

The Ocean Law Daily

"Security, Sovereignty, Sustainability - the Law of the Sea Convention"

October 11, 2010

You can add the South China Sea to the issues of the extended continental shelf and the legal regime for the Arctic to the short list of current issues in which the Law of the Sea Convention is a critical element in protecting US interests at sea in the current day.

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Exposition on the LOS Convention, China and the South China Sea

Early last week I was spurred by a question posted on "The Interpreter," the web site of the Lowy Institute for International Policy, to write a response that put the issue of China and the South China Sea in context of the LOS Convention. The response stands alone, but if you wish to read the original question, you can find it here. The original question is well worth reading because it puts the South China Sea in a broad context of historic claims and claims in other regions.

My response follows:

I'll try to respond to several items in your reader's question. I apologise for the length of this response — the relevant provisions of international law were a collective effort of lawyers, sea service officers, geographers and geologists and diplomats. There is logic to the result that incorporates skills from each discipline, but that also makes the result seem complicated and arbitrary to a newcomer.

The compromises between disciplines and interests were made to achieve near universal acceptance of the final result by all of the parties in the negotiation. And fitting into all of those fields myself, I can't help but reply with a detailed response.

Basically, the 1982 UN Convention on the Law of the Sea is the guideline for determining national authority at sea under international law. The Convention includes 159 nations and the European Community as members, and many other countries, including the US, have signed either the Convention or the 1994 agreement on implementation with intent to become a party.

In the meantime, the US, at the written direction of President Reagan in 1983 and 1989, follows all of the provisions of the convention related to the territorial sea, the exclusive economic zone, the continental shelf and the high seas, pending full membership in the convention. Effectively, the Law of the Sea Convention has now supplanted both the 1958 Geneva Conventions on the Law of the Sea and customary international law for the sea as the basis for determining national rights and obligations at sea regardless of membership status.

The Law of the Sea Convention defines five general of jurisdiction at sea:

1. Territorial sea, which may extend as far as 12 nautical miles from shore. In this area the coastal state has complete sovereignty, subject to respect for the right of innocent passage for ships.
2. The Exclusive Economic Zone, a creation of the LOS Convention. This applies from the outer edge of the territorial sea to a distance of 200 nautical miles (not kilometers as your reader wrote in his post). In this area the coastal state has complete authority over the exploitation of living resources, exploration and development of mineral resources of the sea floor. It also has a right to require and approve scientific missions (this was added to keep foreign countries and firms from knowing more about offshore resources than the coastal state, thereby gaining an edge in negotiating access agreements). There are requirements for coastal states to allow foreign access to unused portions of the maximum allowable catch. In the waters of the EEZ and in the airspace above, ships and aircraft have the same rights of free navigation that they would have in and above the high seas.
3. The Continental Shelf, which the convention redefines from its earlier scientific definition to include all seabed within the 200 nautical mile EEZ and the geologic continental shelf, slope and rise out to a limit specified in the Convention by a set of geological and geographical definitions collectively referred to as 'Article 76' of the Convention. Claims may extend outward to a limit of 350 nautical miles or 100 miles from the 2500 meter isobath, except that the limit to claims over the natural extension of continental crust (the geological continental shelf) are not subject to those limits.
4. The High Seas, which includes all waters beyond the EEZ. In this area the broadest definition of freedom of navigation applies, with the specific right being defined quite similarly to the 1958 Geneva Convention on the high seas and as practiced under customary international law before that.
5. The 'Area', which consists of the deep seabed beyond the limits of national jurisdiction — basically the seafloor outside the claims of territorial seas under the EEZ and Article 76. This has no relevance in the South China Sea since every bit of seabed is subject to claim by one or more coastal states.

One of the points of contention in the South China Sea is related to the rocks, islets and islands in the sea. Under the Convention, a 'rock' has a 12 mile territorial sea but does not have an EEZ. An inhabited island, or an island capable of supporting economic life, does have an EEZ. Thus, you will see photos of huts erected on stilts in which states of the region try to demonstrate that they 'inhabit' the rocks for purposes of claiming an EEZ.

Also, international tribunals have recognised both historic rights to a region and the role of equity in defining boundaries dividing claims. The LOS Convention recognizes that states may use the International Court of Justice, the International Tribunal on the Law of the Sea or International Arbitration under procedures defined in the convention. However, boundary disputes are one of the issues that countries can exclude from compulsory dispute resolution, so arranging a solution is a political exercise that may, but is not required to, use these tribunals.

After that long exposition, it is important to note that China's claim is very ambiguous. While China's 'nine dash line' encircles much of the South China Sea, it is not clear whether the claim is over the sea or just over the islands within the encircled region. A claim to an EEZ within that region would be different from a claim to rocks and islands that might be limited to a 12 mile territorial sea.

