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Defining EEZ claims from islands: A potential South China Sea change

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Abstract

In the face of seemingly intractable territorial and maritime disputes in the South China Sea, the article examines how the 1982 United Nations Convention on the Law of the Sea (LOSC), sets out what maritime claims States can make in the South China Sea and how it establishes a framework that will enable States to either negotiate maritime boundary agreements or negotiate joint development arrangements (JDAs) in areas of overlapping maritime claims. It provides an avenue whereby the maritime claims of the claimants can be brought into line with international law, potentially allowing for meaningful discussions on cooperation and maritime joint development based on areas of overlapping maritime claims defined on the basis of the LOSC.

Keywords

south, change, potential, sea, islands, claims, eez, defining, china

Disciplines

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Defining EEZ Claims from Islands: A Potential South China Sea Change

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Abstract

In the face of seemingly intractable territorial and maritime disputes in the South China Sea, the article examines how the 1982 United Nations Convention on the Law of the Sea (LOSC), sets out what maritime claims States can make in the South China Sea and how it establishes a framework that will enable States to either negotiate maritime boundary agreements or negotiate joint development arrangements (JDAs) in areas of overlapping maritime claims. It provides an avenue whereby the maritime claims of the claimants can be brought into line with international law, potentially allowing for meaningful discussions on cooperation and maritime joint development based on areas of overlapping maritime claims defined on the basis of the LOSC.

Keywords

South China Sea islands – EEZ maritime disputes – maritime claims – maritime boundary delimitation – joint development

Introduction

The South China Sea territorial and maritime disputes are commonly viewed as “intractable” and joint development of maritime areas subject to overlapping jurisdictional claims is often offered as a potential way forward. An enduring

obstacle to the establishment of joint management mechanisms has, however, been the question of precisely where such joint zones should be located. This issue has been made especially problematic because of the lack of clarity in the maritime claims of the parties. This article seeks to address this central, problematic issue and offers a potentially “game-changing” route towards a clearer definition of the areas of overlapping claims—something that has the potential to contribute substantially to de-escalating these disputes and is an essential precursor to the realisation of maritime joint development in the South China Sea.¹ This article examines how the 1982 United Nations Convention on the Law of the Sea (LOSC)² sets out what maritime claims States can make in the South China Sea and how it establishes a framework that will enable States to either negotiate maritime boundary agreements or negotiate joint development arrangements (JDAs) in areas of overlapping maritime claims.

The analysis is based on the view that the States claiming sovereignty over the islands in the South China Sea (the Claimants) will not be able to resolve the territorial sovereignty disputes through negotiations for the foreseeable future. It is also considered that they will not be willing to give their consent to refer the sovereignty disputes to an international court or arbitral tribunal and ask that court or tribunal to determine which State has the better claim to sovereignty. Consequently, we have not attempted to analyse the merits of the sovereignty claims to the disputed islands. Nor have we attempted to analyse the legal issues in a wider geopolitical context. The proposals made here offer avenues whereby the maritime claims of the South China Sea Claimants can be brought into conformity with the LOSC. It is recognised that for this to be achieved, political will on the part of the Claimants is essential. We are, however, firmly of the view that the parties to the South China Sea disputes have shared interests in relations that are grounded on trust, mutual respect, cooperation and the rule of international law. Moreover, we believe that the changes that we advocate can be effected at relatively limited cost but potentially substantial benefits to all of the South China Sea littoral States.

This article is organised as follows. First, the sovereignty and maritime claims in the South China Sea are summarised. Second, the prospect of identifying

1 The authors would like to thank Ms. Youna Lyons, Senior Research Fellow at the NUS Centre for International Law, for her assistance in identifying and classifying the features in the Spratly Islands and the Paracel Islands. The authors are also indebted to I Made Andi Arsana of the Dept. of Geodetic and Geomatic Engineering, Faculty of Engineering, Gadjah Mada University, Indonesia, for his assistance in the preparation of the maps accompanying this article.

2 United Nations Convention on the Law of the Sea (LOSC) (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 397.

the areas of overlapping maritime claims and negotiating JDAs in the areas surrounding the Spratly Islands is examined. Third, an analysis of issues and opportunities related to specific sectors of the South China Sea is provided. Finally, some general conclusions are drawn on the role of the LOSC in defining the areas of overlapping claims in the South China Sea.

Maritime Claims in the South China Sea

Sovereignty Claims to Offshore Geographic Features

The fundamental legal dispute in the South China Sea is about which State has the better claim to sovereignty over the disputed offshore islands. The LOSC has no provisions on how to determine competing claims to sovereignty over islands or other land territory. That issue is governed by the rules and principles of customary international law on the acquisition and loss of territory.³ The LOSC provides a broad framework with respect to international law of the sea issues. Of particular relevance to the present discussion, the LOSC sets out the freedoms, rights and obligations of States on the high seas and in the various maritime zones measured from land territory and islands. The LOSC assumes that sovereignty over the land territory and islands has been established. Therefore, the LOSC is of no assistance in resolving the territorial sovereignty disputes in the South China Sea. Determining which coastal State (or States) has (or have) sovereignty over the disputed islands of the South China Sea is, however, directly relevant to claims to maritime jurisdiction in keeping with the long-standing legal maxim that “the land dominates the sea”.⁴

China, Malaysia, the Philippines, Taiwan and Vietnam have sovereignty claims to some or all of the islands in the Spratly Islands⁵ and Brunei may also claim sovereignty over one reef in the Spratly Islands. China, Taiwan

3 James Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, Oxford, 2012) 215–244.

4 This point was emphasised by the International Court of Justice (ICJ) in its first case concerning jurisdiction beyond the territorial sea, the *North Sea Continental Shelf Cases (Germany v. Netherlands, Germany v. Denmark)* (1969) I.C.J. Reports 3, especially para. 19.

5 The Chinese name for the group of islands known as the Spratlys is Nansha and the Vietnamese name is Trường Sa. There are multiple names in Chinese, Vietnamese, Filipino and Malay for most of the individual features in the Spratlys. For the sake of simplicity and consistency, we have used only the English language versions. For a list of the names of the features in the Spratly Islands in the various languages, see the Gazetteer to the map published by the US State Department in 2010. It is available on the CIL web site at http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/75967_gazetteer.pdf; accessed 5 April 2014.

and Vietnam also claim sovereignty over the Paracel Islands.⁶ None of the Claimants have clarified which geographic features they claim are islands as defined in Article 121 of the LOSC and subject to appropriation. Nor have they issued charts or geographic coordinates of any straight baselines relating to the islands from which they measure the territorial sea as required by Article 16 of the LOSC. Where normal baselines apply to these islands, the Claimants have likewise not publicised charts illustrating the location of the low-water line they officially recognise in accordance with Article 5 of the LOSC. They also have not clarified which geographic features are low-tide elevations that can be used as basepoints because they are wholly or partially within 12 nautical miles (nm) of an island.⁷

China has defined straight baselines around the Paracel Islands, but these baselines are not consistent with the LOSC and have excited international protests.⁸ Although at first glance these baselines have the appearance of being archipelagic baselines, under the LOSC only ‘archipelagic States’ are permitted to draw such baselines around mid-ocean archipelagos.⁹

There is also uncertainty regarding the current status of an historic claim of the Philippines to an excessive claim to a territorial sea. The long-standing position of the Philippines was that its “international treaty limits” were established under three international treaties, namely the 1898 Treaty of Paris,¹⁰ the

6 The Chinese name for the Paracel Islands is Xisha and the Vietnamese name is Hoàng Sa, and there are also names for the individual islands in English, Chinese and Vietnamese. For the sake of simplicity and consistency, we have used only the English language versions. For a list of the names of the features in the Paracel Islands in the various languages, see the Gazetteer to the map published by the US State Department in 2010. *Ibid.*

7 This is permitted under Art. 13(2) of the LOSC. It is recognised that “M” is the technically correct abbreviation for nautical miles. However, “nm” is frequently used in the literature and will be employed as the abbreviation for nautical miles in this article.

8 Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea of the People’s Republic China, 15 May 1996, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn7_1996.pdf; J. Ashley Roach and Robert Smith, *Excessive Maritime Claims* (3rd ed., Martinus Nijhoff Publishers, Leiden, 2012) 98; See also, United States Department of State, Bureau of Oceans and Environmental and Scientific Affairs, ‘Limits in the Sea No. 117—Straight Baseline Claim: China’, available at <http://www.state.gov/documents/organization/57692.pdf>; accessed 5 April 2014.

9 China is not an “archipelagic State”; see LOSC Arts. 46 and 47(1).

10 The Treaty of Paris between Spain and the United States, signed at Paris, 10 December 1898, TS No. 343.

Cession Treaty of 1900¹¹ and the 1930 Treaty of Washington.¹² Under Section 1 of the 1935 Philippines Constitution, the territory of Philippines is described as consisting of the territory established by these treaties, with all waters from the baselines of the Philippines to the so-called “international treaty limits” being considered as the territorial sea of the Philippines.¹³ Consequently, at the furthest extent of the “box” formed by the treaty limits outlined above, the Philippines claimed territorial sea rights extending 285 nm from the straight baselines it claimed in the 1960s.¹⁴ Perhaps unsurprisingly, the international community, including the United States as a party to the 1898 Treaty of Paris, did not accept the position of the Philippines on the status of the waters inside the rectangular box established by the treaties.¹⁵ In response to an objection by Australia, the Philippines submitted a statement to the UN Secretary-General, dated 26 October 1988, that it would harmonise its domestic legislation with the LOSC.¹⁶ This harmonisation took more than 20 years. In 2009, the Philippines passed a new baselines law which brought its claim into conformity with the LOSC.¹⁷ As a result, the Philippines seems in practice to be bringing its maritime claims into strict conformity with the provisions of the LOSC. However, it has still not amended its Constitution or formally abandoned its historic maritime claim.

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- 11 The Treaty between Spain and the United States for the Cession of Outlying Islands for the Philippines, signed at Washington, 7 November 1900, TS No. 345.
 - 12 Convention between the United States and Great Britain Delimiting the Philippine Archipelago and the State of Borneo, signed at Washington, 2 January 1930, TS No. 856.
 - 13 Republic Act No. 3046 of 17 June 1961. An Act to Define the Baselines of the Territorial Sea of the Philippines, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf; accessed 5 April 2014.
 - 14 See *ibid.* Republic Act No. 3046 of 17 June 1961, subsequently amended them through Republic Act No. 5446 of 18 September 1968. An Act to Amend Section One of the Republic Act Numbered Thirty Hundred and Forty-Six, Entitled “An Act to Define the Baselines of the Territorial Sea of the Philippines”, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1968_Act.pdf; accessed 5 April 2014; See also Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (Martinus Nijhoff Publishers, Leiden/Boston, 2005) 452.
 - 15 Roach and Smith (n 8), at 146–148.
 - 16 *Ibid.*, at p. 222.
 - 17 Republic Act No. 9522: An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes Approved by the President on 10 March 2009 (2009) 70 *Law of the Sea Bulletin* 32–35.

Maritime Claims from Mainland Territory

All of the States bordering the South China Sea claim an exclusive economic zone (EEZ) measured from the baselines along their mainland coasts, or in the case of the Philippines and Indonesia, from archipelagic baselines.¹⁸ It is generally agreed that the archipelagic baselines employed by Indonesia and the Philippines around their main archipelago are consistent with the LOSC (see Fig. 1).¹⁹

Although some of the straight baselines used by China, Malaysia, Taiwan and Vietnam may be of questionable legality,²⁰ and may have a substantial impact on the areas subject to the regimes of internal waters and territorial sea, they will have only moderate impact on the outer limit of the 200-nm EEZ claims measured from those baselines. For example, the islands that Vietnam's straight baselines link can generate maritime claims in their own right. This means that the expansion of the potential scope of Vietnam's EEZ is increased to a far more limited extent than might otherwise be presumed (see Fig. 2).

18 Brunei Darussalam—Territorial Waters of Brunei Act, 1982. Indonesia—Law No. 1/1973 Concerning Continental Shelf (6 January 1973); Law No. 5/1983 on the Indonesian Exclusive Economic Zone (18 October 1983); Law No. 6/1996 regarding Indonesian Water (8 August 1996); Government Regulations No. 38/2002 on the Geographical List of Coordinates of the Indonesian Archipelagic Baselines (28 June 2002) and Government Regulations No. 37/2008 amending Regulations No. 38/2002 (19 May 2008). Malaysia—Exclusive Economic Zone Act, 1984; Act No. 31 An Act Pertaining to the Exclusive Economic Zone and Certain Aspects of the Continental Shelf of Malaysia and to Provide for the Regulations of Activities in the Zone and on the Continental Shelf and for Matters Connected Therewith, the Baselines of Maritime Zones Act 2006—Act 660 (29 December 2006) and the Territorial Sea Act 2012—Act 750 (18 June 2012). People's Republic of China—Law on the Territorial Sea and the Contiguous Zone of 25 February 1992; Exclusive Economic Zone and Continental Shelf Act, 26 June 1998. Philippines—Presidential Decree No. 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for other Purposes; Republic Act No. 9522 (n 17). Vietnam—Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977; Statement on the Territorial Sea Baseline of 12 November 1982, all available at the United Nations, Division for Ocean Affairs and the Law of the Sea (UNDOALOS) National Legislation Database—Asian and South Pacific States: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/asia.htm>; Vietnam—The Law of the Sea of Viet Nam, 21 June 2012, Art. 15, available at <http://vietnamnews.vn/politics-laws/228456/the-law-of-the-sea-of-viet-nam.html>; Republic of China—Law on the Territorial Sea and Contiguous Zone, 21 January 1998; Law on the Exclusive Economic Zone and the Continental Shelf, 21 January 1998, available at http://www.moi.gov.tw/english/english_law/law.aspx?pages=12; accessed 5 April 2014.

19 Roach and Smith (n 8), at pp. 209 and 213.

20 *Ibid.*, at pp. 76–82.

