AMID CONTINUING TENSIONS over maritime disputes in Southeast Asia, a robust, binding Code of Conduct (COC) for the South China Sea between the Association of Southeast Asian Nations and China has become something of a diplomatic Holy Grail. Indonesia has produced a so-called Zero Draft of a COC with provisions for confidence-building, conflict prevention and conflict management based on the 2002 agreed Declaration on Conduct (DOC) and the “elements” of a COC agreed by ASEAN in July 2012. ASEAN foreign ministers discussed this Zero Draft on the sidelines of the United Nations General Assembly meeting in late September 2012, and discussions continue.

Once ASEAN agrees on the draft, the next step will be to formally discuss it with China. It was hoped that the agreed draft would be comprehensive and binding, and would include “rules of the road” and the expected behavior necessary to maintain stability. The principal objective was to reach an ASEAN-China accord on the COC before the November 2012 East Asia Summit in Phnom Penh, and to finalize and formalize it there. That did not happen. ASEAN Secretary General Surin Pitsuwan, a former Thai foreign minister, predicted in late October that an agreement wouldn’t be reached, despite prodigious efforts by many diplomats.

Thailand, as country co-ordinator for ASEAN-China relations, has tried to mediate an agreement. But on October 29, senior Thai Foreign Ministry official Sitasak Phuangkerkeow told reporters at an ASEAN-China meeting in Pattaya that it might take another two years to reach agreement. That meeting only tabled guidelines for negotiations between the sides for the coming year and urged China to return to discussions. Unnamed Southeast Asian officials said China was “stonewalling” attempts to start talks. Moreover, some analysts doubted that China would seriously discuss a COC with ASEAN before China’s leadership transition and its aftermath.

Indonesian Foreign Minister Marty Natalegawa, who has been a leading proponent of a COC, cautioned that the process should proceed “naturally without any pressure.” But many observers are skeptical that China will ever consent to a robust COC with dispute-resolution mechanisms. China has made it clear that progress would be inhibited by any US involvement, either directly or indirectly. This has or could become a sticking point in the negotiations.

A more fundamental problem facing Natalegawa and other Indonesian officials is that China is unlikely to garner the support it needs from all the parties involved. Disputed territorial claims in the South China Sea continue to be a thorn in the side of ASEAN-China relations, and efforts to craft a Code of Conduct for all parties involved are key to ensuring that disputes don’t escalate into armed conflict.

Mark J. Valencia has studied an initial draft of a code drawn up late last year by Indonesia and concludes that while it represents progress, it is unlikely to garner the support it needs from all the parties involved.

What the ‘Zero Draft’ Code of Conduct for the South China Sea Says (and Doesn’t Say)

Navigating Differences

By Mark J. Valencia
does not really believe Indonesia is neutral in this affair. In fact, Indonesia and China probably have overlapping jurisdictional claims in the South China Sea, depending on the meaning of China’s historical “nine-dashed line,” which Indonesia has formally criticized at the United Nations. Natalegawa has warned that “absent a code of conduct, absent a diplomatic process, we can be certain of more incidents and more tension for our region.”

Nevertheless, Natalegawa had reason to be optimistic about China’s recognition of the need for diplomatic progress. Chinese Foreign Minister Yang Jiechi visited three Southeast Asian countries in July 2012 to try to move dispute management forward. ASEAN think tanks have also held several brainstorming sessions with Chinese counterparts on the COC. The participants reaffirmed the benefit of concluding a binding COC and that it was important in the meantime to fully implement and adhere to the DOC. They agreed that a COC based on the DOC should be more “comprehensive and effective than the DOC.” Finally, they suggested that a group of “experts and eminent persons” should be used to support the official track to develop a code of conduct “if and when called upon,” adding that such meetings could perhaps be funded by the ASEAN-China Maritime Fund.

Also significant was a call from leading experts in China and Taiwan for enhanced co-operation between the two in the South China Sea matters, including petroleum exploration and research, to develop legal arguments to support the historical claim. It is not clear whether this would help or hinder an agreement between China and ASEAN on a COC.

