

China and the South China Sea Disputes

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TRUONG-MINH VU AND NGUYEN THE PHUONG, SEP 9 2014

The South China Sea (SCS)[1] conflict includes disputed sovereignty claims over the Paracels (between Vietnam and China) and the Spratlys (between China, Taiwan, Brunei, Malaysia, the Philippines and Vietnam), a dispute on maritime boundaries related to the use of Exclusive Economic Zones (in connection with the suspected potential of oil and natural gas resources), and control of the islands in the South China Sea (one of the most important waterways in the region).

Since the tension over the disputes has been escalating in recent years, establishing a Code of Conduct (COC) in the SCS – a legally binding and enforceable contract between all parties – has become a pressing need. For the small ASEAN (Association of South East Asian Nations) states, an agreement on a binding COC is a possible way to control China's behaviour in the disputes. China's approach towards the COC negotiations, however, varies throughout the years. Until 2007, China conducted a policy of 'a peaceful rise' by accepting a non-binding Declaration of Conduct (DOC) in 2002 and by increasingly enhancing both political and economic relations with ASEAN. Nevertheless, since 2008 the state has become more powerful in terms of economic and military capabilities which made it unwilling to restrain its power through binding institutional frameworks.

The question of how a rising power like China interacts with international institutions, and the COC in particular, is the central puzzle addressed in this article. Is China using the COC negotiations as a power investment or as a tool of power?

According to John Ikenberry (1999), a decision by a dominant power to accept the creation of international institutions and to comply with international law stems from its desire to preserve its power. The use of international institutions can be regarded as a power investment when, relying on their power advantages, states create rules and laws that ensure their interests even when their power is declining relatively. In this way states can reduce the costs of maintaining their power. Using hard power to protect their interests or to solve disputes is very costly. Through institutions, weaker nations are willing to accept principles set out by bigger nations as a result of the use of force or as being offered some benefits. In short, when a big power takes part in building an institution and is willing to be bound by it, it uses international institutions as a power investment.

On the other hand, international law can be regarded as a tool of power. Dominant powers can reshape international institutions in various ways (Krisch 2005). For instance, by choosing to use bilateral treaties instead of multilateral ones, a powerful state can impose its will on smaller nations and neutralize the cooperation between them in multilateral negotiations. In addition, moderating the legal constraints imposed by international institutions can result in softened or less binding international rules. The objective is clear – protecting national interests and prestige while using institutions to exercise influence over other actors.

The Promise and Problems of the Declaration of Conduct

In response to China's occupation of the Mischief Reef in 1995 the Philippines proposed creating a Code of Conducts (COC) to bind the behaviour of all states involved in the South China Sea disputes. The Mischief Reef incident was seen as a milestone, providing ASEAN, especially Vietnam and the Philippines, with the argument that

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China could use military forces to occupy features in the disputed areas. For ASEAN, signing the COC, which contains provisions of “mutual restraint in the conduct of activities” and “cooperative activities”, will bring about significant benefits. Binding China’s behaviors through multilateral mechanisms as intended by ASEAN would mean dealing with maritime disputes via negotiations.

At first, due to its superior military and economic capabilities, China refused be bound by international institutions or mechanisms. The military dominance of China has facilitated the use of military force. In theory, the signing of the COC would prevent China from using its superior power to protect its own national territory. As a consequence, shortly after the Philippines proposed the COC, China declined to join this highly binding multilateral mechanism.

Beijing changed its approach in 1999 when it agreed to multilateral discussions and accepted to join COC negotiation with ASEAN nations. The shift from completely rejecting the COC to participating in the negotiation was beneficial to Beijing in two aspects. Firstly, China could intervene in the formation of COC rules from the beginning by suggesting its own draft of the document. Secondly, China could take full advantage of the splits among ASEAN nations.

After working out a COC draft, ASEAN nations worked together and exchanged notes with China for a final draft in March 2000. However, disagreements still remained concerning territorial issues, limitations on building new infrastructure in the disputed areas, conducting military actions in the waters near the Spratly Islands, and whether fishing boats in disputed waters should be arrested or not (Thayer, 2012).

Due to the existing disagreements among ASEAN member states, and to China’s dominant power in the negotiations, ASEAN nations failed to create a complete COC as intended. Instead, in November 2002, ASEAN and China signed a non-binding political deal, called Declaration of Conducts (DOC). This document defined four elements of confidence building and five cooperative areas between China and ASEAN. In the Declaration, all nations agreed to exercise “self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from inhabiting the presently uninhabited islands, reefs, shoals, cays, and other features” (see The official document of DOC).

While the COC was expected to solve the disputes, the DOC is simply a non-binding mechanism which manages them. Some argued that the Declaration is just a semi-political and semi-judicial document, showing no strong obligatory ties, and merely relying on the subjective willingness of the involved states (Ha & Thang, 2011). The DOC is indeed not a legal instrument and thus is technically not legally binding (Thao, 2003: 281). Moreover, the content of the Declaration is too general and does not regulate any specific issues. This may result in conflicting interpretations of the document, depending on the perspective or approaches of the parties involved.

Although it is considered to be a compromise without binding legal force, the DOC was designed as a first step towards a binding Code of Conduct. In fact, ASEAN and China have both confirmed that the 2002 DOC is only a step towards the final destination. The final COC will include the following main pillars: peaceful settlement of international disputes, prohibition against use of force and threats of force, exercise of self-restraint, search for and adoption of Confidence-Building Measures (CBMs), cooperation, consultation, respect for the freedom of international air and maritime navigation (Thao, 2001).

