

Grand Theft of the Global Commons

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Hainan claims to administer all the waters enclosed by the dashes from 1 to the heavy red line intersecting the dashes between 8 and 9. The enclosed waters comprise two million square kilometers. China claims a total of three million square kilometers of maritime space, and all the resources found there, out of the 3.5 million square kilometers of maritime space in the South China Sea.

Most of us gathered here tonight consider ourselves life-long students of the law. We believe in the rule of law among nations as the essential condition for the survival of our civilization on this planet. We have seen the development of the rule of law from ancient times to the present, with international law generally progressing to regulate the conduct of wars among nations. Thus, the foundation of international law is the laws of war and peace among nations.

UNCLOS – The Constitution for the Oceans and Seas

After WWII when the threat or use of force against the territorial integrity of another State was outlawed under the Charter of the United Nations, international law progressed considerably. One of the greatest achievements in international law was the signing in 1982 of the United Nations Convention on the Law of the Sea or UNCLOS. UNCLOS took effect in 1994 and has regulated the use of the oceans and seas of our planet for the last two decades. UNCLOS is the Constitution for the oceans and seas of the earth.

UNCLOS is the greatest codification of international law into one coherent system, complete with a compulsory dispute settlement mechanism to enforce its provisions. It took 26 years, starting from the first negotiating conference in 1956, to negotiate UNCLOS – the longest running negotiation in the history of the United Nations. Some 165 States have ratified UNCLOS, representing an overwhelming majority of members of the United Nations. All the claimant States in the South China Sea dispute are parties to UNCLOS and are bound by UNCLOS.

UNCLOS not only codified existing customary international law on the law of the sea, it also created novel watershed entitlements like the Exclusive Economic Zone (EEZ) and the Extended Continental Shelf (ECS). UNCLOS institutionalized the global commons – which originated from the ancient idea that the oceans and seas of our planet belonged to all mankind.

Under UNCLOS, there are four maritime zones in the oceans and seas, all measured from coastal land following the concept that the land dominates the sea, which means that entitlement to maritime zones is derived from sovereignty over land. *First*, we

have the 12-NM territorial sea adjacent to coastal land; *second*, the 200-NM EEZ adjacent to coastal land; *third*, the additional 150-NM ECS beyond the EEZ; and *fourth*, the AREA, the maritime space beyond the ECS.

In its territorial sea the adjacent coastal State has full sovereignty just like in its land territory. In its EEZ beyond its territorial sea, the adjacent coastal State has only the sovereign or exclusive right to exploit the living or fishery resources, as well as the non-living or mineral resources; in its EEZ the adjacent coastal State does not have full sovereignty in the same way it has full sovereignty in its territorial sea. In its ECS the adjacent coastal State has the sovereign right to exploit only the non-living or mineral resources; in the ECS the living or fishery resources belong to all mankind. In the AREA, the living and non-living resources also belong to all mankind.

In short, the fishery resources beyond the 200-NM EEZ of a coastal State belong to all States of this planet, whether coastal or landlocked. The waters beyond the 200-NM EEZ are called the “high seas.” No State can claim exclusive right to fish in the high seas. No State can bar other States from fishing in the high seas. The fishery resources in the high seas belong to all mankind, forming part of the global commons, just like the sun, the moon and outer space. No State can appropriate for itself the fishery resources in the high seas, in the same way that no State can appropriate for its exclusive use the energy radiating from the sun.

Thus, UNCLOS expressly provides: “The high seas are open to all States, whether coastal or landlocked. Freedom of the high seas xxx comprises, *inter alia*, both for coastal and landlocked States xxx, (e) freedom of fishing. xxx. No State may validly purport to subject any part of the high seas to its sovereignty.” UNCLOS expressly defines the high seas as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” These are the express declarations and specific commands of international law, in particular UNCLOS. Clearly, the fishery resources in the high seas are part of the global commons, belonging to all mankind.

The Concept of the Global Commons

The concept of the global commons is central to the development of the law of the sea. The Institutes of Justinian of the Roman Emperor Justinian, written in the 6th century, declared that the sea is “common to mankind” and its use is subject only to “the law of nations.” This early concept of the global commons prevailed in Europe from the 6th to the 12th century. Afterwards, States started claiming control and ownership of their adjacent seas.

