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The 1982 UN Convention on the Law of the Sea and its relevance to maritime disputes in the South China Sea

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The 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹ is the dominant international maritime legal instrument. It identifies the scope and extent of various maritime zones and also provides mechanisms for the delimitation of maritime boundaries. All of the Southeast Asian states with interests in the South China Sea are parties to the UNCLOS. Under the UNCLOS a distinction needs to be made between the delineation of maritime claims on the one hand – which goes to the basis in international law for such a claim to be asserted and the outer limits of that claim; and on the other hand the delimitation of maritime boundaries in instances in which neighbouring states have overlapping claims and there is a need to resolve the boundary between two or more states. In this regard, maritime boundaries under the law of the sea can be distinguished from terrestrial boundaries, which will always delimit territory between two or more states. It is common under the law of the sea for unilateral maritime boundaries to exist in which a coastal state has asserted a claim to a maritime zone which does not in whole or in part adjoin or overlap an area claimed by neighbouring states.

The delineation of a maritime claim, and the ability of a coastal state to be able to justify the outer limits of that claim based upon law of the sea principles, raise different issues from the delimitation of maritime boundaries between two or more neighbouring states. In the South China Sea this is an important consideration as in most instances, the assertion of a maritime claim and the delineation of that claim is the first order issue that will need resolution. Once that matter is resolved, then a very extensive body of international law and practice concerning the delimitation of maritime boundaries between neighbouring states comes into play, by which well-settled principles can be applied.

Disputes concerning the legal status of maritime features

A central aspect of the UNCLOS is that it confers entitlements to assert a claim over a maritime zone to a 'coastal State'². While the term 'coastal State' is not defined in the UNCLOS, it is taken to encompass any state that has a territorial entitlement which encompasses a sea coast³. This extends not only to continental states, but also to island states, including those that are properly characterised as archipelagos such as Indonesia, Japan and the Philippines⁴. Problematic issues arise with respect to maritime features claimed by coastal states, including those that have been subject to territorial claims or which are encompassed within territorial claims, and the capacity of those features to generate maritime zones. These features will range in size from islands, as properly defined, through the entire gamut of associated maritime features, including atolls, cays, islets, rocks, banks, shoals, and reefs. The status of these features, their ability to be subject to territorial claims, and their ultimate capacity to generate maritime zones can be contentious. This is certainly the case with respect to such features in the South China Sea that are at the centre of land and maritime disputes.

In the case of islands, Part VIII of the UNCLOS details a so-called 'Regime of Islands' which contains provisions of considerable significance in the context of the South China Sea. Article 121(1) defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide', which can be referred to as Article 121(1) islands. An artificial island does not therefore meet the criteria, nor does an area of land not above water at high tide, which may in other respects meet the

² See, eg, LOSC, Arts. 2, 33, 56, 76.

³ To that end the LOSC make direct reference to a 'land-locked State' which is a 'State which has no sea-coast': LOSC, Art. 124(1)(a).

⁴ A distinction needs to be drawn between the a state which is a geographic archipelago, such as Japan, and an 'archipelagic State' for the purposes of Part IV of the LOSC which is entitled to draw archipelagic baselines from which maritime claims can be asserted; see discussion in Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart, 2010), Ch. 8.

¹ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994).

criteria of a low-tide elevation⁵. Rocks, shoals, or reefs which may be visible at low tide are therefore not islands for the purposes of the UNCLOS. The importance of Article 121(1) islands under the UNCLOS is that they generate the complete range of maritime zones. A small island is therefore capable of generating a continental shelf or EEZ that may be many times the size of the island's land dimensions and considerably more economically valuable in terms of living and non-living natural resources⁶.

The only exception to this entitlement is the case of islands that may be characterised as rocks, even though they may be above water at high tide. Rocks which 'cannot sustain human habitation or an economic life of their own' do not enjoy an entitlement to a continental shelf or an EEZ⁷, but will still nonetheless enjoy a territorial sea and contiguous zone. These maritime features can be referred to as Article 121(3) rocks. Perhaps the most prominent of these features is Rockall, which is a rock in the Atlantic Ocean to the north of Scotland, claimed by the United Kingdom, which Britain has conceded does not generate a continental shelf or EEZ⁸. The status of Japan's claim to an extended continental shelf offshore Okinotori Shima island, as identified in its 2008 CLCS submission, has highlighted these issues for East and Southeast Asian states and has been a matter of contention for Japan and its neighbours⁹.

