

Five ways Australian politicians could do some good on the South China Sea

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Shadow Defence Minister Senator Conroy should be applauded for entering the debate on Australia's South China Sea policy. His instincts that Australia should do more to support a rules-based global order that is coming under stress are correct. In a more multipolar and contested strategic environment, it is important that we seek to strengthen a system where 'right means might' and where norms against the opposite principle, 'might means right', are well established.

It is also apparent that he and his advisers have only started their journey into developing a clear, sound and effective position in what is a very complex area of strategic policy. To assist the Senator on what will be a long and arduous voyage, here are five suggestions.



1. *Don't say we know when we don't*

Firstly, Senator Conroy and his advisers ought to test any automatic assumption that Australia's freedom of navigation operations, such as Operation Gateway, are 'supporting the international system'. Without a recognised international tribunal judging on the various claims in the South China Sea, we don't have absolute certainty on whose positions are valid under international law.

It's likely that the Australian Government's position, that our FONOPS are consistent with international law, is in line with the bulk of international legal opinion. However it remains the case that our position is only our interpretation of the international law – we don't absolutely know that our interpretation is better than the other countries involved, including China. We need to push all claimants towards an independent court of impartial judges to establish with finality the legality of various claims, especially if they can't find any other way to reduce tensions. This is a better way of supporting the international system than unilaterally saying we know which claims can be ignored.

2. *Bone up on the rules*

Second, Senator Conroy should get better acquainted with the international system that he has proposed Australia do more to uphold. Indeed if any Australian leader wants to support a rules-based order in the South China Sea, they should seek to make public comments on the South China Sea in a way that shows they understand and respect these rules. This would include demonstrating awareness that the disputes in the South China Sea are legally multifaceted and involve:

- Disputes about sovereignty over land forms.
- Disagreement about the extent of maritime zones around the land forms.
- Differences of opinion over the rights that apply in the maritime zones.

The right of freedom of navigation can intersect with some or all of these issues. The Chinese Navy protest against the Operation Gateway flight late last year could have been for a wide variety of reasons. Depending on where our RAAF aircraft transited (over the territorial sea of a natural island that China is occupying or within 200 nautical miles of a reclaimed island), the legal implications differ. The fact that we, the Australian

public, don't know where the flight went means we don't know what kind of freedom of navigation right the RAAF plane was asserting, and how close or how far from the mainstream of legal opinion China's objection was. Part of the reason Australia might have been so quiet about recent FONOPS is that, similar to the US, our Government may not have a clear idea about what it's protesting.

To extrapolate this point further, it's important to realise that what the US and China disagree about is a cluster of related issues, not just one issue.

One is sovereignty. Under its nine-dash line concept, China's sovereignty claims in the South China Sea cover both land and maritime zones, are very expansive and are largely divorced from the UNCLOS system of calculating maritime zones from land masses. The US and nearly all countries disagree with this sovereignty claim.

But the US and China also disagree about what rights states have in maritime zones, regardless of sovereignty. For example, the US believes it can collect hydrographic data in China's exclusive economic zones for military purposes without China's agreement. China strenuously disagrees. These two sources of disagreement are often conflated. But if we are going to claim we are supporting the international system, we'd better have a clear idea of what we are protesting and why.

3. Be careful of throwing stones

Third, Senator Conroy should be aware that the 'glass houses' rule, so important in domestic politics, also applies here. China is far from the only country that has sought to bypass the system of international rules to pursue what it perceives as its national interest.

On 22 March 2002, Australia advised the International Court of Justice that it did not accept the Court's jurisdiction on maritime boundary disputes. This removed East Timor's legal capacity to negotiate the maritime boundary between it and Australia, leaving the fledgling nation dependent on bilateral negotiations. While Australia's actions were legal, this action by a large nation towards a small nation on its doorstep was not an ideal precedent, especially for a country that now wishes to assert the importance of the international system in adjudicating disagreements. Of course Australia's spying on East Timor during the subsequent negotiations further harmed our reputation. Australia and all countries will need to think through the ramifications of their own future decisions if the international system is to be strengthened.

4. Consider alternatives to FONOPs

Fourth, Senator Conroy should not restrict his consideration of policy to kinetic or symmetric actions such as FONOPs patrols. As I've written previously, there are many other means by which Australia can make its voice and concerns known. Consistent diplomacy, especially where Australia can bring together like-minded countries, can be just as effective and less risky. We hope Australia's military planners are seeking to minimise the risk of an incident such as the collision between the American EP-3E and Chinese fighter aircraft on 1 April 2001. This will be particularly important in the more contested political climate after the Permanent Court of Arbitration hands down its decision on the Philippines' application this year. As Ernest Bower and Conor Cronin wrote recently, all countries in the region will need to move quickly, carefully and deftly to 'constructively encourage Beijing to recognize and embrace this core tenet of international governance and security'. Hamfisted FONOPs won't necessarily be the best approach.

5. Bring on a Senate inquiry

Fifth, if Labor wants a debate on this matter, and for the entire parliament and Government to get a better understanding of the South China Sea, why not initiate, with the Greens, a Senate inquiry? This would enable expert diplomatic, legal and strategic opinion to be focused on what will be a very important and difficult area for Australian foreign policy in the years ahead. This would certainly be a more productive topic for discussion than the tired old debate over whether Australia should acquire the Joint Strike Fighter.

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