



Confidence and  
Security Building  
Measures in Southeast  
Asia's Maritime  
Domain

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# CONFIDENCE AND SECURITY BUILDING MEASURES IN SOUTHEAST ASIA'S MARITIME DOMAIN

Collin Koh

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## INTRODUCTION

Confidence and security-building measures (CSBMs) trace their origins from our earlier understanding of arms control measures. In short, arms control comprises structural (i.e. quantitative and qualitative limitations on armaments) and operational (i.e. limitations imposed on the employment of armaments). What used to be called confidence-building measures (CBMs) and operational arms control measures then become more collectively known as CSBMs, which generally refer to “arrangements designed to enhance assurance of mind and belief in the trustworthiness of states and the facts they create.”<sup>1</sup> Such measures do not seek to impose limits on the type and quantity of armaments acquired but only targeted at restraining freedom of military action and entail certain limitations on the use of military force.<sup>2</sup> Therefore, CSBMs are especially promising for naval forces and activities.<sup>3</sup>

Generally, CSBMs can be promulgated at the bilateral and multilateral levels, and they seek to accomplish the following: 1) to reduce or eliminate misperceptions of and concerns about potentially threatening military activities; 2) promote openness or transparency; in other words, on the exchange of information though the concept of constraining military activities are also considered to be of value; and 3) to convey the absence of hostile intentions, through the communication of credible evidence of the absence of feared threats.<sup>4</sup> But there are also criticisms against CSBMs, especially with respect to their actual utility of restraint should the political decision be made to proceed with use of force as incentivized by other factors; and whether they could even materialise in a climate of non-détente and lack of political will among the parties involved. This is not to mention transgressions against agreed CSBMs, for instance selective compliance and deception.<sup>5</sup> Moreover, CSBMs are time-consuming, fraught with uncertainties and yet do not necessarily guarantee results. While some CSBMs are legally binding in nature, many are not. This means that at any point of time, parties to the arrangements may renege on their commitments out of political expediency.

Nonetheless, CSBMs continue to be relevant notwithstanding their limitations. This is especially the case for the Indo-Pacific maritime domain, given unresolved territorial and sovereignty disputes in such flashpoints as the East and South China Seas, as well as evolving Great Power rivalries, for instance the naval dynamics between China and the United States. This paper does not attempt to cover all CSBMs in the Indo-Pacific maritime domain, but focuses on those in Southeast Asia. First, a brief rundown on the typology of CSBMs shall be discussed to set the analytical stage. Then, the paper surveys some of the most relevant multilateral CSBMs in the Southeast Asian maritime domain, namely, the Guidelines for Air Military Encounters (GAME), the proposed Code of Conduct in the South China Sea (CoC), and the Code on Unplanned Encounters at Sea (CUES).

## A TYPOLOGY OF CSBMS

Three main categories of CSBMs are examined in this paper: declaratory; transparency and constraint (also known as “stabilisation” or “security-building,”<sup>6</sup> hence the functionally broader term CSBM as opposed to just CBMs) measures. These CSBMs along with their sub-categories are presented in Table 1.

*Table 1: Typology of Confidence and Security-Building Measures*

Categories	Declaratory Measures	Transparency Measures	Constraint Measures
Sub-Categories	<ul style="list-style-type: none"> <li>▪ General principles that promotes interstate amity and concord</li> <li>▪ National politico-legal acceptance of international laws, e.g. UNCLOS III</li> <li>▪ Non-aggression pacts</li> <li>▪ Nuclear weapons-free pacts</li> </ul>	<p><u>Information Measures</u></p> <ul style="list-style-type: none"> <li>▪ Dialogues</li> <li>▪ Participation in arms registry</li> <li>▪ Navy-to-navy contacts</li> <li>▪ Seminars and workshops</li> <li>▪ Personnel exchanges</li> <li>▪ Exchanges of calendar on naval activities</li> </ul> <p><u>Communication Measures</u></p> <ul style="list-style-type: none"> <li>▪ Common inter-navy communication procedures</li> <li>▪ Crisis management communication links</li> </ul>	<p><u>Risk Reduction Measures</u></p> <ul style="list-style-type: none"> <li>▪ INCSEA-type pacts</li> <li>▪ Special communication procedures</li> <li>▪ Emergency communication procedures for ships and aircraft crossing or entering disputed maritime boundaries</li> <li>▪ Submarine underwater communications for close-contact contingencies</li> </ul> <p><u>Exclusion/Separation Measures</u></p> <ul style="list-style-type: none"> <li>▪ Demilitarized zones</li> </ul>

