Applicability of the Law of the Sea in the Settlement of Territorial and Maritime Disputes in the East and South China Seas

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Abstract

The maritime situation in East Asia is currently a focus of the world attention primarily because China’s assertive, ‘expansionist’ behaviour is said to have tightened tensions in the region. In the author’s opinion, one cannot blame China alone for the current tension in and around the East and South China Seas.

The aim of this paper is to examine the applicability of the law of the sea, including the United Nations Convention on the Law of the Sea (UNCLOS), in settling territorial and maritime disputes in the East and South China Seas. The focus of discussion therein is on the following three points: first, China’s position as a challenger or a revisionist in terms of the current rules of international maritime law; second, the relevance of history and historical factors in applying the current rules; and third, theory and reality of interpretation and application of the current rules in East Asia.

This paper concludes by raising the following three points: first, the law of the sea is not perfect to settle all maritime conflicts and disputes in the East and South China Seas between states concerned, let alone the territorial disputes; second, the law of the sea does not directly and precisely govern historical matters, such as historic waters and historical rights; and third, to settle a territorial and maritime dispute, peaceful and direct talks between the parties concerned should be a basic threshold.

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Introduction

The maritime situation in East Asia is currently a focus of the world attention primarily because China’s assertive, ‘expansionist’ \(^1\) behaviour is said to have tightened tensions in the region.\(^2\) Having grown as a rising power in a setting of economic development and military enhancement, particularly in this millennium, China’s behaviour is regarded by many as provocative and threatening.\(^3\)

In the author’s opinion, however, one cannot blame China alone for the current tension in and around the East and South China Seas.\(^4\) This is particularly so when the mass media are more or less under the strong influence of some nationalistic voice of a country and the people are, to a certain degree, biased through the lenses of western-centric glasses.\(^5\)

Having had the opportunity to present his analysis of the disputes concerning the South China Sea and the East China Sea over the course of several years,\(^6\) the current author presents this paper to examine the applicability of the law of the sea, including the United Nations Convention on the Law of the Sea (UNCLOS),\(^7\) in settling territorial and maritime disputes in the East and South China Seas. To minimise the overlapping of issues to be addressed, the focus of discussion herein is on the following three points: first, China’s position as a challenger or a revisionist in terms of the current rules of international maritime law; second, the relevance of history and historical factors in applying the current rules; and third, theory and reality of interpretation and application of the current rules in East Asia.

I. China as a Challenger to the Current Legal Regime

As it grows, China has become a power to make a maritime claim to defend its own national interest.\(^8\) It does not need to stay quiet in front of other countries’ offensive and/or unfriendly actions in the maritime area off its coast or in the aerial zone above its territorial sea. This can be said under international law.\(^9\) The status quo may not necessarily be favourable for China in terms of the legal situations in the East China Sea and South China Sea, in particular.\(^10\) The issuance of a new map of the whole territory claimed by China, for example, can be considered in this context,\(^11\) even though the legal
significance of this conduct may be limited in practice. [MAP 1]

In fact, it may be commonly understood that, ‘in accord with practical realities’, the ‘common consent’ of the members of an international community is regarded as the basis of international law.12 This observation leads to the following:

[No state can at some time or another declare that it will in future no longer submit to a certain recognised rule of international law. The body of the rules of this law can be altered by the generally agreed procedures only, not by a unilateral declaration on the part of one state. This applies to all rules other than those created by treaties which admit of denunciation or withdrawal.13 (emphasis added)]

【MAP 1】
There is, however, no explicit legal rule that forever prohibits a state from taking a recalcitrant behaviour against unfavourable situations or measures for itself, even though it is nowadays frequently said that, under international law, a unilateral action with force must not be taken in order to change the status quo for its favour. In the context of this paper, the passage cited above may only apply when one can clearly answer the following questions: first, do the states concerned in the territorial and maritime disputes really have ‘a certain recognised rule’ applicable in the East and South China Seas?; and second, what are the ‘generally agreed procedures’ to alter the body of the rules in question? It does not seem to be easy to answer these questions under the current situations.

