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Increasingly contested waters? Conflicting maritime claims in the South China Sea

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Introduction

The South China Sea is host to a complex coastal geography, numerous sovereignty disputes over islands featuring multiple claimants, excessive and controversial claims to baselines, conflicting and overlapping claims to maritime jurisdiction and, most recently, contested submissions regarding extended continental shelf rights. The objective of this paper is to review and analyse these issues from spatial, legal and geopolitical perspectives. An overview and assessment of the geographical and geopolitical factors that inform and underlie the South China Sea disputes is offered prior to the claims of the littoral states to baselines and maritime zones being assessed. Maritime boundary agreements and joint development zones are also highlighted. Finally, indications that maritime jurisdictional claims are being more vigorously enforced are explored.

Geographical and geopolitical context

The South China Sea is a large semi-enclosed sea, encompassing at least three million square kilometres, bordered by – in clockwise order from the north – China and Taiwan; the Philippines; Malaysia; Brunei Darussalam (Brunei); Indonesia; Singapore; and Vietnam. Additionally, Cambodia and Thailand border the South China Sea's Gulf of Thailand extension. A key consequence of the South China Sea's semi-enclosed character, coupled with the large number of coastal states involved, is that their maritime claims tend to converge and overlap with one another. The broad dimensions of the South China Sea mean that there is in excess of 400 nautical miles (nm) between opposing shores; a large high-seas pocket or 'doughnut hole' may exist in the central South China Sea (see below). The maritime jurisdictional scenario is, however, considerably complicated by the presence of multiple groups of insular features of diverse types in the South China Sea. The principle island groups of the South China Sea are as follows (clockwise from the northwest):

- *The Paracel Islands*, which comprise around 130 islands, predominantly divided between the Crescent and Amphritite groups (disputed between China/Taiwan and Vietnam);
- *The Pratas Islands*, the principle feature of which is Pratas Reef, which is a circular coral reef 11 miles across, enclosing a substantial lagoon (under the administration of Taiwan, claimed by China);
- *Scarborough Reef (or Shoal)*, a feature consisting of a large coral atoll, submerged at high tide save for several small outcrops, and associated lagoon (disputed between China/Taiwan and the Philippines), and Macclesfield Bank, located to the west of Scarborough Reef, which is an entirely and permanently submerged feature;
- *The Spratly Islands*, consisting of around 150–180 generally small islands, islets, rocks, reefs as well as numerous low-tide elevations and submerged features (claimed in whole or in part by Brunei, China/Taiwan, Malaysia, the Philippines and Vietnam); and,
- *The Natuna Islands* which comprise an extensive group of over 200 islands and other insular features in the southwestern South China Sea.

As indicated above, with the exception of the Natuna Islands, which are under the uncontested sovereignty of Indonesia, sovereignty over all of these island groups is subject to dispute. Additionally, with respect to issues of maritime jurisdiction, the South China Sea islands are potentially highly significant. In this context the legal status of these insular features, as well as their potential role in the delimitation of maritime boundaries, assumes critical significance. For example, should the disputed South China Sea islands be classified as islands capable of generating exclusive economic zones (EEZs) to 200 nautical miles (as opposed to "rocks" which cannot), then the potential high seas pocket mentioned above disappears.

Geopolitical drivers for the South China Sea disputes

The key geopolitical factors that inform, underlie and drive the South China Sea disputes include abiding concerns over sovereignty and sovereign rights, concerns over freedom of navigation and the security of critical sea lanes, and marine resource access considerations. Among these factors sovereignty looms large. Despite deepening globalisation, bounded Westphalian territorial states have by no means withered away, perhaps least of all in East and Southeast Asia. Disputed sovereignty, especially over land territory (disputed islands), therefore remains a root cause for the South China Sea islands disputes, especially when coupled with the negative influences of historical competition and animosity.

The South China Sea is host to a series of Sea Lines of Communication (SLOCs) of regional and global significance. Secure SLOCs and freedom of navigation are essential to the smooth functioning of the global economy as international trade remains overwhelmingly reliant on maritime transport. Indeed, if anything, this dependence on sea-borne trade is accentuated for the generally resource-poor but export-oriented economies of East and Southeast Asia, and in this context the SLOCs that traverse the South China Sea are unquestionably crucial. There is also a strong, and increasing, energy security dimension to sea lane security in the region. It is worth noting that the network of SLOCs connecting the constricting chokepoints that provide entry to and egress from the South China Sea tend to avoid the disputed South China Sea islands as hazards to navigation.

Concerning access to marine resources, there has been a long-standing – though arguably not well-founded – perception that the disputed areas of the South China Sea host substantial reserves of seabed energy resources. Such hydrocarbons, should they exist, would undoubtedly be highly attractive to the South China Sea littoral states, all of whom save for Brunei are facing increasingly urgent energy security concerns. However, estimates regarding the oil and gas potential of the South China Sea vary wildly; they are often speculative, poorly supported, and are thus frequently highly misleading and should be viewed with caution. Nonetheless, the persistent

perception that the South China Sea represents a major potential source of seabed energy resources remains a key driver in the South China Sea disputes. Recent incidents involving oil and gas exploration activities in the South China Sea have served to reinforce this view.

