



Chinese vessels, believed to be manned by Chinese maritime militia personnel, seen at Whitsun Reef in the South China Sea on March 27, in a photo taken by the Philippine Coast Guard. PHOTO: REUTERS

South China Sea disputes

Whitsun Reef – awash in a sea of (legal) uncertainty

Self-restraint is needed as the question of whether the presence of Chinese fishing vessels is a 'violation of international law' is not as clear-cut as it appears

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For *The Straits Times*

The Philippines and China have recently engaged in a tense exchange of words over the reported presence of more than 200 Chinese fishing vessels around Whitsun Reef, part of the disputed Spratly Islands in the South China Sea.

The Philippines has called their presence a violation of international law and a derogation of its sovereign rights in its exclusive economic zone (EEZ). China's response is that these are civilian fishing boats sheltering from storms in traditional fishing grounds of Chinese fishermen.

The question of whether the presence of Chinese fishing vessels around Whitsun Reef is a "violation of international law" is not as clear-cut as it may first seem.

Under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the legality of any activity conducted around Whitsun Reef is complicated by several uncertainties. These uncertainties relate to the status of Whitsun Reef (is it an island, rock or low-tide elevation?); the location of Whitsun Reef in relation to other disputed features in the Spratly Islands; and the type of activities that can take place in disputed waters.

IS WHITSUN REEF AN ISLAND, A ROCK OR A LOW-TIDE ELEVATION?

Under UNCLOS, the distinction between land features which are above water at high tide (classified as islands) and those which are below water at high tide (classified as low-tide elevations) determines whether a feature can be subject to sovereignty claims and whether it can generate maritime entitlement.

Only islands are considered "land" capable of being subject to sovereignty claims and generating maritime entitlement. The extent of maritime

entitlement depends on whether the island is capable of sustaining human habitation or economic life of its own. If it is, it is entitled to a 12 nautical mile (nm) territorial sea, 200nm EEZ and a continental shelf.

If it is not, it is still an island, but is deemed a "rock" only entitled to a 12nm territorial sea.

Low-tide elevations, on the other hand, are above water at low tide but submerged at high tide. They are not considered territory like "islands" and do not generate any maritime entitlement. They form part of the seabed and will be subject to either the legal regime of the territorial sea or EEZ, depending on where they lie.

If a low-tide elevation lies within the 12nm territorial sea of an island, it may be used as a base point to measure the breadth of the territorial sea from that island.

The status of Whitsun Reef as an island, rock or low-tide elevation is not clear.

It was not one of the features considered by the tribunal in the 2016 South China Sea Arbitration between the Philippines and China. A United States government map describes Whitsun Reef as having a reef "visible at high tide". The Philippines' experts' report submitted in the South China Sea arbitration opined that Whitsun Reef was a low-tide elevation. A National University of Singapore satellite research project on South China Sea features noted that "there are three small above-water sand banks" on Whitsun Reef which are "small, barren and dynamic" and unlikely to remain above water at all times.

THE MEANING OF 'HIGH TIDE' AND WHY IT MATTERS

UNCLOS does not expressly state whether a feature needs to be permanently above high tide to be classified as an island. Moreover, UNCLOS does not spell out how "high tide" is to be determined.

It leaves it to states to choose their methodology in determining "high tide" provided it reasonably corresponds to the ordinary meaning of "high tide", potentially leading to inconsistent determinations on whether a

feature is above high tide.

Whether Whitsun Reef is above water or below water at high tide accordingly remains an open question.

If Whitsun Reef is above water at high tide, it is an island over which China, the Philippines and Vietnam have competing claims of sovereignty. It would likely be classified as a rock entitled only to a 12nm territorial sea because it is incapable of sustaining human habitation or economic life of its own.

If Whitsun Reef is a low-tide elevation, it would not in principle be subject to sovereignty claims or entitled to any maritime zones of its own. Whitsun Reef will belong to the state in whose territorial sea or EEZ it lies. This is why the location of Whitsun Reef in relation to other Spratly Islands features is critical.

LOCATION OF WHITSUN REEF IN RELATION TO OTHER DISPUTED SPRATLY ISLAND FEATURES

Whitsun Reef is part of a larger reef formation known as Union Banks that consists of about 20 geographic features located within the disputed Spratly Islands. The features in Union Banks are subject to the competing sovereignty claims of China, Vietnam and the Philippines.

