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Original Citation

Ndi, George (2016) Philippines v China: Assessing the Implications of the South China Sea Arbitration. *Australian Journal of Maritime and Ocean Affairs*, 8 (4). pp. 1-17. ISSN 2333-6498

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Philippines v China: Assessing the implications of the South China Sea Arbitration

*Dr George K. Ndi**

**Dr George K. Ndi is Senior Lecturer in Law & PGR Leader at the School of Law, University of Huddersfield, England, United Kingdom.*

*Address: School of Law
University of Huddersfield
Queensgate, Huddersfield HD1 3DH
West Yorkshire, England
United Kingdom Tel +44 1484 473080
Email: g.ndi@hud.ac.uk
<http://www.hud.ac.uk>*

Acknowledgements: the author wishes to express his gratitude to the University of Huddersfield School of Law for the research time allocation which made it possible to conduct this research.

Disclosure Statement: This research has been conducted as part of academic staff research of the University of Huddersfield Law Research Group. No funding has been received from any external sources for the research.

ABSTRACT

The question concerning the legality of China's nine dash line has been the subject of arbitration proceedings at the Permanent Court of Arbitration (PCA) at The Hague. The case, which was submitted to the PCA by the Philippines for adjudication, raised issues which went beyond the main question concerning the legal status of the dash line as a maritime boundary under UNCLOS provisions. These included, *inter alia*, complaints concerning China's activities within the area enclosed by the nine dash line, the status of maritime features within the maritime enclosure and alleged environmental damage caused by Chinese dredging and infrastructure building activities within the contested area. On 12 July 2016 the PCA rendered its judgment on the merits of the case. The main objective of this paper is to critically assess the implications of the PCA's decision for the region and for the international law of the sea.

Keywords: South China Sea; nine dash line; maritime dispute; law of the sea; UNCLOS arbitration.

Introduction

China's nine dash line has long been the subject of much academic and political debate, generating as much controversy in the process. The precise nature and legal character of the dash line concept has always been shrouded in ambiguity and uncertainty. And yet, its visual projection as a cartographic feature of the South China Sea (SCS) is conspicuous and seemingly indelible. Its precise legal status as a maritime boundary has been the subject of claims and counterclaims, as well as conjecture and speculation on the part of neutral observers. On 12 July 2016 the Permanent Court of Arbitration (PCA) sitting at The Hague had the opportunity to finally add its official voice to the debate by rendering a judgment on the legality of the nine dash lines under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) in a case brought by the government of The Philippines against China. UNCLOS is the key legal instrument which provides the multilateral framework for the international law of the sea. Its prescriptive rules regulate entitlement by coastal states to maritime zones, and thus constitute the applicable legal framework for the assessment of claims by littoral states to maritime jurisdiction.

Apart from the legal status of China's nine dash line under UNCLOS principles governing maritime jurisdiction, other matters for consideration before the PCA included determination of the legal status of maritime features within the area enclosed by the nine dash line. The complaint by the Philippines referred to the activities of the Chinese government within the enclosed area, most notable dredging and artificial island construction on low tide elevations and submerged maritime features such as reefs, as well as the restriction of access to fishing grounds within the enclosed area to nations of neighbouring littoral states, in particular fishermen from the Philippines.

The judgment delivered by the PCA was to the effect that any claim to maritime jurisdiction which is based on historic rights (such as China's nine dash line) is inconsistent with UNCLOS entitlements. It is, however, a non-binding ruling. China has consistently contested the jurisdiction of the PCA to adjudicate the case brought by the Philippines under the dispute settlement provisions of UNCLOS while arguing for a regional diplomatic or political settlement as its preferred option (Wu 2013). On delivery of the judgment the prompt reaction of the Chinese government was thus to reject the ruling. Despite this negative reaction on the part of the People's Republic of China (PRC), it is axiomatic that the ruling has significant implications for the littoral states of SE Asia region, many of which have overlapping claims to maritime jurisdiction by virtue of the intersection of their unilaterally demarcated maritime boundaries with China's nine dash line. China's own claim to maritime jurisdiction over the area of the SCS enclosed by the nine dash line is founded on historic rights ostensibly emanating from traditional usage (Gao and Jia 2013).

This paper has the following main objectives: (a) to explain the historical and legal background to the dispute, including the genesis and evolution of China's dash line concept; (b) to examine the procedural and substantive aspects of the case; (c) to assess the implications of the ruling for the SCS and for maritime relations between littoral states of the region; and (d) to critically appraise the implications of the judgment for the international law of the sea, including the exercise of freedoms of the high seas (fishing, commerce, overflight and navigation). The article concludes with a number of recommendations both for the region and for future normative development of the international law of the sea, particularly with reference to infrastructure usages of the high sea.

Background to the dispute

The SCS is a semi-enclosed sea in SE Asia with a surface area of approximately 3.5million sq.km. It opens out to the Pacific Ocean to the south and in the north east. The SCS contains a significant number of maritime features including three main groups of land features with disputed claims to ownership and territorial sovereignty involving the littoral states of the region. In the first group are the disputed Paracel Islands in the northern sector of the SCS, including Woody Island which at 2.4sq.km represents the largest of the islands within the maritime zone enclosed by the nine dash line. The Paracel Islands, occupied by the PRC, are also the subject of conflicting claims by Vietnam and the Republic of China or Taiwan (Amer 2014). In the second group are the Spratly Islands in the south, which are the subject of conflicting claims to territorial sovereignty by the Philippines, PRC, Taiwan (ROC), Brunei, Malaysia and Vietnam (Duong 1997). The third group consists of the Macclesfield Bank which includes Scarborough Shoal, one of the most fiercely contested features.

