

Dr Bill Hayton, Associate Fellow, Asia-Pacific Programme, Chatham House – Written evidence (UNC0012)

UNCLOS: fit for purpose in the 21st century?

Submission to the House of Lords International Relations and Defence Committee

Dr Bill Hayton, Associate Fellow, Asia-Pacific Programme, Chatham House, and Author of 'The South China Sea: the struggle for power in Asia'

Introduction

10 December 2022 will be the fortieth anniversary of the first state signatures being applied to the United Nations Convention on the Law of the Sea (UNCLOS). 109 countries chose to sign that day. The UK (along with the United States and West Germany) did not, mainly because of a disagreement over the rules for deep seabed mining.¹ Nonetheless, UNCLOS came into force on 16 November 1994, following its ratification by 60 states. Shortly after the Labour government came to power in 1997, the UK revised its position and, on 25 July, acceded to UNCLOS. To date, UNCLOS has been ratified by all but 15 members of the United Nations. Seven of these 15 refuseniks are landlocked countries, but the United States, Iran and North Korea are also among them.

In the past 40 years, UNCLOS has become the foundation of global ocean governance. Its simple existence has not resolved every disagreement, but its rules and principles have been used to settle or manage dozens of maritime disputes. In the region that I focus on, Southeast Asia, several states have changed their domestic laws and adjusted their maritime claims to bring them into line with UNCLOS and thereby resolve boundary and other disputes with their neighbours. UNCLOS has proved its worth and should be defended and celebrated.

Challenges to UNCLOS

Challenges to UNCLOS come in two main forms: long-standing claims which are at odds with the principles of the treaty, and new claims by rising powers. Many states have maintained domestic laws that are at odds with their UNCLOS commitments. These include laws in Brazil, India and Malaysia (among others) that require warships to seek permission before entering the country's 'Exclusive Economic Zone'. Since 1979, the United States has operated a 'Freedom of Navigation' (FON) Programme to challenge such regulations through both diplomatic communications and the physical presence of American warships. The State Department's annually published FON Report offers a good summary of US

¹ D. H. Anderson, 'British Accession to the UN Convention on the Law of the Sea' in *The International and Comparative Law Quarterly*, Vol. 46, No. 4 (Oct., 1997), pp. 761-786

objections to these domestic laws, and most of these objections would be shared by the UK.

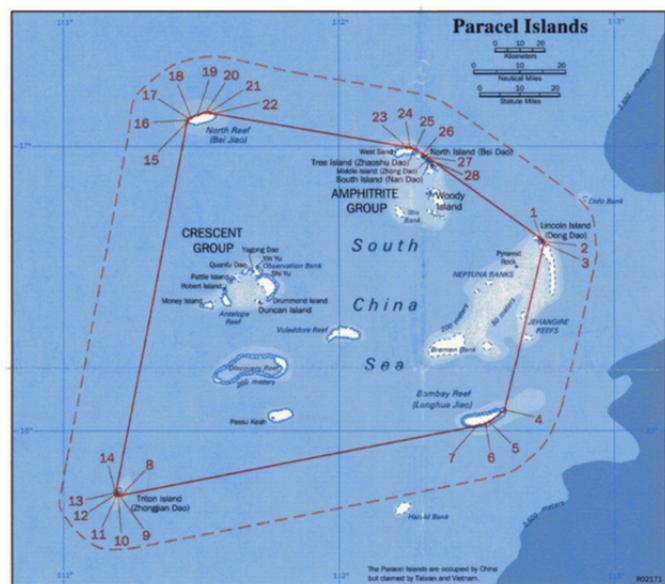
New threats to UNCLOS come in the form of rising powers attempting to assert innovative claims that violate the terms of the treaty or asserting alternative legal bases for maritime rules. The two most troubling contemporary examples of this involve Turkey in the eastern Mediterranean and China in the South China Sea. Others are better informed about Turkey's recent actions. In this submission, I will address China's behaviour.

