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The Straits Times

www.straitstimes.com

Published on Sep 13, 2011

REVIEW BRIEF

Mapping out rival claims to the South China Sea

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DURING the past two years, tension has been rising in the South China Sea. As a result of a deadline set by a United Nations body for coastal states to submit their claims to extended continental shelves, there was a flurry of claims and counter-claims in 2009, including a joint submission by Malaysia and Vietnam and a response by China.

There have also been several incidents at sea, between China and Vietnam, over fisheries; and between China, on the one hand, and the Philippines and Vietnam, on the other, over collection of seismic data and exploration for hydrocarbons by oil companies.

At the Asean Regional Forum, held in Hanoi in July last year, there was a sharp exchange of words between the foreign ministers of China and the United States.

Much has been written about the South China Sea, but the salient questions of law and fact involved remain unclear. I will attempt to answer 10 of the most frequently asked questions.

• Question 1: What and where is the South China Sea?

The South China Sea is a semi-enclosed sea, bounded by China in the north, the Philippines in the east, Vietnam in the west, East Malaysia and Brunei in the south-east, and Indonesia and West Malaysia in the south-west.

This body of water is about 3.5 million sq km. It forms part of the Pacific Ocean, one of the global commons.

• Question 2: What is the significance of the South China Sea?

First, it is the highway for trade, shipping and telecommunications. Eighty per cent of world trade is seaborne. One-third of world trade and half of the world's traffic in oil and gas pass through the South China Sea. Freedom of navigation in the South China Sea is, therefore, of critical importance to China, Japan, South Korea, Asean and other trading nations and maritime powers.

Second, it is rich in fish and other living resources. Fish is a principal source of protein and fishing is a source of employment for millions of Asians who live in coastal communities.

Third, it is presumed that there are significant deposits of oil and gas in the continental shelves underneath the South China Sea.

• Question 3: Is there a law governing the South China Sea?

It is governed by international law, particularly the UN Convention on the Law of the Sea (Unclos), which was adopted in 1982 and came into force in 1994. China, Japan, South Korea and all the 10 Asean countries are parties to this convention and thus bound by its provisions.

• Question 4: Which are the claimant countries and what have they claimed?

Two groups of geographic features located in the South China Sea are subject to competing claims of sovereignty, namely the Paracel Islands, located in the northern part of the South China Sea, and the Spratly Islands, located in the central part of the South China Sea. In particular, the sovereignty dispute over the Spratly

Islands is a continual source of conflict and tension in the region.

China, Brunei, Malaysia, the Philippines and Vietnam are the claimant states. Taiwan is also a claimant but not recognised by the international community as a sovereign and independent state. It is, therefore, not a party to the UN Convention.

Brunei reportedly claims part of the area of waters in the Spratly Islands adjacent to it, including two maritime features, namely Louisa Bank and Rifleman Bank, as part of its continental shelf.

The Philippines reportedly claims 53 of the maritime features in the Spratly Islands which it calls the Kalayaan Island Group as well as Scarborough Shoal.

Malaysia reportedly claims sovereignty over 11 maritime features in the Spratly Islands.

Vietnam claims sovereignty over all the maritime features in the Paracel Islands and the Spratly Islands.

China claims sovereignty over all the maritime features in the South China Sea.

Taiwan's claims are identical to those of China. Taiwan is, however, in physical possession of the largest maritime feature in the South China Sea, namely Itu Aba or Taiping.

● **Question 5: Are the claims consistent with Unclos?**

The convention does not contain any new law on how to determine a state's claim to sovereignty over territory. The question has to be determined by customary international law.

Disputes over sovereignty can be resolved by negotiation, conciliation, arbitration or adjudication. It is, thus, not possible for one to say whether the sovereignty claims by the five claimant states are valid or not. They have not been tested in a court of law or arbitral tribunal.

The Chinese claim is not clear. The ambiguity is caused by a map which was attached to a Chinese official note to the UN on the outer limits of its continental shelf under Unclos in May 2009. The map contains nine dashed lines forming a U, enclosing most of the waters of the South China Sea. The map was first published in 1947 by the Republic of China under the Kuomintang, prior to the founding of the People's Republic of China.

What is not clear is whether China is claiming sovereignty over the maritime features enclosed by the lines or to both the features and the waters so enclosed. If the former, this is consistent with the convention. However, if the latter, then China's assertion of rights, based upon history, to the waters, is not consistent with the convention. The convention does not recognise such rights.

When China acceded to the convention, it agreed to be bound by the new legal order set out in the convention. Under the law of treaties, when a state becomes a party to a treaty, it is under a legal obligation to bring its laws and conduct into conformity with the treaty.

● **Question 6: What maritime zones are the features entitled to?**

There is considerable confusion about the answer to this question. First, there is no authoritative study of the different maritime features which make up the Spratly Islands group. Such a study should classify them into: islands, rocks, low-tide elevations and artificial islands.

Second, under the convention, artificial islands are not entitled to any maritime zones except for a 500m safety zone. A low-tide elevation is not entitled to any maritime zone but can be used as a base point in measuring the territorial sea. A low-tide elevation is submerged at high tide.