China and Vietnam claim sovereignty over all the features in

Union Banks pursuant to their sovereignty claim over all of the features in the Spratly Islands. The Philippines claims sovereignty over all the features in Union Banks as part of its claim over the Kalayaan Island Group within the Spratly Islands (reflected in the polygon-shaped box in the illustration).

The legal situation is further complicated because six of the 20 features in Union Banks have been occupied and contain man-made structures. China occupies McKennan Reef and Johnson Reef, while Vietnam occupies Grierson Reef, Lansdowne Reef, Sin Cowe Island and Collins Reef.

Whitsun Reef (and many of the other disputed islands in the Spratly Islands) is also located within the 200nm EEZ of the Philippines that is measured from its archipelagic baselines connecting the outermost points of the outermost islands and reefs in its main archipelago.

The Philippines has exclusive sovereign rights over the living and non-living resources in the water column and seabed in its EEZ. However, the EEZ rights of the Philippines apply only outside the 12nm territorial sea of any feature in the Spratly Islands that meet the definition of an island in UNCLOS.

As noted earlier, if Whitsun Reef is an island above water at high tide, it will be deemed a "rock"

entitled to a 12nm territorial sea of its own. If it is a low-tide elevation and located within the 12nm territorial sea of a disputed island in Union Banks, it will belong to the state in whose territorial sea it lies.

According to available information, Grierson Reef (occupied by Vietnam) is reportedly an island above water at high tide. Whitsun Reef appears to be located within the 12nm territorial sea of Grierson Reef, an island subject to sovereignty disputes. Whitsun Reef would therefore be under the sovereignty of the state that ultimately has sovereignty over Grierson Reef.

In other words, Whitsun Reef is not only within the 200nm EEZ of the Philippines. It is also located in the territorial seas of islands which are subject to competing sovereignty claims of China, the Philippines and Vietnam over the features in the Spratly Islands.

CHINA'S ACTIVITIES IN THE WATERS SURROUNDING WHITSUN REEF

One argument raised is that the anchoring of a large number of Chinese fishing and/or maritime militia vessels in the waters surrounding Whitsun Reef is contrary to UNCLOS as it interferes with the sovereign rights of the Philippines over its resources in its EEZ.

While China's actions may have raised serious concerns about its intentions in waters around islands claimed by the Philippines, Vietnam and other states, its actions to date are arguably not violations of UNCLOS. This is because UNCLOS has no provisions setting out what states who claim sovereignty over disputed islands can or cannot do either on the disputed islands themselves or within the territorial seas around these islands.

The underlying concern about Chinese fishing vessels around Whitsun Reef appears to be that it

is a precursor to China occupying and constructing facilities on Whitsun Reef.

But UNCLOS does not explicitly prohibit occupation and construction on disputed islands and low-tide elevations within 12nm of disputed islands.

The South China Sea Arbitration did not address whether the occupation and construction activities of China on disputed islands and low-tide elevations within 12nm of a disputed island were unlawful.

However, it ruled that China was required to comply with certain obligations to protect the marine environment before it conducted such activities. Accordingly, it is unclear whether there is any prohibition on claimants to a sovereignty dispute occupying disputed islands and low-tide elevations within 12nm of a disputed island.

THE NEED FOR RESTRAINT IN THE FACE OF LEGAL UNCERTAINTY

The Whitsun Reef skirmish is a stark reminder of the legal complexities and uncertainties that continue to characterise the South China Sea disputes.

While the South China Sea arbitration bought some much-needed clarity to some legal issues, there remains a considerable amount of uncertainty stemming from the competing sovereignty claims, the status of many features in the Spratly Islands and their location in relation to other Spratly Island features.

While these legal uncertainties have no easy resolution, they do highlight the importance of the 2002 Asean-China Declaration on the Conduct of Parties in the South China Sea (2002 DOC).

Recognising the intractable and seemingly unresolvable legal and political issues in the South China Sea, Asean and China declared in 2002 that they would exercise self-restraint in the conduct of activities, and, in particular, would refrain from "inhabiting on the presently uninhabited islands, reefs, shoals, cays and other features".

The pledge in the 2002 DOC to exercise self-restraint and not inhabit currently uninhabited features is as important today as it was in 2002.

If China were to occupy or assert effective control over Whitsun Reef or any other unoccupied feature in the Spratly Islands, it is certain to increase tensions not only with the Philippines, but also with Vietnam and other states.

Moreover, it is almost certain to jeopardise the ongoing negotiations for a code of conduct between Asean and China. Therefore, the only rational path forward is one of self-restraint.

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Reef rows



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