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CHINA'S MARINE LEGAL SYSTEM AND THE LAW OF THE SEA

Zou Keyuan

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Preface

This book is mainly derived from a mega and long-term project on “China’s Ocean Policy and the Law of the Sea” initiated in 1996 when I was a Humboldtian Fellow, associated with the Department of Human Geography, University of Hannover, Germany. It is in fact a sister book of my other book titled *Law of the Sea in East Asia: Issues and Prospects* (Routledge, 2005). The prestigious fellowship awarded by Alexander von Humboldt Foundation made the proposed research project possible in practice. In 1998 I joined the East Asian Institute of the National University of Singapore, where I continued the research project on the law of the sea. The interdisciplinary working environment either in the German or in the Singaporean institutions helped to have broadened my vision in understanding legal issues in and related to China.

China in this book refers to the People’s Republic of China (PRC) unless otherwise specified. The development of China’s marine legal system is actually concurrent with the development of the overall Chinese legal system. Looking at the legal history of the PRC, the Chinese legal system, which was smashed during the notorious Cultural Revolution (1966–1976), has been gradually rebuilt since China carried out economic reforms and “open-up” policy in 1978. By the continuing building up in the last three decades, the Chinese legal system has become almost fully-fledged. As officially pledged, China will have established a comprehensive legal system by 2010.

There are at least three key factors which have pushed China to move forward in regard to the construction of its legal system, particularly in the late 1990s and early 2000s. First, the most dynamic driving force is the need of

laws and regulations for the development of China's market economy. It is understandable that during the early period of economic reform before the 1990s, China's legislation mainly lay in the economic field so as to facilitate economic development and foreign trade, including laws on foreign investment, foreign trade, banking, taxation, contract, etc. After the 1990s with the further development of China's economic reform and its increased international involvement, particularly after China endorsed the conception of market economy, legislation has been expanded to cover more new areas in the economic field, such as company, insurance, securities, anti-dumping, telecommunications, and intellectual properties. Laws governing the emerging legal services such as Law of Lawyers have come out as well.

Second, the requirements from the World Trade Organization (WTO) formulate the second main factor for the new wave of Chinese legislation. As a WTO member, China has to bring its relevant laws and regulations in line with those of the WTO. China has promised to revise and/or adopt laws and regulations to cope with the new situation. It should be noted that the WTO effect is fundamental to the change of Chinese laws at present and in the years to come. The 2003 Law on Administrative Licensing, which came into force on 1 July 2004, is a typical example and it will require the government to behave in accordance with the requirements of the WTO, such as transparency and accountability.

Finally, what is more remarkable is the conviction of rule of law which has been gradually accepted by the Chinese. The 1999 Amendment to the Chinese Constitution expressly endorsed the conception of rule of law by stipulating that "the People's Republic of China implements law to govern the state and construct the socialist country with rule of law".¹ This endorsement can be regarded as a milestone development in China's overall legal reform. Since then, the term "rule of law" has been frequently used in China's political, economic and social life. After the smooth Chinese leadership succession in March 2004, the new Chinese leaders have often emphasized the importance of law, particularly the Constitution and called for the whole society to abide by the law and the Chinese government to behave and function in accordance with law (*yifa xingzheng*).

The above factors have been naturally reflected in the establishment and building up of China's marine legal system. Of course, the marine legal system cannot be misunderstood as independent of China's overall legal system, but actually part of it. Nevertheless, it has its own characteristics because of its ocean/marine related nature and it governs the ocean as well as human

¹ Text is available in *People's Daily* (in Chinese), 17 March 1999. For details, see Zou Keyuan and Zheng Yongnian, "China's Third Constitutional Amendment: A Leap Forward towards Rule of Law in China", *Yearbook Law & Legal Practice in East Asia*, Vol. 4, 1999, 29-41.

activities there. With the development of the entire legal system, the marine legal system has become more and more completed.

On the other hand, it is noted that the marine legal system is closely related to other branches of laws in the overall legal system. For example, when a marine law prescribes criminal liability, the enforcement of such criminal liability depends on the application of China's criminal law. The effective marine environmental protection is also heavily dependent on the implementation of other environmental protection laws applicable to the air, land or fresh water. However, this close relationship between the marine legal system and other law branches will not erode the distinctiveness of the former.

