

The Uncertainties of Middleton and Elizabeth Reefs

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Introduction

In the Coral Sea, Middleton Reef (29° 28'S, 159° 04'E) and Elizabeth Reef (29° 35'S, 159° 02'E) lie 130 nautical miles (nm) and 99nm respectively north of Norfolk Island, and 310nm from the Australian mainland. The *Australian Pilot Volume III* (The Hydrographer, Royal Australian Navy (RAN), 1973: 215-6) for this area records that the only features above high water on these reefs are some coral boulders on Elizabeth Reef. There are references to the edge of Middleton Reef drying, and to a sand cay drying on Elizabeth Reef. This is more information than contained on the plans of the two reefs published on chart *AUS 213* (The Hydrographer, RAN, 1965). The plan of Middleton was surveyed by Captain Denham in *HMS Herald* in 1853 and published at a scale of 1:50,000. It shows Middleton as an oval reef with a long axis measuring about 5nm aligned northeast and a short axis measuring about 2.5nm. The plan of Elizabeth Reef was surveyed by Lieutenant Richards in *HMS Renard* in 1878 and is also published at a scale of 1:50,000. Elizabeth Reef is of similar shape and size to Middleton Reef with the long axis aligned east-west. Middleton possesses a major embayment, called 'The Sound' on its northwest edge. Neither of these plans shows any features above high water.

There are two uncertainties associated with these reefs. The first is their legal status under the terms of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which will determine the extent to which they can be used as basepoints from which maritime zones may be claimed. If it is possible that one or both of the reefs may be used as basepoints from which maritime zones can be claimed, the second uncertainty concerns their ownership. The Australian authorities are convinced that they belong to Australia but a private company is equally sure that Australia has never formally claimed the reefs, which the private company claimed in 1970.

Can Middleton and Elizabeth Reefs be used as Basepoints for Maritime Claims?

If the descriptions in the *Australian Pilot* (The Hydrographer, RAN, 1973: 215-6) are accurate, it would mean that Middleton Reef appears to have the legal status of a low-tide elevation while Elizabeth Reef is a rock.

It is certain that rocks on Elizabeth Reef could not support habitation; however, it is uncertain whether they could be claimed to sustain an economic life of their own, as required by Article 121(3) of the Law of the Sea Convention (UNCLOS), to allow claims to an Exclusive Economic Zone (EEZ) or continental shelf. Presumably any such claims could rest on commercial fishing activities or use of the reef by companies providing diving holidays.

As a low-tide elevation Middleton Reef could only be used as a basepoint for claims to maritime zones if any part of the reef, exposed at the lowest astronomic tide, lay fewer than 12nm from the exposed normal baseline of Elizabeth Reef, which would also be the lowest astronomic tide. The lowest astronomic tide is specified because that is the normal baseline proclaimed by Australia in 1983, and there is no question of any closing lines or straight baselines being drawn, according to Articles 7, 9 or 10 of UNCLOS, on these features as described in the *Australian Pilot*. The reefs seem to be too far apart for Middleton Reef to be used as a low-tide elevation because the shortest distance between the closest points shown on the plans on *AUS 213* is 35nm and the depth of water between them reaches 2,800 metres.

In 1997 surveys were made of these two reefs using a Laser Airborne Depth Sounder. While maps resulting from this work have not been published, it is understood that the survey confirmed that there is a very small cay on Elizabeth Reef, in addition to the rocks recorded in the *Australian Pilot*, and that there were rocks standing above high water on Middleton Reef.

