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U.S. Protests China's Maritime Claims in the South China Sea

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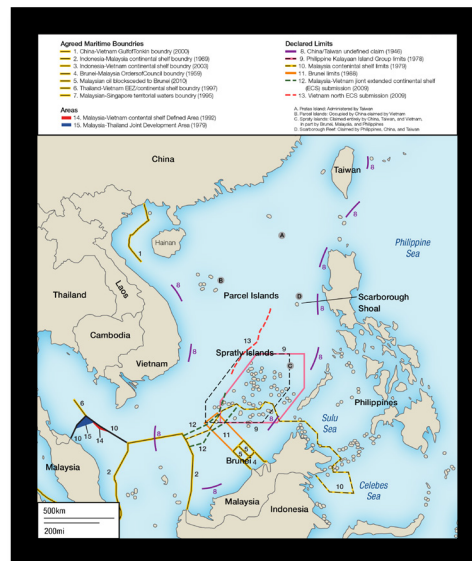
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The thoughts and opinions expressed are not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

The United States has consistently protested China's maritime claims in the South China Sea.

Background. The United States conveyed a letter to the United Nations Secretary General on June 1, 2020, rejecting China's unlawful maritime claims in the South China Sea (SCS) as inconsistent with international law as reflected in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹ The letter responds to China's *Note Verbale* No. CML/14/2019 sent by the Permanent Mission of the People's Republic of China (PRC) to the Secretary General on December 12, 2019,² objecting to Malaysia's submission to the Commission on the Limits of the Continental Shelf (CLCS), dated December 12, 2019, providing information on Malaysia's extended continental shelf claim in the SCS.³

China's *Note Verbale*. China objected to Malaysia's SCS submission indicating that Malaysia had seriously infringed on China's sovereignty, sovereign rights, and jurisdiction in the SCS. Specifically, China asserted that it (1) has sovereignty over Nanhai Zhudao (SCS Islands), consisting of Dongsha Qundao (Pratas Islands), Xisha Qundao (Paracel Islands), Zhongsha Qundao (Macclesfield Bank) and Nansha Qundao (Spratly Islands); (2) has internal waters, territorial sea and contiguous zone claims, based on Nanhai Zhudao; (3) has exclusive economic zone (EEZ) and continental shelf claims, based on Nanhai Zhudao; and (4) has historic rights in the SCS.



U.S. Protest. Heretofore, U.S. objections to China's unlawful maritime claims have been limited to bilateral diplomatic exchanges. However, given that China's *note verbale* asserts excessive maritime claims that are inconsistent

with the international law of the sea as reflected in UNCLOS, and that those claims purport to unlawfully interfere with the rights and freedoms enjoyed by the United States and all other States in the SCS, the United States felt compelled to reiterate its formal protest of these unlawful assertions to the UN. The United States originally communicated its views on China's unlawful SCS claims in a *note verbale* to the PRC on December 28, 2016, following the Tribunal's award in *The South China Sea Arbitration* on July 12, 2016.⁴

Historic Rights. The United States objects to China's claim to "historic rights" in the SCS because it exceeds the maritime entitlements China could assert consistent with UNCLOS. China's claim to "historic rights" in the SCS is not within the narrow category of historic claims recognized in UNCLOS (Articles 10 and 15). Numerous coastal States have EEZ and continental shelf entitlements in the SCS, and UNCLOS does not permit those entitlements to be overridden by another State's maritime claims based on "history." Moreover, even if the three-part legal test for "historic waters" were applicable, the nine-dashed-line (9DL) claim would fail each element of that test. The burden of establishing the existence of an historic title is on the claimant. A State must demonstrate (1) open, notorious, and effective exercise of authority over the body of water in question; (2) continuous exercise of that authority; and (3) acquiescence by foreign States in the exercise of that authority.⁵ China's purported exercise of authority over the SCS has not been open, notorious, and effective. China's purported exercise of authority over the SCS has not been continuous given that there is widespread usage of the area by other claimants that is not consistent with Chinese sovereignty or exclusive jurisdiction. Finally, no State has recognized the validity of China's historic claim within the 9DL.⁶