This book focuses on the establishment and development of China's marine legal system in the context of the new law of sea centered on the 1982 United Nations Convention on the Law of the Sea (LOS Convention). China ratified this convention in 1996. However, even before its official ratification, China began the process of building up its marine legal system in particular consideration of the very recent developments in the law of the sea including the LOS Convention. As is seen in the chapters of this book below, marine laws and regulations are basically in harmony with relevant provisions of the LOS Convention, though inconsistencies between some Chinese laws and regulations and the LOS Convention occasionally exist. Second, the book unfolds China's marine legal system through maritime activities, rather than maritime zones, including navigation, marine resource management and use, marine environmental protection, and marine scientific research. Basic marine laws and regulations are discussed and assessed in various chapters so as to present the reader a full picture of what consists of China's marine legal system. Finally, the book narrows China's marine legal system down to the context of the international law of the sea so that maritime law in China is not specifically included.

One thing which needs an explanation is about the last chapter of the book on the Chinese in the Polar Regions. Polar affairs in China has been managed by the State Oceanic Administration and long regarded as part of China's marine affairs, together with China's activities in the international deep seabed. So far there is no specific law governing China's activities in the Polar Regions, but when a relevant law or regulation comes out, it will fall within the domain of the marine legal system. As reveals in Chapter 12, China is now preparing a regulation governing China's activities in the Arctic.

During the preparation of this book, I obtained support and assistance from many people to whom I express my sincere gratitude. I would like to mention a few herewith: Professors Hanns Buchholz, Rainer Lagoni, Wolfgang Graf Vitzthum during my research stay in Germany; Professors Wang Gungwu and John Wong in the East Asian Institute where I have been working. Finally, I would like to thank my family which gives me enormous physical and spiritual support, keeping me making everyday progress in scholarship and academic career.

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Part I Introduction

Chapter 1

Building a Marine Legal System in China: An Overview

On 16 November 1994, the long awaited United Nations Convention on the Law of the Sea (the LOS Convention) came into force, ushering in a new era to manage the use of the oceans on the global scale. On 15 May 1996 China ratified the LOS Convention, 14 years after signing it. Thus China has committed itself to develop its domestic laws and regulations on marine affairs in line with the LOS Convention and to establish its marine legal system to meet the demands and changed circumstances in the use of oceans. On the other hand the entry into force of the LOS Convention and China's ratification of it also pose a new challenge to be coped with by the Chinese in the resolution of both domestic and international issues regarding the China seas. This chapter, as a general introduction, attempts to provide an overview of the Chinese marine legal system by examining essential elements of the Chinese marine laws and regulations in the context of the international treaties, particularly the LOS Convention, while indicating the general trend of development of the construction of China's marine legal system.

BACKGROUND

China is the third largest country in the world with a land territory of 9.6 million square kilometres. China is also a coastal state with very long coastlines. The coastline of the mainland is more than 18,000 kilometres from the mouth of the Yalu River in Liaoning Province in the north to the mouth of the Beilung River in the Guangxi Autonomous Region in the south. The seas adjacent to the mainland are the Bohai Sea, the Yellow Sea, the East China Sea, and the South China Sea. The Bohai Sea is the internal sea of China, surrounded by the Shantong Peninsula and the Liaotong Peninsula, with an area of about 77,000 square kilometres and an average depth of 18 m with a maximum depth of 70 m. It consists of three bays: the Liaotong Bay, the Bohai Bay and the Laizhou Bay. The Bohai Sea is linked to the Yellow Sea by the Bohai Strait, which is 45 nautical miles wide. The Yellow Sea is about 380,000 square kilometres, 44 m of depth on average with a maximum depth of 140 m. It is a continental shallow sea.¹ The East China Sea is a wider shallow sea with an average depth of 370 m and 770,000 square kilometres in area. The South China Sea is bounded on the north by mainland China, on the east by the Philippine archipelago, on the south by Kalimantan, and on the west by the Malay Peninsula and Vietnam. The area of the South China Sea is about 3.5 million square kilometres with an average of 1,212 m and a maximum depth of 5,559 m.² The total areas of the above seas are equivalent to about half of China's land territory (more than 4.73 million square kilometres),³ with abundant natural resources that can be exploited and utilised by the Chinese and other peoples, and which have served as a tie of friendly intercourse between the Chinese and other nations. For example, in ancient times there existed a "road of silk at sea" just like the road of silk on land to the West. The seas are also natural barriers safeguarding China's land territory. All the seas described above, except for the Bohai Sea which is part of China's internal waters, are semi-enclosed seas within the legal definition of the LOS Convention.

