

UNCLOS and Sovereignty Claims in the South China Sea

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United Nations Convention on the Law of the Sea

Before looking at the various claimant states' claims, it is helpful to examine what laws, if any, govern the South China Sea. In 1982, the U.N. adopted the United Nations Convention on the Law of the Sea (UNCLOS) in an effort to peacefully settle disputes over maritime matters. Despite several oversights, UNCLOS remains the most recognizable document regarding maritime disputes. Within UNCLOS, three sections are generally recognized as being most relevant to the South China Sea dispute. Article 3 states: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention."^[13]

In essence, this article allows each claimant state in Southeast Asia to extend its national territorial boundary 12 nautical miles into offshore waters. In accordance with UNCLOS, these areas are sovereign territory, controlled by the mainland state.

Articles 55 through 75 deal with an important concept known as an Exclusive Economic Zone (EEZ). According to Articles 55 and 56, the EEZ is "an area beyond and adjacent to the territorial sea" where a nation can engage in "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. . . ."^[14]

However, Article 57 notes that the EEZ cannot extend beyond 200 nautical miles from the baseline of the state. The remaining articles, 58 through 75, stipulate what activities can take place in a country's EEZ. Finally, Part VIII of UNCLOS, entitled the "Regime of Islands," deals with certain issues regarding the definition of territory. Specifically, Article 121 states, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive zone or continental shelf."^[15]

This has been a particularly important article in the South China Sea dispute and was used by several countries to justify attempts to build structures on submerged rocks and reefs in order to establish a new EEZ in the region. Overall, UNCLOS is a helpful instrument for beginning discussions of sovereignty among South China Sea claimant states. Indeed, it is essentially the only document—signed by all six countries—that addresses issues related to the dispute. However, despite all its positive contributions, UNCLOS has significant shortcomings. Taken collectively, its articles create the potential for overlapping claims in the South China Sea. For example, if two countries establish structures in close proximity, then an overlapping EEZ could emerge.

Claimant States

Any discussion of the South China Sea dispute that focuses exclusively on the legal considerations of UNCLOS is shortsighted. Xavier Furtado writes, "Although the Spratlys conflict is in many ways a straightforward territorial dispute, it is also a function of the region's unique set of historical and geopolitical considerations that challenge

the ability of the Convention to provide an authoritative framework that all parties can use.[16]

Keeping this in mind, it is helpful to examine the claims made by each of the six nations surrounding the South China Sea region. It is also worth considering the historical conflicts that have occurred and evaluating the potential for future conflicts between various claimant states.

Brunei

Most of the Spratly Island claimants have occupied some part of the island chain and/or stationed troops and built fortifications on various reefs. Brunei, on the other hand, does not claim any of the Spratlys, nor has it stationed troops on any islands in the South China Sea. Brunei has, however, claimed two separate areas, the Louisa Reef and Rifleman Bank. Controlling the Louisa Reef, which is also claimed by Malaysia, would allow officials in Bandar Seri Begawan to extend Brunei's EEZ. The Louisa Reef claim is relatively weak because this reef features merely two small rocks partially exposed during high tide.

Brunei's claim to Rifleman Bank is based on a 1954 decree by Britain declaring the boundaries of the island of Borneo, on which Brunei is situated, to include, "the area of the continental shelf . . . to the territorial waters." [17] A more recent map published by Brunei in 1988 extended its continental shelf to 350 nautical miles, further justifying its territorial claim to Rifleman Bank. Brunei's claim to an extended continental shelf, however, does not appear to be consistent with the provisions of UNCLOS, which mandates that the natural prolongation of the continental shelf must be uninterrupted.

Indonesia

Indonesia also has modest territorial claims in the South China Sea. Jakarta, like Brunei, does not claim any part of the Spratly or Paracel Islands; however, it does assert a 200-mile EEZ under the provisions of UNCLOS.

