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# RSIS COMMENTARIES

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## **The South China Sea Disputes: Formula for a Paradigm Shift?**

By Robert C Beckman and Clive H Schofield

### **Synopsis**

*China could trigger a paradigm shift in the disputes in the South China Sea if it were to issue charts indicating the outer limit of its exclusive economic zone (EEZ) claims from the islands over which it claims sovereignty. A full effect 'equidistance line' from the largest islands towards the surrounding coasts would create a large area of overlap between the EEZ claims of the ASEAN claimants and the EEZ claim of China from the disputed islands. This could lead to possible provisional arrangements of a practical nature, including joint development zones, in the areas of overlapping claims.*

### **Commentary**

CALLS ON China to clarify its maritime claims in the South China Sea have been reopened following the testimony on 5 February 2014 by US Assistant Secretary of State for the Asia-Pacific Daniel Russel, before the House Committee on Foreign Affairs, Subcommittee on Asia and the Pacific.

Mr Russel stated that the United States takes a strong position that maritime claims must accord with customary international law, and that this means all maritime claims must be derived from land features and otherwise comport with the international law of the sea. He further stated that claims in the South China Sea that are not derived from land features, such as those apparently based on China's so-called nine-dash line, are fundamentally flawed. He called upon China to clarify or adjust its maritime claims so as to bring them into accordance with the international law of the sea.

### **Bringing China's claim under international law**

Mr Russel's testimony raises a fundamental question that has long been at the heart of the legal disputes in the South China Sea. Can China bring its maritime claims into conformity with the international law and still protect its legitimate interests in the South China Sea? We believe that it can, and that it would be in China's interests to do so, not least because this could open the door to serious discussions on joint development in areas of overlapping maritime claims.

To begin with, China could trigger a paradigm shift in the disputes in the South China Sea if it were to issue charts indicating the outer limit of its exclusive economic zone (EEZ) claims from the islands over which it claims sovereignty. China could limit its EEZ claim to just the 12 largest islands in the Spratlys. Although the total land area of these islands is only about two square kilometres, they all have vegetation and in some cases

roads and structures have been built on them.

Therefore, it can be argued in good faith that they are “islands” entitled in principle to EEZ and continental shelf rights of their own under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and are not “rocks which cannot sustain human habitation or economic life of their own” that are only entitled to a 12 nm territorial sea.

The same logic can be applied to the largest features among the Paracel Islands group, together with the Pratas Islands. Claiming only the larger islands will not limit China’s maritime reach significantly, but it would bring these claims more in line with international law.

While it may appear that using only the larger disputed islands to generate its EEZ claim would entail a ‘loss’ of potential maritime areas to China, actually the impact would be minimal because of the way in which the islands are grouped in close proximity to each other, allowing a broad sweep of EEZ claims.

The islands in question could be given full effect – the full 200 nautical mile EEZ limits - in the direction of the open sea in the central part of the South China Sea. In the direction of the mainland coast or main archipelago of the ASEAN claimants, China could limit its EEZ claim from the selected islands to the theoretical ‘equidistance line’ between the islands and mainland coast or main archipelago. This is the mid-point in the waters from the islands claimed by China to the land belonging to the other claimant states.

### **Advantages to China and ASEAN claimants**

Past international practice suggests that the equidistance line is almost always the starting point in delimiting the boundary between offshore islands and mainland territory. Therefore, an EEZ claim extending from the islands to the equidistance line would arguably be a good faith claim comporting with UNCLOS. But is still likely to be contested by other claimants, in keeping with their own claims to sovereignty over disputed islands. They may also argue that such a full effect equidistance line would be inequitable and inconsistent with the reduced effect generally given to small offshore islands by international courts and tribunals.

As illustrated in the attached map, a full effect equidistance line from the largest islands towards the surrounding coasts would create a large area of overlapping claims in the middle of the South China Sea, with only a small “high seas pocket” beyond the limits of any EEZ claims.

This notwithstanding, the major advantage to China in making such a claim is that its actions would be consistent with UNCLOS and it could no longer be criticised as acting outside of international law. In addition, it would create an area of overlapping EEZ claims in which the States concerned would be under a legal obligation to make every effort to enter into ‘provisional arrangements of a practical nature’ such as joint development arrangements.

Further, the States concerned would be under an obligation pursuant to UNCLOS not to take any unilateral actions in the areas of overlapping claims that would jeopardise or hamper the reaching of a final agreement on the maritime boundaries. Also, if China followed this course of action it would not be subject to the compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS on the settlement of disputes. This is because China has exercised its right to make a declaration excluding disputes on the provisions on maritime boundaries from such procedures.

If China were to exercise this option it would benefit the ASEAN claimants because it would clarify which areas in the South China Sea are not areas of overlapping claims. The areas between the equidistance line and the mainland coasts or main archipelago of the ASEAN States would be within the EEZ of the ASEAN States where they have sovereign rights to explore and exploit the fisheries and hydrocarbon resources.

