



SOUTH CHINA SEA: JUST WAITING FOR THE BREEZE?

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The South China Sea issue is clearly an international problem. We are accustomed to think of ‘problems’ in engineering terms; they have solutions, provided only that we have the wit, time and patience to find out what they are. But some international problems seem to be more intractable than this. The Berlin problem during the Cold War was arguably one such. This really was an issue that seemed beyond solution, and, indeed, it was a problem that was never solved as such. Instead there was, with the collapse of the Soviet Union and the end of the Cold War, a seismic shift in the whole international context which meant that the wall came down making the problem of Berlin completely irrelevant. In such circumstances all statesmen on both sides of the argument could do, was to manage and contain the Berlin problem as much as they could, rather than try to solve it. Their aim was to ensure that the problem would not too badly affect the general situation - until something came up to change the terms of the issue. This was a matter, as the Russians used to say, of ‘sitting on the shore and waiting for the breeze.’ So they built the Berlin wall; for the West this seemed a crisis, but in fact it wasn’t – in effect it ended the Berlin problem as a crisis, leaving it merely as an irresolvable international problem which, for the next 30 years, both East and West showed they could live with.

Perhaps, then, the same philosophy should be applied to the apparently equally intractable problem of jurisdiction over the South China Sea and its rocks and islands? Perhaps the sensible and modest aim should be merely to wait for better times – the breeze- and in the meantime to concentrate on containing the effects of the dispute as much as possible. This seems to be the philosophy behind Track 2 negotiations which aim at talking through the issues in workshops like this in order to improve general understanding, at the 2002 agreement by all parties, not to resort to the use of force as a means of hoping to resolve the issue and by proposals for the joint exploration of the potential mineral resources of the area, which temporarily put questions of jurisdiction aside.



But there are several reasons which suggest that such a policy, however well intentioned, might turn out to be over sanguine and that something more radical may be required as well.

THE GROWING IMPORTANCE OF ENERGY

One of the main reasons for the fact that the South China Sea is so intractable is its energy potential. The whole world is engaged in an anxious search for the future energy resources that just might be found below the waters of the South China Sea. The point is that these resources, assuming they exist, are increasingly important and this will inevitably put growing pressure on the current situation.

THE GROWING SYMBOLIC VALUE OF MARITIME JURISDICTION

Jurisdiction over islands is peculiarly sensitive because it symbolizes the authority and the reputation of claimant states, both domestically and internationally. Because islands are necessarily remote from the centres of government, they are seen as general ‘performance indicators’ of a regime’s capacity to rule effectively. This is why the dispute over the Falkland islands was so important to the governments of both Argentina and the UK; what was at stake was not simply a matter of jurisdiction over distant islands, but the reputation, even the survival as it turned out, of the two conflicting regimes. This is partly because in the modern media age, the people at large cannot be excluded from such complex issues – and they often seem to be more nationalistic than their governments.

It is generally hard to contest the fact that, quite unlike the Europe of the late 1950s, the Asia-Pacific region is one in which two partially competing trends may be discerned. The one is an increasing recognition of the need for a cooperative approach to common problems that is partly based on a lively appreciation of the costs of doing otherwise and partly on recognition of the consequences of increasing levels of economic interdependence. But alongside this, the growing sense of national pride that is natural for the ‘rising’ powers of the area. At a time when India and China, Cambodia and Thailand still clash over disputed borders¹, and when MM Lee’s suggestion that South-east Asia

¹ ‘Clash of the Asian giants’ *The Straits Times* 7 Nov 2009; Cambodian Thai ties sink over Thaksin *The Straits times* 7 Nov 2009. Significantly the latter’ dispute has resulted in Thailand’s tearing up of an 8 year old memorandum of understanding for the joint development of a disputed sea area which has never been exploited.



needs the United States to ‘balance’ China sparks furious debate amongst that country’s citizens.² It is hard to deny that old-fashioned nationalism remains strong in the area, not least at the popular level. But what has undoubtedly grown is the capacity of these now more active and powerful states to take actions which have significant impact on the international environment. For both these reasons, the main parties to the South China Sea dispute are getting both more cooperative and more competitive at the same time and the latter of course, makes it more and more difficult to resolve the situation.

THE LAW IS NOT STANDING STILL

Far from resolving disputes over maritime jurisdiction in itself, the United Nations Convention on the Law of the Sea [UNCLOS] merely provides a means by which jurisdiction might be first claimed by disputants and, if they all agree to submit otherwise irresolvable disputes to external arbitration by which such disputes might be concluded. As Malaysia and Singapore have shown by their agreement to abide by the results of external arbitration of their maritime jurisdictional disputes, this is a possible way of ending the South China Sea jurisdictional issue once and for all. But so far, none of the disputants have demonstrated willingness in this way to subordinate national interests to the cause of establishing greater regional harmony over the issue.