Some surrounding countries exhibit negative feeling about China’s expanding presence in the maritime area in and near the South and East China Seas. This sense of a threat or suspicion towards China’s attitude and behaviour in this region may sometimes be derived from ignorance, misperception, and prejudice of the states and people concerned. China now has the second largest economy in the world, with a history, tradition, culture and civilization of ‘several millennia’; the size of its area is over 9,500,000 square km, and its population is over 1.3 billion. Its geographic and demographic factors easily affect regional as well as international matters. Moreover, what is often overlooked is the arguably unprecedented phenomenon of China’s rising as a huge power, comparable to the United States, at least in this region.

In the author’s opinion, communist China, as a returning (quasi super-) power rising from a ‘sleep’ of more than 150 years, has been gradually challenging, if not rectifying, some parts of the current legal order, or status quo, in the maritime area surrounding its country. This perspective may explain what is normally neglected or unknown in the debate from Western points of view. The following argument is noteworthy:

Commentators often use the expression “Westphalian sovereignty” when discussing national sovereignty, thus revealing how significant a role the Peace of Westphalia (1648) plays in the Western concept of political authority and international relations. The treaties that created the Peace of Westphalia were signed at the end of the Thirty Years War in the area known as Westphalia, currently the modern-day provincial
state of North Rhine-Westphalia, Germany. Westphalia is a long way from the Forbidden Palace in Beijing. Why should Westphalian sovereignty, the Western concept of sovereignty, apply to an entity that had existed some 3,000 years before the Peace of Westphalia, and thousands of miles away? 24

Therefore, it would not be correct to think that people in the Eastern countries and those in the Western countries completely share the same views of history and values. 25

China’s position may be understandable if one turns one’s eyes to the precedence of the United States with respect to the Truman Proclamation of 28 September 1945 regarding the continental shelf and its resources. 27 On the basis of ‘contiguity and reasonableness’, 28 the United States unilaterally initiated state practice concerning the development and exploitation of the resources of the continental shelf of its coast under the circumstance where there had been no such precedent.

It is usually understood that this unilateral act of the US was a remarkable and invaluable pioneering act, which led to the creation of customary law regarding the legal concept of the continental shelf in international law. 29 This is mainly because the US Proclamation was ‘followed by similar claims made by many other States’ (with the belief that they were permissible in international law). 30 The US’s unilateral act of the Proclamation was founded in a state of legal vacuum, that is, a situation where there had been no applicable legal rules or standards to govern the idea of the continental shelf and its resources under international law. 31

In comparison, China seems to have a different position with respect to the territorial and maritime matters in the East China Sea and the South China Sea. As Mark J. Valencia argues:

[T]he legal purists who think international law is absolute and unchanging and are wedded to the status quo – which favors Western powers – will criticize this position. But the reality is that ‘international law is the arms of geopolitics’ and its evolution and interpretation will be influenced by rising nations – just as they have been influenced by today’s ‘global leaders’. For China such a statement would indicate it has
“risen” and is ready to challenge the existing world system and contemporary interpretations of international law – if necessary to protect its interests.32

Therefore, China does not appear to be trying to create a new rule through its state practice, but rather, to challenge the current unreasonable and inconvenient situation for itself by way of legal interpretation and application. This can be also said with respect to the law of the sea. For example, one of the most controversial issues surrounding the exclusive economic zone (EEZ) is the relationship between the freedom of navigation exercised by the flag state and the exercise of jurisdiction of the coastal state in its EEZ under Article 5833 of UNCLOS.34 The question here is whether military activities in other states’ EEZ are permissible without consent of those states.35 Similarly, the issue of conducting marine scientific research (MSR) in other states’ EEZ is also controversial because some coastal states require other states to obtain their consent in conducting MSR in their EEZ under Article 24636 of UNCLOS.

As regards these issues, China and the US have been opposed to each other.37 The US position regarding these issues is that all states will continue to enjoy the right to conduct military activities, including oceanographic survey and surveillance activities, in the EEZ because these activities have always been regarded as ‘internationally lawful uses of the sea’.38 In this connection, it is also suggested that ‘all forms of marine data collection should be under coastal State control would deprive the people of all nations of the benefits of free and open access to data that enhance safety and environmental protection’.39 However, China, as a coastal state, considers that other countries that conduct MSR in its EEZ need consent from it under Article 246 of UNCLOS.40 The US and those that want to conduct MSR and other surveys of any kind in other countries’ EEZ have the freedom to do so, and are not regulated by coastal states.41 The latter group of countries, including the US, take the view that MSR and surveying conducted in the territorial sea are not explicitly forbidden during the exercise of innocent passage in Part II of UNCLOS, while Part XIII does not govern hydrographic and military surveys.42