THE ZERO DRAFT

The Zero Draft Code of Conduct, which is still a work in progress, is formally entitled, “A Regional Code of Conduct in the South China Sea,” and currently would apply only to ASEAN members and China. According to the preamble of a copy of the draft that I have recently reviewed, the parties to the code would:

- Recognize that a comprehensive and durable settlement of the territorial and jurisdictional disputes in the South China Sea will contribute to regional peace and stability;
- Emphasize the need to further promote a peaceful, friendly and harmonious environment in the South China Sea for achieving a durable solution to the differences and disputes while maintaining the South China Sea as an area of peace, stability, friendship and co-operation;
- Commit to resolve differences and disputes by peaceful means without resorting to the threat of use of force or the use of force and in accordance with universally recognized principles of international law, including the 1982 UNCLOS (United Nations Convention on the Law of the Sea);
- Recall the obligations of states under international law, including UNCLOS, to safeguard the environmental characteristics and biodiversity of the South China Sea; and
- Stress the commitment by ASEAN-China leaders to develop a COC to maintain peace and stability in the South China Sea.

This preamble is designed to publicly acknowledge that there is a history of peaceful relations between China and ASEAN and that there is tacit agreement on the need for a COC for the South China Sea. Much of the language in the preamble is taken from the already agreed DOC. In particular, the clause regarding “recognized principles of international law” was in the preamble of the DOC and is preferred by China, because China bases its maritime claims on “historic claims and rights” — not solely on UNCLOS.

Below is a summary of the current draft, along with my analysis:

The first article lists the guiding principles of the COC. This also comes from the DOC and includes the UN Charter, the 1982 UNCLOS, the Treaty of Amity and Co-operation in Southeast Asia (TAC), the DOC, the Five Principles of Peaceful Co-existence, and other universally recognized principles of international law, including the principle of resolution of disputes by peaceful means.

The next article stipulates that the COC is a rules-based framework containing a set of procedures to govern the conduct of parties, and aims to promote confidence, prevent incidents, and manage and resolve incidents.

The following article lays out “Basic Undertakings” of the parties and draws heavily on the DOC. It reiterates several principles such as a commitment to building trust and confidence; freedom of navigation and overflight; resolution of both territorial and jurisdictional disputes by peaceful means without resorting to use or threat of force; and self-restraint and non-complication or escalation of disputes. It then adds three key commitments: respect for the Exclusive Economic Zone (EEZ) and continental shelf of the coastal states; respect for the COC and the taking of actions consistent with it; and the encouragement of other countries to respect the COC.

The clause regarding respect for the EEZ and continental shelf of coastal states is ambiguous; it could mean anything from respecting existing claims to respect for laws enacted by the coastal states whether or not they are consistent with UNCLOS. The “basic undertaking” under the provision “Managing and Resolving Incidents” is to “develop modalities and arrangements for the promotion of settlement by peaceful means of disputes and prevent their escalation that would affect peace, stability and security in the area.” This is a key provision, which when examined in the context of a later reference to ASEAN’s TAC and UNCLOS (see below), indicates the form that those “modalities” should take. China may accept this provision because it is sufficiently vague and the TAC can be invoked only with the consent of all the parties to a dispute. However, although decisions rendered through the TAC or UNCLOS dispute settlement mechanisms are unenforceable, a decision by China to reject or ignore an adverse dispute settlement would erode its soft power.

The next article, “Areas of Application,” addresses a critical issue and stipulates that the COC shall apply to unresolved maritime boundary areas of the parties concerned in the South China Sea. This is a controversial provision. Does it include claimed internal waters, territorial waters and archipelagic waters if their boundaries are unresolved? Does it include all waters within China’s nine-dashed line claim? Does it include waters around the disputed Paracel Islands?

