

Assessing the Effectiveness of Confidence-building in the South China Sea: Cool and Constructive?

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Introduction

The so-called ‘Asian century’ and the rise of China is accompanied by a resurgence in territorial disputes and nationalistic fervour which threatens more than forty years of peace and prosperity in Asia. Correspondingly, there has been widespread interest in confidence-building measures (CBMs) as a means to promote peace.² CBMs are discussed at regional diplomatic meetings, at so-called ‘track two’ dialogues, between militaries and amongst academics. This ubiquity is reflected in the overarching security regime in Southeast Asia, the Association of Southeast Asian Nations (ASEAN) Regional Forum (ARF) with its three-stage aim of confidence-building, preventive diplomacy, and conflict resolution. The goal of all this is to ‘handle relevant differences in a cool and constructive manner.’³

The literature concerning CBMs is substantial. In Australia alone, a major study by Rory Medcalf and Raoul Heinrichs in 2011⁴ was followed by a conference focused on the South China Sea in 2013.⁵ Despite articles looking at confidence-building in particular relationships or at particular measures, little attention has been paid

¹ The views expressed are the author’s own and not necessarily those of the Australian Department of Defence.

² Sometimes also called confidence and security building measures (CSBM) to distinguish military focused measures from broader non-military CBMs. The term confidence-building measures is used throughout in this paper without distinction. See: Organization for Security and Co-operation in Europe, *OSCE Guide to Non-military Confidence-Building Measures*, OSCE, 2012, pp. 14-16.

³ ASEAN, “ASEAN-China Cooperation Towards the 21st Century: Joint Statement of the Meeting of the Heads of State/Government,” Kuala Lumpur, 16 December 1997.

⁴ Rory Medcalf and Raoul Heinrichs with Justin Jones, *Crisis and Confidence: Major Powers and Maritime Security in Indo-Pacific Asia*, Lowy Institute for International Policy, 2011.

⁵ *Special Report on Maritime Confidence Measures in the South China Sea Conference*, Australian Strategic Policy Institute, September 2013.

to assessing their effectiveness. In fact, since Medcalf and Heinrichs' survey, confidence-building in the Asia-Pacific has been put under acute stress and this assessment is overdue. This paper answers this question: 'what are the characteristics of effective CBMs in the South China Sea?'

The paper argues that the type of measure determines effectiveness. Firstly, whether they are top-down, politically driven or bottom-up, operationally driven agreements, and secondly, whether they directly address the causes of insecurity or only indirectly improve confidence. It finds that bottom-up and direct agreements are more effective. This matters because the assumption that CBMs have only positive effects and negligible costs is mistaken and therefore policy makers should pursue those measures with the best chance of success.⁶

This analysis concentrates on military, and particularly naval, CBMs. The ultimate risks to peace and security lie in military confrontation. Given the maritime nature of the Asia-Pacific, this usually means maritime military forces. Non-military issues such as fisheries, resource development and environmental protection can sap confidence and are fruitful areas for CBMs. Pointedly, the intersection of these domains in 'white-hulled' law enforcement and ambiguous maritime militia deserves study. However, that is a large topic in its own right and therefore here we focus on military CBMs.

The paper begins in Chapter 1 by defining confidence-building and effectiveness, identifies the two characteristics of CBMs that are analysed, and provides background of the South China Sea as a case study. Chapter 2 describes the major CBMs in the South China Sea, namely: the ASEAN-China Declaration of Conduct, the U.S.-China Military Maritime Consultative Agreement, the Vietnam-China Basic Principles Agreement, and the Code for Unplanned Encounters at Sea. Chapter 3 assesses the effectiveness of each of these agreements before the paper concludes with some implications of the analysis.

⁶ Marie-France Desjardins, *Rethinking Confidence-building Measures*, Adelphi Papers No. 307, Oxford University Press, 1996.

Chapter 1: Background

Firstly, this chapter deals with the difficult matter of defining CBMs and their effectiveness. It establishes two criteria for effectiveness: improvement in military security through improving crisis stability and transforming the security climate to reduce the risk of conflict. Secondly, it describes two dimensions that characterise CBMs: (1) the level of government involvement ranging from top-down, political processes to bottom-up, operational processes, and (2) the directness of the measure's connection to the security risks ranging from directly treating the risks to indirectly contributing to broader confidence. Finally, this chapter discusses the South China Sea as a case study. There is a brief history of the disputes up until 2012 when relative stability gave way to a period of acute crisis. This crisis from 2012 through to 2016 is the basis for the case study.

(1) Defining confidence-building measures and effectiveness

One of the few attempts at a theoretical framework for CBMs defines them simply as ‘arrangements designed to enhance such assurance of mind and belief in the trustworthiness of states and the facts they create.’⁷ To say that the objective of CBMs is to build confidence begs the question – what is the purpose of confidence? Especially since lack of confidence is not regarded as a principal cause of conflict.⁸ These early definitions were associated with arms control and the goal of reducing the likelihood of war through recognition of common interests, even military interests, with potential adversaries.⁹ However, compared with arms control, CBMs seemed easier and post-Cold War were being touted as a force for regional conflict prevention. The establishment of ARF in 1994 reflects this belief with its focus on confidence-building and preventive diplomacy

⁷ Johan Jørgen Holst, “Confidence-building measures: a conceptual framework,” *Survival* 25, No. 1, 1983, p. 2.

⁸ In a recent comprehensive survey, only one model of the causes of war (the “steps-to-war” model) engages with issues of trust. Jack S. Levy and William R. Thompson, *Causes of War*, Wiley-Blackwell, 2010, pp. 60-63.

⁹ Robert Jervis, “Arms control, stability and causes of war,” *Political Science Quarterly* 108, No. 2, Summer 1993, pp. 239-241.

in the Asia-Pacific.

For these historical reasons, there are two distinct objectives for CBMs. The first, associated with earlier literature, is to improve military security. This is aimed at reducing the possibility of surprise attacks, reducing the risk of escalation due to miscalculation or miscommunication, and generally increasing the predictability and stability of military relations. The main thrust of this objective is crisis stability – ensuring that crisis does not lead to unintended conflict. The second objective, associated with the broader post-Cold War view, is to transform the security climate. Specifically, this includes breaking deadlocks to bring about better working relationships and providing a basis for new models of cooperative or collective security regimes. This objective seeks to reduce the underlying risk of conflict and prevent crises from occurring in the first place.¹⁰

CBMs rarely state their objectives in these terms and may, in fact, address both. Furthermore, the advantages may lay in the process rather than the concrete measures. James Macintosh argues that negotiations on particular measures often results in failure but, rather than the measures, it is the ‘dynamic process of transforming a security relationship from a flawed present to a more stable and less risky future’ that is effective.¹¹ Nevertheless, this paper assesses the effectiveness of CBMs in terms of these two broad objectives. To be considered effective, a CBM must materially improve military security as seen through improved crisis stability or it must transform the security climate to reduce the underlying risk of conflict.

What does the literature say about CBM effectiveness? In general, studies of individual agreements tend to concentrate on the impediments to negotiation rather than effectiveness in use. For example, regarding naval CBMs in South America, it is argued that

¹⁰ Desjardins, *Rethinking Confidence-building Measures*, pp. 4-5.

¹¹ James Macintosh, *Confidence Building in the Arms Control Process: A Transformation View*, Arms Control and Disarmament Studies, No. 2, Dept. of Foreign Affairs and International Trade, 1996.

cooperation is only possible once territorial issues are resolved. After this, effective institutions – in particular, ‘legitimacy, reliability and long-term compliance are key factors’.¹² This argument is about the possibility of CBMs; little is said about what kinds of measures might be effective beyond a preference for naval measures.

