

Some legal aspects of the drilling rig incident in the South China Sea in 2014¹

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1. The positioning of the drilling rig and justifications by China in the light of international law.

In May 2014, China deployed the drilling rig HYSY 981 in the EEZ of Vietnam. The first location on 2 May 2014 is 15°29'58" North Lat – 111°12'06" East Long, which is 130 nm from the coast of Vietnam, 119 nm from Vietnam's base point (Ly Son Island), 17 nm from Triton Island of Paracel Islands of Vietnam³ (Zhongjian Island of Xisha Islands claimed by China), about 180 nm from Hainan Island of China.⁴ The second location on 27 May 2014 is 15°33'38" North Lat – 111°34'62" East Long, which is about 23 nm from the first location, 150 nm from the Vietnam's base point (Ly Son Island), 25 nm from Triton Island,⁵ about 190 nm from Hainan Island of China.⁶

Vietnam asserted that the locations were within Vietnam's exclusive economic zone (EEZ) and continental shelf, thus immediately protested through diplomatic channels. One of the first questions being asked by observers was why Vietnam did not make its protest any earlier but only on 2 May 2014? It is obvious that the drilling rig, escorted by nearly 60 ships were moving all the way to the location during at least a week before it finally stopped and started to position itself. However, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS), in EEZs coastal states

¹ The views and opinions expressed in this paper are those of the author and do not necessarily reflect the official policy or position of any institutions of Vietnam.

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³ Remarks by Foreign Ministry Spokesman Le Hai Binh on 4th May 2014, available at: http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns140505232230.

⁴ Ernest Z. Bower and Gregory B. Poling, 'China-Vietnam Tensions High over Drilling Rig in Disputed Waters' (2014) <http://www.csis.org/publication/critical-questions-china-vietnam-tensions-high-over-drilling-rig-disputed-waters> accessed 4th October 2014.

⁵ Remarks by Foreign Ministry Spokesman Le Hai Binh on 27th May 2014, available at: http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns140527221322.

⁶ Measured by Mr. Tran Huu Duy Minh - the lecturer of the International Law Faculty at the Diplomatic Academy of Vietnam.

have sovereign rights for the purpose of economic exploitation and exploration of natural resources of the zones. The freedom of navigation has been preserved for other states in EEZs. The question of possible violation of the UNCLOS, therefore, can only be raised at the time the drilling rig started its installation (establishing its fixed position) in the EEZ of Vietnam.

In the justification for its action, on 12 May China's MOFA Spokespersons stated that the rig is (i) carrying out "normal operation within China's territorial sea" and (ii) operating "in the water south to the Zhongjian Island."⁷ One of China's official statements also stipulates that the location is "totally within the waters off China's Xisha Islands."⁸ China's arguments based on Triton/Zhongjian Island and Paracel/Xisha Islands have been difficult to be proved under UNCLOS.

As related to the "territorial sea" argument, first it is obvious that the location of the rig is 17 nm from Triton Island, which is, in accordance with UNCLOS, outside any legitimate 12-nm territorial sea. Second, sovereignty over the Paracels is now still under dispute between China and Vietnam. China's invasion of the islands by force in 1974 is unlawful and cannot generate legitimate title for China over these islands.

As related to the "water south to the Zhongjian Island" argument, again, the first question is the one of sovereignty as mentioned above. Second, Triton/Zhongjian island can hardly be considered suitable for human habitation or able to have an economic life of its own to satisfy as an island, entitled for EEZ and continental shelf within the meaning of Article 121(1) UNCLOS. Similarly, the location is not within the scope of EEZ and CS of any feature of Paracels that can satisfy the requirements of an island within the meaning of Article 121(1). Third, even if Triton has contiguous zone, which is not likely as explained above, China still has no right to drill or explore oil as the contiguous

⁷ Remarks by Foreign Ministry Spokesperson Hua Chunying in Regular Press Conference on May 12, 2014, available at:

http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1155154.shtml.