The next article, “Territorial Claims in the South China Sea,” is also important, because it is a detailed disclaimer saying that nothing in the COC shall be interpreted as compromising the position or claim of any party to territory (or islands) in the South China Sea. It reiterates for the third time in the document that the parties to the COC will resolve their territorial and jurisdictional disputes “in accordance with universally recognized principles of international law, including, but not solely, the 1982 UNCLOS.” This is also stated in the DOC.

BOLD LANGUAGE

Perhaps the most controversial provision is tucked into the article “Implementation of the Code of Conduct.” Under the heading “Promoting Confidence,” the parties to the code would agree to refrain from “conducting military exercise, military surveillance, or other provocative actions in the South China Sea; occupying or erecting new structures on the islands, and land features —
A fundamental problem facing Indonesian officials is that China does not really believe Indonesia is neutral in this affair. In fact, Indonesia and China probably have overlapping jurisdictional claims in the South China Sea, depending on the meaning of China’s historical “nine-dashed line,” which Indonesia has formally criticized at the United Nations.

Presently occupied or not; inhabiting the presently uninhabited islands and other land features; and conducting activities that threaten navigational safety and/or polluting the environment.”

While I personally applaud such bold initiatives, it is highly unlikely that even ASEAN members will agree to the first provision, let alone China or outside powers like the US. The claimants/occupiers of disputed islands or islets are also unlikely to agree to the second provision, as well. Nevertheless, each new construction with military applications raises tensions and ratchets up the action-deterrence dynamic another notch. The third and fourth prohibitions are in the DOC in one form or another and should not be a problem.

A second part of this implementation section consists of a mishmash of existing international agreements such as the International Regulations for Preventing Collisions at Sea 1972 (COLREGS) and previous Incidents at Sea (INCSEA) agreements. The US Navy negotiated agreements on similar “rules of the road” with the former Soviet Union to manage incidents between the two navies. Others have followed suit. But it is not clear where this particular content came from since it was neither in the DOC nor the agreed “elements.”

While these provisions are useful, they apply mostly to operators of vessels, particularly military vessels, and not to nations and their decision-makers. As such, they should be taken out of the COC and negotiated and agreed separately. However, the last two provisions of this section are significant in that they provide agreement by the parties to use the High Council of the TAC to settle any disputes relating to incidents that may arise. Further, they stipulate that any unresolved incident may be referred to an appropriate dispute settlement mechanism — again with the consent of the parties concerned.

ABMIGOUS MONITORING, UNCLEAR DISPUTE SETTLEMENT

One critical provision is the “Monitoring and Reporting Mechanism,” which states, somewhat ambiguously, that “the COC shall be monitored through a mechanism agreed upon by ASEAN and China to oversee the Implementation and reporting of this Code of Conduct.” This is crucial to the effectiveness of a COC, yet the mechanism is “to be determined.” Also, the mechanism is only “to monitor the implementation of the COC.” The draft does not say what happens if a party is found to be in violation of the code. Perhaps there should also be a clause mandating public reporting of the monitoring function, since international opprobrium would be an effective enforcement tool.

One of the most important parts of a robust COC is the dispute-settlement mechanism. This provision of the draft COC — taken from the draft “elements” — proposes that the TAC dispute settlement mechanism should be used first, and if the issue cannot be resolved within this ASEAN framework, then the parties should use the mechanism provided by international law, including but not limited to UNCLOS. The TAC, to which China acceded on Oct. 8, 2003, provides for a ministerial-level ASEAN High Council comprised of representatives of all “High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.” If no solution is achieved through direct negotiations, the High Council “shall recommend to the Parties in the dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation.” The High Council itself may, with the consent of the parties to the dispute, take on these functions itself, and can also “recommend appropriate measures for the prevention of deterioration of the dispute or the situation.” However, in the 36 years of the TAC’s existence, the High Council has never been constituted or used, presumably due to ASEAN’s culture of non-interference in the internal affairs of other countries. This constraint will have to be overcome.

