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SOUTH CHINA SEA: AN INTRODUCTION TO THE DISPUTES AND PROSPECTS FOR INTERNATIONAL LAW

My talk today is entitled South China Sea on the Rocks. I sub-title the paper “The Disputes and Prospects for International Law.”

As you would be aware, the South China Sea is regularly described as a flash point and a source of tension. Importantly, although China is always described as being the source of friction the disputes encompass a number of overlapping claims that do not involve China at all. However it is the assertions made by China that lie at the heart of the disputes, as well as their possible resolution within the framework of UNCLOS.

My thesis today is that the South China Sea is not readily amenable to final dispute settlement within the UNCLOS framework, and that instead UNCLOS and UNCLOS dispute settlement must be seen as being only a building block on the path towards ultimate resolution.

First, some background to the disputes. The focus of most attention regarding the South China Sea resources has been on hydrocarbons in general, and oil in particular. Oil deposits have been found in the land territory of many of the States adjacent to the waters of the South China Sea. The South China Sea region has proven oil reserves and some existing oil production (largely involving Malaysia and the Philippines). Oil has also been discovered near Vietnam and near Hong Kong.

Because these areas have some proven oil reserves, there has been widespread speculation to the effect that the South China Sea has untapped riches. In fact, geographic evidence suggests that the actual prospective areas are quite small, as most of the seabed lacks the essential characteristics to be seriously prospective. In fact, there is little evidence that the region contains extensive oil resources.

However, the speculation has given the land masses within the South China Sea, and the underlying sea bed, great strategic value. Notably, the area also has very high strategic value as it represents both a major source of seafood and is a major shipping route through which much of the world's maritime cargo travels.

The main areas of the disputes can be seen on slide 1. It can be seen that the Spratly Islands are close to Philippines and Vietnam and Brunei, and seem on the map to be quite a long way from China. The Spratlys are the subject of disputes between Vietnam, China, Taiwan, Brunei, Malaysia, and the Philippines.

Indonesia, China, and Taiwan each claim the waters North East of the Natuna Islands (which have Indonesian sovereignty).

The Philippines, China, and Taiwan have claims over the Scarborough Shoal – these disputes are amongst the most contentious in terms of military activity at the moment.

The Paracel Islands are disputed between the two Chinas and Vietnam.

There are also claims involving Malaysia, Cambodia, Thailand and Vietnam over areas in the Gulf of Thailand.

Source of Disputes:

Obviously in the time available I cannot delve into all of these individual disputes today, but I will look at two or three of the main ones.

The starting point should be China's claims, by which I mean the PRC. Taiwan (ROC) maintains parallel claims to mainland China. Taiwan's maritime claims are subservient to and dependent upon its status as a state.

China has a nebulous and ambiguous claim to the area of the South China Sea and the land masses within it. It is very unclear, even today, whether China seeks to claim all of the waters of the South China Sea, or whether China merely claims certain land territories within the area, with subsequent dependent maritime claims in the nature of territorial seas, EEZ and continental shelf claims.

China seems reluctant to articulate the precise legal basis for its claims. What is known is that it asserts historical title to certain island features, and it also asserts some unstated form of title to waters within a line on a map.

The Nine-dash Line:

The nine-dash line is a sketched series of 'dashes' on a map.

The line originally consisted of eleven dashes, and was apparently first published by the Kuomintang Government of the PRC in 1947 although there is a suggestion that it appeared internally in 1914.

The line was revised in 1949 by removing two dashes and therefore became known as the nine dash line.

The 9-dash line is very vague. It certainly does not meet modern standards of geographic precision. It appears to be a representation of a hand-drawn line that simply seeks to enclose most of the South China Sea.

It is important to recognise that the dotted lines do not show how the lines would be joined if it was continuous. It is also very hard to ascertain the basis upon which the line was drawn. Certainly at international law a state can not draft a maritime claim internally, assert it on a map, and by bootstraps have it recognised.

