Legal Aspects of the ROC’s Position on the U-Shaped Line

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Abstract
In 1947, the Republic of China (ROC) government published a map on which a “U-Shaped Line” was drawn to enclose the four groups of islands, a large part of the waters, and other features of the South China Sea. The “U-Shaped Line” has been a pivotal focus in the South China Sea’s territorial and maritime boundary delimitation disputes since 2009. Its legality was challenged by the Philippines in an arbitration case in 2013. This paper analyzes the legal aspects of the ROC’s position on the “U-Shaped Line.” It first provides a brief background on the history of the line. Then, it reviews a variety of interpretations on the legal status of the “U-Shaped Line” with special reference to the ROC’s state practices. After examining implications of the “U-Shaped Line” on the South China Sea disputes, some observations are made in the conclusion section.

Keywords: U-Shaped Line, South China Sea, UNCLOS, Historic Waters, Taiping Island
I. Introduction

What is the “U-shaped Line”? In December 1947, the Republic of China (ROC)\(^1\) government, based upon information collected by its navy, published a map, named Nanhai Zhudao Weizhi Tu (南海諸島位置圖, the Location Map of the South China Sea Islands), and the Cross Reference Table of the New and Old Names of the South China Sea Islands.\(^2\) On this map, eleven line dashes were drawn to enclose the four groups of South China Sea islands, namely, the Dongsha (Pratas), the Xisha (Paracels), the Zhongsha (Macclesfield Bank), and the Nansha (Spratlys), a large part of the waters, and other features of the South China Sea (see Figure 1). Because of its shape, the line has often been referred to as the “U-shaped Line” in Taiwan. It frequently has been called the eleven-dashed line, the eleven-dotted line, the nine interrupted-lines, the nine-dashed intermittent line, the line of national boundary, the dotted-line, the dashed lines, as well as the tongue-shaped line.\(^3\)

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1. In this article, the terms “Taiwan” and “ROC,” as well as the terms “mainland China” and “PRC,” will be used interchangeably. Cross-Strait relations, instead of ROC-PRC relations, is used here in order to avoid reference to sovereignty disputes.
3. For various names of this line, see Keyuan Zou, “China’s U-Shaped Line in the South China Sea Revisited,” Ocean Development and International Law, Vol. 43, Issue 1, February 2012, p. 18.
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Figure 1: The Location Map of the South China Sea Islands

The “U-shaped line” has been a focal point in the South China Sea’s territorial and maritime boundary delimitation disputes. In 2009, in order to protest Vietnamese and joint Malaysian-Vietnamese submissions to the Commission on the Limits of the Continental Shelf (CLCS), mainland China attached a map showing the “U-Shaped Line” to support its claims. In 2013, the legality of the “U-Shaped Line” itself was challenged by the Philippines in an arbitration case before the Permanent Court of Arbitration (PCA). In the memorial presented on March 30, 2014, among other submissions, the Philippines requested the tribunal to adjudge and declare “(1) China’s maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea; and (2) China’s claims to sovereign rights and jurisdiction, and to ‘historic rights,’ with respect to the maritime areas of the South China Sea encompassed by the so-called ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under UNCLOS.”


The state of the South China Sea disputes and their relevance to international law and affairs have interested scholars and practitioners around the world, and much has been written on issues, such as the Sino-Philippine Arbitration, the legal status of the South China Sea islands, and their security considerations. Thus, the “U-Shaped Line” certainly is worthy of further discussion.

This paper analyzes the legal aspects of the ROC’s position on the “U-Shaped Line.” Following this introduction, it provides a brief background on the history of the line. Then, it reviews a variety of interpretations on legal status of the “U-Shaped Line,” with special reference to the ROC’s state practices. After examining implications of the “U-Shaped Line” on the South China Sea disputes, the conclusions of this article will be presented.

II. Origin and Evolution of the “U-Shaped Line”

When studying the origin of the “U-Shaped Line,” one may find it likely first appeared on a map compiled by a Chinese cartographer in December 1914. At that time, it only included the Pratas and the Paracels. Then, in response to France reasserting claims to the Paracels in 1931 and the Spratly Islands in 1933, a Review Committee for Sea and Land Maps was established in June 1933. In 1935, the ROC government issued a revised “Review Regulation for Sea and Land Maps,” and published the Zhongguo Nanhai gedao yu tu (Map of the Islands of the South China Sea), where the line was extended to 7° to 9° north latitude to indicate clearly that China enjoyed sovereignty over the Nansha (Spratly) Islands.

