

**ENTERING UNCHARTED WATERS?  
ASEAN AND THE SOUTH CHINA SEA DISPUTE  
Friday 18 February 2011**

A conference on ‘Entering Uncharted Waters? ASEAN and the South China Sea Dispute’ was held at the Institute of Southeast Asian Studies (ISEAS) on Friday, 18 February 2011. It was organised by the ASEAN Studies Centre (ASC). Conference speakers were former journalists, legal professionals, academics, government representatives, and other analysts. The aim of the conference was not to provide an instant solution to the disputes but to highlight the claims of the states involved, understand these claims in the context of the legal framework, such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and illuminate how external parties to the disputes, such as the non-claimant member-states of the Association of Southeast Asian Nations (ASEAN), can help to resolve these disagreements by peaceful means.

The day began with an overview of the current state of affairs in the South China Sea, provided by a former ASEAN Secretary-General, Mr Rodolfo Severino, and Professor Robert Beckman, Director of the Centre for International Law, National University of Singapore. Mr Severino, now head of the ASC at ISEAS, explained that everyone’s objective regarding the South China Sea (SCS) was essentially to ‘prevent conflict’. It was extremely unlikely, he said, that there would be a ‘grand solution’ to what was a matter, for the individual states concerned, of ‘strategic national interest’. In this light, none of the countries involved was prepared to compromise on territorial issues. It was important, Mr Severino declared, for the claimants to align their claims with the provisions and requirements of UNCLOS and come to agreement on what is and what is not allowed in an individual country’s exclusive economic zone (EEZ). To prevent the disputes from escalating, the ASEAN states, China and the United States (US) should play their parts. This was, of course, easier said than done.

Professor Beckman’s international-law perspective provided participants with an understanding of how the law could be applied and utilised. However, Professor Beckman

echoed Mr Severino's sentiment that the law was 'not determinative' when it came to resolving the dispute. It was more a tool to 'influence the conduct of the parties' involved and to make possible a 'frank and fair debate'. The legal instruments that were available and applicable to the SCS dispute included the 1982 UNCLOS, which clearly defined the maritime zones to include the 12-mile territorial sea), the 200-mile EEZ and the continental shelf. China's claims to 'historic waters' within the nine bars on a Chinese map issued in 1947 were deemed to be inconsistent with UNCLOS.

ASEAN and China had attempted to deal with the SCS dispute through the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), which called for 'dialogue, confidence building and cooperative measures'. One of the key components of the declaration was the clause stipulating that countries should refrain from taking action 'that would complicate or escalate disputes and affect peace and stability including . . . refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features'. However, the DOC had proved extremely difficult to implement. Professor Beckman suggested that one solution to the disputes would be to enter into 'provisional arrangements of a practical nature', which UNCLOS called for in Articles 74 and 83, principally concerning 'joint development'.

Mr Severino emphasised that ASEAN could not become legally involved in the disputes. However, it could provide the framework and platform for dialogue and consultations. A common policy could not be arrived at within ASEAN because of the differences among the claimant-countries and the overlapping claims of the four ASEAN countries and China (including Taiwan).

Session Two explored ASEAN's 'View on the South China Sea', with papers presented by Dr Hasjim Djalal, member of the Indonesian National Maritime Council and Vice Chairman of the Indonesian delegation to the Third UN Law of the Sea Conference, and Professor Aileen S P Baviera from the Asian Centre, University of the Philippines.

In presenting his paper, entitled 'South China Sea: Contribution of 2<sup>nd</sup> Track Diplomacy/Workshop Process to Regional Peace and Cooperation', Dr Djalal explained

the history of armed conflicts that had taken place between China and Vietnam. One of the causes of the disputes, according to him, was the rush to secure resources (living and non-living). Although such resources could be obtained from as far afield as Africa, they still needed to be transported to China through the Straits of Malacca. There had been confrontations and conflicts between China and other Southeast Asian countries. Relations between Indonesia and China, for instance, were frozen for 23 years. Countries outside Southeast Asia had also become more interested in the SCS, particularly in terms of freedom of navigation and overflight, such as the US and Australia. More recently, India, with her 'look east' policy, had also taken an interest.

Indonesia's position in the 1980s was that the disputes in the SCS could have effects on peace and stability in Southeast Asia. Because of this, Dr Djalal personally undertook a tour of the then five other ASEAN countries to see what could be done and established the following:

- Practically everybody thought that something should be done to address the SCS dispute;
- Apprehension that territorial disputes could pose major difficulties in developing cooperative efforts;
- It would be better if the approach was informal (2<sup>nd</sup> track), at least at the initial stage;
- There are important bases for cooperation under UNCLOS 1982, regarding 'enclosed and semi-enclosed seas' like the SCS, particularly in Articles 122 and 123;
- Article 122 defines 'enclosed and semi-enclosed sea' as a 'gulf, basin or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states'.
- Article 123 recommends that 'States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization'.