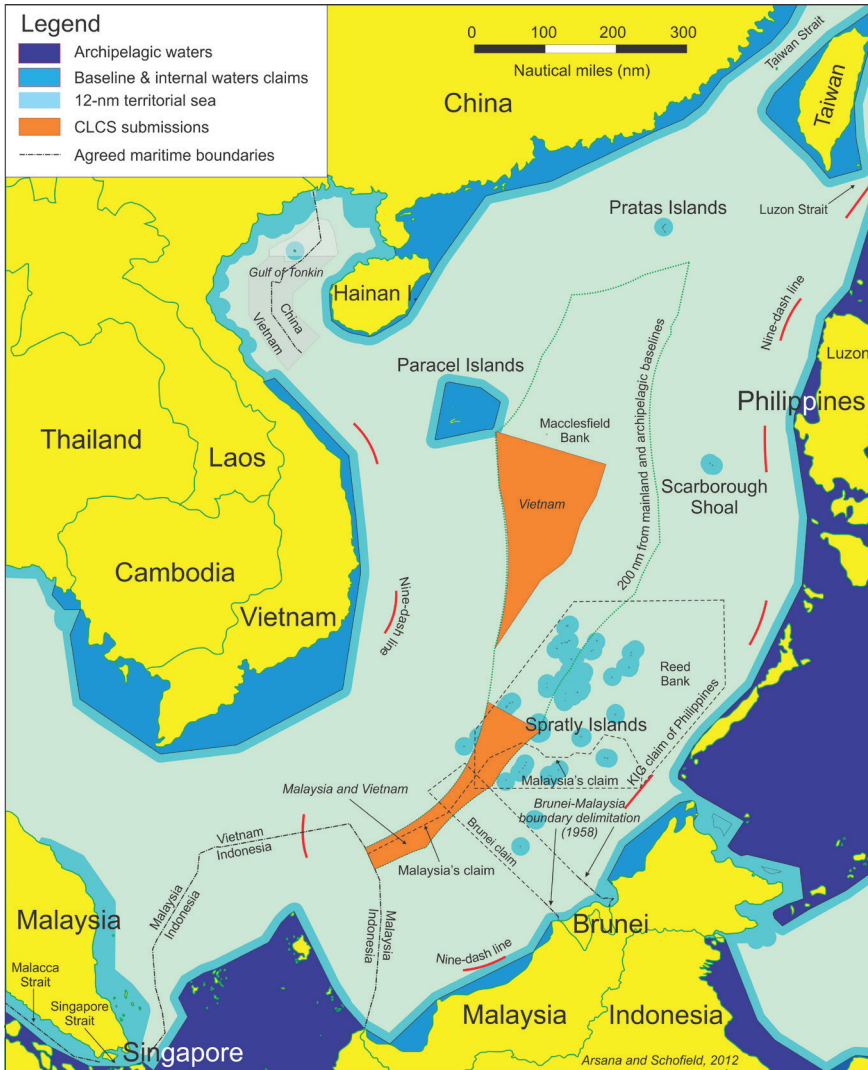


FIGURE 1 *Baselines and maritime claims in the South China Sea*
 SOURCE: ADAPTED FROM A MAP INCLUDED IN THE JANUARY 2013 ISSUE OF THE *AMERICAN JOURNAL OF INTERNATIONAL LAW* PREPARED BY CLIVE SCHOFIELD AND ANDI ARSANA OF THE AUSTRALIAN NATIONAL CENTRE FOR OCEAN RESOURCES AND SECURITY (ANCORS), UNIVERSITY OF WOLLONGONG, AUSTRALIA.

Therefore, the questionable use of straight baselines, while an important issue of concern, especially with respect to potential implications for freedom of navigation, is relatively unimportant with respect to identifying areas of overlapping maritime claims in the central part of the South China Sea.

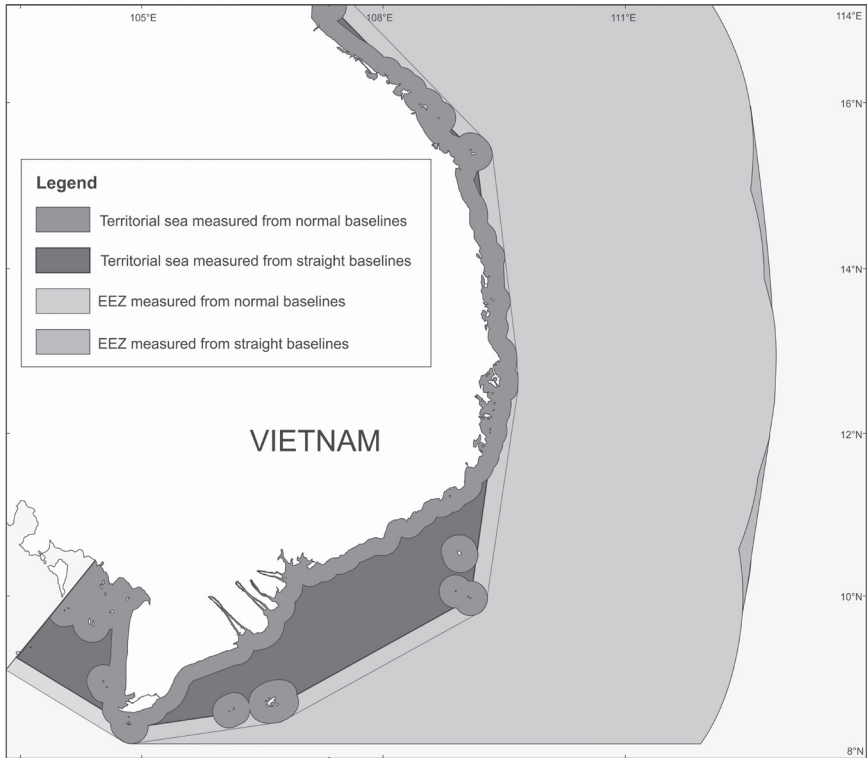


FIGURE 2 *The impact of Vietnam's claimed straight baselines on its maritime claims*²¹

None of the States bordering the South China Sea have issued official charts or lists of geographic coordinates showing the outer limit lines of their EEZ claims as required by Article 75 of the LOSC. However, the outer limits of the EEZ claims of Malaysia and Vietnam are shown on the maps contained in their submissions to the Commission on the Limits of the Continental Shelf (CLCS).²² Brunei, China, the Philippines and Taiwan have not issued charts or

21 Adapted from Fig. 2.11 in Clive Schofield, 'Defining the "Boundary" between Land and Sea: Territorial Sea Baselines in the South China Sea', in S. Jayakumar, Tommy Koh and Robert Beckman (eds), *The South China Sea Disputes and Law of the Sea* (Edward Elgar Publishing, UK, forthcoming, 2014).

22 Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Joint Submission by Malaysia and Socialist Republic of Viet Nam, Executive Summary (6 May 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm; accessed 5 April 2014.

coordinates indicating the outer limit of their EEZ claims. It is interesting that the Joint Submission of Malaysia and Vietnam shows a 200-nm EEZ limit for the Philippines.²³

Several of the States bordering the South China Sea are adjacent to each other and agreements will be required to clarify their adjacent EEZ boundaries. Brunei seems to have settled its adjacent boundaries with Malaysia through an exchange of letters,²⁴ and China and Vietnam have reached a partial boundary agreement in the Gulf of Tonkin.²⁵ Additionally, Indonesia has delimited its continental shelf boundaries in the south-western part of the South China Sea with both Malaysia and Vietnam (see Fig. 1).²⁶ The adjacent boundary between Malaysia and the Philippines is an especially difficult problem because of the historic sovereignty claim of the Philippines to the Malaysian State of Sabah.²⁷

In May 2009, Malaysia and Vietnam made a Joint Submission to the CLCS claiming a continental shelf beyond 200 nm.²⁸ Vietnam made a separate submission for an extended continental shelf further to the north, opposite

23 *Ibid.*

24 Brunei Darussalam's Preliminary Submission concerning the Outer Limits of its Continental Shelf, 12 May 2009, para. 10, available at http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf; accessed 5 April 2014.

25 Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves of the Two Countries in Beibu Bay/Bac Bo Gulf (with maps) (Beijing, 25 December 2000, in force 30 June 2004), 2336 *UNTS* 179.

26 Indonesia and Malaysia signed an agreement related to seabed boundary delimitation in the Strait of Malacca and South China Sea, on 27 October 1969. See Choon-ho Park, 'Indonesia-Malaysia (Continental Shelf)' in Jonathan I. Charney and Lewis M. Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff Publishers, Dordrecht/Boston, 1993) 1025–1027. The terminal points of the two lateral seabed boundary segments defined by Indonesia and Malaysia in the south-western South China Sea were subsequently connected to each other through a continental shelf boundary line agreed between Indonesia and Vietnam which was signed on 26 June 2003. See Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Indonesia concerning the delimitation of the continental shelf boundary (26 June 2003, in force 29 May 2007), in David A. Colson and Robert W. Smith (eds), *International Maritime Boundaries* (Volume VI, Martinus Nijhoff Publishers, Leiden, 2011), 4,301–4,315.

27 Official Gazette, No. 2587 Appendix XVI, Republic of the Philippines Department of Foreign Affairs, 2 February 1966, available at <http://www.gov.ph/1966/02/07/philippine-claim-to-north-borneo-sabah-vol-ii-appendix-xvi/>; accessed 5 April 2014.

28 CLCS, Joint Submission by Malaysia and the Socialist Republic of Viet Nam (n 22).

the Philippines.²⁹ Brunei, China and the Philippines have either made partial submissions or submitted preliminary information indicating that they also intend to make submissions claiming an extended continental shelf in the South China Sea.³⁰ China and the Philippines have objected to the Joint Submission of Malaysia and Vietnam, as well as to the separate submission of Vietnam.³¹

If Brunei, China and the Philippines make extended continental shelf claims in the South China Sea, they are likely to overlap with the claims of Malaysia and Vietnam. In addition, Malaysia and Vietnam are likely to object to their claims. Therefore, even if no maritime zones (such as the EEZ and continental shelf) are claimed from the disputed offshore islands, there will be substantial areas of overlapping continental shelf claims between opposite States and adjacent States in the South China Sea.

EEZ and Continental Shelf Claims from Offshore Geographic Features

The offshore geographic features in the South China Sea that meet the definition of an island in Article 121(1) are entitled in principle to an EEZ and continental shelf of their own.³² However, Article 121(3) provides that if they are rocks which cannot sustain human habitation or economic life of their own,

29 CLCS Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submission to the Commission: Submission by the Socialist Republic of Viet Nam, Executive Summary (7 May 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm; accessed 5 April 2014.

30 Brunei Darussalam's Preliminary Submission (n 24); Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China, 11 May 2009, available at http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf; CLCS Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Republic of the Philippines, 19 July 2012, available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_phl_22_2009.htm; CLCS Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the People's Republic of China, 14 December 2012, available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_chn_63_2012.htm; accessed 6 April 2014.

31 Communications Received with regard to the Joint Submission made by Malaysia and Viet Nam to the CLCS (n 22), China (7 May 2009 and 14 April 2011) and the Philippines (4 August 2009 and 5 April 2011); Communications Received with regard to the Submission made by Viet Nam to the CLCS (n 29), China (7 May 2009 and 14 April 2011) and the Philippines (4 August 2009 and 5 April 2011).

32 LOSC Art. 121(2).

they are not entitled to an EEZ and continental shelf. If it is not a rock within the meaning of Article 121(3), an island is automatically entitled to a continental shelf. If a State intends to claim an EEZ from an island or from other land territory, it must make a formal claim. As a practical matter, the simplest option would be for a Claimant to claim an EEZ from an island, as that would give it sovereign rights for the purpose of exploring and exploiting the natural resources of both the seabed and subsoil and the superjacent waters.³³

For example, under its national legislation China claims an EEZ from the Paracel Islands,³⁴ but it has not clarified the outer limits of its EEZ claim. China has stated that the Spratly Islands are entitled to an EEZ and continental shelf,³⁵ but it has not indicated the baselines from which its maritime zones are measured or the outer limit of its EEZ or continental shelf claim from the Spratlys.

Indeed, none of the other Claimants have indicated whether they are claiming an EEZ or continental shelf from any of the islands in the Spratly Islands, and Vietnam has not indicated whether it is claiming an EEZ or continental shelf from the Paracel Islands. The fact that Malaysia and Vietnam included EEZ claims only from their respective mainland coasts in their submissions to the CLCS implies that they are not intending to claim an EEZ or continental shelf from any of the disputed islands over which they claim sovereignty. However, they would arguably not be precluded from claiming an EEZ from the islands at some point in the future if they decide that it is in their interests to do so. If EEZ and/or continental shelf claims are made from any of the disputed islands, they will overlap substantially with the EEZ claims and extended continental claims from the mainland territory and archipelagic baselines of the States bordering the South China Sea.

Historic Title or Historic Rights inside the Nine-Dashed Line

When China attached its nine-dashed line map to its *Note Verbale* of 6 May 2009 to the UN Secretary-General, questions arose as to the significance of the map to China's maritime claims in the South China Sea. The *Note Verbale* states that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over

33 LOSC Art. 56(1).

34 China—Law on the Territorial Sea and the Contiguous Zone (n 18), Art. 2; Exclusive Economic Zone and Continental Shelf Act (n 18), Art. 2.

35 Communications Received with regard to the Joint Submission made by Malaysia-Viet Nam (n 22), China (14 April 2011); Communications Received with regard to the Submission made by Viet Nam (n 29), China (14 April 2011).

the relevant waters (see attached map)³⁶ Under the LOSC, a State has sovereignty over islands and the 12-nm territorial sea adjacent to them. It also has sovereign rights and jurisdiction to explore and exploit the natural resources in the EEZ measured from the islands and to any continental shelf claimed from the islands. Therefore, if the term ‘adjacent waters’ is meant to signify areas of territorial sea while the phrase ‘relevant waters’ is intended to refer to an EEZ claimed from the islands, China’s statement as to its claims would be consistent with the LOSC.

The question has arisen as to whether China is claiming rights and jurisdiction only in the EEZ measured from the islands or whether it is claiming rights and jurisdiction in all the waters inside the nine-dashed line. With respect to jurisdiction, some national legislation of China states that it applies not only in China’s maritime zones, but also in all other sea areas under the jurisdiction of the PRC.³⁷ Some commentators have suggested that the “other sea areas under

36 Communications Received with regard to the Joint Submission made by Malaysia-Viet Nam (n 22), China (7 May 2009); Communications Received with regard to the Submission made by Viet Nam (n 29), China (7 May 2009).

37 Regulations of the People’s Republic of China on the Control over Dumping Wastes into the Sea Waters, 6 March 1985, Art. 3: “The present Regulations shall apply to (1) The dumping of wastes or other matter into the internal sea and the territorial sea, onto the continental shelf and into other sea areas under the jurisdiction of the People’s Republic of China; . . . (3) The shipping of wastes or other matter in the internal sea, territorial sea and other sea areas under the jurisdiction of the People’s Republic of China for the purpose of dumping.” Available at <http://www.asianlii.org/cn/legis/cen/laws/rotprocotcodwitsw934/>; Marine Environment Protection Law of the People’s Republic of China, 25 December 1999, Art. 2: “This law shall apply to the internal waters, territorial seas and the contiguous zones, exclusive economic zones and continental shelves of the People’s Republic of China and all other sea areas under the jurisdiction of the People’s Republic of China.” Available at <http://www.asianlii.org/cn/legis/cen/laws/meplotproc607/>; Fisheries Law of the People’s Republic of China, Art. 2: “All productive activities of fisheries, . . . in the inland waters, tidal flats, territorial waters and exclusive economic zones of the People’s Republic of China and in all other sea areas under the jurisdiction of the People’s Republic of China shall be conducted in accordance with this Law.” Available at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917138.htm; Surveying and Mapping Law of the People’s Republic of China, 29 August 2002, Art 2: “All surveying and mapping activities conducted in the domain of People’s Republic of China and other sea areas under the jurisdiction of the People’s Republic of China shall comply with this Law.” Available at <http://www.asianlii.org/cn/legis/cen/laws/samlotproc506/>; accessed 6 April 2014.

the jurisdiction of the PRC” could refer to the all of the sea areas inside the nine-dashed line.³⁸

China issued a second *Note Verbale* on 11 April 2011. Some writers have argued that the language used in this second *Note Verbale* suggests that China is also claiming historic rights to resources in all the areas inside the nine-dashed line.³⁹ However, the *Note Verbale* does not use the phrase ‘historic rights’. Also, there appears to be no other official statement from the Chinese Government claiming that it has historic rights in the waters inside the nine-dashed line. The only reference to historic rights in any official document is that in Article 14 of China’s national legislation on the EEZ, which states that “[t]he provisions of this Act shall not affect the historical rights of the People’s Republic of China”.⁴⁰ However, that Act gives no indication as to where China may have historical rights.

