ However there was a “big disagreement” on the South China Sea according to the Philippines Foreign Secretary Albert del Rosario. While some members including Philippines and Vietnam desired that ASEAN should craft the draft before sharing it with China, Cambodia wanted China to be involved right from the beginning.¹¹

⁴ <http://www.usatoday.com/news/world/story26-04-26/south-china-sea-philippines/54566350/1>.

⁵ The Hindustan Times, New Delhi, 13th May, 2012.

⁶ <http://www.thanhiennews.com/official-statement-hoang-sa/2012024>. The Times of India, 22nd March, 2012.

⁷ Eurasia Review, March 16, 2012.

⁸ <http://www.bbc.co.uk/news/world-asia-17343596>.

⁹ <http://guambatstew.in/2012/03/south-china-seiz.html>.

¹⁰ <http://bbc.co.uk/news/world-asia-17610092>

¹¹ Ibid.

5. On the outcome of the 20th ASEAN Summit, opinions vary. While there are claims that four important documents were adopted- 1. Phnom Penh Declaration on ASEAN: One Community One Destiny, 2. Phnom Penh Agenda on ASEAN Community Building, 3. ASEAN Leaders' Declaration on Drug-Free-ASEAN 2015, and 4. ASEAN's Concept Paper Movements of Moderates¹², some hold the opinion that the meet did not achieve anything as there was no agreement on the actual on-going problems.¹³ The meet did not focus on the measures to face the growing territorial disagreements in the South China Sea.¹⁴ This reflects a weakness in the approach of the ASEAN. Unless they come up with an agreed approach, they would find it difficult to deal with the growing tension which has the potentials to flare up into a limited conflict.

6. The problem needs to be seen in the context of the Chinese claims and intentions. China claims most of the region in the South China Sea with its nine dotted lines. It has in the past objected to the purely commercial activities like oil exploration in the EEZ area of Vietnam. It also bans fishing activities by the fishermen during May and August every year, while it encourages fishing by its own fishermen in areas which belong to other countries. These lead to tensions among the countries in the South China Sea region. However what is more alarming is the fact that China is now trying to redefine its land and maritime borders to project its growing power.¹⁵ Recently it has been learnt that China has established a Steering Sub-Committee for guiding, coordinating and supervising, educating, propagating awareness of national map and controlling entire national map market with coordination of 13 Ministries which include National Agency for Geographic Information and Map Production, Committee for Propaganda and Instruction of the Communist Party of China, Ministry of Foreign Affairs, Ministry of Education, Ministry of Industry, Ministry of Public Security etc. The main objective of this committee is to instruct and guide the task of reprinting and republishing national maps and organising propaganda¹⁶. This would indicate that China is going to intensify cartographic aggression and would make its position very rigid with new "justifications" for the disputed areas. Significantly, State Councillor Dai Bingguo who had been appointed chair of a new Leading Small Group to oversee South China Sea policy at the end of 2010 is not only guiding the affairs of the South China Sea but also dealing with the Sino-Indian border dispute.¹⁷ This suggests that China has adopted the same strategy in regard to the disputed areas. It may be mentioned that Mr M.K.Narayanan, the former National Security Advisor and Special Representative for talks on Sino-Indian border issue has noted that China is playing "a waiting game" to solve the protracted border dispute with India.¹⁸ Another former National Security Advisor and Special Representative for Sino-

¹² <http://storify.com/macho/20thASEAN> Summit?

¹³ <http://www.bangkokpost.com/opinion/opinions28?>

¹⁴ Ibid.

¹⁵ See Dr S Pandey and Professor Hem Kusum's article entitled "Wherewithal of China's Periphery Military Strategy" in USI Journal, New Delhi, (July- September 2011).

¹⁶ <http://www.globaltimes.cn/NEWS/tabid/99/ID/2256/South-China-Sea-mapping-underway.aspx>.

