

**Keynote Address by Professor S Jayakumar**  
**CIL Conference on Joint Development and the South China Sea**  
**Thursday, 16 June 2011, 9.10 AM**

Ambassador-At-Large Hasjim Djalal

Ambassador-At-Large Tommy Koh, Chairman, CIL

Professor Robert Beckman, Director, CIL

Distinguished Guests

Ladies and Gentlemen

I join Pak Hasjim and Ambassador Koh to welcome all of you to the Centre for International Law's Conference on Joint Development and the South China Sea.

The disputes in the South China Sea

The Spratly Islands in the South China Sea have long been a source of tension and potential conflict in this region. Some or all of the islands and reefs are claimed by Brunei Darussalam, China, Malaysia, the Philippines, Vietnam and Taiwan. Many are occupied by the claimants and some have even been fortified.

When I was invited to speak at this Conference a few months ago, the South China Sea issues had not flared up as they have in recent days.

Such periodic escalation of tensions over competing claims is not conducive for regional stability. The recent incidents since March 2011 among China, Vietnam and the Philippines are particularly dangerous and disturbing. The most recent incident took place on 9 June about 270 km

from Vung Tau in the southern part of Vietnam. This is, to the best of my knowledge, the first such incident in this area.

To avoid any potential conflict, there is an urgent need to clarify the extent of the various claims and speedily conclude the implementation guidelines of the 2002 *Declaration on the Conduct of Parties in the South China Sea* (2002 DOC) that have been stalled for nearly a decade. The 2002 DOC should be seen as a step towards the elaboration of a binding Code of Conduct for the South China Sea.

In my view, stable relations between China and ASEAN, on the one hand, and among all the major powers with interests in the region, on the other hand, are essential conditions for regional growth and prosperity. In that sense, what is at stake is much more than the merits of specific territorial claims in the South China Sea.

In this regard, two major powers – China and the US – must take certain steps.

**China:** China should not continue to leave unaddressed the concerns and questions raised by many over its puzzling and disturbing nine-dotted-lines map. I say it is “puzzling” because it does not seem to have any basis under the 1982 UN Convention on the Law of the Sea (UNCLOS), which China has repeatedly said it respects. I say it is “disturbing” because it can be interpreted as being a claim on all the maritime areas within the nine dotted lines. This ambiguity has led to concerns not just among claimant States, and it is clearly in China’s interests to clarify the extent of its claims and thereby dispel any apprehensions over its intentions. Failure to do so

could jeopardise the trust essential for any peaceful resolution and undermine all the gains of Chinese diplomacy made in the last two decades.

**United States:** The US is a major maritime power whose engagement with, and presence in, the region is crucial for maintaining stability in the South China Sea. Unfortunately, it has yet to become a party to UNCLOS. This despite the US having stressed many times its interests in the South China Sea, especially freedom of navigation. Every administration since President Clinton has requested the Senate to accede to the UNCLOS and I hope that the current Senate will do so, because such accession will greatly enhance the role and credibility of the US.

Singapore is not a claimant State and we have good relations with all of the claimants. We are neutral vis-à-vis the various claims. This does not mean we have no interests. Like Indonesia and other non-claimant ASEAN States, Singapore's interest is to ensure that these claims do not threaten regional peace and stability or impede the freedom of maritime navigation, overflight rights and the freedom to lay and repair submarine cables in the South China Sea.

As a small State, we also have an interest in ensuring that all the claimant States, when pursuing their rights and obligations, will always act in accordance with international law, including the UNCLOS. In this regard, the Philippines' decision to amend its archipelagic baselines law in 2009 to bring its legislation into conformity with UNCLOS is a positive move.<sup>1</sup>

UNCLOS contains no provisions on how to resolve sovereignty disputes over islands or other geographic features. It only sets out what maritime zones can be claimed from such islands or features<sup>2</sup> and that delimitation of

overlapping maritime zones shall be effected by agreement on the basis of international law, in order to achieve an equitable solution.<sup>3</sup>

Some UNCLOS member States like Australia, China and Korea have chosen under Article 298 to opt out of the UNCLOS dispute settlement mechanism for disputes relating to maritime delimitation.<sup>4</sup> UNCLOS also has a provision whereby, when it is impossible for States to reach an agreement on delimitation, these parties should make every effort to enter into “provisional arrangements of a practical nature.”<sup>5</sup>

