

A Code of Conduct for the South China Sea?

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On July 20, 2012, foreign ministers of the Association of Southeast Asian Nations (ASEAN) called for “the early conclusion of a Regional Code of Conduct in the South China Sea.” The statement that the Cambodian foreign minister, as chairman of the July 9 ASEAN Ministerial Meeting, issued on behalf of his colleagues invoked past ASEAN agreements pertaining to the rule of international law, self-restraint, the non-use of force, and the peaceful resolution of disputes. Based entirely on an Indonesian draft cleared with all ASEAN member-states, the statement laid down what were the positions of ASEAN, claimants and non-claimants alike, on the South China Sea and their interests in it.

When contemplating a Code of Conduct for the South China Sea, some facts ought to be taken into consideration and certain issues have to be resolved – or fudged – or, in any case, addressed.

One of those facts is what caused the downgrading of the 2002 document from what it initially was, a legally binding code, to a political declaration called, awkwardly, the Declaration on the Conduct of Parties in the South China Sea, which all of ASEAN’s foreign ministers and Wang Yi, China’s vice foreign minister, signed Nov. 4, 2002. The downgrading resulted from questions about where the “legally binding” code would apply. The question was raised primarily because of the dispute over the inclusion of the Paracels between Vietnam, which maintained its claim to the Paracels, and China, which had – and has – occupied them and steadfastly refused even to discuss the Paracels as disputed territory in the South China Sea.

Another geographical uncertainty was the location of the nine dashes on the U-shaped line around the South China Sea on Chinese maps. The location of those dashes has never been pinpointed, China not having supplied the usual coordinates for them. Nor has the nature of the Chinese claim been clearly defined. Is the claim only to land features encompassed by the nine-dashed, U-shaped line and their “adjacent” or “relevant” waters, as some official Chinese statements assert? Or to all the waters of the South China Sea, as others fear? In the absence of such precision, is it possible to agree on a legally binding code?

Pressing China to clarify its claim, including defining precisely and clearly the location and nature of the nine-dashed line, might back the Chinese into a corner and induce

them to take an even harder line than it does today. That is, however, a matter of political calculation.

In any case, uncertainty over where a “binding code of conduct” would apply was one of the factors cited for downgrading the 2002 instrument from a legal code to a political declaration. A code of conduct continues to be proposed. The 2002 Declaration called for the “eventual” adoption of a code of conduct. At the July 2011 ASEAN ministerial meeting, “guidelines” for the implementation of the Declaration were adopted, including the approval of a code of conduct. The chairman’s statement of the November 2011 ASEAN Summit stated that ASEAN’s leaders “look forward to the conclusion of a regional code of conduct.”

Is uncertainty about its area of application still a factor in and an obstacle to its adoption? If it is, how do the supporters of a code of conduct propose to overcome the problem? In other words, would the Paracels be included in the code’s area of application? Would the location and nature of the nine-dashed line on Chinese maps be more clearly defined? If these issues would be fudged in the proposed document, as is most likely at this time, how would this be done?

Another question is whether such a code would be concluded between China and ASEAN as a whole or between China and individual claimant-states only. This is the well-worn issue of bilateralism, which China insists upon, and multilateralism, which most ASEAN states prefer.

Technically, ASEAN and ASEAN-related agreements are entered into by individual members of an inter-governmental association of sovereign states and signed by their respective leaders or plenipotentiaries. For example, the November 2002 Declaration on the Conduct of Parties begins, “The Governments of the Member States of ASEAN and the Government of the People’s Republic of China.” It ends with the signatures of all foreign ministers of ASEAN and the Special Envoy of China.

However, the fact is that the Declaration was negotiated among ASEAN officials first, before they sat down, together, with Chinese counterparts. It was concluded on the occasion of the ASEAN-China Summit meeting. It is the popular assumption, in media and academic circles, that, in a real sense, ASEAN as a whole is affected by the conflicting claims in the South China Sea

With specific reference to the South China Sea, the chairman’s statements of both the November 2011 and April 2012 ASEAN Summits, chaired, respectively, by the Indonesian president and the Cambodian prime minister, noted that the 2002 Declaration had been “signed between ASEAN and China.” The November 2011 ASEAN document enjoins ASEAN and China to “work together to fully and effectively implement the DOC” (Declaration on Conduct).

It is also true that the sovereignty and jurisdictional issues can be resolved only through negotiations or adjudication involving the claimant-states themselves, but not, in the case of most of them, bilaterally. Most of the disputes in the Spratlys and other parts of the South China Sea (pending clarification of the claims) are more than bilateral in nature, an important source of their complexity. They involve more than two parties. Only the Paracels, among the objects in dispute, seem to be susceptible to bilateral treatment — again, pending clarification of the claims.