A real and unforgettable recent conflict between these different
positions was the dangerous USNS *Impeccable* incident of 2009, in which the ocean surveillance vessel operating 75 nm south of China’s Hainan island within the EEZ claimed by China had to take avoidance action to avoid collision with China’s state-owned vessels due to their ‘harassing’. What was at issue in the incident is the legality of the US ship’s operation in China’s ‘special economic zone’ in the South China Sea without China’s permission.

In connection with this incident, some writers states that ‘[t]he point of distinction between the Chinese and United States position on these issues is whether a non-resource related activity in the EEZ such as military marine data collection is a form of marine scientific research subject to coastal state regulation or whether this is a legitimate freedom of the seas’. These issues are also concerned with the question of what is meant by ‘normal circumstances’ under Article 246, paragraph 3, of UNCLOS. Some writers maintain that ‘[p]roviding these military activities fall beyond the scope of Article 246 marine scientific research and there is no direct threat posed to the coastal state which would legitimately activate the right of self-defence then military-related survey activities in the EEZ are consistent’ with UNCLOS and international law. As regards the question of the interpretation of ‘normal circumstances’, one view is that ‘circumstances are “normal” except where there is hostility or serious tension between the coastal State and the researching State’.

It is not easy, however, to judge whether military-related survey activities in the EEZ are compatible with UNCLOS and international law in a practical case. One may wonder what is meant by a ‘direct threat’ and by ‘hostility or serious tension’, for example. No matter what sort of hydrographic or military surveying is conducted, the subjective factors of the conductor, such as intention and motivation, cannot easily be identified by coastal states. The conducting of surveys for any purposes, even in the name of freedom of navigation to challenge excessive coastal state maritime claims, may be deemed to be unfriendly and suspicious by the coastal states, particularly when the relationship between the conducting state and the coastal state is at stake with very little confidence in each other. Accordingly, the question here is whether China and the US have confidence with each other or not. In this sense, it is noteworthy that the US-China Memorandum of Understanding (MOU) on the Rules of Behavior for the Safety of Air and Maritime Encounters has
been announced to deal with this issue and other related matters, although this may be a small step for the future of the two powers due to several weaknesses.\(^{53}\)

Another good example of a conflict arising from different interpretations of UNCLOS and other related international legal norms is China’s declaration\(^{54}\) of an Air Defence Identification Zone (ADIZ) in the East China Sea in 2013.\(^{55}\)【MAP 2】 Although as many as 20 states had already declared similar ADIZs for security purposes before China’s declaration,\(^{56}\) this was shocking and unwelcomed by its neighbouring states, as well as the US,\(^{57}\) for its peculiar function of military enforcement in expressing China’s will to ‘adopt defensive emergency measures’\(^{58}\) against uncooperative or non-obedient aircraft. ADIZs themselves are not very well founded under

【MAP 2】
international law, though there has been similar precedence followed by some countries who share nearly the same purpose, that is, national security, or the prevention of threats to peace.

This kind of military responsive actions taken by a coastal state may seem to be incompatible with the freedom of overflight included in the freedom of the high seas under Article 87 (1) of UNCLOS. However, this point is controversial, and not easily resolved among opponents. First, whether this sort of ADIZ is legal or not depends, in particular terms, on how the coastal state implements the defensive measures in reality, even though the declaration in question may have a chilling effect on the states concerned. Second, under the circumstances that national security may be under great peril and danger before an eminent urgent situation due to the remarkable development of military technology, relevant rules in international law are not definitively clear-cut. Third, UNCLOS, to which the US is not yet party, will still be dependent on the consequent practice of the states concerned, as UNCLOS parallels customary law.

China’s unilateral action may be untimely and unfriendly for the political environment in East Asia, but it is not necessarily illegal or unfounded under international law. In addition, it should be borne in mind that the United States ‘established the first ADIZ during the Cold War to manage the air threat from the Soviet Union’ in the region in question. Therefore, China’s challenge to the status quo of the overflight in the East China Sea by setting the overlapping and, reputedly, more assertive ADIZ in the maritime area cannot be refuted as illegal, but must be regarded as an act to level its status as the power who actually rules the region, i.e. the United States. Understandably, a formerly quiet, docile actor may alter its behaviour and attitude in accordance with its growth and development, as well as changing domestic and international circumstances.