		<ul style="list-style-type: none"> <li>▪ Conflict prevention centres</li> <li>▪ Mandatory consultation on unusual or dangerous naval activities</li> </ul> <p><b><u>Notification Measures</u></b></p> <ul style="list-style-type: none"> <li>▪ Naval force manoeuvres or movements</li> <li>▪ Military alerts</li> <li>▪ Mobilisation of reserves</li> <li>▪ Weapon test-launches</li> <li>▪ Naval accidents at sea</li> <li>▪ Scientific activities in disputed zones</li> </ul> <p><b><u>Observation/Inspection Measures</u></b></p> <ul style="list-style-type: none"> <li>▪ Invitation of observers to naval exercises</li> <li>▪ Surveillance and control zones</li> <li>▪ Open skies treaties</li> <li>▪ Naval force separation and monitoring</li> <li>▪ Sensors/early-warning stations</li> </ul>	<ul style="list-style-type: none"> <li>▪ Disengagement zones</li> <li>▪ Keep-out/in zones (air/sea)</li> <li>▪ Nuclear weapon-free zones</li> </ul> <p><b><u>Constraints on Personnel, Equipment and Activities</u></b></p> <ul style="list-style-type: none"> <li>▪ <u>Personnel</u>: national limits; category limits and zone limits</li> <li>▪ <u>Equipment</u>: deployment limits (by geographical area or numbers); category/type limits; storage/monitoring limits; and nuclear weapons types/deployment</li> <li>▪ <u>Activities</u>: manoeuvre/movement limits (by geographical area or force size); advance notification for movements, exercises and alerts; limits on force readiness; bans on simultaneous exercises/alerts and/or certain force/unit types; nuclear weapons</li> </ul>
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**Source:** Based on and compiled from: Comprehensive Study on Confidence-building Measures, United Nations Department for Disarmament Affairs Report for the Secretary-General, A/36/474 (NY: United Nations, 1982); John Borawski, "The World of CBMs," in John Borawski (ed.), *Avoiding War in the Nuclear Age: Confidence-building Measures for Crisis Stability*, Westview Special Studies in National Security and Defense Policy (Boulder and London: Westview Press, Inc.: 1986), 11-13; Richard Fieldhouse, "Naval forces and arms control: a look to the future," in Richard W. Fieldhouse and Shunji Taoka, *Superpowers at Sea: An Assessment of the Naval Arms Race*, SIPRI Strategic Issue Papers (Oxford; New York: Oxford University Press, 1989), 164; James L. Lacy, "Within and Beyond Naval Confidence-Building: The Legacy and the Options," *The RAND Note*, N-3122-USDP (Santa Monica, CA: The RAND Corporation, 1991), 28-29; Andrew Mack, "Arms Control at Sea," in Hugh Smith and Anthony Bergin (eds.), *Naval Power in the Pacific: Toward the Year 2000* (Colorado; London: Lynne Reiner, 1993), 93; Stanley B. Weeks, "Chapter 4:

Incidents at Sea Agreements and Maritime Confidence-Building Measures,” in Sam Bateman and Stephen Bates (eds.), *The Seas Unite: Maritime Cooperation in the Asia-Pacific Region* (Canberra: Strategic and Defence Studies Centre, Research School of Pacific and Asian Studies, The Australian National University, 1996), 88-89; Rory Medcalf and Raoul Heinrichs with Justin Jones, “Crisis and Confidence: Major Powers and Maritime Security in Indo-Pacific Asia,” *Lowy Institute for International Policy*, June 2011, 26-30.

This list of CSBMs is certainly non-exhaustive. It is also important to note that this study does not adopt an exclusively maritime-oriented set of CSBMs even though they are fundamentally different from “terrestrial CSBMs” given the different nature of armaments and criteria governing maritime operations. CSBMs that are more political in nature fall under the category of declaratory measures. Finally, it needs pointing out that these three categories of CSBMs may be ranked in an ascending order of difficulty and comprehensiveness in the process of negotiations and implementation.<sup>7</sup>

Declaratory measures are comparatively easiest because they are essentially political and do not entail technical-operational restrictions on maritime forces. Not all of such instruments are legally binding in nature. The onus lies on the signatories to keep to these declarations as an article of faith, or to risk otherwise especially in the absence of legal provisions that enforce compliance. At the next level of difficulty, transparency measures require greater commitment towards actual implementation and in many cases, involve the defence establishments right down to operational units in the field. Within this category, information measures are perhaps the most commonly practiced. Communication, notification and observation/inspection measures are by nature more difficult to accomplish. In fact, CSBMs of the information kind being the only ones with much hope of being agreed, albeit at best of limited value,<sup>8</sup> continue to ring true today.

*The level of difficulty rises when CSBMs require greater commitments; if they impose restrictions on the political and operational freedom of action; and perhaps most daunting to some countries especially those in the Indo-Pacific which abhor external interferences.*

Constraint measures are the most intrusive of all CSBMs due to specific restrictions placed on personnel, equipment and activities that may clash with countries’ own preferences and priorities. This creates potential hurdles during negotiations, especially when it concerns verification instruments to ensure compliance. Therefore, constraint measures are more challenging to be agreed upon and be adopted (partially or in full), relative to the other two

categories, because they would entail the prospects of having to give up some sovereignty and freedom of action. Generally to say, the level of difficulty rises when CSBMs require greater commitments; if they impose restrictions on the political and operational freedom of action; and perhaps most daunting to some countries especially those in the Indo-Pacific which abhor external interferences – the unthinkable prospects of having to relinquish some sovereignty as part of the commitment to accept intrusive verification mechanisms.

It may be argued that as states embark on potentially more challenging CSBMs, it also demonstrates a certain political resolve on their part to signal intent to their potential rivals or to the international community as a whole. However, multilateral CSBMs are often difficult to accomplish, both as a process of negotiation and implementation due to the diverse and even conflictual interests of the concerned parties. The irony is also that, while CSBMs are aimed at ameliorating interstate tensions and promoting transparency and trust, in the regional context the overall strategic trust deficit often stands in the way of promoting CSBMs. This is especially so the case for some of the CSBMs found in the Southeast Asian maritime domain.

