China's erosion of UNCLOS: Distortion through domestic legislation and interpretation

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1 Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) of 1982, also known as "the constitution of the oceans," establishes an objective framework for coordinating handling of the use of the sea by states in the exercise of their legislative, judicial and executive powers. Its provisions are intended to be incorporated into national legislation for domestic implementation.[1] The Convention is a universal multilateral convention to which 168 countries join as parties as of December 31, 2022. Generally, States Parties to UNCLOS enact national legislation to implement UNCLOS provisions in their countries. As UNCLOS codified customary international law on the sea, and 40 years have now passed since the adoption of the Convention, many of the articles of UNCLOS have also acquired the status of the rules of customary international law for non-State Parties to the Convention.

In order to establish the "rule of law" in international community, each county must comply with treaties and international customary law. It is for this reason that each country normally stipulate in its constitution the obligation to comply with international law.[2] However, there is no article in the Constitution of the People's Republic of China that refers to the relationship with international law. As a result, it is not clear how China views the relationship between treaties, which are typical of international law, and its Constitution, nor is it clear the order of priority between its domestic laws and international law. It bears noting that under its Constitution China grants the National People's Congress and the National People's Congress Standing Committee exercise the legislative power of the state.[3] The problem is that China's legislative bodies, in enacting domestic laws to fulfill treaty obligations, distort those obligations in domestic laws for the purpose of securing their own national interests. There are two aspects to this distortion, the first being distortion by domestic legislation and the second being distortion by self-serving interpretation of the UNCLOS articles.

Indeed, the Chinese government shows no hesitation to enact domestic legislation that diverges from the text of UNCLOS in order to secure its own "core interests." Notwithstanding the fact that China is a State Party to UNCLOS, it enacts domestic legislation that conflicts with UNCLOS articles and adopts a different interpretation of UNCLOS than other States Parties in order to secure its own maritime interests. Conventionally, any State Party would be expected to interpret its domestic laws in conformity with the Convention, in other words UNCLOS, but China makes no attempt to do so. It rather continues to utilize its own enactment of domestic legislation that conflicts with the provisions of UNCLOS to exert pressure on neighboring countries.

However, a multilateral treaty like UNCLOS is established by the agreement of the negotiating States, or to put it another way, by the common will of those States. A treaty, which therefore represents such an agreement, cannot be unilaterally changed on the will of an individual nation, in this case China, through the enactment of domestic legislation. The Vienna Convention on the Law of Treaties (1969) to which China is a Party, stipulates that, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Article 26), and confirms that, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27). This point has been confirmed in the Advisory Opinion of 1988 handed down by the International Court of Justice in the case of the Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of June 1947, which states that, "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[4]

In the world of the 21st century, China's ready willingness to deviate from the international legal order through self-serving interpretation of the articles of UNCLOS is a violation of the rules of international law, and gives rise to various disputes with neighboring countries in the South China Sea and East China Sea.

2 Distortion of UNCLOS through domestic legislation

(1) Denial of the right of innocent passage of foreign military ves els in the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone

1 Soji Yamamoto, "The historical meaning of UNCLOS" in *Kokusai Mondai (International Affairs)*, No.617 (2012), p. 1.
2 For example, Article 98.2 of the Constitution of Japan stipulates that, "The treaties concluded by Japan and established laws of nations shall be faithfully observed." "Established laws of nations" refers to international customary law.
3 Constitution of the People's Republic of China, Article 58.
4 Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters agreement of June 1947, Advisory Opinion of 26 April 1988, *ICJ Reports 1988*, pp.34-35, para.57.

The Law on the Territorial Sea and the Contiguous Zone (1992) is a Chinese domestic law that is comprised of 17 articles and, with two exceptions, is generally in line with Part II (Territorial Sea and Contiguous Zone) of UNCLOS.

The first exception is that regardless of the fact that UNCLOS recognizes the right of innocent passage in foreign waters for all vessels, including military vessels, Article 6 Paragraph 2 of the Law on the Territorial Sea and the Contiguous Zone stipulates that, "Foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China," thus adopting a system of prior permission for the passage of foreign military vessels in Chinese territorial waters.[5] Mr. Tommy Koh, who served as President of the Third United Nations Conference on the Law of the Sea at which UNCLOS was adopted, stated plainly, "I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State."[6] In other words, China's Law Concerning the Territorial Sea and the Contiguous Zone violates the provisions set forth in UNCLOS. This point has been confirmed by the International Tribunal for the Law of the Sea (ITLOS), in a Provisional Measures Order issued in the Case Concerning the Detention of Three Ukrainian Naval Vessels (2019), which uses the expression, "Under the Convention, passage regimes, such as innocent or transit passage, apply to all ships" (paragraph 68).[7]

