

## **UK government's position on legal issues arising in the South China Sea**

The UN Convention on the Law of the Sea – UNCLOS - is a critical part of the rules-based international system. Its provisions apply to 70% of the surface of the globe and form an essential component of global governance. The United Kingdom is fully committed to upholding its rules and securing the implementation of its rights and obligations. This commitment is a common endeavour of the international community. It is reflected in the UN General Assembly's annual Resolution on the oceans and law of the sea. This affirms "*the universal and unified character of the Convention*" that "*sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis for national, regional and global action and cooperation in the marine sector.*" The Resolution affirms that the integrity of UNCLOS "*needs to be maintained.*" The United Kingdom fully subscribes to this approach, which guides our response to ocean issues, including the South China Sea.

UNCLOS sets out the definitive legal framework for maritime claims and the rules of freedom of navigation. It also sets out obligations for bilateral, regional and international co-operation, including for the conservation and management of living resources, for the protection and preservation of the marine environment, and for the peaceful settlement of disputes. This legal framework applies in the South China Sea as it also applies across the rest of the world's ocean and seas.

The South China Sea is bordered by China, the Philippines, Malaysia, Brunei, Indonesia, Singapore, and Vietnam. An estimated one third of global shipping use routes that traverse the South China Sea. There are at least seven groups of geographical features spread across the South China Sea, five of which are contested. All of the States that claim sovereignty over features in the South China Sea are parties to UNCLOS.

The largest groups of features are the Spratly and Paracel groups. The Paracels are located in the northwest of the South China Sea and comprise about 130 individual features. China maintains a human presence in the Paracels, which are also claimed by Vietnam.

The Spratly group lies across the southeast flank of the South China Sea. It comprises about 100 individual features. China, the Philippines and Malaysia maintain a human presence on at least 34 of the features. Brunei claims Louisa Reef but does not have a human presence there.

The UK's position on the South China Sea is longstanding and well known. The UK does not take a position on the competing claims to sovereignty over features in that region. The UK's commitment is to upholding international law, including UNCLOS in particular. The UK calls upon all parties to refrain from activity likely to raise tensions, including land reclamation, construction and militarisation. The UK urges all parties to exercise restraint and behave responsibly in accordance with their international obligations

In 2016, the Arbitral Tribunal constituted under UNCLOS to consider the case brought by the Philippines against China set out its findings in the *South China Sea Arbitration*. As set out in UNCLOS, the findings of that Tribunal are binding on the two parties. The Arbitral Award has no binding force except between the two parties, but it is an important contribution to the jurisprudence on the law of the sea.

This paper addresses some specific considerations in the South China Sea.

### **Status of features**

UNCLOS sets out the rules under which various features are entitled to generate maritime zones, such as a territorial sea, exclusive economic zone and continental

shelf. The UK has carefully considered the various physical features within the South China Sea, without taking a position on the relative merits of sovereignty claims over them.

### Low-tide elevations

Some of the features in the South China Sea are low-tide elevations. A low-tide elevation is a natural feature that is above water at low tide, but submerged at high tide. A State has sovereignty over low-tide elevations within its territorial sea. A low-tide elevation that sits outside the territorial sea cannot be the subject of a sovereignty claim. It is also clear from Article 13 of UNCLOS that a low-tide elevation outside the territorial sea cannot generate a claim to its own territorial sea.

### Islands and Rocks

Article 121 of UNCLOS sets out the rules applicable to islands and rocks. Islands and rocks are capable of generating a maritime zone. In order to qualify as an island or rock, the area of land must be surrounded by the sea, not submerged, at high tide.

Islands are entitled to a territorial sea, contiguous zone, exclusive economic zone (or EEZ) and continental shelf. National airspace will exist above the territorial sea.

Rocks are defined in UNCLOS as being incapable of sustaining human habitation or an economic life of their own. They are only entitled to a territorial sea and contiguous zone.

The UK takes a case-by-case approach in reaching a view on the status of any particular feature – whether it is a rock or an island. If a small area of land has been inhabited at any time in the past by a settled population, or has a regular economic use by a mainland population – for example it is used for seasonal grazing of animals, collecting fruit or as a base for fishing - then this would be strong evidence that it should not be classified as a rock. However, the introduction on to a small feature of

an official or military presence, serviced from the outside, does not provide strong grounds that the feature is capable of sustaining human habitation or has an economic life of its own, and it should be classified as a rock.