## **GAME ON FOR SOUTHEAST ASIA... BUT NOT OTHERS PERHAPS?**

Most of the CSBMs in the Southeast Asian maritime domain are bilateral in nature, and mostly residing in the categories of information and communications measures as seen in Table 1. Given that such measures typically do not impinge on sovereignty, which is a sensitive topic in Southeast Asia, this is understandable, even if one could still question their efficacy. Multilateral mechanisms are few and far in between, though it can be argued that member states of the Association of Southeast Asian Nations (ASEAN) often build multilateral security cooperation on pre-existing bilateral initiatives. A good example would be how the Malacca Straits Patrols, which were promulgated in 2004 by Indonesia, Malaysia, Singapore and Thailand (which joined in 2005) in response to the scourge of piracy and armed robbery against ships in the late 1990s to the early 2000s, stemmed from the preceding habits of bilateral maritime security cooperation amongst these countries. It is from this perspective one understands how an incremental, building block approach is essential in helping to build CSBMs in the Southeast Asian maritime domain, since this helps foster trust and a certain level of comfort for the regional governments to advance such cooperation.

Seen in this light, one may understand how the Guideline for Air Military Encounters (GAME) came about. While not exclusively a maritime-oriented CSBM, GAME was promulgated in 2018 by the ASEAN Defence Ministers Meeting (ADMM) with regional maritime hotspots, such as the South China Sea (SCS) disputes, in mind.<sup>9</sup> GAME came on the heels of preceding major close air



encounters between China and the United States over regional waters, in international airspace. As the world's first multilateral code that seeks to govern military aerial interactions, GAME is adopted as solely an ASEAN Defence Ministers Meeting (ADMM) initiative, meaning, by just the ten member states. Still, the guidelines are open to non-ASEAN signatories for widespread adoption. It is encouraging to note that the eight ADMM-Plus dialogue partners including China and the United States have lent "in-principle" support for this mechanism.<sup>10</sup> Amongst ASEAN member states, close air encounters were rare and in the recent decade, were not observed – at least in public. The last major, publicly known close air encounter involving any ASEAN member state was back in late May 2021, when a formation of Chinese military transport aircraft flew within the Malaysian flight information region off the Borneo state of Sabah, close to the contested Luconia Shoals and were intercepted by Royal Malaysian Air Force jets.

Notably, GAME is significant for Southeast Asia not only as an accolade of being the world's first such mechanism, but it can be deemed a type of constraint measure – more precisely a risk reduction mechanism as seen in Table 1. It therefore represents a leap for the ten-member bloc from the mostly declaratory measure and to a lesser extent, transparency measures. Over the past four years since its promulgation, GAME can be deemed to have achieved its purpose of promoting safe military aerial interactions between ASEAN member states. However, one needs to be reminded that since the 1990s and early 2000s, ASEAN member states have made noteworthy progress in addressing their extant territorial and sovereignty disputes, especially in the maritime domain. Indonesia and Malaysia referred their disputes over the Ligitan and Sipadan Islands to the International Court of Justice (ICJ), and likewise, Malaysia and Singapore over the Pedra Branca row. Outside the recourse to international legal arbitration, ASEAN member states have over the past two decades or so resolved a number of outstanding maritime disputes via bilateral political negotiations – the most notable recent example being the finalisation of a 12 year-long negotiation process between Indonesia and Vietnam on their overlapping exclusive economic zones in the SCS. In a nutshell, these significant achievements help further foster political trust amongst ASEAN member states, thus helping to set the stage for "higher achievements" such as GAME. Put another way, the progression from lower-tier CSBMs to higher-tier ones, especially constraint measures, is facilitated by the improving climate of strategic trust between ASEAN member states.

But where extra-regional parties are involved in CSBMs in the Southeast Asian maritime domain, which is a natural given the international nature of the waters in the region, the situation presents a different set of challenges. GAME would not have any significant impact on interactions with, and amongst, extra-regional players such as China and the United States – by far the most consequential players in Southeast Asia's maritime domain given their extant geopolitical rivalry. GAME is anything but novel to China and the United States because prior to

that, they have maintained bilateral CSBMs for the same purpose. Under the auspices of the Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety (MMCA),<sup>11</sup> the two powers inked first the Memorandum of Understanding (MOU) regarding the Rules of Behavior for Safety of Air and Maritime Encounters in 2014,<sup>12</sup> and then a Supplement the following year adding Annex III, on Rules of Behavior for Safety of Air-to-Air Encounters; and a new Terms of Reference for Air-to-Air Encounters for inclusion into the original MOU's Annex I.<sup>13</sup>

In fact, comparing the two mechanisms, GAME contains many provisions similar to the 2015 Supplement. Even though both contain commonalities – being voluntary and non-binding, building on existing international instruments such as the Convention on International Civil Aviation (Chicago Convention), and having provisions for assessment and review – the Sino-US mechanism is a more elaborate document. Yet this has failed to ensure full compliance all the time. Notably, in May 2016, two Chinese J-11 fighter jets flew within 15 meters of a US Navy EP-3 reconnaissance aircraft east of Hainan island, in what US authorities described as an “unsafe” encounter,<sup>14</sup> and viewed the Chinese action as violation of the 2014 MOU and 2015 Supplement.<sup>15</sup> In February 2017, another “unsafe” aerial incident happened, in the general vicinity of the Scarborough Shoal, when a US Navy P-3C maritime patrol and reconnaissance aircraft and a Chinese KJ-200 airborne early warning plane flew within about 304 meters of each other.<sup>16</sup> It was against these backdrops that GAME was conceived – as ASEAN sought to promote safe aerial interactions amongst regional militaries. From late 2018 to at least 2020, there had been no major reported incidents.