After World War II, the ROC government reclaimed the Tungsha (Pratas), Shisha (Paracel), and Nansha (Spratly) Islands under ju-
risdiction of the Kwangtung provincial Government in 1946, and garrisoning erecting stone markers on some of the major islands. In December 1947, the government renamed the South China Sea islands and issued the Location Map of the South China Sea Islands, which showed the Pratas Islands, the Paracel Islands, and Spratly Islands within the 11 dotted “U-Shaped Lines,” as mentioned above. In 1948, the ROC dispatched warships to the four groups of islands to conduct surveys and erect landmarks. The Atlas of Administrative Areas of the Republic of China, including the above map, was published as the first official map showing the “U-Shaped Line” in the South China Sea.13

In 1949, the ROC transferred jurisdiction of the Spratly Islands from the Kwangtung provincial Government to the Hainan Special Administrative District, based upon the “Organizational Statutes Governing the Office of the Special Administrator of Hainan.” In 1950, the ROC Government withdrew its forces from Hainan Island and the Paracels, as well as the Spratly Islands, due to the defeat in the civil war. In 1956, in response to Filipino Tomas Cloma claiming ownership by discovery and occupation of “Freedomland,” the ROC protested to the Philippine Government and sent forces to Taiping Island (Itu Aba Island), the largest natural island in the Spratly Islands, and has remained there ever since.14 In 1990, the Executive Yuan placed Tungsha Island (Pratas Island) and Taiping Island (Itu Aba Island) under the jurisdiction of the Kaohsiung City Government.


On the other hand, after the People’s Republic of China was established in 1949, the “U-Shaped Line” always has appeared on maps officially published by mainland China, with one particular change, where the two dashes in the Gulf of Tonkin were erased.\textsuperscript{15}

From 1947 to the 1970s, no country, including Southeast Asian countries, protested or challenged the validity of the “U-Shaped Line”.\textsuperscript{16}

### III. Legal Status of the “U-Shaped Line”

There are several possible interpretations of the “U-Shaped Line” provided by scholars: the line of boundary, a baseline, the line of historic waters, the line of historic rights, and the line of ownership of the features.\textsuperscript{17} Among them, some thoughts on the interpretation of this line shall be examined in the following discussion.

First, some scholars have indicated that the “U-Shaped Line” is the line of boundary to define the limit of ROC territory. The basis of this assertion is the manner of depicting the “U-Shaped Line” is the same as the regular boundary line between China and other states, such as Vietnam. This theory is comparatively weak because it would not have a proper legal basis under the law of the sea. It is generally agreed that one country may not establish unilaterally its own maritime boundary with other countries.\textsuperscript{18} For example, the UNCLOS provides,

\textsuperscript{15} Jinming Li & Dexia Li, “The Dotted Line on the Chinese Map of the South China Sea: A Note,” p. 290.

\textsuperscript{16} Kuan-Hsiung Wang, “The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea,” p. 249.


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with respect to the EEZ and continental shelf, that boundary delimitation “shall be effected by agreement on the basis of international law .... in order to achieve an equitable solution.”

Then, there also exists an argument that the waters enclosed by the “U-Shaped Line” are internal waters, no matter whether under the legal regimes of baseline or the line of historic waters. After

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22. There is no universally accepted definition of historic water that exists, but it has its root in historic fact and it is closely related to the legal regime of historic bays. Although related to the development of the concept of “historic waters,” the terms “historic waters” and “historic bays” are not synonymous. International Law Commission, “Juridical Regime of Historic Waters, Including Historic Bays,” Yearbook of the International Law Commission, Vol. II (1962), Document: A/CN.4/143, 1962, pp. 6-7. The UN Secretariat’s Office of Legal Affairs (OLA) at the request of the International Law Commission also indicated “at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States.” International Law Commission, “Juridical Regime of Historic Waters, Including
carefully reviewing the nature of the “U-shaped line,” Prof. Kuan-Hsiung Wang emphasized the “U-Shaped Line” is not a baseline system, neither a normal baseline nor a straight baseline.22

What needs to be answered, however, is whether or not the “U-Shaped Line” is intended to be used as a historic claim. Under this possible interpretation, the line would be a “historic water” limit, within which a state enjoys sovereignty over the maritime space, or a line to preserve both a state’s title to territory and its historic rights.23 Judge Zhiguo Gao and Prof. Bing Bing Jia of mainland China believe that, within the “U-Shaped Line” in the South China Sea, mainland China “has sovereignty over the islands and other insular features, and has sovereignty, sovereign rights, and jurisdiction — in accordance with UNCLOS — over the waters and seabed and subsoil adjacent to those islands and insular features.”24 They also emphasize the “U-Shaped Line” “preserves Chinese historic rights in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf sur-

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rounded by the line.”