More importantly, there seems to be no customary or treaty based foundation for the nine dashed line.

The 9-dash line has been the subject of official protests by Vietnam, Malaysia, Brunei, Indonesia and the Philippines. As I will discuss later, the line is also now challenged in the arbitral proceedings under UNCLOS which have been instituted by the Philippines.

On May 11, 2009, the People's Republic of China (PRC) submitted the preliminary survey findings on the outer limits of its continental shelf to the UN Commission on the Limits of the Continental Shelf (CLCS). The submission makes a claim to an

extended continental shelf beyond 200 nautical miles. Perhaps more importantly, China responded to the joint submission made by Malaysia and Vietnam by asserting that it had historic title to the sea bed within the nine dash line.

On 7 May 2009 China submitted a Note to the UN Secretary-General concerning the Joint Submission of Malaysia and Vietnam. It included the following statements:

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 (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.

The continental shelf beyond 200 nautical miles as contained in the Joint Submission by Malaysia and the Socialist Republic of Viet Nam has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea. In accordance with Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, the Chinese Government seriously requests the Commission not to consider the Joint Submission by Malaysia and the Socialist Republic of Viet Nam. The Chinese Government has informed Malaysia and the Socialist Republic of Viet Nam of the above position.

The fact that China attached the 1947 nine dashed line map to its Notes Verbales responding to the Joint Submission of Malaysia and Vietnam was a cause for concern among some members of ASEAN. It was the first time that the PRC had included the map in an official communication to the United Nations.

The Philippines lodged a diplomatic protest against China suggesting that it claimed the whole of South China Sea illegally. Vietnam and Malaysia filed their joint protest a day after China submitted its 9-dash line map to the UN. Importantly, Indonesia also registered its protest, even though it did not have a substantial claim to the South China Sea.

China appears to be escalating its claims and their enforcement. In June 2012 China created a new administrative government unit that was said to administer sovereignty over the entire area within the 9-dash line. Chinese vessels now routinely challenge foreign vessels within the 9 dash line. China has issued new passports to citizens which include the nine dash line map. A law took effect on 1 January 2013 requiring inspection, expulsion or detention of vessels within the 9 dash line. The Philippines has recorded instances of vessels being boarded and siphoned of fuel leaving just

enough to reach land. Of course, if the waters are in fact high seas, this is tantamount to piracy.

The problem for China is that UNCLOS does not recognise historical claims to high seas maritime waters. Nor does historical customary international law. Waters are either territorial seas, or high seas. UNCLOS extends certain additional rights through the EEZ and continental shelf doctrines which give expanded jurisdiction as to natural resources in those areas.

In my view, which is I think also the view of most scholars, the 9-dash line provides an extremely weak basis for an assertion of Chinese sovereignty in the region. To that extent, the rules contained within UNCLOS provide a starting point for the analysis.

However, if the nine dash line can not found a claim to sovereign rights, it is instead necessary to turn to particular land features within the South China Sea, determine sovereignty over those features and then delimit the extent of maritime zones that extend from those features. In other words, the waters follow the land in the sense that the maritime zones flow from legitimate title to land.

UNCLOS has no substantial role to play in the resolution of the underlying claims to land title.

So, putting to one side the nine dash line, we now have a starting point for analysis, which is first to determine the legal status of land masses within and adjacent to the disputed waters, and then to determine the extent of any legitimate maritime zones (including any extended continental shelf claims) and finally to delimit those maritime zones where they intersect. Immediately it can be seen that this is not a straightforward exercise!

The underlying claims to land title are extremely complex. China claims to have sovereignty over many island features dating back some 500 years ago.

One issue for China is that there appears to have been little effort to exhibit sovereignty, at least until recently, and its claim is to that extent extremely difficult to

determine. The position is further complicated by historical events including occupation by Japanese forces during World War II of many islands, followed by the relinquishment of those island features by Japan under treaty following the conclusion of that war.