There is another potential problem. The TAC also encourages “other High Contracting Parties not party to the dispute (to offer) all possible assistance to settle the said dispute. Parties to the dispute should be well disposed toward such offers of assistance.” Does this mean that the US, which has acceded to the TAC, would be justified in offering its assistance to settle the disputes between ASEAN claimants and China? Or, conversely, does this mean that ASEAN members could offer to help settle disputes between China and the US regarding freedom of navigational issues in the South China Sea? This raises the question of who is a “High Contracting Party” — the original signatories only, or any party that has acceded to the treaty? This question, if raised, would presumably be addressed within ASEAN and decided by consensus.

The UNCLOS dispute settlement option is irrelevant regarding sovereignty claims. Moreover, it is highly unlikely that China would agree to have its jurisdictional disputes resolved by the ITLOS. In short, these mechanisms may not be very helpful in resolving the South China Sea disputes.

The remaining provisions appear to be only housekeeping, but they are significant in that they essentially make the COC a treaty — that is, a legally binding instrument. They include establishing a review mechanism on the basis of “consensus by all parties concerned;” prohibition of reservations to the COC; stipulation of provisions for entry into force of the COC; provisions for its amendment; an “indefinite” duration for the treaty; and provisions for its respect by other countries. Finally, there is a provision that the Secretary General of ASEAN register the COC with the Secretariat of the United Nations.
WHAT IS MISSING?
While this draft is certainly a step forward and more specific and comprehensive than the “elements,” some key provisions are still missing, including important parts of the informal DOC. These include:

• Specification of the parties to the code: Should this include claimants to the disputes only? All members of ASEAN as individual states and China? All of ASEAN as a unit and China? Or all who want to be parties, including outside powers using the sea? After all, stability, peace and security in the South China Sea are in many countries’ interests, both those within the maritime region and those using it. Should the code be open to accession by others?

• A standard disclaimer regarding agreement on operation in disputed areas: The region had unfortunate experience in this regard when it was alleged that the Philippines — by agreeing to joint exploration with China in certain areas claimed by both — recognized the legitimacy of China’s claims. Therefore, it may be necessary to allay fears that co-operative activities in disputed areas could constitute acquiescence or recognition of the legitimacy of opposing claims.

• A commitment to use the area for “peaceful purposes” only: This term is somewhat controversial, but its inclusion would constitute an important commitment. After all, the term is used several times in the 1982 UNCLOS.

• A commitment to specific confidence-building measures like dialogue, prior notification of military activities in waters claimed by others, voluntary exchange of information etc.; A commitment to endeavor to determine and agree which features and areas are in dispute and which are undisputed: This is a very controversial suggestion that has been advanced by the Philippines, although at present the idea appears to be dead in the water. To “endeavor” to do this is little more than is already being attempted.

• A clause promoting “provisional arrangements of a practical nature” as provided in the DOC and UNCLOS: The clause could include “sharing or joint development of resources in areas of overlapping claims.” A phrase could also be included that says “the modalities, scope and locations of bilateral and multilateral co-operation should be agreed by the parties concerned prior to their actual implementation.” This would prevent unilateral actions in waters claimed by others under the guise of “co-operation.”

• A clause saying that the parties will not take any unilateral action in disputed areas that would jeopardize or hamper the reaching of a final agreement regarding the disputed area: This language is included in UNCLOS. By precedent, this would include drilling for hydrocarbons.11

• A statement reaffirming the formal binding nature of the code: The signatories to the code should be the heads of state, which would underscore the importance of the document and the commitment to its provisions.

In conclusion, the Zero Draft Code of Conduct is a step forward and contains some bold proposals, but it is unlikely that the ASEAN claimants will agree to all of the provisions, let alone all ASEAN members. China too is unlikely to embrace the current draft, which also presents some problems for users of the South China Sea such as the US. It would seem that there is much more diplomatic work to be done. The reality is that a truly robust Code of Conduct may be a bridge too far.

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