International Law in the South China Sea: Does it Drive or Help Resolve Conflict?

Stein Tønnesson
Peace Research Institute Oslo (PRIO)
and Department of Peace and Conflict Research, Uppsala University

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

[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.

1982 Convention on the Law of the Sea."[2] The same affirmation has been made in statements from many bilateral meetings. Thus, during Vietnamese 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]

---

[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 teh 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).

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

---

[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." *The American Journal of International Law* 89(4): 724-749 (725).

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.

The interaction between power and law in the South China Sea engages a basic disagreement between normatively and geopolitically oriented political scientists. Geopolitically oriented scientists tend to disregard law as a causal factor. Law in their view is just a language or "smokescreen" used to legitimise actions made on the basis of interest and power. By contrast, liberal and constructivist political scientists join legal scholars in attributing real impact to the lawas such. Rules have binding effects even on the most powerful, say the liberal scholars. Constructivists go even further by pointing out that certain kinds of language or "discourses," such as those developed in the practice of international law may tie up political actors by conforming them to certain thought patterns.

The truth may be somewhere inbetween. There are times when states use raw power to force other states to compliance, and just supplement their coersion with some ad hoc legal arguments or feigned negotiations with the aim to persuade lesser powers to comply. More often, however, the stronger power sees a need to ground its accomplishments not just in power but in agreed principles of international behaviour. This may induce an adversary to accept a durable settlement, gain respect from third parties, and also enhance a government's domestic legitimacy and security. As M. Taylor Fravel has shown, China has on several occasions made substantial concessions in border negotiations in order to gain stability at its borders, and has done this from positions of strength.

---

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

When China has been in a weaker position it has tended to stick to its maximum claims.[9] The widespread assumption that it is easier to obtain a good deal from a weak than from a strong opponent may well be false. Great powers have many problems to tackle and may be willing to yield concessions to resolve one problem so they can concentrate on more important matters. China has many problems that are more important than control of islets, oil and fish in areas claimed by the Philippines, Malaysia and Vietnam. China wants internal stability, continued economic growth, reunification with Taiwan, and an end to what it sees as US encirclement. Moreover, if China is earnest in seeking national energy security it may see it as more important to institute a system of agreed borders than to gain sovereign rights to the oil. This is because the key to getting on with full-scale oil exploration is to establish a clearly system of national jurisdiction. Sovereignty disputes and international tension frighten oil companies and banks away. If China is primarily interested in the oil and gas itself and not the revenue gained from its production, then it can import oil and gas produced on the continental shelf of the Philippines, Brunei, Malaysia and Vietnam. It will have a short way to the Chinese market, and Chinese oil companies will no doubt be invited to take part in their exploitation as soon as the borders have been agreed upon. The only additional benefits China may hope to gain by using force or "biding its time" are the revenue from the production - and perhaps a less tangible kind of national emotional satisfaction from controlling a huge maritime zone.

In order to gauge the relationship between law and force we shall now first look separately at the history of law and international conflict, and then bring the two together.

History of Law

Two different bodies of international law are relevant for the disputes in the South China Sea. One is the part of international law that regulates national sovereignty to land, and the other is the law of the sea. The first concerns title to islands, and to larger disputed territories such as Sabah. An island is defined in the Law of the Sea Convention as "a naturally formed area of land, surrounded by water, which is above water at high tide."[10] The legal principles for how to resolve disputes over ownership to land have developed over several centuries, and the main ways of acquiring a legal title to territory have been discovery or conquest followed by the planting of a flag or another sovereignty marker and a public prescription, and then permanent occupation. A major legal change happened in 1945, when the UN Charter expanded the prohibition established unsuccessfully before World War II against the use of force by one sovereign state against another. Article 2(4) of the UN Charter established: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Although this may be seen as forbidding only the use of force directed at the territorial integrity or political independence of another state, most commentators agree that the article institutes a general prohibition against any use of force, except in self-defence or with an explicit authorization by the UN Security Council based on Chapter VII of the Charter. The prohibition against the use of force is considered to have become a part of customary international law. This means that a territorial acquisition made by force after 1945 shall be considered null and void. Today the main way to demonstrate one's

---

[9] M. Taylor Fravel (2008) *Strong Borders Secure Nation: Cooperation and Conflict in China's Territorial Disputes.* Princeton: Princeton University Press.

