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Managing South China Sea Disputes: The Legal Basis for Cooperation

By Ian Townsend-Gault

Synopsis

Recent exchanges over South China Sea issues continue to focus primarily on sovereignty over islands and jurisdiction over adjacent marine areas. But coastal state rights are balanced by obligations, such as to protect the marine biosphere, especially in a semi-enclosed sea.

Commentary

IN THE exchanges between Sam Bateman and Huy Duong and Tuan Pham in the recent issues of RSIS Commentaries, a number of important points were raised. In his response to the critique by the two Vietnamese authors, Dr Bateman called for a shift away from strident assertions of sovereignty in favour of a focus on the environmental and ecological risks facing the South China Sea.

I have long joined the ranks of those imploring government and policy makers in the regional littoral states to look into this, as reflected in my joint commentary with Dr Hasjim Djalal (RSIS Commentary 11 April 2014). Accordingly, I was struck by the fact that in the debate over the Chinese oil rig in disputed waters, little or no attention has been paid to Part IX of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) especially Article 123 on the Regime of Enclosed and Semi-enclosed Seas.

South China Sea as semi-enclosed waters

There is no doubt that the South China Sea is semi-enclosed within the meaning of this part of the agreement (Article 122). The difficulty lies in the wording of Article 123, which asserts that states bordering an enclosed or semi-enclosed sea “*should* co-operate with each other”, including in the “management, conservation, exploration and exploitation of the living resources of the sea” (emphasis added).

This seems to constitute an ideal legal framework for long-term cooperation in key areas as opposed to continual conflict. It also leaves the door open for participation by non-littoral states. The problem is that if the states concerned are not willing or able to cooperate, according to some, there is no legal obligation to do so – given that the word used is “*should*” as opposed to “*shall*”.

Against this, I would advance two arguments. Firstly, the framers of the 1982 Convention decided to single out enclosed and semi-enclosed seas, as opposed to other ocean areas, and called for them to be given special treatment. Is this not in itself significant? The wording suggests something between cooperation as a nice idea

and cooperation as an absolute obligation.

Another problem, as often discovered during the South China Sea Workshops that Dr Hasjim and I organised, is that some states regard cooperation as an implied dilution of their claims to sovereignty or sovereign rights. This need not be the case.

Ecosystem-based management

There was a time when Argentina and the United Kingdom were prepared to cooperate in marine activities in the vicinity of the disputed Falkland Islands/Islands Malvinas. They were prepared to do so “without prejudice” to their respective claims to sovereignty. In the common law system at least, writing a letter on a legal matter and heading it “without prejudice” means that no legal obligation is intended by the writer. In other words, what follows is an idea, as opposed to a statement binding the writer in law in some way.

Secondly, it should always be remembered that the rules of international law do not operate in isolation either from each other, or from the world. Law is not autonomous: it does not inhabit a sphere entirely of its own. It is intended to serve individuals, society, countries, regions, and the international community as a whole. But it can only do that if it engages wholly and functionally with issues of concern to the above constituencies as appropriate.

So far as marine scientists are concerned, the optimum way to regard issues relating to the South China Sea’s environmental, ecological, and living resources is through the concept of the large marine ecosystem. This means ecosystem-based management, as opposed to one focussed solely on the marine area falling within the jurisdiction of a state.

This envisages an approach based not on artificial divisions caused by maritime boundaries, but giving protection, management and exploitation in light of the characteristics of the ecosystem as a whole. In addition, it does not necessarily require the prior conclusion of maritime boundaries.

This approach requires new and unblinkered thinking because the law of the sea developed since 1945 - when the United States made the first unambiguous claim to jurisdiction beyond the limits of the territorial sea - on the basis of unilateral rights and unilateral control. Such rights related to the natural resources of the continental shelf, primarily hydrocarbons. But even here, absolute rights might have to give way to the demands of functional management.

Nowhere is this more apparent than in the case of the cross-boundary hydrocarbon field, i.e. an oil or gas field divided by a maritime boundary in such a way that *most of the resources* can be recovered by operations taking place on either side of the line. In such cases, it is perfectly possible for the party undertaking drilling to stay on its own side of the boundary but, at the end of the day, recover at least some part of the resources that, in their original state, were located in the subsoil of the land or continental shelf of its neighbour.

Cooperation the only way

The only way to prevent this is by intensive cooperation between all the stakeholders, i.e. by treating the field as a single unit and apportioning the proceeds according to the percentage which underlay each party’s area *ab initio*.

Accordingly, I would argue that the South China Sea littoral states have an excellent opportunity to embrace Article 123 of the Convention – an agreement to which they are all party. I argue this not to encourage cooperation for its own sake, but because it is functionally required: the alternatives are fraught with risk.

We return to the fact that hundreds of millions of people depend on the South China Sea for their protein needs. But what would the consequences be if these protein needs were to be unmet? As Dr Bateman commented, would it not be better for the energy that is being put into the strident claims to sovereignty be diverted into tackling this very present, very real challenge?

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