Despite its reasonable sovereignty declarations, Indonesia would very likely be drawn into a regional conflict as a result of Chinese and Taiwanese claims that extend into Indonesia's EEZ and continental shelf, specifically the West Natuna gas field. Despite the potential for conflict, however, relations between Beijing and Jakarta over the issue of the South China Sea have been good. For example, after acquiring nine Repsol YPF S.A. subsidiaries in April 2002, China's stateowned oil giant, the China National Offshore Oil Cooperation (CNOOC), became the largest offshore oil producer in Indonesia. Moreover, CNOOC recently paid \$275 million to acquire a 12.5% stake in Indonesia's Tangguh LNG project.[18]

Indonesia has two additional natural gas agreements with Singapore and Petro China. One of these projects is the West Natuna pipeline project, which fulfills a contract with the Singapore consortium Semb Gas.

Malaysia

In total, Malaysia claims 12 islands in the South China Sea. Six of these—Ardasier Reef, Dallas Reef, Louisa Reef, Mariveles Reef, Royal Charlotte Reef, and Swallow Reef—are physically occupied by Malaysian forces. The Malaysian government has also used soil from the mainland to raise the level of Swallow Reef, constructing a hotel, airstrip, and chalet for scuba divers on the reef. Three reefs—Erica, Investigator, and Luconia—are also claimed by Malaysia but are unoccupied. The Commodore Reef is claimed by both the Philippines and Malaysia, while the Amboyna Cay and the Braque Canada Reefs are jointly claimed by Malaysia and Vietnam.

Malaysia has consistently used the continental shelf theory, outlined in UNCLOS and reaffirmed in Malaysia's own Continental Shelf Act of 1966, to justify its claims in the region. However, researchers Valencia, Van Dyke, and Ludwig argue that Kuala Lumpur's claims are dubious at best.[19] Although Malaysia has never used violence to assert its claims in the region, it did briefly detain 43 Filipino fishermen in spring 1995 for violating Malaysia's EEZ.

Philippines

The Philippines claims eight islets of the Spratly Island chain, but not the main landmass itself. By and large, Manila's claim is based on four arguments: the islets are adjacent or contiguous to the main Philippine islands; this region is economically and strategically vital to the Philippines; the islets were abandoned after World War Two; and the recent Philippine occupation of some of the islets gives it title either through "discovery" or "prescriptive acquisition." [20] However, the strongest of Manila's arguments is rooted in historical record. In 1947, Tomas Cloma, a Filipino businessman, established a settlement on eight islands of the Spratly archipelago. In 1956, Cloma declared himself protector over the islands and named them Kalayaan (Freedomland). Cloma deeded the Kalayaan Islands to the Philippines in 1974. In 1971 and 1978, President Ferdinand Marcos formally declared the Kalayaan Islands to be part of the Philippines. Manila reiterated its claim prior to signing UNCLOS in 1982.

To bolster this historical claim, the Philippines in 1971 sanctioned drilling off the Reed Bank area and occupied eight of the islands—Nanshan, Flat, West York, Northeast Cay, Thitu, Lankiam Cay, Loaita, and Commodore Reef—in 1978. An all-weather airstrip capable of handling small aircraft has been constructed on Thitu Island; reportedly, Manila has expressed an interest in developing infrastructure for tourism there. On five separate occasions during the 1990s, the Philippines and the PRC clashed over disputed territory in the South China Sea. In 1995, China occupied Mischief Reef and built "fisherman's structures" over these half-submerged atolls. In objection to the Chinese occupation of the reef, the Philippine navy evicted the Chinese and in March 1995, Filipino forces destroyed Chinese stone markers in the area. With respect to Mischief Reef, two points are worth considering. First, this disputed territory is within the Philippines' EEZ and over 1,000 miles from the Chinese mainland. Second, the Chinese took these provocative actions despite having signed the 1992 ASEAN Declaration on the South China Sea that called for mutual restraint by all parties.