[10] Law of the Sea Convention, article 121.1. http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (accessed 30 Oct 2011).

sovereignty to an island is to document a long history of permanent occupation, not to take it by force from someone else.

The law of the sea has undergone dramatic change since World War 2, partly as an effect of changes in customary international law, established through state practice and a number of third party settlement, and partly as a result of the three United Nations Conferences on the Law of the Sea, UNCLOS I in 1958, UNCLOS II in 1960, and the drawn out UNCLOS III from 1973 to 1982. UNCLOS I had been preceded by a substantial work of codification undertaken by the United Nations International Law Commission (ILC) between 1949 and 1956, by which time in a final report submitted to the General Assembly it proposed four different conventions. They were endorsed by the UNCLOS I in 1958: a Convention on the (3 nautical mile) territorial sea and contiguous zone; a convention on the continental shelf; a convention on the High Seas, and a Convention on Fishing and Conservation of Living Resources of the High Seas. UNCLOS II did not produce any direct results, but served to clarify some outstanding issues. While the first two UN Conferences were dominated by the European and North American countries, and put strong emphasis on the freedom of navigation on the "High Seas," UNCLOS III was strongly influenced by a Group of 77 developing countries, which had been established in 1964, and which came to include all the countries around the South China Sea. As a result of intense diplomatic efforts by Indonesia and some other states, UNCLOS III agreed to recognize some countries, notably the Philippines and Indonesia as "archipelagic states," meaning that they could draw straight baselines from the outermost points of one outermost island to another around their whole home archipelago (on certain conditions). The waters inside these baselines were defined as "archipelagic waters" where the state enjoys almost the same degree of sovereignty as states do in their internal waters. The only exception is that an archipelagic state is obliged to keep designated sealanes open for international navigation.

The Law of the Sea Convention that came out of UNCLOS III incorporated the four conventions from 1958, thus maintaining a strong principle of "freedom of navigation" on the high seas, but in addition reconfirmed the right of all coastal states to exert full sovereignty over a 12 nautical mile territorial sea (albeit under the obligation to allow "innocent passage" by foreign ships) and sovereign rights to all the resources in a 200 nautical mile Exclusive Economic Zone (EEZ) and continental shelf. The push for an EEZ as wide as 200 nautical miles did not come primarily from the countries around the South China Sea, but from Latin American and African coastal states whose EEZs would extend 200 nm outwards in the Pacific, Atlantic or Indian Ocean without meeting any rival claim based on opposite coasts. Argentina, Chile, Peru and Ecuador had established 200 nm zones already in the 1945-50 period. The right to establish such extended zone claims also benefitted some developed countries with long coasts facing the ocean or a large sea, like Japan and Norway.

While China had been represented at UNCLOS I and II by the Republic of China (Taiwan), the People's Republic of China took over China's UN membership in time to take over the Chinese seat at UNCLOS III from the beginning. China saw this as an opportunity to demonstrate its role as a developing country in opposition to both of the "hegemonistic powers," the USA and the Soviet Union. China played a significant role in preventing the developed countries from dominating the conference in the same way they had done previously. China supported the emerging movement for a 200 nm EEZ although this was not necessarily in China's own interest since there are so few areas off the Chinese coast where a 200 nm EEZ claim will not overlap with someone else's claim. China was basically satisfied with the LOS Convention, signed it on the first day it was open to signature

on 10 December 1982, and ratified it in 1996. Still China did have its disagreements.[11] One was that it objected to the principle of using an equidistant or median line in establishing the maritime borders between states with adjacent or opposite coasts. Instead it wanted a flexible system that could enhance a negotiated solution based on "equity" or "equitability." If this meant in relation to the length of the coasts or to some other criterion was left in the vague.[12]

There is a clear continuity from China's opposition to the median line principle during UNCLOS III to its present attitude to maritime delimitation in the South China Sea, while customary law has tended to move in direction of even greater emphasis than before on the median line principle. However, the line will not in every case be equidistant from two opposite national baselines since the relative lengths of these coasts may count in the calculation when one of them, such as a coast around a small island, is given only partial effect.