⁸ Remarks by Chinese Foreign Ministry Spokesperson Hua Chunying in the Regular Press Conference on 6th May 2014, available at:

http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1153131.shtml.

zone is for custom, sanitary, finance or migration purposes, not for exploration or exploitation of natural resources as clearly stated under Article 33 of UNCLOS.

The argument that the location is “totally within the waters off China’s Xisha Islands” seems to be based on China’s claim of a 200nm EEZ⁹ from an archipelagic baseline around the Paracel islands,¹⁰ which is obviously not in conformity with UNCLOS. Article 47 of the Convention allows archipelagic baselines to be used only by archipelagic states, not to mention that the archipelagic baselines used by China do not meet the strict conditions set out in the said article.

So far, these have been the only explanations officially provided by China for the placement of the rig. Since all the official arguments have no legal ground, as explained above, Vietnam firmly protests against the placement of the rig. China has not mentioned the U-shaped line in its argument, even though its activities have been suspected as one of the steps to strengthen this unfounded claim.

It should be pointed out that measured from uncontested Hainan Island the two locations of the drilling rig is at a distance of about 182 nm and 190 nm. Despite having a much more grounded basis, for some reasons China has decided not to make use of this argument. Regardless of the intention behind such silence, even if this were the case, the drilling rig, which is 119 nm from the coast of Vietnam, would be within the overlapping EEZs and continental shelves of the two States.

Leaving aside the fact that if delimitation was to be carried out, the rig would still be to the west of the delimitation line, pending delimitation, UNCLOS obliges concerned states to enter into provisional arrangements and

⁹ China passed a law on 200nm EEZ from an archipelagic baseline around the Paracel islands in 1998. *See* Exclusive Economic Zone and Continental Shelf Act (adopted at the third session of the Standing Committee of the Ninth National People’s Congress, 26 June 1998). Available at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf

¹⁰ China drew an archipelagic baseline around the Paracel islands in 1996. *See* Declaration of the Government of the People’s Republic of China on the baselines of the territorial sea (15 May 1996), available at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf

not to jeopardize or hamper the reaching of a final agreement (Articles 74(3) and 83(3)). In the similar *Suriname/Guyana* case, the Arbitral Tribunal placed emphasis on the phrase “in a spirit of understanding and cooperation” and held that any unilateral activity that might affect the other party’s rights in a permanent manner or lead to a permanent physical change, such as exploitation of oil and gas reserve, would be prohibited.

The presence of the drilling rig, supported by a flotilla of ships including armed vessels, already shows a clear disregard for any spirit of understanding or cooperation. China’s persistence for this to be a successful drill and “not be interfered or disrupted by external factors”¹¹ is yet another blatant defiance of its obligations under international law.

2. Diplomatic responses of Viet Nam

Shortly after the deployment of Chinese drilling rig discovered, Vietnam made a number of diplomatic efforts in order to persuade China to remove its rig out of the Vietnamese waters. These efforts were made at various levels in sequences from senior diplomatic officers to Minister of Foreign Affairs and up to state leader-level. According to Ministry of Foreign Affairs of Vietnam, there were more than 30 meetings between Vietnam and China within the first two months after the deployment.¹² As positions of the two sides remained diverse, diplomatic efforts were deployed at multilateral level in line with continuous bilateral attempts. Vietnam had made protests and called for supports from other states at ASEAN high-level meetings, requested the UN Secretary-General to circulate its position papers to UN member states. It can be seen that Vietnam handled the dispute with China in a very good faith manner, from officers to high-level leaders, from bilateral to multilateral.

