

INDO-PACIFIC STRATEGIC PAPERS

UNCLOS and China's Claim in the South China Sea

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Abstract

This paper discusses China's claim in the South China Sea in the context of the UN Convention on the Law of the Sea (UNCLOS). The paper acknowledges role of UNCLOS in assisting to provide governance arrangements for the maritime domain in certain circumstances, and notes that China intends to work constructively over the coming decade to help refine it.

However, it argues that China's sovereignty in the South China Sea is not a subject that UNCLOS should be adjudicating because China's claim is based on historic rights which are defined under a regime independent of UNCLOS. Moreover, it contends that the continued insistence of some countries in attempting to use UNCLOS to frame the debate about China's claim in the South China Sea is not only incorrect but is increasing the risk of regional instability.

UNCLOS and China's Claim in the South China Sea ¹

Introduction

International law in general, and the UN Convention on the Law of the Sea (UNCLOS) in particular, have been applied over and over again to judge China's claim in the South China Sea.² With UNCLOS being praised as 'a constitution for the Oceans', any claim which China makes that is incompatible with UNCLOS tends to be interpreted by some countries as a violation of international law.³

Indeed, there is a trend in the Western media of portraying the relationship between China and UNCLOS as a war between a 'good' global norm and a 'bad' local belief.⁴ Sometimes, it is even made to sound like a moral war, exemplified by the statement of the US Assistant Secretary of State for East Asian and Pacific Affairs, Daniel Russel, who said in June 2015 that territorial disputes in the South China Sea are 'an issue between China and international law'.⁵

Using UNCLOS to frame the debate about China's claim in the South China Sea is an oversimplified and incorrect approach. The US, the only global superpower, is seemingly determined to challenge China's claim by saying that the US will 'fly, sail, and operate wherever international law allows, as we do all around the world'.⁶ Regional states, as expressed by Singapore's Prime Minister Lee Hsien Loong, worry that 'if the present dynamic continues, it must lead to more tension and bad outcomes'.⁷ So clarifying the relationship between China's claim in the South China Sea and UNCLOS is clearly a matter of considerable significance to regional security.

This paper will argue that the relationship between China's claim in the South China Sea and UNCLOS is not mutually incompatible. It will assert that China's sovereignty in the South China Sea is not a subject that UNCLOS should be adjudicating because China's claim is based on historic rights which are defined under a regime independent of UNCLOS.

The paper will also argue that even if UNCLOS is a good 'global norm' for countries to follow in regard to considering contemporary maritime governance issues, its ratification in 1994 was neither the start of the history of nations claiming sovereignty or exercising jurisdiction in the maritime domain, nor is it the end of that history. UNCLOS is neither a perfect framework, nor is it the only framework to use to understand China's claim. As a signatory, China appreciates the value of UNCLOS and intends to work constructively over the coming decade to help refine it. However, UNCLOS is presently being abused by some countries and used as a political tool to coerce China, which is increasing the chances of regional instability.

China's sovereignty in the South China Sea

China acquired its sovereign rights in the South China Sea based on the state's consistent practice, not from UNCLOS. China's sovereignty in the South China Sea is antecedent to UNCLOS. This paper does not intend to go through the practices of successive Chinese dynasties in relation to the South China Sea but will start only from the early 20th century.

Since the early 1900s, French colonialists in Annam (now part of Vietnam) had been trying to occupy the Xisha Islands and the Nansha Islands. Activities conducted by the French colonialists alarmed the Chinese government, which decided it needed to publish a detailed map of the South China Sea with unified, verified names in Chinese and English for all the 132 relevant islands, isles, reefs and shoals.⁸ The Land and Maritime Map Examination Commission accordingly published *The Map of Chinese Islands in the South China Sea* in April 1935.⁹

In 1945, China won the century-long anti-colonial invasion war. According to the Cairo and Potsdam Declarations of 1943 and 1945 respectively, all the Chinese territory stolen by Japan was to be returned to China. In 1946, the Chinese government dispatched four warships, named *Taiping*, *Yongxing*, *Zhongjian* and *Zhongyeto*, to the islands to recover the lost territories. In 1947, the Ministry of Interior of the

Republic of China published its official map of the region, *Nanhai zhudao weizhitu* (map of locations of South China Sea islands).¹⁰

Since the release of this map, no protests or opposition were lodged by the international community nor were any diplomatic protests made by neighboring Southeast Asian littoral states (at least until the mid-1990s), which Li Jinming contends would signify their tacit recognition.¹¹ One thing that needs to be emphasised is that there was no common concept about maritime boundaries when the Chinese government illustrated its boundary on this official map—the international community had not evolved into the era of managing oceans by general agreement. As to the way the dashed line is delineated, Jinming notes that:

The line basically follows the outermost islets and reefs of the four Chinese island groups in the South China Sea.... Such a method of delineation accords with the international convention of the time. It is a shorthand method of encompassing all the islands and reefs within a boundary line that runs along the outermost islets, so sparing the trouble of enumerating the numerous islets individually by name. In fact, such a practice was in widespread use in the late 19th and early 20th centuries, as seen in the boundary delineation in Alaska between the United States and Czarist Russia in 1867.¹²

Also, under the circumstances at the time, the Chinese government did not think it necessary to clarify the status of 'enclosed waters' within the dashed-line in terms subsequently used by UNCLOS.¹³ Furthermore, it was clearly impossible for the Chinese government to foresee or abide by a law which had not been codified at that time.