Amongst the submerged maritime features enclosed by China's claim through the nine dash lines are Macclesfield Bank and James Shoal. As with most of the SCS, maritime features in the area around Macclesfield Bank and James Shoal consist mainly of submerged reefs or low tide elevations (i.e. uninhabited 'rock-like formations') and hence are legally incapable of generating any legitimate entitlements to maritime claims under Article 121(3) UNCLOS (other than 12 nautical miles). There are approximately 103 such maritime features (Poling 2013: 27-28), of which only about 38 may be classified as islands although their precise legal status have not yet been determined under relevant UNCLOS provisions.

At the heart of the maritime dispute in the SCS is what many states in the region perceive as China's expansive territorial claims to maritime jurisdiction as represented by the nine dash lines which incorporate roughly 85% of the SCS within the enclosed area, representing 22% of China's land area (US Department of State 2014: 4). The claim by China on the basis of historic rights and traditional usage has significant implications for recognised freedoms of the high seas such as fishing, commerce, navigation for commercial shipping and military vessels, and rights to exploitation of minerals resources of the seabed. These concerns have been further exacerbated by Chinese actions within the maritime area enclosed by the dash lines, including coercive enforcement actions such as naval patrols along the outer edges of the lines.

China has laid a claim to the fisheries resources of the enclosed area on the basis of historic rights to traditional fishing grounds. Examples of coercive enforcement actions include the expulsion of Filipino fishermen from Scarborough Shoal in 2012, a maritime feature located approximately 125 sq.km from the coastline of the Philippines. China's assertive actions and infrastructure-building activities include land reclamation through the dredging and transformation of submerged maritime features and low tide elevations as a prelude to the construction of artificial islands, airfields/runways and other civilian and military installations - most notably on the appropriately named Mischief Reef in the Spratly Islands which are the subject of a rival claim by the Philippines. The most conspicuous of these infrastructure projects has been the construction of the so-called 'great wall of sand' (Duong 1997). Furthermore the China National Oil Corporation has been granted petroleum exploration rights within the dash line enclosure. The southern extremity of the dash lines also represents an area of conflict through intersection and overlapping with Malaysia's

lawful entitlement to an exclusive economic zone (EEZ) under UNCLOS. This southern portion of the dash line enclosure incorporates James Shoal, which by virtue of being a permanently submerged maritime feature is incapable of generating any rights or entitlements to maritime claims under UNCLOS.

Genesis and evolution of China's dash line concept

A historical review of China's dash line concept reveals a number of variations and mutations since its initial conception by the Nationalist Koumintang government of the then Republic of China following its publication of a 'Map of the South China Islands' in 1947 (Beech 2016). However, it would seem that that the map of 1947 with its eleven dash lines was inspired by an even earlier map of 1935 titled 'Map of the Chinese Islands in the South China Sea' and published by the Land and Waters Maps Inspection Committee of the Republic of China (Jinming and Dexia 2002). The dash lines' chief evolutionary features are defined by three historical phases: the first phase represents its initial inception as a cartographic feature of the SCS in 1947; the second phase marked its transformation from the initial eleven dash lines to nine dash lines following the Gulf of Tonkin settlement with neighbouring Vietnam in 1952 and the consequential erasure of the two dashes off the north-eastern coast of Vietnam to the north-west extremity of the SCS (see Map 1). It was this map containing the nine dash lines which China presented to the UN Forum on 7 May 2009 in support of its claim to sovereignty over the SCS.



Map 1: The nine dash lines

Note: The two dashes in the north-western sector of the SCS were deleted by China as part of the Gulf of Tonkin settlement with Vietnam in 1952, resulting in the Nine Dash lines. The tenth dash line to the east of Taiwan was added in 2013.

The third phase in 2013 saw the addition of a new line to the west of Taiwan in the north-western extremity of the SCS, thus incorporating Taiwan within the area enclosed by the dash lines and forming part of China's maritime claim. The third phase in 2013 introduced a new innovation in the shape of a vertical map – i.e., a cartographic representation of the enclosed maritime area in the SCS in the form of a vertical projection of what had now become the ten dash lines.

The dash line concepts has for long represented an enigmatic cartographic feature of the SCS, not least in terms of its precise legal status as a maritime boundary. It has never been given an official name by either the Nationalist Koumintang Government of the Republic of China or the Communist Government of the PRC which defeated the Nationalist Government in 1949. In the absence of an official name scholars have over the years adopted innovative nomenclature for the lines such as the U-Shaped line (Gau 2012), the 'Nine dash line' (Gao and Jia 2013), the 'Dotted line' (Jinming and Dexia 2003), and even the 'Cow's tongue' or 'Ox's tongue' line (Hoang 2009) . In this paper the dash lines and the nine dash line will be the preferred usage.

The non-lethal weapons of a maritime conflict: cartography, immigration and language.