In line with Chiang Kai-shek's government's refusal of a French proposal in January 1947 to submit the Paracels dispute to the International Court of Justice for impartial adjudication, both of the Chinese Republics have resisted any idea of any third party settlement of disputes in the South China Sea. China prefers to rely entirely on negotiations, preferably only bilateral ones. Thus in 2006 China made an official statement saying that it did not accept any of the procedures established in the LOS Convention for third party settlement.

Another Chinese objection to the convention was that coastal states were not given any rigt to demand prior notification from warships passing through the territorial sea. China held that warships would need permission from the sovereign state before passing through.[13] On this point China held a view diametrically opposed to that of both the USA and the USSR. They both insisted on the right of warships to unhindered passage through other countries's territorial sea, and were not willing to institute any system of notification to the host state. Today this remains the principal disagreement between China and the United States concerning how to interprete the law of the sea. China has also more recently expressed its opposition to military exercises and other operations such as intelligence gathering not just in the 12 nm territorial sea but in the whole 200 nm EEZ as well.[14]

Because of legal and political developments before and during the three United Nations Conventions, the conflict in the South China Sea has been transformed from a dispute over sovereignty to islands between China, France/Indochina and Japan/Taiwan to a much broader dispute over fisheries, oil exploration, the delimitation of maritime zones, and the "freedom of navigation" among the People's Republic of China, the Republic of China (Taiwan), Vietnam,

---

[11] The following builds on Jeanette Greenfield (1992) *China's Practice in the Law of the Sea.* Oxford: Clarendon Press.

[12] When China ratified the Convention in 1996, it made an accompanying statement saying, among other: "The People's Republic of China will effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability." http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification (accessed 30 Oct 2011).

[13] The PRC also declared upon its ratification of the convention: "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State." Ibid.

[14] See Peter Dutton, ed. (2010) *Military Activities in the EEZ: A US-China Dialogue on Security and International Law in the Maritime Commons.* Newport, Rhode Island: Naval War College China Maritime Studies Institute, No. 7.

Malaysia, Brunei, the Philippines and - as far as the right to passage and manouvers by warships is concerned: the USA. This development, which has involved a number of incidents and clashes between the naval forces of the surrounding states reflects the offshore expansion of coastal state jurisdiction worldwide, which in turn has been fuelled by three causes: diminishing fish stocks, increasing capacity for offshore exploitation of oil and gas, and the legal principle of 200 nautical mile Exclusive Economic Zones. This has led to conflict both between countries with overlapping claims and between coastal states and naval powers.

From a legal perspective there are three main problems today with regard to the South China Sea, which were both much discussed at UNCLOS III. One is the diverging interpretations of the principle of "freedom of navigation." The other is the boost that was given by UNCLOS III to the importance of small islands/islets/rocks/reefs/shoals/banks when it endorsed the principle of 200 nm EEZs. Once it was clear that very small islets under certain conditions might give ground for the same extensive maritime zone claims as mainland coasts it became all important to possess such islets. Even poor countries thus diverted considerable resources to keeping them permanently occupied. This problem was aggravated by the fact that article 121.3 in the Law of the Sea Convention was left rather vague: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." What does it take to sustain human habitation or economic life of one's own? Shall reefs, shoals or banks that cannot sustain human habitation or an economic life be considered as analogous to "rocks"? Article 121.3 has been much discussed by legal scholars, and this discussion is bound to continue and even heaten up. A tendency in international practice has been to allow very small features to generate extensive zone claims whenever their EEZ does not overlap with anyone else's claim but only consumes a part of the High Seas, but to either ignore or accord a limited partial weight to small features in those cases where their zones overlap with zone claims made from more substantial coasts. Valencia, Van Dyke and Ludwig took the position in 1997 that in the South China Sea the best approach, in terms of international law, logic and practicality would be to "deny extended maritime zones to any of the Spratlys," and suggested as a fallback position that it might be possible to allow the islets to generate a "regional" zone, that would be shared and jointly managed.[15] Such a zone might not, however, include the whole vast area. It would include only the 12 nm territorial waters around the islets themselves (and only those above water at high tide). This would create a patchwork of enclaves, some overlapping with each other.

