

Maritime Zones Generated by the Spratlys: Legal Analysis and Geographical Overview

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This paper is based on my project «The Legal Regime of Islands in the South China Sea». The central content is the question whether or not any of the Spratly Islands in the South China Sea (hereinafter SCS) have the capability to generate maritime zones of their own. This paper does not intend to enter a deep analysis of the issues in resolving the question of maritime zones generated by the Spratlys, but is rather a resume of the issues involved.

1. Introduction

The Spratly islands comprise of over one hundred obstacles in the SCS. (148 that are named, according to a recent survey) Those features are currently the main elements of the SCS dispute, and they are made subjects to a complex web of sovereignty claims. None of the littoral states have yet obtained acceptance for their claims to sovereignty to the offshore features. All the sovereignty claims to the Spratlys have weaknesses, and thus each nation must know that it may not ultimately or completely prevail if the dispute were to be presented to a tribunal or arbitrator. Dispute settlement approaches have suggested to disregard the sovereignty issues totally, due to the complex situation of different claims. These sovereignty issues are, however, only half of the problem because the maritime space and resources must be delimited as well. These issues are also very complicated, because many difficult preliminary issues have to be unravelled before the central problem of finding an equitable solution can be addressed.

All the littoral states now fight to gain the strongest position for the maritime delimitation settlement. But before the maritime boundary issues can be addressed it must also be decided whether or not the islands can generate any maritime zones of their own. On the one hand, if some of the islands can generate maritime zones, and possibly even the extensive 200 Nautical

mile zone or a continental shelf, this could severely influence the maritime delimitation in the SCS. On the other hand the isolated insular outcroppings scattered throughout the sea, will have minimal effect if not granted maritime zones of their own, and further they will have less importance to the littoral states because the valuable resources are found in the seas, seabed and subsoil, and not on the islands. The islands however, may have some military strategic value in regard of national security. Resolving the question whether or not the spratly features have the capacity to generate maritime zones of their own, might therefore be a valuable contribution to the process of finding an equitable solution to the SCS dispute.

2. The role of International law

The principles of International Law have been thought to play a key role in resolving the dispute. Nevertheless neither legal processes nor political negotiations have so far been successful in dispute resolutions. Moreover the littoral States` acceptance of the United Nations Convention on the Law of the Sea (Hereinafter LOS Convention), and the Conventions entry into force in 1994, makes it most likely to assume that the legal rights put down in the Convention might be a major tool in solving the dispute. To what degree the States actually will comply with the provisions of the Convention is nevertheless uncertain, and moreover a question on the political level. Although the role of international law in the SCS dispute remains an unresolved issue, the principles of International Law might not even be sufficient to resolve the dispute. It seems worth mentioning though, that the dispute settlement provisions may have some impact on future maritime delimitation. A settlement of the SCS dispute might construct precedents¹, which could be of major importance in resolving similar disputes in the future.

3. The relevance of the LOS Convention

The Conventions relevance to the SCS dispute is evident due to that all the littoral states, except Taiwan, have signed and ratified the agreement. Further many countries have said that they view the Convention as expressing in general the customary international law that applies to ocean issues. Customary international law are rules generally accepted among States through long and consistent practice, which also includes an «*opinio juris*», meaning a recognition by States of a certain practice as obligatory. This set of rules is legally binding on all states. The International Court of Justice has ruled that certain parts of the LOS Convention now are customary law. This strengthens the relevance of the Convention to the dispute due to that parts of the Convention are legally binding also for States not party to the Convention. It therefore seems justified to let the Convention be the framework of rules in this particular conflict. Nevertheless it should be noted that, parts of the Convention may not be universally accepted, and that regional practices can sometimes alter norms that are accepted elsewhere.

¹ Decision of certain legal aspects of one dispute, which is believed to settle these legal aspects also for future disputes.

Several preliminary interpretation issues have to be unravelled before any conclusions can be reached. First, the rules of the LOS Convention must be interpreted. A numerous of sources may have a say in this regard, but the main source is the Vienna Convention on the Law of Treaties (1969). Secondly it must be determined whether or not the specific provisions of the LOS Convention are customary law, and thirdly the geographical and geological facts about the Spratlys must be determined as well. How the terms of the provisions of the LOS Convention ultimately will be interpreted will eventually depend on the actual maritime claims made by nations on behalf of the offshore features they have sovereignty to, and the extent to which those claims are accepted by other States.