Finally, the semi-enclosed, tropical environment of the South China Sea and Gulf of Thailand hosts marine environments of great richness in biodiversity terms. These environments support fisheries of significance in global, and certainly regional, terms, especially with respect to the food security of coastal populations numbered in the hundreds of millions. It follows that access to the waters of the South China Sea for fishing, as well as the preservation and protection of the marine environment that supports such activities, should be the top priority for the South China Sea coastal states. Unfortunately, however, the marine environment, biological diversity and living resources in question are widely acknowledged to be under serious threat.

Claims to maritime jurisdiction

All of the South China Sea littoral states, with the sole exception of Cambodia, are parties to the UN Convention on the Law of the Sea (UNCLOS). Consequently, it is appropriate to assess their claims to maritime jurisdiction against the backdrop of UNCLOS.

Baselines

Maritime claims are dependent on sovereignty over land territory possessing a coast in keeping with the legal maxim that ‘the land dominates the sea’. Baselines along coasts are, in turn, fundamental to claims to maritime jurisdiction, as maritime zones are measured from such baselines. UNCLOS¹ provides for multiple types of baselines. However, in the absence of any other claims, ‘normal’ baselines coincident with the low-water line as shown on large-scale charts recognised by the coastal state concerned will prevail in accordance with Article 5 of UNCLOS. In the context of the South China

¹ United Nations, United Nations Convention on the Law of the Sea, Publication no.E97.V10, (New York, NY: United Nations, 1983). See, 1833 UNTS 3, opened for signature 10 December 1982, Montego Bay, Jamaica (entered into force 16 November 1994), <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

Sea, normal baselines as well as the convention's provisions on the baselines of reefs (Article 6 of UNCLOS) are particularly relevant to the baselines and maritime claims of the generally disputed South China Sea islands. Normal baselines are also applicable to the maritime claims of Brunei as well as of those of China and Vietnam within the Gulf of Tonkin.

With regard to the mainland coasts of the states surrounding the South China Sea, the majority of the states concerned evidently consider that their coasts are deeply indented or fringed with islands in their immediate vicinity and have accordingly defined systems of straight baselines as provided for under Article 7 of UNCLOS. Such claims to straight baselines have been made by Cambodia, China and Taiwan, Thailand and Vietnam. While Malaysia has yet to officially publicise the location of its straight baselines, it is evident from Malaysian maps that such claims have been made. These claimed straight baselines are predominantly extensive and often front generally smooth coastlines or serve to link small, widely separated islands remote from mainland coastlines. Consequently, these claims have attracted international protests, notably from the United States, which undertakes a systematic review of the maritime practice of other states as part of its Freedom of Navigation (FON) program. Additionally, two of the South China Sea littoral states, Indonesia and the Philippines, are archipelagic states and have defined archipelagic baselines in keeping with Article 47 of UNCLOS.

Claims to maritime jurisdiction

In keeping with the relevant provisions of UNCLOS, the South China Sea coastal states have generally claimed 12nm territorial seas and EEZs to 200nm from baselines together with continental shelf rights. Most of these claims have tended to be ambit in character. That is, they simply specify the maximum allowable breadth of the maritime zone in question, in keeping with the terms of UNCLOS. However, some more specific unilateral claims have been advanced, notably within the Gulf of Thailand; in the South China Sea proper by Malaysia in 1979; by Brunei in 1988; and Indonesia in 2010. Perhaps unsurprisingly given the disputes concerning sovereignty over islands, these unilateral maritime claims overlap with one another to a substantial extent.

The South China Sea is also host to claims to maritime space apparently based on historic

arguments. Within the Gulf of Thailand, Thailand has since 1959 claimed the northernmost extension of that body of water, the Bight of Bangkok, as a historic bay. Additionally, since 1982 Cambodia and Vietnam have claimed an oblong area of 'joint historic waters' projecting from their coasts, but within their claimed straight baselines, in the Gulf of Thailand. The Philippines has also long claimed rights within its Treaty Limits, that is, the 'box' formed by several late nineteenth and early twentieth-century treaties. China's controversial so-called 'nine-dashed line' or 'U-shaped line' claim may also constitute a historic claim to large portions of the South China Sea. It remains uncertain whether the dashed line represents a claim to sovereignty over the disputed islands within that territory – indicative of a unilateral claim to a maritime boundary – or represents a claim to the maritime spaces within the dashes, whether as historic waters or another type of maritime zone.

