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# The South China Sea: the evolving dispute between China and her maritime neighbours

By Robert Beckman

The South China Sea is reputed to be resource-rich. As tensions rise in the region, **Robert Beckman** examines the stance of each maritime state in the context of the United Nations Convention on the Law of the Sea (UNCLOS).

There are several groups of disputed islands in South China Sea. The Spratly Islands are the source of the most tension and perhaps even the source of potential conflict. They are located in the central part of the South China Sea, north of the island of Borneo (which comprises Brunei Darussalam and the east Malaysian States of Sarawak and Sabah), east of Viet Nam, west of the Philippines, and south of the Chinese island of Hainan. The Spratly Islands are claimed in their entirety by China, Taiwan, and Viet Nam, while some islands and other features are claimed by Malaysia and the Philippines. Brunei has established a maritime zone that overlaps a southern reef, but it has not made any formal claim.

The Spratly Islands consist of more than

140 islets, rocks, reefs, shoals and sandbanks (some totally or occasionally submerged while others are always dry) spread over an area of more than 410,000 square kilometres. Less than 40 of the features are islands – that is, naturally formed areas of land surrounded by and above water at high tide as defined in Article 121(1) of UNCLOS. The total land area of the thirteen largest islands is less than 2 km<sup>2</sup>. The remainder of the features are either completely submerged or are above water only at low tide.

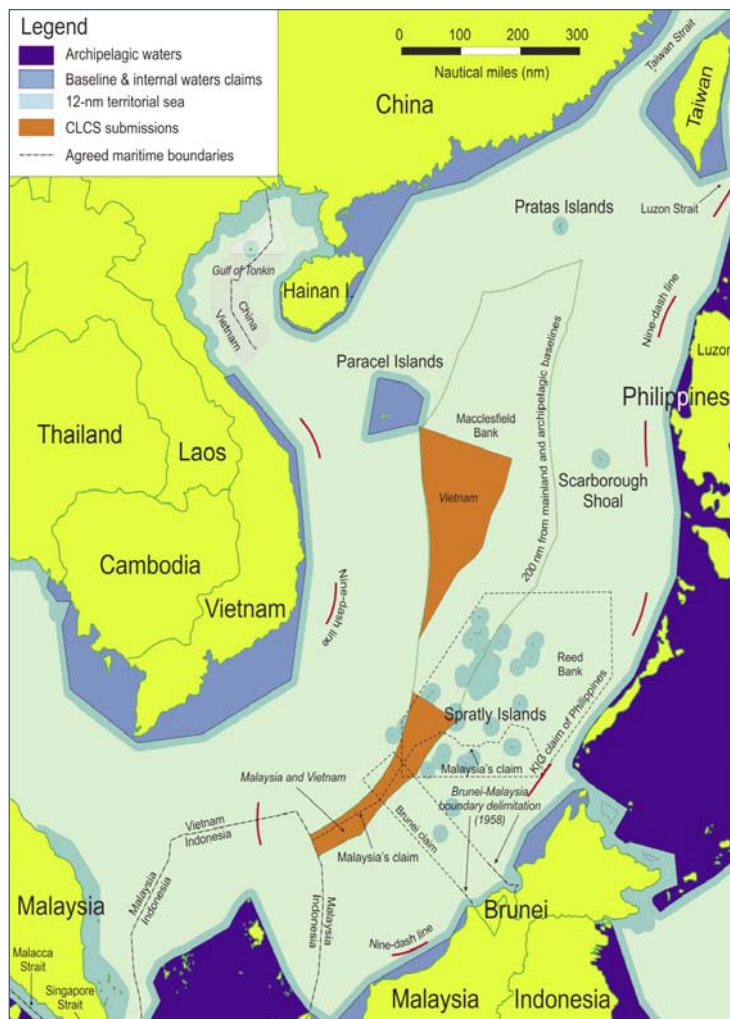
The Parcel Islands are located in the northern part of the South China Sea, approximately equidistant from the coastlines of Viet Nam and China (Hainan). They are claimed by China, Taiwan and Viet Nam. China forcibly ejected South Vietnamese troops from the Parcel Islands in 1974, and they are now occupied exclusively by China. China denies the existence of a dispute over these islands, but they are a continual source of tension between China and Viet Nam. The Parcel Islands consist of about thirty five islets, shoals, sandbanks and reefs with approximately 15,000 km<sup>2</sup> of ocean surface. Woody Island, the largest island in the Parcel Islands, is 2.1 km<sup>2</sup>, which is about the same land area as all of the Spratly Islands combined. Woody Island is the location of Sansha City, a prefecture-level city established by China in June 2012 as its administrative centre for its claims in the South China Sea.

Scarborough Reef is located in the northern part of the South China Sea between the Philippines and the Parcel Islands, and is claimed by China, the Philippines and Taiwan.

Scarborough Reef is located about 130 miles from the Philippine island of Luzon. Most of the reef is either completely submerged or above water at low tide, but it contains several small rocks which are above water at high tide. It has been a major source of tension between China and the Philippines since the Philippines attempted arrest of Chinese fishermen in June 2012.

