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ASEAN AND THE SOUTH CHINA SEA DISPUTE

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The South China Sea Dispute: An International Lawyer's View

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BACKGROUND ON THE SOUTH CHINA SEA DISPUTES

The South China Sea consists of four groups of islands, two of which are in dispute, the Paracels and the Spratlys.

The Paracel Islands consist of two groups, the Crescent Group and the Amphitrite Group. Together they contain over 30 islets, sandbanks or reefs, and occupy about 15,000 km^2 of ocean. The Paracels are located in the northern part of the South China Sea, approximately equidistant from the coastlines of Viet Nam and China (Hainan). In 1974, China forcibly ejected South Vietnamese troops from the Paracels, and since then they have been occupied exclusively by China, but they are also claimed by Viet Nam.

The Spratly Islands consist of more than 100 islets, coral reefs, and sea mounts scattered over an area of nearly 410,000 sq km in the central South China Sea, north of the island of Borneo, east of the Viet Nam, and west of the southern Philippines. The total land area of all of the islands is less than 5 sq miles. The Spratly Islands are claimed in their entirety by China, Taiwan, and Viet Nam, while some islands and other features are claimed by Malaysia and the Philippines. Brunei has established a fishing zone that overlaps a southern reef, but it has not made any formal claim.

The Spratly Islands are not critically important for international maritime navigation. They are dangerous for shipping, and no major international shipping lanes pass through them. However, the islands could be important in safeguarding the international shipping lanes, and they are often described as having strategic importance. Japan occupied all of them during its expansion into Asia in the 1930s and it staged its invasion of the Philippines from its submarine naval base on Itu Aba, the largest island in the Spratlys.

The islands were not regarded as very important until the 1970s, when it was agreed at the Third United Nations Conference on the Law of the Sea to allow States to claim a 200 nm exclusive economic zone (EEZ) from islands. The prospect of a 200 nm EEZ around the islands triggered a renewed interest in the islands because of potential gas and oil deposits and fisheries resources.

Taiwan has occupied Itu Abu, the largest island, since 1947, except for the period from 1950 to 1956 when it withdrew because of the civil war in China. It has had a garrison on the island since 1963. In the early 1970s, other claimants began occupying the islands and other geographic features. The Philippines began occupying islands in the early 1970s, and declared a 200 nm EEZ in 1978. Viet Nam occupied 6 islands in 1975, and expanded its occupations in the 1980s. Malaysia claimed an EEZ in 1980 and occupied Swallow Reef in 1983. It later occupied other atolls. China was late in the quest to occupy the features. After a military confrontation with Viet Nam in 1988, China constructed a base on Fiery Cross Reef in the following year.

Following the 1992 ASEAN Declaration on the South China Sea, the contest over unoccupied features continued. Tensions peaked in 1995 after China occupied Mischief Reef, which was claimed by the Philippines and is located only 100 miles off the coast of Palawan. The occupation of Mischief Reef caused serious tension between ASEAN and China and led to discussions for a code of conduct which resulted in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC).

It was reported in 1997 that the number of features occupied by each of the claimants in 1996 was as follows: Viet Nam 21-24, Philippines 8, China 8-9, Malaysia 3-6 and Taiwan 1.[1] It is not clear whether these figures are accurate or whether the figures changed between 1997 and 2002. A study published by Jamestown Foundation in November 2009 states that Viet Nam occupies 21 features, the Philippines 9, China 7, Malaysia 5 and Taiwan 1. It has been reported that there were no new occupations after the adoption of the 2002 DOC. However, observers have reported that the parties have continued to develop facilities on the features which they occupy.

INTERNATIONAL LAW APPLICABLE TO THE DISPUTE

Relevance of international law

From an international lawyer's perspective, it is important to understand how the principles of international law on territorial sovereignty and the law of the sea apply to the dispute. The rules and principles of international law will not be determinative in resolving the South China Sea disputes, but they will often influence the conduct of the parties and frame the debate. In addition, the rules of international law have a significant impact on how the international community perceives the legitimacy of the positions of the claimant States on the issues.

Two fields of international law are relevant to the dispute. First, the rules of customary international law on the acquisition and loss of sovereignty over territory are applicable. Second, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) sets out what maritime zones States can claim from territory over which they have sovereignty, and the rights and obligations of States in the various maritime zones.

International law on acquisition and loss of territorial sovereignty

Territorial Sovereignty is the right to exercise the functions of a State within a piece of territory, to the exclusion of any other State. Territorial sovereignty may be exercised over continental land territory and over islands. The major and intractable

[1] Valencia, Van Dyke & Ludwig, *Sharing the Resources of the South China Sea* (University of Hawaii Press 1997) page 8.

disputes in the South China Sea are about which State has the better claim to sovereignty over the islands in the Spratlys and the Paracels.

