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A Regional Code of Conduct: For South and East China Seas?

By Yang Razali Kassim

Synopsis

ASEAN is moving into high gear to craft a regional code of conduct (COC) to address the disputes in the South China Sea. The COC could also be relevant to similar disputes in the East China Sea, including over the Senkaku/Diaoyu islands between Japan and China.

Commentary

ASEAN IS displaying a sense of urgency to get the proposed regional Code of Conduct (COC) in the South China Sea off the ground. The latest manifestation is a joint statement by Singapore and Vietnamese leaders last week. Following a visit on 14 September to Singapore, the General Secretary of the Vietnamese Communist Party, Nguyen Phu Trong, and Prime Minister Lee Hsien Loong stressed the importance of starting talks on the COC "as soon as possible".

The same urgency has been expressed in other regional capitals since ASEAN restored some of its dented credibility with a joint statement of principles on 26 July following the failure of the 45th ASEAN foreign ministers meeting (AMM) in Phnom Penh to issue a joint communique on the South China Sea disputes.

Critical East Asia Summit

The draft COC, which has been discussed by ASEAN in Phnom Penh, has to be negotiated with China and readied in time for the ASEAN Summits in November. ASEAN leaders will first meet among themselves, and then have back-to-back summits with their East Asian counterparts China, Japan and South Korea, as well as five other powers, including the United States. These key actors have stakes in a region that is currently roiling with tension over territorial disputes in the South China Sea and the East China Sea. An anti-Japan nationalist groundswell in China is threatening to escalate into a major confrontation between the two neighbours over the disputed Senkaku/Diaoyu islands.

The coming ASEAN and East Asia Summits will therefore be the most critical gathering of regional leaders in years. They will affect regional peace and shape the security architecture of not just East Asia but also the wider Indo-Pacific region in view of the far reaching repercussions.

With only three months to go, putting in place a COC process is vital – at least as a framework for negotiations. If managed sensitively, a code of conduct in the South China Sea has the potential to also become a template

for dispute resolution in the East China Sea. The US, while declaring its neutrality, has warned of conflict breaking out in the event of a miscalculation over the Senkaku/Diaoyu disputes which could drag it in. Needless to say, the same apprehension lies behind the current rush in ASEAN for the much anticipated COC for the South China Sea.

China in no hurry?

But China, as a principal actor in the territorial disputes in both bodies of water and a key party to the regional COC with ASEAN, appears to be in no hurry. While on a visit to Jakarta as part of a regional trip on 11 August 2012, Foreign Minister Yang Jiechi said China was willing to work with ASEAN to implement the Declaration on the Conduct of Parties in the South China Sea (DOC). But at the same time, this exercise, he said, should be “on the basis of consensus” towards “the eventual adoption of the COC”. The Chinese foreign minister has reportedly also said that China would approach the COC “when the time is ripe”.

In other words, whatever ASEAN comes up with to resolve the South China Sea disputes will not fly without the concurrence of China. Besides, before the COC is agreed, Beijing would prefer to focus on implementing the DOC – which is one significant step before the COC. Clearly, the COC negotiations will be tough and protracted. While ASEAN and others want to step on it, especially in view of the growing tensions in the region, China seems intent to bide its time.

Key elements of Code of Conduct

Unlike the DOC, the COC is supposed to be binding. But whether it will indeed be so is not a certainty. ASEAN has proposed key elements to reflect the underlying principles of peaceful resolution of disputes; conformity with international law; and mechanisms for dispute resolution and for monitoring the implementation of the code of conduct. By now the key elements would have been forwarded to China for consideration.

But at what point should China come into the picture in the drafting of the COC? On 4 April 2012, the Philippines said only ASEAN members would be involved in the drafting. Indonesia’s foreign minister Marty Natalegawa, taking a different tack, said: “There will be constant communication through the ASEAN-China framework so that whatever final position ASEAN comes up with, (it) will have benefitted from some kind of communication with China as well.”

From China’s perspective, the South China Sea disputes are best addressed within the framework of the ASEAN-China Summit track (ASEAN+1). In other words, even the drafting of the COC has to have Beijing’s concurrence. Dr Marty’s formulation of China’s entry into the drafting process is therefore a compromise: it allows ASEAN its own space to discuss what essentially is an internal affair that affects all of them - claimant state or not – while still exchanging notes with China as a negotiating partner.

Deng Xiaoping Solution?

As a confidence-building measure, a regional Code of Conduct actually fits in with China’s geo-strategy. It was the late Deng Xiaoping who came up with a formula to resolve competing claims over territory: Disputing parties should shelve their claims pending a resolution and in the meanwhile jointly develop the disputed areas. If Beijing does go for the so-called “Deng Xiaoping solution”, joint development will be one of the key elements in China’s version of the COC.

This, however, does not mean it will be accepted by the ASEAN claimants. While the Deng formula is pragmatic, the underlying dispute over sovereignty will still be in the way. In fact, some of the ASEAN claimant states may have reservations about the “develop now, resolve later” approach. Acceptance, they fear, might imply recognition of China’s claim to the disputed areas.

Regardless, moving from the DOC to the COC phase is critical if the region is to contain and defuse the current tensions in the South China Sea. Indeed, it may also have an effect on the tensions further north in the East China Sea that are calling out for cooler heads to prevail.

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