



ICAS Issue Primers

Topics in U.S.-China Relations

Issues In 2018: An ICAS Preview

What to Expect in the South China Sea

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Introduction

Looking into 2018, the status quo of the South China Sea will remain stable. Important steps were taken towards laying the groundwork for managing these disputes in 2016 and 2017, but any new progress will likely be slow and reflect changes to the rules of the game that have already been made. The South China Sea issue has taken a backseat to other more immediate concerns, such as the crisis on the Korean Peninsula. However, the fact that the issue has declined in prominence does not mean that the South China Sea is going away. In the coming year, the geopolitical competition between China and the United States will increase and will continue to set the stage for, and influence, the disputes in the South China Sea.

Code of Conduct

China and ASEAN are in the process of devising a forward-looking and multilayered Code of Conduct (CoC) for the South China Sea (SCS). 2018 will reflect a high degree of expectation from stakeholders in the region - and indeed the world - that progress will be made towards drawing up the contents of the CoC. Even with strong political will in place, the negotiations will encounter various obstacles, e.g. establishing the exact nature of the CoC; defining the applicable geographical area; whether the CoC should be a legally binding document with established dispute settlement provisions; etc. These obstacles reflect the differences among ASEAN member states on the one hand, and the divergence between China and other claimants on the other.

China is inclined to favor a multilateral mechanism which is applicable to the area surrounding the Spratly Islands, is limited to the concerned parties, and does not involve external stakeholders. It does not aim to resolve sovereignty or maritime jurisdiction issues through the CoC process. There are also differing points of view regarding the CoC's role within ASEAN. For instance, President Aquino III of the Philippines has said that he wants the CoC to serve as a dispute-resolution mechanism with legally binding force. And while Vietnam takes the same stance on the legal

attributes of the CoC as the Philippines, it does not side with the Philippines on solving territorial and border disputes through a third-party mechanism. There are also long-standing differences among claimant countries regarding the relevant maritime space where the CoC will apply. China wants the CoC to only cover the Spratlys area; Vietnam seeks for the CoC to be applicable to the Paracel area as well. The Philippines hopes to extend the applicable area to Scarborough Shoal, and Malaysia has its own disputes with Vietnam. These conflicting interests and divergent viewpoints can only be addressed through patience and compromise.

In this context, setting the CoC as the cornerstone of the legal-cultural community of the SCS area could pave the way for the difficult negotiating process ahead. This is in accordance with the interest of both China and ASEAN. For ASEAN, the SCS issue should not leave a negative impact on its economic integration and political cohesion. For China, establishing an institutionalized set of rules for the South China Sea benefits its national interest and is consistent with its advocacy for international law. ASEAN and China should work together to develop a broad consensus on the nature of the CoC, especially the functional extent, geographic scope, and its legally binding obligations, as soon as possible. They should seriously consider a proposal to build a legally binding code of conduct to facilitate the resolution of lesser sensitive issues. This mechanism could be applied to solve disputes other than territorial sovereignty and maritime delimitation, such as fishery disputes and maritime environmental issues.

Freedom & Safety of Navigation

For the United States, the Freedom of Navigation Operation Program (FONOP) is used to challenge territorial claims on the world's oceans and airspace that it considers to be excessive, using diplomatic protests and/or operational assertions. In some coastal states' view, including China's, by wearing the hat of "FONOP," the United States aims to secure its access and dominance in the South China Sea as well as balance China's power through intelligence gathering, surveillance and reconnaissance.



The FONOP is a key tool for the United States to maintain its military and strategic dominance in the Asia-Pacific. In 2018, the United States will continue its FONOPs' in the South China Sea, while China will continue to protest them through diplomatic channels. Both countries will likely succeed in managing their differences and enhancing their maritime cooperation in the region, despite these conflicting views.

The most urgent challenge in this regard is to secure a safe environment for navigation in the South China Sea in 2018. In disputed waters pending maritime delimitation, confrontations between law enforcement agencies from claimant states and between government vessels and fishing vessels could lead to dangerous situations and trigger an outbreak of tensions. In 2018, China and ASEAN need to further demonstrate their commitment to apply the Code of Unplanned Encounters at Sea (CUES) in the South China Sea. China and the United States should continue their efforts to reduce the risk of miscalculations and close encounters between naval ships and aircrafts. The respective strength of the Chinese and American navies in the region also puts them in a unique position to cooperate on providing enhanced search and rescue and humanitarian assistance in the South China Sea, a move that would strengthen the bilateral relationship between the two navies and their governments.

