



Anatomy of the Code of Conduct Framework for the South China Sea

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In Manila on August 6, 2017, the foreign ministers of the Association of Southeast Asian Nations (ASEAN) and China endorsed a framework for a code of conduct in the South China Sea (CoC). The framework had earlier been approved by senior officials from ASEAN and China at a meeting in Guiyang, China, on May 19.

Statements by the two sides were broadly welcoming of the framework. In their joint *communiqué*—which was delayed for nearly 24 hours due to differences between some member states on how the South China Sea 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.” 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 a note of caution: 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.

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.” But Wang went on to warn 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.

From a glass-half-full (or slightly less) perspective, the framework represents progress; from a glass-half-empty perspective, it is a disappointing outcome after more than three years of discussions. The framework—as the name suggests, to be fair—is short on details, reiterates much that was in the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC), and contains only a few new items. It is especially disappointing for those ASEAN

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members who had long argued that the CoC should be legally binding.

Structure and Preamble

The framework is just over a page long and comprises three sections: Preambular Provisions, General Provisions, and Final Clauses. Within the General Provisions, there are three subsections: Objectives, Principles, and Basic Undertakings.

The Preambular Provisions section lists three items: bases of the CoC, interconnection and interaction between the DoC and CoC, and importance and aspirations. It does not provide any details on how the DoC and CoC will relate to each other. People familiar with the discussions, however, suggest that in China's view the DoC takes precedence over the CoC, and the CoC should be seen as part of the implementation process for the DoC. As a consequence, the final CoC might not look too different from the DoC.

Objectives within the General Provisions

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.” The phrase “rules-based framework” appears instead of “legally binding.” China is opposed to a legally binding CoC (as it was opposed to a legally binding DoC), and the ASEAN states themselves are divided on this issue. In the Final Clauses section reference is made to “nature” and “entry into force,” and these two clauses could provide an opening for future discussions on a CoC that is legally binding and would require ratification by the eleven parties. But given China's opposition to a legally binding agreement that would limit its freedom of action in the South China Sea, that outcome is rather unlikely.

The second objective is “to promote mutual trust, cooperation and confidence, prevent incidents,

manage incidents should they occur, and create a favorable environment for the peaceful settlement of the disputes.” The requirements of promoting mutual trust, cooperation, and confidence are already in the DoC. What is new is the reference to preventing and managing incidents, which reflects concern within ASEAN that the frequency of such incidents has increased greatly since the DoC was signed in 2002. Over the years, several ASEAN leaders have warned that unless tension-generating incidents are reduced, the organization's credibility and aspirations for “centrality” within the regional security architecture will suffer.

The third objective is “to ensure maritime security and safety and freedom of navigation and overflight.” While the DoC called on the parties to “respect” their commitment to freedom of navigation, “ensure” sends a stronger message. This term was inserted because some of the ASEAN states are concerned that the dispute risks undermining freedom of navigation, especially if China declares an air defense identification zone over the Spratly Islands, which could be monitored and enforced from its manmade islands. China has always maintained that the dispute does not endanger freedom of navigation.

Principles within the General Provisions

The framework goes on to enunciate a set of four principles. The first is that the CoC is not an instrument to settle territorial or maritime boundary disputes. This clause is included to reinforce the notion that the ASEAN-China DoC/CoC process is about conflict management rather than conflict resolution. Resolving the dispute is up to the parties themselves. ASEAN has never arrogated to itself this role, and China has long argued that the dispute can only be resolved bilaterally—that is, between China and each of the claimants separately.

The second principle commits the parties to the “purposes and principles” of the UN Charter, United Nations Convention on the Law of the Sea (UNCLOS),

Treaty of Amity and Cooperation, and Five Principles of Peaceful Co-existence.

The third principle commits the parties to the “full and effective” implementation of the DoC. ASEAN and Chinese officials have been discussing specific implementation proposals since 2005, but progress has been very slow. To date, not a single proposed cooperative project in the DoC has been put into effect.

The fourth principle of the CoC framework reiterates two of the principles contained in the Five Principles of Peaceful Co-existence: the importance of respect for each other’s independence, sovereignty, and territorial integrity; and noninterference in the internal affairs of other states. The repetition is deliberate and was inserted by the ASEAN states as a way to remind China that it must respect the sovereignty and rights of its Southeast Asian neighbors.

Basic Undertakings within the General Provisions

The “basic undertakings” subsection consists of six parts: duty to cooperate; promotion of practical maritime cooperation; self-restraint/promotion of trust and confidence; prevention of incidents, followed by two bullet points (“confidence-building measures” and “hotlines”); management of incidents, followed by a bullet point that repeats “hotlines”; and “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 except Cambodia have ratified. Promotion of practical maritime cooperation provides no details but is likely to include search and rescue, maritime scientific research, environmental protection, and combating transnational threats—areas touched on during previous discussions between ASEAN and China. “Self-restraint” is not defined and was one of the major shortcomings of the DoC; if the CoC is to add value, this term needs to be clearly defined with a set of “dos and don’ts” that would inform

the “prevention of incidents” clause. With regard to confidence-building measures, some progress has already been made: in 2016, ASEAN and China agreed to apply the Code for Unplanned Encounters at Sea to the South China Sea and establish diplomatic hotlines for use during emergencies and crises. These are likely to be incorporated into the CoC.

Final Clauses

The third and last part of the framework is Final Clauses. This section has five brief lines: “encourage other countries to respect the principles contained in the CoC”; “necessary mechanisms for monitoring of implementation”; “review of the CoC”; “nature”; and “entry into force.”

The latter two were addressed earlier in this analysis. Getting other countries to respect CoC principles can be interpreted in two ways. Those who view the glass as half full might see it as recognition of the rights and interests of other stakeholders such as Japan and the United States in the dispute. But for those who view the glass as half empty, encouraging other countries to respect CoC principles is an attempt by China to exclude those stakeholders and prevent them from “meddling” in the dispute. Foreign Minister Wang’s comment about “disruption” from “outside parties” suggests that the latter is the case.

The monitoring of the CoC is likely to be undertaken by the Joint Working Group on the Implementation of the DoC and the Senior Officials’ Meeting on the Implementation of the DoC, which will report to the foreign ministers. The foreign ministers will have the right to review the CoC if and when necessary.

Two important issues are absent from the framework: geographic scope (over which Vietnam fought and lost a diplomatic battle with China during the DoC negotiations) and enforcement and arbitration mechanisms. The absence of the latter is fairly typical for ASEAN documents, which generally

omit enforcement clauses. It is unclear whether future talks will define the geographic scope of the code, but if the code applies to the South China Sea, that may not be a problem.

The framework will form the basis of future negotiations on the CoC, which will probably start later this year. If past is prologue, this process is likely to be protracted and frustrating, especially for those Southeast Asian countries that are keen to have a legally binding, comprehensive, and effective CoC in place as quickly as possible. ∞

Banner image: Royal Malaysian Navy corvette KD Lekir (C) and other warships take part in a May 15, 2017, naval review near Changi Naval Base, Singapore. ROSLAN RAHMAN/AFP/Getty Images.

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