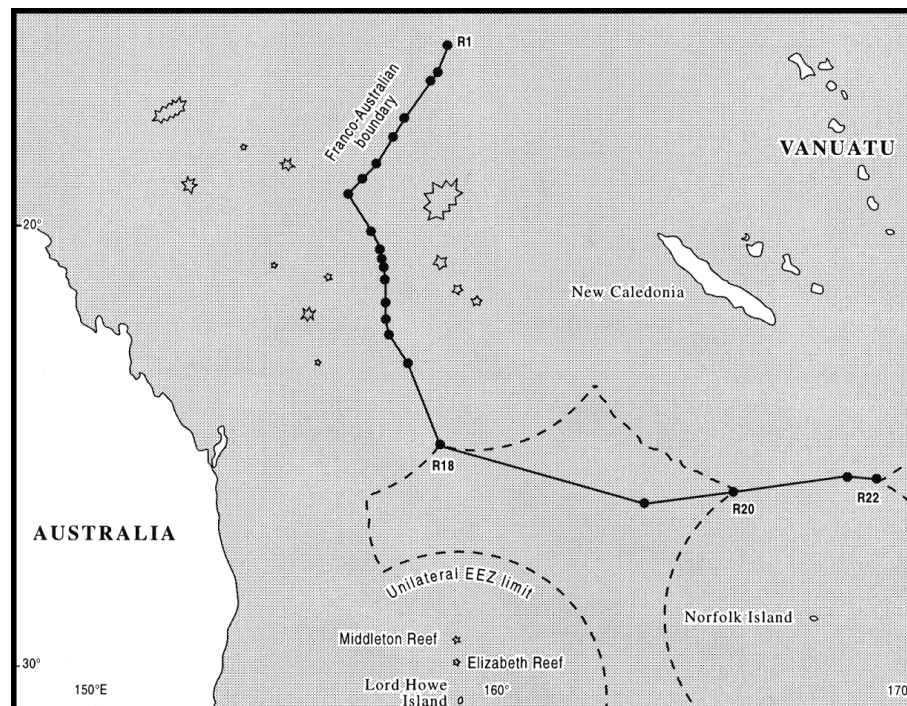
If this understanding is correct and there is indeed a cay on Elizabeth Reef, then this island can be used to claim the entire suite of maritime claims. There are various definitions of a 'cay', sometimes called a 'key'. A cay is defined by de Kerchove (1961: 134) as: "A low insular bank of sand, coral and so on awash or drying at low water". This definition does not apply to an island as defined in the 1982 Convention which states in Article 121(3) that an island is a naturally formed area of land above water at high tide. The International Hydrographic Organization (IHO) (1990: 37) records that a that a cay is: "A low, flat ISLAND of SAND, CORAL, etc. awash or drying at LOW WATER" (Original emphasis retained). While the similarity with de Kerchove's definition is obvious the difference is glaring. The substitution of 'island' for 'bank' changes the meaning but raises questions about the soundness of the definition by the IHO. The use of words in capital letters in the IHO dictionary invites readers to consult the word elsewhere in the dictionary. An island is defined succinctly as: "A piece of LAND completely surrounded by water" (International Hydrographic Organization (1990): 110). Following the trail of capitals 'LAND' is defined as: "The solid portion of the EARTH's surface as opposed to SEA, water. A portion of the EARTH's surface marked off by natural or political BOUNDARIES" (International Hydrographic Organization, 1990: 115). It is not necessary to

pursue any more capitals to conclude that the IHO's definition of a cay is ambiguous. An island as defined by UNCLOS cannot be either awash or drying; those are conditions appropriate to low-tide elevations, which all sources agree are not islands.

Whittow (1984: 86) describes a cay as: "A small flat island composed of a bank of sand overlying coral reef just above high water." Charton and Tietjen (1988: 212) defines a key as "a low or flat island or reef usually a CORAL and sandy islet." It is interesting that Whittow and Charton and Tietjen complete their definitions by referring to the islets off the south coast of Florida, while the IHO notes that the term was originally used for the coral islets around the coast and islands of the Caribbean Sea. Given the nature of the Florida Keys there can be no doubt that the term 'cay' can be properly interpreted to mean 'a small island'.

Article 121(1) makes no qualifications as to the size of islands but it does qualify entitlements to maritime claims from rocks in paragraph (3), by specifying that rocks which cannot sustain habitation or economic life of their own shall have no Exclusive Economic Zone (EEZ) or continental shelf. Now a cay is clearly not a rock. The 'classical' rock is Rockall in the North Atlantic, which is all rock. Since the 1980s some authors have argued that 121(3) applies to small, unpopulated barren islands

Figure 1: Middleton and Elizabeth Reefs



(Van Dyke and Brooks, 1983; Van Dyke, Morgan and Gurish, 1988). Indeed Valencia, Van Dyke and Ludwig (1997: 42) refer to the "...overwhelming majority of commentators ..." holding this view. That might well be the case but it appears that this view is not based on any reasonable interpretation of Article 121, or on the reported discussions that took place in the Committee that considered it during the conference that produced the 1982 Convention. While it might be difficult to distinguish between a tiny rocky island and a very large rock there is no difficulty in distinguishing between a sand island and a rock.

