

The South China Sea

Law Trumps Power

ABSTRACT

The article looks at three ways in which international law has affected government behavior in the South China Sea. It has exacerbated disputes. It has probably curtailed the use of force. And it has made it difficult to imagine solutions that violate the law of the sea.

KEYWORDS: South China Sea, China, Southeast Asia, international law, law of the sea, use of force

INTRODUCTION

Fifteen years ago, a seminal work by three Hawaii-based scholars made suggestions for an “ideal maritime regime” in the South China Sea, based on international law.¹ In light of the modest impact of their suggestions, some commentators have despaired of the law, thinking that power politics has taken over.²

By combining an account of legal developments with a chronology of geopolitical events since 1973, this article seeks to establish the impact of international law on conflict behavior. Law has on the one hand created,

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

2. “. . . realpolitik looks set to trump diplomacy and legal regimes . . .,” Ralph Emmers, *Geopolitics and Maritime Territorial Disputes in East Asia* (London: Routledge, 2010), p. 4. Southeast Asians fear that China may “resolve the sovereignty question militarily,” Carlyle Thayer, “Sovereignty Disputes in the South China Sea: Diplomacy, Legal Regimes and Realpolitik,” paper presented at St. Petersburg University, April 6–7, 2011, p. 28.

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exacerbated and accentuated disputes by encouraging overlapping claims and failing to clarify key issues. On the other, it is likely to have constrained countries from resorting to force. More notably, legal thinking has over the last few decades penetrated the thinking and diplomatic practice of the claimant states (China, Philippines, Malaysia, Brunei, Indonesia, and Vietnam)—all of which have signed and ratified the 1982 Convention on the Law of the Sea (UNCLOS)—to such an extent that it is difficult to imagine solutions to their territorial disputes that are not based in international law. This is important, since the law of the sea sets clear limits to what a solution can look like.³

Since 2009, a number of incidents have occurred over fishing and oil exploration, most often pitting China against Vietnam or the Philippines. The United States has engaged itself by warning against the use of force and insisting that solutions to the sovereignty disputes must be based in international law. China has protested against U.S. immersion in regional affairs. The impression has spread that the rivalry for access to living and non-living resources, and for sovereignty over the Spratly and Paracel islets and Scarborough Shoal, forms a part of an emerging geopolitical confrontation between a rising China and a coalition of neighbors assisted by the U.S.A., Japan, and India. China, with its rapidly increasing capabilities, has become more assertive in its approach to its neighbors. Meanwhile, the U.S.A. has been “pivoting” back to Asia. In such a situation, one might assume, international law loses what force it might have had.

This article argues the opposite. The law manifests itself right through the noise of fishing incidents, naval exercises, submarine purchases, diplomatic quarrels, and great power posturing. Law even defines the noise occurring. All the countries with claims in the central part of the South China Sea are legally bound by UNCLOS, which in spite of its flexibility is quite determinate on several important points. Moreover, since the Convention was opened for signature in 1982, customary law has undergone continuous refinement through precedents set by a number of bilateral agreements and third party settlements. Taken together, customary international law, UNCLOS, the

3. See also Song Yann-huei and Stein Tønnesson, “The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the South China Sea,” *Ocean Development and International Law* 44:3 (2013), pp. 235–269.

U.N. Charter, and other treaty law constitute a substantial legal regime, whose impact on government behavior needs to be assessed.

The South China Sea states have repeatedly declared their intention to apply international law. A Declaration on the Conduct of Parties in the South China Sea (DoC), agreed upon by China and all members of the Association of Southeast Asian Nations (ASEAN) in 2002 referred more than once to the “universally recognized principles of international law, including the 1982 Convention on the Law of the Sea.”⁴ Similar affirmations of respect for international law have been made at many bilateral and multilateral meetings. Thus, when Vietnamese Communist Party General Secretary Nguyen Phu Trong visited Beijing in October 2011, a six-point Sino-Vietnamese agreement was signed, stating that the two countries should solve their maritime disputes “on the basis of legislation and principles enshrined in international law.” Both sides pledged to “fully respect legal principles.”⁵ After the 19th foreign ministers’ meeting of the ASEAN Regional Forum in Phnom Penh in July 2012, the Chair (Cambodia) stated: “The Ministers stressed the importance of . . . respect for the universally recognized principles of international law, including the 1982 UNCLOS . . .” Although there had been acute disagreement at the meeting, the participants unanimously called upon all parties to peacefully resolve their disputes “in accordance with the recognized principles of international law, including the 1982 UNCLOS.”⁶ Shortly afterwards, the foreign ministers of ASEAN issued a six-point statement, reaffirming their commitment to “the peaceful resolution of disputes, in accordance with universally recognized principles of international law.”⁷

This, however, is just words. In order to gauge the relationship between law and practice we must examine the history of international law, the legal status of a controversial Chinese map with a U-shaped line and, notably, conflict behavior.

4. Zou Keyuan, *China-ASEAN Relations and International Law* (Oxford: Chandos, 2009), p. 241.

5. “China, Vietnam sign accord on resolving maritime issues.” *Xinhua* (Beijing, China), October 12, 2011.

6. Chairman’s Statement of the 19th ASEAN Regional Forum, Phnom Penh, July 12, 2012, <<http://www.presspool.jp/asean/officialdocuments/459991.html>>, accessed June 27, 2013.

7. Statement of the ASEAN Foreign Ministers, Phnom Penh, July 20, 2012, <http://www.mfaic.gov.kh/mofa/default.aspx?id=3206&utm_source=buffer&utm_medium=social&utm_campaign=buffer>, accessed June 27, 2013.