The conflict over the SCS not only pre-dates the foundation of modern PRC. At various times in history it has involved the French colonial administration of French Indochina (on whose territorial legacy some of the claims of modern Vietnam are based), as well as the Japanese. The latter's pre-WW2 occupation of some of the maritime features and islands in the SCS, and their repossession by China following Japan's defeat in WW2, provide the historical basis for some of the arguments put forward by China in support of its claims. Many of the maritime features enclosed by the nine dash line are thus subject to overlapping and conflicting claims by China, Vietnam, Philippines, Malaysia, Brunei Darussalam and Taiwan. Unsurprisingly, the latter's claims mirror those of China, given the historical genesis of the line and its original conception in 1947 by the Nationalist Koumintang government which subsequently relocated to Taiwan following its defeat by Communist forces, leading to the foundation of the ROC in 1949.

The SCS disputes have been conducted most visibly on cartographic maps or in the form of "competitive cartography" (Banyan 2014:1). The author observes that such cartographic competitions have since acquired the status of a spectator sport with map exhibitions taking place in Haiphong, Vietnam, in June 2014; and in Manila by the Philippines in September 2014 simultaneously with a rival Taiwanese exhibition in Taipei. These cartographic and archive exhibitions, which are intended to serve as a visual projection of the legal grounds on which rival claimants' arguments are based, are undoubtedly guided by a historically themed subtext to the effect of '*look, our map is better than yours*'. The cartographic exhibition by the Philippines in Manila, for example, is claimed to be based on a map dating from 1636 which locates Scarborough Shoal (part of the Macclesfield Bank maritime features) in the maritime territory of the Philippines - thus authenticating the Philippines' claim as pre-dating the nine dash line map which China officially submitted to the United Nations for the first time in 2009, as well as any other rival claims.

A particularly sensitive aspect of the SCS dispute has been the attempt by China to reproduce the nine dash lines on official documents such as passports as a way of bolstering its expansive

maritime claims. The effect has been a spill-over of what is essentially a territorial dispute into the area of immigration policy. Vietnamese immigration officials have rejected Chinese issued passports with a map of the SCS and the dash lines, opting instead to issue separate on-arrival visas to Chinese visitors to Vietnam rather than stamping Chinese passports embossed with maps of the nine dash line (Global Nation 2016). Vietnamese officials also announced that similar passports which have already been stamped by mistake will have their stamps voided at the next point of entry into Vietnam. The symbolism in these gestures are symptomatic of the seriousness attached by governments in the region to the SCS dispute, with officials careful to avoid any actions which, advertently or inadvertently, could in future be interpreted as equating to either acquiescence or recognition of China's portrayal of the dash lines as a historically valid claim.

The conflict has not been limited to discussions and debates in diplomatic, political, legal or immigration forums. Language has also been employed as a potent tool in pursuit of territorial sovereignty over disputed maritime features in the area. The Paracel Islands, occupied by China since 1974 and the subject of disputed claims by Vietnam and Taiwan, is known by the Chinese as Xisha Islands. The Spratly Islands which is the subject of disputed claims by all the littoral states bordering the SCS is known to the Chinese as Nansha Islands. Macclesfield Bank consisting mainly of sand banks, rocks and reefs is named Zhongsha Islands by the Chinese. As previously stated its only maritime feature which is permanently visible above sea level is Scarborough Shoal (Huangyan Dao to the Chinese and Panatag Shoal to the Philippines) which has been the theatre for high profile clashes between the two countries. Apart from the Chinese and Filipino claims, Macclesfield Bank itself is also the subject of a rival claim by Taiwan. The lesser known Pratas Island in the north eastern sector of the SCS which is claimed by both China and Taiwan is named Dongsha Islands by the former.

Coercive and enforcement measures

In order to bolster its territorial claims to the insular features of the SCS and to mineral and fisheries resources in the maritime area enclosed by the nine dash line, China has frequently resorted to political and military measures including coercive actions such as enforcement patrols along the outer edge of the line and other exclusionary measures. China has also been particularly active in carrying out infrastructure projects including dredging, the settlement and population of previously uninhabited islands in the SCS, as well as the construction of artificial islands and infrastructure development on Mischief Reef in the Spratly Islands. Taiwan has equally been involved in infrastructure building with the construction of a new port on the largest of the Spratly islands, known as Itu Aba (Taiping to the Taiwanese and Dao Ba Binh to the Vietnamese).

It is worth emphasising that the key issues at stake in these rival claims are not limited to freedom of navigation for both military vessels and merchant ships, fisheries and the flow of commerce through one of the busiest waterways in the world. There are more strategic interests at stake including sovereign rights to the exploitation of seabed resources. The SCS is reputed to be rich in mineral resources, particularly oil and gas, although significant discoveries of deposits are yet to be made.

In pursuit of natural prolongation? The continental shelf thesis.

The historical, political, diplomatic, legal and cartographical aspects of the SCS dispute have often overshadowed a geological and geomorphological dimension to the problem based on the geographical configuration of the SE Asia region which includes the enclosed maritime feature known as the SCS. This is an aspect of the SCS conundrum which is yet to receive adequate attention in scholarly discourse on the subject. It could be argued that an underlying factor to the SCS problem resides in the extent to which geographical and geomorphological factors have exposed latent flaws in the normative foundations of the international law of the sea as embedded in UNCLOS principles governing the attribution of entitlements by coastal states to maritime jurisdiction over the territorial sea, contiguous zone and exclusive economic zone (EEZ).

