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Code of Conduct in the South China Sea: More Discord than Accord

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ABSTRACT

In a departure from its previous stance, China, in August 2017 during the Association of Southeast Asian Nations (ASEAN) Foreign Ministers' meeting, stated that it Beijing was willing to discuss the possibility of re-engaging in a dialogue on the Code of Conduct (CoC) in the South China Sea. The CoC is not a new idea in the region in terms of finding an amicable solution to the South China Sea dispute, which involves China, Taiwan, Vietnam, Brunei, Malaysia, and the Philippines. In 2002, China and the ASEAN member countries officially engaged in formalising the CoC for the first time. However, the CoC finally agreed to was non-binding in nature. While the decision recently taken by the ASEAN countries and China in restarting the negotiations to discuss the CoC again has been seen as a positive move, it is widely believed that, keeping in view China's assertive posture, it is not likely to agree to the CoC anytime soon.

This paper discusses the origin and evolution of the CoC in the South China Sea, provides an analysis of China's behaviour with regard to the CoC, and concludes by listing the future prospects for the CoC in the South China Sea.

KEYWORDS

South China Sea; Code of Conduct; maritime dispute; maritime security; Indo-Pacific; ASEAN

Backdrop

Making a surprising move to join a multilateral dialogue in the South China Sea, China during the Association of Southeast Asian Nations (ASEAN) Foreign Ministers' meeting in August 2017 stated that Beijing was willing to discuss the possibility of re-engaging in a dialogue on the Code of Conduct (CoC) in the South China Sea, thus showing its willingness to re-engage in peaceful, multilateral negotiations aimed at finding a solution to the contentious South China Sea issue. Earlier, in May 2017 at Guiyang, in the Guizhou province of China, China and ASEAN member countries had given their consent to a draft framework CoC at the fourteenth China–ASEAN Senior Officials Meeting. Reaffirming the Chinese decision, on November 12, 2017, at the 20-hour-long China–ASEAN (10 +1) leaders' meeting in Manila, the Chinese Premier Li Keqiang made the proposal to begin negotiations on the CoC.[1]

The dispute, which involves Brunei, Malaysia, the Philippines and Vietnam in addition to China and Taiwan, has become one of the biggest flashpoints in Asia. The CoC the South China Sea is not a new idea in the region in terms of exploring avenues to find an amicable solution to the disputes over islands, islets and exclusive economic zones

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(EEZs). In 2002, China and the ASEAN member countries engaged in official negotiations for the CoC for the first time. However, the CoC finally agreed to was non-binding in nature.

That kept the window open for disputant countries to decide for themselves whether they wished to respect the CoC or not. By repeatedly highlighting the centrality of the so-called "nine-dash line" in its territorial claims, China used the liberty in its favour and violated the norms, which led to protests by the Southeast Asian countries one after another on issues of encroachment, land reclamation, island building and militarisation of islands by China.

Eventually, the Philippines raised the issue at the Permanent Court of Arbitration (PCA) of the International Court of Justice (ICJ), The Hague, an arbitration tribunal constituted through the provisions of Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). Though the Philippines won the case at The Hague, China refused to abide by the ruling of the International Court of Justice. Earlier, it had also refused to participate in the proceedings arguing that the Philippine case was not grounded in history and was also a violation of the 2002 CoC signed between ASEAN member countries and China. Since 2010, even at the ASEAN Foreign Ministers' meeting and the East Asia Summit, the issue has turned out to be a contentious one.

While the success of ASEAN countries and China in arriving at an agreement to discuss the CoC again may be seen as a positive move, one may argue that keeping in view China's assertive posture, Beijing is not likely to agree easily to a binding CoC, or sacrifice its territorial and maritime interests anytime soon. The negotiations, if they continue at all, are likely to be protracted and tedious.

This paper discusses the origin and evolution of the CoC in the context of the South China Sea dispute. It also attempts to list possible scenarios for the CoC in the South China Sea.

Making Sense of the South China Sea Dispute

Considering that the South China Sea dispute is one of the key issues that dominate the regional security agenda, it is important to understand the status and significance of the South China Sea, and disputes therein.