LEGAL DEVELOPMENTS

When considering the force of law we cannot just look at the law of the sea but must consider other parts of international law as well, both treaty law (such as the UN Charter) and customary law. Although UNCLOS provides an authoritative definition of what constitutes an island, it does not help decide who has sovereignty to it. This is because islands are land, not sea. An island is defined in Article 121.1 as “a naturally formed area of land, surrounded by water, which is above water at high tide.” The principles for how to gain sovereignty to islands have developed over centuries, with the main methods being discovery *or conquest* followed by the erection of a sovereignty marker and/or a public prescription, followed in turn by effective, permanent occupation. The year 1945 brought major change, when the U.N. Charter removed conquest as a legitimate way to gain sovereignty: “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” (Article 2.4). Most legal experts agree that this rule of *jus cogens* institutes a general prohibition against any use of force, except in self-defense or when explicitly authorized by the U.N. Security Council. Hence any territorial conquest made after 1945 is illegal. Today the main way to gain sovereignty over an island is to document a history of continuous, effective occupation.

The law of the sea has developed immensely since 1945, both through state practice and third party settlements, and at three U.N. Conferences: UNCLOS I 1958, UNCLOS II 1960, and UNCLOS III 1973–82. UNCLOS I adopted four conventions: one on the Territorial Sea and Contiguous Zone; one on the Continental Shelf; one on the High Seas; and one on Fishing and Conservation of Living Resources of the High Seas. UNCLOS II failed to agree on anything, but clarified some issues. While UNCLOS I and II were dominated by Western powers, most of whom were keen to protect an uncurtailed freedom of navigation, UNCLOS III came under the influence of a Group of 77 developing countries, including those surrounding the South China Sea. Much as a result of their efforts UNCLOS III did not just incorporate the four 1958 conventions, but also established a territorial sea that can extend up to 12 nautical miles from a coastline, and a regime of *sovereign rights* to all resources in a 200nm Exclusive Economic Zone (EEZ) and continental shelf. The push for an EEZ and continental shelf as wide as

200nm did not come primarily from the South China Sea countries but from Latin American and African states facing the Pacific, Atlantic or Indian Oceans. While they would not be hindered by overlapping rival claims, EEZ claims in semi-enclosed seas, like the South China Sea, were bound to overlap.

While China had been represented at UNCLOS I and II by the Republic of China (R.O.C., Taiwan), the People's Republic of China (P.R.C.) took over China's U.N. seat just before UNCLOS III. China played a prominent role in the Group of 77, demonstrating its status as a developing country in opposition to the "hegemonistic" U.S.A. and U.S.S.R. After the adoption of the Convention, the chairman of the Chinese delegation declared: "The new convention has . . . brought about a change in the situation in which the old law of the sea only served the interests of a few big powers. This is conducive to the fight against maritime hegemonism."⁸ At first, Beijing defended every nation's right to unilaterally define the breadth of its territorial sea, if need be out to 200nm.⁹ When it became clear that this was anathema to the maritime great powers China went along with a compromise solution of instituting a 200nm EEZ, where the state would have just *sovereign rights* to the resources, not *sovereignty*. The establishment of the 200nm EEZ was fully supported by China but was not tailored to suit its own particular needs, since China does not face the ocean but a string of semi-enclosed seas. Yet Beijing was satisfied, signed the Convention on the first day it was open for signature, and ratified it in 1996.

China had some disagreements, however.¹⁰ One concerned the median line: China objected to the principle of using an equidistant or median line in establishing the boundaries between states with adjacent or opposite coasts. Instead it wanted a flexible system allowing for a more general equitability. When China ratified the Convention, it made an accompanying statement saying that it would effect the delimitation of the boundary of the maritime jurisdiction with the states with coasts opposite or adjacent to China "in accordance with the principle of equitability."¹¹ Customary law has since

8. Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford: Clarendon Press, 1992), p. 203.

9. *Ibid.*, pp. 57–64.

10. *Ibid.*, pp. 198–204.

11. U.N., *Oceans & Law of the Sea, Declarations and Statements*, <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification>, accessed July 21, 2012.

moved in the direction of using the median line principle, with an approach whereby one first draws up an equidistant line, and then adjusts, if need be, for equity, based on the length of the coasts and other relevant circumstances. China has continued to emphasize a more general equity/equitability without, however, defining it. On November 19, 2012, after having taken part in the International Court of Justice (ICJ)'s unanimous judgment on the maritime boundary between Nicaragua and Colombia, Chinese judge Xue Hanqin made an independent declaration saying she would have preferred to take equity into account from the beginning instead of first drawing an equidistant line and then adjusting for equity.¹²

Another of China's disagreements, which it shares with several other parties to UNCLOS as well as non-parties such as the U.S.A, concerns third party settlement: China will rely entirely on negotiations, and therefore took exception to the provisions in UNCLOS for international adjudication or arbitration when it ratified the Convention in 1996 and again in 2006, when it officially stated that it did not accept the procedures for obligatory third party settlement. In February 2013, this led China to reject a request from the Philippines to appoint a Chinese representative in an Arbitral Tribunal to clarify the meaning of the Chinese U-shaped line (see below). The Arbitral Tribunal thus had to be established without Chinese participation. When the Tribunal set a December 15, 2014 deadline for China to present its views on the Philippines' request, the Chinese Foreign Ministry instead issued a 93 point "position paper," arguing that the Tribunal had no jurisdiction in the matter.¹³

A third disagreement concerns the freedom of navigation. China wanted UNCLOS III to give coastal states a right to demand prior notification from warships passing through the territorial sea. This was unacceptable for the U.S.A., U.S.S.R., and U.K., which insisted on the right to unhindered "innocent passage." China declared its dissenting view at the end of the conference in 1982, and restated it when ratifying the Convention in 1996.¹⁴ Hence China

12. I.C.J., "Territorial and maritime dispute (Nicaragua v. Colombia)," <<http://www.icj-cij.org/docket/files/124/17172.pdf>>, accessed June 25, 2013.

13. "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines." December 7 (2014), <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>, accessed February 19, 2015.