Acquisition of Territory by the display of sovereignty (occupation or prescription)

Under traditional customary international law, two of the most common modes of acquiring sovereignty over remote islands are by *occupation* and *prescription.*

Occupation applies to territory that is *terra nullius, that is, t*erritory which is not under the sovereignty of any State and is subject to acquisition by any State. Occupation requires proof of two elements: (1) the intention or will to act as the sovereign; and (2) the continuous and peaceful display of sovereignty. The requirements for manifestations of territorial sovereignty for tiny, remote uninhabited islands are far less than for land territory.

Prescription applies to territory that was claimed by another State. It is described as the acquisition of territory through a continuous and undisturbed exercise of sovereignty during such a period as to usurp another State's sovereignty by its implied consent or acquiescence.

In actual practice, the distinction is often blurred, especially with respect to tiny, remote off-shore islands. In modern cases such as the *Pedra Branca Case,* the Court does not examine whether the historical requirements of occupation or prescription have been satisfied. Instead, the Court examined the acts of the competing States which evidenced their belief that they had sovereignty over the territory, and the reaction of the competing States to such displays of sovereignty.

The degree of exercise and display of sovereignty required depends upon the nature of the territory. The requirements for remote, inaccessible and uninhabitable islands are much less stringent. A State must put forward evidence that it acted as though it had sovereign authority over the island.

Evidence of the exercise of authority by a State would include licenses or orders for the building of a lighthouse or other structures on the island, legislative and administrative acts relating to the island, granting of concessions for mining or fishing, treaties with other States recognizing sovereignty, the exercise of criminal jurisdiction over acts on the island, the investigation of accidents in the waters near the island, the publication of official maps indicating title to the island, control over immigration or access to the island, markers on the island, etc.

Acquiescence and Protest

An important factor in accessing a State's evidence of sovereignty is the reaction of other States, especially the reaction of another State which also claims sovereignty over the territory. If a second State claims sovereignty over the island and it objects or protests to the displays of sovereignty of the first State, this obviously weakens the claim of the first State. Also, if a second State which claims sovereignty fails to object

to acts of sovereignty of the first State of which it has notice, the second State can be deemed to have acquiesced to the sovereignty of the first State.

The issue of acquiescence was a critical factor in the *Pedra Branca Case*. The Court gave considerable weight to the fact that Singapore performed several acts with respect to Pedra Branca which were evidence that it believed it had sovereignty over the island, and Malaysia failed to object or protest these acts. Therefore, the Court in effect held that Malaysia had acquiesced to Singapore's sovereignty.

States in the South China Sea disputes are obviously very aware that they should object or protest the sovereign acts of another State over a disputed island if they want to protect their own claim and not be deemed to have acquiesced to the sovereignty of the other State. Therefore, the claimants immediately protest when a Government official visits a disputed island or when a competing State takes any action with respect to the island that could be interpreted as an exercise of sovereign authority.

The Critical Date

The critical date is the date on which a dispute arose between two States over sovereignty. If the issue of sovereignty goes to a court or tribunal, the court or tribunal will only examine the actions of the two States *before the critical date*. It will not consider evidence of the exercise of authority after the critical date. For example, in the *Pedra Branca case*, the Court held that the critical date was 14 February 1980, the date of Singapore's diplomatic note protesting the 1979 map which had depicted the island as within the territorial waters of Malaysia. Any evidence of maps, investigations, patrols, etc, after 14 February 1980 was not considered by the court. In other words, once the dispute arises, a State cannot perform further acts in order to try to bolster its case.

The claimants to the South China Sea islands seem to be assuming that the issue of sovereignty will not be decided by a court or tribunal, but by negotiation. They obviously believe that their bargaining positions in such negotiations will be strengthened and their claims to sovereignty bolstered if they can demonstrate that they have occupied the islands and performed acts on them such as the building of lighthouses, ports, research stations, naval stations, airstrips, tourist facilities, etc. Therefore, they are ignoring the rules of customary international law and the critical date principle.

Geographic Contiguity

The claims of the Philippines, Malaysia and Brunei are not entirely clear, but to some extent they seem to be based on the principle of geographic contiguity. They seem to be arguing that small islands and other features close to their main territory, within their EEZ or on their continental shelf, should belong to them as a matter of

fairness, especially if such features were never actually occupied or effectively administered by another State.

Under customary international law, contiguity is not an independent basis for the acquisition of territory. Effective, peaceful and continuous display of state authority is required to claim authority over islands which are *terra nullius*. It is also required over islands over which other States claim sovereignty.

