



# Global Maritime Governance and the South China Sea

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**July 2012**

## **Introduction**

The South China Sea, one of the world's geopolitical flashpoints, is heating up again. In recent months, China has engaged in a stand-off with the Philippines over fishing vessels at the Scarborough Shoal and has clashed with Vietnam over maritime oil fields. Shortly after Vietnam passed a law reaffirming the country's claim to the Spratly and Paracel Islands, an announcement on China National Offshore Oil Corporation's (CNOOC) website declared oil blocks within Vietnam's Exclusive Economic Zone open for exploration, causing sparks to fly. The spotlight on the dispute grew stronger yet in July, when the ASEAN ministerial summit hosted in Phnom Penh failed to produce a joint communiqué for the first time in its history, due to internal discord over declarations on the South China Sea. In addition, China has just established its newest prefecture-level city, Sansha, on a disputed Paracel island – with a military garrison expected to be quartered in the controversial location shortly.

The following paper aims to contextualize this conflict within the scope of global maritime governance and its range of formal institutions. After a brief description of the tensions in the South China Sea, the formal mechanisms of global maritime governance are unwrapped in order to answer the question: who governs the seas? First and foremost, the United Nations Convention on the Law of the Seas (UNCLOS) is described, as the institution determining sovereignty over portions of the seas. This section contains an overview of UNCLOS' legal zones of sovereignty, followed by a description of related intergovernmental organizations such as the International Seabed Authority (ISA) and dispute settlement bodies. Subsequently, the paper zooms in on intergovernmental organizations working in specific thematic areas, such as navigational safety and security, navigational and marine science, and the environment. Finally, regional arrangements come into focus, leading to a brief conclusion on the applicability of the machinery of global maritime governance to the case of the South China Sea.

## Sovereignty in the South China Sea

The maritime area known as the South China Sea, extending off the shores of China, Indonesia, Malaysia, Vietnam, The Philippines, Brunei and Taiwan, has been hotly contested for years. Disputes rage - sometimes quietly, sometimes with threatening displays of military might - over islands and inhabitable rocks included in island groups such as the Spratlys, the Paracels, the Senkakus and the Dokdos. While historical claims have been deeply rooted in national sovereignty issues, currently the South China Sea is also contentious for its fertile fishing grounds and critical shipping arteries, as well as its riches



Source: U.S. Central Intelligence Agency [Public domain] via Wikimedia Commons

in the deep: large reserves of oil and natural gas. Though the exact quantities of natural resources under the seabed in the South China Sea remain unknown, the prospects of their extraction are highly tempting to the growing South East Asian economies with their burgeoning populations and consequently, many lay claim on these waters.

The countries surrounding the South China Sea assert sovereignty over portions of the maritime territory invoking, on the one hand, arguably historical claims (China, for example, submitted a contested historical claims map from 1947, called the nine-dotted line<sup>1</sup>, to the UN Commission on the Limits of the Continental Shelf in May 2009<sup>2</sup>) and on the other, arguments based on the stipulations of the reigning United Nations Convention on the Law of the Seas (UNCLOS). In order to support their UNCLOS claims, states often struggle over sovereignty over seemingly meaningless, uninhabitable rocks in the sea, some of which disappear beneath the waves during high tide. These struggles are closely tied to the legal definitions contained in the UNCLOS, explained further below.

<sup>1</sup> The nine-dotted, U-shaped line is represented in green on the map in green above.

<sup>2</sup> It could be argued that 2009 was the year the South China Sea situation started heating up again, as a consequence of the South China Sea states' submissions to the UN Commission on the Limits of the Continental Shelf. 2009 was the deadline set by this body for proposals on the establishment of the continental shelf past 200 nautical miles (by UNCLOS Annex II, article 4, the submission deadline was originally set for 10 years from the entry into force of the Convention for each state; however, for states that had ratified prior to 1999, it was later postponed to ten years after the adoption of the Scientific and Technical Guidelines of the Commission (CLCS/11) in May 1999 (Doc. SPLOS/72)). In response to this deadline, Vietnam and Malaysia launched a [Joint submission](#) on the southern part of the South China Sea on May 6 2009, to which China replied with a Note Verbale (CML/18/2009) including the nine-dash map; Vietnam submitted information on the [North Area](#) on May 7 2009; and China submitted [preliminary information](#) to the Commission on May 11 2009.