By intervening in the process of creating the COC China aimed at softening the regulations of the agreement. These softened regulations kept China from being bound by the COC. In addition, they can be accepted more easily by China since they enhance its prestige in the South China Sea and are in line with the policy of peaceful development. They also allow for the use of military force when China deems it appropriate and reduced the US’ attention while Washington was redefining its policy after the Cold War.

After signing the DOC in 2002, little further progress has been made towards a binding COC. An agreement on the Guidelines for the Implementation of the DOC was reached by ASEAN and China in 2011, but the document is clearly tentative and non-binding (Thayer, 2009: 91). In early 2013, a positive indicator appeared when China was reported to proactively pursue a continuation of the COC negotiations with the ASEAN countries. However, whether

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the negotiations will meet ASEAN's expectation is yet to be determined. The new Foreign Minister of China, Wang Yi, recently stated that ASEAN should have "realistic expectations" and take "a gradual approach" when searching for a COC consensus (Chiu, 2013).

Reasons for Pessimism

Through the COC negotiations, China attempted to present itself as a benign hegemon in the region that favours the building of a rule-based order. The final result of the negotiations is yet to be achieved, but so far the states have accomplished a temporary outcome through the establishment of the non-binding DOC. This agreement was significant because it marked a milestone in China's engagement in peaceful negotiations and signalled its intention to form long term relations with its neighbours. However, when the balance of power started shifting in favour of China as a result of the global economic crisis in 2008, China's attitudes towards the COC changed significantly. There are at least three indicators that the COC negotiations are presently used as a power tool rather than a power investment by China.

Firstly, as a rising power, China is facing the problem of how to deal with its growing capabilities and expanding interests beyond its borders. China's power is steadily augmenting and Beijing is not under pressure to constrain itself through international institutions. Using the COC negotiation as a time-buying solution, or even accepting a revised less binding COC will help China cultivate the illusion of being on the right track when it comes to settling disputes in accordance with international law.

For China, using multilateral negotiation to deal with the South China Sea disputes would only further complicate the tensions in the region that should instead be addressed through bilateral negotiations. The fact that China always strives to negotiate bilaterally with other claimants shows China's desire to display its power standing. Through this, China can enhance its prestige in the South China Sea and continue the policy of peaceful development. Meanwhile, the COC (if signed) will function more as an ornament rather than to reflect the reality of the situation.

Secondly, for ASEAN signing the COC will bring about significant benefits when it comes to dealing with maritime disputes via negotiations. China, on the other hand, showed that it had no intention to join any treaty which would limit its power in the region. Although China has declared its willingness to negotiate such a treaty, it has not acted in accordance with this declaration and has even increased its military presence in the South China Sea. China's attempts to exacerbate the tensions prior to the negotiations indicate that China wishes neither to reach a binding COC nor to resolve the South China Sea disputes in accordance with international law.

More importantly, Chinese officials and diplomatic representatives have proclaimed several times that the COC is a symbolic measure of confidence building. Recently, the spokesman of the Chinese Foreign Ministry, Liu Weimin said that "the COC is not designed to solve disputes in the South China Sea, but to promote mutual trust and cooperation between parties" (Xinhuanet, 2012). This perspective not only undermines the importance of the COC as a binding legal tool but also restricts its political functions and efficacy.

Thirdly, China could take full advantage of the disunity among ASEAN nations. In July 2012, for the first time in the history of the organization, the foreign ministers of the ASEAN states failed to issue a joint communiqué after their annual meeting in Phnom Penh. Analysts have attributed this failure to conflicts within the organization. When it comes to the South China Sea disputes, ASEAN member states can generally be divided into three groups: those on the front lines of the sovereignty issue (Vietnam and the Philippines); those with significant interests in the ultimate outcome of the conflict (Indonesia, Malaysia, Singapore, and Brunei); and those tilted towards accommodating China (Cambodia, Laos, Myanmar, and Thailand) (McDevitt, 2013: 181). This division creates problems when it comes to the unanimous reaction of ASEAN members vis-à-vis China in the South China Sea disputes.

The Way Forward

Will a legally binding COC be signed in the near future? And can it contribute as the stepping stone to restore China's rule-based regional leadership in the South China Sea?

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Chinese elites should realize that pursuing a policy of hard power could draw the attention of the US and this might result in confrontation. Since 2009, China has faced the dilemma of choosing between using its growing power or complying with international law. China's internal debates (between elites and think tanks) have discussed different approaches and viewpoints (Li 2012; Shambaugh 2011). While one side believes that the current context provides an opportunity for China to take the initiative in resolving sovereignty disputes, the other calls for more caution.

The existing power gap between the US and China means that any direct, or indirect, confrontation with the US in the South China Sea will wreak tremendous havoc on the Chinese economy. If Beijing continues to follow the current approach, China's short term interests can still be achieved, but the future strategic environment could develop in a way that is extremely disadvantageous for the country. Therefore, a "tao guang yang hui" (meaning "not to show off one's capability but to keep a low profile") policy should be established, through which China is obliged to devise a way to settle the conflicts with its neighbours through accepted rules and recognized norms.

Only an extended COC which encompasses all nations with interests in the South China Sea (such as the US, Japan, and even India) or a maritime agreement for the whole region, can become a real power investment in managing the territorial disputes and in framing the rise of China as a responsible great power.

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[1] It should be noted that the South China Sea is known as the Eastern Sea (Biển Đông) in Vietnam, and the West Philippines Sea (Dagat Kanlurang Pilipinas) in the Philippines

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