Maintaining Maritime Peace in East Asia: A Legal Perspective

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Abstract

Defined under the 1982 UN Convention on the Law of the Sea as semi-enclosed, East Asian seas are abundant not only in rich marine resources, but also with overlapping claims and maritime disputes, which would trigger and/or escalate tensions and even armed conflict in the relevant maritime areas, thus endangering peace and security which is necessary for economic development and better life for people living around these seas. This article is designed to examine the recent developments in maritime conflict and cooperation in East Asia in a legal perspective and explores the future possible solutions perpetual maritime peace and security.

Keywords

East Asia, law of the sea, LOS Convention, East China Sea, South China Sea

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The East Asian seas, from north to south geographically, include the East Sea/Sea of Japan, the Yellow Sea, the East China Sea and the South China Sea. All these seas carry the same characteristic that defines them as semi-enclosed under the 1982 United Nations Convention on the Law of the Sea (LOS Convention).[1] The bordering countries include Brunei, Cambodia, China, Indonesia, Japan, two Koreas, Malaysia, the Philippines, Russia, Singapore, Thailand and Vietnam. Natural resources are abundant in these seas and serve the peoples living around them.

In order to maintain peaceful uses of these seas, there should be a maritime order which is supported by rules and institutions deriving from international law. The LOS Convention provides that oceans and seas should be used for peaceful purposes, and any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations shall be prohibited (Art. 301). This article is designed to examine how and to what extent international law, particularly international law of the sea, plays a role in promoting and maintaining peace in East Asia seas by looking at several aspects including marine resources management, marine environmental protection, safety of navigation, maritime boundary delimitation and island disputes and their settlement. The assumption is: as long as international law can be dully observed by the States in East Asia, then peace can be maintained and orderly development can be promoted in that region.

The current marine legal order in the world has been largely established by and maintained under the LOS Convention, which is commonly regarded as the constitution of oceans and has incorporated many previously existing conventional and customary rules and norms concerning the oceans. Pursuant to the provisions of the LOS Convention, a coastal State has the right to establish maritime zones under its jurisdiction: internal waters inside the baselines which are used to measure the extent of the territorial sea and other jurisdictional waters, the territorial sea of 12 nautical miles (nm), the exclusive economic zone (EEZ) of 200 nm, and the continental shelf of 200 nm (or up to 350 nm in some cases), outward from the baselines. Within these maritime zones, a coastal State is entitled to enjoy either sovereignty or sovereign rights and to exercise its jurisdiction and enforce its laws and regulations in accordance with international law. All 16

1 According to Article 122 of the LOS Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. 21 ILM (1982) 1261. The Convention was open for signature on 10 December 1982 and came into effect on 16 November 1994. As of March 2014, there were 166 Contracting Parties to it, including one international organization.

East Asian countries except Cambodia and North Korea have acceded to the LOS Convention. In order to implement the LOS Convention, these countries have adopted relevant domestic laws and regulations for the management of its own maritime zones and maritime activities within their jurisdiction (United Nations Office of Legal Affairs, 2011).

The extension of jurisdictional maritime zones of coastal States may cause conflicts and disputes between and among neighboring countries that share the same sea so that bilateral arrangements are needed to facilitate the maintenance of the marine legal order. These arrangements are concerned with various maritime matters such as fisheries management, maritime boundary delimitation, joint development of marine non-living resources, marine environmental protection, and maritime safety. Ironically, some bilateral agreements are a source of disruption when they involve and/or encroach on the rights and interests of a third State. The typical example is the Agreement concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries between Japan and South Korea signed in January 1974 (Park, 2000, pp. 181-198). China made a strong protest by stating that the agreement had violated China's sovereignty and sovereign rights in the East China Sea (Zhao Lihai, 1998, pp. 41-57). In that sense, multilateral arrangements are preferable to bilateral ones when rights and interests of a third party are involved.

Maintaining Maritime Peace through Cooperation

It is noted that maritime cooperation in East Asia is extensive. They are at least reflected in the following areas:

Fishery Management

While there is no regional institution or organization relating to fisheries management in East Asia, there are a number of bilateral fishery agreements. For example, China concluded fishery agreements with Japan (1997), South Korea (2000) and Vietnam (2000) respectively with an aim at sustainable fishery management in the East China Sea, the Yellow Sea and the Gulf of Tonkin (Zou, 2002, pp. 127-148). South Korea and Japan also concluded a new fishery agreement in November 1998 and it entered into force in January 1999 (Kang, 2003, p. 117). All the agreements established joint fisheries zones in the relevant sea areas and fishing in these areas should be conducted in accordance with terms and conditions provided for under these agreements. It is to be noted that all these agreements were concluded after the entry into force of the LOS Convention and based on the rel-

evant provisions of the latter.

