

MALAYSIA AND SOUTH CHINA SEA: POLICY, STRATEGY AND RISKS

**Edited by
BA Hamzah, Adam Leong and Vivian Louis Forbes**

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Last but not least, we would like to state the views expressed in this book are entirely those of individual authors and do not represent the official policies of their respective organizations. We aim to inform our readers on the issues that Malaysia faces in the territorial dispute in our regional sea which contains our vital sea lanes of communication that must be kept free for maritime transportation and accessible to sustainably harvest marine biotic resources and exploit the marine hydrocarbon resources.

BA Hamzah, Adam Leong and Vivian Louis Forbes
Kuala Lumpur, November 2020

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INTRODUCTION

Vivian Louis Forbes

This volume features a series of eight chapters presented by ten contributors who offer narratives to explain the policy, diplomatic and military strategies and associated risks relating to Malaysia's actual and potential actions in dealing with the territorial and sovereignty issues in the South China Sea. Each of the authors in their respective chapters give explanations of the policy and analysis of events for the reader to better appreciate and understand Malaysia's posture in the South China Sea historically and as a guide for the future.

The responsibility for mapping the area was given to the National Survey and Mapping Department of Malaysia. They were supported by various agencies from the Ministry of Defence and the National Security Council. The Royal Malaysian Engineers and their colleagues from the National Survey and Mapping Department would not have been able to undertake their dangerous and arduous task of surveying the uncharted area. The data they collected were transformed into the 1979 Map on the Continental Shelf of Malaysia. Producing the map was indeed a national cooperative and collective effort during the reign of Tun Hussein Onn as Prime Minister. However, it was Prime Minister Dr Mahathir Mohamed who was the architect and champion of Malaysia's policy in the Spratlys. Without his personal commitment, the entire project to acquire territories in the Spratly would not have materialised.

The first chapter presents a historical perspective by describing the involvement of the Royal Malaysian Navy's Special Forces Unit (PASKAL) in making Malaysia's first steps in staking its claim in the South China Sea by occupying a feature and placing markers on five other nearby marine features to indicate territorial gain. The Royal Malaysian Air Force played its part in the process of the occupation of the marine feature of the Spratly Archipelago. This chapter recalls the first tenacious moments when a team of Malaysian naval personnel put their feet on a rocky coral outcrop (a reef) in the southern sector of the South China Sea within Malaysia's natural continental shelf.

The narrative offers a factual and serious, yet at times humorous and light-hearted in parts, account of the initial time spent on Swallow Reef (*Pulau Layang Layang*) when Malaysia took formal possession of the reef feature together with the adjacent features. The authors, Mat Taib Yasin, Rahim and Ahmad, obviously write a narrative from first-hand experience and knowledge gleaned from their colleagues. It tells of the sacrifices, hardships (lack of fresh food and water), camaraderie and events (such as being hit by a typhoon on 22 December 1985) that led to the occupation of the reef under the Malaysian flag and sovereignty.

Regular visits to the feature by Dr Mahathir Mohamed, the then Prime Minister of Malaysia, gave the seal of approval. His visits proved popular for the staff administering Terumbu Layang- Layang (TLL) and were memorable, among others, for the fact of the improved quality and quantity of food served during such visits. Realising the potential for tourism of this idyllic spot the Malaysian Government seized the opportunity to develop TLL into a fully-fledged island resort which opened to international visitors on 15 January 1990. Narratives of notable events of rescue in the vicinity of TLL and close encounter with suspected pirates/armed robbers in the Singapore Straits as the modules for the reefs were being transported are included.

The occupation of TLL and other features in the southern Spratly Group was of national significance and conducted with patriotism and pride. It was also an opportunity for personnel of PASKAL and the Royal Malaysian Navy to be involved in and associated with the successful execution of a mission that began in May 1983. The mission could not have been achieved without the support of the various Service Chiefs in the Malaysian Armed Forces who used their authority to fast track their joint pet project. However, as stated above, personnel from other agencies were equally involved.

The second chapter informs the reader about the dire situation presently faced by the Royal Malaysian Navy (RMN) with the lack of ships and near obsolete equipment hampering RMN's operations to safeguard Malaysia's maritime realm in general, and especially, in the South China Sea. The author, Krishnan, discusses the significant role played by the RMN in safeguarding Malaysia's sovereign rights and interest in the South

China Sea over a surface area in excess of half-a-million square kilometres. The author discusses the challenges and issues facing the RMN, namely, to ensure un-disrupted movement of marine transportation, protection of oil and gas exploration assets, and importantly, for Malaysian fishers to operate within a secure marine setting. The fishing industry contributes over 60 per cent to the blue economy of Malaysia, equating to about 1.5 per cent of the country's GDP.

A major ongoing issue in the South China Sea is that of Illegal, Unreported and Unregulated (IUU) fishing activities. These activities are complicated by the presence of Chinese Coastguard and marine militia accompanying the IUU operators from China especially in the waters off Sabah and Sarawak. The RMN is challenged by big power intimidation and the concept of the Grey Zone Operations (GZO) as explained by the author of the chapter. These challenges raise the question of capabilities of the RMN and whether it is equipped sufficiently to respond to the contests within its EEZ and beyond. In this respect, the RMN and the Malaysian Maritime Enforcement agency (MMEA) work in coordination and in a cost-effective manner. At present the synergy between the RMN and MMEA is strong and is reinforced with the establishment of the National Task Force (NTF) in April 2020.

The functions of the Royal Malaysian Air Force (RMAF) in the context of maritime surveillance and maritime patrol aircraft is important and is recognised in this context. It is a flexible instrument for surveillance, transport, and combat rescue missions and counter measure or response efforts. The RMAF, by mid-2018, was also considering replacing almost 40 per cent of its ageing fighter aircraft. Malaysia, as with Indonesia and Vietnam have benefitted from donation of drones from the USA. These assets have been valuable for the purpose of surveillance within Malaysia's EEZ.

The following Chapters, Three and Four, explain the boundary issues related to the South China Sea and what the 1982 Convention has to say about some of the maritime claims. Chapter Three presents a discussion on Malaysia's actual and potential maritime boundaries in the South China Sea basin. Until December 2019, it is observed, that the successive Malaysian Governments took a cautious and diplomatic

approach in the arguments relating to the territorial disputes in the SCS. However, on 12 December 2019, Malaysia re-enforced its claim to an extended continental shelf jurisdiction within the basin by submitting its proposal to the Commission on the Legal Continental Shelf which prompted a protest from the Government of China via the UN Secretary-General. The author, Forbes, presents brief discussions on Malaysia's maritime boundaries with Indonesia, Brunei, the Philippines and Vietnam and the 'New Map of 1979' which announced Malaysia's intentions to claim limits to a natural continental shelf in accordance with the 1958 Convention on the Continental Shelf.

The established maritime boundaries in the Natuna Sea between Malaysia and Indonesia and Malaysia and Vietnam; with the Philippines in the Balabac Strait and the south-eastern sector of the South China Sea; and, with Brunei further westward, appear to be effective and satisfactory. Notwithstanding, the boundaries that are in place, there are major issues like illegal trade, human trafficking, illegal fishing and the potential and/or actual acts of terrorism and piracy. Such activities are a major cause for concern.

The Government of Malaysia is confident that through constructive joint dialogue between ASEAN countries and China resolving the disputes concerning sovereignty and territory in the South China Sea is achievable; through diplomacy, and not by coercion.

The potential maritime boundaries to be delimited within the central South China Sea basin and accepted by the international community include those with Vietnam, Thailand and possibly with China (PRC). The Government of Malaysia made two submissions to the Commission on the Legal Continental Shelf in 2009 (a joint submission with Vietnam) and another, a unilateral claim, on 12 December 2019. An elaboration of these submissions is given in the following chapter.

In its sincere diplomatic stance, Malaysia did reiterate that its submission of December 2019 should not be interpreted in any manner whatsoever to prejudice or affect matters relating to the delimitation of maritime boundaries in the SCS. Mention is made to the description of the

Extended Continental Shelf (ECS) of 2017 which was submitted to the CLCS in December 2019 in Chapter Four.

Malaysia's claim for continental shelf jurisdiction (1979) and extended continental shelf beyond 200 nautical miles (in 2009 and 2019) are discussed in a legal context, in Chapter Four, by Jalil. The author initially briefly comments on the rationale of the 'New Map of 1979' then describes the Rules of Procedures (RoP) for coastal and island States who desire to lodge submissions with the CLCS to claim an extended continental shelf. The requests by States since 2009, have generated a host of juridical decisions. An analysis of the arguments forwarded by the parties to the dispute and the decisions of the courts and tribunals in the respective cases is given in this chapter.

The author alludes to the cost to the coastal and island States to prepare the scientific and technical data submissions, apart from adhering to the provisions of Article 76, Annex II and the RoP, coastal States have spent millions of dollars including considerable time and efforts. Invariably the process entails a high number of inter-agency meetings, logistic preparation, complex data collection and the use of ocean-going vessels time to undertake surveys

The author observes that the decisions by the CLCS to defer its rulings on various submissions have caused coastal and island States to explore the option of seeking judicial and arbitral bodies to delimit their respective continental shelf beyond 200 nautical miles. The author is of the opinion that Malaysia could explore this avenue in respect of its submissions of 2009 and 2019 and highlights the fact that the activities of International Tribunal for the Law of the Sea (ITLOS), the International Seabed Authority (ISA) and the Commission on the Legal Continental Shelf (CLCS) complement each other to ensure coherent and efficient implementation of the provisions of the 1982 Convention.

Brief discussions are offered on cases relating to the delimitation of the extended continental shelf beyond the State's 200 nautical mile limit. Case studies of the Bangladesh and Myanmar; Barbados and Trinidad and Tobago; Nicaragua and Colombia; and Bangladesh and India are discussed in this chapter. The author concludes that the jurisprudence on the cases

is an excellent application for States in a similar situation in which their submissions have been deferred and they are desirous to delimit their continental shelf beyond their respective EEZ limit.

The strategic logic of Malaysia's response is analysed from the perspective of a small state's grand strategy in Chapter Five. Malaysia's proactive stance in the SCS dispute was brought to the fore, in April 2020, when a Chinese-registered seismic survey ship accompanied by coast guard vessels from China were operating in the vicinity of a foreign-owned drilling vessel engaged in hydrocarbon exploration, on behalf of a Malaysian company, off Luconia Shoal. The shoal is located within Malaysia's natural continental shelf. The incident drew a response from Australian and US Naval ships who appeared over the horizon apparently in a pre-planned arrangement with the US forces.

In this chapter, the author, who specializes in strategic studies, alludes to Malaysia's non-aligned stance since the 1950s and yet has taken comfort in accepting the security offered by Australia, UK and the USA in the form of various defence treaties. Adam Leong concluded that a lack of effective strategic response by Malaysia, and perhaps other ASEAN member States involved in the territorial dispute in the SCS will result in China continuing to position itself with greater strength in the region and unilaterally claim the marine features despite the ruling of the PCA'S ruling of 12 July 2016, which China refused to comply. Indeed, China has stated its indisputable territorial sovereignty and maritime rights in the SCS and firmly opposes activities infringing upon its rights and interests in maritime areas under its jurisdiction.

The narrative is of a geopolitical context with a focus on China. An elaboration of the PCA's ruling is presented. In July 2020, the Government of Malaysia lodged a formal policy regarding China's claim in the SCS basin and reiterated that China's claim under the Nine-Dash Line concept has no basis under contemporary international law, echoing the Ruling of the PCA on 12 July 2016.

Perhaps the four-year delay in lodging a protest may be considered a trifle too long; but then, it could be argued that Malaysia, acting in unison with ASEAN was giving China a chance to reconsider its claim and fall into

line with contemporary international maritime law. The author alludes to the positive, reliable and strong trading partnership Malaysia has developed with China and its unhesitant stand to join the Belt and Road Initiative (BRI) proposed by China in October 2013. Indeed, the author reminds readers that Malaysia became the first ASEAN State to establish diplomatic relations with China in May 1974. For the last one decade, Malaysia has benefited greatly from investment and trade relations with China.

The next chapter provides a succinct opinion about the excessive claims made by China that sometimes borders on downright arrogance.

The concerns demonstrated in Chapter Five are continued by Hamzah in Chapter Six, who offers a Malaysian perspective of the excessive territorial claims and China's land reclamation and high-handed militarization of the marine features has made it abundantly clear that China's objective is not just about marine biotic and mineral resources but territorial gain and bringing 'perceived Chinese territories' under the rule of the CCP. It is not only the Government of Malaysia, but also that of the Vietnam, Indonesia, Brunei and others that are concerned with China's excessive maritime claims in the basin as demonstrated by their respective *Notes Verbale* deposited with the Secretary-General of the United Nations following Malaysia's partial submission to the CLCS for an extended continental shelf in December 2019.

The author argues that the policy of the USA in the SCS has been long on promises but weak in action. However, that stated, the USA has been persistent in sending its naval ships to the basin and conducts regular military flights over the regional airspace.

The thought that China is rewriting the rules for regional and global order, whilst at the same time denying that it wanted to replace the USA as a hegemon, is a concern, because the country's ruling Party demonstrates ambition and has significant global influence with the funds to back its plans. The author stresses that Malaysia's policy in the SCS has always been to maintain good relations with China and continues to support the ASEAN-initiated confidence-building mechanisms, including the Code of Conduct initiative, with China. In the same token, Malaysia

supports freedom of navigation in accord with international law and norms.

The author predicts that although China is no pushover for the US military might, the collateral damage from such a confrontation in the region will be massive. China faces a strategic dilemma in the SCS especially after the USA promulgated a new policy in July 2020 challenging the legality of China's historic claims. The claimant states have questioned China's real intentions since it started to establish military garrisons on the artificial islands in the Spratly Archipelago since 2012, according to Hamzah. However, if the questioning was in a diplomatic manner and setting then it is possible that a truthful impression was absent.

Hamzah concludes that China's high-handed policy and provocations in the SCS have created considerable irritation not only with the USA but also amongst the littoral States. Events of China's conduct during 2019/20 has not been friendly demonstrated by the forceful challenges to the legitimate activities of coastal States', for example, fishing and the exploration for hydrocarbon reserves. The prime concern is that of the militarization of the seven artificial islands (parked aircraft carriers as they have been referred to) as they can be used against the US forces in the SCS as well the targets in the claimant States, especially, the Philippines, Vietnam and of course, Malaysia and Indonesia if deemed necessary.

Chapter Seven elucidates the difficulties of maritime law enforcement in Malaysia's EEZ providing a fresh legal perspective about the challenges facing the law enforcer. Mokhtar, the author, offers a discussion on maritime law enforcement in Malaysia's EEZ illustrated with facts such as the 238 detected intrusions by foreign vessels in Malaysia's EEZ in a three-year period to 2019. Out of this tally, 89 ships belonged to the Chinese Coast Guard while 149 were fishing vessels. The narrative provides a brief description of the maritime law enforcement in the contested waters in examples other regional seas.

The author stresses that China has not reciprocated to Malaysia's exercise of restraint. China has not demonstrated any inclination to

observe its own obligations nor abide by some provisions of the 1982 Convention although it is a Party to the Convention. Indeed, reaction to the PCA ruling of 2016, has shown that China has adopted aggressive actions on the Philippines and Vietnam and slightly lesser on Malaysia.

Mokhtar discusses at length the issue of maritime law enforcement in disputed areas, noting that a coastal State is not precluded from enforcing its laws and regulations in areas within its jurisdictional reach even though such areas are subject to overlapping claims. He cites examples from other maritime regions noting that an obligation exists requiring parties with overlapping claims to act in good faith towards finding an interim solution, however, they are not obligated to reach an agreement on any provisional arrangement. The question also arises with reference to the geographical scope to which the obligation of self-restraint applies.

The author concludes that notwithstanding the infringement of Malaysia's sovereign rights over natural resources in its EEZ, its capacity to enforce those rights is constrained not by the want of laws, but by the obligation and good will to abstain from aggravating the dispute in the South China Sea basin.

Last, but by no means least, Chapter Eight describes a major criminal activity, illegal fishing, that also has international political dimensions if it is not managed and controlled effectively and carefully. The author, Singh, presents a narrative on Malaysia's approach towards IUU fishing operations in the SCS. The author opines that on an annual basis, nearly 26 million tons of fish are illegally captured estimated at US\$ 22 million in the international context. However, in the context of the SCS basin, an area that is already over-fished, fish stocks have declined by 66-75 per cent since 2000. In 2016, ASEAN member states jointly declared action on IUU fishing and pledged to enhance sustainable fishing in the region.

Malaysia has adopted various conservation measures that is included in the Strategic Fisheries Plan (2011-2020) which also contains provision to tackle IUU fishing in Malaysia's EEZ. The author concludes that there are many factors that contribute to the incidence of illegal

fishing activities, one of which is weak governance. The political will of each country's fishing authorities and maritime enforcement agencies is critical to tackling the problem and towards ensuring sustainable development of the marine biotic resources of the SCS and especially, in Malaysia's EEZ.

The ongoing strategic rivalries played out by some great powers in the South China Sea will have serious ramifications for the region and especially for Malaysia. The South China Sea separates Peninsular Malaysia with its two eastern states in Borneo Island, Sabah and Sarawak. Malaysia also has extensive territorial waters, Exclusive Economic Zone (EEZ) waters, and Continental Shelf claims in the South China Sea. Malaysia also derives extensive economic resources from its share of the South China Sea namely in the oil and gas industry, and fisheries. However, parts of the South China Sea are also claimed by the Philippines, Brunei and Vietnam, often overlapping with Malaysia's. China wants to claim almost the whole of South China Sea based on its historical argument and its geographical span of the claim was dubbed the 'Nine Dash Line'. These South China Sea contentious issues will continue to drive Malaysia's strategic positioning in its respective maritime areas.

However, there were many examples, of actual and potential encroachments – fishing boats, marine militia, Coast Guard and Naval vessels from China and indeed from other states into Malaysia's EEZ/continental shelf. Incidents include Chinese operations and prolonged lingering in the vicinity of James Shoal and Luconia Reef/Shoals; publication in *Notice to Mariners* of intention to erect 'platforms' within the Brunei/Malaysia maritime boundary and at Vanguard Bank. The straw that broke the camel's back was the incident of April 2020 alluded to in the following chapters, hereunder.

As a consequence of not only the US withdrawal from the region, following the war in Vietnam and the end of the Cold-War in the 1980s, China (the PRC) assumed that the time was right and ripe to flex its muscles in first occupying the Paracel Islands and then insisting that all or most of the South China Sea was in reality a China Lake. The ultimate aim

and reward are to have complete control of maritime space and most, if at all, of the marine features in the South China Sea basin.

The claimant States of the SCS marine features will need to be on the alert of any developments relating to attempts by the PRC to establish territorial sea straight baselines so as to encompass the entire Spratly Archipelago, a move that will no doubt go against the letter and spirit of the provisions of the 1982 Convention but will also puncture the goodwill and diplomatic relationship bubble with the claimant States and possible with ASEAN in general.

The present volume is a timely and welcomed addition to academic literature, as for too long, as some commentators maintain (Forbes (2013), Storey (2016), Hamzah (2020), amongst others) that successive Governments of Malaysia had adopted a conciliatory, cautious and softly-softly approach with China (PRC) to the territorial dispute in the South China Sea basin. This was understandable on the one hand, due to its cordial diplomatic stance and with due regard to its standing in the community of regional neighbours, and, particularly, the consensus approach of ASEAN.

It was never Malaysia's intentions to aggravate the PRC and its neighbours.

CHAPTER 1

Malaysia's Occupation of Spratly Features: A Special Operation by PASKAL

Mat Taib Yasin, Azhar Abdul Rahman and Johari Ramzan Ahmad

Introduction

The earliest political resolution for Malaysia's entry into the South China Sea (SCS) territorial claim was made sometime in 1974, after the Second Prime Minister's Tun Abdul Razak's return from historic visit to the People's Republic of China (PRC). To the Malaysian Armed Forces (MAF), particularly the Royal Malaysian Navy (RMN), this radical change of interest came in the form of a directive to enhance its (RMN) presence in the SCS - Spratly waters. This marked the beginning of Operation TERUMBU (Op TERUMBU), broadly defined as all MAF operations pertaining to the Spratly. In early 1975, RMN Landing Ship Tank (LST) KD SRI LANGKAWI along with a team of army engineers and a Royal Malaysian Air Force (RMAF) Nuri helicopter embarked onboard, was assigned to install markers on Spratly features identified to be within Malaysia's claimed territory, including Amboyna Cay (Terumbu Amboyna)¹.

In 1978, RMN hydrographers were tasked to conduct *recce cum* surveys of features located in the south western part of Spratly chain.² During one of these surveys Malaysia's marker installed on Terumbu Amboyna in 1975 was found to be missing. To demonstrate Malaysia's unwavering resolve in staking her claim over the feature, a replacement marker was installed. However, it was again destroyed by Vietnam in 1979 whose military subsequently occupied Terumbu Amboyna.

Following this incident, the Malaysian Cabinet at its meeting on 13 June 1979 decided that sturdier 25-foot monuments or 'tugus'³ were to be erected on 9 other Malaysian claimed features namely; Commodore Reef (Terumbu Laksamana), Investigator Shoals (Terumbu Peninjau), Erica Reef (Terumbu Siput), Mariveles Reef (Terumbu Matanani), Ardasier

Reef (Terumbu Ubi), Swallow Reef (Terumbu Layang-Layang) (TLL) and Royal Charlotte Reef (Terumbu Semarang Barat Besar), Louisa Reef (Terumbu Semarang Barat Kecil) and Luconia Shoals (Beting Patinggi Ali).

As some of these identified features were permanently underwater, eventually only four 25-foot markers managed to be erected namely on; Terumbu Laksamana, TLL, Terumbu Semarang Barat Kecil and Terumbu Semarang Barat Besar.

The monument at Terumbu Laksamana however was destroyed by the Philippines in June 1980 who subsequently occupied the feature. Hence, as of 7 January 1981, Malaysia had monuments left only on 3 features namely; Terumbu Layang-Layang (TLL), Terumbu Semarang Barat Besar and Terumbu Semarang Barat Kecil. Despite Malaysia's vehement diplomatic protests to both Vietnam and the Philippines over their occupation of Terumbu Amboyna and Terumbu Laksamana respectively, the situation remained status quo. In mid-1985 the monument on Terumbu Semarang Besar was also found missing.

Malaysia's political resolve to claim and occupy the Spratly features was rejuvenated when Dato' Dr. Mahathir Mohammad (Dr. Mahathir) became the fourth Prime Minister on 16 July 1981. Just a month after becoming the Prime Minister, on 21 August 1981 his Cabinet directed the MAF⁴, to make necessary preparations to occupy TLL.

Ensuing the latest Cabinet's decision, the RMN intensified its patrols and surveys of TLL and other features in its vicinity. The first detailed hydrographic survey of TLL was carried out from 11 to 23 May 1982.⁵ Assigned with the specific task of landing and manning the feature the newly established RMN Special Operations Force or Pasukan Khas Laut (PASKAL) was vigorously prepared for the mission.

At some point or another, the conduct of Op TERUMBU involved hundreds, if not thousands of military and civilian personnel. As pioneers, they were exposed to perilous weather and living conditions. For example, the first team of PASKAL had only their ponchos rigged on elevated rocks for shelter against blazing sun and accommodation for months on end.

The army engineers, with all the limitations due to prevailing operational and security circumstances were directed to build and complete the first temporary module at TLL within 10 days. The Nuri helicopter pilots and air crew despite the hazardous flying conditions, were assigned to transport personnel, building materials and equipment, fresh water, other stores and supplies from the RMN LST to the construction site. The continuous presence of ships and the deeds of the crew in providing administrative and logistics support to those landed on the feature during the constructions of the temporary module undeniably augmented the success of the mission. All these require a well-planned, coordinated and executed joint operations where the navy, army and air force worked as a cohesive team.

It is not implausible to say, the political decision to occupy TLL was the single most important factor which ensured Malaysia's presence in TLL and the other four features until today. Otherwise, they could have conceivably been occupied by other contesting claimants.

This chapter seeks to narrate some of the untold stories of Malaysian pioneers involved in the Spratly operations focusing on the experiences of the PASKALs, being the first human residents of TLL.

Preparing the PASKAL Team ⁶

In March 1983, less than a year after its official establishment, PASKAL was directed to plan and prepare for the permanent occupation of TLL. Lt Ahmad Johari Ramzan, the designated landing team leader recounted how he was summoned to attend a high-level meeting at the Ministry of Defence in Kuala Lumpur. This meeting was attended by senior representatives from the three services, the Policy Division, National Security Division as well as representatives from the Ministry of Foreign Affairs. The RMN was led by Captain V. Ramachandran, the Director of Naval Operations. In the meeting, a number of strategic issues were discussed. Utmost concern among the diplomats and policy makers present was, what should be Malaysia's response if this physical occupation of TLL be met with aggression from any of the other claimants?

Do we have the political will and wherewithal to follow through with our actions and proceed into a shooting war?

The initial lengthy and heated discussion immediately transformed into an academic discourse when the chairman stated that the Prime Minister had already made up his mind. Henceforth, the meeting deliberated on the best feasible military and/or diplomatic course of actions so as to minimize suspicion as well as mitigate whatever likely risks arising from any hostile response from contesting claimants.

For Lt Johari being a through-bred operational man, his immediate concern was the tactical readiness of his PASKAL team to undertake the mission. Despite his relatively junior rank, he was expected to give this undertaking to the meeting. He later briefed the meeting that the PASKAL team under his command was more than ready to undertake this challenge. He saw this as a golden opportunity for the newly established PASKAL to prove its worth to the nation.

Reality began to set in only after this “gung-ho” commitment was given. As the lead time between this high-level meeting and the D-Day (actual date of operation) was less than two months, Lt Johari’s first thought was how best to quickly bring his team up for the tasks ahead. Training, equipment, and logistical support issues become immediate challenges that need to be addressed.

While it might not be very important for the PASKAL team members to comprehend the detailed strategic picture of the Spratly disputes, they ought to be apprised of the *raison d’etat* of their deployment as well as the current and potential threats to be encountered. They need to take heed the history of violence demonstrated by contesting claimant states against each other. One of which was the annihilation of the South Vietnamese troops in the Paracel Islands by Chinese forces in January 1974. He realized that one of the biggest gaps in the mission planning and training of his team was the lack of tactical intelligence data. This deprived the team of the actual details of potential enemy’s strength and formations/units in the vicinity as well as their weapons fit and modus operandi. At the tactical team level operations, these minute details will determine success or failure, or bluntly, life or death.

The First Eleven PASKALs on TLL

The first group of personnel tasked for the mission to occupy TLL was drawn from PASKAL's Alpha Squadron. The selected team comprised an officer, a senior rating and nine junior ratings. Training and preparation for the mission was done intensively at the Lumut Naval Base. In early May 1983, the team boarded KD MUTIARA, an RMN hydrographic survey ship bound for TLL as part of the naval task force involved in Exercise PAHLAWAN, MAF annual joint exercise.

The use of KD MUTIARA for the landing mission was a rather shrewd artifice on the part of the mission's planners. The presence of KD MUTIARA at TLL would most unlikely arouse suspicion on the part of the feature's contesting claimants. KD MUTIARA has been seen in the vicinity of TLL in the past conducting 'routine' hydrographic surveys, thus its presence in the early morning of 5 May 1983 would likely be construed as just carrying out its routine tasks. Credit must be given to the planners whose deception plan worked well that the landing and first permanent occupation of the TLL changed from a tactical landing into an administrative landing instead. The PASKAL Team that first landed and occupied TLL comprised:

- Lt Johari Ramzan Ahmad RMN (Team Leader).
- Petty Officer (PKL) Gurnam Singh s/o Bhag Singh (PO Gurnam) (Second In-Command).
- Leading Seaman (PKL) Ani@Nasir Budin.
- Able Seaman (PKL) Maznan Ahmad.
- Able Seaman (PKL) Nor Azman Sulaiman.
- Able Seaman (PKL) Zulkifli Husin.
- Able Seaman (PKL) Azid Yusof.
- Able Seaman (PKL) Rosman Jafri Abdullah.
- Able Seaman (PKL) Ismail Wahab.
- Able Seaman (PKL) Abdullah Ismail.
- Able Seaman (PKL) Hussin Sohor.

The Landing⁷

It was forenoon and at high water when the PASKAL Team landed. The entire feature was submerged except for a dry patch of sand measuring approximately 5 to 10 feet wide and about 40 feet long. The Team was to find out later that at the highest tide, even this sand patch would be submerged under water. Once all the Team members were ashore, PO Gurnam, the seasoned second-in-command of the landing team who had served with the Malaysian Special Services Unit during the Indonesian confrontation in the mid-1960s, candidly bade, "Welcome to Fantasy Island boys!". In reality, TLL then could be anything but definitely not a paradise in the middle of nowhere in the South China Sea. Well known for his dry sense of humor, PO Gurnam's quips were taken wittily by the team.

Making the Best Out of Situation⁸

The first and only sign of civilization sighted upon landing was the monument or "25-ft Tugu" built by the Malaysian Army Engineers in June 1980. Unlike previous recesses to the area by the RMN hydrographers and surveyors from the Department of Survey and Mapping Malaysia (JUPEM), this time the PASKALs were staying put on TLL for good.

The first order of business for the Team was to identify and establish defensive fighting positions and rig up their tents. A quick reconnaissance of the surrounding area confirmed that the only viable locations to rig their tents were on top of high elevation rocks if they were to remain dry during high water. The risk of rigging these flimsy tents on top of the rocks was very evident as they could be blown off by strong winds given the unpredictable weather of the South China Sea. Being newcomers, they had to share those limited high-elevation rocks with the sea birds. From the enormous amounts of poops scattered indicated that these birds had long been permanent residents of TLL. Unbeknown to the Team members initially, these seabird's poops breed blood-sucking mites that would crawl into their tents and bite all over their bodies. The excruciating itch from the mites' bite triggered endless scratching causing sleepless nights. Denied of a good night sleep, exacerbated by the lack of basic human necessities such as fresh water, shelter from unrelenting sun

and proper meals; together with the need for 24/7 mental and physical alertness against possible hostile intrusions, the situation truly stretched PASKAL's patience and mental well-being.

At the end of the first week, while having breakfast at the base of the monument, PO Gurnam sheepishly jested to his team members "Are you enjoying your stay here at Fantasy Island boys?", while fervently scratching his buttock, thighs and ears. There was a simultaneous burst of laughter by everyone present with Leading Seaman PKL Nasir Budin telling him "You can be the permanent mayor here PO!". In the absence of other forms of entertainment, it was such a sense of humor that made life bearable for the team during the early days of occupation.

Rigging tents on the rocks on the other hand meant the Team would be exposed to potential enemy's aerial and surface strikes. However, the advantage was that the sides of these rocks could also provide covers against rifle and machinegun fire or even direct bombardments from warships at sea. Trained to make the best out of the worst situations, the Team designated the biggest rock at the feature as the lookout post to increase the sentry's line of sight. Rain or shine, day and night, there would always be a sentry on top of this big rock. As night vision equipment was not a standard issue yet at this point in time, only standard military binoculars were used by the sentries.

This sentry duty was humorously termed as "tugas penunggu batu" or the "ghost of the rock" duty. At high tide, personnel will have to wade through chest deep or even neck deep water, depending on one's height to close up for duty on the big rock. The more enterprising members would carry their uniforms in plastic bags and waded through the water in their underwear or swimming trunks before putting on their uniform again on the big rock. Others would just wade through the water in their uniforms and take up their duty station. For those who decided to don their wet uniforms testified that the uniform will keep them cool during the day and prevent them from falling asleep when on duty at night. Truth befalls, none of the PASKAL members caught pneumonia or other related diseases throughout their stay at TLL.

Sufferings Taken in a Stride⁹

Being exposed to the unforgiving sun from sunrise to sunset without a single leave for shade was truly agonizing. These were days when applying the sunscreen was not in fashion yet; at least for Malaysians in general, hence, almost everyone suffered serious sunburn. Escaping from the burning extreme daytime heat by hiding in the shadows of the numerous half submerged rocks quickly became a naturally acquired instinct. Some members became adept at resting and even napping with part of the body submerged in water during the hottest part of the day. Another trick of the trade was to keep their camouflage uniform wet when the heat was unbearable.

Taking shelter below the poncho rigged on either the sandy patch or the bigger rocks, to escape from the heat was a no-no. The humid air trapped below the poncho made it feel like one is trapped in a sauna. While for holiday makers spending half a day on a sunny beach may sound fun, spending weeks and months on end under the unescapable blistering sun and soaked by relentless sea sprays can be hellish.

After a few days at the feature, all the PASKAL members were so sunburned that they resembled more like troops from Africa rather than from Malaysia! This may sound an exaggeration, but it just shows how much discomfort they endured. At the end of the day, they reluctantly bathed with seawater to clean their salt-stained bodies! Sunset was very much welcomed by everyone, the beginning of a nice cool evening and escape from the unrelenting sun. However, darkness also means the security threat is higher and the number of sentries on duty have to be doubled. Infiltrations and raids usually take place during the hours of darkness, especially an hour or two before morning twilight when the Team will be in their deepest sleep. Unlike well-constructed infantry defensive fighting positions, the Team had only the numerous rocks found in the vicinity of their bivouac and sand bag placed on top of some of the rocks as their improvised defensive fighting positions. After being 'roasted' the whole day by the sun, all the off-duty personnel were deliberately awakened around the "high risk hours" to be on stand-to i.e. to man their defensive fighting positions. This was done without fail every day.

The Pains of Growing Up

Being officially established less than a year, PASKAL as a special force was not only under-equipped but also under-armed and under-manned. Other than personal issued M16 assault rifles fitted with the 40mm grenade launchers, the heaviest support weapons provided were machine gun, mortar and man-portable recoilless rifle. About a dozen Claymore anti-personnel mines were also supplied to the team. Trip flares and Claymore mines were rigged all around the outer perimeter of their encampment. Keeping the Claymore mines and trip flares dry was a true challenge. With this kind of firepower, the team may be able to repel a platoon size attack if they were able to optimize the use of their defensive fighting positions well. However, if attacked by a company strength of marines or bigger infantry formations, the only hope of survival for the team would be reinforcement from Labuan or Sabah. Aware that reinforcement from the mainland may not be available in less than 12 hours, the team fully understood that in the worst-case scenario, they may have to make the ultimate sacrifice. Instead of being demoralized, this sobering fact actually boosted their *esprit de corps* and seriousness in the conduct of their daily assignments.

As for communications, they were issued with the most basic radio sets comprising a long range of high frequency (HF), a short range very high frequency (VHF) radio and a few sets of walkie-talkies. The HF radio was mainly used for communications with the Naval Region 2 Headquarters (HQ) in Labuan while the VHF radio was for communicating with ships or aircraft in the vicinity. The walkie-talkies were for communications between the Team members, mainly between the lookout post and the Team Leader/Deputy. To maximize the life of the battery, both radio sets would only be used for contingency operational matters and for sending daily situational reports (SITREPS) to the HQ. A hand-powered generator was also provided to power the radios in the event that replacement batteries were not delivered from Labuan as scheduled. On a number of occasions, this mini 'world-war 2' vintage hand-powered generator had proven its worth when all available batteries ran flat.

Once the team settled into their daily routine at this desolated feature, apathy and complacency could creep in should no initiative been taken to boost and sustain the Team members' morale. Bear in mind these were days before the advent of the internet, satellite TV, e-mails and cell phones. The feeling of complete isolation and the monotonous nature of the tasks coupled with very primitive living conditions would likely form an ideal environment for breeding boredom and complacency. As the saying goes, "an idle mind is the devil's workshop". Keeping Team members occupied in order to overcome boredom was one of the biggest challenges for the Team leader. A number of activities were planned and organized to brighten up the days ahead and more importantly to keep everyone occupied.

To keep everyone on their toes, counter assault drills using live ammunition and explosives were conducted on a regular basis. These drills based on simulated scenario of an attack on the feature, were conducted at odd hours of the day. Typically, without warning, a C4 would be exploded in vicinity of the tents. On other occasions, the sentry on duty would be told to fire his GPMG and shout 'musuh, musuh, musuh' ('enemy, enemy, enemy') in the dead of the night when everyone off-duty was in his deep sleep. The speed at which team members reacted to this 'attack' gave the team leader a good appraisal of how each team member would react in a real emergency. In one particular drill, a team member who was crawling to his defensive position was almost shot by his mate who thought the crawler was an enemy intruder. This early morning "surprised" exercise which suddenly rouse off-duty members from their deep sleep was realistic drills that kept the team members on their toes and as a check against complacency. The risk of doing such unplanned drills using live ammunitions and explosives no doubt was high, but it was the closest to the real thing. Hence, it was definitely a calculated risk that was worth taking.

Fishing was a popular activity to overcome monotony and a rewarding one as well. Fishing trips were regularly arranged to the rich fishing ground within the lagoon. Not only did these expeditions kept the members boredom away, the usually abundant catch also helped to supplement the bland military issued pack rations. Nevertheless, from experience, probably due heavy consumption of seafood but low in the

intake of fiber (vegetables) and freshwater had often led to “constipation pandemic” among TLL crew.

Shooting competition was another activity that everyone looked forward to. Weather and situation permitting, these shooting competitions were held at least once a week. Shooting ‘Falling Plates’ and ‘Live Pigeons’ were among the types of competition held. True to the maxim, necessity is the mother of invention; expired baked beans cans from packed rations were used as ‘plates’. The sight of exploding cans and the hissing sounds of escaping sauce when hit by M16 rounds added some excitement to otherwise a mundane routine. ‘Live Pigeons’ shoot involved the shooting of predatory sea birds while they are in flight. Having thousands upon thousands of sea birds making the feature as their home, finding an airborne target was never an issue. The winner of the shooting competition would be crowned as the ‘Terumbu Marksman’. A shell from a giant clam simulating a champion’s medal would then be hung around the neck of the marksman.

Temporary Accommodation Module

The first temporary accommodation module on TLL was built by Rejimen Ke 91 Askar Jurutera Diraja (91RAJD) in August 1983, 3 months into the occupation of the feature. Operating from RMN LST KD SRI BANGGI, the 91 RAJD team was assisted by an embarked RMAF Nuri helicopter. Cognizant of the urgency of the requirement, weather and security considerations, the army engineers were given only 10 days to complete the task. Bearing in mind that their working hours were also restricted to the times of high and low waters and daylight, it was really a race against time. Off-duty PASKAL members were also roped in to assist them.

Weather permitting, both ship’s boats and Nuri helicopter were concurrently deployed to transport personnel and logistics. However, when hazardous sea conditions made ship’s boats inoperable, the Nuri was fully utilized. It truly tested the pilot and aircrew’s skills to the maximum when landing and taking off from the confined unstable deck of the LST. With all the limitations, the temporary module was built within the specified timeframe demonstrating that with the right

professionalism, positive attitude and 'Can-Do' spirit, almost anything is possible.

The move from tents mounted on the rocks to this temporary module referred as "Humble Hut" by Dr Mahathir, greatly improved the quality of life of the Team. Protected from the heat and the sprays, and not to mention the escape from the blood sucking mites, it was indeed a morale booster, notwithstanding the comparatively primitive conditions of the newly constructed module.

The Logistics Challenges

Without any natural source of fresh water in TLL, fresh¹⁰ water for drinking and cooking was usually transported in 44-gallon drums by patrol crafts from Labuan. As TLL was surrounded by navigationally hazardous corals and reefs then, a patrol craft could only get as close as possible to the accommodation module. She would then have to ditch these 170kg water drums into the sea to be swim dragged ashore by the PASKALs to their accommodation. In a way, this was a good swimming exercise for the Team. This challenging evolution made fresh water a commodity as precious as gold at TLL. It was only used for drinking and cooking and nothing else. For shower, laundry and other ablutions they had to use sea water. This rule was strictly enforced irrespective of rank, seniority or appointment. Any rule breaker would be severely dealt with like having his tour of duty at TLL extended when the rest of the Team members are rotated back to Labuan. For reasons best known to them, hardly anyone broke this sacred rule.

Resupply of rations and rotation of PASKALs would normally be carried out by Labuan based patrol crafts. During monsoon season when the sea became too rough and unsafe for small ships operations, this task would then be taken over by the RMAF Nuri helicopters. A true workhorse, the Nuris had served the RMN offshore stations with distinction. In extremely adverse weather when it was not safe to deploy both the patrol crafts and Nuri helicopters, RMAF Maritime Patrol Aircraft (MPA) would air drop rations and other essentials onto TLL, using

watertight tubular plastic containers. Other than rations, old newspapers and magazines were prized items that everyone looked forward to.

