

Executive Summary of the 3rd Asian Maritime Security Forum

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The past two years has seen a sharp increase of public and stakeholder interest in the strategic maritime areas of East and Southeast Asia. While many of the political and legal issues are longstanding, recent events in the South China Sea and in the East China Sea have given issues of regional security new importance, and indeed a measure of urgency. The question of how issues can be effectively managed, developed or resources pursued, freedom of navigation preserved, and disputes resolved in a constructive and peaceful manner is central to keeping the Pacific “pacific.”

Against this backdrop, on 13 November 2015, the 3rd Asia Maritime Security Forum was held in Ottawa, Canada, co-organized by the China Institute of the University of Alberta, the National Institute for South China Sea Studies (NISCSS) and the Institute for China-America Studies. Over 50 participants were at the Forum, including scholars from Canada, China, the United States, Japan, the Republic of Korea and Taiwan, as well as representatives from the International Tribunal for the Law of the Sea (ITLOS) and other international organizations. There was a strong representation by senior officials from Global Affairs Canada and the Department of National Defence and the Canadian Armed Forces.

Active discussions were conducted on topics such as the geopolitical challenges/alt setting, military actions, economic factors and the state of regional cooperation, legal challenges and the applicability of international law, as well as broader issues of the reconciliation of interests of coastal states and user states.

Panel 1: Geopolitical Challenges: When Power Politics Outweighs Regional Cooperation



Participants in this panel discussed the broader strategic picture in the South China Sea, with particular reference to the relationship between the United States and China. A few speakers noted that China's growth and as well as its strategic shift towards a maritime rather than continental focus has altered the United States' and other states' perceptions of the PRC. Different interpretations of the status quo in the South China Sea were also in play,

with one participant arguing that China is simply a latecomer to an ongoing process of many states establishing a presence in the South China Sea whereas others suggested that China's recent activities, notably in reference to land reclamation, had in effect acted to upset that status quo. Yet another participant suggested that the real status quo was the title to South China Sea featuring China who had been granted by virtue of the Potsdam agreement.

The recent Freedom of Navigation Operation (FONOP) conducted by the USS Larson was at the center of much discussion. One participant described it as "gunboat diplomacy" whereas another described it as a carefully planned transit in accordance with UNCLOS' rules on innocent passage. Here the "status quo question" came up again, with assertions from one participant [comment: "party" sounds too 'official'] that the Larsen transit was intrinsically coercive and a very dangerous militarization of the issue, and another participant stating that China's land reclamation activities were intrinsically coercive towards other claimant states. It was observed that many within the US military believe that merely by placing harbors and airstrips on the reclaimed Spratly features, China has already "militarized" the region, regardless of what weapons are actually deployed there. One participant described both the US and China as "tone deaf" on these issues: e.g., the US asserting, rather unilaterally, that its FONOPS are not provocative; and China making similarly declarative assertions that its claims in the South China Sea were "indisputable."

On the subject of possible ramifications of recent events, one participant wondered whether the US' FONOPS program would push China towards militarizing the features or drawing straight baselines around the Spratly archipelago. Another asserted that drawing straight baselines would be unhelpful for regional stability, as it would effectively expel other claimants from the Spratly islands. One panelist predicted the creation of a South China Sea ADIZ, whereas another predicted that reclamation was over, that China will not try to claim that such features are "islands" under UNCLOS, and that scientific, search and rescue and other facilities conducive to global public goods would soon be placed on the reclaimed features.

Proposals for mitigating tensions in the area included increasing empathy and understanding between states. The US and China in particular, it was argued, tend to only see the validity of their own perspectives. In this context, leadership by middle powers in resolving tensions between and among claimant states would be helpful, as would be efforts by China to demonstrate that any military characteristics of reclaimed features are minimal.

Panel 2: Economic Factors: Can Common Interests Drive Regional Cooperation?