On the other hand, it has to be realised that bilateral fishery agreements have limitations; they may affect the interests of a third party. For example, South Korea expressed its dissatisfaction with the Sino-Japanese Fishery Agreement by asking China and Japan to explain how they drew the northern-limit line of their joint fishing area. They should consult South Korea before reaching their agreement (Pak, 1999, pp. 614-615). In addition, since bilateral agreements only regulate bilateral relations, fishing activities of third parties are outside any regulation. This is particularly true when Taiwan is concerned.[2] Finally, many fishery resources in the East China Sea and the Yellow Sea are migratory species so that they belong to the same marine ecosystem. In that sense, the East Asian seas urgently need a regional and multilateral fishery arrangement which can be more effective to conserve and manage the fishery resources therein.

Joint Development

Regarding the management of marine non-living resources, the legal concept of joint development has been applied to East Asian seas. "Joint development" refers to "an agreement between two States to develop so as to share jointly in agreed proportions by inter-State cooperation and national measures the offshore oil and gas in a designated zone of the seabed and subsoil of the continental shelf to which both or either of the participating States are entitled in international law" (British Institute of International and Comparative Law, 1989, p. 45). It contains several characteristics: (a) it is an arrangement between two countries; (b) it concerns an overlapping boundary maritime area; (c) it is a provisional arrangement pending the settlement of the boundary delimitation disputes between the countries concerned; (d) it is designed to jointly develop the mineral resources in the disputed area. In East Asia, joint development agreements include, *inter alia*, the Japan-South Korean joint development arrangement in the East China Sea in the 1970s, the Malaysia-Thailand joint development area in the Gulf of Thailand and the Australian-Indonesia joint development zone for the Timor Gap.

The Japanese-South Korean joint development arrangement was the first as such in East Asia. It was based on several agreements signed between the two countries. The arrangement is significant in state practice since it represents the first application of the idea of joint development of offshore oil where the parties failed to agree on boundary delimitation (Miyoshi, 1999, p. 1). Under the agree-

2 It is noted that in April 2013, Taiwan reached a fishery agreement with Japan, but China was obviously not pleased with this arrangement as, in China's view, Taiwan is part of China and the Taiwanese government is a local authority.

ment, concessionaires who are authorized by the two respective governments have an undivided interest with respect to each of the nine defined sub-zones, and one operator is chosen from among the concessionaires so authorized for a particular sub-zone (Miyoshi, 1999, p. 12). The agreement establishes a Joint Commission as a consultative body to implement the agreement.

What is more significant is the joint arrangement made by three countries—Malaysia, Thailand and Vietnam—in the Gulf of Thailand for their overlapping claimed sea areas, consisting of two separate but associated bilateral agreements either between Malaysia and Thailand or between Malaysia and Vietnam. In 1979, Malaysia and Thailand signed a Memorandum of Understanding (MOU) to establish, on an interim basis of 50 years, a Malaysia-Thailand Joint Authority "for the purpose of the exploration and exploitation of the non-living natural resources of the seabed and subsoil in the overlapping area" (Charney & Alexander, 1993, pp. 1099-1123). More than ten years later, the two countries worked out the Constitution and other matters relating to the establishment of such an authority, which provides details of the operation in the joint zone (Charney & Alexander, 1993, pp. 1099-1123). There are two striking characteristics in this joint development scheme: a powerful joint authority which decides on the plan of operation and the work program, to permit operations and conclude transactions or contracts, to approve and extend the period of exploration and exploitation, to approve the work program and budgets of the contractor, and inspect and audit the operator's books and accounts (Art. 7); and the introduction of a production sharing system which include such terms and conditions as the duration of the contract not exceeding 35 years, the payment of 10% of gross production of petroleum by the contractor to the Joint Authority as royalty, 50% of gross production to be applied by the contractor for the recovery of costs, the remainder of gross production to be profit and divided equally between the Joint Authority and the contractor, all costs of operations to be borne by the contractor, and any dispute arising out of the contract to be referred to arbitration unless settled amicably (Art. 8).

In the same vein, Malaysia and Vietnam also signed an MOU in 1992 for joint development in the Gulf of Thailand. Accordingly Petronas and Petrovietnam are assigned to undertake respectively petroleum exploration and exploitation in the "defined area." The arrangement between the two state-owned oil companies made in August 1993 established an 8-member Coordination Committee to issue policy guidelines for the management of petroleum operations. This is different from the Thai-Malaysia model in which the Joint Authority is appointed directly by the governments. After the conclusion of the commercial arrangement in July 1997, oil has been extracted from the Bunga Kekwa field (Nguyen, 2003, p. 145). Based on the bilateral arrangements, a tripartite mechanism has been gradually

evolving for an overlapping maritime area.

On 11 November 2003, the China National Offshore Oil Corporation (CNOOC) and the Philippine National Oil Company agreed to jointly explore oil and gas in the South China Sea through the signing of a letter of intent between the two sides. A joint committee was set up to help select exploring areas in the South China Sea. They also agreed to establish a program to "review, assess and evaluate relevant geographical, geophysical and other technical data available to determine the oil and gas potential in the area" (Agence France Presse, 13 November 2003). Following this development, the State-owned oil companies of China, the Philippines and Vietnam (CNOOC, PetroVietnam and Philippine National Oil Company) signed an agreement on joint seismic exploration in a designated area (143,000 km^2) of the South China Sea in March 2005 (*LianheZaobao*, 15 March 2005). However, after the first stage of the joint seismic survey, there has been no follow-up activity sponsored by the above three countries. Apparently, this preliminary joint development scheme has encountered a political stalemate resulting from distrust and conflict of maritime interests.