This would mean that the maritime spaces between the equidistance line and the nine-dash line would not be claimed by China. This is the natural consequence of China recognising that under international law maritime claims must be derived from land features.

### **Restoring trust and moving towards cooperation**

The claimant States could justify any move towards joint development in the area of overlapping claims to their domestic constituents by pointing out that such overlapping claims are based on UNCLOS, that any provisional arrangements are ‘without prejudice’ to their sovereignty claims to the islands as well as being without prejudice to any final agreement on maritime boundaries.

In summary, if China were to clarify the extent of its EEZ claims as described above it would send a clear signal

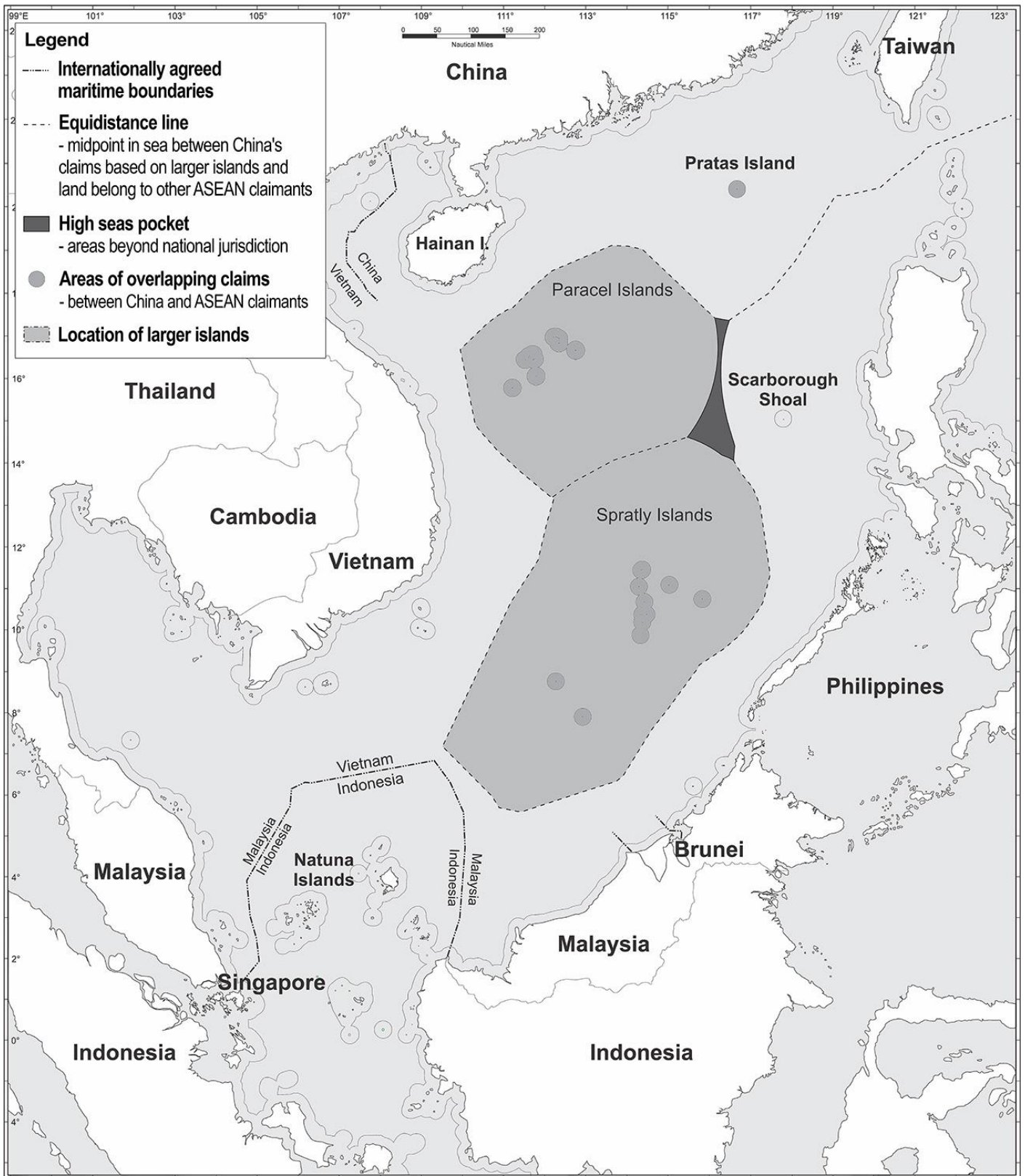
to the international community that it is willing to pursue its interests in accordance with the rules of international law. This would help restore trust and confidence in the region.

It could also trigger serious discussions and negotiations aimed at reaching a consensus on areas of overlapping claims defined in accordance with the provisions of UNCLOS and on provisional arrangements of a practical nature, including joint development arrangements, in these areas of overlapping claims.

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# Proposal to Resolve Overlapping Claims

If China's claims are based on larger islands only, this could ease the way for joint development of the overlapping areas with other ASEAN claimants.



RSIS Graphics by: Clive Schofield and I Made Andi Arsana