International Law in Managing Unsettled Maritime Boundaries: A Chinese Perspective

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1. Diplomatic efforts in settling boundary issues with neighboring countries

1.1. Land boundaries: Mostly done in the 1990s, especially:

- Vietnam: agreement: 12/30/1999
- Russia (west part): 09/03/1994
- Russia (east part) agreement: 05/16/1991; supplementary agreement: 10/14/2004; supplementary protocol: 07/21/2008 (finalized the 4300 km boundary with Russia)

1.2. Maritime boundaries: many remain unsolved


- South China Sea: declaration on a code of conduct (ASEAN and China, 2002)


- East China Sea: the “Principled Consensus” with Japan (06/18/2008)
2. Policies implied

2.1. Boundary stability is essential for China in creating harmonious international (regional) environment for its peaceful rise (development) >> 维稳 (maintaining stability)

- evidenced in the efforts in the past 20 years on land boundaries;
- ostensibly discarded the “naturalist” position (Jacques deLisle 1998) regarding boundary/territorial issues -- especially evidenced in the case of boundary agreements (east) with Russia
2.2. Maximizing national interests: the logic of “peaceful rise”

维权 (upholding rights)

- maritime boundary issues seem to be more difficult to handle: national interests awakened: natural resources, national security interests etc.

→ Searching for instruments (peaceful means) to achieve policy ends
3. International law’s role in achieving the policy ends

3.1. National Interests

- Post-war legal order in general is regarded as beneficial to China’s economic development (WTO etc., no unequal treaty argument post-1949, see also Jacques deLisle, 2000, p.273)

- National interests can be ensured and safeguarded in the process of international law making (Climate Change)
3.2. Stability

- Arrangements of boundaries/territory with IL basis will make them more acceptable to Chinese public opinion (expressed via internet etc.); otherwise danger of instability will be triggered by nationalist ideology (e.g., the May Fourth Movement).

- IL basis will also facilitate other parties ratification of arrangements for boundaries/territory by their legislatures (subject to constitutional structures) and thus promoting regional stability.

- Political compromises sometimes leave seeds for future confrontations (e.g., the China-U.S. Joint Communiqués etc.)
3.3. others (Geo-political etc.)

- less space for diplomatic manipulation when the opposite party has similar capacities—political, economic and military power. (e.g., Japan)

- eases worries of small countries in the region (ASEAN countries)
4. Potential and Limit

- Deng’s "we should also strengthen our study of international law." (1979) and the founding of Chinese Society of International Law in February 1980
- The Newly-established Department of Boundary and Ocean Affairs
- .......

- more confident today regarding IL:
  - with newly certain “might”; contrast with past suspicious attitude to IL, 'If there is right without might, the right will not prevail.' (LI Zhaojie, 2001, p.317)
  - elites with more international experience and perspectives, understanding normativity of IL.
However,

- Lack of legal culture/tradition
- Problems of capacity building
- …
Part 2.

IL in Managing Unsettled Maritime Issues: Good Faith and Reciprocity in a Dynamic Process of Dispute-Settlement
1. Why a Dynamic Process

- Rule of Law in IR has be maintained by auto-interpretations in diplomatic interactions rather than formal judicial process


- UN Art.33.1 provides great discretion for the states to chose what they like in peaceful settlement of their disputes, in an order of “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”
UNCLOS Article 298: Optional exceptions to applicability of section 2

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, 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. Such arrangements shall be without prejudice to the final delimitation.”
In sum:

- state-state negotiation is a default/primary route in settle/resolve maritime/concurrent territorial disputes, and mostly on provisional arrangements.

- there will be a “long and winding road”, and therefore need guidance in steering this dynamic process.
2. Good Faith and Reciprocity for “Provisional Arrangements” prior to Delimitation:

- At first glance, as merely a possible product under the obligation to negotiate in good faith, it seems that the provisional arrangement can be in any form or with whatever contents of which the countries in dispute can agree.

