

CHAPTER III

THE SOUTH CHINA SEA DISPUTE BETWEEN THE PEOPLE’S REPUBLIC OF CHINA AND THE REPUBLIC OF THE PHILIPPINES

This chapter will discuss the roots of dispute in the South China Sea, particularly between the People’s Republic of China and the Republic of Philippines, as the part of claimant countries in the area and parties involved in the South China Sea Arbitration (*Philippines v. China*). This chapter aims to give information about the South China Sea dispute as well as China’s and the Philippines’ claims and interests in the South China Sea.

Since the ancient times, the South China Sea was known as a generally tranquil area for fishing and navigation until two recent developments happened in the area. The first one was happened in 1970s when some coastal states surrounding the area started to physically occupy the Nansha, or Spratly, Islands. That activity continued for the rest of the century until nearly all features in Spratly Islands were controlled by one state or another. The second one was happened in 1982 when the states around the world submitted the limits of their claims to the continental shelf beyond two hundred nautical miles from their coastal baselines or known as Exclusive Economic Zone (EEZ) to the Commission on the Limits of the Continental Shelf based on Article 76(8) of UNCLOS (UNCLOS, 1982; Guo & Jia, 2013). The overlapping claims in the South China Sea created disputes among the claimant countries, namely China, Taiwan, the Philippines, Vietnam, Brunei, and Malaysia. In order to understand the South China Sea dispute in that context, the writer will explain the 1982 UNCLOS and the Exclusive Economic Zone (EEZ) first before explains the ongoing dispute further and the specific claims made by China and the Philippines.

A. 1982 UNCLOS

The law of the sea is a combination of treaty and emerging or established customary international law that has developed over centuries. The four United Nations Convention on the Law of the Sea 1958 is the first successful attempt to codify the law of

the sea, which respectively concerns the territorial sea and the contiguous zone, the continental shelf, the high seas, fishing and conservation of living resources on the high seas. Then, the 1982 United Nations Convention on the Law of the Sea replaces the 1958 Convention, sets out the most important aspects into a single treaty. The states listed as parties tied to 1958 Convention are, in many cases, now bound by the rules of the 1982 Convention (Aust, 2010). The 1982 Convention entered into force on 16 November 1994, and now has some 162 parties.

The 1982 Convention has been used as a legal framework for marine and maritime activities. The General Assembly of the United Nations is the appropriate political body to handle them. The 1982 Convention has created three new institutions on the international scene: the International Tribunal for the Law of the Sea, headquartered in Hamburg (Germany), the International Seabed Authority, headquartered in Kingston (Jamaica), and the Commission on the Limits of the Continental Shelf, based in the United Nations Headquarters in New York.

The 1982 Convention consists of 320 articles, with 9 appendices on different topics. It has been the subject of two implementation Agreements, which are the Agreement concerning Part XI of the Convention (July, 1994), and the Agreement concerning the overlapping stocks (ratified in August, 1995). Those texts live their legal lives autonomously while serving to implement the Convention. A state may be a party tied to the Convention without being a party to either one of those Agreements.

B. Exclusive Economic Zone (EEZ)

According to the article 55 and 57 of the UNCLOS, the Exclusive Economic Zone (EEZ) is “an area beyond and adjacent to the territorial sea” and it “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured” (UNCLOS, 1982). Before EEZ exists, most of the area would have been high seas. Therefore, the EEZ does not have the same legal character as the territorial sea, since it is still not being under the sovereignty of the coastal state. Therefore, within the EEZ, coastal State enjoys only

sovereign rights for certain purposes, such as conserving and managing the natural resources, and economic exploitation and exploration of the zone related to the production of energy from the water, currents, and winds (Aust, 2010; UNCLOS, 1982).