In the East China Sea, China and Japan also discussed the possibility of joint development of petroleum resources in the disputed areas. A consensus agreement was reached in June 2008 regarding joint development in the East China Sea after 11 rounds of negotiation. Accordingly, the agreed consensus includes (a) bilateral cooperation in the East China Sea and turning it into a sea of peace, cooperation and friendship; (b) joint development in the East China Sea and a small patch of joint development zone has been identified; and (c) participation of Japanese legal person in the development of Chunxiao Oil and Gas Field in accordance with Chinese laws (Gao, 2009, pp. 291-303). The conclusion of this agreement is in line with the spirit and provisions of the LOS Convention which encourages States concerned to work out provisional arrangements including joint development agreement pending the settlement of their maritime boundary disputes. However, the designated maritime zone for joint development is just a small patch and China is currently reluctant to go further with the implementation of this consensus agreement.

In fact, joint development is an actual implementation of the LOS Convention as it contains provisions stipulating that pending agreement reached between them on the delimitation of the EEZ and continental shelf, the states concerned, in a spirit of understanding and cooperation, are required to "make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement" (Art. 74 and Art. 83 of the LOS Convention). But in practice, it is not easy to implement these provisions in East Asian seas due to various factors.

Marine Environmental Protection

Regional cooperation and institutions for marine environmental protection is not new in State practice. Under the sponsorship of the United Nations Environmental Program (UNEP), several regional arrangements have been made for different sea areas throughout the world. They are the Wider Caribbean Region, the Southeast Pacific Region, the Mediterranean Region, the West and Central African Region, the Red Sea and Gulf of Aden Region, the Kuwait Action Plan Region, the Eastern African Region, the South Asian Seas Region, the South Pacific Region, and the Black Sea Region (Birnie & Boyle, 1992, pp. 260-263). All these arrangements bear some common characteristics: they were sponsored by UNEP; they have an action plan as well as a treaty. In 1989, the UNEP Governing Council designated the Northwest Pacific (NOWPAP) as a new area where a regional action plan and later a regional sea treaty should be developed. The geographical coverage includes the marine environment and coastal zones of China, North and South Koreas, Japan and Russia. Interested countries around the Northwest Pacific sent their representatives to attend the initial contact meeting held in Nairobi shortly thereafter (Kim et al., 1993, p. 204). The subsequent developments showed that the establishment of a regional program in East Asia was not as easy as in other regions. The main culprit may be the abnormal political relations among the coastal States in the East Asian region (Paik, 1995, p. 7). The tension in the Korean Peninsula and the Taiwan issue are all obstacles against smooth regional co-operation for the marine environmental protection. For example, when the first meeting of National Focal Points and experts convened in Vladivostok in October 1991, North Korea did not send its representative (Kim et al., 1993, p. 73).

In 1994 the Action Plan was finally adopted and contained five objectives: monitoring and assessment of the environment condition; creation of an efficient and effective information base; integrated coastal area planning; integrated coastal area management; and establishment of collaborative and cooperative framework (NOWPAP, 2005). To implement the Action Plan, a number of projects are designed and carried out in parallel by national institutions with the support from relevant regional and international organizations. For multiple projects, the scattered nature of the various activities, as well as the wide scope of input possible from both within and outside the region, a network of participating institutions coordinated by regional activity centres will be established. Besides, a Regional Coordination Unit (RCU) should be established to ensure the integrated and well-managed execution from within the Region of the projects under the Action Plan. Until such time as an RCU is established and functioning effectively, the member governments designate UNEP as the organization responsible for the coordination of the Implementation of the Action Plan (NOWPAP, 2005).

Following the Action Plan, the Intergovernmental Meeting (IGM) was created which is the high-level governing body of NOWPAP that provides policy guidance and makes decisions. As of 2013, 18 annual IGMs were held. In accordance with the IGM decisions, Regional Activity Centres (RACs) were established between 2000 and 2002. Regional Coordinating Unit (RCU) was also set up in Toyama, Japan and Busan, Korea, in November 2004 (NOWPAP, 2005).

Associated with the NOWPAP is the Coordinating Body on the Seas of East Asia (COBSEA) which was established in 1981 and the participating countries include Australia, Cambodia, China, Indonesia, Malaysia, the Philippines, Singapore, South Korea, Thailand and Vietnam. In 2000, a Regional Programme of Action for the Protection of the Marine Environment of the East Asian Seas from the Effects of Land-based Activities was adopted and the New Strategic Direction for COBSEA (2008-2012) was adopted in 2008 to strengthen member capacity in responding to the growing pressure from the coastal and marine environment (COBSEA, 2005).