Underneath all of the above is a third somewhat larger problem of a moral kind, which does not seem to have led to much friction, at least not directly. This is the injustice done by the regime of 200 nm EEZs to geographically disadvantaged nations without any coast (Laos), with just short coasts (Cambodia), or whose coasts face islands under the sovereignty of other states (Turkey versus Greece; China versus Japan). Geographically disadvantaged nations are given certain rights in the LOS Convention, but "inequity" in the wider meaning of the term has not played any significant or explicit role in maritime disputes.

Were it not for the regime of 200 nm EEZs, then the semi-enclosed South China Sea would naturally have lended itself to a regional co-operative regime for the management of fisheries outside of the 12 mn territorial sea and the establishment of a treaty-based joint authority to exploit hydrocarbon and other resources under the seabed. The quest for such cooperation does get some support from article 123 in the LOS Convention, which says:

---

[15] Mark J. Valencia, Jon M. Van Dyke and Noel A Ludwig (1997) *Sharing the Resources of the South China Sea.* The Hague: Martinus Nijhoff: 45.

> "States bordering an enclosed or semi-enclosed sea should cooperate 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: (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article."

What appears to be the biggest of all problems for China's application of the law of the sea, indeed the most serious impediment to a peaceful resolution of the disputes in the South China Sea is that the legal regime developed during UNCLOS III is so difficult to reconcile with a map often used in China to mark its territorial claims in the South China Sea. This map has a peculiar u-shaped line that runs around the whole South China Sea at a rather short distance from the surrounding coasts. The u-shaped line can be found on most maps produced in the Republic of China (Taiwan) and the People's Republic of China since the late 1940s. Sometimes it is called the "nine-dashed" line, sometimes the "nine-dotted" or "stapled" line. A part of the line first appeared on an unofficial Chinese map in 1914, was elaborated and extended southwards by Chinese cartographers during the 1930s-40s, and published officially in an *Atlas of Administrative Areas* by the Republic of China in 1948.[16] This was long before UNCLOS III and at a time when only a few Latin American states were claiming 200 nm economic zones. At that time the line obviously did not mean to indicate any Chinese claim to an exclusive fishery zone or a continental shelf. What it meant was that China claimed all islands within the line, an this claim was made in response to rival French and Japanese claims to the Paracel and Spratly Islands. However, once the possibility emerged of claiming sovereignty not just to islands (and 3 nm territorial waters), but to radically extended maritime zones, the u-shaped line took on a new meaning in popular imagination and seemingly indicated an extravagant Chinese claim to almost the whole of the South China Sea. This is how the u-shaped line is mostly understood today by media and other people with limited legal expertise, both in and outside of China. Most legally trained scholars, and this includes China's own experts, are aware that the u-shaped line can only indicate a claim to the islands within it and the maritime zones these islands might generate.[17] Since this is not, however, understood by the Chinese public and certainly not among Chinese fishermen, oil executives, naval officers or patriotically oriented students at Chinese universities a situation has developed where any equitable legally based agreement between China and the other countries around the South China Sea will look to the Chinese public like a disastrous Chinese retreat. This is a big political and psychological problem for the Chinese leadership. To resolve it will require political skill, will and courage. In order to facilitate the emergence of such will and courage it might be helpful if other countries ceased to consider the u-shaped line as an outrageous claim to "historical waters," and just saw it as one of many indications of the Chinese sovereignty claim to the Spratly islets. Maps can have a great psychological and political impact even when they are of little legal importance. It is therefore high time for everyone to stop publishing maps of maritime zone claims in the South China Sea that include the u-shaped

---

[16] Zou Keyuan (2009) *China-ASEAN Relations and International Law.* Oxford: Chandos: 176-177.