Again, because UNCLOS does not assist the resolution of the land claims I will not devote more time to the specific claims to title in this paper.

A second issue, which does fall to be determined by UNCLOS, is the characterisation of particular features as either rocks, islands or submerged features. I will address that question in some detail.

In the time available I will address some of the main areas in dispute:

Scarborough Shoal is a grand name given to 6 or 7 small rocks that protrude less than 3m above high water. The largest is said to be 10m wide. Both China and the Philippines claim sovereignty.

The Shoal is about 120nm west of the Philippines.

The acrimonious confrontation over Scarborough Shoal, known as Huangyan Island in Chinese, began in 2012 when Beijing started to assert fishing rights in the area. China prevented the Philippines from fishing, ordered its civilian patrol vessels to stop the Philippines enforcing its fishing rights by arresting Chinese fisherman working in the disputed area and began allowing fishing by Chinese vessels.

The Philippines says the shoal falls within its 200 nautical mile Exclusive Economic Zone (EEZ), giving it the right to exploit the natural resources in this area.

China claims that records show China's sailors discovered Huangyan Island 2,000 years ago and China has cited records of visits, mapping expeditions and habitation of the shoal from the Song Dynasty (960-1279 AD) right through to the modern period.

Scarborough Shoal falls within the nine-dashed line.

The Paracel Islands are about half way between Vietnam and China.

Vietnam has a major maritime claim in the south china sea - second only to China and Taiwan. Vietnam's claim includes all of the Spratly and Paracel Islands.

The Paracels include actual islands although they do not permit human habitation other than in a supported sense – only military and government officials live there. There is some evidence of Chinese history on some of the Paracel Islands, dating from the Tang and Song dynasties. In the mid 19th century, France (which had conquered Vietnam) took over the Paracel Islands and administered them in the name of the colony. In 1930 France formally claimed the islands.

On January 19, 1974, the Battle of the Paracel Islands occurred between China and South Vietnam. A number of Vietnamese vessels were sunk and 53 Vietnamese sailors and soldiers were killed. After the battle, China gained effective control over the entire Paracel Islands.

In 1979 Vietnam's foreign ministry issued a White paper which set out the historical basis for Vietnam's claims. Vietnam notes that France in the 1930's made repeated claims to the Paracels.

In July 2012, China established Sansha City which included the Paracel islands as one of the three townships of the city.

Gillian Triggs has suggested that Vietnamese claims may be stronger than Chinese, but the resolution of historical title to the Paracels is likely to be extremely difficult if not impossible given the relatively early discovery, but lack of evidence of occupation and control for many centuries.

The Spratly Islands are the most complex area of disputed land territory (with dependent maritime claims)

The Spratlys are close to the Philippines, Brunei and Malaysia. They are relatively distant to Vietnam and even further from China.

The Spratlys are an archipelago of 400 odd rocks reefs and small islands.

They are occupied in part by each of Vietnam, the Philippines, China, Malaysia, Taiwan and Brunei.

They are within China's 9-dash line.

China claims the Spratlys first apparently because they are within the 9 dash line, and secondly because they claim historical occupation. China produced a map of what it described as its historic claims to the Spratlys in 1993. All of the other claimants also point to historical occupation of various features within the islands. Vietnam claims sovereignty over all the features in the Spratly Archipelago. Vietnam has never officially declared which features it is claiming sovereignty over nor defined geographical co-ordinates. Vietnam has, however, incorporated the whole Spratly Archipelago into its provincial administrative system.

The Philippines do not claim sovereignty over the whole of the Spratly Archipelago but rather a group of islands known as the Kalayaan Island Group which consists of fifty-three features in eastern South China Sea excluding Spratly Island itself. The Philippines' claim over the KIG is based on discovery, and to a certain extent on proximity, as well as effective occupation and control.

