A South China Sea Code of Conduct: A hopeful reality or a hopeless falsity?

The Maritime Issues conducts a conversation with Southeast Asia-based experts on issues related to a Code of Conduct (COC) for the South China Sea.

In May 2017, China's Foreign Ministry announced that ASEAN and China had reached an agreement on a framework for the long-awaited code of conduct (COC) for the South China Sea. Yet, no details have been released. Chinese officials expressed optimism about the progress ASEAN and China have made so far. However, observers exhibited skepticism over substantive progress toward a meaningful COC.

In order to get a better understanding of the progress and anticipate the prospect for a COC for the South China Sea, *The Maritime Issues* (MI) conducted a conversation with four Southeast Asia-based experts in the field, including Dr. Ha Anh Tuan from Diplomatic Academy of Vietnam, Mr Evan A. Laksmana from Centre for Strategic and International Studies, Indonesia, Professor Richard J. Heydarian from De La Salle University, the Philippines and Dr. Ian Storey from the ISEAS Yusof Ishak Institute, Singapore.

MI Question: What are there in the framework of the COC on which China and ASEAN countries reportedly agreed recently? Should such a step be considered a tangible progress toward a viable COC?

Evan A. Laksmana: The supposedly agreed upon COC framework, based on media reports and conversations with regional officials, appears to be a restatement of existing "joint statements" and "principles" previously made regarding the South China Sea since the 2002 DOC. There does

not appear to be any firm timeline of a final let alone a legally binding COC, nor is there any clear description of how such a document might look like and how it might implemented. As such, the COC framework, in my opinion, is nothing more than an attempt to present an illusion of progress when in fact we are nowhere near to a final and legally binding COC. This development is of course troublesome if not ironic given the fact that the ASEAN-China DOC-COC setup was designed as a temporary tension management mechanism necessary before final delimitation negotiations between the claimants. In other words, the latest "framework" is nothing more than an effort to shift the goalpost while claiming success.

Richard J. Heydarian: Based on the final document that I have seen, to put it bluntly, it is barely an outline -- not even a framework. It just sets outs a series of concepts and principles, which are already well reflected in existing documents. In some ways, I see the framework as a prelude to a repackaged Declaration on the Conduct of Parties in the South China Sea, since dispute-settlement mechanisms and any reference to relevant UNCLOS provisions (and Philippine arbitration) is excluded, so far. In the section on “objectives”, the framework outline states: “To establish a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea.” The operative term is ‘norms’, which denotes the absence of a legally-binding nature. In the section on “principles”, this is quite clear, where it states clearly that the final COC will not be, “an instrument to settle territorial disputes or maritime delimitation issues.”

Ian Storey: The draft framework is underwhelming. It’s slightly over a page long, contains general rather than specific provisions and includes a lot of boilerplate language. Disappointingly, but perhaps not surprisingly given China’s opposition, the phrase “legally binding” does not appear —instead the draft refers only to a “rules-based framework” which is not nearly the same. Is it progress? It’s limited progress but highly disappointing after more than three years of talks.

Ha Anh Tuan: The agreed draft framework of the COC is so far a confidential document. However, it is a very short document containing basic issues when referring to the COC. It is even generally considered as a just an outline, which is short of a tangible progress toward a viable COC because there is nothing substantial and new in the draft. However, looking from a more optimistic perspective, reaching an agreement is better than having nothing. It shows the efforts of all concerned parties in reaching certain consensus on this issue.

MI Question: In your own opinion, what is the momentum behind this development? Why has China been keen on pushing the COC consultation this time?