In response, China, for the first time, requested UN Secretary-General to circulate its position papers regarding the South China Sea dispute and the

¹¹ Chinese Foreign Ministry Spokesperson Hong Lei's Further Remarks Concerning the Withdrawal of the HYSY 981 Drilling Rig on 16th July 2014, available at:

http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1175131.shtml

¹² Ministry of Foreign Affairs of Vietnam, Press conference on 5th June 2014, at http://www.mofa.gov.vn/en/tt_baochi/tcbc/ns140609024213, accessed on 5th October 2014.

drilling rig incident to UN member states.¹³ Even though the arguments in the China's position papers are unfounded in facts and in law,¹⁴ this action can be considered as an evidence of China's use of third party in dealing with an issue relating to the South China Sea dispute.

Diplomatic efforts during the drilling rig incident not only contribute to the settlement of the dispute but are also of legal importance. First, they are in accordance with the principle of peaceful settlement of dispute – a fundamental principle of international law embodied in the UN Charter.¹⁵ Second, in light with UNCLOS, those diplomatic efforts may be considered as having satisfied the condition of exchange of views between parties which is required before a party can unilaterally initiate judicial proceedings at international courts or tribunals.¹⁶ The right to bring other state before international courts or tribunals can only be exercised if there were efforts to negotiate beforehand.

3. The applicability of judicial means

It is clearly stipulated in the statement of Vietnam's spokesperson that "Vietnam will use all peaceful means¹⁷ to settle the dispute in the *East Sea*."¹⁸ This can be interpreted that the possibility of the use judicial measures is not excluded.¹⁹ During the drilling rig incident, there has been a considerable portion of public opinion in Vietnam in support of the use of judicial means to settle the dispute. However, it should be mentioned that from international law

¹³ See Letter dated 22 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/68/887.

¹⁴ See Letter dated 3 July 2014 from the Permanent Representative of Vietnam to the United Nations addressed to the Secretary-General. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/68/942.

¹⁵ Charter of the United Nations, Art. 2.3 and Art. 33.

¹⁶ The United Nations Convention on the Law of the Sea 1982 (UNCLOS), Art. 283.

¹⁷ The policy of resorting to all peaceful measures to settle the disputes in the East Sea has been reiterated by MOFA's Spokesperson Le Hai Binh. See, for example, Regular Press Briefing by MOFA's Spokesperson Le Hai Binh On May 15, 2014, available at: http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns140516233943.

¹⁸ In Vietnam the name "Bien Dong" with the equivalent English translation "East Sea" has been used instead of the international name "South China Sea."

¹⁹ Ms. Nguyen Thi Thanh Ha (Director of the Department of International Law and Treaties, Ministry of Foreign Affairs of Viet Nam) in the International Press Conference on developments in the East Sea on 23rd May 2014, stated that: "The use of peaceful means including international tribunals is in conformity with international law."

and the law of the sea perspectives, as analyzed below, it is not easy to bring a country before international tribunals.

It is a well-established principle that a state cannot be brought before international courts or tribunals without its consent. The consent of a state may be expressed in forms of unilateral declarations, treaties or conducts.²⁰

To settle disputes between state parties concerning the interpretation or application of UNCLOS, the Convention provides for a judicial mechanism with four choices, namely the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), an arbitral tribunal established under Annex VII, and a special arbitral tribunal established under Annex VIII. The court or tribunal, which is chosen by all parties to a dispute, will be the competent one to settle their dispute.²¹ In case the choices are different or there is no choice the default forum is the arbitral tribunal established under Annex VII.²² Vietnam and China (like other states directly concerned in the South China Sea disputes) do not choose any court or tribunal, thus the arbitral tribunal under Annex VII will be competent forum for them.

However, the Convention allows State Parties to optionally make a declaration to exclude one or more of following types of disputes from the jurisdiction of one or more tribunals, mentioned above, i.e. disputes relating to maritime delimitation, historic titles or bays, disputes involving the concurrent consideration of any unsettled dispute concerning sovereignty, disputes concerning military activities and certain enforcement activities with regards to marine scientific research and fisheries and disputes concerning issues under the consideration of the UN Security Council.²³ Vietnam does not make such declaration, but China did in 2006, excluding from the jurisdiction of all tribunals provided in Article 287 all the categories of disputes provided for in Article 298.

