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PERSPECTIVE

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Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea

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EXECUTIVE SUMMARY

- In Manila on 6 August 2017, the foreign ministers of ASEAN and China endorsed the framework for the Code of Conduct for the South China Sea (COC).

- While the framework is a step forward in the conflict management process for the South China Sea, it is short on details and contains many of the same principles and provisions contained in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) which has yet to be even partially implemented.

- The text includes a new reference to the prevention and management of incidents, as well as a seemingly stronger commitment to maritime security and freedom of navigation. However, the phrase "legally binding" is absent, as are the geographical scope of the agreement and enforcement and arbitration mechanisms.

- The framework will form the basis for further negotiations on the COC. Those discussions are likely to be lengthy and frustrating for those ASEAN members who had hoped to see a legally binding, comprehensive and effective COC.

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INTRODUCTION

On 6 August 2017 in Manila, the foreign ministers of China and ASEAN endorsed the framework on the Code of Conduct for the South China Sea (COC). The framework had earlier been approved by the ASEAN-China Senior Officials Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea (SOM-DOC) in Guiyang, China on 19 May 2017.

The framework was broadly welcomed by ASEAN and Chinese leaders. In their joint communique—which was delayed for nearly 24 hours due to differences between some ASEAN members on how the dispute should be characterized—the ASEAN foreign ministers said they were "encouraged" by the adoption of the framework which would "facilitate the work for the conclusion of an effective COC on a mutually-agreed timeline".[1] ASEAN Secretary-General Le Luong Minh said he hoped the framework would "pave the way towards meaningful and substantive negotiations towards the conclusion of a COC" but added that if the code was to be effective at preventing and managing incidents in the South China Sea it would have to be legally binding—a phrase that does not appear in the framework.[2] Singapore's Foreign Minister Vivian Balakrishnan called the framework "an important document because it represents, in a sense, consensus and more important than that, a commitment on behalf of the 10 Asean states and China to make progress on this long overdue issue."[3] According to China's Foreign Minister Wang Yi, the framework "brings stability to the issue, demonstrating a positive momentum. This shows our common wish to protect the peace and stability in the South China Sea."[4] More ominously, however, Wang went on to say that substantive negotiations on the contents of the code could only begin if there was "no major disruption from outside parties", a veiled reference to the United States which China has consistently accused of "meddling" in the dispute.[5]

The process of negotiating a COC has been long and arduous. The 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) had called on the parties to adopt a COC.[6] The difference between the DOC and the proposed COC was never made clear, though some ASEAN members, especially the Southeast Asian claimants, envisaged a legally-binding agreement that would be more comprehensive and effective than the DOC which was a non-binding political statement.

It was not until 2013 that China agreed to start talks with ASEAN on the COC. Due to rising tensions in the South China Sea, when the discussions started in early 2014 some ASEAN members repeatedly called for the talks to be expedited. However, it was not until after the

[1] Joint Communique of the 50th ASEAN Foreign Ministers' Meeting, Manila, Philippines, 5 August 2017.
[2] "Deal on framework of South China Sea code", *Straits Times*, 7 August 2017.
[3] Ibid.
[4] Ibid.
[5] "Framework for South China Sea code adopted", *Today*, 7 August 2017.
[6] 2002 Declaration on the Conduct of Parties in the South China Sea, available at <http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

Arbitral Tribunal at The Hague had issued its historic ruling on 12 July 2016[7] that China consented to accelerate the talks.[8] There are two possible reasons why China agreed to do so. First, that Beijing wanted to deflect criticism away from its rejection of the Tribunal's award and instead project the image of a cooperative partner. Second, Philippine President Rodrigo Duterte's response to the ruling. Although the award was overwhelmingly in favour of the Philippines, Duterte decided to put it to one side and prioritize strengthening economic ties with China while addressing the two countries' overlapping maritime territorial and jurisdictional claims on a bilateral basis. Duterte's approach led to a significant reduction of Sino-Philippine tensions in the South China Sea, especially after Beijing lifted its blockade of Scarborough Shoal in October 2016 which had prevented Filipino fishermen from fishing at the reef since May 2012. The easing of tensions between the Philippines and China may also have contributed to better atmospherics in ASEAN-China relations.

