

Maritime Governance: A Tale of Two Seas

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A Tale of Two Seas

- The Arctic and the South China Sea: two paradigms of regional maritime governance
 - The Arctic Ocean: strong degree of regional participation, high level of cooperation, and range of substantive issues resolved
 - The South China Sea: Not so much
- Evaluate the nature and sources of those differences, to understand:
 - Underlying conditions for strong regional governance scheme, including those factors that strengthen governance and those that undermine it, with a view regarding
 - When and how law can play a role in regional maritime governance

Arctic Ocean

- The Arctic Ocean
 - Active regional organization adopting range of governance arrangements
- Arctic Council
 - Eight nations, U.S. , Canada, Russia, Norway, Denmark (by virtue of Greenland), Finland, Sweden and Iceland
 - First five also considered Arctic Coastal States
 - Popular enough to attract some guests, India, China, Singapore, South Korea, Japan, Netherlands, UK, Spain, Germany and Italy as formal observers
 - With China asserting status as a “near Arctic” nation

Arctic Ocean

- Has organized working groups to address monitoring and assessment of contaminants; conservation of flora and fauna; emergency response; protection of environment; and sustainable development
- Leading to range of agreements covering:
 - Search and rescue in the Arctic
 - Specific ship standards for the Arctic
 - Suspension of fisheries in Arctic waters (by coastal states)
- Strong endorsement of LOSC
 - 2008 Ilulissat Declaration: committed to LOSC and orderly settlement of overlapping claims
 - Hence the Convention plays a key, and accepted, role in Arctic governance

Arctic Ocean

- Historically, challenges and sources of conflict, but largely contained or resolved:
 - Disputes regarding delimitation of maritime claims
 - For example, Canada and Denmark, Norway and Russia
 - Resolved by bilateral agreements – even where significant resource claims were at stake
 - Disputes regarding scope of maritime claims and access to international straits
 - Involving use of straight baselines, assertion of historic claims
 - With efforts to show historic claims consistent with LOSC
 - US and Canada have agreed to accommodations where neither party concedes its view of applicable legal principles



Arctic Ocean

- Disputes regarding claims to rights in extended continental shelf
 - Both Russia and Denmark claim the North Pole
 - But all parties complying with process established in LOSC
 - With submissions, and re-submissions, premised on arguments based on criteria laid out in LOSC
 - Little attempt to rely on historic claims or other extraneous matters
- Naval operations in the Arctic
 - Regional states all take position warships are entitled to innocent passage rights and naval operations may be conducted on high seas
 - Agreed to decades ago by US and Russia
 - Active naval operations, but they are for the most part literally invisible

Arctic Ocean

- Some commentators have found in Arctic experience lessons that could be applied to South China Sea
 - Potential to develop hard law agreements through soft law processes
 - Use of informal institutional mechanism to facilitate regional cooperation
 - Involving non-state actors in cooperation
 - Regional assessments and active monitoring programs
 - Without seeking or requiring comprehensive, legally binding framework

Contrast with South China Sea

- No consensus regarding application of Law of the Sea Convention
 - SCS states are parties to Convention, and Declaration of Conduct adopted in 2002 provided “reaffirmation of commitment the 1982 UN Convention on the Law of the Sea ...and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations”, but
 - Little use of Convention for cooperative regional governance
 - Of two most powerful states operating in region:
 - One has ratified the Convention, but with implicit, explicit reservations
 - The other has failed to ratify the Convention
 - And no consensus regarding the application of many key provisions of the Convention
 - For example, fundamental disagreements between U.S. and China regarding right of innocent passage, naval operations in EEZ

South China Sea

- No bodies that correspond closely to Arctic Council and its working groups
- ASEAN
 - By its very nature, doesn't have a central oceanic focus
 - Misalignment of parties/geography
 - Maritime Forum requires strengthening
- Coordinating Body Seas of East Asia (COBSEA) and Partnership in Environmental Management for the Seas of East Asia (PEMSEA)
 - Highly reliant outside funding; relatively unproductive
 - Again, geographic coverage beyond South China Sea
- Workshops ad hoc
- No centralizing body, with capacity to propose or implement definitive guidance or rules

South China Sea

- Amidst continuing sources of dispute and acrimony
 - China/Vietnam: the Paracels
 - Armed conflict/continuing dispute that, as in the case of the HY-981 incident, can escalate far beyond scope of maritime claims dispute, or as in June, 2017, can cut short bilateral military talks
 - Spratlys
 - Conflicting claims among China, Philippines, Taiwan, Malaysia Brunei regarding sovereignty, and maritime claims
 - Construction of artificial/enhanced islands and military structures
 - Ongoing disputes about resource rights/conservation measures in region