(2) Extension of jurisdiction of national security to the contiguous zone

The second exception is Article 13 of the same law, which stipulates that, "The People's Republic of China has the right to exercise control in the contiguous zone to prevent and impose penalties for activities infringing the laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters or territorial sea." China has added "security" to the beginning of the list provided by Article 33 of UNCLOS that states, the "infringements of customs, fiscal, immigration or sanitary laws." In this manner, China has extended the right to exercise control concerning security to the contiguous zones.[8] This provision is clearly in violation of UNCLOS.

The result is an asymmetry with respect to the contiguous zone between China and neighboring Japan. On an almost daily basis China Coast Guard vessels enter the contiguous zone in the vicinity of the Senkaku Islands, over which Japan exerts effective control. However, although Japan Coast Guard patrol vessels engage in surveillance and warning measures in the surrounding waters to guard against intrusion into territorial waters, they do not refuse to allow China Coast Guard vessels to enter Japan's contiguous zone on security grounds. The reverse, however, is not the case. This is because not only vessels of Japan, but also military and government vessels of other countries are unable to enjoy freedom of navigation in China's territorial waters or contiguous zone.

(3) Distortion of UNCLOS through the Coast Guard Law of the People's Republic of China

(i) Vague concept of "waters under the jurisdiction of China"

It was in 2021 and the enactment of the China Coast Guard Law that China's expansion of jurisdictional rights emerged as a tangible threat to other countries.[9] Under international law, the maritime areas over which coastal states may exercise enforcement jurisdiction and the conditions under which they may do so are clearly defined in UNCLOS, and the exercise of enforcement jurisdiction under domestic laws that stipulate a different maritime area or conditions is illegal under international law, and violates the sovereignty and jurisdiction of other countries.

The China Coast Guard Law stipulates the maritime areas where the China Coast Guard (CCG) engages in activities to be the following: "Where the coast guard agency conducts the activities of maritime rights protection and law enforcement on and over the waters under the jurisdiction of the People's Republic of China (hereinafter referred to as the 'waters under the jurisdiction of China'), this Law shall apply" (Article 3).[10] Under the provisions of UNCLOS the maritime areas under a state's jurisdiction are internal waters, territorial seas, contiguous zone, exclusive economic zone (EEZ), and continental shelf (including extended continental shelf). However, in its domestic law, China creates the vague concept of "waters under the jurisdiction of China," specifying clearly that the CCG will engage in law enforcement operations to protect maritime interests in waters over which they would not be able to exercise jurisdiction under the terms of UNCLOS (e.g. waters within the nine-dash line in the South China Sea). What should be noted here is that the law refers to the coast guard agency "conducting the activities of maritime rights protection and law enforcement on and over the waters." While airspace over territorial waters is indeed territorial airspace, and it is permissible under international law for a subordinate state to exercise jurisdiction over airspace violations, freedom of overflight above a country's EEZ is permitted in the same way as for the high seas. Any attempt to exercise jurisdictional rights over such areas would be a violation of international law and also of UNCLOS.

The issue is that the country enacting these domestic laws in violation of international law is the country with the largest maritime police agency in the world. China refuses to recognize the Philippines' EEZ claim based on its assertions regarding the

5 However, it is said that there are more than 40 countries that either do not recognize the right of innocent passage for foreign military vessels, or place some kind of restriction on it. Eleanor Freund, *Freedom Navigation in the South China Sea: A Practical Guide*, Harvard Kennedy School Belfer Center, Special Report June 2017, p.12, note 2.

6 As cited in B. H. Oxman, *The Regime of Warship under the United Nations Convention on the Law of the Sea*, 24 Virginia Journal of international Law, 854 (1984).

7 ITLOS, Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures Order, May 25, 2019, para.68.

8 The five countries that have asserted claims to extend jurisdiction of national securuty to the contiguous zone are Cambodia, China, Sudan, Syria and Vietnam.

9 For a comprehensive analysis of this law, see Raul (Pete) Pedrozo, Maritime Police Law of the People's Republic of China, 97 Int'l. L. Stud. 465 (2021), pp.467-471.

