

Testing China's – and the State Department's – nine-dash line claims by Sourabh Gupta

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China's maritime claims in the South China Sea have long vexed neighbors and foes alike.

Beijing's specific legal formulation – “*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 ... [and which is] supported by abundant historical and legal evidence*” – is as imprecise as it is compliant with international law. Although China has recently spelt out the view that the Spratly Islands are entitled to full maritime zones, the status of the insular formations in the sea as well as the limits of the ‘relevant waters’ claim line to which it exercises sovereign rights and jurisdiction has been left vague.

This is par for the course for a South China Sea claimant. Unlike Manila, Hanoi and Kuala Lumpur, however, China has not been shy to enforce its writ to the extremity of claim (the nine-dash line), as a hardline expedient to signal displeasure with other claimants' activities in these contested waters. Such enforcement actions appear to be based on extreme interpretations of the Law of the Sea (LOS) treaty, do not discriminate between conforming and non-conforming LOS-based functional competencies – fisheries, marine scientific research, etc. – in semi-enclosed seas and, on rare occasion, even transgress the boundaries of LOS. That the Chinese government has never published a law or decree giving the nine-dash lines any domestic legal significance, and the tendency of Chinese commentators to scour treaty and customary law to ferret out supporting rationalizations has compounded the impenetrability of the nine-dash line. (In fairness though, some Chinese scholars have been precise and consistent in their evaluation of the line.)

On Dec. 5, the State Department's Bureau of Oceans and International Environmental and Scientific Affairs stepped into this legal morass by proffering its analysis of China's maritime claims in the South China Sea, as part of its Limits in the Seas series. Unlike an earlier study of Taiwan's claims which had skirted appraisal of the nine-dash line, (Taiwan and China's positions on the line overlap significantly but not fully), the new study dwells specifically on the line's consistency/inconsistency with international law. The study is a valuable tying together of many legal strands which seeks to demonstrate that the nine-dash line is, at minimum, an ambiguously tenable but insufficient basis for the exercise of sovereign jurisdiction in the South China Sea waters and, at worst, a wholly inconsistent basis for the exercise of such

rights. Disappointingly though, the State Department study fails to come to conceptual grips – and thereby fails to rebut – the most compelling possible legal basis of the nine-dash line: the line as a geographic limit of China's historically-formed and accepted traditional fishing rights in the semi-enclosed waters of the South China Sea which are exercised today on a non-exclusive and non-exclusionary basis (more on this below).

The State Department study of the nine-dash line is structured along three interpretive pillars: (a) that the dashes represent a title to the islands, and island group, that it encloses; (b) that the dashes represent a national maritime boundary; and (c) that the dashes represent a historic rights-based claim line to waters that are exclusive to China. On the first two counts, the study's findings are in most part unimpeachable; on the final count, less so.

As the State Department study accurately notes, the nine-dash line's attribute as an efficient and practical means to cartographically enclose and illustrate the group of islands over which China claims sovereignty, is a defensible one. The study notes, however, that the specific maritime claims to sovereignty and sovereign rights and jurisdiction must be strictly derived from land features – high-tide elevations in particular, which China has yet to clarify. The study would have been on even firmer ground had it gone a step further and called out the dashed line at the southern-most extremity under James Shoal. As a submerged feature barely 60 nautical miles (nm) from the nearest Malaysian coastal base-point, the shoal can under no circumstance be deemed to be ‘territory’ – let alone be appropriated in any way, shape or form by a sovereign more than 200 nm administratively removed at the very least. As a cartographic illustration of claims to the islands within, this dash of the nine-dash line should appear *above* – not *beneath* – James Shoal.

The State Department study's finding that the nine-dash line as expression of the outer limit of China's maritime boundary is inconsistent with international law, is irreproachable. In the course of maritime delimitation cases, international tribunals have been disinclined, as a general principle, to weigh in on the precise status of small insular features. They have nevertheless tended to strike down the entitlements of far-removed islands/rocks that reach deep into an adjacent or opposite state's coastal projection – as the Spratlys appear to do – and impose an inequitable ‘cut-off’ effect of that latter state's maritime entitlement. A LOS-compliant maritime boundary drawn by Beijing should under no circumstance exceed the median line from each insular formation that it administers in the South China Sea. The nine-dash line fails this test and as a national boundary would be inconsistent with international law.

