

South China Sea disputes arise again

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Recent communications by the governments of Malaysia and China to the United Nations Secretary-General with respect to Malaysia's submission regarding an "extended continental shelf" in the South China Sea have once again focused attention on the legal and maritime disputes in the South China Sea.

On Dec 12 last year, the Malaysian government advised the UN Secretary-General that it was depositing a partial submission to the Commission on the Limits of the Continental Shelf (CLCS) in order to claim an extended continental shelf in the northern part of the South China Sea beyond the outer limit of the 200 nautical mile exclusive economic zone (EEZ) it claims from the baselines along its coast.

On the same day, China officially protested against Malaysia's submission by sending an official communication to the UN Secretary-General, asserting that Malaysia's submission seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea.

The objective of this commentary is to explain the significance of these submissions to the ongoing legal disputes in the South China Sea.

WHAT IS AN EXTENDED CONTINENTAL SHELF?

Under the 1982 UN Convention on the Law of the Sea (Unclos), coastal states are permitted to claim an EEZ extending to 200 nautical miles from the baselines along their coasts.

In its EEZ, a coastal state has sovereign rights and jurisdiction to explore and exploit the natural resources in the water column (for example, fisheries), as well as the natural resources of the seabed and subsoil on the continental shelf below the water column (for example, hydrocarbons and mineral resources).

Unclos also permits states with a broad continental shelf off their coasts to make a claim to an "extended continental shelf" beyond the 200 nautical mile outer limit of their EEZ.

To claim an extended continental shelf, a state must submit technical information to the CLCS, a body of scientific experts established under Unclos.

The information submitted must demonstrate to the CLCS that it meets the requirements of Article 76 of Unclos to establish the outer limits of its continental shelf beyond 200 nautical miles.

On its extended continental shelf, the coastal state has the exclusive right to explore and exploit the natural resources of the seabed and subsoil.

The 2019 partial submission by Malaysia is not a new development. It is a continuation of similar



submissions made to the CLCS more than 10 years ago. On May 6, 2009, Malaysia and Vietnam made a joint submission to the CLCS claiming an extended continental shelf in the southern part of the South China Sea.

In addition, Vietnam made a separate submission to the CLCS in 2009 claiming an extended continental shelf in the area north of its joint submission with Malaysia.

In its 2009 communication, Malaysia indicated that it will be making a partial submission in the same region as the separate submission made by Vietnam in 2009.

After more than 10 years, Malaysia finally made that submission on Dec 12 last year. When they made their submissions to the CLCS in 2009, Malaysia and Vietnam anticipated that the Philippines would also make a

submission for an extended continental shelf in the same area of the South China Sea. In fact, Manila sent official communications to the CLCS in 2009 stating that the submissions of both Vietnam and Malaysia for an extended continental shelf overlap with those of the Philippines.

Malaysia's 2019 submission acknowledges that there are possible areas of overlapping entitlements in the area subject to its partial submission, and that it may be necessary to resolve the overlapping claims of Malaysia, Vietnam and the Philippines.

SIGNIFICANCE OF SUBMISSIONS TO THE SOUTH CHINA SEA DISPUTES

When analysed from the wider perspective of the ongoing sovereignty and maritime disputes over the islands in the South China Sea, the extended continental shelf

claims of Malaysia, Vietnam and the Philippines are very significant.

This is because although the EEZ and extended continental shelf claims of the three states extend into the Spratly Islands, none of them have claimed an EEZ or continental shelf from any of the disputed Spratly Islands that they either occupy or claim sovereignty over.

The outer limit of the 200 nautical mile EEZ claims of Malaysia and Vietnam is measured from baselines along their mainland coasts, and the EEZ claim of the Philippines is measured from the archipelagic baselines surrounding its main archipelago.

In other words, in their actual practice when asserting rights to claim an EEZ and an extended continental shelf, the three Asean member states have taken the position since 2009 that none of the islands in the Spratly Islands is

entitled to an EEZ or continental shelf of its own.

The practice of the three Asean member states is consistent with the 2016 award of the arbitral tribunal in the South China Sea case between the Philippines and China. The arbitral tribunal held that all the largest islands in the Spratly Islands were "rocks that cannot sustain human habitation or economic life of their own" under Article 121 of Unclos and, as a consequence, were not entitled to an EEZ or continental shelf of their own.

CHINA'S OBJECTIONS IN MAY 2009

The positions of Malaysia, Vietnam and the Philippines with respect to claims to an EEZ and an extended continental shelf in the South China Sea were a serious threat to the position of China on rights to resources in the areas surrounding the Spratly Islands. Therefore, China officially protested in 2009 and again last year.

On May 7, 2009, just one day after the joint submission of Malaysia and Vietnam, China submitted a formal communication objecting to the joint submission. It stated that the joint submission seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea.

China summarised its position in the following statement: China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.

With the statement was an "attached map" – the now infamous "nine-dashed line" map. This was the first time that this map had been circulated by China to the UN.

China's communication triggered a series of communications by Malaysia, Vietnam, the Philippines and Indonesia, as well as a reply by China. The communications made it clear that Malaysia, Vietnam, the Philippines and Indonesia did not accept that China had any rights and jurisdiction in the South China Sea based on the nine-dashed line map or based on its claims of sovereignty over the islands in the South China Sea.

CHINA'S OBJECTIONS IN DECEMBER 2019

China's response to Malaysia's submission last year stated that the submission seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea; it requested the CLCS not to consider the submission by Malaysia.

In support of its request, it stated that China has sovereignty over the South China Sea islands, consisting of four groups of islands (Paracels, Spratlys, Pratas and Macclesfield Bank). It further stated that based on the islands, China has internal waters, territorial sea and contiguous zone, as well as an EEZ and

continental shelf. In addition, it stated that China has "historic rights" in the South China Sea.

POSSIBLE RESPONSES TO CHINA'S COMMUNICATION

The CLCS is likely to comply with China's request not to consider the submission by Malaysia.

This is not because it accepts China's arguments. It is simply because the CLCS is a scientific body, not a legal body. Its practice is that it defers or does not consider any submissions that have been challenged by other states.

Asean member states and others with an interest in the South China Sea disputes are certain to carefully scrutinise China's communication of Dec 12 last year to try to discern whether it reflects any change from the legal position it articulated in 2009.

Is the 2019 communication evidence that China is abandoning its claim based on the nine-dashed line and replacing it with a claim to sovereignty over the four island groups in the South China Sea as mid-ocean archipelagos? Is China continuing a policy of "deliberate ambiguity" as to the exact legal basis of its claims to rights and jurisdiction in the South China Sea?

Malaysia, Vietnam and the Philippines may decide that they must respond to China's communication in order to protect their interests. This is because China's communication is a direct challenge to their claims to an EEZ and an extended continental shelf in the South China Sea.

In addition, China's communication is in direct conflict with the 2016 award of the arbitral tribunal in the South China Sea case between the Philippines and China.

The tribunal ruled that none of the islands in the Spratly group was entitled to an EEZ or continental shelf of its own. The tribunal also ruled that China had no historic rights in the South China Sea. In addition, the tribunal ruled that China is not permitted to draw archipelagic baselines around the island groups over which it claims sovereignty because it is not an archipelagic state as defined in Unclos.

In conclusion, the 2019 communications are another chapter in the continuing sovereignty and maritime disputes in South China Sea.

The communications are evidence that neither China nor the Asean states bordering the South China Sea are backing away from their legal positions on rights to explore and exploit the natural resources in the South China Sea. Therefore, their legal disputes are likely to continue, notwithstanding the efforts of Asean and China to agree on a code of conduct for the South China Sea.

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