China's claims in the South China Sea

The People's Republic of China became a full member of the United Nations in 1971, just in time to play a full part in the negotiations that resulted in UNCLOS. It signed the UNCLOS text in 1982 and ratified it in 1996.

Paracel Island Baselines

On 15 May 1996, three weeks before its formal ratification of UNCLOS, China declared a set of 'straight baselines' around its coastline. In principle, this is allowed under UNCLOS (the UK has some straight baselines, for example). However, some of the Chinese baselines appear to be out of conformity with UNCLOS. This is particularly true of the straight baselines drawn around the Paracel Islands. This is not allowable under UNCLOS. Only archipelagic states – countries that are entirely made up of islands (such as Indonesia or the Philippines) – are permitted to do this. The PRC declared the area within these baselines to be 'internal waters' – and therefore



not subject to 'innocent passage'. The area of 'internal waters' claimed by the PRC in the Paracels is much larger than the 'territorial waters' that surround each of the individual islands. (This is illustrated in the map right, drawn by the US Department of State.) China's Paracel Islands baselines contravene the principles laid down in UNCLOS and have been challenged by the UK both legally and physically, notably by HMS Albion making a transit through the islands in 2018. News reports suggested that a Chinese warship and helicopters had harassed HMS Albion during its transit.

Exclusive Economic Zone vs 'historic rights'

When China ratified UNCLOS it made a declaration explicitly stating that it claimed 'sovereign rights and jurisdiction' over an Exclusive Economic Zone of

200 nautical miles. However, the Exclusive Economic Zone law that China adopted two years later (26 June 1998) included a phrase stating that the incorporation of UNCLOS rules into Chinese legislation “shall not affect” (*bu yingxiang*) China’s “historic rights” (*lishixing quanli*).² This is the single greatest cause of instability in the South China Sea today.

The Chinese government has never clearly defined its claims in the South China Sea. My own archival research has led me to the conclusion that China’s claims emerged in a haphazard fashion in the years between 1907 and 1947 and were characterised by a lack of knowledge about the features that were being claimed.³ In the decades since then, Chinese officials have sought to regularise, backdate and extend the country’s claims, often without a clear understanding of the history or legal basis behind them. The best explanation we currently have for China’s claims comes from the President of the National Institute of South China Sea Studies (NISCSS), Dr Wu Shicun. NISCSS is an organisation jointly managed by the Chinese Ministry of Foreign Affairs and the province of Hainan Island. Dr Wu says China’s claims have three parts:

1. A territorial claim to all the features inside the ‘U-shaped line’ printed on Chinese maps since 1947
2. Sovereign rights and jurisdiction as defined by UNCLOS
3. “certain historic rights” within the U-shaped line, “such as fishing rights, navigation rights and priority rights of resource development”.⁴

It is the third part of this formulation that represents a fundamental challenge to UNCLOS. The rules of UNCLOS were intended to supersede all such ‘historic’ claims. China’s insistence on maintaining them poses a threat to both the rules-based order in the South China Sea and to the interests of its Southeast Asian neighbours. In the past few years, the region has witnessed Chinese government vessels blockading offshore oil and gas development, protecting fishing fleets and conducting unauthorised seismic surveys in the Exclusive Economic Zones of Vietnam, Indonesia, Malaysia, Brunei and the Philippines. In all these activities, China appears to be using the ‘U-shaped line’ as the boundary of its activities, in defiance of the principles of the 2016 Arbitration Ruling.

All the Southeast Asian claimant states in the South China Sea are coming under increasing pressure to agree to what the PRC calls ‘joint development’. China is, in effect, telling these countries to give up the rights laid down in UNCLOS and share the resources of their EEZ with China. So far none of the other claimants have agreed to do this, despite huge diplomatic pressure. They need outside support to maintain the integrity of UNCLOS.