In any case, not only the claimants but all of ASEAN and other countries that use the South China Sea as a lane of commerce have a stake and interest in peace and stability in the region, the prevalence of the rule of international law, the non-use of force in the pursuit of jurisdictional claims, and the freedom of navigation and overflight. The statement issued by Cambodia's foreign minister July 20 says as much with respect to ASEAN.

All this gives rise to another question, and that is whether ASEAN members should consult among themselves before holding discussions with China on the South China Sea. First, this matter is for ASEAN, and ASEAN alone, to decide. In exercising their sovereign rights and in the interest of ASEAN solidarity, ASEAN members do undertake consultations on important international, regional, and even national issues all the time. The joint communiqué of the July 2011 ASEAN Ministerial Meeting reported, "(W)e initiated discussion in ASEAN on a regional Code of Conduct in the South China Sea (COC). We look forward to intensive discussion in ASEAN on a regional Code of Conduct in South China Sea (COC). In this regard, we tasked the ASEAN SOM to work on the development of the COC and submit a progress report to the 19th (November 2011) ASEAN Summit." According to its chairman's statement, the Summit welcomed "the commencement of discussion in ASEAN to identify the possible key elements of a regional code of conduct." I understand that such intra-ASEAN discussions have already taken place and that the results have been given to China as a basis for negotiation.

So, at what stage China should be involved in the negotiation and formulation of the proposed code of conduct? Some in ASEAN think after ASEAN has reached consensus; others in ASEAN insist that China should be involved from the beginning. In a sense, this question has been rendered moot and academic by the issuance of the ASEAN foreign ministers' statement July 20, although it may be presumed that the draft was cleared with the Chinese beforehand.

Timing is another question. The longer the prospect of a code of conduct tantalizes those waiting for it, the more the Chinese and those sympathetic to them and their positions can claim that others, like the United States, should keep out and not "complicate" the issue, since China and ASEAN are taking care of it, primarily through negotiations on a code of conduct. This is probably why the July 20 ASEAN statement called for "the early conclusion" of a code of conduct. But how early is "early"?

Another fundamental reason why the problems arising from the conflicting claims in the South China Sea are so

difficult and intractable is that all claimants feel that their footholds in the South China Sea are essential to what they consider as their national interests.

The Chinese fear that those who try to prevent or resent their country's rise might use the South China Sea to contain it. Many of them remember that many of the powers that subjected China to centuries of humiliation invaded from the southeast. Vietnam recalls that China colonized Vietnam for more than 1,000 years, and, more recently, China attacked Vietnam in 1978, and China gained a foothold in the South China Sea by ejecting, first, South Vietnamese troops from their half of the Paracels in 1974 and then the forces of a unified Vietnam from some of the Spratlys in 1988. If Vietnam were to compromise its claims to the South China Sea, it would be almost surrounded by land features and maritime regimes that China claimed as its own.

Filipinos do not forget that Japan invaded their country from some of the Spratlys and, therefore, feel the need, for geopolitical reasons, to push their western frontier as far out as possible. There is also the demand for fish in the diet of almost 100 million Filipinos and for oil and gas for the economy of energy-hungry Philippines.

The two wings of Malaysia, which bases its claim on the claimed features' location on its continental shelf, on their proximity to the Malaysian mainland, and on national security, are not only divided but also linked by a large expanse of the South China Sea. Brunei Darussalam feels the need for the resources lying within and beneath its "exclusive fishing zone" and continental shelf against the day when its currently lucrative oil and gas fields run dry. The Malaysian and Brunei claims, as well as those of others, overlap. In March 2009, the two countries' leaders announced "the final delimitation of maritime boundaries" between them; the text of the agreement has not been released, however.

This clash of national interests underlies the conflicting claims in the South China Sea. It makes it most difficult even to appear to be making compromises on national territory or maritime regimes and, thus, almost impossible to resolve disputes there. Nor does it help that, as policy-makers enjoy shorter and shorter tenures and societies increasingly open up, more people acquire influence on policy while being more vulnerable to over-simplified concepts.

The disputes in the South China Sea cannot be resolved anytime soon, if at all. The most that can be done is to prevent them from developing into armed conflict. This could be the overarching aim of any code of conduct that ASEAN and China might produce. It should, at the very least, declare that national interest could be pursued but not at the expense of those of others. In no case should force be used in that pursuit.

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