Nevertheless, some commentators from China and Taiwan have asserted that China claims historic rights and jurisdiction in the waters inside the nine-dashed line.⁴¹ Some academics have opined that in practice China has been asserting not only historic rights to fish in the waters inside the nine-dashed line, but also historic rights to other maritime activities, including the right to explore and exploit oil and gas resources.⁴²

The Philippines and Vietnam have taken the position that under the LOSC, States can only claim sovereign rights to explore and exploit natural resources in and under the water if they claim maritime zones from land territory, including islands.⁴³ They do not recognise the legitimacy of any other claim to historic rights to resources in and under the waters inside the nine-dashed line.

38 Nong Hong, ‘Interpreting the U-Shape Line in the South China Sea’, 15 May 2012, available at <http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>; accessed 6 April 2014.

39 Zhiguo Gao and Bingbing Jia, ‘The Nine-Dash Line in the South China Sea: History, Status, and Implications’ (2013) 107(1) *The American Journal of International Law (AJIL)* 98–124, at p. 108.

40 China—Exclusive Economic Zone and Continental Shelf Act (n 18), Art. 14.

41 Yann-Huei Song, *United States and Territorial Disputes in the South China Sea: A Study of Ocean Law and Politics* (School of Law of the University of Maryland, Baltimore, 2001) 73. Keyuan Zou, ‘Historic Rights in International Law and in China’s Practice’ (2001) 32(2) *Ocean Development and International Law (ODIL)* 149–168, at pp. 160–163; Gao and Jia (n 39), at pp. 123–124.

42 Hong (n 38); Gao and Jia (n 39), at pp. 108 and 124; Keyuan Zou, ‘China’s U-Shaped Line in the South China Sea Revisited’ (2012) 43(1) *ODIL* 18–34, at p. 22.

43 See, for example, Republic of the Philippines Department of Foreign Affairs Manila, SFA Statement on the UNCLOS Arbitral Proceedings against China, 22 January 2013,

They presumably take a similar position with respect to the assertion of claims to jurisdiction over activities in the waters inside the nine-dashed line that are not consistent with the jurisdiction of coastal States in the EEZ as provided in Article 56 of the LOSC.

It can be argued that the decision in the *Eritrea/Yemen Arbitration* supports the view that historic fishing rights of a third State in waters under the jurisdiction of a coastal State were not necessarily extinguished by the LOSC and continue to be governed by customary international law.⁴⁴ However, it is unlikely that the ASEAN Claimants would recognise China's claim to historic fishing rights within the areas they consider to be part of their EEZs. They would in all probability maintain that they have sovereign rights to exploit the living resources in their EEZ, and that they need only to take into account "the need to minimise economic dislocation in States whose nationals have habitually fished in the zone" when granting access to any surplus in their EEZ.⁴⁵

Furthermore, Clive Symmons maintains that a claim to historic rights must meet the same general requirements as a claim to historic waters. That is, there must have been a formal claim, a continuous and effective exercise of the rights being claimed, and international acquiescence in the claim.⁴⁶ It would be very difficult for China to prove that these requirements have been met in the South China Sea, as it would need to show that it formally claimed historic fishing rights in the EEZ of the other Claimants and that those States acquiesced in China's claim. It would be even more difficult for China to assert historic rights to explore and exploit for hydrocarbon resources in the EEZs of other States.

China's claim to historic rights in all the waters inside the nine-dashed line could possibly be considered and ruled upon in the pending arbitration case between the Philippines and China.⁴⁷ Otherwise, the only other prospect for resolving this issue would be for the Claimants to enter into JDAs which spell out the right of the Claimants, including China, to exercise rights to resources in the areas subject to the JDAs. Such JDAs might be possible if they sidestep

Notification and Statement of Claim on West Philippine Sea, available at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>; accessed 6 April 2014.

44 Permanent Court of Arbitration (PCA): *Eritrea v. Yemen*, Award of the Arbitral Tribunal in the Second Stage of the Proceedings—Maritime Delimitation (17 December 1999), at paras 109–11; available at http://www.pca-cpa.org/showpage.asp?pag_id=1160; accessed 6 April 2014.

45 LOSC Art. 62(3).

46 Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff Publishers, Leiden/Boston, 2008) 111–245.

47 PCA: *The Republic of the Philippines v. The People's Republic of China*, available at http://www.pca-cpa.org/showpage.asp?pag_id=1529; accessed 6 April 2014.

the difficult legal issues by not specifically mentioning either the nine-dashed line or the historic rights of China.

Potential Impact of the Philippines v. China Arbitration

The Arbitral Tribunal in the *Philippines v. China case*⁴⁸ will decide whether it has jurisdiction to hear the case, notwithstanding the declaration of China under Article 298 excluding disputes concerning the interpretation or application of Articles 15, 74 and 83 of the LOSC relating to sea boundary delimitations, or disputes involving historic bays or titles.⁴⁹ If it does decide that it has jurisdiction, the Arbitral Tribunal could rule on several issues that would clarify how LOSC provisions apply to the complex legal disputes in the South China Sea.

First, the Arbitral Tribunal may rule on the Philippines' assertion that claims to rights and jurisdiction in maritime space can only be made from land territory, including islands. In the course of doing so, it may also confirm that reefs or rocks that are totally submerged are part of the seabed and cannot be subject to appropriation.

Second, the Arbitral Tribunal may also consider whether China has rights and jurisdiction in the waters surrounding disputed islands within the EEZ of the Philippines. In the course of addressing this issue, the Arbitral Tribunal may consider the issue of whether China has historic rights in such areas, even though historic rights are governed by customary international law rather than the LOSC. Article 321 of the LOSC provides that a tribunal having jurisdiction under section 2 of Part XV shall apply the LOSC and "other rules of international law" compatible with the LOSC. Thus, even though the topic of historic rights is governed for the most part by customary international law rather than by the LOSC, the Arbitral Tribunal could decide how the concept of historic rights relates to the LOSC, and under what circumstances historic fishing rights in the EEZ of another State must be recognised or taken into account.

Third, the Arbitral Tribunal may decide whether the islands occupied by China are rocks under Article 121(3) that are not entitled to an EEZ and continental shelf of their own. In the course of deciding this question, it could also provide valuable guidance on whether any of the larger islands in the South China Sea would in principle be entitled to an EEZ and continental shelf of their own.

48 Philippines—Notification and Statement of Claims on West Philippine Sea (n 43).

49 China—Declaration made after Ratification (25 August 2006), available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China Upon ratification; accessed 6 April 2014.

Fourth, the Arbitral Tribunal may address the legal issues relating to the occupation of low-tide elevations, including rights and jurisdiction in the waters surrounding them.

Although attempting to discern the possible or likely outcomes of the Arbitral Tribunal's deliberations would inevitably be highly speculative, if some or all of these issues are addressed, the Arbitral Tribunal could clarify some of the complex legal issues that are relevant to resolving the maritime disputes in the South China Sea. However, any award of the Arbitral Tribunal will not address the two most fundamental legal issues which underlie the disputes in the South China Sea. First, the Arbitral Tribunal cannot consider which State has the better claim to sovereignty over any of the disputed islands because it can only consider disputes concerning the interpretation or application of the LOSC, and there are no provisions in the LOSC on how to decide issues of sovereignty. Second, the Arbitral Tribunal cannot decide how to delimit any EEZ boundaries between China and its neighbours, including the EEZ boundary between the main archipelago of the Philippines and the disputed offshore islands. This is because the declaration made by China under Article 298 excludes the disputes on the interpretation or application of Article 74 concerning the delimitation of overlapping EEZ boundaries.

Clarifying Areas of Overlapping Maritime Claims around the Spratly Islands

Maritime Claims from the Spratly Islands

None of the ASEAN Claimants have clarified whether they are claiming an EEZ from any of the Spratly Islands over which they claim sovereignty. This is not surprising, as it is arguably in their interests to maintain that all of the islands in the Spratlys are rocks within Article 121(3) that have no entitlement to an EEZ and continental shelf of their own. This would serve to limit the "areas in dispute" in the waters surrounding the Spratly Islands to the 12-nm belt of territorial sea around those features which meet the definition of an island, that is, the naturally formed areas of land surrounded by and above water at high tide.⁵⁰ The result would be that the areas of overlapping claims associated with the islands would be limited to the 12-nm territorial sea surrounding the disputed islands. From the perspective of the ASEAN Claimants, this would be advantageous as it would leave them free to pursue marine resource development activities in offshore areas proximate to their coasts in the South China

50 LOSC Art. 121(1).

Sea. However, Claimants would still need to delimit their adjacent maritime boundaries. This scenario would leave a substantial high seas “pocket” in the central part of the South China Sea located beyond 200 nm from the surrounding mainland and main island coasts (see Figs. 1 and 8).

From its *Notes Verbales* of 7 May 2009 and 11 April 2011, it seems that China is making two types of claims to maritime space in the South China Sea.⁵¹ First, it claims ‘sovereignty’ over the islands (and perhaps over other geographic features) in the four archipelagos in the South China Sea, as well as to the ‘waters adjacent to the islands’, which most likely refers to the 12-nm territorial seas adjacent to the islands. Second, it claims ‘sovereign rights and jurisdiction’ over the ‘relevant waters’ as well as the seabed and subsoil thereof. Given that the statement of 11 April 2011 also asserts that the Spratly Islands are fully entitled to a territorial sea, EEZ and continental shelf, we can probably assume that China is claiming sovereign rights and jurisdiction to the natural resources in the EEZ (and continental shelf) measured from the islands.

As noted above, if the reference to ‘adjacent waters’ is read to refer to the territorial sea and the reference to ‘relevant waters’ is read to refer to the EEZ, China’s claims would be consistent with the LOSC and international law. However, China has not indicated which of the islands it believes are entitled to an EEZ, and it has not amended its national legislation to declare baselines around them, as it has for the Paracel Islands.⁵² Therefore, the extent of its EEZ claim from the islands, and the area of overlapping claims, is uncertain.

A Game-Changing Option for China?

China could potentially trigger a paradigm shift in its disputes in the South China Sea if it were to formally declare an EEZ from the largest islands in the Spratly Islands.⁵³ To make its EEZ claim clear, China could identify which islands in the Spratlys it believes are in principle entitled to an EEZ of their own. It could define the baselines for these islands, taking into account the provisions in the LOSC for baselines of islands on atolls and fringing reefs, as

51 Communications Received with regard to the Joint Submission made by Malaysia-Viet Nam (n 22), China (7 May 2009 and 14 April 2011); Communications Received with regard to the Submission made by Viet Nam (n 29), China (7 May 2009 and 14 April 2011).

52 China—Declaration on the Baselines of the Territorial Sea (n 8).

53 For an appraisal of hydrographic issues relating to the South China Sea islands, see David Hancox and Victor Prescott, ‘A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst those Islands’ (1995) 1(6) *International Boundaries Research Unit (IBRU) Maritime Briefing* 1–88.

well as the existence of any low-tide elevations situated within 12 nm from islands on the reefs.⁵⁴

Since most of the islands in the Spratlys are very small and are located in relatively close proximity to each other, China could limit its EEZ claim to the largest islands and/or those which are vegetated, without having an overly dramatic impact on the scope of its claims to maritime jurisdiction based on claimed sovereignty over the disputed islands of the South China Sea. For purposes of illustration, we have identified what appear to be the 12 largest islands based on past studies (see Fig. 3). They are all very small and the total land area of the 12 islands is less than two square kilometres. Despite their limited size, however, all 12 have vegetation and in some cases roads and structures have been built on them.

When Article 121 of the LOSC was drafted, numerous proposals were made regarding the tricky issue of distinguishing between islands capable of generating continental shelf and EEZ claims and mere “rocks” which cannot. Many of these proposals focused on criteria related to size and the presence of vegetation and/or water sources.⁵⁵ Ultimately, no consensus was reached then and subsequently no definitive position has been determined through State practice or by virtue of an authoritative ruling from an international judicial body. Nonetheless, it is suggested that island size, coupled with the presence of vegetation, are useful, if not necessarily definitive, indicators of islands that may, in principle, be capable of generating continental shelf and EEZ rights.

Accordingly, it can be argued in good faith that the islands we have identified are not “rocks which cannot sustain human habitation or economic life of their own” within the meaning of Article 121(3). As a result, they would, in principle, be entitled to a territorial sea, EEZ and continental shelf of their own. Furthermore, the largest features among the Paracel Islands group have been identified and would similarly be entitled to generate EEZ and continental shelf rights in keeping with Article 121(2) of the LOSC (see below). Further, Pratas Island can be viewed as being of an analogous character.

Of the 12 largest islands in the Spratlys, Taiwan occupies Itu Aba (Taiping Island), the largest island and the only one reported to have a source of fresh

54 LOSC Arts. 6 and 13.

55 Such proposals were advanced, for example, by the delegations of Malta and Ireland during the Third Conference on the Law of the Sea (UNCLOS III). See S.N. Nandan and S. Rosenne (eds) *United Nations Convention on the Law of the Sea 1982: A Commentary* (Volume III, Kluwer Law International, Dordrecht, 1995) 321–339. On the legislative history of Article 121, see also UNDOALOS, *Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* (United Nations, New York, 1988).

water. The Philippines currently occupies five features, all of which are located within what it terms the Kalayaan Island Group (KIG): Northeast Cay, Thitu Island, West York Island, Loaita Island and Nanshan Island. Vietnam occupies the remaining six: Southwest Cay, Sand Cay, Namyit Island, Sin Cowe Island, Amboyna Cay and Spratly Island. All of those islands occupied by Vietnam are within the KIG, except for Spratly Island, which is located towards the southwestern fringes of the Spratly Islands group. Although China does not currently occupy any of the 12 islands, as it claims sovereignty over all of them, it is likely to take the view that it has a right to claim an EEZ from them.

If China were to claim an EEZ from these 12 islands, it should issue charts indicating the geographic limits of its EEZ claim. In indicating the geographic limits it could give full effect to the islands toward the open sea and draw an equidistance or median line between the islands and the coasts of Brunei, Malaysia, the Philippines and Vietnam.⁵⁶ Even though the jurisprudence of international courts and tribunals provides that the maritime zones from small offshore islands should be given reduced effect or even ‘enclaved’ when delimiting maritime boundaries between large mainland territory and a small island, it is now well established that the starting point for courts and tribunals is almost always the equidistance line.⁵⁷ Since the equidistance line is the first step in determining the boundary in the case of overlapping claims between offshore islands and mainland territory, a claim to the equidistance line would

56 An equidistance line is a geometrically exact expression of the concept of a “mid-line”, consistently at an equal distance from opposing basepoints. In the technical law of the sea literature, the term “median line” is sometimes used when referring to an equidistance line between two opposite States and the term “equidistance line” is used for an equidistance line between two adjacent States. However, as is observed in the International Hydrographic Organization’s TALOS Manual, “In practice, however, the concept of adjacent and opposition are often difficult to define and apply, but the method used to determine an equidistance line is the same whatever the relationship of the coasts of the States.” Consequently, the term ‘equidistance line’ is preferred in this Chapter. See International Hydrographic Organization (with the Intergovernmental Oceanographic Commission and the International Association of Geodesy), *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea—1982*, Special Publication No.51, (4th ed., International Hydrographic Bureau, Monaco, 2006) (*TALOS Manual*) Chapter 6, 3–4, available at http://www.gc.noaa.gov/documents/gcil_iho_tech_aspects_los.pdf; accessed 6 April 2014.