A second panel examined the possibility that economic cooperation could lead the way in diminishing political tensions. It was noted by more than one panelist that hydrocarbon deposits in the South China Sea are not thought to be vast, but are fairly substantial, although only lightly explored. What is significant about hydrocarbons in the waters of the South China Sea is their proximity to claimant states, which offers them the potential

of greater energy security. It was observed that most hydrocarbon deposits in the South China Sea are in disputed waters, making it very difficult to obtain private sector cooperation in exploration or exploitation. Given the disputes and associated legal complications, most participants were not optimistic that hydrocarbon cooperation was a near-term possibility. One noted that there were no avenues or instruments by which cooperation from China can be induced because it has a state-owned oil company that is able and willing to engage in exploration in disputed waters, whereas other claimant states must rely on private sector entities that cannot operate under circumstances of legal uncertainty or by implication comparable measures of state support. One participant recommended that ASEAN members should work out their own bilateral deals, then expand their agreements to an ASEAN-wide system of reciprocity, and then finally have ASEAN reach an agreement with China, Japan and Korea.

Participants were more optimistic about facilitating cooperation on fisheries management, and each panelist commented on the great economic and environmental importance of the South China Sea and its fisheries. One looked to the Southeast Asian Fisheries Council for a possible model for successful cooperation on regulating harvest sizes and managing reporting and monitoring systems. It was suggested that this organization could be emulated or expanded to include the South China Sea. However, as one panelist pointed out, the organization is currently voluntary and needs restructuring in order to make it effective in countering the current trend of overfishing in the South China Sea. Panelists discussed whether the agreement between Vietnam and China on regulating fishing in the Gulf of Tonkin was a possible model. One panelist argued that such an agreement must

be predicated on an EEZ delimitation between the two countries, and that therefore there was no basis to even begin talks on fisheries management in the rest of the South China Sea.

During the question period participants discussed a number of related issues. One participant recommended that China should allow ASEAN facilities on its reclaimed features in order to make good on its promise to provide “public goods” in the region. Several other participants discussed the problem of how sovereignty disputes stand in the way of cooperation, particularly when China typically seeks recognition of Chinese sovereignty in relevant areas from prospective partners in resource development. One participant noted that when political conditions were different, China had made agreements with Japan in the East China Sea, and showed a certain flexibility on South China Sea matters. Another participant suggested that cooperation should start in areas considered to be “high seas.” A potential role for drawing upon Canadian experience in fisheries management issues was also raised.

Panel 3: Legal Challenges: When International Law Encounters National Interests



This panel discussion focused largely on the sustainability and utility of UNCLOS and its associated dispute settlement mechanisms in the context of the South China Sea disputes, as well as the broad disagreement between the US and China on freedom of navigation issues. One panelist noted that between China’s non-participation in the Philippines arbitration case and Russia’s non-participation in the Arctic Sunrise

case, there seemed to be a de facto political challenge in play to the UNCLOS legal regime.

One panelist observed that UNCLOS tribunals and courts have thus far avoided fragmentation in their judgments and awards because they have been very careful to study the rulings of other tribunals and maintain cohesion. Many panelists, however, indicated that the current case brought against China by the Philippines was taking the court into uncertain territory for a variety of reasons. More than one panelist indicated that the Arbitral Tribunal was touching upon issues that the UNCLOS regime seeks carefully to avoid—including making determination of historic titles and the question of sovereignty over land—and might problematically undermine expedient legal ambiguities regarding the definition of “island” as distinct from so-called low tide elevation rocks (LTEs) and, in conjunction with this issue, what may or may not constitute permissible military activities in EEZs deemed to apply.

One participant noted that it isn't clear how the Permanent Court of Arbitration will rule based on the preliminary decision on jurisdiction, and that the Tribunal may still find in the future that it does not have jurisdiction over significant areas of the case. Other UNCLOS tribunals have returned to the question of jurisdiction in later stages of the arbitration. The Tribunal does, however, seem to be willing to make a determination about the nature of land features in the South China Sea without regard to the question of sovereignty. One participant noted that the United States, Canada, and many other nations have refused to participate in similar adjudications, as is their right. Multiple participants expressed concern that the tribunal may overplay its hand and weaken the legal regime by pursuing the case and issuing a judgment in the absence of China's participation and in the face of China's likely non-compliance with any adverse judgment (from the Chinese perspective).