The South China Sea is a marginal Sea and part of the western Pacific Ocean. Its geographic expanse is from the Karimata and Malacca Straits to the Strait of Taiwan. According to International Hydrographic Organization (IHO), the South China Sea is located east of Vietnam; west of the Philippines; east of the Malay peninsula and Sumatra, up to the Strait of Singapore in the west; south of China; and north and northeast of Natuna Islands.[2] In terms of area, the entire sea covers around 1,400,000 square miles.

So far as the islands and other features are concerned, the features are grouped into three archipelagos (The Spratly Islands, the Paracel Islands and the Pratas Islands), Macclesfield Bank and Scarborough Shoal. The Spratly Islands are the biggest of them all, and have been claimed by multiple disputing parties. The Spratly Islands are followed by the Paracel in terms of size.

What makes the South China Sea both significant and contentious is the presence of more than 250 islands, reefs, atolls, cays and shoals, and the presence of proven oil resources. It is believed that the South China Sea region has proven oil reserves of about 7.5 billion barrels, with 1.3 million barrels per day oil production in the region.[3]

The fact that it is one of the busiest routes for global trade, on which China's energy supplies are largely dependent, make it even more significant.

> The South China Sea is a crucial shipping lane, a rich fishing ground, home to a highly biodiverse coral reef ecosystem, and believed to hold substantial oil and gas resources. The southern portion of the South China Sea is also the location of the Spratly Islands, a constellation of small islands and coral reefs, existing just above or below water, that comprise the peaks of undersea mountains rising from the deep ocean floor. Long known principally as a hazard to navigation and identified on nautical charts as the "dangerous ground", the Spratly Islands are the site of longstanding territorial disputes among some of the littoral States of the South China Sea.[4]

For China, the South China Sea assumes much greater significance in view of the fact that it (and the Malacca Straits) is the only side where China has access to the open seas. As Robert D. Kaplan eloquently explains,

> If one assumes that the Persian Gulf and Northeast Asia are the two critical areas of the Non-Western world that the United States should never let another great power dominate, consider the energy rich South China Sea, which lies between them, the third.[5]

Clearly, China understands the criticality of the South China Sea for its own national security and also its position in the global geopolitics. Mingjiang Li highlights the importance of the South China Sea for China by stating that

> it [the South China Sea] is a natural shield for China's security in the south, China's most densely populated and developed region. A "strong foothold" in the South China Sea gives China a "strategic hinterland" of over a thousand miles stretching to Indonesia, and would thus act as a "restraining factor" for the US Navy's Seventh Fleet transiting the Pacific and Indian Oceans. A strong foothold in the South China Sea also helps China's navy break through the straitjacket of the American-dominated First Island Chain in the Western Pacific.[6]

That South China Sea is one of the prime strategic priority for China is also evident from the fact that China is working overtime to build its A2/AD capabilities in the South China Sea waters. According to M. Taylor Fravel,

> as China's recent land reclamation efforts suggest, the South China Sea outcrops can also be developed into forward outposts for projecting military power. Such outposts might be necessary to defend China's southern flank in the case of military conflict with Taiwan. They might also aid China's submarine force by preventing other states from tracking Chinese submarines that seek to enter the Western Pacific from the South China Sea.[7]

Furthermore, the "control over the South China Sea's oil and natural gas reserves would make China a little less dependent on Middle East energy", a factor which makes the Chinese feel that the South China Sea is a "Blue National Soil".[8]

China understands very well that its complete dependence on one ocean has limitations which might pose grave security and economic challenges in times of crisis. To overcome the so-called "Malacca Dilemma", China has been trying to control those waters. China is also developing anti-access/area denial (A2/AD) capabilities to stop other major powers such as the US from influencing the dynamics of the South China Sea.

> It's also developing a variety of long range anti-ship ballistic missiles (ASBM) and anti-ship cruise missiles (ASCM) to threaten US forces in the Pacific, and limit US access to its littoral region. Developments in missile technology and maritime reconnaissance systems have made China's ASBMs and ASCMs capable.[9]

China is increasingly becoming confident in stopping its adversaries from entering the South China Sea.