14. U.N., *Oceans & Law of the Sea*, op. cit.

considers itself free to demand prior notification from warships passing through its territorial sea. Freedom of (military) navigation still remains a bone of contention between China and the U.S.A., although now mainly concerning the EEZ. China refuses to accept military exercises and reconnaissance activities in its EEZ, which the U.S.A. considers “international waters.”¹⁵

During UNCLOS III, the disputes in the South China Sea widened from concerning mainly sovereignty over islands to also including naval freedom, rights to living and non-living resources, and delimitation of maritime zones. Meanwhile the number of claimant states increased. Until 1945 the protagonists had been the R.O.C., France, and Japan (including Taiwan, its colony from 1895–1945). Japan renounced its claims in 1951. A number of new states then emerged that all claimed islands as well as maritime zones: the P.R.C., South and North Vietnam, the Philippines, Malaysia, and Brunei. Indonesia also claimed an EEZ and continental shelf in the southern part of the sea.

Since then a big difficulty has been the importance attributed to the small Spratly and Paracel islets due to the possibility that some of them could generate a 200nm EEZ. This problem is due to the vagueness of UNCLOS Article 121.3: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” In its November 19, 2012 judgment in the *Nicaragua v. Colombia* case, the International Court of Justice expressly considered that Article 121 “forms an indivisible régime, all of which . . . has the status of customary international law.”¹⁶ So far, however, the court has shied away from defining exactly what it means to sustain human habitation or economic life.¹⁷ In their *Sharing the Resources*, Valencia, Van Dyke and Ludwig said the best approach, in terms of international law, logic and practicality would be to “deny extended maritime zones to any of the Spratlys.” They could be given

15. Peter Dutton, ed., *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, 2010), No. 7.

16. I.C.J., “Territorial and maritime dispute (*Nicaragua v. Colombia*),” p. 51, para 139, <<http://www.icj-cij.org/docket/files/124/17164.pdf>>, accessed June 25, 2013. For the court’s failure to interpret article 121.3 in connection with its decision that the Serrana bank should have no effect beyond 12 nautical miles, see paras 180 and 238. With a length of 1000 meters and breadth of 400 meters Serrana has the same size as Itu Aba/Taiping Dao, the largest of the Spratly islands.

17. A concise discussion may be found in Clive R. Symmons, “Maritime zones from islands and rocks,” in S. Jayakumar, Tommy Koh and Robert Beckman, eds, *The South China Sea Disputes and Law of the Sea*. Cheltenham: Edward Elgar (2014), pp. 55–120 (see pp. 98–107).

a regional jointly managed zone, including the 12 nautical mile territorial sea around each high tide elevation and any low tide elevation in their vicinity.¹⁸ By contrast, the late Jonathan Charney held that some of the Spratlys might generate extended maritime zones. He thus found it necessary to resolve the sovereignty issue before settling maritime boundaries. Yet he also confirmed, with reference to customary international law, that “the greater division of the South China Sea may be largely unaffected by the islands. The driving force will be the mainland coastlines.” In general, said Charney, “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.”¹⁹

Since no agreement on maritime delimitation seems likely any time soon there have been many calls for interim joint development or joint management. While this is perhaps not so realistic for hydrocarbons, it is urgent for the conservation of fish stocks. UNCLOS does not, however, include a legal obligation for states bordering a semi-enclosed sea to cooperate. Article 123 says only that they “should” cooperate in the exercise of rights and performance of duties.

For the South China Sea the most controversial legal provisions are the freedom of navigation, regime of islands, the 200nm EEZ and continental shelf, and the possibility to extend a continental shelf beyond 200nms. As regards the former, China is not alone in wanting to prevent military exercises or reconnaissance in its EEZ. India, Thailand and Vietnam have also adopted laws to this effect. However, on the issue of the Spratlys’ capacity to generate extended maritime zones, China and Taiwan now stand alone against the rest. As for the 200nm EEZ, while China does not perhaps regret its support for it at UNCLOS III, it would prefer something different in the South China Sea, either a joint development regime or one where China enjoys “historic rights” beyond 200 nautical miles. As for the extension of the continental shelf beyond 200nm, Malaysia and Vietnam have made submissions to the U.N. Commission on the Limits of the Continental Shelf (CLCS), while the Philippines, Brunei and China have not yet done so.²⁰

18. Valencia, Van Dyke and Ludwig, *Sharing the resources*, p. 45.

19. Jonathan I. Charney, “Central East Asian Maritime Boundaries and the Law of the Sea,” *The American Journal of International Law* 89:4 (1995), pp. 724–49 (741–42).

20. Alex Oude Elferink, “Do the coastal states in the South China Sea have a continental shelf beyond 200 nautical miles?” in S. Jayakumar et al, *op. cit.*, pp. 164–191.

The main factor behind China's excessive expectations, and the main obstacle to defining China's maritime claims in consonance with the law of the sea, is its U-shaped line.

THE MAP

Since the late 1940s most Chinese maps have contained an interrupted line running around the South China Sea at a short but variable distance from the surrounding coasts. This is the U-shaped "nine-dashed" line. It was first published officially in an Atlas of Administrative Areas by the R.O.C. in 1948.²¹ This was at a time when only some Latin American states had claimed a 200 nautical mile territorial sea or fishery zone. The line is thus not likely to have been meant as a maritime zone claim. It meant that China claimed all islands within it.

In the 1960s–70s, when the option to claim extended maritime zones emerged, the U-shaped line took on a new meaning as a claim to a vast "maritime territory." This is how the media generally interpret the line today, both in and outside China, although most legal scholars, including the Chinese, are aware that the line can only indicate a claim to the islands within it and their adjacent waters, i.e., their maritime zones. According to a U.K.-based Chinese legal expert, "the majority of the Chinese scholars tend to recognize that the line is the one that only defines the islands and other territories within the line."²² Some Chinese scholars have looked for ways to meet their compatriots' exaggerated expectations by arguing that China has special "historic rights," not just to fish but also to non-living resources. The historic rights argument is difficult to justify legally.

The only reasonable interpretation is that the line indicates a claim to islands and their maritime zones. Even as such, however, the map does not in itself constitute a valid legal claim. Unilaterally drawn maps that are not annexed to treaties are not given much weight when boundary disputes are decided on the basis of customary international law.²³ The Chinese are aware

21. Zou Keyuan, *China-ASEAN*, pp. 176–77.

22. Ibid., p. 178. For an even clearer statement, see Ye Qiang and Jiang Zong-qiang, "China's "Nine-dash Line" Claim: US Misunderstands." *RSIS Commentary* 011, January 14 (2015), <<http://www.rsis.edu.sg/wp-content/uploads/2015/01/CO15011.pdf>>, accessed February 19, 2015.