The issue with respect to the islands in the South China Sea is whether a State contiguous to islands can claim sovereignty over them through occupation and effective control even if they were previously claimed by other claimants. One problem is how China and Viet Nam could demonstrate a continuous display of sovereignty over remote islands which they never occupied. Malaysia and the Philippines seem to be assuming that if they actually occupy and construct facilities on such islands, they will be able to usurp any sovereignty previously claimed by the other claimants. This position is weakened by the fact that China, Viet Nam and Taiwan have consistently objected to the actions of Malaysia and the Philippines.

Conquest, Cession and Succession

Conquest through armed force was a means by which a State could acquire territory under traditional customary international law. However, since the adoption of the United Nations Charter in 1945, it is not possible to acquire territory through the use of force. Therefore, China cannot argue that it acquired sovereignty over the Paracels by conquest when it took possession in 1974 by driving Viet Nam off the islands by using force.

Cession is another method by which sovereignty over territory can be transferred from one State to another. A cession is a formal transfer of sovereignty which is usually done by means a formal treaty. For example, the British acquired sovereignty over Singapore through a treaty of cession with the Sultan of Johor (or the Temenggong). In the South China Sea disputes, there were no treaties of cession.

Succession is not a traditional means of acquiring territory, but it is relevant in the South China Sea disputes. Viet Nam is arguing that it succeeded to the title held by France over the Spratlys and the Paracels as the Successor State to French Indo-China or Cochin China. Viet Nam is also arguing to some extent that it succeeded after unification to the claims made by South Vietnam, and the PRC is arguing to some extent that it succeeded to the claims made on behalf of China by the Republic of China (ROC) Government when it was acting as the Government of China before the end of the Civil War. When succession applies, the Successor State only acquires such title as the Predecessor State possessed.

Resolution of the sovereignty disputes by an international court or tribunal

Under customary international law, a legal dispute between two States cannot be taken to the International Court of Justice (ICJ) or to an international arbitral tribunal

without the express consent of the parties to the dispute. If such a dispute is referred to adjudication before the ICJ or to arbitration before an international arbitral tribunal, the court or tribunal decides who has the better claim to sovereignty under international law, and its decision is binding on both parties. For example, in both the *Pedra Branca case* between Malaysia and Singapore and the *Sipadan-Ligitan case* between Indonesia and Malaysia, the two States concerned expressly agreed to resolve the sovereignty dispute by referring it to the ICJ.

States can also use other non-binding modes of third party dispute settlement such as mediation or conciliation to attempt to resolve the sovereignty disputes, but they are not required to do so. The only binding rule is that under the UN Charter States are obliged to resolve their disputes by peaceful means.

It is generally agreed that it is unlikely that the claimants will agree to resolve South China Sea sovereignty disputes by referring them to an international court or tribunal. This is because of the complexity of the historical disputes, the number of parties involved, the weakness of the claims of some of the States and the economic and strategic importance of the islands. Therefore, if the disputes are to be resolved, it is likely to be through negotiations or some form of non-binding third party dispute settlement.

Continuing Influence of the international law on territorial sovereignty

Even though the claimants agree that the disputes are not likely to go to formal dispute settlement, the rules of international law on territorial sovereignty continue to influence the conduct of the claimant States. They have continued to attempt to bolster their claims to the features they occupy by carrying out acts to demonstrate their sovereignty, such as conducting naval patrols and constructing scientific research stations, airstrips, naval facilities and tourist facilities. They have also released historical documents, arranged visits for tourists and journalists, and enacted national laws incorporating the features into nearby regional governments for administrative purposes.

By continuing to carry out acts to reinforce and bolster their claims to sovereignty over the islands, the claimants may believe that, as a practical matter, they will strengthen their position in any negotiations. They also continue to object to acts by any other claimant which are inconsistent with their own claim. This is to ensure that they can never be accused of acquiescing to the sovereignty claim of another State. In such cases, the protests or objections are made on the advice of their lawyers in order to protect their sovereignty claim. Such objections and protests should not be interpreted as actions intended to escalate the dispute or as actions reflecting a more hard-line posture.

Relevance of the 1982 UN Convention on the Law of the Sea (UNCLOS)

China, Viet Nam, Malaysia, Philippines and Brunei are all parties to UNCLOS. Taiwan is not able to ratify UNCLOS because it is not recognized as a State by the United Nations, but it is likely to accept that it is bound by most of the provisions of UNCLOS under customary international law. Therefore, UNCLOS establishes the legal framework between the claimant States.