Evan A. Laksmana: China has been pushing the COC consultation less of an effort to finalize the COC than a ploy to "dangle the carrot" of a possible COC, which would tactically allow Beijing to control ASEAN's strategic narrative following the 2016 tribunal ruling, the elevation of Trump, and a Duterte presidency highly favorable to Beijing. If Beijing is perceived by ASEAN to be "finally willing" to negotiate a COC--and the "framework" is the current "prize"--then it is not surprising that ASEAN statements over the past year have been more accommodative of Beijing's wishes (i.e. watered down or meaningless vague references to the South China Sea). With a pro-Beijing Manila under Duterte and a Trump presidency seemingly willing to "play nice" with China to get it to better manage North Korea, China sees a strategic opening to control the narrative in Southeast Asia while securing its South China Sea interests by essentially giving away nothing but an empty carrot in the form of a "framework".

Ha Anh Tuan: China is certainly instrumental in this development. Since early this year, Beijing has publicly announced that it wants to reach an agreement concerning the COC with Southeast Asian countries by the middle of the year. China's active push to reach an agreement with ASEAN countries on the draft framework of the COC is a part of its recent broad strategy to

advance its cooperative initiatives in the SCS. There are two main reasons for this: Firstly, China has basically completed its land reclamation and artificial island building in the Spratlys, and it will drive the COC discussion and agreement towards the direction in which a COC, if agreed, would not be able to prevent China from expanding its physical presence in the region in the future. Secondly, with the agreement on the draft of COC framework, Beijing wants to show the world that China and Southeast Asian countries can cooperate to manage maritime disputes in the SCS, thus playing down the role of the 2016 South China Sea arbitral award, which was a devastating defeat for China, and keeping extra-regional powers, most notably the US, out of the region.

Richard J. Heydarian: I think there is a recognition in Beijing that it has to recreate a new veneer of ‘diplomatic engagement’ to push back against growing regional and international criticism over its aggressive reclamation and attendant militarization of artificially-created islands across the South China Sea. Satellite imageries, media articles, and government outlets have unambiguously exposed the extent of Chinese maritime ambition and assertive tendencies in the area. From China’s point of view, it is crucial to get its ‘peripheral diplomacy’ right by projecting itself as a responsible power, which is willing to peacefully manage disputes with smaller powers. The reality is that, the latest round of negotiations over a COC framework is likely part of the tried-and-tested “talk and take” strategy, whereby China changes facts on the ground on a daily basis, while engaging in hermeneutic circles of diplomatic exchanges without clear commitment to any binding set of rules. The COC negotiations also provide China with a pretext to tell external powers, particularly the United States, to ‘stay out’ of the disputes, since they are purportedly being peacefully addressed by claimant states.

Ian Storey: For several years, some ASEAN members had been calling on China to expedite the COC process. However, it wasn’t until after the Arbitral Tribunal issued its award on 12 July 2016 that China finally agreed to do so. Presumably this was to deflect criticism away from its

refusal to recognize or abide by the Tribunal's ruling. By agreeing to accelerate talks on the COC, China gives the impression of being cooperative and constructive. However, I still believe that China's aim is to drag out the talks for as long as possible and ensure that the final product in no way limits its freedom of action in the South China Sea.

MI Question: Why have ASEAN countries, collectively and individually, embraced the idea of a framework for the COC, not a full document? How do they see the value of a COC framework?

Richard J. Heydarian: The ASEAN is divided when it comes to the South China Sea disputes. Internal divisions and external pressure (from China) are just too robust to allow for any unified position on the issue. Then you have the fact that countries like the Philippines, the current chair of the ASEAN, made a complete turnabout once it elected a new president, who is deliberately prioritizing bilateral economic benefits from China at the expense of a coherent, effective and commensurate regional approach to the South China Sea disputes. The COC framework is at best a 'useful narrative', which allows the Philippines to claim success as the ASEAN chair. It is the 50th anniversary of the regional body and the South China Sea disputes are entering a dangerous stage. Thus, it makes perfect sense to "get something done" -- and a framework is the least common denominator at this point in time, where no one really loses anything, including China, but everyone gains something by claiming to have achieved something, when in reality they are simply providing one major power with even more leeway to push the envelope in disputed waters.