A second incident, in January 1996, involved three Chinese naval vessels that engaged in a 90-minute gunbattle with Philippine naval ships near Campones 19. According to experts on the South China Sea dispute, neither UNCLOS nor Malaysia's own act indicate that the continental shelf pertains to land or rocks that rise above sea level. The wording of both documents addresses only submerged land and rocks. Twice during the next two years, the People's Liberation Army-Navy (PLAN) and Philippine fishermen clashed near Scarborough Shoal over the placement of Chinese markers in the area. More recent events suggest that the PRC and the Philippines have not resolved their differences regarding Mischief Reef. In late 1998 and early 1999, new construction was observed on Mischief Reef, prompting one Filipino professor to quip: "China's record on matters of territory and national pride does not induce calm on the part of the smaller countries sitting under the belly of an increasingly prosperous dragon." [21]

Manila intelligence sources have reported that multistory Chinese structures manned with anti-aircraft guns and large enough to serve as landing pads for helicopters when completed have been upgraded with new communications equipment linked to Chinese satellites. [22]

More recently, China and the Philippines have shown a willingness to cooperate on territorial matters. In November 2003, Philippine Foreign Affairs Secretary Blas Ople branded new claims of Chinese aggression in the South China Sea "inaccurate and exaggerated." [23] Chinese and Philippine oil companies have also begun joint exploration in the South China Sea, a proposition that Beijing had rejected more than 10 years ago. In November 2003, CNOOC and the Philippine National Oil Company signed an agreement to undertake joint exploration in an area offshore of northwest Palawan, the westernmost Philippine province. [24]

Taiwan

The Republic of China (ROC) on Taiwan claims sovereignty over several South China Sea island groups including the Spratlys (Nansha), Paracels (Hsisha), Macclesfield Bank (Chungsha), and Pratas (Tungsha) Islands and was the first claimant state to occupy an island within the Spratly chain. Taipei also occupies Taiping (also known as Itu Aba), the largest island in the Spratly archipelago.

As of April 1997, Taiwan had a garrison on Taiping with approximately 110 marines, a radar station, meteorological center, and power plant. Taipei has also considered constructing a communications facility and airstrip on Taiping. However, Taiwan has historically taken no action when other claimant states have occupied other parts of the island chain. In addition, the ROC has refrained from constructing lighthouses on ROC-claimed islands for similar reasons. As Cheng-yi Lin has noted, "It is clear that Taipei has adopted a policy of self-restraint with regard to the South China Sea, and it has done this simply because it does not have the military capability to back up its historical claims."^[25]

Although the Spratly archipelago is 800 nautical miles from Taiwan and effectively beyond the ROC's power projection range, the government in Taipei has given a high priority to the islands. In 1990, the Executive Yuan (cabinet) placed Pratas and Taiping Islands under the temporary jurisdiction of the municipal government of Kaohsiung, Taiwan's southernmost city. In October 1992, Taipei established a 4,000-meter wide prohibited sea zone around Pratas and Taiping. The "National Defense Report, Republic of China, 1993-1994" included a special section on the South China Sea.^[26] From a geographical standpoint, the Pratas Island chain is extremely important.

The archipelago, consisting of Pratas Island and two coral reefs that are submerged at high tide, is more than 140 miles from Hong Kong and, some experts believe, would provide Taiwan an additional five minutes of warning time against an air attack from mainland China.^[27] Although the PRC also claims Pratas, Taiwan has occupied the island and constructed razor wire and concrete structures designed to protect it from invasion. Indeed, Taiwan has not abandoned the military option for responding to a South China Sea contingency. Beginning in April 1994, the ROC Navy began to patrol the waters surrounding the Spratly and Paracel Islands. In March 1995, Taiwan's Seventh Peace Preservation Police Corps (marine police) sent three patrol boats to the South China Sea but turned back after reaching Pratas Island. Later that month, warning shots were fired at a Vietnamese cargo vessel that intruded into the prohibited zone around Taiping Island. Since 1995, the ROC Navy has dispatched two transports and two destroyers to Taiping for semi-annual resupply missions. Should Taipei decide to increase its presence in the region, this could be accomplished relatively easily through Taiwan's modernized naval assets. Since 1995, however, Taiwan has insisted on a peaceful solution to the South China Sea dispute. In an effort to reduce tension with China over this issue, in December 2000 Taiwan President Chen Shui-bian transferred responsibility for Pratas and Taiping Islands from the Ministry of Defense to the civilian Coast Guard Administration. Some members of the ruling Democratic Progressive Party believe that this move helped to reduce tensions in the region.^[25]