¹⁷ Carlyle A. Thayer, Paper presented to the International Conference on Topical Regional Security Issues in East Asia, St. Petersburg State University, St. Petersburg, Russian Federation, April 6-7, 2012, "Sovereignty Disputes in the South China Sea: Diplomacy, Legal Regimes and Realpolitik", p19.

¹⁸ The Mail Today, New Delhi, 29th February, 2012.

Indian border talks called for strategic partnership with US to hedge China.¹⁹ China in fact is trying to strengthen its position with regard to disputed areas with a view to deal with other claimants from the position of strength. Thus, the window for a negotiated settlement is fast closing for other powers.

7. Alongside China continues its aggressive activities with all its neighbours. Chinese activities towards India and Japan also need to be seen to understand the overall Chinese strategy for the disputed regions. China after losing the ground at the ASEAN Summit on the South China Sea, warned India on the oil exploration activities in the region.²⁰ In January, 2012 the Chinese troops intruded in J&K.²¹ In March 2012, the Chief Minister of Himachal Pradesh stated that two Chinese choppers violated Indian space in Kinnaur district.²² Tension was also witnessed between Japan and China. This year witnessed two Chinese ships of Fisheries Administration equipped with weapons reaching near the Senkaku Islands.²³ The above incidents reflect that the Chinese aggressive activities in the disputed regions continue despite the signing of the Guidelines for the implementation of DOC.

8. The Chinese activities assume greater significance when seen the backdrop of Chinese defence related developments. The Chinese defence budget has been increased substantially and for the first time the official budget has crossed \$100 bn (\$106.39 bn).²⁴ It is well known that the actual budget is about 2.5 times more than the official budget. The USA's report on "Military and Security Developments involving the People's Republic of China, 2011" has assessed, "However, the pace and scope of China's sustained military investments have allowed China to pursue capabilities that we believe are potentially destabilizing to regional military balances, increase the risk of misunderstanding and miscalculation and may contribute to regional tensions and anxieties. Such capabilities could increase Beijing's options for using military force to gain diplomatic advantage, advance its interests or resolve military dispute in its favour."²⁵ China's missile capabilities increased substantially which is reflected in the growth of number of missile units. In the last ten years, its short range missile units have increased more than seven times indicating the number of missiles added in the Chinese store since the year 2000. Its long range missiles have impressive range though the number has not increased much in the last two years. China is also replacing its liquid fuel missiles with solid propellant missiles. There has been 30% increase in cruise missiles in 2010.²⁶ Pentagon has described that China has "the most active land-based ballistic and cruise missile programme in the world".²⁷ According to a document prepared by the Project 2049 Institute, "The People's Republic of China is developing capabilities that would alter the strategic landscape in Asia-Pacific region and beyond. Authoritative Chinese writings

¹⁹ Ibid.

²⁰ <http://ibnlive.in.com/news:China-warns-India-again-on-south-china-sea/245908-3.html>.

²¹ <http://indiatoday.intoday.in/story/indian/175815html>.

²² <http://www.indiablooms.com/News.Details.Page/2012/newsdetails230312r.php>.

²³ http://zeenews.india.com/news/world/china-sendsnaval-ships-todisputed-islands_772989.html.

²⁴ The Hindu, New Delhi, 5th March, 2012.

²⁵ <http://www.defense.gov/news/newsarticle.aspx?id=65130>.

²⁶ These figures have been taken from the articles available at Federation of American Scientists. <http://www.fas.org/blog/ssp/category/china>.