Mutually Overlapping Claims and Contestations

So far as the claims made by the disputant parties are concerned, China claims most of the area by virtue of its "nine-dash line". The nine-dash line, which is shaped like a cow's tongue, is actually an imaginary line drawn by China on the basis of its so-called historical claims, and oversteps into the territory currently occupied by other claimant countries, and also overlaps the EEZ claims of Brunei, Indonesia, Malaysia, the Philippines, Taiwan and Vietnam.[10] It is interesting to note here that China and Taiwan have almost identical claims. So far as other claims are concerned, the maritime boundary along the Vietnamese coast between China, Taiwan and Vietnam is a matter of dispute among the three countries. This has invited a lot of diplomatic friction between China and Vietnam. Islands, reefs, banks and shoals in the South China Sea, including Macclesfield Bank, the Paracel Islands, the Pratas Islands, Scarborough Shoal and the Spratly Islands, between China, Taiwan, and Vietnam are disputed.[11] Parts of the area are also contested by Malaysia and the Philippines. After China, Taiwan and Vietnam, the Philippines has the most critical claims to make.

In addition to the above, the maritime boundary off the coast of Luzon and Palawan is disputed among China, the Philippines and Taiwan. The Philippines is also a claimant on the maritime boundary north of Borneo, and the maritime boundary and islands in the Luzon Strait, which are also claimed by China and Taiwan. The other disputant parties are China, Malaysia, Brunei and Taiwan. The maritime boundary in the north of Natuna Islands is disputed among China, Indonesia and Taiwan. Indonesia, which is not a claimant in any other part of the South China Sea, is dragged into this part because China's claims trespass into the Indonesian EEZ. Sabah, where the maritime boundary, the land territory, and the islands of Sabah, including Ambalat, are disputed among Indonesia, Malaysia and the Philippines, is the only area of the South China Sea where China and Taiwan have not made any claims. All in all,

> Brunei claims a southern reef of the Spratly Islands. Malaysia claims three islands in the Spratlys. The Philippines claims eight islands in the Spratlys and significant parts of the South China Sea. Vietnam, Taiwan, and China each claims much of the South China Sea, as well as all of the Spratly and Paracel island groups … Beijing claims to own what it calls its historic line – surrounding these island groups from China's Hainan Island south 1200 miles to near Singapore and Malaysia.[12]

Situating the Code of Conduct in the South China Sea Dispute

According to the Cambridge English dictionary, the phrase "Code of Conduct" means "a set of rules about how to behave and do business with other people". Essentially, it means a set of rules and norms placed in a particular environment for a group of actors, which should guide their behaviour. Normative values of the environment demand that actors follow the rules and norms so that order is maintained and a balance is always in place. Deviation in behaviour by one or a few actors would very likely lead to behavioural changes in other actors also, thus leading to chaos and confusion.

In international relations, the CoC is dealt with in its definitional sense largely by those who study the role of norms and ethics, and legal aspects of international relations. In the practice of international relations, two of the most commonly known Asian issues that are very strongly linked with the CoC are the Senkaku Islands dispute in the East China Sea, and the South China Sea dispute. The South China Sea is a semi-enclosed sea bounded on the east by the Philippines, on the west by Vietnam, and to the south by Brunei and Malaysia. The chain of islands in the South China Sea – namely the Spratly Islands, Paracel Islands and other islands and EEZs –lies at the core of the South China Sea dispute.

So far as the evolution of the idea of a "Code of Conduct" in the South China Sea is concerned, its beginning can be traced to the times when the bilateral maritime boundary spat between China and Vietnam was going on. Formal usage of the term came about first in 1992, when ASEAN issued its first – ever statement on the South China Sea in the context of the China–Vietnam conflict over control of the islands in the South China Sea.

At that moment, ASEAN issued a statement calling upon the parties involved in the conflict to end hostilities and follow a "Code of Conduct". It may be noted here that both China and Vietnam, two of the disputants involved, were not members of ASEAN. The fact that Vietnam was not an ASEAN member made the ASEAN position relatively easier since the latter was an outside party. Today, if such a situation arises, ASEAN would find it difficult to arrive at a consensus in solving the South China Sea disputes since all the Southeast Asian claimants to the dispute are ASEAN members. Thus, a conflict situation between China and any given Southeast Asian country over the South China Sea would directly affect ASEAN and would actually weaken its position as a regional organisation that operates on the basis of consensus. In essence, China must note that a weakened ASEAN would lead to weakening of China's soft power and regional stability in the long run.