Malaysia claims sovereignty over eleven features in the Spratly Islands. Malaysia has asserted two legal bases for its claims, being a claim based upon the extended continental shelf and a claim based upon effective occupation.

In 1988 there was a second military conflict between Vietnam and China at Fiery Cross Reef, leading to 72 Vietnamese deaths and China's occupation of the reef.

Although some of the Spratlys are properly characterized as islands, many are merely high tide rocks. Many of the structures created in the Spratlys are on concrete stilts. According to the Philippines, all of the features occupied by China are mere rocks for the purpose of Art 121(3). For example, Fiery Cross Reef is no higher than 1m above high tide.

Of course, whatever the resolution of the historical titles, it can be seen that even if the titles were resolved, and maritime zones extended from the features, the maritime zones would intersect leading to difficult if not impossible tasks of delimitation.

What can international law do in this situation?

First, international law provides no basis for the 9-dash line. China, being realistic, must accept that as a matter of international law whatever it says diplomatically.

Second, public international law provides the basis for the resolution of the underlying territorial claims to land. This involves essentially two questions, first whether or not a particular feature is a rock, and island, or a submerged feature, and then secondly the means and rules for resolving questions of historical title. Finally, public international law can delimit intersecting and competing maritime zones once the land boundaries are determined.

The first threshold issue is whether the land features are rocks or islands, or submerged features.

Article 121 of UNCLOS provides:

Article 121

Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Also relevant is Article 13:

Article 13

Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

In the case of the South China Sea it is entirely clear in my view that many of the features that are claimed constitute low tide elevations, or at best, rocks. Therefore they are incapable of generating either a territorial sea, or are incapable of generating any exclusive economic zone or continental shelf claims.

Thus if you recall the photograph of the Scarborough Shoal it would seem beyond doubt that it constitutes a mere rock within the meaning of Art 121(3) of UNCLOS:

It follows that in my view the Scarborough Shoal can not sustain an EEZ or continental shelf but it could generate a territorial sea of 12nm.

A similar process of analysis must be conducted for each and every land feature within the South China Sea that is claimed by the competing States.

A very difficult question of the interpretation of UNCLOS arises. Several of the land features are clearly above water, but are only capable of sustaining human life by supported and artificial means. Recalling the words of Art 121(3):

“3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

The question of interpretation is what is meant by “human habitation or economic life “of their own”?

Is a human habitation consisting of a structure on concrete platform or stilts, much like an oil rig, and supported by regular re-supplies, a sustainable human habitation? The better answer is probably not, but as yet there is little to guide us in the question of interpretation.

In the time available I will only mention very briefly the second of the tasks for international law, being the determination of title to territory having first resolved the question of the proper characterization of the territory as rock island or submerged feature. Obviously public international law (although not UNCLOS) has relatively well established rules for the determination of land title.

Determination of rights to territorial sovereignty is vital to all boundary delimitations for, as the International Court of Justice has reiterated, the rights of a state to the continental shelf and to an exclusive economic zone are based on the principle that the land dominates the sea through the projection of the coast or the coastal fronts”.

In the *North Sea Continental Shelf cases* of 1969 this Court observed that „the land is the legal source of the power which a state may exercise over territorial extensions seaward.

Again in *Tunisia/ Libya*, the ICJ found that the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it

The resolution of the competing claims will require consideration of the concepts of occupation of terra nullius, the requirements of effective occupation in places where there seems to be little evidence of consistent occupation, questions of conquest, reconquest and cession by treaty at least in the case of Japan. These questions are beyond the scope of today’s lecture but are likely to prove intractable.

If title to territory could be determined, the ICJ has now developed a relatively sophisticated jurisprudence on the delimitation of competing maritime claims. Despite the extraordinary complexity of the intersection of likely maritime zone claims, the ICJ and other tribunals could be expected to apply the now well-established principles of delimitation as for example described in the *Black Sea Case* between Rumania and Ukraine.

