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Chinese Claim to the South China Sea under International Law

The main objective of this article is to present a brief overview of the dispute in the South China Sea, focusing on China's claims and a legal perspective on the issue. In the introduction the author presents the geography and history of the dispute as well as the main laws introduced in China on maritime zones and the submissions of the disputants to the Commission on the Continental Shelf in 2009. It also focuses on the politics in the region providing an example of main initiatives undertaken on the ASEAN forum. The second part of the article provides a legal analysis of the claim with a particular reference to the "Nine-dashed line," which has the biggest influence on the current understanding of the Chinese position. Lastly, the author refers to the arbitration case initiated by the Philippines, which is one of the disputants, and where China is reluctant to take any legal steps.

The article attempts to answer the question whether in such a complicated legal dispute it is possible to reach a peaceful settlement in accordance with international law.

Introduction

The South China Sea is of great importance not only to the Southeast Asian states, but to the whole international community. Through its waters leads one of the world's main shipping routes, the area is rich in oil and gas reserves in the seabed and the subsoil, and, also has wide grounds for fisheries.

The South China Sea is a semi-enclosed sea covering an area of 3.5 million km², where China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei Darussalam present claims. The dispute can be traced back decades and is still called “the troubled waters.” There are several island groups that are disputed in the South China Sea.

The first group are the Paracels, known also as the Xisha Islands (in Chinese), which are claimed by China, Taiwan and Vietnam. The Paracel Islands since 1974 are occupied by China, which in the same time does not see the Paracels as being disputed. There are around 35 islets, reefs or shoals with Woody Island, measuring 2.1 km² as the biggest one (Gau & Jia 2013).

The second group are the Spratly Islands, named the Nansha Islands by the Chinese, and are the biggest group of around 250 islands, islets, rocks and shoals, among which around 25 are islands, with Itu Aba being the largest. The features are claimed by China, Taiwan, the Philippines, Malaysia, Vietnam and Brunei Darussalam. All the states, except the latter, are occupying some of the features in this particular area.

Macclesfield Bank known as the Zhongsha Islands (in Chinese), including the only part that is permanently above sea level at high tide – the Scarborough Shoal – is disputed by China, Taiwan and the Philippines and consists of rocks, sandbanks and reefs. The Pratas Islands, in Chinese known as the Dongsha Islands are claimed by China and Taiwan, but will not be discussed further in this paper.

China provides evidence of their use of the sea two millennia back, but more importantly refers to recent decades in establishing their case in the South China Sea. In the 1930s the government appointed a commission, which in 1935 produced the result of its work of examining private maps as an atlas of 132 insular features in the South China Sea (Talmon & Jia 2014, p. 3).

China states that it has recovered the Paracel and Spratly Islands after the Second World War, in 1946, when Japan renounced all their islands in the Pacific (Gao & Jia 2013, p. 102). Moreover, according to the Chinese, there was no objection for doing so by the other states of the region.

In 1947 the Chinese government issued the eleven-dashed line map “to indicate the geographical scope of its authority over the South China Sea” (Gao & Jia 2013, p. 102). In the late 1940s, the government published and circulated another list with 172 names of islands and placed them under the authority of the Hainan District. The eleven-dashed line is explained further in the paper as the nine-dashed line, but at this point it is noteworthy to point out that it was the Republic of China, which in 1946 first presented this map.

It was not till the mid-1950s, when the Philippines suggested that some of the Spratly Islands and Macclesfield Bank should belong to them and also, when two lines from the eleven-dashed line in the Gulf of Tonkin were removed (Roque 1997; Greenfield 1992; Amer 2002).

China's Laws on Maritime Zones

China has been issuing laws, like the 1958 Declaration on China's Territorial Sea, where it has asserted the ownership titles to all groups of islands in the South China Sea (Dupuy & Dupuy 2013, p. 126). Such an approach has been confirmed in the 1992 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China and then in 1996 when China ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

In the declaration to the Convention, China has stated that it shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.¹ China notes that through consultations and on the basis of international law and in accordance with the principle of equitability, it will effect the delimitation of the boundary of the maritime jurisdiction with the states with coasts opposite or adjacent to China. In the same time, in article 3, it reaffirms its sovereignty over all its archipelagos and islands as listed in the 1992 Law on Territorial Sea and the Contiguous Zone.

