

The *South China Sea Case* and the Potential Utility of International Law for Conflict Mitigation and/or Resolution

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Overview

I have been asked to reflect on, in light of the *South China Sea Case* arbitral award, the prospects for joint resource management in such forms as joint exploration, joint development and fisheries management regimes in the region. There are obviously significant tensions in the region at present over both fishing and resource exploration. In respect of the former, there have been a series of low-level incidents between Chinese coastguard and fishing vessels and the coastguard and fishing vessels of neighbouring States. There have also been incidents such as the dispute between China and Vietnam over the exploratory activities of Oil Rig HD-981 in the Paracels in 2014.

In areas where maritime delimitations remain unresolved and there are overlapping potential claims to exclusive economic zones, it is not uncommon to find examples of jointly managed fisheries or oil and gas deposits. These are normally termed 'provisional arrangements' (see below) with the label 'joint development' normally referring to arrangements following the delimitation of a boundary.

Of many examples internationally of either provisional arrangements or joint development, one could consider models including:

- the South Korea/Japan or UK/Argentina provisional arrangement zones;
- the Norway/Russia joint fishing 'grey zone' provisional agreement of 1978-2011;
- the South Korea/Japan joint fisheries agreement of 1999 (a provisional arrangement); or
- the long proposed but never-quite-eventuating Israel/Cyprus natural gas joint development agreement following the 2010 delimitation of their maritime boundary.¹

Indeed such cooperation may seem required, or at least strongly encouraged, under Article 74(3) and 83(3) UNCLOS which provide that, pending delimitation of overlapping EEZ and continental shelf claims, States with opposite or adjacent coasts:

'shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.'

According to the *Guyana v Suriname* case this involves, at the least, obligations to:

- actively negotiate in good faith; and
- avoid activities 'lead[ing] to a permanent physical changes, such as exploitation of oil and gas reserves' in the area unless there is mutual agreement.²

¹ Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Leiden: Brill, 2004), Chapter 3.3; Hedy Cohen, 'Israel, Greece, Cyprus mull joint natural gas projects', *Globes*, 20 April 2016, <http://www.globes.co.il/en/article-israel-greece-cyprus-mull-joint-natural-gas-projects-1001119233>. For an exhaustive study of State practice see: British Institute of International and Comparative Law, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas* (BIICL 2016).

² *Guyana v Suriname*, Award, 17 September 2007, paras 461-8. See also: *Aegean Sea Continental Shelf Case (Greece v. Turkey) (Request for the Indication of Interim Measures of Protection)* 1976 ICJ Rep 3.

Unilateral acts not leading to permanent physical changes, such as seismic exploration are, therefore, permitted.

While there is no duty to successfully conclude joint development zone agreements, there is a legal duty to pursue negotiations to that end in a 'conciliatory' spirit and with a willingness 'to make concessions'.³ Implicitly, absent such a willingness to engage in genuine negotiations towards interim measures the price of disagreement may be that activities involving 'permanent physical changes' are impermissible and valuable resources go underutilised as a result.

The difficulty, of course, in light of the *South China Sea Case* is that there would appear to be little to delimit and little willingness on any side to make concessions. It certainly seems unlikely that the Philippines will lightly abandon the legal advantage it has obtained in a ruling which finds that there are *no* possible overlapping EEZ entitlements as between it and China. At most it might be that some of the maritime features found in the award to be rocks may belong to China, resulting in enclaved territorial seas.

Although the findings of the award are formally binding only upon the parties to the case, the logic of the award plainly favours the position of Vietnam in the dispute between it and China concerning the Paracels. Under such circumstances, it seems unlikely that coastal States adjacent the nine dash line would concede there is an area of overlapping entitlements to jointly manage pending delimitation.

At least in respect of fisheries management there may, however, be some limited scope for the establishment of a new regional fisheries management organisation (RFMO) as a means of joint management. The prospect is unlikely, but less unlikely than a convention joint development mechanisms which might implicitly concede that there are overlapping entitlements to delimit. Certainly, there are examples of RFMOs which have management roles both in respect of high seas stocks and fisheries within member States' EEZs, such as the African Subregional Fisheries Commission. The establishment of an RFMO may not seem a politically likely outcome but, I would submit, it is a more realistic prospect than a 'grey zone' or 'provisional arrangements' agreement which might implicitly concede the legitimacy of the Chinese claim.

Provisional arrangements or joint development zones

The advantages of provisional arrangements are reasonably obvious. Overlapping maritime claims may 'pose a constant irritant in bilateral relations' undermining 'peace and stability' and hinder effective:

- 'resource exploration and exploitation';
- 'conservation of living resources';
- measures to protect the marine environment; and
- maritime law enforcement 'against illegal activities', especially IUU fishing.⁴

Provisional arrangements have the potential to allow effective utilisation, management and protection of resources pending final delimitation. They are thus widely promoted in the literature as a worthwhile dispute management tool.

³ *Guyana v Suriname*, Award, 17 September 2007, para 461.