Nevertheless, the 1992 incident could not bring much to the table in terms of starting a sincere dialogue on the CoC, let alone a debate on a binding CoC the South China Sea dispute. In 1994, China occupied the Mischief Reef, which was claimed by the Philippines. This time the situation was different because the Philippines, despite having one of the weakest armed forces among the claimant countries in the dispute, was a member of ASEAN, and therefore ASEAN had to do all that it could on the diplomatic front to diplomatically protest against the Chinese occupation of the Mischief Reef. The intense diplomatic footwork of the Philippines paid off, and the ASEAN foreign ministers issued a statement for the second time on the South China Sea in which they expressed their "serious concern" and urged the concerned parties to work towards stabilising the situation. The statement released by the ASEAN foreign ministers on March 18, 1995, entitled "Recent Developments in the South China Sea", stated:

> We, the ASEAN Foreign Ministers, express our serious concern over recent developments which affect peace and stability in the South China Sea.
>
> We urge all concerned to remain faithful to the letter and spirit of the Manila Declaration on the South China Sea which we issued in July 1992 and which has been endorsed by other countries and the Non-Aligned Movement. The Manila Declaration urges all concerned to resolve differences in the South China Sea by peaceful means and to refrain from taking actions that de-stabilize the situation. We call upon all parties to refrain from taking actions that de-stabilize the situation.[13]

The Philippines lobbied its fellow members to adopt a CoC that would compel China from making further encroachment. Thanks to their differing views and priorities, it took ASEAN member countries nearly 5 years to agree on a draft ASEAN CoC. By that time China had drawn up its own draft CoC.[14] Ultimately, in 2002, ASEAN started making efforts to convince China about the utility and potential benefits of a binding CoC on regional peace and stability.[15]

Finally, on November 4, 2002, China and ASEAN signed a Declaration on Code of Conduct (DoC) for the South China Sea in Phnom Penh, Cambodia. Apparently, this was the first time that China had participated in and given consent to a multiparty agreement on the South China Sea.

However, as Carlyle Thayer points out, "the DOC was stillborn". He further states, "it took another 25 months before senior officials reached an agreement on the terms of reference for the ASEAN–China Joint Working Group (JWG) to implement the DoC. In August 2005, ASEAN tabled draft guidelines to implement the DoC at the first meeting of the JWG. Point two called for ASEAN consultations prior to meeting with China. China objected and repeated its long-held position that the relevant parties should resolve sovereignty and jurisdictional disputes bilaterally. This proved such a sticking point that another 6 years of intermittent discussions and 21 successive drafts were exchanged before final agreement was reached".[16] In August 2005, a joint working group was held in which ASEAN put forward the draft guidelines with regard to the DoC.

It is worth noting here that China has become increasingly assertive on the South China Sea dispute since 2007–2008, leading to a swift and intense rise of nationalism in other countries also. This has led to rising disharmony between collective ASEAN position and that of the individual member countries. Diplomatic frictions and uncertainties have therefore crept in on the CoC issue. For instance, "in July 2011, the guidelines to implement the DOC were adopted after ASEAN dropped its insistence on prior consultations and agreed instead to promote dialogue and consultations among the parties".[17] The compromises were made to keep China engaged in a sustained dialogue, which seems to be working now, albeit in a different context and for China's own reasons. The foreign ministers of ASEAN and China consented to finalisation of the framework for the CoC for the South China Sea on August 6, 2017.

Why Has China Agreed to Restart the CoC Negotiations?

As it is, after the PCA ruling, China has found itself in a tight spot. This is due to the fact that under the provisions of UNCLOS, when a dispute settlement process is invoked, the decisions taken are final. Moreover, countries across the world released statements against China's non-compliance with international law and illegal claims through the nine-dash line in the South China Sea.