David Griffiths identifies that naval CBMs have a long and successful history stretching back to medieval agreements.¹³ He highlights the U.S.-Soviet Incidents at Sea agreement as particularly effective. David Winkler, who has studied this CBM extensively, argues there were seven reasons for this. (1) It was in both sides’ best interests, (2) it was simple to implement, (3) discussions remained professional rather than political, (4) regular reviews with thorough preparation, (5) ‘atmospherics improved working relationships, (6) it operated confidentially with little publicity, and (7) included verification and accountability.¹⁴

In a rare critical assessment of CBM effectiveness, Marie-France Desjardins distinguishes between a ‘European model’ of CBMs focussed on military security like the 1975 Helsinki Final Act and a newer ‘comprehensive’ approach which seeks to encourage cooperation and reduce the risk of conflict. These approaches correspond with our two measures of effectiveness – crisis stability and transformation of the security climate. Desjardins finds that the keys to effective CBMs are ‘specific action-oriented agreements’ and verification. Mere process is insufficient, first-generation agreements that might be non-binding or non-verified need to be implemented and evolved into more specific agreements. Importantly, mutual self-interest is essential and cannot be assumed.¹⁵

There is much commonality between Desjardins and Winkler. In favouring bottom-up and direct CBMs, this paper is broadly in

¹² Pedro Luis de la Fuente, “Confidence-building measures in the Southern Cone: a model for regional stability,” *Naval War College Review* 50, No. 1, winter 1997, pp. 46-48.

¹³ Griffiths, *U.S.-China Maritime Confidence Building*, p. 10.

¹⁴ David F. Winkler, “US-Soviet maritime confidence-building measures” in *Maritime Confidence Building in Regions of Tension*, edited by Jill R. Junnola, The Henry L. Stimson Center, 1996, pp. 17-20.

¹⁵ Desjardins, *Rethinking Confidence-building Measures*, pp. 60-63.

agreement with their conclusions. Unlike assessments of individual CBMs, this paper provides a comparative case study which yields a more general theory of CBM effectiveness. Additionally, when Desjardins wrote in 1996, it was difficult to properly assess the new post-Cold War comprehensive approach to CBMs. This contemporary case study gives full weight to both confidence-building approaches.

(2) Characteristics of confidence-building measures

This paper classifies CBMs along two dimensions. The first dimension classifies them by the level of government driving the process, from top-down and political to bottom-up and operational. In a top-down process, measures are largely determined by how they fit into the broader relationship between the parties. With the aim of improving confidence, parties embark on the process of negotiating CBMs. This process is driven by foreign ministry or leader level engagement and determines what measures are acceptable in the political context. In a bottom-up process, measures are negotiated by military or law enforcement agencies and reflect operational considerations. Negotiating is still a political process and politics may still determine what measures are acceptable but the character of the CBMs will be different when initiated at the operational level. The distinction between top-down and bottom-up reflects different priorities at the operational and political levels.

While the first dimension is concerned with process, the second is concerned with content. In particular, CBMs are classified as either direct or indirect.¹⁶ Direct measures are intended to deal directly with the threats to peace and stability in a region. Examples include 'hotlines' that assure communication during crisis, communication procedures for operational units, agreements on particular operational behaviour, joint patrols and data sharing, notification of exercises and movements, and observation and inspections. In contrast, indirect measures are activities that seek to foster greater understanding. Examples include periodical dialogues -

¹⁶ Medcalf and Heinrichs, *Crisis and Confidence*, pp. 27-31.

military-to-military talks, conferences and visits - as well as goodwill ship visits, educational exchanges, and exercises and agreements related to uncontested issues such as humanitarian assistance, disaster relief and search and rescue.

Arguably, this categorisation is redundant with our two objectives. That is, CBMs with an objective of military security are necessarily direct measures derived from a bottom-up process while those with an objective of transforming the security climate are indirect and top-down. However, these represent distinct elements of CBMs - the ends, ways and means - that should be considered separately. It is possible that politicians may be more willing to compromise on operational issues or that military leaders may seek measures with a long-term focus on transforming the security climate.

(3) South China Sea as a case study

To assess effectiveness, this paper uses the South China Sea as a case study. It looks at incidents between the Scarborough Shoals incident in April 2012 and the judgement on the Philippine-initiated arbitration in July 2016. This case study is a challenging test for CBMs and highly relevant for current policy.

What is at stake in the South China Sea?

The Asia-Pacific is dominated by strategic competition between the U.S. and China. Depending on your viewpoint, the South China Sea is either the most dangerous, representing 'future of conflict',¹⁷ or the least significant of the flashpoints in East Asia.¹⁸ Regardless, it is of particular interest to the U.S. and China, to extra-regional powers such as Japan, Australia and India, and, not least, to the Southeast Asian nations that enclose the sea. This makes it a difficult test case; while other flashpoints are bilateral disputes overlaid with U.S.-China rivalry, the South China Sea features a range of claimants and stakeholders. This provides a variety of approaches to assess the

¹⁷ Robert D. Kaplan, "The South China Sea is the Future of Conflict," *Foreign Policy*, Sep/Oct 2011, pp. 76-85.

¹⁸ Brendan Taylor, "The South China Sea is Not a Flashpoint," *The Washington Quarterly* 38, No. 1, 2014, pp. 99-111.

effectiveness within one geopolitical context.

This geopolitical context consists of four elements. The first is territorial. The South China Sea is a semi-enclosed sea containing more than 250 small islands and features and includes two major archipelagos, the Paracel Islands in the north and the Spratly Islands in the east. The Philippines, Vietnam, Malaysia and Brunei have conflicting claims to features as well as Exclusive Economic Zones (EEZ) and continental shelf claims extending from their coastlines. China makes an extensive and ambiguous claim to the majority of the area known as the nine-dash line. Taiwan's claims match those of mainland China but it has taken different steps over those claims. While not disputing ownership of any of the islands, Indonesia's maritime boundaries overlap the nine-dash line.¹⁹

Secondly, there are the resources associated with these claims. Although opinions vary about the significance of oil and gas reserves, offshore exploration activities by China, Vietnam and the Philippines have led to confrontations in disputed waters.²⁰ More critically, the South China Sea is an extremely rich fishing ground, responsible for around 12% of the world's total catch and is vital to all of the claimants.²¹ More than oil exploration, fisheries incidents provide the regular drumbeat of crisis in the region.

For the U.S. and China, the South China Sea is a stage in the contest for regional hegemony. The particular dispute concerns the Law of the Sea and the 'rules-based global order'. The *United Nations Convention on the Law of the Sea* (UNCLOS) is itself a powerful maritime CBM which regulates the claims and behaviour of states. However, the U.S. and China take differing viewpoints on the military uses of the EEZ. The U.S. views the EEZ as an inwards extension of

¹⁹ For a detailed summary see: Gregory B. Poling, *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute*, Center for Strategic & International Studies, 2013.

²⁰ Leszek Buszynski, "The South China Sea: oil, maritime claims and U.S.-China strategic rivalry", *The Washington Quarterly* 35, No. 2, Spring 2012, pp. 141-143.

²¹ Clive H. Schofield, Rashid Sumaila and William Cheung, "Fishing, not oil, is at the heart of the South China Sea dispute," *The Conversation*, August 10, 2016. <https://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580>.

the high seas and claims high seas freedoms, including military surveillance, while China views it as an outwards extension of territorial waters and claims broad rights to prevent or control foreign military activities. This tension between maritime and coastal states under UNCLOS is found worldwide but overlaid with strategic rivalry it becomes a source of confrontation.²²

From a third perspective, the South China Sea sits astride the major shipping routes from Europe and the Middle East to East Asia which covered 21% of global trade in 2016.²³ China is the most important destination of this shipping but the extra-regional powers such as Japan and Australia emphasise the importance of this sea line of communication and the costs if it were closed.²⁴ These concerns are often expressed in the same language of freedom of navigation and rules-based global order used by the U.S. but the strategic interests differ.²⁵

The fourth geopolitical element is nationalism. Chinese perceptions reflect the ‘century of humiliation’ narrative, and the perception that the sea is territory to which China has historic rights, feeds a maritime nationalism.²⁶ Nationalism is also a factor in other claimants, Vietnam has suffered widespread riots against Chinese interests during maritime stand-offs and in the Philippines, popular concern over the closeness of President Gloria Arroyo to China contributed to the hard line taken by President Benigno Aquino.²⁷

²² Ji Guoxing, “Rough waters in the South China Sea: navigation issues and confidence-building measures”, *AsiaPacific Issues*, No. 53, August 2001, www.eastwestcenter.org/publications/rough-waters-south-china-sea-navigation-issues-and-confidence-building-measures.