China claims sovereignty over the South China Sea Islands (the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands) and the adjacent waters on the basis that China was 'the first country to discover, name, explore and exploit the resources of the South China Sea islands and the first to continuously exercise sovereign powers over them'.¹⁴ This approach of acquiring territory was well recognised at the time and was adopted by many countries. Australia, for example, has declared that its sovereignty claim to the Antarctic is based on 'discovery and effective occupation'.¹⁵

However, like China's claim in the South China Sea, Australia's sovereignty claim also faces challenge from other countries, such as Japan. Even though Australia is reluctant to enforce its anti-whaling law in the Antarctic, given its awareness of its fundamentally weak sovereignty claim over the Antarctic, Australia has not withdrawn its claim.¹⁶ Likewise, just because China's sovereignty claim is being questioned by some, it does not justify others denouncing China's right to its claim.

A state's historic rights and UNCLOS are two independent regimes

How to resolve the controversy between a state's historic right to a certain maritime area and the applicable rule of general international law was one of the crucial issues that concerned the negotiators of UNCLOS. One earlier report, issued by the Secretariat of the International Law Commission in 1962, clearly displayed the relationship between a state's historic rights and UNCLOS.¹⁷ The report noted that:

The concept of historic waters has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea.... A long-standing exercise of sovereignty over an area of the sea could not suddenly be invalidated because it would not be in conformity with the general rules being formulated.... States could not be expected to accept rules which would deprive them of considerable maritime areas over which they had hitherto had sovereignty.¹⁸

As a compromise, the formulation of UNCLOS deliberately avoided the issue of historic rights or historic waters. However, to address the relationship between historic rights and UNCLOS, the preamble of the Convention proclaimed 'the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans'.¹⁹

It is apparent that 'due regard for the sovereignty of all States' is the prerequisite for the application of the Convention to determine maritime rights of the parties to the Convention. On this basis, it can be argued that UNCLOS is not entitled to rule on a matter that would involve negating a state's historic rights. In this

regard, the accusation that China's historic rights claim is illegal is also unjustifiable, with Sourabh Gupta asserting in late 2014 that 'China is no more or no less guilty than all other claimants.'²⁰

UNCLOS is neither the end of history, nor the start of history

Generally speaking, as a legal regime specific to the maritime environment, UNCLOS promotes particular interests and values. As such, it has its promises and limitations.²¹ As to the Convention's provisions on maritime boundary delimitation—which are quite controversial—the Permanent Court of Arbitration noted in 1999 that UNCLOS was 'consciously designed to decide as little as possible'.²² Apparently these rules 'reflected the distinct lack of consensus on this issue when the Convention was being drafted,' which means UNCLOS needs to be amended or developed in this regard.²³ In fact, UNCLOS has been evolving since its inception, and continues to be developed and clarified by a series of judicial and arbitral decisions in boundary disputes between sovereign states.

A particularly noticeable aspect is that even when applying UNCLOS in such disputes, the awards 'were not always entirely consistent with the legal principles that the International Court of Justice enunciated'.²⁴ The deeper motive, as asserted by Robert Volterra, is probably that 'boundary arbitration and delimitation are practical processes designed to provide long-term solutions to disputes between neighbors'.²⁵ It is fair to say that the role of UNCLOS is to provide a common frame of reference for the countries involved in a disagreement or a dispute to develop their arguments but, as articulated by Malcolm Shaw, 'it cannot solve every problem, no matter how dangerous or complex, merely by being there'.²⁶

Besides the contribution of the International Court of Justice to the evolution of UNCLOS, the practice of states in questions of international law constitutes a main factor in the evolutionary process as well.²⁷ China's claim could be called 'historic rights with tempered sovereignty', which is not 'inner waters' in the traditional sense, nor 'non-exclusive rights with full sovereignty'.²⁸ China has been exercising its historic rights, such as fishing, in this semi-enclosed sea for centuries and the freedom of navigation has remained unaffected.

This shows that China is practising its rights on a non-exclusive basis and that 'the nine-dash line as a perimeter of exercise and enforcement of China's sovereign rights and jurisdiction of traditional/historic fishing activities in the South China Sea, is not inconsistent with international law'.²⁹ China's practice is not only consistent with customary international law, it is also a good practice if it is well appreciated. The non-exclusive nature of China's claim in the South China Sea provides equal and indiscriminate chances for the mobility of any commercial shipping while preserving China's historic rights.