There are clear rules (and sometimes not so clear rules) in UNCLOS on many of the issues relating to maritime claims in the South China Sea. If the conduct of the claimants is not consistent with the provisions in UNCLOS, questions will be raised as to the legitimacy of their positions. Finally, some disputes between claimants relating to the application and interpretation of provisions of UNCLOS may be subject to compulsory binding dispute settlement under Part XV of UNCLOS.

UNCLOS has no provisions on sovereignty. UNCLOS assumes that it has been determined which State has sovereignty over a continental land mass or an off-shore island. It then sets out what maritime zones can be claimed by States, and the rights, freedoms, jurisdiction and obligations of States in those maritime zones.

Territorial Sea

The territorial sovereignty of a State extends to its land territory and to its air space, as well as to the 12 nm territorial sea adjacent to its coast, including the airspace above the territorial sea and the sea bed and subsoil below the territorial sea. States are entitled to claim a 12 nm territorial sea from the territory over which they have sovereignty, including off-shore islands.

The sovereignty of a State in the territorial sea must be exercised subject to the rules of international law, including UNCLOS. The main exceptions to the sovereignty of a coastal State in the territorial sea are the right of innocent passage of ships and the right of transit passage of ships and aircraft in those parts of the territorial sea that are straits used for international navigation as defined in UNCLOS.

Exclusive Economic Zone

States are entitled to claim an exclusive economic zone (EEZ) out to a distance of 200 nm from the baselines of the territory from which the territorial sea is measured, including off-shore islands. The EEZ is a sui generis regime which is not under the sovereignty of the coastal State or part of the high seas. It is a special zone in which coastal States have sovereign rights and jurisdiction to explore and exploit the natural resources. In the EEZ, all other States have the right to exercise high seas freedoms of navigation, overflight and the laying of submarine cables and pipelines, as well as the right to "other lawful uses of the sea relating to such freedoms."

Once it was agreed in the mid-1970s that States could claim a 200nm EEZ from offshore islands, the potential fishing and hydrocarbon resources made long forgotten small remote islands potential sources of vast wealth.

Continental Shelf

States also have the sovereign right to explore and exploit the natural resources of the seabed and subsoil on their continental shelf. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

As in the EEZ, States have the sovereign right to explore and exploit the natural resources of the seabed and subsoil and their continental shelf. If a State's continental shelf extends to a distance less than 200 nm, there is a substantial overlap between the EEZ regime and the continental shelf regime, as both give States the sovereign right to explore and exploit the natural resources of the seabed and subsoil. However, the continental shelf regime is very important for States whose shelf extends beyond 200 nm.

Article 76 of UNCLOS permits States to make continental shelf claims beyond 200 nautical miles out to a maximum of 350 nautical miles or 100 nautical miles from the 2,500 metre isobaths (the line connecting the depth of 2,500 metres). The claim to an extended continental shelf must be made by submitting technical information to the Continental Shelf Commission established by UNCLOS. The deadline for submission of claims was 10 years from the date of entry into force of UNCLOS. At the 11th meeting of the Conference of Parties, States Parties to UNCLOS decided that the 10 years should begin on 13 May 1999. The effect of this decision was to extend the deadline for most States Parties to 13 May 2009. In June 2008, it was decided that States could meet the deadline by submitting "Preliminary Information" instead of a full submission.

The effect of a submission on existing maritime disputes is dealt with specifically in the Rules of Procedure of the Commission. Rule 5(a) provides that in cases where a land or maritime dispute exists, the Commission shall NOT CONSIDER and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute. (emphasis added).

Baselines

All maritime zones are measured from baselines. The normal rule for baselines is the low water line along the coast. Article 7 permits the use of straight baselines (1) where the coastline is deeply indented and cut into, or (2) if there is a fringe of islands

along the coast in its immediate vicinity. In either case, the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast.

In the *Qatar and Bahrain cas,e* the International Court of Justice stated that Article 7 should be interpreted strictly. However, most States in East and Southeast Asia have interpreted Article 7 very liberally, and some of the straight baselines employed by China, Taiwan, Viet Nam and Malaysia along their coasts are not consistent with a strict reading of Article 7. The Philippines adopted a new baselines law in 2009 establishing archipelagic baselines. Initial reports are that the baselines are in conformity with UNCLOS.

UNCLOS permits an "archipelagic State" to draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. An archipelagic State is "a State constituted wholly by one or more archipelagos, and may include other islands such as Indonesia and the Philippines. Continental States with off-shore archipelagoes are not permitted under UNCLOS to draw such straight archipelagic baselines. Therefore, straight archipelagic baselines cannot be used in the islands in the South China Sea (such as in the Paracels) even though they are sometimes described as "archipelagoes".