Maritime space entitlement under UNCLOS is premised on the rationale of an actual or presumed presence of a continental shelf as a maritime feature which represents an extension or natural prolongation of the landmass of the coastal state stretching from the coastline to the continental margin. Claims to maritime jurisdiction are generally founded on land-based features. Furthermore, in order to generate maritime entitlement insular features must come within the accepted UNCLOS definition of an 'island'.

The continental margin marks the boundary line between the continental shelf and the oceanic crust. Comprising of the continental shelf, the continental slope and the continental rise, the continental margin separates the thick continental crust from the thin oceanic crust at the point at which the seabed drops to a greater depth, thus signifying the end of 'natural prolongation'. Pursuing the logic implicit in this premise (i.e. natural prolongation), the conceptual basis for entitlement under UNCLOS to maritime jurisdiction is *a priori* territorial. But two seemingly inconsequential questions emanate from this premise which, on closer examination, prove to be problematic. The conceptual nature of this problem is examined next.

Interface between geomorphological factors and territorial sovereignty.

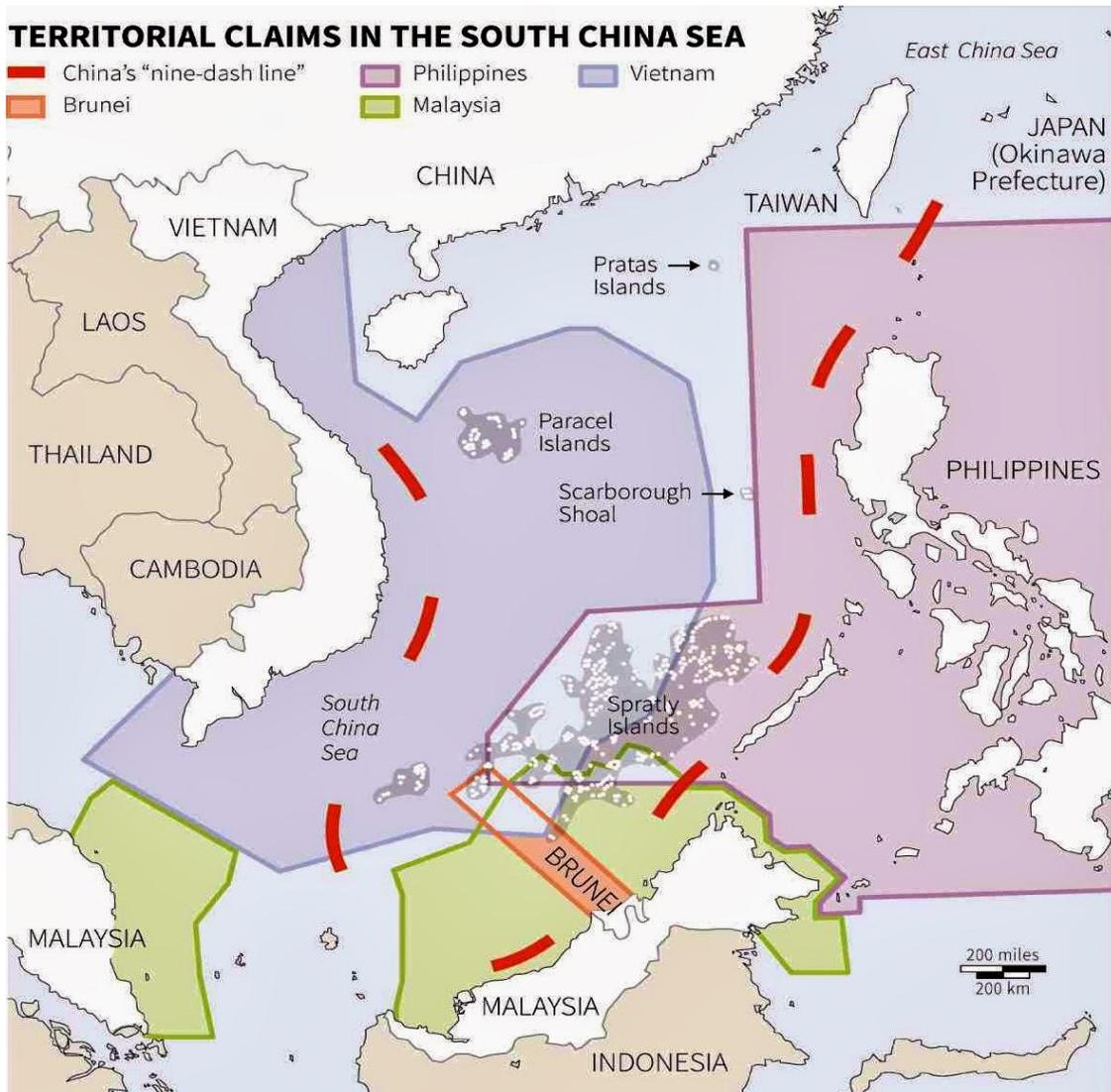
The first issue concerns geomorphological conditions where the continental margin which marks the end of a coastal state's continental shelf falls short of the full UNCLOS entitlement of 200 nautical miles (nm) limit measured from the baseline. Part V of UNCLOS addressed this problem by providing for a maximum allowed limit of 200 nm (from the baseline) for the regime of the EEZ.