Indeed, there is not a single report that can be categorised as China trying to limit the freedom of navigation around its claims in ways that are contrary to accepted international law.³⁰ Given the flaws of UNCLOS, unilaterally pressing China to 'furnish a basis for the alignment of its nine-dashed-line that complies with international law' is not only unfair but also not pragmatic.³¹ If the purpose of codifying general rules is really to enhance peace, it should not dogmatically exclude a state's constructive contribution.

The manipulation of UNCLOS is becoming a destabilising factor

Ultimately, the South China Sea disputes are not legal issues, they are political issues that are part of a power game.³² Jeffrey Bader, the principal adviser to US President Barack Obama on Asia Affairs at the National Security Council from 2009 to 2011, conceded in a May 2015 interview that 'certainly I understand the Chinese concern ... [but] in some respects, this is just a conflict of interest and it's not going to be resolved'.³³ This would suggest that the US has been trying to include China's disputes with its neighbours in the South China Sea as part of its own strategic rivalry.

The US has opposed any claim by China to maritime rights based on the nine-dashed-line on Chinese maps, and to possible historic claims by Vietnam.³⁴ In May 2015, American military officials took a CNN crew on a US Navy reconnaissance flight of the South China Sea and released the footage.³⁵ This was a well-designed action to provoke China and test its willingness to assert its claim in the South China Sea.

Ironically, as a non-member of UNCLOS, and a non-related party to the South China Sea disputes, the US continuously justifies its intercessions into the dispute as a 'protector' of UNCLOS. To show its commitment to freedom of navigation, the US continuously conducts 'operational assertions' in other countries' waters, including Chinese, Malaysian and Vietnamese waters.³⁶ The collision of a US EP-3 reconnaissance plane and a Chinese J-8 fighter jet in April 2001 is a good example of such an intrusion.³⁷ Apparently, the US is not doing risk-reduction; it is carrying out risk-inducing actions.

Encouraged by the US pivot strategy, US allies in the region have started to become more assertive than they were before 2010. The Philippines' 'lawfare', of initiating international arbitration proceedings against China, is an example.³⁸ Even aware that 'some of the questions presented to the Tribunal may not be cognizable', The Philippines still initiated compulsory arbitration proceedings in January 2013 because it 'see[s] no harm in asking for the moon'.³⁹ The calculation behind this is that either China will be forced into an involuntary arbitration or that it will have to face a damaged reputation by refusing to participate. The Philippines could also be taking advantage of America's fear of losing its dominance in the region in order to get the US to back its claims.

Under these circumstances, China has been forced to adjust its South China Sea strategy. Before the US pivot strategy and The Philippines' arbitration case against China, 'the Vietnamese occupied about 25 islands in the South China Sea, the Malaysians about seven, and The Philippines seven or eight. China only occupies seven islands in the Spratly Islands where the latest tensions are developing. So China entered into the game late.

Additionally, the Chinese have not attacked any of these other islands in the South China Sea, even though they claim them. As noted by Matthew Bell, the Chinese are showing restraint, at least, in that respect.⁴⁰ China's construction activities in the South China Sea islands are more like a response to the provocation and pressure from the US and its allies, rather than an active deliberate provocation. One serious analyst and senior strategy practitioner in the US noted that it is the US 'which had upset the status quo'.⁴¹

Conclusion

UNCLOS is a great achievement by the international community regarding how to govern a massive maritime domain in the 20th century. But it is also a law characterised by many ambiguities, different interpretations and reservations. Unfortunately, it has also generated or exacerbated conflict by raising the stakes and failing to resolve a number of key legal issues since it came into effect.⁴² It is also evident that it is not an appropriate regime to resolve intractable territorial disputes. Its credibility and viability are at stake right now because certain countries, like the US and The Philippines, unilaterally interpret and abuse its provisions.⁴³

Since the South China Sea issue is becoming a 'lawfare' issue rather than a legal issue or historic rights issue, abusing UNCLOS as an excuse to carry on provocative and confrontational military actions in the South China Sea is highly likely to cause miscalculation and incidents. How to strike the right balance between the historic rights of nations and general international law—and how to strike a balance between the abiding rule of law and respecting other international governance approaches to building a just, equal and fair world—will be a defining factor in either maintaining or undermining the peace in this region in the years ahead.

Notes

- 1 This is an edited version of a paper, titled 'Not About a "Good" Global Norm Versus a "Bad" Local Belief: UNCLOS and China's claim in the South China Sea', submitted by the author while attending the Defence and Strategic Studies Course at the Centre for Defence and Strategic Studies at the Australian Defence College in 2015.
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- 12 李金明 (Li Jinming), '南海断□□:□生背景及其法律地位' ('Behind the Dotted Line on the Chinese Map of the South China Sea').
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- 40 Bell, 'If China Militarizes the South China Sea, the US "Will Have" to Respond'.
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- 42 Yann-Huei Song and Stein Tonnesson, 'The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the South China Sea', *Ocean Development & International Law*, Vol. 44, 2013, pp. 235-69.



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