One may conclude that GAME could have had the effect of impressing upon Beijing and Washington the urgency of prudently managing safe maritime and aerial interactions between their forces. Yet this situation did not last long. In the couple of years, there had been an uptick in instances of unsafe intercepts involving Chinese fighter jets against American, Australian and Canadian military aircraft operating in international airspace across the western Pacific region, including the SCS.<sup>17</sup> In the latest such incident, a Chinese J-11 fighter was video-taped having flown within 20 feet of a US Air Force RC-135 reconnaissance aircraft over the SCS in late December 2022.<sup>18</sup>

## **CODE OF CONDUCT IN THE SCS: UNRESOLVED PROBLEMS**

This paper shall not ruminate at length on the origins and history of the proposed Code of Conduct in the South China Sea (CoC). In summary, the code came about following the 1990s' Mischief Reef incidents when Chinese presence was first detected on the hitherto unoccupied feature,<sup>19</sup> a low-tide elevation that lies well within the Philippine exclusive economic zone (EEZ).

In March 2000, ASEAN and China exchanged their respective drafts and agreed to consolidate them into one document but they concluded that a formal CoC proved a bridge too far.<sup>20</sup> Therefore, ASEAN and China reached the Declaration on the Conduct of Parties in the South China Sea (DoC) in November 2002. The DoC is a watered-down version of the original CoC and is meant to be a precursor to an eventual code. It reaffirms freedom of navigation and overflight and commits the parties to resolve the disputes peacefully. However, there is no commitment requiring the claimants to refrain from building new structures on the islands they already occupy, as ASEAN proposed, even though there is an agreement not to occupy any additional uninhabited islands, reefs or shoals. In principle, the states involved have agreed to avoid provocative actions and to desist from placing further installations on the disputed islands. In practice, states have not fully complied with these guidelines, causing continual friction and tension. However, the de facto occupation of Scarborough Shoal, an uninhabited shoal within the Philippine EEZ, by Chinese forces following their standoff with the Filipinos in 2012, and massive island-building work by Beijing, underlined the DoC's ineffectiveness and urgency of having the CoC.

Momentum on the CoC began to pick up following the Scarborough Shoal debacle as ASEAN pushed for the code not just to stabilize the situation but also to reinforce its centrality in the regional architecture given the brickbats it received over its perceived failure to effectively address the SCS problem. This might have been motivated by ASEAN's failure to issue a joint communique for the first time over the SCS in July 2012, Manila's decision to lodge a legal challenge against Beijing on the SCS row after having declared to exhaust all other means – which obliquely referred also to the ASEAN recourse – and China's island-building and militarisation of the area. China shifted from its foot-dragging stance towards a more enthusiastic stance on the CoC only after the July 2016 arbitral award, which overwhelmingly ruled in favour of Manila and created nothing short of an international embarrassment for Beijing. The code would not only help repair Beijing's tarnished reputation but more importantly, to feed its strategic narrative that the SCS issues should be managed and resolved solely by ASEAN and China, without interference by external parties. About a year after the arbitral award, momentum was built and all eleven parties adopted a draft framework on the CoC, followed in June 2018 by ASEAN and China adopting a Single Draft Negotiating Text (SDNT).

*Within ASEAN, not all member states shared the common desire for a substantial, prescriptive CoC that can truly constrain provocative behaviour.*

Even then, differences over the form of the CoC look set to remain a teething challenge that could beset negotiations. Within ASEAN, not all member states shared the common desire for a

substantial, prescriptive CoC that can truly constrain provocative behaviour. In January 2012, about three months before the Scarborough Shoal incident brewed up, the Philippines circulated an informal, eight pages-long working draft titled, Philippines Draft Code of Conduct, to which some ASEAN members shared reservations about it being too prescriptive. An Indonesian proposal called “Zero Draft A Regional Code of Conduct in the South China Sea”, introduced in September the same year suggested rules, norms and procedures for carrying out confidence-building measures, as well as detailed provisions for preventing incidents and collisions at sea.<sup>21</sup> Yet this proposal also did not gain consensus amongst the ASEAN ministers. This situation is further complicated with China on board the negotiation. Instead of a united ASEAN position versus China’s, negotiations on the CoC take the form of 10 ASEAN member states against Beijing, because the bloc members have different perceptions and interests regarding the code. Generally, those differences revolve around: 1) geographical scope of where the code applies in the SCS; 2) measures to manage escalation of disputes and promote self-restraint; 3) whether the code is binding or otherwise; and 4) participation of relevant countries, including non-claimants and generally maritime users in the SCS. These intra-mural differences have endured till this day.<sup>22</sup> Table 2 consolidates and underlines differences over those key clauses proposed in the SDNT.<sup>23</sup>