Overall, Taipei's South China Sea policy is guided by five principles, embodied in the 1993 "South China Sea Policy Guidelines": insist on Taiwan's sovereign claim over the Spratlys, support any actions to settle the dispute peacefully, oppose any provocative move in the region that would trigger new conflict, support the idea of temporarily shelving the sovereignty dispute in order to exploit resources jointly, and continue to actively participate in the Workshop on Managing Potential Conflicts in the South China Sea and other related international conferences to fully cooperate with other claimant states to avoid a conflict.^[28]

Vietnam

The relationship between the final two claimant states—Vietnam and China—is historically antagonistic. This fact has not changed in the post-Cold War environment and, indeed, is again evidenced by repeated military clashes in the South China Sea. Although oil and natural gas considerations fuel the conflict between Hanoi and Beijing, the rivalry is one of the best examples of a geopolitical struggle for influence in Southeast Asia.

Vietnam claims the entire Spratly Island chain as an offshore district of Khanh Hoa Province. In addition, Vietnam continues to claim the Paracel Islands, despite their seizure by China in 1976. Hanoi maintains garrisons on about 22 geographic features in the South China Sea, including locations at Spratly Island, West London Reef, Amboyna Cay, Pearson Reef, Sin Crowe Island, Namyit Island, Sand Cay, Barque Canada Reef, and Southwest Cay. In 1988, Vietnam had an estimated 350 troops stationed on these islands and by 1992 the total had grown to 1,000. The main garrison on Sin Crowe Island is heavily fortified with coastal artillery and anti-aircraft batteries.[29] In addition to a military presence, the Vietnamese have undertaken extensive construction in and around the South China Sea. In 1989, Vietnam built a small airstrip on Spratly Island and artificial structures on Vanguard Reef, Prince Consort Bank, and Grainger Bank. Hanoi's claim to these islands, however, has often been contested because these geographic features are submerged in several feet of water. Overall, Vietnamese claims are based on a combination of historical data and the continental shelf principle. According to Vietnamese court documents during the reign of King Le Thanh Tong (r. 1460–97), the Vietnamese claimed sovereignty over the Spratly Islands. This claim was well documented during the 17th century when many Vietnamese maps incorporated parts of the Spratly archipelago into Vietnam. In 1884, the French established a protectorate over Vietnam and asserted their colonial claim to the Spratly and Paracel Island chains. Ironically, the current Vietnamese government continues to use these historical claims as part of its justification for sovereignty in the South China Sea.[30]