The other regional marine environmental program is the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) jointly sponsored by the International Maritime Organization (IMO), the United Nations Development Programme (UNDP), the Global Environmental Facility (GEF) and the World Bank. This regional program, implemented in 1994, has such participating countries as Brunei, Cambodia, China, Indonesia, Japan, Malaysia, North Korea, the Philippines, Singapore, South Korea, Thailand, and Vietnam. Therefore, its geographical coverage is broader than the NOWPAP. Its overall objective is to support the efforts of the participating countries in the prevention and management of marine pollution at both the national and sub-regional levels on a long-term and self-reliant basis (IMO, 1997). In order to institutionalize integrated coastal management (ICM), the Regional Program established two demonstration sites to demonstrate the application of ICM in Xiamen, China and Batangas Bay, the Philippines. Later such sites are set up in Cambodia, Indonesia, Malaysia, North Korea, Thailand and Vietnam. Another kind of Demonstration Sites for subregional sea areas and pollution hot spots were also established in China (Bohai Sea), the Philippines (Manila Bay), Malaysia/Singapore (Malacca Straits), and Thailand (Gulf of Thailand). The program launched the Marine Pollution Monitoring and Information Management Network to help build linkages with participating countries on the status of the marine environment in the East Asian seas. The program has four operating mechanisms: the East Asian Seas (EAS) Congress, the East Asian Seas (EAS) Partnership Council, the PEMSEA Resource Facility, and the Regional Partnership Fund (PEMSEA, 2006). During the 2nd East Asian Seas Congress held in Haikou, China in December 2006, the partners signed the Haikou Partnership

Agreement on the Implementation of Sustainable Development Strategy for the Seas of East Asia (PEMSEA, 2014). Since 2010 PEMSEA has become an international organisation with legal and financial status separate from the UNDP (Dyke & Broder, 2014, p. 22). Since the three regional programmes are independent of one another, it is suggested that an integrated approach with close collaboration among them be taken to strengthen the protection of the marine environment in East Asia.

Maritime Security and Safety of Navigation

In terms of maritime security and safety of navigation, the piracy problem is the most threatening factor in East Asian seas. The term "piracy" is usually referred to a broad range of violent acts at sea. According to the LOS Convention, piracy consists of any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed to: (i) on the high seas or in a place outside the jurisdiction of any State, against another ship or aircraft, or against persons or property on board such ship or aircraft (Art. 101).

However, the LOS Convention definition has limitations. First, it defines "piracy" as only for "private ends" and terrorist acts at sea for political ends are generally excluded. Second, according to the above definition, piracy *juris gentium* presupposes that a criminal act be exercised by passengers or the crew of a ship against another ship or persons or property on its board. The two-vessel requirement is an ingredient of the crime of piracy, unless a criminal act occurs in terra nullius (Ronzitti, 1990, p. 1). Thus "internal seizure" within the ship is hardly regarded as "act of piracy" under the definition of the LOS Convention. Finally, piracy must occur on the high seas and piratical acts within territorial waters are not subject to the above definition.

To remedy these limitations, IMO has attempted to divide acts of piracy into two categories by geographical and legal division of maritime zones: piracy on the high seas is defined as "piracy" under the LOS Convention definition, while acts of piracy in ports or national waters (internal waters and territorial sea) are defined as "armed robbery against ships" (Olsen, 1999, p. 2).

International law has established an obligation for States to cooperate in the suppression of piracy and grants States certain rights to seize pirate ships and criminals. Article 100 of the LOS Convention provides that "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." Article 105 further provides that "on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy

and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith." However, only warships or military aircraft or similar governmentally authorized ships or aircraft have the power to seize a pirate ship or aircraft in the high seas. It should be noted that the above piracy provisions are also applicable to the EEZ though it is within the national jurisdiction.[3]

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) applies to all maritime terrorist acts, whether private or political. The significance lies in that if terrorist acts would not be punished and suppressed under the LOS Convention, they are still under the suppression of the SUA Convention. This means that any maritime terrorist and piratical act cannot escape justice. The other twin instrument is the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the SUA Protocol, 1988), which was adopted at the same time as the SUA Convention and contains similar provisions. It is relevant to the East Asian seas in the context that the seas are rich in oil and gas and the coastal States have already launched exploitation projects either by themselves or jointly with foreign oil companies. It is said that offshore oil and gas installations are potential targets of piracy (Bateman & MacKinnon, 1998, p. 5). In case that any terrorist or piratical attack should be aimed against oil platform(s) or artificial islands located in the East Asian seas, it could be suppressed under this protocol.

Regional cooperation is a necessity to effectively combat piracy in the region. In November 2002, the Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues (the Joint Declaration) was adopted, which initiated full cooperation between ASEAN and China in the field of non-traditional security issues and listed the priority and form of cooperation. The priorities at the current stage of cooperation include "combating trafficking in illegal drugs, people-smuggling including trafficking in women and children, sea piracy, terrorism, arms-smuggling, money-laundering, international economic crime and cyber crime." As to the multilateral and bilateral cooperation, it aims to "(a) strengthen information exchange, (b) strengthen personnel exchange and training and enhance capacity building, (c) strengthen practical cooperation on non-traditional security issues, (d) strengthen joint research on non-traditional security

3 Provisions on the high seas of the LOS Convention are applicable to the EEZ as long as there is no contradiction.

issues, and (e) explore other areas and modalities of cooperation." In addition, the 2002 Declaration on the Conduct of the Parties in the South China Sea also mentions the suppression of piracy and armed robbery at sea.