#### ASEAN – China Declaration on the Conduct of Parties in the South China Sea

On 22 July 1992, ASEAN Foreign Ministers adopted the 1992 ASEAN Declaration on the South China Sea in response to increased tensions in the South China Sea in the early 1990s.<sup>6</sup> The 1992 Declaration calls upon claimant States to:

- Resolve disputes by peaceful means;
- Exercise restraint;
- Explore the possibility of cooperation; and
- Use the 1967 Treaty of Amity as a basis for establishing a code of conduct for the South China Sea.

In the mid-1990s, discussions to reduce tensions in the South China Sea began at a bilateral level. In August 1995, the Philippines and China issued a joint statement on conduct in the South China Sea,<sup>7</sup> followed by the Philippines and Vietnam in November 1995.<sup>8</sup>

In July 1996, ASEAN Foreign Ministers agreed to conclude a regional code of conduct in the South China Sea.<sup>9</sup> ASEAN States and China subsequently agreed in December 1997 to, inter alia, resolve their disputes

in the South China Sea through friendly consultations and negotiations in accordance with universally recognized international law, including UNCLOS.<sup>10</sup>

Between 1996 and 2001, ASEAN States and China held discussions aimed at adopting a Code of Conduct for the South China Sea. As some States were reluctant to adopt a legally binding code of conduct, a proposal was made to first adopt a non-binding “declaration”.

On 4 November 2002, the 2002 *Declaration on the Conduct of Parties in the South China Sea* (2002 DOC) was adopted by the Foreign Ministers of ASEAN and China.<sup>11</sup> The 2002 DOC, inter alia:

- Reaffirms the freedom of navigation and overflight in the South China Sea as provided for by universally recognized principles of international law, including UNCLOS;
- Emphasises consultations and dialogues concerning relevant issues;
- States that Parties undertake to respect the provisions of this Declaration and take actions consistent therewith; and
- That Parties agree to work, on the basis of consensus, towards regional peace and stability.

The 2002 DOC provides for its implementation through confidence-building measures, cooperative measures, and through dialogue and consultation. A plan of action was adopted in November 2004<sup>12</sup> and a joint working group established in December 2004<sup>13</sup> to formulate recommendations on (a) guidelines and the action plan for the implementation of the 2002 DOC; and (b) specific cooperative activities in the South China Sea. However, the working group’s Terms of Reference were silent on a Code of Conduct. Notably, although official statements in

the past few years seem to reflect the continued importance of the 2002 DOC,<sup>14</sup> little progress has been made in its implementation.

### The ideal solution

If negotiations do not lead to an agreed political solution, then in my view, the ideal is to follow the excellent examples set by Malaysia and Singapore and Malaysia and Indonesia in the Pedra Branca and Sipadan and Ligitan cases respectively, where the disputes were referred to the International Court of Justice.

But I am also a realist. Territorial disputes and disputes over maritime delimitation are highly emotive issues. Many countries are reluctant to refer such disputes to adjudication or arbitration because the daunting prospect of losing the disputed territory is politically untenable. As I said in my recent book "DIPLOMACY – A SINGAPORE EXPERIENCE": [I am sorry for this sales pitch!]

*Disputes over territorial sovereignty are especially difficult to resolve. Whatever the nature of the territory, whether large or small, endowed with resources or not and populated or not, territorial disputes always evoke intense political reactions and nationalist emotions. These constraints leave governments little room to reach a negotiated settlement or compromise. They fear that their own public will accuse them of "selling out" part of their lands. Witness, for example, the emotions generated over the territorial disputes in the South China Sea.*

*These downsides [in third party adjudication] may explain why some of the territorial disputes in Asia, such as between China and*

*Japan over the Diaoyu/Senkaku Islands, or between Japan and Russia over the Kuril Islands, remain intractable. Consider also the any overlapping claims in the South China Sea. I believe all the claimant states must have concluded that no legal judgment is likely to resolve the issue completely. Some claimants may even feel that they can secure their claims on the ground by de facto control through superior force.*

What is the alternative? Approach of setting aside the dispute on sovereignty and pursuing joint development instead

If there is an impasse in attempts to resolve sovereignty and maritime delimitation disputes by negotiations or if there is a reluctance to resort to third party dispute settlement, what is the alternative if we want to avoid instability, tensions or worse, conflict?