²³ Center for Strategic & International Studies, “How much trade transits the South China Sea?” *China Power*, August 2017, <https://chinapower.csis.org/much-trade-transits-south-china-sea/>.

²⁴ Kazumine Akimoto, “A new dimension to Australia-Japan maritime security cooperation” in *Indo-Pacific Maritime Security: Challenges and Cooperation*, edited by David Brewster, Australian National University National Security College, 2016, pp. 15-18.

²⁵ For some of the different perspectives on “rules-based orders” see: Hitoshi Nasu and See Seng Tan, “A rules-based order in the Asia-Pacific”, *Centre of Gravity Series*, No. 34, 2017.

²⁶ Katherine Morton, “China’s ambition in the South China Sea: is a legitimate maritime order possible?”, *International Affairs* 92, No. 4, 2016, pp. 911-912.

²⁷ Aileen S.P. Baviera, “Domestic Interests and Foreign Policy in China and the Philippines: Implications for the South China Sea Disputes,” *Philippine Studies: Historical and Ethnographic Viewpoints* 62, No. 1, 2014, pp. 133-143.

These views make it difficult for the various claimants to find accommodations.

History of the disputes

The disputes in the South China Sea can be traced to the end of World War II and the disposition of territories occupied by Japan. The merits of the various claims are beyond the scope of this paper. It suffices to say that all of the claimants have used occupation of islands (sometimes merely low-tide elevations or rocks), reclamation and construction, legislative and administrative measures, and diplomacy to advance their claims.²⁸ Sometimes this has led to confrontation and armed conflict. China expelled South Vietnamese forces from the Paracel Islands in 1974 and clashed with Vietnam over the Johnson South Reef in 1988. In 1995, China seized the Philippines claimed Mischief Reef causing a crisis but no conflict. Meanwhile, China became increasingly willing to confront the U.S. maritime surveillance leading to a fatal mid-air collision near Hainan Island in 2001.

Corresponding with these security challenges, various CBMs were introduced. ARF was established in 1994, the U.S. and China signed the Military Maritime Consultative Agreement in 1998, and ASEAN and China agreed a Declaration of Conduct in 2002. Even given the slow and incremental progress towards implementation, these CBMs have had ample time to demonstrate effectiveness by the case study period.

The case study begins in 2012 when a dramatic upswing in the level of incidents in the South China Sea heralded a period of acute crisis.²⁹ In April, a confrontation broke out between China and the Philippines over Scarborough Shoal, an isolated feature north of the Spratly Islands. China employed the so-called ‘cabbage strategy’ to extend de facto control using incremental actions that fall short of

²⁸ Stein Tønnesson, “The history of the dispute” in *War or Peace in the South China Sea?*, edited by Timo Kivimäki, NIAS Press, 2002, pp. 6-23.

²⁹ Christopher D. Yung and Patrick McNulty, “An Empirical Analysis of Claimant Tactics in the South China Sea”, *Strategic Forum*, No. 289, Institute for National Strategic Studies, August 2015, pp. 1-12.

provoking a response.³⁰ Defeat led the Philippines to adopt a new strategy of arbitration against China in the Permanent Court of Arbitration.

While the arbitration case was underway, further confrontations occurred. At Second Thomas Shoal, China attempted to prevent resupply of the small Philippine garrison. China faced accusations of militarisation after embarking on massive reclamation and construction work in the Spratly Islands. Vietnam confronted Chinese oil exploration in disputed waters off the Paracel Islands leading to clashes at sea and riots in Hanoi. A pattern emerged of frequent and aggressive interception of U.S. surveillance flights by Chinese warplanes.

This series of linked crises and confrontations presents a particularly rich case study for the effects of CBMs. The case study ends with the arbitration judgement in July 2016 but there was no fundamental resolution of the disputes. As events continue to unfold in the South China Sea it represents a juncture and a convenient end point for this analysis.

Chapter 2: Major confidence-building measures

There are four major CBMs that are relevant in the South China Sea. These are: (1) Declaration of Conduct between ASEAN and China, (2) Military Maritime Consultative Agreement between the U.S. and China, (3) Basic Principles Agreement between Vietnam and China, and (4) Incidents at Sea Agreements, principally the Code for Unplanned Encounters at Sea. This chapter describes these CBMs with respect to the South China Sea disputes and characterises them as top-down or bottom-up and direct or indirect.

(1) Declaration of Conduct

The principal CBM between the claimants in the South China Sea is the 2002 *Declaration of Conduct of Parties in the South China Sea*

³⁰ Jeff Himmelman, “A game of shark and minnow”, *The New York Times Magazine*, 27 October 2013.

or DOC.³¹ ASEAN became involved with the disputes in 1992 when it called for restraint during tensions between Vietnam and China. During the Mischief Reef incident, it was expressing ‘serious concern’ and calling on unnamed parties ‘to refrain from taking action that de-stabilize the situation’.³² In a 1997 joint statement, ASEAN and China undertook to ‘resolve their disputes in the South China Sea through friendly consultations and negotiations’ and in the interests of ‘enhancing mutual confidence ... continue to exercise self-restraint’.³³ Consultations led both sides to develop drafts of a binding code of conduct but these drafts proved irreconcilable. The DOC was a non-binding compromise to move past this deadlock.³⁴

The DOC states that ‘the Parties are committed to exploring ways for building trust and confidence’ and reaffirms commitment to a range of existing treaties and agreements, notably including UNCLOS. In article 5, parties ‘undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes’ specifically refraining from occupying currently unoccupied features. Article 5 also details four specific CBMs: dialogues ‘as appropriate’ between military officials, ‘just and humane’ treatment of people in distress, voluntary notification of joint or combined military exercises, and voluntary exchange of ‘relevant’ information. These are typical CBMs but with particularly weak language. Dialogues, notifications and information exchange are all voluntary and lack details. There are no specific force levels that might trigger notification or timeframes to be adhered to.

Article 6 outlines five cooperative activities that parties ‘may explore’. Namely, marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combating transnational crime. Further negotiation will determine the ‘modalities, scope and location’ of these

³¹ Declaration on the Conduct of Parties in the South China Sea, Signed at Phnom Penh 4 November 2002.

³² Carlyle A. Thayer, “ASEAN, China and the Code of Conduct in the South China Sea”, *SAIS Review of International Affairs* 33, No. 2, 2013, pp. 76-77.

³³ ASEAN, “ASEAN-China Joint Statement”, 16 December 1997.

³⁴ Thayer, “ASEAN, China and the Code of Conduct”, p. 77.

activities and as such they are best regarded as a political statement of intent to negotiate rather than a CBM itself.

The DOC is the most directly relevant CBM for claimants but there are other ASEAN-led measures. The previously mentioned ARF currently includes ASEAN and 17 other states. ARF envisages a three-stage process of confidence-building, preventive diplomacy and conflict resolution however in its own estimation, preventive diplomacy ‘has been a contentious subject’ due to ‘concerns over the erosion of sovereignty’.³⁵ ARF has become rigidly institutionalised and ineffective in advancing these measures and hence has not been able to address conflict in the South China Sea.³⁶

Additionally, there is the *Treaty of Amity and Cooperation in Southeast Asia* which began as a peace treaty amongst ASEAN members in 1976 but later expanded to other states with interests in Southeast Asia. It aims to promote both peace and cooperation while enshrining core ASEAN principles of respect for sovereignty and non-interference. Relevant to the South China Sea, parties agreed to settle disputes peacefully and renounce the use of force.³⁷ China acceded to the treaty in 2003 and therefore these provisions should strengthen those within the DOC.

How should we characterise the DOC? It is clearly politically driven and was initiated in the foreign ministries of the parties. The top-down nature starts with the goal of reducing conflict in the South China Sea and then identifies measures that might further that goal. As a result, the measures are vague and not directly implementable. If it had been developed by a bottom-up process it would have started with specific concerns such as militarisation of features and specific measures required to build confidence regarding those concerns.

The specific DOC measures are a combination of direct and indirect. Official dialogue and agreements to assist people in distress

³⁵ ASEAN Regional Forum, *Joint Study on Best Practices and Lessons Learned in Preventive Diplomacy*, undertaken by Pacific Forum CSIS and S. Rajaratnam School of International Studies, 2008, p. i.