²⁷ <http://www.defence.gov/news/newsarticle.aspx?id=65130>.

indicate research into and development of increasingly accurate and longer range conventional strike systems that can be launched from Chinese territory against land and sea based targets through the Asia Pacific region in a crisis situation.²⁸ China's growth of missile stockpile is viewed by its neighbours as well as Western countries as a threat to the balance of power in the region. Quoting a report by the Federation of American Scientists, a news item reported that 'China continues to deploy four new nuclear capable ballistic missiles (DF-21, DF-31, DF-31A and JL-2) including the one that can be launched from submarines, causing fear among its neighbours and the US'.²⁹ Chinese deployment of Anti-Ship Ballistic Missiles and operationalization of its air-craft carrier-Varyag have also been noted with concern by its neighbours. The Indian Naval Chief Admiral Nirmal Verma remarked on 2nd December, 2011, that China's new anti-ship ballistic missile, if fully functional, posed "a different category of threat and certainly requires a different measure to counter it". He further noted that Jin class of submarines with its ballistic missile capability and underwater endurance levels have compelled other maritime powers to see what the Chinese intentions with such platforms and weapons are.³⁰

9. Changes in the Chinese nuclear doctrine, indicating the possible use of nuclear weapons to get back its territories, pose a serious threat to the China's neighbours. In the last few years, it has become clear that China has no intention to follow the doctrine of "No First Use" (NFU) of nuclear weapons at least in the regions, which it claims as its own territory.³¹ The security experts analyse that tactical nuclear weapons of China are incompatible with its declared NFU doctrine. This raises an important issue whether China would use nuclear weapons to ensure its control over the islands in the South China Sea or not. Since China has agreed to support the South East Asia Nuclear Weapon Free Zone (SEANWFZ) and is bound not to attack non-nuclear weapon States, it would appear that China would not use it. However, going by the logic of this doctrine it can be said that if China feels that "its territory in South China Sea" is attacked by US or any other power even with conventional weapons, it could use nuclear weapons. The "No First Use" is not applicable for safeguarding its own territory. It may be added that this concept was developed to safeguard the Chinese interests in Taiwan. Since the U shaped line in the Chinese maps reflects the Chinese perception that at least all the islands covered in it belong to China, this change in the nuclear doctrine would appear to be relevant for the disputed islands in the South China Sea. While China has so far not made it clear whether she claims only the islands or the waters as well, it has made it clear that the South China Sea is amongst its core concerns.³²

10. China's growing military power has coincided with a more aggressive tone and activities. The Chinese claims of its peaceful rise are seriously questioned by most countries. The Chinese attempts to project its growing power as China's peaceful rise that is not aimed against any country appear to be a ploy to obfuscate its ulterior motive of strengthening itself

²⁸ Mark Sokes, "China's Evolving Conventional Strategic Strike Capability", prepared for the Project 2049 Institute-a think tank. http://project2049.net/documents/chinese_anti_ship_ballistic_missile.asbm.pdf.

²⁹ The Times of India, New Delhi, dated 5-11-2011.

³⁰ The Times of India, New Delhi, 3rd December, 2011.

³¹ http://defense.gov/pubs/pdfs/2011_cmpr_final.pdf.

³² http://dorai:fi/bitstream/handle/10024/71938/MA_-_Tin_Glogan_4..pdf?sequence=5.

without arousing the suspicions of its neighbours. In this context, statement of two analysts- Sean Chen and John Fiffer- is significant, “Ultimately, even if Chinese leadership views the military leadership as the natural part of the country’s ascension to great power status, the uncertainties surrounding its military expenditures actually undermines the contention that China’s rise is peaceful.”³³ Dr Milan Vego, Professor of Operations, Naval War College summing the perceptions of US and other countries around China remarked, “The rapid increase in PRC’s anti-access capabilities in the Western Pacific should greatly concern the US and its allies and other friendly countries in the area. We should take note of supposed peaceful rise and far more prudently its military capabilities.”³⁴ The harsh comments of Chinese official media often made the situation more complicated as there were always strong reactions from the Chinese neighbouring countries. An analyst Aaron L. Friedberg, Professor of Politics and International Affairs at Princeton commenting on the situation stated, “China’s military policies are not the product of misunderstanding; they are the part of a deliberate strategy that other nations now find ways to meet. Strength deters aggression: weakness tempts it. Beijing would denounce such moves as provocative but it is China’s actions that currently threaten to upset it.”³⁵