10 https://www.lawinfochina.com/display.aspx?lib=law&id=34610

nine-dash line in the South China Sea and obstructs the operations of Philippine fishing vessels. China, exercising its legislative jurisdiction, has, based on its Territorial Sea Law, sought to establish territorial waters in the vicinity of the Senkaku Islands, which are inherentJapanese territory. By so doing, this ensures that under Chinese domestic law China can claim against Japan that the waters are "China's territorial waters" or "waters under the jurisdiction of China" and exercise enforcement jurisdiction over them.

(ii) Enforcement measures against foreign military vessels and foreign government vessels

The China Coast Guard Law stipulates that in the event that a situation arises in which foreign military vessels or foreign government vessels operated for non-commercial purposes (e.g. patrol vessels of the Japan Coast Guard) violate China's domestic laws in waters under the jurisdiction of China, then "the coast guard agency shall have the power to take necessary precautionary and control measures to stop such vessel and order it to immediately leave the relevant waters; and if it refuses to leave and causes serious harm or presents a serious threat, the coast guard agency shall have the power to take such measures as forcible expulsion and forcible ejection by towing" (Article 21).

However, UNCLOS stipulates that, "…nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes" (Article 32), and grants immunity from the enforcement jurisdiction of coastal states over government vessels. If the CCG were to implement "forced towing" or other measures against such foreign military or government vessels, it would constitute a violation of UNCLOS. What is more, with regard to military vessels, under the provisions of UNCLOS coastal states are limited to requiring such ships to leave the territorial sea (Article 30), and if a clause "applying the provisions of relevant laws" were to imply any further measures, it would be a violation of UNCLOS. This article would appear to set out in writing China's intention to counter the United States that conducts freedom of navigation operations in the South China Sea.

Article 120 of the revised Maritime Traffic Safety Law (2021) stipulates that, "Where official vessels of foreign nationality navigating, berthing or operating in the territorial sea of the People's Republic of China violate the laws or administrative regulations of the People's Republic of China, they shall be punished in accordance with the relevant laws and administrative regulations. The relevant laws shall be applicable to the administration of foreign military vessels within the sea areas under the jurisdiction of the People's Republic of China."[11] In the case of the East China Sea, there are concerns that this could affect Japanese government vessels engaged in oceanic surveys in territorial waters around the Senkaku Islands. Furthermore, although this article stipulates that measures shall be taken in accordance with relevant laws, etc., given that, as noted above, UNCLOS grants immunity to military vessels and other government vessels operated for non-commercial purposes. Therefore, if such measures were to be actually executed, they would constitute a violation of UNCLOS.

(iii) Vagueness of criteria relating to the use of weapons

Article 22 of the China Coast Guard Law states, "When the national sovereignty, sovereign rights, or jurisdiction is being illegally violated at sea by a foreign organization or individual, or is in imminent danger of illegal violation, the coast guard agency shall have the power to take all necessary measures including the use of weapons to stop the violation and eliminate the danger according to this Law and other applicable laws and regulations." Whether the "foreign organization" referred to in this text means a "foreign state organization" or a "foreign terrorist organization" remains unclear, but given that it envisages cases in which national sovereignty is violated, it can be understood to include a "foreign state organization." Also, Article 46 stipulates that, "In any of the following circumstances, coast guard agency personnel may use police equipment or other equipment and tools on the spot." These circumstances include: "(2) forcibly evicted or towed away from the ship according to law; and (3) obstacles or nuisances encountered in the execution of duties according to law." Furthermore, Article 49 provides that, "coast guard agency personnel who use weapons in accordance with the law but are too late to warn or may cause more serious harm after warning, they may use weapons directly.."

It can thus be inferred from the text of the Coast Guard Law that Article 22 extends the scope of the use of weapons to use against foreign state organizations, and that Articles 46 and 49 permit more aggressive use of weapons. The possibility cannot be ruled out that CCG vessels, which claim the waters surrounding the Senkaku Islands as their territorial waters over which they have sovereignty, and which are following Japanese fishing vessels, could resort to the use of weapons. Furthermore, with regard to the stipulation of Article 46 (3) that refers to a situation in which "coast guard agency personnel encounter obstacles or nuisances in the execution of duties according to law," if a Japan Coast Guard patrol vessel were to intercept a CCG vessel following a Japanese fishing vessel in waters surrounding the Senkaku Islands, there is an undeniable possibility that such an act may be deemed to be "obstacles or nuisances" with the result that the CCG vessel may use weapons. Japan needs to be prepared to respond to any such new moves by China.