The ROC government once officially stated the view the water areas within the “U-Shaped Line” are its historic waters in 1993 when it issued the South China Sea Policy Guideline. Since this guideline was terminated in 2005, the U.S. Department of State suggests Taiwan may no longer officially make a historic water claim. On the other hand, mainland China has not officially made a cognizable historic claim to the waters within the “U-Shaped Line.”

Some believe, given the title and developments of the map outlined above, it is clear that the major purpose of the “U-Shaped Line” is to identify that the islands, or groups of islands, enclosed by the lines are part of territories of the Republic of China. For example, Prof. Steven K.T. Yu argues that the purpose of drawing the “U-Shaped Line” was to show the public that the four large groups of islands in the South China Sea belong to China. Prof. Kuan-Hsiung Wang took a similar position, indicating “according to later practices, the ROC Government took the ‘U-Shaped Line’ to justify

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its position that they are a series of lines that embrace all the islands and represent sovereignty over those islands.”30

Reviewing the ROC’s practices in the South China Sea, no doubt the ROC claims sovereign over all the islands with the “U-Shaped Line”.31 The ROC Ministry of Foreign Affairs (MOFA) reiterated “the South China Sea islands were first discovered, named, and used, as well as incorporated into national territory by the Chinese.”32 Also, they were “returned to the Republic of China according to the San Francisco Peace Treaty, which entered into effect on April 28, 1952, as well as the Treaty of Peace between the ROC and Japan which was signed that same day, together with other international legal instruments.”33 The MOFA also indicates “in the several decades since, the fact that the ROC owns and exercises effective control over these islands has been recognized by foreign governments and international organizations.”34

Nevertheless, what is unanswered in MOFA’s statement is the legal nature of the water enclosed by the “U-Shaped Line”. Since the “U-Shaped Line” map was published in 1947, the ROC government has never claimed the waters of the South China Sea enclosed by the “U-Shaped Line” are internal waters or territorial waters. In addition, foreign vessels, including warships, have continuously and freely navigated the waters of the South China Sea enclosed by the line.35

32 ROC Ministry of Foreign Affairs, “Statement on the South China Sea.”
33 ROC Ministry of Foreign Affairs, “Statement on the South China Sea.”
34 ROC Ministry of Foreign Affairs, “Statement on the South China Sea.”
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Then, on April 13, 1993, the ROC seemed to provide a legal basis for this line. The Executive Yuan of the ROC adopted the Policy Guideline for the South China Sea, which answered the above question as follows:

*In terms of history, geography, international law and facts, the Nansha Islands (Spratly Islands), Shisha Islands (Paracel Islands), Chungsha Islands (Macclesfield Bank) and Tungsha Islands (Pratas Islands) are part of inherent territory of the Republic of China; the sovereignty over those islands belongs to the Republic of China. The South China Sea area within the historic waters limit is the maritime area under the jurisdiction of the Republic of China, where the Republic of China possesses all rights and interests.*

Therefore, under the SCS Guideline, the “U-Shaped Line” serves to define the ROC’s historic waters. Nevertheless, developments have indicated the government has changed its original position, as evidenced by the SCS Guidelines. First, the 1998 Law on the Territorial Sea and the Contiguous Zone of the ROC did not adopt the concept of historic waters. Then, on December 15, 2005, the SCS Guideline

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was terminated by the Ministry of Interior during the presidency of Chen Shui-Bian.\textsuperscript{39}

Since being elected as President in 2008, President Ma Ying-jeou has not reactivated the SCS Guidelines, but he has been taking a much more active approach for the ROC’s South China Sea Policy\textsuperscript{40} and is willing to make claims on islands in the South China Sea. For example, on May 25, 2015, in addition to calling on claimants for the South China Sea to temporarily shelve their disagreements to enable negotiations on sharing resources, President Ma’s South China Sea initiative emphasized the following:

\textit{The government of the Republic of China (Taiwan) reiterates that, whether from the perspective of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha Islands (Macclesfield Bank), and Tungsha (Pratas) Islands, as well as their surrounding waters, are an inherent part of ROC territory and waters. The ROC enjoys all rights over them in accordance with international law.}\textsuperscript{41}


\textsuperscript{41} ROC Ministry of Foreign Affairs, “South China Sea Peace Initiative,” May 25,
Nevertheless, as in public statements made by the MOFA after 2005, the above initiative contained no mention of historic waters and made no claim on historic waters. On January 28, President Ma Ying-jeou led government officials and scholars to visit Taiping Island in the Nansha Islands and made remarks as follows:

> Whether from the perspective of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha (Macclesfield Bank) Islands, and Tungsha (Pratas) Islands, as well as their surrounding waters, are an inherent part of ROC territory and waters, and the ROC enjoys all rights over these islands and their surrounding waters in accordance with international law. This is indisputable.\(^{42}\)

Once again, this remark did not clarify the legal status of the claimed waters by the ROC government, neither did President Ma indicate the scope of “surrounding waters.” Based upon the above analysis, however, we may see that the purpose of the Location Map of the South China Sea Islands issued in 1947 is to delineate “the scope of ROC territory and waters in the region.”\(^{43}\) During the Ma administration, the ROC government has made it clear that freedom of navigation in the South China Sea will be respected, in accordance with the rules under the international law of the sea.

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\(^{43}\) ROC Ministry of Foreign Affairs, “Statement on the South China Sea.”
IV. Implications of the “U-Shaped Line” for the South China Sea Disputes

The status of the “U-Shaped Line” has had a great impact on the South China Sea disputes. Observing the statements made by the states in the context of submissions to the Commission on the Limits of Continental Shelf (CLCS), Prof. Michael Sheng-ti Gau found the ROC’s “U-Shaped Line” is facing three challenges by other states.

First, the asserted ownership or sovereignty of insular features or groups of islands within the “U-Shaped Line” is being challenged. For example, Vietnam disputes the sovereignty of Shisha and Nansha. Second, the legal capability of the insular features (islands or rocks) within the “U-Shaped Line” to generate maritime zones under the LOS Convention has been challenged. The status of Taiping Island as an Island or Rock is one case. This issue relates to interpretation of Article 121 of the LOS Convention. A feature cannot generate even a territorial sea if it fails to meet the conditions of Article 121 (1) because it is permanently submerged. If an island meets the conditions in Article 121(3) of the LOS Convention, it can generate only a territorial sea, but without EEZ or continental shelf. The third kind of challenge is against the establishment or existence of the so-called historic waters enclosed by the “U-Shaped Line.” We may add that the fourth type of challenge, as indicated by professor Franckx, i.e., arguing factors that demonstrate the probative force of the Location Map of the South China Sea Islands, is weak.

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46. Erik Franckx, “Dots and Lines in the South China Sea: Insights from the Law
The status of the “U-Shaped Line” claimed by Taiwan also will affect the so-called Cross-Strait relations, which make sovereignty and maritime disputes in the South China Sea much more complicated and difficult to resolve than the disputes in the East China Sea. It is generally agreed the PRC inherited this claim from the ROC, so, how the ROC interprets its claims is relevant to the PRC’s position. Once, Taiwan claimed that the waters encircled by the “U-Shaped Line” were its historic waters and that it owned all of the land features within the line. While Taiwan has not claimed the entirety of the waters encircled by the “U-Shaped Line” as its historic waters since December 2005, it continues to claim that, whether from the perspectives of history, geography, or international law, the Nansha Islands, Shisha Islands, Chungsha Islands, and Tungsha Islands, as well as their surrounding waters, are an inherent part of ROC territory and waters. To support its claims, Taiwan continues to emphasize that the San Francisco Peace Treaty of 1952, as well as the Treaty of Peace between the ROC and Japan, together with other international legal instruments, confirm that the islands and reefs in the South China Sea occupied by Japan should be returned to the ROC. In a recent speech on January 28, 2016, President Ma cited the Qing Empire’s naval presence in the 18th century and the “U-Shaped Line” as evidence of the legitimacy of ROC sovereign claim over the South China Sea.