Historically, China was one of the earliest nations of the world to use the ocean. Marine affairs in China have had a long tradition. As proved by excavated archaeological relics, more than 4,000 years ago inhabitants in the Chinese coastal regions had learned to use marine resources: for example, to collect shellfish as food, and to boil seawater into salt. Emperor Yu (2205–2197 BC),

¹ A brief description on the natural setting of the Yellow Sea can be found in Mark J. Valencia, "The Yellow Sea: Transnational Marine Resource Management Issues", *Marine Policy*, Vol. 12, 1988, 383–385.

² See Luo Yuro and Zeng Chengkui (eds.), *Marine Affairs of the Contemporary China* (Beijing: Social Sciences Press, 1985) (in Chinese), 1–2.

³ For details, see Committee of Editors of the China Natural Resources Series (ed.), *China Natural Resources Series: Ocean* (Beijing: China Environmental Science Press, 1995) (in Chinese), 35–45.

the first emperor of the Xia Dynasty, once issued an imperial edict which prohibited fishing during the fish-breeding seasons.⁴ During the Zhou Dynasty (2,800 years ago), special officials were assigned to manage salt production. Later on during the feudal period, the Chinese people developed various fishing implements and methods of catch while undertaking sea-going navigation. In the Song Dynasty (960–1279 AD), the Chinese Government began to send warships to the South China Sea to go on patrol around the Xisha Islands (Paracel Islands). During the years from 1405 to 1433 in the Ming Dynasty (1368–1644), Zheng He, the great seafarer in Chinese history, led the greatest ocean-going fleets of the world of that time, sailing to the Pacific and the Indian Ocean, visiting more than 30 nations, and promoting foreign communications.⁵ However, in the 18th century the marine development in China was frustrated because the Qing Dynasty (1644–1911) began to enforce the “forbidden to the sea” policy which prohibited the Chinese people from going out to sea, and violators were subject to the death penalty. Despite this unfortunate fact, one incident during the Qing Dynasty caused the then Chinese Government to pay attention to the law of the sea. In 1864 when Prussia and Denmark were at war, Prussia arrested three Danish vessels in China’s Bohai Sea. The Chinese Government lodged a protest, stating that the Bohai Sea was “the inner ocean” of China, – which at that time meant the territorial sea – and the Prussia act was a violation of the law of nations. Finally, Prussia accepted the protest and released the Danish vessels.⁶ This was the first time that China had formally invoked a legal concept in the law of the sea.

Not long after the People’s Republic was founded in 1949, China began to wage a struggle against the armed provocation carried out by the US Navy so as to safeguard its sovereignty and jurisdiction over the territorial sea. Together with many strong protests against the encroachments of US warships into China’s territorial sea, the Chinese Government, on 4 September 1958, promulgated the Declaration on China’s Territorial Sea,⁷ which is a very significant legal document in the history of Chinese marine legislation. China declared that,

⁴ As is said, Chinese people began fishing in the East China Sea as early as the Xia Dynasty, see Hongye Zhao, “Recent Developments in the Legal Protection of Historic Shipwrecks in China”, *Ocean Development and International Law*, Vol. 23, 1992, p. 305.

⁵ For details, see Wang Gungwu, “Early Ming Relations with Southeast Asia: A Background Essay”, in John King Fairbank (ed.), *The Chinese World Order: Traditional Chinese Foreign Relations* (Cambridge, 1968), 53–54.

⁶ This case has been frequently cited in China as the first indication of China’s realization of the importance of international law, particularly the law of the sea. For example, see Wang Tieya, “International Law in China: Historical and Contemporary Perspectives”, *Recueil des cours*, Vol. 221, 1990, II, 232–233.

⁷ Both Chinese and English versions may be found in Office of Laws and Regulations, Department of Ocean Management and Monitoring, State Oceanic Administration (ed.),

- (1) the breadth of the territorial sea of China would be 12 nautical miles, which would apply to all territories of China, including the Chinese mainland and its coastal islands, as well as all other islands belonging to China;
- (2) China's territorial sea would take, as its baseline, the line composed of the straight lines connecting basepoints on the mainland coast and on the outermost of the islands; the water area extending 12 nautical miles outward from the baseline would be China's territorial sea, and the water areas inside the baseline would be China's inland waters, including the Bohai Sea and the Chiungchow Strait; and
- (3) no foreign vessels for military use and no foreign aircraft would be allowed to enter into China's territorial sea or the airspace above without the permission of the Chinese Government.

