

FORUM ON THE SOUTH CHINA SEA

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TOWARDS PEACE AND PROSPERITY IN THE SOUTH CHINA SEA: PATHWAYS FOR REGIONAL COOPERATION

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Introduction

I want to focus on the history of Asean-China relations over the South China Sea, analyze the key elements in the relationship, particularly the 2002 Declaration on the Conduct of Parties (DoC), and examine prospects for a better future.

ASEAN-China, 1992-2011

The first indication that China and Southeast Asia were headed for tension in the South China Sea came in early 1992, when Beijing adopted its Law on the Territorial Sea and Contiguous Zone. The law explicitly asserted China's claim to the Spratly and Paracel islands.

Beijing's move provoked a response from the Association of Southeast Asian Nations: The 1992 ASEAN Declaration on the South China Sea called for the peaceful resolution of sovereignty and jurisdictional issues without resort to force, the exercise of restraint, possible cooperation in maritime safety, environmental protection, search and rescue, and action against piracy, robbery at sea and drug trafficking, and the application

of the principles of the Treaty of Amity and Cooperation as the basis for a code of conduct for the South China Sea.

A turning point was China's intrusion onto Mischief Reef, inside the Philippine Exclusive Economic Zone (EEZ) in 1995. ASEAN recognized the "disturbing development" as a test of its 1992 Declaration. In March 1995, barely a month after the discovery of the structures, ASEAN foreign ministers urged "all concerned" to remain faithful to the letter and spirit of the earlier declaration and said, "We specifically call for the early resolution of the problems caused by recent developments in Mischief Reef."

Diplomatically, the immediate aftermath of Mischief Reef represented a high water mark for ASEAN. At previously arranged political consultations in Hangzhou, China, Beijing initially stuck to his line that the South China Sea issue should be dealt with bilaterally rather than between China and ASEAN as a group. The Chinese refused to have the issue on the agenda or to discuss it in the formal sessions. But ASEAN senior officials insisted on raising the South China Sea after a "welcome" dinner, with the heated exchanges continuing deep into the night.

However, ASEAN's triumph turned out to be minor in the larger scheme of things, as ASEAN and individual Southeast Asian countries have been battling with little success to restrain China ever since. The total outcome of ASEAN's efforts is the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DoC), which remains the only framework for managing potential conflicts in the area. Signed in 2002, it has yet to be implemented and has demonstrably failed to keep the area peaceful.

Analyzing the Record

I think it is possible to make some observations and draw some conclusions from this 20-year experience, which could prove helpful in considering ways to move forward. At the very least, an analysis of the record should inject a dose of realism into future action.

- 1. China's behavior in the South China Sea follows a pattern. While repeatedly stressing its peaceful intentions, China has become increasingly aggressive in advancing its position on the ground. When criticism of its actions becomes shrill, China offers "concessions", usually discussions or talks that convey the message that the contentious matters are to be addressed in a less confrontational setting.

- 2. When China has agreed to discussions, it appears to be for tactical reasons, as Beijing is prepared to delay the proceedings almost indefinitely, knowing that the passage of time improves Beijing's effective control of the South China Sea. For example, the DoC went nowhere for nine years, mainly because the ASEAN-China Joint Working Group could not agree on implementation guidelines. The stumbling block was Beijing's objection to putting in writing that ASEAN would meet separately before it discussed the matter with China. From ASEAN's viewpoint, China's stand made little sense, as Beijing has no way of stopping ASEAN from conferring. And, as my colleague Rod Severino said this morning, nobody can tell the ASEAN members what to discuss. Moreover, ASEAN is required to do so under its charter, which states that members, in conducting external relations, shall "coordinate and endeavor to develop common positions and pursue joint actions".

- 3. ASEAN has been unable to maintain its initial burst of political solidarity on the South China Sea issue. There is a natural split between the four ASEAN claimants and the three non-claimant mainland Southeast Asian states. But even the Southeast Asian claimants have found themselves at odds over the South China Sea -- for example, when ASEAN pressed China for a code of conduct in the wake of Mischief Reef. Although Vietnam had insisted on the specific inclusion of the Paracels in the coverage of the code, China refused point blank. Without the geographic extent specified, Malaysia joined China in opposing a legally binding code. The compromise was the 2002 DoC.

Prospects for progress

Implement the DoC

Mark Valencia yesterday called the DoC “weak and leaking”, and I can agree with that description. It was also said yesterday that ASEAN and China compromised to reach agreement this year on the implementation guidelines for the DoC. No. ASEAN compromised, not China. ASEAN gave way to China’s demand that they not put in writing what ASEAN members intend to do anyway: confer among themselves first. It is obviously not the “breakthrough” as both sides proclaimed, as after years of fairly pointless haggling, the two sides are almost back to where they were in 2002. Nevertheless, the DoC remains the only government mechanism that might bring peace and stability to the South China Sea.

At this conference so far we’ve discussed what has happened between ASEAN and China till July, when they agreed on the guidelines. I would like to update you on what has been happening in the three months since then. It’s a case of good news and bad news. The good news is that both ASEAN and China want to push ahead with the DoC. The bad news is that they want to go in different directions.

