Abstract

The interplay of power and law in the South China Sea is not well understood. To analyze the disputes over navigation rights, sovereignty to islands, and delimitation of maritime zones we need to grasp how states define and defend their geopolitical interests as well as the ways in which international law influences their claims and conflict behaviour. This paper starts with the huge difference in interpretations made by geopolitically oriented political scientists and more normatively or legally oriented scholars. Then the paper asks how developments in international law have affected the conflicts in the South China Sea historically. It establishes parallel histories of alternation between periods of conflict and détente and of legal developments, both in customary and treaty-based international law. The main emphasis is on the law of the sea. The paper concludes by establishing causal linkages between the two histories, while seeking to ascertain in what ways the law as such has influenced conflict behaviour. Has it exacerbated disputes by encouraging conflictual claims? Or has it established rules and procedures that help manage or resolve conflicts? The paper is written on the assumption that the answers we give to these questions may influence the way we see the prospects of future peace in the South China Sea.

Introduction

In their seminal work from 1997, *Sharing the Resources of the South China Sea*, Mark J. Valencia, Jon M. Van Dyke and Noel A Ludwig put forward several alternative suggestions for an “ideal maritime regime” in the South China Sea, based on a proper understanding of international law. They expressed the hope that their suggestions would “stimulate constructive discussion on a comprehensive multilateral interim solution” to these “difficult and dangerous

disputes". [1]

All the countries with claims in the central part of the South China Sea have both signed and ratified the United Nations Convention on the Law of the Sea (LOSC), which was ready for signature in December 1982 and entered into force in 1996 when the 60th country ratified it. They have also contributed in various ways to developing customary law through bilateral agreements and third party settlements, and have taken note of how agreements and settlements made elsewhere in the world have established precedents. Taken together, all of this constitutes a substantial legal regime. The 2002 Sino-ASEAN Declaration on the Conduct of Parties in the South China Sea referred more than once to the "universally recognized principles of international law, including the 1982 Convention on the Law of the Sea". [2] The same affirmation has been made in statements from many bilateral meetings.Thus, duringVietnamese Communist Party Secretary General Nguyen Phu Trong's visit to Beijing 11-15 October 2011, the two deputy foreign ministers Ho Xuan Son and Zhang Zhijun signed a six-point agreement, stating that the two countries should solve their maritime disputes "on the basis of legislation and principles enshrined in international law, including the United Nations Convention on the Law of the Sea signed in 1982". Both sides pledged to "fully respect legal principles".

The Sino-Vietnamese 11 October 2011 agreement pointed out three venues for getting on with a long-term bilateral approach to conflict resolution. First the two parties would resolve the issue of the maritime border at the mouth of the Tonkin Gulf as a follow up to the delimitation agreement signed by the two countries in 2000 for the Gulf itself. Second, they would establish cooperation in several "less sensitive" areas. And third, the leaders of the two countries' border negotiation delegations would have regular meetings twice a year to negotiate their bilateral differences, while also consulting third parties. [3] This seems like a realistic and constructive plan for practically oriented negotiations, based on international law. Yet the agreement followed on the heals of some serious incidents between Chinese and Vietnamese vessels in the South China Sea earlier in the year, leading to a series of mutual accusations between the two governments, to angry demonstrations before the Chinese embassy in Hanoi, and to active Vietnamese attempts to internationalise the disputes in the South China Sea by drawing attention from the United States and other external powers. The main incidents happened when Chinese maritime surveillance vessels cut the cables from ships making seismic exploration of the seabed in areas that in any reasonable reading of international law belongs to Vietnam's continental shelf. Vietnam's strong reactions caused consternation in China, where there was much discussion on blogs, and even in official media, about teaching Vietnam another "lesson" - a clear reference to the 1979 invasion. As late as 29 September 2011, the Chinese leaders allowed the weekly journal *Global Times* to publish an op ed calling for China to "strike first" against Vietnam. [4]

When the BBC reported the amicable six-point agreement of 11 October 2011, it commented that these were “fine words” that might be “difficult to put into practice. [5]

Some geopolitically oriented scholars are similarly sceptical as to the possibility of arriving at legally based solutions between countries with strongly conflictual sovereignty claims. Ralph Emmers speaks in his 2010 book *Geopolitics and Maritime Territorial Disputes in East Asia* of a Southeast Asian fear that China may one day use its growing naval power to “resolve the sovereignty question militarily”. Emmers seems himself to consider this as possible. He holds that states involved in maritime disputes have “misused” the Law of the Sea Convention to “extend their sovereign jurisdiction unilaterally” to “guarantee their access to natural resources” and “justify their claims..”.
[6]
It is perhaps a little strange to call this “misuse” since the Convention not only authorizes but even expects coastal states to extend their jurisdiction over resources in the sea and under the seabed to a distance of 200 nautical miles from legitimately drawn coastal baselines. The continental shelf may even extend as far as 350 nautical miles as if the geomorphology of the seabed satisfies certain conditions, to be determined by the United Nations Commission on the Limits of the Continental Shelf (CLCS). For a government to clarify the precise extension of its maritime zone claims is to fulfill an obligation in the eyes of the law, not to misuse it. Still Emmers may have a point. There can be little doubt that the decision at the 3rd United Nations Conference on the Law of the Sea (UNCLOS III) 1973-82 to legitimise such extensive maritime zones contributed to escalating maritime rivalries worldwide. And this was notably the case in a semi- enclosed sea such as the South China Sea, where many states with adjacent or opposite coasts will end up with overlapping claims: China (both the PRC and ROC on Taiwan), Vietnam, the Philippines, Malaysia, Brunei, and Indonesia.