23. Eric Franckx and Marc Benatar, "Dots and Lines in the South China Sea: Insights from the Law of Map Evidence," *Asian Journal of International Law* 2 (2012), pp. 89–118 (104, 115). U.S.

that they need better grounds for their sovereignty claim to the Spratlys. Meanwhile, the other claimant states are waiting for China to clarify its 200nm EEZ and continental shelf claim, measured from Hainan Province, the mainland coast, Taiwan (under the “one-China principle”), and from smaller islands deemed capable of generating an EEZ and continental shelf. China may try to use base points in the Paracels but will find it hard to do the same in the Spratlys since all its high tide elevations (islands) are occupied by other countries, except for the Taiwan-occupied Itu Aba/Taiping Dao.²⁴ China might argue that only Itu Aba can generate extended maritime zones. Itu Aba is China’s greatest asset in the Spratly area. Until now, however, China has considered—on dubious legal grounds—the whole of the Paracels and Spratlys (Nansha) to constitute a single (archipelagic) unit.²⁵

In May 2009, the challenge from the U-shaped line became acute as the U.N. deadline approached for coastal states to submit calculations of how far their continental shelf extends beyond 200 nautical miles. China did not make a submission but provided some “preliminary information” and used other countries’ submissions as a pretext for promoting its claims in protest letters. Vietnam submitted one continental shelf calculation for the northern part of the sea and one jointly with Malaysia for the southern part. The joint calculation *ignored* the Spratly islands. This means that the two countries had reached the conclusion that none of the Spratlys—not even those occupied by themselves—should have any effect on the extension of the continental shelf. Vietnam and Malaysia thus joined the Indonesian view that the Spratlys can have no EEZ or continental shelf. China protested to the U.N. the following day and for the first time attached to an official diplomatic communication its map with the U-shaped line. Malaysia, Vietnam, Indonesia and Brunei protested against the protest. So did the Philippines, which had not submitted its own calculation for the South China Sea but had protested against the Malaysian-Vietnamese submission since it included calculations from Sabah, whose inclusion in the Federation of

Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, “China: Maritime Claims in the South China Sea,” *Limits in the Seas* 143, December 5 (2014).

24. While some very small rocks may have been above water at high tide at the reefs where China built controversial artificial islands during 2013–2015, this is no longer possible to ascertain. UNCLOS gives artificial islands a right only to a 500 meter security zone, not to any territorial sea.

25. “Position Paper” *op. cit.*

Malaysia has never been accepted by Manila. These protests will prevent the CLCS from handling or deciding upon the Malaysian and Vietnamese submissions.

In the general consternation caused by China's official use of the U-shaped line, too little attention was paid to the wording of the cover letter: "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)." While the words "adjacent" and "relevant" are not terms used in UNCLOS, the only reasonable interpretation is that China claims all islands inside the U-shaped line and their maritime zones. The extension of China's maritime zone claims thus depends on the capacity of the Spratly islets to generate extended maritime zones. In April 2011, China officially stated that "China's Nansha [Spratly] Islands is [sic.] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."²⁶ This pits China against the consensus reached by the Southeast Asian claimants.

On February 29, 2012, in an attempt to reassure international opinion, a Chinese Ministry of Foreign Affairs (MFA) spokesperson stated: "No country including China has claimed sovereignty over the entire South China Sea."²⁷ This should mean that China does not claim any part of the sea that cannot be part of its 200nm EEZ calculated from the Chinese coast or from islands under Chinese sovereignty. However, it soon became clear that the statement did not represent a concerted Chinese view. In June 2012, in apparent retaliation against a new Vietnamese maritime law, the China National Offshore Oil Company (CNOOC) put out nine blocks for tender in areas that are closer to the Vietnamese coast than to any island claimed by China.²⁸ These blocks are thus clearly on Vietnam's continental shelf. China's December 2014 "Position Paper" also refrained from clarifying the meaning of the U-shaped line.

26. "The Permanent Mission of the PRC to UN Secretary General Ban Ki-Moon CML/8/2011," April 14, 2011.

27. Mark Taylor Fravel, "Clarifying China's Claim," *The Diplomat*, March 5, 2012.

28. China National Offshore Oil Corporation (CNOOC), "Notification of Part of Open Blocks in Waters under Jurisdiction of the People's Republic of China Available for Foreign Cooperation in the Year of 2012," <<http://en.cnooc.com.cn/data/html/news/2012-06-23/english/322127.html>>, accessed July 21, 2012.

THE USE OF FORCE

As a basis for discussing the impact of these legal developments, a history of conflict behavior is needed. Since the 1930s there have been seven crises in the South China Sea, interspersed with periods of *détente*. From the 1840s onward, Europeans charted the South China Sea, establishing the location of islands, reefs and shoals. Britain claimed sovereignty over some of the Spratlys but later let its claim lapse. Under European inspiration, the Vietnamese Nguyen Dynasty claimed sovereignty over the Paracels, and the Chinese Qing Dynasty did the same thing. Thus by the early 1900s there were already conflicting modern claims. Yet there was little conflict until the 1930s. Oil was not yet on people's mind and no one imagined that small islets could generate huge zones. As a U.S. colony, the Philippines showed only scant interest in features such as Scarborough Shoal, outside the parameters defined in the Spanish-American treaty of 1898 for its archipelago.

The relative calm ended with the growing rivalry between Japan and the European powers. Japanese companies took an interest in the Paracels and Spratlys from the 1920s, at a time when China was internally divided. The years 1933–41 marked the first crisis, with intense rivalry in the Paracels and Spratlys. France, Japan, and China all pushed claims by sending expeditions, setting up markers, making official declarations, publishing maps, and exchanging diplomatic notes. The U.K. stood back while letting France serve as a buffer against Japan. Although France and Japan both did their best to provide legal arguments for their claims, the driving force behind the rivalry was the naval contest between Japan and the Western powers.