57 ICJ: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985 (1985) I.C.J. Reports 13; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001 (2001) I.C.J. Reports 40; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012 (2012) I.C.J. Reports 624.

be a good faith claim that is consistent with the LOSC and international law. Any claim to an EEZ from an island beyond the equidistance line could be viewed as an abuse of right under Article 300 of the LOSC. At the same time, China could make an EEZ claim from Pratas Island, which is currently occupied by Taiwan but also claimed by China, and from the Parcel Islands, which are currently occupied by China but also claimed by Vietnam.

Fig. 3 is intended to demonstrate the effect of an EEZ claim from the 12 largest islands in the Spratlys, as well as from the largest islands in the Paracels and from Pratas Island. It gives full effect to the islands in the direction of the open sea, making most of the area in the middle of the South China Sea subject to the EEZ regime rather than the high seas regime. The map also shows the theoretical equidistance line between the 12 islands in the Spratlys and the coasts of Brunei, Malaysia, the Philippines and Vietnam. Moreover, the map illustrates full effect lines into the central part of the South China Sea as well as theoretical equidistance lines for the largest of the features among the Parcel Islands and for Pratas Island.⁵⁸

For the purposes of this exercise, normal rather than claimed straight or archipelagic baselines have been used for the surrounding mainland and main island coastlines. This approach is consistent with past international judicial practice which has tended to ignore claimed straight baselines when determining the basepoints from which to construct equidistance lines.⁵⁹ The area of overlapping claims would include a significant portion of the above-mentioned KIG claim area of the Philippines (illustrated on Fig. 1). It would also include some areas where the Governments of some of the littoral States have

58 The names of the islands in the Parcel Island group that we believe would be entitled in principle to an EEZ and continental shelf of their own are annotated on Fig. 8 and listed in the next section of this paper, together with an analysis of the practical effect of such an EEZ claim. Note that Fig. 3 is designed to illustrate the location of the larger islands in the Spratly and Parcel Islands. These are shown with shaded territorial sea areas around them. Note also that there are numerous other smaller features in these island groups that are entitled to generate territorial sea areas. These smaller features are not illustrated on Fig. 3 in order to highlight the location of the larger islands used to construct equidistance lines. See, however, Fig. 9. See also the Appendix to this paper, which contains an explanatory note summarizing the rationale for the maritime zones drawn from the islands illustrated in the figures accompanying this article.

59 It remains open to question how an international court or tribunal might treat archipelagic baselines defined in accordance with Art. 47 of the LOSC when constructing equidistance lines, as this issue has yet to arise before an international judicial body.

granted concessions for the exploration of hydrocarbon resources.⁶⁰ One notable impact of this approach is that a relatively small high seas pocket would exist in the north-eastern part of the South China Sea (see Fig. 3).

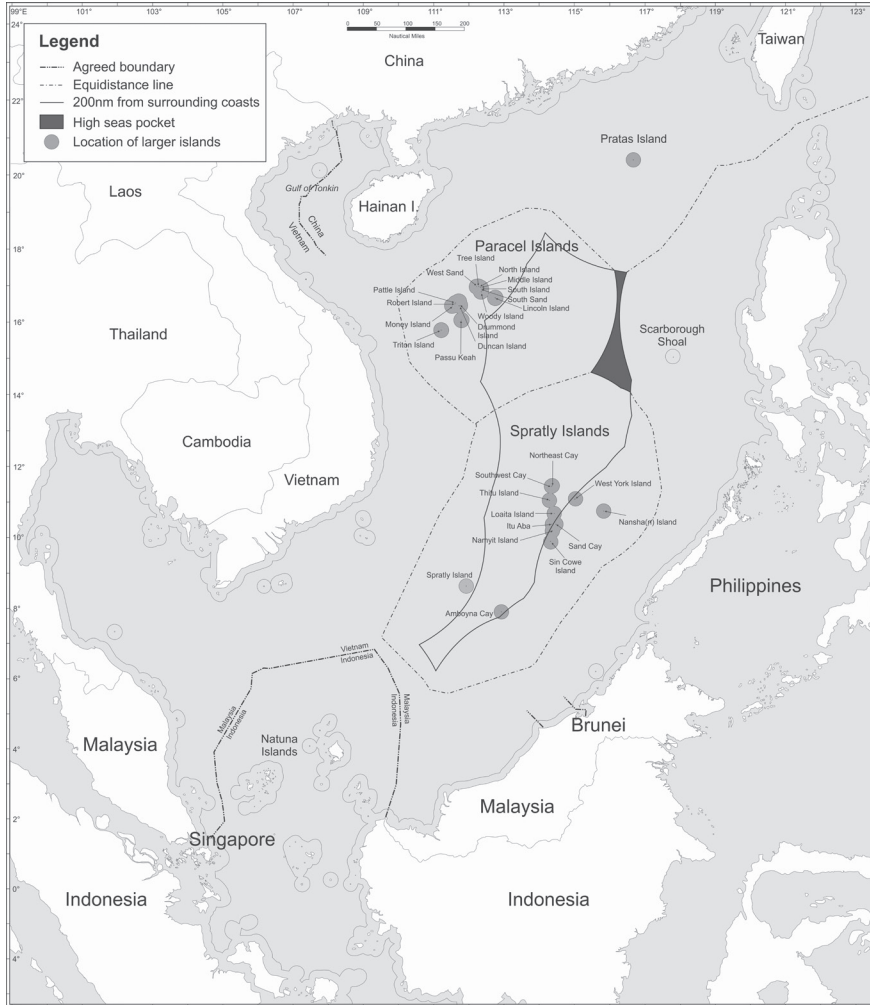


FIGURE 3 *Theoretical equidistance lines and remaining high seas pocket generated from larger islands in the South China Sea*

60 For example, the Philippines, with respect to the Reed Bank area located to the north-east of the Spratly Islands group, Malaysia and Brunei, concerning areas off their territories on the Island of Borneo, and Vietnam, in relation to the Vanguard Bank to the south-west of the Spratly Islands.

There would be several advantages to China if it made such a claim. First, its claim would be in conformity with the LOSC. Second, it would result in a large area of overlapping EEZ claims that would be subject to the provisions in Articles 74 and 83. The Claimants would be under an obligation to make every effort to enter into “provisional arrangements of a practical nature” such as JDAs.⁶¹ Furthermore, they would be under an obligation not to take any unilateral actions that would jeopardise or hamper the reaching of a final agreement on the maritime boundaries.⁶² In short, this action would bring China’s maritime claims into line with both the LOSC and the claims made by the other Claimant States. Consequently, all of the Claimants would be negotiating on the same basis in international law and, in the authors’ view, this could result in a de-escalation of the South China Sea disputes and arguably clear the way for them to begin negotiations on the area of overlapping claims.

A further advantage to China if it followed this course of action is that the ASEAN Claimants may not have the option of invoking the compulsory procedures entailing binding decisions in section 2 of Part XV of the LOSC on the settlement of disputes. China’s declaration of 26 August 2006 excludes any disputes on the interpretation or application of Articles 74 and 83 from the compulsory procedures entailing binding decisions in section 2 of Part XV.⁶³

As alluded to above, if China were to claim an EEZ from the largest 12 islands in the Spratlys, the Philippines or Vietnam may challenge the claim. They could maintain that all of the islands in the Spratlys are rocks within Article 121(3) and not entitled to an EEZ or continental shelf of their own. This would be a very difficult argument to make, unless a very strict reading of Article 121(3) were to be taken. Alternatively, the Philippines and Vietnam could respond by also claiming an EEZ from some or all of the same islands if they also claim sovereignty over them. If they were to make such a claim, they are likely to argue that islands can be given full effect in the direction of the open ocean, but that they should be given a substantially reduced or partial effect in the direction of their mainland territory or main archipelago and even “enclaved” or “semi-enclaved” (see Fig. 4). They could cite the jurisprudence of the International Court of Justice (ICJ) in support of their position on the

61 LOSC Arts. 74(3) and 83(3).

62 *Ibid.*

63 China—Declaration made after Ratification (n 49). The texts of the declarations of all States Parties to the LOSC are available on the United Nations Treaties Database (Status as at 05 April 2014) at https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en; accessed 6 April 2014.

latter point.⁶⁴ The result would be negotiations between China and ASEAN Claimants as to how to define the area of overlapping claims between the islands and the coasts of the ASEAN countries.

If China claimed an EEZ from the largest islands, it would benefit the ASEAN Claimants as well as China. The ASEAN Claimants would benefit because it would be clear that, at the least, the waters on “their” side of the equidistance line would not be areas of overlapping claims. Therefore, they would have undisputed sovereign rights to explore and exploit the natural resources in these areas.

Clarifying the Areas of Overlapping Maritime Claims

If China were to make an EEZ claim from the largest disputed islands as described above, it would set the stage for negotiations to more precisely define the areas of overlapping claims. In some areas between the islands and the mainland coasts, the Claimants directly concerned may agree to follow the jurisprudence of international courts and tribunals and give these small, isolated islands a reduced or partial effect, rather than full effect. The impact of according the larger islands of the Paracel and Spratly Island groups half and quarter effect is illustrated in Fig. 4.

In the areas of overlapping claims, the Claimants could then attempt to negotiate JDAs and other cooperative arrangements as called for in the 2002 Declaration on the Conduct of Parties in the South China Sea.⁶⁵ Such cooperative arrangements would be interim arrangements of a practical nature and they would be without prejudice to the sovereignty disputes over the islands or to a final agreement on the maritime boundaries.

If the Claimants were to enter into negotiations to cooperate in the areas of overlapping claims, they could sidestep most of the difficult legal issues, such as which State has the better claim to sovereignty over the islands, whether an extended continental shelf claim from the mainland takes precedence over or “trumps” an EEZ claim from an island, and whether a State has the right to legally occupy a low-tide elevation.

If it took this approach, China would not need to formally abandon its nine-dashed line map or even issue a formal clarification of the nine-dashed line.

64 ICJ: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 57).

65 Declaration on the Conduct of Parties in the South China Sea (Phnom Penh, 4 November 2002), available at <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>; accessed 6 April 2014.

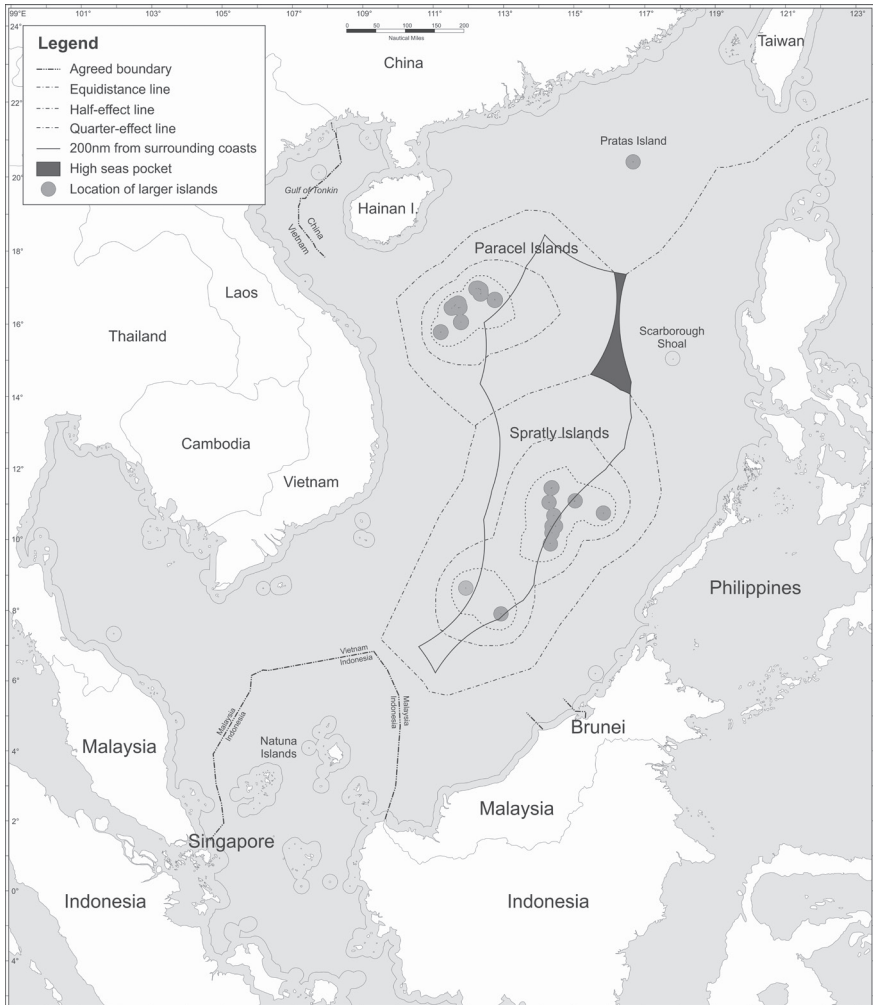


FIGURE 4 *Partial effect for the larger Paracel and Spratly Islands*

China could instead simply agree to begin negotiations on cooperative arrangements in the areas of overlapping claims resulting from its EEZ claims from the disputed islands. The result would be that the ASEAN Claimants would, in principle, have sovereign rights over those maritime areas off their coasts up to the equidistance line with the largest disputed islands—something that presently appears to be contested. China could, however, still take the position that its “historic fishing rights” should be taken into account in any JDAs in the areas of overlapping claims. In addition, China could request that the ASEAN Claimants give access to its nationals to any surplus in the areas of their EEZ

that are not subject to overlapping claims. The rationale for the latter request is Article 62 of the LOSC, which provides that when giving access to any surplus in their EEZ, coastal States should take into account the need to minimise economic dislocation in States whose nationals habitually fished in the zone.

If China adopted this pragmatic position, it would be similar to that of the Philippines with respect to its historic claim to a territorial sea based on the 1898 Treaty of Paris. Like the Philippines, China could take measures to bring its claims into conformity with the LOSC without formally abandoning its historic claim.

Clarifying Areas of Overlapping Maritime Claims in the Other Areas in the South China Sea

Gulf of Tonkin and Areas Surrounding the Paracel Islands

This section of the South China Sea includes Hainan Island and the southern coast of mainland China, the northern section of the coast of Vietnam, the Gulf of Tonkin between China and Vietnam, and the Paracel Islands. The sovereignty and maritime disputes in this area are essentially between China and Vietnam, although Taiwan has a claim similar to that of China.

