

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

South China Sea: International Law and Geo-Strategic Challenges

ISHRAT ALI¹

ABSTRACT

The recent Japan-India-Australia-US Quadrilateral Security Dialogue (QUAD) summit (May 20, 2023- Hiroshima) is an indication that diplomatic partnership of four countries is now effectively combating Chinese influence in South China Sea. Japan had hosted last summit also in May, 2022 when leaders of four-nation alliance expressed serious concern over unilateral attempts to change the status quo by force in the East and South China Seas and reaffirmed to strengthen the foundations of international order with particular reference to Indo-Pacific emphasizing that the “centerpiece of the international order was international law, including the UN Charter, respect for sovereignty and territorial integrity of all states. All countries must seek peaceful resolution of disputes in accordance with international law.” Clearly, the combined resolve has proved wrong the assertion of Chinese foreign minister Wang Yi that QUAD was a ‘headline grabbing’ exercise which will ‘dissipate like sea foam’. He had also charged US with creating an ‘Asian NATO’ (in the form of QUAD).

Keywords: South China Sea, UNCLOS, QUAD.

I. INTRODUCTION

The recent visit of Manasseh Sogavare, Prime Minister Solomon Islands to China has not been liked by the US and Australia. Solomon Islands, a politically volatile region in Southwest Pacific had signed a strategic alliance with China last year. While in China, Sogavare had signed nine agreements and memorandums including a police cooperation program aimed at cooperation on law enforcement and security matters. Though the Island had been a traditional ally of US and Australia, it has developed closeness with China in the recent years. In April last year, Japan had deputed some senior officials to Solomon islands to convey its apprehensions on closeness between China and Solomon Island while in February this year, US had officially announced to opening it's embassy in Solomon Islands apparently to monitor closely the developments in the region. Biden administration had also warned the island nation that US may take unspecified action if its closeness with China poses a threat to US or allied interests.

¹ Author is Pursuing Masters in Journalism and Mass Communication from UP Rajarshi Tandon Open University, Prayagraj, U.P., India.

The US-China trade war also continues with US accusing China with unfair trading practices and theft of intellectual property rights while there is general perception in China that US was creating problems in the way of China's rise as global economic power. Skirmishes between India and China over long territorial disputes continue after May 2020 Galwan valley face-off. The US-Philippines strategic security deal is also a driving force.

(A) Win without fighting approach

China has been asserting itself with more vigor since last two decades. Beijing's emergence as a major power with world's second largest economy after US and a world class military has surprised many. It is widely believed that China currently spends more on its armed forces than any other country except the US and if the trend continues, it may overtake US when it comes to defense spending. The rise of China may be linked to fresh territorial disputes with new flash points emerging in the region. China's disregard to Hague Tribunal's ruling has given rise to new claims by rising powers and instances where states interpret the provisions of UN Convention on the Law of the Seas (UNCLOS) that are often at odds with the agreed principles of the treaty. The 1992 domestic legislation (Law on the Territorial Sea) passed by China is also widely seen as 'inconsistent' with UNCLOS.

II. STRATEGIC IMPORTANCE OF SOUTH CHINA SEA

South China Sea is a semi-enclosed sea in the western Pacific Ocean, spanning an area of approx 3.5 million square kilometers. It lies to the south of China, to the west of Philippines, to the east of Vietnam and to the north of Malaysia, Brunei, Singapore and Indonesia. For China and other littoral states in the region, the South China Sea is of high strategic importance. This is the second most used sea-lane in the world. Though Japan and South Korea also heavily rely on South China Sea for their supply of fuel and raw material, they do not appear to be in favor of escalation of tension. Further, they are trading partners with China. The South China is also rich in oil and natural gas reserves. Controlling this strategic maritime route and critical islands in the area means controlling the rest of Asia. The southern portion of the South China Sea is the location of the Spratly Islands, a constellation of small islands and coral reefs, existing just below or above water, that comprise the peaks of undersea mountains rising from the deep ocean floor. These mountains are known as a hazard to navigation and identified on nautical charts as 'dangerous ground' while Spratly islands are the site of longstanding territorial disputes among some of the littoral States of South China Sea. In 1947, China started developing a map with '*eleven dots*' which encompassed a large portion of South China Sea. However, within a few years, two dots were removed from the map and now a '*nine-dot line*' map exists covering the