²⁰ The consent in form of acts is usually termed *forum prorogatum*.

²¹ UNCLOS, Art. 287(4).

²² UNCLOS, Art. 287(3), (5).

²³ UNCLOS, Art. 298.

Even though Vietnam has full legal basics and historical evidences to support its sovereignty over Paracels, the islands now are illegally occupied by China. In accordance with UNCLOS, disputes involving the concurrent consideration of the sovereignty over the Paracels would be excluded from the jurisdiction of the Annex VII Arbitration. For the purpose of examining the applicability of UNCLOS's judicial procedures to the drilling rig incident, issues relating to the sovereignty over the Paracels will not be considered in this paper.

Obligations under Articles 74(3) and 83(3)

Putting aside the issue of the sovereignty of the Paracels since the presence of these islands will not change the legal status of the maritime area where the drilling rig was deployed, the location of the drilling rig, as explained above, was in the overlapping EEZs and continental shelves from undisputed coasts of two countries. Pending delimitation, the two countries are under the obligations stipulated in Articles 74(3) and 83(3), which read that: *'Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.'* In the *Guyana v. Suriname* case²⁴ the arbitral tribunal held that the provision provides for two specific obligations. First states have duty to make every effort to reach provisional arrangements of practical nature, which are usually under the form of arrangements for joint development in the overlapping areas. It is also a duty to act in "spirit of understanding and cooperation" when conducting activities in such area. As analyzed in the first part of the paper, this obligation has not been fulfilled by China.

The second duty provides that states concerned have to make every effort not to jeopardize or hamper the reaching of final agreement on maritime delimitation. In the opinion of the arbitral tribunal the second duty should be

²⁴ *Guyana v Suriname*, Award, ICGJ 370 (PCA 2007), 17th September 2007, Permanent Court of Arbitration [PCA].

understood as a duty not to make physical change to the environment or the seabed of the concerned areas, which are of irreparable nature.²⁵ In overlapping areas, states concerned may conduct only those unilateral acts that are within the framework of a joint development agreement or those, which do not cause “permanent physical change” to the area such as seismic exploration.²⁶ The exploitation of gas and oil is expressly prohibited.²⁷ It is also worth noting that the Tribunal believes that seismic exploration can be considered as lawful, while some drilling exploration may cause permanent physical change to the marine environment. Thus it is quite clear that if the exploration activities are conducted by seismic testing, it should be permissible. In other hand, if the exploration involves drilling activities, it may be illegal. In the incident between Vietnam and China, since the drilling rig conducted drilling activities²⁸ it can possibly be found that the act violated the obligation mentioned above.

If any of the parties in the case considers to use judicial means, namely the arbitral tribunal under Annex VII of the UNCLOS, the jurisdiction of the tribunal depends on whether obligations under Article 74(3) and 83(3) should be considered as (i) “relating to sea boundary delimitations” or (ii) as pre-delimitation obligations. If look at the titles of Articles 74 and 83, one may jump to the conclusion that paragraphs 3 of these Articles relate to delimitation and therefore fall under the exceptions in China Declaration 2006. The author of this paper is with the view that the obligations are clearly not related to delimitation, based on the substance of paragraphs 3 of these Articles. They should be correctly considered as pre-delimitation obligations and the arbitral tribunal, therefore, should have jurisdiction over these issues. Similar cases

²⁵ *Guyana v. Suriname case*, paras. 465 – 470.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Even though there remains some inconsistency in China’s reference to the operation of the HYSY 981 oil platform, in Letter dated 22 May 2014 from the Chargé d’affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General, available at:

http://www.un.org/ga/search/view_doc.asp?symbol=A/68/887.

China clearly stated that its “HYSY 981 drilling rig started an oil and gas *drilling* operation”

have never been brought before any international tribunal and the answer, therefore, remains uncertain.