³⁶ Ralf Emmers and See Seng Tan, “The ASEAN Regional Forum and preventive diplomacy: built to fail?,” *Asian Security* 7, No. 1, 2011, pp. 44-60.

³⁷ Treaty of Amity and Cooperation in Southeast Asia, Signed at Denpasar, Bali 24 February 1976.

are indirect measures that may build confidence generally but do not tackle the sources of insecurity. Notification of military exercises and exchanges of information are potentially direct measures that can reduce the risk of misperception but they are hampered by their vague and voluntary nature. The majority of the cooperative activities are indirect; only cooperation on safe navigation and communication at sea could be considered to directly address South China Sea issues.

(2) Sino-U.S. Military Maritime Consultative Agreement

The U.S.-China relationship is multifaceted but in the South China Sea it is predominantly about strategic competition and predominantly maritime. Consequently, the most significant CBM for this case study is the 1998 *Military Maritime Consultative Agreement* (MMCA).³⁸ Its genesis was in 1994 with a three day confrontation in the Yellow Sea between a Chinese submarine and the aircraft carrier USS *Kitty Hawk*. U.S. Secretary of Defense initiated a study group into the incident which led to a series of joint communiqués and eventually the MMCA. On signing it was claimed that it would ‘reduce the chances of miscalculation’ and contribute to ‘peace and stability in the Asia-Pacific region’.³⁹

The MMCA has a simple mechanism - the parties agree to annual consultations for the ‘purpose of promoting common understanding regarding activities undertaken by their respective maritime and air forces’. There is guidance on the duration and representation, stipulations for working groups to inform the annual meetings, and for special meetings if required. The consultations remain private with only a mutually agreed summary released. The content includes ‘such measures to promote safe maritime practices and establish mutual trust as search and rescue, communication procedures when ships encounter each other, interpretation of the Rules of the Nautical Road and avoidance of accidents at sea.’

³⁸ Formally, Agreement on Establishing a Consultation Mechanism to Strengthen Maritime Safety, Signed at Beijing, 19 January 1998.

³⁹ Tao Li, “Confidence-Building Measure and the Sino-US Military Maritime Consultative Agreement,” PhD diss., Harvard University, 2004, pp. 9 and 14.

This agreement differs from the DOC significantly. Firstly, although in form a government-to-government agreement, it is a bottom-up process. It is a military agreement signed by their respective ministers. The consultation process calls for delegations to be headed by an admiral or general officer and include ‘professional officers engaged in activities at sea’ as well as defence and foreign ministry officials. This is a notable distinction noting the Chinese preference for top-down approaches.⁴⁰

The mechanism at the heart of the MMCA is a dialogue which is inherently an indirect measure. In this case, however, the dialogue is targeted at safe encounters at sea which is the most pertinent security issue. As we will see later, it was able to implement mechanisms to tackle the source of potential confrontation and move towards becoming a more direct measure.

(3) Sino-Vietnamese Basic Principles Agreement

A different approach to confidence-building is seen between China and Vietnam who have an extensive series of agreements for both cooperation and competition.⁴¹ There is a history of border conflicts. In 1974, a sea battle between Chinese and South Vietnamese forces at the Paracel Islands gave the Chinese effective control over the islands. An encounter at Johnson South Reef in 1988 was a one-sided Chinese victory with more than 70 killed on the Vietnamese side. Besides skirmishes at sea, thousands were killed in the land war of 1979 and repeated border clashes until the normalisation of ties in November 1991.⁴²

Disputes continued, but normalisation was followed by extensive CBMs structured around talks at leader to leader level, foreign minister level, deputy and vice minister level and between experts. A joint working group on the Gulf of Tonkin met from 1994 leading to a fisheries agreement in 2000 and a delimitation agreement in 2004.

⁴⁰ Kevin Pollpeter, *U.S.-China Security Management: Assessing the Military-to-military Relationship*, RAND Corporation, 2004, p. 81.

⁴¹ Lucio Blanco Pitio III and Amruta Karambelkar, “Philippines and Vietnam in the South China Sea,” *The Diplomat*, 21 October 2013.

⁴² Tønnesson, “The history of the dispute,” pp. 16-17.

Progress in the South China Sea was slower, but the incidents that occurred could be characterised as ‘limited periods of tension’ and the situation as ‘stable’. This changed with the submission of Vietnam’s continental shelf claim in 2009 and repeated clashes over fisheries. May and June 2011 saw further escalation over Vietnamese oil and gas explorations including alleged incidents where seismic survey cables were cut. Immediately after, Vietnam’s deputy foreign affairs minister was despatched to Beijing for talks.⁴³

Talks yielded the *Agreement on Basic Principles Guiding the Settlement of Sea-Related Issues* or BPA signed on 11 October 2011.⁴⁴ The BPA recommitted China and Vietnam as ‘good comrades and good partners’ to settling their maritime disputes through ‘friendly negotiations and consultations’ in accordance with the principles of international law, including UNCLOS, and adhering to the ‘principles and spirit’ of the DOC. The parties agreed to discuss ‘provisional and temporary measures’ including joint development and to ‘actively promote co-operation in less sensitive fields like marine environmental protection, scientific research, search and rescue, and prevention and mitigation of natural disasters.’ These efforts would ‘enhance mutual trust’ in order to tackle more sensitive matters. The parties agreed to regular meetings twice a year and to establish a hotline to ‘exchange views and address maritime issues in an appropriate and timely manner.’

A succession of meetings followed starting with the President Hu Jintao and General Secretary Nguyễn Phú Trọng. Additional hotlines were agreed between the foreign ministries and the ministries responsible for fisheries. A June 2013 joint statement praised the fisheries hotline as ‘highly valued’ and said that the Foreign Ministries will ‘make good use of the hotline for managing and controlling crisis at sea’. Meanwhile, expert groups agreed to pursue

⁴³ Ramses Amer, “China, Vietnam, and the South China Sea: disputes and dispute management”, *Ocean Development & International Law* 45, No. 1, 2014, pp. 18-25.

⁴⁴ Agreement on the Basic Principles Guiding the Settlement of Maritime Issues Between the Socialist Republic of Viet Nam and The People’s Republic of China, Signed at Beijing, 11 October 2011, translation in Amer, “China, Vietnam, and the South China Sea”, pp. 39-40.

priority areas of cooperation amongst the ‘less sensitive fields’.⁴⁵

The BPA is essentially a top-down mechanism. It was initiated by high-level political summit and represents a ‘de facto bilateral code of conduct.’⁴⁶ The agreed CBMs, however, contain direct measures. Hotlines between fisheries and foreign ministry officials aim to deal with directly with incidents at sea. It builds on the success of the Gulf of Tonkin agreements which include joint patrols. Where direct measures were not possible, cooperation on ‘less sensitive fields’ indirectly supports confidence-building.

(4) Incidents at Sea Agreements

One of the most successful Cold War CBMs was the U.S.-Soviet Incidents at Sea Agreement (INCSEA). Close surveillance and other activities had led to collisions, heated rhetoric and threats of escalation. In response, the two nations agreed a code of conduct in 1972. The agreement to reduce the risk of unsafe actions at sea ‘proved to be not only an excellent incident-management tool but also a catalyst for further practical cooperation.’⁴⁷ Because of its success, the agreement has been widely emulated. Recently there have been calls for a U.S.-China INCSEA. However, critics point out that, unlike the U.S. and Soviet Union, the U.S. and China do not share a common understanding of the Law of the Sea and that surveillance operations are not reciprocated.⁴⁸ Importantly, the U.S.-China relationship has cooperative and competitive aspects in contrast to the adversarial stance of the Cold War.

Although not in the style of the 1972 agreement, there are regional INCSEAs. The disputes in the South China Sea are not solely with China but also amongst the ASEAN claimants and although ASEAN has managed land-based disputes, in maritime arena,

⁴⁵ Amer, “China, Vietnam, and the South China Sea” p. 27.

⁴⁶ Ibid., p. 28.

⁴⁷ Griffiths, *U.S.-China Maritime Confidence Building*, p. 13.

