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The South China Sea Issue: Code on Conduct of Parties Revisited

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Abstract

An elaboration on Code on Conduct of Parties in the South China is one of the hottest topics in current Asia-Pacific geopolitics. Nevertheless, this project is unlikely to be completed owing to incongruence between the main lines of contradictions over this issue and the instruments to keep them within manageable bounds. Under these circumstances, a probable failure of Code on Conduct may produce a stabilizing rather than a negative effect on the South China Sea issue.

Key words: *South China Sea, Code on Conduct of Parties, China, the US*

Introduction

When Declaration on Conduct of Parties in the South China Sea (DOC) was signed by China and the ASEAN states in November 2002, hardly anyone expected that it could be revised – the more so, under the pretext of ensuring freedom of navigation. Nevertheless, since late 2000s, moving from Declaration 2002 to Code on Conduct of Parties in the South China Sea (COC) has been one of the hottest topics in Asia-Pacific geopolitics. Although this attempt is laudable, nevertheless it is very likely to fail.

The key reason for this assessment stems from obvious reality: the issue has outgrown its previous dimension while instruments for keeping the situation in the South China Sea in a manageable state are being used within the previous conceptual paradigm. As things currently are, the main line of contradictions is running between China and the United States while the Code of Conduct is being – and under current trends will be – developed between China and ASEAN. In these circumstances, prospects for COC are not too bright. Nevertheless, its probable failure may produce a stabilizing rather than negative effect on the issue.

The paper is divided into three parts. Part One traces the elaboration on Declaration on Conduct of Parties in the South China Sea and a subsequent move to Code on Conduct. Part Two analyses the Sino-US dimension of the South China Sea issue. Part Three focuses upon the prospects for Code on Conduct based on its likely influence upon the interests of key Asia-Pacific actors. The conclusion summarizes the foregoing analysis.

Liberalism, Constructivism and Realism: Time to Reconsider Arguments

Being a under a scrupulous expert spotlight, the South China Sea issue has been analyzed by research methods of different schools of international relations – mainly, realism, liberalism and constructivism. None of these conceptual paradigms have pretended to offer absolute truth – on the contrary, the debates, although heated and sometimes even stormy, have traditionally been mutually complementary and aiming to broaden the scope of intellectual reflection on the developments under consideration.

At present, however, practical reality seems to have discouraged the three schools of thought. Several points are noteworthy in this regard.

A basic argument generally offered by liberals and neo-liberals that “complex interdependence” between actors will inevitably create an atmosphere conducive to resolving their political contradictions, falls short of the way the South China Sea issue is evolving. In spite of flagrant contradictions relating to the Code on Conduct of Parties, China and ASEAN are planning to have reached the level of annual trade of one trillion by 2020 (Xinhua 2013) – and they probably will. The US and China – the key geopolitical rivals in the South China Sea – instead of expanding cooperation, possibilities of which exist in overabundance, are leading competing initiatives of Asia-Pacific economic regionalism – Trans-Pacific Partnership and Regional Comprehensive Economic Partnership. Non-state actors, be they trans-national businesses or multilateral dialogue mechanisms, are virtually non-existent in exerting serious influence upon the issue. If all this is not evidence for failure of the vision for resolving conflicts promoted by the liberal school of thought – what is?

No less challenging are tasks real life has set to the constructivist analytical paradigm. Suffice it to look at attempts made by China and ASEAN states to

elaborate on the legal parameters of the issue resolution. In spite of discussions that have been held the late 1990s, the “common identity” and “shared norms” between the parties still remain beyond the realm of the possible. But even more disturbing is that the Southeast Asians themselves are still far from their own shared normative framework – a point clearly exemplified by the inglorious outcome of the 45th ASEAN Ministerial Meeting.

The harsh reality has dismissed another constructivists’ argument – about a high utility of regional institutions for resolving contradictions. Multilateral dialogue platforms at which the South China Sea issue is discussed have been created in overabundance, but little results, as the paper will demonstrate, have been reached so far. On the contrary, institutions embracing many participants are increasingly becoming venues to stir up the issue rather than mitigate its escalations. The events that have taken place at recent several sessions of ASEAN Regional Forum and East Asia Summit prove this assessment.

