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# RSIS COMMENTARIES

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## Islands or Rocks? Evolving Dispute in South China Sea

By Robert Beckman

### **Synopsis**

*The wrangling over access to resources in the Spratly Islands is evolving into a legal dispute. The issue is whether the geographic features in the South China Sea are islands or rocks. Islands are entitled to an EEZ and continental shelf of their own, but rocks are not.*

### **Commentary**

SOVEREIGNTY over the Spratly Islands in the South China Sea is contested by China, Malaysia, the Philippines, Vietnam, Brunei and Taiwan in whole or in part. Diplomatic notes submitted to the UN Secretary-General by the Philippines and China in April have set the stage for an evolving dispute between some ASEAN claimant States (Malaysia, the Philippines and Vietnam) and China relating to the legal status of the features comprising the Spratly Islands.

The most important issue at stake is: who has the right to explore and exploit the natural resources in and below the waters surrounding the islands? While the dispute is ultimately about rights to these natural resources, it is being structured as a legal dispute on the interpretation and application of Article 121 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

### **Legal Definitions**

Article 121 provides that an island – defined as “a naturally formed area of land above water at high tide” – can in-principle, generate the same maritime zones as land territory. These include a 12 nautical mile (nm) territorial sea; a 200 nm exclusive economic zone (EEZ); and a continental shelf. Some of the Spratly Islands features claimed and occupied by the claimants do not meet the definition of an island. They are either below water at high tide, or above water at high tide only because of reclamation works or the presence of man-made structures. Such features are not even entitled to a 12 nm territorial sea.

Paragraph 3 of Article 121 creates an exception for certain categories of islands by providing that “rocks which cannot sustain human habitation or economic life of their own” shall have no EEZ or continental shelf. Many of the features in the Spratly Islands may fall within this category and are thus only entitled to a 12 nm territorial sea.

## **Malaysia, Vietnam and China Positions**

The diplomatic notes submitted to the UN Secretary-General by the Philippines on 5 April 2011 and China on 14 April 2011 are the latest in a series of diplomatic notes relating to the Joint Submission of Malaysia and Vietnam dated 6 May 2009. In their joint submission to the Commission on the Limits of the Continental Shelf, Malaysia and Vietnam claimed an extended continental shelf beyond the outer limit of their 200 nm EEZ claims in the South China Sea.

On 7 May 2009 China responded by diplomatic note to the 6 May 2009 Joint Submission of Malaysia and Vietnam. China maintained that it has indisputable sovereignty over the Spratly Islands and their adjacent waters. China also asserted sovereign rights and jurisdiction in the "relevant" waters in the South China Sea, attaching the infamous nine-dashed line map to its diplomatic note.

## **Philippine Response and China's Reply**

The Philippines responded by diplomatic note on 4 April 2011. It stated that UNCLOS provided no legal basis for any claim to sovereign rights and jurisdiction over "relevant" waters (and the seabed and subsoil thereof) within the nine-dashed lines outside of the claims to waters that are "adjacent" to islands as defined in Article 121. Although the language in the note is ambiguous, it seems to suggest that China has no legal basis for claiming sovereign rights and jurisdiction over any resources in or under the waters within the nine-dashed line outside of the waters adjacent to the islands.

On 14 April 2011, responding to the note of the Philippines, China reiterated its traditional position that it has indisputable sovereignty over all of the Spratly Islands and their adjacent waters. It also asserted its sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. However, it did not mention the nine-dashed line map, and it stated – for the first time – that the islands are entitled to a territorial sea, EEZ and continental shelf. This could be a significant development as China appears to be clarifying its claims and justifying them under UNCLOS.

## **Evolving positions on Islands and Rocks**

In the evolving dispute about islands and rocks, the ASEAN claimants are likely to maintain that they have sovereign rights and jurisdiction over the natural resources in and under the waters in the Spratly Islands. They based this claim on their 200 nm EEZ and extended continental shelf claims measured from their land territory or archipelagic baselines. They will not claim an EEZ from any of the geographic features in the Spratly Islands, and will maintain that many of the disputed features are not islands, and that those which are islands are in fact, only rocks.

This strategy would give the ASEAN states undisputed sovereign rights to explore and exploit the natural resources in and under most of the waters in the Spratly Islands. The only areas where they will not have sovereign rights and jurisdiction over the hydrocarbon resources will be in the 12 nm territorial sea adjacent to islands, so long as the dispute continues as to who has sovereignty over those islands.

To protect its interests, China will need to maintain that at least some of the features are "islands" which are entitled to an EEZ and continental shelf of their own. Such a position will produce a substantial overlap in the EEZ claimed by China from these islands and the 200 nm EEZ and/or extended continental shelf claimed by the ASEAN claimants from their land territory or archipelagic baselines.

One difficulty China will face is its own earlier position on islands and rocks. In discussions at the UN on the right of Japan to claim an EEZ and continental shelf from the island of Okinotorishima, China argued that small, remote, uninhabited features should not be given an EEZ or continental shelf of their own. The ASEAN claimants are likely to maintain that this argument should also apply to the small geographic features in the Spratly Islands as well.

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