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**Some Reflections On Maritime Boundary & Territorial Disputes in the  
Asia-Pacific With A Focus On The South China Sea**

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Over the past fifty years the international community has increasingly sought to draw lines in the seas and oceans of the world to define boundaries of various sorts for reasons of sovereignty, economic and security purposes. The Third United Nations Convention on the Law of the Sea (UNCLOS III) that deliberated from 1973 to 1982 provided a comprehensive set of principles and rules. Although the intentions of its many architects may have been to devise a universal code it has opened a sea of troubles that today manifest in some cases as maritime and territorial boundary disputes. However, there are many safety valves in the system whereby differences can be resolved including pragmatic mutual agreement or in the case of a desperately contested dispute, by the International Court of Justice. In the Asia-Pacific region there are many maritime boundary delimitations to be fixed. A casual look at a schematic drawing of the Asia-Pacific with approximate EEZs and claimable continental shelf illustrates the complexities of maritime boundary delimitation. Who can lay claim to what is a question that has several physical and geographic dimensions to it. It dramatically underscores the importance of understanding the region and signals that there are a number of potential trouble spots. Such a diagram raises the not inconsiderable problem of how do we humans manage our way through such a maelstrom of complexities. Furthermore the world is changing with bewildering speed and what we took to be certainties just a little while ago now appear to be ephemeral and transitory.

The purpose of this paper is to briefly discuss contemporary issues of boundaries, mainly Exclusive Economic Zones (EEZs), in the region and in particular the South China Sea and to fit them into a broader historical perspective. The formula for the various boundaries is simply depicted in the attached schematic at Enclosure 1.<sup>1</sup> The actual drawing or the delimitation of boundaries in coastal regions is complicated by geography as illustrated in the diagram at Enclosure 2.<sup>2</sup>

Where did EEZ's come from and why was the distance or 200 miles chosen? In January 1971 Kenya made a proposal to the Asian-African Legal Consultative Committee and in the following year to the United Nations Sea Bed Committee concerning exclusive use of the sea neighbouring the coast – these proposals being supported by a number of developing nations. Concurrently some Latin American countries also developed a similar concept of the “patrimonial” sea. The two strands of thinking on the matter received active support from many Afro-Asian countries and also from some developed

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<sup>1</sup> Churchill R.R., and Lowe A.V. (1999) *The Law of the Sea*, Third Edition, (Melland Schill Studies in International Law) (Manchester: Manchester University Press), p. 30.

<sup>2</sup> Churchill R.R., and Lowe A.V. *Op.cit.*, p36

coastal states.<sup>3</sup> A prime motivator from many of these countries was to reduce the perceived depredations of Distant Water Fishing Nations (DWFN) in waters adjacent to their shores and to gain more control over fish stocks in particular. The actual distance of 200 miles appears to have been based on rather flimsy evidence. According to A.L. Hollick, and I quote directly from Churchill and Lowe:

The figure of 200 miles seems to be something of an accident. Chile's claim was motivated by a desire to protect its then new offshore whaling operations. The whaling industry only wanted a fifty-mile zone, but was advised that some precedent was necessary. The most promising precedent appeared to be the security zone adopted in the 1939 Declaration of Panama. This zone was wrongly thought to have been 200 miles in breadth: in fact it varied and was nowhere less than 300 miles.<sup>4</sup>

An idea of why some sort of regulation or claim to fishing zones was considered necessary can be gauged by the large number of fishing boats actively engaged in fishing activities around the world. For example, the Japanese Government had to undertake negotiations worldwide with thirty-two coastal states to secure access for their ships to fish in the new zones after many states declared 200-mile Exclusive Economic Zones in the late 1970s.<sup>5</sup>

During the mid to late 1970s countries around the world declared 200-mile zones with astonishing frequency. India declared a zone on 28 May 1976 and the Mexicans in June 1976.<sup>6</sup> The French Cabinet issued an official communiqué on 16 June 1976 announcing a draft law to establish a 200 nautical mile economic zone.<sup>7</sup> The Canadians intended their 200-mile EEZ to come into force on 1 January 1977, as did Norway and the USA on 1 March 1977. Britain also intended the same thing for 1 January 1977 but faced delimitation talks with France, Denmark and Iceland.<sup>8</sup> What is important to recognise in the development of the Law of the Sea is that it has diluted the privileges of Western Nations who were the principal architects of the original law. This bias is revealed in the principles of the so-called "freedom of the seas", that is, freedom of navigation, freedom of fishing, freedom to lay submarine cables, and pipelines, and freedom to fly over the sea. Furthermore, the high seas in legal terms had been kept as large as possible by restricting the width of territorial seas – the idea of the cannon shot suited the powerful maritime nations as they could then influence and control what went on ashore.<sup>9</sup> An unfortunate outcome of UNCLOS III is that it has complicated relationships in those

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<sup>3</sup> Churchill R.R., and Lowe A.V. Op.cit., p 160.