The Pratas Islands are located just over 200 miles southwest of Hong Kong. They are occupied by Taiwan, and are also claimed by China.

Macclesfield Bank, a large sunken reef that is completely submerged at low tide, is located between Scarborough Reef and the Parcel Islands. It is claimed by China and Taiwan.



Map of the South China Sea produced by Clive Schofield and Andi Arsana, (ANCORS) showing claims in the South China Sea.

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## The relevance of UNCLOS

The fundamental issue in the South China Sea is one of territorial sovereignty, that is, which



state has sovereignty over the islands and their adjacent waters. UNCLOS has no provisions on how to determine sovereignty over offshore islands. As there is no treaty that governs the issue of sovereignty, states must look for guidance to the rules of customary international law on the acquisition and loss of territory. Territorial sovereignty disputes cannot be resolved unless the claimant states reach agreement between themselves or consent to refer the disputes to the International Court of Justice, the International Tribunal for the Law of the Sea or an international arbitral tribunal. However, given the sensitivity and complexity of the disputes, this is not likely to happen.

UNCLOS is critically important to the disputes in the South China Sea because it establishes a legal framework for all uses of the oceans, including the claims to maritime space which can be made by states from their mainland territory and from off-shore geographic features. All of the states claiming sovereignty over features in the South China Sea are parties to UNCLOS, and are under a legally binding obligation to carry out its provisions in good faith and to bring their national laws into conformity with their rights and obligations under UNCLOS.

UNCLOS has four types of provisions, which are highly relevant to the South China Sea disputes and which enable us to evaluate whether the actions of the claimant states are in accordance with international law. First, it sets out what maritime zones can be claimed from the mainland of the states bordering the sea, and what rights and jurisdiction coastal states and other states enjoy in those maritime zones. Second, it sets out which off-shore geographic features are capable of being subject to a claim to sovereignty. Third, it sets out what maritime zones can be claimed from offshore geographic features, and the rights and jurisdiction states enjoy in those maritime zones. Finally, it establishes rules on how to delimit maritime boundaries in situations where there are overlapping maritime claims.

### Maritime zones under UNCLOS

States have sovereignty in the 12 nautical mile (nm) territorial sea adjacent to their coast, subject to the passage rights of foreign ships. The general rule is that the territorial sea is measured from the low water line along the coast, but states are permitted to use straight baselines along their coast in certain circumstances.

Coastal states have the right to claim an exclusive economic zone (EEZ) extending out to 200 nm from the same baselines from which the territorial sea is measured. In the EEZ coastal states have 'sovereign rights' to explore and exploit the living and non-living natural resources in the water as well as the resources of the seabed and subsoil. Coastal states also have jurisdiction to govern the



**Above:** *Itu Aba or Taiping Island, one of the Spratly Islands and held by China.*

exploration and exploitation of the resources in the EEZ, as well as jurisdiction as provided in UNCLOS over marine scientific research and the protection of the marine environment. At the same time, all other states enjoy freedom of navigation and over-flight and the right to lay submarine cables and pipelines in the EEZ.

Coastal states also have sovereign rights to explore and exploit the resources of the continental shelf adjacent to their coast. The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the coastal state's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin (depending on whether it meets certain geophysical criteria), or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin extends to less than this distance. In order for a coastal state to claim a continental shelf beyond 200 nm, it must submit technical information to the Commission on the Limits of the Continental Shelf (CLCS).

### Maritime zones from offshore features

UNCLOS makes important distinctions between offshore geographic features such as (1) islands, (2) rocks, (3) low-tide elevations, and (4) submerged features.

The distinctions are significant because different maritime zones can be claimed from different features. Claims to maritime zones can only be generated from baselines that are measured from land territory over which a state has sovereignty. This is often described as the principle that 'the land dominates the sea'. The maxim is long-standing and continues to be cited with approval by international courts and tribunals.

### Islands and rocks

The land territory of a state includes its mainland territory as well as islands under its sovereignty. The general rule is that every island is entitled to the same maritime zones as land territory, that is, to a territorial sea, an

**ISLANDS**  
Naturally formed areas of land surrounded by and above water at high tide as defined in Article 121(1) of UNCLOS.

*“UNCLOS has no provisions on how to determine sovereignty over offshore islands.”*

EEZ and a continental shelf. The same baseline rules apply to islands as to the territorial sea. The normal rule is that the baseline is the low water line along the coast.

However, there is an important exception for certain types of islands. Article 121(3) of UNCLOS provides that 'rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf'. In other words, rocks are only entitled to a territorial sea.

*“...China’s policy with respect to its claims in the South China Sea seems to be one of ‘deliberate ambiguity’...”*

**Low-tide elevations and submerged features**

Low-tide elevations are naturally formed areas of land surrounded by and above water at low tide, but submerged at high tide. Low-tide elevations are not islands and are not entitled to any maritime zones of their own. However, if they are within 12 nm of any land territory, including any island, they can be used as points for measuring the baselines of that land territory.