Discussions on Article 121 in the late 1970s centred on attempts to produce a classification of islands by size, which might have helped define a rock; and the arguments of countries faced with the existence of foreign islands close to their coast, seeking restrictions on claims made from those islands. Nor is it apparent that countries which possess small islands are prepared to have them treated as rocks, even though they might agree to the claims from the islands being discounted during the delimitation of boundaries dividing EEZs or continental margins.

The United States, which has the best international record of protesting against evident breaches of rules contained in the 1982 Convention, properly makes claims to some extended maritime zones from insignificant islands northwest of Hawaii, and does not appear to have protested against Japan's claim of an EEZ from Okinotorishima (Smith and Roach, 1992). This tiny feature, previously known as Douglas Reef and Parece Vela, is described in the British *Pacific Islands Pilot* (The Hydrographer, 1970: 596) as a coral reef with three rocky heads which dry. In 1988 it was reported in the *New York Times* (4 January) that Okinotorishima was reduced to two rocks, each about the size of a king-size bed, 1,300 metres apart standing less than one metre above high water. It was further reported that to prevent further deterioration Japan was spending up to US\$240 million to build a protective wall around each of these rocks.

If the laser depth sounding found rocks above high water on Middleton Reef its status as a low-tide elevation must be upgraded and at least territorial waters could be claimed from the Reef. If it could be proved the rocks sustained an economic life of their own they could be used as basepoints to delimit EEZ and continental shelf claims.

This examination of the legal status of these reefs in terms of the 1982 Convention concludes with the reports from a variety of sources, including the private claimants of the reefs, that there is a cay on Middleton Reef. If the airborne laser survey confirmed these reports, then claims to an EEZ and continental shelf could be made from Middleton Reef without any need to establish that the existing rocks standing above high tide can sustain an economic life of their own.

Are Middleton and Elizabeth Reefs part of Australian Territory?

This is a proper question for a political geographer to ask but quite beyond his or her ability to answer. So this survey simply parades what seem to be the facts in the hope that lawyers skilled in matters of territory and sovereignty might provide reasoned opinions.

Middleton Reef was discovered for European chart-makers by one Lieutenant Shortland in the transport *Alexander* on 20 July 1788 after leaving Botany Bay, occupied 6 months earlier by a British contingent (David, 1995: 30). The feature was named Middleton Island after Admiral Sir Charles Middleton. It is also possible that Shortland sighted Elizabeth Reef, since he referred to a dry sandbank with an extensive shoal south of Middleton Reef, which he called Middleton Shoal (Bradley, 1969: 156). The definite European discovery of Elizabeth Reef is given to Captains Welsh and Proudfoot of the *Claudine* and *Marquis of Hastings* respectively on 16 May 1820 (Davis, 1995: 34). The name 'Elizabeth' commemorates the wreck of a vessel with that name in 1831. Middleton Reef was surveyed by Captain Denham in *HMS Herald* during two weeks in June 1853 and his plan is still the best available and appears on the current edition of chart *AUS 213*. In January 1855 Denham made a sketchy survey of Elizabeth Reef (David, 1995: 213) but the plan which is still published on *AUS 213* was made by Lieutenant Richards in 1878.

Australia made a general claim to the legal continental shelf on 11 September 1953, mainly as a device to give it a stronger position in negotiations with Japan over pearl fisheries adjacent to the Australian coast (O'Connell, 1955). On 25 September 1953 the precise limits of Australia's continental shelf in northern Australia were proclaimed. This showed the limits of the Australian claim in the direction of Indonesia, Dutch West New Guinea and Papua New Guinea, then still under

Australian control. A second proclamation on the same day set the limits of Australian waters regarding pearl fisheries. These defined areas extended from 27° S on the east coast of the continent, around the north coast of Australia to Shark Bay on the west coast (Prescott, 1985: Figure 16). Middleton and Elizabeth Reefs were not included in areas covered by these proclamations.