<sup>4</sup> Churchill R.R., and Lowe A.V. Op.cit., p 163.

<sup>5</sup> Miles, Edward L. (ed), (1989), Management of World Fisheries: Implications Of Extended Coastal State Jurisdiction, (Seattle: University of Washington Press), pp. 298-9.

<sup>6</sup> The Gazette of India, New Delhi, Friday, 28 May 1976, Bill No XXVIII of 1976, The Territorial Waters Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976.

<sup>7</sup> New Zealand Archives PM 106/22/16, 24 June 1976.

<sup>8</sup> New Zealand Archives PM 106/22/16, circa July 1976.

<sup>9</sup> Bynkers-hoek in his book *De domino maris*, proposed that a nation should exercise dominion over the adjacent seas only to the extent that she could defend them from the shore, which was taken as the existing range of a cannon, and agreed to be three miles. See Kemp, Peter (ed), (1988), The Oxford Companion to Ships and the Sea, (Oxford: Oxford University Press), p. 863.

waters where several countries have competing claims as in the South China Sea and the archipelagic waters of South East Asia.<sup>10</sup> Major beneficiaries of the EEZs in the region are Indonesia, New Zealand, Australia, Japan, Kiribati and Papua New Guinea as the following table illustrates.<sup>11</sup> See Enclosure 3.

### **Boundaries & Disputes**

Where the claims of two or more coastal states intersect for reasons of territorial, contiguous, EEZ or continental shelf delimitation it raises a complexity of issues in coming to some sort of agreement. One might very reasonably ask why is it necessary to establish these boundaries. Some answers are provided by Dr Clive Schofield who cogently argued in a CSCAP Maritime Working Group meeting last year, that maritime boundary delimitation assists in providing jurisdictional *clarity* and *certainty*. A lack of agreed boundaries could hamper effective *international* cooperation thus reducing maritime security and furthermore that rational exploitation of resources could similarly be compromised. Clearly, it is not in anyone's interest to contribute to a "tragedy of the commons".<sup>12</sup> It is the *international* element that is important. Unlike some coastal states that have no or insignificant international boundaries it is *cooperation* that is the critical ingredient of successful use of space and the sustainable and equitable use of resources by those states with several intersecting boundaries with others that is crucial.

A significant dispute is brewing over access to hydrocarbons in the Timor Sea between the newly independent state of Timor L'Este and Australia. The coordinates of the maritime boundaries have yet to be fixed but powerful commercial and state interests are involved in the outcome. On the one hand, Australia is committed to a "strong and productive relationship with East Timor" but then on the other, the Timor Sea Treaty is seen by some as being too generous.<sup>13</sup> It looks as if the dispute will have to be settled by an extensive process of litigation which is not necessarily in the best interests of Timor L'Este's exchequer.<sup>14</sup> The new state will have planned much of its new development on hydrocarbon revenues but until a satisfactory position is established there will be little investment. Copies of two opinions that illustrate the complexities of it all are Annex A and B respectively.

Boundary delimitation in Oceania is yet a long way from resolution. These small states simply do not have the largesse and expertise to invest in the exercise. It should be noted that the State of Kiribati, has the 11<sup>th</sup> largest EEZ in the world but little in the way of infrastructure to finance the exercise. However it appears that the Pacific Island Forum, of which Kiribati is a member, is anxious, at long last, to start a process to develop an Oceans Policy in which boundary delimitation is a vital part.

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<sup>10</sup> Suter, K., "The New Law of the Sea", in *Contemporary Review*, Vol. 267, No. 1554, July 1995.

<sup>11</sup> Churchill R.R., and Lowe A.V. *Op.cit.*, p 178.

<sup>12</sup> Schofield, Clive, Unpublished paper presented at the CSCAP Maritime Cooperation Working Group/PECC Meeting, Manila 6-7 September 2003.

<sup>13</sup> Forbes, Vivian Loius, *Timor Sea Treaty and Related Agreements*, <http://www.aph.gov.au/house/committee/jsct/timor/subs/sub15.pdf>, accessed 16 May 2004.

<sup>14</sup> Smith, Jeffrey, *Offshore Jurisdiction of the Timor Lest in the Timor Sea*, <http://www.etan.org/et2003/march/01/07offsho.htm>, accessed 16 May 2004.