One option is that the countries concerned could consider the option of joint development – for instance, of hydrocarbon resources found in overlapping claim areas.<sup>15</sup> Joint development agreements have emerged over the past fifty years as a viable means to allow oil exploration and exploitation in disputed areas while preserving the respective claims of the parties.<sup>16</sup> It is also consistent with the UNCLOS concept of a “provisional arrangement of a practical nature” which is without prejudice to the sovereignty disputes or the final determination of the maritime boundaries.

Six ASEAN member States (Brunei,<sup>17</sup> Cambodia,<sup>18</sup> Indonesia,<sup>19</sup> Malaysia,<sup>20</sup> Thailand,<sup>21</sup> and Vietnam<sup>22</sup>) and three Northeast Asian countries (China,<sup>23</sup> Japan<sup>24</sup> and South Korea<sup>25</sup>) have either officially agreed to negotiate joint development agreements or have been party to a joint

development agreement. This could be due to the Asian cultural preference for consensus-building and collective cooperation.<sup>26</sup>

The idea of putting aside sovereignty claims and jointly developing hydrocarbon resources in waters surrounding the Spratly Islands has been mooted since the 1980s. The late Deng Xiaoping first promoted this principle of “setting aside dispute and pursuing joint development” in China’s dispute with Japan over the Diaoyu (Senkaku) Islands.<sup>27</sup> When China established diplomatic relations with Southeast Asian countries in the 1970s and 1980s, Deng proposed the same approach for the Nansha (Spratly) Islands.

The fourth generation of Chinese leaders have continued talks with ASEAN leaders on the Spratly Islands and have reiterated their call for setting aside the dispute and pursuing joint development.<sup>28</sup> Other claimants to the Spratly Islands such as Malaysia,<sup>29</sup> Vietnam<sup>30</sup> and Brunei<sup>31</sup> have also entered or agreed to enter into similar joint development agreements.

### Conclusion

This Conference is both important and timely as it will enable participants to better understand the concept of joint development. Instead of focusing on which claimant has a better claim to the features in the Spratly Islands, a topic which has already been extensively examined elsewhere, this Conference will explore existing joint development arrangements in Asia to see if there are “lessons learnt” which may be applicable to the South China Sea. Hopefully, this will encourage discussion and debate on what appears to be one of the more viable solutions to the South China Sea disputes, and mark a step forward on the long road towards a peaceful resolution. I am confident that through this conference,



we will all build upon our ideas and experiences to seek good solutions. I wish all of you an eventful and enjoyable time in Singapore. Thank you.

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## END NOTES

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<sup>1</sup> Republic Act No. 387, An Act to Amend Certain Provisions of Republic Act No. 3046 As Amended by Republic Act 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, 10 March 2009 available online at the UNDOALOS National Legislation Database:

<[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/phl\\_2008\\_act9522.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/phl_2008_act9522.pdf)>.

<sup>2</sup> Article 121, UNCLOS.

<sup>3</sup> Articles 74 (1) and 83 (1), UNCLOS.

<sup>4</sup> Declarations and Statements upon UNCLOS Ratification available online at the UNDOALOS Website:

<[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm)>.

<sup>5</sup> See Articles 74 (3) and 83 (3), UNCLOS.

<sup>6</sup> 1992 ASEAN Declaration on the South China Sea, Adopted by the Foreign Ministers at the 25<sup>th</sup> ASEAN Ministerial Meeting issued on 22 July 1992 in Manila, Philippines available online at the CIL Documents Database: <<http://cil.nus.edu.sg/1992/1992-asean-declaration-on-the-south-china-sea-signed-on-22-july-1992-in-manila-philippines-by-the-foreign-ministers/>>.

<sup>7</sup> Joint Statement of the Republic of Philippines and the People's Republic of China on the South China Sea and on other Areas of Cooperation, 9 – 10 August 1995, reproduced in Nguyen Hong Thao, "Vietnam and the Code of Conduct for the South China Sea," 32 Ocean Development and International Law 105 at 125 – 126.