Sovereignty Dispute

The Paracel Islands are located approximately equidistant from the coastlines of Vietnam and the Chinese island of Hainan. China, Taiwan and Vietnam all claim sovereignty over the Paracel Islands. China forcibly ejected South Vietnamese troops from the Paracels in 1974, and they are now occupied exclusively by China.⁶⁶ Vietnam continues to claim sovereignty over the islands, but China denies the existence of a sovereignty dispute.⁶⁷ Vietnamese fishermen continue to enter the waters surrounding the Paracels, and the arrest of Vietnamese fishermen by China is a continual source of friction and tension

66 King C. Chen, *China's War with Vietnam, 1970: Issues, Decisions, and implications* (Hoover Institution Press, Stanford, 1987) 42–48; Cable News Network (CNN), 'China and Vietnam: A Timeline of Conflict', 28 January 2011, available at <http://edition.cnn.com/2011/WORLD/asiapcf/06/27/china.vietnam.timeline/>; accessed 6 April 2014.

67 Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 21 June 2012, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t945296.shtml; accessed 6 April 2014. Vietnam—The Law of the Sea of Viet Nam (n 18), Art 1.

between China and Vietnam, as is the issue of exploration for seabed energy resources.⁶⁸

Questions will remain as to the rights and obligations of the two Claimants in the waters surrounding the Paracels, including their rights in what would be internal waters or territorial sea of the islands. This is not an issue of overlapping claims between opposite or adjacent States, but an issue of rights and jurisdiction in the waters surrounding islands over which both States claim sovereignty. Two principles of general international law that would clearly be applicable are the obligation to refrain from the threat or use of force and the obligation to resolve any disputes in a peaceful manner.⁶⁹

Maritime Claims

Vietnam has claimed an EEZ from the baselines along its coast.⁷⁰ Vietnam has not issued any official charts or geographic coordinates indicating the outer limit lines of its EEZ, but the map accompanying its submission to the CLCS in May 2009 does indicate the outer limit of its EEZ claim.⁷¹ In May 2009, Vietnam made a separate submission to the CLCS claiming an extended continental shelf in the area off its east coast, southwest of the Paracel Islands.⁷² China has objected to Vietnam's extended shelf claim, and has asked the CLCS not to consider it because of the existence of land or maritime disputes in the area.⁷³ One of the bases of China's objection is that Vietnam's claim may overlap with China's claims in the same area.

China has claimed an EEZ measured seawards from its territorial sea baselines, including its claimed straight baselines fronting its mainland coast, as well as the straight baselines that it has defined around the Paracel Islands.⁷⁴

68 China Detains Vietnamese Fishermen in Disputed Water, 22 March 2012, available at <http://www.reuters.com/article/2012/03/22/china-vietnam-idUSL3E8EM3YJ20120322>; Vietnam Lodges China Protest over Claims of Attack on Fishermen, available at <http://www.bloomberg.com/news/2013-07-18/vietnam-lodges-china-protest-over-claims-of-attack-on-fishermen.html>; accessed 6 April 2014. See also, for example, 'Vietnam and China ships "collide in the South China Sea"', BBC News, 7 May 2014, available at <http://www.bbc.com/news/world-asia-27293314>, accessed 23 May 2014.

69 Charter of the United Nations (San Francisco, 26 June 1945, in force 24 October 1945), Art. 2(3)–(4), available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>; accessed 6 April 2014.

70 Vietnam—The Law of the Sea of Viet Nam (n 18), Art. 15.

71 CLCS, Joint Submission—Malaysia-Viet Nam, Executive Summary (n 22).

72 CLCS, Submission—Viet Nam (n 29).

73 Communications Received with regard to the Joint Submission made by Malaysia-Viet Nam (n 22), China (7 May 2009 and 14 April 2011); Communications Received with regard to the Submission made by Viet Nam (n 29), China (7 May 2009 and 14 April 2011).

74 China—Exclusive Economic Zone and Continental Shelf Act (n 18), Art 2.

However, it has not issued any charts or geographic coordinates showing the limits of its EEZ claim in this area. China has submitted preliminary information to the CLCS suggesting that it may make a further submission regarding extended continental shelf limits and such a submission may well involve this area.⁷⁵ China's claim could conceivably overlap with the extended continental shelf claim of Vietnam.

Woody Island, the largest island in the Paracels, hosts the Chinese administrative centre known as Sansha City, as well as military facilities, and is about the same size as the 12 largest islands in the Spratly Islands combined.⁷⁶ Therefore, a strong argument can be made that Woody Island is entitled to an EEZ and continental shelf of its own. Also, the information available suggests that several other islands in the Paracels are large enough to be entitled, in principle, to an EEZ and continental shelf of their own.⁷⁷

If an EEZ is claimed from the largest islands in the Paracels, it would extend east into the area beyond the outer limits of the EEZ claims measured from the mainland coasts of Vietnam and China. The EEZ generated from the Paracels would include Macclesfield Bank, but would not extend as far as Scarborough Shoal. An EEZ from the Paracels would also overlap with the EEZ claimed from the largest islands in the Spratlys. The result would be that most of the area in the middle of the South China Sea north of the Spratlys would be an area of overlapping claims.

The impact of an EEZ claim from the largest islands in the Paracels in the north-western part of the South China Sea is indicated in Fig. 5. In preparing this figure, the EEZ from the Paracels was measured from the largest islands, not from the straight baselines employed by China around the islands. This is because the straight baselines employed by China around the Paracel Islands are not in conformity with the LOSC.⁷⁸ However, the area of EEZ that can be claimed from the Paracels is not significantly reduced if the EEZ

75 CLCS, Preliminary Information—China (n 30), paragraph 10 “China reserves its right to make submissions on the outer limits of the continental shelf that extends beyond 200 nautical miles in the East China Sea and in other sea areas”; also Submission—China (n 30).

76 China Raises Administrative Status of South China Sea Islands, 21 June 2012, available at http://news.xinhuanet.com/english/china/2012-06/21/c_131668568.htm; accessed 7 April 2014.

77 The following islands in the Paracels may be large enough to generate an EEZ of their own: Woody Island and Rocky Islet, Lincoln Island, Triton Island, Pattle Island, Duncan Island, West Sand, Money Island, Robert Island, North Island, Drummond Island, Tree Island, South Island, Middle Island, Passuh Keah and South Sand. See Explanatory Note in the Appendix to this paper.

78 See China's straight baselines claims and other States' responses (n 8).

is measured from the largest islands rather than from the straight baselines connecting them.

Fig. 5 illustrates 12-nm territorial seas for the Paracel Islands themselves, together with theoretical equidistance lines between the Paracel Islands on the one hand and the mainland coasts of both China and Vietnam on the other.

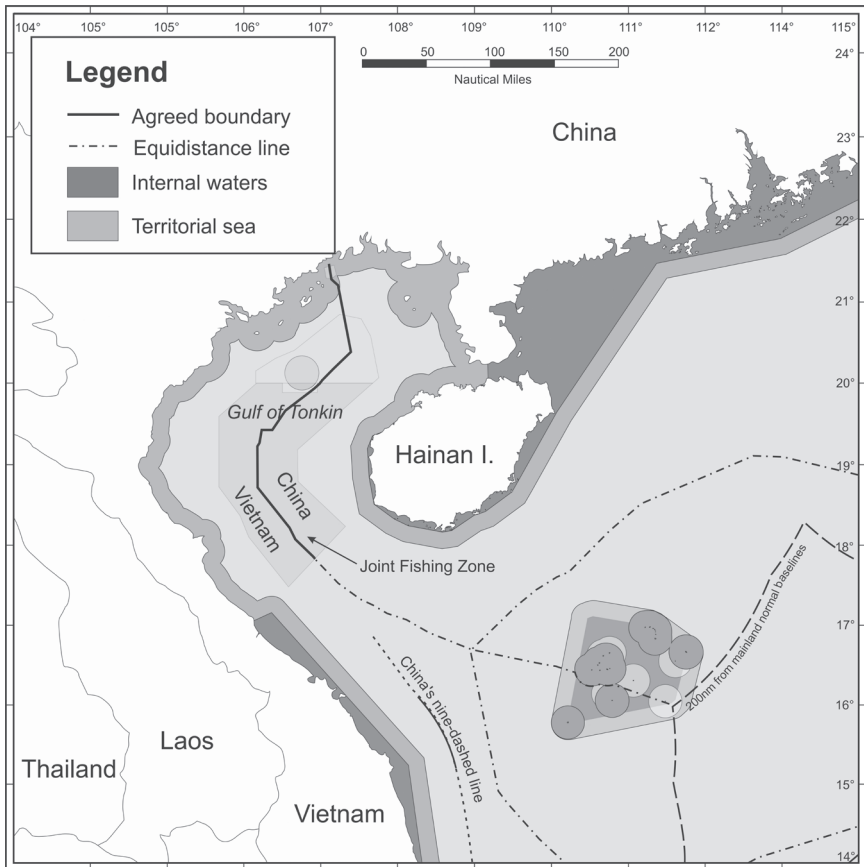


FIGURE 5 *Overlapping maritime claims in the North-western South China Sea*⁷⁹

79 The continuous, that is, “joined up”, version of the nine-dashed line illustrated in the maps accompanying this chapter was formed by plotting the dashed line segments extracted from a map attached in the Chinese note to the Secretary-General of the United Nations in its response to Malaysia-Vietnam’s extended continental shelf submission and then interpolating a line to connect these dashes. There is therefore some inherent uncertainty in the precise location of these lines. Available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; accessed 7 April 2014. It is worth emphasising that China has never officially issued coordinates for the nine-dashed line nor depicted this line as a continuous one.

Once again, for the purposes of this exercise the straight baselines of both China and Vietnam have not been taken into account due to their excessive character and normal baselines have been used to generate theoretical equidistance lines. This provides an indication of what can be viewed as the maximum maritime area that could be realistically associated with these disputed islands under the LOSC and thus a plausible area of overlapping claims, as both China and Vietnam claim sovereignty over the Parcel Islands. Additionally, a theoretical equidistance line between China and Vietnam ignoring the Parcel Islands is illustrated by proceeding seawards from the mouth of the Gulf of Tonkin into the north-western part of the South China Sea and out to the 200-nm limit from normal baselines along mainland coasts (including Hainan Island), allowing 12-nm territorial sea semi-enclaves around features among the Parcel Islands, as appropriate.

Because the EEZ generated from the largest islands in the Parcel group into the potential central high seas “pocket” beyond 200 nm from surrounding mainland coasts would include Macclesfield Bank, this would solve a difficult legal problem for China. China has claimed sovereignty over Macclesfield Bank, even though it is a submerged reef that is not subject to a sovereignty claim.⁸⁰ However, if Macclesfield Bank lies within the EEZ claimed from the largest islands in the Paracels, China would have a basis to claim sovereign rights to explore and exploit the natural resources in and under the water in Macclesfield Bank. In such a case, it would not be necessary for China to pursue its sovereignty claim over Macclesfield Bank, which is clearly a problematic one to sustain in international law terms.

Maritime Boundaries

China and Vietnam have reached agreement on a maritime boundary in the section of the Gulf of Tonkin extending seaward from their land boundary.⁸¹

80 People's Republic of China—Law on the Territorial Sea and the Contiguous Zone (n 18), Article 2: “The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its offshore islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China.” This English translation is available in Office of Policy, Law and Regulation, State Oceanic Administration, *Collection of the Sea Laws and Regulations of the People's Republic of China* (Ocean Press, 1998), 186. The English names of the four groups of islands in the South China Sea are Pratas Island (Dongsha Islands), Parcel Islands (Xisha Islands), Macclesfield Bank (Zhongsha Islands), and Spratly Islands (Nansha Islands).

81 Agreement between China and Viet Nam on the Maritime Delimitation in Beibu Bay/Bac Bo Gulf (n 25).

Additionally, they reached an accord concerning fishing activities in specified areas straddling the agreed boundary line.⁸² Negotiations are continuing to extend the existing boundary south-eastwards, and in October 2013 the two States agreed to undertake joint seismic surveys in this area.⁸³ The current boundary could be extended for a short distance without too much difficulty (see Fig. 5). However, it will be extremely difficult for the two States to extend this boundary too much farther because it will then intrude into the maritime zones of the disputed Parcel Islands.

The ocean space between the Paracels and the Vietnamese coast is likely to be a continual source of friction. China is likely to maintain that as the islands in the Paracels are entitled to an EEZ of their own, the waters between the islands and the Vietnamese coast are an area of overlapping EEZ claims between opposite States. Vietnam is likely to maintain that as it has sovereignty over the Paracels, all the waters between its coast and the Paracels are either its territorial sea or its EEZ.

Vietnam officially protested China's use of straight baselines around the Paracels.⁸⁴ However, it has not taken any official position on whether the Parcel Islands are entitled to an EEZ and continental shelf of their own. Given the size of Woody Island, it may be in Vietnam's own interests to recognise that the largest islands in the Paracels are entitled to an EEZ of their own.

In addition to overlapping EEZ claims, complex issues arise because of the outer continental shelf claim by Vietnam north-west of the Spratlys.⁸⁵ Vietnam's claim to an extended continental shelf in this area will overlap with the EEZ claim of China from the Parcel Islands. China has indicated this in its diplomatic notes regarding Vietnam's claim.⁸⁶ This raises the issue of whether an extended shelf claim will "trump" an EEZ claim from offshore islands in the

82 *Agreement on Fishery Co-operation in the Tonkin Gulf between the Government of the People's Republic of China and the Government of the Socialist Republic of Vietnam* (Beijing, 25 December 2000, in force 30 June 2004), in Nguyen Hong Thao, 'Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf' (2005) 36(1) *ODIL* 25–44, at pp. 35–41.

83 Teddy Ng, 'China, Vietnam to set up Group to Explore Disputed South China Sea', 14 October 2013, available at <http://www.scmp.com/news/china/article/1331106/china-vietnam-set-group-explore-disputed-south-china-sea>; accessed 7 April 2014.

84 Daniel J. Dzurek, 'The People's Republic of China Straight Baseline Claim' (1996) 4(2) *IBRU Boundary and Security Bulletin Summer* 77–89, at p. 80.

85 CLCS, Submission—Viet Nam (n 29).

86 In its *Note Verbale* of 7 May 2009 objecting to a separate Submission of Viet Nam (n 29), China stated that "the above Submission by the Socialist Republic of Viet Nam has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea".

same area with regard to rights and jurisdiction over the seabed and subsoil. The decision of the International Tribunal for the Law of the Sea (ITLOS) in the *Bangladesh/Myanmar* case suggests that this is a possibility in some cases.⁸⁷ If so, there may ultimately have to be separate EEZ and outer continental shelf boundary agreements in the area, although the prospects of this being realised in the foreseeable future are dim in light of the parties' irreconcilable positions on sovereignty over the Parcel Islands.

Prospects for Joint Development in Areas of Overlapping Claims

China and Vietnam seem to have only two options if they want an alternative other than continued uncertainty and friction. First, they can decide to take the issue of which State has the better claim of sovereignty over the Parcel Islands to an international court or tribunal, and once the sovereignty issue is resolved, they can attempt to negotiate an EEZ boundary agreement. It seems unlikely that China would even consider this option, given the fact that it controls the Paracels, has invested heavily in them and does not even acknowledge the existence of a sovereignty dispute over them.⁸⁸ It is also uncertain whether Vietnam would seriously entertain this option, given its own oft-repeated uncompromising position, analogous to China's, regarding sovereignty over the Paracels.⁸⁹

The second option would be to agree, either formally or informally, to set aside the sovereignty dispute over the Paracels and to try to reach an agreement on a combination of maritime boundaries and JDAs in areas of overlapping maritime claims. For example, the existing maritime boundary agreement between China and Vietnam in the Gulf of Tonkin could be extended from the terminus of their existing agreement in a south-eastward direction until a potential tripoint between the mainland coasts (including Hainan Island) and a full effect equidistance line involving the Parcel Islands, without undue

87 International Tribunal for the Law of the Sea (ITLOS): *Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, paras 463–474, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf; accessed 7 April 2014.

