



China's Next Legal Battle at Sea

China has sent warships into Japanese territorial seas. There is no room for complacency, even after an award on the South China Sea.

Despite being a permanent member of the United Nations (UN) Security Council, China is making no attempt to abide by the UN Convention on the Law of the Sea. China's one-sided claims are similarly based on flimsy grounds. If it wants to become a great sea power however, China cannot afford to make enemies. Japan meanwhile needs to focus its full attention on this increasingly fierce legal battle.

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Adopted in 1982, the United Nations Convention on the Law of the Sea (UNCLOS) is also known as the “Constitution of the Oceans”. As of 2016, 167 countries are parties to the Convention, including Japan, China and every other country with a coastline along the South China Sea. Each country is required to comply with provisions set out in UNCLOS, which serves as an international code of conduct for marine activities. At the same time, UNCLOS also sets out an objective framework for concerted measures in the event that any individual country wishes to exercise its legislative, judicial or executive powers when using the seas.

If enacting marine-related domestic legislation, it goes without saying that each country has to enact provisions that coincide with those set out in UNCLOS. Countries must also refrain from engaging in acts in violation of UNCLOS when implementing domestic measures.

Nonetheless, China is engaging in actions in violation of both of these points on the South China Sea and the East China Sea. Prime examples include claims over the nine-dash line in the South China Sea, and claims regarding recent Chinese military incursions into Japanese territorial seas in the East China Sea.

Disputes over the interpretation and application of the law China's claims over the nine-dash line

In 2009, the Chinese government sent a verbal note to the Secretary-General of the United Nations stating the following. “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



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the seabed and subsoil thereof. The above position is consistently held by the Chinese government, and is widely known by the international community.” The note went on to claim that a joint submission by Malaysia and Vietnam, and a separate submission by Vietnam, to the Commission on the Limits of the Continental Shelf have “seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea.”

An attached map was submitted along with the note, featuring a “nine-dash line” encircling almost all of the South China Sea with a broken line. The map did not even indicate latitude or longitude coordinates, and could never have been construed as an effective means of demarcating ocean boundaries.

The claim of the nine-dash line dates back to documents published by a Regional Bureau of the Ministry of the Interior of the Republic of China, entitled “Map of Chinese Islands in the South China Sea” and “Map of South China Sea Islands.” on December 1, 1947. These maps feature an eleven-dash U-shaped line that encircles the Spratly Islands and the Paracel Islands. The People’s Republic of China issued these as official maps in 1949. When sovereignty over Bach Long Vi island in the Gulf of Tonkin was transferred from China to Vietnam in 1953, the eleven-dash line on the map was re-drawn as a nine-dash line. Since then, it has become known simply as the “nine-dash line.”

The Law of the People’s Republic of China Concerning the Territorial Sea and the Contiguous Zone (1992) stipulates that “the land territory of the People’s Republic of China includes the mainland of the People’s Republic of China and its offshore islands, Taiwan and all islands appertaining thereto including the Daiyou Islands; the Penghu (Pescadores) Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands that belong to the People’s Republic of China” (Article 2, Paragraph 2).

China is in disputes with the Philippines, Vietnam and other ASEAN countries over territorial sovereignty, regarding the Spratly Islands and the Paracel Islands in the South China Sea. In 2013, China has constructed seven artificial islands in rocky reefs and atoll areas in the South China Sea. Although China denies it, there have been signs of military facilities and air defense identification zones being established, including the construction of military runways and ports capable of accepting large vessels, as well as the deployment of surface-to-air missiles.

Philippines makes a move to drag China into the arena of international law

On January 22, 2013, the Philippines submitted its disputes with China over the Spratly Islands to a court of arbitration based on Annex VII, in accordance with a requirement to resolve disputes under Part 15 of UNCLOS. Prior to this submission, on August 25, 2006, China lodged a declaration with the UN Secretary-General stating that it would exclude the disputes stipulated in Subparagraphs (a), (b) and (c), Paragraph 1, Article 298 of UNCLOS from compulsory dispute settlement procedures. This meant that the court of arbitration had no jurisdiction over disputes regarding matters such as the delimitation of maritime boundaries or historic entitlement.

In an effort to bypass this jurisdiction restriction, the Philippines asserted that, in spite of China’s

claims of sovereign rights and jurisdictions over all waters within the nine-dash line, such sovereign rights and jurisdiction may only be claimed for waters within a measured distance from land, including islands. It also stated that the Spratly Islands and other low-tide elevations effectively controlled by China have no exclusive economic zone or continental shelf, and that the shores of the islands, such as the Scarborough Shoal fall under “rocks which cannot sustain human habitation or economic life” (Article 121, Paragraph 3). On these grounds, the Philippines asked the court to declare that determining waters based on the nine-dash line is in violation of UNCLOS. This effectively triggered an entitlement dispute surrounding the interpretation and application of UNCLOS.

China and South Korea, amongst others, claim that the Okinotori Islands fall under “rocks” as stated in Article 121, Paragraph 3 of UNCLOS. Depending on the award handed down, this could have an impact on Japan’s long-standing claim on the islands.