Real life has also challenged some assumptions on which realism rests. The developments in and around the South China Sea has amply demonstrated: the issue is stirred up by the “status quo power” (the United States) rather than by its rising regional competitor (China). In case current trends continue, China with its rapid and stable economic growth coupled with military modernization doesn’t need to resort to regional expansionism. In contrast to this, for the United States stirring up the issue may be the only available means to consolidate the region on the anti-Chinese basis and therefore – to maintain its regional pre-eminence.

Does the afore-mentioned mean that the three mainstream schools of thought fail to catch the current essence of the South China Sea issue? Of course, it doesn’t. Rather, it suggests a need for making amendments to theory by learning lessons from practice. Given that the latter is the sole criterion for testing the truth, the international relations theory will only benefit from it.

A Thorny Path to DOC and beyond

For the first time, a multilateral attempt to codify the rules of conduct in the South China Sea was made in ASEAN Declaration on the South China Sea 1992. In that document, a possibility to develop “a code of international conduct over the South China Sea” was mentioned (25th AMM 1992). Nevertheless, the Declaration 1992 didn’t specify even the basic parameters of the presumable code, its likely

participants, geographical boundaries etc. The reason was explicable – ASEAN Regional Forum (ARF) as the pan-regional multilateral venue for discussing major Asia-Pacific security challenges was just a matter of time. With this in mind, in influencing upon the South China Sea issue, ASEAN countered upon the ARF potential rather than its own efforts.

But an apparent failure of the Brunei session of ARF in 1995 to discuss the issue along with the rise of Sino-Philippine contradictions over the Mischief reef disillusioned the association. So, the idea to develop Code on Conduct got a second wind. As a result, in 1996 the participants of 29th ASEAN Ministerial Meeting “endorsed the Idea of concluding a regional code of conduct in the South China Sea which will lay the foundation for long term stability in the area and foster understanding among claimant countries”. (29th AMM 1996)

During and in the immediate aftermath of the Asian financial and economic crisis, the idea of COC was temporarily shelved. Nevertheless, it didn't fade away: in the late 1990s, the Philippines, Vietnam and Malaysia began to draw up the ASEAN draft of Code on Conduct. Later on, its provisions were negotiated with China.

Regarding those discussions, several points are noteworthy. Malaysian, the Philippine and Vietnamese views on the Code differed fundamentally. The differences embraced the geographical area, an admissibility to internationalize the issue and whether the future commitments were to be followed on the voluntary or the obligatory basis. Contrary to this, China demonstrated flexibility and readiness for compromises. The latter is especially noteworthy since prospects for CAFTA as a milestone project in Sino-ASEAN relations were more advantageous to ASEAN than to China. Under these circumstances, it was the ASEAN states' inability to coordinate their positions regarding the parameters of the presumable Code that generated Malaysian proposal to sign Declaration on Conduct of Parties in the South China Sea (DOC) instead of Code of Conduct.

A close analysis of DOC reveals obvious pro-Chinese terms of conflict resolution. This assessment is based on the following examples.

First, although the South China Sea is focused upon, no precise geographical definition of the disputed areas is offered. In fact, in the South China Sea there are several territorial disputes – over the Spratly archipelago, over the Scarborough reef and over the Paracel Islands. The latter case is a good points of reference – the archipelago has been under China's occupation since 1974, but is claimed by

Vietnam. Nevertheless, according to the letter of DOC, the dispute over the Paracel islands is outside the legal framework of conflict resolution.

Second, Article 4 specifies that all contradictions are to be resolved “by sovereign states directly concerned”. In practical terms, this means:

- ❖ No internationalization of the issue. Consequently, the US’ intervention or UN intermediary became against the DOC provisions;
- ❖ No Taiwan’s participation;
- ❖ In a veiled form – the bilateral rather than multilateral format of dealing with problems when they escalate. This gave China a strong leverage upon the issue as it became, figuratively speaking, between China and each of the ASEAN states taken separately rather than between China and the ASEAN states put together.

Third, Article 10 stresses that the eventual Code on Conduct in the South China Sea is to be developed on the basis of consensus. Needless to say that in case any of the parties objects to any minor point, coming to a consensus might well become an endless process.

In sum, the formal terms of conflict resolution outlined in DOC are favourable to China rather than to ASEAN states. At this juncture, another factor bears attention: ASEAN as a multilateral unity was conspicuously out of the negotiating process. When the afore-mentioned contradictions between Malaysia, Vietnam and the Philippines aggravated, no pan-ASEAN mechanisms like ASEAN High Council were used. But even more representative was another point: although ASEAN was mentioned in the DOC, as it was signed by China and ten ASEAN states (not four or ten states of Southeast Asia), no ASEAN institutional mechanisms were given a mandate to handle the issue.