During 1942–44, the South China Sea was a “Japanese lake.” Naval realpolitik reigned supreme. For some time, there was a dual presence in the Paracels and Spratlys of Taiwanese-Japanese and French-Vietnamese nationals (Indochina remained under French administration until March 9, 1945). The Japanese deployed submarines in the Spratlys and fortified some islands. The Paracels were raided by U.S. aircraft in early 1945, and Itu Aba faced naval bombardment in May.²⁹ In U.S. plans for the invasion of Japanese-held territories, however, the South China Sea islands were mostly ignored. They were of little strategic value.

With its surrender and loss of Taiwan, Japan's role in the South China Sea was over. During 1946–47 there was a second crisis, when Chiang Kai-shek

29. Bill Hayton, *The South China Sea* (New Haven, MA: Yale University Press, 2014).

sent an expedition to the Spratlys and occupied Woody Island in the Paracels.³⁰ France, China's main rival at the time, also sent expeditions. When a French warship landed at Woody Island in January 1947, it found a Chinese garrison there. A standoff ensued, ending when the French withdrew to Pattle Island and established a base there instead. The Paracels were thus divided between the Chinese-held Amphitrite Group and the Franco-Vietnamese Crescent Group. The division lasted for the duration of the Chinese Civil War, the French Indochina War, and most of the Vietnam War. When the P.R.C. was established in 1949 and Chiang Kai-shek fled to Taiwan, the two Chinese governments were too busy fighting each other to waste resources on small islets. The same was the case for France and the French-controlled state of Vietnam, whose overall priority was their struggle with the Viet Minh. The period 1950–54 was therefore a quiet time at sea. Japan formally renounced its claim to the South China Sea islands at the San Francisco Conference in 1951 and in a separate agreement with the R.O.C. the following year, but did not say to whom. In 1950, at the outbreak of the Korean War, the British Commonwealth discussed the Spratlys' strategic importance. Australia argued that communist China must be prevented from taking them. The British Navy, however, found the Spratlys of negligible military value. It understood that what counts is not to hold small islets but to dominate the sea. No base in the Spratlys can be defended against a determined attack. From a purely military viewpoint it does not therefore make sense to waste resources on their occupation, although holding them may present some advantages in peacetime.

The third South China Sea crisis came in 1956, in the interregnum between the two Indochina Wars. The French were thrown out of South Vietnam by the new government of Ngo Dinh Diem. He launched a more activist policy in the South China Sea, partly in response to an initiative from Philippine businessman Thomas Cloma, who claimed to have discovered a number of hitherto unknown islands (which in fact were the Spratlys). Cloma declared a new Kalayaan (Freedomland) covering most of the Spratly area, and got some backing from the Philippine government. This provoked a series of claims and counter-claims from the R.O.C. (which reinforced its position in Itu Aba); the P.R.C. (which in 1955 had established a permanent presence in the Amphitrite group of the Paracels, and now restated its claim to the Spratlys); France (which transferred the Crescent Group in the Paracels to

30. Marwyn Samuels, *Contest for the South China Sea* (New York: Methuen, 1982).

South Vietnam while upholding its own claim to the Spratlys); and South Vietnam (which claimed both the Paracels and the Spratlys). Britain, which still held sovereignty in Sarawak, Brunei, and North Borneo (Sabah), remained passive.

In 1963, Malaysia came into being. Offshore oil was soon produced from north of East Malaysia and Brunei. Test drilling began off the Philippines in 1971 and off South Vietnam in 1973. These events, which converged with the international oil crisis and the opening of UNCLOS III, provoked the fourth crisis, reaching its apex in January 1974, when the P.R.C. used force to evict South Vietnam from the Paracels. This happened after the U.S. withdrawal from Vietnam but before the fall of Saigon and Vietnam's unification. Although the P.R.C. no doubt violated international law, the attack did not provoke much protest internationally and met just subdued resentment in North Vietnam, which depended on Chinese support. Saigon was frustrated and rushed to take possession of more islets in the Spratlys. These outposts were transferred from South to North Vietnam in the final phase of the Vietnam War. The 1973–74 crisis was the first where the old protagonists Japan, France, and the U.K. had left the scene (and the R.O.C. had lost its U.N. membership), while all of today's claimants (except Brunei) had become independent actors.

The post-Mao period 1976–86, marked by the Khmer Rouge genocide and war in Cambodia, was calm at sea. China reinforced its position in the Paracels. Taiwan, Vietnam, and the Philippines held onto their islands in the Spratlys, and Malaysia occupied Swallow Reef in the southernmost Spratlys in connection with its publication of a continental shelf claim. Foreign ministries busied themselves with drawing baselines along their coasts. Some specified their claims in national legislation, and some issued concessions to oil companies.

By 1987 the P.R.C. had provoked the fifth crisis by deciding to move into the Spratlys, first with a scientific expedition, then militarily. Since all islands (high tide elevations) were already occupied (with the possible exception of some very small rocks), China resolved to establish itself on low tide elevations or underwater reefs. The commander of the operation is said to have asked for permission to take the Vietnamese-held Sin Cowe Island, but his request was apparently denied. A Sino-Vietnamese race ensued for occupation of additional reefs. This led to a battle in March 1988 in which more than 60 Vietnamese soldiers lost their lives.

Five states or political entities (counting Taiwan) have kept troops in the Spratly area since 1988, on islets so small and exposed that only the most ardent patriotism or discipline can make young troops sustain the hardship. In 1991, a multilateral peace agreement ended the war in Cambodia. China and Vietnam normalized their relations and reopened their border. China would now use national legislation and oil concessions to promote its claims. In 1992, it adopted a Law on the Territorial Sea and Contiguous Zone and issued a concession for oil exploration in the western Spratlys to the U.S. company Crestone. Vietnam would later retaliate by issuing a concession to the U.S. firm Conoco in an overlapping area. In 1995, the Philippines discovered that China had set up permanent buildings on Mischief Reef just west of Palawan. This led to the sixth crisis, which happened when ASEAN was expanding its membership to include Vietnam, Laos, Myanmar, and Cambodia. ASEAN provided support to the Philippines and Vietnam, and entered into talks with China with the aim of preventing conflict.