That said, Beijing specifically denotes the nine-dash line to be an 'undefined' boundary in its domestic maps and a provisional one in its international filings. It is customary practice by almost every state with an open territorial dispute, including other South China Sea claimants, to issue unilateral map-based claims that far exceed the compromise basis on which they will putatively be resolved. In doing so, and by explicitly marking its provisionality, China is no more or no less guilty than all other claimants – although, again, it is the scope of Beijing's enforcement reach which is the cardinal grievance. And so long as the outstanding delimitation claims are resolved as per best practices in international law, as was the case of the Vietnam-China settlement in the Tonkin Gulf, or the underlying sovereign rights and jurisdiction are equitably shared, as was the case in the Japan-China fisheries agreement, it is a stretch to posit, as State's study does, that the (undefined and provisional) nine-dash line is an inadmissible unilateral national maritime boundary claim.

It is the analysis of the third pillar – that China's historic rights-based claim is an insufficient basis to exercise exclusive sovereign rights and jurisdiction beyond its territorial seas, much less beyond its 200 nm exclusive economic zone (EEZ) – where the State Department's study is at its most questionable. The study reasons that China, in acceding to UNCLOS' EEZ regime, had effectively given up traditional/historic fishing rights-based claims that it may have held in foreign EEZs – even in semi-enclosed seas. In addition, it concludes that the limited rules pertaining to such historic uses is confined to the territorial sea of the coastal state and in any case the advent of exclusive LOS-based jurisdiction has overridden prior usage rights. It quotes the International Court of Justice's *Gulf of Maine* judgment of 1984. This reasoning is not defensible; the study's shortcoming is, both, one of conception as well as one of legal obsolescence. **Historically formed and transmitted, by way of long-usage, traditional (fishing) rights which are exercised on a non-exclusive/non-exclusionary basis and accepted by way of practice by regional peers in a semi-enclosed sea do not get extinguished unless expressly countermanded by positive international law.**

At the conceptual level, the study fails to conceive that fishing rights and related activities in semi-enclosed seas can assume a character other than being practiced exclusively. Article 123 of the LOS Convention (which pertains to semi-enclosed seas) however enjoins all bordering coastal states to cooperate in the exercise of their rights with regard to the conservation, exploration and exploitation of the living resources of the sea. Article 62 of LOS (which relates to EEZs), meantime, enjoins the coastal state to give others access to the surplus of the allowable catch in its own EEZ. Read together, they provide a bias – and basis – toward admitting the non-exclusive and non-exclusionary exercise of traditional fisheries rights in semi-enclosed seas such as the South China Sea. Tribunal panels constituted subsequent to the *Gulf of Maine* decision – *Jan Mayen, Eritrea/Yemen; Qatar/Bahrain; Barbados/Trinidad & Tobago* – have all backed the reading that such longstanding traditions are entitled to the respect and protection of international law.

The State Department study also erroneously conflates these traditional/historic rights to a prior juridical regime of 'historic waters' (by way of which countries had laid claims to bays, straits, estuaries and archipelagic waters) and thus unduly confines the application of these rights to China's internal waters. **Indeed, so long as China practices such activities on a non-exclusive basis and desists from enforcing non-conforming rights that exceed those listed in Article 123, such as resource development/marine scientific research, the nine-dash line as a perimeter of exercise and enforcement of China's sovereign rights and jurisdiction of traditional/historic fishing activities in the South China Sea is not inconsistent with international law.** That the line skirts so close to the mainland coasts and coastal islands of the other littorals, ranging from 24 nm to 75 nm, is no bar either – although Beijing would have been on firmer ground had it discussed these proximities with littorals. In the semi-enclosed waters of the East China Sea, Japanese and Chinese fishing vessels operating under flag state jurisdiction in their common fisheries zone are allowed to encroach, as per their 1997 fisheries agreement, as close as 52 nm of each other's coastline.

Of course, the onus is on China to explicitly declare an international law-compliant basis for its alignment of the nine-dash line. Oblique references to historical rights/evidence, without clarification of their basis or scope, as in its 1998 EEZ Act and *Note Verbale* to the U.N. in 2011, feed doubts that the line constitutes a strategically ambiguous perimeter of deterrent actions across a wide-ranging – and customary/treaty law non-compliant – menu of EEZ-based prerogatives.

But ASEAN claimant states should be ready to test Beijing's *bona fides* in these shared waters by offering to prioritize the negotiation of a formal ASEAN-China regional fisheries agreement, much like its Northeast Asian counterparts, including Pyongyang, have already concluded bilaterally. Joint resource development in the South China Sea is as yet a bridge too far; the Code of Conduct negotiations will continue at a glacial pace – a regional fisheries agreement, by contrast, is a harvestable low-hanging fruit. It might also precipitate a virtuous cycle of shelving jurisdiction-based claims and seeking practical solutions in concert to the more intractable challenges of the South China Sea.

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