4. The definition of an island

Traditionally, international law has viewed with some indifference what kind of territory may generate a maritime zone, and it has thus been accepted that not only continental territory but also offshore features loosely referred to as «islands» might generate their own zones. The LOS Convention provides us with the definition of an island and rules for the generation of maritime zones of islands in Article 121.

Article 121

Regime of Islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks, which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf.

The term «island», from a geographical viewpoint, may encompass a variety of insular characteristics from sandbanks to large landmasses, depending on the functional purpose of the usage. For the purpose of claims to surrounding waters, the term, island, was first examined in the 1930 League of Nations Conference for the Codification of International law, where it was defined as «an area of land, which is permanently above high water mark». In the Convention on the Territorial Sea drafted at the first United Nations Conference on the Law of the Sea at Geneva in 1958 (UNCLOS I), the definition was modified to read, «a naturally formed area of land, surrounded by water, which is above water at high tide». This was a result of that the significance of islands and the need for a more precise definition had become more evident due to the amount of States gaining independence from colonial powers. In addition the international community became more concerned with the resources found in adjacent waters.

However, the drafters of the 1958 Conventions at UNCLOS I did not agree on the breadth of the territorial sea, and neither did the second conference in 1960 (UNCLOS II).

During the third UNCLOS the problem of defining islands for the purpose of claiming maritime zones arose again. Proposals for giving all islands the same status as continental territory were submitted. On the other hand it was proposed that the maritime zones of islands be limited, depending on factors such as size, habitation and population. The resulting compromise was the ambiguous language of article 121 of the LOS Convention. The definition of an island in the Convention on the Territorial Sea and the Contiguous Zone was adopted literally as paragraph one in the very same article. The negotiations on the breadth of the territorial sea resulted in the introduction of an Exclusive Economic Zone in addition to the former zones, namely the territorial sea, the contiguous zone, and the continental shelf. Although the definition of an island surely is considered customary law, there is still some doubt related to finding what is covered by the definition. What lies within the meaning of the conventional text, as to an area of land, a natural formation, surrounded by water and above water at high tide, can be interpreted differently by various nations. These criteria will be thoroughly analysed in my project «The Legal Regime of Island in the SCS».

5. The special «rocks» paragraph

Paragraph 3 of article 121 of the LOS Convention identifies a subcategory of islands that do not generate extended maritime zones, «Rocks, which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf». The terms used in this paragraph are not otherwise defined in the convention and commentators have speculated substantially about how the vague terms of this paragraph should be interpreted.

The big controversy combined with the understanding of the different phrases of article 121.3 of the LOS Convention, is probably the main element of the question as to whether or not the Spratly Islands can generate maritime zones. Although the term «rock» is not defined in the 1982 Convention, it appears from the context that a rock is a particular type of island. Probably, we can assume that ordinary definitions of the term are applicable, due to that the Convention provides no specific definition itself. This becomes even more evident because the Vienna Convention on the Law of Treaties (23 may 1969) states in its draft Article 31 (1) that «ordinary meaning» is the general rule of interpretation.

Further article 121.3 of the LOS Convention operates with the phrase «sustain human habitation or have economic life of its own». The terms of this phrase also give rise to various questions of interpretation. Must the island be capable of complete self-sufficiency? Does then self-sufficiency refer to the past, present or future? Is the phrase «of its own» addressed to the criteria «economic life» or both criteria's «economic life» and «human habitation»? Does the «of its own» phrase refer to economic life on the island specifically, or can the resources found

in the adjacent water and subsoil be taken into account when determining whether or not an island can have economic life? The convention itself provides no or little clues at all for the interpretation of these terms. They might, however, be resolved by resort to the dispute settlement system of the LOS Convention, or by a consensus of State practice derived from application of the rule.

Taking into consideration the eminent role of the International court of Justice and arbitrators in the definition of the law applicable to the delimitation of maritime boundaries, a similar contribution to the clarification of article 121.3 of the LOS Convention might be considered a possibility. However, there are a number of circumstances, which may cause the ICJ or an arbitrator to not always address the issue of article 121.3 even if it is raised by one of the parties to the proceedings. The cases concerning maritime delimitation, which have been decided until now, have not assessed article 121.3 of the LOS Convention in any detail. My project will examine the relevant sources for the purpose of finding a proper equitable interpretation of the "rocks" paragraph assessed to the SCS dispute.