**Table 2: Key Clauses of Interest Proposed by Parties in the SDNT**

	CH	BN	CA	ID	MY	PH	SG	TH	VN
<b>KEY PRINCIPLES</b>									
Rules-based framework	X	X	X	X		X	X		X
Set of norms			X						
Respect each other's independence, sovereignty and territorial integrity	X	X	X	X	X	X	X		X
Consistent with international law	X	X	X	X		X	X		X
Commit to purposes and principles of UN Charter	X	X	X	X		X			X
Comply with universally recognized principles of international law/instruments, including 1972 COLREGs, 1974 SOLAS, 1979 SAR Convention, 1988 SUA Convention	X		X	X			X	X	
SCS used exclusively for peaceful purposes			X			X		X	
Avoid or prevent incidents	X	X	X	X	X	X	X		X
Manage incidents in peaceful manner and consistent with international law	X	X	X	X		X	X		X

Resolve disputes by peaceful means, without resorting to threat or use of force	x	x		x	x	x		x	x
<b>GEOGRAPHICAL SCOPE</b>									
Depending on the operative elements/contents of the COC, the geographical scope/scope of application may have to be defined					x				
Apply to all disputed features and overlapping maritime areas claimed under the 1982 UNCLOS									x
<b>FREEDOM OF NAVIGATION AND OVERFLIGHT</b>									
Safety and freedom of navigation and overflight in accordance with international law, including 1982 UNCLOS				x	x		x		
Safety and freedom of navigation and overflight through effective implementation of obligations under applicable international instruments	x	x	x	x	x	x	x	x	x
Encourage application of recommendations on operational procedures for promotion of safety of overflight and navigation under ICAO and IMO	x		x	x			x	x	
<b>PRACTICAL COOPERATION</b>									
Cooperative activities/practical maritime cooperation	x	x	x	x	x	x	x	x	x
<b>CSBM: GENERAL MENTION</b>									
Refrain from conduct of activities that would complicate or escalate disputes, affect peace and stability, endanger environment, or otherwise inconsistent with international law	x	x		x		x	x		x
Self-restraint in conduct of activities that would complicate or escalate disputes including refraining from action of inhabiting on presently uninhabited features	x	x	x	x				x	
Exercise self-restraint in the conduct of activities that would complicate matters or escalate tensions					x				
Adopt, at the appropriate levels of government, processes, guidelines and notification protocols to operationalise						x			

the Parties' obligation to exercise self-restraint in the South China Sea, and mechanisms at the appropriate levels to ensure their implementation									
<b>CSBM: INFORMATION MEASURES</b>									
Dialogues and exchanges	x			x				x	x
<b>CSBM: COMMUNICATION MEASURES</b>									
Use of safety and communications procedures for safety of all Parties' naval ships and naval aircraft as set out in WPNS CUES to improve operational safety in air and at sea	x		x					x	
Utilize MFA-to-MFA hotline	x	x	x	x				x	
Enhance bilateral and multilateral communication among Maritime Law Enforcement (MLE) agencies	x								
Establish bilateral and multilateral military hotlines among defence authorities at all levels	x								
Establish hotline platforms among MLE agencies	x								
<b>CSBM: NOTIFICATION MEASURES</b>									
Notification mechanism on military activities, and to notify each other of major military activities if deemed necessary	x								
Notifying, on voluntary basis, other Parties concerned of any impending joint/combined military exercise				x					
Notify other Contracting States of any impending joint/combined military exercise/drill to be taken place within the South China Sea. Such notifications shall be made 60 days before the commencement of such military exercise/drill									x
<b>CSBM: CONSTRAINT MEASURES</b>									
Define militarisation									x
Define self-restraint									x
Parties shall not hold joint military exercises with countries from outside the region unless the parties concerned are	x								

notified beforehand and express no objection									
Nothing in the COC shall affect the rights or obligations of Parties under international law, including rights and processes relating to the peaceful resolution of disputes of the rights or ability of the Parties to conduct activities with foreign countries or private entities of their choosing					x				
No air defence identification zone									x
Develop bilateral and multilateral codes for maritime and air encounters for military ships and aircraft	x								
<b>COMPLIANCE, VERIFICATION AND ENFORCEMENT</b>									
Necessary mechanisms for monitoring of implementation - option 1: SOM (Senior Officials' Meeting) -DOC and JWG (ASEAN-China Joint Working Group)-DOC for monitoring and reporting of full and effective implementation to ASEAN-China PMC (Post Ministerial Conference)	x	x	x		x		x		
Necessary mechanisms for monitoring of implementation - option 2: establishment of Commission represented by foreign ministers									x
Resort to the High Council of the Treaty of Amity and Cooperation (TAC), at the consent of the Parties concerned, to settle any dispute relating to incidents				x					
Refer unresolved incident to appropriate international dispute settlement mechanism, at consent of concerned parties				x					
Legally binding					x				
<b>REVIEW OF CODE</b>									
Review of CoC every XXX years			x	x		x	x		x
Review of CoC among Parties	x		x	x		x	x		
Review of CoC by Commission									x
<b>NON-SIGNATORY PARTIES</b>									
Joint proposal by Parties of an UNGA biennial resolution to ensure all other		x							

countries respect the principles contained in the CoC									
Encourage other countries to respect the principles contained in the CoC	x	x		x	x				

**Index:** CH= China; BN = Brunei; CA = Cambodia; ID = Indonesia; MY = Malaysia; PH = Philippines; SG = Singapore; TH = Thailand; VN = Vietnam

**Source:** Author’s consolidation from the original June 2018 SDNT and categorized into key sub-headings including the various classes of CSBMs (see Table 1).