II. Historical Factors and the Law of the Sea

Regarding the issue of historic waters or historic rights under the law of the sea, UNCLOS refers to ‘historic bay’ and ‘historic title’ in Articles 10, 15, and 298 (1) (a). These concepts are often introduced by some writers in relation to the claim of China with respect to the South China Sea, and
they are, in fact, controversial concepts. There may be some countries such as China that interpret these provisions as embodying the ‘recognition and respect’ of the ‘historical rights’. However, this issue is not easily resolved because UNCLOS itself does not say anything significant with respect to the definition, standard, and criteria of these terms concerning history.

As is well known, the claim to historic waters incurs great risk in international relations, as there has long been huge debate over the concept itself. Normally, the following three requirements must be met for historic waters to be recognised: first, the coastal states’ exercise of title in the region in question; second, continuity of the period of exercising this competence; and third, the attitude of other foreign countries towards the claim of historic waters. However, what lies at the bottom of the concept of historic waters is the idea that an original matter based on what is initially ‘an illegal situation’ under the legal system valid at that time subsequently becomes valid or complete, not only by the lapse of time, but also by the acquiescence of the legitimate possessor or toleration by, other countries. The concept of historic water is not considered as an established legal principle under international law, because one cannot easily ascertain who the original legitimate possessor is, or how to evaluate the existence and form of any acquiescence.

However, there is still an argument regarding the legal foundation of the legality or illegality of conduct in the context above, as discussed below. The UNCLOS provisions that refer to ‘historic bays’ and ‘historic rights’ also leave ambiguity in their interpretation. It is certainly difficult to claim that the South China Sea is a normal bay, and whether the South China Sea is a historic bay is also a controversial issue, perhaps with a negative result. Judging from the Preamble of UNCLOS, with the relevance of history, these concepts will certainly be ‘governed by general international law’, that is, customary international law. Again, however, the rules of customary international law concerning these concepts are also unclear, and not necessarily defined.

As judicial precedent of the International Court of Justice (ICJ) shows, each individual case is recognized as unique. In other words, there is no almighty legal criterion or standard to apply and operate with respect to historic waters. Therefore, one should normally check the following questions, among others: to what extent has a claimant state exercised its jurisdiction within the maritime area in question; whether, in the course of these
actions, there has been any protest from other countries; and how far state practice has gone in comparison with that of other countries. China may also need to clarify these questions, if it wants to be considered as a legitimate claimant.\textsuperscript{77}

One writer suggests that among the historic rights are rights to fishing that has been conducted for a long time by Chinese fishermen, for example.\textsuperscript{78} While maritime area that does not fall into the category of the EEZ or the continental shelf may be entitled to the same legal status as the area of the EEZ and the continental shelf and their subsoil, maritime area where 'historical rights' are claimed can exceed 200 nautical miles and will be, even within 200 nautical miles, subject to domestic laws and regulations different from those of the EEZ regime.\textsuperscript{79} Another writer suggests that China has used a combination of the concept of sovereign rights in the EEZ and the continental shelf under UNCLOS with the concept of 'historical rights' to claim all the living and non-living resources within the so-called nine dash line (or U-shaped line) that China uses in the South China Sea.\textsuperscript{80}

Some Chinese officials have referred to the concept of historic rights to the effect that the dashed line is what China's sovereignty rights over the South China Sea have established and developed 'in the long process of history'.\textsuperscript{81} China seems to be of the opinion that there had been no criticism or protest from foreign countries even after the publication of the map on which the dashed line was drawn. Some commentators concur, adding the phrases 'throughout recorded history' and that passage of '[t]hose rights do not derive from UNCLOS'.\textsuperscript{82} However, it is not easy to judge whether there had been tolerance or acquiescence by the international community, including the states concerned about China's unilateral actions, such as publication of the map containing the dashed line mentioned above.