On 22 November 1967, an act to encourage offshore petroleum exploration contained the definition of Australia's continental margin in accordance with the 1958 Convention on the Continental Shelf. The claim therefore extended to the 200 metre isobath "...or beyond that limit, to where the depth of superjacent waters admits of the exploitation of the natural resources..." (United Nations, 1958). The 1967 act also defined *Adjacent Areas* within which designated authorities would apply the rules governing petroleum activities. The Adjacent Area off the coast of New South Wales extended to meridian 160° E and would therefore encompass Middleton and Elizabeth Reefs (Prescott, 1985: Figure 17). However within the Adjacent Areas, which in some cases extended more than 300nm from the Australian coast, only those areas of seabed covered by the definition in the United Nations Convention were claimed.

In September 1969 Australia proclaimed the Coral Sea Islands Territory, which consisted of fragments of territory such as Kenn and Wreck Reefs, Magdelaine Reef and Cato Islands (Prescott 1985: 74). The southern limit of this area coincided with parallel 24° S and therefore did not include Middleton and Elizabeth Reefs. Burmester (1883) has provided a useful account of the processes by which Australia acquired its various external territories.

Australia's fishing zone, extending 200nm from its baselines, was announced on 1 November 1979 (Prescott, 1985: 74-5). The Division of National Mapping produced a map at a scale of about 1:18 million to show the outer limit of the fishing zone (Division of National Mapping, 1979). On the reverse of the map about 850 points defining the outer limit are expressed to the nearest minute or the nearest second of latitude and longitude. It is clear that Middleton and Elizabeth Reefs were not used as basepoints for projecting arcs of circles with a radius of 200nm.

On 4 January 1983, Australia and France signed a treaty delimiting maritime boundaries between their

possessions in the Indian Ocean and the Coral Sea; the treaty came into force on 9 January 1983 (Choon-ho Park, 1993). This discussion is only concerned with the boundary in the Coral Sea. A single boundary extended for 1,200nm from Point R1, which is the tri-junction with claims from Australia, France and the Solomon Islands, to Point R22, between Norfolk Island and French territory. Apart from the section between Points R18 to R20, the boundary is an equidistance line and separates what are now the EEZs of both countries. The section of boundary between points R18 to R20 divides the seabed between Australia and France.

One interesting aspect of the negotiations was that the French accepted the use of Middleton Reef as a relevant feature, even though this reef was only exposed at low tide. If Middleton Reef had not been taken into account a median line delimitation would lie further to the south. The French also accepted an Australian proposal that the median line be 'straightened' to improve the boundary from both practical and presentational viewpoints. (Bassett, 1983: 8)

When Bassett, an officer in the Australian Department of Foreign Affairs, asked my views on his paper, before it was presented to a conference organised at the Australian National University in September 1983, I suggested that he delete this section in case nationalists in New Caledonia criticised this French concession. While the statement remained in the paper presented to the conference, it was removed when the paper was published the following year and replaced by the bland statement that "... a number of outstanding minor issues relating to delimitation in certain areas of seabed beyond 200 nm were resolved through diplomatic negotiations..." (Bassett, 1994: 190). Kaye (1995: 169) raises questions about the "...physical limitations..." of some of the outlying features of France's territory of New Caledonia, but South Bellona Reef, which is the French territory closest to Middleton Reef, includes a cay standing 1.5 metres above high water (The Hydrographer, 1973: 216).

On 9 February 1983, one of the last acts of the outgoing Fraser Government was to proclaim Australia's baselines for the measurement of the territorial seas (Commonwealth of Australia Gazette, 9 February 1983). By the general standards of baseline proclamations this declaration was meticulous. For example, it stipulates that the terminus of any segment of straight baseline is the

nearest point on the line of the Lowest Astronomic Tide to the position of the terminus printed in the description. It further notes that if any segment of straight baseline intersects a portion of the line of the Lowest Astronomic Tide, around a naturally formed area of land, that portion of the straight baseline above the low-water line will be replaced by the normal baseline of the low-water line (Prescott, 1985: 50 and Figure 8). In the proclamation there is no specific mention of any islands, other than those in the Torres Strait where territorial waters are affected by the 1978 marine boundary agreement with Papua New Guinea. Thus the baseline definition of 1983 does not seem either to support or diminish any claims that Australia might have to Middleton and Elizabeth Reefs.

Australia's definition of its EEZ was issued on 26 July 1994 (Prescott, 1995). The points were specified to the nearest minute or second of latitude or longitude. Chart AUS 5950A, at a scale of 1:10 million at latitude 37° 30' S was issued in 1996 to show the extent of the Australian EEZ (Hydrographic Service, 1996). It shows that Middleton and Elizabeth Reefs, which are marked on the chart, were not used as basepoints in fixing the outer limit of the exclusive economic zone.