## The mechanisms of global maritime governance

With bodies of water such as the South China Sea constituting over two thirds of the Earth's surface, the question is: how is this space governed? Sovereign states control their landmasses, but who owns the seas, and which actors determine the activities that can take place on and in the water? What follows is a description of the formal mechanisms constituting the machinery of global maritime governance, with a specific focus on intergovernmental organizations.

### UNCLOS: United Nations Convention on the Law of the Seas

The main international agreement governing the seas is the United Nations Convention on the Law of the Seas (UNCLOS), which was ratified in 1994 and currently has 162 member states, including the European Union. Most major coastal states, including China and Japan, are party to UNCLOS (both ratified in 1996); however the USA signed the Convention, but never ratified it. This hesitation is mainly related to Part XI of UNCLOS, which contains stipulations on the portion of the oceans which falls outside states' sovereign zones, an area which is governed by the International Seabed Authority (ISA), described below. Despite attempts to accommodate industrialized countries by modifying the original clauses of Part XI, the USA has remained outside the agreement.

### Defining areas of sovereignty in the seas

One of UNCLOS' greatest contributions to the governance of the oceans is the definition of rights over portions of the sea and seabed. The Convention defines a number of zones extending from states' coasts, with varying sovereign rights according to each zone.

Besides states' *internal waters*, the first of the defined zones is the *territorial waters*, which extend up to 12 nautical miles from the country's baseline<sup>3</sup> and where states can determine laws and exercise full sovereignty over resources and use of the territory. Foreign vessels are allowed 'innocent passage'<sup>4</sup> through territorial waters. In the *contiguous zone*, extending a further 12 nautical miles past the territorial seas, states also have the right to enforce their customs, fiscal, immigration and sanitary laws.

Habitually, the areas which are most strongly contested are the *Exclusive Economic Zone* (EEZ) and the *continental shelf*, which may or may not overlap. The EEZ, defined by

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<sup>3</sup> A state's baseline generally corresponds to the low-water line; however in a number of cases defined by UNCLOS article 7, including a coastline which is significantly indented or fringed by islands, the baseline can be redrawn as a straight line.

<sup>4</sup> UNCLOS article 19 defines that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State", continuing to detail activities that are considered prejudicial.

UNCLOS Part V, extends 200 nautical miles from a country's baseline. Within this zone, coastal states have sovereign rights with respect to natural resources superjacent to the seabed, whether living or non-living - such as fish stocks, or the renewable energy potential of the winds, water and currents. They also hold the rights to other activities for economic exploitation, as well as to marine science research and environmental protection. Foreign states enjoy the right to navigation and overflight in this area, and are entitled to lay submarine cables and pipelines. However, the provisions of the EEZ do *not* apply to the resources contained in the seafloor underneath these waters.

Indeed, the minerals and natural resources of the seabed are governed by a separate section of UNCLOS, namely Part VI, on the *continental shelf*. This area comprises the seabed and subsoil of the submarine areas either to a distance of 200 nautical miles from the baseline or contained within the natural prolongation of the land territory, whichever is greater. However, only 350 nautical miles of this natural prolongation, extending from the baseline, can be considered continental shelf of a country. Moreover, if a country claims an area of continental shelf beyond the 200 nautical miles of the EEZ, it must submit information on these limits to the UN Commission on the Limits of the Continental Shelf, which makes recommendations on the matter.

### **ISA: International Seabed Authority**

The implications of this definition of the continental shelf are not insignificant: according to UNCLOS article 77, coastal states hold sovereign rights over the exploration and exploitation of the shelf's natural resources; no other foreign party may undertake such activities without the express consent of the state. Nevertheless, this is not without boundaries: UNCLOS article 82 stipulates that the coastal state must make proportional payments to another UN body, the International Seabed Authority (ISA), in case of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baseline. These payments are then distributed by the ISA to the other parties of the UNCLOS on the basis of "equitable sharing criteria".

The ISA, furthermore, acts on behalf of "mankind as a whole" in the portion of the seas which do not form part of the territorial waters or EEZs of any state, referred to as the *high seas*. This organization, based in Jamaica, regulates deep-sea mining for minerals and other resources. States which have ratified the UNCLOS are *ipso facto* members of the ISA<sup>5</sup>.