Ian Storey: The ASEAN states would like to have seen a legally-binding and comprehensive COC signed several years ago, but this was not possible due to Chinese foot dragging. Right from the start China set the pace of the talks, and that pace was dead slow ahead. Unfortunately, there is little the ASEAN states can do to get China to move any faster. China's agreement to issue a draft framework for the COC was therefore presented by ASEAN as a welcome sign of progress and

proof that its efforts to manage the dispute with China were paying dividends. However, some ASEAN states, and especially the claimant states, will have been very disappointed at the framework's lack of substance, and particularly at the absence of the phrase "legally binding".

Ha Anh Tuan: Looking back over a decade ago, it was ASEAN countries that proposed to negotiate a COC to create a binding mechanism for the behavior of regional countries in the SCS, thus helping maintain peace and stability in the region. At that time, however, Beijing often avoids discussing a binding mechanism. So when China expressed a willingness to discuss the COC, ASEAN countries are supportive of this new development. However, creating a full-fledged COC acceptable to all signatories and more valuable than DOC is a very difficult task. That's why ASEAN countries (and thus ASEAN as a whole) embraced the gradual approach, which is to reach an agreement on the draft framework of the COC first.

As I stated earlier, many observers do not see the signature of a COC framework as a milestone in Sino-ASEAN cooperation to manage maritime disputes in the SCS because it does not carry game-changing terms. Nonetheless, reviewing ASEAN's history reveals that its gradual approach often brings about concrete result. I do not know how ASEAN countries really think about COC framework, but I personally believe that it is a new development in China-ASEAN cooperation to manage disputes in the SCS.

Evan A. Laksmana: With China never going to budge much, if at all, on the South China Sea, and with Manila swinging wildly from one extreme to another (submitting the tribunal process but ignoring the results), any sense of public progress--even if meaningless in practice--may have been preferable to nothing. Manila, after all, didn't fully consult all ASEAN members when it submitted its case to the UNCLOS tribunal. Further, when ASEAN celebrated its 50th anniversary, questions and debates over the group's relevance and strategic salience grew louder and louder. What better way to silence those criticisms than to present a "prize" of progress in the toughest issue of them all? ASEAN is eager to move on to other things than the South China Sea

that has "held the group hostage" for the last several years. Finally, with the focus so much on the South China Sea, ASEAN member states have been "getting a pass" on their domestic political challenges--think of the situation in Myanmar, Southern Philippines, Thailand, or even Malaysia.

MI Question: How will the COC relate to the DOC? Why are the two processes needed simultaneously?

Ha Anh Tuan: The COC will definitely inherit the spirits and principles set out in the DOC. At the same time, it must be seen as a further step towards a substantial cooperation between China and ASEAN countries. However, as I noted before, it is unrealistic to expect a full binding COC to be completed in a near future. Until then, promoting a full and effective implementation of DOC would contribute to regional stability. Fostering DOC will also enhance regional trust and maritime cooperation, which in turn, play a vital role in building a binding COC. That explains why the two processes are currently conducted simultaneously.

Evan A. Laksmana: The processes between the signing of the 2002 DOC and the final yet-to-be-determined COC are not publicly known, discussed, or fully disclosed. Therefore, we cannot say for sure how and when exactly the DOC is supposed to specifically lead to a final and legally binding COC. We do know the post-DOC processes have been used to generate a habit of negotiations and dialogue, albeit in a snail-pace manner, between ASEAN and China. Thus, in a way, the DOC and COC are not "simultaneous", but sequential: the DOC sets the stage for discussions to eventually produce the COC.