Unsurprisingly these provisions of the UNCLOS have generated analysis and consideration by international courts as to the distinction between islands and rocks and the differential entitlements they enjoy to maritime zones. For example, in the cases of *Monte*

*Confurco*¹⁰ and *Volga*¹¹ before the International Tribunal for the Law of the Sea (ITLOS), Judge Vukas expressed the view that the sub-Antarctic Kerguelan Islands (France) and the Heard and McDonald Islands (Australia) in the Southern Ocean were not islands from which the coastal states were entitled to claim EEZs consistent with the UNCLOS. In the case of the two Australian islands, Judge Vukas attributed particular importance to the fact that the islands were uninhabited. However, such a view regarding sub-Antarctic islands¹², which considers the distinction between an Article 121(1) Island and an Article 121(3) rock turns on whether the maritime feature is inhabited or is capable of habitation has not found wider support in ITLOS or other international courts. It can therefore be observed that naturally formed islands, properly characterised as such and distinguished from Article 121(3) rocks and not ones that have been subject to the installation of man-made structures which are built upon low-tide elevations and features so that they sit above water at high tide for human habitation, do generate an entitlement to all UNCLOS maritime zones. It would appear that whether such islands are inhabited or not would not be determinative as to their capacity to generate an EEZ or continental shelf, though it may highlight issues associated with the island's size and whether it is capable of sustaining human habitation, including the presence of fresh water.

A further category of maritime feature referred to in the UNCLOS is a 'low-tide elevation' which is defined as 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'¹³. Low-tide elevations can be distinguished from Article 121(3) rocks in that they are not subject to appropriation other than when they fall within the territorial sea limits of the coastal state and are otherwise not to be equated

5 LOSC, Art. 13(1) defines a low-tide elevation as 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'.

6 This is highlighted by the case of the island state of Nauru which is comprised of a single land mass of 21 km² but which generates maritime zones consistent with the LOSC of 430,000 km²: *Nauru Country Study Guide* (Washington: International Business Publications, 2011) Vol. 1 at 49.

7 LOSC, Art. 121(3).

8 Clive R. Symmons, 'Ireland and the Rockall Dispute: An Analysis of Recent Developments' (Spring 1998) IBRU Boundary and Security Bulletin 78-93.

9 The Japanese submission was the subject of note verbales from the PRC (CML/2/2009: 6 February 2009) and Republic of Korea (MUN/046/09: 27 February 2009), online: CLCS http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm.

10 *Monte Confurco (Seychelles v. France)* (Prompt Release), Judgment of 18 December 2000, Declaration of Judge Vukas, [2000] ITLOS Rep. at 122.

11 *Volga (Russian Federation v. Australia)* (Prompt Release), Judgment of 23 December 2002, Declaration of Vice-President Vukas, [2002] ITLOS Rep. at para. 2.

12 None of the other judges in the *Monte Confurco* and *Volga* cases raised similar issues.

13 LOSC, Art. 13(1).

with land territory¹⁴. Therefore, low-tide elevations do not generate a territorial sea when located beyond the breadth of the territorial sea from the mainland or an island. Otherwise low-tide elevations may be used as a basepoint for the baseline in delineating the breadth of the territorial sea and other maritime zones and to that end may prove useful in determining the outer limits of a maritime zone, or for the purposes of maritime boundary delimitation.

In the South China Sea, distinguishing between Article 121(1) islands, Article 121(3) rocks and low-tide elevations is of greater significance because of the much greater number of maritime features that are in dispute, as are the efforts made by some of the disputing states to build structures such as platforms, lighthouses and small dwellings on these features in an effort to sustain their territorial claims and the capacity of those maritime features to be characterised as Article 121(1) islands¹⁵.

Maritime boundary delimitation

Another law of the sea issue of significance relates to how maritime boundaries may be determined following confirmation of territorial sovereignty over islands and associated maritime features, and whether they are capable of generating the full suite of maritime zones. It can first be observed that the law of maritime boundary delimitation is very well developed with Articles 73 and 84 of the UNCLOS, which provide a legal framework within which coastal states can seek to delimit their overlapping boundaries by negotiation, or within which international courts and tribunals can apply developed legal principles to bring about their resolution¹⁶.

The second observation is that the majority of the South China Sea islands, currently the subject of dispute, are generally small in size, are either uninhabited or have very small permanent or itinerant populations, and are at some distance either from continental Asia or major island systems such as the Philippines archipelago. International courts and tribunals have traditionally been conscious of the potential distorting effects that islands have on maritime boundaries, especially if those islands are granted their full entitlement to extensive maritime zones such as a continental shelf or EEZ, and a number of judicial techniques have been applied to address this problem¹⁷. There are also examples in state practice where small, sparsely inhabited islands which are located very close to the mainland of another state have been given minimal effect in negotiated maritime boundaries settled by way of treaty¹⁸.

This significance of ensuring that small islands do not have a distorting impact upon a maritime boundary is further reinforced in the UNCLOS, which makes clear that the delimitation of these maritime zones is intended to achieve an 'equitable outcome'¹⁹, as reflected in recent International Court of Justice (ICJ) decisions²⁰. In the 2012 decision of the ICJ in *Nicaragua v Colombia*, for example, notwithstanding the Court finding in Colombia's favour with respect to its sovereignty over several small islands and maritime features, many of these features were given diminished or no effect when it came to delimiting the continental shelf/EEZ boundary between Colombia and Nicaragua²¹. Of particular note was the manner in which the Court dealt with low-tide elevations within the territorial sea or particularly small maritime features that were above water

14 See *Pedra Branca/Pulau Batu Puteh* where the ICJ made a distinction between Middle Rocks and South Ledge, in which the latter were classified as a low tide elevation: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* [2008] ICJ Rep 12 at paras. 291–9; quoting with approval discussion in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, [2001] ICJ Rep 40 at paras. 205–6.