11. The impact of the Chinese activities and tone of statements is just the opposite of what China desires. China does not want internationalization of the South China disputes and closer relations between US and other claimants. However by challenging purely commercial activities of Indian and Russian oil companies³⁶ and annual US-Philippines military exercise³⁷ as also claims of “indisputable sovereignty” over most areas in the South China Sea, it has brought the South China Sea disputes into the sharper focus of the comity of nations. And the Chinese aggressive activities are enhancing the threat perception of smaller countries in the region, which in turn is pushing them to US. John Lee, a security specialist at the University of Sydney has noted, “After 2010 there was little choice for other regional capitals but to seek closer relations with US in order to balance and hedge against future Chinese intentions and behaviour.”³⁸ In addition, the increasing projection of the claims on the islands in the U shaped dotted line is also drawing outside powers. While there is no doubt that the outside powers have interests in the region, the Chinese actions are acting as catalyst to bring the outside powers into the region. The Indian foreign Minister Mr S.M. Krishna has stated that the South China Sea is the property of the world.³⁹ He also stated that trade ways in the international waters were open for all countries.⁴⁰ The US has already taken a decision to keep 2500 troops in Australia and deploy littoral ships in Singapore and later in the Philippines keeping in view the growing tension and to be in a position to protect its interests.⁴¹ China should be able to see that by adopting aggressive policies, it is inviting

³³ <http://www.asianperspective.org/articles/v33n4.c>.

³⁴ www.nytimes.com, dated 6-9-2011.

³⁵ www.cbsnews.com dated 15-11-2011.

³⁶ The Times of India, 11th April, 2012.

³⁷ http://English.ndtv.com/ndtv_en/news_asia/2012/Philippine-war-games.html.

³⁸ www.cbsnews.com dated 15-11-2011.

³⁹ The Times of India, New Delhi, 12th April, 2012.

⁴⁰ The Hindu, New Delhi, 14th April, 2012.

⁴¹ The Times of India, New Delhi, 17th December, 2011.

outside powers into the South China Sea. Their view on the freedom of navigation is increasingly viewed by outside powers as a serious challenge to the normal trading process.

Move towards COC

12. Thayer has rightly pointed out that after the signing of the Guidelines for the implementation of DOC, diplomatic efforts have moved in two directions. The first track involved negotiations between China and ASEAN member states on practical measures to implement the intent of the DOC. The second track involved discussions among ASEAN members themselves on a draft Code of Conduct that they would later present to China.⁴² ASEAN and Chinese senior officials met in China for three days (January 13-15) to discuss practical measures to implement the DOC and how to utilize the three billion Yuan (US \$476 million) China-ASEAN Maritime Cooperation Fund announced by China in November 2011. At the conclusion of the meeting it was agreed, to speed up specific cooperation projects, and to host seminars on maritime disaster-relief, environment, rescue etc. Towards these ends, four experts committees were set up: maritime scientific research, environmental protection, search and rescue, and transnational crime. These committees were derived from the five cooperative activities listed in the 2002 DOC. Significantly no expert committee on safety of navigation and communication at sea was established.⁴³

13. The other track is moving to produce a draft COC before the July meeting. This track presupposes that the circumstances would be conducive enough to have an agreed COC. Alongside diplomatic efforts in this direction, experts are also preparing drafts for the consideration. We may examine some of the drafts that have come up and see whether they would be to achieve the objectives for which COC is to be adopted. It is known that one unofficial draft has been circulated by the Philippines. This draft try to define, clarify and segregate the disputed land features in the Spratly, in accordance with international law specially UNCLOS.⁴⁴ The thrust in this paper is dividing the disputed and non-disputed areas so that the COC may be designed to develop cooperative efforts in the disputed areas. A good draft for COC has been presented by Mark J. Valencia in a conference in Cambodia in March, 2012. His paper entitled “A Code of Conduct for the South China Sea: Politics, Principles and Possible Provisions.”⁴⁵ This draft contains 12 Articles besides the preamble. It has taken some important aspects from DOC. It mentions the need for having a temporary solution pending the final resolution of the issue. It also mentions that the Parties would use the South China Sea for peaceful purposes only and that they would ensure the freedom of navigation in and over flights outside the internal, territorial and archipelagic waters in accordance with the UNCLOS. It also mentions the need to jointly develop the disputed areas. However it does not include any independent dispute resolving mechanism, though it talks of hot lines and a secretariat to resolve the dispute among themselves through peaceful

⁴² Carlyle A. Thayer, *opcit.* p.7.