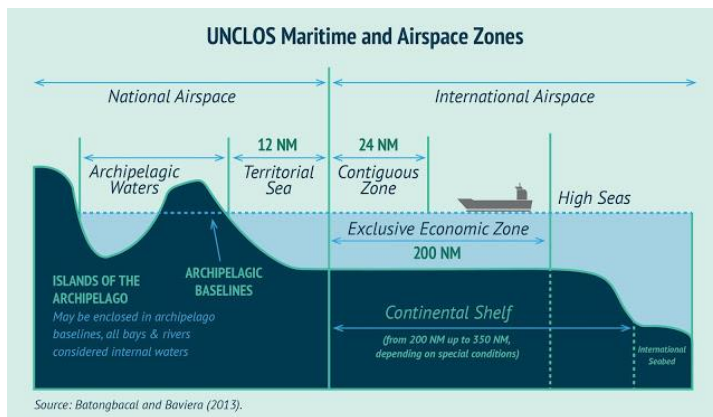


Figure 3.1 UNCLOS Maritime and Airspace Zone

Under the article 55 of UNCLOS 1982, a “specific legal regime” applies to the EEZ. Geographically, the EEZ extends from the seaward limit of the territorial sea (12 NM or less) up to 200 NM as measured from which the breadth of territorial sea is measured. Therefore, the maximum breadth of the EEZ is 188 NM in cases where the coastal states has claimed a 12 NM territorial sea. Vertically, the EEZ includes the air space above, the water column, as well as the seabed and subsoil which form the territorial sea (Dux, 2010).

The EEZ has a unique characteristic which is called “sui generis” that provides for a balanced regime, where it does not grant a full sovereignty to the coastal state but provides an exclusive functional rights while maintaining certain prerogative rights for other states, such as the freedom of navigation, overflight, and immersion. The uniqueness of the regime is also apparent from the Article 59 which gives the basis for the conflict resolutions regarding the attribution of rights and jurisdiction of the EEZ. In cases where the Convention does not

attribute rights or jurisdiction to the coastal state or to other state, the conflict will be resolved on the basis of equity (Dux, 2010; UNCLOS, 1982).

C. The Past Attempts in Resolving Disputes in the South China Sea

To prevent an escalating conflict in the South China Sea, in 2002 the Association of Southeast Asian Nations (ASEAN) member states joined with China to sign a Declaration on the Conduct of Parties in the South China Sea. The DOC is an agreement to pave the way for the enhancement of peace, stability, economic growth and prosperity in the region (ASEAN, 2012). For seven years, it was a period of peace between the South China Sea's claimant countries which include China, Taiwan, Vietnam, Philippines, Malaysia, and Brunei Darussalam. However, the dispute was escalated in 2009 when Malaysia and Vietnam made a joint submission which followed by exchanges of *notes verbales* to the Commission on the Limits of the Continental Shelf (CLCS) regarding the outer limits of the continental shelf beyond 200 nautical miles from the baselines of the Vietnam (Sinaga, 2015).

The joint submission were objected by both China and the Philippines (Espina, 2013). As response to the Malaysia and Vietnam's submissions, China submitted a verbal note to the United Nations, stating that:

“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community” (United Nations, 2009).

In the submission, China attached a map of its “U-shaped Line” area which is known as China's nine-dash line in the South China Sea.



Figure 3. 2 China’s nine-dash line map submission to the *(United Nations, 2009)*

The Philippines also submitted a note to the UN conveying its position on the joint submission by Malaysia and Vietnam. The country stated that:

“the Joint Submission for the Extended Continental Shelf by Malaysia and Vietnam lays claim on areas that are disputed not only because they overlap with that of the Philippines, but also because of the controversy arising from the

territorial claims on some of the islands in the area including North Borneo” (United Nations, 2009).

The joint statement by Malaysia and Vietnam in 2009 had generated more responses from other claimant states. Overall, the submissions of claim for the Extended Continental Shelf had impacted on the South China Sea territorial disputes and the relations among concerned countries. It added complexity in the multi-faceted disputes on the maritime jurisdictions, the ownership of the maritime features, and China’s vague “historic” claim in the South China Sea (Espina, 2013). To this day, the ASEAN claimant countries and China are still trying to find the best solution to those issues.

D. China’s Claim and Interest in the South China Sea

In the South China Sea, China’s first public claim in the area can be identified as early as 1950s. In August 1951, Chinese premier Zhou Enlai declared a statement during the Allied peace treaty negotiations with Japan that China claims sovereignty over the Paracel and Spratly Islands (Zhou E. , 1990). To support Zhou Enlai’s statement, the People’s China issued a commentary that claimed the Paracel and Spartly Islands are within the records of Chinese history dated back to the Sung Dynasty. One of the proofs is the discovery of coins belonging to Emperor Yung-lo of the Ming Dynasty in a coral reef there which was found before the War of Resistance of Japanese Aggression (People's China, 1951). Besides claiming the Paracel and Spratly Islands, Zhou Enlai also pointed out that “although the islands had been occupied by Japan for some time during the war of aggression waged by Japanese imperialists, they were all taken over by the then Chinese government, following Japan’s surrender” (Lo, 1989).