A most significant development recently is the adoption of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). It was signed by 16 Asian countries including Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand and Vietnam on 11 November 2004. The Agreement came into force on 4 September 2006 when it received 10 ratifications.[4] The Information Sharing Centre (ISC) was officially launched in Singapore in November 2007.

The Agreement obliges Contracting States (a) to prevent and suppress piracy and armed robbery against ships; (b) to arrest pirates or persons who have committed armed robbery against ships; (c) to seize ships or aircraft used for committing piracy or armed robbery against ships; and (d) to rescue victim ships and victims of piracy or armed robbery against ships (Art. 3). The Contracting States pledge to implement the Agreement including preventing and suppressing piracy and armed robbery against ships "to the fullest extent possible" "in accordance with their respective national laws and regulations and subject to their available resources or capabilities" (Art. 2.1).

There are several characteristics regarding the ReCAAP. First, though the original negotiators of the Agreement are 16 Asian States, the accession to the Agreement is not exclusive; any State can join after its entry into force as provided for in the Agreement (Art. 18.5). Second, the ReCAAP is the first specific international treaty concerning the prevention and suppression of piracy. Because of this, it becomes a model of law for other regional legal arrangements. For example, the Djibouti Code of Conduct was signed on 29 January 2009 for the fight against piracy in the Western Indian Ocean and Gulf of Aden (IMO, 2009). Thirdly, the ISC established under the ReCAAP is a governmental international organization, different from other organizations which operate similar functions such as the Piracy Reporting Centre (situated in Kuala Lumpur) of the International Maritime Bureau under the International Chamber of Commerce. Finally, it contributes to the legal definition on piracy and armed robbery against ships as it has endorsed the definition provided by the IMO above (Zou, 2009, pp. 323-345).

4 It is to be regretted that two major Straits States Indonesia and Malaysia have not yet ratified the Agreement, though participating in ISC activities as observers.

Maritime Boundary Delimitation

There are a number of bilateral agreements concerning maritime boundary delimitation in East Asia. A significant one is the agreement between China and Vietnam regarding the Gulf of Tonkin. The size of the gulf, as agreed by the two countries, is more than 126,000 square kilometers (Vietnam News Agency, 2004; Ministry of Foreign Affairs of the People's Republic of China, 2004),[5] with abundant marine living and non-living resources. On 25 December 2000, the two sides completed the negotiation process and signed the Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf (the Sino-Vietnamese Boundary Agreement) (Zou, 2005a, pp. 22-24) and the Agreement on Fishery Cooperation in the Beibu Gulf (the Sino-Vietnamese Fishery Agreement) (Zou, 2002, pp. 127-148). Both agreements came into effect from 1 July 2004 after the ratification of the two countries concerned. A new marine legal order based on the LOS Convention has been, therefore, established in the Gulf of Tonkin.

The Sino-Vietnamese Boundary Agreement contains 11 clauses. Article 1 defines the area of the Gulf of Tonkin for the purpose of delimiting the territorial seas, EEZs and continental shelves of the two countries. Article 2 uses 21 geographic points to draw the maritime boundary in the Gulf of Tonkin. In the use of the coordinates, the line connecting Point 1 to Point 9 is the line to divide the territorial seas of the two countries, whereas the line connecting Point 9 to Point 21 is the line to delimit the EEZs and continental shelves of the two countries in the Gulf of Tonkin.

Both China and Vietnam have adopted straight baselines to measure the breadth of their territorial seas and other maritime zones. China publicized part of its straight lines along its mainland coast as well as Hainan Island in 1996 when it ratified the LOS Convention. The straight baselines connected by four geographic coordinates from YinggeZui (Oanh Ca in Vietnamese) to Junbi Jiao along the coast of Hainan Island facing the Gulf have probably affected the delimitation in the Gulf between the two countries. It is recalled that China deliberately left the baselines for the Gulf of Tonkin undefined because of the maritime delimitation with Vietnam. However, part of its baselines along Hainan Island still produce some impact on the delimitation since this sector of the baselines is within the area of the Gulf of Tonkin as defined by the Sino-Vietnamese Boundary Agreement.

For Vietnam, it has also adopted straight baselines as proclaimed in its 1982

5 The figure that Vietnam refers to is 126,250 square kilometres while the Chinese figure is 128,000 square kilometres.

Statement on the Territorial Sea Baseline of Vietnam. But on the other hand, as the above Statement provides, the Vietnamese part of the Gulf of Tonkin, as delineated by the 1887 Border Treaty signed between France and China, "constitutes the historic waters and is subject to the juridical regime of internal waters" of Vietnam (United Nations, 1989, p. 384). Under this circumstance, there is no need to use baselines which are applicable to the territorial sea and beyond. However, the Vietnamese historic waters claim was not recognized by China and the Vietnamese agreement to the negotiation on maritime delimitation was in fact an acquiescent abandonment of its former claim.