In 1998 China adopted the Exclusive Economic Zone and Continental Shelf Act stating that it enjoys all rights within this areas and its provisions shall not affect its historical rights. In 2006 China made a declaration under article 298 of UNCLOS, and does not accept compulsory procedures over certain disputes concerning maritime delimitation or military and law enforcement activities.

Submissions to the Commission on the Continental Shelf Limits

On May 6, 2009, on the basis of article 76 (8) UNCLOS, Vietnam and Malaysia jointly presented to the Commission on the Continental Shelf

¹ See: United Nations, Division for Ocean Affairs and the Law of the Sea, *Chinese declaration to UNCLOS*, viewed on May 7, 2014, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification.

Limits relevant information and maps regarding the continental shelf.² In the same time, they stipulated that the proposal does not affect the issue of the continental shelf delimitation in the region.

A day later, on May 7, 2009, China presented on the United Nations forum the U-shaped line and underlined that it exercised sovereignty over the islands in the South China Sea and had jurisdiction over designated sea areas. China criticized the proposal of Vietnam and Malaysia as a violation of its rights. In response to China's position, Vietnam claimed that China does not have any grounds, legal nor historical, to present the *nine-dotted line*. The Philippines called the Commission on the Continental Shelf to refrain from giving an opinion on this matter until the dispute would not be solved.

The second proposal to the Commission on the Continental Shelf from Vietnam regarded the northern part of the continental shelf. China, again, presented the U-shaped line and criticized the authorities of the Philippines for the claims towards a group of islands in the Spratly archipelago called Kalayaan.

Actions Taken on the ASEAN Forum

It is noteworthy to present the action taken on the ASEAN forum, where China has been actively involved. A first breakthrough occurred in 2002 with the adoption of the Declaration on the Conduct of Parties in the South China Sea by the ASEAN Members and China at the ASEAN Summit. According to s. 4 of the declaration, the parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. The parties should not complicate and escalate the conflict and shall refrain from action of inhabiting on the presently uninhabited islands, reefs and shoals. The parties reaffirmed their will to adopt a binding and more detailed Code of Conduct in the South China Sea which would further promote peace and stability in the region. In the next years the declara-

² See: United Nations, Division for Ocean Affairs and the Law of the Sea, *Submissions to the CLCS, Joint Submission by Vietnam and Malaysia*, viewed on May 7, 2014, http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

tion has been described as a milestone and used in all political disputes occurring in the South China Sea.

In 2011 in Jakarta, the states adopted guidelines for the implementation of the conduct of parties in the South China Sea. Once again, the role of bilateral talks between the members of ASEAN and China was presented.

Thanks to the diplomacy actions, in July 2012 ASEAN's 6-point principles on the South China Sea were adopted. It was merely a reaffirmed consensus and an attempt at lowering down the tensions occurring at that time in the region (BBC 2013).

Currently, occasionally there are actions causing other claimants to protest, but the biggest focus is at the moment on the arbitration between the Philippines and China, explained further by the author. The next point will present the concept of the nine-dashed line in order to fully understand the dispute, also from the legal point of view.

The Legal Meaning of the Nine-Dashed Line

The U-shaped line, called also the nine-dashed line, lacks clarity from the government. To date, there has been no suggestion on how to understand the line presented 60 years ago and again in the last 5 years (Valencia 1995; Valencia, van Dyke & Ludwig 1997; Lo 1989; Gau 2012; United Nations 2009). The line is not precise in its coordinates and is rather a general indication of what the maritime delimitation boundaries should look like. It runs in close proximity of the Vietnamese, Malaysian, Bruneian and the Philippine coast.

Chinese scholars suggest the "three layered theory," which means that China has sovereignty over all the features within the lines on the map, and where the historic rights are an addition to the UNCLOS provisions. Such rights would be fishing, navigation, exploration and exploitation of resources. The nine-dashed line may also be a maritime boundary, as if it was delimited as a median line between the islands and the coastline (Gao & Jia 2013, p. 108; Fu 2013, p. 12; Keynan 2000).

Kuen-Chen Fu notes that "the U shaped line, delimited by China in the area, is the outer limit of China's 'historic waters' in the SCS and a pending ocean boundary, which requires identification through negotiations and its neighboring States" (Fu 2013, p. 12).