The Aftermath of the Arbitration

China's negative reaction to the Arbitral Tribunal's Award in favor of the Philippines will remain a sticking point in 2018. The Philippine government has so far chosen to forego near-term implementation of the "Award." Nevertheless, the possibility still exists that the arbitration case will be raised by the Philippines as the domestic political climate shifts. Other claimant states who

stand to benefit from the precedent established by the “Award” may make use of it too. Countries outside the region such as the United States, Japan and Australia will continue to push for its implementation. The forces from both within and outside the region will likely continue to gang-up together to “solidify” and “enforce” the “Award” on the diplomatic, legal and maritime fronts. This will continue to pose a pressing challenge for China as it attempts to move beyond the arbitration and make efforts to secure its rights in the South China Sea, promote maritime cooperation and advance negotiation and consultation of the CoC.

Nationalism and public discourse will continue to play a large role when the strategic and political status quo in the South China Sea is challenged by external factors. The media will almost certainly continue to use a misleading narrative on China’s attitude towards international law, with attention grabbing headlines such as “China challenging rule-based order” in media coverage and analysis of the South China Sea arbitration. Far less attention is given to analysis which tries to bring a more balanced view to the table. ‘Transformation of ways of thinking theory’ should be introduced to policy makers and scholars who study the South China Sea, as a foundation to guide their policy and research. It is essential that diplomatic communities and academics are able to keep an open mind, be unbiased in their analysis, channel the power of nationalism towards productive ends and provide constructive research that can contribute to actually resolving the many disputes in the South China Sea.

The Debate Surrounding UNCLOS

In 2018, the effect of the debate surrounding the role of the United Nations Convention on the Law of the Sea (UNCLOS) will continue to influence dispute settlement practices in the South China Sea. Thus far, the SCS arbitration between China and the Philippines remains the first attempt by a claimant state in the South China Sea to resort to a third-party forum. Though the case failed to make a positive contribution to resolving the underlying dispute between the two claimant states, the legal implications surrounding it are as profound as they are controversial. Article 298 of UNCLOS allows states to opt out of the compulsory settlement mechanism in disputes related to sovereignty, maritime delimitation, and military activities, among others. This article was achieved through a lengthy negotiation process as a compromise to address the demands of some states that did not wish to address certain disputes through a third-party mechanism. In the SCS arbitration, the utilization of Article 287 in a case that clearly involved sovereignty and maritime delimitation has set a poor example that will undoubtedly serve to undermine the true spirit of the dispute settlement mechanism provided by UNCLOS.

More broadly, the arbitration case has shined a spotlight on the abuse of the sensitive issue of “judicial law making.” As a general practice when adjudicating a dispute, international institutions must identify, elaborate and apply relevant international laws and rules to eliminate the source of the dispute. Judicial interpretations should hew to the letter and spirit of the relevant laws and rules, and pay due regard to prevailing state practice. Disputant parties resort to international judicial institutions based on their trust in international law and their expectation of a fair redress of grievances. Of late, however, the principle of “judicial law making” in the international maritime jurisprudential space has been tarnished by the proclivity of UNCLOS-constituted judicial bodies to fashion fresh legal rules that depart from the intent of the legal texts as well as prevailing state practices. In the process of doing so, these courts have upset the regularity and legal stability that state parties had come to expect when they originally ratified UNCLOS.

Another legal and policy area which deserves attention pertains to China’s future trajectory regarding maritime dispute settlement. Will its conventional approach of bilateral negotiations and consultations remain its preferred method for settling inter-state disputes? Or will China come to accept that third-party resolution mechanisms have a useful – and perhaps even pivotal – role in settling disputes with neighboring countries? The Arbitral Tribunal’s ruling on the South China Sea provides an opportunity for China to rethink its traditional approach to dispute resolution.

China-U.S. Relations



Donald Trump's recent visit to the Asia-Pacific sent a clear message that the South China Sea was no longer the driving issue in U.S.-China relations, as it had been since 2010, when then-U.S. Secretary of State Hillary Clinton listed the South China Sea as the top U.S. national interest at the East Asia Summit in Hanoi. However, Trump's unpredictable comments, his offer to mediate these disputes, his failure to fill key Asia posts in his foreign policy team and his lack of a cohesive Asia strategy in general have unnerved allies who look to the United States to defend their interests.

During his trip to Asia in November 2017, Trump and his team repeatedly used the term "Indo-Pacific" instead of "Asia-Pacific" to describe the region, which some see as an effort to undermine China's role. In his speech, "Defining Our Relationship with India for the Next Century," at CSIS on October 18 2017, Secretary of State Rex Tillerson highlighted the role of India and frequently used the term of "Indo-Pacific." Though U.S. Department of State officials attempted to downplay the strategic goal behind the term "Indo-Pacific," many D.C.-based analysts share the view that America's 'Quad' plan with India, Japan and Australia is designed to counter China's geopolitical influence in the region.