In response to the claim filed under Part 15 by the Philippines, on October 29, 2015, the court of arbitration acknowledged that the court had jurisdiction over seven of the Philippines’ claims, including the fact that Mischief Reef, Subi Reef, Gaven Reef, McKennan Reef and others are all low-tide elevations and are not subject to rights based on territorial seas, exclusive economic zones or continental shelves. On the subject of the nine-dash line issue, however, the court refrained from delivering a ruling on jurisdictional authority in this case.

On July 12, 2016, the court of arbitration handed down an award that favored the Philippines’ claims, ruling that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the “nine-dash line.” However, China had refused to appear at the tribunal for the arbitration and had already declared it would ignore the arbitration award when it was granted. An arbitration award is binding, but UNCLOS has no mechanism for enforcing it. For that reason, China is likely to remain in effective control of the reefs in the South China Sea.

Through the court of arbitration, the Philippines raised the issue of the sovereignty of individual reefs that do not have an exclusive economic zone or a continental shelf, in relation to Mischief Reef, Subi Reef, Gaven Reef, McKennan Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef. In an article analyzing China’s legal position over the Spratly Islands, published in the *China Marine Journal* on October 15, 2015, Ying Zhang from China’s Institute for Ocean Development Strategy (State Oceanic Administration) stirred up a whole new legal battle.

The article described the Spratly Islands, a remote archipelago of Chinese islands, using ancient terms from the Song Dynasty (*Wanli Changsha* and *Wanli Shitang*), referring to them all as a single geographical, economic and political unit. It stated that they should be treated as a single entity that cannot be broken up, and claimed that this coincided with the definition of the term “archipelago” in UNCLOS (Article 46, Section (b)), enabling it to draw a straight baseline. This straight baseline however is nothing more than an archipelagic baseline recognized by a “state constituted wholly by one or more archipelagos” (Article 46, Section (a)), such as the Philippines and Indonesia. It is a bit of a stretch to apply the term of China, as a mainland state.

Despite using a straight baseline between the mainland and the Paracel Islands, China had not previously employed a straight baseline in the case of the Spratly Islands. There is now a possibility

that it will employ a straight baseline as a means of opposing the courts.

In any event, the court of arbitration has said “no” to claims made by China to date. Given that China has stated publicly that it will not abide by the court’s decision, this means that a permanent member of the UN Security Council is essentially rejecting the rule of law. Once China has been branded a country that does not abide by court ruling, it is likely to become a country that nobody will trust.

A new legal battle in the East China Sea The Tokara Strait is not an international strait

On June 15, a Chinese warship entered into Japanese territorial sea, passing through the Tokara Strait in a southerly direction towards the island of Yakushima. China justified its actions on the grounds that it is an international strait with the right of transit passage. Much like the United States, Japan has adopted a position whereby it allows the right of innocent passage of foreign military vessels through its territorial seas. China on the other hand stipulates under the Law Concerning the Territorial Sea and the Contiguous Zone that “the entry of a foreign military ship into the territorial sea of the People’s Republic of China must be subject to the approval of the government of the People’s Republic of China” (Article 6, Paragraph 2). It has enacted its own legislation on territorial seas that differs from UNCLOS, requiring foreign military vessels to obtain prior approval before passing through Chinese territorial seas.

If China is claiming that its warships have the right of innocent passage through Japanese territorial seas, that runs counter to the position set out in its own legislation. On January 30, as U.S. destroyer, the *USS Curtis Wilbur*, conducted a “freedom of navigation operations” at Triton Island (Chinese name: *Zhongjian Dao*), one of the Spratly Islands. This was a declaration of intent by the United States, given that China had not granted prior approval for a foreign military vessel to pass through its territorial seas.

Although some regarded China’s recent actions as a freedom of navigation operation aimed at Japan, the two instances were entirely different. Whereas the United States acted in the interests of compliance with UNCLOS, China’s actions were in violation of UNCLOS.

UNCLOS defines international straits subject to transit passage as “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone” (Article 37). As there is very little record of the Tokara Strait being used for international navigation, it does not meet the criteria to qualify as an international strait. The right of transit passage applicable to international straits allows free underwater passage to submarines, as well as overflight in the strait. The countries on either side of the strait shall not impede those rights (Article 38).

China seems to claim that the Tokara Strait is an international strait, so that it can secure free passage for Chinese submarines and fighter jets, under and over Japanese waters respectively, and gain access to the Western Pacific for the Chinese navy. If this happens, it would pose a serious security risk to Japan. In the face of another new legal assault from China, Japan needs to use UNCLOS to

refuse China's claims that the Tokara Strait is an international strait.

Eager to establish itself as a great sea power, China is likely to continue engaging in legal battles on various different fronts in the future. Japan needs to do its utmost to strengthen cooperation with other countries with interests in the region, to ensure that UNCLOS remains in full effect across the South China Sea and the East China Sea, so as to keep dangerous and provocative acts by China to a minimum.

Note: This article was written for publication in *Wedge* on July 8. The author has made minor alterations in view of circumstances since that time.

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