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Plenary Session 4: International Norms & Rules: Code of Conduct & Other Remedies in SCS

The 2002 DOC and the COC

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Part 1

Declaration of Conduct (DOC)

Code of Conduct (COC)

2016 Reaffirmation of 2002 DOC

- In their statement of 25 July 2016, the Foreign Ministers of China and ASEAN
 - Reaffirmed that the **2002 DOC is milestone document** that embodies the collective commitment of the parties to promote peace, stability, mutual trust and confidence in the region, in accordance with the UN Charter and universally recognized principles of international law, including UNCLOS
 - Committed to the **full and effective implementation of the DOC** in its entirety and working substantially towards the **early adoption of a COC** based on consensus

Changes since DOC adopted in 2002

1. SCS has become a matter of International concern
2. Change in Status Quo on Security as a result of “island building” by China
3. Change in Status Quo on Legal Issues because of Award in PvC Arbitration

Issue: Is the time ripe for China & ASEAN to begin serious discussion to fully implement the DOC and agree on a COC ?

Part 2
2002 DOC
Review of Key Provisions

2002 DOC – Paragraph 1

Underlying Principles

Paragraph 1. The Parties reaffirm their commitment to

- purposes and principles of the UN Charter,
- 1982 UNCLOS
- Treaty of Amity and Cooperation in SE Asia
- Five Principles of Peaceful Coexistence
- Other universally recognized principles of international law

2002 DOC – Paragraph 2

Confidence Building Measures

2. The Parties are committed to exploring **ways for building trust and confidence** in accordance with the above-mentioned principles and on the basis of equality and mutual respect

2002 DOC – Paragraph 3. Freedom of Navigation and Overflight

Paragraph 3. The Parties reaffirm their respect for and commitment to

- freedom of navigation in and overflight above the SCS
- as provided for in universally recognized principles of international law,
- including 1982 UNCLOS

2002 DOC – Paragraph 4

Peaceful Resolution of Disputes

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by **peaceful means**,

- without resorting to the threat or use of force,
- through friendly consultations and negotiations by sovereign states directly concerned
- in accordance with universally recognized principles of international law, including UNCLOS

2002 DOC – Paragraph 5

Exercise of Self-Restraint

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others,

- refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays and other features
- and to handle their differences in a constructive manner

2002 DOC, Paragraph 5. Undertakings on CBMs

- a. Holding **dialogues** and **exchanges** of views as appropriate between their defence and military officials
- b. Ensuring just & humane treatment of all persons who are either in danger or distress
- c. **Notifying on a voluntary basis**, other Parties concerned of any impending joint/combined **military exercises**
- d. **Exchanging on a voluntary basis**, relevant information

2002 DOC, paragraph 6: Undertaking on Cooperative Activities

- a. Marine environmental protection
- b. Marine scientific research
- c. Safety of navigation and communication at sea
- d. Search and rescue operation;
- e. Combating transnational crime

The modalities, scope and locations in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned in their actual implementation

2002 DOC, paragraph 10

Code of Conduct

- The Parties agree to work, on the basis of consensus, towards the eventual attainment of the adoption of a **Code of Conduct**

Part 3

2011 Guidelines on Implementation of the DOC

2011 Guidelines on Implementation of the DOC

These Guidelines are to guide the implementation of possible **joint cooperative activities, measures and projects**

1. The implementation of the DOC should be carried out in a **step-by-step approach** in line with the provisions of the DOC.
2. The Parties to the DOC will continue to promote **dialogue** and **consultations** in accordance with the spirit of the DOC.
3. The implementation of **activities** or **projects** as provided for in the DOC should be clearly identified.
4. The participation in the activities or projects should be carried out on a **voluntary basis**.

2011 Guidelines on Implementation of the DOC

5. Initial activities to be undertaken under the ambit of the DOC should be **confidence-building measures**.
6. The decision to implement **concrete measures or activities** of the DOC should be based on **consensus among parties concerned**, and lead to the eventual realization of a **Code of Conduct**.
7. In the implementation of the **agreed projects** under the DOC, the services of the **Experts and Eminent Persons**, if deemed necessary, will be sought to provide specific inputs on the projects concerned.