- Even if Article 74/83(3) issues a “blank check” with regard to the terms, form, or existence of a provisional arrangement, the principles of good faith and reciprocity are legal guidance to help countries to prudently draft provisional arrangements.
2.1. Overlapping Claims in Good Faith (basis)

- The unarticulated premise for the Provisional Arrangements etc.: disputed area **with overlapping claims** to CS title

Since para 3 of art.83 stipulates provisional arrangements etc. prior to delimitation, the principle object and purpose of para.3 is to further the provisional utilization of the area to be delimited, (Lagoni,1984, 354). The area for provisional arrangements etc is thus determined by the area for delimitation.

- The existence of a disputed area with overlapping claims to CS title is *sine qua non* for delimitation (Malcolm D. Evans 1989)
- “Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties laying claim…”(North Sea, papa.20, p.22)
- Para.3 obligation applies only to those areas about which the governments hold opposing views. (Lagoni,1984,356)
- Joint development is a part of provisional arrangements (which encourage exploration in the disputed area), it is made only between states (Miyoshi) and must be restricted in an area of overlapping claims (Lagoni)
- Precluding cooperative exploitation with foreign companies under business contracts.
Claims admissible as overlapping claims that constitute the dispute: claims in good faith

- The parties present their claims by unilateral acts; in doing so, “the parties must have acted in good faith, believing that their action was justified by existing international law” (Lagoni 1984, 356, where he cited sep.op. Jessup in the North Sea case, at 79)

- VCLT art.26, art.31

- Extreme claims: no valid basis in the present corpus of international law or if lacks a reasonable element of proportionality. (Lagoni 1984, 356)

- bona fide claims: used in proposals to LOS Conference

- prima facie claims: a prima facie basis (Nakatani, p.5)
To make a good faith claim, one must first find *prima facie* basis from the corpus of international law (treaty and customary law), and accordingly interpret it in *good faith* in order to make the claim as such.

While a *prima facie* source of law and good faith interpretation are the basic elements, (dis)qualifying factors also need to be considered.

- estoppels;
- Inter-temporal law;
- “authoritative” interpretations: judicial decisions and writings
- Others: Resolutions of UNGA; Resolutions of the COPs/MOPs if properly authorized; and decisions by other authorities / international organizations
2.2. Principle of reciprocity

- The purpose of the provisional arrangements: legal stability

- The implication of reciprocity in provisional arrangements (dynamic aspect); a well-balanced treatment of the claims in good faith of each country (while proportionality matters) (static aspect)
3. Some Remarks on Good Faith and Reciprocity

- Considering the complexity of the issues of law and fact, it must be admitted that good faith claims are not fixed or definite, but are constructed by the interaction of the parties—including the entire process that extends from negotiating provisional arrangements to settling on permanent joint development or to reaching a final agreement of delimitation.
The first step to bring about the complex interaction will be extremely difficult for the parties to take. In order for the first step to be feasible, the threshold for good faith claims should be set at a minimum standard. It means that, though not to exclude complex issues like interpretation, estoppel, or inter-temporal law, the minimum requirement for such a claim to have a prima facie basis in international law would be sufficient as the underpinning of a provisional arrangement.
By the same token, parties’ adherence to the principle of reciprocity can help steer the dynamic process of claim making and negotiation to a result that accords with requirements of proportionality (which does not necessarily require that each provisional arrangement be equal or proportional).
Again, to meet the feasibility concern in negotiating an initial arrangement, reciprocity requires that the parties’ respective good faith, prima facie claims be reflected in a manner consistent with proportionality. At later stages, observance of the requirement of reciprocity will be vital to maintain stability and to sustain negotiations—often under a set of provisional arrangements that will take adequate account of each side’s good faith legal claims and legitimate interests (involving fine legal arguments)—toward a final settlement (if still in need!)
Thank You!