Also discussed were differences between the United States' and China's interpretations of freedom of navigation rights under UNCLOS. The US carries out FONOPS in accordance with its understanding that no prior notifications are required for conducting innocent passage of military vessels under UNCLOS, whereas China and approximately a third of other states assert that conditions or qualifications can legitimately be applied to military activities in territorial seas and exclusive economic zones. It was also suggested by a panelist that the historic rights suggested by China's nine-dash-line were misinterpreted by the US and others—in truth such rights are not exclusive entitlements such as those enjoyed in an exclusive economic zone (EEZ). Another participant noted that such entitlements arising under customary, historic or other non-UNLCOS sources were not under consideration by the Arbitral Tribunal.

Panel 4: Reconciling the Interests of Coastal States and User States: Policy Options



This panel also focused on differing interpretations of UNCLOS rights regarding freedom of navigation both on the sea and in the air. One participant observed that the US/China EP-3 incident revealed how much tension can arise from differing understandings of the rights of military vessels and aircraft, but also noted that these differences can be managed. Another panelist noted that there are many challenges to maritime security

in the Asia-Pacific region, and more broadly the Indo-Pacific region, (e.g., the Korean Peninsula, rivalry between India and Pakistan, and the South China Sea) and that there has been a troubling resurgence of old notions of power-politics recently, with talk of balances of power and spheres of influence becoming commonplace. To this panelist, legal issues cannot be resolved without broader political settlement and a move beyond old ways of thinking about international relations.

Panelists put forth a variety of clear policy recommendations. One pointed out that there is no true forum for all of the user states and littoral states of the South China Sea to come together. This panelist recommended that such a forum be developed in order to facilitate greater agreement on interpreting UNCLOS' provisions on freedom of navigation. Another panelist recommended a series of non-binding principles that clarify UNCLOS navigation rights and render them more palatable to coastal states: for example, recommending that military vessels avoid certain sensitive areas in coastal states' EEZs, and imposing certain restrictions on intelligence gathering in EEZs. One participant suggested that the US Navy was unlikely to accept any restrictions on what it regards to be high seas freedoms within the EEZs of coastal states.

Another recommendation was a more complete integration of military operational procedures, including common search and rescue manuals for navies and coast guards and a better integration of CUES-type codes of conduct into the operational plans of regional navies. The most provocative recommendation was a reconsideration of UNCLOS itself, given the difficulty Asian states have had in applying it to their unique geography. Many participants found this recommendation to be unhelpful, especially given how difficult it was to reach agreement on the original UNCLOS regime. One participant described the situation between the US and China as one of reasonable disagreement in interpreting UNCLOS, not a fatal flaw in the regime. Even the selective non-compliance of one state (in this case, China's hypothetical non-compliance with an adverse decision in the Philippines case) will not bring down the UNCLOS system nor does it call for a drastic revision of the order.

Summary

In summary, the four panels at the Forum illustrated the historical, political and legal complexity in achieving full resolution in the near future to all issues at play. There are limits to ambitious expectations, especially in relation to high speed transformations of international regimes or regional frameworks. Nevertheless, there was a sense of confidence that good will and practicality can prevail in approaching differences given the scope of shared interests at play of both coastal and use states, whether in economic development and trade, resource management and environmental protection, maritime safety, or progress on non-military security issues such as human trafficking or crime. In short, most problems were seen as manageable and progress and innovation as feasible. In any scenario, and whether "Track Two" or Track 1.5, an expansion and regularization of informal dialogues, both on broader issues of regional security and on specific questions, was seen as essential by many at the Forum in order to build consensus and develop constructive approaches by regional governments. However, where issues of national sovereignty and security are in play, and with potential military forces active in the South China Sea region, we can't be sanguine regarding the prospects for early resolution of the rival claims and widely disparate legal positions.