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**INTERNATIONAL LAW AND THE SOUTH CHINA SEA – CLAIMS
AND JOINT DEVELOPMENT**

**Address by Professor S Jayakumar
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Excellencies
Distinguished Guests
Ladies and Gentleman

First, I wish to say I am delighted to be back in Xiamen. I was last here in 2005 to give the keynote speech at the Conference organised by the University of Virginia's Center for Oceans Law and Policy. Thank you for honouring me again by inviting me to deliver the keynote address for this inaugural conference of the Xiamen University South China Sea (SCS) Institute. The establishment of this Institute marks an important milestone in developing knowledge of international law on oceans, in particular, in strengthening our understanding of issues related to the SCS. This Conference could not be more timely given the high profile disputes in the SCS over the last five months. Coupled with the recent tensions over the Diaoyu/ Senkaku Islands and Takeshima/ Dokdo Islands, they highlight how territorial disputes remain a key political and diplomatic challenge in Asia. Hence this Conference gives us an opportunity to try to examine these issues objectively, and assess the options for managing the tensions in the region.

Nature of the SCS Disputes

2 I understand that when the organisers of this Conference were deciding to invite me, they took into account that I had advocated the concept of joint development in the SCS at the International Conference on Joint Development and the SCS, organised by the Center for International Law (CIL), in Singapore in June 2011.

3 In view of the fraught atmosphere in the SCS and the East China Sea, I am sure that many have concluded that anyone who talks of joint development now must either be mad, at worst, or unrealistic, at best. Having known the key people in your Institute for some time, let me assure you that they are sane, sober and realistic individuals and I commend them for keeping alive the concept of joint development. Whether and when any joint development can take place, will ultimately depend on the situation and the prevailing diplomatic temperature. Nevertheless, the key question remains: what is the alternative if there is no joint development of the SCS?

4 By their very nature, sovereignty disputes are complex and take a long time to resolve. The technical and legal questions are complicated enough. Disputes, however, are often further entangled in a web of competing narratives of history and emotive strands of nationalism. Although legal and diplomatic channels exist to resolve territorial claims, these ancillary elements often define the debate and raise the stakes. As such, no side can be seen to be backing down or giving in without incurring high political costs. Hence, it is unlikely that the many overlapping claims in the SCS will be resolved any time soon, if at all.

5 Bearing this in mind, it is important to remind ourselves that no one benefits from an escalation of tensions in the SCS. There is a line of thought, present at varying degrees of conviction in different systems, that territorial claims could be better secured by *de facto* control through a show of superior force. Such thinking must be quickly disabused because of the serious downsides attendant in regional power plays. For one, peace and stability would be disrupted and political uncertainty heightened, bringing about a higher risk of economic fallout in a region as closely interdependent as ours is. It is therefore in everyone's interest to use our efforts to calm the situation and rationally assess how to manage the disputes.

6 On this note, the parties involved in disputes can refer them to international arbitration, the International Tribunal for the Law of the Sea (ITLOS) or the International Court of Justice (ICJ). These are peaceful, neutral means of resolving disputes if all parties are willing to do so. In fact, Singapore and Malaysia have used third party adjudication in the cases involving Pedra Branca and Reclamation. However, I believe that all the SCS claimant states must have concluded that no legal judgement on any one dispute is likely to resolve the issue completely.

7 As I said in my book “DIPLOMACY – A SINGAPORE EXPERIENCE”:

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 SCS.

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 many overlapping claims in the SCS. 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.

The Logic of Joint Development

8 Leaving aside recourse to force or to channels such as international arbitration/adjudication, ITLOS or ICJ, how else can we manage the overlapping claims in the SCS? In this context, as the late Deng Xiaoping recognised through his famous dictum “shelving disputes for joint development”, joint development is a practical way forward if we do not want conflict. To quote Chinese Vice Foreign Minister Fu Ying in her interview with the Straits Times and Lianhe Zaobao on 8 September 2012:

As Mr Deng Xiaoping proposed in the 1980s, based on maintaining its sovereignty position, China would be willing to enter into joint development while shelving the disputes. This was a major decision

China has made in the overall interests of regional peace and stability as well as those of ASEAN countries.