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<sup>5</sup> This *ipso facto* membership of the ISA and corresponding adherence to its rules is arguably one of the major elements blocking the USA's ratification of the UNCLOS, as remarked above.

## **Islands, rocks and archipelagos**

The UNCLOS also contains stipulations on the baselines of *archipelagic* states (part IV) and on the extension of EEZs and territorial waters due to islands and/or rocks. An *island* is defined in article 121 as “a naturally formed area of land, surrounded by water, which is above water at high tide”. If an island pertains to a coastal state, the sovereign zones of that state are expanded to include the areas radiating out from the baseline of the islands. Clearly, states with islands at a great distance from their coasts can enjoy important advantages due to the expansion of these zones and the corresponding rights over minerals and natural resources they contain.

In this context, it is understandable that certain states, for example in the South China Sea, are hungry for sovereignty over disputed islands. Indeed, another implication of the UNCLOS definitions is that a number of uninhabitable *rocks* in the South China Sea and elsewhere are being claimed as islands. In article 121, the UNCLOS defines a rock as not being able to “sustain human habitation or economic life of their own”, stipulating that rocks “shall have no exclusive economic zone or continental shelf”. Therefore, it is of great interest to states to prove that rocks *do* sustain economic life and are not submerged at high tide, for example by building a helicopter pad atop the rock<sup>6</sup>, or demonstrating fishing and touristic activity around it<sup>7</sup>.

## **Mechanisms of dispute settlement**

While providing legal clarification on the zones of the oceans, it is apparent that UNCLOS definitions also shed a harsh light on many overlaps and gray zones in the seas, for example in the case of countries with adjacent or opposite coasts. In these cases, by article 279, state parties to the UNCLOS are under obligation to settle disputes by peaceful means. The states are free to choose between four different dispute settlement procedures: the *International Tribunal for the Law of the Sea (ITLOS)* – which has a specific Seabed Disputes Chamber, the International Court of Justice (ICJ), or one of two arbitral tribunals constituted in accordance with Annex VII or VIII of the UNCLOS.

## **Safety, security and sustainability at sea: further governance organs**

Turning to intergovernmental organizations involved in other sectors of global maritime governance, a major organization of reference is the IMO, the *International Maritime*

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<sup>6</sup> Though the simple fact of being above water at high tide due to an artificial structure does not automatically make a geological structure an island; such man-made structures are considered differently under UNCLOS (articles 60 and 80).

<sup>7</sup> It is important to note that article 77 stipulates that neither effective nor notional *occupation* (for example of islands), nor express proclamation determine the rights of a coastal state over the continental shelf.

*Organization.* Established in 1948, the IMO is currently made up of 170 member states (including China and the USA), each of which contribute to the organization's budget according to the tonnage of their merchant fleet<sup>8</sup>. The IMO is chiefly concerned with safety of navigation (for example through SOLAS, the International Convention for the Safety of Life at Sea), as well as maritime security (including terrorism and piracy) and environmental issues. In this respect, one of the IMO's main instruments is the International Convention for the Prevention of Pollution from Ships (MARPOL).

Other intergovernmental organizations concerned with the marine environment are the *International Whaling Commission (IWC)*, as well as the three *International Oil Pollution Compensation Funds (IOPCF)*. The latter provide compensation for oil pollution damage resulting from spills from oil tankers; member state contributions to the IOPCF are calculated based on how many tonnes of oil the state receives yearly. Furthermore, UNESCO's *International Oceanographic Commission (IOC)* contributes to scientific knowledge on the state of the oceans and coordinates the development of tsunami early warning systems, assisting additionally in monitoring the marine environment, for example regarding climate change. Finally, the *International Hydrographic Organization (IHO)*, headquartered in Monaco, supports navigational safety and the protection of the marine environment through coordination of national hydrographic agencies in the production of nautical charts, documents and information.

## **Regional maritime governance**

In addition to the global mechanisms of maritime governance described above, a number of specific arrangements exist for certain regions. Regarding *fishery*, such organizations are rife: examples are the Asia-Pacific Fishery Commission, the Northwest Atlantic Fisheries Organization, and the North Pacific Anadromous Fish Commission. Many of these fishery organizations are tied to the UN's Food and Agricultural Organization (FAO).

