

Reassurance needed, unlikely over the Nine-Dash Line

Written by vuquangtiép
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What would reassure neighbouring nations is for China to bring their claims into the realm of international law and reasonableness. China should be prepared to negotiate in good faith the limits of the disputed area.



In recent years China's claims in the South China Sea have provoked much regional tension with the Philippines and Vietnam, although while the Philippines and Vietnam also have conflicting claims between each other over most of the Spratly Islands, there has not been much tension between these two nations. Malaysia and Brunei, despite being also parties to the Spratlys dispute, have been keeping a low profile.

This tension, the expansiveness of China's claims and the imbalance of power between China and the other claimants have resulted in these claims being the center of regional and worldwide concern. At the Center for Strategic and International Studies' Third Annual Conference on the South China Sea Disputes, 5-6 June, there were again calls for China to clarify its claims to the waters of the South China Sea.

China's claim is clear – it claims sovereignty over all the islands and rocks of the Paracels, Spratlys and Scarborough Reef, and says there is nothing extraordinary about this claim. What China has not stated are the extent its claims to the waters and the nature and basis of these claims, and it is these claims that are extraordinary, for they seem to cover most of the waters.

While China refuses to be candid, in 2009 it sent the UN's Commission on the Limit of the Continental Shelf a map of the South China Sea with the infamous U-shaped line drawn with the same marking as that of national borders, albeit without stating whether that line demarcates a claim to the islands only, or a claim to both islands and waters.

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China's deliberate ambiguity and increasing assertive actions have further consolidated fears in the other littoral nations of the South China Sea that when the time is right it might declare that it has been claiming all the waters within the U-shaped line all along. Thus these nations, and other nations that have an interest in the stability of the region, consider it imperative that China clarify its maritime claims.

In response to these concerns, Chinese scholars and some international ones, have suggested that China could reassure its South China Sea neighbors and the world by issuing statements along the following line, but without reducing the extent of its maritime claims.

First, China's claims to the waters of the South China Sea are consistent with UNCLOS according an EEZ of 200 nautical miles to the islands that it claims.

Second, the U-shaped line dates back to 1947 and to the Kuomintang government of Chiang Kai-shek that preceded the current one, before the advent of the United Nations Convention on the Law of the Sea (UNCLOS), and therefore accords to China historical rights over the waters within that line that date back and are not superseded by UNCLOS.

Third, the areas of overlap between China's maritime claims and those of the other claimants constitute disputed areas, and the relevant parties to the disputes should put aside the disputes and pursue joint development.

Fourth, China respects the freedom of navigation in the South China Sea.

The first statement is a selective citing of international law in that it cites UNCLOS giving an entitlement of a 200 nautical mil exclusive economic zone to islands, but ignores state practice and jurisprudence on maritime delimitation. According to the latter, in the presence of overlapping entitlements with the surrounding territories, the Paracels and Spratlys would not be allocated EEZs that extend the full 200 nautical miles, nor to anywhere near the U-shaped line.

In fact, if UNCLOS, state practice and jurisprudence in maritime delimitation, such as the recent International Court of Justice judgment on the Colombia vs Nicaragua dispute, are all

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considered, the Paracels and Spratlys are likely to be allocated EEZs that extend not much more than 12 nautical miles, possibly to a quarter of the distance to other territories, which is a long way short of the U-shaped line.

By cherry-picking, China can get international law to say anything it wants, but that will reassure nobody. Good faith requires the opposite of what China is doing and not doing: that China takes to be international law in its totality, and if there are irreconcilable difference with other nations in the interpretation then China be prepared to let an international court or tribunal settle that difference.

The second statement is fallacious. So far China has never declared that it claims all the waters within the U-shaped line, therefore no rights over those waters could ever have emanated from that line. If today China declares for the first time that it claims all these waters, the earliest date for that claim is today. The fact that the U-shaped line was drawn in 1947 does not mean the claim goes back to 1947, and does not mean China has rights that go back to 1947 over the waters within that line.

Furthermore, supposing hypothetically that China had declared in 1947 that it claimed all the waters within the U-shaped line, that declaration would have been illegal, null and void, because at that time international law did not recognize claims that extended so far out to sea. Nations cannot simply take a dusty map out of a cupboard with some line on it and say that that line was a claim to maritime space dating back to the time it was drawn.

On the surface, the third statement sounds like a reasonable and pragmatic way to manage the South China Sea disputes. On closer inspection, it is the opposite. Nations cannot make arbitrary, expansive claims to create arbitrary areas of overlapping claims and then demand that other nations share resources with them in those areas. If that is accepted then the more expansive an unreasonable a claim is, the more the nation that makes it is rewarded in terms of the sharing of resources.

The fourth statement is designed to assuage the US, which has a strong interest in the freedom of navigation in the South China Sea. However, it is simply rhetoric that means little in practice. All it means is that China respects freedom of navigation according to its definition for "the freedom of navigation," which is different from that of the US and most nations.

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The US and the majority of nations understand the freedom of navigation for military vessels and aircraft in the EEZ to be similar to that on the high seas, with some additional constraints to safeguard the economic, environmental and marine scientific research rights of the coastal nation in its EEZ. China and a minority of countries want to restrict this freedom.

The idea that the littoral nations of the South China Sea can be reassured by China's rhetoric, while China still maintains its claims to most of the waters, is simply wishful thinking. Nations are reassured by the reasonable stance and behavior of others, not rhetoric. And laying claims to most of the waters of a common sea and attempting to coerce others into acquiescence is not a reasonable stance or behavior.

Furthermore, closer analysis shows that the proposed reassurances are either very skewed use of or a minority interpretation of international law.

At the heart of the concerns from China's South China Sea neighbors and nations beyond are China's expansive and ambiguous claims to maritime space. Rhetoric and cherry picking international law will not address the problems that are giving rise to these concerns and will not allay any fear.

As Robert Beckman, one of the foremost legal expert on the maritime disputes in the South China Sea, writes in his article *The South China Sea: the evolving dispute between China and her maritime neighbors*, "Therefore, unless China is willing to bring its maritime claims into conformity with UNCLOS and limit its claims to maritime zones measured from islands, it will continue on a legal collision course with its ASEAN neighbors."

What would reassure these nations is for China to bring these claims into the realm of international law and reasonableness. China should be prepared to negotiate in good faith the limits of the disputed area. If this negotiation does not lead to agreement, China should be prepared to join the other claimants in asking an international court or tribunal to delimit the disputed areas - this is without prejudice to the question of which nation owns the islands and rights over the waters in those areas.

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