

International Law as a Tool to Combat China*

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Abstract

It is quite frequently said that China cannot unilaterally change the *status quo* by forcible means. This is perfectly true vis-à-vis international law. No States can change international law unilaterally in order to justify their violations of existing international law rules. We can find three elements here. First, “unilateral,” second, “international law,” and third, “forcible means.” First, regarding unilateralism, China has unilaterally claimed its historical rights over extravagantly wide sea areas encircled by the so-called nine-dash line in the South China Sea. Second, concerning international law, China has been violating the United Nations Convention on the Law of the Sea (UNCLOS), the most important treaty for regulating maritime issues. In a world-famous case, namely *The South China Sea Case*, the arbitral tribunal definitively denied the validity of the Chinese historic rights under UNCLOS. Third, by various aggressive conducts, China has posed a serious threat to other countries not only in the South China Sea but also in the East China Sea. Based upon such an understanding of the situations that China has created in the international dimension, first, I will explain what wrong China is doing from the perspective of international law, which is my field. Second, I will consider a possible way to combat China from a Japanese perspective.

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Introduction: What is Wrong with China from the Perspective of International Law?

It is almost the general recognition among all the participants here that “China has been engaged in wrong-doing.” But, precisely speaking, what wrong is China doing? The starting point for considering the ways to combat China should be to establish an exact understanding as to what wrong China is doing. Doctors need to diagnose first, before they treat their patients. The same holds true with us.

Therefore, first, I will make clear the wrong that China has been doing. I will do this from a

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perspective of international law, which is my field.

It is quite frequently said that “China cannot unilaterally change international law by forcible means.” We can find three elements here: first, “unilateral,” second, “international law,” and third “forcible means.”

From the perspective of international law, I will take up these three points in this order.

1. “Unilateralism” under International Law

First, regarding “unilateralism,” China has unilaterally claimed its historical rights over extravagantly wide sea areas encircled by the so-called nine-dash line in the South China Sea.

In principle, international law is created based upon the agreements of sovereign States. Sovereign States are not allowed to unilaterally create international law.

Sovereign States exist as part of international society and they are equal and independent. Thus, there is no legislative authority that has the competence to enact laws with legally binding force on all sovereign States. In place of an authoritative legislative organ, sovereign States create international law by their mutual agreement. International law takes the forms of treaties and customary laws. We find the element of agreement among sovereign States in treaties and, to a certain degree, in customary laws, as well.

There are, however, some cases in which international law allows sovereign States to act unilaterally. A typical example is as follows.

Coastal States are allowed to unilaterally establish the limits of their jurisdictional sea areas, such as territorial seas, exclusive economic zones (EEZs), and continental shelf. Nonetheless, I have to immediately add that in order to obtain validity with respect to other States, the limits unilaterally set by coastal States should be in accordance with the relevant international law rules. I can introduce to you a very famous part of the judgement rendered by the International Court of Justice in the 1951 *Fisheries Case*.

Although it is true that the act of delimitation is necessarily a *unilateral act*, because only the coastal State is competent to undertake it, *the validity of the delimitation with regard to other States depends upon international law.*” (emphasis added)

In a world-famous case, namely, *The South China Sea Case*, the arbitral tribunal definitively denied the validity of the Chinese historic rights under the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS is the most important treaty on the law of the sea. The decision by the tribunal has a legally binding force on China. South Asian countries and others in the world have not recognized any validity to the Chinese claims of historic rights in the South China Sea. Accordingly, legally speaking, there is no room for the Chinese historic rights that are unilaterally claimed by China to survive under UNCLOS. This unilateral claim by China and its attitude to regard the decision as null and void are totally reproachable and, therefore, “wrong.”

2. “International law”

The second element for which to criticize China is its acts contrary to international law. As I already mentioned, the most important international law currently for regulating maritime issues is UNCLOS.

UNCLOS determines the width of jurisdictional sea areas and sea-bed, such as territorial seas, EEZs, and continental shelf. The so-called nine-dash line encloses extravagantly wide sea areas over which China claims historic rights. This is totally contrary to UNCLOS and, thus, “wrong.”

3. “Forcible Means”

Third, international law prohibits both the use of force and the posing of threats by force. The most important provision, in this regard, is Article 2, Paragraph 4 of the United Nations Charter, a multilateral treaty.

Let's look concretely at China's acts both in the South China Sea and in the East China Sea.

China has frequently dispatched its Coast Guard vessels to the territorial seas of neighboring States. This is for the purpose of overtly demonstrating China's sovereignty over those sea areas. The Coast Guard vessels have been recently incorporated into the Chinese military under the country's legal system. Chinese fishing boats have also come to the territorial seas of neighboring States, in some cases escorted by China's Coast Guard vessels. The Chinese fishermen have suddenly become militias. Even China's military vessels enter the territorial seas of other countries, including Japan.

In the East China Sea, particularly in the Japanese territorial sea surrounding the Senkaku Islands, these kinds of conducts by China have been repeated almost periodically.

It is not always easy to precisely define what "the use of force" is, and what "the posing of threats by force" is, under international law. Thus, it is not an easy decision to make that China's acts fall under the categories of the use of force and/or the posing of threats by force.