During the Jinmen crisis, China reaffirmed its claim to the Paracel and Spratly Islands when it asserted rights to territorial waters. In the 1958 declaration, China for the first time linked its claims to territorial sovereignty with the assertion of maritime rights to territorial waters. The disputes over the Paracel and Spratly Islands were relatively dormant throughout the 1960s,

but from the mid-1970s to the present, the conflicts continuously present as the claimant countries began physically occupy the features in Spratly Islands.

As the international maritime legal regime began to evolve, China started codifying its claims to maritime rights through the domestic legislation by harmonizing China's legal system with the requirements of the UNCLOS. In 1992, the National People's Congress (NPC) passed a *Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China* as reaffirmation to the 1958 declaration. After that, China began to issue baselines for its territorial waters in 1996, and in 1998, the NPC issued the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China* to claim additional maritime rights beyond those contained in the 1992 law (State Oceanographic Administration Office of Policy, 2001). The 1998 law did not refer to the Paracel and Spratly Islands, but combined with the 1992 law, it provides a basis for claiming China's maritime rights in the South China Sea. In 2011, China sent a *note verbale* to the UN Commission on the Limits of the Continental Shelf by stating that the Spratly Islands were "fully entitled" to territorial waters, an EEZ and a continental shelf as reaffirmation to the interpretation of China's 1998 EEZ law (United Nations, 2011).

There are several ambiguity in China's claims to maritime rights over the Paracel and Spratly Islands. The first ambiguity is that the land features claimed by China in the South China Sea are not qualified as islands under the article 121(3) of UNCLOS and therefore, it cannot serve as basis of a claim to an EEZ. The second ambiguity is concerning the historical rights that China has claimed in the South China Sea. In the article 14 of the 1998 EEZ law, it states that it "shall not affect the historic rights [*lishixing quanyin*] that the PRC enjoys" (United Nations, 1998). Although some Chinese policy analysts have suggested that China has historic waters in the area based on the 1998 law, it still did not define the scope of the historic rights (Dutton, 2010).

The third source of ambiguity is the presence of the "nine-dashed line" that appears on official Chinese maps. The line was initially drawn in the 1930s. It first appeared on an official

Republic of China (ROC) map in 1947, with 11 dashes at the time. The dashes encompassed most of the South China Sea. The CCP adopted the map in 1949, but removed two dashes to give the Gulf of Tonkin to communist Vietnam as a courtesy. The disputed Parcel and Spratly Islands and various other features, such as Scarborough Shoal, are within the nine dashes (Mollman, 2016). Regarding the meaning of the line, neither the ROC nor the PRC has ever defined what type of international legal claim the line depicted, and the line remains undefined to this day (Zou, 2005).

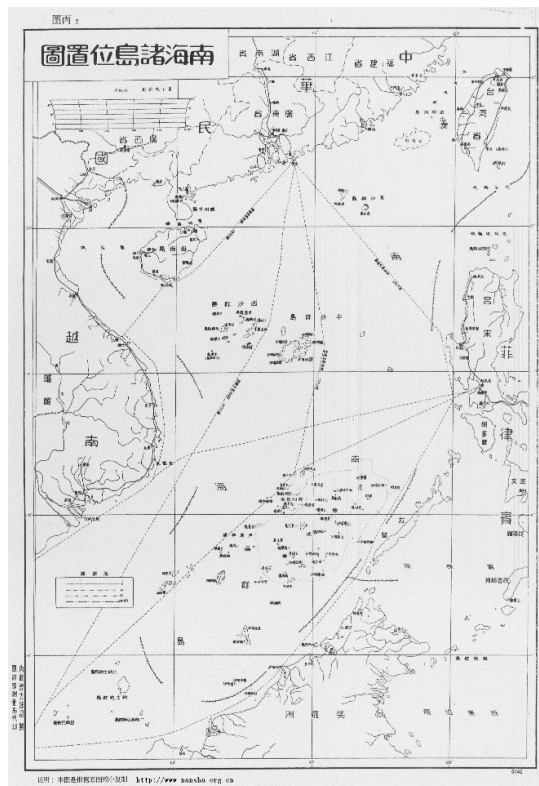


Figure 3. 3 The dashed-line map of 1947 (Mollman, 2016)