Islands, rocks, low-tide elevations and artificial islands

An "island" is defined in Article 121 of UNCLOS as "a naturally formed area of land above water at high tide." The normal rule is that islands are entitled to the same maritime zones as land territory, including a territorial sea, contiguous zone, EEZ and continental shelf.

Article 121(3) creates an exception to this rule for very small features. It provides that "rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf." Therefore, it is critically important whether a particular feature is only entitled to a 12 nm territorial sea because it is a "rock" as defined in Article 121(3).

Estimates are that less than 50 of the 150 or more features in the South China Sea are islands as defined in Article 121 because they are naturally formed areas of land above water at high tide. Estimates also are that the vast majority of the 50 or so islands in the South China Sea are so small that they should be classified as rocks which cannot sustain human habitation or economic life of their own.

Most of the geographic features in the South China Sea are not islands because they are below water at high tide. Some are "low-tide elevations", which means that they are below water at high tide but above water at low tide. States are not entitled to claim any maritime zones from low-tide elevations, not even a 12 nm territorial sea. In fact, it is not even clear under international law whether a State can claim sovereignty over a low-tide elevation. In the *Pedra Branca Case*, the ICJ stated that

international law was not clear whether a State could have sovereignty over a low-tide elevation such as South Ledge. However, it refused to address the issue in that case.

Others geographic features in the South China Sea are reefs, shoals and sandbars that are not above water even at low tide. Such features are not subject to a claim of territorial sovereignty, and no maritime zones can be claimed from them.

If a State has used land reclamation or has built structures on a geographic feature so that it becomes above water at high tide, that feature does not become an island. Under UNCLOS, an island must be a "naturally formed" area of land above water at high tide. Such features would be treated as "artificial islands" and would be governed by the rules of UNCLOS on artificial islands, installations and structures. States are not entitled to claim any maritime zones around such features, but they are entitled to declare a safety zone of 500 metres around them.

Therefore, if Article 121 were applied strictly, only a very small number of the islands in the South China Sea would be entitled to an EEZ and continental shelf of their own. Many of the small islands would be rocks within Article 121(3) and would be entitled only to a 12 nm territorial sea and a 24 nm contiguous zone. The majority of the features are not islands because they are not above water at high tide. Such features would not be entitled to any maritime zones of their own (not even a 12 nm territorial sea).

Delimitation of maritime boundaries

Articles 74 and 83 govern the delimitation of the EEZ and continental shelf boundaries between opposite or adjacent States. The wording of both articles is near identical and provides that the delimitation shall be effected by agreement on the basis of international law in order to achieve an equitable solution.

Courts have referred to the method called for in Articles 74 and 83 (and in customary international law) as the "equitable principles-relevant circumstances" method. In more recent cases, a clear two-stage approach has emerged whereby a preliminary strict equidistance line giving full effect to all features is constructed, before the particular facts of the case are examined with a view to assessing whether an adjustment of the line is required in order to achieve an equitable result.

There are overlapping maritime claims in the South China Sea because the EEZ or continental shelf claims of adjacent States overlap. These overlapping boundary claims are complicated by the fact that two or more claimants maintain that the islands in the South China Sea are under their sovereignty. At least some of the disputed islands may be entitled to an EEZ of their own. Therefore, there would be an overlap between the EEZ claim measured from the baselines along mainland coast and the EEZ claim measured from the baselines of the off-shore islands. However, because sovereignty over the off-shore islands is disputed, these overlapping EEZ claims cannot be addressed. As with the case of *Pedra Branca*, States must first determine who has

sovereignty over the island before they can begin negotiations on how to delimit the maritime boundary.

One provision on delimitation which is important in the South China Sea is the provision in Articles 74 and 83 relating to delimitation of the EEZ and continental shelf providing that States should enter into "provisional arrangements of a practical nature" pending final agreement on the maritime boundary. This provision has been cited by academics to try to convince claimants that they should cooperate on matters of common interest (fisheries management, protection of the environment, search and rescue, etc.) pending any resolution of the boundary delimitation issues. The relevant paragraph reads as follows:

> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

UNCLOS provides that if agreement cannot be reached through negotiation, delimitation disputes can be referred to the system of compulsory binding dispute settlement in Part XV. For example, in October 2009, Bangladesh invoked Part XV against both India and Myanmar to resolve the overlapping maritime claims in the Bay of Bengal.

However, Article 298 of UNCLOS provides that States have a right to "opt out" of the system for compulsory binding dispute for disputes on the interpretation or application of the provisions on maritime boundary delimitation. Significantly, China has exercised its option to opt out of the compulsory binding dispute settlement system in UNCLOS for disputes relating the interpretation or application of the provisions on maritime boundary delimitation.