⁴⁸ For example: Sam Bateman, “Managing incidents at sea”, *The Strategist* (blog), Australian Strategic Policy Institute, 14 February 2013, www.aspirstrategist.org.au/managing-incidents-at-sea/. For a critique see: Pete Pedrozo, “The U.S.-China incidents at sea agreement: a recipe for disaster”, *Journal of National Security Law & Policy* 6, No. 1, 2012, pp. 207-226.

military force is still a tool for asserting sovereignty.⁴⁹ For example, maritime disputes and potentially dangerous confrontations led to the *Malaysia-Indonesia Prevention of Incidents at Sea Agreement* or MALINDO in January 2001. Compared to the high seas focus of the U.S.-Soviet INCSEA, MALINDO deals with safe encounters in a more complex environment of competing maritime claims. However, the wider security relationship is also more benign.

A more ambitious CBM is the *Code for Unplanned Encounters at Sea* (CUES). The Western Pacific Naval Symposium (WPNS) is focused on improving naval cooperation in the region. It aims to hold discussions on ‘common issues affecting naval professionals and not on political issues, nor on the maritime confidence and security building measures occupying the minds of those concerned with second track diplomacy.’⁵⁰ In reality, it encompasses the parties to the regional disputes⁵¹ and is clearly involved in confidence-building. CUES was presented at a WPNS workshop in 1998 but approval was held up due to objections by China to the use of the word ‘code’ before it was finally approved in 2014.⁵² It provides a non-legally binding ‘coordinated means of communication to maximise safety at sea’. It applies to unplanned encounters providing basic safety, communication and manoeuvring instructions.⁵³

Section 2 of the code identifies specific safety procedures, in part restating obligations under the International Regulations for Preventing Collisions at Sea (COLREGS). The military specific elements are couched in non-prescriptive terms - simulated attacks and similar activities present the most danger for inadvertent escalation but they are merely ‘actions the prudent commander might

⁴⁹ J.N. Mak, *Sovereignty in ASEAN and the problem of maritime cooperation in the South China Sea*, RSIS Working Papers Series No. 156, S. Rajaratnam School of International Studies, 2008, pp. 8-9.

⁵⁰ Sea Power Centre - Australia, “The Western Pacific Naval Symposium”, *Semaphore*, No. 14, July 2006.

⁵¹ 27 navies as of 2017, www.wpns-ws-chile.cl/participating.html, accessed 21 August 2017.

⁵² Shannon Tiezzi, “Small but positive signs at Western Pacific Naval Symposium”, *The Diplomat*, 24 April 2014.

⁵³ Western Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, version 1.0, 22 April 2014, sec. 1.1-1.2.

generally avoid’⁵⁴ Section 3 contains communication procedures including radio frequencies and flag signalling. The procedures aim to reduce the dangers of misunderstanding including emphasis on pronunciation in voice communications. An appendix provides a series of signals that could be used for manoeuvring and operations in close proximity where there are no other agreed procedures.

CUES differs from the US-Soviet INCSEA and MALINDO. Firstly, it is not a treaty so the obligations it places upon the parties are weak. Secondly, it places no new limits on behaviour that might reduce the risk of incidents occurring. Thirdly, CUES is missing the process of regular meetings and frank debriefings that was integral to the original INCSEA. In fact, WPNS declines involvement in ‘disputes arising from incidents between naval ships or naval aircraft or from the use of CUES.’⁵⁵ This responsibility is left to other agreements.

In comparison to the previous CBMs, CUES is the most bottom-up and operationally driven, arising from the practical concerns of regional navies and agreed at the navy-to-navy level. It is direct in that it is targeted at concerns about miscommunication leading to misperception but it does not tackle the key issues of military security in the region. It is better considered as an indirect trust-building measure absent more concrete measures.

(5) Characterising confidence-building measures

CBMs in the South China Sea present a range of characteristics. Considering the level of government, the top-down and political DOC is contrasted with the bottom-up and military MMCA. Both of these agreements, however, are relatively indirect measures aimed at broad confidence-building rather than the sources of security risk. In contrast, the BPA is top-down like the DOC but with specific measures aimed more directly at the security issues. The CUES represents something of a special case. Although the most bottom-up of all the agreements, it is multilateral which means that directness varies depending on the issues between the parties.

⁵⁴ WPNS, *Code for Unplanned Encounters at Sea*, sec 2.8.

⁵⁵ *Ibid.*, sec. 1.6.1.

Chapter 3: Assessing effectiveness

Why does effectiveness matter? The orthodoxy is that more confidence-building is better and that all CBMs should be pursued as part of a broad approach. Desjardins argues that the popularity of CBMs rests on ‘negotiability’ – their ability to achieve something against intractable security problems. This is due to the minimal political will required, their reciprocal nature, and the lack of real constraints or obligations.⁵⁶ However, they still require negotiation and this process poses stumbling blocks to success.

The cost-benefit analysis of a CBM will differ by situation. China may be less concerned with the escalation of a crisis than the militarily inferior ASEAN members and therefore place less value on concrete CBMs with ASEAN. In contrast, China may view escalation with the U.S. as having far greater costs and hence concrete CBMs would have greater value. There are also risks if negotiations are perceived to be undertaken in bad faith. Some argue that China’s agreement to the DOC and drawn-out negotiations merely provide cover while it strengthens its position in the South China Sea, a policy dubbed ‘talk and take’.⁵⁷ For their part, Chinese strategists may see stronger CBMs with transparency and verification requirements as a ploy to reveal Chinese weakness and hence entrench the U.S. position of superiority rather than build mutual confidence.⁵⁸

The more directly CBMs engage with the military security risks in a region, the more difficult it becomes. Agreements that impose obligations, are precise and have verification or compliance mechanisms will be harder to negotiate than vague, voluntary undertakings. Yet these CBMs are most likely to be effective.⁵⁹ Likewise, bottom-up agreements between navies require governments

⁵⁶ Desjardins, *Rethinking Confidence-building Measures*, pp. 24-27.

⁵⁷ Ian Storey, “China’s bilateral and multilateral diplomacy in the South China Sea” in *Cooperation from Strength: The United States, China and the South China Sea*, ed. Patrick M. Cronin, Center for a New American Security, 2012, p. 56.

⁵⁸ Pollpeter, *U.S.-China Security Management*, pp. 55-57.

⁵⁹ Desjardins, *Rethinking Confidence-building Measures*, pp. 38-40.

to provide ‘political space’ for frank communication.⁶⁰ In many states, governments are unwilling to delegate to their militaries in this way.

Beyond the difficulties of negotiation, agreements can actually destroy confidence if they are announced but not concluded or if there is perceived cheating - CBMs can be ‘*détente* consuming’.⁶¹ If political good-will and diplomatic resources are consumed in negotiating ineffective agreements then the effectiveness of CBMs should be a key consideration for policy makers. They should be ‘informed by a nuanced and realistic understanding of what might work and what patently will not.’⁶²

The remainder of this chapter assesses the effectiveness of each of the major South China Sea CBMs in turn and in doing so illustrates how this is determined by the characteristics of the CBM. As detailed earlier, this is measured against two broad objectives - military security, principally through crisis stability and improved political climate.

(1) Declaration of Conduct

The DOC has been completely ineffective in the South China Sea. It did not contribute to military security by reducing the potential for confrontation or improving crisis stability. Nor has it transformed the political climate to allow greater cooperation and resolve the underlying sources of insecurity. In the case study period, the DOC was the only significant CBM between China and the Philippines. Despite compounding factors in the China-Philippines bilateral relationship, including Philippine domestic politics and the U.S. defence treaty, an effective DOC would have played a discernible role in the confrontations.

The early stages of the Scarborough Shoal incident show evidence of Philippine attempts at de-escalation.⁶³ If this was exercising restraint in accordance with the DOC then it was one-way with no

⁶⁰ Griffiths, *U.S.-China Maritime Confidence Building*, p. 20.

⁶¹ Desjardins, *Rethinking Confidence-building Measures*, p. 5.

⁶² Medcalf and Heinrichs, *Crisis and Confidence*, p. 50.