In mid-December, the United States released its 2017 National Security Strategy, which referred to "rival powers aggressively undermining American interests around the globe." The report states, "[China's] efforts to build and militarize outposts in the South China Sea endanger the free flow of trade, threaten the sovereignty of other nations, and undermine regional stability" as part of "a campaign designed to limit U.S. access to the region." The Trump administration's report then proposes that the United States should seek to "uphold a regional order respectful of sovereignty and independence" in response, as well as "help South Asian nations maintain their sovereignty as China increases its influence in the region."

The U.S. Navy will likely conduct freedom of navigation operations more frequently in the South China Sea in 2018. Meanwhile, due to the significantly enhanced capabilities of its navy, and recently developed facilities and deployments on some of its South China Sea islands, China will be able to command more effective counter-measures against American military activities in these waters. It is safe to say that the geopolitical competition between China and the United States will continue to influence the South China Sea disputes in 2018, even though they no longer represent the top foreign policy priority in U.S.-China relations.

China-ASEAN Relations

Since July 2016, the main developments in the South China Sea have been largely focused on the China-ASEAN relationship. This coincided with the arbitral proceeding coming to an end. In a statement issued by Rodrigo Duterte, the president of the Philippines and ASEAN Chair in 2017, he listed three major threats that ASEAN faces: terrorism, piracy & maritime armed robbery, and illegal drug trafficking. The disputes in the South China Sea were not included in this list of priorities. The Party Secretary of Vietnam, Tran Dai Quang, recently issued a statement that Vietnam hopes to settle its maritime disputes



through peaceful negotiation. Lee Hsien Loong, Prime Minister of Singapore, coordinator of the China-ASEAN Dialogue and ASEAN Chair in 2018, praised the recent step taken by ASEAN and China to initiate the Code of Conduct negotiations. In the joint statement that was put out at the 50th ASEAN summit, all parties reaffirmed the importance of non-militarization and self-restraint in the South China Sea and stressed the importance of improving relations between ASEAN and China. In their joint statement, China and the Philippines noted that the situation in the South China Sea had become increasingly stable as a result of joint cooperative efforts between China, the Philippines, and other ASEAN states. They further agreed to strengthen maritime cooperation in areas such as marine environmental protection, disaster risk reduction, and possible cooperation in the area of marine scientific research. The Chairman's Statement of the 20th ASEAN-China Summit reiterated the commitment to the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC), and adopted the Leaders' Declaration on a Decade of Coastal and Marine Environmental Protection in the South China Sea, which is reflective of the shared commitment to implement the DOC and desire to transform the South China Sea into a sea of peace, stability and prosperity. China and ASEAN have agreed to start negotiations on a Code of Conduct for the South China Sea to ease regional tensions over territorial disputes in the area.

In 2018, China and ASEAN will continue this positive trend of maritime security cooperation through various institutions, e.g. ASEAN-China Dialogue, China-ASEAN Maritime Cooperation Fund, Belt & Road framework.

Among the Claimants

Vietnam has shown signs of moderating its policy in its South China Sea-related disputes with China, following the improvement of China-Philippine relations that occurred in the second half of 2016. China and Vietnam agreed to utilize the established border negotiation mechanism between the two governments and seek a fundamental and long-term solution to their maritime disputes in the South China Sea. This having been said, Vietnam's sincerity in following through on its pledges is open to question, given its quiet but unrelenting adversarial moves in the South China Sea. It continues to strengthen cooperation and coordination with the United States and Japan on South China Sea issues and has been actively seeking to create a favorable external environment for its own attempts to accelerate land reclamation in contested areas. This is a tactic known in ancient Chinese military doctrine as "feigning action in one place while making the real move in another."

Vietnam has also taken advantage of the opportunities provided by China's commitment to the CoC negotiation process with ASEAN to carry out unilateral oil and gas exploitation in the disputed areas of the Nansha islands. It has done so with the intention of presenting this as a *fait accompli* before the CoC consultation phase is completed. Vietnam has actively sought to strengthen its territorial claims by expanding its *de facto* control of certain disputed waters through a variety of approaches, such as fishery operations, marine scientific research, resource development, and law enforcement. It has also invested significant sums on public discourse management and international relations campaigns, including in Washington, D.C., to garnish international support for its claims.