Although the rule regarding «rocks» was originated in the LOS Convention it may still represent existing customary international law. The Continental Shelf Convention of 1958, provided limitations for the use of islands in generating continental shelves. Article 6 of the convention stated that disputes over zones created by islands are to be settled by agreement of the parties involved, and further that «special circumstances» may require limitations on the ocean space generated by the islands. These special circumstances were not defined in the Convention, thus one commentator has noted that size, position and importance may well be deciding criteria when assessing whether or not any particular island should be taken into account when forming a sea boundary. Further, the International Court of Justice in the Channel Island case, stated that «location» was a special circumstance in the meaning of article 6 of the Convention on the Continental Shelf. This illustrates that there also prior to the «rocks» paragraph in the 1982 Convention, were made restrictions on the capability of islands to generate maritime zones. We can therefore not exclude that paragraph 121.3 could be customary international law.

The entry into force of the Convention strengthens the argument that the limitations on entitlements of features defined as such rocks, is customary international law. If it is not part of customary international law, a non-party to the convention might argue that any rock feature within its sovereignty that otherwise qualifies as an island, be entitled to all maritime zones. Nevertheless such an entitlement, if it were claimed, would probably not be rewarded with a significant maritime zone since small features regularly have been discounted or even ignored in maritime delimitation issues brought before tribunals or arbitrators.

6. Which maritime zones are applicable to islands

In general, according to paragraph 2 of Article 121 of the LOS Convention, islands can generate ocean space just as continental landmasses do. Any island coming within the «island definition» in Article 121.1 is entitled to its own territorial sea and contiguous zone. However, the entitlement of the more extensive zones, the exclusive economic zone and the Continental shelf, requires additional requirements of habitation and economic viability stated in paragraph 121.3.

According to Article 3 of the LOS Convention, the Territorial Sea of an island stretches to a maximum of 12 nautical miles measured from the baseline of that island. The baseline is usually the low-water line of the coastline, but is subject to modifications due to certain geographical conditions. The baseline of an island is submitted to a special legal regime, and the drawing of those will affect the maritime zones. The drawing of baselines are also contested in the SCS dispute. The territorial sea is legally an extension of the State's territorial sovereignty. According to Article 2 of the LOS Convention, the State is given exclusive sovereign rights to the airspace over the area as well as its waters, seabed and subsoil. The Contiguous zone, however, according to Article 33 of the LOS Convention, stretches to a maximum of 12 nautical miles beyond the territorial sea, but the jurisdiction in this zone is limited to exercising rights concerning customs, fiscal, immigration or sanitary laws and regulations.

Only the features which truly qualifies as islands according to article 121.1 and the rocks paragraph in 121.3 may generate the extensive maritime zones. It is based on these extensive zones that the Spratly Islands are capable of taking up great areas of the South China Sea, which is believed to contain valuable resources. According to Articles 56 and 57 of the LOS Convention, the Exclusive Economic Zone of an island stretches to a maximum of 200 nautical miles from the baseline of that island. The state has sovereign rights for the purpose of exploiting and exploring the natural resources, whether living or non-living, of the sea, seabed and subsoil in that area. According to Article 76 of the LOS Convention, the Continental Shelf also stretches to a distance of 200 nautical miles, but has the potential to take up even greater areas seaward due to its natural prolongation. However, the sovereign rights of the shelf do not include the waters covering the shelf.

According to Article 2 of the LOS Convention, the waters on the landward side of the baseline form part of the Internal Waters of the State. The State, in these waters, exercises sovereign rights equal to the territorial sea in regard of exploring and exploiting the natural resources of the sea, seabed and subsoil.

7. The influence of baselines

Although the baseline issue is separate from issues related to generation of maritime zones, two specific approaches are worth mentioning. First, the use of low-tide elevations in the drawing of

baselines for islands. Low tide elevations are defined in the LOS Convention as naturally formed areas of land, surrounded by and above water at low-tide but submerged at high tide. Those features do not possess the status of islands in international law, and are not capable of generating any maritime zones of their own. Nevertheless Article 13 of the LOS Convention provides that any low-tide elevation situated within the territorial sea of an island, may be used for the measurement for the drawing of baselines of that island. This could in the most extreme instance lead to that the island could double the breadth of its territorial waters, or more precisely, extend the internal waters to a breadth similar to the territorial sea.