Maritime boundary delimitations involving Islands and Rocks

Although there has been no authoritative ruling on how Article 121, paragraph 3 is to be interpreted, international courts and tribunals have on a number of occasions been faced with the question of how islands should be treated in the context of the delimitation of maritime boundaries.

Courts and tribunals have often have dealt with small islands by treating them in one of three ways. First, International courts and tribunals have tended to address the potentially disproportionate effect of offshore islands by according them reduced effect on the final delimitation line. This is often achieved by constructing strict equidistance lines and then modifying the line so as to give the feature concerned only partial effect. Second, some courts and tribunals have given small islands very little effect by partially or wholly "enclaving" them. Third, in some cases, court and

tribunals have wholly discounted small islands by not allowing them to be used as basepoints in the construction of the boundary line.

Historic rights

There are no provisions in UNCLOS which refer to historic rights. There are references to "historic bays" and "historic title" in three articles. First, Article 10(6) provides that the provisions in Article 10 on baselines for bays do not apply to *so-called "historic" bays*. Second, Article 15 provides that the territorial sea of opposite or adjacent States shall be delimited according to the equidistance line, but that such provision does not apply where necessary by reason of *historic title* or other special circumstances to delimit the territorial seas of the two States in another manner. Third, Article 298 permits States to opt out of the compulsory binding dispute settlement system for disputes involving *historic bays or titles*.

The terms "historic bays" or "historic title" are otherwise not dealt with. They would be determined by customary international law. However, given that the term historic title is referred to only in the context of historic waters in the territorial sea, it is implied that States are not able to make any historic claims outside the territorial sea regime.

The rights of States to claim sovereign rights to the natural resources outside the territorial sea are set out in the continental shelf and EEZ regimes. Therefore, although UNCLOS does not say so directly, it seems clear that States parties to UNCLOS would not be able to make any claims to historic rights or historic waters outside the territorial sea. Given this, most experts would agree that there is no basis whatsoever for China to maintain that its infamous "u-shaped line" can be used to support any claim to historic rights or historic waters outside the territorial sea. This issue will be dealt with in more detail later.

2002 ASEAN-CHINA DECLARATION OF CONDUCT

The 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) was adopted by the Foreign Ministers of ASEAN and China at the 8th ASEAN Summit in Phnom Penh on 4 November 2002.

The DOC states that the Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by universally recognized principles of international law, including UNCLOS. In addition, it states that the Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration. It also states that the Parties undertake to respect the provisions of this Declaration and take actions consistent therewith. In addition, the final paragraph states that the Parties concerned reaffirm that the adoption of a *code of conduct* in the South China Sea

would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

The vagueness of the self-restraint provision in the 2002 DOC has resulted in misunderstandings and increased tension. The self-restraint provision states that the Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from the action of inhabiting the presently uninhabited geographic features. This suggests that the Parties are to refrain from new occupations, and that they should not undertake activities on islands they already occupy if such actions would "complicate or escalate disputes and affect peace and stability". However, the parties seem to have interpreted the self-restraint clause to imply that they can continue enhancing their presence on features they already occupy. In other words, the Parties seem to take the position that their actions to build fortifications, structures, runways and tourist facilities on features they currently occupy are not inconsistent with the self-restraint provision.

One of the obvious weaknesses of the 2002 DOC is that it contains no provisions setting out any procedures or mechanisms to ensure that the parties comply with their obligation "to respect the provisions of this Declaration and take actions consistent therewith." Nor does it provide for any mechanism to deal with differences which may arise over the interpretation or application of the provisions in the Declaration, especially the self-restraint provision.

THE 2009 EXTENDED CONTINENTAL SHELF SUBMISSIONS

As mentioned above, Article 76 of UNCLOS provides that coastal States with broad continental shelves have the right to extend their continental shelf claim beyond 200 nm, but they must do so by making a submission to the Commission on the Limits of the Continental Shelf (CLCS), which is body of scientific experts established under UNCLOS. Under rules of procedure adopted by the CLCS, most States, including those surrounding the South China Sea, were required to submit information to the CLCS by 13 May 2009 if they intended to make a claim for a continental shelf beyond 200 nm.

Several claimant States made submissions to the CLCS in order to meet the 13 May 2009 deadline. When such submissions included areas surrounding features claimed by other States, the States affected, as would be expected, submitted Notes Verbale to the UN Secretary-General objecting to the submissions in order to protect their legal interests.