The UK's practice with respect to this issue is well illustrated in our treatment of Rockall. Located in the Atlantic Ocean, Rockall had previously been used as a basepoint to generate a fishery zone of 200 nautical miles. However, when the decision to accede to UNCLOS was made in 1997 it was announced that:

'The United Kingdom fishery limits will need to be redefined...since Rockall is not a valid basepoint for such limits under article 121(3) of the Convention'.

An accompanying press statement explained that 'Rockall is incapable of sustaining human habitation'. This is despite the fact that at various times individuals have stayed on the rock, the longest being unsupported for 43 days.

#### "Naturally formed"

Whether a feature is a low tide elevation, a rock or an island is determined on the basis of its natural capacity, without external additions or modifications. Land reclamation cannot change the legal status of a natural feature for the purposes of UNCLOS. It cannot change a low-tide elevation into a rock or a rock into an island.

If a low-tide elevation is altered by means of dredging, artificial enhancement or the building or emplacement of artificial structures, this does not alter its legal status. If reclamation works take place on low-tide elevations, these constructions count as artificial islands, structures or installations. Outside of the territorial sea, the relevant rules of Articles 60, 80 and 87 of UNCLOS will apply to such features. Article 60(8) of UNCLOS is clear - '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'.

The UK has also considered the findings of the *South China Sea Arbitration* with respect to the status of various features in the South China Sea. That award found that the features under consideration in that case were either low-tide elevations or rocks. That finding is binding on both China and the Philippines.

### **Maritime delimitation**

UNCLOS sets the rules governing the extent to which different types of features can generate maritime zones. UNCLOS also sets the complete and definitive rules on the drawing of baselines from which maritime zones are measured.

Following the *South China Sea Arbitration*, a number of papers were published by the Chinese Government and Chinese academic institutions. The United Kingdom has given these careful consideration. These papers assert maritime claims in the South China Sea by the People's Republic of China based on "historic rights" and the concept of "offshore archipelagos". The United Kingdom objects to such claims in the South China Sea as not founded in law, as they are inconsistent with UNCLOS.

### **"Nine-dash line"**

The most well-known of China's assertions to a maritime zone in the South China Sea is the so-called "nine-dash line", which encompasses all of the waters of the South China Sea. China has never clearly articulated the basis of this claim. To the extent that the "nine-dash line" is based on claimed "historic rights" to resources within it, that is not consistent with the regime for maritime claims set out in UNCLOS.

This issue was considered in the *South China Sea Arbitration*. The Tribunal found that, while China had never clearly articulated the nature of its "nine-dash line" claims, these claims were not claims to historic title or sovereignty. They were claims to historic rights short of title, i.e. sovereign rights to exploit the living and non-living resources of area within the "nine-dash line".

The Tribunal held that UNCLOS defines the scope of maritime entitlements and sovereign rights of coastal states in the South China Sea. UNCLOS superseded any historic rights, or other sovereign rights or jurisdiction in excess of the areas provided for by its provisions. UNCLOS is comprehensive in setting out the nature of maritime entitlements - a territorial sea, a contiguous zone, an EEZ and a continental shelf - and the rights of other states within those zones. While the Tribunal recognised that states could agree to modify the operation of UNCLOS between them to include a recognition of historic rights, it found there was no evidence of agreement in this case.

The Tribunal found that China's claim to historic rights was not compatible with the provisions of UNCLOS. China's "nine-dash line" claim to most of the sea areas within the South China Sea was contrary to the allocation of maritime entitlements under UNCLOS, and was without lawful effect to the extent that it exceeded the geographic and substantive limits of China's maritime entitlements under UNCLOS. The UK fully concurs with the Tribunal's reasoning.

#### "Offshore archipelagos"

##### *China's claim*

In a statement "published after the 2016 *South China Sea Arbitration*, China asserted its sovereignty over four groups of features in the South China Sea – the Pratas, the Paracels, the Spratlys and Macclesfield Bank. China asserted a right to internal waters, a territorial sea, contiguous zone, EEZ and continental shelf based on these so-called 'offshore archipelago' groups, rather than on individual features. China effectively asserted a right to draw baselines around all four groups of features. It is important to note that China has not published charts with baselines around all the island groups, only the Paracels. Maritime zones based on China's 2016 statement could potentially be used to encompass approximately the same area of waters as the "nine-dash" line.

The term "archipelago" has a specific, technical meaning within UNCLOS. UNCLOS also defines the term "archipelagic state", and the availability of a special regime for constructing archipelagic baselines around such states owing to their unique

characteristics. However, China is not an archipelagic State, and does not claim to be one. It is therefore not entitled to construct 'archipelagic baselines' as permitted in UNCLOS.

