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Is the Time Ripe for Serious Negotiations on a Code of Conduct for the South China Sea?

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Introduction

The Foreign Ministers of the Member States of ASEAN and the People's Republic of China adopted the Declaration of the Conduct of Parties in the South China Sea (DoC) on 4 November 2002 at the 8th ASEAN Summit in Phnom Penh, Cambodia.[1]

The parties agreed in paragraph 10 of the DoC that the adoption of a legally binding code of conduct (CoC) in the South China Sea would further promote peace and stability in the region, and they further agreed to work, on the basis of consensus, towards the eventual attainment of this objective.

Progress on implementing the DoC and adopting a CoC has been extremely slow. In December 2004, in Kuala Lumpur, the first Senior Officials Meeting (SOM) on the DoC was convened, and the parties decided to set up a joint working group mechanism to discuss implementation of the DoC.[2] However, agreement was not reached on guidelines to implement the DoC until 2011.[3] ASEAN began to push for the drafting of a legally binding CoC, but there has been little progress.

Is the Time Ripe for Implementation of DoC and Adoption of CoC?

Developments in 2016 may mean that prospects are improving for serious discussions on implementing the DoC and adopting a CoC. In their statement of 25 July 2016[4], 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[5]

- 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

The renewed interest in implementing the DoC and adopting a CoC may be due at least in part to two recent developments concerning the South China Sea. First, China has completed most of its construction activities on the reefs that it occupies in the Spratly Islands. Before its construction activities China occupied the smallest geographic features in the Spratlys, but it now occupies artificial islands several times larger than the natural islands occupied by the ASEAN claimants. Also, China has sent a clear message through its construction activities that it does not intend to compromise on its sovereignty claims to the disputed islands in the South China Sea, and that it has the capacity to enforce its claims. As a result, it has created a new status quo with respect to maritime security in the South China Sea. Therefore, if it begins serious negotiations on a CoC at this time, it will be negotiating from a position of strength because the new status quo with respect to security will have to be taken into account.

Second, the Award of the Arbitral Tribunal in the *Philippines v China Case* was issued on 12 July 2016.[6] Although the Award does not address the competing sovereignty claims in the South China Sea, it does clarify the maritime claims. The Tribunal decided that China has no historic rights to the natural resources within the exclusive economic zone (EEZ) of the Philippines. It ruled that whatever historic rights China may have had to resources inside the nine-dash line map in areas that are now the EEZ of the Philippines, China gave up those historic rights when it ratified UNCLOS. The Tribunal also decided that none of the islands in the Spratly Islands are entitled to an EEZ of their own. The Award diminishes the importance of the disputed islands in allocating resources, and in effect gives most of the fisheries resources and hydrocarbon resources to the bordering coastal States.

China did not participate in the arbitration and it made a serious diplomatic effort in the weeks leading up to the decision of the Tribunal to cast doubt on the legitimacy of the Arbitral Tribunal and its Award. Nevertheless, the Award is legally binding on China. If China openly defies the Award, it runs the risk of exacerbating its disputes with the ASEAN States and being branded by significant segments of the international community as a rising power with little respect for international law. By turning the attention of the international press to its efforts to cooperate with the ASEAN States in the South China Sea, China will divert attention away from the Award in the *Philippines v China Case*.

Given these developments, it can be argued that the time is now ripe for China and the ASEAN member States to begin serious discussions on implementation of the DoC and the adoption of a CoC. This will not only focus attention on confidence building and cooperation, but it will also highlight the fact that the South China Sea issues are being dealt with by China and the ASEAN member States, without the participation of the United States or other external powers.

Review of Key Provisions in the DoC

Before discussing how the DoC might be implemented, it may be helpful to review the key provisions in this non-binding but important political document. The Arbitral Tribunal in the *Philippines v China Case* ruled that the DoC is not a legally binding agreement, but it nevertheless is an important political document.

Paragraph 1 and 4 set out the fundamental principles underlying the DoC that are also contained in other international documents. Paragraph 1 provides that the Parties reaffirm their commitment to purposes and principles of the UN Charter, 1982 UNCLOS, the Treaty of Amity and Cooperation in SE Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law. Paragraph 4 states that the Parties 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 1982 UNCLOS.

Paragraph 3 states that the Parties reaffirm their respect for the freedoms of navigation in and overflight above the South China Sea as provided for in universally recognized principles of international law, including 1982 UNCLOS.