In the first half of 2017, ASEAN and Chinese officials met three times to discuss the COC. At the 19th ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea (JWG-DOC) meeting in Bali, Indonesia on 27 February the two sides agreed on the basic outline of the draft framework. A longer, one-page version was subsequently discussed at the 20th JWG-DOC in Siem Reap, Cambodia on 30 March 2017. This version was amended slightly during the SOM-DOC meetings in Guiyang in May. This article focuses on the contents of the framework and explains the meaning behind some of the language employed.

The framework is slightly over a page long and is divided into three parts: 1. Preambular Provisions; 2. General Provisions; and 3. Final Clauses.

PREAMBULAR PROVISIONS

"Preambular Provisions" lists only three brief items: a. Bases of the COC; b. Inter-connection and interaction between DOC and COC; and c. Importance and aspirations.

Although part b does not explain in detail what the relationship between the DOC and COC will be, according to those familiar with the talks China views the COC as part of the implementation process of the DOC, and that accordingly the DOC will heavily influence the contents of the COC. This suggests that the final COC may not look very different from the DOC. As Chinese officials have repeatedly stressed, people should lower their expectations that the COC will be radically different from the DOC.

[7] PCA Case No. 2013-19, "In the Matter of the South China Sea Arbitration before An Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People's Republic of China: Award", 12 July 2016, available at < https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.
[8] "Asean urges self-restraint in South China Sea activities, no mention of tribunal ruling", *Straits Times*, 25 July 2016.

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GENERAL PROVISIONS

"General Provisions" is composed of three parts: a. Objectives; b. Principles; and c. Basic undertakings.

The first objective is "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". Significantly the phrase "rules-based framework" is used rather than "legally binding" which some ASEAN states had long envisaged the COC to be. However, as China is opposed to a legally binding code because it would limit its freedom of action in the South China Sea, and because the ASEAN states themselves do not have a consensus on this issue, the phrase has been omitted. Whether it will be included in later versions of the COC remains to be seen, but China will almost certainly try to ensure that it does not. Thus the final COC is likely to be voluntary and non-binding, as is the DOC and the 2014 Code for Unplanned Encounters at Sea (CUES).

The second objective is "To promote mutual trust, cooperation and confidence, prevent incidents, manage incidents should they occur, and create a favourable environment for the peaceful settlement of the disputes." In the DOC the parties also agreed to build "trust and confidence" and "enhance favourable conditions for a peaceful and durable solution of differences and disputes among the countries concerned". However, this is the first time they have agreed to prevent and manage incidents at sea. Reference to the prevention and management of incidents highlights that the frequency of tension-generating activities has increased significantly since the DOC was signed in 2002—and especially after 2007-08—and the pressing need to better manage the dispute and prevent potentially dangerous incidents from occurring and escalating.

The third objective is "To ensure maritime security and safety and freedom of navigation and overflight". The parties to the DOC also "reaffirmed their respect for and commitment to the freedom of navigation in and overflight above the South China Sea" but "ensure" sounds slightly stronger than "respect for and commitment to", and underscores the concern of some ASEAN states that the dispute risks undermining freedom of navigation, especially if China declared an Air Defence Identification Zone (ADIZ) over the South China Sea as it did over parts of the East China Sea in November 2013. China's position is that the dispute does not threaten freedom of navigation.

The "Principles" section is divided into four parts. The first principle is that the COC is "Not an instrument to settle territorial disputes or maritime delimitation issues." This is not as controversial as it may seem, as the ASEAN member states have never given the organization a mandate to resolve the dispute; that can only be done by the claimants themselves, either through legal arbitration or political negotiations, bilaterally or multilaterally. This sentence is included in the framework to disabuse the notion that the COC will help "resolve" the sovereignty and jurisdictional disputes among the claimants as is sometimes erroneously claimed in media reports.

The second principle is a commitment to the "purposes and principles" of the United Nations Charter, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Treaty of Amity and Cooperation, the Five Principles of Peaceful Coexistence and

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"other universally recognized principles of international law". This language also appears in the DOC and has formed the basis of ASEAN-China ties since dialogue relations were established in 1991.

The third principle is a "Commitment to full and effective implementation of the DOC", which ASEAN and China have previously agreed to. How the DOC will be fully and effectively implemented is not addressed. ASEAN and Chinese officials have been discussing ways to do so since 2005 with little progress. As noted above, China appears to view the COC as part of the process of implementing the DOC.