On the other hand, China is ensuring that its laws are consistent with the provisions set out in UNCLOS. Therefore, even when the meaning of

some of the presented notions is lacking, it should be taken into account that there is no other evidence available proving that China wants the South China Sea as their internal waters or historic waters, which could be considered as not compliant with the convention (Gao & Jia 2013, p. 109).

Consequently, one can establish three main legal issues in assessing whether the nine-dashed line is legitimate under international law, including the 1982 United Nations Convention on the Law of the Sea (Valencia 1995; Valencia, van Dyke & Ludwig 1997; Hong 2012).

Territorial Sovereignty

The first one regards the sovereignty of a state over the features in the South China Sea. China relies its ownership on the discovery and occupation, alternatively presenting the historic title. It is noteworthy to point out that UNCLOS does not have any provisions on sovereignty; the states have to rely on customary international law provisions in this matter. Gao and Jia (2013, p. 110) present an opinion that the evidence of China's discovery of the islands is "simply overwhelming." They also refer to occupation as a mode of acquisition of the territory and point out that a state needs to do it peacefully and continuously over *terra nullius* or after a definite renunciation of a previous sovereign (Gao & Jia 2013, p. 110). That might be a reference to Japan renouncing their sovereignty over the islands in South China Sea after the Second World War. China objects to the legal meaning of events occurring before World War II, considering the French occupation of the islands (which Vietnam uses as proof of their claim) as unlawful. They also contest the effective occupation of the Scarborough Shoal by the Philippines proving that China has shown "a consistent line of legislative and administrative acts" in respect to all of the groups of islands (Gao & Jia 2013, p. 113).

Maritime Delimitation

The second legal issue is connected with the maritime zones that can be generated from the features in the South China Sea and the legal status of such islands and rocks.

The geographical nature of the South China Sea requires taking into account opposing larger areas and the possible overlaps of the maritime zones. In a case of a semi-enclosed sea and in the case of so many contested ownership issues, it is extremely difficult to reach a consensus on all of the issues.

In addition, it has to be determined whether the Paracel Islands and Spratly Islands are islands in the meaning of article 121 of UNCLOS or are there other provisions applicable. The definition states that an island is a naturally formed area of land, surrounded by water, which is above water at high tide. Having this legal status enables a similar delimitation from the basic lines of the territorial sea, the contiguous zone, exclusive economic zone, and continental shelf as in the land territory. Subject to s. 3 of the article, rocks which cannot sustain human habitation or economic life of their own shall have no economic zone or continental shelf. Moreover, the convention in article 13 distinguishes low tide elevations. They are naturally formed areas of land that are surrounded by and above water at low tide but submerged at high tide. Where a low tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

If the maritime zones that can be generated from the islands and continent are overlapping, then accordingly with UNCLOS, states should cooperate in exercising their rights and obligations. All the claimants are parties to UNCLOS.³ They have the right to establish 200 nautical-mile exclusive economic zones and a continental shelf of the same width. On the other hand, accordingly to the case law, the states should refer to established rules and methods on maritime delimitation, i.e. to the equidistance and relevant circumstances rule (Tanaka 2006, pp. 43–46; Paik 2012, pp. 199–221).

Fu (2013, p. 26) due to the case law, considers a few factors to be relevant in the process of maritime delimitation, such as geographical considerations (natural prolongation of land territories, distance, proportionality of the length of coast lines, configuration of the coast, baselines, low-tide elevations), geological and geomorphologic considerations, historic interests in term of fishing and navigations, and social economic considerations (economic dependency, natural resources, security interests).

Historic Rights

Another possible legal concept, presented by China is the one of the historic rights (Keynan 2000; Duong 1997, p. 47; Whiting 1997–1998, p. 897). Some authors raise also the possibility of the South China Sea

³ Full list of State Parties to the United Nations Convention on the Law of the Sea 1982 on the DOALOS website: http://www.un.org/depts/los/convention_agreements/convention_agreements.htm. Taiwan is not a party to UNCLOS.

being historic waters through the principle of historic titles or the historic title over the insular features itself (Dupuy & Dupuy 2013, p. 138). All said above is to be treated supplementary to the previously presented modes of territory acquisition, which China considers prevailing.

The main differences between these two concepts is the fact that a historic title justifies claims over maritime zones, whereas the historic rights relate mostly to fishing rights, not excluding other states' sovereignty over a certain area. Historic waters, on the other hand, should refer only to the waters that are in close proximity to the mainland, not hundreds of miles away.