Submissions relating to the outer limits of the continental shelf where it extends beyond 200nm from baselines made in 2009 by Vietnam alone and Malaysia and Vietnam jointly to the United Nations Commission on the Limits of the Continental Shelf (CLCS) have led to some clarification in the maritime claims of at least some of the South China Sea states. The implication of these submissions is that, as far as Malaysia and Vietnam at least are concerned, the disputed islands of the South China Sea should not be awarded full 200nm EEZ and continental shelf rights. These submissions prompted China to issue protest notes which, importantly, included maps showing China's nine-dashed line. These notes led to responses and counter-protests from other interested South China Sea states – notably Indonesia, Malaysia, the Philippines and Vietnam – that, in turn, led to further diplomatic correspondence. These diplomatic – and not so diplomatic – exchanges are revealing in that they serve at least to partially clarify the positions of these states. What is also clear, however, is that China not only regards the disputed South China Sea islands as being 'indisputably' subject to Chinese sovereignty, but also that these islands are capable of generating the full suite of claims to maritime jurisdiction.

Maritime boundary and joint development agreements

Although the South China Sea tends to be portrayed as host to numerous contentious territorial and maritime disputes and as a potential arena for conflict, several encouraging maritime agreements have been achieved, albeit generally and at the periphery of the South China Sea. Notable examples include boundary agreements between Brunei-Darussalam and Malaysia (inherited from the United Kingdom and through a 2009 Exchange of Letters), Indonesia and Singapore (1973 and 2009), Thailand and Malaysia (1979), Thailand and Vietnam (1997), China and Vietnam (2000), and Indonesia and Vietnam (2003).

Additionally, the South China Sea hosts multiple maritime joint development agreements and cooperative arrangements of a practical nature. These include those between Malaysia and Thailand (agreed in principle in 1979 and implemented from 1990) concerning seabed energy resources; between Malaysia and Vietnam, also related to seabed hydrocarbons exploration and development in 1992; and between China and Vietnam in 2000, concerning joint fishing activities as part of their above-mentioned maritime boundary treaty. Cambodia and Thailand also agreed in principle to pursue an accord on maritime joint development for part of their overlapping claims area in 2001, although little progress has subsequently been achieved. Further, through their 2009 Exchange of Letters Brunei and Malaysia reportedly reached an accommodation with respect to formerly disputed seabed areas now confirmed as under Brunei's jurisdiction, but according to Malaysia's national oil company, Petronas, a leading role in their exploration.

Increasingly contested waters?

In one sense little has changed in relation to the South China Sea disputes. The sovereignty disputes over islands that are at the root of the problem remain unresolved and there appears little prospect of their being addressed in the foreseeable future. Further, no new maritime claims have been advanced as such. For example, continental shelf rights are inherent to coastal states so the submissions relating to the outer limits to the continental shelf made to the CLCS do not constitute fresh claims in a legal sense. The counterpoint is that their articulation has proved to be highly contentious. Thus, these submissions and the diplomatic notes that they prompted

have provided welcome, albeit partial clarification regarding at least some of the previously ambiguous claims of the South China Sea coastal states. Simultaneously, however, the stark differences between the opposing positions of the claimant states have also been highlighted.

What does appear to have changed in recent years is that there has been a significant escalation in tensions in the South China Sea. In particular, in recent years a series of incidents have occurred involving Chinese maritime surveillance and enforcement agencies and Chinese-flagged fishing vessels in waters closer to the proximate mainland and main island coastlines than to the nearest disputed islands. Such actions appear to be based on the nine-dashed line, rather than maritime claims in line with the terms of UNCLOS advanced from the disputed islands. Incidents have included enforcement activities related to fisheries jurisdiction, for example with respect to waters that Indonesia considers to form part of its EEZ, as well as interventions to disrupt oil and gas survey and exploration activities conducted by Malaysia, the Philippines and Vietnam in their respective coastal waters. Moreover, in June 2012 the China National Offshore Oil Corporation (CNOOC) issued tenders for oil concessions in close proximity to the Vietnamese coastline, yet just within the nine-dashed line.

These incidents appear in part to have arisen as certain South China Sea coastal states, notably Indonesia, Malaysia, the Philippines and Vietnam have sought to undertake activities in what they consider to be their waters, proximate to their mainland and main island coasts. These states appear to have taken the view that those parts of the South China Sea closer to their undisputed territories than to any disputed feature in the South China Sea are undisputed. It is increasingly apparent that China disagrees. Worryingly, China not only appears resistant to such efforts to restrict or minimise the area of the South China Sea subject to dispute, but is also apparently increasingly willing to back up its assertions with enforcement actions on those waterways, apparently up to the limits of the nine-dashed line which encompasses the vast majority of the South China Sea. It also remains open to question whether recent efforts on the part of the Philippines to initiate arbitral proceedings with China under Annex VII of UNCLOS on a number of uncertainties in the Chinese position, including the status of the nine-dashed line assertion and the status and role of certain South China Sea insular features, will bear fruit. Consequently, for the foreseeable future the South China Sea states are indeed faced with increasingly contested waters.