Paragraph 5 addresses a critically important issue. It provides that 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. It can be argued that most of the parties have acted contrary to this provision to some extent because they have taken unilateral actions that complicated or escalated the disputes. However, all the parties have refrained from the one action specifically mentioned. They have refrained from occupying uninhabited islands or other geographic features.

Paragraphs 2 and 5 deal with confidence building measures. Paragraph 2 states that the Parties are committed to exploring ways for building trust and confidence in accordance with principles in paragraph 1 and on the basis of equality and mutual respect. Paragraph 5 sets out the undertakings of the parties on confidence building measures pending the settlement of the territorial and maritime disputes. The Parties undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

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

Paragraph 6 sets out the undertaking of the Parties on Cooperative Activities. It provides that pending a comprehensive and durable settlement of the disputes, the Parties may explore or undertake cooperative activities which may include the following:

a) marine environmental protection;
b) marine scientific research;
c) safety of navigation and communication at sea;
d) search and rescue operation; and
e) combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

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

To what extent has the DoC been effective? It can be argued that the Parties have complied with the most essential elements. They have refrained from attempting to resolve the disputes by the threat or use of force, and they have exercised self-restraint by not occupying any additional geographic features. They have also engaged in some confidence-building measures. However, they did have done very little with respect to cooperative activities.

2011 Guidelines on Implementation of the DOC

The 2011 Guidelines on Implementation of the DoC were a long time in coming. They were a very cautious step forward, with an emphasis on the need for a consensus and the volutary nature of cooperative activities. However, they did acknowledge that they could lead to the "eventual realization" of a CoC.

The purpose of the 2011 Guidelines is to guide the implementation of possible joint cooperative activities, measures and projects. They are as follows:

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.

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.

Possible Ways Forward on Implementation of the DOC

The key to implementation of the DoC is for the parties to agree on confidence-building measures and cooperative activities. A "trust deficit" currently exists because of China's construction activities in the Spratly Islands and because China has been perceived by the ASEAN States as taking a much more assertive position regarding its perceived rights and claims in the South China Sea. The decision by the Philippines to institute arbitral proceedings against China also raised tensions. Now that China's island-building has been completed and the arbitral tribunal has issued its Award, it is time for both sides to take stock of the new status quo and identify their common interests in the South China Sea.

The DoC lists four possible confidence-building measures that could be agreed upon by China and the ASEAN member States. Most of these have not been implemented, except for holding dialogues and exchanges of views between defence and military officials. The dialogues and exchanges of views should be expanded to include government officials from all ministries who have interests in the South China Sea, including transportation, fisheries, law enforcement, environment, etc. In addition, the dialogues and exchanges should not be limited to government officials. Workshops and meetings should also be organized at the Track 1.5 and Track 2 levels, as such meetings often encourage a freer and more frank exchange of views.

The most urgent priority is to put measures in place to minimize the risk of incidents at sea between government ships of China and the ASEAN member States. In 2014 the Western Pacific Naval Symposium reached agreement on a

Code for Unplanned Encounters at Sea (CUES)[7] in order to reduce the risk of an incident at sea when there are unplanned encounters at sea between the naval forces of two States participating in the agreement. A specific CUES-type agreement could be entered between China and the ASEAN member States for the South China Sea. However, it will have limited use if it only applies to naval vessels. Given that most of the Chinese government vessels in the South China Sea are coast guard vessels or other law enforcement vessels, any agreement should include unplanned encounters between the law enforcement vessels of two States as well as unplanned encounters between naval warships of one State and coast guard or law enforcement vessels of another State.

Other confidence-building measures that could be agreed upon include the following:

1) Maintaining the "status quo" on occupied features, including low-tide elevations
2) Not asserting sovereignty in the airspace above occupied islands
3) Having warships and other government vessel remain a minimum distance away from features occupied by another State
4) Agreeing on greater transparency about facilities on occupied features
5) Agree to define the limits of "militarization" on occupied features

Cooperative Activities are a form of confidence-building measures. They are also an acknowledgment by the parties that despite their differences and the existence of disputes on some issues, they have common interests that can be advanced through cooperation.

The potential cooperative activities that were listed in the DoC are:

a) marine environmental protection;
b) marine scientific research;
c) safety of navigation and communication at sea;
d) search and rescue operation; and
e) combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

It should be possible for China and the ASEAN member States to agree on some of these cooperative activities. However, when the activities in question are, according the rules of international law set out in UNCLOS, under the jurisdiction of the coastal State in whose maritime zone the activities are taking place, States may be reluctant to cooperate. This is because they may be viewed as having recognized the maritime claims of other States. For example, under UNCLOS marine scientific research can only be undertaken in the EEZ or on the continental shelf with the consent of the coastal State. China may be very reluctant to ask for the consent of the Philippines to carry out marine scientific research in the EEZ of the Philippines as it could be perceived as a recognition by China of the Philippines claim to an EEZ as well as a recognition by China that it has nor right to conduct scientific research in the area.