Boundary delimitation in the South China Sea is complicated by claims of an historical nature by China and also the occupation of certain small islands from which territorial, contiguous, EEZ and continental shelf limits can be drawn. There is no doubt that China has exercised a significant influence over this sea since antiquity and continually used it for commercial purposes. Distinguished scholars ranging from Professor Wang Gungwu, and his seminal work, “The Nanhai Trade: The Early History of Chinese Trade in the South China Sea”, published in the 1950s, Anthony Reid’s, “Charting the Shape of Early Modern Southeast Asia”, and Deng Gang’s “Chinese Maritime Activities and Socio-economic Development c.2100BC – 1900 AD”, underscore and support this assertion. Nonetheless, historical claims are extremely tricky tools to use as a basis for international law.

One cannot view modern boundary disputes in the South China Sea without a brief look at contemporary Chinese maritime history of say, the past fifty years or so. At the end of the Chinese Civil War, the Nationalists or Guomindang (GMD) evacuated their forces and a huge amount of imperial treasure to offshore islands in 1949, principally to Taiwan. The communists were soundly beaten with huge casualties when the PLA attempted invasion of some of these islands. This caused much introspection by Mao and his generals - he is reputed to have said, “We must build a Navy capable of defending our coastal areas and effectively guarding against possible aggression by the imperialists”.<sup>15</sup> The imperialists in this case were considered to be the Americans. The Chinese leadership however, merely considered the Navy to be an adjunct of the Army and to be used to provide a first line of defence to limit an invading enemy’s operations whilst ground forces were manoeuvred to best advantage. The strategy was known as *jinhai fangyu* - its primary purpose was to adopt guerrilla type tactics against an invading force but under the direction of local military commanders - it was in effect for some thirty years notwithstanding the ambitions of a highly motivated and expansionist naval cadre who had been trained and influenced by the Russians at the Voroshilov Naval Academy in Moscow.

When Deng Xiao Ping assumed the mantle of leadership in 1978, PLA theorists and planners began thinking in terms of four specific types of war:

- (a) Small confrontations at the frontier, eg Siachen Glacier,
- (b) Medium sized conventional wars,
- (c) Full-scale conventional wars under the condition of nuclear deterrence,
- (d) Nuclear war.

It was the first two types of war that were considered the most likely and with Vietnam and India being the opponents.<sup>16</sup> However, one must also reckon this against the recent expansion of the Soviet Navy at that time - the establishment of port facilities in Cam

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<sup>15</sup> Tai Ming Cheung, “Growth of Chinese Naval Power, Priorities, Goals, Missions and Regional Implications”, in Pacific Strategic Papers, Institute of Southeast Asian Studies, Singapore, 1990, p. 4.

<sup>16</sup> Lewis, John Wilson and Xue Litai, China’s Strategic Seapower” - The Politics of Force Modernization in the Nuclear Age, Stanford University Press, Stanford California, 1994, pp. 214-219.

Ranh Bay and Da Nang in Vietnam which were, in effect, a continuance of the border conflict between the USSR and China into a maritime dimension.<sup>17</sup> We must not forget the Chinese takeover of the Paracel Islands in 1974 - a naval operation - it was exquisitely accomplished by the Chinese leadership during a time of rapprochement between the Chinese and US - the understanding being that the US would not intervene. It was perhaps factors of this nature that opened the minds of the communist leadership to the need for a comprehensive maritime strategy and the tools with which to do it. Deng Xiao Ping's modernising influence marks a shift from a purely territorial defensive strategy to one of a maritime nature. The build-up of the Soviet Navy and Merchant fleet under Admiral Gorshkov in the 1960s and 1970s also helped to convince the Chinese leadership that there really was something useful in this maritime sphere after all.

Also at this time we must not overlook developments in UNCLOS III. The opportunity to claim a 200 mile EEZ and to formalise a historical claim to the Spratly islands and therefore access and ownership of significant fishing and minerals resources (particularly hydrocarbons) gave Chinese naval planners much more muscle in arguing their case for a greater share of the national defence budget. But the Spratlys were, and are not, the only islands to which Beijing wants to lay claim. The islands to the north of Taiwan the Diayudao or Senkakus are on the edge of the continental shelf of China and there are reports of significant deposits of hydrocarbons there. However, both Japan and Taiwan lay claim to the same area. UNCLOS III in terms of EEZs therefore gave China a sense of the importance of local maritime resources and their security that may not have been that prominent in earlier Chinese strategic circles. However, those odd bedfellows of "influence and security" began to stir the imagination of China's leadership in ways that had not necessarily been previously considered throughout Chinese history. The leadership perceived the need to establish China as a major regional sea power and to deter competition from India and Japan as well as from the US and the USSR.