Even if China presents the historic titles concept as a binding one, it needs to evidence the exercise of authority over the area, continuity over time of this exercise of authority and the attitude and acceptance of foreign states to the claim. According to Gao and Jia (2013), the evidence that there has been acquiescence by other disputants of the nine-dashed line lies in the fact that till 2009 none of them has formally objected to it. That could be a ground for the estoppel principle, where the other state cannot refrain from its previous actions, which led to another state's belief in the validity of such acquiescence (Gao & Jia 2013, p. 116). On the other hand, Dupuy states (2013, p. 141) that there have been "repeated displays of disagreement by the states in the region," giving the example of Vietnam, which has lodged protests against China's laws and declaration for decades.

The meaning of the maps, presented in the 1940s and in the course of the submissions to the Commission on the Continental Shelf Limits remains unclear. So far there has been no official legal justification of it and one can only assume what it means based on the Chinese scholars' work. In that case, they refer to the "three layered theory" providing the United Nations Convention on the Law of the Sea and additionally supporting customary international law. Not all of the legal concepts have a definition under UNCLOS, therefore causing even more ambiguity in its meaning (Gao & Jia 2013, p. 123). Some scholars put in doubt whether a sixty-year-old map can be sufficient evidence of a state's effective control over an area and whether an international tribunal would decide that it constitutes a title (Dupuy & Dupuy 2012, p. 132).

Having said that, it is interesting to have a closer look on the arbitration instituted by the Philippines in 2013, where the nine-dashed line is one of the grounds of the Statement and Notification of Claim.

China and the Third Party Adjudication

China has always preferred bilateral negotiations to third party dispute settlement (Pan 2009; Miyoshi 2012). Such a position is stated in the declarations on the ASEAN forum and proved in their actions before the international tribunals, where to date it has not been an active participant of any proceedings (Talmon & Jia 2014).

One may refer to the strong Chinese nationalism as a ground for legitimacy for the government and the objections that existed strongly in the 1980s to the adjudication bodies, which did not reflect the legal systems of the world in China's view (Pan 2009; Miyoshi 2012).

Pan (2012, p. 105) writes that "Chinese nationalism, as one of the most effective instruments available for the Chinese government to deal with its domestic and foreign affairs, has profound implications for its choice of method to resolve its territorial and boundary disputes."

China may use the International Court of Justice, the International Tribunal for the Law of the Sea or any other arbitral tribunal, when the national interest requires it. Until then, it seems participation in any proceedings may be "labelled as harming Chinese national sovereignty" (Pan 2012, pp. 111–112).

Consequently, China is making reservations and declarations to international treaties when acceding or ratifying them. It has ratified the United Nations Convention on the Law of the Sea in 1996, but made a declaration under article 298 only in 2006. It seems that for 10 years it was possible for another state to bring the case for compulsory adjudication under Part XV of the Convention. One of the reasons it has been so, is that China strongly relied on good relations with neighboring states and did not assume that any of them could bring a case against it to arbitration (Pan 2012, pp. 120–126).

The Philippines v. China Arbitration

On January 22, 2013, the Philippines instituted proceedings against China under Annex VII of the Convention. China refuses to participate in the proceedings and objects to the jurisdiction and the admissibility of the claims. Undoubtedly, the case will have an impact on the other claimants in the South China Sea and may give grounds for interpretation of some unclear issues under UNCLOS, such as the legal status of the islands (Storey 2013; BBC 2013).

In the Statement and Notification Claim, the Philippines seek an award that “declares that China’s claims based on its nine dash line are inconsistent with the Convention and further invalid, determines whether certain of the maritime features claimed by both sides are islands, low tide elevation or submerged banks and whether are capable of generating entitlement to maritime zones greater than 12 nautical miles and enables the Philippines to exercise and enjoy the rights within and beyond its EEZ and continental shelf.”⁴

The Philippines and China are parties to the 1982 United Nations Convention on the Law of the Sea.⁵ They both have not made any declarations under article 287 UNCLOS as to choosing the adjudicating body from between the International Court of Justice, International Tribunal for the Law of the Sea, arbitral tribunal constituted in accordance with Annex VII or a special arbitral tribunal in accordance with Annex VIII. In such case, s. 3 provides that a state party that is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII (Rao 2011; Boyle 1997).