On occasions, the tubular plastic containers dropped by the MPA were blown by strong winds away from their drop zone. Instead of landing in the calmer waters of the lagoon where they could be safely retrieved, the rations that landed onto the open sea was washed away by big waves. Should this happen, until the weather improved to enable the next resupply, fish freshly caught from the lagoon, rice and soya sauce would be the staple food for everyone. At times, the MPA crew would on their own initiative buy 'roti canai' (flat bread) and newspapers to be air dropped to the very appreciative men marooned on TLL. This gesture demonstrated the excellent camaraderie and *esprit de corps* that existed between officers and men of the RMAF and the RMN.

Construction of Permanent Module

Having personally seen and experienced the dismal living conditions of the temporary module, Dr. Mahathir proposed for Promet Berhad, a Malaysian based company, to construct a more livable self-sustaining accommodation structure on TLL¹¹. This would not only improve the quality of life of the troops but also to make it more defensible. With a budget of RM60 million, Promet turned TLL into an island through reclamation using Caisson Retained Island (CRI) technology, the first of its kind in South China Sea.

The construction of the permanent module began at the end of 1983 involving simultaneous fabrication of metal caissons at Promet yard in Jurong, Singapore and on-site earth works at TLL. The metal caissons were then discreetly transported by barge to TLL. Packaged in the construction of permanent module were a helicopter hanger, officer's and crew's accommodations, office spaces, dining hall, galley and machinery stores. To facilitate safe access for ships and boats to deliver logistics or for shelter in the TLL lagoon's calmer waters, a navigation channel and jetty was added to the package. To enhance the serenity of TLL as an island, the new module was landscaped with grass and trees.

The new module was officiated by the Prime Minister on the 17th of April 1984 and designated as RMN Station LIMA. Situated 160 nautical miles to the north west of Labuan Island, between the Vietnamese occupied Terumbu Amboyna and the Philippines occupied Terumbu Laksamana, Station LIMA subsequently became the staging point for Malaysia's occupations of four other features; Terumbu Ubi, Terumbu Matanani, Terumbu Siput and Terumbu Peninjau.

Commuting between Old and New Module Site

During the construction of the new module, the Team was still staying at the "Humble Hut". To provide continuous security and monitor activities at the new construction site, assault boats were extensively used to transport personnel between the two locations. The water in the lagoon between the old and new module under construction was rather shallow and littered with underwater rocks and boulders often damaging boat propellers. To address these navigation hazards, Team members were directed to physically remove the hazardous rocks and boulders along the half kilometer boat's route. This back breaking task was assigned during the fasting month of Ramadan which some members teasingly described as "worse than being punished to hard labor in a prisoner-of war camp!".¹² Their hard labour eventually paid off when incidents of groundings and damaged propellers were drastically reduced.

Encountering Tropical Revolving Storm 'Irving'

On 22 December 1985, TLL was hit by a severe tropical storm 'Irving' with winds of up to 120 km/h pummeling the modules. The force of the wind ripped the wall of the helicopter's hanger. A Riverine Craft Patrol (RCP) was also lost along with the buoy where it was moored, believed to have swept into the open sea by strong waves and sank. The culverts used as a retaining wall for the $\frac{3}{4}$ acre reclaimed area were damaged after being repeatedly slammed by the drifting fuel barge. Fortunately, there was no injury or loss of life caused by this severe storm.

The Prime Minister's Visits

As the Prime Minister, Dr. Mahathir was a regular visitor to TLL from the early eighties and into the nineties. These visits usually took place over the weekends. Normally, he would fly in from Kuala Lumpur to Labuan for a brief stopover or sometimes an overnight stay before proceeding to TLL the next morning. PASKAL members always looked forward to Dr. Mahathir's visits. It is just not common for officers and sailors to have the opportunity to spend days socializing with the Prime Minister in a not too formal manner, particularly during meals and his morning walks. Not to mention, the quality and quantity of food served would also exponentially improved during his visits.

Routine and Administration¹³

Under the initial arrangement, the PASKAL squadron leader assigned to TLL on six - weekly rotation was fully responsible for all administrative and operational matters. He would be assisted by an executive officer and supporting personnel from Naval Region 2 HQ, Labuan who would serve TLL on a two-weekly rotation. Whereas, the PASKALs would serve a three-monthly rotation between RMN STATION LIMA, Labuan and Lumut.

This routine was rather disruptive to the smooth administration and operations of the installation since there were gaps in the continuous monitoring and running of the Station. As personnel rotations were usually done by Nuri helicopters from Labuan, the time available for the handing over of duties between the in-coming and out-going crew was often limited to the time to refuel the Nuri before its return flight to Labuan with the off-duty personnel.

To ensure better accountability and continuity, in May 1985, an officer and two ratings each from the technical branch, store and general clerk were posted as TLL's permanent staff. Aside from the appointment of a permanent Commanding Officer (CO) for the administration of RMN Station LIMA, PASKALs continued to be deployed to the Station to provide overall security. Now, all the technical, logistics and administration tasks were done by the non-PASKAL personnel.

Reaping the Economic Rewards

On 17 March 1987, the Cabinet approved a deep-sea fishing initiative to capitalize on the abundant marine life in waters around TLL especially the much sought-after yellow fin tuna. A kilogram of highly grade yellow fin tuna could easily fetch about USD50 or more in Japan. This was truly a boon for deep-sea fishing companies based in Sabah and Sarawak. In the same year, the Cabinet also authorized the opening of TLL Fisheries and Marine Research Center to selected foreign researchers. Concurrently, infrastructures at TLL were upgraded. These include a RM4.5 million contract to build a jetty, canal, fuel farm, and shore power supply for ships calling at TLL.

From Barren Feature to World Class Diving Paradise

Realizing the tourism potential of TLL, surrounded by one of the world's most breathtaking marine ecosystem, the Malaysian government decided to develop and turn this man-made island into a premier dive tourism destination. A private construction company began building the Layang-Layang Island Resort (LLIR) in February 1989. The construction of these 78 rooms resort complete with VIP residence, cafeteria and a swimming pool was completed on 3 October 1989. On 15 January 1990, PLL was opened for local and international visitors.

In December 1991, a decision was made to upgrade the short airstrip at TLL to a 1,067-meter runway. This was in anticipation of increased tourist arrivals with the opening of TLL as an international diving destination. The runway was further extended to 1,367 meters in 2003.

The transformation of TLL into a world class diving paradise is truly remarkable. From the pre - 'Humble Hut' days where there was mere four hundred square feet of dry patch of 'land' at high water, it has now been converted into an 83-acre Island with modern infrastructure and support facilities. To all the pioneer PASKALs who stayed on top of rocks and shared the space with sea birds during its early days, the transformation of TLL into what it is today is just beyond their wildest

dream. The name of TLL (Layang-Layang Reef) was officially changed to Pulau Layang-Layang (Layang-Layang Island) by the Prime Minister on 29 March 1992.¹⁴

Occupation of Terumbu Mantanani & Terumbu Ubi

With TLL occupied and secured, on 25 September 1985, the Malaysian Cabinet made a decision to occupy nearby Terumbu Mantanani and Terumbu Ubi. Unlike TLL, the topography of these two much smaller features could only accommodate the installation of the containerized type of modules. These modules modelled on the proven patrol craft design are equipped with accommodation and office spaces, a dining hall, a galley, generators and a water making system, and other facilities. Both modules were fabricated on top of barges in a shipyard in Johore and were later towed to Terumbu Mantanani and Terumbu Ubi and embedded at their designated sites. Upon commissioning the RMN designated the module at Terumbu Mantanani as RMN Station MIKE. Due to its proximity to the Vietnamese occupied Terumbu Amboyna and Terumbu Laksamana, RMN Station MIKE was declared as a protected zone by the Malaysian government on 18 May 1994. The daily routine and rotation plan for personnel manning this station is similar to those practiced by RMN Station LIMA.

The module for Terumbu Ubi arrived at its destination on 24 September 1986. Upon commissioning on 26 November 1996, the module was officially designated as RMN Station UNIFORM.

Under the initial chain of command structure, both the COs of RMN Stations MIKE and UNIFORM were answerable to the CO of RMN Station LIMA for all administrative and operational matters. However, in June 1987, a new organization known as the 'Markas Gugusan Semarang Peninjau (GSP)' was established at the Naval Region 2 HQ in Labuan to administer all the three RMN offshore Stations. Under the new entity, all the three Station's COs report direct to the Commander of GSP.

Occupation of Terumbu Peninjau and Terumbu Siput

On 21 October 1996, the Cabinet gave a greenlight for the MAF to occupy Terumbu Peninjau and Terumbu Siput. For this purpose, two barge mounted modules identical to those earlier built for RMN Stations MIKE and UNIFORM were simultaneously built in Penang. Upon completion, these modules designated as Module A and Module B, concealed in plywood boxes were towed via the Straits of Malacca and Straits of Singapore and to their respective sites in the South China Sea, in mid-April 1999. Module A arrived Terumbu Peninjau on 10 May 1999 while Module B arrived Terumbu Siput on 12 May 1999. Both modules were embedded into their designated sites. Upon commissioning, the RMN designated Module A as RMN Station PAPA and Module B as RMN Station SIERRA. Similar to other offshore Stations, the COs of both RMN Stations SIERRA and PAPA are answerable to the Commander of GSP.

Close Encounter in Singapore Straits¹⁵

While transiting the Straits of Singapore under cover of darkness, both modules A and B were escorted by armed PASKALs, holed up behind the plywood box such that they were not visible to prying eyes. After sunset in early May, a darkened boat was seen approaching the barge carrying Module 'A'. Perhaps thinking that there was no one on the slow-moving barge, the darkened boat moved closer to the barge perhaps with the intention to either have a better look or even to board. Unknown to the darkened boat's crew, their movements had been closely watched by the PASKAL escorts onboard using their night vision device. As the approaching boat got closer, the PASKAL Officer in charge on Module 'A' ordered one of his men to come out of hiding and pointed his rifle to the wheelhouse of the darkened boat which was by now only a few feet away from the stern of the barge. Surprised and shocked by the sight of a rifle's barrel pointed right onto his face, the boat's coxswain made a super quick breakaway maneuver and the boat was never to be seen again. Who was involved and the objective of the boat approaching close to the barge could not be positively ascertained and remained a mystery until today.

PASKAL TO THE RESCUE

PASKAL members have regularly being called upon to uphold the broader roles and functions of the RMN; that is to ensure the safety of lives at the offshore Stations. And for that they were involved either directly or indirectly in life-saving feats. Some of the more eventful rescues include assisting Mr Manuel Reyna, a Peruvian Sabah Fishery Marketing Authority (SAFMA) consultant. Mr Reyna¹⁶ while inspecting 'fish houses' or 'payaus' using a small boat in June 1986 outside TLL lagoon was suddenly struck by a violent squall causing his small boat to capsize. Battling the big waves and strong current, he swam back into the lagoon and just barely made it to the tugboat, owned by the contractor Sin Matu anchored in the lagoon for assistance. With all his energy gone and on the verge of drowning, he managed to get assistance after more than an hour, from the crew of the tugboat and taken to Station LIMA to be checked and treated by the station's medical staff.

Rescuing Japanese Recreational Divers ¹⁷

In June 1990, the Sin Matu recreational boat cum diving tender took two Japanese scuba divers for diving just outside the lagoon near the old channel. While the Japanese divers were underwater, a sudden storm hit TLL waters. The waves and swells were so violent that the diving tender had to leave the divers behind and took shelter inside the lagoon to avoid from capsizing. Once inside the lagoon, the boat's coxswain immediately contacted the CO of Station Lima for assistance to recover the two Japanese divers who by now could have surfaced and being washed away by strong currents and winds to the open sea. A PASKAL Search and Rescue (SAR) team was dispatched to locate and rescue the two Japanese divers that were abandoned by the diving tender in the violent sea. The rough sea prevented the station's lookouts from visually sighting the two divers. Fortunately, the SAR team located them via the flashing lights on their lifejackets. After battling huge waves and strong winds for about 45 minutes, the Team was finally able to recover the two divers.

Tan Sri Ani Arope's Dreadful Fishing Trip ¹⁸

In 1994, the late Tan Sri Ani Arope, Chairman of Tenaga Nasional Berhad (TNB) was in TLL to inspect TNB installed R&D wind turbine. A keen angler who had read about TLL fishing potentials, Tan Sri Ani was very eager to test his deep-sea angling skill and luck. After early dinner, the TNB team led by Tan Sri Ani accompanied by his two engineers and a PASKAL escort left for the fishing ground to the south of TLL onboard a Layang-Layang Island Resort (LLIR) boat. About an hour through their fishing, the sky all of a sudden turned pitch dark. And along came a strong gust of low depression revolving wind generating 2 to 3 meters multidirectional waves and shortly followed by a heavy squall. In this "confused" sea state, the drifting boat rolled, pitched and yawed violently.

Given the situation, the wisest thing to do was to abort fishing and quickly head for the lagoon. In the pitch-dark night, the helmsman, a hotel staff, was seen frantically struggling to control and navigate the boat out of the confused and violent sea. The strong high waves coming from the stern of the boat were so forceful such that they almost shoved the boat's bow underwater. Had this happened the boat would have capsized. At this point the PASKAL escort out of survival instinct jumped over to wrest control of the wheel from the struggling helmsman. He managed to take control and maneuver the boat out of immediate harm, and gradually steered towards the entrance of the lagoon. Back at the jetty, instead of sharing the thrills of their fishing trip, the subject was centered on how lucky they had been to survive the most harrowing experience of their life. All thanks and appreciations were directed to the quick action by the PASKAL escort.

Conclusion

With the benefits of hindsight, it could be articulated that for the followers of Malaysia's strategic affairs, the decision to occupy TLL and other features in the South China Sea's Spratly chain was one of the finest moments in the nation's history. It demonstrated the unrelenting resolve of a leader with fortitude, courage and vision who had taken an enormous

gamble that would benefit the country and our future generations for many years to come.

The courageous political decision was matched by precise military planning and execution. Perhaps with some divine intervention, none of the other contesting claimants responded to the landing operation, not until days after it had taken place. The stratagem of using the annual MAF's EX PAHLAWAN exercise to conceal the real landing operation was indeed a shrewd move.

The landing operation and permanent stationing of troops on a desolated feature was a first-time experience for the PASKALs and the RMN in general. During the early days of the landing and occupation, it was truly a daunting challenge for the PASKALs to not only sustain themselves on the feature with practically no infrastructure whatsoever, but to also conduct their daily tasks under notoriously unpredictable weather and constant military threats from other contesting claimants simultaneously.

Some felt that this was indeed a God-sent tasking of national importance for the nascent PASKAL Team. The subsequent development and expansion of PASKAL into one of the most elite special forces of the country very much started with the successful execution of this mission in 5 May 1983.

¹ Related by Captain Mat Taib Yasin RMN (Ret), as a Midshipman onboard LST KD SRI LANGKAWI when the vessel was assigned to the Spratly. His batch of RMN Officers Intake 11 joined the early 1975 trip to qualify for their Ocean Navigation Certificate (ONC).

² Captain Mat Taib Yasin RMN (Ret) interview with Rear Admiral (R Adm) Dato' Dr Mohd Rasip Hasan (Ret) on 17 July 2018 in Kuala Lumpur. The latter was the Executive Officer of RMN hydrographic ship KD MUTIARA when the vessel conducted the initial survey of TLL from 11 to 23 May 1982.

³ Guardian of the Frontier, Royal Malaysian Navy Sea Power Centre (RMN SPC), Kuala Lumpur, 26 November 2018, page 26

⁴ RMN SPC, Guardian of the Frontier, page 33.

⁵ Interview R Adm Dato' Mohd Rasip (Ret) on 17 July 2018.

⁶ Personal account of Captain Johari Ramzan Ahmad RMN (Ret) who led the first group of eleven PASKALs that landed and occupied TLL on 5 May 1983. Captain Johari served as the Alpha Squadron Leader in the rank of Lieutenant RMN from 1 October 1982 till June 1985. He served both at TLL's old and new modules from March 1983 till May 1985.

⁷ Personal account by Captain Johari Ramzan (Ret).

⁸ Captain Johari Ramzan (Ret).

⁹ Captain Johari Ramzan (Ret).

¹⁰ Captain Johari Ramzan (Ret).

¹¹ Captain Johari Ramzan (Ret).

¹² Captain Johari's interview with WO1 PKL Jalaludin bin Nek (Ret) at Seri Manjung Perak on 16 October 2018. WO1 Jalaludin was deployed to the RMN offshore stations from 1983 till 1990 as part of PASKAL's Bravo Squadron.

¹³ Based on the Briefing Notes for personnel reporting for duty at RMN Station LIMA prepared by Cdr K. Sivarajah RMN (Ret), a UK Mechanical Engineering graduate who served as the Station's Commanding Officer from mid 1985 till mid 1987.

¹⁴ From the archives of "Pusat Strategi Maritim dan Sejarah TLDM".

<http://pusmas.navy.mil.my>

¹⁵ Captain Johari's interview with WO 1 PKL Ariffadilah Omar (Ret) at Seri Manjung, Perak on 18 October 2018. WO1 PKL Ariffadilah was the senior rating in charge of Module 'B' while it was towed from Penang to Terumbu Peninjau.

¹⁶ Captain Johari's interview with WO1 PKL Ariffadilah Omar (Ret).

¹⁷ Captain Johari's interview with WO 1 PKL Jalaludin bin Nik (Ret) on 20 October 2018 via WhatsApp. WO1 PKL Jalaludin was one of the PASKALs who was involved in the rescuing of the two Japanese divers at TLL in June 1990.

¹⁸ Related to Captain Mat Taib by Hj Shazdly Wahab, former Senior Manager R&D Tenaga Nasional Berhad (TNB), at Taman Setiawangsa, Kuala Lumpur, on 7 June 2018. Hj Shadzli accompanied Tan Sri Ani Arope for the said trip to TLL.

CHAPTER 2

Safeguarding the South China Sea: A Challenge for the Royal Malaysian Navy

Tharishini Krishnan

Introduction

The Royal Malaysian Navy (RMN) plays a significant role in safeguarding Malaysian maritime interests. Its continuous presence at sea derive from various geographical factors. First, Malaysia's long coastline spans a length of 6,037 km². Malaysia sovereign rights, which include the Exclusive Economic Zone (EEZ), cover an area of 569,845 km² as compared with Malaysia's total land area of 329,758 km². Malaysia's territorial waters cover a total of 65,035 km². A 600-km stretch of the South China Sea (SCS) separates Peninsular Malaysia from the states of Sabah and Sarawak. Second, Malaysia is situated at the crossroads of east and west sea lines of communication with the Malacca Straits acting as a major choke point. The country also shares maritime borders with Indonesia, an archipelago nation, and Singapore, the only city island nation in the world. Malaysia has long been a hotspot for influxes of seaborne illegal immigrants, smuggling, and trafficking activities via the Andaman Sea. Third, in the east, Malaysia water borders is adjacent to North Borneo with the Philippines, another archipelagic population. The claim to Sabah by the Philippines made North Borneo and the Sulu Island of the southern Philippines another significant hotspot.

However, the area of the SCS has been the biggest maritime flashpoint for the RMN. Besides being connected to the world's major east-west trade routes, Malaysia is one of the claimant states of the Spratly Islands, also contested between Vietnam, Philippines, Brunei, Taiwan, and China. One the other hand, the EEZ, which allows Malaysia to exercise sovereign rights to explore, exploit, conserve, and manage natural resources, both living and non-living,¹ overlapping water borders with neighbours subsequently complicating the functions and challenges of the RMN in the SCS.

The central argument is that whilst the use of regional platform and the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) provide guiding principles for Malaysia to manage and seek peaceful resolution to the conflict regarding the SCS, the continuous assertiveness of China and contestation amongst claimant states in the area challenge RMN operations, testing its abilities to protect Malaysia's rights and address sophisticated threats to its own maritime estates. How can the RMN remain relevant and improve its readiness in the SCS? As a maritime nation and the protector of the country's vast maritime interests, it is important for RMN to improve its primary role at sea. This chapter reinforces the central argument by attempting to respond to this question. The first section describes the issues and challenges of the RMN in the SCS. The second section briefly projects current RMN capabilities, and the third section analyses the way forward for the RMN in terms of how the RMN can ensure Malaysia's maritime interests are preserved in the SCS.

Issues and Challenges in the South China Sea

Protecting the Oil and Gas Industry

The oil and gas (O&G) industry is a significant contributor to Malaysia's economy. It represents 20% of the country's gross domestic product (GDP).² Malaysia is the world's third-largest exporter of liquefied natural gas (LNG),³ and in 2017, Malaysia's proved oil reserves amounted to 3.6 billion barrels,⁴ the fourth highest reserves in the Asia-Pacific after only China, India, and Vietnam.⁵ Malaysia remains one of the key O&G producers in the Asia-Pacific, with an average daily production of crude oil at 608.734 thousand barrels per day in December 2019.⁶ In Southeast Asia (SEA), Malaysia is the second-largest O&G producer after Indonesia. Petroleum and other liquids production (including crude oil, lease condensates, natural gas liquids, biofuels, and refinery processing gains)⁷ in 2016 was an estimated 744,000 barrels per day (b/d).⁸ The quality of the crude oil (light and sweet) is favoured in the Asian markets and fetches a higher premium compared with other crude oil blends.⁹

To this end, the RMN is challenged on two fronts. First, the RMN must ensure undisrupted movement of goods and security of vital sea

location for economic productions. This responsibility is even more challenging to fulfil when O&G resources are offshore, as the RMN must maintain continuous sea surveillances. Peninsular Malaysia has the most prolific O&G production in the Malay Basin. Penyu Basin covers an area of 5,000 km² whilst some parts of the central and north Sumatra Basin are adjacent to the Malacca Straits, the busiest traditional international route in the world. Tapis specifically is key in this area, producing almost a quarter of Malaysia's crude oil production. In Sarawak, seven geological provinces, namely West Baram Delta, Balingian, Central Luconia, Tinjar, Tatau, West Luconia, and North Luconia,¹⁰ have hydrocarbons and are deep water areas. Sabah, in comparison, has three major basins: one at the heart of Sabah, one in the northeast, and one in the southeast. As these areas are offshore fields, it is all more important that Malaysia's exploration activities can be conducted without disruption, especially in the SCS areas. Furthermore, Malaysia has limited oil pipelines and relies on tankers to distribute products onshore. Movement of products must be safe and guarded at all times.

Second, the RMN must provide support and resilience to ensure the accessibility and continuity of O&G projects, which are key to boosting the economic growth of the country. In terms of enhanced oil recovery (EOR) projects, predominant companies like Shell and Petronas have invested heavily in the areas of Sabah and Sarawak. Besides EOR projects, risk-service contract (RSC) projects have been helping to maximise oil production as well as deep-water projects offshore at Sabah, which will boost the total oil production of the country. Kikeh oil field, which is operated through a partnership between Petronas and Murphy Oil, and the Siakap North-Petail satellite field are examples. The Gumusut-Kakap project is the main artery for crude oil production in the country. Shell, Conoco Philips, Petronas, and Murphy Oil are all connected to the Kimanis area, where Sabah Oil and Gas Terminal is located, making this area a vital stress point. The Malikai O&G is another example. Since crude oil is the biggest chunk of Malaysia's economic returns, Miri, Kikeh, and Kimanis at Borneo demand higher commitments from the RMN in terms of stability. Also in Sabah are several prominent natural gas and condensate fields such as Keabangan, Kamunus East, and Kamunsu East Upthrown Canyon. In the north, Malaysia has the Kinabalu Non-Associated Gas project and the Rotan field. With such a vast number of projects ongoing

and bolstering the economy of the country, the RMN must serve an increasing number of functions to ensure a stable and peaceful environment for economic activities.

A similar challenge exists at the O&G location in the SCS. To begin with, the SCS is an important sea line of the Western Pacific and the Indian Ocean. The sea route that goes through the Malacca Straits extends right up to East Asia and the SCS and enables extensive oil transportation. Besides Japan, the Republic of Korea, and Taiwan, 80% of China's crude oil imports goes through the SCS. The total oil reserves in the SCS are estimated at 125 billion barrels and 500 trillion cubic feet of gas,¹¹ and the reserves hold around 11 billion barrels of oil and 190 trillion cubic feet of natural gas.¹² For Malaysia, the O&G reserves in the SCS are important to economic income and sustainability of projects as postulated in the previous paragraphs. China's attempt to control and gain supremacy over this area through expansion of O&G projects and militarisation threatens Malaysia's strategic and economic interests. The encroachment of the Chinese Coast Guard (CCG) around Malaysian waters such as the Luconia Shoals has been challenging Malaysia due to Malaysia's economic dependency on China. This risk was also relevant when China's Haiyang Dizhi 8 entered waters near West Capella, a drillship operated by London managed Seadrill and contracted to Petronas, in April 2020. Better readiness is important to responding effectively to China's behaviour in the SCS. Thus far, Malaysia's military presence is strongest at Swallow Reef, the Mariveles Reef, and the Ardasier Reef, none of which are adjacent to Malaysian air or naval bases; as a result, air and sea-lift capabilities are required to reinforce the remote garrisons as well as other offshore capabilities.¹³

Conserving the Fishery Industry

A critical food source in Malaysia comes from the fishery industry, which contributes over 60% of the country's total protein. In terms of GDP contribution, the fishery industry contributes between 1 to 2%.¹⁴ This industry is also an important sector for rural and coastal communities as it helps to create job opportunities. Malaysia's geographical position plays an important role in the potential of this particular industry to cultivate income for the country. With its substantial coastal length of inshore and offshore fishery activities, Malaysia has extensive marine resources that

can be exploited, especially around the EEZ areas. However, whilst the marine resources around Peninsular Malaysia have been adequately explored, the Eastern Malaysian marine fishery resources remain unexplored and still hold potential to contribute to the country's economy. The environment of Sabah and Sarawak make this area one of the world's richest ecosystems. Sabah has a vast spread of deep seawaters and therefore a huge amount of fish stock. Sarawak also has deep seawaters and abundant fish resources, but deep-sea fishing efforts remain limited. Given the intense demand for fish and fish products, the harnessed resources vis-à-vis the potential resources are clearly mismatched.

Fishing is quite profitable, even taking into consideration its operating expenses and the degree of riskiness in the industry. Most importantly, fishing is the only issue that is shifting from a non-traditional to a traditional issue and ultimately requiring the RMN to play a stronger role in protecting the industry. Namely, the RMN needs to ensure the safety and security of the fishermen as well as the survivability of the fishing industry, which is key to the country's economy and sustainable food security. In particular, Illegal, Unreported, and Unregulated (IUU) fishing has been a major concern. IUU fishing involves the encroachment of both national and foreign vessels and consists of trawling, fish bombing, cyanide fishing, fish laundering, and fishery crimes. Inefficient and ineffective management of fishing can result in the collapse of a fishery industry, which would impact the sustainability of the ecosystem and local fishermen's livelihoods. In 2016, Malaysia's fisheries sector produced 1.74 million tons of fish valued at RM 10.18 billion and generated additional trade worth RM 6 billion.¹⁵ But at the same time, according to the Department of Fisheries (DOF), Malaysia loses up to RM 6 billion due to illegal fishing each year, and only 50% of fish caught from national waters make their way to the local market, while the rest are untraceable.¹⁶

IUU fishing is even more complicated in the SCS. The area holds approximately 3,365 species of marine fish, and almost 55% of global marine fishing vessels operate in the area.¹⁷ However, the fish stock has been declining due to IUU fishing. Continuous IUU fishing can thus decrease food security, reduce employment in the fisheries value chain, lead to loss of employment for domestic fishers, and decrease government revenue. These losses and shortages in the long run can heighten tension

between countries. The arrest or firing of Chinese fishermen in the SCS began as early as the 1990s; today, now that the Chinese has stronger maritime power and an active militia, tensions have increased further with more encroachment in the SCS. Fishing boats that have received military training have flocked to the disputed areas, especially the Luconia Shoals. Vietnamese fishing vessels have also crossed Chinese, Malaysian, Indonesian, and Philippine waters – in a recent case in April 2020, 1000 Vietnamese fishing ships intruded in these countries and caused conflict.¹⁸ Both China and Vietnam have large maritime militias capable of causing hostile situations. At the moment, the SCS disputes do not have a clear solution. However, stability in this area is important for economic activities. Malaysia has, to some extent, adopted sound monitoring, control, and surveillance systems in the EEZ in accordance to the UNCLOS 1982. However, with encroachment from countries like Vietnam, Thailand, and Indonesia, the biggest challenge for Malaysia is maximising the use of its current maritime assets while at the same time improving its assets procurement.

Managing Grey Zone Operations

Grey Zone Operations (GZOs) are a method that many states use to exploit the sea for economic benefits while maintaining a presence in conflict areas. Three characteristics summarise GZOs: the operations represent an effort to alter the status quo, the operations employ ‘unconventional’ elements of state power, and the operations are carried out gradually. GZOs are undertaken deliberately in order to stay below the threshold of conventional military conflict and open interstate war, so the exploitation is conducted without crossing established red lines.¹⁹ In other words, GZOs are something between war and peace, and in conducting GZOs, a nation seeks to make political or territorial gains against another without resorting to actual combat.²⁰

The first challenge for the RMN is big power intimidation. GZOs can put additional pressure on a state because stronger states naturally can intimidate weaker states. If a state responds to a stronger power, whether regarding marine resources exploitation or movement of ships, fisheries, or merchant vessels, the state may face costly competitive disadvantages. Weaker states have to calculate risks in terms of the energy and resources spent to respond to bigger warships. For instance, in the 1974 Paracel

incident, China conducted a GZO in South Vietnam by claiming Paracel Island in the SCS. This GZO was a systematic commercial operation that had been conducted since 1973 through militia employment which eventually led to the building of a primitive seafood processing plant.²¹ In this case, the Vietnam navy was pushed to its limits and came close to combat – in other words, this GZO was a calibrated move targeting strategic returns.²² Indeed, the Chinese ultimately portrayed the Vietnam navy's actions as a form of aggression, claiming that the Chinese counterattack was only in self-defence.

Irregular or quasi-military forces, also known as fishing militia, are increasing in the areas of the SCS, where most fishermen also conduct defence and security activities for their navy. For example, the US Navy oceanographic research vessel the USNS *Impeccable* faced off with a Chinese fishing vessel off Hainan Island in 2009. Hanoi also has seen many cases of Chinese fishing vessels ramming its coastguard vessels. In Malaysia, adjacent to the South Luconia Shoals, another incident took place. China is an expansionist power, and its hegemonic behaviours are hard to keep up with. The responses of the Malaysian government during the recent maritime skirmishes that have taken place in the midst of the pandemic between the United States (US) and China further reflect that as a small state, Malaysia must prioritise in order to avoid being torn between superpower rivalries. The RMN, however, must still increase its deterrence. The responses of the Icelandic coast guard towards the British trawler exploiting cod fishery which led to the Cod Wars (1958-1976)²³ is an example of how a weaker state can undermine the status quo. Iceland threatened to ally with the Soviet Union in order to break the will of the British trawlers. However, for such victories to be materialised, the main question is whether the small navy has the capacity, capability and credible deterrence in terms of assets and readiness to respond to such scenarios.

The second challenge is that grey areas can be exploited through local misjudgement. The case of the USNS *Impeccable* is again another classic example. In 2009, a US surveillance operation conducted intelligence gathering within a coastal state's 200-mile EEZ in the SCS. However, when Chinese fishing vessels neared the USNS *Impeccable*, it appeared that the Chinese vessels were manoeuvring aggressively and

dangerously towards a slow moving and unarmed US ship. Due to poor information management and misleading news, the incident impacted opinion as well as image branding amongst the international community. Information management is crucial in avoiding local misjudgement, so RMN in the SCS in particular must improve its information sharing to avoid unwanted tension. For that, surveillance and information sharing is important.

China's GZO incidents are prominent in the SCS. For instance, in 2012, deliberate harassment perpetrated by Chinese fishing vessels in Scarborough Shoal pressured the Philippines to board the vessels, causing unwanted tension. In 2013, China employed a cabbage strategy²⁴ by harassing both the Philippine military and civilian craft at South Thomas Shoal. In the same year, an Indonesian patrol vessel seized a Chinese fishing vessel, which later led to a bigger Chinese vessel appearing at the Natuna Islands. In addition, the Chinese also attempted to jam Indonesian communications. The Philippines were able to respond to China. The same was true of Vietnam when the Hai Yang Shi You 981 drilling platform moving nearer to Paracel Islands in the EEZ; namely, Vietnam responded by militarising its fishing vessels and strengthening its own forces. But in both cases, substantive resources were required. Moreover, such efforts may not necessarily be successful. Indonesia's resilience against China in 2013 was not strong enough, and as a result, Indonesia suffered damage and exhaustion of its resources and funds.

These incidents suggest the need for stronger maritime capabilities and capacity in responding to an advanced country like China. In one recent case, China's *Haiyang Dizhi 8* entered waters near Malaysia's state oil drillship West Capella, in April 2020. Malaysia did not comment further because it claimed that there was no explicit confirmation that China was conducting any improper activities, even though the vessel was only 200 miles off Malaysia's EEZ. The same Chinese vessel was observed at Vietnam's EEZ followed by the sinking of a Vietnamese fishing boat by the CCG near the contested waters. All these incidents show China has the potential to challenge the RMN's resilience and readiness in responding to big power whilst safeguarding Malaysia's interests in the area.

Royal Malaysian Navy: Growing Mismatch in Capabilities

The main question that transpires from any overview of the issues and challenges at stake in the SCS is whether the current fleet of the RMN is large enough, effective enough, and prepared enough to respond to the threats. The RMN is perceived to be a mature force in the region of SEA. At the time of its founding in 1934, the RMN, due to its British roots, was initially known as the Straits States Royal Naval Volunteer Reserve. It was a significant force during this time – it experienced World War Two and showed resilience during the *Konfrontasi* in the 1960s.²⁵ Its forces underwent intense development in the 1970s and expansion in the 1980s with the aim of building a blue-water, inshore, and coastal patrols task. The SCS was specifically the key area of strategic interest. At the end of the 1990s, Malaysia bought its first submarine (*Tunku Abdul Rahman*), and the country commissioned its second (*Tun Razak*) in November 2009. Both are stationed in Sepang, Sabah and are armed with torpedoes and mines and can launch anti-ship SM 39 *Exocet* missiles.²⁶ It is also fitted with SUBTICS integrated and UDS International supplied weapon control and sonar systems.²⁷ Besides submarines, the RMN also obtained four small *Laksamana* class missile corvettes and *Leiku* class frigates (*KD Leiku* and *KD Jebat*) in the later 1990s.

To maintain and support ageing assets from the 1970s and 1980s, six large *Kedah* class offshore patrol vessels were later put into service. The RMN's development is a case of "fitted for but not with".²⁸ In other words, the RMN has been fitted with the necessary equipment to respond to challenges offshore. The RMN is therefore considered a useful asset in managing threats towards the fishery and O&G industry. However, the size of the RMN's vessels is not favourable since the RMN cannot respond quickly along the coastline or address the devious behaviours and movements of illegal fishermen and sea robbers. The New Generation Patrol Crafts (NGPCs) were expected to come into service in 2020, but implementation has stalled. Boustead Naval Shipyard (BNS), the local shipping building industry in the country, constructed six *Kedah* class NGPCs, which entailed Boustead building six French-designed Gowind-class (3,100-ton) Littoral Combat Ships (LCSs) in partnership with Direction des Constructions Navales (DCNs), a French naval contractor, and spending at least USD 2.8 billion.²⁹ Furthermore, the Second-

Generation Patrol Vessel (SGPV) program is regarded as crucial by the RMN to overcome its lack of credible combat capability in the SCS disputes.³⁰ The RMN's maritime modernisation was supposed to be upgraded in 2016 with the purchase of four Littoral Mission Ships (LMSs) from China as part of the RMN's 15 to 5 programme. This effort was supposed to give a new flavour and image to the RMN, as most of its past warships have been from European countries. The RMN received its first LMS *KD Keris*, which was commissioned in January 2020. The second LMS, which was meant to be launched as *KD Sundang* in 2019, is yet to be commissioned by the RMN. Besides these two ships, no other upgrade efforts are operational due to poor management and planning. This is also the case with the LSCs that had been assigned to the BNS, which had been expected to complete the project by 2023; again, the project became a dead-end due to ineffective administration.

Modern electronics and weapon systems, countermeasures and quick response capabilities are important features in today's maritime domain. The ever-changing innovations and advances in the technology of both traditional and non-traditional threats make it challenging for states to ensure their capabilities are up to date. In the SCS, it is imperative for Malaysia to have a modern maritime force that is resilient and responsive in the face of serious challenges, especially in the context of managing the GZO, protecting the O&G, and conversing with the fishery industry. In short, readiness is vital. Observing its ageing assets, however, the RMN has many weaknesses. Table 1 shows an extraction of the RMN's current fleet from the 15 to 5 Transformation Programme official report. All the combat and patrol class vessels are from the 1970s and 1980s, and the majority of these ships are reaching a point of diminishing return, i.e. the return of keeping these vessels available vis-à-vis the cost required to maintain these vessels is diminishing. Hence, performance is not meeting full specifications. *KD Kasturi* and *KD Lekir* have undergone a Service Life Extension Period (SLEP); nevertheless, their capacity is close to ten years now and both are also reaching a point of diminishing return. Lack of profitability, corruption, and poor shipbuilding expertise and technology are factors contributing towards this drawback, though cost remains the greatest challenge for the RMN in modernising its fleet.

TABLE 1: AGEING OF ROYAL MALAYSIAN NAVY CURRENT FLEET

<i>CLASS</i>	<i>YEAR OF PURCHASE</i>	<i>SHIP'S LIFE PERIOD (YEAR)</i>	<i>POINT OF DIMISHING RETURN (YEAR)</i>	<i>SERVICE LIFE EXTENSION PERIOD (YEAR)</i>	<i>AGE AT 2020 (YEAR)</i>
LEKIU	1995	23			25
KASTURI	1983	25 (2008)		12	37
LAKSAMANA	1983	25 (2008)	12		37
KEDAH	2009	11			9
PERDANA	1972	25 (1997)	23		48
HANDALAN	1979	25 (1997)	23		48
JERONG	1976	25 (2001)	19		44
KRIS	1968	25 (1983)	27		52
MPCSS	1980	25 (2005)	15		40
AUXILIARY	1997	23			23
MAHAMIRU	1985	25 (2010)	10		35
HIDRO	1978	25 (1991)	17		42
HANG TUAH	1966	25 (1991)	29		54
PERDANA MENTERI	2009	11			11

Source: Extracted from Strategy Document for RMN the 15 To 5 Transformation Program, pp. 44-45.

Sealift and amphibious capabilities are another feature that is important. Since the incident of a fire breaking out on *KD Sri Inderapura* in 2008,³¹ the RMN has had no amphibious ships. *KD Sri Indera Sakti* and *KD Mahawangsa* are Multi-Purpose Command Support Ships (MPSCs), but

both are also ageing and were supposed to be replaced by three Multi Role Support Ships (MRSSs) that never manifested due to financial factors. All of the projected upgrades were part of the 15-5 Transformation Plan – the brainchild programme of the former Chief Navy Admiral Tan Sri Ahmad Kamarulzaman bin Hj Ahmad Baharuddin. See Table 2 and Table 3 for an overview of the 15 to 5 programme. The idea to transform the RMN was timely. However, due to fiscal challenges and hiccups in the local shipping industry, upgrades were temporised.

TABLE 2: CURRENT RMN FLEET

<i>CURRENT RMN FLEET</i>	<i>TOTAL</i>
New Generation Patrol Vessel	6
Corvette	4
Fast Attack Craft (Missile) 1	4
Fast Attack Craft (Missile) 2	4
Fast Attack Craft (Gun)	6
Mine Counter Measure Vessel	4
Patrol Craft	2
Multi-Purpose Command Support Ship	2
Littoral Combat Ship	6 (stalled)
Auxiliary Ship	2
Hydrography Ship	2
Training Ship	1
Frigate	2
Corvette	2
Submarine	2

Source: Extracted from Strategy Document for RMN the 15 To 5 Transformation Program, pp. 76.

TABLE 3: FUTURE RMN FLEET

<i>FUTURE RMN FLEET</i>	<i>TOTAL</i>
Multi Role Support Ship	3
Littoral Combat Ship	12
Littoral Mission Ship	18
New Generation Patrol Vessel	8
Submarine	4

Source: Extracted from Strategy Document for RMN the 15 To 5 Transformation Program, pp. 77.