There is no agreement on the geographical scope to which the CoC applies. This was left open-ended within the SDNT. Vietnam proposed “all disputed features and overlapping maritime areas” as the scope, which would imply the inclusion of the Paracel Islands that are disputed between Hanoi and Beijing. However, this proposal was not accepted by at least several ASEAN member states which view the Paracel Islands row as a purely bilateral one between China and Vietnam. Beijing naturally does not accept the Paracel Islands to be included because it views these features as indisputably Chinese territory. Using China’s expansive nine-dash line as a basis for the code’s geographical scope of application would run afoul of the arbitral award in 2016 that has since invalidated that claim. Moreover, ASEAN governments have pressed Beijing to clarify the basis of this claim to no avail.

The second issue concerns differences over measures to manage escalation of disputes and promote self-restraint. The phrase “self-restraint” was not defined in the 2017 draft framework, and various parties interpreted it as they saw fit.<sup>24</sup> Vietnam is the only party which seeks to define “self-restraint” in the SDNT whereas the rest shied away from that beyond making general mention about the phrase. A survey of the proposed provisions in the SDNT clearly shows that all parties were enthused in making proposals to promote practical security cooperation such as search-and-rescue and marine environmental protection. Such extensive proposals mask the fact that most parties simply tried to shy away from making substantial CSBM-related proposals. Much of the CSBMs proposed in the SDNT relate to transparency measures which are arguably much easier to accomplish, such as dialogues and exchanges between concerned parties’ government agencies, as well as hotline communication mechanisms. Constraint measures constitute the “barren land” which most of the parties shied from fertilizing, for reasons that shall be explained in the next section.

The third issue of concern is the role played by non-parties to the CoC, which refer to any state actor who do not sign onto or accede to the code. More pertinent to ask is whether ASEAN and China alone suffice in making the code effective without the inclusion of non-parties given the internationalized nature of the SCS. Back in 1999, a Philippine Department of Foreign Affairs



source reportedly suggested that the proposed code should bind all countries with a stake in the SCS to refrain from undertaking any destabilizing move: “It is better to include Japan, Korea and the United States, so they would be bound by a code of conduct... If they accede to the code, they would refrain from doing anything to cause tension in the area,” adding that: “Each one has their (sic) own interests to protect.”<sup>25</sup> The draft ASEAN joint communique penned by Manila in its capacity as ASEAN chair in August 2017 mentioned “all other states”.<sup>26</sup> Beijing has referred to these “all other states” as “non-regional forces” in its repeated call to push away external interference in the disputes.<sup>27</sup> As such, the CoC will most plausibly not be signed by anyone else besides ASEAN members and China, since the latter opposes internationalizing the disputes.

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Finally, the issue of whether the code is binding, legally or otherwise. This is where much disagreement exists. Vietnam is again the only party that explicitly proposes for the CoC to be legally binding. Kuala Lumpur once referred to the envisaged code as “a guideline”.<sup>28</sup> Manila called it a “gentleman’s agreement” and added that “the word and commitment of countries” should be sufficient to make the accord binding.<sup>29</sup> Vietnam even claimed that ASEAN has been pushing for an “effective and legally-binding” code.<sup>30</sup>

In August 2019, then Chinese foreign minister Wang Yi expressed optimism that the code could be promulgated “within three years’ time.”<sup>31</sup> 2022 came and went without an agreed code because of the COVID-19 outbreak, which stalemated the negotiation process as ASEAN countries and China focused on the exigency. Yet one cannot help but observe that recurring incidents in the SCS since the end of 2019 till this day have undermined confidence and trust amongst parties. Tensions spiked in the SCS not long before the pandemic – China and Vietnam over Vanguard Bank in late 2019,<sup>32</sup> China and Indonesia over the North Natuna Sea in early 2020<sup>33</sup> followed soon after by China and Malaysia over West Capella drillship off Sarawak,<sup>34</sup> and then China and the Philippines over Whitsun Reef in early 2021.<sup>35</sup> In late 2022, Manila revealed that all parties were in the second round of negotiations even though they remained “still very far from completing this document.”<sup>36</sup> In early 2023, Indonesia has sought to leverage its position as ASEAN chair to intensify the negotiations from March, yet ASEAN member states have refrained from suggesting timelines.<sup>37</sup> As negotiations gradually returned on track in the post-pandemic era, those SCS incidents continue to persist – with Indonesia and Malaysia still parrying off Chinese coercive acts in their EEZs, whereas the Philippines and China witnessed two serious incidents since the start of 2023 – the laser-pointing episode in February<sup>38</sup> and Second Thomas Shoal near-collision in April between their coastguards.<sup>39</sup>