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48 ROC Ministry of Foreign Affairs, “Statement on the South China Sea.”
Understanding the ROC’s Constitution, domestic legislations, Constitutional Court interpretations, and its policies on mutual non-denial and 1992 consensus will be helpful in appreciating why the legal basis and arguments for Taiwan’s claim relating to the “U-Shaped Line” are on discovery, uses, and history. This also shows why the claim Taiwan makes to the ownership of the disputed islands and the accompanying maritime rights and interests in the South China Seas is more or less identical to mainland China’s claim. When considering the issue of protection of territory integrity, the ROC cannot deviate from its aforementioned constitution and domestic laws. The reality is the ROC government effectively governs Taiwan, the Pescadores, and the islands of Kinmen and Matsu. The ROC insists the islands within the “U-Shaped Line,” as well as their surrounding waters, are parts of ROC territory and waters. The ROC’s Constitution asserts a claim to sovereignty over all of China, and the ROC government maintains that it has never unequivocally asserted that Taiwan is an independent state.

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49. Office of the President, ROC (Taiwan), “Remarks by President Ma on Taiping Island.”
52. “The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly.” See, ROC (Taiwan), The Constitution of the Republic of China, Chapter I, Article. 4, January 1, 1947, Taiwan Documents Project, <http://www.taiwandi.org/constitution01.htm>; Ying-jeou Ma, “President Ma’s address at the 2011 International Law Association Asia-Pacific Regional Conference,” May 30,
Of course, the ROC government fully understands it faces a policy dilemma over taking a position that is preferred by the United States, Japan, and the ASEAN member states. This can explain why Taiwan always emphasizes it will not cooperate with mainland China, and reiterates it wants to be a responsible stakeholder and a regional peacemaker.

To Taiwan, the imminent challenge is coming from the Philippines-mainland China arbitration, which brought the issue of status of Taiping Island (Itu Aba) as an island or a rock to the arbitral tribunal. The ROC has made it clear it will not accept related awards or findings; thus, the arbitration will not have any effect on Taiwan, since the Philippines has not invited Taiwan to participate in its arbitration with mainland China and since the arbitral tribunal has not solicited Taiwan’s views. Further, Taiwan also insists that Taiping is an island, rather than a rock or a reef as the Philippines has argued in the international tribunal. It asserts that strong evidence shows Taiping Island to be an “island” capable of sustaining human habitation or economic life under UNCLOS Article 121.

Taiping Island (Itu Aba), the largest (0.5 square km) of the naturally formed Nansha (Spratly) Islands, has been garrisoned by ROC
troops since 1956. In February 1990, by executive decree, the Executive Yuan of the ROC put Taiping Island under the administrative jurisdiction of Kaohsiung City. Taiping Island has groundwater wells, natural vegetation, phosphate ore, and fishery resources. Moreover, personnel stationed on the island cultivate vegetables and fruit and rear livestock. Taiwan argues, from legal, economic, and geographic perspectives, that Taiping Island indisputably qualifies as an “island,” according to Article 121 of the United Nations Convention on the Law of the Sea, and can sustain human habitation and economic life of its own, which makes it categorically not a “rock.”

V. Conclusion

Based upon aforementioned observations, we may conclude the exact meaning of the “U-Shaped Line” has never been made very clear. The ROC may want to keep this “ambiguity” so it does not

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need to address its formal position and clarification of this map. Recent statements by the ROC government, like the purpose of the Location Map of the South China Sea Islands issued in 1947 is to delineate “the scope of ROC territory and waters in the region” are not very helpful for defining the legal status of the “U-Shaped Line.” One fact, however, is certain. The ROC’s assertions regarding the South China Sea do not exceed this demarcation. 57

Among several interpretations on the “U-Shaped Line,” observers generally agree the Location Map of the South China Sea Islands of 1947 provides evidence to support the ROC as the first country in the South China Sea region to claim sovereignty over the islands enclosed by the “U-Shaped Line.” The truth is that the ROC has never used the “U-Shaped Line” as a national boundary line, never adopted any interpretation completely at odds with the United Nation Convention on the Law of the Sea (UNCLOS), never threatened freedom of navigation, and never represented a challenge to the current international maritime order.

Under provisions of the UNCLOS, there are no definitive rules in international law that govern the status of the “U-Shaped Line.” Since there are no such rules, it is not an easy job for Taiwan and other claimants in the South China Sea to agree legal status of the “U-Shaped Line.”

56 Some authors say Taiwan should conduct an open and thorough examination of the process through which the line came to be drawn, because Taiwan is where the U-shaped line archives of the Republic of China are stored, see Bill Hayton, The South China Sea: The Struggle for Power in Asia, p. 265.
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