Way Forward

According to the Malaysian Defence White Paper (DWP), Malaysia is a maritime nation with continental roots that acts as a bridging linchpin between the Asia-Pacific and Indian Ocean region.³² Its role as a linchpin is due to Malaysia having been identified as a strategic outlook point in the changing security environment as projected in the DWP. Be it facing uncertain big power relations, the SEA neighbourhood, or non-traditional security threats, the issues and challenges faced in terms of the GZO, O&G industry, and fishery industry converge to place great pressure on the RMN to play a stronger role in safeguarding Malaysian waters, especially in strengthening its primary role at sea. Malaysia's Prime Minister Muhyiddin Yassin during his tenure as the Home Minister stressed that Malaysia's economic assets, including its O&G platform is the main contributor to the country's economic growth.³³ Fishery is no exception. Of course, Malaysia's defence budget plays a crucial role in addressing these issues but the government continues to fall short on funds. Defence remains a lower priority as evidenced by the 2019 budget. An amount of RM 13.918 billion (USD 3.421 billion)³⁴ was announced in November, a decrease from 2018's allocation of RM 15.49 billion (USD 3.8 billion).³⁵ Nevertheless, Malaysia must weigh its options to remain relevant and increase its readiness at sea.

Strengthening Maritime Surveillance and Maritime Patrol Aircraft Capabilities

The seamless and borderless ocean is a difficult setting in which to observe threats. Nonetheless, the characteristics of the sea, and especially those of the disputed SCS, make detection and identification of threats vital. Hence, maritime surveillance and maritime patrol aircraft are key components. China's assets are difficult to match, especially taking into consideration that Malaysia is a small maritime power with limited and ageing capabilities. Improving its capabilities in these two areas in particular will best serve the RMN's abilities to function at sea.

The function of the Royal Malaysian Air Force (RMAF) in the context of maritime surveillance and maritime patrol aircraft is important. It is a flexible instrument for surveillance, transport, and combat rescue missions and counter measure or response efforts. Furthermore, it has the ability to be a support for maritime bases and logistics. As many other previous Defence Ministers have often mentioned, the RMAF thus plays a crucial role in protecting maritime interests. Most recently, during the Langkawi International Maritime and Aerospace Exhibition (LIMA) in 2019, former Minister of Defence of Malaysia Mohamad Sabu placed the maritime and air domains as top priorities because these domains do not stand alone; in reality, the RMAF in the air domain complements and supports the maritime duties of the RMN. Interoperability between the RMAF and the RMN is therefore vital in addressing the problems in the SCS, especially given that the RMAF has rapid response capabilities that the RMN lacks.

In recent years, Malaysia has been planning with this duality in mind. The country's main priorities have been to strike a balance between maritime surveillance and maritime patrol aircraft. Hence, mid-year in 2018, the RMAF was already considering replacing almost 40% of its ageing fighter jets.³⁶ Unmanned aircraft systems, ground-based radar, and missiles have been the main preferences parallel with the DWP announced in 2020. This effort was already in place in 2019 when the US announced that it would deliver US drones to the SEA members over the next few years. The US has since provided Malaysia with eight drones, including the Gray Eagle UAS; several Boeing In-situ ScanEagle unmanned aerial vehicles; and the Aeroironment RQ-11 Raven, a hand-launched

unmanned aerial vehicle that can be used to safeguard US interests in the SCS. Other countries like Indonesia and Vietnam have also benefited from such initiatives. As part of the Maritime Surveillance Initiative, Malaysia has been the biggest recipient of these drones, having been granted a total of 12 ScanEagle unmanned aerial vehicles which will be completed in 2022. Vietnam has received six, and Indonesia has received eight. The donation of 12 drones to Malaysia is worth almost RM 80 million,³⁷ and Malaysia did not incur any costs to receive them. Malaysia is also looking into acquiring single-type multi-role combat aircraft (MRCA) as well as maritime patrol aircraft and light combat aircraft. Some of the short-listed contenders are the KAI F/A-50, the HAL Tejas, the Leonardo M346, the Pakistani-Chinese JF-17, the Yak-130, and even the Saab Gripen, a hangover from the MRCA affair.³⁸ Light combat aircraft in particular are much lower in operation cost and capital compared to the diminishing point of return of the BAE Hawk 108/208 and the Aermacchi MB-339CM, which both have technical and maintenance hiccups.

In 2019, the RMAF reviewed several proposals from the defence industry with the aim of purchasing maritime surveillance aircraft, for instance developed by Alenia Aermacchi, which offered lower costs and consistency. A sea surface surveillance platform also appeared to be a favourite. For example, the RMAF expressed interest in the P-8A Poseidon, the most advanced maritime patrol aircraft in the world manufactured by Boeing. Thus far, India and Australia are the only Asia-region buyers of this maritime patrol aircraft, providing Malaysia a window of opportunity to engage with these countries in addition to the US under the Quadrilateral Security Dialogue (Quad) Initiatives. Malaysia has already experienced the Indian Navy's Boeing P-81 Neptune advanced maritime patrol/anti-submarine warfare (ASW) during the search for Malaysian Airlines flight MH370. The AP-3C Orion from Australia was also involved in the search of the missing flight. Other options are the C295 and ATR-72MP; the former is a multirole maritime patrol aircraft originating from the C295 transport aircraft developed by Airbus, and the latter is an advanced, mission-proven, twin turboprop multi-mission maritime patrol aircraft available on the market. Malaysia is also seeking to convert two PT Dirgantara Indonesia (PTDI) CN-235 transports into maritime patrol aircraft, so the RMAF could experience the Merlin MS system developed by Oregon-based Integrated Surveillance and Defence, Inc (ISD).

Nevertheless, at the moment, the US remains the dominant security partner for Malaysia for two main reasons. First, the US has the required technology to address China's supremacy in the SCS. Second, Malaysia's fiscal problems have led to a stronger inclination towards the US under the Maritime Security Initiative for maximum gain.

It is important to focus on the RMAF's capabilities especially because Peninsular Malaysia is separated by the eastern states of Sabah and Sarawak. This geographical factor makes the RMAF all the more important to the RMN's activities at sea. The RMAF has a total of 26 Multi Role Combat Aircraft (MRCA): No 11 squadrons with 18 Su-30MKM and No 19 squadrons with 8 F/A-18D Hornets. It also has three B200T as maritime patrol aircraft, 18 light combat aircraft, 14 C130, and seven CN-235 Tactical Airlifts. A total of four A400M type Strategic Airlifts are also available. It also operates 14 S614A and 12 EC725 helicopters. However, as discussed earlier, Malaysia's maritime patrol aircrafts need to increase their capabilities beyond the two PTDI from Indonesia. For this, a medium-range, long-endurance (MALE) UAS for maritime surveillance is on the priority list.³⁹ There is also a need to have offensive capability against surface vessels and submarines.⁴⁰ Plans to upgrade Hawks have been dropped due to fiscal constraints.

Malaysia could seek to engage regional partners to cover the financial constraints. In a larger context, the US security assistance to the region aims to balance the power of a rising China, especially in the maritime domain, as well as to express the importance of the SEA region to US-Asia policy. The US security assistance is also an effort to rejuvenate the US Free and Open Indo-Pacific (FOIP) strategy by making SEA the bridge. For countries like Malaysia that have a long-standing security partnership with the US, such initiatives are useful to control China's behaviour and shrink China's supremacy in the region. Malaysia has already participated in the Association of Southeast Asian Nation (ASEAN) – US Maritime Exercise (AUMX) in 2019, which involved eight warships and four aircraft. The exercise covered scenario planning, reinforced interoperability, and raised maritime domain awareness. Under the FOPI banner and as an ASEAN member, Malaysia benefited from such training because Malaysia's experiences can be useful in responding to the threats in the SCS.

New regional partnership, in addition to continuing to engage with traditional partners like the US and Russia, is a smart approach. For instance, Malaysia could also benefit from the Quad Initiative and build strong friendships with Australia, India, and Japan. The Indo-Pacific Endeavour (IPE) 2017 initiated by Australia opened up cooperation opportunities for Malaysia as well. It was a three-month cruise across the region consisting of various joint activities. The AP-3C Orion has operated from RMAF Butterworth for a number of decades as part of the bilateral Malaysian and Australia Operation Gateway.⁴¹ More such collaboration can take place in enhancing interoperability in the SCS. The challenge for Malaysia, however, lies in drawing lines and not antagonising China through its engagement with the US-led Indo Pacific initiatives. Given the amount of force shown through the IPE, it could be easily be misconstrued as an effort to constrain China.⁴² Other options are the Southeast Asia Deployment, Milan, and Rim of the Pacific (RIMPAC). With limited capabilities, Malaysia's engagement with external partners within and across other regions can help advance the country's maritime surveillances and maritime patrol capabilities and address the challenges in the SCS.

Improving Navy-Coastguard Nexus

The disputes in the SCS have implications for Malaysia; the RMN has a direct responsibility to ensure Malaysia's national interests are preserved. But as much as the navy is the key player, it often has limitations. For instance, coast guard vessels are more suitable than warships to perform law enforcement functions, especially in sensitive areas like the SCS.⁴³ This is simply because the coast guard's image, with the vessel's 'white hull', is far less intimidating than a 'grey hull'; the coast guard can therefore be a useful tool in safeguarding the SCS especially in managing GZOs. Coast guard vessels do not stimulate enmity among conflicting nations compared to warships performing law enforcement arrests. Coast guard vessels are less threatening than larger, more heavily armed grey warships.⁴⁴ In terms of cost effectiveness, it is also wiser to use white hulls versus grey hulls because a typical warship is fitted with advanced technology and extremely expensive to construct. Using warships to serve law enforcement would be like "bringing a Lamborghini to a market".

Besides practicality and cost-effectiveness, the job scope and law enforcement leverage of the MMEA needs to be considered. According to the MMEA Act 2004, the MMEA's role is the maintenance of law and order; the preservation of peace, safety, and security; the prevention and detention of crime; the apprehension and prosecution of offenders; and the collection of security intelligence.⁴⁵ This role includes the internal waters, territorial sea, continental shelf, EEZ, and Malaysian fisheries waters as well as the air space over the zone.⁴⁶ The MMEA can exercise its powers in any water space where federal law can be applied, especially in the EEZ.⁴⁷ Hence great strength lies in collaborating with the MMEA. The MMEA is the sole authority in providing layered support to the RMN to tackle encroachment into Malaysian waters and perform coastal water safeguarding. Given that navies do not hold law enforcement roles in territorial waters and face more budgetary constraints, navies need to evolve strategically. Relying on efficient use of coast guard tactics (such as surveillance, detection, classification, identification, and action) can allow navies to achieve the most coverage in terms of their assets, providing effectiveness and flexibility in responding to intrusions and encroachment at sea.

Collaboration between the RMN and MMEA is not new. The coast guard was established in February 2005 as a result of the overlapping jurisdiction of many related maritime organisations in the country. This decision was timely taking into consideration the huge territorial water space that had to be safeguarded at key strategic points surrounding Malaysian waters, especially pertaining to non-traditional issues. In the early stage, one could argue that given the complexity in the SCS, covering the SCS would be best made the primary role of the RMN, because the MMEA is less capable of responding. The continuous support of the RMN right after the establishment of the MMEA, both in contributing assets and leadership by ex-navy personnel in the coast guard, set a strong foundation for better synergy between the navy and coast guard. In the beginning, the MEMA received an asset transfer of two 75m Musytari-class offshore patrol vessels (OPVs), later called Langkawi-class, and 15 smaller patrol craft of Sabah, Keris, and Kedah classes. Such collaboration has made both entities much more consolidated today. Furthermore, during the occurrence of the conflict, the MMEA functions fell under the

RMN in safeguarding Malaysian waters. This further strengthened and consolidated the role of both entities.

As mentioned above, the synergy between the RMN and the MMEA is strong. This can be observed with the establishment of '*Prosedur Tetap (PROTAP) Operasi Bersama Agensi Penguatkuasaan Maritim Malaysia dan Tentera Laut Diraja Malaysia*' – a common Standard Operating Procedure which was shaped in 2016 to coordinate and regulate Rules of Engagement (ROE) between both maritime entities in order to achieve effective coordination and communication at sea. A prior research by the author⁴⁸ found that the maritime entities shared geographical setting and boundaries (territorial and EEZ) make it easier to operate functions in the same area with similar assets. PROTAP has further reduced miscommunication and overlapping functions and has become a benchmark, and such ROE can be implemented in the SCS. *Ops Sekat* is one such example.⁴⁹ The biggest challenges in the future, however, pertain to asset acquisition and financial support. At the moment, the budget received is equivalently sufficient to the program planned, but funding remains relatively low considering what is at stake in the SCS. With more assets and funding, interagency cooperation between the RMN and the MMEA would be more feasible. The National Task Force (NTF) established in April 2020 demonstrated Malaysia's ability to conduct integrated operations with all related security enforcement agencies,⁵⁰ including Malaysia's flagship *Ops Benteng*; the NTF is thus a testimony to Malaysia's consolidation of resources. Similar coordination can take place in managing the issues at the SCS and roping in vital entities such as the Royal Marine Police (RMP) and *Pasukan Khas Angkatan Laut (PASKAL)* for better use of assets and expertise. For instance, Malaysia has put forth some future plans to establish a marine corps adjacent to James Shoals in Bintulu. In other words, being a smart force is the key in addressing the challenges in the SCS.

Today, the MMEA has further reaching capability and more experience in facing the complexity in the SCS. The MMEA has approximately 88 ships and 164 boats, and for conducting 'white hull' diplomacy, it has six NGPC class and one training ship Marlin class medium-range ships that can provide platform and escort support up to ten days from 50 to 100 nm and up to 30 days from 100 to 200 nm. As for

its main ships, it has *KM Pekan*, *KM Arau*, and two *Langkawi* class that can carry land helicopters and unmanned aerial vehicles. It also has two fixed wing aircraft Bombardier CL-415MP amphibious platforms which joined in 2009. It has multipurpose variants fitted with the SSC's Airborne Maritime Surveillance System 6000 that can detect oil spills and small targets and forward-looking infrared sensors. These assets have proven useful in protecting Malaysia's offshore O&G and illegal fishing boats. The CL-415MP can also be useful for firefighting at sea. The MMEA also operates three Agusta Eurocopter AS365N3 Dauphin helicopters and three Agusta Westland AW139 helicopters. In Feb 2020, the government approved four helicopters worth RM 600 mil.⁵¹ These helicopters will assist in safeguarding waters via 'white hull' diplomacy. In July 2020, the MMEA received two NGPCs – *KM Kota Kinabalu* and *KM Tok Bali* – to help monitor and curb illegal fishing, adding on to its current NGPC.⁵² All these capabilities could support the RMN in safeguarding the SCS.

More strategic planning is underway for the MMEA. During the launch of Malaysia's Maritime Strategic Planning 2040, both short and long-term planning were focused on acquiring assets and strengthening human resources. The third phase of planning between 2016-2020 was focused on acquisition, replacement, and the SLEP program to achieve better performances. The fourth phase (the current phase) between 2021-2025 is focused on the maritime patrol aircraft and SLEP program, which have now been implemented for more than 20 years. This phase also focuses on the Malaysian Maritime Surveillance System (SWASLA) and C4ISR (command, control, communications, computers, intelligence, surveillance and reconnaissance) system improvement. With better consolidation with the MMEA, the RMN can be expected to benefit from all these new acquisitions and technologies in strengthening patrolling and safeguarding of the SCS.

Conclusion

The maritime domain is an important defence area for Malaysia due to Malaysia's geographical proximity to both eastern and the western maritime routes. Malaysia has also been a major watchdog at the busiest international trading routes since the Malacca empire. Moreover, the

Malacca straits represent a vital chokepoint for China's access to the western international routes. The maritime estates around Malaysia also contribute heavily to the country's economy, especially in trade, the O&G industry, and the fishery industry. The geopolitical scenario around Malaysian waters also contributes to Malaysia's inclination towards maritime defence. Besides non-state actors, state actors are dominant factors, in particular China, which is a much more advanced and stronger power relative to Malaysia. In the SCS, the situation is critical for Malaysia because the disputed area divides Peninsular Malaysia from Sabah and Sarawak. Increasing militarisation and naval fortification means that Malaysia's peace and stability hinges on its own backyard. This area involves the territorial and sovereignty rights of Malaysia, and the claimant states are close regional members of SEA. Indonesia, Vietnam, and the Philippines are building their navies as well, and these regional maritime forces do not put Malaysia in a comfortable position, naturally driving Malaysia to improve its capabilities and readiness at sea.

Over the last few decades, Malaysia has rigorously worked towards building the RMN to address all these challenges. Besides many other modernisation programs, the 15-5 program has been the crust of the RMN fleets' transformation. This program focused on acquiring new ships to replace ageing ships, reducing cost and logistics problems, and most importantly building an efficient fleet. Abiding to international law and UNCLOS 1982 has helped to sustain the peace and stability of the region. However, intrusion and encroachment continuous to be rampant. There is a sore need for the RMN to maximise its options to remain relevant and improve its readiness. Malaysia has already extemporised its asset acquisition, especially through stronger engagement with the RMAF – both maritime surveillance and maritime patrol aircraft have been the priorities. Established defence companies have been identified to deliver these assets. Nonetheless, it is also important for the RMN to diversify its regional partners beyond the US and engage stronger with countries like India and Australia to maximise its advantages. The RMN has also worked towards improving the RMN-MMEA nexus to augment and boost its strength at sea. However, stronger consolidation is needed with the entry of other related maritime organisations in the country. Having said that, financial constraints have been the underlying factor holding Malaysia back from achieving the abovementioned objectives. As a result, the RMN

still falls short in performing its tasks at sea. Matching China in particular remains the greatest challenge. Amongst ASEAN members, Malaysia is lagging behind its neighbours. “We were once ranked as the best (in the region) in the 1970s”, said the former Defence Minister Mohamad Sabu.⁵³ “However, today we are lagging behind Indonesia, which ranks top, and Vietnam”.⁵⁴ To that end, the RMN must be prioritised for the good of the region.

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CHAPTER 3

Malaysia's Actual and Potential Maritime Boundaries in the South China Sea

Vivian Louis Forbes¹

Malaysia is confident that through constructive joint dialogue between ASEAN countries and China, will achieve a mutually beneficial long-term solution with respect to the South China Sea for the stability and prosperity of the region.

Media Statement, Prime Minister's Department on 25 May 2016²

Malaysia believes "all relevant parties can peacefully resolve disputes by full respect for diplomatic and legal processes and relevant international law and 1982 United Nations Convention on the Law of the Sea (UNCLOS)."

The Star, 13 July 2016²

To ensure regional peace and stability, Malaysia is committed to ensure everyone respects international law, resolves any dispute and avoids the use of force or threats of violence.

Foreign Minister Saifuddin Abdullah, Malaysian Parliament, 17 October 2019²

Abstract

A substantial portion of Malaysia's coast abuts the South China Sea. Under the provisions of the 1982 Law of the Sea Convention (the 1982 Convention) Malaysia, as a coastal State, has rights to claim maritime jurisdictional zones of varying widths, and obligations to manage these zones, in accordance with national and international rules and regulations. Malaysia's maritime claim in the South China Sea basin is based upon the continental shelf principles as provided in Articles 76 and 77 of the 1982 Convention. Governments of Malaysia, past and present, have been proactive in negotiating the nation's maritime boundaries, however, such a complex geopolitical issue is not easy to resolve. This chapter discusses Malaysia's actual and potential maritime boundaries.

Key Words

Continental shelf; Continental margin; Extended Continental Shelf; Maritime boundary delimitation; Exclusive Economic Zone

Introduction

This chapter discusses Malaysia's actual and potential boundaries in the South China Sea, as revised by the International Hydrographic Organisation as depicted in Figure 1, below. It **does not** address Malaysia's boundaries - actual and perceived limits - in other adjacent seas, for example, the Malacca Strait, the Straits of Singapore, the Sulu Sea and the Celebes Sea. Any discussion that focuses on the topic of maritime boundary delimitation and sovereignty over marine features – islands, isles, reefs, rocks, shoals and Low-Tide Elevations (LTEs) – in the South China Sea basin, for the past three decades to mid-2020, was open to conjecture and a potential cause for heated debate.

Malaysia has taken a cautious and diplomatic approach in the territorial dispute in the South China Sea as witnessed by the three quotations above. However, on 12 December 2019, the Government of Malaysia, took a bold step forward and made a new submission for an extended continental shelf (ESC) beyond 200 nautical miles (M) from the baselines from which the breadth of the territorial sea is measured to the United Nations Commission on the Limits of the Continental Shelf (CLCS).³

China claims nearly the entire South China noting in its communications (2009, 2011, 2019, 2020) with the UN Secretary-General that:

China has sovereignty over Nansha Qundao (*Spratly Archipelago*) and its adjacent waters, and over Huangyan Dao (*Scarborough Reef/Shoal*) and its adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China has historical rights in the South China Sea. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.⁴

Therein is the source for all the diplomatic, legal and resource allocation problems in this regional sea. Brunei, Malaysia, the Philippines, Taiwan and Vietnam also have overlapping territorial claims, just like China, to this marine region, where volumes of global maritime trade in excess of \$US5 trillion passes through annually, and allegedly a sea rich in marine biotic and mineral resources.⁵

Within this regional sea, which is semi-enclosed, the littoral states are locked, for many decades, in a sovereignty dispute over the marine features and now the international community is witnessing a conflict between law – international customary and conventional law on the one hand – and history – the vague concepts of historical rights’, ‘historical waters usage’ and ‘adjacent seas’ – on the other hand. In the context of this chapter, I will adhere to the revised defined limits of the South China Sea whose south-western limit is moved northwards to exclude the Natuna Archipelago. Thus, the surface area of the South China Sea has shrunk as compared to the 1953 defined limits.⁶ [Figure 1]

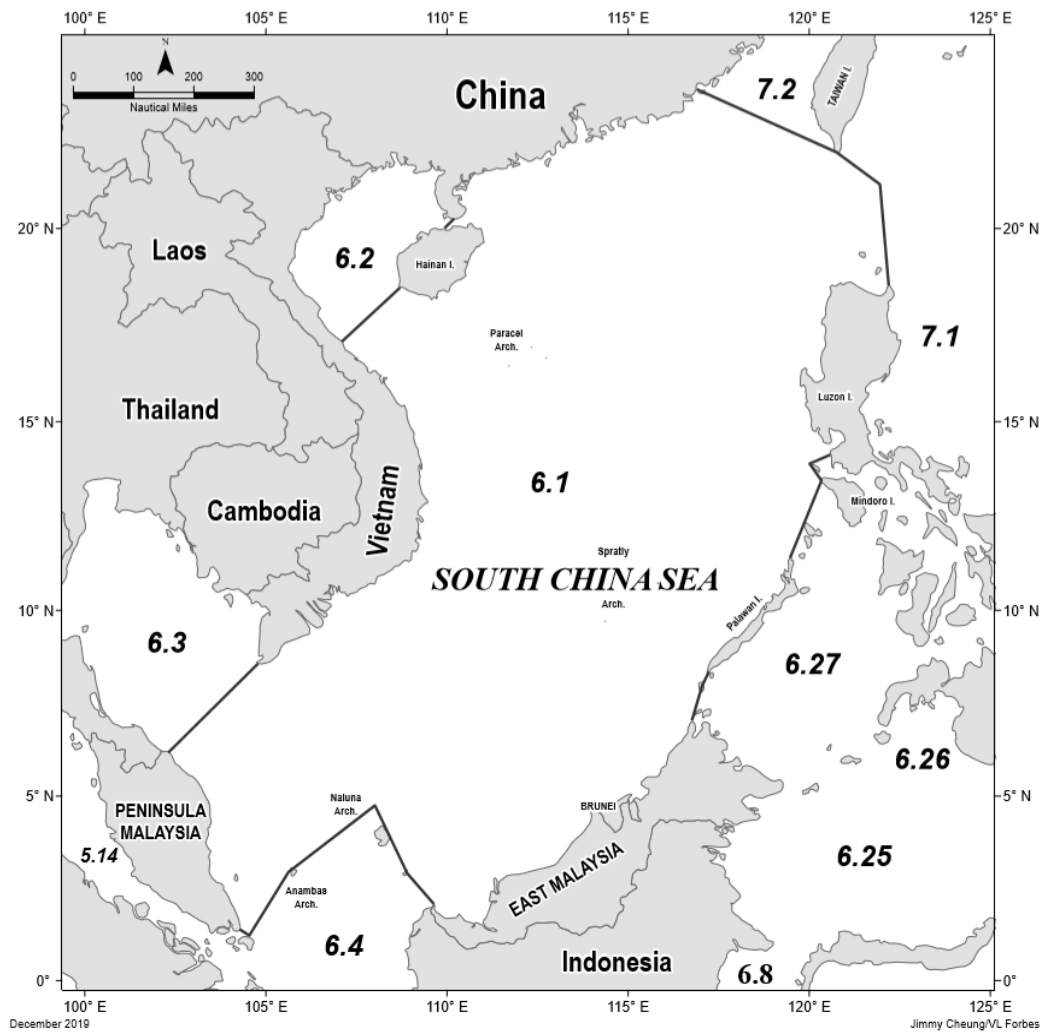


Figure 1: The Limits of the South China Sea
(Source: the present author, 2020)

The structure of this chapter initially discusses, illustrates and analyses the established continental shelf boundary agreement between Indonesia and Malaysia of 1969, from Turning Points 21 to 25, inclusive; and, Malaysia's continental shelf unilateral claim of 1979 from Turning Points 48 to 66 that was delineated on a map specifically designed for the notification of Malaysia's intentions.⁷

The chapter then offers a brief comment of the discussion relating to the *Exchange of Letters* of 16 March 2009 between Brunei and Malaysia;⁸ the Treaty of 1930 between UK and USA with implications to

the Malaysia and the Philippines limits in the south-eastern sector of the South China Sea; and the claims made by Malaysia for Extended Continental Shelf (ECS) beyond 200M from its territorial sea straight baseline system which was lodged on 6 May 2009 and 12 December 2019.⁹ In the context of this narrative, the measurement for distance is given in Nautical Mile (M) which is equivalent to 1,852 metres (m) – an international standard, as used for marine navigation and in the provisions of the 1982 Convention. It will then discuss the pending determination of Malaysia's maritime boundaries in the southern sector of the South China Sea. An objective position founded on geographical factors, regional diplomacy and legal standing is adopted in this chapter.

The Legal Issues

The legal issues raised by the competing claims to the marine features – islands, rocks, sand cays, reefs and shoals – and the maritime jurisdictional zones, generated by and attached to these features, if permissible under contemporary international law – in the South China Sea are daunting in their complexity. Because the principles of international law may be a major factor in resolving these disputes, it will be necessary to resolve such territorial and sovereignty issues so that the strengths and weaknesses of the claims under international law can be appreciated and understood.¹⁰ This chapter does not profess to undertake this task, rather that will be left to the political will of the leaders of the littoral States, in particular the claimants, based on the legal, political and technical advice they receive.

The demands of the South China Sea neighbouring littoral States include claims to the marine features in the Spratly Group, and therefore, a series of questions can be classified as 'sovereignty' issues. How does a nation acquire sovereignty over an isolated and essentially un-inhabitable outcropping of land – reefs and islets in this instance? What historic claims do the nations of the regional sea – semi-enclosed as is the South China Sea basin – to these marine features? If the features are geographically modified to transform them from reef to what appears to be fully fledged 'island' equipped with runways in excess of 1.3 kilometres – airfields capable of receiving and dispatching large military planes, radar and

satellite dishes and housing military personnel – are the features termed islands or merely ‘artificial islands’? If that is the case, are the features entitled to the full suites of maritime zones in accordance with the 1982 Law of the Sea Convention? The answers were offered in the Ruling of the Permanent Court of Arbitration on 12 July 2016.¹¹ The extent of the Ruling will not be repeated in this chapter.

These sovereignty issues are complex enough in themselves, however, they become particularly important because the sovereign owner of a land area may – in appropriate circumstances – be entitled to the resources of the super jacent sea, its seabed and within the substratum of the seabed. The principles governing these entitlements can be characterised as ‘boundary delimitation’ issues, and they require a separate – and equally complex – analysis.

There are several maritime boundary delimitation agreements in the South China Sea negotiated both prior to, and after, the entry into force of 1982 UN Law of the Sea Convention (the 1982 Convention).¹² Malaysia delimited its continental shelf boundary with neighbour Indonesia in October 1969; established provisional agreements with Thailand on 24 October 1979 and with Vietnam on 5 June 1992;¹³ and made agreements with Brunei on 11 September 1958 and in April 2009 in an *Exchange of Letters*.¹⁴ A maritime boundary with the Philippines was inherited from a Treaty in 1898 and another Treaty in 1930 between the United States of America and the United Kingdom.

The then Government of Malaysia signed the 1982 Convention when it opened for signature on 10 December 1982. In August 1994 it signed Part XI Agreement and two years later, on 16 October 1996, it ratified the Convention with Declarations. It was bound by Part XI Agreement. Malaysia has made two submissions for recognition and rights to an extended continental shelf limit in the southern half of the South China Sea. One was a joint submission with Vietnam in May 2009; the other was prepared in November 2017 and submitted two years later (December 2019). The gist of these submissions on the extended continental shelf are discussed below and later illustrated in Annex I, below.¹⁵

Continental Shelf: Natural and Extended Legal

A brief commentary about the natural and legal concepts of continental shelves is required here before proceeding with the discussion of Malaysia's actual and potential maritime boundaries in the South China Sea. The concept of the continental shelf is defined in Article 76 (1) of the 1982 Convention as the seabed and subsoil of submarine areas which because of their geological characteristics, are considered as the natural prolongation of the continental or land mass beneath the oceans or seas to the outer edge of the continental margin, or to a distance of 200 nautical miles (M) from the baselines from which the breadth of the territorial sea is measured. The continental margin consists of the shelf, the slope and the rise (Article 76 (3)). It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. The Convention gives coastal States sovereign rights to explore and exploit the marine biotic and mineral resources within the water column, on the seabed and in the substratum of the seabed,¹⁶

The determination of the outer limit of the continental shelf of States is necessary to separate those areas that fall under national jurisdiction from those areas of the seabed which were proclaimed by the General Assembly, and later the 1982 Convention, to be the *common heritage of mankind*.¹⁷ The resources of the deep seabed beyond the limits of national jurisdiction are to be managed jointly by all States through the International Seabed Authority (ISA), a body also established by the Convention.¹⁸

In 1979, pre-dating the entry into force of the current law of the sea, Malaysia made a unilateral claim with the publication of a suite of maps, referred to as the '1979 New Map' (*Peta Baru*) which defined and delineated a continental shelf boundary. The geographical co-ordinates of Turning Points 1 to 84 were published. Turning Point 1 is located at the northern sector of Malacca Strait and Terminal Point 84 on the land boundary between Indonesia and Malaysia on Pulau (Island) Sebatik on Latitude 4°10'N (Longitude 117° 55' E.).¹⁹

Turning Points 1 to 52, apart for the section within the Straits of Singapore, are coincident with established points of previous negotiations

with Indonesia in 1969. Much later, some of the Turning Points were linked to the negotiated joint development for marine mineral resource areas with Thailand (MOU, 1982) and Vietnam (ACA, 1995). Turning Points 53 to 66, defining the continental shelf limits in the southern sector of the South China Sea, according to the 1979 Map is a unilateral declaration by Malaysia and hence was subject to dispute with its maritime neighbours.²⁰

Geographical Factors

The geographical focus of this chapter is the sea space that is located within the southern sector of the South China Sea – an area stretching from about Latitude (Lat.) 4° to 13° N, and Longitude (Lon.) 108° to 118° E., in essence – the sea that borders the northern coast of Borneo Island and in particular the Malaysian states of Sabah and Sarawak. Immediately, to the east of Longitude 108° E the sea space, which has been delimited, partly falls within the three States – Indonesia, Malaysia and Vietnam created by the Indonesia/Malaysia Agreement of 1969 and the Indonesia and Vietnam Agreement of 1992.

To the north of the Pedra Branca (Pulau Batu Puteh), Middle Rocks and South Ledge marine features the political division of maritime space has yet to be determined to the satisfaction of Indonesia, Malaysia and Singapore. Negotiations are in progress according to reliable sources in June 2020.²¹

To the west of the meridian of Lon. 118° E is the Sulu Sea wherein Malaysia and the Philippines have shared allocated maritime space (which is outside the discussion of this Chapter).²² To the north of the defined area, the question of sovereignty over insular features of the South China Sea is highly contentious and debatable and is a geopolitical issue in the context of determining and delimiting maritime boundaries. Thus, this commentary is of a geopolitical context and hence takes a cautious approach in the discussion on the potential maritime boundary delimitation process.

Since becoming a party to the 1982 Convention, Malaysia has been represented at the States Parties meetings of the 1982 Convention as well as the meetings of the ISA and at other international fora and committees relating to maritime issues. Malaysia will eventually have to delimit its remaining maritime boundaries. In its case, the defining, delimiting and delineation process will not be a simple task, especially in its maritime space in the South China Sea basin. The premise here is that of sovereignty over the numerous insular features that is collectively known as the Spratly Archipelago. The total surface area associated with the Spratly Archipelago is nearly 170,000 square nautical miles (M²).

Geopolitical Background

Actual and perceived aggressive and coercive moves by the Government of the People's Republic of China (PRC) dispute over a group of islands in the East China Sea with Japan during early November 2010 was cause for concern in Malaysia's military and political circles and elsewhere in Southeast Asia.²³ These events prompted Malaysia's Defence Chief to state, on 10 November 2010, that his nation's confidence in a traditional friend, China, is based on a trading relationship dating back thousands of years, with reference to sea-borne trade.²⁴ The Governments of the Peoples' Republic of China (PRC) and Malaysia acknowledge that they are good neighbours, and that the peoples of these countries share a long history of friendly exchanges.²⁵

During the period 2010 to 2019, political trust had been deepened and economic and trade cooperation had yielded remarkable results, bringing substantial benefits to both nations. Malaysia's acceptance and adoption of the 'One China Policy', even while pursuing close economic relations with Taiwan, reflects commercial expediency in the face of political realities. The PRC and Malaysia has adopted a constructive approach to resolve outstanding problems, including overlapping claims and the determination of land and maritime boundaries with some of their respective neighbours, for example, China and Vietnam in the Gulf of Tongkin, and with Thailand and Vietnam in the Gulf of Thailand.²⁶

Regional Diplomacy

Every diplomatic effort has been made to ensure that bilateral relations do not become adversely affected by the territorial dispute in the South China Sea. Since the 1980s, the Malaysian government has even agreed to refer territorial disputes to a third party, for example, with Indonesia and Singapore to the International Court of Justice, in 2002 and 2008, respectively; and to International Tribunal on the Law of the Sea against Singapore in 2010. These actions indicate the extent to which Malaysia was prepared to go in achieving amicable solutions to bilateral territorial problems.²⁷

Notwithstanding the outstanding Sino-Malaysian territorial disputes over the Spratly Group, past and present Malaysia government administrations have demonstrated great reluctance to the joint development of hydrocarbon resource exploitation in the vicinity of the Spratly Group for many reasons but most importantly, such an action may infer or appear to indicate acknowledgement of the transfer of sovereignty and territory.

Instead, Malaysia is actively exploiting the hydrocarbon resources within its Exclusive Economic Zone (EEZ) in its own right, even while trying to enhance its claim over the area through military presence and commercial development. Most importantly, Malaysia's 2009 decision to submit with Vietnam a joint continental claim to the UN Commission on the Limits of the Continental Shelf and another submission for extended continental margin in December 2019 will almost certainly interfere with China's apparent claim to the entire South China Sea, as portrayed on its 2009 "Nine-dashed" Line map which was based on a version of the 1946 map published by the then Nationalist Government of China.²⁸

One positive outcome in the South China Sea may result in the actions brought about by the then Government of the Philippines, particularly during 2013 and 2016, which was sparked by worsening disputes in the northern sector of the South China Sea between China and Vietnam and China and the Philippines. In January 2017, Vietnam hinted that it may seek legal redress against the actions of China in the South

China Sea. Malaysia has taken a soft diplomatic approach termed a 'charmed offensive'.²⁹

The Governments of the Member States of ASEAN and the Government of the People's Republic of China, on 4 November 2002, signed in Cambodia, the *Declaration on the Code of Conduct of Parties in the South China Sea* (the Code) which stipulated that: The Parties: reaffirmed their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations; and, were committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect.³⁰

They also reaffirmed their respect for, and commitment to, the freedom of navigation in and overflight above the South China Sea in accordance with the principles of international law; and, to undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned; and 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 action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

The Code is a promise to formalise an agreement which minimises the risk that disputes between fishers or other users within the South China Sea, for example, commercial companies engaged in exploration for hydrocarbon reserves, or those undertaking marine scientific research, might escalate into conflict. The practicalities of the Code has not emerged; however, optimists allude to the restraint that claimant States have demonstrated since 2002 in occupying uninhabited islands or specks of rocks in reef complexes although they have been energetically fortifying those marine features within the Spratly Group where they already have a presence.

A Single Draft for a Code of Conduct (CoC) was presented in Singapore at the 51st ASEAN-China Foreign Ministers' Meeting in September 2018 which explored rule-based governance of the South China Sea. However, there are still contentious issues that remain to be resolved, for example, the defining of the geographical scope and whether the provisions are applicable to the whole region or only to certain areas that have not been elucidated. The CoC in its present form, is non-binding, in accord with the wishes of the Government of China; however, most members of ASEAN would prefer a binding working document which means its legal status is defined and it follows international law and norms. China has been upbeat about the Code of Conduct as not only a sign that it is happy to find a multilateral solution to disagreements, but also intrinsic to its 'Asia for Asians' foreign policy refrain.³¹

The Government of China has thus far ignored the Ruling of Permanent Court of Arbitration of 12 July 2016 which was based on international law and norms. The illegality of China's claim in the South China Sea was addressed in the PCA's Ruling and hence this should be factored into the CoC. An effective monitoring mechanism is essential for enforcing international law and norms. The contentious issues remain unresolved such as geographic scope, despite settlement procedure, legal binding, marine biotic resources harvesting and development and hydrocarbon resources exploration and exploitation on the continental shelf and in the substratum thereof.

The 'New Map' of 1979

Malaysia's maritime jurisdiction claim over the south-western portion of the South China Sea and its interests in the management of the space and resources therein has been proclaimed and clearly stated since the publication of a suite of maps (in two sheets) of 1979. The 'New Map' indicated the area of Malaysia's continental shelf of the South China Sea north of the coasts of Sabah and Sarawak defined by a list of turning points whose geographical coordinates were listed on the map.³²

The alignment of the unilateral claim is depicted as a pecked line commencing at Point 25 in a north-easterly direction. Figure 2, below, illustrates the three segments of continental shelf boundary between Indonesia and Malaysia – one segment in the Malacca Strait and two in the South China Sea basin on either side (east and west) of the Natuna Archipelago. In the map the country of Malaysia is shown in green and Malaysia's neighbours are depicted in a buff-colour tone.