When legitimate zone claims overlap, as they do wherever states have adjacent or opposite coasts, it is necessary to negotiate or seek a third party settlement to determine maritime borders along a median or equidistant line (a median line is not necessarily equidistant from opposite coasts since the length of those coasts is customarily taken into consideration in order to produce an equitable outcome).According to Emmers there is not much help to be got from international law in determining where to draw maritime borders. He refers to the legal scholar Jonathan I. Charney, who in a 1995 article stated that the maritime boundary delimitation prescriptions in the Law of the Sea Convention are “general and indeterminate”. However, the point made by Charney was not that the law of the sea as a whole is general or indeterminate on this point, only the 1982 Convention. The reason why the principles for how to establish the borders in areas where legitimate claims overlap are not described in any detail in the Convention is not just that this was controversial but also that such rules have been established in customary international law through a number of agreements and settlements in various parts of the world. [7] The law of the sea is the combination of treaty based law, such as that codified in the 1982 Law of the Sea Convention, and customary international law as established through multiple agreements and state practice.

Emmers is certainly not alone to think that geopolitics trumps international law to the extent of making the latter inconsequential. It is commonplace to imagine that once the Chinese navy becomes strong enough to keep other navies out of the South China Sea it can take control of the sea and seabad as such and extract resources by force. The assumption is that no one will dare to prevent Chinese fishermen and oil companies from operating in the whole South China Sea if only China is sufficiently strong. Is this a reasonable assumption? If smaller countries feel that their rights are trampled upon, are they then likely to remain passive? Navies can patrol the sea, but they cannot keep it permanently occupied. Fishermen from neighbouring countries are likely to continue to fish even if China forbids it. Oil installations are expensive and may be easily sabotaged. China will lose economically if foreign owned ships begin to avoid the South China Sea and use other sealanes instead. For all of these and several other reasons it is probably not in China's interest to seek a permanent solution through force. It may be symbolically useful for China to have an awe- inspiring navy, but only to the extent that it does not get into battle. To the extent that China wants to institute a fishing regime that is respected by others, and to the extent that China wants to find and exploit oil and gas resources under the seabed, the best way to do so is to negotiate bilateral and multilateral agreements with the other South China Sea states.

Still there are many, both in and outside the Middle Kingdom, who think China just "bides its time". Even former secretary general of ASEAN Rodolfo Severino holds the slightly cynical view that "amidst all the legal arguments and political and diplomatic posturing, the claimants .... are really driven by their strategic interests in it". In order to "justify, in terms of international law ... their interest-driven positions, the claimants invoke their respective interpretations of history and international and national laws", he says. [8] Severino seems to build on a false contradiction between strategic interest and legal argumentation. It may well be in the strategic interest of a powerful state to realize its interests through legal arguments, and also to accept that there are limits to what one may possibly argue. When international law indicates that a certain area is under the sovereignty of somebody else, then it may well be in a given country's strategic interest to recognize this as a fact in order to secure peace and get recognition from others for its own sovereign rights. For purely strategic reasons this may be preferable to imposing a solution by force even in such cases where the concessions made seem huge.

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[1] Mark J. Valencia, Jon M. Van Dyke and Noel A Ludwig (1997) *Sharing the Resources of the South China Sea.* The Hague: Martinus Nijhoff: 222.

[2] Thus the first point read. “The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence and other universally recognised principles of international law which shall serve as the basic norms governing state-to-state relations”. Declaration on the Conduct of the Parties in the South China Sea. Appendix 5 in Zou Keyuan (2009) *China-ASEAN Relations and International Law.* Oxford: Chandos: 241.

[3] “China, Vietnam sign accord on resolving maritime issues”. Xinhua 12 Oct. 2011. http://news.xinhuanet.com/english2010/china/2011-10/12/c_131185606.htm(accessed 24 Oct 2011).

[4] Long Tao (strategic analyst of China Energy Fund Committee), “Time to teach those around the South China Sea a lesson,” *Global Times* 29 Sep 2011: “...Unfortunately, though hammered by China in the 1974 Xisha Island Battle and later the Sino-Vietnamese War in 1979,Vietnam’s insults in the South China Sea remain unpunished today. ... it is probably the right time for us to reason, think ahead and strike first before things gradually run out of hand ... For those who infringe upon our sovereignty to steal the oil, we need to warn them politely, and then take action if they don’t respond. ... out there could just be an ideal place to punish them. Such punishment should be restricted only to the Philippines and Vietnam, who have been acting extremely aggressively these days ...We should make good preparations for a small-scale battle while giving the other side the option of war or peace. ..”. http://www.globaltimes.cn/NEWS/tabid/99/ID/677717/Time-to-teach-those-around-South-China-Sea-a-lesson.aspx(accessed 25 Oct 2011).

[5] Michael Bristow, “China and Vietnam sign deal on South China Sea dispute”. BBC News 12 Oct. 2011. http:// www.bbc.co.uk/news/world-asia-pacific-15273007(accessed 24 Oct 2011).

[6] Ralph Emmers (2010) *Geopolitics and Maritime Territorial Disputes in East Asia.* London: Routledge: 4, 19, 122.

[7] Ralph Emmers (2010) *Geopolitics and Maritime Territorial Disputes in East Asia.* London: Routledge: 50. Charney in fact characterizes the Convention in this way as part of an argument to the effect that the specific principles for drawing median or equidistant lines has been settled in customary international law through precedents established in international agreements and third party settlements rather than through treaty based texts. Jonathan I. Charney (1995) “Central East Asian Maritime Boundaries and the Law of the Sea”.
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89(4): 724-749 (725).

[8] Rodolfo C. Severino (2009) “ASEAN and the South China Sea”. *Security Challenges*, Vol. 6, No. 2 (Winter 2010), pp.37-47.