A rock is entitled to a 12-nautical mile (22km) territorial sea. An island is entitled to a territorial sea, a 200-nautical mile exclusive economic zone and a continental shelf.

Under Article 121 of the convention, the difference between a rock and an island is that an island is capable of sustaining human habitation or economic life.

Third, the policies and pronouncements of the claimant states show little regard for the law and are self-serving.

To put it crudely, they seem to be saying that 'my rock is an island and your island is only a rock'. In its submission to the UN in 2009, Indonesia contends that all the features in the South China Sea are rocks and not islands.

• **Question 7: What is Asean's position on the South China Sea?**

Asean, as a group, does not support or oppose the claims of the four Asean claimant states. The group has also not taken a position on the merits of the disputes between China and Asean claimant states. Therefore, any perception that the claims of Brunei, Malaysia, the Philippines and Vietnam are backed by Asean is incorrect.

Asean is, however, a stakeholder in the South China Sea. First, it wishes to maintain peace in the region. Second, it wishes to promote good relations between China and Asean. Third, it is committed to the peaceful settlement of disputes. Fourth, it wishes to ensure that all interested parties act strictly in accordance with international law, especially Unclos.

In 2002, when tensions were high, Asean drafted a Declaration on the Conduct of Parties in the South China Sea (DOC). The DOC was signed by Asean and China. In July this year, the Asean Regional Forum adopted a set of implementing guidelines. Both the DOC and the guidelines are non-binding.

Although they are not unimportant, the fact is that some claimant states have violated both the letter and spirit of the DOC by acting unilaterally to expand and fortify the features they occupy.

Asean and China should work together to formulate and adopt a binding code of conduct as their next goal.

• **Question 8: What is the US position on the South China Sea?**

The US is not a claimant state or a littoral state. It is, however, a stakeholder. Why? First, the US is a major trading nation and maritime power. It has a legitimate interest in ensuring that the freedom of navigation and other lawful uses of the sea are respected by the claimant states and littoral states.

Second, the US has an interest in ensuring that the claimant states act strictly in accordance with international law, including the Unclos, of which it is, unfortunately, not a state party.

Third, while the US has not endorsed the claims of the Philippines and Vietnam, it is concerned that the disputes should be resolved peacefully, without resort to force.

Fourth, the US is concerned about the Chinese map and would oppose any attempt by China to assert rights to the waters enclosed by the nine dashed lines.

Fifth, the US has a treaty alliance with the Philippines but it has been ambiguous over whether and under what conditions that alliance might apply to an armed conflict in the South China Sea involving the Philippines and another claimant.

• **Question 9: What could China and the Asean claimant states do to bring about an amicable settlement to their disputes?**

They have two fundamental choices. The first option is to try to resolve their sovereignty disputes through negotiations, both bilaterally and multilaterally.

However, if the negotiations prove to be fruitless, the parties should consider whether to resort to other modalities of dispute settlement, such as conciliation, arbitration and adjudication.

However, sovereignty disputes cannot be referred to any form of third-party dispute settlement without the consent of the parties.

Also, China has exercised its right, under Article 298, to opt out of compulsory binding dispute settlement, for disputes concerning its maritime boundary delimitation. So, a claimant state, such as the Philippines, cannot refer maritime boundary delimitation disputes with China to arbitration under Annex VII of Unclos or adjudication before the International Tribunal for the Law of the Sea.

However, the Philippines could, for example, frame the issue as one relating to other Unclos provisions, such as its rights to explore and exploit the natural resources in its exclusive economic zone or whether certain disputed features are rocks or islands.

The second choice is for the parties to put aside their sovereignty disputes and to apply the concept of joint development to the disputed areas. Joint development has worked in other cases, for example, between Malaysia and Thailand (1979-1990), between Malaysia and Vietnam (1992) and between Australia and Timor Leste (2002).

However, we face a major obstacle. The concept of joint development must be applied in the context of a disputed area. But, until China is prepared to clarify its claims, we will not be able to determine what are the disputed areas.

- **Question 10: What is Singapore's position?**

Singapore is not a claimant state. It does not support the position of any of the claimant states. On the merits of the various claims, Singapore is neutral.

Singapore is, however, not neutral on the need by all the claimant states to strictly adhere to international law, in general, and Unclos, in particular. Singapore is also insistent that the disputes must be resolved peacefully. Any threat or use of force would be unacceptable. Singapore shares Asean's aspiration to maintain peace in the region and to promote good relations between Asean and China.

Pending the resolution of the dispute, Singapore supports the effort by Asean and China to implement the DOC that would serve as a guide for the behaviour of the claimant states in order to avoid confrontation and reduce tensions.

As a neutral party, trusted by all the claimants, Singapore seeks to play a helpful role, especially through the National University of Singapore Centre for International Law, to bring the parties together, elucidate the issues, research the facts and the law, and help the parties to find ways to achieve an amicable settlement to their disputes.

The writer is chairman of the Centre for International Law at the National University of Singapore. He was president of the Third UN Conference on the Law of the Sea which produced the UN Convention on the Law of the Sea (Unclos).

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