Nevertheless, DOC became the only internationally recognized document to lay down the legal parameters of dealing with the existing contradictions. For some time, the interest to COC faded away, but it revived after H. Clinton’s speech made at the Hanoi Session of ASEAN Regional Forum in 2010. In her statement, the American Secretary of State stressed the US’ national interests in the South China Sea and encouraged the parties to reach agreement on a “full code of conduct”. At this juncture, with expected US’ support in mind, the association again floated the idea to move from the Declaration 2002 to Code on Conduct of Parties in the South China Sea, and Sino-ASEAN negotiations recommenced. As an interim measure, the parties signed Guidelines for the Implementation of DOC

in which their intention in “the eventual realization of a Code of Conduct” was reconfirmed. (BienDong.Net 2012).

An attempt made by ASEAN to create more secure legal foundations for managing the issue is laudable in itself. Nevertheless, in reality prospects for COC are bleak. Several points are noteworthy in this regard.

First, the ASEAN states still face serious difficulties in developing a unified position on the issue. The best example was provided by ASEAN Foreign Ministers failure to produce Joint Statement after their 45th meeting in July 2012 owing to contradictions between the Philippines and Vietnam as parties of the South China Sea dispute and Cambodia as ASEAN Chair. Manila and Hanoi insisted on stressing contradictions with China while Phnom Penh saw it as “dragging” ASEAN into bilateral problems of its individual members (Embassy of Cambodia to Japan 2012). To compound the problem, the nearly simultaneous ASEAN Six-Point Principles on the South China Sea came into existence due to Indonesian efforts. Cambodia, the formal ASEAN Chair, didn’t contribute its share.

ASEAN unity is also undermined by the “joint development” factor. In summer 2012, China National Offshore Oil Corporation invited foreign business to participate in developing the resources of an area where China’s and Vietnam’s claims overlap. Malaysian and Thai companies expressed interest. (Martins 2012) In summer 2013, Malaysia supported China’s proposal to undertake joint economic activity in the South China Sea in order to prevent “extra-regional states” from interfering. (South China Morning Post 2013) This is considerably at variance with the Philippines’ and Vietnam’s positions carry out joint projects with oil companies of many states outside the South China Sea; apart from it, Manila advocates international arbitration of the issue. All this can further split the association.

Second, ASEAN cannot drive on COC at a pace comfortable to itself. Convincing evidence for this assessment was provided during the recent meeting in Suzhou, where Chinese and ASEAN diplomats discussed ways to elaborate on the provisions of the document. During those negotiations, China outperformed ASEAN in all respects. Suffice it to mention that in spite of ASEAN previous calls for an “early conclusion” of COC, the final agreement was “to follow the "step by step and to reach consensus through consultation" approach and start from identifying the consensus to gradually expand consensus and narrow differences”. Also, the level of the negotiations on COC was downgraded from Senior Official

Meetings to China-ASEAN Joint Working Group. Last but not least, the parties “agreed to continue to steadily push forward the COC process during the full and effective implementation of DOC”. (Ministry of Foreign Affairs of the People’s Republic of China 2013) All this suggests that moving from Declaration 2002 to Code on Conduct will be a long process.

In this context, it is especially important that ASEAN institutional resources to both speed up the process and influence on the substance of COC are again conspicuously absent. As things are, the association lacks institutional mechanisms other than the aforementioned China-ASEAN Joint Working Group. The existing platforms seem to have depleted their potential. In fact, along with their rise in number – currently, apart from ARF there are ASEAN Defense Ministers Meeting Plus Eight and East Asia Summit – their effectiveness is impaired by the principle of consensus and over-cautiousness in tackling sovereignty issues. Also, a conservation of the instruments of conflict resolution plays a role – the contradictions over South China Sea issue are becoming more and more complicated while the conceptual foundation for tackling them is conspicuously lagging behind rather than taking the lead over the situation. Last but not least, the image problem of these platforms also plays a role – according to the prevailing sentiment, they are no more than just talks for the sake of talks. Under these circumstances, ASEAN has no alternative other than to negotiate the issue within the framework of the above-mentioned China-ASEAN Joint Working group.