China has said it wouldn't interfere with navigation through the region, but it already interferes with warship activities in the EEZ in spite of the Convention's recognition of high seas navigational freedoms within the EEZ. China utilises the navigational freedom

provisions of the LOS Convention to ensure passage of warships and cargo vessels through the seas of east Asia and the Indian Ocean, and it has begun making the same arguments for freedom of navigation in sending an icebreaker into the Arctic ocean. It cannot long sustain arguments of an extended claim over a vast region of the South China Sea while also demanding navigational freedoms through the seas off the coasts of other major powers.

Here are the basics of a possible outcome in the South China Sea:

Clearly, one country or another has claim to each and every rock and island in the South China Sea, and each island has, at a minimum, a 12 mile territorial sea. Determination of whether an island qualifies for an EEZ will require agreement among the disputants either through conventional diplomacy or international dispute resolution. The economic value of the disputed area is weakened when there is question of legal title and threat of armed conflict, so there is an economic cost to leaving the disputes unresolved.

Outside of the 12 mile territorial sea, regardless of the issue of the EEZ, high seas navigational freedoms apply within the South China Sea, no matter who controls islands and rocks therein.

The regional states need to resolve among themselves how claims to fisheries and to the ocean floor are to be divided based on national coastlines and nationality of islands and rocks and on historic claims and fishing activities.

China needs to follow the Convention's provisions regarding freedom of navigation for warships and ships on government service in the EEZ, regardless of how the EEZ is determined for the islands within the South China Sea.

Other Responses to the SCS Question

Here are two more responses to the request for information on the original Lowy page. They both raise the important point of the ambiguity of the Chinese claim within their "9 dash line" encompassing nearly the whole of the South China Sea. If, as these writers suggest, the Chinese claim is to the islands alone, and the territorial sea surrounding them, and innocent passage is recognized within them, then the security interest of the United States would be minimized and US policy could focus on encouraging regional negotiation leading to agreement over the division of the seabed and fisheries beyond 12 nm from shore. One commentator, Sam Bateman from the S. Rajaratnam School of International Studies, has written extensively on security issue of the region and he recommends a paper published in August, 2010, by Robert Beckman, director of the Centre for International Law at the National University of Singapore. The second response is from Judah Grunstein, the very capable editor of the on-line journal World Politics Review.

Here is a link to the page with responses from Bateman and Grunstein to the initial question about the China, the South China Sea and LOS:

Responses by Bateman and Grunstein:

<http://www.lowyinterpreter.org/post/2010/10/07/Reader-ripostes-Law-of-the-Sea.aspx>

In Sam Bateman's response above, he refers to a recent paper by Robert Beckman that provides a possible interpretation of Chinese claims that would be consistent with the Law of the Sea Convention. Beckman's recent paper on this topic highlights Chinese claims and points out that one interpretation would alleviate much of the issues and lay the groundwork for an outcome satisfactory to both regional and distant (i.e. the United States) powers.

Here is an excerpt from Beckman's paper:

On the face of it, the wording of China's Note appears to be consistent with international law and with UNCLOS. However, China also attached the infamous

dotted-line map to its Note. The dotted-line map was first produced by the Chinese government in 1947 and has nine dashes drawn in a u-shape around the islands in the South China Sea. Although China has used this map on several occasions, it has never clarified its position on exactly what it is claiming inside the dotted-line. This has led some to conclude that China is claiming all the waters within the dotted-line as its territorial waters or historic waters. Such a position would be contrary to UNCLOS.

While much attention has been given to the dotted-line map attached to China's Note Verbale, it should be remembered that the Note does not assert sovereignty over the waters in the dotted-line except for the waters "adjacent" to the islands which arguably only refers to a 12 nm territorial sea. The Note contains no language suggesting that China claims that all the waters inside the dotted-line are its territorial waters or historic waters, or that it has any historic rights in the waters inside the dotted-line. This suggests that China's claim is only to the islands inside the dotted-line, and to the maritime zones that can be generated from such islands, a position consistent with UNCLOS.

Whether you might agree or disagree with Beckman's presentation, I think it is important to read it and understand it. It provides an alternative view to that of unavoidable conflict that not only needs to be considered, but provides a diplomatic outcome that should be explored even while the US maintains its adherence to freedom of navigation operations in the South China Sea and support for its ASEAN allies in peaceful resolution of seabed and EEZ claims. But even if this outcome were to be achieved, there would still be the issue of Chinese claims of authority over military activities in, under and above the EEZ outside of the territorial sea, a critical issue on which the US cannot compromise (outside of adjusting operations as appropriate to accommodate rules for conservation and environmental protection and avoiding interference with offshore development operations).

Beckman's paper, in PDF format, is available here:

<<http://www.rsis.edu.sg/publications/Perspective/RSIS0902010.pdf>>