Another issue that has to be explained before analyzing the substance of the Philippines submission is a declaration under article 298 UNCLOS. This article specifies optional exceptions to applicability of section 2 of Part XV UNCLOS, i.e. compulsory procedures entailing binding decisions.

China has made such a declaration in 2006 and does not accept compulsory procedures over disputes concerning the interpretation or application of article 15, article 74, and article 83 of UNCLOS relating to the sea boundary delimitations or those involving historic bays or titles (article 298 (a)(i)), to disputes concerning military activities, law enforcement activities (article 298 (b)) and over disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the charter.

The Philippines Statement and Notification of Claim is carefully drafted, but in China’s view the Arbitral Tribunal will not find that in its jurisdiction (Beckman 2013a; Beckman 2013b). Moreover, they claim that that the Philippines’ note has serious errors in fact and law and false accusations. In their opinion the Philippines have broken their commit-

⁴ Republic of the Philippines, Department of Foreign Affairs, *Notification and Statement of Claim of the Philippines* dated January 22, 2013, viewed on May 2, 2014, <http://www.dfa.gov.ph/index.php/downloads/doc_download/523-notification-and-statement-of-claim-on-west-philippine-sea>.

⁵ More on the status of the State Parties on DOALOS website: <http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm> viewed on April 5, 2013.

ments, cast aside the framework of dialogue upheld by the majority of countries, refused to cooperate and cast a shadow over the relations and peace and stability of the South China Sea (Ministry of Foreign Affairs of People's Republic of China 2013b).

China does not want to take part in the proceedings, has sent back the Notification and Statement of Claim to the Philippines and has not appointed its own arbitrator. It has a time-fixed limit to present its counter-memorial till December 15, 2014, but so far there has been no official indication as it finally might appear before the Tribunal.

Annex VII and the Procedure Rules of the Tribunal state that there can be no adverse conclusions of the fact that the other party does not come to the court and present its position. The Arbitral Tribunal has to find that the Philippines' claim is well founded in fact and law. Moreover, China has the possibility of joining the proceedings at any time if it decides so. The award, however, is binding even in case of a default of appearance.

China invokes that the Arbitral Tribunal will not have jurisdiction in this case, mainly because the claims presented by the Philippines regard territorial sovereignty. Such disputes are excluded on the virtue of article 298 UNCLOS. Having that in mind and without knowing who has the ownership title over the features in the South China Sea, it might be extremely difficult to decide upon other matters, involving maritime zones. To add, article 288 UNCLOS sets out that only disputes concerning the application and interpretation of the Convention shall be within the scope of the Tribunal's jurisdiction.

Even if the Tribunal finds it has jurisdiction over the case, the claims must be found admissible. China would have to prove that the conditions set out in Part XV of UNCLOS have not been met by the Philippines. China finds the provision of the Declaration on the Conduct of Parties in the South China Sea binding, therefore excluding the possibility of satisfying the requirements of section 1 Part XV UNCLOS by the other party. This is based on the assumption that the declaration is an agreement and all settlements shall be done with a recourse to its provisions, not to third party adjudication. Moreover, in China's view, there has not been an exchange of views on the matter of bringing the case to an international tribunal and there was no chance of proposing other solutions and presenting views (Mincai 2014, p. 11).

Even though there are many controversies and objections from the Chinese side to the proceedings of the Tribunal, the international community is waiting for its decision as it might bring some clarification on the disputed matters, answer questions on the differences between islands

and rocks, and may cause that the countries of the region bring their laws into conformity with the United Nations Convention on the Law of the Sea (Mincai 2014).

Conclusions

Undoubtedly, China secures its interest and has a strong influence on the dispute in the South China Sea. It provides evidence of discovery and effective occupation of the features in the South China Sea, therefore claiming territorial sovereignty. It uses both the customary international law principles and the provisions of the United Nations Convention on the Law of the Sea to support its claims. For many, the ambiguous character of the nine-dashed line is an obstacle to settle the dispute without resorting to third party adjudication. The South China Sea dispute has a very complicated nature and an international tribunal would have to assess many issues, including the definition of an island or what effect can be given to it in an area where there are so many overlapping zones.

Concluding, the South China Sea dispute has been the main focus of politics in the region of South East Asia, it is important to the international community and claimants should cooperate to settle it in a peaceful way. China's claim to the South China Sea is based on many historic factors what makes the case interesting also from a legal perspective. The near future might bring new answers and set a new legal order in the waters of the South China Sea.

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