## CUES: THE MOST EFFICACIOUS MECHANISM?

The Code for Unplanned Encounters at Sea (CUES) was promulgated with 21 signatory navies at the Western Pacific Naval Symposium (WPNS) in April 2014 to mitigate the risks of accidental or inadvertent clashes in times of encounters between naval forces at sea. This development was primarily motivated by a close encounter involving the Chinese and US navies in the SCS in December 2013, the USS *Cowpens* incident.<sup>40</sup> Since then, certain limitations had been highlighted – including especially how this voluntary, non-legally binding code does not apply to maritime law enforcement agencies (or colloquially, coastguards) as well as irregular forces. Despite overt support by various regional countries, including the United States (in fact, the US Navy also proposed expanding CUES back in August 2015 to include the China Coast Guard, as part of their bilateral confidence-building mechanisms at sea),<sup>41</sup> and the Philippines’ suggestion to expand the code to coastguards,<sup>42</sup> there has been little movement on that front. Singapore introduced an underwater CUES in 2016 to prevent and mitigate risks of undersea close encounters.<sup>43</sup> In March 2016, as tensions spiked in the SCS, Singapore proposed extending the 2014 CUES to all parties in the area, and to expand it to both naval and coastguard forces.<sup>44</sup> The revised CUES (version 2.0) which was approved at the WPNS in October 2018 defined “naval ship” to include warships, naval auxiliaries and submarines. “Naval auxiliary”, according to CUES, is “a vessel, other than a warship, that is owned by or is under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service.”<sup>45</sup> The issue of coastguard and irregular forces such as maritime militia, however, remains unaddressed.

Observers have identified several factors that would hinder the promulgation of this expanded mechanism. Some coastguards in the region sought to centralize maritime law enforcement powers from the various agencies, thus making it harder for their governments to commit to such a code. China, Indonesia, and Malaysia count as examples. Another problem concerns sovereignty, given that such a mechanism might mean subjecting these forces typically regulated by domestic laws to international rules created with other countries. In any case, in September 2016, not long after the SCS arbitral award was handed down, ASEAN and China adopted a joint statement on the application of CUES in the SCS.<sup>46</sup> This was operationalized at the inaugural ASEAN-China Maritime Exercise conducted in 2018, during which CUES was practised between the participating ASEAN and Chinese navies. But regional navies also generally apply CUES in their interactions. In June 2014, barely two months after the code was first adopted, the Chinese and Indonesian navies practised CUES as part of a bilateral exercise in the Java Sea.<sup>47</sup> In April 2019, the Philippine Navy practised CUES with its Taiwanese counterpart off Mavulis Island, of the Philippines’ Batanes Province.<sup>48</sup> This despite Taipei not being a signatory of the code.

Given the origins of CUES, the attention on how this code would be adopted and applied by China and the United States would be understandable. There were initial concerns that Beijing might selectively apply CUES or not even do so at all, especially when Senior Capt. Ren Xiaofeng, the head of the Chinese navy's Maritime Security/Safety Policy Research Division, said in 2014 that when and where the code was implemented had to be discussed bilaterally between China and other nations, including the United States "It's recommended, not legally binding," he said, adding "How we arrange things, how we use this thing, that's something we need to talk about... We're just talking about the rules. Whether or where or when these rules will apply – it leaves that open, leaves it to bilateral (talks)."<sup>49</sup> Nonetheless, the Chinese did apply CUES during their interactions with their American counterparts. Both navies practised CUES off the Horn of Africa in December that year.<sup>50</sup> In particular, the application of CUES between the Chinese and US navies improved the situation and helped contribute to stability between these rival forces. US naval officers with experience of SCS operations commended that Chinese crews' communication and navigational understanding has improved. "There is a professionalism that we didn't see before," one officer said, on condition of anonymity. Use of the CUES between the United States and Chinese navies has lowered "the likelihood of miscalculations that could lead to dangerous escalation," said David Shear, then Assistant Secretary of Defense for Asian and Pacific security affairs at the Defense Department, during Senate testimony in September 2015.<sup>51</sup> In the following January, during a two hour-long video conference, the navy chiefs of China and the United States lauded the increased use of CUES.<sup>52</sup>

Unlike close aerial encounters (as described in earlier discussion on GAME), reported ship-to-ship encounters between the Chinese and US navies had been relatively few. The last major surface close encounter took place in September 2018 in the SCS, between the USS *Decatur* and Chinese destroyer *Lanzhou*.<sup>53</sup> Otherwise, the two navies had interacted with each other in a generally safe and professional manner. In October 2019, then US Navy Pacific Fleet commander Admiral John Aquilino (now heading the Indo-Pacific Command) commented that 99 percent of the fleet's interactions with the Chinese had been safe.<sup>54</sup> Then, early on the following year, a PLA Navy warship lased a US Navy P-8A Poseidon maritime patrol and reconnaissance aircraft approximately 380 miles west of Guam while the latter was flying in international airspace, which American naval authorities criticized as violating CUES.<sup>55</sup> Nevertheless, Rear Admiral Doug Verissimo, then commanding Carrier Strike Group 9 in January 2021 acknowledged the Chinese naval build-up but observed "a large percent" of the US Navy's interactions with its Chinese counterparts were "very predictable and professional."<sup>56</sup>

It is not presumptuous to conclude that CUES is at present holding up as a generally effective mechanism, at least as far as naval forces are concerned. At the time of writing, CUES has yet to apply to coastguards and irregular forces, especially Chinese maritime militia. Parallel

arrangements exist alongside CUES. Notably, the Switzerland-based non-profit Centre for Humanitarian Dialogue regularly facilitates dialogue sessions between the coastguards of China, Indonesia, Malaysia, the Philippines and Vietnam, and they altogether co-drafted a set of Common Operating Principles (COPs) to reduce the risk of escalations during maritime encounters.<sup>57</sup> The extent to which COPs has had an effect on moderating the behaviour between these coastguards is far from being known. There had been some unsafe and unprofessional interactions documented lately between the Chinese and Philippine coastguards for example. That said, the existence of ad-hoc mechanisms such as COPs remains helpful in promoting a generally peaceful and stable, albeit fraught with tensions, SCS.