The first Chief of the PLA Navy was Admiral Xiao Jingguang who advocated a "light type navy capable of coastal defence", essentially to support continentalist army manoeuvre operations. Although he did try to convince Mao of the necessity to have a blue water capability it found little favour. It was his successor Admiral Liu Huaqing who had been educated in Russia and deeply influenced by Gorshkov who had set about changing the Soviet Navy from coastal defence into a real deep ocean and blue-water capability. Admiral Liu commended all his officers to very carefully read Gorshkov's book, "Seapower of the State".

Admiral Liu introduced the idea of a "green water" zone. That is, the littoral between the brown water of the coast and the deep blue sea beyond the island chain off the coast of China. His slogan was "*Jijide jinhai fangyu zhanlie*" which roughly translated means active green water defence. This is quite different from the idea of the light type navy of Admiral Xiao. In China's case the area stems from the Chinese waters adjacent to Vladivostok in the north to the Straits of Malacca in the south and from the island chain stretching from the Ryukyu Islands and Japan in the north, through Taiwan and the

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<sup>17</sup> Tai Ming Cheung, "Growth of Chinese Naval Power, Priorities, Goals, Missions and Regional Implications", in Pacific Strategic Papers, Institute of Southeast Asian Studies, Singapore, 1990.

Philippines. These distances are in some cases more than 1000 nautical miles from the Chinese mainland. Admiral Liu's ideas represented a quantum leap forward in China's maritime thinking and strategy. During the 1990's the PLAN invested considerable resources in overseas bases, navigational facilities including hydrography, oceanography, meteorology, magnetic field intensity and nautical charts. China now lays claim to a coastline of 18,000 kilometres and a vast expanse of ocean spanning some 3.6 million square kilometres. There are, as we know, a number of problems to be resolved in the South China Sea with other countries including, Brunei, Philippines, Malaysia, Indonesia and Vietnam. Other factors integrated into China's maritime strategy include the exploitation of the mineral wealth of the sea off the Chinese continental shelf – it is now a major preoccupation of the Chinese leadership. Geologists report huge hydrocarbon deposits - they represent some 40% of China's gross potential yield. Some studies conducted by the PLAN Naval Staff look towards using the sea as a method of generating tidal electric power and this must be factored into matters of oceans governance and effect on neighbours as well. The PLAN has also assumed responsibility for deterring any local crises in the coastal regions where much of China's new industrial base is located. One must also include, in a maritime strategic context, the security of China's foreign trade - there are some 3700 ships on the Chinese register totalling over 22 million tonnes much of which transits the South China Sea. The volume of goods has approached some 500 million tonnes per annum. SLOC protection has therefore become a major pre-occupation for the PLAN. There is also the protection of China's burgeoning fishing fleet. China intends to achieve the catch level of South Korea and Taiwan in the near future.<sup>18</sup>

What is important to appreciate is that the PLA Navy has reached the second stage of its development envisioned by Admiral Liu Haoqing - it is now capable of controlling the "green sea". China has many other problems to solve of a maritime nature - nonetheless there is sufficient evidence to suggest that the Chinese leadership, after a somewhat languid start, is beginning to appreciate the benefits of a maritime orientation to grand strategy. In this respect it colours questions of boundary delimitation off the whole of the Chinese coast.

A recent paper by Peter Kien-Hong Yu discusses the matter of the Chinese U shaped line in the South China Sea and some considerations that ought to be factored into understanding the positions of both China and Taiwan.<sup>19</sup> This is the traditional southern Chinese maritime boundary. However, its traditional or historical significance is one issue but whether or not it actually fits with UNCLOS III and the claims of the four or five regional coastal states is another. These two dynamics form the basis of the ongoing tussles. Nonetheless the Chinese Government signed on 4 November 2002 after what has been a protracted series of negotiations over many years with ASEAN and in several different forums, a multi-lateral agreement or declaration on conduct in the South China

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<sup>18</sup> You Ji, The Evolution of China's Maritime Combat Doctrines and Models: 1949-2001, Working paper No 22, Institute of Defence and Strategic Studies, Singapore, May 2002.

<sup>19</sup> Kien-Hong Yu, Peter, Contemporary Southeast Asia, "The Chinese (Broken) U-Shaped Line in the South China Sea: Points, Lines and Zones", Volume 25, No3., December 2003.

