

CONFERENCE SUMMARY: REVISITING AND INNOVATING MARITIME SECURITY ORDER IN THE ASIA-PACIFIC

Nanjing, China
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Introduction

An international selection of scholars from Asia and North America met to discuss the question of Asia's maritime order, particularly in light of this year's arbitration ruling in the case lodged by the Philippines against China. In the wake of the ruling, and the still more recent reset of China-Philippines relations, participants took on a variety of topics related to cooperation and conflict mitigation in the Asian maritime space.

Panel 1: The Geopolitical Situation and Security Challenges

The first panel examined distinct aspects of the fast-evolving dynamics in the maritime security domain. One panelist discussed emerging issues associated with increased use of the Arctic Ocean. Another discussed Japan's increasing focus on improved maritime security capacity-building in a number of South-east Asian countries. Still another discussed the intersection of maritime law and regional politics in the Asia-Pacific maritime domain and the unpredictability and uncertainty that this intersection has generated of late.

Most of the panel focused on an evaluation of the changing situation in the South China Sea, and an assessment of the security implications of Philippine president Rodrigo Duterte's reset of relations with Beijing. While Scarborough Shoal seems to be an area of likely interim reconciliation between China and the Philippines, other areas of contention in the Spratly archipelago still loom large in the relationship. Participants discussed the extent and meaning of Duterte's "separation" from the United States, the history of China-Philippine relations, and the Philippines' broader strategic outreach to other regional actors.

Discussion emphasized the fluidity of the political situation between China and ASEAN members, particularly the Philippines, but also broader structural changes in the security environment and the region's disposition towards using legal tools like UNCLOS rather than political pragmatism to settle disputes.

Panel 2: The Role of International Law in Maritime Dispute Settlement

Participants in the second panel examined the potential for legal dispute settlement, effective ways to implement legal solutions, and examples of successful use of international law to solve maritime delimitation issues. One participant outlined a case of successful dispute settlement by judicial means, that of the Indonesia-Malaysia dispute over Sipadan and Ligitan islands.

Discussion was very much focused on the question of whether the Philippines' case against China at the Permanent Court of Arbitration was constructive or conducive to settling the longstanding dispute. Most participants were, in one way or another, skeptical that the arbitration proceedings had brought China and the Philippines or the region in general closer to a resolution to the maritime sovereignty disputes. Some critiqued the arbitral tribunal on the grounds that it failed to show adequate deference to regional political processes, to non-UNCLOS areas of international law, or even to state practice while interpreting the Law of the Sea.

Chinese participants largely held that not only was the ruling invalid, but Beijing was wise to boycott the proceedings entirely. Some indicated a suspicion that both Manila's decision to lodge the complaint and the PCA itself was influenced by the United States. There was some discussion and disagreement about how to evaluate the notion that judicial proceedings can be used for "political" purposes. Another disagreement surrounded whether arbitrary dispute settlement was a peaceful means for resolving disputes. Participants discussed China's broader disposition towards international law, with some Chinese participants emphasizing that its rejection of the PCA process was not an indication of a turn away from participation in legal processes. Most participants seemed to agree that in the future political processes should be given more latitude by judicial bodies than was displayed during the current PCA case.

Panel 3: Functional Cooperation

The third panel explored the degree to which cooperation between South China Sea littoral states can be carried out in the absence of a settlement of boundary and jurisdictional disputes. “Functional” areas were typically envisioned to be “low politics” issues, including oil and gas exploration, scientific research, fisheries management, maritime law enforcement and marine conservation.

Some participants focused on the vital necessity for functional cooperation in marine conservation and fisheries management. They noted that the region is in dire need of conservation and fisheries management regimes, and one proposed a joint system for monitoring ecological and other non-traditional security issues in the maritime domain.

One noted that the time was ripe for functional cooperation, given the PCA verdict and the 15th anniversary of the DOC. Others focused on the utility of functional cooperation for improving relations. One panelist warned that functional cooperation can cause problems, given its susceptibility to manipulation, disagreement about the dividing line between “functional” and strategic matters, and the possibility of unduly heightening expectations. By this account, functional cooperation is not an optimal way to address more significant disagreements between states.

Other panelists discussed models for an ASEAN+China cooperation scheme that is based on useful practices and precedents elsewhere. These included the Mediterranean Sea model for comprehensive regional cooperation, the International Maritime Organization as a model of consensus-based approaches to functional problems, and the Northwest Atlantic Fisheries Organization. Panelists were in general agreement that there were a number of avenues for pursuing increased functional cooperation in the South China Sea, and that UNCLOS and the DOC process both allowed for increased cooperation without prejudice to the final settlement of sovereignty disputes.