In 1609, the Dutchman Hugo Grotius wrote his famous *Mare Liberum* or the Free Sea. Grotius argued that no nation could claim ownership of the oceans and seas because they belonged to all mankind. The naval powers at that time – Spain, Portugal and England – held the opposite view, claiming ownership of the oceans and seas by discovery. The English John Selden advocated this opposite view in his 1635 treatise *Mare Clausum* or the Closed Sea. Since then until the end of the 18th century, these two contradictory views - one claiming that the oceans and seas belonged to all mankind and the other claiming that nations could appropriate as their own the oceans and seas - competed for world approval. Grotius’ idea eventually won and became the foundation of the law of the sea. Grotius is known as the father of international law for his writings on the laws of war and peace.

Thus, under international law since the turn of the 19th century until today, the waters beyond a coastal State’s territorial sea could never be subject to sovereignty by the coastal State. Before UNCLOS, the territorial sea was a belt of 3-NMs of waters from the coast, and beyond this 3-NM territorial sea was the high seas, belonging to all mankind as part of the global commons. Under international law, before and after UNCLOS, no State could appropriate the high seas as its own exclusive waters. Before and after UNCLOS, the high seas were part of the global commons.

In 1967, the negotiations for a new law of the sea treaty had become moribund under the UNCLOS I and UNCLOS II negotiating Conferences. Then, on November 1, 1967 Ambassador Arvid Pardo of Malta, in an impassioned speech before the General Assembly, beseeched the United Nations to declare “the seabed and the ocean floor a common heritage of mankind.” The concept

of the “common heritage of mankind” electrified the General Assembly. This paved the way for the UNCLOS III negotiating Conference that finally resulted in the signing of UNCLOS in 1982.

Thus, UNCLOS expressly provides: “The Area and its resources are the common heritage of mankind. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources xxx. All rights in the resources of the Area are vested in mankind as a whole xxx.”

Clearly, international law, specifically UNCLOS, indisputably declares that the fishery resources in the high seas, which are the waters beyond the EEZ of a coastal State, and the fishery and mineral resources in the Area, which is the maritime zone beyond the ECS of a coastal State, belong to all States as the common heritage of mankind. These fishery and mineral resources are part of the global commons. No State can appropriate these resources as its own. No State can bar other States from enjoying these resources in accordance with international law. Any State that bars other States, and appropriates for its own exclusive use, these fishery and mineral resources is shamelessly stealing what belongs to all mankind.

The Global Commons vs. China’s 9-Dashed Lines

In the South China Sea, the global commons for fishery resources refers to the area beyond the EEZs of coastal States. In maps of the South China Sea that indicate the EEZs of coastal States, the global commons appears as the elongated hole of a doughnut right in the middle of the South China Sea. This “hole of a doughnut” was a phrase coined by the late Foreign Minister of Indonesia, Ali Alatas. This global commons, beyond the EEZs of coastal States, comprises about one-fifth of the South China Sea. All States, coastal and landlocked, have the right to fish in this global commons. However, China’s infamous 9-dashed lines gobble up entirely this global commons.

China’s 9-dashed lines were first made known by China to its own people in 1947. China officially submitted a map of its 9-dashed lines to the United Nations only in 2009. Up to today the

9-dashes, which have been increased to 10 dashes in 2013, have no fixed coordinates. China has never explained the legal or factual basis of the 9-dashed lines. Under its 9-dashed lines China asserts control and “indisputable sovereignty” to almost 90% of the South China Sea, including China’s coastal waters outside the 9-dashed lines. Of course, this blatantly violates international law because no State could appropriate for itself the high seas, whether before or after UNCLOS. China is the only country in the world today that is claiming “indisputable sovereignty” over the high seas.

Under China’s 1986 Fisheries Law, foreign fishing vessels are required to secure permission from Chinese authorities “before entering the territorial waters of the People’s Republic of China to carry on fishery production or investigation of fishery resources.” This law refers to “territorial waters” of China. Other States have no quarrel with this Chinese law since obviously foreigners cannot engage in fishing in the “territorial waters” of China. There is no dispute that China has indisputable sovereignty over its own “territorial waters.”

Under China’s 2011 amendment to its Fisheries Law, foreign fishing vessels are required to secure permission from Chinese authorities if they wish “to enter the waters under the jurisdiction of the People’s Republic of China to engage in fishery production or survey of fishery resources.” This amendment refers to “waters under the jurisdiction” of China, which legally is more expansive than the “territorial waters” of China. Under UNCLOS, a State has jurisdiction over its EEZ, and this jurisdiction includes the exclusive right to fish in its own EEZ. Thus, other States still have no quarrel with China’s 2011 amendment to its Fisheries Law because under UNCLOS a coastal state has exclusive fisheries jurisdiction over its own EEZ.