The second problem is one has more relevance to the SCS than the first problem identified above. This second problem is also seemingly one which UNCLOS, with its foundational roots in customary international law, did not envisage. It relates to cases where a combination of geographical, geological and geomorphological conditions result in a prolonged continental margin with a continental shelf which extends beyond the 200 nm limit. The obvious answer to this conundrum is to refer to the prescribed 200 nm maximum limit allowed under UNCLOS. But this still leaves unanswered the question of 'natural prolongation' which provided the initial rationale and conceptual basis for UNCLOS calibration of nautical mileage allocation of maritime entitlements.

As is the case with most enclosed seas, hydrographic and bathymetric measurements of the SCS have indicated that the continental margins stretches beyond the 200 nm limit for the EEZ. The

presence of insular features such as low tide elevations, reefs and shoals have compounded the problem. In the SCS the continental margins or shelves of adjacent littoral states tend to merge or converge on each other. The end result is a uniformity in the geomorphological structure and profile of the SCS to the extent where it could be argued that the whole of the SCS seabed constitutes a continuous or single extended sheet of continental shelf. It is arguably the case that exaggerated or expansive claims by coastal states to maritime space are invariably founded on an underlying geomorphological logic which impulsively equates 'natural' *cum* territorial 'prolongation' to 'territorial waters'.

Although not officially admitted or deployed as the foundational basis for claims to maritime entitlements by States in the region, the continental shelf question could nonetheless be deduced as an underlying factor informing the generally excessive maritime claims in the SCS. It could be further argued, with this geomorphological 'anomaly' of the SCS in mind, that China's expansive nine dash line claim could perhaps be seen as being pursuit of natural prolongation, with territorial sovereignty extending from its land mass outwards to sea and throughout the whole of its continental shelf. The obvious problem is that it is a continental shelf which is shared by other countries bordering on the SCS. Viewed from this perspective, it is not surprising that China's claim to territorial sovereignty have been anchored on historic rights based on discovery and occupation of maritime features within the area enclosed by the nine dash line (see Gao and Jia 2013:110).



Map 2: Excessive and overlapping maritime claims in the SCS (Source: www.phamphongphuoc.net)

The north to south alignment of the dash lines seemingly lends credence to the continental shelf *cum* natural prolongation thesis in view of the projection of the line from the southern coast of China (its presumed baseline) into the southern portion of the SCS.

China's position on the SCS dispute

According to Gao and Jia (2013:102), when the ROC government issued the original eleven dash map back in 1947, it intended the map to serve as an indication of the “geographical scope of its authority over the South China Sea.” The vagueness of this statement calls into question its true meaning. What does “geographical scope of its authority” actually mean? Does it signify territorial sovereignty? And is such ‘geographical authority’ limited to historic rights centred on traditional usage such as fisheries? Or does it signify historic title over insular features enclosed by the dash lines based on discovery and occupation? The imprecision which characterises the statement is indicative of the manner in which both the Chinese authorities and Chinese scholars and commentators have historically approached the question concerning the legal status of the dash lines. In this section the position of the Chinese government will be examined first, followed by the views of Chinese scholars and commentators on the subject.

There are no specific Chinese laws which confer on the dash lines a legal character or status other than the appearance of the lines on Chinese maps, seemingly in the form of an undefined maritime boundary. Apart from opaque references to historical rights, China's maritime claims have mainly taken the form of cartographic representations on Chinese maps and official documents such as passports, together with inferences drawn from various Chinese administrative and legislative instruments. The only evidence presented in support of the historic rights argument rests on the fact that China has used the sea enclosed by the dash lines for millennia as a traditional fishing ground. However, the same could equally be said about any of the other countries bordering on the SCS. To buttress its historic rights case, China has highlighted the fact that a Commission was established by the ROC government which in 1935 produced a Chinese map containing 132 maritime features of the SCS after examining private maps and collating the cartographic information contained in them (Malczewska 2015: 68). The 1935 map was followed by the better known map of 1947 which included the eleven-dash lines together with a list of 172 names for various islands and maritime features within the area enclosed by the dash lines. These islands were placed under the administrative authority of Hainan District.

However, it was not until the 1950s, following rival territorial claims by the Philippines to Macclesfield Bank and the Spratly Islands, that China started enacting official laws on its maritime entitlements in the SCS. In 1958 China issued the Declaration on China's territorial sea which in effect asserted territorial sovereignty and ownership rights over all the group of islands and insular features of the SCS within the dash line enclosure. This was followed in 1992 by the Law on the Territorial Sea and Contiguous Zone of the PRC, the main objective of which was to proclaim sovereignty over all of the maritime features identified and listed as part of this law. The turning point in this legislative activity came in 1996 when China ratified UNCLOS. In the declaration issued as part of the ratification, China recognised the 200 nm limit whilst reaffirming its sovereignty over all of the maritime features (archipelagos and islands) listed in the law of 1992.