Naturally, a frustrated ASEAN is looking for quick progress on a code of conduct, which is, after all, the main reason the group initiated the negotiations with China in the first place. But China is no keener on a code of conduct now than it was when the subject was mooted in the wake of Mischief Reef. Foreign Minister Yang Jiechi has told ASEAN that the Chinese will work with Southeast Asia towards a code of conduct “at an appropriate time” and “when conditions are ripe”, language Beijing usually uses to describe a distant goal.

Sure enough, China wants to tackle DoC cooperative activities and confidence building measures first. I’ve learned that Beijing has proposed the establishment of three

technical committees: marine scientific research and environmental protection; navigation safety and search and rescue; and combating transnational crime at sea.

Most immediately, the Chinese proposed convening the ASEAN-China senior officials on the DoC in Taiyuan, Shanxi province, on October 27-28, with the ASEAN-China Joint Working Group on the DoC to meet a day earlier. The Chinese also proposed a 1.5 track seminar on freedom and safety of navigation in the South China Sea, to coincide with the gathering in Taiyuan.

As all these cooperative activities and confidence building measures are contained in the DoC, they might be considered welcome. But I can tell you they are being greeted with deep suspicion, even skepticism, by core ASEAN members. To them, Beijing seems to be following its usual pattern, switching gears to “all-out cooperation mode”, as one Southeast Asian official put it, in an effort to counter international criticism of China’s alleged bullying in the South China Sea. Given the way China delayed the implementation of the DoC for years over a point of no practical consequence, the Asean side suspects the heavy agenda is also designed to slow the movement on a code of conduct.

At an unpublicized meeting in Bali last Tuesday (October 11), ASEAN took a stand to regain the initiative. ASEAN decided to inform China that the proposed Taiyuan program was not possible, and that an ASEAN-China senior officials meeting would need to be postponed until after next month’s East Asia Summit in Indonesia. In fact, the meeting might not be scheduled until next year. In that case, another Chinese proposal, for a technical workshop on regional oceanographic exchange around the South China Sea, suggested for Qingdao on December 10-12, is also likely to be scrapped.

Most importantly, the ASEAN senior officials also decided last week that the first joint project with China on the South China Sea under the DoC should be initiated by the ASEAN side. It most likely will be on search and rescue.

ASEAN's firm stand against China's approach is being handled diplomatically and couched in language described by one Southeast Asian official as "sweetness and light". But make no mistake, he said, "The motivation is not to let China score propaganda points".

One reason that ASEAN has postponed the ASEAN-China senior officials and the ASEAN-China Working Group meetings is to allow the Southeast Asian side, especially the claimants, to begin drafting a code of conduct. They will soon start discussing the desirable elements of such a code, "so we have something in common to discuss with China", as another Southeast Asian official put it. The work will be done by a specially formed ASEAN Working Group on a code of conduct at senior officials level, which will meet for the first time, in Bali, prior to the ASEAN foreign ministers ahead of next month's ASEAN summit.

It is hard to be optimistic that ASEAN and China will produce a binding code of conduct anytime soon. With goodwill, they should be able to work on a code and functional cooperative activities simultaneously. But given the history of foot-dragging by China, it will take a change of attitude by Beijing for the Joint Working Group to show real progress.

Zone of Peace, Freedom, Friendship and Cooperation

Another possible complicating factor in ASEAN-China relations in the Philippine proposal for a Zone of Peace, Freedom, Friendship and Cooperation (ZOPFF/C). Manila is pushing hard to persuade ASEAN to adopt its concept, which envisages a two-step process. The first step is to segregate disputed areas, such as the Spratlys, from areas which the Philippines does not consider should be contested, such as coastal waters and continental shelves. The second step calls for claimants to demilitarize atolls and establish a joint cooperation area to manage maritime resources.

But while the Philippines presents ZOPFF/C as consistent with the DoC and actually a complementary follow-up to the implementation of the DoC, it immediately hits a brick wall in the form of the nine-dash line on Chinese maps enclosing most of the South China Sea. The DoC does not separate disputed areas from undisputed areas. ZOPFF/C assumes the Chinese line is invalid under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and customary international law.

No surprise, China has dismissed ZOPFF/C outright. But, in addition, it has also pressured individual ASEAN members not to even participate in discussions about it. As a result, Cambodia and Laos did not send specialists to an ASEAN maritime legal experts meeting in Manila last month at which the Philippines tried again to sell its plan. The Manila meeting could agree only to further study the legal, technical and political aspects and implications of ZOPFF/C. The meeting of ASEAN senior officials in Bali earlier this month again settled for “further study”. All things considered, I think ASEAN is most unlikely to adopt the Philippine plan.

A policy to clarify claims

Just as ZOPFF/C encounters trouble with the nine-dash line, so does any thought of joint development and almost any other proposal designed to manage potential conflicts in the South China Sea. I see a growing insistence from Southeast Asia that the Chinese government explain the line and how it can be justified under international law, especially UNCLOS, which China ratified in 1996. That demand is being driven, not by the claimants, but by two influential ASEAN countries, Indonesia and Singapore, which do not support any claims in the South China Sea but feel strongly about maintaining freedom of navigation and a peaceful environment for economic development.

Potentially, the most rewarding confidence building measure of all would be for China to explain what it means by the nine-dash line.

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