The first meeting of the then six ASEAN member countries to address the SCS issue took place in Bali in 1990. Three objectives were set:

1. Devise 'cooperation programs' in which everyone could participate regardless of size or scope of the issue;
2. Promote 'confidence building';
3. 'Encourage dialogue' between the parties to aid the solution-making process.

Over the past 20 years, the number of countries participating has grown, with the addition of more ASEAN members, China, and Chinese Taipei (Taiwan). Technical working groups (TWGs) have been set up for the following areas:

1. Marine scientific research
2. Resource assessment
3. Marine environmental protection
4. Safety of navigation, shipping and communication
5. Legal matters

All of these measures are meant to promote a spirit of cooperation among the claimant-countries. It is in part because of them that no violent conflict has taken place since 1988. However, this is not so say that this goodwill can last indefinitely; this process has to be carefully managed so as to ensure that the momentum is sustained and good relations continue. Efforts have to be made to maintain a combination of formal and informal (2<sup>nd</sup> track) channels of communication and to nurture 'the habit of cooperation rather than the habit of confrontation'.

Professor Baviera's paper, 'The South China Sea Disputes Writ Large: Intra Asian Contest or US-China Hegemonic Competition?', argues that with the rise of China both economically and militarily and a potential US-China strategic competition, the 'environment for addressing SCS disputes has changed'. Professor Baviera suggests that only a US 'supportive of China-ASEAN dialogue and a peaceful dispute settlement can

have a positive impact'. Professor Baviera pointed out that tensions had increased over the last two years, as assertions of sovereignty rose, with incidents ranging from Chinese intimidation of oil and gas companies operating in the SCS and disagreements over fisheries territories to military activities in general. Included in these was China's declaration that the SCS was part of its 'core interest', implying that it was not ruling out the use of force in the area. In turn, the US proclaimed the SCS as being in its 'national interest' with respect to freedom of navigation and respect for international law. Both of these stances have brought about mixed reactions from ASEAN member states that are seemingly caught in the crossfire while trying to maintain peace and stability in their immediate surroundings. Professor Baviera pointed out that the US benefited from ASEAN countries' perceived "mistrust" of China; however, ASEAN needed to combine 'tactical hedging' and 'strategic balancing/containment'.

Professor Baviera concluded that the state of play had changed; thus, all parties needed to 'take stock' of the 'new challenges (and opportunities)' arising from the growth of China and the dynamics of China-US relations. According to Professor Baviera, as well as Dr Djalal, one way in which to address this was to foster closer cooperation in areas such as fisheries, oil and gas, and marine life. Professor Baviera contended that there was a danger that the 'SCS disputes . . . could deteriorate into a proxy for great power conflict' and that this should be avoided at all costs; however, 'time is not on ASEAN's side'.

Session III concerned China's position, with two papers from Dr Wang Hanling of the Chinese Academy of Social Sciences and Dr Li Mingjiang, Assistant Professor at the S Rajaratnam School of International Studies. Explaining that he had been asked to provide a paper on 'China's Stance on Some Major Issues of the South China Sea', Dr Wang provided a definition of the SCS issue from the Chinese perspective:

- Chinese territories are illegally occupied and resources exploited by foreign countries (continually and escalating);
- Some parties have denied their recognition before the mid-1970s of Chinese sovereignty over islands and archipelagos and adjacent waters;
- Outsiders inappropriately interfere in SCS affairs.

According to Dr Wang, China ‘has always stood for the peaceful settlement of the SCS disputes, particularly through bilateral negotiation and consultation between the parties concerned, and opposes outsider interference’. China believes that:

1. The best and long-term solution: recognition of Chinese territory and sovereignty and sharing SCS resources.
2. Short-term solution: shelving disputes and going in for joint development.
3. Confidence building measures: environmental protection, conservation of resources, anti-piracy, MSR (marine scientific research), SAR (search and rescue).

Dr Wang defined what he called the ‘changeable’ and the ‘unchangeable’. Essentially, these meant that, while the “fundamental principles such as territory, sovereignty and peaceful settlement” could not be changed, the ways in which to achieve the latter were ‘flexible’. He declared that ‘outsiders’ intervention is unlikely to change China’s position on the SCS’.

Dr Li examined ‘The Changing Contexts of China’s Policy on the South China Sea Dispute’, which covered China’s policy in the first decade of the 21<sup>st</sup> century, China’s move towards ‘non-confrontational assertiveness’, and the ‘implications for ASEAN’. In the latter part of the previous century, according to Dr Li, China’s three key conflicts were the 1974 battle over the Paracels, a result of the perceived threat from the Soviet Union; the 1988 Sino-Vietnamese conflict, which was largely fuelled by the completion of China’s defence budget; and the 1995 Mischief Reef skirmishes. However, since the late-1990s, the policy had shifted to one in which ‘strategic interests became more important’, and so a policy of “calculated moderation” ensued, leading to China’s ‘Golden Decade’ of participation in maritime cooperation. The final policy change was linked not only to the SCS but to joint naval exercises and maritime control.