² Bill Hayton, ‘The Modern Creation Of China’s ‘Historic Rights’ Claim In The South China Sea’, *Asian Affairs* (2018)

³ Bill Hayton, ‘The Modern Origins of China’s South China Sea Claims: Maps, Misunderstandings, and the Maritime Geobody’, *Modern China* 2019, Vol. 45(2) pp127–170

⁴ Keyuan ZOU & Xinchang LIU, ‘The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction’ in *Chinese Journal of International Law*, Volume 14, Issue 1, March 2015, pp57–77.

Freedom of navigation

China also takes a different view on the question of 'freedom of navigation' to most states. UNCLOS is clear on this point: Article 24 clearly states, "The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea". This right – known as 'innocent passage' – applies everywhere, even around rocks and reefs subject to sovereignty disputes – provided that vessels do nothing to threaten "peace, good order or security" or jeopardise anyone's safety. China agreed to this wording when it signed UNCLOS in 1982.

Ten years later, however, the PRC approved its 1992 Law on the Territorial Sea, which states, "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." Then, when it formally ratified UNCLOS in June 1996, the PRC made a declaration that 'innocent passage' through the territorial sea "shall not prejudice the right of a coastal state to request a foreign state to obtain advance approval from or give prior notification to the coastal State for the passage of its warships". In other words, the PRC went back on the position it had agreed to when it signed UNCLOS after nine years of negotiations.

The world now faces a situation where China makes use of the innocent passage provisions of UNCLOS abroad but denies that they apply in the South China Sea. Twice in July 2017 and twice in July/August 2019 Chinese warships have sailed through the English Channel – passing through British territorial waters en route to exercises with Russia in the Baltic Sea.

South China Sea Arbitration

In January 2013, the Philippines announced the beginning of a legal case against China held under the rules of UNCLOS. An 'International Arbitral Tribunal' of leading judges was convened and finally delivered its 'Award' on 12 July 2016. The ruling was 500 pages long but its two main conclusions were that

1. China's 'U-shaped line' claim had no validity under UNCLOS
2. None of the features in the Spratly Islands (in the southern part of the South China Sea), nor the coral reef known as Scarborough Shoal, were able to, in the words of Article 121(3) of UNCLOS, "sustain human habitation or an economic life of its own"

As a result, China's legal claims to the resources of the South China Sea should be limited to the areas allowed by UNCLOS: an Exclusive Economic Zone of up to 200 nautical miles (around 400km) from its coast plus circles of 12 nautical mile diameter around each disputed feature.

China has refused to recognise or accept the Tribunal's Award and continues to violate its provisions. This is a major threat to the credibility of UNCLOS and a worrying indicator of China's attitude towards the international rules-based order.

The UK's interests in preserving UNCLOS in the South China Sea

The United Kingdom has a strategic interest in preserving the rule of international law around the globe. Preserving even arcane details of UNCLOS provides a defence against chaos. If international law breaks down in some parts of the world, then it ceases to be an arbiter of disputes between states. If China is successful in its campaign of pressure against smaller states in Southeast Asia, then we will be returning to an era of 'spheres of influence' and imperialism. We would see a return to coercion and the use of force between countries.

The UK has a vital national interest in the free flow of international maritime trade. China has not yet threatened this flow but without a full and explicit commitment to the provisions of UNCLOS, we have no guarantees about its future behaviour. Close UK partners, such as Japan and the Republic of Korea, are concerned that any future dispute between them and the PRC could – potentially – involve problems in transiting the South China Sea.

The UK also has specific defence commitments to three states involved in the South China Sea. It has a garrison in Brunei and is part of the Five Power Defence Arrangements with Malaysia and Singapore (along with Australia and New Zealand). The UK has good relations with every state in Southeast Asia (except Myanmar) and is seen as an important 'balancing' factor in a region that does not want to be dominated by China, the United States or any other power. Our on-going diplomatic and military presence there helps to maintain the various states' independence.