The Sino-Vietnamese Boundary Agreement has produced the first maritime boundary that China has ever agreed to share with its neighbouring countries. As China still has maritime delimitation problems with eight countries (i.e. Brunei, Indonesia, Japan, Malaysia, North Korea, the Philippines, South Korea, and Vietnam), the success of the delimitation in the Gulf of Tonkin is an invaluable experience to China in its future negotiations with other countries. The practice of using one single maritime boundary line to delimit three different maritime zones (territorial sea, EEZ and continental shelf) indicates that China may follow this practice in future negotiations with other neighbouring countries, bearing in mind that China has used the doctrine of natural prolongation in its claim to the continental shelf in the East China Sea,[6] which would create two different maritime boundary lines in the event that China's claim could be accepted by Japan. For Vietnam, though the Boundary Agreement is the second of the three agreements Vietnam has signed with its neighbouring countries (with Thailand in 1997 and Indonesia 2003), Vietnam has admitted that this agreement is "the first most comprehensive of its kind" (Vietnam News Agency, 2004). Vietnam also concluded a boundary agreement with Indonesia in June 2003 and it was based on the willingness and desire to strengthen and further develop the existing friendly relations between the two countries (Nguyen, 2011, p. 182).

Territorial and Maritime Disputes

Maritime boundary demarcation often becomes an issue which causes tensions between States concerned in East Asia. The recent incident in the Yellow Sea between the North and South Koreas resulted directly from the unclear and contro-

6 The doctrine of natural prolongation is embodied in the LOS Convention which provides that "the continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise" (Art. 76).

versial demarcation of their maritime boundary. In June 1999 and June 2002 respectively, two Koreas had armed skirmishes in the disputed sea areas around the so-called Northern Limit Line (NLL) which was unilaterally drawn by the United Nations Command after the conclusion of the Armistice Agreement concerning the Korea War in 1953, but its validity was rejected by North Korea (Park, p. 108).[7] In response, the North Korean military authorities declared after the 1999 incident (on 2 September 1999) that they had set up a “North Korean Military Demarcation Line in the West Sea (Yellow Sea)” which overlaps with the existing NLL. The different lines existing in the same area definitely have caused and will continue to cause maritime conflicts unless a clear boundary line can be negotiated between the two sides. It is, therefore, not easy to reach agreements on maritime boundary delimitation, though relevant negotiations are now under way, for example, between China and Japan, China and South Korea, and Japan and South Korea.

Recent claims to the extended continental shelves exacerbated further the complicated situation in maritime boundary delimitation in East Asian seas. As we know, some countries such as Japan, Malaysia, Philippines and Vietnam have officially submitted their applications for outer continental shelves to the Commission on the Limits of Continental Shelf (CLCS), while others sent Preliminary Information to the CLCS to reserve their rights of future claims. Following their Preliminary Information, China and South Korea submitted their outer continental shelf claims to the CLCS in the East China Sea in December 2012, which was objected by Japan (United Nations Division for Ocean Affairs and the Law of Sea, 2014). The recent high tension in the South China Sea is actually triggered by such moves of littoral countries.

There are several islands issues/disputes in East Asia, including the Kuril Islands (between Russia and Japan), the Dokdo (between Korea and Japan), the Diaoyu Islands (between China and Japan), and the South China Sea islands (various claimants). The islands in the South China Sea, particularly the Spratlys are claimed by five countries including China (including Taiwan), Brunei, Malaysia, the Philippines and Vietnam. There were two armed skirmishes which happened in the South China Sea in 1973 and 1988 between China and Vietnam over the disputes of the South China Sea islands. The 1995 tension between China and the Philippines over the Mischief Reef also invited a high profile exposure in the mass media. Arrests of fishing boats and fishermen are frequent. The claimed States

7 A Korean scholar (Park, 2000), following the South Korean government position, argues that the NLL has become a bilateral customary law.

blame one another for incursions in the disputed areas.[8] In June 2002, Vietnam lodged a protest against China's live ammunition exercises in the South China Sea, but China dismissed Vietnam's protest and stated that the drill fully complied with international law (*Voice of Vietnam*, 2002; *Xinhua News Agency*, 2002).

Currently, China's U-shaped line in the South China Sea has been challenged by other claimants. This line is the line with nine segments off the Chinese coast on the South China Sea, as displayed in the Chinese map and its official Chinese name is "traditional maritime boundary line." China's claim to the South China Sea is based on the U-shaped line. On 1 December 1947, the Chinese Ministry of Interior renamed the islands in the South China Sea and formally allocated them into the administration of the Chinese Hainan Special Region (Hill et al, 1991, 88). Meanwhile, the same ministry prepared a location map of the islands in the South China Sea, which was then first released for internal use (Li & Li, 2003, p. 290). In February 1948, the Atlas of Administrative Areas of the Republic of China was officially published, in which the above map was included. This is the first official map with the line for the South China Sea. It has two general characteristics: the southernmost end of the line was set at 4° north latitude including James Shoal; and the eleven-segment line was drawn instead of the previous continuous line. According to the then official explanation, the basis for drawing the line was: "[t]he southernmost limit of the South China Sea territory should be at the James Shoal. This limit was followed by our governmental departments, schools and publishers before the anti-Japanese war, and it was also recorded on file in the Ministry of Interior. Accordingly it should remain unchanged" (Han, 1988, pp. 181-184). It should be noted that the map is an official map, different from those previously drawn by individual cartographers. Since then, maps officially published both in mainland China and Taiwan are the same regarding the line since both have succeeded to the official map published in 1948.