But, in reality, as a matter of fact, nobody can deny that these Chinese strategies of making use of its Coast Guard vessels and fishermen as militias, and even its military vessels, have posed serious threats to neighboring States. South Asian countries and Japan share common criticism against China. The tense situations produced by China have been maintained over more than a decade in the East China Sea and the South China Sea, as well.

I strongly believe and I can safely say that those Chinese strategies are regarded as uses of "forcible means." This is so in considering the actual threats posed by China to Japan and South Asian countries. Thus, the Chinese acts that I have just explained are no doubt reproachable, and, therefore, "wrong."

In this way, we have reached a common understanding as to the precise meaning of "what wrong China is doing."

Before moving onto the next point, let me explain the usefulness of international law even when faced with such wrong-doing by China. I would like to emphasize this point to demonstrate the solid validity of international law.

It is true that China has been violating international law. Regarding the arbitral tribunal's decision made on the 12th of July 2016, China regards that decision as null and void, and totally disregards it. But, I can give you one typical example of reliance even by China on international law. From the beginning to the end of the tribunal's procedure, China was totally absent. Nonetheless, China issued an excessive number of national statements to criticize the tribunal's procedures. In addition, China also explains its position concerning its historic rights by saying that Chinese historic rights are "based upon customary international law." While China violates UNCLOS, a multilateral treaty, it seeks legal justification for its historic rights based upon "customary international law." In that sense, even China needs legal justification based upon public international law. Therefore, in relation to China, a rule breaker, international law solidly maintains its validity.

Then, based upon a common understanding of what wrong China is doing, next, I will consider possible ways to combat China from a Japanese perspective.

4. Rule of Law

"The rule of law" has been the main pillar of Japanese diplomatic policies for more than a decade. It contains three principles: first, any claims of rights should find legal justification, second, no forcible changes of law are allowed, and third, disputes should be peacefully resolved.

The Chinese strategies, as we have just confirmed, are definitely contrary to "the rule of law." Therefore, Japan, as a responsible player for maintaining world order, should take measures to recover and maintain the said order. Japan should respond to China in order to make it comply with international law.

Then, how is Japan to make China obey international law? In this regard, needless to say, Japan should itself adhere to “the rule of law.”

In international society, sovereign States exist with equality to and independence from each other. There are no authorities above sovereign States. As a result of this, in international society, no compulsory enforcement measures can be taken to maintain the effectiveness of international law. In this sense, international law, critically, lacks teeth.

Under this reality of international law and international society, with respect to the ways to combat Chinese wrong-doings, two points may be emphasized.

First, with regard to China in the East China Sea, Japan must respond without escalating the tense situation between the two countries. The Japan Coast Guard, rather than the Japanese Maritime Self-Defense Force, copes with the Chinese vessels approaching and entering Japanese territorial sea. This has become almost a permanent situation for a decade in the Japanese territorial sea surrounding the Senkaku Islands. These islands are definitely Japanese ones from legal and historical perspectives. Nevertheless, China has claimed its sovereignty over them and has tried to overtly demonstrate its sovereignty even by using “forcible means” in the sense explained before. The Japanese Maritime Self-Defense Force is already ready for cooperation with the Japan Coast Guard. But, Japan, with the highest prudence, has tried to prevent the tense situation from growing into a military situation. This policy of non-escalation is important for Japan to avoid forcible means as much as possible.

This Japanese policy is to be taken mainly in bilateral relations with China.

Second, Japan has been taking advantage of the “interplay” of bilateral, regional and multilateral dimensions.

The most important thing is for States around the world to form a strong legal circle around China from which it cannot escape. For that purpose, bilateral, regional, and multilateral measures that may have cumulative effects should be taken. This is not an instant method that will have instant results. It will take time, but enclosing China in the legal world is very important.

I said “interplay,” as Japan expects “synergy” to be produced by bilateral, regional and multilateral measures. For instance, a regional measure taken in the South China Sea would work not only in that sea area, but also in the bilateral relationship between China and Japan, and in the region of the East China Sea, as well. Multilateral voices criticizing China would have impacts on its behaviors regionally in the South and East China Seas. Thus, “synergy” means the functions produced by the measures taken at these different levels. The functions are also found at different levels, namely the bilateral, regional and multilateral levels.

At a regional level, for instance, Japan is expecting a code of conduct to be established by ASEAN countries. The code of conduct needs to be effective enough to make China comply with international law. At a world-wide level, Japan’s policy of “the rule of law” has been sufficiently well recognized. Japan strongly urges other States to take the same stance toward China in order to build a strong circle in the legal world from which China can find no escape. With respect to the freedom of navigation, the US, Australia, and Japan, as well as other countries, have cooperated to maintain the freedom of navigation in the South China Sea where China claims its historic rights over extravagantly wide sea areas. Furthermore, EU countries might not have as keen an interest in relation to the South China Sea situations as the US, Australia, and Japan. Nevertheless, they have criticized China’s negative attitude toward the decision rendered by the arbitral tribunal.

It is true that regional cooperation is very important, but in addition to that, multilateral cooperation is also expected and required. Multilayered cooperation is indispensable to strongly establish a legal circle from which China cannot escape.

These ways that I have mentioned so far will not have instant results. They will not immediately work, either. Without a strong and solid attitude for a certain amount of time, it will be difficult to reach our desired outcome. Nonetheless, as responsible players that abide by

international law, Japan, along with other cooperating countries, should solidly continue such measures to combat China in a very “patient” manner.