China's ratification of UNCLOS in 1996 left many unanswered questions concerning the SCS dispute. The first question concerns the baselines from which its territorial sea, contiguous zone and EEZ are to be measured. Is it from the southern coast of mainland China with Hainan Island serving as the equidistance point of its maritime boundary delimitation with Vietnam? Or is it in Chinese expectations that any of the maritime features within the nine dash line should generate entitlement to maritime space in the SCS? If so, should such entitlement be generated under Article 121 of UNCLOS or should it be based on the historic rights argument which China has consistently posited? The second main question concerns the issue of delimitation of maritime boundaries. In its ratification declaration China highlighted the need for consultations with neighbouring littoral states with a view to effecting the delimitation of maritime boundaries in the SCS, while at the same time reaffirming its sovereignty over maritime features of the SCS listed in its 1992 law. On what legal basis would such delimitation proceed? And will UNCLOS play any role?

Far from addressing these key questions, particularly on the issue of baselines, China's 1998 Act on the EEZ and Continental Shelf once again reasserted its sovereign rights over these areas while reaffirming its historical rights over the SCS. A further declaration of 2006 pursuant to Article 298 of UNCLOS precluded compulsory dispute settlement procedures for the SCS dispute with

particular reference to maritime boundary delimitation, or military, security and law enforcement activities (Malczewska 2015: 69).

It is worth noting that none of the official initiatives mentioned above specifically relate to the dash lines, but are rather couched in the form of general statements of principle without providing any authoritative insight as to the precise legal status of the dash line concept. In the absence of clear and unambiguous statements on the legal status of the dash lines from official sources, it has been left to Chinese scholars and commentators to further explain the precise scope, significance and function of the lines in the SCS. The compendium of academic literature containing expositions in search of a rationale range from theoretic legal justifications (Fu 2013; Gao and Jia 2013) to the purely sentimental (see Wang 2014). But attempts at elucidations on the whole seem hesitant and tentative.

Chinese scholars who have sought to explain the precise character of the dash lines have employed a “three layered theory” in doing so (see Malczewska 2015: 71). The first theory is founded on China’s territorial sovereignty over the maritime features enclosed by the lines based initially on discovery and occupation over what presumably was then *terra nullius*, and subsequently through re-occupation following Japan’s renunciation of its sovereignty over the SCS islands in the aftermath of WW2. Gao and Jia (2013: 110) pursue this thesis by further proclaiming that the historical evidence of China’s discovery of the SCS islands is overwhelming. Yet no such evidence is proffered, nor are there any precise dates cited for the initial discovery and occupation. To further back up their claim, the authors point to a “... consistent line of legislative and administrative acts...” adopted by China with regard to the insular features of the SCS (Gao and Jia 2015: 113). This particular argument, similar to the geographical scope of authority over the SCs also used by the authors, has been deployed to counter Filipino claims to territorial sovereignty over Scarborough Shoal on the basis of the effective Filipino occupation.

The second explanation provided by Chinese scholars is that of historic rights to fishing, navigation, commerce and the marine resources of the SCS. In arguing this point, Fu (2013: 12) posits that the nine dash lines represent “... the outer limit of China’s ‘historic waters’ in the SCS ...” pending delimitation of maritime boundaries in the area. But what is the precise scope, legal nature and function of such historic waters. Is the ‘traditional usage’ on which the claim is based an exclusive right, or is it usufructory? The historic rights argument confuses and confounds the issue in that if the first premise based on territorial sovereignty is correct, then there is no need to claim historic rights. From both a conceptual and practical point of view it is difficult to see how historic title (territorial sovereignty) can co-exist alongside historical rights of usage. It would have to be either the one or the other, not in the sense of the two concepts being mutually exclusive, but from the point of view that once historical title is established historic rights become superfluous, perfunctory and hence redundant - unless the historical title claim relates solely to the insular features of the SCS while historic rights relates to the waters, a distinction which is not elucidated in the literature. At the same time similar claims by Vietnam based on historic occupation of some of the islands under French colonial administration are dismissed by Chinese authorities on the grounds that such events pre-date WW2. This is rather surprising given that the history of the SCS did not begin only after WW2 and in light of the historical background to China’s own arguments.

The third explanation provided by scholars is to the effect that the dash lines represent a maritime boundary, i.e., a median line between the coastline and the islands of the SCS (Gao and Jia 2013: 108; Keynan 2000). The problem with this explanation resides in the fact that delimitation in this case is perceived by other littoral states in the region to have proceeded on a unilateral and arbitrary basis, whereas an effective and sustainable maritime boundary delimitation exercise should in essence be collective, cooperative and consensual, and proceed on the basis of established UNCLOS principles.

None of the arguments posited by Chinese scholars contain any explanation as to the precise legal character and status of the dash lines under international law. Given the fact the dash line is a unique maritime feature with no antecedents in the international law of the sea, it would have been pertinent to provide specific legal justifications for the dash line *vis-à-vis* its status under UNCLOS. However, the view from China seems to be that the dash lines pre-date UNCLOS (Global Nation 2016). Implicit in such a view is the non-applicability of UNCLOS provisions to the dispute in the SCS. But such argument is flawed in as much as previous State practices and considerations based on historic rights have been subsumed and embedded in UNCLOS provisions, and thus extinguished. It would therefore be inadmissible to base maritime entitlements outside the scope of UNCLOS, which provides a comprehensive and exclusive multilateral legal framework for entitlements to maritime space in contemporary international law of the sea.