88 Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 21 June 21 2012 (n 67).

89 See, for example, Note from the Permanent Mission of the Socialist Republic of Viet Nam to the United Nations addressed to the Secretary General of the United Nations, 86/HC-2009, 18 August 2009, available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf; accessed 7 April 2014.

difficulty (see Fig. 5). Additionally, without either China or Vietnam formally giving up their respective sovereignty claims to the Paracels, JDAs could be reached in the areas of overlapping claims between the disputed islands and the mainland coasts of the parties.

Under such a scenario, it is conceivable that each side might have a greater share in the joint zone on “their” side of the theoretical line ignoring the influence of the Paracel Islands. Moreover, Vietnam and China could agree to jointly develop the resources in areas to the south-east of the Paracels, including Macclesfield Bank.⁹⁰ It is recognised that the compromises and concessions require significant reserves of political will. Accordingly, the potential scenarios outlined here are likely to prove difficult to realise in practice. The above suggestions are not, however, intended as a proposed solution, but as examples of the sort of options available to the two States in a negotiating context where the primary objective is to achieve a mutually beneficial solution in an area that will otherwise be a protracted source of tension and potential conflict.

Area between the Philippines and Taiwan and China

The north-east section of the South China Sea is bordered by China and Taiwan in the north and the Philippines in the east. There is one significant offshore atoll in the area, Pratas Island. The Pratas Island consists of a number of features located on an atoll that is 2.8 km long and 0.865 km wide, located about 140 nm off the coast of China and about 240 nm west of Taiwan.⁹¹ Pratas Island is claimed by China and Taiwan, and occupied by Taiwan. Given the size of Pratas Island, it can be argued in good faith that it is not a rock within the meaning of Article 121(3) of the LOSC, but an island entitled, in principle, to an EEZ and continental shelf of its own.

Areas of Overlapping Maritime Claims

The Philippines claims an EEZ from its archipelagic baselines.⁹² This produces an area of overlapping EEZ claims between opposite States which would be

90 If the Philippines claimed an extended continental shelf beyond 200 nm from its archipelago, some of its extended continental shelf area might overlap with the EEZ generated from the Paracel Islands, which may include Macclesfield Bank.

91 Tungsha Atolls (Pratas), available at <http://island.giee.ntnu.edu.tw/islandengweb/007.htm>; Marine National Park Headquarters, Introduction to Dongsha Atoll National Park, available at http://marine.cpami.gov.tw/english/index.php?option=com_efpublication&view=pdetailen&id=4&Itemid=79; accessed 7 April 2014.

92 Philippines—Presidential Decree No. 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for other Purposes (n 18), Section 1.

governed by Article 74 of the LOSC. The Philippines has submitted a claim to the CLCS for an extended continental shelf in Benham Rise, off its east coast, and has indicated that it intends to claim an extended shelf in other areas,⁹³ which may include the area in the direction of Pratas Island and China's southern coast. China's future claim to an extended continental shelf in this area is likely to overlap with the future extended continental shelf claim of the Philippines.

Taiwan claims an EEZ from the straight baselines around its main island. It also claims an EEZ from the Pratas Island, using a combination of normal baselines and straight baselines.⁹⁴ This area of overlapping claims includes the Luzon Strait between Taiwan and the Philippines, which is a major route for international navigation. Taiwan is not a party to the LOSC. Therefore, it is not eligible to submit an extended continental shelf claim to the CLCS.

The overlapping EEZ claims in the area of Luzon Strait involve Taiwan and the Philippines, because Taiwan has effective control of Taiwan Island and Pratas Island. To define the possible EEZ boundary in this sector of the South China Sea, an equidistance line can be drawn between Taiwan and Pratas Island on one side, and the nearest Philippine islands on the other side (see Fig. 6). If the equidistance lines were drawn from basepoints on the largest islands rather than from the straight baselines, it would avoid any problems relating to the legality of the baselines employed by Taiwan. In this context it can be observed that the Philippines would be likely to push for recognition of its archipelagic baselines. However, although this would likely be a point of discussion, the influence of the archipelagic baselines of the Philippines on the construction of the theoretical equidistance line is marginal, because an equidistance line constructed from basepoints on the islands would be the almost the same as one constructed from the archipelagic baselines.

The fact that the Taiwan's use of straight baselines may not be in compliance with the LOSC is not likely to have a significant effect on securing an agreement on the EEZ boundary (or a provisional fisheries enforcement line) between Taiwan and the Philippines, because the baselines need not be taken into account in the negotiations of the EEZ boundary. As Bautista and Schofield have noted, if a theoretical equidistance line is constructed between the Philippines and Taiwan, it would proceed from an eastern tripoint where

93 CLCS, Submission—Philippines (n 30).

94 Republic of China—Law on the Territorial Sea and the Contiguous Zone (n 18), Art 4; Law on the Exclusive Economic Zone and the Continental Shelf (n 18), Art 2; Territorial Sea Baseline, Outer Limits of the Territorial Sea and Contiguous Zone Amended, 26 November 2009, available at <http://navy.mnd.gov.tw/english/Publish.aspx?cnid=844&p=38637&Level=1>; accessed 7 April 2014.

the claims of Taiwan and the Philippines meet those generated from Japan's Sakishima Islands group, then proceed through the Bashi Channel in the Luzon Strait into the South China Sea "proper" (see Fig. 6).⁹⁵

Further to the south-west, a theoretical equidistance line between China and the Philippines relies on basepoints located on Pratas Island on one side and the western coast of the major Philippine island of Luzon on the other. In light of the small size and thus restricted coastal front of Pratas Island in comparison to Luzon, if maritime boundary delimitation negotiations were ever initiated with China/Taiwan, the Philippines would be highly likely to argue that Pratas Island be accorded a substantially reduced effect, if not entirely ignored and "enclaved" within their territorial sea areas. Further, if a theoretical equidistance line is generated between the mainland coast of China and the Philippines, baseline issues and particularly the questionable straight baselines of China fronting its mainland coast would likely prove to be key points of discussion. The Philippines would be likely to insist that any equidistance line be measured from China's coast, that is, from its normal baselines, rather than from its straight baselines (see Fig. 6). The maritime area lying between an equidistance line according full weight to the Paracel Islands and one giving them nil effect and, moreover, ignoring the potential influence of China's claimed straight baselines, represents a theoretical area of overlapping maritime claims. As illustrated in Fig. 6, Pratas Island also has a potential impact on the scope of the above-mentioned high seas pocket in the northern-central part of the South China Sea.

Prospects for Joint Development in Areas of Overlapping Claims

Special legal problems arise in reaching an agreement on the EEZ boundary in this area because of the legal status of Taiwan. The position of the Governments of both China and Taiwan is that there is one China and Taiwan is part of China. The Republic of China Government on Taiwan is recognised by a small number of States as the legitimate government of China. The People's Republic of China Government in Beijing represents China in the United Nations. Taiwan was not invited to participate in the negotiation and signing of the LOSC and it was unable to become a party to it.⁹⁶ The Philippines, like the other

95 See Lowell Bautista and Clive Schofield, 'Philippine-China Border Relations: Cautious Engagement Amidst Tensions', in Bruce Elleman, Stephen Kotkin and Clive H. Schofield (eds) *Beijing's Power and China's Borders: Twenty Neighbors in Asia* (M.E. Sharpe Publishers, Armonk/New York, 2012) 235–250, at pp. 237–238. See also, Prescott and Schofield (n 14), at p. 434.

96 Ministry of Foreign Affairs Republic of China (Taiwan), 'Declaration of the Republic of China on the Outer Limits of Its Continental Shelf' (12 May 2009), available at <http://>

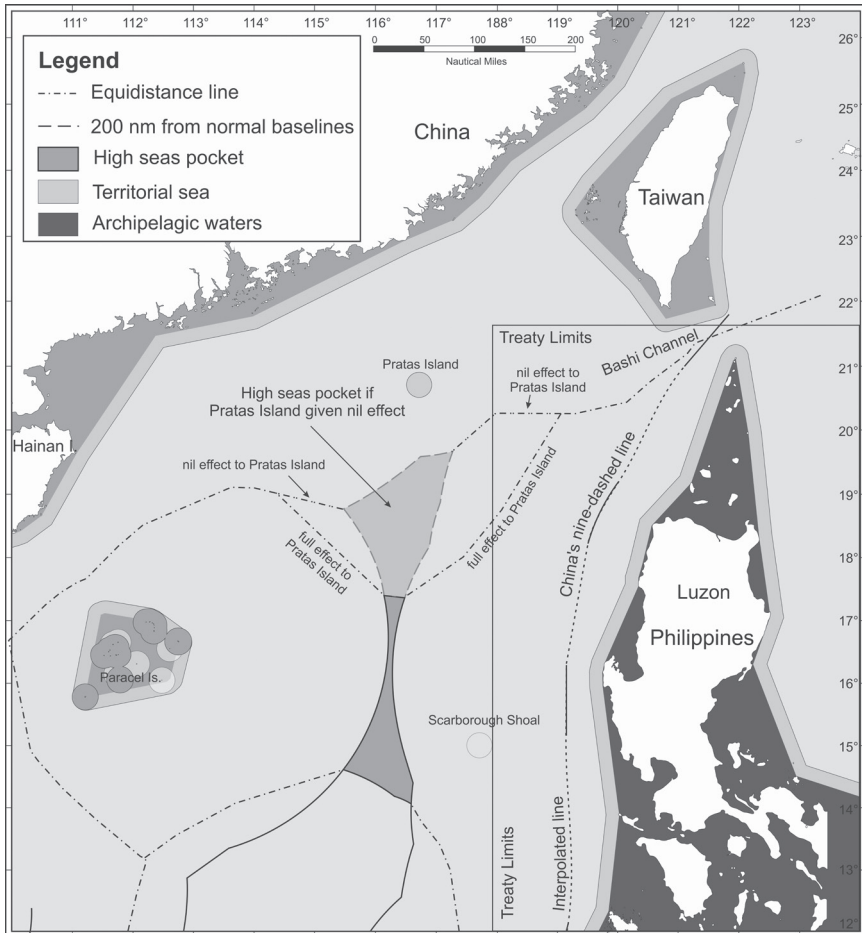


FIGURE 6 *Overlapping maritime claims in the North-eastern South China Sea*

ASEAN member States, follows a ‘One China Policy’ under which it officially recognises that Taiwan is part of China.⁹⁷ This makes it extremely difficult, if not impossible, for the Philippines to negotiate an EEZ boundary with Taiwan in this area. China is likely to object if the Philippines and Taiwan enter into

www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/ad125edc-048e-45de-93bc-11427232687b?arfid=7b3b4d7a-8ee7-43a9-97f8-7f3d313ad781&opno=84ba3639-be42-4966-b873-78a267de8cfi; accessed 7 April 2014.

97 Taipei Economic and Cultural Office in the Philippines, Taiwan-Philippine Relations, available at <http://www.roc-taiwan.org/PH/ct.asp?xItem=57628&CtNode=4705&mp=272&xpi>; accessed 7 April 2014.

formal maritime boundary negotiations because it would be contrary to the 'One China Policy'.

On the other hand, the Taipei authorities, not the Beijing authorities, are in effective control not only of Pratas Island, but arguably also of the waters in this area, both in the vicinity of Taiwan itself, but also proximate to Pratas Island; and Taiwanese fishing vessels fish in these waters. Therefore, for an agreement to be effective, Taiwan would have to be a party to it, or at least not challenge it. In this context, it is perhaps noteworthy that Taiwan was able to conclude a joint fisheries agreement with Japan in April 2013 in respect of parts of the southern East China Sea—suggesting the possibility of an analogous arrangement being applied to parts of the north-eastern South China Sea.⁹⁸

It has been reported that following an incident in 2013, in which the Philippines coast guard fired on a Taiwanese fishing vessel and killed a Taiwanese fisherman, the Taiwan authorities have requested the Philippines authorities to enter into some kind of provisional arrangement with respect to fishing in these waters in order to prevent potential conflicts in the area of overlapping EEZ claims.⁹⁹ Any arrangement must be consistent with the 'One China Policy' so that it does not raise an objection from China. The dispute

98 The agreement does, however, exclude the 12-nm territorial waters of the disputed Senkaku/Diaoyutai Islands and its conclusion is without prejudice to the parties' positions concerning that dispute. See Shih Hsiu-chuan, 'Taiwan, Japan ink fisheries agreement', *Taipei Times*, 11 April 2013. Available at <http://www.taipeitimes.com/News/front/archives/2013/04/11/2003559323/2>; accessed 7 April 2014.

99 Philippines and Taiwan have agreed to: refrain from using force in enforcing fisheries laws and regulations, inform each other of their respective maritime law enforcement procedures; establish a mechanism for prompt notification when an enforcement operation is underway against any fishing vessel of the other party, and set up a mechanism for the prompt release of detained fishing vessels and their crews. See the Press Release of the Ministry of Foreign Affairs of the Republic of China (Taiwan), 8 August 2013, available at <http://www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/eb8081fd-8616-4263-8b96-f443c63b3294?arfid=12e3ae93-5bcb-43a6-90cb-05ff0268cafc&opno=3874e0ced467-4f72-b271-a5af8d47ab33>; See also Camille Diola, 'Taiwan Ready to Revive Fishery Talks with Philippines', 8 August 2013, available at <http://www.philstar.com/headlines/2013/08/08/1066891/taiwan-ready-revive-fishery-talks-philippines>; Elaine Hou, 'Taiwan, Philippines to Set Up Working Group for Fishery Issues', 22 October 2012, available at <http://focustaiwan.tw/news/aip/201310220048.aspx>; Kelvin Huang and James Lee, 'Foreign Ministry Reports Progress in Taiwan-Philippines Fishery Talks', 28 October 2013, available at <http://focustaiwan.tw/news/aip/201310280016.aspx>; accessed 7 April 2014.

settlement procedures in Part XV will not be relevant to any dispute between the Philippines and Taiwan because Taiwan is not a party to the LOSC.

A further potential complication in this area is the fact that the theoretical equidistance lines outlined above and illustrated in Fig. 6 cut through the Philippines Treaty Limits area or rectangular “box”. This may lead to complications in pursuing negotiations, particularly towards maritime boundary delimitation, on the Philippines domestic front.¹⁰⁰

In conclusion, this area of the South China Sea presents issues of boundary delimitation and fisheries cooperation between China, Taiwan and the Philippines which are complicated in particular by the status of Taiwan. Nonetheless, it is conceivable that joint arrangements and other provisional arrangements of a practical nature could be agreed upon, for example in relation to fisheries resources, as has already occurred in parts of the East China Sea, if the governments concerned recognise their common interests and can agree on practical steps to cooperate in this area.