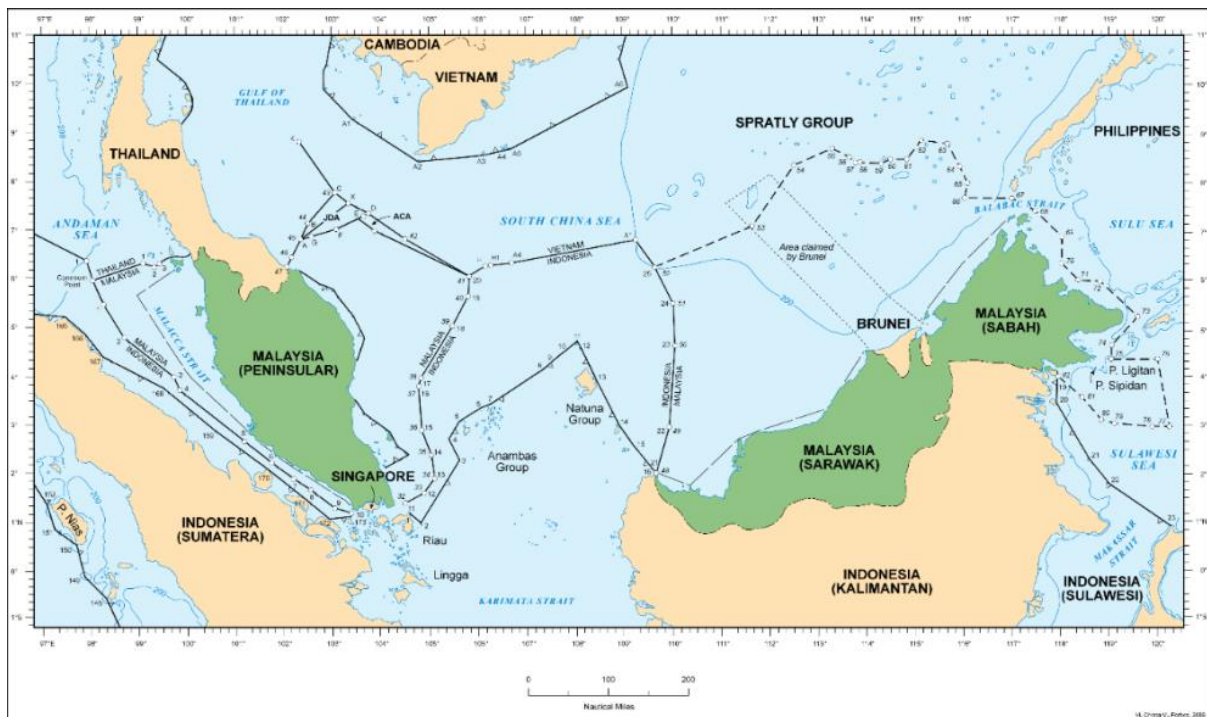


Figure 2: Delimited maritime boundaries of Malaysia with its neighbours
(Source: The present author, 2009)

Figure 2 also depicts the limits of the continental shelf claimed by Malaysia in 1979 which is to the east of the 1969 continental shelf boundary between Indonesia and Malaysia, namely the east-west stretch that links Turning Points 53 to 66; the continental shelf boundary between Indonesia and Vietnam; and the two co-operative approaches to development of marine biotic and mineral resources with Thailand and Vietnam. This map shows the eastward extension and northern limit of Malaysia's unilateral claim to a continental shelf, defined by geographical co-ordinates, numbered 54 to 66 inclusive, in the vicinity of the southern Spratly Archipelago. The map also portrays the parallel maritime

boundaries (feint blue pecked lines) that represent Brunei's EEZ in the South China Sea. The lines overlap Malaysia's continental shelf unilateral claim.

Within this defined continental shelf limit of Malaysia, a number of the marine features are shown as Malaysian territory that included, but not limited to, Amboyna Cay (*Pulau Kecil Amboyna*) Commodore Reef (*Terumbu Laksamana*) and Swallow Reef (*Terumbu Layang-Layang*, whose status was amended as *Pulau Layang-Layang*). However, The Philippines and Vietnam claim some of these features and China and Taiwan would argue sovereignty over the marine features.

The marine features claimed and/or occupied by Malaysia include:

Ardasier Reef (*Ubi Reef*) at Lat. 7° 37' 19" N, Lon. 113° 51' 39" E, lies about 13 nautical miles (M) NNE of Swallow Reef and about 4M east of Dallas Reef. Ardasier Bank, a sunken atoll, extends for over 23M ENE and has a total surface area of over (2,347km²) The reef is located at the south-western end of the and it forms a lagoon which is about 65 metres deep. The Royal Malaysian Navy has maintained a naval station on the reef called "Uniform Station" since 1986.

Dallas Reef (*Laya Terumbu*) at Lat. 7° 38' N. 113° 48' E., is approximately 3.5M in length by 1M in width and encloses a lagoon of about 15 metres depth. It is 4M west of Ardasier Reef and 13 M north of Swallow Reef.

Erica Reef (*Siput Terumbu*) Lat. 8° 6' N, Lon. 114° 8.5' E) is a small, almost circular reef located about 6M NE of Mariveles Reef in the Spratly Group. It apparently dries entirely at low tide enclosing a shallow lagoon. A few rocks remain visible on the east side at high water. The lagoon is too shallow, and the outer reef is a steep slope rather than a drop-off, but it descends into deep water. On each reef the south walls are precipitous while their other boundaries are slopes, the walls are a result of prevailing currents and the direction of maximum sunlight encouraging coral growth. The Royal Malaysian Navy has maintained a naval station called 'Sierra Station' since 1999.

Investigator Shoal (*Peninjau Terumbu*) Lat. 8° 6' 51" N, 114° 42' 7" E is an atoll above water at low tide; some large rocks at the western end might be visible at high water. The atoll has a total length of 16M and about 2M in width. The total surface area is about 32M². The lagoon is up to 45 metres deep. The Royal Malaysian Navy has maintained a naval station called '*Papa Station*' since 1999.

Louisa Reef (*Semarang Barat Kecil Terumbu*) at Lat. 6° 20.7'N Lon. 113° 16' 47" E) is spheroid shaped and is approximately 1M in an E/W axis and less than 0.25M in on a N/S alignment. Most of the reef is underwater, however, some portions dry at low tide and some small rocks remain above water even at high tide. Louisa Reef is about 74M SW of Pulau Layang Layang. Malaysia previously operated a small navigational light on this reef but has since dropped its claim to this feature in difference to its neighbour, Brunei.

Brunei maintains its claim to Louisa Reef to the extent that the feature is an island and subject to appropriation. That being the case, Brunei would appear to have a better claim to sovereignty over the feature. If, however, Louisa Reef is either a low-tide elevation or a submerged feature, it is not subject to appropriation and is simply part of Brunei's continental shelf.

Mariveles Reef (*Mantanani Terumbu*) at Lat. 7° 59' 38" N, Lon. 113° 53' 42" E., is approximately 30M east of north from *Pulau Layang Layang* and 35M southeast of Barque Canada Reef. The reef dries at low tide enclosing two relatively large lagoons in a figure of eight formation with a sand cay between them which has an elevation of about 1.5 to 2 metres and there are some isolated rocks which are just visible at high water. The Royal Malaysian Navy has maintained a naval station called '*Mike Station*' since 1986.

Swallow Reef (*Pulau Layang Layang*) at Lat. 7° 22' 20" N, Lon. 113° 50'30" E. has an area of about 35 hectares. This island has been re-constructed from a reef of a mere 6.2 hectares. Its physical dimensions are about one nautical mile in length and about 200m in width.

On 21 June 1980, Malaysia's PAKSAL, a special force, erected a plaque claiming sovereignty over Swallow Reef. The Royal Malaysian Navy has maintained a presence on the island (*Pulau Layang-Layang*) since 1983 and called it '*Lima Station*'. In 1989, the Government of Malaysia considered the development of the island into a tourist destination. By 1995, additional infrastructure was established which included an aircraft landing strip of about 1.3km in length, a radar station and a jetty. In July 2004, a marine research facility, MARSAL (Marine Research Station Pulau Layang-Layang) commenced operations.³³

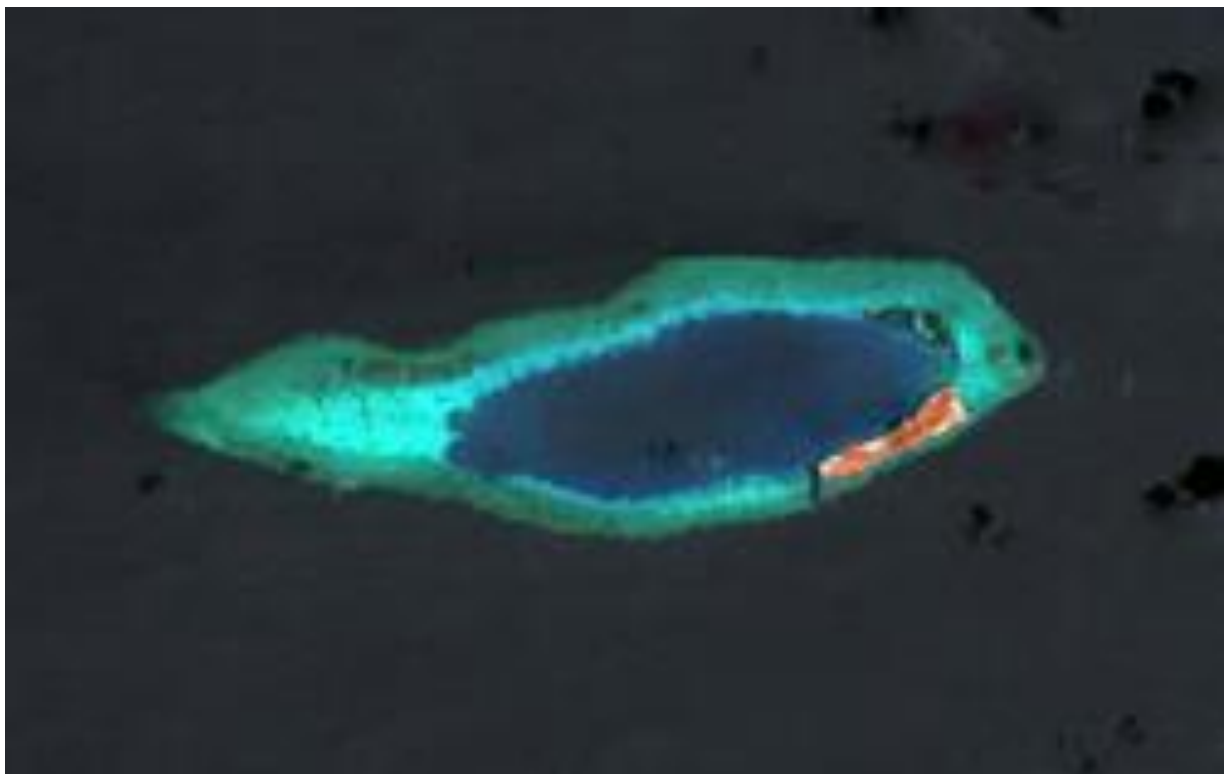


Figure 3: An enhanced satellite image of Swallow Reef
(Source: NASA accessed 24 February 2016)

The islands and reefs and other bathymetric features, mentioned above, are all located on the continental margin of the States of Sabah and Sarawak which are part of the Federation of Malaysia and claimed in accordance with the provisions of the 1958 *Geneva Convention on the Continental Shelf* and for that matter, in accord with the provisions contained in the 1982 Convention. It could also be argued that some of the features are on the continental margin of the Philippines if the Palawan Trough and the North Borneo Trench were discounted.

The rationale for Malaysia's claim over these marine features is based upon the natural continental shelf principle and are encompassed within clearly defined geographical coordinates of the country's defined limits of its continental shelf in 1979. The argument requires that the islands were *res nullius* and this condition is in accord with the Japanese renouncement of sovereignty over the features inferred in the San Francisco Treaty of 1951. There was a relinquishment of the right to the islands without any special beneficiary. Thereby, the features became *res nullius* and available for annexation. At this stage we discuss the delimited maritime boundaries negotiated by Malaysia with its neighbours Thailand and Vietnam and an exchange of discussions with Brunei.

Delimited Maritime Boundary

Maritime Boundary: Malaysia and Indonesia

The Governments of Indonesia and Malaysia were quick to recognise the need to delimit a continental shelf boundary in 1969 and to appreciate that such a delineation on charts and maps were essential for the effective management of maritime space and in the allocation of marine biotic and mineral resources in their adjacent seas.

Malaysia's continental shelf boundary with Indonesia is in three sections. One segment of the boundary is within the Malacca Strait. It is a series of ten straight lines, which commences at the Common Point and the Turning Points then numbered from one to ten. The geographical coordinates of the points are defined. Points 11 to 20 and 21 to 25 are located as two segments in the South China Sea on either side of the Anambas and Natuna archipelagos which belong to Indonesia. It is the alignment to the east of the Natuna Archipelago that commences at Point 21 located in the vicinity of Tanjong Datu, that is relevant to this chapter. This sector of the boundary, observed Prescott (1981: 39),³⁴ was delimited as inclining increasingly westward, away from the line of equidistance, and terminated at a point that is further from Malaysia than either Amboyna Cay or Spratly Island. The terminal point at the time was Point 25. In the context of this Chapter, I will only concentrate on the

eastern continental shelf boundary, namely from Point 21 to Point 25, inclusive., that is the within the area of sea to the east of Lon. 108°E.

There appeared to be no problems in its location as both Indonesia and Vietnam, by their collective actions, acknowledged its legitimacy, nearly three decades later, when the location became a Common Point or Tri-point in an agreement signed by Indonesia and Vietnam in 1995 in finalising their continental shelf boundary just to the north of the Natuna and Anambas Archipelagoes. However, since the entry into force of the 1982 Convention in November 1994, the Government of Indonesia, whilst recognising the continental shelf boundary with Malaysia is of the opinion that there should be a water column boundary that represents an Exclusive Economic Zone (EEZ) limit between the two countries. Naturally, Malaysia is not in accord with this sentiment.³⁵

Maritime Boundary: Brunei and Malaysia

Discussions to delimit the maritime boundary between Malaysia and Brunei were first raised in 1994 and negotiations began in 1997. After a lull, the negotiations resumed in May 2003 until August 2008. Both Parties were aware that submissions for their respective extended continental shelf would be due by May 2009. Brunei ratified the 1982 Convention on 5 November 1996.

The Governments of Malaysia and Brunei reached an agreement in 2009 on their maritime boundaries. No details were released at that instant and at the time of compiling this study no information is not forthcoming. However, it may be inferred from Brunei's preliminary submission to the Commission on the Limits of the Continental Shelf (CLCS) on 12 May 2009 and two Press Statements.³⁶

In its Submission, Brunei noted that in accord with two agreements the maritime boundaries (two nearly parallel lines as faint pecked lines in Figure 2) the alignment projects seaward out to 200M. In the first agreement, by two 1958 British Orders in Council, the territorial sea and continental shelf between Brunei and Malaysia were delimited as far as the 100-fathom isobath (or about 200 metres). In the second agreement, the territorial sea, the Exclusive Economic Zone (EEZ) and the continental shelf boundary projected in a north-westerly direction to a distance of

200M were delimited by an *Exchange of Letters* (EoL), which was signed on 16 March 2009.

Through the series of negotiations, both Parties agreed to a package deal that included the maritime boundary delimitation, collaboration in the exploration and exploitation of hydrocarbon resources, established a Commercial Arrangement Area (CAA) and demarcated land boundaries between the two countries on Borneo Island. The un-suspendable rights of maritime access for nationals and residents of Malaysia across Brunei's maritime zones *en route* to and from their destinations in Sarawak and Sabah.

The EoL ensures certainty for the above-mentioned issues with regard to sovereign rights and jurisdiction on the continental shelf and the EEZ of both countries and resolves any overlapping maritime claims and opens the door to a raft of cooperative measures and development of strategic partnership. The mutual admiration and understanding by the leaders of the two countries is commended, however, neither State has given due publicity to the details of the maritime boundary alignments as required by Articles 75(2) and 84(2) of the 1982 Convention.

Maritime Boundary: Malaysia and The Philippines

Within the geographical scope of this chapter, it is not entirely clear, by mid-2020, whether Malaysia and the Philippines concur that there is a maritime boundary between them. They are successor states to the 1930 Treaty between the United Kingdom and United States of America relating to the boundary between the State of North Borneo, with UK as a colonial power; and, over the Philippine Archipelago the United States of America was sovereign. Treaty law is distinct that no action is required by successor states when maritime and terrestrial political boundaries are the subject of a treaty, because of the need for definitive delineated lines on charts and maps for administrative and law enforcement purposes.

The rationale for the 1930 Treaty was to delimit the boundary between the Philippine Archipelago and the State of North Borneo to allocate to the UK and USA the islands in the Balabac Strait and vicinity. The 1930 Treaty

is silent as to the sovereign rights of resources in the waters on either side of the line.³⁷

Extended Continental Shelf: Potential Boundary

The 2009 Joint Submission: The Malaysia Context

On 6 May 2009, The Governments of Malaysia and Vietnam, jointly, made a partial submission to the United Nations' Commission on the Limits of the Continental Shelf (CLCS) for an extended continental shelf (ECS) in the western sector of the South China Sea. At about the same time, Vietnam also lodged a partial submission for an ECS on the north-western sector of the South China Sea. Both submissions dismissed the possibility of continental shelves generated by the insular features within the Paracel and Spratly Archipelagos.³⁸

The Joint Submission was in accordance with the Scientific and Technical Guidelines and the Rules for Procedure of the Commission for the declaration of the outer limits of the continental shelf. In accordance with Paragraph 3 of Annex I of the Commission's Rules of Procedure, the Joint Submission is a proposal for only a portion of the two coastal States' continental shelf.

The limits of the proposed continental shelf are generated and bound by the intersection point of the envelope of arcs of 200M limits of Malaysia and the Philippines in the east (Point A), the intersection of two converging envelope of arcs of Malaysia's 200M limits towards the south west from Point A (Points B and C), the intersection point of Malaysia's 200M limit and the continental shelf boundary line delimited under the Agreement between Indonesia and Malaysia in October 1969. Except where otherwise provided (See Annex II, below) the Points defining the limits of Malaysia and Vietnam are 200M from each countries' territorial sea baselines as proclaimed or inferred in various publications.

Point 25 under the 2003 Agreement for the Delimitation of the Continental Shelf between the Governments of Vietnam and Indonesia (Point F) and the intersection point under the aforementioned Agreement towards the northwest (Point G) and the envelope of arcs of Vietnam's

200M limits toward the northeast (points H and I). (Refer to Annex II, below) The limits consist of 810 points whose geographical co-ordinates were submitted for consideration and approval by the CLCS.

The Governments of the People's Republic of China (PRC) and the Philippines protested both submissions. The PRC attached a copy of the 'Nine-Dash Line' map, which purports to refute any existence of a continental shelf claim beyond 200M in the South China Sea. The PRC, and possibly the Government of Taiwan (Republic of China, ROC) claim a continental shelf for all the features in the central portion of the South China Sea.³⁹

Submission For Extended Continental Shelf: November 2017

On 12 December 2019, the Government of Malaysia made a new submission for an ECS, which was prepared on 28 November 2017, whose limits are beyond the 200M from the baselines from which the breadth of the territorial sea is measured. The submission noted that the claim is not located in an area which has any land or maritime dispute between Malaysia and any other coastal State. However, the Government of Malaysia acknowledged that there are areas of potential overlapping entitlements in respect of the continental shelf beyond 200M of the area that is the subject of the 2019 Partial Submission.⁴⁰

Assurance was given to the Commission (CLCS) that, where possible, the Partial Submission will not prejudice matters relating to the delimitation of the continental shelf beyond 200M between States with adjacent or opposite coasts.

Description and Analysis of the ECS 2017 Claim

The outer limits of the ECS beyond 200M are defined by 96 fixed points, of given geographical coordinates, determined by 60M from the Foot of the continental slope (FOS), in accordance with Article 76, Paragraph 4(a)(ii) of the 1982 Convention. Figure 4 illustrates the alignment of the ECS (or Outer Limit of the Continental Shelf OLCS, shown in magenta colour). The fixed points are connected by straight lines not exceeding 60M in length, in accordance with Article 76, Paragraph 7 of the 1982 Convention. Further, in accordance with Paragraphs 5 and 6 of the said Article of the 1982 Convention, all fixed points of the outer limit of the ECS

are not more than 350M from the baselines from which the breadth of Malaysia's territorial sea is measured, or do not exceed 100M from the 2,500-m isobath constraint line. Apart from nine of the 96 points all are about one nautical mile apart. Of the nine points, four are greater than one nautical apart and five are less than one nautical mile apart. (Refer to Figure 1 in Annex I)

The Governments of the PRC and the ROC claim over the marine features are identical in accordance with the 'Nine-Dash Line', as first published in 1946 and subsequently modified between 1947 and 2009. The legality and validity of the 1946 Map and later versions was rejected in PCA's Ruling of July 2016.⁴¹

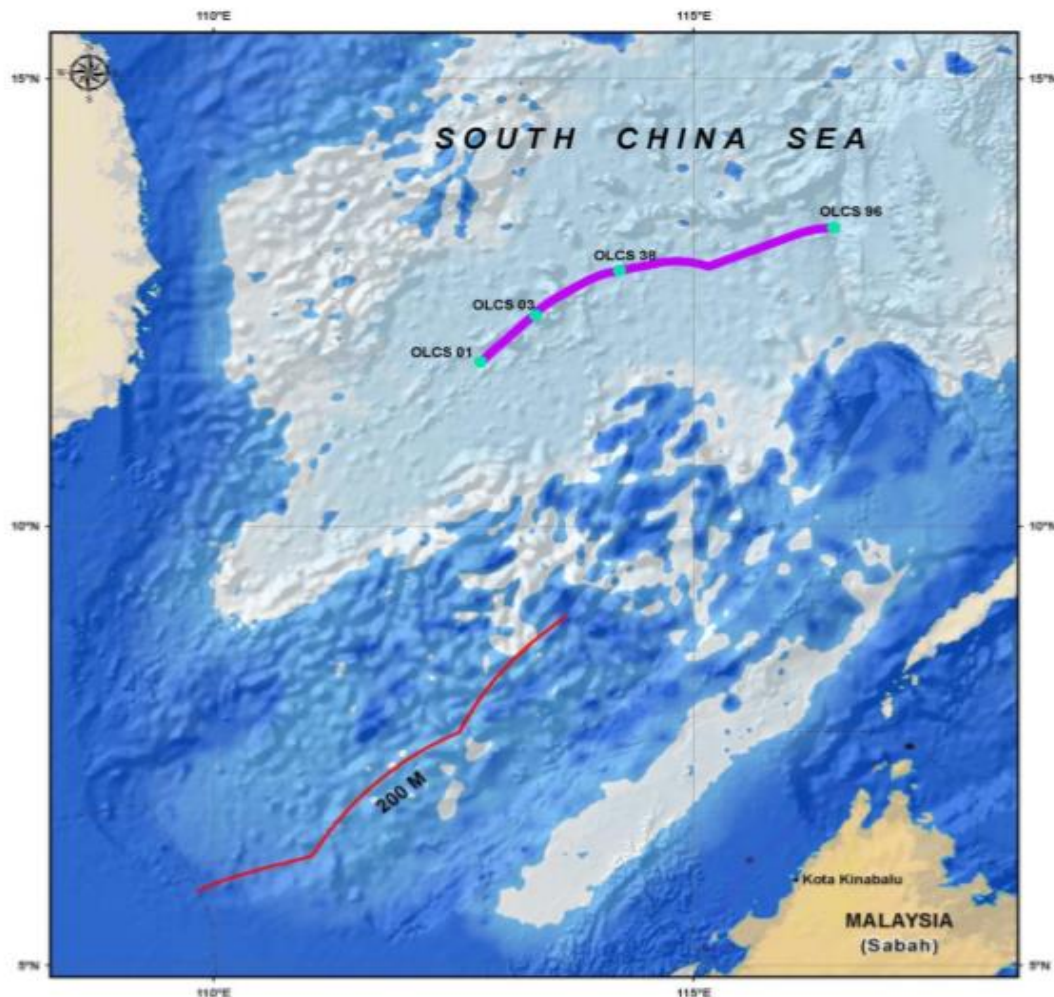


Figure 4: The OLCS of Malaysia, 2017
(Source: MYS_ES_DOC-01_281117)

Malaysia's Potential Maritime Boundaries

A simple resolution for determining Malaysia's potential maritime boundaries would be to accept the 200M limit for an EEZ water-column boundary, and the Outer Limit Continental Shelf (or ECS) as depicted on the map that was submitted in the Executive Summaries of 2009 and 2017. The Joint Submission Defined Area between Malaysia and Vietnam appears to be mutually accepted. There may be a slight overlap of Malaysia's ECS limit with that of Vietnam.

The lingering issues are the territoriality of the marine features of the Spratly Archipelago and sovereignty over maritime space and resources and thence the delimitation of maritime boundary with the Philippines in the eastern sector of the South China Sea; and, the most complex of all is the dispute between ASEAN and China and perhaps Taiwan.

Examples of incidents from mid-2019 to April 2020 and years earlier suggest that finalisation of maritime boundaries in the South China Sea will not be achieved in an amicable manner. Whilst ASEAN and China may perceive to be on the same page of the CoC of 2012, actions in the region suggest that there are many pages of narrative to be consulted and agreed upon. For example, there was a dangerous, ongoing game involving navy ships, coastguard units, militia vessels, a drill ship named *West Capella*, as well as associated offshore supply ships as illustrated in Figure 2 of Annex I. Other incidents include collisions between coastguard vessels of China with fishing boats from Indonesia and Vietnam in separate occasions.

Summary

The established maritime boundaries with Indonesia and Vietnam in the Natuna Sea; with the Philippines in the Balabac Strait at the eastern sector of the South China Sea, and Brunei appear to be effective and satisfactory, however, there are major issues of intrusion in Malaysian waters by fishers, and aliens involved in illegal trade and human trafficking – all

considered to be trans-boundary activities at sea and cause for concern in maritime security enforcement.

The Government of Malaysia stated that the submission of December 2019 to the CLCS made in pursuant of Article 76 of the 1982 Convention should not be interpreted in any manner whatsoever to prejudice or affect matters relating to the delimitation of maritime boundaries in the South China Sea between States with opposite or adjacent coasts and their position concerning land and maritime boundaries.

The Government of Malaysia is confident that through constructive joint dialogue between ASEAN countries and China resolving the disputes concerning sovereignty and territory in the South China Sea is achievable, however, it can only be attained in accord with international law and norms in a 'rules-based' order and not by coercion and soft-diplomacy.

¹ The present author is affiliated as an Associate with CDiSS; Adjunct Associate Professor at UWA; and, Adjunct Research Professor at NISCSS, Haikou.

² The sources of the quotations are as indicated.

³ Malaysia and China relations in the context of maritime issues in the South China Sea are in Forbes, 2013 'Malaysia and China: Economic Growth Overshadows Sovereignty Dispute' in Elleman, B.A., Kotkin, Stephen, and Schofield, Clive (Eds.), *Beijing's Power and China's Borders* Twenty Neighbours in Asia, (Ch. 11 by VL Forbes), Armonk: M.E. Sharpe, pp.154-167; Forbes, V.L. (2015) 'ASEAN, China and Malaysia: Cautious Diplomacy, Trade and a Complex Sea', *International Journal of China Studies*, Vol. 6, No. 2 August, pp.129-148; BA Hamzah, 'Maritime Boundary Issues in Malaysia: Time to Act', *CDiSS Commentary*, No. 40, 6 August 2018

⁴ By virtue of a map published originally in 1946 China's perceived sovereignty over the South China Sea is depicted in a series of 11-Dashed Lines. A revised copy of the map was submitted to the United Nation's S-G in May 2009. (CML/18/2009) New York; See also Tsu-Sung Hsieh (Ed) *The South China Sea Disputes, Historical, Geopolitical and Legal Studies*, Series on Contemporary China, Vol. 42, 2018

7 May 2009; CML/8/2011; CML/14/2019; CML/11/2020)

⁵ The value of maritime trade passing through the South China Sea fluctuates on a yearly basis. See also UNCTAD Annual Reports on Trade.

⁶ International Hydrographic Organisation, Publication S23, 1953; and revision

⁷ For a thorough analysis and discussion of Malaysia's maritime boundaries, refer to R Haller-Trost *The Contested Maritime and Territorial Boundaries of Malaysia*, London: Kluwer Law International, The Maps were published in 1979 titled: *Peta Baru* (New map). See also V Prescott and Clive Schofield, *Maritime Briefing* Vol 3, No 1, 2001

⁸ JJ Smith 'Brunei and Malaysia Resolve Outstanding Maritime Boundary Issues', *LOS Reports* Vol. 1 (2010) *American Society of International Law*; J Ashley Roach, 'Malaysia and Brunei: An Analysis of their Claims in the South China Sea, A CNA Occasional Paper, August 2014.

⁹ Malaysia's submissions of 2009 (Joint with Vietnam) and unilateral of 2019 are available on the UN CLCS's website. ADD HERE THE Docs to UN Sec-Gen

¹⁰ The 1982 UN *Convention on the Law of the Sea* is the legal document. Full text available on the UN website; V.L. Forbes, *Conflict and Cooperation in Managing Maritime Space in Semi-Enclosed Seas*, Ch 6, Singapore: Singapore University Press, 2001; Stein Tønnesson, 'The South China Sea Law Trumps Power, *Asian Survey*, Vol 15 (3) pp. 455-477, 2015; V.L. Forbes, 'Artificial Islands in the South China Sea: Rationale for Terrestrial Increase, Incremental Maritime Jurisdictional Creep and military Bases', *The Jour of Defence and Security*, Vol. 6, No.1 2015, pp.30-55

¹¹ The Decision of the PCA's Tribunal over the Case of the *Philippines vs. China* of 12 July 2016 is available on the PCA's website

¹² The Agreements, include the Indonesia/Vietnam Maritime boundary Agreement

¹² The Agreements, include the Indonesia/Vietnam Maritime boundary Agreement

¹³ The Indonesia/Malaysia Agreement relating to the Continental Shelf boundary, October 1969; Provisional Agreements in the context of resource sharing with Thailand, 1979; and with Vietnam in 1992.

¹⁴ See Note 8, above.

¹⁵ Details of Malaysia's dates of actions in the context of the UN Law of Sea are available on the webpages of Un Division of Oceans and Law of the Sea.

¹⁶ The full text of the 1982 UN *Convention of the Law of the Sea* is available online.

¹⁷ The concept of 'common heritage of mankind' is of immense political value and is employed in the Preamble of the 1982 UN *Convention on the Law of the Sea*.

¹⁸ See The 1982 Convention, Articles 156 to 185 for a thorough understanding of role of ISA.

¹⁹ The Peta Baru or New Map of 1979 delineated the unilateral limits of Malaysia's Continental Shelf.

²⁰ Singapore, Indonesia and the Philippines each in turn lodged protests when the map was published.

²¹ The dispute between Malaysia and Singapore over the marine features at the eastern approaches to the Straits of Singapore are documented in S.Jayakumar and Tommy Koh, *Pedra Branca*, 2009 and Kadir Mohamad, *Malaysia's Territorial Disputes*, Two cases at the ICJ, 2009; and in the ICJ's Website.

²² V.L. Forbes 'Celebes and Sulu Sea: Maritime Jurisdictional Limits, in Hamzah and Forbes (Eds) *Maritime Security in the Sulu Zone*, 2019, pp. 6-25.

²³ The Senkaku Group of Islands, whose sovereignty is in dispute, was the focus of attention.

²⁴ Defence Chief of Malaysia: his comments of 12 October 2010

²⁵ V.L. Forbes, 'Geopolitics, Energy Security and Soft-Shoe Diplomacy in the South China Sea, *The Jour of Diplomacy and Foreign Relations*, Vol. 13, No. 1 July 2013; Ian Storey, 'China's Bilateral Defense Diplomacy in Southeast Asia, *Asian Security*, Vol. 8 Iss. 3 pp. 287-310.

²⁶ The text of these Agreements are available in the relevant webpages of the UN Div. of Ocean Affairs and Low of the Sea (UNDOALOS).

²⁷ See note 21, above and ITLOS Website for the case between Malaysia and Singapore.

²⁸ The text of the many *Note Verbale* exchanges between China and its maritime neighbours of the South China Sea that are addressed to UN Secretary-General are available at the CLCS Website. See also Note 9, above.

²⁹ Refer to Note 25, above; V.L. Forbes and S. Permal, 'Geopolitical Trends in the South China Sea: 2013-15, Jour. Of Diplomacy and Foreign Relations, pp. 5-16, 2015)

³⁰ The text of the DoC, 2002 and COC is reproduced in the Annex, below

³¹ Thayer, 2018

³² Map produced by the Department of Surveying Mapping of Malaysia

³³ Adrian David 'How Malaysia's five naval stations at Spratly were built, 4 March 2019 <nst.com.my/news...> accessed 6 July 2020

³⁴ JRV Prescott, 'Maritime Jurisdiction in Southeast Asia: A Commentary and Map, EAPI Research Report No. 2, East-West Centre, Hawaii, 1981: 39; The Maritime Political Boundaries of the World, Methuen, London, 1985

³⁵ The Government of Indonesia is of the conviction that there is a need for a boundary for seabed resources and a water column boundary for marine biotic resources, basically, a continental shelf boundary and an Exclusive Economic Zone boundary – a dual regime.

³⁶ The documents referred to are mentioned in Note 8; see also J. Ashley Roach

³⁷ The 1930 Treaty...

³⁸ The Executive Summary of the Joint Submission is available on the CLCS webpage

³⁹ The suite of correspondence – *Note Verbales* – are available on CLCS webpage.

⁴⁰ Executive Summary available on CLCS website -doc. MYS_ES_DOC-01_281117

⁴¹ The Ruling is available on the PCA's webpage

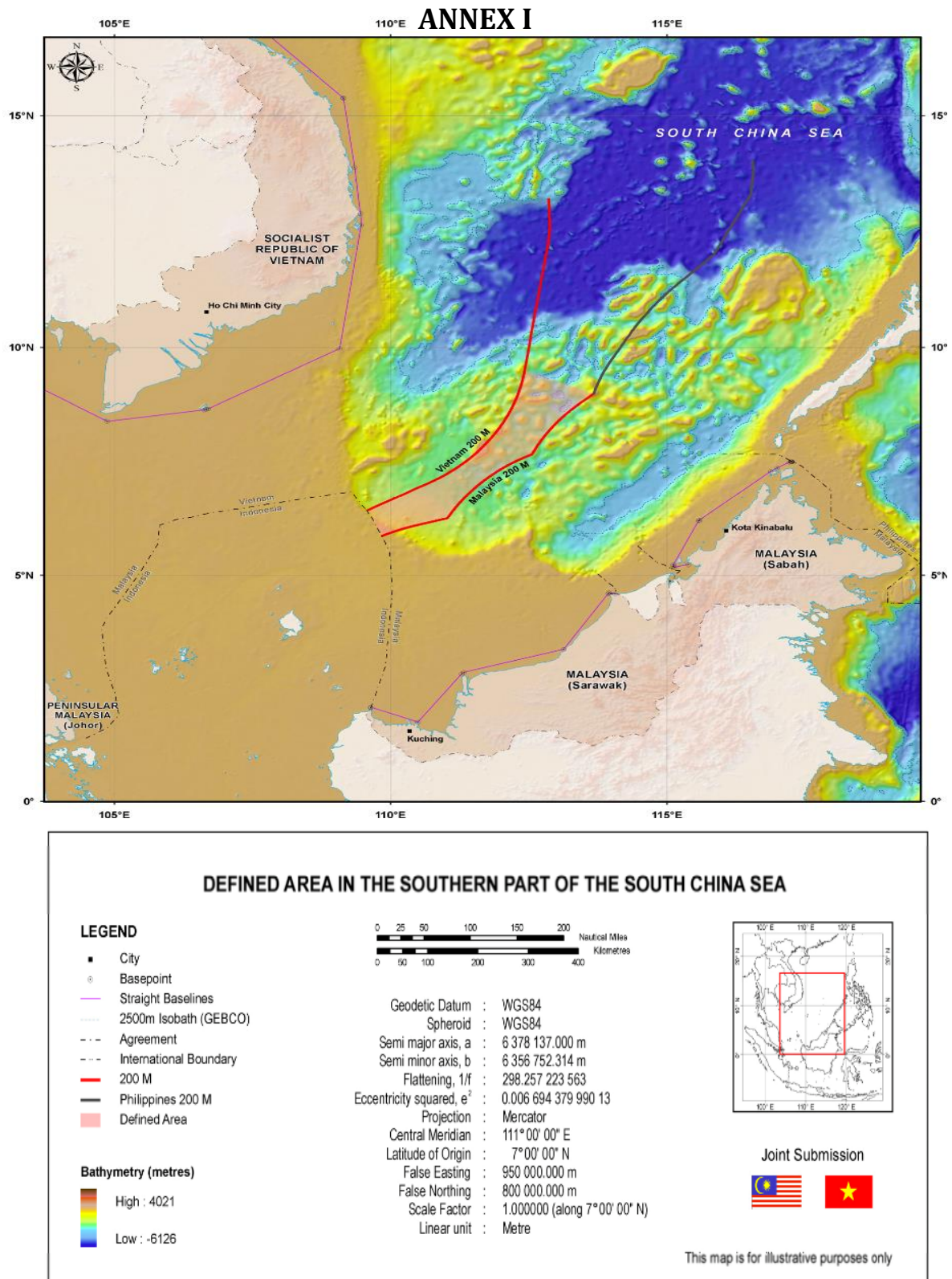


Figure 1: The Malaysian and Vietnam OLC
 (Source: Executive Summary of Joint Submission, 2009)

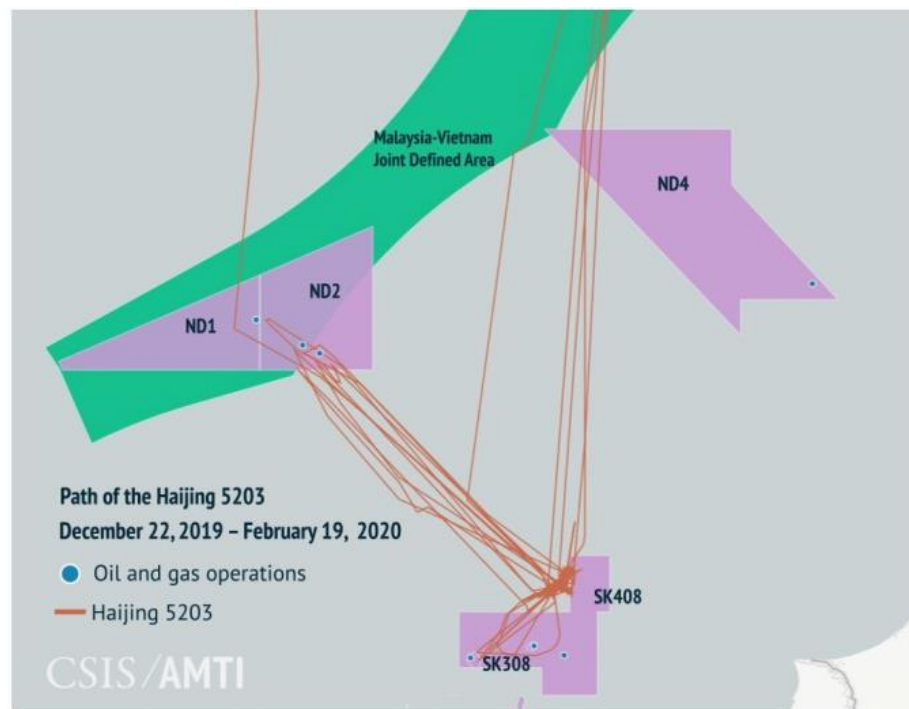


Figure 2: The *West Capella* incident, 2019/20
(Source: CSIS: AMTI)

ANNEX II

<i>Point Identification 1969 MB 1979CS</i>	<i>Latitude N ° “ ”</i>	<i>Longitude E ° ‘ ”</i>	<i>Comment</i>
21 and 48	02 05 00	109 38 48	Southern terminal point
22 and 49	03 00 00	109 54 30	
23 and 50	04 40 00	110 02 00	
24 and 51	05 31 12	109 59 00	
25 and 52	06 18 12	109 38 36	Mal/Indo and Indo/Viet TPs
53	07 07 45	111 34 00	
54 (equidistant	08 23 45	112 30 45	Amboyna Cay and Spratly Is
55 (from named features)	08 44 24	113 16 15	Barque Canada R/ Cuareteron
56	08 33 55	113 39 00	Barque Canada R/Cuareteron
57	08 24 24	113 47 45	Barque Canada / Cornwallis S
58	08 24 26	113 52 24	Mariveles R/Cornwallis S. R
59	08 23 45	113 52 24	Erica Reef/Cornwallis Reef
60	08 30 15	114 29 10	Investigator R/Tennent Reef
61	08 28 10	114 50 07	Investigator R/Tennent Reef
62	08 55 00	115 10 35	Commodore R/Alicia Annie R
63	08 49 05	115 38 45	Commodore R/ 1 st Thomas Sh.

