

THE SOUTH CHINA SEA AND AUSTRALIA'S REGIONAL SECURITY ENVIRONMENT

Launch by Professor the Hon Gareth Evans AC QC, Chancellor of The Australian National University, of National Security College Occasional Paper No 5, Crawford School of Public Policy, ANU, Canberra, 2 October 2010

For foreign policy wonks both practising and academic, foreign correspondents and international lawyers, the South China Sea is the gift that goes on giving. It has everything:

- multiple states making territorial claims of varying degrees of historical plausibility;
 - competition for hydro-carbon resources;
 - competition for fisheries resources;
 - controversies about freedom of navigation; and
 - a history of potentially explosive physical confrontations over all of the above, which have not all been easy or quick to defuse
- all occurring within a body of water through which over half the world's merchant fleet tonnage (and some 60 per cent of Australia's trade) passes annually, and whose sea-lanes are vital, among other things, for the energy security of the whole of North East Asia;
 - all regularly generating tension and disagreement within ASEAN – as between the noisy claimants (Vietnam and the Philippines), the quieter claimants (Malaysia and Brunei), the anxious non-claimants (Indonesia, Singapore and Thailand), and the China-influenced not very helpful non-claimants (Cambodia, Laos and Myanmar);
 - and all raising not just regional but global security concerns, as China's assertiveness in advancing its position in recent years has led to push-back from the US (albeit without Washington taking sides on territorial issues and focusing on freedom of navigation) - in a way that has added a significant new dimension to the already ever-present tension associated with China's economic and military rise combined with the US's unwillingness to date to concede in response any of its hard won geostrategic primacy in the region (and indeed to up the ante with its 'pivot' or 'rebalancing' strategy)

Add to all this, for the lawyers

- multiple unresolved substantive international law issues about the proper interpretation of various provisions of the UN Convention on the Law of the Sea (including the difference between an island and a rock, on which vast consequences hang); and
- difficult legal process issues about how to resolve competing sovereignty claims to particular land features and then how to deal with overlapping maritime claims (whether for territorial sea, contiguous zones, EEZ or continental shelf zones) flowing from them

and you have probably the world's single most complex, and intractable, international relations problem.

In this context it's not surprising that a substantial body of analytic and academic literature is now being generated on the subject, much of it of quite high quality, in which category I'd place the just-published IISS book-length Adelphi paper, *Regional Disorder: The South China Sea Disputes*,¹ and, if I can be forgiven the advertisement for my old organization, the International Crisis Group reports last year on *Stirring Up the South China Sea*,² particularly that identifying internal competition between the 'nine dragons' (especially the Foreign Ministry, PLA, other maritime agencies, local governments and state energy companies) as a major factor contributing both to the erratic character and lack of international credibility of much Chinese behaviour in the region.

We can now add to the bundle this NSC Occasional Paper, bringing together papers presented at a workshop sponsored by the College in March. The value of this publication I think lies primarily for a non-specialist audience, in the succinct way the opening papers describe the history and elements of the current inter-related disputes, and then successive papers (with very appropriately chosen authors in each case) spell out the issues from the perspectives of the most interested players: China, Vietnam, the Philippines, ASEAN, the US and Australia.

The overall publication is best understood and appreciated as a sampler for a more substantial book-length publication which is to follow next year, which I hope will be toughly edited to overcome some of the unevenness in quality of some of these initial contributions – inevitable in a symposium exercise of this kind – and address some of the more difficult issues in rather more detail than has been possible here.

I thought two of the most interesting contributions to the present paper, within the limits of the obvious space constraints, were from Do Thanh Hai on Vietnam, who describes the way Hanoi has been redefining, and in the process somewhat modifying, its claims to make them more obviously consistent with international law constraints, and Zhang Jian on China. Dr Zhang argues that China's growing assertiveness in recent years in establishing a more visible presence in the areas it claims (and muscling others out of the way in the process) should not be seen as prelude to raising physical-force stakes higher in the future, as many have feared, but in fact can be seen as intended to create greater evidentiary support for claims that it intends to make in the future through legal and diplomatic channels. We'll see.

For an Australian readership, a key question is what exactly are our interests in all of this, and what if anything *we* can do to help settle the tensions. It's hard to disagree with Michael Wesley's enumeration of the multiple structural and relational interests we have in keeping this part of our neighbourhood benign, though I am inclined to think that the risk to commercial sea-lanes is actually quite small given the attitudes and instincts of China and the other major players. When the US talks up, as it regularly does, the risk to freedom of navigation, its overwhelming preoccupation is, frankly, with the right to engage in military surveillance unhindered, as close inshore as it can.