Sea.<sup>20</sup> Unfortunately disputes between some of the ASEAN claimants also complicate the picture. This document is but a first step in providing a base for further negotiation and compromise between ASEAN and China. Should we look at this as some commentators suggest as a watered down agreement without substance or is it another of a long series of agreements between China and the states of Southeast Asia?<sup>21</sup> Lessons from history provide a degree of comfort that the agreement is but yet another step in a long lasting “*dance macabre*” where each of the actors understands their own role. Martin Stuart-Fox, writing in a recent issue of Contemporary Southeast Asia contends that,

Though the ASEAN states may prefer to deal with China as a group, it is upon their bilateral relations regimes that they will ultimately have to rely – and these are deeply influenced by history and culture. Southeast Asian leaders are thus likely to give China what they believe the Chinese want – due deference, status as a great power, recognition of China’s interests even while pursuing their own – in return for non-interference in their internal affairs and fair trading relations.<sup>22</sup>

We should not, therefore, view the Declaration on the Conduct of Parties in the South China Sea as a toothless agreement, it is but part of a long unfolding historical process.

Other viewpoints tend to underscore this contention but offer the reality of new institutions in the development of East Asia’s economic performance and the development of a fabric of international cooperation in the region. Such concepts as the clear delineation of property rights and the public provision of information on which business and investment decisions are made are clearly in the interests of all. David Kang writes about Southeast Asian countries “bandwaggoning” on China’s rise rather than “balancing” and feeling threatened.<sup>23</sup> A further feature in the regional security architecture is China’s New Security Concept (NSC). In essence it seeks “to rise above one-sided security and seek common security through mutually beneficial cooperation. It is a concept established on the basis of common interests and is conducive to social progress”.<sup>24</sup> A commentary by Denny Roy provides a measure of comfort that the competing interests will not be resolved by resort to armed conflict. He writes that,

The NSC promotes cooperative security, an expanded understanding of security that includes threats beyond traditional state-vs.-state military conflict, and security cooperation that is aimed at promoting trust among

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<sup>20</sup> Buszynski, Leszek, Contemporary Southeast Asia, “ASEAN, the Declaration on Conduct, and the South China Sea”, Volume 25, No. 3., December 2003.

<sup>21</sup> Emmers, Ralf, Straits Times, 21 November 2002, ‘Keeping Waters Calm in South China Sea’.

<sup>22</sup> Stuart-Fox, Martin, Contemporary Southeast Asia, “ Southeast Asia and Chian: The Role of History and Culture in Shaping Future Relations”, Volume 26 No 1., April 2004, p. 136.

<sup>23</sup> Kang, David, International Relations, “Hierachy, Balancing, and Empirical Puzzles in Asian International Relations”, Volume 28, No 3, Winter 2003/4.

<sup>24</sup> <http://www.chinaembassy.org.au/eng/jmhzt46228.htm> accessed 16 May 2004.

states rather than targeting specific countries considered potential adversaries.

The NSC advocates multilateral dialogue, confidence building measures, arms control and non-proliferation, and expanded economic interaction as policies that will reduce international tensions. It denounces the use or threat of force to settle political disputes and calls on large countries to treat smaller countries with equality and respect”.<sup>25</sup>

The précis of the precepts noted above are very much in line with the concepts of Comprehensive and Cooperative Security advocated by the Council for Security Cooperation in the Asia-Pacific.<sup>26</sup> Although the NSC may reflect China’s growing confidence, Denny Roy suggests that “If the NSC can be considered a harbinger of Chinese intentions, the Chinese seem to believe at present that they will be able to achieve security and prosperity without forcing their will on their neighbours”. In terms of resolving disputes in the South China Sea perhaps there is some cause for optimism. Nonetheless there has to be a drawing of boundaries if for no other reason than to provide for good order at sea and to provide jurisdictional *clarity* and *certainty*. No matter how much China and ASEAN countries may agree to co-operate at various levels of dialogue the absence of specified boundaries reduces the effectiveness of a regime of *international* cooperation. This will impair maritime security, lead to misunderstandings and compromise sustainable use of natural and mineral resources to the detriment of all in the region. It is therefore imperative that the various methods of defining and delimitating these important boundaries are applied so that we all know where they are and thereby avoid a state of ongoing disputation.

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<sup>25</sup> Roy, Denny, China’s Pitch for a Multi-polar World: The New Security Concept, Asia Pacific Centre for Security Studies, Volume 2 – Number 1, May 2003.

<sup>26</sup> CSCAP Memorandum No. 3, The Concepts of Comprehensive Security and Cooperative Security.