⁶³ Michael Green, et al., *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence*, Center for Strategic & International Studies, 2017, pp. 101-104.

evidence of Chinese de-escalation until the very end of the crisis. Alternatively, Philippine actions could represent the weakness of their position. The management of the crisis generally was stymied by miscommunication and misperception. Initially, communication was conducted through respective embassies or media statements. As a result, changes in force posture at the shoal were invariably viewed as surprising and escalatory by the other side. Promising avenues for resolution, such as seizure of the illegal catch but release of the fishermen, were foreclosed when Chinese forces escorted the fishing vessels out of the shoal.⁶⁴

Lacking direct communications, the Philippines president resorted to back-channel negotiations. These talks achieved a steady reduction in forces at the shoal but, although unclear, it seems that separate U.S.-China negotiations were miscommunicated to the Philippines. When a Philippine withdrawal was not immediately reciprocated, the Philippines publicised the agreement and China felt obliged to call off its withdrawal.⁶⁵

After the incident, the Philippines decision to file for arbitration demonstrates the breakdown in trust in the DOC. For its part, China claimed that unilateral arbitration was a clear breach of the DOC and other commitments.⁶⁶ This led to an action-reaction dynamic where China strengthened its South China Sea position through land reclamation.⁶⁷ Various claimants had engaged in land reclamation and construction of military facilities since signing the DOC in 2002. However, Chinese efforts were on a different scale and illustrate that the DOC is a dead letter with respect to restraint in the South China Sea.

The lack of Chinese transparency on land reclamation further undermined confidence. Initially, it downplayed the scope of the land reclamation, only releasing a ministerial level statement in March

⁶⁴ Green et al., *Countering Coercion in Maritime Asia*, pp. 102-104.

⁶⁵ *Ibid.*, pp. 116-119.

⁶⁶ Yang Lu, "Why the arbitration initiated by the Philippines threatens peace and stability in the South China Sea?," *IPP Review* (2016).

<http://ippreview.com/index.php/Home/Blog/single/id/123.html>.

⁶⁷ Xiaoqin Shi, "UNCLOS and China's claim in the South China Sea," *Indo-Pacific Strategic Papers*, Australian Defence College, 2015, p. 4.

2015 after 18 months of dredging.⁶⁸ Once the reclamation was essentially complete, President Xi Jinping stated that ‘China does not intend to pursue militarization’, an ambiguous pledge subject to broad interpretation.⁶⁹ China did stop short of militarising Scarborough Shoal, a potentially more provocative action, but this is likely due to effective deterrence rather than confidence-building.⁷⁰

So there is little evidence of the DOC promoting crisis stability but it has also failed to transform the underlying security relationships. It should have led to a more rigorous code of conduct through the four CBMs in article 5 and five cooperative activities in article 6. In reality, up until the end of the case study period in July 2016, none of the CBMs had been used in relation to South China Sea tensions and none of the cooperative activities had been implemented.⁷¹ After signing the DOC in 2002, it took until August 2005 for a first Joint Working Group discussing implementation. Six years of negotiations, including 21 drafts, eventually led to agreement in July 2011 on guidelines to implement the DOC but this started further negotiations from January 2012 on implementation in accordance with the guidelines. Even then, safety of navigation and communication at sea was shelved as too contentious.⁷²

Rather than transforming the security relationship between ASEAN and China, these interminable negotiations represent politics by other means. China can ‘manufacture a pretext at any moment to suspend discussions due to what it considers to be the unacceptable behaviour of one of the claimants’.⁷³ Negotiations on the DOC and a code of conduct are therefore political carrots held out to induce behaviour. This aligns with the Chinese position that cooperative

⁶⁸ Green et al., *Countering Coercion in Maritime Asia*, pp. 235-256.

⁶⁹ Mark J. Valencia, “Who is Militarizing the South China Sea?,” *The Diplomat*, 20 December 2015.

⁷⁰ Zack Cooper and Jake Douglas, “Successful signaling at Scarborough Shoal?,” *warontherocks.com* (blog), 2 May 2016, www.warontherocks.com/2016/05/successful-signaling-at-scarborough-shoal/

⁷¹ Carlyle A. Thayer, “Managing security tensions in the South China Sea: the role of ASEAN” in *Indo-Pacific Maritime Security: Challenges and Cooperation*, ed. David Brewster, Australian National University National Security College, 2016, pp. 28-29.

⁷² Thayer, “ASEAN, China and the Code of Conduct,” p. 77.

⁷³ *Ibid.*, p. 82.

activities cannot proceed without strategic trust between the parties.⁷⁴ The stop-start nature of dialogue means that when it is most needed to manage crisis is when the DOC has least influence. Additionally, because ASEAN prioritises working towards a code of conduct, the lack of progress on DOC implementation has potentially precluded smaller-scale efforts that might be more effective.

(2) Sino-U.S. Military Maritime Consultative Agreement

U.S.-China military exchanges have been prone to interruptions following serious incidents.⁷⁵ The Defence Consultative Talks that spawned the MMCA were temporarily suspended by China after the 1999 bombing of the Chinese Embassy in Belgrade and then by the U.S. following the 2001 Hainan Island mid-air collision. Critics claim that China has ‘failed to use the MMCA process to engage in a serious discussion on the EEZ’, a key concern for the U.S., while it ‘repeatedly uses MMCA as a platform to espouse government opposition to U.S. arms sales to Taiwan.’⁷⁶ Incidents involving the USNS *Impeccable* in 2009 and the USS *Cowpens* in 2013 are said to demonstrate the failure of the MMCA to improve on the safety of at-sea interactions.⁷⁷

Despite these negative appraisals, there has been progress. Five months after Hainan Island, a special meeting was held under the MMCA to work on preventing future incidents. Although the USNS *Impeccable* and USS *Cowpens* incidents were not prevented, both sides made efforts to prevent escalation and in the case of *Cowpens* the incident was resolved locally through ‘bridge-to-bridge’ communications.⁷⁸ This progress came to fruition in 2014 with the approval of CUES in April and two significant U.S.-China Memorandums of Understanding (MOU) covering ‘Rules for

⁷⁴ Sam Bateman, “Cooperation or trust: what comes first in the South China Sea?,” *RSIS Commentaries*, No. 167, 17 September 2013.

⁷⁵ Phillip C. Saunders and Julia G. Bowie, “US-China military relations: competition and cooperation,” *Journal of Strategic Studies* 39, No. 5-6, 2016, pp. 673-674.

⁷⁶ Pedrozo, “The U.S.-China incidents at sea agreement”, p. 226.

⁷⁷ Carl Thayer, “USS *Cowpens* incident reveals strategic mistrust between U.S. and China,” *The Diplomat*, 17 December 2013.

⁷⁸ Linda Jakobson, *The US and China: A Mature Interdependent Relationship*, US Studies Centre, 2016, p. 9.

Behaviour for Safety of Air and Maritime Encounters’⁷⁹ and ‘Notification of Major Military Activities’ in November.⁸⁰

The ‘Rules of Behavior’ MOU, in large part, restates CUES and COLREGS. Where it goes further is in a requirement to ‘refrain from interfering’ with activities in maritime warning areas while acknowledging the ‘internationally lawful uses of the sea’ related to freedom of navigation.⁸¹ An annex related to air encounters was successfully concluded in 2015 and the agreements utilise the MMCA to provide a regular review.

The ‘Notification’ MOU is more novel in the U.S.-China relationship. It exists under the broader Defence Policy Coordination Talks rather than the MMCA but it was negotiated and announced together with the ‘Rules of Behavior’ MOU. The ‘Notification’ MOU is voluntary and contains two annexes, one for the notification of major security policy announcements, and one intended to promote the reciprocal observation of major exercises and activities. Like the ‘Rules of Behavior’, MOU it contains a regular review process.

A key feature of the MOUs and MMCA are confidentiality clauses. In the original INCSEA, the ability to engage in frank discussions without politics was a key reason for success.⁸² However, when review processes are a closed box to outside observers it is difficult to assess whether they are effective.⁸³ There are positive signs that the MMCA has become more effective since the *Impeccable* and *Cowpens* incidents. When the USS *Lassen* conducted a freedom of navigation operation in October 2015, the interactions with Chinese military

⁷⁹ Memorandum of Understanding Between the Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, Signed at Washington and Beijing 9 and 10 November 2014.