In the discussion of the International Law Commission (ILC), 'historic bay' was widely pointed out as a concept that was disadvantageous to countries with shorter histories, but advantageous to those with longer ones.\textsuperscript{83} At any rate, it is not easy to find a rule of international law that governs the 'historical rights' of China. Under these circumstances, the legality or illegality of China's claim regarding the historical rights within the dashed line in the South China Sea is widely open for further discussion.
III. Theory and Reality of the Application of an Agreed Framework

It may be often thought that bilateral and regional fishery agreements complement UNCLOS, and that they serve the regional interest in fisheries. In fact, UNCLOS, as an umbrella agreement, needs regional and bilateral agreements to facilitate and ensure implementation of the rules and norms in the maritime areas in question.\(^84\) It is not impossible for two opposing states engaged in a territorial and/or maritime dispute to reach an agreement on fisheries by shelving the territorial/maritime dispute.

However, a state-state relationship through a bilateral agreement does not necessarily turn out to be favourable or beneficial to the people domestically. In other words, the local people’s interest in fisheries, for example, may be sacrificed under the guise of a friendly relationship between the two state-parties. A state may neglect or turn a blind eye to the interests of fishermen, weighing more of the national interest in strategic and geopolitical inter-state relations.

A typical example might be the fisheries agreement signed by Japan and Taiwan in April 2013.\(^85\) As Japan does not recognise Taiwan as a sovereign state due to its (and Taiwan’s) relations with mainland China, the 2013 Fisheries Agreement is not a state-state agreement but an agreement between a state and an entity without statehood (through civil agencies), strictly speaking.\(^86\) The Fisheries Agreement allows fishing vessels from both parties to operate for the first time in more than forty years in disputed waters of vast size near the Senkaku/Diaoyudao/Tiaoyutai Islands. [MAP 3] This achievement was initially hailed and welcomed officially, at least by the two parties, as a successful symbol of diplomatic, peaceful but time-consuming dialogue between the two, despite the existence of the territorial dispute over the Senkaku/Diaoyudao/Tiaoyutai Islands.\(^87\) Sidestepping the issue arising from both parties’ overlapping EEZs, the Agreement has introduced ‘special cooperative waters’ in which fishermen of both parties may enter and fish under certain conditions.

In effect, however, it is too early to say that this agreement has brought about peace in the maritime area where both parties’ fishermen should share catches through fishing in a mingled way.\(^88\) The agreement did not prescribe
【MAP 3】

minute and detailed rules and regulations, but left them to bilateral consulta-
tions in a joint commission. Unfortunately, a series of the consultations has 
not been very successful to date, and has produced little fruit. Moreover, it has 
been reported that the Japanese fishermen of the maritime area are, strangely, 
not satisfied at all with the Fisheries Agreement, and that the Taiwanese fish-
ermen have harvested more than they used to from these fisheries, causing 
more trouble in terms of competing fisheries with the Japanese fishermen.

One cannot easily judge, in an actual life, whose benefit the bilateral 
agreement will bring about. More current data is needed to make a fair evalu-
ation of the result of concluding the 2013 Fisheries Agreement. What should 
be noted here is that regardless of the superficial success in concluding a fish-
eries agreement, the voice of the Japanese fishermen was not reflected in the 
agreement, and that in the face of diplomatic difficulties with China regarding 
the territorial dispute over the Islands, for the sake of appearance, Japan dared 
to take the nominal fruit of concluding a bilateral agreement in order to check 
China diplomatically and strategically.

The operation of a fisheries agreement may be negatively influenced by 
a breakdown in diplomatic talks between the parties concerned due to other, 
different bilateral matters. Due to the territorial dispute over the Takeshima/ 
Dokdo islands, Japan and South Korea, in spite of the current bilateral fish-
ing agreement concluded in 1999, could not do anything but take the unusual 
step to prohibit each other’s fishing boats from operating in their respective EEZs, failing to reach an agreement over quotas and other issues for various 
reasons. It has been reported that tensions over historical and 
other issues may have dimmed the prospects for a swift recovery to ordinary 
relations. The 1999 fishing agreement has been regarded as a successful 
result of diplomatic talks between the two by way of shelving the difficult ter-
ritorial dispute over the Takeshima/Dokdo islands. The direct beneficiaries, 
practically speaking, are the fishermen of each party to the agreement, but 
they are at the same time, the direct victims of the act of their state.