However, since the ruling is not binding, nor does UNCLOS have an enforcement mechanism, this gives China significant leeway. Analysing the situation, and predicting China's possible response on the issue, Bill Dayton argued, "Beijing would now attempt to defuse the situation in the South China Sea after so many of its claims there were ruled 'completely incompatible with the law'".[18] "China in its argument that the ruling is null and void gave as one of the reasons that the Philippines had violated the standing agreement between the two countries to resolve disputes through bilateral negotiations - as

found in the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea and in their bilateral documents".[19] However,

> The tribunal established in its October 2015 award that the 2002 China–ASEAN Declaration on the Conduct of Parties in the South China Sea 'is a political agreement and not legally binding, does not provide a mechanism for binding settlement, and does not exclude other means of settlement'. It came to the same conclusion with regards to joint statements of China and the Philippines on resolving their disputes through negotiation.[20]

Before that, countries such as the US, Japan, India, and Australia criticised the Chinese land-reclamation activities and militarisation of islands.

The oil rig episode between China and Vietnam also came as a flashpoint. The Chinese decision to place the oil rig in Vietnamese EEZ in the South China Sea has been termed one of the worst breakdowns in Sino–Vietnamese ties since they fought a brief war in 1979. On May 2, 2014, China's state-owned China National Offshore Oil Corporation moved its Hai Yang Shi You 981 ("Hải Dương – 981" in Vietnamese) oil platform to waters near the Paracel Islands in the South China Sea. Vietnam interpreted this action as a Chinese attempt to encroach on Vietnamese territory. Hanoi's fundamental contention was that the Chinese oil rig was within the 200-nautical-mile EEZ and on the continental shelf of Vietnam, which is a violation of international law of the sea. Therefore, it tried to stop the Chinese from establishing a fixed position.

The more than 2-month-long standoff between China and Vietnam over the Hai Yang Shi You 981 oil rig was considered a serious flashpoint between the two countries. Some have termed it the most serious since the Johnson South Reef Skirmish in 1988 in which 64 Vietnamese soldiers were killed.

Arguably, whenever there is a sharp diplomatic reaction to Chinese activities, China tends to soften its stand. One such incident happened in July 2010 in Hanoi during the ASEAN Regional Forum meeting, where 12 out of 27 participating countries expressed concerns over developments in the South China Sea. Reservations were also expressed regarding China's increasingly assertive postures. The diplomatic pressure worked and, consequently, China buckled somewhat under pressure. From July 2010 until March 2012, China softened its position somewhat and refrained from taking provocative actions against the other claimants.[21]

In addition, the US, Australia and others conducted the Freedom of Navigation Operations (FONOPs) in the South China Sea waters, thereby irking China. These events, especially the International Court of Justice case filed by the Philippines, not only embarrassed China but also led to its increasing diplomatic isolation, prompting Southeast Asian countries to look for alliances, partners or military support from external powers.

The second possible reason for China's decision to restart CoC negotiations with ASEAN is China's Belt and Road Initiative, popularly known as the One Belt, One Road initiative (OBOR). OBOR, China's ambitious connectivity, transport, infrastructure and energy linkage plan, aims to link countries across continents to build seamless linkages with China. China has invested significant capital in and has pinned hopes on this multibillion-dollar agenda.

> Given that the South China Sea is a critical part of China's 21st Century Maritime Silk Road, it cannot afford to not exercise restraint. Deadlock in the South China Sea dispute is already damaging the prospects of the maritime arm of the One Belt, One Road

> (OBOR) initiative, which promises to act as a catalyst for China to step up infrastructure connectivity in the region and beyond. China spends a huge sum of its GDP [gross domestic product] every year to showcase its impressive growth, development and soft power. The fear of a poor image and possible isolation may lead China to strike a deal with the Philippines. Such an approach might not lead to a speedy resolution, but will ensure stability in the region.[22]

That China has put so much at stake is evident from the fact that President Xi Jinping has been working hard to make it a success. In the recently held nineteenth Chinese Party Congress, the Chinese leadership decided to include OBOR in the constitution/mandate of the Chinese Communist Party. China has been working on this idea at local, provincial, national, regional and international levels. Under these circumstances, doubts have been raised about China's soft power credentials. This was particularly the case with the smaller Southeast Asians countries which were apprehensive of Chinese design. To keep the OBOR plan up and running, China seems to have decided to restart the CoC negotiations.