⁴³ *Ibid.* p.9.

⁴⁴ *Ibid.* p.14.

⁴⁵ Mark J. Valencia, Paper presented in Cambodia, “A Code of Conduct for the South China Sea: Politics, Principles and Possible Provisions.”

negotiations. Another draft was also placed by CASS which has been prepared by a group of experts at the same conference. This draft did include a dispute resolving mechanism but the main basis remained the division of disputed and undisputed areas and the management of disputed areas. The remaining articles were in accordance with the DOC and the Guidelines. There was no mention of temporary demarcation of maritime zones, which remains an important aspect.

14. A closer look at the issues involved is necessary to see what needs to be included in the COC. The main aspect is to find a temporary solution to the vexed problem of overlapping claims of sovereignty. The claims generally involve two or more countries but not all the members of ASEAN. Therefore the interest of all the ASEAN members is not at the same level in the COC. More over the division of disputed and undisputed is stressed by most nations as they feel that their own disputed area is limited and the COC would be effective in dealing with the problems in those regions. Such a division would strengthen the argument that the matter can be dealt with at the bilateral or trilateral level rather than at the multilateral level. What also needs to be understood is that the outside powers are users of the South China Sea and the Code of Conduct would not only regulate their use of South China Sea but would also place certain obligations on them. More over if a dispute arises amongst powers, the dispute resolution mechanism is needed to take the final decision and this fact must be known to them. These issues need to be kept in view for drafting a COC that would be effective.

15. Notwithstanding the continued tension in the region due to the incidents mentioned earlier, most members of ASEAN have shown interest albeit some hesitatingly in having a Code of Conduct for the South China Sea. The positive side is that the Guidelines for the Implementation of the DOC have been signed and there had not been any armed conflict. They all have understood the need for temporary solutions. China had agreed to this in October, 2011 while signing an agreement with Vietnam. China has also agreed hesitatingly to have a COC.⁴⁶ The Philippines has already circulated a draft COC which presumes a temporary solution to manage the South China Sea. Thus there is a general consensus for a COC based on temporary solution for the South China Sea. However, the reluctance of China to deal with the issue at multilateral level is palpable. Unless the issue is seen as involving several countries and the need to deal the issue at the multi-lateral level, the success in having an agreed COC by all concerned, would be difficult to achieve.

16. The following issues need to be kept in view while drafting the COC for the South China Sea-

- What should be the basis of temporary arrangement in the South China Sea?
- Who should be the signatories? Whether only the ASEAN and China should be the signatories or Taiwan should also be included? The chances for COC to be effective would increase if all the States in the South China Sea sign the document.

⁴⁶ <http://www.nytimes.com 2011/11/20/world/asiaty-after-meeting-obama.html?pagewanted=all>.

- The area to be covered by the COC is to be clearly indicated. Whether only disputed areas are to be covered or the entire South China Sea should be covered?
- The need to ensure that the outside powers using the South China Sea abide by the COC.
- How to ensure that no untoward incident takes place? And in case an incident takes place, how to control it and in case of need, impose penalty on the erring side?