Third, which is the key factor, the issue has outgrown its previous dimension. At present, the essence of the South China Sea contradictions has shifted from the bilateral and the Sino-ASEAN level to the Sino-American level. Currently, this maritime area is the top prize in the geopolitical competition between China and the US for dominance in Asia-Pacific waters. In the years to come, in case current trends in Sino-American relations continue, the Sino-American scramble for the South China Sea is doomed to become much more intense than it currently is.

With this in view, to trace the Sino-American dimension of the South China Sea contradictions is a timely exercise.

The South China Sea in Sino-American Relations

Although the Sino-American confrontation over the South China Sea has been the key feature of the issue since the late 2000s, Beijing and Washington have

always regarded each other as *the key competitors* in the area. Suffice it to mention that the two armed clashes that have occurred so far – in 1974 and 1988 – became possible owing to China's calculus that the US wouldn't interfere. An important reason behind China's push through the South China Sea in the early and the mid 1990s was a reduction of the US' forward deployed forces in Asia-Pacific. Finally, the pro-Chinese terms of DOC were agreed upon to a significant extent owing to Washington's preoccupation by other issues rather than the South China Sea dispute.

With the benefit of hindsight, three stages of Sino-US dialogue on the South China Sea issue can be singled out.

First of them embraced 1950s – late 1980s and can be characterized as *moving from accusations to mutual patience*. The former are exemplified primarily by China's anti-American rhetoric during escalations of tension between itself and the American Asia-Pacific allies – the Philippines, Taiwan and South Vietnam in 1956, 1958 and 1959 respectively. However, after the normalization of Sino-American relations Beijing and Washington made each other gestures aimed at giving reassurances that the partner's interests will be respected or, at least, taken into consideration. As a result, the US remained completely neutral during two Sino-Vietnamese naval clashes in 1974 and 1988 respectively. In its turn, in 1970s and 1980s China carefully avoided aggravation of tensions over the South China Sea in relations with the Philippines in line with the Sino-American rapprochement.

The second stage lasted from early-1990s to late-2000s. Its key feature was *the US' reactive vs China's proactive approaches to the issue*.

This assessment is exemplified, first and foremost, by Beijing's and Washington's stances on the freedom of navigation via the South China Sea. As things were, the US didn't raise this discourse – primarily, because it didn't distinguish between *the trade* and *the military* navigation. As things were, after the Brunei session of the ASEAN Regional Forum in 1995, at which Beijing promised not to threaten freedom of trade navigation, the US preferred not to damage relations with China during simultaneously aggravating Sino-Philippine contradictions over the Mischief reef. Misunderstanding between China and the US over the freedom of military navigation didn't exist at all as PLA Navy even theoretically couldn't undermine American predominance in Asia-Pacific waters.

In its turn, Beijing was able to distinguish between two key points – sovereignty and freedom of navigation. In spite of rise of nationalism in China, which displayed itself, first and foremost, in the provisions of 1992 Law of

Territorial Sea and Contiguous Zone, Beijing's leadership didn't make even veiled attempts to hamper freedom of navigation via the South China Sea. Later on, this flexibility played a significant role in achieving the pro-Chinese terms of DOC.

Also, the US didn't fully utilize the potential of regional multilateral dialogue platforms to influence upon the issue. Washington's initial interest in ASEAN Regional Forum quickly lost its steam, and attempts to discuss the developments in the South China Sea were sporadic and uncoordinated. On the contrary, China with a lapse of time embraced multilateral negotiations vis-à-vis ASEAN, and those discussions paved the way to DOC.

The reputational side of Chinese and American policies was also at play. During and after the Asian economic and financial crisis the US' image in the region was tarnished. The problem was aggravated by simultaneous American actions in the Middle East and proposals to launch the Container Security Initiative, the Proliferation Security Initiative and Regional Maritime Security Initiative. In contrast, China significantly improved its image in Southeast Asia, which started during the Asian financial and economic crisis and continued throughout the early and the mid 2000s. Expected economic benefits which the association could obtain from CAFTA can be rightfully regarded as the deciding factor behind the pro-Chinese terms of conflict resolution outlined in DOC.

The key outcome of this period was explicable – the US lagged behind the developments while China led and shaped them. More importantly, Beijing gradually got used to the idea that the US would remain “out of play”.