Part 4

Possible Ways Forward on DOC and COC

Additional Legal basis for Cooperation - UNCLOS Article 123

States bordering an enclosed or **semi-enclosed sea** shall endeavor, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the **living resources** of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the **marine environment**;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of **scientific research** in the area;

Additional area for Cooperative Activities – Fisheries

- Should give high priority to cooperation to coordinate the management, conservation, exploration and exploitation of fisheries resources
- Cooperation can begin by agreeing to coordinate fishing bans, protect of endangered species, prohibit destructive fishing practices, etc
- Each State can exercise jurisdiction & control over its nationals and ships flying its flag

Involvement of other interested States and international organizations

Article 123. Cooperation in Semi-Enclosed Seas

- (d) to invite, as appropriate, **other interested States or international organizations** to cooperate with them in furtherance of the provisions of this article.

For fisheries cooperation, should include **FAO Fisheries experts** as well as **Taiwan** (a major fishing entity)

CBMs and Cooperative Arrangements must be “Without Prejudice”

1. No claimant gives up or surrenders in any manner its historic position on sovereignty, maritime boundaries, historic rights or sovereign rights
2. No claimant recognizes the legitimacy of the claims or historic positions of any other claimant
3. Any cooperative arrangements or CBMs that are agreed upon cannot be taken into account in any subsequent negotiations or procedures aimed at finally resolve the sovereignty and maritime disputes

Negotiations for CBMS and Cooperative Arrangements “Without Prejudice”

- The claimants agree that any statements made, positions taken or compromises made in the negotiations to reach agreement on cooperative arrangements or CBMs cannot in any way be considered as evidence that any claimant:
 - Has recognized the legitimacy of the sovereignty or maritime claims of any other claimant or
 - Has given up or modified in any way its own position on issue of sovereignty or maritime claims

Possible Confidence Building Measures

1. Incidents at Sea agreements when an enforcement vessel of one claimant meets vessel of another claimant
2. Agree to maintain “status quo” on occupied features
3. No assertion over airspace above occupied islands
4. Remain certain distance away from occupied features
5. Work toward greater transparency about facilities on occupied features
6. Define limits of “militarization” of occupied islands

Possible Cooperative Arrangements

1. Measures to reduce the risk of potential conflicts between government vessels – expansion of CUES
2. Measures to establish cooperative arrangements on matters of common interest, including the protection and preservation of the **marine environment** and the promotion of **marine scientific research**
3. Cooperative Arrangements on **fishing** resources such as coordination of seasonal fishing bans, bans on use of certain fishing practices or equipment, etc.

Role for Track 2 and Track 1.5

- Discussions should include Track 2 and Track 1.5 meetings
- Track 2 and Track 1.5 allow more open exchange of ideas
- Track 2 and Track 1.5 meetings could also include experts from outside the region or from international organizations
- Track 2 and Track 1.5 meetings can also include Taiwan

Questions on Code of Conduct

1. Is the main advantage that it will be legally binding?
2. Will States be less reluctant to agree to details if they are legally binding?
3. If a legally binding COC has no provision for settlement of disputes by a third party, will it in practice be any different than a non-binding DOC?
4. May be better to have transparent **Compliance Mechanisms** than a dispute settlement mechanism.

Negotiating COC

1. Concurrent work on implementation of DOC & drafting of COC
2. COC can be a **broad framework agreement**
3. **Separate annexes** can be added to the COC on particular CBMS and on cooperative arrangements
4. COC should contain **mechanisms to promote compliance**:
 1. Parties make period reports that are reviewed by others
 2. Monitoring by other parties
 3. Technical & financial assistance to members
 4. Complaint procedure if party fails to comply

The Time may be Ripe to begin Serious Discussions on DOC and COC

1. New Status Quo on Security because of island-building
2. New Status Quo on Legal Issues because of decision by Arbitral Tribunal
3. Serious discussions on DOC and COC would :
 - take attention away from Arbitral Award
 - focus attention on Confidence Building & Cooperation
 - be limited to China and ASEAN, unless specific invitation to outside powers or int'l organizations

Thanks for Your Attention

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