17. The above issues would require careful consideration, so that a draft of COC is prepared which can address all the dimensions. While it would be better to include all the States in the South China Sea, perhaps in the initial stage only ASEAN and China may draft the COC and others may be asked to agree to it later. The second is the critical question of the area to be covered by the COC. Since this issue is closely linked to the use of EEZs and freedom of navigation, the COC should cover the entire South China Sea. This brings to the issue whether, the States are prepared to keep the disputes at the back-burner and agree to a provisional arrangement that is permissible under Articles 74(3) and 83(3). These stipulate that the concerned States “in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.” Hence a provisional agreement needs to be put in place that would be acceptable to most of the nations. It is true that no nation would like to leave the areas already under their occupation and therefore in the provisional agreement they should not be disturbed. However the demarcation of territorial waters and EEZs for the interim period is needed. The rules for the use of open sea and EEZs also need to be clarified for the use by outside powers in accordance with the UNCLOS. The third issue is the critical need for having a dispute management mechanism as none of the nations have indicated that the avenues available in the UNCLOS would be resorted to in case of a dispute. The powers of the dispute management mechanism should be clearly defined so that it may undertake its responsibilities efficiently. The fourth issue that requires attention is to ensure that at least the official media units of States do not make statements that would increase tension amongst the States. Keeping these in view and the DOC as also the drafts by Mark Valencia and the CASS, a model draft is placed below-

Model Draft

CODE OF CONDUCT FOR PROMOTING PEACE, STABILITY AND MUTUAL TRUST AND ENSURING HARMONY IN SOUTH CHINA SEA

The contracting States, which are the stake-holders of peace, stability and harmony in South China Sea and are signatories of the document known as the Guidelines for the Implementation of DOC,

Reaffirming that the DOC is the milestone document signed between ASEAN Member States and China embodying their collective commitment to promoting peace, stability and mutual trust and to ensuring peaceful resolution of disputes in the South China Sea;

Recognizing that the full and effective implementation of the DOC will contribute to the deepening of ASEAN-China Strategic Partnership for Peace and Prosperity;
Confirming the undiminishing validity of the Guideline for the Implementation of DOC to initiate possible joint activities, measures and projects as provided in the DOC as well as of the 1982 United Nations Convention on Law of Sea (UNCLOS) and UN Charter;
Guided by the desire to contribute in every possible way to ensure peace and harmony in South China Sea and to transform the South China Sea into a zone of peace, friendship, freedom and cooperation;
Have adopted the following Code of Conduct:

Article I

1. The contracting States emphasize full respect for the principles, values, concepts and objectives contained in the DOC and the methodology spelt out in the Guidelines for the Implementation of DOC are of fundamental importance for stability, peace and security of the region and firmly commit to implement them in letter and spirit.
2. The contracting States recognizing the need for initiating the confidence building measures for strengthening relationship among them and noting the current efforts in this direction, decide to accelerate the process for joint projects in non-contentious issues namely, marine environmental protection, marine scientific research, safety of maritime navigation and communication, maritime search and rescue and combating transnational crimes. The contracting States decide that further steps would be urgently identified by their nominated experts at the earliest.
3. The contracting States realizing the complexities of the issues involved in the South China Sea disputes as activities in the EEZs, interpretation of freedom of navigation as also geographical linkages between the different parts of South China Sea, agree that the Code of Conduct would be applicable to entire South China Sea.

Article II

4. The contracting States realizing the need for a binding nature of provisions, firmly commit that the Code of Conduct would be binding to all. The States also agree that they would not invoke the provisions of internal law for non-fulfilment of their obligations under this COC.
5. The contracting States firmly commit, in accordance with the Point 4 of the DOC, to resolve the issues through peaceful means and not to resort to use of force or threat to use of force.
6. The contracting States reaffirm that they would, as spelt out in the Point 5 of the DOC, exercise self-restraint in the conduct of activities that would complicate or escalate disputes and adversely affect peace and stability. The contracting States firmly commit that actions that generate tension would not be allowed. These would include no interference in the exploration activities of a State in its EEZ by other States, whether carried out by the owning State alone or by any other State with its consent; no aggressive action; no further construction activity in the islands, features and reefs, till the resolution of the disputes; not allowing their officials to threaten the vessels of other countries either by issuing warning or by firing outside their territorial waters; etc.