The general position stated in the above Declaration continued to be maintained in China's Law on the Territorial Sea and Contiguous Zone of 1992.

Two regulations relating to the passage through China's inland waters and territorial sea also were promulgated. One was the Regulations Required to be Observed by Merchant Vessels Passing Through the Lao Tieh Shan Channel in 1956,⁸ which provided for prohibited areas and other rules on the passage of Chinese or foreign merchant vessels. This Channel links the Bohai Sea and the Yellow Sea and is of strategic importance. The other was the Regulations on Non-Military Foreign Vessels Passing through the Chiungchow Strait in 1964,⁹ which contained several restrictions, especially providing that the passage of foreign merchant vessels should be subject to prior permission by the Chiungchow Strait Administrative Agency. Some of these rules have been rescinded.¹⁰ In order to safeguard the security of its territorial sea, China has also publicised a number of prohibited areas for navigation and closed sea lanes.

Besides the above, China has promulgated several laws and regulations regarding fishing, navigation and harbour administration, such as the Order on Prohibited Area Trawl-net Fishing in the Bohai Sea, the Yellow Sea and the East China Sea of 1957; the Provisional Regulations on the Safety at Sea of the Non-Power-

Collection of the Sea Laws and Regulations of the People's Republic of China (Beijing: Ocean Press, 1991), 1–4.

⁸ See Office of Laws and Regulations, *ibid.*, 64–68.

⁹ See Office of Laws and Regulations, *ibid.*, 56–63.

¹⁰ For example, Article 6, – which originally provides that passage through the administrative region by non-military foreign vessels must, as a rule, be made in the daytime; they should enter the administrative region after sunrise and clear the region before sunset. The Administrative Agency shall decide the specific hours of entrance and exit for the non-military foreign vessels that apply for passage in the light of their speed, – has now been revised as: non-military foreign vessels may pass through the Strait after they obtain the permission; but while entering and clearing the administrative region, the speed of the vessels shall not less than ten knots.

Driven Boats of 1958; and the Provisional Regulations on Harbour Administration of 1953. Many of the earlier laws and regulations have been replaced or amended.

During this early period of marine legislation, the most important legal document was the Territorial Sea Declaration, which was influenced by the four law of the sea conventions adopted in April 1958 in Geneva.¹¹ The Chinese Government observed these new developments on the law of the sea: for example, the use of straight baseline provided in the 1958 Declaration. Before 1949 China had used low-water line as the baseline to measure its territorial sea.

THE FRAMEWORK OF THE MARINE LEGAL SYSTEM

In 1978 China began to implement its economic reform and “open door” policy. China started to re-establish its national legal system, which was to a large extent destroyed during the catastrophic Cultural Revolution (1966–1976). With this policy and the influence of the Third United Nations Conference on the Law of the Sea (UNCLOS III) (1973–1982), China began systematically to lay down laws and regulations concerning different sectors in marine affairs, in developing its marine legal system. The marine legal system is an integral part of the whole Chinese legal system but it has special characteristics of its own. First, it is integrated and comprehensive, including all the human activities relating to the sea or in the sea. Second, it has quite a number of obvious foreign elements in comparison with other domestic laws in China.¹² It governs various aspects at sea which will be considered in turn below.

Marine Sovereignty and Jurisdiction

Among all the domestic laws and regulations, the most important is the 1992 Law on the Territorial Sea and the Contiguous Zone¹³ which has improved the territorial sea regime established under the 1958 Declaration on the Territorial Sea. China has set its territorial sea at a breadth of 12 nm and the contiguous zone of 24 nm, measuring from the coastal baselines. Merchant ships enjoy the

¹¹ For reference, see Liu Zerong, *Introduction to the Law of the Territorial Sea* (Beijing: People's Publishing House, 1965) (in Chinese), 54–69.

¹² See Zhao Enbo, “Some Opinions on China's Marine Legal System”, in China Institute for Marine Development Strategy (CIMDS) (ed.), *Marine Law and Policy*, Vol. 1 (Beijing: Ocean Press, 1990) (in Chinese), 124–125.

¹³ The English version may be found in Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State, *Limits in the Seas*, No. 117 (Straight Baselines Claim: China), July 9, 1996, 11–14.