Another part of the China Coast Guard Law that cannot be overlooked is the text of Article 83, which stipulates, "the coast guard agency perform defense operations and other tasks in accordance with the "National Defense Law of the People's Republic of China", the "People's Armed Police Law of the People's Republic of China" and other relevant laws, military regulations and orders of the Central Military Commission." In other words, the China Coast Guard is clearly identified as an organization possessed of dual functions: firstly, naval functions of conducting defensive operations in waters under China's

11 Raul (Pete) Pedrozo, China's Revised Maritime Traffic Safety Law, 97 Int' L. Stud. 967 (2021).

jurisdiction (military activities), and secondly, the functions of a maritime law enforcement organization (law enforcement activities). The law has thus transformed the CCG into an organization with a foreign defense mission. The likely result is that the China Coast Guard's military aspect is expected to be strengthened, , with an increase in the size and armament of its equipment.

In this way, it can be seen that China is codifying into domestic law measures that distort its obligations under UNCLOS for the purpose of ensuring its own maritime interests.

3 Distortion of UNCLOS through self-serving interpretation

A typical example of China's attempts to distort UNCLOS through its own interpretation can be seen in the Chinese government's interpretation of the Award by the Arbitral Tribunal in the matter of the South China Sea Arbitration of 2016. Neighboring countries are resisting this interpretation on the basis of the text of UNCLOS. The text of UNCLOS is interpreted and developed by international judicial bodies, such as the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), and arbitral tribunals as provided for under Annex VII of UNCLOS. However, China refuses to comply with such arbitral awards, and continues to apply relevant domestic laws that conflict with UNCLOS. This stance has resulted in confrontation with neighboring countries that are abiding by the provisions of UNCLOS.

In the Award in the matter of the South China Sea Arbitration on July 12, 2016, the Arbitral Tribunal ruled that, "…the Tribunal concludes that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention,"[12] thus denying China's claims with regard to the nine-dash line. Notwithstanding this conclusion, China declared the award illegal and invalid and refuses to implement it. However, Article 296 Paragraph 1 of UNCLOS stipulates that, "Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute," which recognizes the award to be *res judicata* (a matter already judged). China's refusal to implement the award violates this provision.

However, in a Note Verbale dated 2 June 2020 addressed to the Secretary-General of the United Nations, China restated its stance, claiming that, "China has historic rights in the South China Sea. China's sovereignty over Nanhai Zhudao and its maritime rights and interests in the South China Sea are established in the long course of historical practice and consistent with international law, including the Charter of the United Nations and UNCLOS" (Paragraph 1), and going on to add that, "The Arbitral Tribunal exercises jurisdiction *ultra vires*, clearly errs in ascertaining facts and applying the law. The conduct of the Arbitral Tribunal and its awards…gravely infringe China's legitimate rights as a sovereign State and a State Party to UNCLOS, and thus are unjust and unlawful. The Chinese Government has solemnly declared that China neither accepts nor recognizes the awards. This position is consistent with international law." (Paragraph 3)[13]

However, it is clear that it is China and not the Award in the abovementioned matter that is mistaken. Countering these claims by China, in a Note Verbale written in 2021 New Zealand observed that, "There is no legal basis for states to claim 'historic rights' with respect to maritime areas in the South China Sea, as confirmed in the 2016 South China Sea Arbitral Award."[14]

Of recent note in matters relating to the South China Sea are China's claims to archipelagic baselines. UNCLOS provides that countries, such as the Philippines or Indonesia, that are constituted wholly by one or more archipelagos are archipelagic states, and the breadth of territorial seas and other areas of these archipelagic states shall be recognized using archipelagic baselines that link the outermost points of the outermost islands (Article 47.1 and Article 48). China, a continental state, declared straight baselines around the Paracel Islands (Xisha Islands) in the South China Sea in 1996 and around the Senkaku Islands in the East China Sea in 2012. In the near future there is a possibility that it might adopt straight baselines around other islands in the South China Sea.[15] In fact, Chinese researchers assert that Part V of UNCLOS does not clearly stipulate whether the archipelago system is applicable to offshore archipelagos of continental states.[16] It goes without saying that an offshore archipelago is one that does not fulfil the geographic conditions stipulated in Article 7 (straight baselines) and Article 47 (archipelagic baselines) of UNCLOS. However, as Professors Churchill and Lowe clearly note, only archipelagic states may declare archipelagic baselines around archipelagos. Archipelagic states do not include continental states that possess offshore archipelagos. In other words, Denmark (Faroe Islands), Ecuador (Galapagos Islands), Norway (Svalbard Islands), Portugal (Azores Islands), and Spain (Canary Islands) also cannot draw archipelagic baselines nor straight baselines around the islands.[17]