Under Article 35 of the Hainan Provincial Government’s 2014 Regulations to implement China’s Fisheries Law, foreign fishing vessels “entering the waters under the jurisdiction of this province (Hainan) to engage in fishery operations or fishery resource surveys shall secure approval from relevant departments of the State Council.” The fishery Regulations, which took effect January 1 this year, require permission from Chinese authorities to enter “waters under the jurisdiction” of Hainan.

Area of Waters under China's Jurisdiction

The problem arises when China's Fisheries Law is applied to the high seas, and to the EEZs of other coastal States, that China claims fall within its 9-dashed lines in the South China Sea. China's 12th Five-Year Plan for National Oceanic Development states that the sea area under China's jurisdiction comprises three million square kilometers. The 12th Five-Year Plan of the Hainan Maritime Safety Administration states that the sea area under Hainan's jurisdiction comprises two million square kilometers. The South China Sea has a sea area of three million five hundred thousand square kilometers. In the 1988 decision of China's National People's Congress creating the province of Hainan, Hainan's territory expressly includes Zhongsa Island or what is internationally known as Macclesfield Bank.

The Fisheries Law of China, and the fishery Regulations of Hainan, when applied to the high seas in the South China Sea, violate directly, openly and glaringly two specific provisions of UNCLOS: *first*, that all States have a right to fish in the high seas; and *second*, that no State can subject the high seas to its sovereignty.

Let me quote from the January 24, 2014 article of Isaac Kardon in *China Brief* published by the Jamestown Foundation:

The Xinhua press release announcing the new *banfa* (Regulations) asserts that Hainan is responsible for some 2 million square kilometers of relevant maritime area (*xiangguan haiyu*). The only official document citing this figure is the relatively obscure Twelfth Five-Year Plan of the Hainan Maritime Safety Administration (MSA) (Hainan Maritime Safety Administration, July 7, 2012). The Hainan MSA document claims that the province administers roughly two thirds of China's overall maritime space (*woguo haiyu*), sets basepoints for the northern tier of waters under Hainan's administration, and extends a line south-east at 140 degrees from the Qiongzhou Strait as the north-eastern boundary of that zone xxx. By

inference, this line encloses the Macclesfield Bank, and then intersects the now-infamous U-shaped, or “nine-dashed,” line, thus including the disputed Spratly and Paracels Islands as well as areas claimed as the EEZ of Vietnam, Malaysia, Indonesia, Brunei and the Philippines. xxx.

This tells us five revealing assertions. *First*, Hainan claims to administer two million square kilometers of maritime space, or two-thirds of China’s total claimed maritime space in the South China Sea. *Second*, China’s total claimed maritime space in the South China Sea is three million square kilometers. *Third*, since the entire South China Sea has an area of 3.5 million square kilometers, the maritime space Hainan claims to administer comprises 57% of the entire South China Sea. *Fourth*, with a claimed maritime space of 3 million square kilometers, China claims 85.7% of the entire South China Sea. *Fifth*, and most importantly, the maritime space China claims under its jurisdiction, and Hainan claims to administer, includes the Macclesfield Bank, as well as large swathes of the EEZs of Vietnam, the Philippines, Malaysia, Brunei and Indonesia.

Wu Shicun, the head of Hainan’s Foreign Affairs Office and President of the National Institute for South China Sea Studies, told the *New York Times* that Hainan’s fishing Regulations apply to “all entities within the nine dotted line and the contiguous waters.” Wu Shicun also told the *Global Times* that Hainan would put more focus on administering the Xisha Islands (Paracels) and Zhongsa Islands (Macclesfield Bank) and their adjacent waters. Shen Shishun, Director of the Department of Asia-Pacific Security and Co-Operation of the China Institute of International Studies, explained to the *South China Morning Post*, “Our navy and law enforcement forces have not patrolled the disputed areas often enough. Now, given the strengthening of their capabilities, they will set up surveillance ... That’s why we now require foreign fishing vessels to get permission.”

Macclesfield Bank - A Part of the Global Commons

Macclesfield Bank is one of the largest atolls in the world, with a water surface area of 6,448 square kilometers, about ten

times the land area of Metro Manila. Macclesfield Bank lies just outside the Philippines' EEZ facing the South China Sea in Luzon Island. Macclesfield Bank is named after the *HMS Macclesfield*, a British warship that ran aground in the area in 1804.