As China claims that it "has indispensable 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. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence" (China's Note Verbale, 2011). China further stated that "since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands therefore clearly defined" (China's Note

8 For example, the Philippines expressed its alarm over increasing Vietnamese military and fishing vessel incursions into the waters off the disputed Spratly Islands in the South China Sea and there were 205 Vietnamese vessels in areas claimed by the Philippines in the first 10 months in 2001.

Verbale, 2011). It is indicated that historic aspect is an essential element in China's claim to the South China Sea islands.

On 26 June 1998, China promulgated the Law on the Exclusive Economic Zone and the Continental Shelf and Article 14 of the Law provides that "the provisions of this Law shall not affect the historic rights enjoyed by the People's Republic of China" (Zou, 2005b, pp. 342-345). It is generally agreed that this clause is connected to China's claim to the South China Sea within the U-shaped line. However, instead of using the term "historic waters," China wisely chose a more softened term "historic rights." The provision of the EEZ law on historic rights can be understood in the following three interpretations: (1) it might be interpreted to mean that the sea areas which could not become China's EEZ and/or continental shelf should have the same legal status as EEZ and/or continental shelf; (2) it might be interpreted to mean that the sea areas which embody China's historic rights are beyond the 200 nm limit; and (3) it might be interpreted to mean that the sea areas which embody China's historic rights but within the 200 nm limit can have an alternative management regime different from the EEZ and or continental shelf regime (Zou, 2001, p. 162).

However, China's historic rights claim has been rejected by other claimants. Moreover, in January 2013, the Philippines instituted the LOS Convention Annex VII Arbitration process to challenge China's such claim based on the U-shaped line. The notification sent to the Chinese Ambassador in Manila dated on 22 January 2013 notified China that the Philippines is bringing the dispute in the South China Sea before an arbitral tribunal in accordance with Article 287 and Annex VII of the LOS Convention. The Philippines asks the arbitral tribunal to issue an award that, among other things, "Declares that China's maritime claims in the South China Sea based on its so-called 'nine dash line' are contrary to [United Nations Convention on the Law of the Sea] and invalid" (People's Daily Online, 2013). In February 2013, the Chinese Ambassador in Manila rejected and returned the Note verbale and the attached the Philippines' notification of arbitration and statement of claim. Beijing accused Manila of violating the consensus in the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), because the declaration states that disputes should be solved through friendly talks and negotiations by sovereign states directly concerned. In addition, the Chinese government pointed out that there were factual and legal mistakes and unfounded accusations against China in the Philippines' notification and statement of claim. Despite that China returned its notification of arbitration, the Philippines claims that the arbitral procedure will continue.

China is facing an increasing pressure not only from the Philippines, but also from other members of the international community, which include the United

States and the European Union (EU) and its member states. In January 2013, U.S. Representative Ed Royce, chairman of the House Foreign Affairs Committee, stated in Manila that China should agree to face the Philippines before a U.N. arbitral tribunal to avoid a possible crisis over their long-raging territorial disputes in the South China Sea. This was followed by support from US Secretary of State John Kerry, German Foreign Minister and a group of EU law makers in February 2013. In March 2013, it is included in a report on EU-China relations approved by the European Parliament, stating that it "urgently appeals to all the parties involved to refrain from unilateral political and military actions, to tone down statements and to settle their conflicting territorial claims in the South China Sea by means of international arbitration in accordance with international law, in particular the UN Convention on the Law of the Sea, in order to ensure regional stability" (Song & Zou, 2014, p. 298).

Despite the refusal from China, the President of the International Tribunal for the Law of the Sea (ITLOS) has appointed ITLOS Judge Stanislaw Pawlak as Arbitrator representing China. On 24 April 2013, the ITLOS President appointed the remaining three arbitrators. It is interesting to note that among the five arbitrators, four are Europeans and one long-term European resident (ITLOS, 2013).[9] The arbitration raises two important questions: (1) To what extent this development could help clarify a number of legal issues that are related to the status of U-shaped line and a number of land features located in the South China Sea? (2) Would the existing complicated and complex South China Sea situation become more difficult to tackle between China and the other claimant states?