Dr Li provided some possible explanations for the ‘paradigm shift’ that took place in what he described as ‘an unfortunate year’ for Chinese security policy. Possible factors included an ‘inflated self-confidence’ and ‘bureaucratic politics’ as manifested in the J20 test flight, which had been undertaken apparently without communication between the

military and the government. According to Dr Li, this newfound ‘non-confrontational assertiveness’ can be attributed to:

- Growing capabilities, which have allowed for more options and the boldness to try to do things differently;
- China’s frustrations and concerns with outside intervention and the perception of others ganging up on China;
- Higher expectations of interests;
- Leadership transition in the Chinese Communist Party, with top-level changes taking place in 2012;
- Rising nationalism; for example, scholars who refuted the statement on the SCS as an area of ‘core interest’ were silenced;
- Bureaucratic politics, which continues with no coordinated policymaking process.

Such a change in policy is meant to ‘avoid strategic confrontation’ and maintain the status quo.

Session IV centred on ASEAN claimants’ positions and that of Taiwan, with Dr Nguyen Thi Lan Anh from the Diplomatic Academy of Vietnam, former Visiting Fellow, Centre for International Law of the National University of Singapore; Mr Henry Bensurto, Secretary-General, Centre for Maritime and Ocean Affairs, Department of Foreign Affairs, Philippines; Dr Dzirhan Mahadzir, independent defence and security analyst based in Kuala Lumpur; and Dr Liu Fu-Kuo, Executive Director, Centre for Security Studies, Institute of International Relations, National Chengchi University, Taipei, Taiwan, making up the panel.

Dr Lan Anh provided ‘A Vietnamese Perspective’ on the SCS, from the legal angle, encompassing the role of the law and the role of transparency. She declared that it was essential that all parties act in good faith in the application and interpretation of the law, implementing existing commitments, such as in the DOC, and ‘avoiding inconsistency between words and actions’. Providing examples of recent ‘good practice’, Dr Lan Anh

cited the new archipelagic baselines law of the Philippines and the joint and partial submissions on the expanded continental shelves of Vietnam and Malaysia. Dr. Lan Anh highlighted three ‘needs’ – the ‘need for resources’, ‘the need for peace’, and ‘the need for cooperation’.

Mr Bensurto’s paper, ‘Filipino Archipelagic Agenda for the 20<sup>th</sup> Century and the South China Sea: Unlocking the Gridlock’, which had not been sanctioned by the Philippine government, aimed to address the dangers of overlapping claims, the imperatives for delimitation, and the Philippines’ template for the South China Sea. It offered a framework for how the ‘convoluted lines of overlapping claims and territorial disputes could be smoothed and simplified to provide a much more stable base’. Mr. Bensurto pointed out that the Philippines is an archipelagic state comprising more than 7,100 islands, with 62 out of 71 provinces categorised as coastal. Its central location at the ‘heart of Southeast Asia’ makes it a ‘crossroads’ for major international routes. It is also a ‘hotbed’ of geological resources and activity with a high potential to yield oil and gas. Finally, the Philippines hosts the ‘greater part of the Coral Triangle’, making it a ‘centre for biodiversity’.

Dr Dzirhan Mahadzir gave an overview of the Malaysian position, explaining that Malaysia’s stance on the Spratly islands had been ‘fairly consistent’. The Malaysian military had always been preparing for the “worst case”, with all military exercises carried out in public. Dr Dzirhan argued that the ‘step-up’ in military operations was in response to the actions of others in the region.

Dr Liu Fu-Kuo highlighted ‘Taiwan’s South China Sea Policy Revival’, focusing on Taiwan’s claim from an historical perspective and on the legal claims and policy approaches that the Taiwanese government had adopted to address the SCS disputes. The SCS issue had to be ‘redefined as a strategic interest for Taiwan’, said Dr Liu, so that Taiwan could become ‘more proactive’.

‘The Interests of Others’ was the title of Session V, the ‘others’ being mainly the United States. In presenting his paper, Barry Wain, Writer-in-Residence at ISEAS,

Singapore, and a former editor of the Asian Wall Street Journal, acknowledged that many points had already been covered. According to him, the overriding theme of the others' interests was that the 'international community has a stake in the peace and security of the SCS'. The US position arises mainly from its insistence on 'freedom of navigation'. The US had 'no position' on the territorial or sovereignty claims, but it strongly opposed the use or threat of force and offered to 'assist in any way that the claimants deem helpful'. However, there was always a suspicion that China was hoping to challenge the US for 'supremacy' in the Asia Pacific region. The danger was that the 'US-China rivalry . . . will play out with the SCS as a battleground'.