[17] "Though still debated, the majority of the Chinese scholars tnd to recognise that the line is the one that only defines the islands and other territories within the line." Zou Keyuan (2009) *China-ASEAN Relations and International Law.* Oxford: Chandos: 178.

line as a so-called "Chinese claim." The fact of the matter, which should be reflected on the maps used in atlases and media, is that China has long claimed the Spratly islands, but has never clarified its maritime zone claims. As long as this is the case, one can just assume that China will claim a 200 nm EEZ and continental shelf measured from Hainan, the Paracels, its mainland coast and Taiwan, and that it might in addition seek to establish extended maritime zones around some of the Spratlys. The latter is, however, complicated by the fact that these islets are not occupied by the PRC, but by Vietnam, the Philippines, Malaysia and the ROC (Taiwan). The PRC occupies only reefs that do not seem to even qualify as islands.

A significant new legal development took place in May 2009, which made the above problem acute. That month was the deadline for submitting to the United Nations Commission for the Limits of the Continental Shelf (CLCS) the first round of national calculations of how far the continental shelf off their coast extends beyond 200 nautical miles. China did not make any submission. The Philippines submitted a very partial calculation that did not pertain to the South China Sea. Vietnam submitted an individual calculation for the northern part of the South China Sea and a joint calculation with Malaysia for the southern part. This joint calculation, which was sent to the United Nations on 6 May, ignored the Spratly islands. This meant that the two countries had reached the conclusion that those small islets - even the ones occupied by themselves - cannot sustain human habitation or economic life of their own and thus cannot generate any maritime zones beyond 12 nm territorial waters. China protested the following day with a letter to the CLCS and attached for the first time in any official communication with the United Nations a map with the u-shaped line. Thus the u-shaped line was made open to legal scrutiny.[18] Malaysia, Vietnam, Indonesia and Brunei protested against the map, and so did the Philippines. In August 2009, the Philippines also protested against the Malaysian-Vietnamese submission on the basis of its long held claim to Sabah, which was part of the basis for the Malaysian calculation.

In the general consternation caused by the Chinese submission of the map with the u-shaped line, few commentators remarked on the wording of the Chinese protest letter of 7 May 2009. The key sentence was the following: "China has undisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map)."[19] While this may be open to interpretation, and while the vagueness of the sentence was no doubt intended, the only reasonable reading of this text is that China claims all islands inside the u-shaped line and the waters and continental shelf that can be generated by those islands on the basis of the principles laid down in the law of the sea. The extension of China's maritime zone claims in the southern part of the South China Sea thus depends entirely on the capacity of the Spratly islets to generate extended maritime zones. It is not thus surprising that the ASEAN claimants (Vietnam, Malaysia, Brunei and the Philippines) now seem to converge around the view that the Spratly islands do not satisfy the conditions for generating more than 12 nm territorial waters, while China takes the opposite view.

History of Conflict

The main task in this paper is to examine how developments in international law have interacted with conflict behaviour in the South China Sea. This requires a chronology of international conflict to be compared with the chronology of legal developments.

---

[18] See forthcoming article by Erik Franckx.

[19] http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm (accessed 31 Oct 2011).

The modern history of conflict in the South China Sea may be divided into the following periods:

1840-1930: European exploration and domination; limited tension with a weak and divided China.
1930-1941: Rival European, Japanese and Chinese claims. Increasing tension between Japan and France/Britain, with marginalization of a still weak China.
1942-1945: Complete Japanese domination. The US Navy reappears in January 1945, but the South China Sea is of little strategic importance for the final battles of World War II.
1946-1950: The Republic of China begins to use the map with the u-shaped line indicating a claim to all the small islets in the Spratlys, Paracels, and Scarborough Shoal, and establishes a presence in the Paracels and Spratlys. An acute crisis erupts with France when a French warship appears in the Paracels in January 1947. The crisis is resolved with China controlling the Amphitrite Group (Woody Island) while France (later South Vietnam) controls the Crescent Group (Pattle Island). France maintains its pre-WW2 claim to the Spratlys.
1950-1955: Relative calm in the aftermath of the Chinese Civil War. The San Francisco conference 1951 and the peace agreement between the Republic of China and Japan 1952 do not resolve the issue of ownership to the Paracels or Spratlys. Japan gives up its claim, but it is not clear to whom.
1956: A critical year. A Philippines businessman claims a “Freedomland” east of the Spratlys (which clearly is a part of the Spratlys), thus provoking a series of reaffirmed counter-claims from the two Chinas, France, and South Vietnam. Britain cautiously stays out of the competition, in spite of the Shell company’s interest in offshore exploration north of Borneo.
1957-1973: The Vietnam War era. Malaysia (formed 1963 out of territories becoming independent of Great Britain) joins the fray with oil exploration north of Borneo. Oil exploration also begins off South Vietnam, who publishes a map with concession blocs.
1974-75: China, who already occupies the Amphitrite Group, takes the Crescent group in the Paracels by force from South Vietnam. This happens after the US withdrawal from Vietnam, and after South Vietnam has published its oil concession map. The aggression does not, as expected in Beijing, provoke any US intervention, but causes subdued resentment in North Vietnam. South Vietnam reacts by reinforcing its presence in the Spratlys, and transfers its possessions there to North Vietnam in the last phase of the Vietnam War.
1976-86: Relative calm. Occupying powers stay in their positions. Foreign ministries busy themselves with drawing baselines for future maritime zone claims. Some specify their claims in national legislation, and some issue concessions to oil companies. Malaysia publishes a map of its continental shelf including the southern part of the Spratlys.
1987-90: China establishes its military presence first at Fiery Cross Reef in the westernmost part of the Spratlys, and then at some other low-tide elevations and reefs east of this initial position, all close to islets held by Vietnam. A Sino-Vietnamese race for occupation of more reefs ensues. This leads to a battle at Johnson Reef, in which two Vietnamese ships are sunk and more than 60 soldiers are either killed or drown. China maintains the reefs it has occupied and builds constructions on several more, but does not try to forcefully take over any islet occupied by someone else.
1991-94: A multilateral peace agreement ends the war in Cambodia. China and Vietnam reestablish full international relations and reopen their border. China issues a concession for oil exploration in the Vanguard Bank area of the western Spratlys to the small American oil company Crestone. Vietnam protests at a time when it is seeking diplomatic normalization with the United States. The US naval base in Subic Bay of the Philippines is closed down.
1995-98: China establishes a permanent presence on Mischief Reef, near the Philippines, causing regional and international tension at a time when ASEAN is expanding its membership to

include Vietnam, Laos, Myanmar and Cambodia. Vietnam "retaliates" against the Chinese Crestone concession by issuing a concession to Conoco in an overlapping area.

1999-2002: China and Vietnam sign first a land border agreement and then an agreement on their maritime border in the Tonkin Gulf. China overcomes its opposition to multilateral talks with ASEAN and agrees to a Sino-ASEAN Declaration on the Conduct of the Parties in the South China Sea, probably as a means to prevent powers external to the region (the United States, Japan, India) from becoming involved. The Chinese turnaround may have been helped by the 2001 spy plane incident just east of Hainan, which reactivated the Chinese view that military intelligence operations are not included under the freedom of navigation principle either in the sea or the air inside China's EEZ.

2003-2008: Relative calm, but no progress is made in Sino-ASEAN talks aiming to establish a legally binding code-of-conduct in the South China Sea.

2009-2011: A number of incidents lead to renewed tension and to further internationalisation of the South China Sea dispute. These incidents follow from: a) US naval intelligence activities south of Hainan, where China has constructed a submarine base; b) reactions to the joint Malaysian-Vietnamese May 2009 submission to the United Nations Commission on the Limits of the Continental Shelf; c) an apparent Chinese wish expressed to US interlocutors to add the South China Sea (or perhaps just the area south of Hainan) to a list of Chinese "core interests" that the United States must respect; d) a Chinese fishing ban in areas claimed by other states; and e) Chinese interference with seismic exploration undertaken by or on behalf of Vietnam. In the ensuing crisis, the USA modifies its long held hands-off position in relation to the territorial disputes by no longer just insisting on the peaceful resolution of such disputes but now also stating officially that any resolution must be based on the legal principle of delimiting maritime zones on the basis of distance from coasts.

2011- : A kind of legally based "alliance" may now emerge among the ASEAN claimants, the United States and some other external powers (India, Japan), converging around an interpretation of the law of the sea that does not give the Spratly islets a right to extended maritime zones. China faces a difficult choice between a policy of legally based accommodation aiming to maximise China's maritime zones on the basis of international law through protracted bilateral and multilateral negotiations, and a more assertive policy based on threats or the use of force that would most likely lead the rest to "gang up" further against China.