<sup>8</sup> Joint Statement on the Fourth Annual Bilateral Consultation between the Socialist Republic of Vietnam and the Republic of Philippines, issued on 7 November 1995 in Hanoi, Vietnam, reproduced in Nguyen Hong Thao, "Vietnam and the Code of Conduct for the South China Sea," 32 Ocean Development and International Law 105 at 126 – 127.

<sup>9</sup> 1996 Joint Communiqué of the 29<sup>th</sup> ASEAN Ministerial Meeting issued on 21 July 1996 in Jakarta, Indonesia available at the CIL Documents Database:

<<http://cil.nus.edu.sg/1996/1996-joint-communiqué-of-the-29th-asean-ministerial-meeting-issued-on-21-july-1996-in-jakarta-indonesia/>>.

<sup>10</sup> 1997 Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China issued on 16 December 1997 in Kuala Lumpur, Malaysia available at the CIL Documents Database:

<<http://cil.nus.edu.sg/1997/1997-joint-statement-of-the-meeting-of-heads-of-stategovernment-of-the-member-states-of-asean-and-the-president-of-the-peoples-republic-of-china-issued-on-16-december-1997-in-kuala-lumpur-malaysia/>>.

<sup>11</sup> 2002 Declaration on the Conduct of Parties in the South China Sea signed at the 8<sup>th</sup> ASEAN Summit on 4 November 2002 in Phnom Penh, Cambodia by the Foreign Ministers of ASEAN and the People's Republic of China available online at the CIL Documents Database:

<<http://cil.nus.edu.sg/2002/2002-declaration-on-the-conduct-of-parties-in-the-south-china-sea-signed-on-4-november-2002-in-phnom-penh-cambodia-by-the-foreign-ministers/>>.

<sup>12</sup> 2004 Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity adopted on 29 November 2004 in Vientiane, Laos by ASEAN Heads of State/Government available online at the CIL Documents Database:

<<http://cil.nus.edu.sg/2004/2004-plan-of-action-to-implement-the-joint-declaration-on-asean-china-strategic-partnership-for-peace-and-prosperity-adopted-on-29-november-2004-in-vientiane-laos-by-the-heads-of-stategovernment/>>.

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<sup>13</sup> 2004 Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea adopted at the ASEAN-China Senior Officials Meeting on 7 December 2004 in Kuala Lumpur, Malaysia available online at the CIL Documents Database: <<http://cil.nus.edu.sg/2004/2004-terms-of-reference-of-the-asean-china-joint-working-group-on-the-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea-adopted-on-7-december-2004-in-kuala-lumpur-mal/>>.

<sup>14</sup> 2009 Joint Communiqué of the 42<sup>nd</sup> ASEAN Foreign Ministers Meeting “Acting Together to Cope with Global Challenges” issued on 20 July 2009 in Phuket, Thailand available online at the CIL Documents Database: <<http://cil.nus.edu.sg/2009/2009-joint-communique-of-the-42nd-asean-foreign-ministers-meeting-acting-together-to-cope-with-global-challenges%e2%80%9d-issued-on-20-july-2009-in-phuket-thailand/>>; Chair’s Statement of the 18<sup>th</sup> ASEAN Summit, 7 – 8 May 2011, “ASEAN Community in a Global Community of Nations” issued on 8 May 2011 in Jakarta, Indonesia available online: <[http://www.kemlu.go.id/Documents/KTT\\_ASEAN%2018/Chair's%20Statement%2018th%20ASEAN%20Summit%20as%20of%208%20May%2011%20FINAL\(1\).pdf](http://www.kemlu.go.id/Documents/KTT_ASEAN%2018/Chair's%20Statement%2018th%20ASEAN%20Summit%20as%20of%208%20May%2011%20FINAL(1).pdf)>.

<sup>15</sup> Thomas Mensah, “Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation” in Ranier Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff Publishers, The Netherlands, 2006) 143 – 153 at 146.