Hanoi also argues that the extent of its continental shelf—in accordance with the provisions of UNCLOS—entitles Vietnam to occupy the Spratly Islands. Vietnam suggests that each littoral country be entitled to a full 200-nautical-mile EEZ starting from the main coastline and that any high seas area beyond that distance should be governed by the International Sea-Bed Authority.[31] However, in 1982 Vietnam used straight baselines originating from its coasts, some of which were inconsistent with the provisions of UNCLOS. Under international pressure Vietnam reassessed its baseline claims and is expected to make a new map in the near future.[32] Vietnam has consistently clashed with other claimant states including the PRC over territory in the South China Sea. In January 1974, the first clash occurred between Vietnam and China over the Paracel Islands. The incident began when two Chinese fishing boats sailed into the area. South Vietnamese soldiers and gunboats fired on the fishermen, driving them away from the archipelago. Shortly thereafter, South Vietnamese military personnel removed PRC flags from Robert and Money Islands and landed troops there. The Chinese response was swift. On January 17, the PLAN escorted troops from Woody Island to Money and Duncan Islands, where a gun battle between PRC and Vietnamese forces ensued. After the final shots were fired several weeks later and a Vietnamese corvette was sunk, the PRC effectively seized control of the Paracels.[33] In 1975, the People's Army of Vietnam moved to occupy several of the Spratly Islands, previously held by the Saigon government. In 1988, China and Vietnam clashed again at Johnson Reef—also known as Fiery Cross Reef—in the Spratlys, resulting in over 70 Vietnamese deaths. Based on the evidence, this geographic feature hardly seems worth fighting over. According to the U.S. Defense Mapping Agency, Johnson Reef is 14-nautical-miles long and submerged at high tide. However, since occupying the reef in 1988, China has converted the area into an artificial island with a supply base, helipad, industrial pier, and ultramodern oceanic observation station.[34]

In 1992, Vietnam accused China of drilling for oil in the Gulf of Tonkin and landing troops at Da Luc Reef. Beijing responded by seizing 20 Vietnamese cargo vessels en route to Hong Kong. Again in 1994, 1996, and 1997, Vietnam and China clashed over conflicting oil claims in so-called Vietnamese oil blocks. The most recent incident occurred in 1998 when Vietnamese soldiers fired on a Filipino fishing boat near Tennent (Pigeon) Reef. At present, Hanoi and Beijing continue to have unresolved disputes regarding territory in the South China Sea.

China

The most provocative of all South China Sea claimant states is the PRC, which claims virtually the entire South China Sea for itself. China's name for the Spratly Islands—located about 1,000 kilometers from the closest point of China proper—is the Nansha Archipelago. Describing China's actions in the South China Sea, Mark Valencia, a leading expert on the region, notes, "What the situation is in a nutshell is China's thirst for oil is pushing its search and its claims further and further offshore, and in the process it is both rubbing up against its neighbors and competing with them for the resources of the sea." [35] Although China sounds highly assertive, its statements of entitlements in the South China Sea region have been a relatively recent phenomenon. In fact historically, Chinese attitudes toward the South China Sea were best reflected in the statement by one author that "Until World War II, the islands in the South China Sea were only worth their weight in guano." [36] Beijing bases its

claims in the region on what the PRC calls historical data.[37] In the year 110, the Han Dynasty embarked on a naval expedition into the region surrounding the Spratly Islands. Another expedition was sent by the Ming Dynasty during 1403–33. From the 12th century until the 17th century, Chinese historical records made periodic references to the Spratly Islands, including a discussion of their elevation above sea level. However, because of the Confucian tradition—which believed that territory was expressed in zones of influence rather than definite linear boundaries—it is difficult to prove many of the PRC’s claims in the South China Sea.[38] As Valencia, Van Dyke, and Ludwig note, delineating historical claims vis-à-vis Vietnam is difficult because “China asserted dominance over Vietnam during this period.”[39] Beginning in the 19th and 20th centuries, the Chinese government asserted claims to both the Spratly and Paracel Islands. The first formal claim of sovereignty was made in 1876 when China’s ambassador to England claimed the Paracel Islands as Chinese territory. This was followed in 1883 by the expulsion of a German survey team from the Spratlys. However, by the 1930s China was losing portions of the islands. For example, in the late 1930s, Japan established a strong presence in the South China Sea using Ito Bay as a submarine base for intercepting commerce in the region.