Spratlys, Paracels, Pratas and Scarborough Shoal. Countries in the region the Philippines, Vietnam, Malaysia and Brunei have claims in South China Sea and do not recognize nine-dots line. Vietnam has claim over Spratlys and Paracels, the Philippines claims a large portion of Spratlys and Scarborough Shoal. Malaysia and Brunei also claim some of the Spratlys. However, Brunei's claims is relatively limited with only a 200-nautical mile EEZ as prescribed by UNCLOS. In addition to some land features falling within its legally delimited boundaries in the southern portion including Louisa Reef, Owen Shoal and Rifleman Bank. Brunei has no permanent military presence in the area to enforce the claim. However, UK maintains a light infantry battalion in Brunei under an agreement which is renewed every five years. The rising tensions in South China Sea have given British presence in Brunei a strategic value. The claims by Philippines and Vietnam have been the most contentious. In 1974, China had taken control of Paracels by forcefully removing South Vietnamese military occupants. Some islands in Spratlys are still under Vietnamese control. China's upper hand in South China Sea has prompted Vietnam to assert itself. On March 14 last year, Hanoi commemorated at a large scale, the 34th anniversary of a battle against Chinese Navy. The ceremony was officially attended by Prime Minister Pham Minh Chinh. The ceremony marked a new stand as for a long time, the China-Vietnam clash was not discussed publicly mainly due to Chinese pressure. It is still not included in the educational curriculum. The state owned media used to avoid the name of China while reporting the incident and generally used the words 'foreign forces' in place of China. Earlier, Vietnam government systematically silenced the commemoration of the clash by censoring journalists but this time, both print and electronic media was allowed to cover these events which points to a significant change in the attitude of present Vietnam government. It may be mentioned that 64 Vietnamese soldiers were killed in the clash that took place on March 14, 1988 and Johnson South reef in South China Sea was taken over by Chinese navy. Earlier in 1949, Philippines had claimed some islands within Spratly on the basis of their proximity to Philippines but the claim was rejected by China. In 1971, Philippines took control over Kalayaan islands group within Spratlys.

III. THE LAW OF THE SEA AND SHADOW BOXING

United Nations Convention on the Law of the Seas (UNCLOS) was finally adopted and signed in the year 1982 though the deliberations over it were initiated much earlier. It replaced the four Geneva conventions. The UNCLOS has created three new institutions to regulate the law of the seas. These are International Tribunal for the Law of the Sea, International Seabed Authority and Commission on the Limits of the Continental Sheds. Prior to this, there existed a school of thought known as 'freedom of the seas'. There was general consensus that oceans should be

treated as international waters and not controlled by any one nation. This was primarily based on the idea carried by a book '*Mare Liberum*' (the Free Sea) authored and published in 1609 by Dutch lawyer and thinker Hugo Grotius, one of the early thinkers of international law. As per this school of thought, there were not limits or boundaries set to the aspect of marine business and commercial activities. It was in the middle of the 20th century that many nations started feeling the need to ensure the protection of their marine resources. The first UN conference on the Law of the Sea (UNCLOS-I) was held in Geneva in Feb-April, 1958 in which 86 nations participated. Now the number has grown to 168.

Though China is a signatory to UNCLOS, it is not ready to surrender its perceived rights in South China Sea based on *nine-dot lines*. It was made clear by China at the time of signing UNCLOS that it reaffirmed its sovereignty over all islands and archipelagos as postulated in Article 2 of the Law of the People's Republic of China on territorial sea and the contiguous zone published in 1992. This listed all of the major island chains contained within the nine-dash line as part of China's sovereign territory. China also stipulated that the right of innocent passage through territorial seas afforded to vessels shall not hinder China's requirement that foreign warships receive prior permission for such innocent passage. It may be mentioned that as per Article 19 of UNCLOS, the passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with UNCLOS and with other rules of international law.