The Enigma of the Nine Dash Line

Apart from representing a peculiar feature of the SCS, the dash line concept is a unique cartographic feature in international maritime affairs. Both the novelty and ambiguity reside in the fact such an approach to maritime boundary delimitation is unfamiliar to UNCLOS principles, under which the claims to maritime space should be derived from land based features such as coastlines and inhabited islands. It remains doubtful if any of the maritime features enclosed within the line are capable of generating UNCLOS entitlements. And even if they do, it will certainly not be in the form of the expansive claims implicit in the dash lines concept or the excessive rival claims of other littoral states bordering on the SCS. The precise nature, purpose and function of the nine dash lines thus remain an enigma. In the absence of a reasoned rationale or specific Chinese laws which confer on the line a legal character other than its representation on maps in the form of a seemingly undefined maritime boundary, there are three possible ways in which the lines could be interpreted - i.e. as representing:

- a) A territorial claim to sovereign rights over the insular features inside the line, with the lines themselves serving as a practical means to cartographically enclose claimed maritime features; this links in with arguments based on discovery and occupation by China coupled with supposed acquiescence by the other states in the region further leading to the invocation of the principle of estoppel (Gao and Jia 2013: 116).
- b) A national maritime boundary: but this view calls into question the baseline from which the boundary is measured for maritime delimitation purposes.
- c) A historic claim to enclosed maritime space based on traditional usage with the dash lines serving as an illustrative delineation of China's traditional fishing grounds in the SCS (Duong 1997). Such a claim, by virtue of the fact that it falls short of a claim to historic title (territorial sovereignty) would thus be exercised on a non-exclusionary basis. However,

some of China's coercive and enforcement actions which include naval patrols on the outer edge of the dash line and the exclusion of fishermen of other nationalities from the enclosed area would seem to point to a claim based on exclusive rights, hence undermining this view.

Further underlining the sense of ambiguity is the fact that despite demonstrating a clear structure the dash line is unsystematic and unevenly distributed, with no precise geographical coordinates. The riddle of the dash lines reside above all in their visual representation as a cartographic feature of the SCS. Its dashed feature avoids the obvious controversy which a solid unbroken line would generate through unavoidable intersection and overlap with the maritime claims of neighbouring states to lawful maritime entitlements under UNCLOS, most notably with Malaysia's EEZ at its southern extremity. Nonetheless, its presence on the map even in its dashed form conveys to any observer a clear impression as to the precise geographical scope and extent of China maritime claims in the SCS.

Also noteworthy in the evolutionary trait of the dash line concept is the fact that at each stage in the process the lines seem to be drawn closer to the coastline of neighbouring littoral states, although there has never been any published geographical coordinates specifying the exact location of each of the dashes. The dash lines of 2013 have for instance, appeared closer to the coastlines of neighbouring states as compared to the eleven dash lines of 1947, thus highlighting an inconsistency in the mapping exercise. Another curiosity about the map of 2013 is that the lines are not only much closer to the coastal lines of neighbouring states but also drawn much further away from the insular features of the SCS (US Department of State 2014: 5).

Overview of PCA proceedings in Philippines v China

China's position with regard to dispute resolution in the SCS has always leaned in favour of a regionally negotiated settlement with ASEAN as the relevant forum. This position is contained in a number of instruments including the ASEAN Declaration on the Conduct of Parties in the SCS (2002). In 2011 the ASEAN states adopted guidelines for the implementation of the code of conduct, followed by a six point principles in 2012 reaffirming the need for consultation, negotiations and consensus. However, other nations in the region had a perception that China's actions in the SCS, which included occupation and population of previously uninhabited islands and the submission to the UN Forum of the nine dash line map in 2009 (emphasising its sovereignty over islands of the SCS) did not reflect the spirit of the code of conduct. On 22 January 2013 the government of the Philippines instituted proceedings against China at the PCA and in its statement of claim, sought a declaration that China's claims based on the nine dash line are inconsistent with the Convention and therefore invalid, and called on the tribunal to further determine whether certain maritime features claimed by both parties are islands, low tide elevations or submerged banks with a view to ascertaining the legal status under UNCLOS *vis-à-vis* their entitlement to maritime zones greater than 12 nm.

Given China's preference for a regional settlement it is not surprising that its response was to contest the jurisdiction of the PCA as a dispute resolution forum. In the light of this the proceedings had to be bifurcated, with the preliminary question of jurisdiction dealt with as a procedural matter before proceeding to the merits of the case. Even the bifurcation process had its own problems, as some of the procedural issues under consideration were so inextricably interwoven into the fabric of

the case as to deprive them of a wholly preliminary character. Such issues therefore had to be deferred to the merits stage of the proceedings.

Nine dashes too far? The findings of the PCA tribunal

Following the bifurcation process the PCA rendered its judgement on jurisdiction on 29 October 2015 with a positive ruling in favour of exercising jurisdiction over the case. It is worth pointing out all countries involved in the SCS dispute are signatories to UNCLOS, with China ratifying the convention in 1996. The PCA's judgement on the merits of the case was rendered on 12 July 2016. The *ratio* of the PCA judgment was the finding that China had no historic rights to the resources of the SCS and that any such claims based on the nine dash line were incompatible with UNCLOS provisions in as much as claims based on historic rights have been extinguished by the Convention. China's immediate reaction was to reject the PCA decision.

Implications of the PCA ruling for the region and for the international law of the sea.

