



ASEAN, UNCLOS, and the South China Sea: A New Momentum?

By

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In its latest post-summit statement, ASEAN came up with perhaps the strongest stance so far with regard to the disputes in the South China Sea. How do we interpret the statement? What does it mean for the ongoing effort to maintain rules-based order in the South China Sea?

Background

On 26 June, ASEAN held its 36th summit. Communicating through video conference, Southeast Asian leaders discussed pressing issues. In addition to the ongoing pandemic, regional security, especially developments in the South China Sea, was high on the agenda.

Public attention was caught by the relatively assertive statement made by ASEAN on the South China Sea. In the chairman's statement released after the meeting, ASEAN leaders "reaffirmed that the 1982 UNCLOS is the basis for determining maritime entitlements, sovereign rights, jurisdiction, and legitimate interests over maritime zones, and the 1982 UNCLOS sets out the legal framework within which all activities in the oceans and seas must be carried out." Similar statement was made at the ministerial level back in January.

Observers differ in their interpretations of this development. A prominent ASEAN watcher considered it as a "[major departure](#)" from the dull statements ASEAN normally made on the issue of South China Sea. Another well-known analyst said the statement represented "[a significant shift in ASEAN's rhetoric](#)". Others, however, are more sceptical. A popular South China Sea commentator contended that ASEAN, despite the statement, was still "[muted and ambiguous](#)" and that "[little or nothing has changed](#)" when it came to the disputes.



United behind the tribunal award

This author concurs with both perspectives but would like to add up some points to the discussion. First, mentioning UNCLOS in the statement is indeed nothing new for ASEAN. As a matter of fact, reference to the law of the sea has been consistently made in the post-summit statements over the last decade.

In the past, however, UNCLOS was mentioned in relatively vague manners. It was usually mentioned as part of the principles of international law that should be respected within the framework of peaceful resolution of disputes. Never before have ASEAN members agreed that UNCLOS should be *the* legal basis and framework to govern the conduct of states in the disputed South China Sea.

Second, and perhaps most importantly, it is likely that with the statement ASEAN leaders were trying to make a specific reference to the 2016 South China Sea Arbitration. It is hardly a coincidence that the terms invoked were “maritime entitlements” and “sovereign rights” which have rarely, if ever, occurred in the previous ASEAN statements.

The phrases, however, can be associated with the 2016 tribunal award. Indeed, in addition to the status of certain geographic features and the lawfulness of certain actions by China in the South China Sea, the 2016 arbitration, which was instituted by the Philippines against China, [concerned](#) the legal basis of maritime rights and entitlements in the South China Sea. The award, as we all know, concluded, among others, that there was no legal basis for China’s historic claims within the ‘nine-dash line’ and none of the maritime features claimed by China was capable of generating an exclusive economic zone or continental shelf. Therefore, by using the aforementioned terms, ASEAN has managed to draw attention to the award while avoiding from being too provocative.

In the past, ASEAN members were criticised for being largely muted about the 2016 tribunal award, both [individually](#) and [collectively](#).

By the time of the summit, the momentum for ASEAN to collectively invoke the 2016 tribunal award had been building. The statement came against the background of the [“battle of diplomatic notes”](#) between concerned parties that started when Malaysia submitted a proposal to the Commission on the Limits of the Continental Shelf back in December 2019 concerning the outer limits of its continental shelf beyond 200 nautical miles in the South China Sea. The submission was subsequently protested by





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China who believed that its sovereignty, sovereign rights, and jurisdiction in the South China Sea was infringed by the submission.

The battle escalated when a number of concerned states fired a salvo of protests against China's note. [The Philippines](#), [Vietnam](#), and [Indonesia](#) all circulated notes verbales in which they reiterated their [respective positions](#) vis-à-vis China's note. All these states agree that UNCLOS should be the sole legal basis to determine maritime rights and entitlements in the South China Sea. Both the Philippines and Indonesia invoked the 2016 tribunal award in their notes.

Meanwhile, Vietnam and the Philippines also reject the idea that maritime features in the South China Sea should be enclosed within a group of islands surrounded by archipelagic or straight baselines. This idea - dubbed as the "Four Shas" strategy - has been advocated by China for the last couple of years.

The United States also later [joined](#) the party.

ASEAN has taken over the initiative

Third, by having managed to come up with a relatively firm position with regard to the 2016 tribunal award, it is probably safe to say that ASEAN has taken over the initiative from China, at least for the time being.

Prior to the June summit, China had the upper hand regarding the negotiation on the Code of Conduct in the South China Sea. In July last year, while ASEAN members were expressing their worry about the recent incidents in the South China Sea, it was China that went public announcing that China and ASEAN members had completed the first reading of the negotiating text and that the final COC could be completed ahead of schedule. It was unusual that such announcement came from China instead of ASEAN.

Such optimism was probably due to the facts on the ground being already in China's favour. Indeed, by 2019, China's military build-up on its artificial islands in the South China Sea appeared to have [peaked](#). The truth that both China and ASEAN know is that regardless of how many times it is mentioned in statements and communiqués, it is highly unlikely that the militarisation of the South China Sea would be rolled back.

ASEAN's collective invocation of the 2016 tribunal award, however, could potentially level the playing





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field. While certainly it would not neutralise what China has gained on the ground, Beijing is now under pressure to not only conclude the COC on time as it promised but also to negotiate it in terms of UNCLOS.

Conclusion

While stopping short of making an explicit reference, ASEAN's latest chairman statement underscores the agreement reached among ASEAN members regarding the substance of the 2016 South China Sea Arbitration and the role of UNCLOS in general in managing disputes in the South China Sea. It is indeed a major development and a strategic move from ASEAN in that regard.

It remains to be seen, however, if this momentum could be maintained and ASEAN could be consistent in its approach. The organisational structure which gives substantial power to the rotating chairman in formulating the agenda, for instance, might present an obstacle down the road as member states differ in their strategic outlooks.





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