UK options in dealing with China's violations of UNCLOS?

The UK has more influence in the South China Sea than is commonly realised. The simple fact of its diplomatic and military presence makes it a factor in the discussions. By demonstrating our concern, we help to maintain the rule of international law and provide options for small states concerned by the overbearing influence of large states. Beijing expects to sweep away all opposition to its policies through economic and diplomatic pressure. It is vital that the UK takes a strong stance on these questions of principle. The Chinese Communist Party respects strength more than easy capitulation in the face of inducements or threats. China needs the UK as a market and home for investment. This gives the UK leverage.

The UK and its partners need to maintain clear support for UNCLOS in all their public statements on maritime affairs and communicate this frequently to the South China Sea claimants. The UK can be a global defender of UNCLOS by helping coastal states to preserve their own rights. It should take a formal view on what is – and is not – a legitimate claim to maritime resources in the South China Sea. It could then assist Southeast Asian states to build up their capacity to monitor and control their legitimate EEZs. It could increase naval and coastguard cooperation with them to help them protect those claims.

The UK could sanction Chinese companies that are engaged in predatory behaviour within other countries' legitimate EEZs. It could add stipulations about

respecting legitimate EEZ claims to all maritime agreements with the claimant states and insist that fish catches, for example, are traceable to domestic EEZs. These, and other relevant and targeted counter-measures could be adopted to deter rule-breaking in the South China Sea.

On Freedom of Navigation, the UK needs to make clear that Article 24 of UNCLOS applies everywhere. When Chinese warships make use of 'innocent passage' rules to sail near the UK, this should be publicised. The UK might want to take a view on whether its own belief in 'innocent passage' through the English Channel should apply to countries that don't apply the same interpretation of international law in their own waters.

With the 40th anniversary of UNCLOS approaching, the UK should work with like-minded states to champion and celebrate it. It should highlight the role of China in negotiating the text and ask why it now chooses to violate UNCLOS in so many ways.

Indirect implications of the South China Sea Award for the UK

In September 2020, the UK government published its 'position on legal issues arising in the South China Sea', a careful response to the Award of the International Arbitral Tribunal. Notably it stated that, "The Arbitral Award has no binding force except between the two parties, but it is an important contribution to the jurisprudence on the law of the sea." The reasons behind this were not made explicit, but one can surmise that if the principles of the SCS Award were applied in other contexts they might damage UK interests. The most obvious example would be the South Atlantic where the Exclusive Economic Zones around South Georgia and the South Sandwich Islands might be challenged on the grounds that neither is able to, in the words of UNCLOS, "sustain human habitation or an economic life of its own". Without these protected EEZs, the rich fishing grounds around this British Overseas Territory would be open to pillaging by predatory fleets. The economic and environmental costs could be substantial.

The same potential problem applies to several other uninhabited features around the world from which EEZ claims are made. In the Pacific, these would include the Japanese atoll of Okinotorishima, the United States' Minor Outlying Islands and France's Clipperton Island. Norway's Bouvet Island in the South Atlantic and several French possessions in the southern Indian Ocean might also be in this category. If they all lost their EEZs, wide areas of ocean would become vulnerable to unregulated industrial fishing. This could happen relatively easily if another state decided to bring a case at the same kind of Arbitral Tribunal that the Philippines made use of. The Law of the Sea legal community needs to address the implications of the potential loss of these huge EEZs for fisheries conservation.

For the time being, the UK's position is that it "takes a case-by-case approach in reaching a view on the status of any particular feature", which seems to be a way to avoid drawing any global conclusions from the South China Sea Award. The UK is, to my knowledge, the only country that has voluntarily withdrawn an EEZ claim from an uninhabited feature. When the UK acceded to

UNCLOS in 1997 it chose not to assert an EEZ claim from Rockall, thereby ending disputes with both the Republic of Ireland and Iceland.

END

Received 10 November 2021