IV. PHILIPPINES- CHINA DISPUTE IN HAGUE TRIBUNAL

During the presidency of Benigno Aquino-III, Philippines instituted arbitral proceedings (PCA Case No. 2013-19 dated January 22, 2013) against China under Annex VII to the UN Convention on the Law of the Sea. The arbitration concerned the role of historic rights and the source of maritime entitlements in the South China Sea, the status of certain maritime entitlements in South China Sea and the lawfulness of certain actions by China in South China Sea that Philippines alleged to be in violation of the UNCLOS. The historic case was decided on 12 July, 2016 concluding that China's historic rights claim over maritime areas (as opposed to land territories and territorial waters) inside the nine-dash line had no lawful effect if it exceeded what it is entitled to under the UNCLOS. One of the arguments was that China had not exercised exclusive control over these waters and resources. The tribunal upheld the sovereign rights of Philippines in South China Sea. The tribunal declared that "*although Chinese navigators and fishermen, as well as those of other states, had historically made use of the islands in the South China Sea, there was no evidence that China had historically*

exercised exclusive control over the waters or their resources.” The Tribunal found that China had violated the Philippines sovereign rights in its exclusive economic zone by interfering with Philippine fishing and petroleum exploration, constructing official islands and failing to prevent Chinese fishermen from fishing in the zone.

As expected, the ruling of tribunal was rejected by China. The Chinese president, Xi Jinping was quoted as saying that China’s ‘territorial sovereignty and marine rights’ in the sea would not be affected by the ruling. He insisted China was still ‘committed to resolving disputes’ with its neighbors. The Chinese state media also reacted sharply to the verdict. *Xinhua*, the country’s official news agency described the ruling as ‘ill-founded’ that was ‘naturally null and void’. A few days after the ruling, China’s naval chief Wu Shengli told the visiting US chief of naval operations that Beijing would not halt its campaign to turn the contested South China Sea reefs it controls into artificial islands complete with military-ready airstrips. He said China would never give up halfway on its island building efforts. Later, Chinese air force announced that it had sent bombers on ‘normal battle patrols’ over Scarborough Shoal, a disputed reef that Beijing effectively seized from Manila in 2012. The Philippines Baselines Law of 2009 classifies the Scarborough Shoal as part of a group of islands under the Republic of Philippines. It claims that the country had exercised continuous and effective sovereignty over the Shoal since Spanish colonial era.

V. US-PHILIPPINES STRATEGIC RELATIONS

The US is not a signatory to UNCLOS. However, it has considerable interest in South China Sea due to various reasons. On the occasion of the fifth anniversary of the Arbitral Tribunal Ruling on the South China Sea, Antony J. Blinken, US Secretary of State had issued a statement (July 11, 2021) in which he alleged that “*The Peoples Republic of China continues to coerce and intimidate Southeast Asian coastal states, threatening freedom of navigation in this critical global thoroughway.*” Reaffirming July 13, 2020 policy of US regarding maritime claims in the South China Sea, the statement warned that “an armed attack on Philippine armed forces, public vessels or aircraft in South China Sea would invoke US mutual defense commitments under Article IV of the 1951 US-Philippines Mutual Defense Treaty.” (The overall accord contains eight articles and dictates for both nations to support each other if an external party attacks the Philippines or the US). The statement called upon China to abide by its obligation under international law, cease its provocative behavior and take steps to reassure the international community that it is committed to rules-based maritime order that respects the rights of all countries, big and small.

In 2020, President Duterte had served formal notice that he was scrapping the 1998 Visiting Forces Agreement (VFA), a key military agreement which allowed the temporary stay of a large number of US troops in Philippines and he also threatened to cancel the Mutual Defence Treaty. Though the immediate provocation was stated to be US government's cancellation of visa of his senator and former police chief, the actual reason was said to be his desire to maintain distance from US and align with China and Russia before his term ended in June 2022. A few days before he threatened to abrogate VFA, Duterte had said in an interview that a conflict in South China Sea would crush the Philippines and that he was wary that the US would take advantage to spark a wider conflict. However, the notice to abrogate VFA was later withdrawn later without any explanation and as a gesture, the US sent free Covid-19 vaccine doses to Philippines.

In March last year, around 9000 soldiers from US and Philippines had took part in one of the largest joint military drills in Philippines. Such annual exercises known as '*Balikatan*' cover maritime security, live-fire training, amphibious operation and counterterrorism besides humanitarian assistance and disaster relief. At the opening ceremony in Manila, Philippines military chief General Andres Centino said the drills reflected the 'deepening alliance' with the US.