So the main periods of tension in the South China Sea have been:

1937-1939: Japanese assertiveness in the Paracels and Spratlys at the expense of France/Annam
1947: Republic of China and France at the brink of war in the Paracels
1956: New Philippines' assertiveness prompts a series of rival claims: Critical date?
1974: China takes the Crescent Group in the Paracels from South Vietnam by force
1987-1988: Chinese assertiveness in the Spratlys leads to clash with Vietnamese forces
1995-1997: The Mischief Reef crises
2009-2011: Chinese and/or US, Vietnamese and Philippines' assertiveness lead to incidents related to US naval intelligence, naval exercises, Sino-US talks, fishing bans, and exploration for oil and gas.

Now, how does the chronology of tension in the South China Sea relate to the parallel chronology of international legal developments established above? Have legal developments exacerbated the conflicts, or have they provided ways to manage or resolve them?

The Dual Impact of Law

In a South China Sea context, there can be little doubt that the endorsement by UNCLOS III of the 200 nautical mile EEZ principle did drive conflict in several ways: First, by extending the area where coastal states may seek to curtail the movement of foreign military vessels. Second, by making it potentially vitally important for nations to possess small islets - provided that they can be demonstrated to "sustain human habitation or economic life of their own." Third, by creating huge overlaps between the maritime zone claims of countries with opposite coasts.

On the other hand, if we imagine that UNCLOS III had settled for a more narrow continental shelf and economic zone, e.g. 12-50 nautical miles, then this would not necessarily have reduced the long-term conflict potential since the main underlying drivers of the conflict are the quests for oil, gas and fish. The conflict would then have taken a different form since most of the South China Sea would have been beyond the sovereignty of any particular state. Resources would then have been exploited either on a first come first served principle or under the management of a regional or international authority. To set up an equitable regional management and wealth sharing regime would have been a formidable challenge that could also easily have generated conflict.

One pacifying effect of international law stems from the legal prohibition against the use of force by one state against another, except in self-defence or as part of an intervention sanctioned by the United Nations Security Council. This prohibition is a key principle of the UN Charter. The states around the South China Sea are aware that they can strengthen their legal position by occupying previously unoccupied territory, but that the use force will not help establish any legal title. Thus governments have been reticent to invade island features that are already occupied. The only time this has happened in the South China Sea since World War 2 was in 1974 when China took the Crescent Group in the Paracels. China took it from a state that ceased to exist in the following year, and the decision to use force at that juncture was probably meant to force the hand of North Vietnam and preempt it from taking over the South Vietnamese position in the Paracels.[20] It is noteworthy that the Sino-Vietnamese clash in the Spratlys in March 1988 did not result from a direct Chinese attack on Vietnamese occupants, but from a Sino-Vietnamese race for the occupation of a previously unoccupied submerged reef.[21] It would be interesting to know how much weight the legal prohibition against the use of force was given in the calculations made by the governments concerned. Their hesitations before the use of force may also have had other reasons, such as a general wish to avoid damaging relations with neighbouring states, and also awareness of how difficult it is to defend small islands after having seized them. In battles over small islets like the Spratlys, the tactical advantage is wholly on the side of the invader. No state, almost regardless of military strength, can feel secure in occupying such islands in the face of a determined foe. And if a country really dominates the area militarily it will see little strategic need for occupying small reefs and islets. Instead of establishing "sitting ducks" a dominant power will prefer to project power from ships, submarines and airplanes. This is no doubt the main reason why the United Kingdom and later the United States have preferred to leave the Spratlys to others.[22]

---

[20] The most detailed treatment in the literature of the Sino-(South) Vietnamese battle in the Paracels in January 1974 can be found in Lu Ning (1995) *Flashpoint Spratlys!* Singapore: Dolphin Books: 74-86.

[21] Lu Ning (1995) *Flashpoint Spratlys!* Singapore: Dolphin Books: 90-91.

[22] Ref to Modern Asia article.