A low-tide elevation cannot be subject to a claim of sovereignty. If it is located in the territorial sea of a coastal state, it is within the sovereignty of that state, since the coastal state has sovereignty over the seabed and subsoil in its territorial sea. If it is located in the EEZ or on the continental shelf, it cannot be subject to a claim to sovereignty. The state in whose EEZ it lies, or on whose continental shelf it lies, will have jurisdiction over it.

**Claims to maritime zones by ASEAN members**

All the Association of South East Asian Nations (ASEAN) claimants have claimed a territorial sea, an EEZ and a continental shelf measured from the baselines along their mainland coast, or in the case of the Philippines, from its archipelagic baselines. Malaysia and Viet Nam claim a 200 nm EEZ from baselines along their mainland coasts. In May 2009, Malaysia and Viet Nam made a joint submission to the CLCS for an extended continental shelf in the southern part of the South China Sea. Viet Nam made a separate submission to the CLCS for an extended continental shelf in the northern part of the South China Sea. China and the Philippines objected to these submissions and asked the CLCS not

to consider them due to the existence of a maritime dispute in these areas.

The Philippines also took significant steps in 2009 to clarify its maritime claims by passing a new baselines law that is in conformity with the provisions in UNCLOS on archipelagic baselines. Its new baselines law suggests that it will claim an EEZ from its main archipelagic baselines. The law states that the offshore islands it claims in the South China Sea, including Scarborough Shoal, shall be governed by the regime of islands in Article 121 of UNCLOS.

The measures taken by Malaysia, the Philippines and Viet Nam were significant in three respects. First, the maps contained in the submissions to the CLCS clarified for the first time the outer limits of the EEZ claim of Malaysia and Viet Nam. Second, the new baselines law of the Philippines made it easy to calculate where its 200 nm EEZ limit would be. Third, the three states only claimed an EEZ from their mainland territory. They did not claim any EEZ from any of the offshore islands over which they claimed sovereignty.

This suggests that the three ASEAN claimants (and possibly Brunei) may be moving to adopt a common position regarding offshore geographic features in the Spratly Islands. If so, they are likely to take the following positions. First, claims to sovereignty can only be made to those features which meet the definition of an island under UNCLOS (which is less than one-third of the features in the Spratly Islands). Second, most of the features which do meet the definition of an island are 'rocks which cannot sustain human habitation or economic life of their own' and which are not entitled to an EEZ or continental shelf. Third, even if some of the islands are in principle large enough to be entitled to an EEZ and continental shelf of their own, they should only be given a 12 nm territorial sea so that they do not have a disproportionate effect on maritime boundaries. The net effect of this common position will be that most of the resources in the South China Sea will be within the EEZ of the coastal states. The only maritime areas in dispute will be the 12 nm territorial sea adjacent to the disputed islands.

**China’s claims**

Whereas Malaysia, the Philippines and Viet Nam seem to be taking steps to bring their claims into conformity with UNCLOS, China’s policy with respect to its claims in the South China Sea seems to be one of 'deliberate ambiguity' as it refuses to respond to continued calls to clarify its sovereignty and maritime claims. Even more worrying, China seems to be moving to assert maritime claims based not just upon UNCLOS, but also upon history. This is especially worrying because most international law experts would agree that there is no basis for historical claims of this nature in UNCLOS or in customary international law.



**Above:** Johnson Reef



**Right:** Scarborough Shoal is claimed by China, the Philippines and Taiwan.

One of the issues raised by China's sovereignty claim in the South China Sea is whether it is claiming sovereignty over geographic features which do not meet the definition of an island under UNCLOS. For example, China claims sovereignty over Macclesfield Bank even though it is a sunken reef which remains completely submerged even at low tide. Under international law, sovereignty claims can only be made to offshore features which meet the definition of an island.

China could make its maritime claims consistent with UNCLOS by claiming sovereignty only over the features which meet the definition of an island, and by claiming a 200 nm EEZ from the larger islands. It could argue that the islands should be given full effect, especially when the EEZ from the island is in ocean space beyond the limit of the EEZ claimed by coastal states from their mainland.

The main source of controversy about China's claim in the South China Sea is the extent to which its claims are not based on claims from the disputed islands, but based on the infamous nine-dash line (or u-shape line). This line is depicted on the map China attached to diplomatic notes it sent to the United Nations Secretary-General in May 2009 protesting the extended continental shelf claims of Malaysia and Viet Nam.

A major cause of concern is that China's

actions since 2009 are evidence that it is pursuing its claims in the South China Sea along three tracks. First, it is claiming sovereignty over the islands and their adjacent waters, which presumably refers to the territorial sea. Second, it is asserting that the islands are entitled to an EEZ and continental shelf of their own. Third, it is at the same time asserting rights, jurisdiction and control over the resources in and under the waters inside the nine-dash lines based on some form of historic rights.

#### Conformity or collision

It is not possible for the other claimant states to accept China's position that it has historic rights and jurisdiction over the natural resources in and under the waters inside the nine-dash line as these claims have no basis in international law. Therefore, unless China is willing to bring its maritime claims into conformity with UNCLOS and limit its claims to maritime zones measured from islands, it will continue on a legal collision course with its ASEAN neighbours.

#### About the author

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