Many of the features of the Spratly Group are low-tide elevations situated in the territorial sea of the islands among the Group. The breadth of the maritime zones of the features, which qualify as islands in the Spratly Group, may therefore be influenced by the presence of low-tide elevations.

Secondly, the novel considerations regarding reefs in the LOS Convention may also influence the breadth of the maritime zones generated by the Spratlys. The reefs as opposed to the low-tide elevations may also be totally submerged. Article 6 of the LOS Convention which was not included in the previous law of the sea conventions states that, « In the case of islands situated on atolls or of islands having fringing reefs, the baseline of the low-water line of the territorial sea is the low-water line of the reef as shown by the appropriate symbol on charts officially recognised by the coastal State». This provision moves the baseline for measuring the coastal zones seaward from the low-water line of the core island (the traditional rule) to the reef line further seaward, making the waters on the landward side internal waters. In regard of the Spratly Islands generating maritime zones of their own this could have an impact on the breadth of these maritime zones. Geographical surveys have determined that many of the islands comprising the Spratly Group are situated on atolls or have fringing reefs attached to them. My project will try to examine the geographical facts of the Spratly Islands, for the purpose of establishing what impact reefs and low-tide elevations may have on the determination of maritime zones.

8. Artificial structures

At the first Law of the Sea Conference at Geneva in 1958, a proposal by the U.S. led to the insertion of the words «naturally formed» in the definition of an island. This clearly and finally excluded artificial islands and their potential to generate any maritime zones. Article 5(4) of the 1958 Continental Shelf Convention provided that such installations and devices, though under the jurisdiction of the coastal State, «do not possess the status of islands and that they have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal state».

Nevertheless, this issue has been subject to controversies and the text has met considerable resistance in certain regions of the world. Specifically in the Asian region, where we find numerous of so-called «stilt villages» or «dwellings built on piles» which are often built on offshore features which do not qualify as islands in the legal definition. However the stilt villages are probably the kind of artificial structures that have the most equitable reason for generation of maritime zones. Taking into account that one aim of the provisions of the LOS Convention regarding maritime generation, is that the sea areas adjacent to the «island» should be exploited for the exclusive benefit of the population thereof, it could seem justified granting them maritime zones.

In order to put this issue beyond doubt, the following provision was included in the 1982 Convention on the Law of the Sea as Article 60 (8): «*Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf*». As a compromise in the balance of granting artificial structures some kind of adjacent jurisdiction, and that attribution of a territorial sea would mean a unjustified encroachment of the High Seas, the artificial structures were granted safety zones with the maximum reach of 500 metres. These zones are to be publicised, and all ships must respect them, but these zones are in no sense territorial sea.

Many of the Spratly «Islands» are in fact of the artificial category and thus probably only capable of generating safety zones. One example among the Spratlys, is the Mischief Reef, which contains of a few low-tide elevations on which the Peoples Republic of China has built a large wooden complex on stilts. The Mischief Reef is truly an artificial island without capability of generating maritime zones according to the provisions of the LOS Convention, but the Chinese are believed to have a different view. An interesting case in this regard is that Japan claims to have measured extended maritime zones to an artificial island in the Pacific Ocean. These maritime zones apparently have been published on official charts and according to Chinese and Japanese sources have not been subject to any protests by other States. China has according to one commentator stated that this incident could serve as precedent for claiming maritime zones to artificial islands.

The relationship to the baseline issue is also evident for artificial structures. Article 7 and 47 of the LOS Convention provides the use of straight baselines and Archipelagic baselines to and from low-tide elevations on which lighthouses or similar installations are built. The constructions of artificial islands may thus have an impact on the breadth of these maritime zones. These baseline regimes «prima facie» may seem to open for an unjustified use of artificial structures to increase the seaward areas here. My project will thoroughly examine the significance of artificial structures in the Spratlys, in regard to the definition of an island and the capacity to generate maritime space.

9. Application to the Spratlys

In order to resolve the question regarding maritime zones generated by the Spratly Islands, one must also survey the geographical and geological characteristics of the features. This because, some of the legal requirements regarding the definition of an island and the generation of maritime zones of islands are based on geographical and geological facts. There are unfortunately not many sources available for this purpose, because many of the Spratly features have not yet been thoroughly researched. This research will principally make use of a Geographical description done by David Hancox and Victor Prescott for this purpose.

A geographical overview of the Spratly islands: My project is intended to categorise all the different Spratly features according to the requirements needed to qualify the island definition and to have the capacity to generate maritime zones.

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