Richard J. Heydarian: The DOC issue was settled back in 2002. The next step was obviously to negotiate a legally binding Code of Conduct, transcending pure declaratory commitments. But all of a sudden, we have this perplexing, distracting, and enervating dual-track process, which, after a decade of talks, has brought us nowhere near to any kind of resolution. If anything, we are even more confused than when we started the whole process of finding a set of commonly agreed upon

rules among clamant states in the South China Sea in the 1990s. I see the whole gambit as part of a deliberate delaying tactic by one country -- the one giant nation that is dominating all the disputed areas in the South China Sea. And the ASEAN -- currently too divided and weak and internally focused -- is just tagging along with this difficult game.

Ian Storey: At the moment, it's unclear how the COC will relate to the DOC. In my opinion, the two sides should focus all their efforts on the COC, and incorporate useful elements of the DOC into the final agreement. A cynic might accuse China of wanting the two processes to be simultaneous so as to dilute diplomatic resources and draw out the talks for as long as possible.

MI Question: What will be the next step after the framework has been done? What are the key stumbling blocks toward a binding COC?

Evan A. Laksmana: In theory, after the framework is done, ASEAN and China need to figure out how to build on it and finalize a legally binding COC. At this point, however, especially given Manila's ambivalence, such a COC document may not be forthcoming. Best-case scenario? The framework becomes a statement of principles that would allow ASEAN and China to *not* discuss the South China Sea while possibly exploring some form of joint development and cooperation among claimants bilaterally rather than regionally. Worst case? The framework becomes an empty "statement of normative ideas" while China fully militarizes and effectively controls all of the South China Sea to the point of no return--and any "delimitation negotiation" will begin with China as effectively exercising sovereign rights while other claimants "ask for permission" (think of the Scarborough Shoal). In any case, either the COC becomes moot and meaningless as a goal, or China simply refuses to move forward to it. Either way, the COC framework in itself does not provide strategic benefits to ASEAN and Southeast Asian states.

Richard J. Heydarian: I don't see any major stumbling block if the involved parties are simply

looking at a repackaged DOC under the name of COC. The outcome will be toothless and meaningless enough for it to be acceptable to both ASEAN and China, though I suspect one or two countries within ASEAN will be very disappointed. The real challenge is to upgrade the current vacuous framework into a full-fledged legally-binding document, which will compel, at the very least, China and other parties to refrain from coercive military and para-military actions, large-scale artificial island building, and deployment of advanced military hardware to disputed areas. For me, the COC challenge is simple: “Either go big, or go home.” For the negotiators it seems, it is, “Forget about going big, let’s just come up with something to show.” This is the tragedy of small power politics for the ASEAN, which runs a risk of fading into irrelevance in the South China Sea disputes.

Ian Storey: ASEAN and Chinese officials will no doubts continue to meet at the working group and senior officials’ level to try and add flesh to the bones of the draft framework. I expect this process to be protracted and frustrating for those ASEAN officials who would like to see a legally-binding and comprehensive COC signed as soon as possible. The main areas of difficulty in negotiating the COC will be whether it will be legally binding, which areas of the South China Sea it will cover, what kinds of activities it will prohibit, how the agreement will be implemented and monitored and whether it will be enforced. The devil will be in the detail and it could take several more years before final agreement is reached. China is no hurry that’s for sure.

Ha Anh Tuan: As China and ASEAN countries have agreed on the draft framework of the COC, the usual procedure is that they will go into technical issues and discuss in more details about a full COC. There are many major issues on which involved parties have not agreed. One outstanding challenge for them is to agree upon the geographical areas that can be seen as "disputed", or they have to keep it as vague as "the South China Sea". However, in that case, it is hard to make the COC a binding one, as we would not know where the COC would apply. Another stumbling block is to reach a consensus on the effect of the COC and how to make it

enforceable. The legal case of the Philippines against China in the South China Sea has shown that enforcing international law is very difficult, especially if the decision is against the interest of major powers. Other issues include technical concerns, such as whether Southeast Asian participants are named as individual countries or as members of ASEAN, and how the conflict resolution mechanism should be established within the COC./.

Biographies of the Panelists

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