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64 (equidistant)	08 19 55	115 54 05	Commodore Reef and ?
65	08 01 30	116 03 30	Boundary Point defined in the 1898 Treaty and 1930 Treaty
66	07 40 00	116 00 00	Western terminus 1930 Treaty

<i>Point</i>	<i>Lat. ° ' "</i> <i>N</i>	<i>Lon ° ' "</i> <i>E</i>	<i>Description</i>
A = 1	08 59 04.1	113 40 37.6	Intersection of envelope of arcs of 200M limits from Malaysia and the Philippines
B = 165	07 39 42.8	112 33 43.1	Intersection of two converging envelopes of arcs of Malaysia's 200M limits
C = 380	06 14 59.8	111 01 27.3	Intersection of two converging envelopes of arcs of Malaysia's 200M limits
D = 455	05 51 09.7	109 50 29.2	Intersection of Mal. 200M and the boundary line of the Agreement: Mal/Indo of 27 October 1969.
E = 456	06 18 11.0	109 38 45.0	Point 25 of the Agreement of 27 Oct. 1969 between Malaysia and Indonesia re Cont. Shelf boundary
F = 457	06 18 12.0	109 38 36.0	Point 25 of the Agreement between Vietnam and Indonesia of 26 June 2003, re: Cont Shelf boundary
G = 458	06 24 55.7	109 34 06.7	Intersection of Vietnam's 200M limit and the boundary of the

			Agreement Vietnam and Indonesia of 2003.
H = 585	07 41 59.6	111 33 37.3	The point of the envelope of arcs of Vietnam's 200M limits
I = 810	09 30 15.4	112 25 40.3	The point of the envelope of arcs of Vietnam's 200M limits

Select List of Geographical coordinates of the Outer Limits of the Continental Shelf (OLCS) in the South China Sea. All coordinates are in WGS84)

<i>Point</i>	<i>Latitude N</i>	<i>Longitude E</i>	<i>Distance in M.</i>	<i>Method</i>
OLCS 01	11° 50'16.2"	112° 47' 16.8"		Fixed point 60M from FoS 01
OLSC 02	12° 25'26.5"	113° 24' 12.8"	50.35M from 01	Fixed point 60M from FoS 07
OLCS 16	12° 43'52.5"	113° 52' 17.5	20.11M from 15	Fixed point 60M from FoS 08
OLCS 36	12° 56'18.4"	114° 36' 16.5"	25.94M from 35	Fixed point 60M from FoS 09
OLCS 69	12° 54'23.4"	115° 09' 34.4	1.00M from 68	Fixed point 60M from FoS 11
OLCS 95	13° 20'12.9"	116° 31' 08.7"	1.00M from 94	Fixed point 60M from FoS 11
OLCS 96	13° 20'12.3"	116° 31' 20.3"	0.19M from 95	Fixed point on 350M

Apart from the few points mentioned above all the defined points are 1,852 metres one nautical mile) apart.(Source: MYS_ES_DOC-01_281117
Executive Summary of Malaysia's Partial Submission

ANNEX III

2002

Declaration on the Code of Conduct of Parties in the South China Sea (the Code) which stipulated that:

- 1. The Parties **reaffirm** their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;*
- 2. The Parties are **committed** to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;*
- 3. 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 the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;*
- 4. The Parties concerned **to undertake** to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;*
- 5. 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 action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.*

*Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to **build trust and confidence** between and among them. [Emphasis added]*

Declaration on the Code of Conduct of 17 October 2012

Preamble to the Declaration not included here

HEREBY DECLARE the following:

- 1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;*
- 2. The Parties are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;*
- 3. 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 the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;*
- 4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;*
- 5. 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 action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.*

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

- a. holding dialogues and exchange of views as appropriate between their defense and military officials;*
- b. ensuring just and humane treatment of all persons who are either in danger or in distress;*
- c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and*

d. exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

a. marine environmental protection;

b. marine scientific research;

c. safety of navigation and communication at sea;

d. search and rescue operation; and

e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.

7. 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, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;

9. The Parties encourage other countries to respect the principles contained in this Declaration;

10. 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.

Done on the Fourth Day of November in the Year Two Thousand and Two in Phnom Penh, the Kingdom of Cambodia.

October 17th, 2012

CHAPTER 4

The South China Sea and Malaysia's Claims on Continental Shelf and Extended Continental Shelf Beyond 200 NM

Jalila Abdul Jalil

The greatest obstacle to discovering the shape of the earth, the continents, and the oceans was not ignorance but the illusion of knowledge
- Daniel J. Boorstin -

I. Introduction - Malaysia's Claim in the South China Sea

Malaysia's claims in the South China Sea are encapsulated in the *Peta Baru 1979* (known as 1979 Map). The map was drawn based on 1958 Geneva Conventions, bilateral treaties, and customary international law. Malaysia's claim is based on the fact that these features are part of its natural prolongation of the land mass i.e. features which emanate from the continental shelf and not "stand alone" features. This principle emanates from the case of North Sea Continental Shelf Case 1969. Thus, this entitles under the United Nations Convention on the Law of the Sea (UNCLOS) 1982 for Malaysia to an extended continental shelf. Under UNCLOS 1982, Malaysia can claim the respective maritime zones which include the territorial sea, exclusive economic zone (EEZ), and continental shelf.

Malaysia's statement in 1988 pertaining to *Peta Baru 1979* in relation to its claim in the South China Sea read as follows:

"the islands and atolls are under Malaysian sovereignty, and Malaysia has in the past reaffirmed its jurisdiction ... They are within Malaysia's continental shelf area and Malaysia's sovereignty over them has been officially declared through the new Map of Malaysia, published on December 21st 1979 ... The claim is in line with the Geneva Convention of 1958 pertaining to territorial waters and continental shelf boundaries, and the UN Convention on the Law of the Sea, as well as other international practices".¹

Based on *Peta Baru 1979*, Malaysia's claims in the South China Sea are as follows:

- (i) Pulau Layang-Layang (Swallow Island)
- (ii) Terumbu Mantanani (Mariveles Reef)
- (iii) Terumbu Ubi (Ardasier Reef)
- (iv) Terumbu Siput (Erica Reef)
- (v) Terumbu Peninjau (Investigator Reef)
- (vi) Pulau Kecil Amboyna (Amboyna Cay)
- (vii) Terumbu Laksamana (Commodore Reef)
- (viii) Terumbu Perahu (Barque Canada Reef)
- (ix) Terumbu Laya (Dallas Reef)
- (x) Terumbu Semarang Barat Besar (Royal Charlotte Reef)
- (xi) Luconia Shoals: Gugusan Beting Raja Jarum (North Luconia Shoals)
Gugusan Beting Patinggi Ali (South Luconia Shoals)
Hempasan Betin (Luconia Breakers)
- (xii) Beting Serupai (James Shoal)

Malaysia currently occupies five of the features namely Pulau Layang-Layang, Terumbu Mantanani, Terumbu Ubi, Terumbu Siput and Terumbu Peninjau. Malaysia's claim to "some of the features lie beyond 200 nm limit measured from the baselines and that Malaysia adheres to the articles relating to continental shelf as stated in UNCLOS I and UNCLOS III".²

Malaysia's claim in the South China Sea reflected in the 1979 Map of Sheet 2: TP 53 to 65, includes all those features which lie south of its unilateral declared lines. Malaysia's claim is based on the fact that these features are part of its continental shelf. This gives it right under the Law of the Sea Convention for Malaysia extended continental shelf based on the natural prolongation of the continental shelf i.e. features which emanate from the continental shelf and not "stand alone" features. This principle emanates from the case of North Sea Continental Shelf Case 1969. Therefore, this gives the entitlement to Malaysia's extended continental shelf claim in the South China Sea.

Malaysia has been involved in the dispute since 1979. It currently occupies five (5) features namely Pulau Layang-Layang, Terumbu Mantanani, Terumbu Ubi, Terumbu Siput and Terumbu Peninjau. Malaysia's claim as to "some of the features lie beyond 200 nm limit measured from the baselines and that Malaysia adheres to the articles relating to continental shelf as stated in UNCLOS III, despite the fact that it had at that time not ratified the Convention, then any claim to a continental shelf beyond 200 nm is only permissible in special circumstances".³ In addition, Malaysia claim that these features is within its EEZ.

As mentioned before, Malaysia TP 52, lies near Amboyna Cay in the Spratlys Island. It is important point to note that Malaysia's extended continental shelf starts from TP 52 connected to TP 53 to 65 in relation to Malaysia – Vietnam Joint Submission on the Extended Continental Shelf to the Commission on the Limits of the Continental Shelf (CLCS). In this regard, Malaysia have officially published its baselines coordinates within the Sabah and Sarawak area in the Malaysia Submission Extended Continental Shelf to the Commission on the Limits of the Continental Shelf (CLCS) and Malaysia – Vietnam Joint Submission on the Extended Continental Shelf to the Commission on the Limits of the Continental Shelf (CLCS).

II. The Extended Continental Shelf Claims and Rules of Procedures (RoP)

Article 76 (1) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 confers the right for a coastal state to a continental shelf which "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 (nm) 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".

Nonetheless, if the state wishes to extend its continental margin beyond 200 nm, Article 76 (5) of UNCLOS 1982 stated that "...shall not

exceed 350 nm from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nm from the 2,500 metre isobaths, which is a line connecting the depth of 2,500 metres.” A coastal State, in establishing its claim, is required under Article 4 of Annex II of UNCLOS 1982 to submit supporting scientific and technical data to the Commission on the Limits of the Continental Shelf (CLCS)⁴ of such limits, and States have also complied with Rules of Procedure (RoP) of the CLCS in preparing their submissions.

In spite of what is said above, Article 76 (10) of UNCLOS 1982 stated that “the provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”. Article 9 of Annex II to UNCLOS 1982 also reflects the same intention, in that: “[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts”. Similarly, Rule 46(2) of the RoP of the CLCS provides that “[t]he actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States”. In other words, these provisions are similar to the wording of UNCLOS 1982. Article 76(10), Article 9 of Annex II, and Rule 46(2) of the RoP of the CLCS stated in relation to delimitation of a continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, the Commission shall not prejudice the submissions by coastal States. Based on the reading of these three provisions, the key word here is “*shall not prejudice*”, therefore the Commission should not prejudice submissions by coastal State in relation to delimitation of a continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes.

The Year 2009, witnessed many coastal states race to meet the deadline of 13 May 2009 to lodge their submissions or preliminary information on the outer limits of the continental shelf (or referred to as the extended continental shelf beyond 200 nm) to the Commission.⁵

In preparing the scientific and technical data submissions, apart from adhering to the provisions of Article 76, Annex II and the RoP, coastal States have spent millions of dollars⁶ including considerable time and efforts. Invariably the process entails a high number of inter-agency

meetings, logistic preparation, complex data collection and the use of ocean-going vessels time to undertake surveys. Much time is involved in drafting the submissions to best incorporate the scientific and technical data as well as legal information.

As of 28 January 2015,⁷ the CLCS received a total of 77 unilateral, partial, joint or separate submissions and 46 preliminary information that are indicative of the outer limits of the continental shelf had been submitted to the CLCS.⁸ However, some submissions have been deferred by the Commission as a result of paragraph 5 (a) of Annex I to the RoP⁹ which stated, *"In cases where a land or maritime disputes exist, 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"*.

Among the deferred submissions are the Joint Submission by Malaysia and Viet Nam in respect of the southern part of the South China Sea;¹⁰ and the following are unilateral submissions i.e. Vietnam in respect of the North Area of the South China Sea,¹¹ Myanmar,¹² India,¹³ Bangladesh,¹⁴ Kenya,¹⁵ Nicaragua in respect of the southwestern part of the Caribbean Sea,¹⁶ to mention a few. In respect of such deferred submissions, the Commission deliberated and decided:

"...Taking into account these notes verbales [in the case of Nicaragua the notes received are known as communications] and the presentation made by the delegations, the Commission decided to defer consideration of the submission and the notes verbales until such time as the submission is next in line for consideration as queued in the order in which it was received. The Commission took this decision in order to take into consideration any further developments that might occur throughout the intervening period during which States may wish to take advantage of the avenues available to them including provisional arrangements of a practical nature as contained in annex I to its rules of procedure".

It is interesting to note that during the Twenty-eighth session meeting on 16 September 2011 (CLCS/72), a proposal was made by the

Commission to seek advice from the Legal Counsel of the United Nations relating to the question which reads as follows:

“What mechanisms are available to the Commission on the Limits of the Continental Shelf to seek advice on matters of interpretation of provisions of the Convention other than those contained in Article 76 and Annex II as well as in the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea?”¹⁷

The question was raised as this nevertheless could have an impact on the determination of the outer limits of the continental shelf beyond 200 nm presented in the recommendations of the Commission and their implementation by coastal states. The discussion stated as follows:

“a member expressed the view that legal certainty was needed in order for the Commission to properly discharge its functions. Others were of the view that the Commission, in accordance with its mandate, should focus on matters of a scientific and technical nature and should refrain from looking into, or seeking advice on, legal matters of interpretation of provisions of the Convention other than those contained in Article 76 and Annex II. At the request of some members, the Director provided clarifications on the judicial and advisory functions of the International Court of Justice and the International Tribunal for the Law of the Sea”.¹⁸

However, the Commission decided to defer the discussion to the Twenty-ninth session and during the Twenty-ninth session on 30 April 2012 (CLCS/74), *“the Commission considered proposal of the twenty-eighth session (CLCS/72, paras 37 – 40) to seek advice from the Legal Counsel on the matter was withdrawn and the Commission decided not to pursue this issue any further”.¹⁹*

Despite the deferment by the CLCS, States such as Bangladesh, India and Nicaragua have sought the option of seeking judicial and arbitral bodies, namely the International Tribunal for the Law of the Sea (ITLOS), International Court of Justice (ICJ) and Permanent Court of Arbitration (PCA) to delimit the continental shelf beyond 200 nm.

The requests by these States have triggered the evolution of jurisprudence for the continental shelf beyond 200 nm with the three cases, namely *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) Judgment of 14 March 2012*, the *Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment of 19 November 2012*; and the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014*.

Perhaps developments in this latest jurisprudence can be explored by Malaysia in relation to the deferred Joint Submission of Malaysia and Viet Nam in respect of the southern part of the South China Sea, keeping in mind the *Philippines Arbitral Tribunal Proceedings against China*. This article will analyse arguments put forward by the parties and decisions of the international courts and tribunals in the respective cases in relation to the delimitation of the continental shelf beyond 200 nm.

III. Cases on Delimitation of Continental Shelf Beyond 200 nm

A. *International Tribunal on the Law of the Sea Case (ITLOS) Case - Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012.*

This is the very first case for ITLOS on maritime boundary delimitation and is significant as this is the first jurisprudence on delimitation of continental shelf beyond 200 nm. Initially, the Tribunal had to address the issues as to whether the Tribunal had jurisdiction to delimit the continental shelf beyond 200 nautical miles as raised by the parties.

Myanmar argued that although the delimitation of the continental shelf beyond 200 nm could fall within the jurisdiction of the Tribunal, she questioned the issue of its advisability in relation to continental shelf delimitation beyond 200 nm. Myanmar stated that, “even if the Tribunal were to decide that there could be a single maritime boundary beyond 200 nm (*quad non*),²⁰ the Tribunal would still not have jurisdiction to

determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area”.²¹

Myanmar also stated that “as long as the outer limit of the continental shelf has not been established on the basis of the recommendations of the Commission on the Limits of the Continental Shelf, the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are”.²²

Myanmar referred to two notable cases, namely, the *Delimitation of Maritime Areas between Canada and France* stating “it is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist”²³ and *Nicaragua and Honduras* where the ICJ declined to delimit the continental shelf beyond 200 nm between the two disputants because the Commission had not yet made recommendations on their respective claims for the continental shelf beyond 200 nm.²⁴

Bangladesh argued that the Tribunal had jurisdiction to delimit the continental shelf beyond 200 nm stating that the Tribunal is empowered by the Convention to adjudicate disputes between states under articles 76 and 83 of UNCLOS 1982 as the Convention draws no distinction between jurisdiction within 200 nm and beyond 200 nm²⁵

Bangladesh further argued that potential overlapping claims with regard to the rights of third parties, cannot deprive the Tribunal’s jurisdiction to delimit the maritime boundary between two states because third states are not bound by the Tribunal’s judgment and their rights are unaffected by it. Bangladesh stated that as far as third states are concerned, a delimitation judgment by the Tribunal is merely *res inter alios acta*.²⁶ As to the issues concerning the international seabed area, Bangladesh stated the outer limits of the continental shelf *vis-à-vis* the international seabed area are far from the maritime boundary of Bangladesh and Myanmar.²⁷

It is interesting to note that Bangladesh argued that there is no conflict between the roles of the Tribunal and the Commission, and that the roles of both institutions are complementary and the Commission cannot make any recommendations on the outer limits of the continental shelf until the dispute is resolved by the Tribunal or another judicial or arbitral body.

Based on the arguments forwarded by both parties, the Tribunal stated that Article 76 embodies the concept of a single continental shelf. At the same time in referring to article 77(1) and article 77(2) of UNCLOS 1982, the Tribunal mentioned that the coastal state exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction between within 200 nm and beyond 200 nm. The Tribunal referred to the case of *Barbados and Trinidad and Tobago* where “the dispute to be dealt by the Tribunal includes the outer continental shelf, in any event there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”.²⁸ Based on these elements, the Tribunal concluded that it had jurisdiction to delimit the continental shelf in its entirety (within and beyond 200 nm).

In relation to third parties, the Tribunal commented that the delimitation of the continental shelf cannot prejudice their rights as the decision by the Tribunal is binding only between the parties to the particular dispute.²⁹ As to the issues concerning the international seabed area, the Tribunal stated that the delimitation of the continental shelf area beyond 200 nm between Bangladesh and Myanmar is situated far from the area and hence, does not prejudice the rights of the international community.³⁰ The Tribunal also stated that the activities of the Commission, the International Seabed Authority and the Tribunal complement each other to ensure coherent and efficient implementation of the UNCLOS 1982 Convention.

The Tribunal explained that there is a clear distinction between the delimitation of the continental shelf under article 83, entrusted under dispute settlement procedures, exercised by international courts and tribunals on the one hand and on the other hand delineation of the outer limit of the continental shelf under Article 76, where the Commission is

assigned to make recommendations to coastal states on matters relating to the establishment of the outer limits of the continental shelf without prejudice to the delimitation of maritime boundaries.

This case is significant as this is the first time the term “natural prolongation” with reference to Article 76 (1) of the UNCLOS 1982 was defined. The Tribunal decided that Article 76 (1) should be understood in light of the subsequent provisions of the article defining the continental shelf and continental margin” and that entitlement to continental shelf beyond 200 nm should thus be determined by reference to outer edge of the continental margin as referred to Article 76 (4).³¹

The Tribunal in this case stated that the delimitation of the continental shelf within 200 nm should not differ for beyond 200 nm and the equidistance/relevant circumstances method continues to apply for delimitation of the continental shelf beyond 200 nm. It commented that, “this method is rooted in recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf”.³² This method permits resolution of the problem of cut-off effect beyond 200 nm created by an equidistance line where the coast of party is markedly concave.³³ The Tribunal commented that the adjusted equidistance line delimiting the exclusive economic zone and continental shelf within 200 nm continues in the same direction beyond 200 nm, until it reaches the area where rights of third States may be affected.³⁴

B. International Court of Justice (ICJ) Case – Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012

Based on the provisions of Article 76 of UNCLOS 1982, Nicaragua contended that it has an entitlement to a continental shelf extending to the outer edge of the continental margin. Nicaragua requested the Court to define and delimit the maritime areas between Nicaragua and Colombia in accordance with equitable principles and relevant circumstances applicable to delimitation.

Colombia argued that the continental shelf boundary claimed by Nicaragua was situated in an area which has no entitlements, in which the two mainland coasts are more than 400 nm apart. Colombia contended that Nicaragua did not include this request on entitlement of continental shelf beyond 200 nm in its Application and Memorial and further contended that the delimitation cannot be based on geological and geomorphologic factors, and that as such the subject matter is inadmissible.

The Court stated that the claim made by Nicaragua of the overlapping entitlement of continental shelf beyond 200 nm was a new claim but would not render it inadmissible.³⁵ The Court stated the claim of the extended continental shelf falls within the dispute in relation to delimitation and cannot be said to transform the subject matter of that dispute. "What has changed is the legal basis being advanced for the claim [natural prolongation rather than distance as the basis for a continental shelf] and the solution being sought [a continental shelf delimitation as opposed to a single maritime boundary], rather than the subject-matter of the dispute. The new submission is admissible as it concerned the delimitation of the continental shelf, although on different legal grounds".³⁶

Concerning the overlapping entitlement of the continental shelf boundary, both Nicaragua and Colombia agreed that customary international law including the case law of ICJ, ITLOS and international arbitral courts and tribunals applies to the maritime delimitation in this case as Colombia is not a party to UNCLOS.

Both parties agreed that coastal States have *ipso facto* and *ab initio* rights to the continental shelf but disagreed on the entitlement of the continental shelf boundary beyond 200 nm. Nicaragua stated the definition of continental shelf and determination of the outer limits has the status of customary international law. Colombia agreed that the provisions of Article 76 (1) reflected customary international law but not the provisions of Article 76 (4) to (9) as "there is no evidence of State Practice indicating of those provisions to be rules of customary international law".³⁷

The Court stated that the applicable law is customary international law as Colombia is not a party to UNCLOS. The Court accepted that the provisions of Article 76 (1) forms part of customary international law but did not decide on other provisions of Article 76.

The Court noted the jurisprudence of *Bangladesh v. Myanmar* referred to by Nicaragua and stated that the Tribunal in that case did not determine the outer limits of the continental shelf beyond 200 nm but instead extended the line of the single maritime boundary beyond 200 nm until it reaches the area of the third state.³⁸ Both Bangladesh and Myanmar are states parties to UNCLOS and the Tribunal's delimitation in accordance with Article 83 of UNCLOS 1982 does not preclude any recommendations of the Commission as to the outer limits of the continental shelf in accordance with Article 76 (8). The Court commented there is a clear distinction between delimitation of a continental shelf and delineation of a continental shelf of its outer limits.³⁹

The Court in this case quoted its earlier judgment in *Nicaragua v. Honduras* where "any claim of continental shelf rights beyond 200 nm [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf".⁴⁰ In this regard, the Court stated that Nicaragua had only submitted "Preliminary Information", and not the full submission of the outer limit of its continental shelf beyond 200 nm as required under Article 76 (8).⁴¹

The Court could not submit a definitive ruling on the precise location of the outer limits of Nicaragua's continental shelf as Nicaragua had not established its continental margin that overlaps with Colombia's 200 nm. Therefore, the Court cannot address the delimitation of the overlapping entitlement of continental shelf beyond 200 nm between Nicaragua and Colombia.⁴²

In spite of the above, less than one year after the ICJ decision, on 17 September 2013, Nicaragua again instituted proceedings against Colombia in the ICJ and requested the Court to determine the precise course of the maritime boundary between the two states in relation to the delimitation of the continental shelf beyond 200 nm. Nicaragua also requested the Court to indicate "the principles and rules of international

law that determine the rights and duties of between the two States in relation to the area of overlapping continental shelf claims and use of resources”.⁴³ As this matter is still pending, it will be interesting to note the decision of the Court as well as the jurisprudence and principles of international developed from this case.

C. *Permanent Court of Arbitration (PCA) Case – Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014.*

Both Bangladesh and Myanmar had submitted their submissions on the continental shelf beyond 200 nm to the CLCS. For purposes of the arbitration, both countries agreed that Article 83 of UNCLOS 1982 is the applicable law for the delimitation of continental shelf beyond 200 nm and shall be affected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.⁴⁴

Bangladesh stated the decision in *Bangladesh v. Myanmar* that natural prolongation in Article 76 (1) of UNCLOS 1982 “be understood in light of the subsequent provisions of the article defining the continental shelf and continental margin” and that entitlement to a continental shelf beyond 200 nm should thus be determined by reference to outer edge of the continental margin as referred to Article 76 (4) of UNCLOS 1982.

In relation to the delimitation of the continental shelf within and beyond 200 nm, Bangladesh stated that concavity of the coast should be the factor of relevant circumstances in delimiting such areas as it has a continuing effect beyond 200 nm. Nonetheless, Bangladesh further contended that the results of equidistance method would not produce an equitable solution for concave coast as the equidistance line moves further from the coast for continental shelf beyond 200 nm. The equidistance line would cut-off Bangladesh’s potential entitlement to the continental shelf and would in turn allocate India areas of the outer continental shelf that were not claimed before.⁴⁵

As for the delimitation line, Bangladesh argued that a delimitation line within 200 nm may not be the same beyond 200 nm where “it could

be equitable in one part but is not per se equitable in the other”.⁴⁶ The approach of Bangladesh was to accord a maritime corridor out to the natural limits of entitlements to states trapped in the middle of concavity, in this case, Sri Lanka. Bangladesh also forwarded the principle of “maximum reach” where “maritime boundaries are delimited in a way that all disputants are allocated some access to the areas approaching the maximum distance from the coast permitted for each zone”.⁴⁷ Bangladesh argued that for “an equitable solution, where the adjustment must not have a converse distorting effect on the seaward projection” of the coast of the other party, in this instance, India.

India contended that the maritime boundary beyond 200 nm is the prolongation of the boundary within 200 nm and equidistance/relevant method should apply. India stated that in the decision between *Bangladesh v. Myanmar* the Tribunal stated, “the adjusted equidistance delimiting both the exclusive economic zone and the continental shelf within 200 nm between the Parties ...continues in the same direction beyond 200 nm limit of Bangladesh until it reaches the area where the rights of third States may be affected”.

In relation to the entitlement of India on areas of the outer continental shelf that was not claimed in India’s submission to the CLCS, India stated that it had not yet included that area in the submission and had indicated this in their *Note Verbale* to the Secretary-General of the United Nations.⁴⁸

Counter-arguing the delimitation line preferred by Bangladesh, India disagreed to the cut-off effect produced by an equidistance line and further disagreed with coastal concavity effect on the equidistance line invoked by Bangladesh. India also rejected the principle of maximum reach and maintained that it had a different interpretation of the jurisprudence cited by Bangladesh.⁴⁹

The Tribunal in this case stated that international jurisprudence on the delimitation of the continental shelf beyond 200 nm is rather limited and take note of the following cases namely *Barbados v Trinidad and Tobago*, Award of the Arbitral Tribunal, 11 April 2006, *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and*

*Myanmar in the Bay of Bengal (Bangladesh/Myanmar) Judgment of 14 March 2012, the Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment of 19 November 2012;*⁵⁰

The Tribunal stated that Article 76 of UNCLOS 1982 embodies the concept of a single continental shelf, reflected in the Article 77 (1) and (2) of the same Convention in which a coastal State exercises exclusive sovereign rights over the continental shelf in its entirety and these provisions made no distinction between continental shelf within and beyond 200 nm, including Article 83 of the Convention. In *Barbados v Trinidad and Tobago* the Tribunal stated that “there is in law only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf”.⁵¹

The Tribunal noted the distinction between the delimitation of the continental shelf under Article 83 of UNCLOS 1982 and delineation of the outer limits under Article 76 of UNCLOS 1982. The Tribunal further stated that the delimitation of the continental shelf beyond 200 nm required the interpretation and application of Article 76 and 83 of UNCLOS 1982. It also laid down the jurisprudence of *Bangladesh v. Myanmar* that the delimitation beyond 200 nm should be in conformity with Article 76.

The Tribunal stated that the appropriate method for delimitation should be single continental shelf irrespective of area within or beyond 200 nm and that the equidistance/relevant circumstances method for delimitation. The Tribunal commented that “international jurisprudence on the delimitation of the continental shelf does not recognize a general right of coastal States to the maximum reach of their entitlements, irrespective of the geographical situation and the rights of other coastal States”.⁵²

The Tribunal rejected arguments by Bangladesh’s concerning the cut-off effect and coastal concavity of an equidistance line stating that the delimitation of the continental shelf within 200 nm continues to apply for delimitation of the continental shelf beyond 200 nm and that relevant circumstances have a continuing effect on such delimitation.⁵³

The Tribunal stated that the adjusted equidistance line delimiting the exclusive economic zone and continental shelf within 200 nm continues in the same direction beyond 200 nm, until it reaches the area where rights of third states may be affected.⁵⁴

The Tribunal adjusted the provisional equidistance line within and beyond 200 nm to achieve equitable result and further stated that “provisional equidistance line adjustments will allow the coasts of the Parties in terms of maritime entitlements, a reasonable and mutually balanced way and must not infringe the rights of third States”.⁵⁵

IV. Conclusion

The decision by the Commission on the Limits of the Continental Shelf to defer its ruling on various submissions have caused coastal states to explore the option of seeking judicial and arbitral bodies to delimit the continental shelf beyond 200 nm. Such action by coastal State has triggered the evolution of jurisprudence for claims to a continental shelf beyond 200 nm evident in the cases mentioned above.

The jurisprudence on the above cases is a good application for countries in a similar situation in which their submissions have been deferred and they would like to delimit their continental shelf beyond 200 nautical miles. Perhaps Malaysia can explore this avenue in respect of the Malaysia Submission on the Extended Continental Shelf and Joint Submission with Viet Nam and Malaysia relating to delimitation of the continental shelf beyond 200 nm.

¹ Haller-Trost, R. (1998). Chapter 8: The Spratly Islands, The Contested Maritime and Territorial Boundaries of Malaysia, International Boundary Studies Series, Kluwer Law International Ltd, pg. 323. Also refer to New Straits Times, Kuala Lumpur, 25 February 1988.

² R. Haller-Trost. (1998). The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective. Chapter 8: The Spratlys, Kluwer Law International Publication, pg. 325.

³ R. Haller-Trost. (1998). The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective. Chapter 8: The Spratlys, Kluwer Law International Publication, pg. 325.

⁴The Commission on the Limits of the Continental Shelf (CLCS), hereinafter referred to as the Commission is established in pursuant to the Annex II of UNCLOS 1982. The Commission consist of 21 member experts in the field of geology, geophysics or hydrography elected by States Parties on the basis of equitable geographical representation.

⁵ Refer to the Commission on the Limits of the Continental; Shelf (CLCS), United Nations Website on Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982 and Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles.

Information retrieved from

http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm and http://www.un.org/Depts/los/clcs_new/commission_submissions.htm

⁶ Refer to Grignon, Gerard (2013). Extension of the Continental Shelf Beyond 200 Nautical Miles: An Asset for France, Opinion of the Economic, Social and Environmental Council, Manadate 2010 – 2015 – Session of 9 October 2013, Official Journal The French Republic, pg. 181.

⁷ Refer to footnote No.2.

⁸.*Ibid.*

⁹ (CLCS/40/Rev.1, 17 April 2008). Paragraph 5 (a) of Annex I to the Rules of Procedure (RoP) of the Commission of the Limits of the Continental Shelf, Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.

¹⁰ (CLCS/64), Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, Twenty-fourth session, 10 August – 11 September 2009, Joint Submission made by Malaysia and Viet Nam in respect of the southern part of the South China Sea and (CLCS/83) Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chair, Thirty-fourth session, 27 January – 14 March 2014. Information retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/536/21/PDF/N0953621.pdf?OpenElement> and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/284/31/PDF/N1428431.pdf?OpenElement>

¹¹ (CLCS/64), Submission made by Viet Nam in respect of the North Area, information retrieved from www.un.org/Depts/los/clcs_new/commission_documents.htm at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/540/08/PDF/N1054008.pdf?OpenElement>

¹² (CLCS/64, CLCS/68 – 17 September 2010, CLCS/78 and CLCS/83), Submission made by Myanmar, information retrieved from www.un.org/Depts/los/clcs_new/commission_documents.htm at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/540/08/PDF/N1054008.pdf?OpenElement>, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/540/08/PDF/N1054008.pdf?OpenElement> and <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/275/74/PDF/N1327574.pdf?OpenElement>

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/284/31/PDF/N1428431.pdf?OpenElement>

¹³ (CLCS/68), Submission made by India, information retrieved from

www.un.org/Depts/los/clcs_new/commission_documents.htm at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/540/08/PDF/N1054008.pdf?OpenElement>

¹⁴ (CLCS/72 – 16 September 2011), Submission made by Bangladesh, information retrieved from

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/501/39/PDF/N1150139.pdf?OpenElement>

¹⁵ (CLCS/64, CLCS/83 and CLCS/85 – 24 September 2014), Submission made by Kenya, information retrieved from

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/540/08/PDF/N1054008.pdf?OpenElement>

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/284/31/PDF/N1428431.pdf?OpenElement> and

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/547/71/PDF/N1454771.pdf?OpenElement>

¹⁶ (CLCS/83), Submission made by Nicaragua in respect of the southwestern part of the Caribbean Sea, information retrieved from

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/284/31/PDF/N1428431.pdf?OpenElement>

¹⁷ (CLCS/72), Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 16 September 2011, Item 14, Mechanism to seek advice on matters of interpretation of certain provisions of the Convention other than those contained in its Article 76, and Annex II, as well as in the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea. Information retrieved from

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/501/39/PDF/N1150139.pdf?OpenElement>

¹⁸ Ibid.

¹⁹ (CLCS/74), Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 30 April 2012, Item 16, Mechanism to seek advice on matters of interpretation of certain provisions of the Convention other than those contained in its Article 76, and Annex II, as well as in the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea. Information retrieved from

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/326/32/PDF/N1232632.pdf?OpenElement>

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- ⁴⁰ *Ibid*, referring to Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) Judgment I.C.J. Reports 2007 (II), p.759, para. 319.
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CHAPTER 5

The Logic of Malaysia's Strategy in the South China Sea Debacle

Adam Leong Kok Wey

Introduction

While the world is grappling with the coronavirus pandemic, China has continued its maritime assertion in the South China Sea. On 16 April 2020, a Chinese government survey ship, the *Haiyang Dizhi 8*, escorted by at least seven Chinese coast guard vessels sailed through the South China Sea and started a survey at a point about 352 kilometres off the coasts of Brunei and Malaysia. This is within Malaysia's Exclusive Economic Zone (EEZ) but near waters claimed by Vietnam, Malaysia, and China. The next day, the *Haiyang Dizhi 8*, with 10 coast guard and maritime militia vessels, tagged a Petronas (Malaysian state-owned oil company) contracted exploration ship, the *West Cappella*, about 324 kilometres from the Malaysian coast.¹

This latest act of assertion by China prompted the US to send a small flotilla of combat vessels, including the USS *America*, an amphibious assault ship, the guided-missile cruiser USS *Bunker Hill*, and guided-missile destroyer USS *Barry* to the scene to deter Chinese 'bullying behaviour'.² This small flotilla was later joined by a Royal Australian Navy frigate HMAS *Parramatta*. After spending a few days in the area, the Chinese, US, and Australian vessels quietly moved out, thus providing an uneventful ending to China's actions, which were most likely thwarted by the presence of the US and Australian naval ships.

Meanwhile, Malaysia's response to an act of intimidation in Malaysia's EEZ was cautiously muted by calling for all parties to settle the dispute peacefully.³ Malaysia's reaction must have exasperated even the most casual observer of South China Sea strategic affairs.

This latest major Chinese incursion into Malaysian waters and the response garnered must have surprised the Chinese which was

emboldened by the lack of coherent support for the 2016 Permanent Court of Arbitration (PCA) judgement that stated China's historical claim of the South China Sea has no basis.⁴ China responded by refusing to recognize the "law-abusing tribunal" PCA judgement and intensified aggressive maritime and aerial activities in the South China Sea soon after the delivery of the PCA judgement.⁵ Summing up the chaotic response, Ian Storey, a senior fellow at the ISEAS-Yusof Ishak Institute in Singapore, stated, "It really looks not only like ASEAN is in disarray but also that it lacks any backbone."⁶

Much was expected from Malaysia as one of the key founding members of ASEAN and a respected emerging middle-power in the region, to drive the regional organization to mete out a more potent response. During then, Malaysia had been courted by both the United States (US) and China to play the role of an influential regional facilitator for both of these powers' geopolitical struggles in the region. The US wants Malaysia to play a leading role in South East Asia to push for a more concerted front against China's assertions. China, on the other hand, wants Malaysia to stay out of the South China Sea debacle and continues to entice Malaysia with economic incentives to bring an already close bilateral economic relationship to a higher level. Malaysia's response had been enigmatic. For example, during the ASEAN-China Foreign Ministers meeting in June 2016, Malaysia played a leading role in pre-releasing a communique to the press which stated 'serious concerns' over the ongoing South China Sea debacle. The communique however, was swiftly retracted by ASEAN.⁷ Malaysia's response on the South China Sea debacle since then has been consistently muted. Nonetheless, looking at the strategic choices available to Malaysia now, and the historical practice of its foreign affairs strategies, the nuanced response to China's actions in the South China Sea makes strategic sense. Malaysia's 'quiet response' now and in 2016 has its unique grand strategic logic. In the recent *Haiyang Dizhi 8* incursion, the fast deployment of the US and Australian flotilla, and the eventual peaceful conclusion of the standoff signals Malaysia's grand strategy is generating its intended results.

So, what is Malaysia's grand strategy in managing strategic risk in the South China Sea? Malaysia practiced a combination of selective alignment and strategic ambiguity during the Cold War that managed to

secure Malaysia from a myriad of threats and prosper economically. These strategies are still used by Malaysia today, albeit in a different strategic context. Malaysia's foreign affairs strategic history makes for an interesting case study on the dynamics of a small state's foreign affairs strategy in the midst of contemporary strategic rivalries between great powers in the Asian region. This chapter will first describe Malaysia's practice of statecraft, which utilized a combination of selective alignment and strategic ambiguity that had historical precedence in some of the most perilous periods during the Cold War. It will then explain Malaysia's contemporary foreign affairs strategies and the strategic logic behind it.

The strategic history of Malaya/sia

Since its independence in 1957, Malaya had been dubbed a 'mini Cold War warrior' allied to Western powers. Malaya, at that point, still had close defence ties with her ex-colonial master, Great Britain, via its Anglo-Malaya Defence Agreement (AMDA) (1957-1970) and indirect security ties with the United States, and was vehemently anti-communist.⁸ It was still fighting a bitter communist insurgency internally (the Malayan Emergency ended in 1960). Malaya, as a young and small state had been courted to join the Southeast Asia Treaty Organization (SEATO), an organisation initiated to contain both Soviet Union and China's influence in the Southeast Asia region during the early days of the Cold War. However, Malaya refused to join SEATO as it was not yet ready to commit itself to a formal anti-communist military pact and wanted to avoid upsetting some of its closest regional neighbouring states.⁹ Although Malaysia did not join SEATO, the British had continued to station its Far East Strategic Reserve military force in Malaya, which could be mobilized in support of SEATO operations.¹⁰ These combination of official and informal close ties with the West brought unwanted attention on Malaya from Communist powers and their allies.

When Malaysia was formed in 1963 consisting of Malaya, Sabah, Sarawak and Singapore, it was strongly opposed by the ruler of Indonesia, Sukarno, who was propped up by Indonesian communists. Sukarno was against the formation of Malaysia as it was deemed a British strategic move to contain Indonesia's geopolitical ambitions in the region (the

Philippines also opposed the formation of Malaysia but apart from breaking off diplomatic relations did not resort to the use of military means) and to contain the spread of communism. Sukarno launched a '*Ganyang Malaysia*' or 'crush Malaysia' campaign attempting to disrupt Malaysia's formation, initially using political, economic and propaganda means, and later an undeclared war known as the *Konfrontasi* (Confrontation).¹¹

The Indonesia-Malaysia undeclared war lasted until 1966, when Indonesia under its new leader Suharto (who had replaced Sukarno at the end of 1965 in the midst of a failed coup), and suffering serious military setbacks and without much international support for its cause, decided to explore diplomatic options in ending the *Konfrontasi*. Both Indonesia and Malaysia held peace talks leading to the final conclusion of the undeclared war with the signing of a peace treaty. The end of the *Konfrontasi* led to the formation of ASEAN in 1967. It was initially formed as a regional organization to reconcile relations among three of its five pioneer members namely Malaysia, Indonesia and Philippines, and serve as an important confidence building measure. ASEAN subsequently grew into an important platform to discuss shared socio-economic interests in the region based on the principles of neutrality and non-intervention in internal affairs of its members.¹²

After learning lessons from the *Konfrontasi* and as a member of the newly formed ASEAN, Malaysia appeared to have had shifted its foreign policy stance to neutrality and non-alignment. Malaysia realized that being too open against communism had resulted in Indonesian communists influencing Sukarno to intervene in Malaysia, which inadvertently led to the *Konfrontasi*. China, being a major communist power in the region at that time, had also openly opposed the formation of Malaysia by degrading it as a "... a product of neo-colonialism manufactured single-handed by U.S. and British imperialism..."¹³

The Vietnam War stalemate, the political and military setbacks suffered by the US, and the suspicions that the US was becoming frustrated with the war and might pull out from its military commitment in South East Asia worried Malaysia. The announcement of the 'Nixon Doctrine' at the end of 1969 vindicated fears in the region of being abandoned by the

US. In order to secure itself from intervention by ideological powers and without a credible and powerful security ally in the region, Malaysia knew that it had to change its foreign policy posture and embarked on a new set of foreign affairs strategies that promoted itself as non-aligned in its foreign relations. Malaysia also actively sought to change the geopolitical dynamics of the South East Asia region via ASEAN to portray the region as being neutral. By focusing on ASEAN's core principle of non-intervention in each other's internal affairs, mutual respect and equidistance with both Communist and Western powers, Malaysia hoped to buttress the region from threats of intervention by either powers that may lead to proxy wars breaking out (at that point a number of proxy wars were being fought in parts of Africa, South America and Asia).