The Mischief Reef crisis was followed by the most constructive of all periods in South China Sea diplomacy. China and Vietnam reached agreement on their land border (1999) as well as on their maritime boundary in the Gulf of Tonkin (2000). China and ASEAN agreed in 2002 on the above-mentioned DoC, which included a pledge to refrain from “action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features.” China’s constructive attitude at the time may have been prompted by the tension over Mischief Reef and a perceived need to secure good relations with ASEAN after the Asian financial crisis of 1997–98. The DoC ended the sixth crisis, which had seen a mixture of tension and diplomatic progress.

Over the following six years, when many countries focused on the “war on terror,” nothing much happened with regard to the disputes in the South China Sea. There was no progress in Sino-ASEAN talks aiming to transform the DoC into a legally binding Code of Conduct (CoC). China was eager to jointly develop disputed areas, and agreed in 2004 with the Philippines on a Joint Marine Seismic Undertaking (JMSU), which was joined by Vietnam in March 2005. However, Manila had second thoughts. After a political corruption scandal, the Philippines let the JMSU lapse in 2008.³¹

31. Nguyen Hong Thao and Ramses Amer, “A New Legal Arrangement for the South China Sea?” *Ocean Development & International Law* 40:4 (2009), pp. 333–49 (343). Clive Schofield and Ian Storey, *The South China Sea Dispute: Increasing Stakes and Rising Tensions* (Washington DC: The Jamestown Foundation, 2009), pp. 24, 28.

The seventh crisis began in March 2009 with a naval incident south of Hainan. Chinese ships disrupted the activities of the USNS *Impeccable*, which was undertaking seismic exploration of the seabed to facilitate surveillance of submarines. Next came an exchange of protest letters in May, when Malaysia and Vietnam had made their continental shelf submissions. A new aspect of this seventh crisis was a conflation of local sovereignty disputes with a Sino-U.S. rivalry. In May 2010, as a follow-up to President Barack Obama's visit to China in November 2009, a closed meeting between high-level Chinese and US officials discussed what should constitute each side's "core interests." The Chinese apparently hinted they might include the South China Sea along with Tibet and Taiwan. This is what *The New York Times* wrote afterwards. Beijing denied that any such suggestion had been made, and one of the US officials would confirm the denial.³² Yet the rumor caused a stir. Two months later, Vietnam hosted the ASEAN Regional Forum in Hanoi. U.S. Secretary of State Hillary Clinton seized the chance to insist that the South China Sea disputes must be managed peacefully on the basis of international law, and offered U.S. assistance. While her speech was popular with the Southeast Asian claimants, the Chinese were furious. They wanted no outside interference.

The crisis worsened in 2011, with several incidents over oil exploration. Joint ventures had been formed between PetroVietnam and foreign companies, including the Indian flagship firm Oil and Natural Gas Corporation (ONGC) Videsh, to explore for oil off the coast of Vietnam. China protested but India refused to back down.³³ On two occasions in March–May 2011, Chinese surveillance vessels cut cables from seismic survey ships operating on behalf of Vietnam. This led to an international outcry and street demonstrations before the Chinese Embassy in Hanoi. This stirred up ill-feeling in China, where the weekly *Global Times* suggested to "make good preparations for a small-scale battle while giving the other side the option of war or peace."³⁴

32. Michael D. Swaine, "China's Assertive Behavior Part One: On 'Core Interests'," *China Leadership Monitor* 34 (2011), p. 4. Jeffrey A. Bader, *Obama and China's Rise: An Insider's Account of America's Asia Strategy* (Washington DC: Brookings, 2012), p. 76.

33. Suthirto Patranobis, "'Stay away from South China Sea,'" *Hindustan Times* (New Delhi, India), April 4, 2012.

34. Long Tao, "Time to teach those around the South China Sea a lesson," *Global Times* (Beijing, China), September 29, 2011.

Another side of the crisis was an unprecedented number of international conferences. An “epistemic community” of concerned scholars and government officials was activated, partly on the basis of networks built around annual Managing Potential Conflict workshops organized by Indonesia since 1990. The community shared a concern to see international law being applied, although views differed on how likely it was to happen.

In 2012, the focus briefly shifted from oil to fish. China used its fishing fleet to sustain its claimed historic rights. In April–May there was a standoff at Scarborough Shoal between a group of Chinese fishing vessels, backed up by surveillance ships, and a Philippine naval ship that tried unsuccessfully to evict the fishing vessels. The situation resolved itself when China and the Philippines agreed to issue separate, overlapping fishing bans. In mid-May 2012, China announced a two-and-a-half month fishing ban for the northern half of the South China Sea.³⁵ The Philippines withdrew its naval ship but some Chinese ships remained at Scarborough Shoal, barring the entrance to the lagoon with a cord. Most of the standoff happened inside the lagoon or in the 12 nautical mile territorial sea of five little rocks that stick up above water. The Philippines, P.R.C., and R.O.C. all claim sovereignty to these rocks. The area outside of 12 nautical miles must belong to the Philippines’ EEZ, since none of the rocks can sustain human habitation or economic life of their own.

Manila now did its best to gain U.S. support, arguing that the 1951 mutual defense treaty should cover Scarborough Shoal. After meeting with Philippine colleagues in April 2012, Secretary of State Clinton said:

While we do not take sides on the competing sovereignty claims to land features in the South China Sea, as a Pacific power we have a national interest in freedom of navigation, the maintenance of peace and stability, respect for international law, and the unimpeded, lawful commerce across our sea lanes. The United States supports a collaborative diplomatic process by all those involved for resolving the various disputes that they encounter. We oppose the threat or use of force by any party to advance its claims.”³⁶

35. “Fishing ban starts in South China Sea.” *Xinhua* (Beijing, China), May 16, 2012.