VI. GRAY ZONE TACTICS

Despite international pressure, China's behavior in South China Sea does not appear to have changed on ground during the last seven years since tribunal gave its verdict. It has been using pressure on countries in the region to give away their rights to the oil, gas and fishing and act according to Beijing's interests. There are allegation that some countries in the region were being pressurized by China for 'joint development' which they do not want as this will deprive them of their rights accorded under UNCLOS. It has been employing different gray zone tactics against rival countries. In November 2021, Foreign Affairs Department of Philippines (DFA) had disclosed that Philippines government had filed 231 diplomatic protests against Chinese activities in the West Philippines Sea (Philippines side of South China Sea) since 2016. Earlier in the month of April of the same year, eight prominent business groups of Philippines had urged China, for the first time, to respect Philippines' sovereignty and refrain from becoming an 'Imperial Power'. In a strongly worded joint statement, the business groups joined the governments' call on China to withdraw its vessels from Julian Felipe Reef located within Philippines EEZ. The business groups also quoted Deng Xiaoping, China's former paramount leader in reiterating their call.

In 1974, Deng Xiaoping was quoted as saying, “*if one day China should change her color and turn into a superpower, if she too should play the tyrant in the world and everywhere subject others to her bullying, aggression and exploitation, the people of the world should expose it, oppose it and work together with the Chinese people to overthrow it.*”

(A) Warning against enforcing verdict

It is significant to note that in May 2017, President Duterte had said publicly that his Chinese counterpart, Xi Jinping had personally threatened him of war if Philippines attempted to enforce an arbitration ruling and drill for oil in a disputed part, known as Reed Bank, of the South China Sea. Though China did not comment on the allegation of Duterte, an Associate Judge of Philippine Supreme Court Antonio Carpio wanted Manila to file an international arbitration case and a complaint with the UN over what the country’s leader said was a threat of war made by Chinese President. He said the use of force or threat to settle disputes between states was outlawed under UN Charter and if President did nothing to protest, he was “selling us out”. Antonio Carpio was earlier part of the Philippines legal team that represented the arbitration case against China in Hague.

(B) Marcos pledge to uphold Hague verdict

The president of Philippines holds office only for one 6-year term and is not eligible for re-election. On May 26, 2022 Philippines’ President elect Ferdinand Marcos Jr (popularly known as ‘*Bangbong*’) was quoted by news agencies as saying that Philippines would uphold South China Sea ruling insisting he would not let China trample on Manila’s maritime rights. He said “We have a very important ruling in our favor and we will use it to continue to assert our territorial rights. It is not a claim. It is already our territorial right.” However, he added; “*We can not go to war with them. That is the last thing we need right now.*” Earlier, after his election as new leader, Marcos Jr was quoted as saying that Philippines views China as one of its “most important partners”. During a conversation with Marcos after his landslide victory on May 9, 2022 elections, Chinese leader Xi Jinping had also observed that Beijing and Manila had “effectively managed differences through dialogue and consultation” during outgoing President Duterte’s tenure. However, the majority of Philipinos seem to be in favour of asserting the right of their nation. However, since last some years, a number of programs are held every year in Manila on July 12 to mark anniversary of Hague verdict. Last year, a protest was held at Chinese Cultural Consulate at Manila amid a statement by Enrique Manalo, Philippines new foreign minister in which he pledged to uphold Tribunal’s ruling. He said “*We firmly reject attempts to undermine it, even erase it from law, history and our collective memories.*” To mark the

anniversary of Hague verdict, Washington has also been issuing statements every year reaffirming United States July 13, 2020 policy regarding maritime claims in the South China Sea. The findings of an opinion poll conducted recently by Stratbase Institute suggests that about 90 percent of Filipinos want the government to assert country's maritime claims and increase its defense capability, an indicator of growing domestic concern over the long pending issue.

(C) Effectiveness of UNCLOS

UNCLOS is now regarded as Constitution of the Oceans. It provides effective mechanism to allocate maritime resources as per entitlement and creates an interdependence of nations with certain obligations. If international treaties like UNCLOS are seen as merely '*pieces of waste paper*' (as China once described Hague Tribunal's ruling), then international order is bound to break down. The signatories of UNCLOS have an obligation to defend the law of the seas and ensure that small states are protected from unlawful behavior and bullying tactics of big powers that have developed a tendency to interpret international law to suit their own interests. Attempts to use force to overturn legal rights of small nations could pose a serious threat to international peace and security.