To further bolster its non-alignment claims, Malaysia had also joined the Non-Aligned Movement (NAM) in 1971 and officially declared that it is a non-aligned state during these precarious days of bipolar ideological rivalries.¹⁴ Demonstrating its new non-alignment posture, Malaysia opened diplomatic relationship with the Soviet Union in 1968 and later with China in 1974, even though Malaysia was still fighting a second internal communist insurgency allegedly supported by both China and the Soviet Union!

Although successful in signalling that it was a non-aligned state in the region, Malaysia still maintains close defence ties with Great Britain and a few Commonwealth allies via the Five Power Defence Arrangements (FPDA) – a loose consultative defence arrangement consisting of the United Kingdom, Australia, New Zealand, Singapore and Malaysia which replaced the AMDA in 1971. Some British and Australian troops continued to be based in Malaysia. An Integrated Air Defence System (IADS) commanded by a senior Royal Australian Air Force officer covering both Malaysian and Singaporean air space was also setup in Malaysia too under the auspices of FPDA.¹⁵

The FPDA also allowed Malaysia, the United Kingdom, and Australia to have close defence cooperation amidst shared strategic interests. This defence relationship is extremely important to Malaysia as Australia has a formal security alliance with the US through the ANZUS (Australia, New Zealand, United States) Treaty, which indirectly tied

Malaysia's defence with the US via Australia's commitment with the FPDA. Australia reciprocally sees the importance of Malaysia's geographical location as a strategic buffer zone from security threats reaching Australia.¹⁶ Similarly, the United Kingdom's 'special relationship' with the US and their long-proven record of close collaboration in defence and security issues augurs well strategically for Malaysia. The US nexus for both of these FPDA members is important as both the United Kingdom and Australia today lacks adequate expeditionary military power to assist Malaysia. Although the FPDA is a loose consultative arrangement without formal alliance commitments, the perceived moral responsibilities of the United Kingdom and Australia, with their own defence ties with the US, to assist in the defence of Malaysia, had and will continue to deter would-be aggressors against Malaysia.

Malaysia's reshaped the strategic context of the region in the late 1960s and early 1970s by taking a lead role in forming ASEAN and joining NAM, but still maintained discreet defence ties with Western powers. This indicated that Malaysia practiced the grand strategies of selective alignment (instead of purely non-aligned) and strategic ambiguity. Selective alignment allows Malaysia to work closely with all parties for its own relative strategic advantage and spread its risks. Diversification of foreign relations is important for a small state as it allows it to be more flexible, agile, robust, and cope well with uncertainty – a key variable in strategy. Strategic ambiguity, a two-faced deception strategy, on the other hand enabled Malaysia to appear working closely with all parties without being perceived as too bias to one side via its overtly publicized non-alignment foreign policy but still keeping inconspicuous security ties with Western powers which kept both allies and potential adversaries guessing whose side Malaysia is really with.

These grand strategies utilized deft diplomatic manoeuvres to pre-empt potential powerful states in asserting their influence (both from the United States, and Communist states - Soviet Union and China) by promoting a perception that the region is neutral and there is no necessity of either sides to establish footholds to counter each other. These strategies are different from the common alliance politics of either balancing of power or band-wagoning.¹⁷ Malaysia did not join a formal military pact to balance a powerful regional adversary or join a powerful

regional adversary to hedge its security risks. Malaysia instead sought an independent foreign policy that did not entail acts of overt alliance but strategically sought to work with all parties without obstructively sided to one side. Malaysia continuously reshaped the strategic dynamics of the region to avoid from being dragged into an ideological conflict, either directly or as a proxy.

Today's strategic context

The aforementioned Cold War history appears to be playing out again today in the region with China's recent aggressive claims in the South China Sea, and the US's moves to contain it. Malaysia is caught in a difficult position as it is expected to choose sides. Malaysia, a small state – if measured by population size, GDP level, and military power when compared to both China and the US, has not much choice but to work closely with both parties for its economic survival as well as for its own security. Due to geographical proximity and phenomenal economic growth, China today is Malaysia's largest trading partner. Bilateral trade in 2014 was valued at US\$ 140 billion and at US\$ 100 billion in 2015 (the drop was due to the global sluggish economy).¹⁸ Malaysia and the US's bilateral trade in 2015 was valued at US\$ 50 billion.¹⁹

Malaysia, however, has close military relationship with the US, with frequent exchanges of military training, education, and joint exercises. The Malaysian armed forces received US military aid during the Cold War when the Malaysian armed forces were actively fighting an internal communist insurgency.²⁰ Building on this long record of strategic cooperation, Malaysia has been wooed recently by the US to play a more active and influential role in supporting the US's grand strategy in pivoting back to the Asia –Pacific region. Both former US President Barack Obama and Malaysian Prime Minister Dato' Sri Haji Mohammad Najib bin Tun Haji Abdul Razak have built close relationship at the personal level with frequent golf games and meetings.²¹ Former President Barack Obama paid an official visit to Malaysia in 2014, being the second US President to do so since Lyndon B. Johnson's visit in 1966. Malaysia was also included in the recently concluded, albeit shelved by Trump's Administration, Trans Pacific Partnership Agreement (TPPA) which was hoped to be able

to wean Malaysia off from depending substantially on China for its trade and economic prosperity.²²

All these initiatives point to the US's hope in obtaining Malaysia's backing in containing China in the South China Sea as well as Malaysia's influence within ASEAN to gain support for US's strategic moves in the region. Nonetheless, Malaysia's response thus far, apart from its attempt to play a small leading role in the aforementioned ASEAN-China Foreign Ministers meeting, has been extremely cautious and frustrating for the US. Malaysia's influence in ASEAN, even though it is one of the founding members with close rapport with all ASEAN member states, is limited due to ASEAN's way of making decisions by consensus and a multitude of conflicting national interests between its members.

Despite of the photo façade of smiling faces and interlocked handshakes of ASEAN government officials during summits, ASEAN members are quietly entangled in conflicting interests and rivalries. Each of the ASEAN members have their own geopolitical interests and rivalries that hampers cooperation in strategic issues, including the South China Sea debacle. Myanmar, Laos and Cambodia are strong traditional allies of China. Myanmar, facing the Indian Ocean, has no strategic interest in the South China Sea, nor does Laos - being a landlocked country. These states also strongly rely on China's benevolence for both political and economic survival. The ASEAN members with strategic interests in the South China Sea are themselves perpetually locked in rivalry and competition over overlapping claims in the South China Sea.

In the Spratly Islands maritime zone, even before China joined the fray, Philippines, Malaysia, Vietnam, and Brunei have overlapping claims, and had occupied islands and reefs in the Spratly archipelago since the 1970s. For example, Vietnam had occupied Amboyna Cay, a small island, located much closer to Malaysian Sabah than Vietnam. Recent Chinese assertions in the South China Sea threatens directly both Philippines and Vietnamese claims as China's maritime activities were closer to these two states' territorial waters and their respective maritime claims than Malaysia's own maritime waters and claims. It will be strategically prudent for Malaysia not to take part in this trio of rivalries now lest it will

allow either of these states gain long term strategic advantage and forfeiting Malaysia's own South China Sea claims in the future.

All of the ASEAN members are also entangled in various border and territorial disputes between themselves and had occasionally fought minor armed clashes in some of these disputed areas despite the Treaty of Amity and Cooperation in Southeast Asia (TAC) which renounced the use of force and settlement of disputes by peaceful means.²³ Cambodia and Thailand; Cambodia and Vietnam; Thailand and Myanmar; Brunei and Vietnam; Indonesia and Malaysia; Singapore and Malaysia; and the Philippines and Malaysia have unresolved border and territorial disputes between themselves.²⁴ In 2001, both Thailand and Myanmar had even fought a *tank battle* at Thai Border Outpost 9631 when Thai M60A3 Patton tanks faced off Myanmar's Type 69 tanks. Thailand again fought another tank battle with Cambodia in 2008 at the Preah Vihear temple border location.²⁵ The Philippines has not dropped her claim on Sabah, although Sabah joined Malaysia in 1963.²⁶ To further highlight the complexity of the Sabah issue, its maritime waters are still mired in boundary disputes between the Philippines, Indonesia and Malaysia. Also, even though ASEAN operates within its doctrine of non-intervention in each other's internal affairs, Malaysia has been accused to be covertly involved in secessionist movements in Aceh (Indonesia), Mindanao (Philippines), and in Southern Thailand.²⁷

Thailand, which has not staked any claim in the South China Sea, has veiled interest in working closely with China to build a canal through the Kra Isthmus in Southern Thailand, similar with the Panama Canal. This canal is estimated to cost close to US\$25 billion.²⁸ The amount of economic trade-offs from this canal for Thailand will be extraordinary. Construction of this canal would allow ships to bypass the Strait of Malacca and will result in significant loss of maritime shipping revenue for Malaysia, Singapore and Indonesia. China referred this planned project as a part of its new maritime Silk Road, and Thailand, which had deliberated on the building of the canal since the end of the 17th century continues to weigh the potential returns of a geopolitical alliance with China. Thailand, as a start, has procured sophisticated weapons from China in the form of three new Yuan-class submarines in 2015.²⁹ It would

be of the strategic interests for Malaysia, Singapore and Indonesia that China not proceed in building this canal with Thailand.

With so many conflicting national interests and rivalries between the ASEAN members, it is not surprising that ASEAN could not produce a strong joint statement condemning China's aggressive actions in the South China Sea. It would be a fallible idea to hope that Malaysia will be able to influence ASEAN with so much internal squabbling and suspicions with each other.

China continues to prove itself to be a worthy adversarial power in the region. China's rejection of the PCA demonstrated the ineffectiveness of international law in the face of a large power and a permanent member of the United Nations Security Council (UNSC). China's right to veto any UNSC resolution, and as the UNSC is the only arm in the UN that can authorise any collective security action to enforce international law, renders the UN powerless to act. The failure of the US, with its military primacy, to act strongly against Russia's occupation of Crimea and Syria's many crossings of US's self-imposed 'red lines', has shaken the credibility of the US's willpower in using military coercion against powerful adversaries. Compounding the problems further, the new US President, Mr. Donald Trump had strongly voiced out that the US will challenge China's push for supremacy in the region with more serious actions.³⁰ The US's statements thus far appear to be more rhetorical than an indication of any serious shift in the US' policy in the region as the willingness for the US to make any military action appears to be lacking. Nonetheless, the US's uncertain foreign policy posture and its next strategic actions against China has resulted in the need for Malaysia to tread carefully in its strategic relationship with the US. The TPPA has been shelved by President Trump, leaving some of the US's allies in the region feeling betrayed and pushing some to consider working more closely with China instead, through agreements such as the Regional Comprehensive Economic Partnership (RCEP) and the 'Belt and Road Initiative' (BRI) led by China.³¹ The US has launched the Blue Dot Network (BDN) on 4th November 2019 to provide alternative sources of infrastructure finance with credible transparency, environmental protection, and sustainable economic development with focus in the Indo-Pacific region. The BDN however, at time of writing, has not produced any significant buy-in yet,

in fairness probably due to ongoing 2020 Covid-19 pandemic raging in the world.

Malaysia's domestic politics may also influence its foreign affairs strategy. Its potent mix of ethnic Malays, Chinese and Indians has presented Malaysia with serious challenges in ensuring racial and religious harmony and building national unity. By working closely with China, the Malaysian government can gain more support from its Chinese population and at the same time rejuvenate its sluggish economy. A recent trip to China by the Malaysian prime minister in November 2016 had resulted in the signing of trade deals worth about US\$33 billion.³² Such strong economic ties with China ironically had also released some backlash in accusations that the government of Malaysia had sold out to China. Complicating matters further, the US's recent move to ban travel from seven predominantly Muslim states had also resulted in some dissatisfaction among its Muslim majority Malays and may further influence Malaysia to approach the US cautiously. The need to cater to the needs of each respective racial and religious group, has resulted in Malaysia continuing to play to its non-aligned and neutral stance to demonstrate to its population that it works with all parties for mutual national economic growth and strategic security. Although there appears to be some contemporary interest among Malaysia's population in its foreign policies, Malaysian domestic political environment continues to have little influence on foreign affairs, and foreign policy decision making continues to reside with the ruling political elite.³³

Conclusion

With so many uncertainties as well as simmering rivalries amidst the power players in the region, it is strategically prudent for Malaysia to continue its Cold War grand strategy by the deft usage of statecraft and diplomacy in working with all parties and agilely adapting to the evolving strategic context to gain strategic advantage for itself. The inability of international organizations and international law to protect small states against China's assertions in the South China Sea, and without a credible balancing power to ally with at the moment, Malaysia's strategic choices are limited.

The lack of effective strategic responses will result in China continuing to position herself strongly in the region and unilaterally claim her own islands, reefs and rocks in the South China Sea. China will not forfeit the artificial islands that she has built and will continue to occupy and build more artificial islands in the South China Sea. China also will not drop claims in the South China Sea and instead will be more aggressive in using both overt and covert means to stake her claims while the strategic window is still open at the moment. It will be naïve to think that China will give up what she had obtained thus far or will stop further actions. Without any potent strategic choice available to ASEAN members involved in the South China Sea debacle, and uncertainties in any powerful and *reliable* outside help, China will be accommodated and allowed to dominate the region. ASEAN members quietly hope that once China has ascended to primacy in the region, it will reciprocate in kind.

In view of these challenges, Malaysia will continue to practice its astute grand strategies of selective alignment and strategic ambiguity which had proven to be effective for Malaysia during the perilous era of the Cold War. By understanding Malaysia's grand strategy, key lessons about a small state's astute strategic behaviour can be drawn and demonstrate that even a small state can practice grand strategy that yields handsome dividends.

NOTES

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CHAPTER 6

China's Excessive Maritime Claims in the South China Sea: A Malaysian Perspective

BA Hamzah¹

Introduction

Malaysia has been reluctant to sanction China for its high -handed policy believing active engagement² would better serve its long-term strategic interests. However, after many years of engaging bilaterally and through the Association of Southeast Asian Nations (ASEAN) network, it has become quite clear that Beijing's objectives in the South China Sea (SCS) are more than just about gaining access to resources like fish, gas, and oil. China's decision to militarise the SCS has worried Malaysia and other claimant states.

On 29 July 2020, Malaysia addressed a *Note Verbale*³ to the United Nations Secretary General that spelt out its formal policy regarding China's claim in the SCS. The letter reads **"Malaysia rejects China's claim to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the nine-dash-line as they are contrary to the Law of the Sea Convention and without lawful effect to the extend, they exceed the geographic and substantive limits of China's maritime entitlements under the Convention."**

Malaysia also reiterated its position that **China's claim to the maritime features in the SCS has no basis under international law.**

Malaysia's policy statement is in line with the award in ***The South China Sea Arbitration*** (*The Republic of the Philippines V. The Peoples Republic of China*) on 12 July 2016 meted out by the International Tribunal under the Permanent Court of Arbitration at The Hague (hereinafter the Tribunal).

Malaysia's change of policy towards China's claim in the SCS is influenced by recent developments in the country. This includes public anger over intrusions of Malaysia's territory by mainly Chinese fishing boats and survey vessels. These fishing vessels and survey vessels are usually escorted by vessels from the PLA Navy and or the Coast Guard. Malaysia is particularly upset with China's claim to James Shoal, an underwater feature embedded on the continental shelf of Malaysia, about 50 nautical miles from Malaysia's shoreline.

Malaysia's other bone of contention with China's claim in the SCS is its policy of intimidation. The action of an intruding Chinese official survey ship in April 2020 shadowing an oil-drilling vessel on contract with Malaysia's National Oil Company (Petronas) off the Luconia Shoals has hardened the Malaysian position towards Beijing.

China's decision to challenge twice⁴ Malaysia's submissions to the Commission on the Limits of the Continental Shelf (CLCS) has also enraged Putrajaya. These challenges have put on hold Malaysia's claim to an extended continental shelf with potential reserve of oil and gas.

First to establish diplomatic relations with China

Malaysia became the first ASEAN state to establish diplomatic relations with China, in May 1974. What began as a calculated diplomatic strategy has since 1990 spilled over into economic, cultural, educational, and military ties. Despite disagreement over China's extensive territorial claims in the Spratlys, Malaysia did not consider China a hostile power. On the contrary, following the decision to establish diplomatic ties and despite the memory of a brutal insurgency inspired by Communist China, Malaysia has adopted a friendly approach towards China.

Strategically located between the Strait of Malacca and the Sulu Sea, Malaysia considers itself an important geopolitical and economic force in Southeast Asia. It is a pioneer in regional cooperation and has played a leading role in creating a durable security architecture for such cooperation. But a more important contribution Malaysia has made to

regional peace and security has been its leading role in effecting some political and strategic reconciliation between Southeast Asia and China.

Historically, long before the sovereign Malay states won independence in 1957, their seafaring people used to roam the nearby maritime areas in pursuit of economic activities and to conduct military raids against other powers in the region. The Malay seafarers and their counterparts from Vietnam and Cambodia had been active in the Spratlys long before the colonial powers set foot in the region. So were the seafarers and traders from China, especially during the Ming Dynasty (1368 - 1644), who were noted for their expeditions.

Strong economic ties

Since the launch of the Belt and Road Initiative (BRI) in 2013, economic ties between the two states have improved tremendously, with China becoming Malaysia's largest trading partner for the last decade. Bilateral trade increased from US\$63.6 billion in 2017 to US\$77.7 billion in 2018. Over the past 10 years China has invested more than US\$43.8 billion, including taking up 49.9 per cent stake in the once-ailing Proton, the national car project that then-Prime Minister Mahathir Mohamad pioneered in the early 1980s.

Malaysia is among the 65 countries that have participated in BRI projects and a major recipient of Chinese foreign direct investment (FDI). Putrajaya does not look upon BRI projects as a form of debt diplomacy that Beijing is accused of. But the country does have its own woes with China over the multi-billion-dollar mega projects initiated when Najib Razak was prime minister. Najib has been accused of inflating the cost of some projects to bail out 1 Malaysia Development Bhd. (1MDB), the state-backed investment fund that lost US\$4.8 billion⁵.

The focus of Malaysia's policy in the SCS has always been to maintain good relations with China. Malaysia has been soft on China in the SCS for a long time, always trying to defend and accommodate Beijing interests. However, Putrajaya balances its national policy on the SCS by embracing the policies adopted by ASEAN. For example, Putrajaya

continues to support the ASEAN-initiated Code of Conduct mechanism with China in the SCS. Similarly, Malaysia's support for freedom of navigation in the South China Sea reflects its responsibility to the international community and respect for rules-based international order that ASEAN has been advocating.

Malaysia relies on international law and diplomacy to resolve territorial disputes in its waters. Though Malaysia's 1979 map of the continental shelf has been the bone of contention with many in the region, its appeal for international law and diplomacy has produced positive impact on its neighbours. Boundary disputes with Thailand and Vietnam, for example, have been temporarily shelved through joint development schemes. Disputes with Singapore and Indonesia have been resolved through the International Court of Justice.

Malaysia's reliance on international law and diplomacy to manage boundary disputes is a testimony to its active engagement policy in the SCS. In the same vein, Malaysia's reliance on the ASEAN member states to seek peaceful solutions in the SCS helps to reinforce its active engagement in the region.

External factors

Malaysia's new stance on China's policy in the SCS is also driven by external factors, especially the pushback by Indonesia, Vietnam, Australia, and the US who have criticized China's extensive claims at the UN via their respective *Notes Verbale* to the Secretary General on 12 December 2019. These *Notes Verbale* was in response to China's *Note Verbale* contesting Malaysia's partial submission on the extended continental shelf in December 2019.

The US official position on China's assertiveness in the SCS has emboldened Malaysia to take a stronger position against China for its activities in the SCS. For example, in April 2020, Putrajaya timed its reprimand of China's intrusion in the Malaysian waters to coincide with the presence of a strong US naval presence near where the intrusion occurred.⁶

More specifically, Malaysia has been emboldened by US diplomacy at the UN that Putrajaya perceived supporting its position on James Shoal⁷. Putrajaya welcomed Pompeo's warning to China to stay away from the Malaysian territory off the Luconia Shoals and James Shoal. The other littoral states have also viewed Mike Pompeo's warning to Beijing not to harass them in their waters as a positive development in their dispute with china.

China's interests in SCS are not benign

Beijing's current primary concern in the SCS is to consolidate and legitimize its claim that has been rejected by the Tribunal and the littoral states. Secondly, to prevent the claimant states and other stakeholders in the region from ganging up in the SCS. Beijing also fears that the US policy would trigger a backlash from the international community and encourage either Vietnam⁸ or Malaysia (or both) to mount a legal challenge as the Philippines did in 2013.

China does not recognize the territorial claims of claimant states in the SCS whom it considers militarily weak. In 2010, for example, the then PRC Foreign Minister, Yang Jiechi, told his counterparts in Asean at Hanoi that "China is a big country and other countries are small countries and that is just a fact."⁹ Such a reminder did not go down very well with Malaysia and the other claimant states. Although militarily weaker, they could together hamper China's territorial ambitions by other means.

The genesis of the problem in the SCS was the withdrawal of the US from the region in 1975 after the Vietnam war. The first shot was probably heard at the Paracels when the PLA troops seized the island from South Vietnam in late 1974. Since 1975, China has used the political void to exert influence. Without much resistance from any power in the region, except Vietnam, Beijing has succeeded in converting a peaceful "regional common" into its own South China Sea lake.¹⁰

Today, by means of force and economic carrots, China has effective control of the SCS. The only military power that can match China is the US, which is 8,000 nautical miles away. While Washington is strong in

rhetoric, it is weak in action. The failure of successive US administrations to act against those who have defied redlines in Syria and Iraq, for example, gives little confidence that the US will honour its words on redlines in the SCS. It is doubtful whether the US will take on a nuclear armed economic superpower like China with clear-cut geographical advantages when push comes to shove.

In addition to geography that does not favour Washington in the SCS, distance from the area can be nightmarish for US defence planners. The nearest American troops in the region are in South Korea, Okinawa, and Yokosuka. Whereas the Yulin Naval Base, considered by many as “the most strategically important military base for nuclear submarines in the South China Sea” for China, is under 2000 nautical miles from the Mischief Reef. The distance between Yokosuka and Mischief Reef is almost double.

Many China watchers literally slept through when Beijing was on the mission to dominate the SCS. As Asia’s strongest military neighbour and an economic powerhouse, many in the region thought, as a friend China would protect regional interests from outside predators and be willing to coexist peacefully. When China went to war with Vietnam in 1979, many thought the two neighbours with a long unhappy colonial history settling a bilateral problem. After all, China colonised Vietnam intermittently for more than one thousand years.

Then, in March 1988, China and Vietnam squared it off in a naval skirmish off a feature known as the South Johnson Reef. In this short encounter, Vietnam lost 64 sailors and two ships. Many analysts in the region thought China’s punitive action would be confined in Vietnamese waters. However, when Beijing started to harass fishermen in the Indonesian waters since 2014, for example, and interfered with oil exploration activities in Vietnamese and Malaysian waters since 2017, it just dawned on many that China could no longer be considered a friendly power.

Despite the provocations, many believed China could be trusted to maintain law and order in the SCS until Beijing showed its true colour. Beijing’s refusal, in 2016, not to be bound by the decision of the Tribunal has made China unpopular with many. Besides this, many were upset with

China's extensive militarisation programme including the construction of seven military outposts in the SCS. Even when the Chinese fishing fleets started to ram fishing vessels belonging to the littoral states, for example, since 2014, the consensus was that China had no aggressive intentions beyond access to fishery resources.

However, when China sent its survey/research vessels-most prominently *Haiyang Dizhi 8*-to conduct seismic surveys in Vietnamese waters (off Vanguard Reef) in 2019 and in April 2020, the vessel intruded into the Malaysian waters which surprised many Malaysians. Taken together, these incidents demonstrated that China's interests in the SCS could no longer be described as benign.

China will not back down

Washington, Tokyo, New Delhi, Canberra, and London are unduly worried that China would use its military facilities in the SCS to interfere with the freedom of navigation and undermine the flow of international commerce. More importantly, from US and its allies' perspective, there is fear China would use its military assets to undermine further the US influence in the region. Hence, in retaliation, the US assembled an informal and loose coalition of the willing comprising Australia, India, Japan, and the US. Known by many labels, most prominently, the Quadrilateral Security Dialogue (QUAD) is designed to contain China's maritime expansion in the SCS¹¹.

Reports of China and the US conducting military exercises at sea and in the air do not bode well for regional order and stability. The deployment of China's advanced-new ballistic missiles (DF-21D) reportedly designed to destroy a US aircraft carrier in one shot coupled with the presence of its long-range bomber aircraft and its aircraft carrier in the SCS could also lead to escalation of forces. While such deployment is necessary, as a show of force from Beijing's perspective, it is nevertheless provocative.

Recent deployment of *USS Reagan* and *Nimitz* carrier strike groups plus other military, air, and naval activities in the region were equally

provocative and have also escalated tensions in the SCS. Coupled with its official policy towards China's excessive maritime claims, the deployment of the carrier strike groups has further sharpened the rivalry between the two powers. In terms of military power capability, the US and its 'allies' have the advantage of numbers, technology, and experience to defeat China when push comes to shove. However, with its arsenal of nuclear weapons, two aircraft carriers and several carrier-killer missiles, China is no pushover. Nonetheless, the collateral damage from such a confrontation to the region will be massive. A US missile attack on one of the Chinese military outposts in the SCS, for example, could also trigger a global conflict.

Similarly, in retaliation, the Chinese PLA Navy could mount a missile counterattack on a US cruiser in the SCS. This too could also ignite a war that would engulf the entire region with the coastal states bearing the brunt of this military conflict. Either way, the people in the region will suffer in the event of a US-China military confrontation in the SCS: like the grass that get trampled when two elephants make love or make war.

China faces a strategic dilemma in the SCS. Beijing views the activities of other countries in the SCS as a common desire to contain its rise. China also fears that some claimant states and the US are ganging up against its security interests especially after Washington promulgated a new policy in July 2020 challenging the legality of China's historic claims in the SCS, including the nine-dash boundary line.

China challenging US preeminence

Under President Xi Jin-ping, Beijing has moved amazingly fast to challenge the US preeminence in the region that many in the US perceive it as threatening its security interests in the region. Some believe Beijing is rewriting the rules for regional and global order. Although Beijing denies that it wanted to replace the US as a hegemon, an ambitious China with deep pockets and significant global influence, is a cause for concern. With its surplus cash, it has established strong economic and cultural footprints in Africa, Latin America, and the Middle East where the US influence is waning.

Since joining the World Trade Organization (WTO) in 2001, China has become the world's largest economy on a purchasing power parity basis. This in turn has made China a commercial competitor to the US. Washington views China's Belt and Road Initiative (BRI) to connect the world, advance free trade and entrench globalization in negative light. The BRI, President Xi Jin-ping flagship project, has come under scrutiny of Western powers who claim the projects are self-serving political agenda to control the world!

In the wake of anti-globalization and the decision by US President Donald Trump to abandon financial support and leadership of multilateral institutions¹², for example, played into the Chinese hands. Since President Trump's decision to undermine multilateralism, President Xi-Jinping stepped into the void by portraying himself as a firm advocate for multilateralism, globalization and free trade¹³. This approach has endeared President Xi Jin- ping to the more liberal members of the international community who support multilateralism, at the expense of US interests. President Donald Trump's policy to withdraw from the multilateral treaty on climate change and the Trans-Pacific Trade Arrangement have adverse security and economic impact in the region. It will take a while before the confidence in the US leadership is restored.

Recent assurances by Mike Pompeo that the US would throw its weight behind the claimant states' claims have not restored sufficient confidence for them to confront China. Partly, because Washington has not kept its words in the past. For example, Washington promised Manila on many occasions that it would come to the defense of the Philippines on the disputed Scarborough Shoal against China. Washington did nothing when China occupied the Scarborough Shoals in 2010, although President Obama classified it off-limit to China and a red-line not to be crossed.

The SCS, through which an estimated one third of global seaborne commerce passes through every year, is becoming one of the world's flashpoints. China and the US chosen it as the arena to assess each other's strength at a time when Trumpian pre-election rocket-rattling cannot hurt at the polls.

Certainly, China's high-handed policy and provocations in the SCS have stirred considerable irritation not just with the US, which sees its waning clout being tested, but among the littoral nations as well. Reports of foul play, human rights abuse and trafficking of Indonesians have lately put a new spotlight on the activities of Chinese fishing vessels.

Similarly, the presence of Chinese warships and armed Coast Guard vessels in Malaysian waters is a disturbing development for a nation that arguably has cooperated more than it needs to because of its dependence on China for trade, tourism, and investment. China has been Malaysia's largest trading partner since 2009. Thus far, nothing untoward has happened as both sides are careful not to allow such infringements to mar their overall diplomatic, economic relations, trade, and cultural relations.

However, in mid-April 2020, *Haiyang Dizhi 8*, a Chinese government survey vessel that has operated in Vietnamese and Philippine waters since 2017, caused considerable concern. She was spotted trailing the *West Capella*, a drilling vessel on contract to Petronas, Malaysia's national oil company. On this occasion, *Haiyang Dizhi 8* was escorted by several well-armed vessels from China's Coast Guard. This incursion follows on from a previous three-month¹⁴ stand-off between Chinese "survey vessels," and vessels from Malaysian enforcement agency. The incident happened off the Luconia Shoals, where Putrajaya has been prospecting for oil and gas.

In his policy statement on 13 July 2020, US Secretary of State Mike Pompeo took Beijing to task for harassing Malaysian vessels in the Luconia Shoals and James Shoals. The US Secretary of State also condemned Beijing's assertive policy in the waters off Brunei, Indonesia, and Vietnam, which are illegal by any stretch of imagination.

Illegal activities in the SCS are quite common. They include illegal and unreported and unregulated fishing (IUU), incidents of sea robbery, piracy, human and drug trafficking, destruction and degradation of coral reefs and exploitation of protected molluscs like giant clams by many long-distance fishing boats including those from China. These illegal activities present a different set of challenge to the countries in the region. However, they are just the tip of the iceberg of maritime violence and

criminality along with the US\$3.5 trillion-plus worth of international commerce that pass through the SCS annually.

These criminal activities are likely to add fuel to the volatile political environment. For instance, in July 2020, Indonesian authorities arrested two Chinese fishing vessels off the Riau islands, following a tip that an Indonesian crew member had died on one of the boats. The body believed to be the victim of a human trafficking racket was found in a freezer. Three Indonesian crew members also allegedly died while working on a Chinese vessel fishing for tuna early 2020.

A video of the three, unceremoniously buried at sea, has angered the Indonesian authorities. Jakarta demanded an explanation of the inhumane working conditions on Chinese-flagged fishing boats that led to their death. The incidents have caused diplomatic spats between Beijing and Jakarta.

In early 2020, Indonesia deployed six warships and four F-16 fighter jets to the Natuna Sea to counter intrusion by 60 Chinese fishing vessels which were escorted by two Chinese Coast Guard vessels. The showdown was defused after the Chinese vessels left the area, which is reportedly rich in natural gas deposits and fish. Jakarta has since reinforced its military presence on the Natuna Islands that it owns.

In the absence of regional conflict mitigating mechanisms, the tensions could metamorphose into military flashpoints overnight, with potentially serious global consequences. Mike Pompeo's statement formally rejecting "Beijing's claims to offshore resources in the SCS as unlawful" has put China on the defensive¹⁵ and will make it more difficult to rein in the recalcitrant fishing fleets and the dubious "research & survey vessels." While claimant countries find Pompeo's statement on China's excessive claims reassuring, the real challenge is whether Washington will keep its promises when the chips are down.

Beijing has a history of harassing ships in the SCS. Chinese fishing fleets have long operated illegally in waters claimed by Indonesia, the Philippines and Vietnam. A Chinese maritime surveillance vessel, for example, rammed and sank a fishing vessel from Vietnam off the Vanguard

Shoal in April 2020. Confrontations with Filipino fishermen, especially in traditional fishing areas off the Scarborough Reef, which China occupied in 2010, are quite common despite President Rodrigo Duterte's overtly friendly posture towards Beijing.

Evidence of growing political tensions is quite compelling. These tensions have steadily increased in recent years after Beijing went overboard with its militarisation programme. President Xi Jing-Ping promised President Obama he would not undertake to do that. The construction of military facilities on several artificial islands since 2012 has further alarmed Washington and other countries in the region.

Beijing's refusal to embrace the Declaration on the Conduct of Parties (DOC) by ASEAN in "its entirety" after 20 years of negotiations has made it exceedingly difficult for the member states to engage China constructively. China's lip-service to any form of regional mechanism to mitigate violence and lower regional tensions has left a bad taste. Beijing's uncompromising attitude is baffling!

China's military outposts are double-edged sword

The claimant states have been questioning China's *real* intentions since it started to build military garrisons on the artificial islands in the Spratlys, after 2012. Are these outposts designed to prevent US incursion or intended for targets in the claimant states? Distance wise, all seven military outposts in the Spratlys (Mischief, Subi, Cuateron, Gaven, Fiery Cross, Hugh, and Johnson Reefs) are closer to Western Palawan, for example, than to Yulin, the nearest town on China's mainland. The distance between Yulin and Mischief Reef that China occupied since 1995 is 1166 km; Mischief Reef to Western Palawan is only 241 km.

China's operational range for its fighter aircraft from Subi Reef can be extended by 1,000 km. This means all primary targets along the coasts of the Philippines, Vietnam and Malaysia are within China's fighter aircraft operational range. These military outposts in the Spratly can serve as a double-edged-sword: they can be used to hit US targets in the SCS as well as against the targets in claimant states.

Beijing's aggressive land reclamation and militarization of the Spratly Islands and Paracels Islands should have immediately made clear that Chinese objectives were not just about fish, gas, and oil. Following the 1988 skirmish with Vietnam, China went to secure its first seven outposts in the Spratlys converting them into military fortifications. At some point, some analysts note, China might want to occupy the entire Spratlys as its maritime power grows. Military planners in Hanoi, Putrajaya and, Manila are worried Beijing may seize their outposts in the Spratlys, which are weakly defended against the stronger PLA forces.

There are several reasons why the tensions between China and ASEAN member states with overlapping claims, namely Vietnam and the Philippines, and lately Malaysia may flare up. Even Indonesia, as suggested above, a non-claimant¹⁶, has been drawn into the fray. Although there is no evidence of policy coordination between the claimant states and other interested parties in the region against China's assertiveness in the SCS, they have been overtly critical of China's high-handed policy in the SCS.

Although Beijing has downplayed the presence of US warships in April 2020 in the trouble spot, this region could see escalations in US-China tensions as President Donald Trump looks for excuses to boost his chances for re-election in November 2020. I have argued elsewhere¹⁷ that as Commander-in-Chief, President Trump could order the US Navy to strike against the military targets in the SCS to achieve limited political objectives.

In a military conflict scenario, the military targets offer minimum collateral damage to the population and property, avoiding an all-out war. China's growing assertiveness has fuelled concerns over possible armed conflicts in the SCS that President Trump could use as a diversionary tactic to win the re-election.

The jockeying for influence among the major powers in the region comes at a time when the regional security architecture is breaking up¹⁸. The weakened regional security architecture has encouraged new powers like China and Russia to challenge the preeminent position of the US in the region. This comes as Washington seeks to distance itself from

multilateral initiatives only to realise that its competitors have taken advantage of the void. As a competitor China, for example, is strong enough to defy the US and chart its own global strategy. Many believe China is now able to rewrite the rules of engagement and undermine the Post-World War II security architecture that Washington has assiduously built with blood and treasury.

Events across Asia including the US-China rivalry, the re-arming of Japan, the North Korea missile crisis, growing Sino-Russian cooperation, border conflict with India and other issues are raising concerns that the post-World War II security order is collapsing. President Donald Trump's withdrawal from the omnibus Trans-Pacific Partnership Trade agreement designed to pull 12 nations together to neutralize China was arguably the US's biggest mistake. But American influence had been waning steadily for almost a decade in the face of China's rise and US lethargy. The attempt by President Barak Obama's to arrest the perception of US decline through the "pivot to Asia" programme never really came off, limited to such symbolic actions as the deployment of a handful of troops to Australia.

Fears that the old order guaranteed by the US is falling apart have been exacerbated by previous protests in Hong Kong, tensions in the South China Sea, the Sino-US trade war, which many analysts fear can lead to global recession. With the US no longer even attempting to exercise its influence, these vulnerabilities have been further aggravated by Russo-China long-range joint air patrols in July 2019, the first in the Asia Pacific region.

While the US sailing of warships, for example, in June 2020, in the Taiwan Strait was meant to overawe Beijing, China is not intimidated and in fact plans to conduct more live firing exercises in the East China Sea near Taiwan. This military exercise will be the third since the US Senate approved the sales of weapons including F16 fighter jets to Taiwan in August 2020. However, these offensive weapon systems are reportedly lagging the 'fifth-generation' fighters under development in China.

US unable to control events in region

The tensions are testimony to the inability or lack of commitment by Washington to control events and lead the pack. The resurgence of China and Russia, at odds with the US in the region, has complicated the security calculus.

Without a US presence to cool them, the simmering discontents between Japan and South Korea that resulted in political outbursts and the subsequent trade war will likely impact the current security order as well. The decision by Seoul not to renew the 2016 General Security of Military Information Agreement (GSOMIA) with Tokyo is an example of how things can go wrong very quickly. The decision to scrap the GSOMIA was a response to Tokyo's earlier ban on the export of high-tech materials critical to South Korea's semi-conductor and electronics industry.

The spat between the two powers --Japan and South Korea-- undermines the traditional security cooperation mechanism/architecture in the area. GSOMIA was set up to enable intelligence sharing on North Korea, amid reports of Pyongyang firing more intermediate missiles. The failure of the US to restrain its treaty allies from engaging in trade wars and do away with the agreement speaks volume of Washington's declining influence despite maintaining more than 80,000 troops, air, and naval assets in East Asia.

It also reflects the desire of the allies to act independently of their patron. The US has also failed to prevent China and Russia from conducting joint aerial exercises for the first time, using Chinese long-range aerial patrols involving Chinese Xian H-6K jet fighters and Tupolev Tu-95Ms – long-range, nuclear-capable bombers, in the Indo-Pacific region.

According to the Russian Ministry of Defence (MoD), the aim of the military exercise was to “strengthen global stability.” It was also intended to send a message to Washington that Beijing and Moscow are moving towards strategic convergence. It was the US decision to withdraw from the 1987 Intermediate Range Nuclear (INF) Treaty with Russia that precipitated the joint exercise.

The US has failed to weaken China's influence in the SCS. Today, to the chagrin of Washington, Beijing is rewriting the rules of engagement in the SCS within the nine-dash line. Over protests from Manila, People's Liberation Army Navy vessels have simply sailed through the Philippine Archipelagic waters without being deterred. While the Philippine acquiescence is unlikely to last beyond the presidency of Rodrigo Duterte¹⁹, Manila may be powerless to do much about it.

The US has been courting countries to deploy intermediate-range missiles against China. So far, there have been no firm takers. Australia, which joined the US-sponsored maritime protection force in the Persian Gulf, has indicated ambiguously that the US has not made any formal request to deploy the missiles. Meanwhile, President Duterte of the Philippines had announced he would never allow the US to deploy missiles in his country. South Korea, another US Treaty ally, has also confirmed it has no plan to discuss the deployment of missiles with the US.

The disclosure by the United States Studies Centre²⁰ at the University of Sydney, a think tank, that "America no longer enjoys military primacy in the Indo-Pacific and its capacity to uphold a favourable balance of power is increasingly uncertain" reinforces the concerns over Washington's declining influence.

However, the US defence shortcomings are not easy to address in the short-term, making the proposed Quad strategy to counter China an exercise in futility. Why should these countries – all within the range of Chinese missiles – risk their necks for a US government that is bogged down with conflicts in the Middle East and "facing a crisis of strategic insolvency?"²¹

Scholars like Fareed Zakaria have been predicting a post-American world for some time. In an article that he penned for *Foreign Affairs* (July-August 2019)²² Zakaria did not mince his words. Washington, he wrote, "*from an unprecedented position mishandled its hegemony and abused its power, losing allies and emboldening enemies.*" Such an indictment has further undermined confidence in the US's hard and soft power.

