

Making sense of the relevant laws

In a commentary published on Feb 28, Senior Writer Andy Ho wrote that China should argue its case based on customary international law, before the United Nations Convention on the Law of the Sea (Unclos) can be applied. Below is a response to that piece.

By Tommy Koh, For The Straits Times

I THANK Andy Ho for his interest in the South China Sea. His op-ed article, "The international law basis behind China's claims", was, however, not helpful in clarifying key legal issues. I will attempt to disaggregate them and give clear answers to each of these issues.

- **What laws are applicable to the South China Sea?**

The answer is that the South China Sea is governed by international law, particularly, the United Nations Convention on the Law of the Sea (Unclos). All the claimant states, namely, Brunei, China, Malaysia, the Philippines and Vietnam, are parties to Unclos.

They are, therefore, bound by Unclos and should not assert rights and jurisdictions which are inconsistent with it.

They are also under a legal obligation to ensure that their domestic laws are consistent with Unclos.

- **What law is applicable to the determination of sovereignty disputes over territory?**

The applicable law is not Unclos but the customary international law governing the acquisition and loss of territory.

- **Can a claimant country use history as the basis of its sovereignty claim to the islands in the South China Sea?**

History is a relevant factor in determining which state has the better claim to sovereignty over a disputed island, but not the only factor and, sometimes, not the decisive factor. In the Pedra Branca case, for example, the International Court of Justice held that, historically, the island had belonged to Malaysia. However, over a period of time, due to the sovereign acts of Singapore and Malaysia's acquiescence, Pedra Branca's sovereignty had passed from Malaysia to Singapore.

In the case of the South China Sea, we similarly have competing claims of sovereignty and competing arguments on which state's claim is superior. The only peaceful way to resolve such disputes is through negotiations, conciliation, arbitration or adjudication.

If negotiations are unsuccessful, the claimant states should consider referring their sovereignty disputes to one of the binding third-party procedures just like Singapore and Malaysia did in the Pedra Branca case. The alternative is for the claimant states to set aside their sovereignty claims and to jointly develop the areas of overlapping maritime claims.

- **Are all the so-called islands in the South China Sea entitled to a territorial sea, exclusive economic zone and continental shelf?**

Under Unclos, a coastal state is entitled to claim from its land territory a 12-mile territorial sea, a 200-mile exclusive economic zone (EEZ) and a continental shelf which could extend beyond 200 miles, depending on its geomorphology. In the case of the South China Sea, the so-called islands consist of islands, rocks, low-tide elevations, reefs and shoals.

Islands are naturally formed areas of land surrounded by and above water at high tide. They are entitled to a territorial sea, EEZ and a continental shelf. Rocks are naturally formed areas of land surrounded by and above water at high tide, but they are only entitled to a territorial sea because they are not capable of sustaining human habitation or economic life of their own. A low-tide elevation is a naturally formed area of land above water at low tide but submerged at high tide. A low-tide elevation is not entitled to any maritime zones of its own.

Artificial islands are not naturally formed areas of land so they are not entitled to any maritime zones of their own. Reefs, shoals or other features that are completely submerged are part of the seabed and not entitled to any maritime zones of their own.

Which of the numerous geographic features in the South China Sea fall into the above categories is not clear. What is badly needed is an objective and authoritative study, using satellite technology, of all the so-called islands in the South China Sea. The results of such a study would assist in determining which of them are islands, rocks, low-tide elevations, etc.

- **Does Unclos or international law recognise claims of historic rights and jurisdiction in the EEZ of other states?**

There are two views on this difficult question. The majority view is that Unclos prevails over customary international law and Unclos does not recognise claims of historic rights and jurisdiction in the EEZ of other states. Unclos provides that coastal states have sovereign rights and jurisdiction to explore and exploit the natural resources in their 200 nautical mile EEZ. This includes the fisheries resources in the water and the minerals and hydrocarbon resources under the water.

In this view, whatever rights and jurisdiction another state had enjoyed under customary international law in the ocean space that is now within the EEZ of a coastal state are deemed to no longer exist. When a state becomes a party to Unclos, it is bound by the Convention. It can no longer assert rights and jurisdictions which are inconsistent with the Convention.

There is, however, a second view. Unclos does refer to "historic bays" and "historic title" in Articles 10, 15 and 298 (1) (a) (i). The minority view is that Unclos has, therefore, not done away with certain pre-existing historic rights, titles and jurisdictions. According to this view, a state's

historic rights, title and jurisdictions can co-exist with Unclos. We will have to wait for a court or arbitral tribunal to decide on which is the correct view.

- **Is there any "high seas" left in the South China Sea?**

My conclusion is that there is very little high seas left in the South China Sea. Most of the waters have been enclosed by the EEZ of the coastal states and by the EEZ claims from the disputed off-shore islands.

- **What is the regime of passage for ships and aircraft on the EEZ?**

The regime of passage for ships and aircraft in the EEZ is not innocent passage, which is applicable in the territorial sea. Coastal states have sovereignty in their territorial sea but not in their EEZ. In the EEZ, a coastal state has sovereign rights to the economic resources but it does not have sovereignty over the water column. The EEZ is neither the territorial sea nor the high seas. It is sui generis. Ships and aircraft in the EEZ must respect the sovereign rights of the coastal states to exploit its economic resources. Subject to this proviso, the regime of passage for ships and aircraft is similar to that on the high seas, that is, all states have freedom of navigation and overflight in the EEZ.

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