Therefore, a diplomatically acrobatic agreement of this kind may be 
hampered by consequent issues between its two parties, irrespective of the will 
and intention of the private parties directly concerned. Particularly in East 
Asia, history recognition and the reminiscence of the Second World War are 
still sensitive and unresolved issues for China and South Korea, among others,
including territorial issues.\textsuperscript{95} It seems evident that the law of the sea cannot in itself solve practical issues.

In this sense, the handling or mishandling of a minor independent incident may tend to lead to an unexpectedly disastrous outcome, such as the incident of September 2010, in which a Japanese coast guard vessel was rammed by a Chinese fishing trawler while trying to detain the trawler for illegally fishing in the waters surrounding the disputed Senkaku/Diaoyudao/Tiaoyutai Islands.\textsuperscript{96} In accordance with Japan’s Letter of the Foreign Minister regarding the Waters Prescribed in Article 6 (b) of the 1997 Fisheries Agreement between Japan and China,\textsuperscript{97} the Japanese government was expected to be flexible enough to avoid applying Japan’s domestic laws and regulations related to fisheries with regard to the Chinese nationals on the trawler.\textsuperscript{98} In fact, however, Japan’s coast guard arrested and detained the captain of the trawler and its crew for obstructing executive officers from performing their duty.\textsuperscript{99}

It should also be mentioned that, in exchange for Japan’s Letter

【MAP 4】

(accessed 30 September 2014)
mentioned above, China also issued a Letter in the name of Chinese Ambassador Extraordinary and Plenipotentiary in exactly identical words and form. It is assumed that the effect of the exchange of these Letters between these two states was not to cause any trouble with respect to each party’s position regarding territorial sovereignty over the disputed Islands by way of the prior agreement on non-application of each party’s laws and regulations related to fisheries to the other party’s nationals. These facts, therefore, can be deemed to mean that, basically, both parties to the 1997 Fisheries Agreement had been in tacit agreement with the recognition that there existed a territorial dispute over the Islands.

Unfortunately, however, the accumulation of certain unexpected and inevitable situations and matters on each side may cause unforeseeable and devastating consequences. Simply maintaining and applying existing legal rules and regulations under the law of the sea will not be enough to maintain and enhance bilateral and regional relations of peace and friendship.

Conclusions

This paper draws the following conclusions from the discussion above: First, the law of the sea, including UNCLOS, is not perfect to settle all maritime conflicts and disputes in the East and South China Seas between the states concerned, let alone the territorial disputes. This is because China, as a returning rather than rising power, may act as a challenger against the status quo. Considering the regional and historical peculiarities, one cannot easily continue to think that the status quo is and will be best for every country in this region. As far as the new relationship between the powers is yet to be defined and its impact to the regional political, economic, and military environment is uncertain, international maritime law, including UNCLOS, will be open to controversial and unstable interpretation and application, in reality.

Second, the law of the sea does not directly and precisely govern historical matters, such as historic waters and historical rights. The defence often offered by the writers who support China’s position that UNCLOS does not apply to matters that precede UNCLOS is open for discussion, since its position as a ‘civilization state’ with a long history is not comparable to any other states, western or eastern, in terms of the territorial and maritime disputes.
Regional and geographical peculiarities will also further entangle the situation. Conditions in the East China Sea, for example, are still under the strong influence of the reminiscence of the Second World War. Confidence-building measures must be taken among the parties concerned in this region as soon as possible.

Third, it is fundamental that, in order to settle a territorial and maritime dispute, peaceful and direct talks between the parties concerned should be a basic threshold. Other countries should not interrupt or hamper their efforts to create the conditions suitable for their direct talks. This can be true with the situations in the Est China Sea and the South China Sea. Even under the compulsory settlement of disputes within the UNCLOS framework by way of arbitration, unilateral institution of the arbitral procedure, for example, will not be very fruitful in the long run for the real solution of the dispute in the South China Sea region. In other words, a plan of containment or isolation of China will not work under current circumstances. A long perspective and effort to make and nurture confidence among the parties concerned should be sought, as there is no short cut for this issue.