The fourth principle is "Respect for each other's independence, sovereignty and territorial integrity in accordance with international law, and the principle of non-interference in the internal affairs of other states." This clause is new, though it reiterates principles one and three of the Five Principles of Peaceful Coexistence. Repetition is used to reinforce the importance of these two principles in the conduct of ASEAN-China relations especially in light of the growing asymmetry in power between China and Southeast Asian countries since the DOC was signed in 2002.

"Basic undertakings" consists of six parts: i. Duty to cooperate; ii. Promotion of practical maritime cooperation; iii. Self-restraint/Promotion of trust and confidence; iv. Prevention of incidents, followed by two bullet points —the first "Confidence building measures" and the second "Hotlines"; v. Management of incidents, followed by a bullet point that repeats "Hotlines"; and vi. "Other undertakings in accordance with international law, to fulfil the objectives and principles of the COC."

"Duty to cooperate" is an obligation under UNCLOS, which all the parties have ratified except Cambodia. While not stated in the text, part ii is believed to include activities such as search and rescue, maritime scientific research, environmental protection and combating transnational crime at sea, which China has been keen to promote. Cooperative activities in these functional areas were also included in the DOC.

The phrase "self-restraint" is not defined and this was one of the major shortcomings of the DOC. Because it was left undefined, the various parties have interpreted it as they see fit. Since 2002, the claimants have accused each other of violating the self-restraint clause while they themselves have engaged in activities that clearly breach this clause—from repairing an existing runway to, in China's case, terraforming seven tiny features into large manmade islands. If the DOC is to add value to the DOC, "self-restraint" will need to be defined.

Linked to the "self-restraint" clause is the "Prevention of incidents" which is a new and welcome development as it suggests that in the future ASEAN and Chinese officials might be able to agree on a list of activities that their armed forces, and possibly their coast guards, are prohibited from undertaking, much like the 1972 US-USSR Incidents at Sea agreement which included a long list of "dos and don'ts". The DOC also called on the parties to establish confidence-building measures and listed five possible areas. In 2016, ASEAN and China agreed to apply CUES to the South China Sea and approved guidelines to establish diplomatic hotlines for use during maritime emergencies and crises, both of which could be incorporated into the final COC.

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FINAL CLAUSES

The third and last part of the framework is Final Clauses. It has five brief lines: a. "Encourage other countries to respect the principles contained in the COC"; b. "Necessary mechanisms for monitoring of implementation"; c. "Review of the COC"; d. "Nature"; and e. "Entry into force."

On the surface, part a seems innocent enough, but it seems that Beijing's intention is to frame the South China Sea as an issue between China and the Southeast Asian claimants only—with ASEAN playing a limited role in conflict management—and that other stakeholders, especially the United States and Japan, should not "interfere" in the dispute. This conforms to China's long-standing position which was reiterated by Foreign Minister Wang in Manila.

Parts b and c seem to indicate that the final agreement will be monitored by the SOM-DOC, supported by the JWG-DOC, which will then report to meetings of the foreign ministers of China and ASEAN who could call for a review of the COC if they deemed it necessary.

Parts c and d are extremely important in that they leave open the prospect that the COC could be legally binding. The COC would then have to be ratified according to the domestic processes of China and the ten ASEAN members. As noted earlier, however, China is firmly opposed to a legally binding code.

WHAT'S MISSING?

Apart from detailed provisions and the phrase "legally binding", there are several important issues which are not included in the agreement.

First, the framework does not mention the geographical scope of the COC, including whether it will apply to both the disputed Paracels and Spratly Islands or only to certain areas. During negotiations for the DOC, Vietnam had argued that the names of the two archipelagos be included, but as consensus could not be reached they were omitted. So long as the COC applies to the entire South China Sea, this may not present a problem.

Second, while the text mentions "mechanisms for monitoring of implementation", it is silent about enforcement measures and arbitration mechanisms should one party accuse another of violating the code. Generally speaking, ASEAN eschews enforcement clauses in its agreements. Nevertheless, the absence of enforcement measures and arbitration mechanisms will weaken the effectiveness of the final COC.

OUTLOOK

Despite its shortcomings, ASEAN and China's endorsement of the framework is a step forward in the two-decade long conflict management process for the South China Sea. Going forward, the framework will form the basis of negotiations between ASEAN and China on the COC. However, if past is prologue, this process is likely to be protracted and

frustrating, especially for those Southeast Asian countries who are keen to have a legally-binding, comprehensive and effective COC in place as quickly as possible.

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