Third, the role of the Philippines cannot be overlooked in this context. It may not be wrong to state that the Philippines has played a critical role in shaping the future of the CoC in more ways than one. For instance, the Philippines put its diplomatic footwork to best use and convinced ASEAN and its member countries to mull over, arrive at a consensus on and adopt a CoC, to help avoid any tensions and conflicts that China might get into with any of the ASEAN member countries. It is noteworthy that 1994 was the same year when the UNCLOS came into force, the provisions of which the Philippines would make use of in 2013. It was the Philippines again which got into a standoff with China over maritime boundary incursions. In January 2012, the Philippines floated the Philippine Draft Code of Conduct. Again in 2013, the Philippines officially moved a legal notification to establish an Arbitral Tribunal under Annexure VII of the UNCLOS.

On January 23, 2013, under the dispute settlement provisions of UNCLOS, the Philippines issued a notification and statement of claims to the Chinese, thereby starting the arbitration process. In response, China rejected the Philippine notification and returned it. However, under the UNCLOS process, even if one party does not give its consent to the arbitration process, it cannot bar the court from carrying on the arbitration process. However, since China had already shown its unwillingness to participate in the case, the president of the International Tribunal on the Law of the Sea appointed China's arbitrator on its behalf.[23]

> While China has always preferred a bilateral approach, the Philippines sought the support of extra-regional powers, the United Nations and filed a case against China in the PCA. In 2009, Malaysia and Vietnam also jointly submitted their claims to the United Nations Commission on the Limits of the Continental Shelf, although they have not filed individual cases against China.[24]

With regard to the Philippine claim, China responded by stating that the tribunal had no jurisdiction over the case as it involves sovereignty over islands in the South China Sea. However, "the tribunal in its first award in October last year said it had jurisdiction as matters submitted by the Philippines did not concern sovereignty".[25] According to Hoang Anh Tuan,

> China has offered a number of justifications in support of its nine-dash line map. First, Beijing has repeatedly stated that it is the legal heir to the claims of the Chiang Kai-Shek regime, including the U-shaped line map that the Kuomintang issued in 1947. Second,

> China has argued that the majority of Chinese people consider the line as China's southern territorial border, and thus no Chinese leader would dare give up the claims and risk a nationalist backlash. Third, China has claimed that the U-shaped line is consistent with international law since China first announced it in 1947, long before the United Nations Convention on the Law of the Sea (UNCLOS) came into effect and, thus, the international community must recognise this historic reality. Fourth, China has pointed to the fact that until recently none of its neighbours objected to the nine-dash line map.[26]

China will not meekly accept whatever the ASEAN countries ask it to do; it will keep on going the way it is going. As the Asia Maritime Transparency Initiative (AMTI) reports:

> New imagery shows that while China is keeping attention focused on its negotiations with Southeast Asian countries over basic principles to manage the South China Sea disputes, its construction of military and dual-use facilities on the Spratly Islands continues. New missile shelters, radar/communications facilities, and other infrastructure are going in on Fiery Cross, Mischief and Subi Reefs, suggesting that while the region is engaged in peaceful discussion, China remains committed to developing its power projection capabilities … China is also busy expanding its already substantial communications and radar capabilities on the artificial islands. A very large antennae [sic] array is being installed on a small outpost at the southern side of Mischief Reef, presumably boosting China's ability to monitor activity around the feature. That ability should be of particular concern to Manila, given Mischief's proximity to Palawan, Reed Bank, and Second Thomas Shoal.[27]

While the tribunal's decision was in some ways not surprising, it is definitely bold.