*Obligations under Articles 60(5) and 80*²⁹

In the drilling rig incident China established a safety zone around the rig which was first one nautical mile, then expended up to three nautical miles. On this point, state members to UNCLOS may ask the arbitral tribunal on whether China violated the obligation under Article 60(5) on the maximum width of safety zone of artificial installation. This issue is clearly not concerning any category of disputes excluded by the 2006 Declaration of China.

UNCLOS allows coastal states to establish a safety zone around artificial installations in its exclusive economic zone. Article 60(5) sets a maximum limit of 500 meters of such zone. States may expand the limit if it is authorized by generally accepted standard or by competent international organizations i.e. the International Maritime Organization (IMO). Until now there is no such standard or authorization from the IMO.³⁰ In 2007 Brazil attempted to obtain authorization from the IMO to expand the width of the safety zone established around its installations in the Campos basin.³¹ However this request has not been adopted. The newest guidelines of the IMO concerning the safety zones in 2010 did not mention the possibility of expanding such zone beyond 500 meters.³² Moreover when considering the request from Brazil the committee of the IMO in charge for the issue concluded that at current time there is no need to consider the expansion of the safety zone and decides to put aside the issue.³³ Thus it can be concluded that up to now there is no standard or authorization from the IMO to expand the safety zone beyond 500 meters, and as a result China violated its obligation under Article 60(5) and 80 of the Convention.

²⁹ Article 80 provides that “Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf”.

³⁰ Satya N. Nandan and Shabtal Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary (Vol. II)* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), p. 585.

³¹ James Kraska and Raul Pedrozo, *International Maritime Security Law* (Leiden: Brill, 2013), p. 78.

³² IMO’s Sub-Committee on Safety of Navigation, *Guidelines for Safety Zones and Safety of Navigation around Offshore Installations and Structures* (07/12/2010).

³³ Kraska and Pedrozo (2013), p. 82

There may be a question of whether a possible submission of this issue to arbitral tribunal by a country, may be considered as that country's implied recognition of Chinese sovereign rights over the waters concerned as Articles 60 and 80 provide for the establishment and regime of artificial installations *within the EEZ and continental shelf of coastal states*. Countries may exclude such risk by expressly state that the submission does not have such implied recognition in all relevant circumstances during the proceedings. In principle, international courts or tribunals cannot adjudicate a dispute broader than the dispute submitted by concerned parties.³⁴ It must be noted, however, that the arbitral tribunal is the one to decide the way it deal with the dispute.³⁵

Obligations under Articles 58 and 87

The establishment of the safety zone and as well as actions by Chinese ships to prevent ships flying flags of other countries from approaching the zone obviously violate the freedom of navigation, stipulated in Articles 58 and 87 of UNCLOS. This category of dispute does not fall under the exceptions, provided in Article 298 and can not be affected by the 2006 Declaration. The arbitral tribunal, therefore, will have jurisdiction over this type of dispute.

Other issues

In addition, other issues such as the allegedly water firing and ramming Vietnam's ships by Chinese ones, especially the ramming and sinking a Vietnamese fishing boat with 10 fishermen on board by a Chinese ship have to be examined more thoroughly in order to analyze the legal aspects of these issues as well as the applicability of judicial means.

In sum, the drilling rig incident, even though took place in the maritime area with overlapping claims of sovereign rights and sovereignty, there are provisions of UNCLOS that the parties are to comply with. The thorough analyzes have proved that the arguments of China to justify its placement of the drilling rig are ungrounded. Other actions of China, following the positioning

³⁴ J. G. Merrills, *International Dispute Settlement* (5th Edn, Cambridge University Press 2011), pp. 116-8.

³⁵ *Ibid*, pp. 119-23.

of the drilling rig, are found to be in violation of the provisions of UNCLOS and incompatible with case law. Even though the applicability of judicial procedures under UNCLOS is quite limited in the case, there have been issues that are not excluded from the jurisdiction of the arbitral tribunal under Annex VII.