Scarborough Shoal Area

Scarborough Shoal (or Reef) is located approximately 124 nm from the Philippines, well within the EEZ claimed by the Philippines from its main archipelago.¹⁰¹ Scarborough Shoal is a large atoll with a lagoon of about 150 km² surrounded by a reef.¹⁰² Most of the reef is either completely submerged or above water only at low tide, but it contains four to six small rocks which are permanently above water at high tide.¹⁰³ Some Chinese writers have claimed that it is part of Macclesfield Bank,¹⁰⁴ but given the distance from Macclesfield

100 See discussion in text at footnotes *supra* 9–16; Also see Bautista and Schofield (n 95), at pp. 238 and 242–243.

101 Republic of the Philippine, Official Gazette, ‘Philippines Position on Bajo de Masinloc (Scarborough Shoal) and the Waters within its Vicinity’ Department of Foreign Affairs (18 April 2012), available at <http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/>; accessed 7 April 2014.

102 Keyuan Zou, ‘Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?’ (1999) 7(2) *IBRU Boundary and Security Bulletin* 71–81, at p. 71.

103 *Ibid.*; Philippines Position on Bajo de Masinloc (n 101). The relevant British Admiralty Sailing Directions (Pilot) describe Scarborough Reef as being “step-to on all sides and consists of a narrow belt of coral enclosing a lagoon of clear blue water”; South Rock, at 3m high, is the “tallest rock” located at the south-east extremity of the reef. See United Kingdom Hydrographic Office, *Admiralty Sailing Directions: China Sea Pilot* (Volume 2, 9th ed., UKHO, Taunton, 2010) 74.

104 Zou (n 102), at p. 71; Keyuan Zou, ‘The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands’ (1999) 14(1) *International Journal of Marine and Coastal Law (IJMCL)* 27–55,

Bank and the depth of the waters in the area between them, it is difficult to argue that it is geographically part of Macclesfield Bank.

The rocks in the Scarborough Shoal are very small and contain no vegetation. Consequently, they appear to be a classic case of “rocks which cannot sustain human habitation or economic life of their own”. Following an incident in 2012, in which a naval vessel of the Philippines arrested Chinese fishing vessels in the lagoon, China has allegedly taken ‘effective control’ of the atoll.¹⁰⁵ It reportedly has coast guard vessels in the area and allegedly does not allow vessels from the Philippines to enter the lagoon.¹⁰⁶

Areas of Overlapping Maritime Claims

The Philippines has claimed an EEZ from the archipelagic baselines surrounding its main archipelago.¹⁰⁷ Although it has yet to issue charts or geographic coordinates setting out the outer limit lines of its EEZ, an EEZ claim from its archipelagic baselines would be consistent with the LOSC, and would include the waters around Scarborough Shoal.

China, Taiwan and the Philippines all claim sovereignty over Scarborough Shoal and over the 12-nm territorial sea surrounding it.¹⁰⁸ The disputes concerning Scarborough Shoal are essentially disputes between the Philippines

at p. 28; Embassy of the People's Republic of China in the Republic of the Philippines, ‘Huangyan Dao Shi Wen (Ten Basic Questions regarding the Scarborough Shoal)’, 16 June 2012, available at <http://www.fmprc.gov.cn/ce/ceph/chn/zgxw/t941671.htm>; accessed 7 April 2014.

105 M. Taylor Fravel, ‘China’s Island Strategy: “Redefine the Status Quo”’, 1 November 2012, available at <http://thediplomat.com/china-power/chinas-island-strategy-redefine-the-status-quo/>; Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on 1 July 2013, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1055206.shtml; accessed 7 April 2014.

106 Jojo Malig, ‘China Claims Control of Scarborough Waters’, 24 May 2012, available at <http://www.abs-cbnnews.com/-depth/05/24/12/china-claims-control-scarborough-waters>; Tarra Quismundo, ‘China’s Surveillance Ships back at Scarborough Shoal’, 8 January 2013, available at <http://globalnation.inquirer.net/80007/chinas-surveillance-ships-back-at-scarborough-shoal>; accessed 7 April 2014.

107 Philippines—Presidential Decree No. 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for other Purposes (n 18), Section 1.

108 Philippines—Republic Act No. 9522 (n 17), Section 2(2); Foreign Ministry Spokesperson Hua Chunying’s Remarks on the Philippines’ Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea, 26 April 2013, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1035577.shtml; accessed 7 April 2014.

and China, with Taiwan taking a position analogous to that of China. Because the rocks on the shoal are islands as defined in Article 121 of the LOSC (that is, naturally formed areas of land surrounded by and above water at high tide), these rocks are subject to a claim of sovereignty.

None of the Claimants have designated baselines for measuring the territorial sea from the Scarborough Shoal. If the rocks above water at high tide are situated on an atoll, the baseline for measuring the territorial sea may be the seaward low-water line of the reef.¹⁰⁹ Because this is a very large atoll, using the seaward low-water line of the reef as the baseline could significantly increase the area of territorial sea surrounding the shoal. Also, the waters inside the lagoon enclosed by straight baselines would be internal waters. Alternatively, if there are drying rocks on the atoll that are within 12 nm of any of the rocks that meet the definition of an island, the drying rocks would be low-tide elevations that can be used as basepoints in determining the baselines from which the territorial sea would be measured.¹¹⁰

Two major issues concerning Scarborough Shoal are not governed by the LOSC, but by general principles of international law. First, which State has the better claim to sovereignty over the islands? Second, what are the rights and obligations of the Claimants in the waters surrounding the disputed islands?

Relevance of LOSC Dispute Settlement Procedures

The most contentious issue with respect to Scarborough Shoal, other than the sovereignty dispute, is the legal status of the islands and their entitlement to maritime zones. The Philippines' legislation on baselines states that Scarborough Shoal is governed by the regime of islands in Article 121 of the LOSC, without stating how Article 121 would apply.¹¹¹ However, the position of the Philippines in its arbitration case with China is that Scarborough Shoal is not entitled to an EEZ or continental shelf of its own because the small rocks fall within Article 121(3) of the LOSC, which provides that "rocks which cannot sustain human habitation or economic life of their own" shall have no EEZ or continental shelf.¹¹² This issue is important to the Philippines because Scarborough Shoal is situated in the EEZ which the Philippines claims from its archipelagic baselines. If the rocks are entitled only to a 12-nm territorial

109 LOSC Art. 6.

110 LOSC Art. 13.

111 Philippines—Republic Act No. 9522 (n 17), Section 2(2).

112 Philippines—Notification and Statement of Claims on West Philippine Sea (n 43).

sea, then the only 'disputed waters' where China could claim any rights would be the 12-nm territorial sea surrounding the islands. The waters seaward of the outer limit of Scarborough Shoal's territorial sea would be the EEZ of the Philippines, where it has sovereign rights to explore and exploit the natural resources (see Fig. 6).

On the other hand, if the Arbitral Tribunal were to hold that the islands in the Scarborough Shoal are in principle entitled to an EEZ of their own, an issue of overlapping EEZ would arise. It would then be a case of delimitation of the EEZ boundaries between opposite States, which is governed by Article 74. Given that China has exercised its right under Article 298 to opt out of the compulsory procedures entailing binding decisions for disputes on the interpretation or application of Article 74, this issue would have to be resolved in bilateral negotiations.

Conclusion on Scarborough Shoal

The area around Scarborough Shoal provokes a bilateral problem between China and the Philippines. Some of the issues concerning the waters in and around the shoal could be resolved by the Arbitral Tribunal in the pending case between the Philippines and China if it decides that it has jurisdiction to hear the case. On the other hand, it might be possible for the two States to settle the case before an Award is issued by the Arbitral Tribunal. The issues concerning Scarborough Shoal are fairly straightforward compared to many areas in the South China Sea. If China and the Philippines could establish the necessary trust and political will, it might be possible for them to reach an amicable arrangement with respect to fishing in and around Scarborough Shoal, provided such arrangements, like all provisional arrangements, are without prejudice to the underlying sovereignty disputes and a final agreement delimiting the maritime boundaries.¹¹³

Indonesia's EEZ Boundaries off the Natuna Islands

There are no disputed islands in the south-western-most section of the South China Sea. Indonesia has undisputed sovereignty over the Natuna Islands.

Area of Overlapping Maritime Claims

Indonesia has agreements delimiting its continental shelf boundaries in this area with Malaysia to both the east and west and with Vietnam to the north.¹¹⁴

¹¹³ LOSC Arts. 74(3) and 83(3).

¹¹⁴ Agreement between the Government of Malaysia and the Government of Indonesia on the Delimitation of the Continental Shelves between the two Countries (27 October

Indonesia negotiated these agreements in 1969 and 2003, respectively. Although the area encompassed by China's nine-dashed line map cuts across these agreed continental shelf boundaries, as illustrated on Fig. 7, no available record indicates that China has objected to Indonesia's boundary agreements with Malaysia and Vietnam.¹¹⁵ This raises the issue of whether, because of its silence, China is precluded from asserting any rights to resources on the continental shelf in this area, even though the area is partially inside China's nine-dashed line.

Indonesia's claim to an EEZ in this area extends beyond the limits of its continental shelf boundary agreements with Malaysia and Vietnam.¹¹⁶ This indicates that Indonesia is not prepared to use the continental shelf boundaries to delimit its EEZ boundaries with Malaysia and Vietnam. Therefore, Indonesia must negotiate bilateral agreements with its neighbours setting out the EEZ boundaries (see Fig. 7).

1969); Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia Concerning the Delimitation of the Continental Shelf Boundary (26 June 2003, in force 29 May 2007), available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm>; accessed 7 April 2014.

115 For example, Oegroseno, referring to the continental shelf boundary agreed between Indonesia and Malaysia in 1969 (n 114), states unequivocally that “[n]ot a single country has challenged the validity of this 45 year-old treaty that divides rather significantly certain segments of the scs [South China Sea]”. See Arif Havas Oegroseno, ‘Indonesia, South China Sea and the 11/10/9-dashed lines’, *Jakarta Post*, 9 April 2014. Available at <http://www.thejakartapost.com/news/2014/04/09/indonesia-south-china-sea-and-1109-dashed-lines.html>; accessed 15 April 2014.

116 Indonesia—Act No. 5 of 1983 on the Indonesian Exclusive Economic Zone, 18 October 1983, Art 2, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IDN_1983_Act.pdf; that Indonesia's EEZ claim extends beyond its agreed continental shelf boundaries with neighbouring States is confirmed by reference to official Indonesian government mapping, notably its National Map which is issued on an annual basis and which clearly illustrates an Indonesian EEZ limit that is further seaward than Indonesia's agreed continental shelf boundary lines. See, for example, Bakosurtanal, *The National Map of the Unitary States of Indonesia [Peta Negara Kesatuan Republik Indonesia]* (generally referred to as *Peta NKRI*), 2013, Cibinong, Indonesia. The same limits are also reflected in depictions of Indonesia's fisheries management zone or Wilayah Pengelolaan Perikanan (WPP), in keeping with the Indonesian Ministry of Marine Affairs and Fisheries (MMAF) Regulation Number 1 of 2009 on Fisheries Management Areas, available at http://infohukum.kkp.go.id/files_permen/PER%2001%20MEN%202009.pdf (in Indonesian) accessed 7 April 2014.

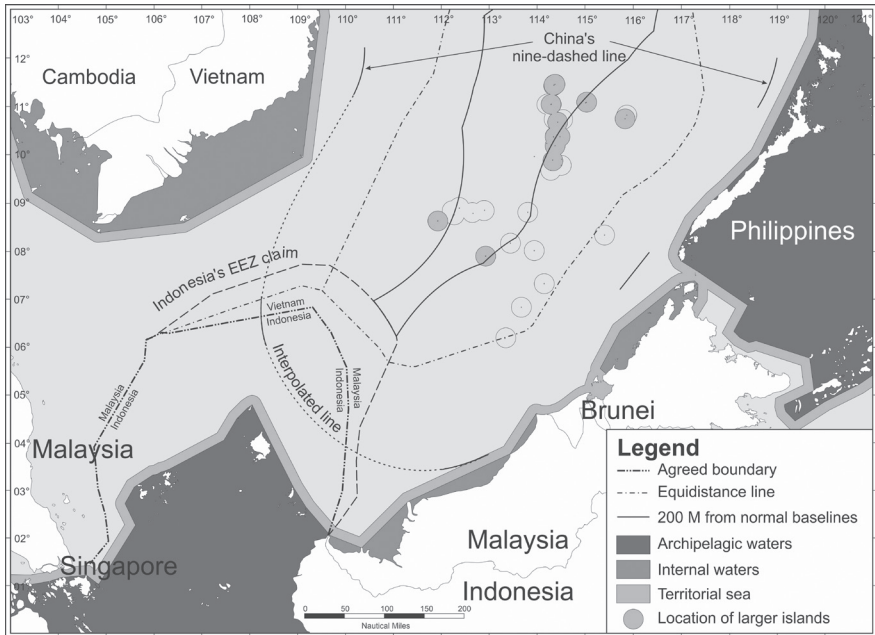


FIGURE 7 *Maritime boundaries and overlapping maritime claims in the South-western South China Sea*

Indonesia has been resistant to any suggestion that it must negotiate a maritime boundary agreement with China because its maritime zones overlap with those claimed by China.¹¹⁷ However, if China were to claim an EEZ from the largest islands in the Spratlys and draw a full-effect equidistance line from the larger Spratly Islands, it would create an overlap with the north-eastern part of Indonesia's EEZ claim. In such a case, Indonesia is likely to take the view that the small isolated and largely uninhabited Spratly Islands should be accorded a reduced effect so that the claims from the Spratly Islands would not overlap with Indonesia's EEZ claim from the Natuna Islands.¹¹⁸

Conclusions

The major obstacle which must be overcome before JDAS can be seriously considered is to reach agreement on the areas of overlapping claims where JDAS

¹¹⁷ See in particular, Oegroseno (n 115).

¹¹⁸ See I. Made Andi Arsana and Clive Schofield, 'Indonesia's "Invisible" Border with China', in Elleman, Kotkin and Schofield (n 95) 60–79, at pp. 67–70.

and other cooperative provisional arrangements can take place. At the present time, there is substantial uncertainty with respect to the areas of overlapping EEZ claims between the mainland coasts and the islands. This is because none of the Claimants have indicated which islands, if any, they believe are entitled to an EEZ and continental shelf of their own. Furthermore, none of the Claimants have indicated the baselines on the islands over which they claim sovereignty or issued charts or geographic coordinates showing the outer limit of the EEZ claims from the islands.

Agreement on areas for joint development is not possible if China maintains that the area for joint development must include all of the ocean space within the nine-dashed line. On the other hand, agreement on areas for joint development is also not possible if the ASEAN Claimants insist that none of the disputed islands in the South China Sea are entitled to an EEZ and continental shelf of their own.

There are several advantages to pursuing discussions to agree on areas of overlapping claims where joint development can take place. First, the arrangements in areas of overlapping claims would be without prejudice to sovereignty claims over the islands or final boundary delimitation agreements between the islands and the mainland coasts. Second, the difficult issues regarding the status of the extended continental shelf claims and their overlap with EEZ claims from the islands could be avoided. Third, the Claimants could remain on the features they presently occupy, again without prejudice to a final settlement of the disputes. Fourth, it would not be necessary to determine the status of each and every geographic feature if Claimants could agree on which of the larger islands in the Spratlys and Paracels are entitled in principle to an EEZ and continental shelf of their own.