I should add that joint development, as a legal option for resolving boundary disputes, is specifically contemplated by UNCLOS as a “provisional arrangement of a practical nature” under Articles 74 (3) and 83(3).

9 We have to be realistic. Joint development can only succeed if the right conditions exist. A conducive climate of trust and confidence is a fundamental precondition before the parties can agree on the need for joint development, let alone how and where to carry out joint development.

10 In this context, when ASEAN and China signed the Declaration on the Conduct of Parties (DOC) in the SCS in 2002, and adopted the Implementation Guidelines in July 2011, both sides made significant steps towards building mutual confidence on a highly delicate issue. These achievements reflected an understanding that while territorial claims were not easily resolved, both sides possessed the will to ensure a peaceful resolution of the issue. Recent events have, however, betrayed a profound lack of trust and confidence among parties. Hence, we should make conscious efforts to create trust and confidence amongst all parties, thereby establishing the right conditions for cooperation, including possible opportunities for joint development.

Managing Disputes

11 This starts with managing the disputes within certain agreed frameworks:

12 First, disputes should be managed in accordance with the accepted principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS). It is the rules and principles of general international law on the acquisition and loss of territory which determine which State has the better claim **to sovereignty** over disputed territory. Once sovereignty has been determined in accordance with general international law, the consequent maritime claims will have to be dealt with in accordance with

UNCLOS. For example, UNCLOS has provisions governing what maritime zones states are entitled to claim from land territory, including islands. It also has provisions concerning low-tide elevations, reefs, artificial islands, installations and structures. These provisions are relevant in the SCS.

13 In this context, it is important to ensure scrupulous compliance with the UNCLOS regime, as otherwise we will undermine the multilateral legal framework, which we had worked so hard to establish. The legal community has an important role to play in generating greater awareness and knowledge about the accurate application of international law and UNCLOS in such disputes.

14 I therefore cannot overemphasise the importance of our actions being consistent with international law and UNCLOS.

15 Take another instance, the concept of the Exclusive Economic Zone (EEZ), which governs the rights and jurisdiction of the coastal State and the rights and freedoms of other States. It is useful for parties to achieve a common understanding of such rights to better manage overlapping EEZ claims and to avoid conflict. Meetings and conferences such as this are also useful platforms to facilitate an exchange of views.

16 Second, we need to have greater clarity on the nature and extent of the various claims in the SCS. While the claimant states have agreed, in principle, to renounce the use of force to resolve the disputes in the SCS, there has been almost no agreement on how we should work towards a resolution. One reason is because we have not even been able to grapple with the nature of the claims. While it is admittedly a complex and sensitive matter, it is important that steps are taken to identify the nature of the claims, in accordance with international law, before we can countenance how to resolve them peacefully, such as starting to identify possible areas for joint development.

17 Third, while the claims are being resolved, the parties should continue with the full and effective implementation of the DOC, both in spirit and in letter. The DOC expresses the parties' desire to peacefully resolve their disputes and claims, and *all* parties should abide by the spirit of

exercising restraint and peaceful resolution. In terms of practical steps to take, the various seminars and workshops to be organised under the DOC will help build mutual confidence and understanding. Workshops such as the one on marine ecosystems and biodiversity organised by Singapore in August 2012 will also help to build collective knowledge about the SCS such as its marine resources in a transparent way. We should view such activities as laying the groundwork in an incremental way for potential joint development.

18 Fourth, it is important to start formal discussions on a Code of Conduct (COC) as soon as possible. The COC will be a critical step in laying down rules of engagement and forging mutually acceptable norms of behaviour in the SCS. For example, as more fishermen move out into deeper waters due to the depletion of fisheries in coastal waters, such rules will become more important in helping parties manage possible mishaps or incidents in the SCS. A COC could help to manage such incidents and more importantly, build norms of cooperation.

My perspective

19 My perspective is that of an international lawyer and a former Minister from a very small country. Singapore is not a claimant state and takes no sides on the merits of the various claims in the SCS. We do, however, have certain critical interests at stake:

20 First, as a small country, we have a strong interest in ensuring that all claims are settled peacefully and in accordance with international law, including UNCLOS.