Concluding remarks

China's high-handed policy and provocations in the SCS have stirred considerable irritation not just with the US, which sees its waning clout being tested, but among the littoral nations as well. This notwithstanding, on balance, the recent assurances by Mike Pompeo that the US would throw its weight behind the claimant states' claims have not restored sufficient confidence for them to confront China.

Washington's policy in the SCS has been long on promises but weak in action.

Beijing's cavalier policy in the Spratlys since it converted seven artificial islands into military garrisons has defied conventional wisdom that it has only limited strategic objectives. Lately, China's conduct in the SCS is anything but friendly. Initially, many people bought the Chinese propaganda that the military outposts in the SCS were meant to prevent the US dominance and had nothing to do with strengthening its historic claim which the Tribunal rejected in July 2016. However, when China started to forcefully challenge the legitimate activities of coastal states like fishing and exploring for oil and gas in their waters, many were irritated.

Beijing's aggressive land reclamation and militarization of the Spratly Islands and Paracels Islands should have immediately made clear that Chinese objectives were not just about fish, gas, and oil. Following the 1988 skirmish with Vietnam off South Johnson Reef, China built its first seven artificial islands in the Spratlys that have been converted into military fortifications. At some point, some analysts note, China might want to occupy the entire Spratlys as its maritime power grows. Military planners in Hanoi, Putrajaya and, Manila are worried Beijing may seize their outposts in the Spratlys, which are weakly defended against the stronger PLA forces. Besides, all the seven military outposts in the Spratlys are nearer to the littoral states than to the nearest city on mainland China.

These bases can act as a doubled-edge sword. They can be used against the US forces in the SCS as well the targets in the claimant states.

Among the claimant states that has been upset with China's assertiveness is Malaysia, a country that has since the 1970s established strong economic, trade, and cultural ties with China, the Middle Kingdom. For a nation that arguably has cooperated more than it needs to be on friendly terms with China, Malaysia has been careful, until July 2020, not to cross swords with China over its excessive maritime claims in the SCS.

Four recent events have changed Malaysia's perception of China *as a friendly power in the SCS*. First, China's assertiveness in the SCS has gone overboard. Second, China's active interference with Malaysia's economic activities off the Luconia Shoals and Beijing's claim to James Shoal, a submerged maritime feature that is embedded to Malaysia's continental Shelf. Under international law, China cannot "assert any lawful maritime rights over it." Third, the brazen challenge against Malaysia's submissions to the CLCS has undermined Malaysia's legitimate right for an extended continental shelf under UNCLOS. The fourth reason is Washington's decision in July 2020 to support the territorial claims of the claimant states has hardened Malaysia's position.

While US backing of Malaysia's claims vis-a vis China in the SCS has given Putrajaya a much-needed leg-up, it is not likely to change its policy towards China overnight as it searches for a balanced relationship with both powers within the context of an increasingly multi-aligned and multipolar world. While it is ill- advised for Putrajaya to roughen up with a powerful military neighbour in its waters, as a sovereign nation, it must stand up for its rights.

¹ Lecturer, Department of Strategic Studies, National Defence University Malaysia, Kuala Lumpur.

² See BA Hamzah, "Malaysia and South China sea Disputes: Applicability of international law" in Keyuan Zou (ed.) Routledge Handbook of the South China Sea (Routledge, forthcoming).

³ Note verbale from the Malaysian Mission of Malaysia addressed to the Secretary General of the United Nations on 29 July 2020. The earlier note verbale was sent on 12 December 2019.

⁴ On 6 May 2009, Malaysia and the Socialist Republic of Vietnam submitted jointly to the Commission on the Limits of the Continental Shelf (CLCS), in accordance with article 76, paragraph 8, of United Nations Convention on the Law of the Sea, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in respect of the southern part of the SCS.

https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf

On 12 December 2019 Malaysia submitted a partial submission to the CLCS in the SCS. https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html

⁵ See Tom Right and Bradley Hope, *Billion Dollar Whale: The man who fooled Wall Street, Hollywood, and the World*, *Scribe Publications*, 2019.

⁶ On April 21, the US Navy deployed *the USS America* to the South China Sea. Its latest amphibious assault ship sailed through the Malaysian waters, close to where a Chinese survey ship was harassing *West Capella*, the oil drilling vessel on contract with Petronas as if giving signals to China to back- off from the Malaysian waters.

⁷ See B.A Hamzah, "James Shoal Claim: Malaysia undisputed owner", *RSIS Commentary*, 1 July 2014. According to Mike Pompeo's statement, "James Shoal is not and never was PRC territory, nor can Beijing assert any lawful maritime rights on it."

⁸ In 2014, former Prime Minister Nguyen Tan Dung said Vietnam was considering legal action following the deployment of a Chinese oil rig to waters claimed by Hanoi – a dispute that triggered anti-Chinese riots and a marine standoff. See "Vietnam Could Take China to Court", 6 November 2019. *Reuters*.

<https://www.freemalaysiatoday.com/category/highlight/2019/11/06/vietnam-could-take-china-to-court-over-maritime-dispute/>

⁹ See "The Dragon's New Teeth", *The Economist*, 7 April 2012.

<https://www.economist.com/briefing/2012/04/07/the-dragons-new-teeth>

¹⁰ BA Hamzah, "The geopolitical reality of regional coexistence in a Chinese Lake", Paper presented at an international conference on the South China Sea, Cooperation for regional security and development, Hanoi, Vietnam 2009.

¹¹ Derek Grossman, "India is the Weakest link in the QUAD", *Foreign Policy*, July 23, 2018.

¹² President Trump withdrew from the Paris Climate Change Treaty, The Iran nuclear deal, the Transpacific Partnership, alienated the NATO alliance and most recently, he withdrew funding from the World Health Organisation as he searches for a scapegoat to his failure to deal with corona virus pandemic as well as domestic violence in the US.

¹³ See President Xi Jin-Ping's speech at World Economic Forum, Davos, 7 January 2017.

http://www.china.org.cn/node_7247529/content_40569136.htm

¹⁴ CSIS Report, Signalling Sovereignty: Chinese Patrols at Contested Reefs in Asia, *Maritime Transparency Initiative*, Washington DC, 29 September 2019.

¹⁵ Following the publication of Mike Pompeo's press statement on 13 July 2020 on the US policy on "US Position on maritime Claims in the South China Sea", China went on damage control mode. President Xi-Jing ping pleaded with some heads of State in Southeast Asia for their support. The Foreign Minister Wang Li was reportedly on a damage control mission to five countries in Europe ostensibly to discuss the issue of Hong Kong and Huawei. However, the South China issue is likely to be on the agenda. See Stuart Lau, "Damage control at heart of Chinese Foreign Minister Wang Yi's Mission to Europe," *South China Sea Morning Post*, 24 August 2020.

<https://www.scmp.com/news/china/diplomacy/article/3098615/damage-control-heart-chinese-foreign-minister-wang-yis-mission>

¹⁶ In its note verbale to the UN Secretary General dated 26 May 2020 Indonesia made the following points: Jakarta is not party to the territorial claim; no maritime features in the Spratly Islands is entitled to an economic zone or continental shelf; the nine-dash -line lacks legal basis.

¹⁷ B A Hamzah, "Tensions Rising, Again: South China Sea Disputes 2.0?", *RSIS Commentary*, 4 May 2020. Number 082.

<https://www.rsis.edu.sg/wp-content/uploads/2020/05/CO20082.pdf>

¹⁸ BA Hamzah, "East Asia Regional Security Falls Apart", *Asia Sentinel*, 3 September 2019.

<https://www.asiasentinel.com/p/east-asian-regional-security-architecture-falls-apart>

¹⁹ A new public opinion study shows that about 51% of Filipinos surveyed have "little trust" for China, the lowest since 2018. See Philippine trust in China drops over South China Activity, *Voice of America*, 25 July 2019. <https://learningenglish.voanews.com/a/philippine-trust-in-china-drops-over-south-china-sea-activity/5051752.html>

²⁰ The report, entitled "Averting Crisis: American strategy, military spending and collective defence in the Indo-Pacific" was published on Aug. 19, 2019 and calls for a collective strategy among the US allies in the region to counter China's growing military power. The Report was co-authored by Ashley Townshend, Brendon Thomas-Noone and Matilda Steward.

²¹ See also Bred Lendon, "China could overwhelm US military in Asia in hours, Australian report", 5 July 2019, CNN. <http://bnn1info.com/English/NEWS/a376305/China-could-overwhelm-US-military-in-Asia-in-hours-Australian-report-says.html>

²² Fareed Zakaria, "What happened to the American Century?" *Foreign Affairs*, Jul-Aug, 2019. <https://www.questia.com/magazine/1P4-2253185838/what-happened-to-the-american-century>

CHAPTER 7

Maritime Law Enforcement in Malaysia's Exclusive Economic Zone

Fadzil Mokhtar

Introduction

The South China Sea is one of the most contested sea in the world,¹ and Malaysia's exclusive economic zone (EEZ) that stretches into this sea is also subject to overlapping claims by Brunei, China, Taiwan, the Philippines and Vietnam. Malaysia's EEZ of 200 nautical miles from the coast of East Malaysia is of immense geostrategic and economic significance to the country as it is to the other claimants. Indeed, Malaysia derives much of its oil and gas resources from its EEZ, and several of its oil fields and platforms lie within the waters claimed by China.² Moreover, its EEZ offers lucrative fisheries critical to Malaysia's fishing sector as it was reported that the zone should be Malaysia's last frontier for increasing multispecies fisheries production.³ In fact, the areas within Malaysia's EEZ are found to be among the most productive fishing grounds, especially for small pelagic fish.⁴

The economic potential of its EEZ has led to Malaysia confronting increased incursions by foreign vessels into its waters. It was recently reported that there were 238 detected intrusions by foreign vessels into Malaysia's EEZ from 2016 to 2019, out of which 89 belonged to the Chinese Coast Guard while 149 were fishing vessels.⁵ As a matter of fact, encroachment of foreign fishing vessels into Malaysia's EEZ has remained a perennial concern as it has contributed to the reduction in the amount of fish in the zone. More alarmingly, is the continued presence of Chinese fishing militia which has not only harassed local fishermen but has also been aggressive in its maneuvers when confronted by enforcement vessels.⁶ That aside, the April 2020 standoff between the *West Capella* and *Haiyang Dizhi 8* was equally disconcerting. The latter was itself conducting a survey within Malaysia's continental shelf while purportedly intimidating Malaysia's exploratory activity.

Even though Malaysia has put in place several legislations to regulate activities in the zone,⁷ enforcing its laws in maritime areas that are also claimed by other States is not unproblematic. It can be a source of friction and trigger a response from the other State whenever its nationals are involved. Most often, the main issue of contention will be the right of the coastal State⁸ to exercise its jurisdiction in areas yet to be delimited because enforcement activities may be considered as unilateral acts by a State that have an adverse impact on the interests of other disputant States.

This article, thus, endeavors to provide a brief description of the position of maritime law enforcement in contested waters with a view to identifying Malaysia's legal capacity to protect its sovereign rights over natural resources in its EEZ. For the sake of completeness, it begins with a general description of the legal regime governing the EEZ, followed by a discussion on the legal position of unilateral actions in disputed waters. The article then highlights some of the issues associated with maritime law enforcement in Malaysia's EEZ.

The Exclusive Economic Zone and Its Legal Regime

The EEZ is an area beyond and adjacent to a State's territorial sea which shall not extend farther than 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.⁹ The EEZ consists of the seabed and its subsoil, the waters superjacent to the seabed and the airspace over the waters.¹⁰ The EEZ was an innovative concept created by UNCLOS III as a result of compromise between coastal States, and major maritime powers; the coastal States wanted the zone to be placed under their sovereignty so as to enable them to exercise control over the resources adjacent to their coast, but with certain freedoms guaranteed to other States, whilst maritime powers regarded the area as part of the high seas, with coastal States having the rights for exploring and exploiting the natural resources therein.¹¹ Both options were ultimately rejected, and a sui generis regime was instead adopted. The EEZ is thus neither an extension of the territorial sea, where State sovereignty exists, nor a part of the high seas, where freedom is enjoyed.

It is noteworthy that the EEZ can be coterminous with the continental shelf, the breadth of which can, generally, extend up to 200 nautical miles from the baseline, or, in some cases, beyond it, but not exceeding 350 nautical miles.¹² The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea of a coastal State. It follows that where an EEZ is claimed, the continental shelf itself becomes the seabed part of the EEZ. However, the superjacent waters above the continental shelf beyond 200 nautical miles remain as part of the high seas.¹³

UNCLOS strictly governs the rights and jurisdictions of both coastal and flag States¹⁴ in the EEZ. Article 56(1) UNCLOS grants a coastal State sovereign rights over the following matters in the EEZ: firstly, the right to explore, exploit, conserve and manage the living and non-living resources of the seabed and its subsoil and superjacent waters. Secondly, the right with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The term “sovereign rights” denotes that the State merely has exclusive rights for the economic exploration, exploitation, conservation and management of the resources therein, and that no other State can undertake these activities without the express consent of the coastal State.¹⁵

With respect to enforcement jurisdiction, a coastal state is expressly empowered by UNCLOS to enforce its sovereign rights for the exploration, exploitation, conservation and management of living resources in its EEZ. To enforce its rights, Article 73(1) permits the state to take the necessary measures against foreign vessels to ensure compliance with its laws and regulations, including boarding, inspection, arrest and judicial proceedings. It is implicitly clear that a coastal state is not restricted to the actions specified in Article 73, but may take any other measures that are necessary to enforce its sovereign rights to the living resources in its economic zone.

Unlike living resources, UNCLOS does not explicitly provide for enforcement jurisdiction over non-living resources in the EEZ. But the International Law Commission in its commentary regarding the sovereign rights over the continental shelf for the purpose of exploring and

exploiting its natural resources stated that “[s]uch rights include jurisdiction in connection with the prevention and punishment of violation of the law.”¹⁶ Procedures for enforcement actions are left for the State to formulate. It is noteworthy that Malaysia has incorporated enforcement jurisdiction in respect of non-living resources in the EEZ in its domestic legislations.

The South China Sea Disputes

The South China Sea is a semi-enclosed sea that sprawls an area approximately 3.8 million square kilometers, bordering, among others, the coastlines of China, Taiwan, the Philippines, Brunei, Malaysia, and Vietnam.¹⁷ It comprises of four island groups all of which are in dispute: the Paracels, claimed by China, Taiwan and Vietnam; the Pratas, disputed by China and Taiwan; the Scarborough Reef and Macclesfield Bank, contested by the Philippines, China and Taiwan; and the Spratlys, claimed in whole by China, Taiwan and Vietnam, and in part by the Philippines, Malaysia and Brunei.¹⁸

The Spratly Islands consist of about 230 islets, reefs and sandbanks,¹⁹ less than 40 of which are above water at high tide, spread over an area exceeding 410,000 square kilometers.²⁰ China and Taiwan claim an area encompassed in a U-shaped line, also known as the nine-dashed line, that constitutes more than 80 per cent of the entire South China Sea.²¹ China advances a historic claim to sovereignty over the Spratly Islands, and sovereign rights over the waters and seabed as well as subsoil within its nine-dashed line. Similarly, Vietnam and the Philippines based their claims on history and effective occupation, with the former claiming all the islands and features above sea level, whilst the latter’s claims are confined to features within the area called Kalayaan in the Spratly archipelago.²² Malaysia, on the other hand, claims eleven features based on the ground that they are located on its continental shelf,²³ and Brunei lays claim to Louisa Reef. Many of the features in the Spratlys are occupied by the respective claimants, of which five are under Malaysia’s occupation.²⁴ The dispute arising from the overlapping claims to the various features in the Spratly Islands is about which claimant has sovereignty over those maritime features,²⁵ as the State in possession

thereof will be able to claim, in certain circumstances, the various maritime zones, including an EEZ and continental shelf, and exercise prescriptive as well as enforcement jurisdiction therein to protect its rights and interests.

Apart from the aforementioned conflicting claims to the offshore islets and reefs, all littoral States bordering the South China Sea have laid claims to an EEZ and continental shelf that stretch from their mainland, or from their archipelagic baselines in the case of Indonesia and the Philippines.²⁶ However, none of the States have issued official charts indicating the outer limits of their EEZ with the exception of Malaysia and Vietnam which have indicated their 200 nautical miles EEZ in the map attached to their joint submission in May 2009 for an extended continental shelf.²⁷ The Philippines has objected to this joint submission on the basis that the areas claimed are disputed not only because they overlap with its own maritime zones, but also because of the controversy surrounding the territorial claims on some of the islands in the area including the State of Sabah.²⁸ China, likewise, registered its objection, asserting that the areas contained in the joint submission infringe its “sovereignty, sovereign rights and jurisdiction in the South China Sea.” China further maintained that it 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.”²⁹ A map attached to this communication indicates its nine-dashed line that extends close to the coast of East Malaysia.

As it is, the South China Sea is subject to conflicting claims to territorial sovereignty over the numerous features by the coastal States, and overlapping claims to sovereign rights and jurisdiction over the sea itself.³⁰ These include Malaysia’s EEZ that overlaps with that of Brunei, China, Taiwan, the Philippines and Vietnam as depicted in Figure 1.

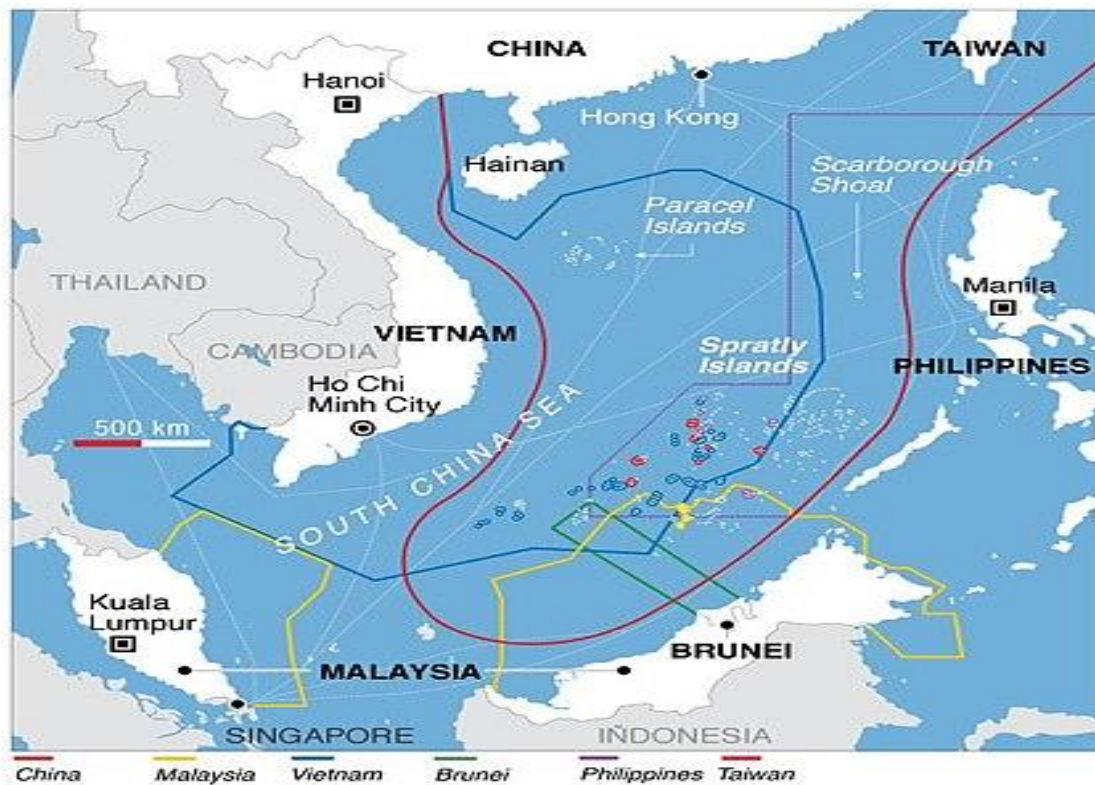


Figure 1: Maritime Claims in the South China Sea³¹

The competition for the Spratlys and their surrounding waters is driven mainly by the strategic and economic significance of the South China Sea. It is located on the major international shipping route linking the Indian Ocean to Northeast Asia,³² and control over the maritime areas would afford dominance over an important sea line of communication carrying about one third of global shipping.³³ In addition, the seabed of the South China Sea is believed to contain an estimated 213 billion barrels of oil reserves as well as a vast reserves of natural gas.³⁴ Above all, is the abundance of living resources in the South China Sea, on which the States in the region depend for their source of food security, and employment that can be generated by the fisheries sector. It is therefore little wonder that claimant States are competing to enforce their rights to the natural resources in the South China Sea, and the manner they undertake maritime law enforcement activities across conflicting jurisdictional claims is considered as a major conflict driver today.³⁵

Maritime Law Enforcement in General

Maritime law enforcement is an indispensable means for a State to manifest its sovereign rights and jurisdiction within its EEZ and continental shelf. It comprises measures taken by a State that are necessary to ensure compliance with its relevant laws at sea, and may include actions to board, inspect, arrest and prosecute infringing vessels. Although, as a general principle, foreign vessels are under the exclusive jurisdiction of their flag State and are immune from the jurisdiction of any other State, consent of the flag State is dispensed with for law enforcement actions by a coastal State in its EEZ or continental shelf as these are areas in which the State possesses an independent enforcement jurisdiction.³⁶ Nonetheless, McLaughlin outlines several prerequisites that must be in place for a State's enforcement operations to be legitimate as they involve interference with otherwise immune foreign vessels.³⁷

First, the capacity of a coastal State to undertake maritime law enforcement is underpinned by the existence of national legislations regulating the conduct which is the subject of the enforcement action, and the State must have the authority to regulate such matters in the maritime area where the infringement is alleged to have occurred. The prescriptive and enforcement jurisdiction is typically attributed to a State by international treaties the provisions of which will have to be incorporated into municipal laws to enable their domestic application.³⁸ These national legislations criminalize conduct that would constitute an infringement of the States' rights, and authorize the State to enforce its rights as well as to implement its obligations under the international instruments. Such legislations are necessary not only for the implementation of the treaty, but also to provide the legal basis for the action to be taken by the enforcement agent against offending foreign vessels.

More importantly, the legislations must be applicable to the maritime area in question. In the case of living and non-living resources, the reach of a coastal State's prescriptive and enforcement jurisdiction is only confined to the breath of its EEZ which should not extend beyond 200 nautical miles from the baseline from which the territorial sea is measured. This jurisdiction can extend to a maximum of 350 nautical miles if an extended continental shelf is claimed, but it is only limited to

enforcement of rights over non-living resources and sedentary species on the continental shelf.

Ordinarily, meeting those two prerequisites for maritime law enforcement is not problematic. Enforcement actions can be undertaken for as long as there are adequate legislations covering matters over which a coastal State is entitled to make under the relevant international treaties, and there exist maritime areas in which the State enjoys sovereign rights. However, the position of China in relation to the second precondition merits closer scrutiny. It may be recalled that China claims sovereignty over the Spratly Islands, and sovereign rights over the waters and seabed as well as subsoil within its nine-dashed line, but its claims are lacking in detail. China has neither clarified the maritime zones generated by those islands, nor the nature and character of its nine-dashed line.³⁹ In any case, the waters enclosed by the nine-dashed line, extending into Malaysia's EEZ and continental shelf, are beyond any realizable EEZ and continental shelf entitlements that can be generated by its mainland coast, Hainan or even the Paracel Islands. Nor can these waters constitute the maritime zones generated by the Spratly Islands over which it claims sovereignty as it was found that none of the high tide features there are legally capable of generating entitlements to an EEZ or continental shelf.⁴⁰ Moreover, China's claim to historic rights over natural resources within the nine-dashed line was also found to be "incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided by the Convention."⁴¹

For the reasons discussed above, it may be argued that there is no legal basis for China to assert its sovereign rights to the living as well as non-living resources in what is Malaysia's EEZ and continental shelf. It therefore follows that China lacks the jurisdiction to enforce its laws thereof in those areas. Unless its enforcement operations are based on matters related to universal jurisdiction (like piracy and pollution control), China's interference with foreign vessels in the said areas without the consent of the flag State, purportedly to safeguard its sovereign rights to natural resources, will be invalid and may be inconsistent with international law. However, given that the award of the tribunal is non-binding on China vis-à-vis Malaysia, China will continue to assert its claims while disputing the maritime zones claimed by Malaysia.

In fact, pursuant to the PCA award, China issued a statement reaffirming its indisputable territorial sovereignty and maritime rights in the South China Sea, and that it firmly opposed activities infringing upon its rights and interests in the maritime areas under its jurisdiction.⁴²

The other prerequisite for a legitimate law enforcement operation relates to the enforcement agent who must be authorized within the national legal framework to act against the foreign ship in relation to its infringement of the aforementioned national law in the maritime area in question.⁴³ While the type of platform that should be utilized is not specified by UNCLOS, it is well established that only State vessels which are authorized by the State can undertake law enforcement operations, including those operated by the navy, coast guard, marine police and other clearly identified State vessels on non-commercial service.⁴⁴ As a corollary, similar vessels enjoy sovereign immunity by virtue of Article 32. Thus, China's law enforcement vessels that encroach into Malaysia's EEZ shall not be subjected to any law enforcement actions. However, the vessels of China's maritime militia do not fall into this category as they are privately owned and are operated for commercial purposes.

Maritime Law Enforcement in Disputed Areas

Technically, a coastal State is not precluded from enforcing its laws and regulations in areas within its jurisdictional reach even though those areas are subject to overlapping claims.⁴⁵ Yet undertaking maritime law enforcement in such areas is actually far from easy owing to the prevailing uncertainty as to which of the claimants has exclusive sovereign rights or jurisdiction over the overlapped areas.⁴⁶ Until the boundaries of the overlapping areas are delimited, every claim is presumed to be legally correct, and that each of the claimant States is equally entitled to claim the relevant rights to, and exercise jurisdiction within, the areas in question.⁴⁷ Therefore, the concerned States are at liberty to unilaterally exercise their rights in the areas of overlapping claims provided due regard is paid to the rights of the other disputant States.⁴⁸

However, unilateral activities in contested maritime areas have the potential of stoking conflicts between the claimant States, especially when

the other claimants respond to those activities with their own unilateral measures. Thus, UNCLOS prescribes rules that regulate the conduct of State parties in maritime boundary disputes pending a final determination of their claims. In particular, Articles 74(3) and 83(3) respectively become relevant where there exists an overlapping claim to the EEZ or continental shelf:

“[T]he 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.”

These identical provisions outline both positive and negative obligations: the obligation to earnestly enter into practicable provisional arrangements, and the obligation not to hamper or jeopardize the reaching of the final settlement of the maritime dispute. The two interlinked obligations simultaneously seek to promote activities as well as limit unilateral conduct in a contested area pending final delimitation.⁴⁹

The first obligation aims to get claimant States to formulate interim practical measures for the utilization of resources of the area during the transitional period. The Ghana/Cote d'Ivoire Arbitral Tribunal pointed out that this obligation requires parties with overlapping claims to act in good faith towards finding an interim solution, but does not oblige them to reach an agreement on any provisional arrangement.⁵⁰ The first obligation in respect of the requirement to enter into provisional arrangement will not be discussed as it is apparent that efforts towards that end are likely to be futile given the prevailing circumstances. The scores of overlapping claims, some of which are yet to be clearly defined, and the inability of ASEAN and China to hammer out the long-awaited Code of Conduct for the South China Sea will continue to undermine the reaching of any meaningful provisional arrangement. The discussion will instead focus on the obligation of self-restraint that is encompassed in the second pillar of Articles 74(3) and 83(3).

Like the first obligation, the second is also one of conduct; States are to exercise restraint by abstaining from acts that would prejudice the reaching of a final agreement of the dispute. The phrase “not to hamper or jeopardize the reaching of a final agreement” in the second limb of Article 74(3) and 83(3) serves to prevent States from engaging in unilateral activities that can adversely impede the successful conclusion of a final delimitation agreement.⁵¹ However, the Guyana/Suriname Arbitral Tribunal clarified that this obligation does not preclude the conduct of activities within the contested area provided those activities would not have the effect of hampering or jeopardizing the final settlement of the dispute.⁵²

The Guyana/Suriname case provides an authoritative interpretation of the second obligation incumbent upon disputant States. The dispute between Guyana and Suriname arose as a result of oil exploration activities of concession holders granted by the former in the continental shelf claimed by both countries. The “*C. E. Thornton*,” an oil rig and drill ship licensed by Guyana, was to begin exploratory drilling within the disputed area when it was instructed to leave the place within twelve hours, or face the consequences, by two patrol boats from the Surinamese Navy. Both the States alleged each other of breaching their obligation “not to hamper or jeopardize the reaching of a final settlement.” Suriname asserted that, by authorizing the exploratory drilling in a disputed area, Guyana had hampered or jeopardized the reaching of a final agreement.⁵³ Guyana, on the other hand, maintained that Suriname had violated the said obligation because its threat of force against the “*C.E. Thornton*” rendered it difficult to conclude a final delimitation,⁵⁴ to which Suriname replied that its expulsion of the oil rig was a valid exercise of its law enforcement jurisdiction to prevent unlawful drilling in the disputed area.⁵⁵

In considering whether the second limb of Article 74(3)/83(3) was breached by both the States, the Arbitral Tribunal laid down the standard of whether unilateral acts have a “permanent physical impact on the marine environment.”⁵⁶ It further stated that unilateral acts that cause a physical change to the marine environment would generally be classified as acts hampering or jeopardizing the reaching of a final agreement, and some exploratory drilling might cause such permanent damage whereas

seismic testing would not. The reason is that acts causing permanent damage would result in a “perceived change to the status quo,” thereby prejudicing the position of the other party to the dispute.⁵⁷ Accordingly, Guyana was held to have violated its obligation of not hampering or jeopardizing a final delimitation agreement by authorizing exploratory drilling in the disputed area without directly informing Suriname of its plans. As to Suriname’s act of expelling the “*C.E. Thornton*,” the Tribunal found that the action was not a mere law enforcement activity, but rather a threat of force in a disputed area which, besides threatening international peace and security, jeopardized the reaching of a final delimitation.”⁵⁸ The violation of its obligation “not to hamper or jeopardize” was the consequence of its forceful conduct before any attempt to bring Guyana to the negotiating table, or, failing which, to invoke the compulsory dispute resolution provisions of UNCLOS.⁵⁹

It can thus be restated that only unilateral acts causing irreparable prejudice to the rights of a disputant State would violate the negative obligation to exercise self-restraint as they hamper or jeopardize the reaching of a final delimitation, while those leaving no permanent physical damage on the marine environment are allowed within contested areas.⁶⁰ This “not to hamper or jeopardize” obligation is underpinned by the notion of mutual restraint. It not only limits the scope of unilateral conduct, but also curtails the manner in which a coastal State can respond to the activities unilaterally undertaken by the other claimants.⁶¹ The rationale underlying this obligation is that a unilateral act would increase the difficulties in reaching a final settlement, and the response thereto from the other party can undermine the prospects of concluding the final delimitation.⁶²

The aforementioned brings forth the question as to whether a disputant State can enforce its legislations in contested waters as a response against a violation of the obligation of self-restraint by another claimant. In this respect, it is worth recalling the Guyana/Suriname case wherein it was ruled that Suriname had jeopardized the reaching of a final delimitation as its expulsion of the drilling ship, the “*C.E. Thornton*” was not a mere law enforcement activity, but rather a threat of force in a disputed area which had threatened international peace and security.”⁶³ As the ruling against Suriname was made pursuant to the finding on its

threat of force, it is unclear whether non-forcible enforcement measures would satisfy the obligation to refrain from hampering or jeopardizing a final settlement.⁶⁴ Hence, whether a coastal State is permitted to undertake activities not involving threat or use of force to enforce its sovereign rights against the other claimants in disputed waters remains an unsettled issue. Some scholars are of the view that enforcement activity against other claimant States' flagged vessels is not consistent with the obligation "not to hamper or jeopardize" as it may aggravate the situation, and peaceful means should instead be preferred in line with the decision in *Guyana/Suriname*.⁶⁵ Others, conversely, opine that law enforcement actions should be allowed, for they may be necessary as countermeasures to a unilateral act of the other party, particularly when there is an urgent need to preserve the interests of the coastal State after a breach has started and while it is taking place.⁶⁶ In this regard, law enforcement activities, even those short of threat or use of force, should only be pursued as a last option. In accordance with the jurisprudence of international tribunals, pacific means of dispute settlement must be exhausted before a recourse to law enforcement. Only in situations of urgency, and after failing to safeguard its rights through other means, will it be considered appropriate for a State to resort to enforcement action. To do otherwise may result in a State incurring international responsibility for the contravention of its obligations under Article 74(3) or 83(3) UNCLOS.⁶⁷

In light of the foregoing, and setting aside the question of the legality of China's maritime claims, it is permissible for Malaysia as well as the other claimants to undertake unilateral activities in the areas of overlapping claims provided, they lead to no permanent physical damage to the marine environment that would otherwise cause irreparable prejudice to the position of the other disputant States. In this regard, the tagging of the *West Capella* by China's *Haiyang Dizhi 8* in April 2020 may arguably be considered as an unjustified interference with a permissible unilateral activity undertaken by Malaysia in what it considered was its EEZ, for the exploratory activity conducted by *West Capella* did not cause irreparable prejudice to China's position as a claimant. By the same token, the unilateral survey conducted by *Haiyang Dizhi 8* in the same area may also be classified as an activity permitted by Article 74(3) as no irreparable prejudice was occasioned to Malaysia.

In a similar vein, it is also permissible for fishing vessels of all claimant States to fish in the contested waters as it leaves no permanent damage to the marine environment given the transitory nature of fishing activities, and the renewable characteristic of fish stocks. Accordingly, neither Malaysia nor the other claimants are entitled to enforce their fisheries legislations, particularly against illegal fishing, in Malaysia's EEZ for as long as the areas remain contested.

Not all fishing activities should, nonetheless, be allowable. Fishing activities unilaterally undertaken could lead to over-exploitation of living resources, raising the likelihood of one party hampering or jeopardizing the resolution of the maritime dispute. Likewise, it may also be argued that non-sustainable exploitation of living resources, like employing destructive fishing practices and harvesting of endangered species, could cause permanent damage to the marine environment.⁶⁸ The rights of rival claimants could be irreparably prejudiced should protected species were to become extinct, or habitats of living resources were to be destroyed by harmful fishing practices. Furthermore, the Tribunal in The Philippines/China case ruled that a State has an obligation under Article 192 and 194(5) UNCLOS, read with other applicable international law, to exercise due diligence to take the necessary measures "to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."⁶⁹ Still, enforcement actions may not be justifiable if they are not preceded by other peaceful means of resolving the issues in view of the legal position of law enforcement operations discussed above.

Another question that has arisen pertains to the geographical scope to which the obligation of self-restraint applies. Some scholars take the view that the obligation not to hamper or jeopardize only applies in the areas that are the subject of the dispute, while the other parts of a State's claim remain unaffected even though they are yet to be delimited.⁷⁰ On this interpretation, Malaysia's position relative to Vietnam and the Philippines is less complicated as the disputed areas are confined to the outer limit of their maritime entitlements. Malaysia can focus its law enforcement operations against all foreign vessels in the undisputed portions of its EEZ without any likelihood of hampering or jeopardizing a final delimitation. Still, policing is required in the areas of overlapping

claims to avoid a legal vacuum, but this may be accomplished by the concerned States establishing a mechanism for coordinating their enforcement activities in those areas.

That said, adopting the same interpretation vis-à-vis China is a different matter altogether in view of its expansive claims in the South China Sea, extending close to James Shoal, 60 miles from the Sarawak coast and about 1,800 km from the Chinese mainland. This raises the question as to where exactly is the disputed area considering that almost the entire EEZ of Malaysia falls within China's nine-dashed line. Applying the abovementioned interpretation would place Malaysia at a considerable disadvantage as it would be obligated to exercise self-restraint in its entire EEZ even though the waters claimed by China are manifestly excessive, ill-defined and unjustified by international law. In fact, another scholar argues against ascribing geographic scope to Article 74(3) and 83(3) as such an interpretation "assumes that all unilateral claims are valid under international law," and would result in constraining unfairly and inequitably a State from undertaking unilateral activities in an area that overlaps with another claimant's extreme claim that has no basis under international law.⁷¹ Yet, China's refusal to accept the 2016 invalidation of its "nine-dashed line by the Permanent Court of Arbitration"⁷² will mean that Malaysia may have to rely on the former's good faith interpretation of its obligation to eschew unilateral activities in the South China Sea. Even its rejection of China's claims to historic rights, or other sovereign rights or jurisdiction with respect to the maritime areas of the South China Sea,⁷³ though undeniably well founded, still begs the question whether Malaysia is under the obligation to exercise self-restraint in its EEZ that is the subject of another State's dubious and illegitimate competing claims.

Turning to maritime law enforcement activities in Malaysia's EEZ, it has to be noted that Malaysia has been cautious in undertaking such actions, preferring instead on diplomatic efforts to deal with the repeated incursions of the other claimants' registered vessels into its maritime areas.⁷⁴ Admittedly, Malaysia has been reported to enforce its fisheries legislations against Vietnamese fishing boats, but those operations were carried out in areas over which Malaysia has undisputed sovereign rights, and to which Articles 74(3) and 83(3) are not applicable.⁷⁵ Nonetheless,

when confronted with encroachments of Chinese flagged vessels into its EEZ, Malaysia resorted to shadowing and ordering those craft to leave the area, without any aggressive maneuvers, followed by quiet diplomatic protests.⁷⁶ Even the encroachment of 100 Chinese fishing boats guarded by two Coast Guard vessels into its EEZ, near Luconia Shoals, 134 nautical miles off the Sarawak coast, in March 2016 was met by self-restraint.⁷⁷ Malaysia's approach has been, and continues to be, anchored on its policy of abstaining from taking unilateral steps, holding steadfast to the peaceful settlement of disputes, and upholding the rule of law.⁷⁸ Whereas Malaysia's approach could have, arguably, been shaped by power asymmetry vis-à-vis China, the fact remains that Malaysia has fulfilled its obligation not to hamper or jeopardize the reaching of a final delimitation incumbent upon it by virtue of Articles 74(3) and 83(3), notwithstanding its rejection, and the questionable legality, of the latter's nine-dashed line.

The same, however, cannot be said of China. There have been increased and more coordinated incursions of China's registered vessels into Malaysia's EEZ comprising of assets from various agencies including the Chinese Navy, Coast Guard, Fisheries Law Enforcement Command and fishing militia.⁷⁹ More alarmingly, these vessels, especially those of the fishing militia, have been aggressive in their maneuvers when confronting Malaysian ships, leading to a few unreported incidents of physical contact between those craft.⁸⁰ Cases of Malaysian fishermen being chased away from the country's EEZ are also not uncommon,⁸¹ whilst the flanking of *West Capella* by *Haiyang Dizhi 8* in April 2020 has raised concerns of China's blatant disregard for the rights of rival claimants in the South China Sea although Malaysia has been less affected by China's growing assertiveness as compared to the other claimant States. Particularly worrisome is the fact that China has over the years enhanced its maritime law enforcement capabilities, and maintained that its law enforcement operations are routine activities to protect its people's legitimate rights in waters near the Spratly Islands.⁸² Yet it has remained opaque on the legal basis supporting its maritime law enforcement activities other than relying on the long invalidated historic claims to the nine-dashed line.⁸³ Despite China's repeated assurance of its commitment to a peaceful resolution of the South China Sea dispute, its unilateral maritime law enforcement activities have fallen short of the standard set by international jurisprudence with respect to a State's obligation to avoid

hampering or jeopardizing the reaching of the final delimitation agreement.

Conclusion

The EEZ was an innovative concept created by UNCLOS that recognizes the importance of marine natural resources for the prosperity of coastal States. UNCLOS thus endows coastal States with sovereign rights and jurisdiction over those resources, but the exercise of these rights is curtailed when the EEZ is also claimed by other States. Once overlapping claims are made, unilateral conduct, including the exercise of enforcement jurisdiction, in the disputed area is strictly regulated, and States are imposed with the obligations to seek for provisional arrangement, and to refrain from acts that would be prejudicial to the reaching a final settlement. The aim of the law is to exhort parties to work towards peaceful settlement of their disputes, and prevent escalation of the dispute through the exercise of mutual restraint.