In my view, it will be easier for China and the ASEAN member States to agree to cooperative activities where each State agrees to exercise jurisdiction and control only over its nationals and ships flying its flag. If one State attempts to board and search vessels flying the flag of another State, the incident is likely to give rise to problems.

Given this concern, China and the ASEAN member States might find it easier to agree to cooperate to preserve and protect the marine environment. States have jurisdiction and control over ships flying their flag and over their nationals. States also have an obligation under UNCLOS to exercise due diligence in ensuring that any activities carried out by their nationals do not pollute the marine environment. Each State could assume responsibility for activities under their jurisdiction and control as follows:

a) Each State could agree that it will ensure that any ship flying its flag that enters to the South China Sea complies with the generally accepted international rules and standards on pollution from ships and on dumping of waste from ships.
b) Each State could agree to investigate and punish any ship flying its flag that is alleged to have polluted the marine environment in the South China Sea in violation of the such international rules and standards.

c) Each State could agree to strictly monitor the activities of its nationals on any geographic feature it occupies in the South China Sea, and to conduct an environmental impact assessment in accordance with best international practice before engaging in any activities on that feature (or on any coral reefs in the South China) if such activities may cause substantial pollution of or significant changes to the marine environment. States could further agree to make the EIAs available to the other parties in English.

China and the ASEAN States might also agree that it is in their common interest to cooperate to protect and preserve the living resources in the South China Sea. It may be premature to talk about all of the States ratifying the 1995 Fish Stocks Agreement[8] and establishing a regional fisheries management organization (RFMO) to manage the fisheries resources in the South China Sea in a sustainable manner. However, it should be possible for China and the ASEAN member States to agree to exercise jurisdiction and control over their nationals who are fishing in the South China Sea and over fishing vessels flying their flag who are fishing in the South China Sea. In particular, each State could agree to cooperate as follows:

1) To make it a crime with serious penalties for vessels flying its flag or its nationals to engage in destructive fishing practices in the South China Sea, including dynamite or blast fishing, cyanide fishing, and the use of certain equipment in fishing.
2) To make it a crime with serious penalties for vessels flying its flag or its nationals to harvest giant claims or other endangered species of marine life in the South China Sea, or to intentionally destroy coral reefs with motors or dredgers in order to harvest marine species.
3) To promptly investigate and punish any persons or the captains of fishing vessels that have engage in such activities.

Another relatively easy way that China and the ASEAN member States could cooperate in the South China Sea is take cooperative action to manage the fisheries resources in the South China Sea in a more sustainable manner. For example, China and the ASEAN member States could agree to impose a

moratorium or fishing ban during the same period, and to ensure that their nationals and fishing vessels flying their flag comply with the ban.

The DoC calls for such cooperation. However, it should also be noted and appreciated that UNCLOS also provides a legal basis for such cooperation. The South China Sea is a "semi-enclosed sea" as defined in Article 122 of the UNCLOS. Consequently, Article 123 of UNCLOS provides a legal basis for China and the ASEAN member States bordering the South China Sea to cooperate. Article 123 reads as follows:

> States bordering an enclosed or semi-enclosed sea shall endeavor, directly or through an appropriate regional organization:
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> 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;
> d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

CBMs and Cooperative Arrangements must be "Without Prejudice"

One of the reasons that there have been relatively few confidence building measures and cooperative arrangements under the DoC may be that States fear that if they undertake certain cooperative activities it will prejudice their position in the underlying sovereignty or maritime disputes. Other States could argue that if a State has undertaken cooperative activities in a certain area, it has in practice recognized the legitimacy of another State's claim in that area.

To address this problem, the document setting out the details of a cooperative arrangement or confidence-building measure should contain a clause making it clear that the actions under the arrangement are "without prejudice" to the underlying sovereignty and maritime disputes. A without prejudice clause means that:

- No claimant gives up or surrenders in any manner its historic position on sovereignty, maritime boundaries, historic rights or sovereign rights ;

- No claimant recognizes the legitimacy of the claims or historic positions of any other claimant; and
- Any cooperative arrangements or confidence building measures that are agreed upon cannot be taken into account in any subsequent negotiations or procedures aimed at finally resolve the sovereignty and maritime disputes.