21 Let me add that, in our relations with other countries, we have put this policy that we espouse into practice. A notable example is our settling of the Pedra Branca territorial dispute with Malaysia by referring it to the ICJ. Indeed, Singapore is one of the few countries in the world which was in physical occupation of the territory in question but yet proposed settlement through the ICJ (in Singapore's case, in occupation for more than 150 years).

22 Second, trade is three times our GDP. We therefore have a fundamental interest in maintaining freedom of navigation, especially along

our sea lanes of communication such as the SCS. Ships of many nations use the SCS and would likely share this concern.

23 Third, we have an interest in ensuring that ASEAN remains united and credible. A cohesive ASEAN is the foundation of continued peace and stability of Southeast Asia, which Singapore's security depends on. ASEAN must also stay united to be able to exercise influence on the international stage. If ASEAN is weakened, the security and influence of ASEAN states will be diminished. This is precisely why ASEAN needs to speak up on regional issues, including the SCS, in a neutral and forward-looking way. In this regard, the Six-Point Principles recently endorsed by ASEAN is a positive development in the right direction. It is also why we hope that ASEAN and China will start talks on a COC soon.

ASEAN-China Relations

24 Moving ahead, the world is closely watching how ASEAN and China will closely manage the SCS issue. China's actions on the SCS will influence perceptions of its peaceful rise. At the same time, how ASEAN responds to the SCS issue will also colour judgements of ASEAN's credibility and ability to deal with complicated issues. It will also shape perceptions of ASEAN-China relations in an evolving geopolitical landscape.

25 ASEAN and China have had a long history of working together, and we should draw strength from this. The ASEAN-China relationship is today a pillar of regional stability and prosperity. China was the first Dialogue Partner to conclude an FTA with ASEAN. Today, China is also ASEAN's largest trading partner and ASEAN is China's third largest trading partner. The scope of our ASEAN-China cooperation has steadily increased over the years on 11 priority areas including energy, transport, culture, public health, tourism and environment. The same spirit of cooperation for mutual benefit should apply to the SCS issue. We should not allow this one issue to dominate the narrative and overshadow years of ASEAN-China cooperation. China has invested 20 years of diplomacy and assets into the region. It is very important that China's responses and behaviour towards the SCS issue should be such that they build on China's hard-won diplomatic efforts in this region, instead of engendering greater mistrust among ASEAN countries of China's long term intentions in the region.

Conclusion

26 By their nature, the territorial disputes in the SCS are complex and involve dynamics which are specific to this region. However, there is not a fixed path forward. As Deng Xiaoping said, we have to cross the river by feeling the stones beneath our feet. At the Track II level, we can start by studying the various models of joint development. There will be no ready answers but we can start exploring models that could work for the region. Perhaps claimant parties can even consider starting a small development zone on an experimental basis. But if we do not move because of political pressure or inertia, and if we let the disputes fester, the collective costs for all of us will be much higher.

27 Before we can contemplate joint development, all parties, claimants and non-claimants, states big and small, need to exercise self restraint to lower temperatures and create a conducive environment to explore ways to manage and hopefully even solve the disputes in the SCS. As I said at the beginning of this speech, territorial disputes will remain a key political and diplomatic challenge in Asia. We should also be realistic and accept that the SCS issue will not, and indeed cannot, be solved overnight.

28 International law and UNCLOS, however, play an important role in the management and eventual resolution of disputes. It stands as a peaceful alternative to the use of force, it focuses our minds on common interests and it provides a ready set of agreed rules and norms to guide our behaviour. A strong Rule of Law is the premise for a predictable global environment that has allowed states in this region to develop and thrive. The rest of the world regards Asia as the world's most dynamic growth region. But the rest of the world must also be wondering how Asian nations can achieve their growth potential when there is a possibility of conflict over territorial and maritime claims in the SCS, which could affect economic development in the region. Hence, it is in our collective interest to demonstrate that we in Asia are able to manage, if not resolve our differences in a peaceful and amicable manner and in accordance with international law, including UNCLOS.

29 I am confident that this Conference and this Institute will go some way in helping the international community reflect, take stock and exchange views on how to pursue our common goal of ensuring regional peace and

stability. I wish all of you fruitful discussions and a successful Conference.
Thank you.

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