⁸⁰ Memorandum of Understanding Between the United States of America Department of Defense and the People’s Republic of China Ministry of National Defense on Notification of Major Military Activities Confidence-building Measures Mechanism, Signed at Beijing and Washington 31 October and 4 November 2014.

⁸¹ *Rules of Behavior for Safety of Air and Maritime Encounters*, section V, article i-2.

⁸² David F. Winkler, “The evolution and significance of the 1972 Incidents at Sea Agreement,” *Journal of Strategic Studies* 28, No. 2, 2005, p. 370.

⁸³ Mira Rapp-Hooper and Bonnie Glaser, “In confidence: will we know if the US-China CBMs are working?,” *Asia Maritime Transparency Initiative* (blog), Center for Strategic and International Studies, 4 February 2015.

units were described as ‘very cordial the entire time ... even before and after the Spratly islands transit,’ and as ‘professional’ and ‘routine’.⁸⁴ Immediately following the *Lassen* operations, the respective Chiefs of Navy met via video conference to reaffirm the importance of dialogue and following agreed protocols.⁸⁵

There is also evidence of effective confidence-building over Chinese interception of U.S. surveillance flights. In 2014, a pattern of increasingly aggressive interceptions culminated in a ‘Top Gun-style’ manoeuvre in close proximity to a U.S. surveillance flight. Following U.S. complaints, both privately and publicly, the Chinese military denied that the intercepts were conducted unprofessionally.⁸⁶ However, the complaints seemed to lead to improved behaviour and it is possible that the pattern of aggressive intercepts was a local initiative.⁸⁷ Further incidents have been reported, highlighting the difficulty of assigning blame,⁸⁸ but the process has clearly improved since Hainan Island in 2001.

Comparing the effectiveness of the MMCA and associated CBMs to the DOC it is apparent that the MMCA is a more effective mechanism during this case study. This applies to crisis stability where freedom of navigation operations have been conducted without unsafe or unprofessional encounters and in the broader security climate where the repeated military-to-military interactions yielded the MOUs. Griffiths credits this to the shared epistemological community between navies – CBMs that occur without political interference promotes mutual understanding at tactical and operational levels and ultimately allow more effective measures to be developed.⁸⁹

It is important to understand the limits to this effectiveness. The

⁸⁴ Yeganeh Torbati, “‘Hope to see you again’: China warship to U.S. destroyer after South China Sea patrol,” Reuters, 6 November 2015.

⁸⁵ Megha Rajagopalan and Andrea Shalal, “U.S., Chinese navies agree to maintain dialogue to avoid clashes,” Reuters, 29 October 2015.

⁸⁶ Green et al., *Countering Coercion in Maritime Asia*, pp. 224-234.

⁸⁷ Jakobson, *The US and China*, p. 9.

⁸⁸ Idrees Ali, “Pentagon says China aircraft intercept violated 2015 agreement,” Reuters, 27 May 2016.

⁸⁹ Griffiths, *U.S.-China Maritime Confidence Building*, pp. 19-20.

MMCA has demonstrated the ability to reduce the risks of interactions between U.S. and Chinese forces leading to inadvertent crisis. It does not address the underlying issue: is military surveillance in the EEZ a threat to China or a legitimate freedom of the seas? Critics point out that the MMCA does not induce China to accept the U.S. interpretation of UNCLOS.⁹⁰ However, this does not prevent it being effective.

(3) Sino-Vietnamese Basic Principles Agreement

China and Vietnam are covered by the same multilateral ASEAN framework including the DOC. Unlike other bilaterals between ASEAN and China, this pairing has a significant layer of additional CBMs in the form of the BPA. This has proven to be more effective than the DOC-only case of China and the Philippines in terms of crisis stability.

The case study period saw a major confrontation between China and Vietnam. In early May 2014, the China National Offshore Oil Corporation (CNOOC) oil drilling rig *Haiyang Shiyou 981* (HYSY 981) was dispatched to conduct exploratory drilling around 17 nautical miles from Triton Island in the Paracels. The Paracels are under Chinese control but claimed by Vietnam. The location of the rig placed it on the Vietnamese side of a hypothetical median line between the mainlands.⁹¹ When Vietnam sent Coast Guard and Fisheries vessels to protest, China responded with its own vessels and a defensive cordon around HYSY 981. Throughout May, dozens of vessels on both sides engaged in confrontations including ramming and water cannons. Protests in Vietnam boiled over into widespread violence including the torching of Chinese-owned factories. At sea, Chinese Navy vessels reportedly trained their guns on Vietnamese Coast Guard vessels and military aircraft conducted low-level flyovers.⁹²

This crisis might suggest that confidence-building was even less effective than at Scarborough Shoal. However, the context is different;

⁹⁰ Pedrozo, "The U.S.-China incidents at sea agreement," pp. 217-220.

⁹¹ Green et al., *Countering Coercion in Maritime Asia*, pp. 207-208.

⁹² *Ibid.*, pp. 214-219.

Vietnam and China have recent history of armed conflict and Vietnam does not have U.S. defence guarantees. Rather than attempt de-escalation like the Philippines, Vietnam challenged Chinese actions at sea. The incident ended when China declared that the drilling objectives had been achieved and withdrew HYSY 981 earlier than planned in an apparently conciliatory move.⁹³

Compared with the misunderstanding between China and the Philippines, China and Vietnam demonstrated robust communications links. Within days, communications included official diplomatic channels through embassies, the use of the direct hotline at a vice-ministerial level, military-to-military contacts via defence attachés and direct contact between the chiefs of PetroVietnam and CNOOC. This was supplemented by public statements aimed principally at international opinion. These statements emphasised the need for restraint. Vietnamese officials stated they would not fire first while the Chinese described the incidents as ‘controllable’ and stated that China was exercising ‘utmost restraint’.⁹⁴

In August, a Vietnamese special envoy met President Xi in Beijing. Both sides pledged to exercise tighter control over subordinate agencies, to enhance bilateral relations and ‘to seriously implement the agreement on basic principles’. Three high level visits followed in late 2014 to cement the process.⁹⁵ The Chinese and Vietnamese navies agreed to continue joint patrols in the Beibu Gulf north of the South China Sea and a hotline between defence ministries was added to the existing hotlines.⁹⁶

These extensive communications and links allowed Vietnam and China to pursue their national policies with some assurance that the risk of escalation was controlled. In this sense, the BPA was a more effective CBM than the DOC alone. However, there are two caveats. Firstly, the BPA does not address the underlying causes - maritime

⁹³ Carl Thayer, “4 reasons China removed oil rig HYSY-981 sooner than planned,” *The Diplomat*, 22 July 2014.

⁹⁴ Green et al., *Countering Coercion in Maritime Asia*, pp. 209-212.

⁹⁵ Carl Thayer, “China and Vietnam Eschew Megaphone Diplomacy,” *The Diplomat*, 2 January 2015.

⁹⁶ Alex Calvo, “China, the Philippines, Vietnam, and international arbitration in the South China Sea,” *The Asia-Pacific Journal: Japan Focus* 13, No. 43/2, 2015, p. 5.

territorial disputes. Secondly, there were still serious and unsafe encounters at sea including boats sunk and injuries sustained. The commander of U.S. forces in the Pacific feared that the ‘risk of miscalculation is high’.⁹⁷ The BPA lacks the operational specifics found in INCSEA agreements or the MOUs under the MMCA that might have reduced this risk.

(4) Incidents at Sea Agreements

Starting from the top-down and indirect DOC we have looked at the more bottom-up MMCA and the more direct BPA, both of which were more effective than the DOC. For the same reasons, the CUES agreement has the potential to be effective - it is a bottom-up CBM that, to some degree, directly addresses a source of crisis in the region. It potentially improves crisis stability by reducing the risks of unsafe encounters and as part of the broader navy-to-navy interactions it might foster a better security climate in the Asia Pacific.

CUES can take some of the credit for more professional encounters between the U.S. and China. The MMCA mechanisms are based largely on CUES and both navy chiefs are reportedly satisfied with its functioning during U.S. freedom of navigation operations in 2015.⁹⁸ Beyond the U.S. and China the evidence is less clear. Although confidential, the MMCA does involve regular meetings which are an opportunity for the navies to comment publicly on their satisfaction. CUES has no corresponding mechanism and the WPNS is explicitly excluded from considering specific incidents.