> The Tribunal's ruling officially ended this ambiguity by rejecting all of China's historic claims. But it would be naive to believe that the ruling can resolve the disputes. No great power is likely to accept an international legal verdict that harms its national interests. The unintended outcome of the arbitration will be the continuous escalation of the disputes because no country, especially China, has the same manoeuvrability that it used to in making [its] South China Sea policy.[28]

Analysing the possible outcome of the PCA ruling, Prakah Gopal argues,

> While the situation in SCS [the South China Sea] is unlikely to change for the better in any dramatic fashion due to the outcome of this arbitration, there is keen interest in the nature, tone and tenor of the impending award. It is likely to set a precedent for resolution of maritime disputes in other parts of the world, by first determining entitlements generated by disputed features before the adjudication on sovereignty issues, possibly by the ICJ. What is also certain is that the award, notwithstanding its nature, will intensify the debate between *Mare Liberum* and *Mare Clausum*, and underscore the increasing conflict between international law and foreign policy imperatives of states.[29]

The challenges now facing China lie on two fronts.

> First, China faces an emboldened US naval presence to safeguard the interests of the United States and its allies in the region. Backed by the Tribunal's decision, the United States could find itself more justified in patrolling the South China Sea waters and carrying on with its FONOPs (Freedom of Navigation Operations). Just three days prior to the ruling, China held a week-long combat drill near the Paracel Islands involving ships from its North, East and South fleets. Clearly, China intends to send strong signals to Washington and its allies by exhibiting its naval capabilities. Second, China faces heightened international claims that it is neither a responsible nor law-abiding global power. Criticism from several corners has already begun. Mindful of a possible backlash, China released its White Paper

> on the South China Sea, which further strengthens its position as outlined in December 2014. Beijing is also concerned about the acceptability of its claims in the international community, which is illustrated by the fact that it has decided to play a South China Sea propaganda video 120 times a day in Times Square, New York.[30]

Keeping this in view, it becomes apparent that China will carry on its construction and military activities in the islands and other areas of the South China Sea, while also keeping the hope for constructive dialogue alive.

> China's prime objective is to expand its control over the seas to the fullest possible, so that even if the Philippines wins the case, the final position taken is on the basis of "actual control" and not the "ideal position" based on "verifiable historical claims". Evidently, this possible shift is causing more anxiety in Southeast Asia.[31]

ASEAN countries, both those which are parties to the dispute and those outside of it, have varying perspectives on the South China Sea dispute. This differing perception will naturally contribute to different levels of anxiety on the South China Sea. As Gurpreet Khurana argues,

> it is encouraging that the lingering maritime-disputes in the Asia-Pacific are being arbitrated upon by international tribunals. Over the years, the decisions of international tribunals on cases such as the India–Bangladesh and the more recent one between China and Philippines would be valuable to fill the legal voids, and would firm up over time to add to the prevailing tenets of international law.[32]

The Road Ahead

So far as peaceful and expeditious negotiations on the South China Sea are concerned, the road ahead depends a lot on how China wishes to walk the path to finalise the CoC on the South China Sea. As Robert D. Kaplan points out,

> the geopolitics of the South China Sea is simple in at least one respect. This is not a world of complex, shifting and multipolar imperial alliances to the same extent that Europe was prior to World War I. There is only one so-called indigenous great power threat in these waters: China, which with its maps, indicates a desire to exert a Caribbean-like control over the region.[33]

While it is still most likely that China will not agree to a binding CoC, still if the possibilities for a binding CoC are explored, there are three possible scenarios: The first, which seems a little idealistic, is that China and ASEAN members agree on a binding CoC to stabilise the South China Sea. The scenario seems unlikely considering the differences in perception among the parties, and also the gravity of the situation on the ground, not to mention the role played by the external players, which gives China an absolute strategic and tactical upper hand over others.

The second possible scenario could be that the CoC is finally agreed upon by the parties, possibly leading to a partial resolution of the dispute, with China graciously giving up some of its claims, and other countries following suit. Thus, it might turn out to be a binding CoC but with certain preconditions and some compromises made by both China and the ASEAN member countries. This scenario is certainly more likely than the first one, but is contingent upon the extent to which China would be willing to compromise, so as to ensure the success of its Belt and Road Initiative in general and of the Twenty-First Century Maritime Silk Road in particular.