Article III

7. The contracting States recognising that the main cause of the disputes is the overlapping claims sovereignty in the South China Sea, agree to come to a provisional arrangement of practical nature till the reaching of final agreement in accordance with the Article 74 (3) and 83 (3) of the UNCLOS over the demarcation of territorial waters and EEZs. This arrangement shall be without prejudice to the final delimitation. The States agree to measure the territorial waters and EEZs from the baselines of the mainland limited to 12nm and 200nm respectively. The islands in the Spratly and Paracels would not generate separate maritime zones during the temporary arrangement, even if they are eligible for this. However for the protection of such islands, separate limit for their territorial waters would be worked out. The demarcation of territorial waters and EEZs between adjacent and opposite States would be done in the interim period on the principle of equidistance. Such demarcation would be honoured by all States till the finalization of the delimitation. These regions would be treated as undisputed and would be under the owning States in accordance with the UNCLOS of 1982.

8. However, the islands currently under occupation of State (s) other than the owning States of territorial waters and EEZs (demarcated temporarily), would continue to be under the present administration. These would be treated as special areas and their problems would be looked after by the joint authority to be created (explained in Article IV).

9. The current status of occupation of islands and features, beyond EEZs would also be maintained in the interim period. The islands and waters claimed by more than one State beyond the EEZs demarcated temporarily would constitute the disputed region and would be managed by the joint authority to be created (explained in the Article IV) but no further occupation of uninhabited islands would be permitted.

10. The contracting States, realizing the significance of the South China Sea for trade, which is essential for them as well as for global commercial operations, agree to allow the freedom of navigation to all ships and of over flights to all aircraft, including those of the outside nations, in their waters and EEZs in the South China Sea. In this context, the States agree to follow the international norms in other such areas.

Article IV

11. Reaffirming their respect for each other's sovereign equality and individuality as well as rights inherent in and encompassed by its sovereignty, the contracting States declare that they would base their mutual security relations upon a cooperative approach. They remain convinced that the security of each one of them is inseparably linked to the security of all others. Therefore, maritime security demands a system to be developed for maintenance of good order at sea and ensuring non-occurrence of tension generating incidents or armed conflicts because of miscalculation, misinterpretation or adventurous activities of a few officials. The contracting States, realising the need for an effective mechanism to control and manage threats to maritime security and ensuring strict compliance of the COC, agree to establish the Maritime Security Authority, to be jointly managed by the contracting States on the basis of equality. This mechanism would serve as the dispute settlement body. Its Management Board would have nominated members from each contracting State (one member for each State) and the Chairperson would be in rotation for a term of one year from amongst the members. The Management Board may engage experts and eminent persons if

deemed necessary for providing assistance in the functioning of the Maritime Security Authority.

12. The contracting States also agree to form under the Maritime Security Authority, a dedicated core staff to be called “Peace Keeping Force” comprising personnel drawn from all the States of the South China Sea to verify and investigate incidents and submit report to the Management Board for taking action. The command of this staff would be rotational among the contracting States.

13. The contracting States agree that the decisions of the Maritime Security Authority would be binding to all the contracting States. The Maritime Security Authority would ensure compliance of its decisions and would have requisite powers in this regard. Those not abiding by its decisions could invite penal action by the Maritime Security Authority.

14. The contracting States, noticing that often the issues get complicated because of differences in interpretations of Articles of UNCLOS declare that the decisions of the Maritime Security Authority on the interpretation of UNCLOS would be binding on all States. The Maritime Security Authority would constitute an expert group for this purpose.

15. The Maritime Security Authority’s Peace Keeping Force would be vested with powers needed for prevention of tension generating incidents, armed conflicts and management of causes of disputes. In this context the Peace Keeping Force would have powers for collection of information regarding illegal activities, search vessels if required, seize evidence for non-compliance of COC or other procedures, and arrests and detention of persons responsible for such acts and would immediately bring to the notice of the Maritime Security Authority. In essence the Peace Keeping Force would be acting as the law enforcement agency of the Maritime Security Authority in the South China Sea and would follow its directions. Its officials would strictly act in accordance with the Code of Conduct for the Law Enforcement Officials adopted by the UN General Assembly Resolution of 17th December, 1979.