When it comes to what Australia can do, I have some sympathy – as you might expect given my own rather activist record on these matters – with Michael Wesley's complaint that we

¹ Sarah Raine and Christian Le Miere, *Regional Disorder: The South China Sea Disputes* (London; IISS Routledge, 2013)

² International Crisis Group *Stirring up the South China Sea (I)*, Asia Report No 223, 23 April 2012; *Stirring up the South China Sea (II):Regional Responses*, Asia Report No 229, 24 July 2012;

may have erred in recent years on the side of caution and risk aversion. But if he is going to both charge pusillanimity and demand creativity, as he does, I think he needs to offer (and I hope he will in his extended chapter when we see it) rather more chapter and verse as to what kind of initiative might actually be productive, other than generically supporting what he describes as ‘some sort of consensual joint management regime’.

When it comes to identifying the way forward, the editors Christopher Roberts and Leszek Buszynski usefully distinguish between ‘Stabilization’ and ‘Resolution’ measures. The former basically come down to, first, negotiating, as a follow on from the 2002 ASEAN-negotiated Declaration, a workable, effective Code of Conduct for the South China Sea – basically designed to commit all relevant states to resolving their disputes peacefully – which has been stymied so far almost as much by disagreement within ASEAN as by obstruction from China. And secondly to negotiate an agreement, or network of agreements, on Avoidance of Incidents at Sea, addressing in detail communication and other operational procedures. No-one should in principle be reluctant to support either of these approaches; Australia has not been; and this indeed is an area where our voice could be louder still.

The harder question is Resolution. The authors here come down on the side of an all-embracing UN Conference on the Law of the Sea, but with the huge number of multilateral and bilateral issues on the table, and the intensity of the competing national interests involved, a lot more needs to be done to show how this approach could possibly bear fruit within any kind of reasonable time frame.

A more productive approach may well be a step-by-step one, in which the first big achievement would be to get every claimant state to make its case using the concepts and legal frame of reference of UNCLOS, so that the foundations are then laid for formal adjudication of competing claims, or – more likely – agreements to be reached, bilaterally or trilaterally as necessary, for resource sharing in areas the subject of continued formal dispute (along the lines that Australia negotiated with Indonesia over the Timor Gap).

The crucial need in this context is for China to set aside once and for all the U-shaped ‘nine-dashed line’, embracing roughly 80 per cent of the whole area of the South China Sea, which it inherited from the Kuomintang and has been using since 1948 to define its interests in the Sea, refusing ever to say clearly whether this line constitutes a claim to the whole area in question (which would be totally indefensible in any court of law or of global or regional opinion), or whether rather it is a way of claiming sovereignty over all the islands and other features within the nine-dashed line that are claimable, and the maritime rights which go with them (which would at least be a start in moving toward a more comprehensible and defensible position).

If China is going to move down that path it is going to have to be as a result of sustained and relentless international pressure, making clear over and over again that nobody that matters in the international community takes seriously the nine-dashed line, and the ‘historic waters’ concept that seems to lie behind it, as having any credibility, and that continued insistence on it is reinforcing the impression that China is an expansionist territorial power, despite all its insistence to the contrary, not content to operate within the constraints of a rule-based international order. And I certainly believe that Australia should be firmly among the countries applying that pressure, by making such statements both privately and publicly.

I for one have been urging Chinese colleagues and counterparts in every meeting or forum where the opportunity has arisen – including in the major second-track Australia-China Forum, of which I was the Australian Chair, in Beijing last November – to make a credible claim under UNCLOS, and to then use that as a foundation for negotiating joint development programs (which China has long been saying it is willing to do) where credible claims overlap. I have been pleasantly surprised by the extent to which my blandishments seem to have been taken on board, without any seriously hostile response. Maybe that's because there is no longer the belief there once might have been (and I've been hearing this from a knowledgeable source or two recently) in the South China Seas as a hydrocarbon repository rivalling those of Saudi Arabia and the Gulf; or maybe, as I'd prefer to think, it's because senior Chinese are becoming more conscious of the soft power, reputational, implications of these issues.

My optimism in this respect might be misplaced, but my sense has been that cooler heads – including the foreign ministry's international lawyers – are likely to ultimately prevail on this, and that if overt provocations from other claimants (of a kind bound to generate reciprocal nationalist chest-beating in China) can be avoided long enough to enable the new leadership to consolidate itself, then moves by Beijing to putting its claims in more defensible terms, with all that might follow from that, are certainly possible in the near term.

None of this stuff is easy to get one's head around. Future historians may well be tempted to say of the South China Sea question what you will remember Lord Palmerston famously said of Schleswig -Holstein in the nineteenth century: "Only three people have ever understood it. One is dead, one went mad, and the third is me – and I've forgotten." This Paper will I think contribute to ensuring that the issue doesn't have quite this fate. I hope that it, and the book which will follow from it, will be widely read as a serious contribution to wider understanding of a very troubling regional and global problem, and I declare it duly launched.

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