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3 See, for example, the comments in the following article: ‘Viewpoints: China Air Zone Tensions’, BBC News, 28 November 2013, at <http://www.bbc.com/news/world-asia-25116119> (accessed 30 September 2014). See also Peter A. Dutton, ‘Testimony before the House Foreign Affairs Committee Hearing on China’s Maritime Disputes in the East


8 In territorial and maritime disputes, for example, acquiescence may be invoked and apply under certain circumstances. See James Crawford, Brownlie’s Principles of Public International Law, 8th Edition, Oxford University Press, 2012, pp. 232-234, 419-420.

9 See the articles in ‘Agora: The South China Sea’, 107 AJIL 95 (2013).

September 2014).


13 Id., p. 13.

14 For unilateral acts of a state, see Crawford, *supra* note 9, pp. 416-420.


18 In this sense, China may be regarded as an ‘economic superpower’. Id., pp. 173-240.

19 Id., p. 244.


23 Ikeshima, ‘The Role and Limits’, *supra* n. 6.

24 Coleman & Maogoto, *supra* n. 5, p. 243 (original footnotes are omitted).


28 R. R. Churchill & A. V. Lowe, *The Law of the Sea*, Third Edition, Manchester University Press, 1999, p. 144. As is pointed out by Valencia, *supra* n. 27, it is noteworthy that the justifications in the Proclamation are the following: first, ‘the long range world-wide need for new resources of petroleum and other minerals’; second, that ‘efforts
to discover and make available new supplies of these resources should be encouraged; third, that ‘recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and fourth, that ‘the exercise of jurisdiction over natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just’ (emphasis added).


30 Churchill & Lowe, supra n. 28, p. 7.

31 Certainly, one could say that the US unilateral declaration is significant in terms of the creation of international customary law because it invited many similar followers with the belief that the claims are based on the recognition of coastal states’ ownership of continental shelf resources.

32 Valencia, ‘The South China Sea’, supra n. 27.

33 Article 58, paragraphs 1 and 3, of UNCLOS reads as follows:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedom referred to in article 87 of navigation and overflight and of the laying of 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.


36 Article 246, paragraphs 1, 2 and 3, of UNCLOS reads as follows:

1. Coastal States, in the exercise of their jurisdiction, have the right to regulate,
authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

2. Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.

3. Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. To this end, coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably. (emphasis added)

For these issues, see the three articles written by Sienho Yee, Raul (Pete) Pedrozo, and Zhang Haiwen, respectively, in ‘Agora: Military Activities in the EEZ’, 9 Chinese JIL 1-47 (2010).


Roach & Smith, supra n. 34, p. 450.


The question here may also be whether one can regard any marine scientific data survey and other related activities can be regarded as the ones that fall within the scope of the freedom of navigation or not.

See Rothwell & Stephen, supra n. 29, p. 330.


Rothwell & Stephens, supra n. 29, p. 276.

See supra n. 36 for the relevant provision. One may also need to refer to Article 246, paragraph 4, of UNCLOS, which reads as follows:

4. For the purposes of applying paragraph 3, normal circumstances may exist in spite of the absence of diplomatic relations between the coastal State and the researching State.

Churchill & Lowe, supra n. 28, p. 407.

Rothwell & Stephens, supra n. 29, p. 276.

Churchill & Lowe, supra n. 28, p. 407.

Articles 88 and 301 (peaceful use of the sea) of UNCLOS, in particular.


For the original text of this MOU, see the following site of the US Department of Defense at <http://www.defense.gov/pubs/141112_MemorandumOfUnderstandingOnNotification.pdf> (accessed 12 December 2014).


Lee, supra n. 55.

It is noteworthy that the US Department of State, concerned about China’s declaration
of 23 November 2013, maintains the following position:

The U.S. government generally expects that U.S. carriers operating internationally will operate consistent with NOTAMs (Notices to Airmen) issued by foreign countries. Our expectation of operations by U.S. carriers consistent with NOTAMs does not indicate U.S. government acceptance of China’s requirements for operating in the newly declared ADIZ.


One of the most relevant questions may be how to interpret ‘adopt defensive emergency measures’ (in Chinese, ‘中国武装力量将采取防御性紧急处置措施’) under international law. For the consequences, however, see infra n. 65.

Lee, supra n. 55.

Abeyratne, supra n. 55, pp. 1 & 5.


See Preamble of UNCLOS, which reads that ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’.

China’s action may be ‘further fuelling the potential for sudden escalation given an accident or miscalculation’. Hsu, supra n. 55, p. 2.

