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REPORT ON THE 5th INTERNATIONAL WORKSHOP ON THE SOUTH CHINA SEA: COOPERATION FOR REGIONAL SECURITY AND DEVELOPMENT

Introduction

I would like to express my appreciation to the Asia New Zealand Foundation for the opportunity to attend the 5th International Workshop on the South China Sea in Hanoi 10-12 November 2013. It is very difficult to do justice in a short report to a Workshop that featured 45 panellists, many of whom provided comprehensive analysis of recent developments in the South China Sea and of future prospects. I will focus on the topics that dominated the Workshop: the Philippines decision to have its case heard under UNCLOS provisions, and prospects for the Code of Conduct (COC).

The Philippines: Breaking Ranks

The Philippines decision to lodge a statement of claim with the United Nations for the establishment of an Arbitral Tribunal under UNCLOS came in for some heavy criticism, on the grounds that Manila had broken ranks with ASEAN, provoked China, and added a further irritant to Sino-United States relations given Manila's close links with Washington.

Carlyle Thayer, a South-east Asian Studies specialist at the Australian Defence Force Academy, noted that the Philippines had not consulted other ASEAN states. China had declined to participate in the Tribunal, and had placed relations with the Philippines "in virtual cold storage". China wanted the matters raised by the Philippines settled bilaterally. The United States had apparently urged Vietnam to join the Philippines application for an Arbitral Tribunal, but Hanoi had declined to do so.

Five judges had been appointed to the Tribunal and had directed the Philippines to address a range of issues by 31 March 2014. They would then determine whether the Philippines had established a case in international law, and if so whether they have jurisdiction over the matters raised. The Tribunal could only proceed if the answer to both questions was in the affirmative. Thayer thought that could be a difficult call.

Thayer suggested that the Philippines had taken this step confident that the United States had its back. The security relationship with the United States had strengthened since the announcement of the rebalance to the Pacific. Moreover, Japan had been “stirring the pot” by establishing “a strategic partnership” with the Philippines. Japan had embraced the “enemy of my enemy is my friend” model of international relations. Japan’s Defence Minister had assured the Philippines that Tokyo would side with Manila in its territorial dispute with China. Japan had since agreed to provide a concessional loan to assist the Philippines acquire ten patrol boats for its Coast Guard.

Mark Valencia, a maritime policy specialist with the Nautilus Institute, considered possible Tribunal outcomes and the implications for ASEAN. ASEAN’s desire to maintain its unity and centrality on security issues was complicated by the political tug-of-war between China and the United States. The Philippines action made the balancing act for ASEAN much harder. Singapore and Thailand were particularly unhappy and had made it clear that the Philippines did not speak for ASEAN or have its backing. Indonesia, too, was unhappy.

ASEAN was already divided on South China Sea issues. The Philippines had exacerbated that divide. China did not now trust the Philippines, while the other ASEAN’s considered the Philippines an obstacle to solidarity. Valencia found the Philippines strong criticism of China’s historic South China Sea claim ironic, given that the Philippines original claim was also an historic one, as was its claim to Sabah. He expressed concern about the Aquino administration’s intention to consider the possibility of also submitting the claim to Sabah to international arbitration. That would further complicate intra-ASEAN relations.

Should the Tribunal decide it does not have jurisdiction, the ASEAN claimants would have to confront the prospect of negotiating their claims with “an

increasingly assertive and intimidating China” buoyed by such a finding. On the other hand, if the finding went in favour of the Philippines, and China chose not to abide by it, “legal and political uncertainty will reign....and violent incidents are likely to proliferate and intensify”. Valencia suggested China could cite the precedent of the United States refusal to abide by the decision of the International Court of Justice, in respect of a case brought by Nicaragua in 1984.

The Tribunal might opt for a mixed result by deciding that it has jurisdiction and finding that China has “historic title” to a share of the resources in the disputed area, but that it must share them with the Philippines (and possibly other claimants). Valencia cautioned that the United States and its Asian allies needed to be careful lest they push China into being what they fear most – a “rogue country that uses might rather than right in its international relations”. He hoped China and the Philippines might consider a mutual “no first use of force” agreement.

Li Jianwei, Director of a Research Division at the National Institute for South China Sea Studies, compared Vietnam’s approach to South China Sea issues with that of the Philippines. There was a highly structured set of dialogues between China and Vietnam involving both government and party officials. This had contributed to the positive management of bilateral disputes in the South China Sea. In addition, defence and security consultation mechanisms had also been very helpful. Although significant issues were still to be resolved there were already some positive outcomes, such as the demarcation of the China/Vietnam land border and agreements on Gulf of Tonkin disputes.