The main impact of the PCA decision has arguably been the dismantlement of the nine dash line (in principle at least) as the central plank of a raft of policies which comprise China's maritime aspirations in the SCS, and thus to severely restrict the area of maritime space which countries in the region can claim in the SCS. The judgment thus has important implications for the region and for maritime law. From a legal perspective it sets a precedent by setting four applicable tests in deciding if a maritime feature qualifies as an island (and is thus entitled to the full raft of claims to a territorial sea, continuous zone and EEZ) or is a rocklike formation which attracts a claim of only 12 nm. The decision also addresses the question of historic rights by emphatically stating that the advent of UNCLOS had the effect of extinguishing such rights, and hence any such claims (including China's nine dash line) are unlawful and invalid under UNCLOS. Of equally importance is the tribunal's conclusion that none of the maritime features in the Spratly Islands qualifies as an "island" under UNCLOS, hence none is capable of legitimately attracting full UNCLOS entitlement to a territorial sea, contiguous zone and EEZ.

It is indeed the case that maritime boundary delimitation based on UNCLOS principles would attribute to China only a fraction of the portion of the SCS enclosed by the dash lines - hence the instinctive recourse to the rather tenuous concept of historic rights as the foundational basis for expansive claims to the acquisition of maritime space.

The strategic implications of these findings will undoubtedly reverberate throughout the region and beyond. From a regional perspective the judgment will serve as a reality check for some of the excessive claims to maritime spaces in the SCS, with littoral states having to review (in private at least) their maritime claims, policies and laws with a view to aligning them with UNCLOS provisions. It remains to be seen how states in the region will react to the PCA's view that none of the maritime features in the Spratly Islands qualifies as an island. In the view of one author, the judgment's reduction of maritime spaces which States can claim in the SCS could well lead to an intensification of disputes over insular features (Taylor Fravel 2016).

On the other hand, by restricting the area of maritime space that can be subject to national jurisdiction the judgment frees up much of the SCS for the region and for the world by transforming it into the high seas (*mare liberum*) regime. This is bound to have a positive effect for the exercise

of *mare liberum* freedoms of navigation, commerce and fisheries – and presumably also render accessible the seabed natural resources of the SCS to exploitation by all nations in and outside the region.

The SCS region is not unique to excessive maritime claims and the effects of the PCA judgment are bound to be felt beyond the region. The United States has made a similar claims to full UNCLOS entitlement including an EEZ around Kingman Reef in Micronesia, and Japan has claimed a 200 nm EEZ around a coral reef called Okinotorishima (Taylor Fravel 2016: 2). By virtue of the PCA's judgment such claims would be deemed to be invalid under UNCLOS.

Remarkably, the PCA judgment did not address two key issues: namely maritime boundary delimitation and territorial sovereignty over maritime features in the SCS. The former was not included in the case brief submitted by the Philippines, while the latter is specifically excluded from the scope and ambit of UNCLOS principles and dispute settlement procedures. Left unresolved, both these issues will undoubtedly continue to provide points of friction in maritime relations between the littoral states of the region. Hence the prospect for more cartographic posturing ('our map is better than yours' syndrome) remains a real possibility in the future. The case also highlights a possible vacuum in maritime law vis-à-vis infrastructure uses of the high sea, in particular the need for artificial islands to benefit from some form of protective cordon or security zone.

Concluding remarks.

The SCS problem is as much a political as a legal dispute with important strategic interests at play (Cohen 2016). At the forefront of these strategic interests are mineral resources, with China and Vietnam actively involved in oil and gas exploration in different sectors of the SCS. From the legal perspective, the ambiguous nature of the dash line concept and its nebulous legal character clearly undermined any claim founded on international law. So consistent has been the vagueness of the Chinese official statements on the dash line and the opacity which has characterised various attempts by Chinese scholars and commentators to explain its precise legal status, that it could on the whole be interpreted as deliberate and calculated ambiguity – an ambiguous policy ostensibly aimed at promoting and sustaining a long term strategy for ensuring China's regional hegemony and maritime supremacy in the SCS. Ironically, this very ambiguity could in future provide the requisite scope and latitude for flexibility in the search for sustainable solutions to the SCS problem.

Given China's negative reaction and rejection of the PCA ruling, it remains to be seen if what appears to be a historic legal victory by the Philippines in the SCS will yield any real dividend or will in the course of time be deemed to have been a pyrrhic victory. China's negative reaction, coupled with its initial challenge to the PCA's jurisdiction, suggests two possible scenarios which could unfold apart from maintaining the *status quo*. The first possibility is that China could ignore the ruling and continue to pursue her maritime claims in the SCS, but on a non-exclusionary basis through a more conciliatory and consultative approach to maritime relations with neighbouring countries. A more radical proposition would be for China to either suspend or withdraw its UNCLOS membership as a prelude to pursuing a more expansionist maritime agenda, thus opening the way to an accelerated programme of artificial island construction and intensified militarisation of the SCS. Such an option, apart from its potentially damaging effect on the UNCLOS process, could spur other nations in the region into following in the footsteps of the Philippines by

commencing judicial proceedings against China. Whatever transpires next, the SCS will certainly remain a testing ground for maritime law, including the exercise of universally recognised freedoms of the high seas such as fishing, commerce and navigation.

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