In 2009, Malaysia and Viet Nam made a Joint Submission and Viet Nam made an additional submission. The Philippines passed new baselines legislation bringing its archipelagic baselines into conformity with the provisions of UNCLOS. It also objected to the submissions of Viet Nam and Malaysia, and reserved the right to make its own submission in the direction of the South China Sea.

China not only objected to the submissions of Malaysia, Viet Nam and the Philippines, but is also attached the infamous map with the u-shaped claim which includes almost the entire South China Sea. This raised old suspicions about the nature of China's claim in the South China Sea. It also brought the United States into the dispute, and arguably pushed some of the Southeast Asian countries closer to the United States.

How claims have been clarified

As a result of the actions of the ASEAN claimant States with respect to the extended continental shelf, their claims have been clarified in several respects.

First, the 200 nm outer limits of the exclusive economic zones of Malaysia and Viet Nam have been declared and their coordinates have been published and circulated. In addition, the adjacent boundaries within 200 nm between Brunei and Malaysia have been clarified by a bilateral agreement between Brunei and Malaysia.

Second, Malaysia, Viet Nam and Brunei seem to have taken the position that the islands over which they claim sovereignty in the South China Sea are not entitled to more than a 12 nm territorial sea. This is implied from the fact that they did not claim an exclusive economic zone from any of the features in the South China Sea, but only from the baselines along the coast of their mainland.

Third, Malaysia and Viet Nam have claimed the area opposite the outer limits of their 200 nm exclusive economic zones as extended continental shelf, but left the maritime boundary between their extended shelves undefined. This would give the two States the sovereign right to explore and exploit the natural resources of the sea bed and subsoil on the shelf. The water above the extended continental shelf area would be high seas, and access to the fisheries resources in this area would be subject to the UNCLOS provisions on high seas fishing.

Fourth, the Philippines has established archipelagic baselines in conformity with the provisions in Part IV of UNCLOS. Therefore, it can be inferred that it has finally given up on its rectangular territorial claim based on the coordinates in the 1898 Treaty of Paris and has brought its archipelagic claim into conformity with UNCLOS.

Fifth, the Philippines has also clarified its claim to the islands in the Kalayaan Island Group (KIG) and to Scarborough Shoal by stating that these features will be governed by the regime of islands in Article 121 of UNCLOS. This means that that it will measure its 12 nm territorial sea from the islands using the general rule on baselines, which is the low water line along the coast, and not by archipelagic baselines. Therefore, the Philippines has also clarified that it will not be using the polygon shaped straight lines around the KIG group as a boundary for its maritime zones. This means that the polygon shaped strait lines were merely a convenient way for the Philippines to have indicated which islands in the Spratlys it claimed are under its sovereignty.

Sixth, the claim of China is clarified to a limited extent. By attaching the u-shaped lines map to their Note Verbale objecting to the submissions of Malaysia and Viet Nam, the PRC has officially given notice to the international community that this map is significant to its claim in the South China Sea, including the Spratly Archipelago. Before 2009, it was not clear whether the PRC had officially based its claim on the map.

Seventh, the wording of China's Note Verbale also clarified its position in some respects. In its Note, China stated that it claimed "sovereignty" over the islands and their "adjacent waters". If China would clarify that by adjacent waters they mean a 12 nm territorial sea measured from the low-water line of each island, this would be consistent with UNCLOS. In its Note, China also stated that it claimed "sovereign rights and jurisdiction" in the "relevant waters". If they would clarify that "relevant waters" means they are claiming only an exclusive economic zone in the waters adjacent to the territorial sea measured from the baselines of each island, this would also be consistent with UNCLOS.

Finally, China's claim is clarified to some extent because of what is <u>not</u> stated in its Note Verbale. The Note Verbale makes no mention of "historic rights" or "historic waters". It uses only the language of UNCLOS, which is "sovereignty, sovereign rights and jurisdiction". Therefore, it seems that China is not asserting any historic rights to the waters inside the u-shaped line and that China is not claiming that the waters inside the u-shaped line are its historic waters. Given that some writers in China and Taiwan had made such assertions when discussing the significance of the u- shaped line map, China's position is now clearer.

How the claims have not been clarified

The claim of the Philippines remains unclear in two respects. First, it has not set out the outer limit of its 200 nm exclusive economic zone in the direction of South China Sea. However, since it has established its archipelagic baselines, it is likely that it will measure the limit of its 200 nm exclusive economic zone from these archipelagic baselines. Second, the Philippines has stated that Scarborough Shoal and the KIG will be governed by the regime of islands in Article 121. It has not clarified whether it intends to treat all of the features as "rocks" that are only entitled to a 12 nm territorial sea, or whether it intends to claim that some of the features are islands entitled to an exclusive economic zone and continental shelf of their own.