15 One of the most prominent of these features in the South China Sea is Mischief Reef which has been the subject of construction works: see Daniel J. Dzurek, 'China Occupies Mischief Reef In Latest Spratly Gambit' (April 1995) *IBRU Boundary and Security Bulletin* 65–71.

16 See discussion in Rothwell and Stephens, Ch. 16.

17 See, e.g., *Anglo-French Continental Shelf Arbitration*, (1979) 18 I.L.M. 397 at paras. 245–51 (where the Arbitral Tribunal elected to give the Scilly Isles in the southern portion of the English Channel 'half-effect').

18 See, eg, Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in an area between the two Countries, including the area known as the Torres Strait, and Related Matters, 18 December 1978, [1985] Australian Treaty Series No. 4 (entered into force 15 February 1985).

19 LOSC, Arts. 74(1), 83 (1).

20 See, eg, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] ICJ Rep 61 at paras. 187–88.

21 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment (19 November 2012) para. 203.

at high tide, disregarding them for the purposes of constructing a provisional and an adjusted equidistance boundary line²². State practice and jurisprudence of international courts and tribunals in interpreting the UNCLOS would therefore suggest that even if territorial sovereignty was conclusively settled over islands and associated maritime features in the South China Sea, there is every likelihood that the ability of these features to generate vast maritime claims would be compromised either because they are not Article 121(1) islands, or because they would have a distorting impact upon the maritime boundaries based upon competing maritime claims from continental or island land masses the status of which is not in dispute.

Philippines Annex VII Arbitration application

One of the most significant recent developments with respect to South China Sea maritime disputes occurred in January 2013 when the Philippines commenced Annex VII Arbitral proceedings against China under the UNCLOS. The Philippines notification to China, dated 22 January 2013, seeks to activate procedures under Part XV of the UNCLOS, specifically under Article 287 and Annex VII, which provide for compulsory arbitration of disputes. The Philippines claim gives particular attention to the asserted invalidity under the UNCLOS of what is referred to as China's 'nine dash line', which is the line asserted by China in the South China Sea that purports to identify those maritime areas over which it seeks to assert influence²³. The Philippines contests the validity of this line and any attempts by China to assert sovereignty or sovereign rights over islands and other maritime features found within this area.

The Philippines application raises a number of procedural issues that will need to be addressed prior to the Arbitral Tribunal determining the claim on the merits. China's Article 298 Declaration declares that it does not accept the compulsory dispute resolution procedures under Part XV with

respect to historic title. On 19 February 2013 China rejected the Philippines application for Annex VII Arbitration and indicated that it would not participate in the proceedings. This position would appear to be based upon China's view that consistent with its Article 298 Declaration, the Annex VII Tribunal lacks jurisdiction. Nevertheless, Annex VII contains procedures whereby if one of the parties chooses to not participate in the proceedings, it remains possible for the Tribunal to be constituted and to proceed to a hearing of the application even in the case of China failing to appear²⁴. In the case of failure to appear the Tribunal would need to make a determination that it nonetheless possesses jurisdiction over the dispute, but also that the claim is 'well founded' in both fact and law²⁵. Accordingly, if the Philippines claim does proceed to arbitration, the Tribunal will in this instance have to determine whether it possesses jurisdiction to determine the Philippines claim on the merits, and in doing so it shall need to assess whether China's Article 298 Declaration is a bar to jurisdiction.

While the Philippines application raises a number of issues with respect to China's claim to both land and maritime features in the South China Sea, it has been drafted in order to avoid questions of territorial sovereignty and also historic title. Ultimately, however, this will be a threshold issue for the Arbitral Tribunal to determine. If the Tribunal does come to the view that it retains jurisdiction, then its determination of the Philippines claim would be the first by an international court or tribunal of the disputed law of the sea issues that exist in the South China Sea. In that respect the judgment would have implications for a number of the other disputes that exist in the region for which China's claims are central, and has the potential to bring clarity to some of the legal issues, especially those with respect to the ability of certain maritime features to generate maritime zones under the UNCLOS. Such an outcome would be of great benefit in terms of bringing some ongoing certainty to the interpretation and application of the UNCLOS in the South China Sea.

22 Ibid., at paras. 202, 203.

23 See discussion in Zhiguo Gao and Bing Bing Jia 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107 *American Journal of International Law* 98–124.

24 LOSC, Annex VII, arts 3, 9.

25 LOSC, Annex VII, art 9.