There was no such structure in place with the Philippines. Prior to President Aquino taking office, joint exploration had been discussed and bilateral consultation mechanisms agreed on a range of matters. The Aquino Administration, however, had turned to the United States and decided to go down the international jurisprudence path rather than to resolve issues bilaterally.

From the DOC to a COC: A Long Road to Begin

The Director of the Foundation for East Sea Studies and Assistant to the President of Vietnam’s Diplomatic Academy, Tran Truong Thuy captured the

sense of a very long journey just to reach the starting point on the road to a COC, and another very long journey ahead. It took almost nine years to complete the guidelines for the implementation of the DOC, which were finally agreed in July 2011.

China's agreement at the Suzhou meeting in September 2013 to place the COC on the agenda of all ASEAN/China senior officials meetings, reflected a change in approach that had followed a "charm offensive" from Beijing intended to demonstrate that China wanted to improve its relations with all the ASEAN's (excepting the Philippines). Under its new leadership, China's strategy was now much more centralised and better coordinated.

At the Suzhou meeting ASEAN had agreed to a Chinese proposal to establish an eminent and experts working group to provide support for official consultations. Earlier, ASEAN had agreed to another Chinese proposal that progress towards a COC should be on the basis of consensus. Tran expressed concern that China could now use the consensus principle to veto any proposal it did not agree with at expert level and then at officials level. COC formulation was therefore likely to be a protracted process.

Tran said Vietnam would demand the inclusion of the Paracels in the COC, which China would oppose. The Philippines would not agree to the inclusion of the Scarborough Shoal, as that would legalise China's occupation by accepting the status quo. Then there was the size of the "disputed maritime zones" generated from "disputed land features". Some of these issues could not be resolved unless the parties clarified disputed areas in the South China Sea. That would require discussions among the claimant states, not between ASEAN and China.

Would the COC be a political document like the DOC or legally binding in the form of an international agreement? ASEAN would prefer the latter, but would face a dilemma. It would need to decide whether to opt for a legally binding document with insufficient content (as China would not agree to a detailed legal document), or a political declaration that contained more detailed provisions. There was the question of the relationship between the DOC and the COC. China did not want the COC to replace the DOC. ASEAN appeared to agree, but if the COC were to incorporate all the elements of the DOC the latter would presumably fade away.

Finally, what is the COC trying to achieve? Both ASEAN and China seemed to agree that the COC is not intended to solve the complicated and longstanding territorial disputes in the South China Sea, but rather to manage them to avoid conflict. ASEAN would likely want to focus on preventing, managing and resolving incidents, while China would want to emphasise cooperative activities.

Looking a decade ahead, Ian Storey, Senior Fellow at the Institute of South-east Asian Studies (ISEAS), Singapore, predicted a continuation of the status quo with tensions continuing to fester. That would increase the likelihood of the dispute “being sucked into the vortex of US-China rivalry, rendering it utterly intractable” for generations to come. A number of other speakers expressed concern about the competition between China and the United States for regional influence and its impact on ASEAN unity and on progress in moving the COC forward.

Termsak Chalermphanupap, Visiting Research Fellow at ISEAS, discussed the Chinese proposal for an ASEAN-China Treaty on Good Neighbourliness and Friendly Cooperation, which Premier Li Keqiang put forward at the 16th ASEAN-China Summit in Brunei on 9 October. China had yet to reveal the details of the proposed treaty and its relationship with the Treaty of Amity and Cooperation was far from clear. Was this, he asked, an attempt to divert ASEAN’s attention from the COC or a counter to the recent proposal by Indonesia’s Foreign Minister for an Indo-Pacific Treaty?

Conclusion

This was an excellent Workshop that examined the key issues in considerable depth. It gave little cause for optimism that early progress could be expected on the COC. The majority view appeared to be that by going it alone the Philippines has added a new layer of complexity to an already incredibly complex problem. A united ASEAN position seems further off now that Manila has widened the gap both between the ASEAN claimant and non-claimant states and between the claimant states. China will be under little pressure to move on the COC until there is clarity on ASEAN intentions.

Meanwhile, further complicating South China Sea issues are the suspicions China and the United States harbour about each other’s intentions in the region. A stable Sino-United States relationship will remain very important

as ASEAN and China inch forward in the search for consensus on the shape and content of the COC.

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