There are reasons to be sceptical. While the U.S. is not party to the territorial disputes, for most parties unplanned encounters are likely to occur in areas of disputed sovereignty. It is not clear that navies will adhere to CUES when encounters occur in areas claimed as territorial sea;⁹⁹ the evidence from the MALINDO agreement

⁹⁷ Ravi Velloor and Li Xueying, “WEF: High risk of miscalculation in China-Vietnam row, says US,” *The Straits Times*, 24 May 2014.

⁹⁸ Ankit Panda, “Unplanned encounters in the South China Seas: under control?,” *The Diplomat*, 25 January 2016.

⁹⁹ Lim Han Wei, “Code for Unplanned Encounters at Sea and maritime stability in the Indo-Pacific,” *Pointer: Journal of the Singapore Armed Forces* 42, No. 2, 2016, p. 15.

suggests they will not. Furthermore, CUES is an agreement between navies, it does not govern the actions of coast guards and other Maritime Law Enforcement (MLE) engaged in South China Sea incidents. CUES could be expanded to cover MLE but this is not straightforward. Regular MLE are often supplemented by irregular forces - maritime militia formed from national fishing fleets. Expansion is likely to be resisted by China and Vietnam who employ them extensively for their ambiguity and flexibility.¹⁰⁰

There are similar shortcomings regarding the safe operation of submarines which are proliferating in the region. The nature of submarine operations provides particular hazards for inadvertent collisions as was evident during the Cold War.¹⁰¹ Singapore has proposed expanding CUES to the underwater domain but the inherently secretive nature of submarine operations may make this an even taller task than expanding to cover MLE.¹⁰²

CUES is thus an effective agreement as part of the suite of U.S.-China CBMs and potentially an effective CBM amongst other nations. If effective, however, it is with an extremely narrow scope. The objectives of the DOC - peaceful resolution of the territorial disputes in the South China Sea - are not commensurate with the objectives of CUES - safe conduct of warships at sea.

(5) Mapping effectiveness

We can now address the research question - what are the characteristics of effective CBMs in the South China Sea? The results are illustrated in figure 1 below. Each CBM is plotted as top-down or bottom-up and direct or indirect. As the previous chapter shows this is often a matter of degree. More effective CBMs are those further towards the bottom right corner. Actions that move CBMs either to the right or down will improve the effectiveness as shown with the

¹⁰⁰ Swee Lean Collin Koh, "Expanded CUES: a worthwhile idea but challenging exercise?," *Asia Pacific Bulletin*, No. 352, September 2016, <https://www.eastwestcenter.org/publications/expanded-cues-worthwhile-idea-challenging-exercise>.

¹⁰¹ Sherry Sontag and Christopher Drew, *Blind Man's Bluff: The Untold Story of American Submarine Espionage*, Public Affairs, 1998, appendix A and B.

¹⁰² Swee Lean Collin Koh, "Promoting submarine operational safety in the Indo-Pacific," *The Diplomat*, 9 June 2017.

additional MOUs to the MMCA.

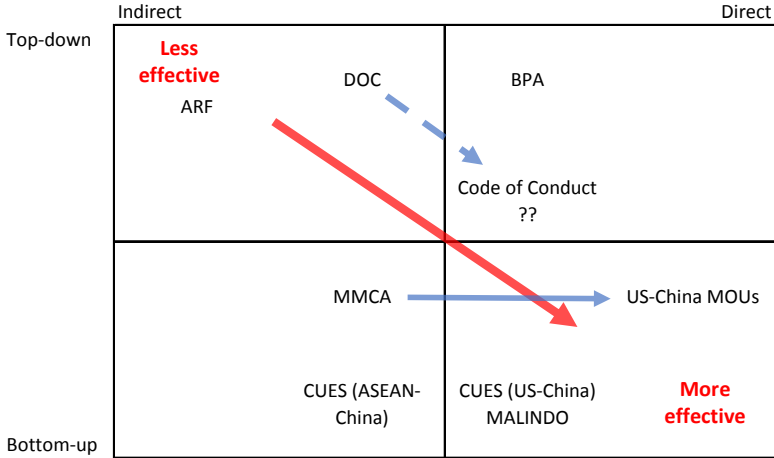


Figure 1: Effectiveness of CBMs
(figure compiled by author)

There are, of course, underlying causes for the South China Sea situation. A recently study has emphasised the practice of deterrence in grey-zone situations.¹⁰³ Other researchers focus on the rise of China and the pressures of so-called hegemonic transition.¹⁰⁴ Answers could be found in the elite politics of China, the U.S. or indeed South-East Asia. The analysis of CBM effectiveness in this paper doesnot attempt to replace these broader theories that might explain the South China Sea. Instead, the goal is to identify the types of CBMs that might improve crisis stability or transform the security climate.

Conclusion

This case study of confidence-building in the South China Sea

¹⁰³ Green, et al., *Countering Coercion in Maritime Asia*.

¹⁰⁴ Mark Beeson, "Hegemonic transition in East Asia? The dynamics of Chinese and American power," *Review of International Studies* 35, 2009, pp. 95-112.

suggests that the effectiveness of CBMs varies with two factors. Firstly, whether they are top-down, political or bottom-up, operational agreements. Secondly, whether they directly address the causes of insecurity or only indirectly improve confidence.

The contrast between the DOC and MMCA shows that bottom-up agreements are more effective. Initially limited to dialogue, over time the MMCA spawned practical agreements that tackled the most pressing issue for the U.S. and China in the South China Sea. This occurred despite the lack of resolution of the broader strategic issues. The DOC, on the other hand, remains a political football subject to the whims of governments on all sides. The BPA is politically driven like the DOC but furnished with a richer set of communications which allowed it to more directly tackle crises over fisheries or resources. This allowed it to contribute to crisis stability in a way the DOC could not. Finally, the example of CUES emphasises the importance of understanding the differing scope and ambition of these agreements. CUES is an important CBM and, although difficult to evaluate, it is likely to be effective. However, its narrow objectives cannot be compared with those of the DOC.

The effectiveness of CBMs matters because they come with costs. They can be *détente* consuming and efforts to pursue particular measures are likely to crowd out other options. Political level CBMs are attractive because of their negotiability, however, in the South China Sea the DOC process may be hindering efforts to strengthen operational CBMs such as CUES or develop more extensive bilateral mechanisms like China and Vietnam.

The implications can be seen today. After the arbitration judgement in 2016, Philippine President Rodrigo Duterte adopted a conciliatory tone towards Beijing. In August 2017, China and ASEAN announced a negotiating framework for a code of conduct. It is unlikely that this is a major breakthrough rather than a continuation of the status quo.¹⁰⁵ It is doubtful if China is actually willing to negotiate a code of conduct and unclear if such a code would be more

¹⁰⁵ Gregory Poling, "This isn't the COC you're looking for," *AMTI Update*, 15 June 2017, <http://amti.csis.org/isnt-coc-youre-looking/>.

effective than the DOC. To become more effective, it would need to incorporate specific and direct measures. Meanwhile, China is accused of planning to again interfere with Philippine outposts and of pressuring Vietnam over drilling.¹⁰⁶

Ultimately, there are many factors at play in the South China Sea. After the Cold War, the structure of ARF and the approach of ASEAN reflected a belief that CBMs could single-handedly bring about peace. It is clear today, in a more contested environment, that CBMs are only an adjunct to other policies – in the Cold War this meant arms control, today these policies could include deterrence and cost-imposing strategies.¹⁰⁷ The value of CBMs as part of a holistic strategy are vividly shown in the China-Vietnam confrontations where effective communications allowed the Vietnamese to follow a cost-imposing strategy while maintaining control over escalation. If the U.S. adopts similar strategies towards China then the need for effective CBMs will be even more critical.

¹⁰⁶ *The Japan Times*, “China quietly expands control in southern sea,” 7 September 2017.

¹⁰⁷ Thomas G. Mahnken, *Cost-Imposing Strategies: A Brief Primer*, Center for a New American Security, 2014.