Two years after the conclusion of World War Two, Beijing produced a map featuring a line of nine undefined dashes, which go deep into the South China Sea, forming a “tongue-like configuration” that encompassed most of the territory in the region.[40] In May 1996, Beijing published a list of baselines that connected the Paracel Islands but made no mention of the Spratly Islands, stating that it would resolve the matter at another time.[41] No further clarification of the map lines has been offered; Taiwan also refers to the U-shaped broken line for discussion of claims. From 1956 onward, the PLA occupied the largest of the Spratly Islands. Chinese aggression was not challenged by any Southeast Asian nation until the 1970s, when China’s rivals began to forcibly occupy other parts of the Spratly chain. As previously noted, by 1973 Vietnam and the Philippines together had occupied 12 islands previously claimed by China.

The PRC synthesized its claims to the South China Sea on February 25, 1992, when Beijing passed the Law on the Territorial Waters and Their Contiguous Areas, known as the Territorial Sea Law. According to Article 2, the Nansha (Spratly) Islands were officially Chinese territory. In addition, the law decreed, “The extent of the PRC’s territorial waters measures 12 nautical miles from the baseline of the territorial sea. . . . The PRC’s territorial sea refers to the waters adjacent to the territorial land. The PRC’s territorial land includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Island, Dongsha Island, Xisha Islands, Nansha (Spratly) Islands and other islands that belong to the People’s Republic of China.”[42] However, Beijing has never publicly published any such territorial baselines.

As the evidence suggests, Chinese claims in the South China Sea have not been merely rhetorical. Of all the states concerned, the PRC has been the most aggressive in pursuing its claims, as seen, for example, in multiple clashes with the Philippines and Vietnam. China has also used its territorial claims to justify its naval assets as well as expand Beijing’s influence in the region. More recently, the Chinese military establishment has used the South China Sea dispute to lobby for additional upgrades to PLAN equipment, including the possible acquisition of an aircraft carrier. As one Chinese military expert stated, “Once the Taiwan front is closed, we may turn to the South China Sea.”[43]

From Beijing’s perspective, controlling the South China Sea region is critical in solidifying Chinese influence in Southeast Asia as well as establishing an aerial and sea denial zone, in which an opposing force is denied the ability to use air or sea space for a given period of time, around mainland China. China’s attempt to establish such a zone began in 1971 after geological surveys of the easternmost island cluster of the Paracel archipelago were completed by the Amphitrite Group. At the conclusion of this survey, a harbor was dug at Woody Island and a 350-meter concrete wharf was constructed for midsized ships. The construction of Chinese bases in the South China Sea region continued in 1974 following the clash between PLAN and South Vietnamese forces over the remainder of the Paracels.[44]

Construction in the Paracels was given top priority by the Central Military Commission and the PLA General Logistics Department. Throughout the Paracels, harbors were dredged, wharfs repaired and constructed, gun emplacements built, and storage facilities for fuel, water, and ammunition erected. These new features created additional responsibilities for the South Sea Fleet and gave PLAN new platforms for operations throughout the South China Sea region.

Additional facilities at the Spratly Islands were built during the late 1980s. Responsibility for construction of the Spratly facilities was given to PLAN, with supplemental assistance provided by the Oceanic Bureau and the Transportation Ministry. On February 3, 1988, construction of an oceanic observation post at Fiery Cross Shoal began. Although the fighting with Vietnamese at this location (described above) slowed construction of Chinese facilities, the oceanic post was completed, amid much fanfare, on August 2, 1988.[45] During the mid- to late 1990s, the PRC used the facilities as a platform for military engagements with several Asian nations, including the Philippines and Vietnam. Since the appointment of President Hu Jintao in March 2003, however, Beijing has followed a more peaceful path to resolving disputes in the region. On October 8 that year, China formally joined the ASEAN Treaty of Amity and Cooperation. Under its provisions—first established by the five founding ASEAN nations in Bali in 1976—member states “shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall at all times settle such disputes among themselves through friendly negotiations.”[46] Since signing the TAC, China has refrained from using force to settle disputes in the South China Sea region.