The third stage started when the Obama administration came to power. Its main feature is *the US' violation of the legal framework of the conflict resolution* – primarily, Article 4 of DOC. In this light, the US' attempts to influence upon the issue at ARF and other multilateral dialogue platforms, as well as through other means, in legal terms run counter to DOC.

Nevertheless, at present the South China Sea issue is being shaped by the Sino-American geopolitical competition in the area. Three main lines of contradictions may be distinguished.

The first relates to the afore-mentioned admissibility to violate the letter and spirit of DOC. The emphasis on freedom of navigation and the interests of the international community have been repeatedly stressed as the US' foreign policy priority. China sees this as the US' attempts to interfere in the issue which has been formally settled. In Beijing's view, progress in moving from DOC to COC

can be achieved only in case the existing legal basis for conflict resolution is respected. (People's Daily Online 2013)

The second line embraces the freedom of navigation discourse. In the context of Sino-American relations, this should be understood as freedom of military navigation conducted by the US in the waters covered by the Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China. In concrete terms, contradictions – which started in March 2009 and since have been developing – concentrate upon admissibility of the US intelligence gathering activities in China's territorial sea and exclusive economic zones. In the short-term perspective, as Sino-American rivalry in the South China Sea intensifies, these contradictions will probably further aggravate.

The third line focuses upon the exploration of resources of the South China Sea. China stresses: as the South China Sea falls within our internal waters and "core interests", any actors attempting to develop the resources of this area are to get our permission. The US retorts that the South China Sea and its resources are part of the global commons, and therefore can be exploited by any interested party – be it oil companies or fishermen of littoral states.

In broader terms, the South China Sea has become part of Sino-American unfolding geostrategic competition in maritime Asia-Pacific. This manifested itself in a clash between China's Anti-Access/Area Denial (A2/AD) strategic doctrine and the US' Air-Sea Battle concept.

An increasing pace of PLA Navy modernization and China's growing geopolitical ambitions generated A2/AD doctrine aimed at undermining the US' supremacy and hampering its freedom of action in maritime Asia-Pacific, or at least make these actions highly risky and prohibitively costly. In its turn, the US stepped up efforts aimed at countering China's improved naval capabilities. The most conspicuous step has been Air-Sea Battle concept designated to integrate "operations across all five domains (air, land, sea, space, and cyberspace) to create advantage". (Air-Sea Battle Concept 2013) China takes this as the US' attempt to preserve American predominant positions in maritime Asia-Pacific and consequently, to undermine PLA Navy top priority of moving beyond the first and the second island chains as part of China's regional and global ambitions.

In this context, the most disturbing for Beijing is another factor: the Air-Sea Battle is a supporting component of the US Joint Operational Access Concept. Part of the latter is Gain and Maintain Access Concept aimed, among other things, at improving the US' capabilities for actions on land. As one political commentator

shrewdly observes, to analyze only Air-Sea Battle Concept "... is like talking about only the back two wheels of a tricycle. What's missing is the front wheel – land power – an essential element for achieving a decisive effect. Most battles at sea, and in the air, take place close to or over land. ...There is a fundamental interdependence between naval and land warfare, and it is virtually impossible for naval power to win a war on its own". (Dean 2012) This link between air, sea and land power warfare looms large in PRC's order of defense priorities as a significant part of China's population is concentrated along its coastal areas. Also, it is the coastal regions that have become drivers of economic growth and since recently have been attached to special importance by the leadership of the country. (People's Daily Online 2009)

In the years to come, this trend might acquire a new dimension. Currently, a new strategic term – the Indo-Pacific region – is under conceptualization. While its parameters – geographical boundaries, institutional framework and key projects – are still unclear, this discourse has become a hot topic in both official and expert debates. Although so far issue has been approached at an initial approximation, the focus has nevertheless been placed on the security dimension, mainly – maritime security, of Sino-American relations. To this end, one shouldn't forget that the South China Sea links the Pacific and the Indian Ocean and therefore, will become the central area of the emerging Indo-Pacific.

In sum, in the years to come the significance of the South China Sea is very likely to increase in both China's and the US international priorities. This will exert profound influence upon elaborating on Code on Conduct of Parties in the South China Sea – to an extent that its failure seems highly probable. Ironically, however, this might well produce a positive rather than a detrimental effect on the issue.

COC Likely Failure: a Blessing in Disguise?