The U.S. position is consistent with the ruling of the Tribunal in *The South China Sea Arbitration*. The Tribunal concluded that UNCLOS comprehensively allocates rights to maritime areas, and that any historic rights China may have had to the resources in the SCS were extinguished by the EEZ provisions of the Convention. The Tribunal also found that there was no credible evidence that China had historically exercised exclusive control over the waters or resources of the SCS. Accordingly, the Tribunal decided that there was no legal basis for the PRC to claim historic rights to resources within the sea areas falling within the 9DL.⁷

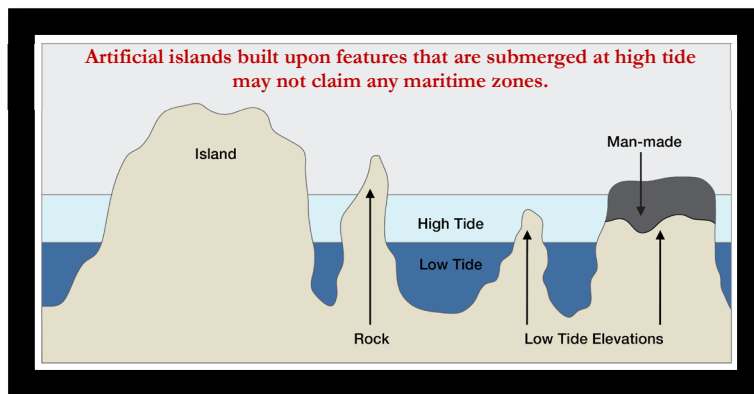
Straight Baselines. The United States objects to any claim of internal waters between the dispersed islands China claims in the SCS, and to any claim of maritime zones derived from treating the SCS island groups as a collective. UNCLOS is very clear—except as otherwise provided in the Convention, the normal baseline for measuring the breadth of the various maritime zones is the low-water line.⁸ Circumstances under which coastal States can deviate from the normal baselines are extremely limited.⁹ None of these exceptions would allow China to enclose the Paracel Islands, Spratly Islands, Pratas Islands, Macclesfield Bank, and Scarborough Reef within a system of straight or archipelagic baselines.

China has created 28 base points and connected them to enclose the Paracel Islands. UNCLOS does not allow straight baselines to be drawn in this area. The proper baseline would be the low-water line of the individual land features. Additionally, China would not be allowed to draw archipelagic straight baselines around the Paracels since UNCLOS prohibits continental States like China from establishing archipelagic straight baselines around their claimed mid-ocean archipelagoes.¹⁰



Status of Land Features. The United States objects to any claimed maritime zones based on features that are not islands or rocks under Article 121. China may not assert sovereignty over, or claim maritime zones derived from, entirely submerged features like Macclesfield Bank or James Shoal, or features like Mischief Reef and Second Thomas Shoal, which in their natural state are low-tide elevations (LTE) that lie beyond the 12-nm territorial sea of the mainland or an island/rock. Such features do not form part of the land territory of a State, are not subject to appropriation, and cannot generate a territorial sea or other maritime zones under UNCLOS.

The U.S. position is consistent with the decision of the Tribunal in *The South China Sea Arbitration*. In evaluating whether certain reefs claimed by China were entitled to establish maritime zones, the Tribunal noted that features are classified based on their “natural” (not man-made) condition.¹¹ Only “naturally” formed features that are above water at high tide are entitled to claim at least a 12-nm territorial sea. LTEs that are submerged at high tide may not claim any maritime zones.¹² Therefore, the fact that China has significantly modified these features to make them more “habitable” through extensive land reclamation and construction activities does not change the underlying character of the features, nor does it entitle these features to claim maritime zones that they would otherwise not be entitled to claim under the Convention.¹³ In other words, China cannot convert a LTE into a rock, or a rock into an island, by artificial enhancements to the features in order to claim more expansive maritime zones.



Restrictions on Navigational Freedoms. The United States objects to China's vast maritime claims in the SCS that exceed the entitlements China could legally claim under UNCLOS and thereby purport to restrict the rights and freedoms, including navigational rights and freedoms, enjoyed by all States. In this regard, the United States also notes that the Philippines,¹⁴ Vietnam,¹⁵ and Indonesia¹⁶ have independently conveyed their legal objections to China's unlawful claims set out in China's *Note Verbale* No. CML/14/2019. Accordingly, the United States again urges China to conform its maritime claims to UNCLOS; to comply with the Tribunal's July 12, 2016 decision, which is legally binding on China;¹⁷ and to cease its provocative and aggressive activities in the SCS.¹⁸

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