Maritime Issues

One of the maritime issues which is haunting East Asia is the controversy on whether the conduct of military activities in the EEZ of another country is legitimate. Incidents such as the EP-3 in 2001 and the Impeccable in 2009 between China and the United States drew much attention from the world community. As there is no express provision contained in the LOS Convention, some states may invoke Article 58 (1) of it to justify their military activities in other countries' EEZ. The provision reads: "[i]n the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of

9 Mr. Pinto was later replaced by Mr. Mensah.

submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention." Freedoms in the high seas provided in Article 87 are thus applicable to the EEZ as long as they are not contrary to other provisions of the LOS Convention. According to maritime powers such as the United States, the term freedoms "associated with the operation of ships, aircraft" implies the legality of naval maneuvers in a foreign EEZ (Boczek, 1988, p. 450). However some costal states such as Bangladesh, Brazil, Cape Verde, India, Pakistan, and Uruguay explicitly restrict unapproved military exercises or activities in or over their EEZs conducted by other countries.

In East Asia, countries like China, Malaysia and Vietnam hold the same view and position as above. For Malaysia: "the Malaysian Government also understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State" (United Nation Division for Ocean Affairs the Las of the Sea, 2013). According to a prominent Malaysian scholar, there are at least three reasons to explain Malaysia's position. First, in Malaysia's view, there is no law that prohibits a coastal state jurisdiction over foreign military activities in the EEZ. Moreover, unauthorised foreign military activities can undermine a coastal state's security, particularly if they are non-peaceful in nature. Second, the LOS Convention is a treaty where the provision on foreign military activities in the EEZ is a new and controversial concept, rather than customary international law. Third, the provision on military activities in the EEZ is not consistent with the principle of peaceful uses of the sea. Malaysia views foreign military activities in its EEZ as undermining and threatening its security as well (Hamzah, 2013, pp. 164-165). The regulations above are made under the rationale that military activities are inherently potential threats to peace and good order of the coastal states.

The East-West Center once organized a series of workshops on "military and intelligence gathering activities in the EEZ" after the EP-3 Incident between China and the United States. The first one was held in Bali, Indonesia in June 2002 and the Honolulu Meeting in December 2003 drafted some guidelines for military and intelligence gathering activities in the EEZs. According to the Guidelines, "ships and aircraft of a State undertaking military activities in the EEZ of another State have the obligation to use the ocean for peaceful purposes only, and to refrain from the threat or use of force, or provocative acts, such as stimulating or exciting the defensive systems of the coastal State; collecting information to support the use of force against the coastal State; or establishing a 'sea base' within an-

other State's EEZ without its consent. The user State should have due regard for the rights of others to use the sea including the coastal State and comply with its obligations under international law" (Ocean Policy Research Foundation, 2005). Furthermore, "warships or aircraft of a State intending to carry out a major military exercise in the EEZ of another State should inform the coastal State and others through a timely navigational warning of the time, date and areas involved in the exercise, and if possible, invite observers from the coastal State to witness the exercise" (Ocean Policy Research Foundation, 2005). As for military surveying, the Guidelines provides that "maritime surveillance may be conducted by states for peaceful purposes in areas claimed by other states as EEZ and should not prejudice the jurisdictional rights and responsibilities of the coastal state within its EEZ" (Ocean Policy Research Foundation, 2005). Unfortunately, these constructive guidelines were rejected by the United States despite the involvement of American scholars in the drafting process.

Conclusion

The LOS Convention has established a rule-of-law regime for the oceans. Compliance with international law including the LOS Convention is one of the requirements when States interact and cooperate in international relations. There is a special provision in the LOS Convention requesting contracting States bordering enclosed or semi-enclosed seas to cooperate among themselves, in particular (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 programs of scientific research in the area (Art. 123). The requirement for cooperation is of course not limited only to the above areas and should apply to maritime security as well.

Nevertheless, it is admitted that law, particularly international law, has its limitations. While international law is useful to guide and govern States behaviour and their interactions, it is unable to solve all the problems. Sometimes even worse, new law may create new problems. This is reflected by the inception of the LOS Convention which has caused a number of maritime issues and disputes in East Asia largely due to its permission to coastal States to extend their maritime zones. Furthermore, due to the different interpretations of international law, States may have disputes over which interpretation can stand. The Sino-American dispute regarding military activities in the EEZs is just one of the examples.

It is generally recognized that the effectiveness of international law depends on the good faith of States to implement it as there is no supra-national organ at the global level which can enforce the law implementation. As we recall, the 2005 World Summit called for universal adherence to and implementation of the rule of law at both the national and international levels. Implementation of international law is an indispensable means to realise rule of law at the global level. However, by observing States practices in East Asian seas, we have found some gaps there: (1) inconsistency/non-compliance with existing international law, such as domestic regulations regarding innocent passage for warships made by China, Taiwan and Vietnam; (2) excessive claims such as straight baselines pronounced by quite a number of East Asian countries; (3) lack of confidence in or disregard for the utility of the international judiciary as exemplified by the exclusion declarations made by China and South Korea; and (4) abuse of international law such as claims to islets/reefs by the excuse that they are within the claimed 200 nm EEZ. From these gaps in implementing international law, it is well perceived that there is a long way for East Asian countries to fully realise the importance of international law and the benefit to effectively comply with it.

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