In light of the factors presented above, prospect for COC are not too bright. But let us approach the issue from a different angle: does any of the key regional actors really want it? Let us have a look at what COC might mean to each of them.

The United States. Being de-facto the central actor in the South China Sea geopolitical game, Washington cannot but understand: under current circumstances, COC will have to take into account the US' position. As a result,

Washington's expectations relating, for instance, to the freedom of navigation in the South China Sea will be reflected in any version of COC. But here, a logical question arises – what next? A likely scenario might be increased expectations about the US further steps – which the latter could be unable to meet.

The key rationale for this argument stems from serious financial constraints Washington is facing. In this light, not only to strengthen but just to maintain the current level of its presence in Asia-Pacific may become problematic. “Pivot”, “rebalancing” and suchlike catchy slogans sound well, but they must be substantiated by policy actions based on commensurate financial capabilities. Under current trends, however, to materialize those plans will be very costly – especially with serious budgetary cuts being in sight. If so, expectations about the US' role as the indispensable Asia-Pacific security provider might well fall short of the practical reality.

Further evidence to substantiate this assessment is provided by recent statements made by the US top foreign policy and military officials. For instance, given by J.Kerry: “I'm not convinced that increased military ramp-up is critical yet...we have a lot more bases out there than any other nation in the world, including China today. We have a lot more forces out there than any other nation in the world, including China today.” (Economy 2013.) Or by S.J. Locklear III – that the budget process has “limited our flexibility to manage and have the potential to undermine our strategic rebalance momentum, as our ability to operate and maintain our force is at increased risk.” (Miles 2013) At this juncture, doubts about the future of the US' military commitments in Asia-Pacific don't seem to be groundless.

So far, these doubts have materialized in what is known as an emerging “power network”. (Cronin et al. 2013) An important reason for this has been a stark reality: American allies are exploring alternative means to maintain security in Asia-Pacific as they cannot rely on the US' guarantees.

China. Beijing seems to be the least interested party in moving Code on Conduct instead of Declaration 2002. The reasons are presented below.

First of all, China doesn't want to lose many advantages stated in the text DOC and obtained, without any exaggeration, by herculean efforts. Currently, any possibility for the situation to move in a way not favourable to Beijing is successfully blocked by the principle of consensus outlined in article 10 of DOC. More than that, a DOC revision or renunciation would be disadvantageous to China for reputational reasons – both within and outside the country. Beijing has

no illusions: in case it compromises its “core interests” based on “undisputable historical facts” it will inevitably lose face – both within and outside the country. In this context, it is worth reminding: the South China Sea vector is an important part of China’s overall strategy formulated at 18th Party Congress – to “build China into a maritime power” and to “attach great importance to maritime, space and cyberspace security”. (Xinhua 2012)

Second, Beijing cannot but realize that in case COC is signed *in the short-term perspective*, China might lose the geopolitical game to the United States. In spite of PLA Navy impressive modernization, China’s power projection capabilities in maritime Asia-Pacific are still lagging behind those of the United States in both qualitative and quantitative terms. At present, the US is capable of carrying out intelligence gathering 75 miles from Hainan (where the incident with the USNS Impeccable took place in March 2009) while for China the same activity at the same distance from the US’ western coast remains outside the realm of the possible.

Moreover, if COC comes into existence China will stop being the rule-setter in the South China Sea geopolitical game. At the same time, for China to abide by the rules set by other regional actors is the least attractive option. Actions and reactions during sessions of East Asia Summit in 2011 and 2012 amply substantiate this assessment.

Under these circumstances, China may be expected to use any pretext to prolong elaborating on Code on Conduct instead of Declaration 2002. Beijing’s diplomats have already demonstrated their tactics by appealing to the principle of consensus at the informal level before discussing COC at formal dialogue platforms. If this tactics continues, negotiations between China and the ASEAN states may take years or even decades with no progress in sight.

ASEAN. The association, as well as its individual members, has come to understand that to indefinitely stir up the South China Sea issue – which is inevitable as long as COC is elaborated on – will undermine their prospective plans and turn out contrary to their national interests. And more importantly, that living without COC might well be easier than with it.

Within the next two years, ASEAN will be under a scrupulous international spotlight as the deadline for establishing ASEAN Community is approaching. At this juncture, the association has to demonstrate its strengths rather than weaknesses. Needless to say that a rush for COC will amply and vividly reveal

both intra-ASEAN contradictions and its limited ability to manage the situation in the South China Sea as it sees appropriate. If so – why drive COC?