The law of the sea is not just a "tool" that can be used by governments for any purpose. Although significant parts of it are open to interpretation, such as the difference between a "rock" and "island," there is much in the law of the sea that is *not* open to interpretation:

- It is *not* possible to claim all - or almost all - of a semi-enclosed sea surrounded by several states as one country's "historical waters." The widespread idea that China claims all the waters within the u-shaped line should simply be put aside as false. The ambiguity maintained by China as to the extension of its maritime zone claims must not be seen as an indication that China is making such a preposterous claim. It can be taken for granted that the u-shaped line means only a claim to the islands within it and the maritime zones that can be generated from baselines around those islands.
- Submerged reefs and low tide elevations (such as Macclesfield Bank and Mischief Reef) are not islands in the eyes of the law, but parts of the seabed. Hence they cannot be occupied or claimed, but will be under the jurisdiction of the country whose continental shelf they belong to.
- It is *not* possible to consider either the Paracels or Spratlys as archipelagos and draw archipelagic baselines around them. Only countries defined as archipelagic (Indonesia, the Philippines) are allowed to do this, and they can only apply the archipelagic principle to their home archipelago. No archipelagic state incorporates any part of the Spratlys, and no additional archipelagos may be added. There can be no Kalaya'an or "Freedomland." In a legal sense the Paracels shall not be treated as an "archipelago," but as a number of individual islands.
- The Law of the Sea Convention and the principles developed internationally for delineating EEZs and the limits of the continental shelf do not allow as much interpretation as many would have us believe. What counts is the distance from coasts and the geological condition of the seabed, little else.
- If some of the Spratly islets are given a right to generate extended maritime zones, they will carry much less weight than the opposite coasts of Palawan, north Borneo and Vietnam in deciding where the median lines are drawn.[23] Only in the "doughnut" (the part of the South China Sea that is more than 200 nm from all main coasts) may the Spratly islands be able to generate a substantial EEZ and continental shelf of their own. And the "doughnut" may more or less disappear if claims for an extended continental shelf beyond 200 nm are approved by the UN Commission on the Continental Shelf.

Powerful states may to some extent bend these principles in bilateral negotiations with neighbouring states, but if they seek to grossly violate the rules they will fail to reach any agreement.

---

[23] Jonathan Charney, although he thinks some of the Spratlys may satisfy the conditions for generating extended maritime zones and (by contrast to this author) finds it necessary to resolve the sovereignty issue to the islands before settling the maritime boundaries yet holds that "the greater division of the South China Sea may be largely unaffected by the islands. The driving force will be the mainland coastlines." His basis for saying so is not the wording of the LOSC, but customary international law as established through international practice: "The international maritime boundaries established by agreement and third-party dispute settlements demonstrate that small features distant from the mainland shore usually have a limited impact on the overall maritime delimitation within the 200-nautical-mile EEZ as a result of the application of various techniques for enclaving and discounting these features. Substantial islands far from shore may attract significant zones, but minor features may very well attract little area beyond the territorial sea. Many of the rocks, reefs, islets and islands in the areas discussed above are found in the latter category. Islands near the mainlands, however, can have augmenting effects. In general, the fundamental boundary delimitations for this area, if they are realized, will tend to enclave or ignore most of the islands and approach an equidistant line generated from the most substantial feature." Jonathan I. Charney (1995) "Central East Asian Maritime Boundaries and the Law of the Sea." *The American Journal of International Law* 89(4): 724-749 (741-742).

To the extent that the states around the South China Sea decide to ignore their legal obligations, international law will be inconsequential and fail to fulfill its potential as a conflict resolution mechanism. To the extent that international law is ambiguous and is allowed to raise stakes by awarding small islets the right to generate extended maritime zones, the law in itself may continue to drive conflict. So the impact of the law is dual. It can drive both conflict and peace.

The questions asked at the beginning of this paper cannot thus be given any definitive answer. State behaviour decides. States can disregard the law and make it inconsequential. States may on some accounts bend legal principles in ways that drive conflict. On the other hand, if governments see the enormous value of international law in providing rules and mechanisms for peaceful conflict resolution, and are willing to sacrifice some of their interests, some of their pride in the quest for practical solutions, then international law will fulfill its mission as a powerful driver of peace.