In summary, delimitation of a single maritime boundary proceeds in three stages. First, the Court establishes a provisional line using geometrically objective lines that are appropriate for the regional geography. An equidistant line will be adopted

between adjacent coasts, unless there are compelling reasons to do otherwise. In respect of opposite coasts, a median line will be adopted. These median and equidistant lines are drawn from base points, chosen by the Court, which are dependent upon the physical geography and the most seaward points of the two coasts.

Secondly, the Court will consider whether there are factors calling for adjustment of the provisional line in order to achieve an equitable result. The Court also confirmed its earlier view expressed in the *Nicaragua v Honduras* case that the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result.

Thirdly, the Court will ensure that the provisional line, as adjusted where appropriate, does not lead to an inequitable result by reason of disproportionality.

Notably, self serving displays of force will not generally assist. There are of course many displays of power now occurring in the South China Sea, including assertive displays of fisheries control, and it is unlikely that much or any weight would be placed on these factors in any judicial or arbitral determination of rights.

The ICJ cited the jurisprudence of the Arbitral Tribunal in the *Barbados and Trinidad and Tobago* case to the effect that „[r]esource related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance

Here, of course there is no obvious pathway to the ICJ which relies upon voluntary acceptance of jurisdiction.

However the Philippines has recently (this year) commenced arbitral proceedings with China under Art 287 of UNCLOS.

Art 287 provides:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a

State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

Article 298 of UNCLOS provides that:

Article 298

Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

- (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the

concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

The Philippines made, last year, a formal request of China for the arbitration under UNCLOS of a number of questions relating to the South China Sea. The procedure is being governed by Annex VII.

The procedure for the arbitration is set out in Annex VII to UNCLOS.

China has declined to participate in the process of arbitration at any level. However the Tribunal has jurisdiction to proceed *ex parte* if it is capable of otherwise satisfying itself of jurisdiction.

The composition of the five-member Annex VII arbitral tribunal is now as follows: Thomas Mensah, president (Ghana), Jean-Pierre Cot (France), Stanislaw Pawlak (Poland), Alfred Soons (The Netherlands) and Rüdiger Wolfrum (Germany).

The Tribunal has required the Philippines to provide full written submissions to it on all questions, including the question of jurisdiction, by March 30 2014. The question of jurisdiction is critical, because China did in fact file a written declaration, dated August 25, 2006, which invoked the opt-out clause of Article 298, providing that

“[t]he Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.”

On 1 August 2013 China wrote a Note Verbale to the Permanent Court of Arbitration in which it stated that “it does not accept the arbitration initiated by the Philippines” and will not participate in the proceedings.

Of the three categories of disputes in Article 298, it is the category described at 298(1)(a)(i) that is likely most relevant here: “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations[.]”

However the Philippines claim is carefully framed to avoid the reservation made by China to questions of “maritime delimitation” since it at least some parts do not seek any delimitation of any disputed area. Rather the focus of the claim will be upon the characterization of the identified features as rocks or submerged features, and upon the legitimacy of the nine dash line.

Of those matters, it seems to me that it is most likely that the Tribunal might consider that it has jurisdiction to determine the characterization question as that seems to fall well outside the scope of the Chinese reservation.

Article 296

Finality and binding force of decisions

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Were the Tribunal to proceed to a determination of the status of the identified features, there would be much benefit for international law and the future resolution of issues in the area. The characterization by a Tribunal of great and undoubted legitimacy of the status of the various features would be a very helpful foundation upon which future tribunals and diplomacy could build.

Finally, I would just like to raise the prospect of joint development as the ideal model for the future, despite all of the complexity that joint development brings, and the unlikelihood that these parties will in the short term be able to put aside their differences.

An attempt at early joint undertaking was made some years ago with a joint seismic study being undertaken. The prospects for development of the area will ultimately

require a level of co-operation which as yet has not been seen. It may be hoped that as the Philippines arbitration proceeds, clarity will be brought to some of the disputed issues and further progress towards a joint development can be made.