Even if there are any "ambiguities" or "omissions" in the text of UNCLOS, as claimed by Chinese commentators who are supportive of straight baselines around the offshore archipelagos, it does not mean that a coastal state can draw a straight baseline to an archipelago that does not fulfil the conditions of either Article 7 or Article 47 of UNCLOS. In actual fact, the Award in the matter of the South China Sea Arbitration stated that, "…the Tribunal is aware of the practice of some States in employing straight baselines with respect to offshore archipelagos to

12 In the matter of the South China Sea Arbitration, at p.111, para.261.
13 Note Verbale dated 2 June 2020 from the Permanent Mission of the People's Republic of China to the United Nations addressed to the Secretary-General of the United Nations, CML/46/2020.
14 Note Verbale dated 3 August 2021 from the Permanent Mission of New Zealand to the United Nations addressed to the Secretary-General of the United Nations, Note Verbale No. 08/21/02.
15 Hua Zhang, The Application of Straight Baselines to Mid-Ocean Archipelagos Belonging to Continental States: A Chinese Lawyer's Perspective, Dai Tamada and Keyuan Zou (eds.) Implementation of the United Nations Convention on the Law of the Sea, 115(2021).
16 Jiang Li and Zhang Jie, A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea, 2010 China Ocean Law Review 167 (2010).
17 R.R. Churchill and A. V. Lowe, The Law of the Sea, 3rd ed., 120 (1999).

approximate the effect of archipelagic baselines. In the Tribunal's view, any application of straight baselines to the Spratly Islands in this fashion would be contrary to the Convention."[18][19] Prof. J. Ashley Roach clearly observes that, "Using straight baselines to enclose offshore archipelagos—that do not qualify as archipelagic states under Article 46 of the Law of the Sea Convention—is not authorized by the Convention or customary international law."[20]

4 Conclusion

Japan and the international community must remain vigilant in the face of China's aggressive maritime expansion. The recent actions of a maritime expansionist China in the South China Sea and East China Sea are due to its efforts to "change the status quo by force," backed by its military capabilities and maritime police agencies.

At a seminar held on May 22 and 23, 2021 jointly hosted by the Chinese Society of International Law and Hainan University on the theme of "Xi Jinping Thought on the legalism (rule by law) and international law," participants discussed the application of international law from the perspective of studying and operating international law in accordance with Xi Jinping Thought on the legalism.[21] According to one Chinese researcher, while General Secretary Xi Jinping states on the one hand that, "the basic principles and rules of international law are the cornerstone for building and maintaining the fundamental order of the modern international community," he also notes that, "encouraging the perfection of international law is an important means to transform the unfair and irrational systems of global governance and promote the building of a more just and rational international order and international system," and goes on to state that, "all States should oppose distortions of international law and exercise their right to oppose acts that violate the legitimate rights and interests of other States and undermine peace and stability in the name of the 'rule of law.'"[22] In other words, Xi recognizes that the current international legal order is subject to distortion and his view is that it is therefore necessary to build a more just and rational international order and system, or, in other words, to perfect an international legal order that reflects China's own interests. While it is certainly the case that the current international legal order may not be perfect in all aspects, such a state of imperfection cannot be given as a reason for ignoring international legal rules that are inconvenient to one's own country.

At the Chinese Communist Party Congress, which concluded on October 22, 2022, "two establishments" were incorporated into the Party Constitution, establishing Xi's "core position" within the Chinese Communist Party and the "guiding role" of Xi Jinping Thought. Looking ahead, it will be necessary to seek to ascertain how "Xi Jinping Thought on the legalism" will be applied to international law. It is necessary to carefully monitor China's moves to see whether it will shift to a stance of adhering sincerely to the provisions of UNCLOS, or whether it will emphasize distortions of UNCLOS and maintain domestic legislation and interpretations that modify UNCLOS for domestic implementation.

18 Award, *supra* note 12, at p.237, para.575.
19 https://amti.csis.org/reading-between-lines-next-spratly-dispute/ (last accessed:20 November 2022)
20 J. Ashley Roach, Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim? 49 OC&IL, 190-191(2018).
21 Seminar held on "Xi Jinping Thought on the Legalism and International Law," *People's Daily*, May 23, 2021 http://cpc.people.com.cn/n1/2021/0523/c64387-32110805.html (Last accessed: 2023.1.9)
22 Xiao Zhang, "Respect the Authority of International Law and Maintain International Order," *People's Daily*, October 16, 2018 http://theory.people.com.cn/n1/2018/1016/c40531-30344197.html (Last accessed: 2023.1.19)