Macclesfield Bank is not an island but a fully submerged atoll whose highest peak is some 9 meters below sea level. China calls Macclesfield Bank the Zhongsa Island, which is glaringly misleading because the entire area is fully submerged even at high tide. Under UNCLOS, a geologic feature is an island only if it is above water at high tide. Macclesfield Bank does not qualify as an island under this UNCLOS definition. An island is subject to a claim of territorial sovereignty but not a fully submerged atoll beyond the territorial sea like Macclesfield Bank. As a fully submerged atoll beyond China's territorial sea, Macclesfield Bank is not subject to any claim of territorial sovereignty by China. And since Macclesfield Bank is beyond China's EEZ, China cannot also claim any sovereign right to exploit exclusively the fishery resources in Macclesfield Bank.

Under UNCLOS, Macclesfield Bank is part of the high seas since it is situated beyond the EEZ of any coastal state. Macclesfield Bank is within the hole of the doughnut in the middle of the South China Sea. UNCLOS prohibits any State from subjecting the high seas to its sovereignty. All States have the right to fish in Macclesfield Bank, which is part of the global commons. Macclesfield Bank, rich in fishery resources, has been a traditional fishing ground of Filipino fishermen, just like the nearby Scarborough Shoal.

Grand Theft of the Global Commons

Hainan's fishing Regulations authorize Chinese maritime administration vessels to apprehend foreign fishing vessels operating without permission within waters administered by Hainan. Chinese authorities can seize the fish catch and fishing equipment of these foreign vessels operating in Macclesfield Bank, and even fine these fishing vessels up to US\$83,000. Prof. Carl Thayer of the University of New South Wales calls the fishery Regulations an act of "state piracy" by China. Others have called the fishery Regulations as the biggest seizure of international

waters since the 1493 Papal Line of Demarcation divided between Spain and Portugal the newly discovered world outside of Europe.

I call the fishery Regulations of Hainan a grand theft of the global commons in the South China Sea. China is taking for its own exclusive benefit fishery resources that belong to all the peoples of the world, as prescribed and commanded by UNCLOS. China, being a party to UNCLOS, is legally bound to comply with the provisions of UNCLOS in good faith. By appropriating the fishery resources of Macclesfield Bank for its own exclusive use, China is blatantly violating its international obligation to comply with UNCLOS.

The Chinese authorities have carefully presented Hainan's fishery Regulations as routine administrative issuances that merely implement existing Chinese law. Thus, China's Foreign Ministry spokeswoman Hua Chunying stated, "China is a maritime nation, so it is totally normal and part of the routine for Chinese provinces bordering the sea to formulate regional rules according to the national law to regulate conservation, management and utilization of maritime biological resources." The *Global Times* chimed in that the fishery Regulations are "just technical amendments to China's Fisheries Law that has been enforced for more than two decades."

The "technical amendments," as interpreted and applied by Hainan authorities, actually bring China's Fisheries Law into a direct and frontal clash with UNCLOS. China's claim of jurisdiction over the high seas in the South China Sea creates this direct and frontal clash. As long as China subjects the high seas, and the EEZs of other coastal states, to its sovereign jurisdiction, China cannot escape being in gross violation of international law, in particular UNCLOS.

Where the Philippines Stands

The Philippines has brought China to an UNCLOS arbitration panel to question the validity of China's 9-dashed lines, which encroach on 80% of the EEZ of the Philippines in the West Philippine Sea, including the Reed Bank and the Malampaya gas field. The stakes are enormous not only for the Philippines, but also for all States of this planet.

The Philippines seeks to prevent China from encroaching not only on the EEZ of the Philippines, but also on the global commons in the South China Sea. The Philippines is fighting a legal battle not only for itself but also for all mankind. A victory for the Philippines is a victory for all States, coastal and landlocked, that China has shut out of the global commons in the South China Sea. ASEAN States whose EEZs are also encroached by China's 9-dashed lines will likewise benefit immensely from a Philippine victory.

If China's 9-dashed lines are allowed to stand, then there will be no global commons in the South China Sea. If there is no global commons in the South China Sea, then there will be no global commons in the rest of the oceans and seas of our planet. Great naval powers will appropriate for themselves whatever global commons they can grab. Coastal nations, large or small, will be forced to strengthen their naval forces to protect their own maritime zones. Naval might, not the law of the sea, will prevail in the oceans and seas of our planet. That will spell the end of UNCLOS, and the end of the rule of law in more than two-thirds of the surface of our planet.

As citizens of the world, we all have a profound stake in preserving the global commons in the South China Sea. As law professors, law students, law practitioners, magistrates and life-long students of the law, we must employ all our legal skills to defend the rule of law in the South China Sea. As Filipinos blessed by the Almighty with the extensive marine resources of an archipelagic State, we must be faithful to our duty as stewards of these marine resources - to protect and preserve these marine resources in our EEZ for the present and future generations of Filipinos.