36. U.S. State Department, “Remarks by Secretary of State Hillary Rodham Clinton with Secretary of Defense Leon Panetta, Philippines Foreign Secretary Albert del Rosario, and Philippines Defense Secretary Voltaire Gazmin after their meeting April 30, 2012,” <<http://www.state.gov/secretary/rm/2012/04/188982.htm>>, accessed July 21, 2012.

The Pentagon urged the Philippines to boost its defense capabilities, and Japan agreed to provide it with 10 patrol boats.³⁷

As the Chinese Communist Party's 18th National Congress elected Xi Jinping as its new leader in October 2012, tension seemed to cool off in the South China Sea, while escalating instead in the East China Sea between China and Japan. In May 2014, however, a new intense crisis took place between China and Vietnam when CNOOC deployed an oil rig to an area just south of the Paracels, provoking violent protests in Vietnam. Several ethnic Chinese were killed in riots. It required intense diplomacy between the two communist states to calm the waters.

THE FORCE OF LAW

How has this alternation between tension and relaxation been affected by law? Three patterns may be discerned. The first accentuates disputes, thus increasing tension. The second discourages the use of force. And the third provides practical solutions. These are three essential phases of conflict resolution. The first phase establishes what the conflict is about. The second puts procedures in place so the parties can promote their objectives without resorting to force. Solutions are hammered out in the third phase, sometimes through a treaty or settlement, sometimes incrementally through a number of partial agreements.

The introduction of the 200 nautical mile EEZ principle at UNCLOS III created, exacerbated, and accentuated conflict in all seas enclosed by more than one state. By creating overlaps between the claims of countries with adjacent or opposite coasts, and extending the area where coastal states might curtail the movement of foreign vessels, the Convention created new conflicts. The vagueness of its regime of islands exacerbated existing sovereignty disputes by boosting the importance of small islets. These conflict-enhancing effects could hardly have been avoided. If we imagine that UNCLOS III had settled for a smaller continental shelf and economic zone, e.g. 12–50 nautical miles, then this would not have reduced the potential for conflict if the main underlying driver was the quest for fish, oil, and gas. The conflict would just have taken a different form. If most of the South China Sea had been a free grab for all, it would either have been exploited on a first come first served

37. Kirk Spitzer, "The South China Sea from Bad to Worse," *Time Magazine*, July 15, 2012.

principle or under the management of a regional authority. To set up an equitable regional management and wealth sharing regime would have been difficult. Thus the role played by the law in increasing and accentuating conflicts over rights to resources was a necessary part of a process toward conflict resolution.

The second legal influence was to discourage the use of force. This is mainly in the interest of the weaker powers. Yet powerful states must also abstain from using force if they want a consensual relationship with less powerful neighbors. This can hardly be obtained by force. Here there is a basic difference between land and sea. Land borders have often been established by war, sometimes followed by a dictated treaty. There is no international body of law saying, e.g., that national borders shall be defined by watersheds or rivers. If states seek to define a new land border they may agree to third party arbitration of adjudication, but there is no multilateral treaty defining how to draw land borders. Attempts to change them thus easily lead to war. This could explain why the colonial land borders drawn by Europeans have mostly been upheld and further demarcated in the post-colonial world. Border revision is risky. Today's global state system was established through an interplay of war, negotiations and arbitrary decisions by imperial powers. Sovereignty over islands is gained in the same way but the sea is different. It has its own body of law, which defines boundaries on the basis of distance from land.³⁸ Hence the role of power is limited and there is less risk of war.

The constraining effect of international law on the use of force is grounded in the U.N. Charter's prohibition against aggression, which was agreed upon after World War Two. This means that in the eyes of the law a state cannot establish sovereignty to a territory through conquest. If we look at the history of the South China Sea since 1945, states have been strikingly reticent to invade islands occupied by others (Russia's 2014 annexation of Crimea notwithstanding). France backed out from Woody Island in 1947 after finding a Chinese garrison there. China took the Crescent Group by force in 1974 but from an adversary with a weak and insecure international standing (South Vietnam). China did not take the Vietnamese-held Sin Cowe Island in 1988

38. Lea Brilmayer and Natalie Klein, "Land and Sea: Two Sovereignty Regimes In Search of a Common Denominator," *New York University Journal of International Law and Politics* 33:3 (2001), pp. 703–768, 2001.

but instead established its presence on unoccupied underwater reefs or low tide elevations in the vicinity. The Sino-Vietnamese naval clash in March 1988 did not apparently result from an attack against an already occupied feature, but from a parallel race into an unoccupied reef.³⁹ It is not perhaps likely that China's constraint has been explicitly motivated by the legal prohibition against aggression. Its reticence may instead be due to fear of adverse reactions from the U.S.A. or U.S.S.R., or a Vietnamese counterattack.

It would be interesting to find out exactly what has motivated China's restraint. In 1995, when the Philippines discovered that China had been setting up installations on Mischief Reef, it is noteworthy that China undertook construction work on a submerged reef instead of evicting the Philippines from one of its occupied islands. In the 2012 standoff at Scarborough Shoal, both sides avoided the use of direct force. The Philippines backed out without a fight. While Vietnam and the Philippines have reason to denounce Chinese "assertiveness," there is no denying that China—at least until now—has shown a certain level of restraint. If this is only due to weakness, then China may use force once it feels more confident in its strength. If more general considerations of international legitimacy play a role in Chinese calculations, then law may trump power.

The use of force in maritime disputes may easily be counterproductive if the aim is to win rights to resources. The best way to prevent illegal fishing is for governments to agree on a management regime. A company that places an oil rig in a disputed area may find it difficult to obtain loans and insurance. The best way to gain access to resources under the seabed is to agree on maritime boundaries.