16. The Peace Keeping Force would specially focus its attention to the special and disputed areas, where tension can easily be built over minor issues. The contracting parties agree to provide necessary support to the Peace Keeping Force by adhering to its advice for maintenance of peace and harmony. The Peace Keeping Force would prepare guidelines to be followed by States in these areas so as to avoid building of unnecessary tension.

17. The Peace Keeping Force would ensure that fishermen are not harassed particularly in disputed areas. The concerned parties agree not to impose bans of fishing in the disputed areas. In these disputed areas, the fishermen of the claimant countries would be allowed to remain there for fishing activities but would not obstruct the activities of fishermen of other countries. The Peace Keeping Force would prepare Standard Operating Procedures (SOPs) for this purpose which all the countries would follow.

18. The claimant States could jointly explore seabed resources in the disputed areas, if agreed by all concerned States, under the supervision of the Maritime Security Authority.

19. The expenditure on the Maritime Security Authority would be equally borne by all the States.

Article V

20. Each contracting State is responsible for the implementation of this Code. If requested, the contracting States would be responsible for providing clarification on the implementation of the COC to the Maritime Security Authority. The Maritime Security Authority would assess and review the implementation of the COC by States and may suggest measures for the improvement in the process of implementation. The Maritime

Security Authority would present its report to the Ministerial Meetings of ASEAN and China annually.

21. The Maritime Security Authority would also review the progress in regard to the confidence building measures and could suggest necessary action in this regard. It can also recommend new areas for confidence building measures.

Article VI

22. The contracting States commit themselves to cooperate to counter tensions that may lead to conflict. The sources of such tensions include violation of human rights and fundamental freedoms, manifestations of aggressive nationalism and chauvinism. Keeping these in view, the contracting States commit themselves to restrain their official media from using threatening language. They agree to formulate guidelines for official media for this purpose.

23. The contracting States realising the need for early identification of potential conflicts and their joint efforts in the field of conflict prevention, crisis management and peaceful settlement of disputes, resolve to take prompt actions in this regard and provide full support to the efforts of the Maritime Security Authority and the Peace Keeping Force.

24. In the event of an armed conflict, the contracting States firmly commit to seek to facilitate the effective cessation of hostilities and seek to create favourable conditions to the resolution of the issue(s) involved in coordination with the Maritime Security Authority and the Peace Keeping Force.

Article VII

25. The provisions of this COC are politically binding and therefore, the COC is not eligible for registration under Article 102 of the Charter of the UN.

26. The contracting States will publish the text of this COC and disseminate it as widely as possible for information of all the nations so that all nations whether directly concerned as claimants or as littoral States or are users of South China Sea for trade are aware of procedures and provisions of COC. The Maritime Security Authority would communicate with them and inform them from time to time about its decisions and procedures. Through the exchange of letters, their “deemed consent” would be obtained.

27. This code will come into effect on-----.

(**Note-** The preamble is based on the DOC. Art I states that the jurisdiction of the COC would be the entire South China Sea. Art II states that the COC would be binding and the States in accordance with the DOC agree to resolve issues peace fully and maintain self-restraint and would not interfere in the exploration activities of other States in their EEZs. Art III describes how temporary demarcation would be done and that freedom of navigation would be allowed in accordance with the UNCLOS. Art IV deals with the Maritime Authority and the Peace Keeping Force and their roles and functions. Art V describes the responsibility of States to provide necessary information on the implementation of COC. Art VI imposes responsibility on States to control official media from using threatening language and to provide all support to the Maritime Security Authority. Art VII states that all efforts would be made to publicise the COC to ensure that the users are aware of the contents.)