On the other hand, there are also more general regional agreements, such as the *Torres Strait Treaty* between Australia and Papua New Guinea, or the *Antarctic Treaty System*. In the case of the *Arctic*, eight states (Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russia, Sweden and the United States) meet in an intergovernmental forum known as the Arctic Council, which considers social and environmental topics. However, in the changing geographical area of the Arctic, the melting effects of global warming are causing new and economically interesting seaways to open up, while simultaneously exposing the natural resource-rich seabed beneath. Regarding the

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<sup>8</sup> At present, Panama is the greatest contributor to the IMO's budget.

ensuing sovereignty issues, recourse must again be sought in international customary law, the UNCLOS, and its bodies.

Returning to the *South China Sea*, no general regional agreement exists. However, there have been displays of intergovernmental cooperation on specific issues, such as ReCAAP (Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against Ships in Asia). Under this agreement, established in 2004, fourteen<sup>9</sup> South and South East Asian countries collaborate, share information, and agree to provide mutual legal assistance on matters of piracy and armed robbery. An additional instance of functional South East Asian regional security cooperation is the Malacca Strait Patrols, created in 2004. Malaysia, Indonesia, Singapore and Thailand (the latter joined in 2008) collaborate under this umbrella in order to jointly ensure security in the critical shipping lanes of the Straits of Malacca and Singapore.

### Applying global maritime governance to the South China Sea

Despite these examples of successful regional cooperation in specific issue areas, the EEZs and continental shelves of the South China Sea remain a source of strife. Legal resolution to the disputes is available in UNCLOS (and, in the case of Taiwan, which is unable to sign UNCLOS, in international customary law). However, in order for UNCLOS' stipulations to function fully, sovereignty over disputed islands such as the Spratlys and the Paracels must first be settled. This process, conducted through official UN channels such as the UN Commission on the Limits of the Continental Shelf, is a lengthy one. Moreover, states are free to choose whether or not to appeal to one of UNCLOS' binding dispute settlement mechanisms in order to resolve sovereignty conflicts. In the meantime, South East Asian states remain at a tense stand-off over the islands and rocks, as well as the fertile fishing grounds above water and the natural resources below. Until EEZs and the continental shelves are fully legally determined, extraction rights will remain a problem.



Source: Voice of America [Public domain], via Wikimedia Commons

<sup>9</sup> *De facto*, sixteen states collaborate within the ReCAAP framework: although Malaysia and Indonesia have not ratified the agreement, they do collaborate with the organization.



Alternatively, the South East Asian states can seek recourse in intergovernmental organizations which are not specifically focused on maritime governance, such as ASEAN<sup>10</sup> (the Association of Southeast Asian Nations) and its related body, the ARF (ASEAN Regional Forum). There have been multiple encounters between China (which is not a member of ASEAN) and the ASEAN parties on the maritime issues. This has led to such China-ASEAN joint statements as the Declaration on the South China Sea (1992) and the 2002 Declaration on the Conduct of the Parties in the South China Sea, expressly stating the intention to resolve the issues of sovereignty in the South China Sea by peaceful means.

However, despite recent accord on guidelines for the 2002 Declaration, progress to concretize the aforementioned agreements has been slow, and as recent tensions have highlighted, such declarations may not suffice in such a dynamic, growing and sovereignty-focused region as South East Asia. Other options to resolve - or circumvent - the sovereignty problems include initiatives of track two diplomacy, joint development of resources (though the details of such agreements could form a quagmire of their own), or networks of bilateral agreements, which China may feel more at ease with.

In summary, as described above, there are a number of institutional options for the resolution of the South China Sea conflict, both regional and global. Nevertheless, the combination of sensitivities concerning sovereignty – which are tightly knotted to domestic discourse in South East Asia – and strong economic interests may inhibit states in making full use of this machinery.

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<sup>10</sup> China and ASEAN have indeed been intensifying their collaboration, in the context of their significant economic interconnectedness. As a consequence, the ASEAN-China Free Trade Area came into force in 2010, yielding significant tariff reductions.

For further information on ESADEgeo's Position  
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