In fact, it is not only the confidence building measures and cooperative arrangements that should be carried out on a "without prejudice" basis. Even taking part in discussions or negotiations to agree on confidence building measures or cooperative arrangements should be on a "without prejudice" basis. In other words, before entering into serious negotiations to implement the DoC, China and the ASEAN member States should agree that any statements made, positions taken or compromises made in the negotiations 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.

Issues Concerning the Adoption of a CoC

A legally binding CoC is the "Holy Grail" that has been called for by many States and observers to alleviate the tensions in the South China Sea. However, one must ask how a CoC will differ from the DoC. Will the content be more or less the same, but the document framed as a legally binding treaty rather than a solemn political statement? If so, will this really make a difference in the conduct of the parties? Given its reaction to the *Philippines v China case*, it is unlikely that China will agree to a dispute settlement provision in the CoC that provides for compulsory procedures before a court or tribunal. If the dispute settlement clause merely provides, like many ASEAN agreements, that any dispute on the interpretation or application of its provisions will be resolved by negotiations between the parties, would a CoC in practice be any different than the DoC?

Also, if the CoC is going to be legally binding, will the parties be more reluctant to include provisions with real substance than they would in a non-legally binding document?

In my view, any CoC will not prove to be effective unless it contains a "without prejudice" clause. In addition, it is more likely to be successful if it contains some mechanisms designed to encourage the parties to comply with its provisions. For example, if the parties agree in the CoC to adopt take certain actions, the CoC should contain a provision that requires the parties to submit a report to all the other signatories within a fixed amount of time setting out what actions they have taken. These reports could be reviewed by a committee and discussed at regular meetings of the parties.

Also, to be effective the CoC should contain some type of compulsory procedures that can be invoked if one party believes that the conduct of another party is contrary to what they has been agreed in the CoC. At a minimum, the parties should be required to exchange views on the issue and attempt to reach a settlement. If they cannot agree on how to resolve the dispute, either party should be able to submit the dispute to compulsory non-binding conciliation. Each party to the dispute could select one member of the conciliation commission, and those two conciliators should then be empowered to select a third, in consultation with the two parties to the dispute. The third member would serve as Chair of the Commission. The Commission could establish its own rules of procedure, and attempt to persuade the parties to the dispute to agree to an amicable settlement.

Finally, given the sensitivity of the issues in the South China Sea, it may be wise to negotiate the CoC as a framework agreement that sets out general procedures for confidence-building measures and cooperation, as well as general provisions to promote compliance by the parties as well as procedures for attempting to resolve disputes that may arise on its interpretation or application. Separate agreements could then be negotiated on specific confidence-building measures or cooperative activities. Each of the separate agreements could be negotiated as protocols to the main agreement. The main agreement should be ratified by China and all of the ASEAN member States, but the protocols could be ratified only by those States participating in the confidence-building measure or cooperative arrangement.

Conclusion

China's island-building has been completed and the decision of the Arbitral Tribunal in the *Philippines v China Case* has clarified some of the legal issues relating to the maritime claims. Therefore, it may be in the interests of both China and the ASEAN member States to focus on their common interests and enter into serious negotiations on the implementation of the DoC and the adoption of a CoC.

I have attempted to provide an international lawyers perspective on some of the issues that the negotiators may want to consider in negotiations on the adoption of confidence building measures and cooperative arrangements to implement the DoC and when negotiating a legally binding CoC.

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[1] Text available at http://www.aseansec.org/13163.htm.
[2] ASEAN-China Senior Officials Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea Kuala Lumpur, 7 December 2004.
3 Guidelines for the Implementation of the DOC, 2011, http://www.asean.org/storage/images/archive/documents/20185-DOC.pdf
[4] Joint Statement of The Foreign Ministers of ASEAN Member States and China on The Full and Effective Implementation of The Declaration on The Conduct of Parties in The South China Sea, 24 July 2016, Vientiane, available at http://asean.org/joint-statement-of-the-foreign-ministers-of-asean-member-states-and-china-on-the-full-and-efective-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea-24-july-2016-vie/
[5] United Nations Convention on the Law of the Sea, 1982. Text is available at http://www.un.org/Depts/los/index.htm.
[6] The Republic of the Philippines v. The People's Republic of China. The 12 July 2016 Award of the Arbitral Tribunal on the Merits is available on the website of the Permanent Court of Arbitration, which served as the Secretariat to the Tribunal. http://www.pcacases.com/web/view/7.
[7] The text of CUES is available at https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea
[8] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995. Text is available at http://www.un.org/Depts/los/index.htm.