Panel 4: After the Arbitration Ruling: How can we move on?

The question of Philippines-China and ASEAN-China relations was a centerpiece of the final panel, although US-China relations were brought in as a background consideration. Many noted the fluidity in relations between China and ASEAN countries, including the Philippines, but also a certain dichotomy within ASEAN regarding closer alignment with either China or the United States. One panelist expressed hope that improved relations between China and Manila will spill over into more productive relations with other ASEAN states. Another panelist contrasted this with the alleged inflexibility of the United States in its policies in the South China Sea.

Panelists recommended a few specific mechanisms for advancing positive relations in the region. One emphasized the importance of non-state actors and epistemic communities in facilitating cooperation within Asia along the lines of the UN Environment Program/Global Environment Facility. Another suggested at a more strategic level, that the region be organized by a “2+” concept of international cooperation. In other words, ASEAN+China (the “2”) should form the core of broader multilateral mechanisms that allow external stakeholders to participate in dialogue on the future of the region. This model would allow the legitimate interests of states like the US to be productively engaged in multilateral discussions. Another recommended mechanism involved intensified confidence building measures between the US and China, including crisis management and security coordination discussions.

Roundtable Discussion

A concluding roundtable discussion focused on a few key points. Many participants were interested in the question of the impact that China’s “three no’s” would have on UNCLOS or international law in general. Many

observed the parallels between this situation and the United States' refusal to comply with an ICJ ruling in the Nicaragua case. While most participants agreed that international law survived and is often honored in the breach, many also thought China should have participated in the proceedings at least to lodge its objections to the PCA's jurisdiction. Some participants rejected this idea.

Another line of discussion focused on the question of why the Philippines brought the case against China in the first place. Some Chinese participants viewed it as manipulation by the United States, but other participants argued that it was a response to bilateral talks breaking down, followed by the 2012 Scarborough Shoal incident.

Discussion about China's next steps included a few participants advocating that China seize this opportunity to define its claims in clear, legal way, in order to help outside audiences understand Beijing's stance on such issues as the interplay of historic rights and UNCLOS. There was considerable agreement about the utility of using international law flexibly in order to promote agreement and cooperation, in the sense that parties should be free to disregard problematic areas of law if they stand in the way.

A final area of discussion covered the issue of US-China relations in the South China Sea. Many participants voiced the idea that the maritime disputes have evolved primarily into a great-power issue between the two states. To some this meant that external states should be wary of intervening and further altering the character of the disputes, but to others this meant that there should be more direct efforts to reconcile or at least manage US-China security issues. Along these lines, some participants raised the idea of strategic restraint, according to which the US and China should continue to develop rules of the road for their militaries, and address ways in which to restrain or modify close-in reconnaissance and freedom of navigation operations.

Conclusion

The conference was marked by a few recurring ideas. Most participants seemed to believe that the recent warming of relations between Manila and Beijing was a positive step forward, although most thought this was inspired by Rodrigo Duterte's policy preferences rather than the ruling in the PCA. To the contrary, many thought that the PCA's verdict was too expansive or insufficiently deferential to political and regional institutional considerations, and that such use of judicial power in the absence of political will among the disputants was unlikely to contribute to a solution. Opinion was divided regarding whether or not the ruling was actually detrimental to political processes of dispute settlement.

Participants seemed virtually unanimous in their appraisal that more functional cooperation can and should be cultivated among South China Sea littoral states. There was also much support for the argument that many precedents for effective cooperation, particularly in fisheries management and conservation, already exist elsewhere on the globe. Some, however, noted difficulties associated with functional cooperation in oil and gas, or observed that functional cooperation is not necessarily a route to more stable political relations. An overarching theme that related to many discussions was the question of the degree to which existing norms and legal regimes can contribute to solving the complex problems in the Asian maritime domain. This included questions about the degree to which UNCLOS supersedes other legal principles, and whether its rigidity on maritime zones is constructive in the very complex littoral environment of East and Southeast Asia. In taking on these issues, participants voiced a few general responses: many emphasized the importance of flexibility in legal regimes such that they don't crowd out necessary political processes that are ultimately required to support them, and others questioned the degree to which current regimes such as UNCLOS must evolve to remain a relevant and useful instrument for managing relations.



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