Worse still, the law is, so to speak, not standing still. UNCLOS also provided for a system by which states may assert rights over the ‘natural prolongation’ of their continental shelf out to a cut-off point of up to 350 nautical miles from their coasts. This is likely to be a technically difficult and complex process³ which leads to three further difficulties. Firstly, identifying cut-off points depends partly on positions on the straight base-lines from which the 200-350 mile arcs may need to be measured, but these are already the subject of acrimonious dispute. Secondly, the data required is complex and very liable to diverse interpretation. Thirdly, the process depends on claimant states providing detailed oceanographic information about the sea bottom in areas that are possibly claimed by others. In such cases, attempts to gather such information might in itself become controversial, rather in the manner of the recent unpleasantness between

² Interestingly, after Singapore’s Minister Mentor Lee Kuan Yew’s suggestion that the Asia-Pacific needed the United States to ‘balance’ a resurgent China, there was a furious response from that country’s citizens. ‘Why Chinese netizens are upset’ *Straits Times* 5 Nov 2009 and ‘” Balance” gets lost in translation’ *Straits Times* 6 Nov 2009. But see also Li Daguang, ‘US Factor in East Asia: More Pros than Cons’ originally in China’s *Global Times*, translated in *The Straits Times* 6 Nov 2009.

³ Clive Schofield and I Made Andi Arsana provide a detailed and authoritative review of these in their ‘Beyond the Limits: Outer Continental Shelf Opportunities and challenges in East and Southeast Asia’ *Contemporary Southeast Asia* Vol 31 No 1 April 2009. This material is presented to the UN Commission on the Limits of the Continental Shelf, which is not a dispute resolution body.



China and the United States over the Impeccable incident.⁴ For both reasons, some suggest that cooperative or at least coordinated research and submission of data to the United Nations Commission on the Limits of the Continental Shelf would be advantageous⁵ but so far there seems little sign of that. China, indeed, has not yet submitted such a claim, but has reacted angrily to both Malaysia and Vietnam which have.

These potential difficulties have grown in the recent past because, although rights to prolonged continental shelf rights are held to be ‘legally inherent,’ there still existed a practical ‘deadline’ of 13 May 2009 for the submission of claims [or at least ‘preliminary information’] for states that were party to the Convention before 13 May 1999. It was for that reason that Malaysia and Vietnam submitted the claims they did, claims which if accepted would seriously impact on China’s own claims to the islands and rocks within that area of arguably ‘prolonged continental shelf’.

THIS IS A DRAMA WITH AN INCREASING CAST

The South China Sea dispute is already more complex than the Berlin crisis was, because there are so many more disputants with views to be considered. In effect, and although there were differences in emphasis between allies, there were just two sides to the West Berlin dispute. There are, however, three claimants to the Paracels and six to the Spratly islands and/or their surrounding waters. The legal status of one of the claimants, Taiwan, further clouds the issue of course.

Worse, non-state actors are increasingly involved and this complicates the matter still further. Fishermen desperate to hunt out dwindling stocks have often been thought involved in the inadvertent but possibly deliberate escalation of various aspects of the overall dispute, raising its temperature and putting pressure on governments to support, even intervene to protect, their nationals. Moreover, oil companies have also become increasingly involved in exploration of the oil-bearing potential of the South China Sea and this in turn has sucked in further external interests. Recently for example, Scot Marciel, a deputy US assistant secretary of state responsible for Asia, complained before the Senate Foreign Relations Committee about China’s alleged threats to the economic interests of US oil companies working with Vietnamese partners. Although the United States does not take sides on the dispute itself he said, “We object to any effort to intimidate US companies... We have raised our concerns with China directly...

⁴ Michael Perkinson, ‘Collision Course: China and US make waves in South China Sea’ *Jane’s Intelligence Review* May 2009. ‘China navy criticizes dispatch of US destroyers: state media’ AFP electronic report accessed in <http://www.spacewar.com/reports> 16 Mar 2009.

⁵ Schofield and Arsana, op cit, p 35.



Sovereignty disputes between nations should not be addressed by attempting to pressure companies that are not party to the dispute.”⁶

The reported rise in incidents of piracy in various parts of the South China Sea could, if unchecked, have the same unfortunate centripetal effects effect if it spreads into areas of dispute.⁷

Moreover, by-standers such as Japan, the United States and most countries in Southeast Asia while not claimants in the dispute, do have interests at stake, not least free navigation. As such they may be expected to take a close interest in how the dispute is handled, if not in a preferred set of outcomes. The United States, for example, has not been slow to urge a the peaceful conduct of the dispute and a series of clear warnings that the outcome must not interfere with free navigation. The increasing salience of the South China Sea as an area by which much of the maritime trade of Eastern Asia passes, gives the dispute a strategic significance that is likely to increase the stake of outsiders in this dispute still further.