⁴ Tara Davenport, 'Provisional Arrangements of a Practical Nature: Problems and Prospects in Southeast Asia', Centre for International Law, National University Singapore, June 2012, <http://cil.nus.edu.sg/wp/wp-content/uploads/2012/06/TaraDavenport-Provisional-Arrangements-of-a-Practical-Nature.pdf>.

Nonetheless, as Schofield indicates there are a number of clear potential difficulties with provisional arrangements. The first is that they necessarily require a high degree of cooperation between the parties.⁵ They thus require significant political will to implement and the terms of their implementation risk, becoming a further source of dispute or vulnerable to changes in government policy or public sentiment on either side.⁶ There is also the distinct risk that they can be seen as incentivising or rewarding excessive maritime claims.⁷ When bound up with nationalist sentiment there is a risk that any such agreement may be seen as unduly compromising sovereign rights, and the simple act of entering in principle agreement to joint development may provoke a local political backlash.⁸ There may also be problems if the states involved favour different systems of resource exploitation management (such as conventional concessionary agreements as opposed to production sharing contracts).⁹ Finally, one may question their practical significance. As Schofield notes: 'Although there are now more than 20 joint development arrangements of various kinds around the world, few of those have actually resulted in significant development.'¹⁰

Schofield also makes the point that provisional arrangements are less likely to work the more complex the dispute, especially if there are more than two potentially affected parties. None of this bodes well for provisional or joint development arrangements in the South China Sea.

Regional fisheries management organisations (RFMOs) as a vehicle for provisional arrangements?

Given that a principal source of tension in the South China Sea dispute at present concerns which State is able to regulate fishing in which ocean area, one might anticipate that a RFMO might be a means of managing that aspect of the dispute.¹¹ That is, although States may be very concerned with where their maritime boundaries fall on a map, fish do not read maps. Governance arrangements may thus be established in respect of a fish stock independently (to some extent) of the maritime zones it inhabits.

In this context, an RFMO's primary function is to agree upon conservation and management measures. Such measures may be either recommendatory or binding upon member States. In practice, RFMOs have a wide discretion as to what conservation and management measures (if any) they adopt:

in order for a measure to be characterized as a 'conservation and management measure', it is sufficient that its purpose is to conserve and manage living resources and that ... it satisfies various technical requirements. ... Typically, ... states describe such measures by reference to such criteria as: the limitation of catches through quotas; the regulation of catches by prescribing periods and zones in which fishing is permitted; and the setting of limits on the size of fish which may be caught or the types of fishing gear which may be used.¹²

⁵ Clive Schofield, 'No Panacea: Challenges in the Application of Provisional Arrangements of a Practical Nature' in Myron H. Nordquist and John Norton Moore (eds), *Maritime Border Diplomacy* (Leiden: Nijhoff, 2012) p. 159.

⁶ Schofield, 'No Panacea', p. 163.

⁷ Schofield, 'No Panacea', p. 160.

⁸ Schofield, 'No Panacea', p. 159 and 162.

⁹ Schofield, 'No Panacea', p. 165.

¹⁰ Schofield, 'No Panacea', p. 167.

¹¹ This section draws substantially on Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), pp. 102 ff.

¹² *Fisheries Jurisdiction Case (Spain v. Canada)*, 1988 ICJ Rep 432, p. 461.

Nonetheless, if states in a region could agree measures such as closed seasons, permissible fishing gear and quotas on the harvesting of particular species this could help limit sources of tension in areas where fishing zones are disputed.

There could thus, perhaps, be some diplomatic advantage in relying on an RFMO as a form of provisional arrangement. In some cases it might be acceptable to establish an RFMO which made *recommendations* which all member States agreed to implement in respect of:

- waters under their sovereignty;
- fishing by their flag vessels; and
- the activities of their nationals.

This could allow States to fish in a common area without the need to have a final delimited boundary. Further, such an approach may also avoid being seen to agree to, even tacitly, the legitimacy of another State's EEZ claim. Indeed, at least technically, the language of *agreeing to implement* RFMO recommendations also avoids any inference that the RFMO itself is setting directly binding rules in respect of a member State's EEZ. On a purely bilateral basis this is roughly the approach taken in the agreement underpinning the Korea-Japan Joint Fisheries Committee.¹³

Nonetheless, this does not carry us very far. An RFMO also requires significant political will to establish. There is also no particularly compelling legal argument that there is a duty to establish an RFMO in an area such as the South China Sea. Arguments that there is a legal duty to establish an RFMO in the South China Seas would have to be founded in UNCLOS Articles 63, 64 or 123. I will deal with Article 123 first, and briefly, given its treatment in other issue briefs. Article 123 relevantly provides that:

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization: (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea ...

This, however, goes no further than a duty to use best endeavours to cooperate and cooperation through an organisation which could 'coordinate the management' of fish stocks would simply be an alternative to direct negotiations. Certainly, it might assist a political or practical argument that such an organisation should be established but it provides no particularly firm basis to conclude there is a legal duty to establish such an organisation.