China has several interests through its claims to territorial sovereignty and maritime rights within the “nine-dashed line” in the South China Sea. As former PLAN Commander Admiral Liu Huaqing observed, “whoever controls the Spratlys will reap huge economic and military benefits” (Liu, 2004). The economic benefit from having a jurisdiction over the “nine-dashed line” is that China could have access to the maritime resources, such as hydrocarbons and fish. It is known that the Spratlys have 105 billion barrels of hydrocarbon reserves, while the South China Sea has also been accounted as the major source for Chinese annual catch of fish (Cole, 2010). The South China Sea has also become the major trade route for China with 80 per cent of it is for oil imports (Lelyveld, 2011). The military benefit from having territorial sovereignty over the South China Sea is that China could have a maritime buffer for the provinces of the southern China and it can be a key theatre of operations in a conflict over Taiwan with the United States (Fravel, 2011).

E. The Philippines’ Claim and Interest in the South China Sea

The Philippines mainly has claimed two basic features in the South China Sea, which are the Scarborough Shoal and the Kalayaan Island Group (KIG). The KIG consists of several features in the Spratly Island, including Reed Bank, Mischief Reef, Itu Aba, Second Thomas Shoal, and Fiery Cross Reef. The country’s claim to the Scarborough Shoal was based on historic facts which can be traced back during Spanish occupation in the 18th century (Rosen, 2014). The Scarborough Shoal was given the name ‘Bajo de Masinloc’ by the Spanish colonizers. In 1734, one of the earliest accurate maps in the area named Carta Hydrographical y Chorographica De Las Yslas Filipinas by Fr. Pedro Murillo Velarde included Bajo de Masinloc as part of Zambales. Bajo de Masinloc made some appearances on later maps published by the Spain in 1792 and 1808, and the US in 1990, as part of the Philippines (GOVPH, 2012). However, the Scarborough Shoal or Bajo de Masinloc was never inside the Treaty Box established in the Treaty of Paris, which defined the territories of the modern day Republic of the Philippines after the United States formally recognized the Philippines independence

in 1946 (National Archive, 2016). Nevertheless, in 2009 the Philippine legislature passed the Republic Act No. 9522 which classified Scarborough Shoal as part of the legal province of Zambales (GOVPH, 2009).

The Philippines' claim over the KIG is loosely based on principles of discovery and effective occupation. Many features in the KIG are within 200 nautical miles of the Philippine's archipelagic baselines and presumptively be part of the Philippine EEZ/continental shelf. Due to its proximity, the KIG is considered as part of Palawan province as constituted in Presidential Decree No. 1596 on June 11, 1978 (GOVPH, 1978). Historically, there was no record of the U.S. activity which made up the KIG as the part of the Philippines' territory, although some Philippine scholars claimed that around 1946-1947, there were communication between the Philippine Ministry of Foreign Affairs and general MacArthur requesting for the KIG to be returned to the Philippines. Apart from that sketchy resource, nothing substantive could be found to support the historical accounts in the Philippine claim (Rosen, 2014).

The Philippines has several interests through its claim in Scarborough Shoal and the Kalayaan Island Group. The Scarborough Shoal becomes fishing grounds for Filipino fishermen who are mainly coming from the provinces of Zambales, Pangasinan, and Bataan (Bonnet, 2012). The shoal is used for defense purpose by the Philippine and U.S. Naval Forces stationed in Subic Bay in Zambales. The area is also used to conduct scientific, topographic, and marine studies by researchers from the Philippines Department of Environment and Natural Resources and the University of the Philippines (GOVPH, 2012). As in the KIG, since 1970s, the Philippines has been conducting oil and gas exploration in the Reed Bank. The Philippines has successfully exploited the natural gas in between Palawan Island and Reed Bank although the area has not yet fully surveyed (Baviera, 2013).