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CHINA AND THE PUBLIC ORDER OF THE OCEANS

*Charles H. Norchi**

The contributors to this Symposium issue of the *Oceans and Coastal Law Journal* appraise a critical marine matter of our time: how China participates in the public order of the oceans. The vast and intense ocean space is the locus of claims made by a wide array of participants of which China is a newly invigorated player. Although traditionally a land power, China has a deep history of oceans activities. As Henry Kissinger has written

[I]n the early years of the Ming Dynast, between 1405 and 1433, China launched one of history's most remarkable and mysterious naval enterprises: Admiral Zheng He set out in fleets of technologically unparalleled "treasure ships" to destinations as far as Java, India, the Horn of Africa, and the Straits of Hormuz.¹

At the time of Zheng's voyages, the European age of exploration had not yet begun.² China's fleet possessed what would have seemed an unbridgeable technological advantage; in the size, sophistication, and number of its vessels, it dwarfed the Spanish Armada (which was still 150 years away).³

China has not recently risen as an entirely new power. When Empires were supreme and nation-states embryonic China was a major actor. Again as Kissinger notes, "[t]hrough many millennia of Chinese civilization, China was never obliged to deal with other countries or civilizations that were comparable to it in scale and sophistication."⁴ After a long period of relative ocean dormancy China again occupies a

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1. HENRY KISSINGER, ON CHINA 9 (2011).

2. *See id.*

3. *Id.*

4. *Id.* at 8

seat at the global maritime table while compelling major and minor players to appraise deeply held identifications, expectations, and newly asserted demands.⁵ The role of a newly invigorated world ocean power in this contemporary post-bi-polar world of extremes and uncertainty is cause for reflection and appraisal.

This *Ocean and Coastal Law Journal* Symposium appraises ocean claims in which China, the United States, and other actors are embroiled.⁶ The contributors are scholars and policy practitioners from China and the United States. The appraisal of those claims and the policy solutions urged are inevitably informed by the standpoints of the contributors who are Chinese and American and who possess military, governmental, and academic backgrounds. The reader will note certain contrasts in the contributors' characterization of claims, understanding of history, interpretation of incidents, and framing of customary and conventional international law of the sea. That, in itself, is an insight into the problem.

China's marine legal system is the subject of the contribution by Ms. Wu Jilu, a Senior Research Fellow at the China Institute for Marine Affairs. She describes the trends in the evolution of China's legal marine and maritime regime, identifies key challenges, offers projections, and considers future developments and the alternatives. Her article emphasizes that understanding China's complex marine legal framework requires a comprehensive and interdisciplinary analysis. Against a backdrop of conflicting regional demands and claims, Ms. Jilu clarifies the formation and contemporary functioning of the marine legal system of China.

To effectively unpack law and policy Harold Lasswell urged asking, "[w]ho says what, in which channel to whom, with what effect?"⁷ In that analytical tradition Jonathan G. Odom, a Commander and active-duty Judge Advocate in the U.S. Navy, considers the Chinese government's flow of words and flow of behavior assessed against prescriptions expressed in the United Nations Law of the Sea Convention (UNCLOS).

5. See generally AARON L. FRIEDBERG, *A CONTEST FOR SUPREMACY* (2011).

6. Claims are "made upon participants in the world process to respond . . . to the extant or probable consequences of acts in [a] particular case[s]. . . . A claim demands attention and activates a response, which implements and even creates policy." W. MICHAEL REISMAN, *Private Armies in a Global War System: Prologue to Decision*, in *INTERNATIONAL LAW ESSAYS* 157 (Myres S. McDougal & W. Michael Reisman, eds., 1981).

7. HAROLD D. LASSWELL, *The Structure and Function of Communication in Society*, in *THE COMMUNICATION OF IDEAS* (Lyman Bryson, ed., 1964). See also, DEREK MCDUGALL, *HAROLD LASSWELL AND THE STUDY OF INTERNATIONAL RELATIONS* (1984).

Commander Odom asserts that China's rhetoric on law of the sea questions the existing international legal order. Legal processes are a form of communication of which the rhetoric of national elites is a key component. Commander Odom raises important questions about the intent of official rhetoric, the selection of target audiences, and plausible outcomes for the law of the sea.

The South China Sea is critical for its natural resources, strategic position, and international navigation routes, which are the objects of conflicting claims. Guifang (Julia) Xue, Director of The Institute for the Law of the Sea of the Ocean University of China, writes of expectations and claims that render the South China Seas an arena of intense competition and an area fraught with peril for world public order. She examines foundational issues contributing to increasing competition and analyzes implications for Chinese interests. Recent continental shelf submissions by South China Sea-bordering countries have augmented the competition in the region. Ms. Xue appraises the legal value of China's maritime boundary—commonly referred to as the U-Shaped Line—tracing its historical evolution and trends in Chinese legislation. Finally, Ms. Xue asserts that, in order to serve its long term national interests, it is vital for China to define its claims based on international law by bringing its claims into conformity with UNCLOS.

Raul (Pete) Pedrozo, retired U.S. Navy Captain and Associate Professor in International Law at the United States Naval War College, examines a trend that he describes as China's Great Wall at Sea. Captain Pedrozo considers what he perceives as capitulation and appeasement to Chinese demands and claims in the South China Sea and beyond. He posits that the United States has failed to take action in the face of Chinese objections to U.S. intervention in the South China, East China, and Yellow Seas, and expresses concern that regional states have been forced to yield to Chinese pressure. Captain Pedrozo urges the United States and its allies to adopt immediate steps to counter China's resurgence in its self-proclaimed zone of influence.

Each contributor affirms that national elites and other actors who are examining state behavior, international incidents, and elite responses to them are now making critical decisions pertaining to China and the oceans. "The law," as Judge Hardy Dillard famously wrote, "is a constantly evolving process of decision-making and the way it evolves will depend on the knowledge and insights of the decision-makers."⁸ Thus it is critical that such decision-makers draw upon intellectual maps

8. Hardy Dillard, *The Policy-Oriented Approach to Law*, 40 VA. L. REV. 626, 629 (1964).

to be fully oriented to stark policy problems. This Symposium contributes to that need.

The law of the sea, as all law, is driven by subjective choices about appropriate goals and policies. By appraising claims in conflict, by assessing diverging expectations and demands, and by evaluating how best to shape and maintain our oceans values, a common interest of the oceans can be clarified. As Myres McDougal and William Burke wrote

[t]he historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertion of special interests in contravention of general community interest.”⁹

Whether the oceans demands and claims considered in this volume will be resolved in the common interest of the world community is an evolving question. However the diversity of perspectives on China and the oceans that are presented in these pages cumulatively reveal a coherent picture of unresolved claims and ongoing challenges. In so doing they underscore the urgent task of clarifying and achieving a common oceans interest. This is critical for China, the United States, and the public order of the oceans.

9. MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 1 (1962).