The United Kingdom objects to the practice of employing straight baselines or archipelagic baselines around so-called "offshore archipelagos" to approximate the effect of archipelagic baselines. Such practice is inconsistent with UNCLOS.

This issue was also considered in the *South China Sea Arbitration* and the UK fully concurs with the findings of the Arbitral Tribunal. The Tribunal was clear that Article 7 of UNCLOS sets the limited and specific circumstances in which a State can draw straight baselines. These circumstances did not apply in the South China Sea context. The Tribunal affirmed that only archipelagic states can draw archipelagic baselines in accordance with Part IV of UNCLOS.

#### *Customary international law*

The government is aware that China is seeking to argue that there is a body of customary international law outside of UNCLOS that supports its claim to "offshore archipelagos". Paragraph 8 of the Preamble to UNCLOS says that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law". This means that customary international law may still be relevant to matters not regulated by UNCLOS. However, UNCLOS deals comprehensively with the drawing of baselines, including straight baselines, and the regime of archipelagic states. The question of customary international law therefore does not arise.

#### *UK practice*

The government is also aware that China may be seeking to rely on UK practice, specifically with respect to the Falkland Islands and the Turks and Caicos Islands, to support its attempt to draw straight baselines around groups of features in the South China Sea. Chinese academic publications have referred to baselines around these two UK Overseas Territories, as well as the baselines of other States. This is an

attempt to demonstrate that there is state practice to support a claimed body of customary international law of “offshore archipelagos” outside the provisions of UNCLOS. We reject this analysis and any claimed reliance on UK practice. The UK’s approach to straight baselines is based entirely on the provisions of Article 7 of UNCLOS, and not a special regime for ‘offshore archipelagos’.

The government has also considered the other examples of claimed “state practice” cited in the Chinese academic literature. We do not, and would not claim to speak for other states. It is clear to the government, however, that the examples relied upon are very different to the groups of features in the South China Sea. We have looked at the geographical nature of the features, the distances between the features and the construction of the baselines in the examples cited. The government does not believe that these form a reasonable basis to support China’s claim to “offshore archipelagos”.

### **Freedom of navigation**

The United Kingdom is clear that the group of rights generally considered under the heading “freedom of navigation”, including innocent passage and overflight, apply in the South China Sea regardless of respective sovereignty claims. The UK is also clear that all government ships, including naval ships, enjoy the rights of innocent passage in the territorial sea and freedom of navigation in the EEZ under UNCLOS. The UK will continue to exercise its rights of innocent passage, overflight and freedom of navigation in the South China Sea.

### **Safety of navigation**

The government is aware that there have been a number of incidents in the South China Sea where the safety of navigation has potentially been put at risk. The International Maritime Organisation has adopted detailed regulations governing the safety of navigation. It is an obligation upon all flag States to ensure that vessels flying their flag comply with these rules, which are vital to prevent collisions and ensure the safety of mariners. The UK calls upon all States to ensure that their vessels comply

with the rules on safety of navigation in the South China Sea. The UK also calls upon all States to instigate appropriate inquiries consistent with Article 94 of UNCLOS into navigational incidents involving ships flying their flag.

### **Protection of the marine environment**

The Tribunal in the *South China Sea Arbitration* also considered the obligations of states under UNCLOS to protect and preserve the marine environment. The Tribunal noted that the obligations of states in relation to environmental protection apply to areas within national jurisdiction as well as areas beyond national jurisdiction. States have a positive duty to prevent, or at least mitigate, significant harm to the environment.

The Tribunal found that “where a State is aware that vessels flying its flag are engaged in the harvest of species recognised internationally as being threatened with extinction, or are inflicting significant damage on rare or fragile ecosystems or the habitat of depleted, threatened, or endangered species, its obligations under the Convention include a duty to adopt rules and measures to prevent such acts”. The state must also maintain a level of vigilance in enforcing those rules and measures. The Tribunal found that China had failed in its obligations by tolerating and actively supporting Chinese fishermen in the harvesting of endangered species and the use of harmful fishing methods.

The Tribunal also found that China’s land reclamation and construction projects caused irreparable harm to the coral reef ecosystem. It found that China had not complied with its obligations under UNCLOS to cooperate and coordinate with other states on the protection and preservation of the marine environment. It had also failed to communicate an environmental impact assessment of the potential effects of such activities on the marine environment.

As a global leader in marine conservation, and founder of the Global Ocean Alliance, the UK takes the Tribunal’s findings in this respect very seriously. The UK calls upon

all States in the region to comply with their obligations to protect and preserve the marine environment.

Foreign, Commonwealth & Development Office

September 2020