Article 63 does not provide a much more promising alternative. Article 63 UNCLOS provides that the states interested in a stock not entirely contained within one EEZ 'shall seek, either directly or through appropriate ... regional organizations, to agree upon the measures necessary to coordinate and ensure [its] conservation and development.' This may occur where the one fish stock overlaps adjacent EEZs, or where the one stock occurs both within an EEZ and 'in an area beyond and adjacent to [that] zone'.¹⁴ In the latter case the duty to seek to agree upon conservation measures only applies to that high-seas fishery and not to any EEZ fishery. Further, under Article 63 as under Article 123, co-operation through an RFMO is merely an alternative to direct negotiations. The same is not true of Article 64 on highly migratory species, which provides that

¹³ See: Agreement on Fisheries between the Republic of Korea and Japan 1999 reproduced in Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Leiden: Brill, 2004), p. 327.

¹⁴ Article 63(2), UNCLOS.

'[t]he coastal state and other states whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and ... optimum utilization of such species ... both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists ... [the fishing] states ... shall cooperate to establish such an organization and participate in its work.'

Annex I includes various tuna species. Article 64 imposes a duty upon all states fishing for a listed species in a 'region' to establish an RFMO, if none exists, and then to 'participate' in it. While this might take us as far as suggesting there could or should be a new tuna RFMO with competency over the South China Sea, it would not resolve the question of how to govern fishing for other species which are *not* highly migratory.

Further, it is arguable that there is already a competent RFMO, indeed there are potentially two. The UN Food and Agriculture Organization's Asia-Pacific Fishery Commission (APFIC) notionally has competence in a broad area (the 'Asia Pacific Area') which encompasses the South China Sea.¹⁵ Its membership usefully includes numerous States with some interest in the South China Sea dispute including: Cambodia, China, Indonesia, Japan, Malaysia, Myanmar, Philippines, Republic of Korea, Thailand, United States of America, Viet Nam. While its functions include the conservation and management of fisheries resources generally, it only has the power to 'formulate and recommend measures' or 'carry out programmes' to this end.¹⁶ It is not a RFMO with the ability to implement binding conservation or management measures. The Western and Central Pacific Fisheries Commission was established in 2004 and is a highly-migratory species RFMO in the meaning of Article 64. Its management area encompasses the South China Sea.¹⁷ It has adopted a range of management measures in respect of Annex I tuna species,¹⁸ but has no wider mandate. The existence of the Commission does not appear to have had much impact on fisheries cooperation in the South China Sea more generally.

Conclusion: what role for international law absent joint development?

It is possible, perhaps, to be too negative about the prospects for peaceful resolution of the South China Sea dispute. Certainly the recent arbitral award has, over the short run, likely heightened tensions in fisheries disputes between the Philippines and China. Nonetheless, the award has reinforced the character of the dispute as being one about sovereign entitlement to regulate resource-extraction activities, principally fishing. The confrontations we are likely to see remain at the level, largely, of coast-guard vessels.

Coastguards have a number of clear advantages over navies:¹⁹

- there are pragmatic considerations: 'lawships' need different capabilities (and less firepower) to warships, and naval vessels are sometimes ill-suited to law enforcement tasks.

¹⁵ Art VI, Asia-Pacific Fishery Commission Agreement 1997.

¹⁶ Art IV(b)(ii), Asia-Pacific Fishery Commission Agreement 1997.

¹⁷ Art 3, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 2000.

¹⁸ See the present conservation and management measures in force at: <http://www.wcpfc.int/conservation-and-management-measures>.

¹⁹ Sam Bateman, 'Securing Australia's Maritime Approaches', *Security Challenges*, Vol 3, No 3, 2007, pp. 109-129; Sam Bateman, Maritime security governance in the Indian Ocean region, *Journal of the Indian Ocean Region*, Vol 12, No 1, 2016, pp. 5-23.

- coastguards allow peaceful assertions of sovereignty: arresting a foreign vessel with a warship is more likely to create an international dispute; sending 'civilian' coastguard vessels to police contested fishing grounds is less likely to further escalate a situation.
- opportunities for regional cooperation: coastguards can cooperate over joint fishing zones in a way navies might find difficult; coastguards create opportunities for cooperation where navies may be reluctant to exchange intelligence; and coastguards enable soft-power diplomacy through activities such as training exercises.

Optimistically, use of coastguards may thus habituate parties to a rule-of-law response to maritime disputes rather than a hard power response. Some commentators warn, however, that unarmed 'white painted' vessels may still be used for coercive action, or for policies of assertion without confrontation.²⁰ Examples of the latter include: China's use of China Marine Surveillance (CMS) and Fisheries Law Enforcement Command (FLEC) vessels to intercept USNS Impeccable (2009), and to interfere with Vietnamese and Philippines survey vessels (2011), and to force the retreat of Philippines from Scarborough Shoal (2012).

One may nonetheless cautiously suggest that even absent obvious paths towards joint development mechanisms in light of the *South China Sea* award the case has furthered the legalisation of the dispute, which helps contain the likelihood of military confrontation.

²⁰ Christian Le Mière, 'Coast Guard competition in East Asia', International Institute for Strategic Studies, 9 September 2013, <https://www.iiss.org/en/militarybalanceblog/blogsections/2013-1ec0/september-2013-1aeb/coast-guard-china-da6b>.