China's reference in the Note Verbale to "adjacent waters" and "relevant waters" left their claim ambiguous. However, the main problem with the Notes Verbale of China was the fact that they said "see attached map' after the vague language, and then attached the infamous u-shaped line map. This raised serious concerns in many countries, including ASEAN countries, and rekindled old suspicions about the nature of China's claim and intentions in the South China Sea. Critics of China were quick to claim that by attaching the map, China was in effect claiming 80-90% of the South

China Sea as either its territorial sea or historic waters, and that such claims were not consistent with UNCLOS or international law. The media in the United States were quick to pick this point up, and observers in the United States began to argue that China's assertive actions were a threat to the freedoms of navigation and overflight in the South China Sea.

China's claim is even more ambiguous when one considers the language it used in its Note Verbale protesting the 2009 Baselines Law of the Philippines. In that Note, China stated it has indisputable sovereignty over the Huangyan Island and Nansha Islands "and their surrounding maritime areas". The phrase "surrounding maritime areas" is even more ambiguous than "adjacent waters". Therefore, unless the true intent was lost in translation, it could be concluded that China's policy with respect to the nature of its claim to the waters in the South China Sea has been one of "deliberate ambiguity".

Even Indonesia, which is not a claimant State, believed it necessary to make an official statement concerning China's Notes Verbale. Indonesia's Note Verbale of 8 July 2010 raised two concerns. First, that the u-shaped line map attached to China's Note Verbale lacks a basis in international law and upsets the balance established in UNCLOS. Second, that China should act consistently in applying UNCLOS, and follow the same reasoning on rocks and islands in the South China Sea as it had articulated with respect to the claim of Japan over Okinitorishima.

In summary, the measures taken by Malaysia, Viet Nam and the Philippines have clarified their claims to a significant extent in a manner that is in conformity with UNCLOS. By contrast, the measures taken by China have reinforced fears and suspicions that its claim is inconsistent with UNCLOS and that it is being deliberately ambiguous about the legal basis for its claim. The result is that a large segment of the international community now views China's claims in the South China Sea as illegitimate.

SHELVING THE DISPUTES AND DEVELOPING JOINTLY

One basic principle of China's policy on the South China Sea since Deng Xiaoping has been "shelving the disputes and developing jointly". However, this phrase has caused some confusion, as some Chinese scholars claim that what it means is that the overlapping boundary disputes are set aside, but not the sovereignty disputes over the islands. However, a common sense interpretation of the phrase would be that each claimant State maintains that it has sovereignty over the disputed islands, but regarding those territorial sovereignty disputes for which they can't reach a comprehensive and durable settlement at the moment, they agree to leave the sovereignty issues alone and set aside the disputes. By shelving the disputes, they are not giving up or renouncing their sovereignty claims, but setting them aside.

In the long term, the only viable solution may be for the ASEAN claimants to enter into discussions with China to implement the "shelving the disputes and developing jointly" principle. However, it must be clear from the outset that such arrangements are without prejudice to a final determination of the sovereignty disputes and the related maritime boundaries.

CONCLUSIONS

Although the policy of the claimant States in the South China Sea is heavily influenced by economic and security concerns, the disputes in the South China Sea cannot be fully understood unless they are also analyzed in light of the relevant rules of international law, especially UNCLOS.

The claims of most of the Claimant States in the South China Sea were unclear prior to 2009. Although the claimant States became parties to UNCLOS in the mid-1990s, they were slow to amend their national laws and practices and bring their claims into conformity with UNCLOS.

As a result of the Submissions and Notes Verbale submitted to the CLCS in response to 13 May 2009 deadline, the situation has changed dramatically. The measures taken by the claimant States with respect to an extended continental shelf have resulted in the claims of the ASEAN claimant States being clarified in a manner that is consistent with UNCLOS and international law.

The claim of China has been clarified to a limited extent. However, the measures taken by China in response to those taken by the ASEAN claimants have cast further doubt on the legitimacy of its claim and on its consistency with international law. Consequently, China will be under increasing pressure to clarify its claim and bring it into conformity with UNCLOS.

Although the only long-term solution seems to be "shelving the disputes and developing jointly", it will be difficult for the other claimants to negotiate with China on joint development arrangements so long as China's claim is viewed as inconsistent with UNCLOS. It is hoped that China will review is policy with respect to the u-shaped line and clarify its claim in a manner that is consistent with UNCLOS.

In the meantime, the best course of action seems to be for ASEAN and China to work together in good faith to implement the Declaration of Conduct.

It thus seems that although security concerns and economic interests will continue to dictate policy, the principles and rules of international law will continue to influence and frame the debate.