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## CONCLUSIONS

This paper surveys three major CSBMs applied in the Southeast Asian maritime domain, focusing foremost on the SCS as a major geopolitical flashpoint where such mechanisms find relevance. GAME is an apt example of how ASEAN, for all its inherent flaws and weaknesses, could still accomplish significant feats in the realm of multilateral CSBMs. The promulgation of the guidelines brings ASEAN beyond the more often known and familiar bilateral CSBMs. And this achievement would not have been possible without the decades-long effort amongst member states to build mutual trust and actively seek to address their outstanding interstate differences, especially pertaining to territorial and sovereignty issues. The longstanding habits of mainly bilateral security cooperation between the militaries, and the gradual accumulation of political trust amongst the ASEAN member states over time through proper legal and political recourse to those extant interstate disputes, help create the reservoir of goodwill and mutual comfort levels sufficient to allow GAME to transpire.

However, multilateral CSBMs in the Southeast Asian maritime domain have clear limitations. GAME in this instance could have efficacious impact on intra-ASEAN military aerial interactions; generally, the ASEAN militaries play by the rules. Yet when extending to extra-regional parties, such mechanisms have limited impact on behaviour. Not only have these extra-regional parties given only in-principle endorsement of GAME – which thereby releases them of any obligation to abide by the guidelines anyway – but their interactions do not necessarily take into account these governments' consideration of the mechanism. Extra-regional parties may pay lip service

to supporting the virtues of the oft-cited – almost as an obligatory mantra – ASEAN centrality, which is very much the reason why they gave in-principle agreement to GAME in the first place. At the end of the day, the prevailing national interests of these extra-regional parties pervade their policy actions with respect to CSBMs, not least GAME. For this reason, one needs to be extremely cautious about the extent to which multilateral CSBMs in the Southeast Asian maritime domain can achieve their objectives.

In that respect, the CoC being a multilateral CSBM presents an interesting case study. Due to its inherent structural limitations, there is no way to “unstick” ASEAN and China in this code – the very mere fact that all 11 parties come together gives reason for the code’s very existence. Having a code just between ASEAN member states, or even just amongst the SCS disputants, would have made little practical sense since China remains undeniably a key player. The question, however, is how to overcome those differences between these parties in the negotiations, and to address the future role played by non-parties. Without China, the CoC is not likely to prosper in any manner. Yet, without addressing the role of non-parties, especially extra-regional powers outside Southeast Asia who have immense stakes in the SCS such as the United States, it is also not presumptuous to conclude that the code may have limited utility. Beijing’s behaviour in the SCS does not solely hinge on that of its Southeast Asian rivals, but arguably and chiefly seen as responding to, or mirroring, American moves.

Given the uncertainty of the CoC and likely limited utility of GAME to moderate the behaviour of those major powers outside Southeast Asia operating within the regional maritime domain, perhaps operational CSBMs such as CUES would serve as a frontier of hope. This mechanism involving maritime practitioners, in this case navies, could be deemed generally effective in promoting SCS peace and stability thus far. There are certainly areas that can be improved upon, for example the possibility of expanding the code to coastguards and irregular forces. Yet the problem here is that expanding the present navies-only CUES to coastguards might still constitute a challenge, thus leaving the coastguards to consider a separate, equivalent code (such as COPs). It is going to remain a problematic situation though: the SCS is a common operating environment for various types of maritime forces. Not all the concerned littoral states have coastguards, hence they deploy navies to perform sovereignty assertion and law enforcement in the SCS. Therefore, interactions between these forces are not straightforwardly symmetric in nature; in other words, it could well be a navy ship confronting a rival country’s coastguard instead of navy vessel. Therefore, another solution would be for a mechanism that can be commonly applied to both navies and coastguards at least.

The complexities surrounding CSBMs in Southeast Asia’s maritime domain underline the complex geopolitics of the region and diversity of stakeholders. There is no way to derive a one-size-fits-all framework that can apply across the entire region, including extra-regional actors. The

foreseeable reality is to make do with this hodgepodge of CSBMs, each with its own designed purpose and set of participants, that could hopefully be effective as a collective sum. Existing initiatives or promulgated mechanisms, such as GAME, CoC and CUES might eventually serve as the building blocks for bolder regional attempts to derive a more robust, broader CSBM framework, even if such a pathway remains fraught with persistent geopolitical dynamics evolving in Southeast Asia and its adjacent neighbourhood.

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**Crisis Avoidance: Preventing Dangerous Maritime Incidents and Unintended Escalation in the Asia-Pacific** is a joint project undertaken by the Verification Research, Training and Information Centre (VERTIC) and the Asia-Pacific Leadership Network for Nuclear Non-Proliferation and Disarmament (APLN). Through a new substantive dialogue and wider international discussions with experts, the project aims to build a new and effective methodology for identifying the risks of dangerous maritime incidents in the Asia-Pacific, evaluating the suitability of existing bilateral and multilateral arrangements to contemporary strategic realities of the region, and bringing forward new proposals to fill important gaps in mitigating incidents and escalation at sea in the Asia-Pacific.



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