No less important is that a decisive move towards COC will suspend current economic projects in which many Southeast Asian states participate. Let us not forget China's dissatisfaction with, for instance, joint Vietnamese-Indian projects. Also, military activity between numerous Southeast Asian countries and their partners like the US, Japan and India, to mention just a few, can become problematic in case the present situation changes. Last but not least, attempts to internationalize the issue, primarily, through UN Arbitral Tribunal, might bring about unpredictable repercussions – for instance, revealing ASEAN disunity and therefore affecting its positions both within and outside Southeast Asia.

Regional middle powers. In line with the emerging regional power network, Japan, South Korea, India and Australia will be increasing their profiles in the South China Sea, both in tandem with the United States and independently. In these circumstances, no one of them knows how COC might affect, for instance, the construction of ROK naval base at Jeju island or India-Vietnam naval cooperation. If so, these powers will not welcome any developments which potentially may narrow their room for maneuver or negatively affect their interests in this strategically important maritime area.

With all these factors in view, the anticipated failure of COC may not be that bad. On the contrary, a win-win effect is only to be expected.

Conclusion and Recommendations

Attempts to lay down the legal framework for the South China Sea issue have been numerous and varying in scale and nature. The most conspicuous result that has been achieved so far is Declaration on Conduct of Parties in the South China Sea. While imperfect in many respects, at present DOC remains the only internationally-recognized document that sets the legal parameters of keeping the issue in a relatively manageable, non-explosive state.

A move from Declaration 2002 to Code on Conduct of Parties in the South China Sea is impeded by an obvious fact: the issue has outgrown the level at which COC is being elaborated on. As time passes, the South China Sea issue will inevitably be shifting to the level of Sino-US geopolitical competition in maritime Asia-Pacific. If so, any version of COC developed by China and ASEAN is

doomed to be out of touch with practical reality. As a result, the idea to work out a viable and internationally recognized framework for resolving the South China Sea contradictions may be discredited for many years ahead, and the issue might well become much more contentious and difficult to handle than it is at present.

Encouragingly enough, however, the latter scenario is unlikely. The much spoken about Code on Conduct of Parties in the South China Sea will probably not materialize as it contradicts important strategic interests of major Asia-Pacific actors no matter what they may publicly claim. As a result, events will resume the course that they followed before the US' involvement in the issue – and many, including Washington itself, will give a sigh of relief.

Does this mean that the issue has reached an impasse and is bound to remain there? Ostensibly, it does, but a broader look at the situation suggests a different assessment. While a complete solution of the South China Sea issue as we know it today turns out highly improbable, nevertheless, possibilities to keep contradictions within manageable bounds do exist.

This assessment rests on the following reality: the issue is rapidly globalizing whether or not some actors with stakes in the South China Sea may like it. At this juncture, to codify approaches to sources of tension becomes an increasingly urgent necessity. At present, however, no such codification exists. As a result, in real-life military stand-offs, which have become a common occurrence, captains and crews have to act at their own risk, and any miscalculation or provocation may lead to disastrous consequences. To prevent them, a comprehensive agreement setting the rules of conduct on seas needs to be elaborated and agreed on.

A pattern to follow might be Agreement on the Prevention of Incidents On and Over the High Seas, signed between the Soviet Union and the United States of America in 1972. In this document, detailed information on what is – and, more importantly, what is not – to be done in cases of bumping, threatening movements and other actions which may represent a danger to navigation or to aircraft in flight should be carefully specified.

A venue to launch discussions on this agreement must be outside the framework of China-ASEAN dialogue. Much more appropriate is East Asia Summit – a dialogue platform embracing heads of state and government of key Asia-Pacific economic, political and security actors. After – and in case – the general agreement is reached, details may be specified and concrete steps be taken at lower levels: for instance, within relevant Working Groups of ASEAN Regional Forum and ASEAN Defense Ministers Meeting Plus Eight.

In practical terms, implementing this initiative will not lead to a great breakthrough for the issue. Nevertheless, an outcome will be generally positive: “the limits of the permissible” in potential stand-offs will be carefully codified. Given a highly complex nature of the South China Sea issue and steadily growing confrontational trends in relations between the parties with stakes in the area, any efforts to strengthen cooperative trends, however modest they might be, should be initially welcomed.

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