As for the Philippines, over the year that has passed since the "arbitral award" was rendered, it has moved rapidly to normalize its relations with China. The two countries have established an inter-governmental consultation and negotiation mechanism to manage their South China Sea disputes and bilateral cooperation on law-enforcement mechanisms and fisheries have made significant progress. However, Duterte's outreach to China and his abeyance on the arbitral decision has been met with great resentment and resistance within sections of the Filipino political establishment. There have been constant calls for Duterte to resist China's economic "lure" and insist on enforcing the award. Meanwhile, the U.S.' and Japan's behind-the-scenes support to these opposition forces against Duterte's South China Sea policy should not be overlooked. Therefore, despite the continued improvement in China-Philippine relations, the bilateral consultations independent of the arbitral award, and the promotion of bilateral maritime cooperation, China-Philippine relations will not necessarily be headed for a period of smooth sailing in 2018.

With regard to Taiwan, the concept of "Taiwanese independence" will continue to be the guiding principle for the policies of the Tsai Ing-wen government. Under the concept of "Taiwanese

independence" and the "New Southbound Policy," Tsai's SCS policy will continue to drift further away from that of the Chinese mainland. Her willingness to compromise the Ma Ying-jeou government's resolute stance on fisheries and related sovereign rights issues with Japan to placate Tokyo and thereby rebalance its regional relations, could be a harbinger of future policy actions. While the Tsai-led authorities in Taipei cannot entirely disregard the SCS disputes, it is possible that they could try to bolster its independence-leaning aspirations by introducing SCS policies that diverge from, or are entirely contrary to, that of the Chinese mainland.

As China continues to develop its islands and reefs in the South China Sea, promote maritime cooperation, and engage in the CoC negotiations, several issues will rise to the fore and become the focal points of contention. These include the legal status of the developed features, the scope of the "disputed areas" in these waters, the definition of "historic rights," the legal implications of the DOC, and whether or not judicial processes should be prioritized in resolving the SCS disputes.

Non-Claimant Players



Given that the countries that make up the "Quad" of nations in America's "Indo-Pacific" concept are all sea faring nations, any security arrangement would likely be focused on cooperation in the maritime sphere. Indeed, the Quad concept is driven in part by developments in the South China Sea. The contest there has become a "symbol of China's inexorable rise." Moreover, if such an arrangement materializes, it would have significant implications for relations between China, the other claimant states, and outside powers

involved or those who are considering getting involved.

As key military allies of the United States with a penchant for intervening in the region's affairs, Japan and Australia will continue to play an unhelpful role in the South China Sea in 2018. The Abe government in Japan has been a persistent factor in stirring up the SCS disputes and hampering the cooperative management of the underlying disputes. In 2018, Japan is likely to further interfere in the security and politics of the South China Sea through such means as Maritime Self Defense Force (MSDF) port visits, joint military drills, and provision of military and law enforcement equipment to littoral states as well as by pushing for anti-China language in joint statements on SCS issues via multilateral mechanisms. Meanwhile, it will keep sensationalizing sensitive issues, such as China's facility deployments, its maritime militia, and its Air Defense Identification Zone so as to fabricate a pretext to justify and normalize its military's presence in the South China Sea.

Australia has also developed a track record of interfering in South China Sea issues that it is not a party to – although it has mainly done so through diplomatic and political means. For example, in his address to the 2017 Shangri-La Dialogue, Australian Prime Minister Malcolm Turnbull asked China to uphold the "rule of law" and called for the preservation of the "rules-based order." At the ARF Foreign Ministers' Meetings in 2016 and 2017, Australian foreign minister Julie Bishop echoed the sentiments expressed by the United States and Japan in calling on China to abide by the decision of the Arbitral Tribunal. This insistent demand was repeated again in its newly-released Foreign Policy White Paper in December 2017. Australia, along with Japan, is also an avid supporter of the recent U.S. "Indo-Pacific Strategy."

Conclusion

Since the election of President Rodrigo Duterte and the conclusion of the China-Philippines arbitration in mid-2016, the South China Sea has enjoyed a period of relative calm. That period of calm and continuity will likely hold in 2018. China-ASEAN relations, which are by far the most important determinant of peace and stability in the South China Sea, are expected to continue

trending in a positive direction. This should provide a boost to the on-going negotiations and consultations on the Code of Conduct (CoC). The SCS issues have also become less prominent within the broader context of U.S.-China geo-political competition in the Asia-Pacific. Nevertheless, lurking beneath the surface are irritants that could complicate the management of the SCS issues. Foremost among them is the role of extra-regional actors, most notably the United States and its allies, Japan and Australia. The U.S. Navy's Freedom of Navigation operations as well as its close-in reconnaissance and surveillance operations in the South China Sea will continue to remain a contentious issue in 2018. Should certain ASEAN countries, such as Vietnam, aim to take advantage of the relaxation of tensions through adversarial actions in the South China Sea, the region could yet again become a hotbed of geo-political rivalry.

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