<sup>16</sup> *Ibid.*

<sup>17</sup> **Brunei** agreed to jointly develop with Malaysia an area offshore of Limbang which had previously been claimed by Malaysia in exchange for Malaysia giving up its claim over this area: See Johan Saravanamuttu, “Malaysia’s Lucrative Approach to Joint Development in Troubled Seas” *Opinion Asia*, 16 May 2010 available online: <<http://opinionasia.com/MalaysiaOilJDs>>.

<sup>18</sup> **Cambodia** has agreed to negotiate joint development agreements with Vietnam (in 1982, Cambodia and Vietnam signed an *Agreement on Historic Waters of Vietnam and Kampuchea*, which included an agreement to jointly develop natural resources in an overlapping area in the Gulf of Thailand) and with Thailand (in 2001, Cambodia and Thailand concluded a *Memorandum of Understanding on the Area of Overlapping Maritime Claims to the Continental Shelf*, which included an agreement to negotiate for joint development of resources in an overlapping area in the Gulf of Thailand claimed by both Thailand and Cambodia). To date, Cambodia has not concluded a joint development agreement with either Vietnam or Thailand: See generally Clive Schofield, “Unlocking the Seabed Resources of the Gulf of Thailand” 29 (2) *Contemporary Southeast Asia* 286 (2007) at 294.

<sup>19</sup> **Indonesia** had a joint development agreement with Australia in the Timor Sea (*1989 Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*) but it is no longer in force after Timor-Leste gained independence from Indonesia.

<sup>20</sup> **Malaysia** is party to 3 joint development agreements, one with Thailand (see the *1979 Memorandum of Understanding between Malaysia and Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-Bed in a Defined Area* and the *1990 Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand and other matters relating to the establishment of the Malaysia-Thailand Joint Authority*), one with Vietnam (see the *1992 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf involving the Two Countries*) and one with Brunei (see note 19).

<sup>21</sup> **Thailand** is party to 1 joint development agreement with Malaysia (see note 22) and agreed to negotiate a joint development agreement with Cambodia (see note 20).

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<sup>22</sup> **Vietnam** is party to 1 joint development agreement with Malaysia (see note 22). Vietnam has also agreed to negotiate a joint development agreement with Cambodia (see note 20) and with China as part of its maritime delimitation with China in the Gulf of Tonkin (see *2000 Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves of the Two Countries in Beibu Gulf/Bac Bo Gulf*). Vietnam has not concluded a formal joint development agreement with either Cambodia or China as yet.

<sup>23</sup> **China** has agreed to jointly develop hydrocarbon resources with Vietnam as part of its maritime delimitation with Vietnam in the Gulf of Tonkin (see note 25). It has also agreed with Japan to jointly develop hydrocarbon resources in an overlapping area claimed by both Japan and China in the East China Sea (*2008 Principled Consensus between Japan and China on the East China Sea Issue*). China has not concluded a formal joint development agreement with either Vietnam or Japan as yet.

<sup>24</sup> **Japan** is party to 1 joint development agreement with South Korea in the East China Sea (*1974 Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*). It has also agreed with China to jointly develop an overlapping area claimed by both Japan and China in the East China Sea (see note 26).

<sup>25</sup> **South Korea** is a party to 1 joint development agreement with Japan in the East China Sea (see note 27).

<sup>26</sup> Yu Hui, "Joint Development of Mineral Resources – An Asian Solution?" 2 Asian Yearbook of International Law 87 (1992) at 112

<sup>27</sup> "Set Aside Dispute and Pursue Joint Development," 17 November 2000, available online at the Ministry of Foreign Affairs of the People's Republic of China Website: <<http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm>>.

<sup>28</sup> "Deepening Strategic Partnership and Promoting All-Dimensional Cooperation," Speech by Chinese Premier Wen Jiabao at the Eighth China-ASEAN Summit in Vientiane, Laos, 30 November 2004 available online: <<http://ph.china-embassy.org/eng/zt/zgydmgx/t180548.htm>>; "Premier Wen Jiabao Gives a Joint Interview to Journalists from Malaysia and Indonesia," 26 April 2011 available online at the Ministry of Foreign Affairs of the People's Republic of China Website: <<http://www.fmprc.gov.cn/eng/zxxx/t818177.htm>>.

<sup>29</sup> See *supra* note 20.

<sup>30</sup> See *supra* note 23.

<sup>31</sup> See *supra* note 17.