The third function of international law is to provide ways to resolve conflicts. The law of the sea sets limits to what solutions can look like, and these limits are constantly refined through evolving state practice and ICJ judgments. Although much is open to interpretation, there is also much one cannot do. The widespread conception that China claims sovereignty to all waters within the U-shaped line is legally impossible. China is bound by treaty to define its territorial sea, EEZ, and continental shelf on the basis of distance from coasts. Since international law does not provide for extending historic rights into the EEZ of neighbor states, the U-shaped line can only signify a claim to the islands inside it and their maritime zones. It is impossible

39. Lu Ning, *Flashpoint Spratlys!* (Singapore: Dolphin Books, 1995), pp. 90–91.

to claim sovereignty over submerged reefs and low tide elevations such as Macclesfield Bank (Zhongsha) unless they are in the vicinity of an island. Low tide elevations form part of the seabed. Yet another impossibility is to use archipelagic baselines around a group of islands if it is not part of an archipelagic state. In the eyes of the law the Paracels and Spratlys are not archipelagos, but a number of individual islands. Hence there can be no “Freedomland.” Moreover, even if one or several Spratlys should be deemed able to generate human habitation or economic life of its own (in order to acquire extended maritime zones), it would be inconceivable that their short coasts should be given the same weight as the long coasts of Palawan, north Borneo, and Vietnam when median lines are drawn.

The law of the sea does not allow as much interpretation as often imagined. What counts is the distance from coasts and the geological condition of the seabed. States may try to bend these principles in bilateral negotiations but if a state violates the ground rules its counterparts will not give their consent, regardless of power. If a government ignores its legal obligations, the law does not fulfill its potential as a conflict resolution mechanism. Then there is no solution. The law is the only way.

Will the South China Sea disputes be resolved? Well, the incremental process is already under way. Indonesia has agreed on its boundaries with Malaysia and Vietnam. Vietnam and Thailand have agreed on their boundary in the Gulf of Thailand. China and Vietnam have agreed on the Gulf of Tonkin, and are negotiating the prolongation of their boundary from the bay mouth into the South China Sea. The impact of international law is evident in the agreements reached. The process toward deciding if the Spratlys can have extended maritime zones is also under way. It may or may not be resolved by the Arbitral Tribunal set up at the request of the Philippines. Indonesia, Malaysia, Vietnam and the Philippines seem to agree that the Spratly islets can only have a 12 nautical mile territorial sea. China has taken the opposite view. Meanwhile, state practice and ICJ judgments evolve. The Sino-Vietnamese Gulf of Tonkin agreement in 2000 gave the inhabited island of Bach Long Vi an EEZ, but just three nautical miles beyond its 12 nautical mile territorial sea.⁴⁰ Bach Long Vi is 2.5 sq. km, while Woody Island

40. Zou Keyuan, “The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin,” *Ocean Development and International Law* 36:1 (2005), pp. 13–24. Nguyen Hong Thao, “Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,” *Ocean Development and International Law* 36:1 (2005), pp. 25–44.

(the largest of the Paracels) is 2.1 sq. km, and Itu Aba/Taiping Dao (the largest of the Spratlys) is 0.5 sq. km. Although the ICJ has not so far come up with an interpretation of UNCLOS Article 121.3, its November 19, 2012 judgment in the *Nicaragua v. Colombia* case applied some principles of interest for the South China Sea. Islands deemed capable of generating extended maritime zones may have a substantial effect on maritime delimitation on the side facing the EEZ of the country that has sovereignty to it while having just a minor effect on the side facing the coast of a rival claimant. This is because the practically oriented ICJ wants continuous national EEZs and not patchworks of enclaves. Its November 2012 judgment allowed enclaves only around two small cays that are far away from other Colombian territories.⁴¹ If the same principle were to be applied in the South China Sea, then any Spratly island deemed capable of having more than a 12 nautical mile territorial sea will have little effect on the side facing the mainland coasts of the Philippines, Brunei, Malaysia and Vietnam unless it belongs to the country it faces.

Research centers now use satellite photography to establish exact data on the Spratlys (and China's recently constructed artificial islands) as a basis for determining their status under Article 121.3 of UNCLOS. While there is no reason to expect that the claimant states will agree anytime soon to refer their disputes to the ICJ or make a big bargain, small steps may continue to be taken, clarifying issues and setting precedents so that the pieces of the puzzle gradually fall into place. With its "Maritime Silk Road" initiative, as part of the hugely impressive One Belt One Road plan, China should have an obvious interest in reducing tension and seeking negotiated solutions.

CONCLUSION

The interaction between power and law in the South China Sea forms a test case for realist and normative international relations theory. Realists tend to disregard law as a causal factor. By contrast, many legal scholars take the impact of law for granted. Some liberal and constructivist scholars attribute real impact to norms and institutions but speak more about governance, interdependence, or discourse than law. This article suggests that law binds even the powerful by making it costly to violate or ignore it, particularly at

41. I.C.J., "Territorial and Maritime Dispute (*Nicaragua v. Colombia*)."

sea. The fate of the Chinese U-shaped line may provide a test of the proposition. If China is able to compel its neighbors to recognize its “historic rights” to resources within the U-shaped line, then power will indeed have triumphed. If China moves to interpret the line as a claim to just the islands inside it and their maritime zones, and subsequently delimits these zones through negotiations on the basis of the law of the sea, then this article’s thesis will be strengthened. Every nation must try to advance its position as much as possible in the eyes of the law. Thus Chinese experts are constantly debating how to reconcile the U-shaped line with international law. Most understand that this cannot be done by obtaining sovereign rights to all resources within the line. The U-shaped line is inconceivable as a maritime boundary. China cannot issue unilateral fishing bans, cut cables from seismic exploration ships, or put out oil blocks for tender in areas within 200nm of the coasts of other countries—and closer to them than to any island claimed by China. If China proves able to compel its neighbors to back out of legitimate fishing and oil exploration, then this article’s thesis is weakened. My expectation is that China will realize the futility of force and internalize the need to base its regional diplomacy in international law.

Can law stop a rising power from realizing its maximum goals? This article surmises that it can. It can make it costly for a rising power to throw its weight around. China is placed in a dilemma from which it cannot extricate itself except by complying with the law. Otherwise it will get no agreements with its neighbors. Then there will be no stability, no safe exploitation of energy resources, no sustainable fishery management regime, and no positive environment for China’s peaceful development. The use of force in the South China Sea can only delay a solution. It will hurt everyone, regardless of who wins the battles. The only way to realize one’s national interest in a stable international environment is to utilize, develop, and comply with international law.