Hsu, supra n. 55, p. 2. For the US ADIZ system, see also Dutton, supra n. 55, p. 698.

At the same time, one should pay attention to a different view on China’s regional strategy. See Dutton, supra n. 3, p. 4, where he maintains that ‘China’s regional maritime strategy appears to have as its aim to reverse the tectonic shift brought about two centuries ago by the introduction of superior foreign naval technology and to restore the regional system to its continental past’. However, it has been reported that Chinese aviation authorities have removed the phrase ‘defensive emergency measures’, despite that there is no change in the operating rules for the new ADIZ outlined on the Chinese Defence Ministry’s website. See Nanae Kurashige, ‘China withdraws threat against violations of airspace zone over East China Sea’, AJW by Asahi Shimbun, December 28, 2014, at <http://ajw.asahi.com/article/asia/china/AJ201412280036> (accessed 29 December 2014).

For the details on this issue, see Ikeshima, ‘China’s Dashed Line’, supra n. 4, pp. 33-36.


See Andrea Gioia, ‘Historic Titles’, Max Planck Encyclopedia of Public International Law, 2013. For state practice on this topic, see Roach & Smith, supra n. 34, pp. 35-56.

In this connection, one may recall that Ian Brownlie stated that ‘[t]he essence of the matter is peaceful holding and acquiescence or toleration by other states’. Ian Brownlie, Principles of Public International Law, Seventh Edition, Oxford University Press, 2008, p. 157.

Ikeshima, ‘China’s Dashed Line’, supra n. 4, pp. 34-35.

See the following: Churchill & Lowe, supra n. 28, pp. 43-45; Rothwell & Stephens, supra n. 29, pp. 47-49.

The last paragraph of the Preamble of UNCLOS states that ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’.

See the Fisheries case, the Land, Island and Maritime Frontier (El Salvador/Honduras; Nicaragua intervening) case, and the Continental Shelf (Tunisia/Libya) case.

In the Cameroon v Nigeria case, the ICJ stated that ‘the theory of historical consolidation is highly controversial and cannot replace the established mode of acquisition of title under international law’. See ICJ Reports 2002, pp. 303, 352.


Id., pp. 169-172.


See Ko, supra n. 85; The Taiwan-Japan Fisheries Agreement, supra n. 86.


See Okinawa Times ‘Senkaku’ Reporting Team (Ed.), Namiyo Shizumare: Senkaku He No Shiza (in English, Calm Down the Waves: Viewpoints for the Senkaku Dispute), Junpo-sha, 2014, pp. 22-29 (in Japanese). This point was also reported in the article written by Ko, supra n. 85.


One writer states that ‘it is acknowledged that the new Fishery Agreement achieved a measure of success in maintaining cooperative and friendly relation between Korea and Japan in terms of fisheries’. See Atsuko Kanehara, ‘A Possible Practical Solution for the Dispute over the Dokdo/Takeshima Islands from the Perspective of the Law of the Sea’, in Dokdo, supra n. 91, pp. 71-89, at p. 83.


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98 According to the Letter of the Japanese Foreign Minister to the Chinese Ambassador, the Minister states that the government of Japan ‘has an intention not to apply, to the Chinese nationals, its own domestic law and regulations related with fisheries in the waters mentioned in Article 6 (b) of the Agreement’ (the author’s translation).


100 See supra n. 97.

They should, in the near term, make an effort to agree among themselves to begin talks, with a possible first step of reaching agreement on safety and rescue (SAR), for example, as soon as possible. For the details of this idea, see Zhang Jie, ‘Commentary: Search and Rescue in South China Sea and Regional Cooperation’, in Maritime Security in the South China Sea: Regional Implications and International Cooperation, edited by Wu Shicun & Zou Keyuan, Ashgate, 2009, pp. 255-261. It is already known that one good example is the SAR operation conducted by the coastal states of the South China Sea after the incident of missing Malaysian Airlines 307 took place in March 2014. See Ankit Panda, ‘Malaysian Airlines Flight 370 Search and Rescue: Cooperation in the South China Sea’, THE DIPLOMAT, 11 March 2014, at <http://thediplomat.com/2014/03/malaysia-airlines-flight-370-search-and-rescue-cooperation-in-the-south-china-sea/> (accessed 12 December 2014).