The third possible scenario is that a binding CoC fructifies but after prolonged negotiations. This would allow China to capture more area through land reclamation and militarisation of the islands. Of the three scenarios for a binding CoC, the third seems most feasible, a situation that will witness a CoC, but after long delays, protracted negotiations and a vastly altered situation on the ground.

Assessing the ASEAN–China Framework for the CoC for the South China Sea, some scholars have argued that though the framework agreement is definitely a step forward, it is mostly drawn from the 2002 Declaration on the CoC, is short in 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.[34] While "a new reference to the prevention and management of incidents" is there, the Framework for Code of Conduct still does not aim to deliver a legally binding CoC in the South China Sea.[35] For ASEAN as a regional grouping, the South China Sea is one of the biggest challenges to its unity. This is particularly significant in light of the fact that in the past the South China Sea issue has led to a lack of consensus and resultant deadlocks. For instance, during the 2012 ASEAN Ministers' Meeting in Cambodia in 2012, and even during the 2017 ASEAN Ministers' Meeting in Manila, that the leaders could not issue a joint statement in the first go tells a lot about the challenges faced by the ASEAN. Growing frictions within the ASEAN clearly indicate that the South China Sea dispute, if not handled carefully, might lead to the situation getting out of control, thus posing an existential threat in the medium to long-term to ASEAN unity and centrality in the Southeast Asian region.

The South China Sea dispute poses challenges to ASEAN at two levels. First, at the operational level, it has disrupted ASEAN unity, which has been under constant challenge. Second, and at the more important ideational level, China's fascination and insistence on dealing with the South China Sea dispute bilaterally and through military means violates the very core of ASEAN norms, which is that ASEAN should be in the driver's seat, and also the point that disputes should be resolved through consensus and dialogue.

Conclusion

Traditionally, China considers the South China Sea Islands its "blue national soil" that need to be reintegrated with the mainland; such an understanding severely limits the possibility of liberal and open negotiations with other claimant countries. On the other hand, the other disputant countries also keep the issue in the realm of their national security agenda, and in countries such as the Philippines and Vietnam it has become an emotive issue of public importance. Public demonstrations and rallies held in support of their claims and against China's island reclamation and militarisation have been witnessed in the past in these countries.

China's decision to at least (re)start the negotiation of the CoC should be considered a success for ASEAN, particularly in view of the fact that ASEAN has faced multiple challenges in the past few years.

At this stage, it seems highly unlikely that China will promptly look for an expeditious negotiation process for a legally binding CoC. The USA's waning interest and influence in Southeast Asia might make the Chinese task easier.

China will continue its island building activities, land reclamation, and island militarisation in the South China Sea while biding its time through protracted negotiations on

the CoC. One may argue that such a situation will continue until China acquires a commanding control over the South China Sea in general and the territories claimed in particular.

China's One Belt, One Road initiative, and more specifically the Twenty-first Century Maritime Silk Road, is likely to serve as a major propeller for China to soften its approach on the CoC. However, that is not likely to change China's basic position on the islands dispute. The mantra which most aptly describes China's contemporary approach towards the South China Sea is "Bide your time until you gain your strength".

For the ASEAN member countries, a deviation from normal would be difficult to deal with. This is important keeping in view the Chinese foreign minister Wang Yi's statement that "when the situation in the South China Sea is generally stable and if there is no major disruption from outside parties, then we will consider during the November leaders' meeting, we will jointly announce the official start of the COC consultations".[36] This clearly means that China does not want Southeast Asian countries to get closer to major non-resident powers in finding a solution to the South China Sea issue, militarily or otherwise. The onus, really, lies on China more than any other country to make sure that even though the negotiations are protracted, with China occupying more area through land reclamation, the situation does not lead to ASEAN and its member countries seeking the support of extra-regional powers.

> Multilateral negotiations resolutely aimed at achieving a concrete solution are the only panacea to this multilateral conundrum. While that may seem quite unachievable right now, the nations could expedite their negotiations on a binding Code of Conduct in the South China Sea under the framework of the ASEAN, so that peace and stability in the region is maintained.[37]

China must understand that a strong and united ASEAN and a peaceful region are essential conditions for its rise as a superpower in the international arena.

Notes

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