China could trigger a paradigm shift in its disputes in the South China Sea if it were to formally declare an EEZ from the largest islands in the Spratly Islands and Paracel Islands and issue charts indicating the outer limit of its EEZ claims from the islands. If China made such an EEZ claim, it would set the stage for serious negotiations on setting aside the disputes, defining the areas of overlapping claims, and pursuing negotiations for JDAs and other “provisional arrangements of a practical nature” under Article 74(3) of the LOSC. In our view, such a move would go a long way towards both clarifying claims and de-escalating the South China Sea disputes.

The advantage for China in making such a claim is that it would be consistent with the LOSC. In addition, it would leave a large area of overlapping EEZ claims that would be subject to the provisions in Article 74. The States concerned would be under an obligation to comply with Article 74(3) and to make every effort to enter into “provisional arrangements of a practical nature”, such as JDAs. Furthermore, they would be under an obligation not to take any

unilateral actions which would jeopardise or hamper the reaching of a final agreement on the maritime boundaries. In other words, the unilateral claim by China would define the area of overlapping claims and establish a legal basis consistent with the LOSC for joint development in the area of overlapping claims. Another advantage for China if it followed this course of action is that the ASEAN Claimants would not have the option of invoking the compulsory procedures entailing binding decisions in section 2 of Part XV of the LOSC on the settlement of disputes.

The ASEAN Claimants would also benefit if China were to exercise this option. This is because it would clarify which areas of their EEZs were not subject to overlapping claims. They could then exercise their sovereign rights and jurisdiction in these areas without fear of any interference and without any prospect of their right to the natural resources in these areas of their EEZs being called into question.

If China defined its EEZ claim from the Paracel Islands, it would complicate its bilateral negotiations for defining its boundary with Vietnam. However, it would clarify the issues which China and Vietnam must address in this area. Clarifying the dimensions of areas of overlapping maritime claims involving the disputed islands represents an essential first step towards discussion on potential joint development areas. As illustrated by boundary delimitation and joint fishing arrangements between China and Vietnam in the Gulf of Tonkin, a solution may not be impossible.

The issues in the remaining areas in the other sectors in the South China Sea are far less complex. The Scarborough Shoal area is a territorial sovereignty dispute between China and the Philippines which could be set aside by provisional arrangements to jointly develop the fisheries resources in the waters in and surrounding the shoal. The area between the Philippines and Taiwan is a boundary delimitation dispute complicated by the role of Pratas Island, baselines issues and the legal status of Taiwan; however, it could be resolved through provisional arrangements between the three parties with respect to, for example, the joint development of the fisheries resources. The area off Indonesia's Natuna Island is such a distance from any disputed islands that the degree of overlapping claims is constrained and is arguably of limited interest to China. However, if an equidistance line were constructed between Indonesia's Natuna Islands and the largest islands in the Spratlys, some overlap would appear to exist, and this may have to be addressed. Nevertheless, a much higher priority for Indonesia will be to negotiate its EEZ boundary agreements with Vietnam and Malaysia in this area.

In summary, despite its limitations, the LOSC provides a legal framework which the Claimants could utilise if they have the political will and trust

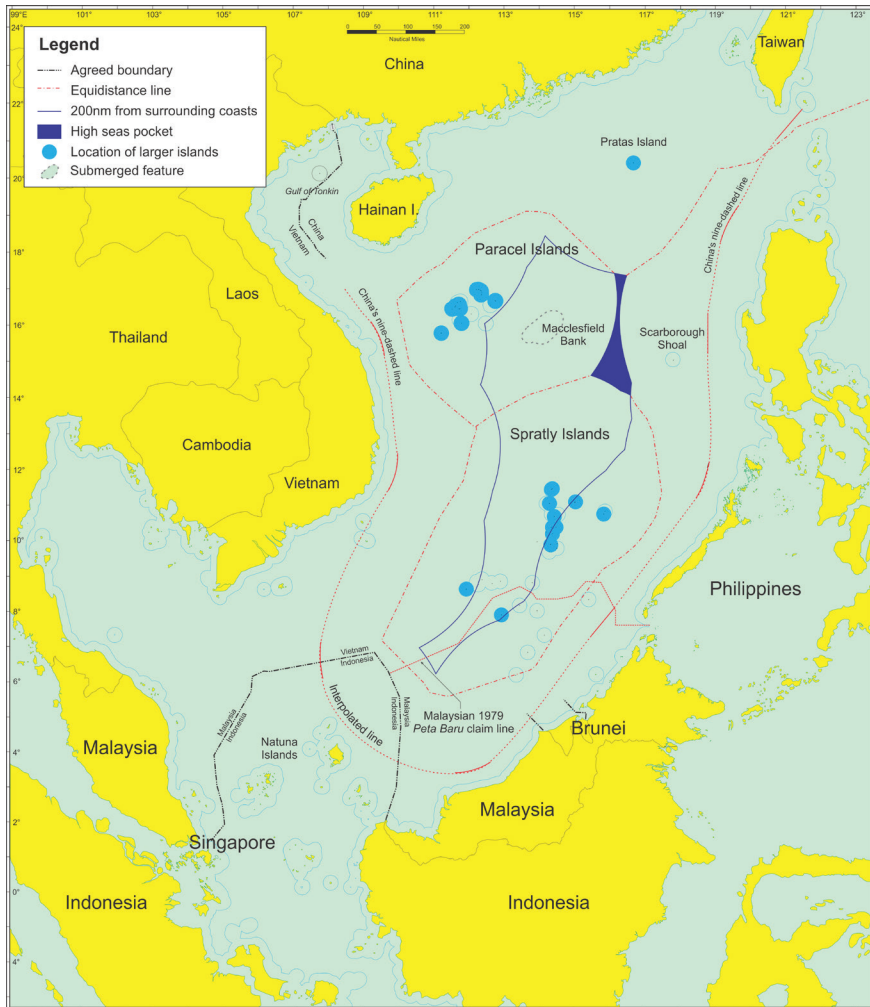


FIGURE 8 Existing maritime claims and EEZ claim from largest islands (with equidistance lines) and 12-nm territorial sea arcs from rocks

necessary to set aside the disputes on territorial sovereignty and maritime claims and begin serious negotiations on JDAs and other provisional arrangements of a practical nature in the areas of overlapping maritime claims. The LOSC also provides a framework whereby all of the Claimants, including China, can pursue their national interests in the South China Sea in a manner that is consistent with international law. The proposals advanced here offer an avenue whereby China’s maritime claims can be brought into conformity with the LOSC at relatively limited cost but potentially substantial

benefit to itself and to the other South China Sea Claimants. This would potentially provide a platform for constructive discussions on cooperation and joint development in the areas of overlapping claims defined on the basis of the LOSC, which would be to the benefit of all parties to the South China Sea disputes.

Appendix: Explanatory Note on Figures

Fig. 1 is a version of the map prepared by Clive Schofield and Andi Arsana of the Australian National Centre for Ocean Resources and Security (ANCORS) for the *agora* on the South China Sea in the *American Journal of International Law (AJIL)*, Vol. 107, No. 1, January 2013, page 96. It was based on the map issued by the Geographer's Office of the U.S. Department of State in January 2010, No. 803425AI(G02257) 1–10. However, the authors determined that several features near Vanguard Bank which had 12-nm territorial sea arcs around them on the US map were in fact submerged. Therefore, these features were not included in the map for the *AJIL*. Subsequent analysis has led to the conclusion that other features are not above high-tide features and this is reflected in the other figures included in this article (see below).

Fig. 2 is adapted from Fig. 2.11 in Clive Schofield, 'Defining the "Boundary" between Land and Sea: Territorial Sea Baselines in the South China Sea', in S Jayakumar, Tommy Koh and Robert Beckman, eds, *The South China Sea Disputes and the Law of the Sea* (Edward Elgar Publishing, forthcoming, UK, 2014). It illustrates that the impact of straight baseline claims is significantly more pronounced with respect to "additional" areas of internal waters and territorial sea generated than in terms of expanding the limits of the EEZ.

Fig. 3 illustrates the effect if an EEZ were claimed from the largest islands in the South China Sea. In drawing hypothetical EEZ claims from the islands *in the direction of the open sea* in the central part of the South China Sea, the islands were given full effect by drawing 200-nm arcs from the islands. As indicated on the map, the result is that all of the South China Sea would be subject to EEZ claims, except for a relatively small high seas pocket in the north-eastern part of the South China Sea.

With respect to maritime spaces lying between the larger islands of the South China Sea and the surrounding mainland and main island coasts, overlapping maritime claims would result as there is predominantly less than 400 nm between them. Consequently, *in the direction of mainland coasts* of the States bordering the South China Sea, theoretical equidistance lines were constructed between the islands and the surrounding mainland and main island coasts. The reason for this is that even if the islands are in principle entitled to an EEZ of 200 nm, the maximum extent of the EEZ that could be accorded to the islands would be that within a strict equidistance line drawn between the islands and the mainland coast.

The 28 islands used for this exercise are 12 islands in the Spratly Islands group, 15 islands in the Paracel Islands group, and Pratas Island. These features were selected based on analysis of satellite imagery and information in the sailing directions issued by the United States and the United Kingdom and relevant literature.¹¹⁹ Evidence suggests that these features meet the definition of an island in Article 121, that is, they are naturally formed areas of land surrounded by and above water at high tide. The islands that were selected are the largest and/or are vegetated. Therefore, it can be maintained that they are not “rocks which cannot sustain human habitation or economic life of its own that are not entitled to an EEZ and continental shelf. Accordingly, it can be argued that these features are capable, in principle, of generating an EEZ of their own”.

The insular features in the Spratly Islands group used to construct theoretical equidistance lines and 200-nm arcs were as follows (from largest to smallest in estimated area): Itu Aba, Thitu Island, West York Island, Northeast Cay, Southwest Cay, Spratly Island, Namyt Island, Nansha(n) Island, Sand Cay, Loaita Island, Sin Cowe Island and Amboyna Cay.

The islands in the Paracel Islands group used for the same exercise were as follows: Woody Island and Rocky Islet, Lincoln Island, Triton Island, Pattle Island, Duncan Island, West Sand, Money Island, Robert Island, North Island, Drummond Island, Tree Island, South Island, Middle Island, Passuh Keah and South Sand. These features are the largest in the Paracel Islands group and all but West Sand appear to be vegetated. Given the relatively large size of West Sand, coupled with its connection to the reef on which Tree Island (which is vegetated) lies, West Sand was included as a basepoint for the purposes of the present exercise.¹²⁰ However, given its proximity to Tree Island, another of the larger Paracel Islands which is also vegetated, its influence on the theoretical equidistance line is minimal.

119 Hancox and Prescott (n 53); UKHO, *Admiralty Sailing Directions China Sea Pilot* (Volume 1, 8th ed., UKHO, Taunton, 2010) 75–78; Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (Martinus Nijhoff Publishers, Boston, 1997) 226–235; UKHO, *China Sea Pilot*, Vol. 2 (n 103), at pp. 64–73; and United States National Geospatial-Intelligence Agency, *Sailing Directions (ENROUTE) PUB.161, South China Sea and the Gulf of Thailand* (13th ed., National Geospatial-Intelligence Agency, Bethesda, 2011) 5–14.

120 The relevant British Admiralty Sailing Directions (Pilot) note that West Sand is a “sandy cay” located near the west end of the reef on which Tree Island lies. See UKHO, *China Sea Pilot*, Vol. 1 (n 119), at p. 77.

These features are annotated on Fig. 3. Also, note that for the purposes of this exercise, normal baselines were applied not only for the islands themselves, but also with respect to the surrounding mainland and main island coastlines.

Fig. 4 illustrates full, half and one-quarter weighting or effect accorded to the larger islands in the Spratly and Paracel Island groups identified in Fig. 3.

Figs. 5, 6 and 7 are larger-scale maps detailing maritime claims, including EEZ claims from larger islands, in the north-western, north-eastern and southern parts of the South China Sea. These maps, together with Figs. 8 and 9, illustrate the location of the larger islands of the Spratly Islands and Paracel Islands groups used for the construction of theoretical equidistance lines by showing shaded territorial sea areas around them. Unshaded 12-nm arcs are shown with respect to smaller features which may meet the definition of an island under the LOSC, but which in our view are too small and barren to be inhabitable and entitled to an EEZ of their own (see below). Unshaded 12-nm territorial sea limits are also shown around mainland and main island coasts.

Fig. 8 shows the hypothetical EEZ claims from the islands and the equidistance lines. As noted above, the islands used to generate the EEZ claims are shown with shaded 12-nm territorial sea circles around them, and unshaded 12-nm territorial sea arcs are shown around other features which may meet the definition of an island under the LOSC, but which were not used to claim an EEZ because they are too small and barren to be inhabitable and entitled to an EEZ of their own. The number of features in the latter category is very uncertain because past studies and past maps are not consistent. Although the 2010 US State Department map has 12-nm territorial sea arcs around more than 50 other features in the Spratly Islands, our analysis of the previous studies and sailing directions indicates that 34 of those features are either clearly below water at high tide or the sources are inconsistent as to whether they are above water at high tide. Consequently, we have adopted a consciously conservative approach and exercised prudence and caution, drawing 12-nm arcs only around the 16 small features (in addition to the 12 larger islands identified above) in the Spratly Islands, which the previous studies consistently refer to as being above water at high tide. For similar reasons, we have drawn 12-nm arcs around Scarborough Shoal as there is consistent evidence that 4–6 small rocks on the reef are above water at high tide.

The features which we identified as rocks entitled to a 12-nm territorial sea of their own include Scarborough Shoal, as well as the following 16 features in

and inconsistencies with respect to hydrographic surveying in the region, it is acknowledged that a number of additional very small features may exist in the Paracel and Spratly Islands which are, in fact, above the high water. Such features can most plausibly be categorised as ‘rocks’ within the meaning of Article 121(3) of the LOSC and therefore would be capable of generating 12-nm territorial sea limits.¹²¹ However, even if such additional insular features do exist in the South China Sea, it is the authors’ view that they would not qualify as islands capable of generating EEZ and continental shelf rights and therefore would not have a meaningful impact on the central arguments advanced in this article.

Fig. 8 also shows the nine-dashed line that is indicated on Chinese maps of the South China Sea. The dashes on the Chinese map are indicated in bold and are also connected by interpolated lines to illustrate what China’s claim is if it claims rights and jurisdiction over all of the maritime space inside the nine-dashed line.¹²² It should be noted that there is inherent uncertainty related to both the location of the nine-dashed line and the interpolated intervening lines shown “joining” the nine dashes up. No official coordinates of the dashed line have been published. The dashed line segments illustrated were extracted from a map attached in the Chinese note to the Secretary-General of the United Nations in its response to Malaysia-Vietnam’s extended continental shelf submission and the intervening lines interpolated between them. This map therefore allows one to visualise the difference between the area inside the nine-dashed line and the area of overlapping claims that would result if an EEZ claim were made from the largest islands in the South China Sea.

121 In this context it is worth noting that, based on its past jurisprudence, the ICJ indicated in clear terms in 2012 that even the smallest island generates a 12-nm territorial sea. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 57), at para. 37.

122 Communications Received with regard to the Joint Submission made by Malaysia and Viet Nam (n 22), China (7 May 2009).