Kaye is an international lawyer who ventured an opinion on part of the question whether Middleton and Elizabeth Reefs were part of Australian territory. In discussing the use of these reefs in the boundary negotiations with France he makes the following observation:

If they [Middleton and Elizabeth Reefs] have been used as basepoints, it must be considered at least irregular, as they would not seem to qualify to be taken into account on any basis, and possibly may not have satisfactorily been claimed by Australia in any case. (Kaye, 1995: 168-9)

In a footnote related to this sentence, Kaye reports that Burmester has noted that the reefs cannot legitimately be part of the states of Queensland or New South Wales and also do not fall within the federal Coral Sea Islands Territory (Burmester, 1985: 58). Kaye then continues the footnote by pointing out that if the reefs are susceptible to claim, Australia has done nothing to formalise its claim or incorporate them into the federal structure (Kaye, 1995, 173). That appears to have been a reasonable presentation of the situation when Kaye was writing in 1994. That situation has now changed.

On 7 July 1997, *An Act to amend legislation relating to the environment, sport and Territories and for related purposes*, No.118, 1997, passed into law after receiving the Governor-General's assent. Amongst fifteen items covered in the Act, including 'Wet Tropics of Queensland World Heritage Areas', the Australian Sports Drug Agency, Australian Capital Territory Planning and Management and Migration, was listed 'Coral Sea Islands Act (1969)'. The section of the Act dealing with the Coral Seas Islands Act repeals the original Preamble and substitutes: "*All the islands in the following areas are territories acquired by the Commonwealth ...*" (Parliament of Australia, 1997: 6). There follows a definition of two areas. The first corresponds to the area originally defined in 1969 but the limits have been redrawn to avoid intersecting the international boundaries agreed with Papua New Guinea, the Solomon Islands and French New Caledonia since 1969. The second area is a small parallelogram measuring about 630 square nautical miles. The four corners are defined by the following coordinates: 29° 21'S 158° 59'E ; 29° 21'S 159° 14'E ; 30° 03'S 159° 10'E ; and 30° 03'S 158° 55'E. This frame surrounds Middleton and Elizabeth Reefs. So Australia has now made a formal claim to at least one island on one of the reefs.

A claim to both reefs was made by a private company, the Ure-Chan Group, in 1970. The following notice was painted on the bridge of *MV Runic*, a wreck that was purchased from the owners Shaw-Savill prior to the visit to Middleton Reef:

This area bounded by 29° 25' to 30° 00' South and 158° to 159° 10' East and adjacent waters is claimed by Alexander Ure and Michael Chan of 363 Pitt St., Sydney. 19.3.1970, St. Joseph's Day (Personal communication from Paul Ure, May 1998)

Members of the Ure-Chan Group have visited the reefs subsequently and "*...have proclaimed, improved and maintained its claim since that date [1970] under both the 1958 and 1982 Law of the Sea Conventions*" (Personal communication from Paul Ure, May 1998). It is known that discussions have been held between representatives of the Ure-Chan Group and the Australian Government but the results, if any, are not known.

Conclusions

It seems likely that EEZ and continental shelf claims could be made from the small cay on Elizabeth Reef. If there is no cay on Middleton Reef then similar

claims could only be made if it is established that the rocks on Middleton Reef can sustain an economic life of their own. If Middleton Reef is a low-tide elevation, lacking a cay or rocks standing above high water, then it could not be used as a basepoint for claims to any maritime zones.

The Ure-Chan Group claimed both reefs in 1970 and reports that subsequently it has maintained and developed that claim. The formal claim to the reefs by Australia appears to date from 7 July 1997.

Competing private and national claims have clashed before in the Pacific Ocean. There are the cases of Thomas Cloma and the Philippines in the Spratly Islands, and a religious group and the King of Tonga in North and South Minerva Reefs. Because discussions between these parties have been confidential it is uncertain what arguments each has deployed. For political geographers perhaps the most interesting question is whether Australia, having claimed an island in the detached parallelogram of the Coral Sea Islands Territory, will now extend its EEZ claim to the north and east of one or both of Middleton and Elizabeth Reefs.

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