South China Sea

- The absence of leverage drives weaker states towards adversarial proceedings that raise:
 - Questions of jurisdiction that can skew substantive results
 - Philippines arbitration jurisdiction turned on whether it raised delimitation claims, which made it critical that no feature generated an EEZ
 - Which in turn meant that Taiping Island (Ibu Attu) could not be an island
 - Not good news for Taiwan, or for the United States
 - And issues of enforcement can create the risk of reduced, not enhanced, respect for the rule of law

Lessons for Governance

- What do these differences tell us about the role of law in maritime governance generally and in the South China Sea in particular
- Recognizing some obvious differences in regions
 - Ice caps always tend to mute disputes
- Also fundamental differences in nature of certain issues
 - In the Arctic, no real issues of territorial sovereignty
 - In the South China Sea, there are, creating fundamental challenges
 - Underlie the maritime disputes in the region but excluded from the scope of LOSC and its dispute resolution mechanisms

Lessons for Governance

- A fundamental underlying issue is lack of meaningful acceptance of LOSC as the “constitution” of maritime governance in South China Sea
 - Key parties decline to accept basic provisions like its dispute resolution provisions
 - For example, China could have participated in arbitration, and challenged jurisdictional grounds
 - Also weakened where fundamental disagreements regarding application of its provisions,
 - Effectively reducing its effectiveness as a constitution
- Arctic may lack a binding regional treaty, but LOSC plays a similar role

The Path Forward for Governance in the South China Sea

- There may be motivations for China to temper its position
 - Minimize adverse impact on public image
 - May for example account for current “charm offensive”, conciliatory gestures regarding Scarborough Reef, etc.
 - There are areas where self-interest may enhance efforts at better governance
 - Particularly where it does not implicate nine-dash line claims
 - Some aspects of ruling might facilitate Chinese goals
 - Bilateral agreements may be easier to negotiate if most features do not generate EEZs

The Path Forward

- Bilateral Agreements
 - All Arctic delimitation disputes resolved through bilateral agreement, as contemplated by LOSC except for Hans Island; US/Canada
 - Model for South China Sea
 - Incremental process that reflects stated China's preference for bilateral talks
 - LOSC provides relatively high degree of flexibility in addressing delimitation
 - Could take into account arbitration rulings without explicit endorsement or wholesale adoption
 - Historic claims could be taken into account as well
 - But ultimately would and should require a shared understanding of LOSC principles as basis

The Path Forward

- Multilateral, regional cooperation to address specific issues
 - In Arctic, has occurred with respect to search and rescue, fishing, and marine hull standards for polar regions
 - Similar opportunities in South China Sea:
 - Regional search and rescue
 - Preservation of migratory fish stocks; environmental safeguards
 - Management of maritime incidents
 - Non-ideological, don't undercut or implicate sovereignty claims

The Path Forward

- Saga of the South China Sea Code of Conduct
 - ASEAN Declaration of Conduct dating to 2002
 - And for fifteen years thereafter, minimal progress
- Suddenly, a variety of developments
 - Initiatives announced at Manila ASEAN meeting this month
 - Foreign Ministers endorsed general initiatives:
 - Enhanced cooperation regarding maritime security, safety and environment
 - Sea and rescue, piracy and armed robbery
 - All very real issues in South China Sea
 - Enhancement of dialogue at ASEAN Maritime Forum

The Path Forward

- And a set of South China Sea specific initiatives
 - Unplanned encounters at sea
- Most importantly, completion of long-deferred Code of Conduct
 - Working off framework document
- Several issues before it can, however, become a meaningful governance document
 - Proposed draft not binding and lacks enforcement mechanisms
 - Scope still open, as is consistency with LOSC
 - Need for full and effective implementation
 - Is that China's goal, or more years of fruitless discussion?

The Path Forward

- All in the context of the following general aspirations
- “The Ministers also took note of concerns expressed by some member states, and in this light, reaffirmed the importance of enhancing mutual trust and confidence, exercising self-restraint in the conduct of activities and avoiding actions that may complicate the situation, and pursuing the peaceful resolution of disputes....”

The Path Forward

- The reality is that these aspirations, and the economic goals discussed at this Conference, will only be realized if:
 - A stronger consensus regarding the LOSC and its implications is forged
 - The issue of sovereignty over maritime features is removed from other initiatives
 - Opening up opportunity for arrangements regarding conservation, resource allocation, even delimitation
 - A goal that is, ironically, furthered by Philippines arbitration
 - And stronger regional institutions are established to protect the peace and environmental stability of the South China Sea

The Path Forward

- All of which underscores the key difference between the two seas – not their climate, but the divergent views of the principal states in each region regarding whether, and to what degree, the rule of law furthers their interests
 - Which will remain the key challenge to implementing the “Arctic” model
 - (With some risk that in the future certain Arctic states may find the emphasis on historic claims an attractive model to follow)