GROWING NAVAL POWER

Finally, the Chinese seizure of the Paracels in 1974, Fiery Cross reef in 1988 and Mischief Reef in 1995 all show that in their naval forces, states have a method by which they can redefine the situation in a manner decisive enough to establish a de facto presence. Against this background the steady growth of the naval and air power of most of the claimants must be regarded with at least with a degree of concern. The increasing strength of Chinese forces in the area, especially since the completion of its base near Sanya on Hainan, and its oft-reported aspirations for the development of an aircraft carrier capacity could well be seen as the most striking local example of the acquisition of potentially decisive naval forces of this sort. But there are others, such as the establishment of Vietnam’s ‘Region 2 naval forces’ responsible for protecting Vietnamese sovereignty over its southern continental shelf.⁸ The fact that this is a dispute involving one great power and a number of small and medium ones complicates the issue still further. In a world in which the weak can sometimes bully the strong, this is no tidily symmetric situation like Berlin was.

⁶ ‘US ‘Concerned’ on China-Vietnam sea tensions’ on <http://www.energy-daily.com/reports> accessed 16 July 09.

⁷ ‘Piracy down in Malacca Strait but up in S. China Sea’ *The Straits Times* 17 July 2009.

⁸ ‘New naval forces established to protect continental shelf’ accessed electronically on 12 Oct 2009 at <http://english.vietnamnet.vn/politics/2009/08/866285>.



WHAT IS TO BE DONE?

If the situation is indeed deteriorating as this survey suggests, in Lenin's words, what is to be done? There are of course a plethora of additional suggestions about how the dispute can be contained and managed – and gradually made less intractable.

One of the most persuasive must surely be greater candour on the part of all claimants, about exactly what it is they are claiming. China's infamous 'u-shaped line' is particularly corrosive from this point of view, since no-one can be sure whether China is claiming the whole of the water space within the line or merely the rocks, islands and associated water areas within the line⁹. Clarity here might relieve the minds of some of the other claimants. It is not clear why China does not do this, especially as its attitude to, and conduct of, the dispute is often taken as evidence of the 'China threat theory' which it so often deplores.¹⁰

Rather in the same spirit, the 2002 agreement urges parties to the dispute, in addition to abjuring the use of force, to refrain from acts that might worsen it. All too often, this seems an injunction more honoured in the breach than in the observance. China's announcement that Sansha city in Hainan would govern the Paracel and Spratly islands, high profile political visits to disputed islands, the tabling of assertive jurisdictional claims, the Philippine Republic Act 9522 to incorporate the Kalayaan Island Group and so on, seem hardly likely to act to promote harmonious relations and so not in the spirit of the 2002 agreement.

Another possibility might be the exploration of new types of functional cooperation, in areas of common interest such as agreed strategies on counter-piracy, search and rescue, the mitigation of risks to offshore installations or the exploration of establishing protocols to counter environmental pollution in the area.¹¹ None of these apparently common-sensical accommodations would be easy however. The devil lives in the details. The local reluctance to enter into collective SAR arrangements for example

⁹ Michael Richardson, 'Beijing has much to do to clarify its boundary claims' *The Straits Times* 18 May 2009.

¹⁰ Wu Shicun, 'Commentary: A Regional Perspective on South China Sea Passage Security' in Shicun Wu and Keyuan Zou (eds), *Maritime Security in the South China Sea* (Farnham, Surrey: Ashgate Publishing, 2009) p 103.

¹¹ Various proposals have already been made to do this. See Zhang Jie, 'Commentary: Search and Rescue in South China Sea and Regional Cooperation' and Zhang Xiangjun 'Regional Cooperation for marine Pollution Contingency Response in the South China Sea' both in Shicun Wu and Keyuan Zou, op cit.



might well derive from a fear that these could allow other countries to enter one's territorial sea.¹²

In addition, it might be worth exploring more radical solutions as a means of breaking the log-jam or at least identifying more clearly what some of the current problems are. One such might be an agreement to submit all the bundle of claims and counter-claims to some external authority for resolution with an advance undertaking to abide by the consequences. This was the way in which Argentina and Chile largely settled the Beagle channel dispute between them, or Malaysia and Singapore the Pedra Branca issue. Another, much more radical, suggestion might be a watered down version of the Antarctic 'solution' basically declaring the area as a no-go area for naval, fishing and oil-exploration vessels for the next couple of decades¹³... Radical certainly, but much less so than descending into conflict over the issue!

In the current circumstances none of these really radical solutions seems at all likely, but perhaps we need not yet despair of the effect of anything else – and that is because of one critical difference between the Berlin crisis and South China Sea dispute which has not so far been mentioned. This is that relations between the Berlin disputants was generally bad everywhere else and in a whole number of other ways too; this is not the case in the South China Sea, where international relations are generally improving as regional trade increases. Although this is a fundamental difference, it is still true that making progress on the dispute, rather than sitting on the shore and waiting for the breeze, would materially improve the international atmosphere still further.

¹² Sam Bateman, 'Good order at Sea in the South China Sea' in Shicun Wu and Keyuan Zou, op cit, p 21.

¹³ There would be significant long-term environmental benefits to such a policy – not least the replenishment of near-exhausted fish stocks. Moreover none of the explorations so far conducted would seem to suggest that the oil resources of the area are globally significant.