The obligation to exercise restraint has made efforts to protect Malaysia's sovereign rights in its EEZ far from unproblematic because the zone falls into China's nine-dashed line. The narrow interpretation given to the obligation means that Malaysia is obligated to refrain from unilateral acts in almost its entire EEZ that is disputed by China. Malaysia has thus been unfairly hamstrung from enforcing its legislations even when faced with repeated incursions by Chinese vessels. Yet despite the lack of legal basis for China's maritime claims, Malaysia has fulfilled its obligation to not hamper or jeopardize the final delimitation of its maritime dispute with China.

However, China has not reciprocated Malaysia's exercise of restraint even though the obligation is also incumbent upon it. It has instead considered maritime law enforcement as an unconstrained right, in complete disregard to the parameters set by international law with respect to unilateral acts in disputed waters.

On balance, it can be concluded that notwithstanding the infringement of Malaysia's sovereign rights over natural resources in the

EEZ, its capacity to enforce those rights is constrained not by the want of laws, but by the obligation to abstain from aggravating the dispute in the South China Sea. As China has not demonstrated any inclination to observe its own obligation, Malaysia might likely continue to be disadvantaged by the application of Articles 74(3) and 83(3). Still and all, Malaysia should not hesitate to categorically object to China's unlawful unilateral activities in its EEZ especially in view of the fact that it has not recognized China's excessive maritime claims. By so doing, Malaysia would not only be protecting its rights and interests, but, most importantly, would be upholding the supremacy of the rule of law that underpins international peace and security.

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- ⁷ The principal legislations are the Continental Shelf Act 1966, the Exclusive Economic Zone Act 1984, and the Fisheries Act 1985.
- ⁸ "Coastal state" is a state, with a sea coast, "which holds jurisdiction in those maritime areas over which it has sovereignty or sovereign rights, and which it has validly declared adjacent to its coast." United Nations Office of Drug and Crime. (2020). *Maritime Crime: A Manual for Criminal Justice Practitioners*. Vienna: United Nations, p. 41.
- ⁹ UNCLOS, Article 55 and 57.
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¹⁴ The term “flag state” means the state of registration of a vessel. United Nations Office of Drug and Crime, op cit., p. 41

¹⁵ Tanaka, op cit., p. 127.

¹⁶ Report of the International Law Commission to the General Assembly, Document A/3159, 23 April – 4 July 1956, p. 297.

¹⁷ Teh, L.S.L., Witter, A., Cheung, U., Sumalia, U.R. & Yin, X. (2017). What is at Stake? Status and Threats to South China Sea Marine Fisheries. *Ambio*, Vol. 46, 57-72, p. 57. The size of the area includes the Gulf of Tonkin.

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²⁸ Communication from the Philippine Mission to the United Nations to the Secretary General of the United Nations dated August 4, 2009 With Regard to the Joint Submission Made by Malaysia and Vietnam to the Commission on the Limit of the Continental Shelf.

²⁹ Communication from the Permanent Mission of the People’s Republic of China to the United Nations to the Secretary General of the United Nations dated May 7, 2009 With Regard to the Joint Submission Made by Malaysia and Vietnam to the Commission on the Limit of the Continental Shelf.

³⁰ Beckman, op cit., p. 142.

³¹ Extracted from Just Earth News dated September 17, 2018, available at <https://www.justearthnews.com/development-details/G/4361/is-beijing-winning-control-of-the-south-china-sea.html>.

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³⁴ Jahangir, S. (2020, June 25). The Strategic Importance of the South China Sea. *World Geostrategic Insights*, 1-4, p. 2.

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³⁶ This exception also applies to internal waters, archipelagic waters, territorial sea and contiguous zone. However, flag States’ warships and their other vessels on government non-commercial service remain immune from the jurisdiction of another state. McLaughlin, R.

(2016). Authorizations for Maritime Law Enforcement Operations. *International Review of the Red Cross*, 98(2), 465-490, p. 479.

³⁷ Ibid., p. 475.

³⁸ This is necessary in countries with “dualist legal system,” in which a national legislation is required for the domestic application of an international treaty. Although, most provisions of an international treaty is self-executing (it is automatically incorporated into domestic law upon ratification) in countries adopting the “monist tradition,” legislations may still be required to cater for the non-self-executing elements of an international treaty.

³⁹ Bernard, L. (2016). The Right to Fish and International Law in the South China Sea. *Journal of Political Risk*, 4(1), 1-34, p. 1.

⁴⁰ In the Matter of the South China Sea Arbitration Between The Republic of the Philippines and The People’s Republic of China, PCA Case N° 2013-19, Award, 12 July 2016, para. 646..

⁴¹ Ibid., para. 261.

⁴² Ministry of Foreign Affairs of the People’s Republic of China, Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (2016/07/12), available at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379493.shtml.

⁴³ McLaughlin, op cit., p. 468.

⁴⁴ Ibid., p. 466.

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⁵¹ Logchem, Y.V. (2014). The Scope for Unilateralism in Disputed Maritime Areas, in Schofield, C.H., Lee, S.W., Kwon, M.S. (eds), *The Limits of Maritime Jurisdiction*. The Netherlands: Martinus Nijhoff Publishers, p. 179.

⁵² Guyana/Suriname Award, op cit., para. 480.

⁵³ In the Matter of an Arbitration Between Guyana and Suriname, Rejoinder of Suriname, p. 152, para. 2c.

⁵⁴ In the Matter of an Arbitration Between Guyana and Suriname, Reply of Guyana, Vol 1 (1 April 2006), p. 139.

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⁵⁶ Guyana/Suriname Award, op cit., para. 478. It is noted that the 2017 decision of ITLOS in Ghana/Cote d’Ivoire with respect to Ghana’s unilateral drilling of mineral resources is a

disputed maritime area has reinforced the law that unilateral act causing irreparable prejudice to the rights of the other party would be prohibited – Logchem, Y.V. (2019). *The Rights and Obligations of States in Disputed Maritime Areas: What Lessons Can be Drawn From the Maritime Boundary Dispute Between Ghana and Cote d'Ivoire?* *Vanderbilt Journal of Transnational Law*, 52:121, 121-177, p. 124.

⁵⁷ Guyana/Suriname, Award, op cit., paras. 470, 480 and 481.

⁵⁸ Guyana/Suriname, Award, op cit., para. 484.

⁵⁹ Ibid., para. 484.

⁶⁰ Logchem, op cit., p. 177. However, Youri van Logchem, in his detailed analysis of the Guyana/Suriname award observed that identifying which activities would cause “permanent damage to marine environment” or “affect the other party’s right in a permanent manner” can be problematic due to the lack of consistency in the use of terminology. For example, activities coming within “physical change to the marine environment” is more expansive than those under “permanent physical change to the marine environment” as the word “permanent” excludes activities that only affect the environment temporarily. Additionally, Nishimoto observes that the view that activities causing no physical change are generally permissible has not received support among scholars as a more flexible approach taking into consideration the context of relations between States may be necessary to determine whether the obligation of self-restraint has been breached - Nishimoto, K. (2019). *The Obligation of Self-Restraint in Undelimited Maritime Areas*. *Japan Review*, 3(1), 28-38, p. 34. Yet a fundamental resolution of this issue is not anticipated, and the standard set in the Guyana/Suriname case will likely prevail in the near future.

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⁶⁵ Ibid.; Herdt, S. D. (2019). *Meaningful Responses to Unilateralism in Undelimited Maritime Areas*. *Journal of Territorial and Maritime Studies*, 6(2), 5-26, p. 16.

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⁶⁹ Ibid., para. 959.

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CHAPTER 8

Malaysia's Approach Towards Illegal, Unreported and Unregulated (IUU) Fishing in South China Sea

Inderjit Singh

Introduction

Overfishing is the biggest threat to ocean habitats in every corner of the globe. More than 2.6 million people worldwide are dependent on the protein source scattered in oceans. (UNDP,2010). The Food and Agriculture Organization (FAO) mentioned that 85% of global aquatic sea food from oceans were over exploited and exhausted (FAO,2016). Overfishing happens when fish are netted at a faster rate than they could reproduce. Fish stocks have declined by one-third over the past 30 years and are expected to fall by another 59 per cent by 2045 if current practices continue.¹

Advanced fishing technology, rising demand for fish and illegal fishing are some of the contributing factors to overfishing. Overfishing can have both destructive and long-lasting environmental and cultural impacts. The global value of illegal, unreported and unregulated IUU fishing is projected to be US\$ 22 billion (RM90.4 billion) per annum (FAO, 2016). It is also estimated that 53 per cent of the world's marine fishery resources have been fully exhausted or fished to the highest sustainable amount, while 32 per cent are actually overfishing, depleting or recovering from depletion.² FAO and the World Bank have cautioned that potential pressures on seafood will increase at the current rate of production. Over the past decades, international trade in fish and fishery products has risen dramatically, based on FAO fishery estimates, as almost all countries trade large portions of their fishery production on the world market. For example, the Indian Ocean Tuna Commission (IOTC) recently indicated that at least 70,000 tons of tuna caught by large longline vessels are unreported each year in the Indian Ocean.³

This has led the FAO to support the International Plan of Action to avoid, assess and abolish Illicit, Unreported and Unregulated (IPOA-IUU)

Fisheries, which includes legislation to prohibit international trade in IUU fish and fishery products (FAO,2001; FAO,2002). Up to 26 million tons of fish are illegally captured each year, estimated conservatively at between 10 and 20% of global catches (N. Majid, 2017). However, the quantity derived from Illicit, Unreported and Unregulated (IUU) fishing could not be calculated from the amount of internationally traded fish and fishery items. With the rising demand for marine resources and limited marine resources, particularly to support the supply of food, IUU fishing has become a major threat to fishing countries.

Several scientific studies have emphasized how IUU fishing threatens marine habitat and abuses fishery resources at the South China Sea (SCS). However, not enough of this research has translated into policy-relevant information that can be used to influence the agenda-setting processes taking place in regional fora, particularly in the SCS. Consequently, most policy enforcement initiatives are not evidence-based, and thus cannot effectively safeguard fisheries resources. Coastal states bordering the SCS have the right to claim maritime zones, as undertaken by Malaysia, the Philippines, Brunei, Vietnam and Indonesia, not only for territorial sea but also for Economic Exclusive Zone (EEZ) and continental shelf.⁴

The lucrative sector is also a significant contributor to the gross domestic product (GDP) of several ASEAN nations. All Indo Pacific stakeholder groups sharing the SCS in particular need to help mitigate the negative security, political and economic implications of IUU fishing.⁵ Fishing landings in Malaysia in 2011 were 1,665,857 tons, with an estimated RM 9.38 billion worth.⁶ The contribution to the Gross Domestic Product (GDP) was 1.1 per cent. The maritime regions of Malaysia are surrounded by other states on almost every side. Since territorial waters are vast and require multiple governing bodies to ensure regulations, it is difficult to trace owners of IUU fishing vessels (J. Azmath & D. Grewal,2017). This paper will look at the beginnings of IUU fishing with the perspective of ASEAN and how Malaysia complement its IUU approach in the SCS. Currently there is no specific IUU fishing policy on SCS but this paper will look at certain general approaches which can be identified and complement for SCS in general.

What is IUU?

The 2001 FAO International Plan of Action (IPOA) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO, 2001; FAO, 2002) provides the following composite definition of illegal, unreported and unregulated (IUU) fishing. IUU fishing tends to be one of the biggest threats to marine ecosystems due to its strong potential to threaten national and international attempts to preserve fisheries as well as marine biodiversity conservation efforts. Illegal fishing happens when fishing is carried out by vessels from countries that are parties to a Regional Fisheries Management Organization (RFMO) but operate in breach of their rules or operate in waters of a country without authorization.⁷ It is estimated that IUU fishing accounts for approximately one third of the total catches in some important fisheries and may represent an overall cost to developing countries of between USD 2-15 billion a year.

Unreported fishing occurs when catches are not recorded or misreported to local national authorities or RFMOs. Unregulated fishing occurs when fishing is carried out by vessels without nationality or when flying the flag of non-partisan States of related fisheries organizations which do not consider themselves bound by their laws. Essentially, fishing which can be defined as illegal, unreported and unregulated (IUU) is now widely understood as fishing activities which are inconsistent with or contravene the management or conservation measures in place for a particular fishery (Agnew and Barnes, 2004). Globally, IUU fishing has been a growing concern in the Southeast Asian region, and even nationally, given that such activities continue to threaten the sustainability of fisheries resources. The global value of IUU fishing is estimated at US\$ 22 billion per annum (RM90.4 billion).⁸ Every year, up to 26 million tons of fish are illegally captured, with a conservative estimate of 10 to 20 % of global catches (FAO,2016). By definition, "IUU fishing is either an expressly illegal activity or, at a minimum, an activity undertaken with little regard for applicable standards" (FAO,2010).

Fishermen of IUU achieve an unfair advantage over legal fishermen; i.e. those who work according to those criteria. In this context, IUU fishers are "free riders" who disproportionately profit from the sacrifices made by others in the interests of proper protection and management of

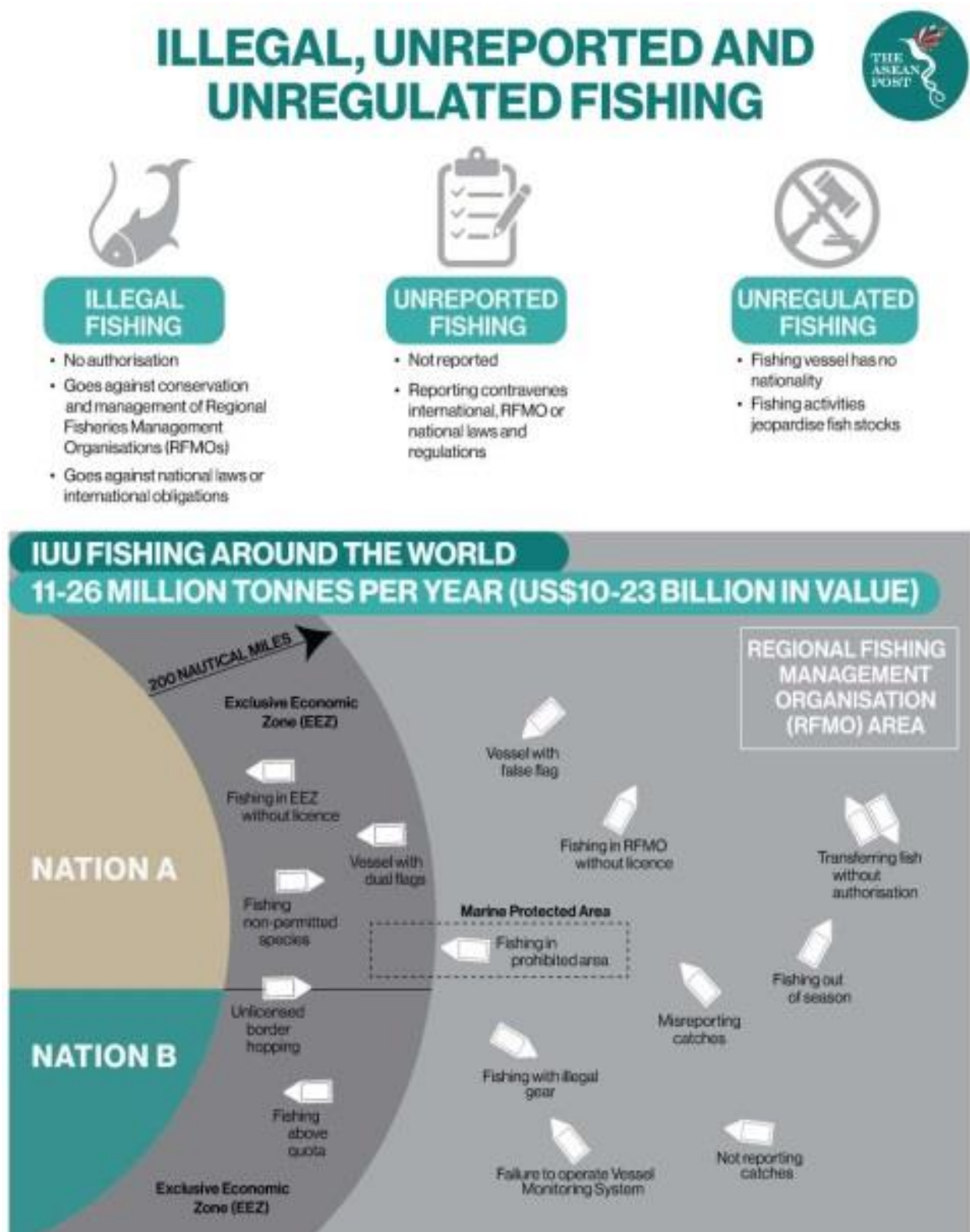
fisheries. This condition damages the morale of legal fishermen and also allows them, even more importantly, to ignore the law. “The objective of International Plan of Action for Illegal, Unreported and Unregulated (IUU (IPOA-IUU) is to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law”.

The IPOA-IUU defines IUU fishing to the definitions below.⁹ Malaysia also uses these definitions in her NPOA-IUU. “Illegal fishing refers to fishing activities carried out by national or international vessels in waters under a State's control, without that State's permission, or in contravention of its laws and regulations”. It is carried out by vessels flying the flag of States which are parties to a particular RFMO but operate in contravention of the conservation and management measures introduced by that organization, by which States are bound, or by specific provisions of applicable international law or in contravention of national laws or international obligations, including those performed by collaborating States. Unreported fishing refers to fishing activities not recorded or misreported to the appropriate national authority in contravention of national laws and regulations or conducted in the area of competence of a particular RFMO that have not been recorded or misreported in contravention of that organization’s reporting procedures.

Unregulated fishing refers to fishing activities conducted by vessels without nationality or by those flying the flag of a State not party to that organization or by a fishing body in the field of operation of a particular RFMO in a manner that does not comply with or contravene the protection and management measures of that organization or in areas or fish stocks in relation to that organization IUU fishing exploits corrupt administrations and weak management regimes, especially those of developing countries lacking capacity and resources for effective oversight, control and monitoring (MCS). It is present in all forms and dimensions of fisheries, occurs in high seas as well as in areas under national jurisdiction, affects all aspects and stages of fish capture and use, and may often be related to organized crime. Fishery resources available to genuine fishermen are heartlessly poached by IUU fishing, frequently

contributing to the collapse of local fisheries, with small-scale fisheries proving to be especially vulnerable in developing nations.

IUU fishing threatens livelihoods, heightens hunger and raises food insecurity. It is well known that in the last 20 years, IUU fishing has escalated, especially in high seas fisheries (FAO,2016). Unfortunately, the complex, adaptable, highly mobile and clandestine nature of IUU fishing prevents its effect from being straightforwardly calculated.¹⁰ However, rough estimates suggest that IUU fishing around the world's oceans weights approximately 11–26 million tons of fish annually or a price tag of US\$ 10–23 billion (FAO,2016).¹¹ Thus, IUU fishing continues to facilitate additional IUU fishing, generating a downward spiral of failure in management. IUU fishing is essentially performed in all catch fisheries, whether in areas under national control or in the high seas. IUU fishing presents a direct and serious threat to the successful protection and management of many fish populations, with numerous adverse effects on fisheries and on people who depend on them in pursuit of their legal livelihood. By undermining the goals of fisheries management, IUU fishing may cause a fishery to collapse or seriously hinder efforts to restore declining fish stocks.¹² This, in turn, may lead to loss of both short- and long-term economic and social opportunities and can diminish food security. Left unchecked, the advantages of successful fishery management can be totally cancelled by IUU fishing.



Source: IUU. European Commission, US National Intelligence Council (2016)

IUU fishing is essentially performed in all catch fisheries, whether in areas under national control or in the high seas. IUU fishing presents a direct and serious threat to the successful protection and management of many fish populations, with numerous adverse effects on fisheries and on people who depend on them in pursuit of their legal livelihood. The unreported existence of IUU fishing renders quantification especially difficult.¹³ Available information nevertheless indicates that, for some important fisheries, IUU fishing accounts for up to 30 percent of total catches and in at least one case possibly much more.¹⁴ Examples of IUU fishing in Malaysian fishing waters involve interference by foreign and local fishing vessels as well as unlicensed fishing by local fishing vessels. Until now, however, there have been no credible corresponding estimates of IUU fishing in Malaysia. IUU fishing has negative and widespread implications for the climate, culture and the economy. Besides its effect on target species survival, IUU fishing adversely affects related and dependent species as well as the broader environment. IUU fishing threatens efforts at international, regional and national levels to efficiently protect and maintain fish stocks, fisheries impact and biodiversity. In the end, IUU fishing will cause a fishery to collapse. At a different level in the perspective of regional picture, the security, safety and sovereignty of a nation is rendered by the existence of such illegal foreign fishing elements. Existing international agreements must be committed by all states to ensure the implementations of all requirements and conduct of IUU in the SCS.

However, when handling fishery resources, applying such sovereign-based policies is counterproductive to the survival of those resources. Fish are migratory and flexible by nature, and do not respect territorial boundaries. While they may spawn in the EEZ of one country, during their juvenile stage they travel to another region, and end their lives in the EEZ of another country. Imposing aggressive state-driven IUU fishing practices in a specific area would prohibit fish from migrating to another location, thus reducing the entire fishing population in the region. Through continuing to equate the fisheries crisis with the territorial disputes, maritime law enforcement agencies in the area would be likely to implement similar requirements while addressing the fisheries crisis in the area. While these requirements tend to protect national interests, they also threaten the sustainability of common regional resources. IUU fishing

also challenges regional stability by making other transnational crimes simpler. As a crime per se, IUU fishing leads per year to a global loss of up to \$45 billion (FAO,2018).¹⁵ Due to diminishing fish stocks in the SCS, however, fishing communities are now forced to pursue revenue through alternative avenues that still rely on a fishing boat and a crew familiar with the waterways of the area.¹⁶

IUU in South China Sea

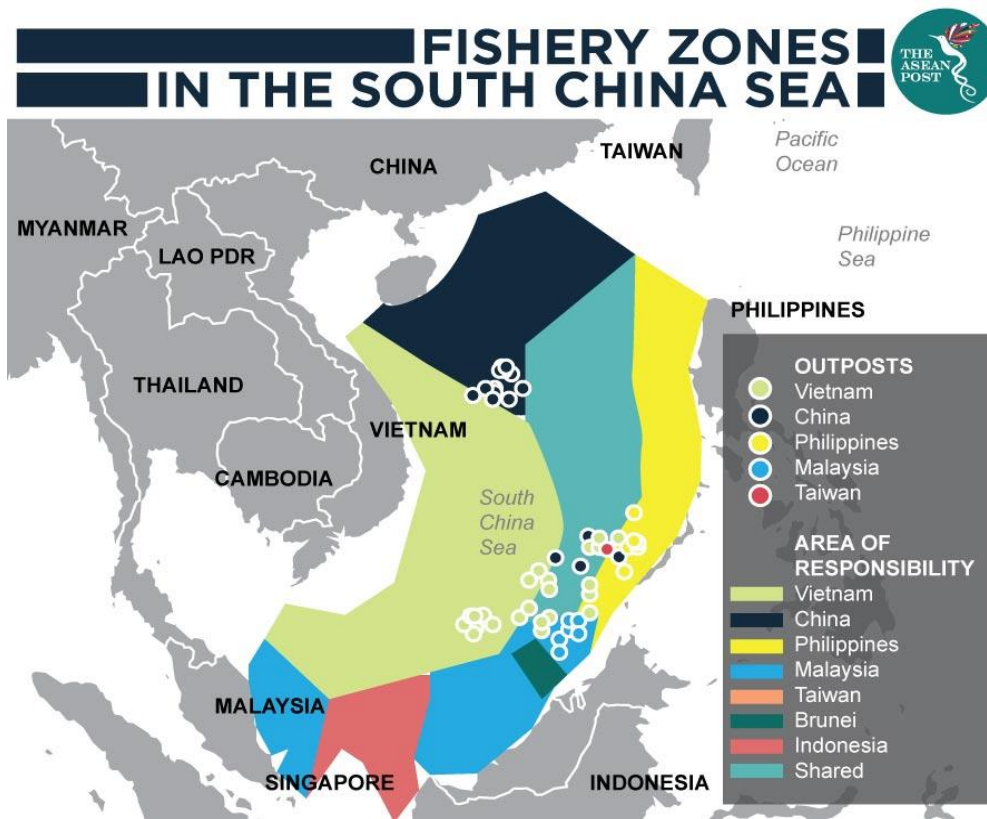
The SCS is situated in a tropical and semi-tropical area [Refer: Figure 1 in Chapter 3, above]. In terms of geographical location, it is the crossroads between Asia and Oceania, connecting the Pacific and the Indian Oceans. The SCS [Refer: Figure 1 in Chapter 3, above] region, as the world's third largest continental sea, is more than 3 million square kilometers. Southern China's island, Indochina, Malay's peninsulas and Malay's Archipelago surround the sea. There are nine countries in the SCS, namely China, Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, Brunei and the Philippines. SCS is a large maritime region bordered by countries such as Malaysia, Vietnam, Indonesia, Brunei, the Philippines and China.¹⁷ SCS accounts for 12 per cent of global fish catch in 2015, and more than half of the world's fishing vessels are reported to be operating there. Officially, about 3.7 million people are working in its fisheries.¹⁸ But they have the SCS dangerously overfished. Total stocks have been depleted by 70-95 per cent since the 1950s and grab rates have declined by 66-75 per cent over the last 20 years.¹⁹ The Southeast Asian Fisheries Development Centre, an intergovernmental organization that comprises all non-China SCS nations, reports that IUU fishing currently accounts for 8-16 percent of total catch. Fishery stocks in the SCS are required to meet global demand for food. The SCS, which also hosts more than half of the world's fishing boats, accounts for about 12 percent of global fish catch. ²⁰ Fish stocks in the SCS are now only 5 percent of what they once were in the 1950s.²¹

ASEAN Perspective on IUU

Overfishing can have detrimental and long-lasting impacts on the ocean as well as society. A report by the World Wildlife Fund (WWF) states that

“once considered inexhaustible, our oceans are now facing a global crisis as more and more people compete for fewer and fewer fish.”²² It is estimated that 53 percent of the world’s marine fishery resources have been completely depleted or fished to the maximum sustainable level, while 32 percent is currently being overfished, depleted, or recovering from depletion.²³ Examples of IUU fishing in Malaysian fishing waters include international and local fishing vessels intervention as well as unlicensed fishing by local fishing vessels. Until now, however, the corresponding estimates of IUU fishing in Malaysia have not been accurate. IUU fishing has negative and widespread climatic, cultural and economic consequences. In addition to its impact on the survival of target species, IUU fishing adversely affects both associated and dependent species as well as the wider ecosystem. IUU fishing challenges attempts to effectively preserve and sustain fish stocks, fisheries impact and biodiversity at the international, regional and national levels.

The Resolution on Sustainable Fisheries for Food Protection for the ASEAN Area Towards 2020 serves as policy platform for the formulation of national policies to harmonize all efforts in the area.²⁴ In 2016, ASEAN member states jointly declared war on IUU fishing and pledged to enhance sustainable fishing in the region during the ASEAN-Southeast Asian Fisheries Development Center (SEAFDEC) regional cooperation forum in Thailand. The association aimed to increase the competitiveness of ASEAN’s seafood industry and to comply with international standards and regulations. Combating IUU fishing has been complicated as many countries share fishery resources, and fishery products are traded intra-regional before export. To tackle IUU fishing involves close collaboration between agencies in different countries. Monitoring, control and surveillance systems (MCS) need to be improved, and the traceability of sources of fish and fishery products needs to be enhanced at the risk of more ASEAN countries receiving EC alerts.²⁵ The three areas in the region prone to IUU fishing include the Gulf of Thailand, Indonesian waters and Malaysia’s Exclusive Economic Zone (EEZ). The Department of Fisheries in Malaysia stated that the country loses up to RM6 billion (US\$1.4 billion) to illegal fishing every year”.²⁶ Despite major plans and strategies within ASEAN to combat IUU fishing across the region as stated in the Strategic Plan of ASEAN Cooperation on Fisheries 2016 to 2020 that was adopted in 2018, illegal fishing is still rampant in Southeast Asia.



Source: Ocean Asia Project (2016)

With China, Taiwan, Vietnam, the Philippines and Malaysia claiming part of the sea, making ocean governance and fisheries management a political obstacle, the situation in the proper SCS is more problematical²⁷. While the Association of Southeast Asian Nations (ASEAN) has plans to address the problem of IUU fishing through, for example, the 2016 to 2020 Strategic Action Plan on ASEAN Fisheries Cooperation adopted in 2018, they have not gone far enough to rein in the problem. Because of the importance of fishing in the area, both economically and as an essential source of livelihood, overfishing in the SCS should not be regarded as some minor ancillary issue of the main sovereignty dispute. It should better be treated and considered as a big issue that needs to be rectified as soon as possible. Citing the UN Convention on the Law of the Sea (UNCLOS), experts suggest that countries in the Southeast Asian region namely Malaysia, Vietnam, the Philippines, Brunei and Indonesia should collaborate with other claimants on the management of fish supplies without undermining claims over the sea. Since all communities across

the SCS are heavily dependent on fish stocks for food security and income, this working group notes that "there is a definite legal duty to cooperate on practical necessity based on fisheries management and the environment".

Malaysia's Approach in Policy Implementation in SCS

According to the FAO of the United Nations, up to 30 per cent of global catches may be illegally captured or remain unreported. Unreported catches make sustainable fishing difficult and jeopardize all conservation initiatives (FAO,2016). Malaysian fisheries waters span a 4,492 km long coastline consisting of the mainland of Peninsular Malaysia, Sabah and Sarawak with 453,186 km² of EEZ waters in the Andaman Sea, the Malacca Straits, the SCS and the Celebes Sea.²⁸ As the territorial waters are infinite and require various governing bodies to ensure compliance, it is difficult to trace owners of IUU fishing vessels. In addition to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the International Plan of Action (IPOA) on IUU fishing is one of the key international instruments adopted to facilitate sustainable long-term fisheries.²⁹ The territorial waters available for exploration and management increased considerably from 47,000 to 160,000 square nautical miles with the EEZ declaration in 1980.³⁰ It is estimated that approximately 980,000 metric tons of fish (value RM6 billion) are robbed annually by illegal foreign vessels, usually from Thailand, Vietnam and Indonesia, in Malaysian waters (mainly East Coast) particularly in the SCS.³¹

Just 50 percent of the fish captured in Malaysian waters have been known to be landed; the remainder are 'unreported' mostly due to territorial sea encroachment by foreign fishing vessels. Infringement of foreign fishermen on the eastern coast of the Malaysian Peninsula not only affects local fishermen's livelihood, but also causes degradation of marine biodiversity, as well as being tangled with drug and weapons trafficking. There are two types of fishing operations, traditional and commercial. Traditional fishing in Malaysia refers to vessels of less than 40GRT (Gross Register Tonnage), which operate traditional gears. Commercial fishing refers to 40GRT and above vessels which use commercial gear such as

trawl nets, purse seines (fish and anchovies), longlines and traps. In 2011, there were 134,110 fishers employed onboard 53,002 approved fishing vessels operating in the fisheries business. A total of 80,546 (60.06%) of this workforce operated on board fishing vessels using traditional fishing gears while 53,564 (39.94%) fishermen operated on board commercial fishing vessels.³² The key threats of IUU fishing in Malaysia include, but are not limited to, infringement of license terms, infringement by local and foreign fishing boats, illegal fishing, misreporting of catch and the use of damaging gears and methods to fish. This has impacted both the fishermen's economic and social livelihoods and the Malaysian fisheries business. Illegal fishing on Malaysian fisheries waters by international fishing vessels poses a security threat to the country and a heavy and unhealthy rivalry with local fishermen. Local illegal fishing also leads to social tensions between licensed fishing operators and unlicensed fishing operators, and between the interference of commercial fishing vessels and traditional fishermen.

In Malaysia, the Malaysian Fisheries Department gathers and maintains data and information about local fishing vessels and foreign flagged vessels engaged in IUU fishing in Malaysian fishing waters as well as international fishing vessels engaged in IUU fishing in the high seas and entering Malaysian ports. Malaysia always cooperate with other nations in the investigation of IUU fishing activities. Under section 15(2) of the 1985 Fisheries Act, Malaysia can, without the approval of the Malaysian Fisheries Department, refuse the loading or unloading of any fish, fuel or supply or transshipment of any fish in Malaysian fishery waters. To some extent, Malaysia has introduced its EEZ, a comprehensive surveillance, control and monitoring system established under the United Nations Convention on the Law of the Sea (UNCLOS) in 1982.³³ In the context of fisheries, Monitoring, Control And Surveillance or MCS is defined by the FAO as an extension of the conventional implementation of national fisheries rules to help broader fisheries management problems. MCS, "functions are controlled as the selection, calculation and analysis of fishing activity, including but not limited to: capture, species composition, fishing effort, by-catch, discards, area of service, etc.; regulation includes determining the terms and conditions under which resources may be collected, and monitoring includes controlling and supervising fishing activities to improve the efficiency of fishing activities". There are a

number of agencies in Malaysia which are involved in the MCS activities as listed in **Table 1**.

Table 1: Agencies in Malaysia which are involved in the Monitoring, Control and Surveillance (MCS) activities

<i>NO</i>	<i>DEPARTMENT</i>	<i>LAWS</i>	<i>FUNCTIONS</i>
1.	Department of Fisheries (DOFM)	<ul style="list-style-type: none"> • Fisheries Act 1985 • International trade in Endangered Species act 2008 • Exclusive Economic Zone (EEZ) Act 1984 	“DOFM is responsible for the overall control of matters relating to fisheries. It administers and enforces the Fisheries Act 1985, EEZ Act 1984 and the Endangered Species Act 2008. It also undertakes research and offers technical assistance to fisheries in the marine, aquaculture, and freshwater sectors”
2.	Department of Fisheries Sabah (DOFS)	<ul style="list-style-type: none"> • Fisheries Act 1985 • Sabah Fisheries Ordinance 1964 • International Trade in Endangered Species Act 2008 	“DOFS is responsible for the management of fisheries related matters in the state of Sabah only. It also administers and enforces the Fisheries Act 1985 and the International trade in engendered Species Act 2008. It also provides technical support for the marine, aquaculture and freshwater fisheries industry.”
3.	Fisheries Development Authority of Malaysia (LKIM)	<ul style="list-style-type: none"> • Fisheries Development Authority Act 1971 	“The functions of LKIM are to promote and develop efficient and effective management of fisheries enterprises and fish

		<ul style="list-style-type: none"> Fishermen's Association Act 1971 	marketing: to promote, facilitate and undertake economic and social development of the Fishermen's Associations: to register, control and supervise Fishermen's Associations and Fisheries Co-operatives and to make provisions for matters related thereto: and to control and coordinate the implementation of aforesaid activities"
4.	Department of Marine Parks Malaysia	Fisheries Act	"The Department of Marine Parks Malaysia is entrusted with the function to afford special protection to aquatic flora and fauna, and protect, preserve and to manage the natural breeding grounds and habitat of aquatic life with particular regard to species that are rare or endangered within the Marine Parks"
5.	Malaysia Maritime Enforcement Agency (MMEA)	Malaysian Maritime Enforcement Agency Act 2004	"MMEA was established to perform enforcement functions for ensuring the safety and security of the Malaysian Maritime Zone with a view to the protection of maritime and other national interests in such zone. The MMEA is entrusted to enforce law

			and order under any federal law; perform maritime search and rescue; prevent and suppress the commission of an offence; lend assistance in any criminal matters on a request by a foreign State as provided under the Mutual Assistance in Criminal Matters Act 2002 (Act 621); carry out air and coastal surveillance; establish and manage maritime institutions for training; ensure maritime security and safety; as well as maritime search and rescue”
6.	Marine Police	Police Act 1967	“The Marine Police has the responsibility to control, plan and implement operations involving public order. It is also involved in planning and coordinating joint maritime patrols and joint border patrols with the Malaysian Armed Forces and the army/navy and coast guards of neighbouring countries. It is also involved in planning, controlling and coordinating search and rescue operations”

7.	Marine Department	Merchant Shipping Ordinance 1952 • Merchant Shipping Ordinance (Amended) 1998.	"The Marine Department has the responsibility to register fishing vessels above 500 GT and register fishing vessels of 15 NRT and above operating in Sabah waters".
8.	Royal Malaysian Customs Department	Customs Act 1967	"The Royal Malaysian Customs Department is involved in the collection of direct truces such as sales tax, petroleum sales tax, service tax, excise duty and windfall profit levy for national revenue. It is also involved in trade and industry facilitation as well as enforcement and in ensuring compliance with legislations"
9.	Malaysian Quarantine and Inspection Services (MAQIS)	Malaysian Quarantine and Inspection Services Act 2011	"MAQIS is involved in the enforcement of all relevant written laws at the entry points, quarantine stations and quarantine premises to ensure that plants, animals, carcasses, fish, agricultural produce, soils, microorganisms and food which are imported into and exported out of Malaysia comply with the health aspect of humans, animals, plants and fish and food safety"
10.	Sarawak Forestry Department	National Parks and Nature Reserves	"These agencies are entrusted with the functions to protect,

	and Sarawak Forestry Corporation	Ordinance 1988 (Sarawak)	preserve and manage natural resources including aquatic fauna and flora within protected areas in Sarawak including marine or freshwater endangered or rare species”
11.	Sabah Parks and Harbours Authority	Ports and Harbours Enactment 2002	“The Sabah Port and Harbours Authority is responsible in the licensing of small vessels below 15 NRT in Sabah”
12.	Sabah Wildlife Department	Sabah Wildlife Conservation Enactment 1997 International	“The Sabah Wildlife Department is responsible to manage and converse the flora, fauna and nature of Sabah so as to ensure the perpetuation of all species within their natural habitats”
13.	Sabah Parks	Sabah Parks Enactments 1984 National Park Enactment 1977	“The Sabah Parks is responsible to protect, conserve and preserve natural areas which have been gazette as a park, especially areas which contain unique features with high esthetical values as a natural heritage”.

(Source: Malaysia's NPOA-IUU,2013)

Malaysia has also adopted various conservation measures to monitor the sustainable development and utilization of marine resources on the eastern coast of the Malaysian Peninsula including SCS. Malaysia as a fisheries region is facing severe and deteriorating fisheries management problems. Its IUU fishing problems are typically associated with competing with neighbouring fishermen like Vietnam, Thailand, and

Indonesia. The importance of controlling and implementing regulations for both fishing activities and trade should never be ignored in combating IUU fishing. Furthermore, to reduce IUU fishing, effective cooperation between government agencies, data and research management, and participation and commitment from all stakeholders are important. Such collaboration involves an effective governance structure involving numerous stakeholders that involves supervision, compliance, coordination, and involvement.³⁴ The UN Convention on the Law of the Sea I (1958) and II (1960) were among the international community's first multilateral efforts to address problems relevant to ocean governance. Given that these two conventions did not address issues related to territorial boundaries and fisheries rights, UNCLOS was further negotiated and signed in 1982 to identify nations' rights and responsibilities with respect to their use of the world's oceans and to establish guidelines for companies, the environment and the management of marine natural resources. Following the steps provided for in UNCLOS (**Table 2**), various legal instruments were made.

Table 2: UN and FAO Legal Implications in Combating IUU

<i>United Nations (UN)</i>	<i>Food and Agriculture Organization (FAO)</i>
UNCLOS 1982	"UNCLOS 1982 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993"
United Nations Fish Stocks Agreement, 1995	"United Nations Fish Stocks Agreement, 1995 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001 (IPOAIUU)"
	"FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, 2009"

(Source: Malaysia's NPOA-IUU,2013).

In Malaysia, there are a number of government ministries, departments and agencies which are involved in the implementation of the NPOA-IUU. This NPOA-IUU's overall aim is to ensure the protection of fishery resources and is a collection of current initiatives within the national system to combat IUU fishing.³⁵ This covers all the coasts of

Malaysia including the SCS. The Malaysian National Plan of Action to Discourage, Assess and Eradicate IUU Fishing (NPOA-IUU), which is consistent with the International Plan of Action on IUU Fishing (IPOA-IUU) of the FAO, is committed to contributing to the credibility of joint action to combat IUU fishing by cooperating with other countries and parties and fulfilling its obligations at the regional level. This includes refusing requests to use its ports by fishing vessels claimed to have fished for IUU. Malaysia's NPOA-IUU adheres similarly to IPOA-IUU regulations. It includes general measures aimed at all States, as well as initiatives explicitly targeted at flag states, coastal states and port states. It also includes market-related measures, measures to meet developed countries' special requirements, and steps to be taken by States through regional fisheries management organizations.

The Department of Fisheries Malaysia's Strategic Plan (2011-2020) also provides for efforts to tackle IUU fishing in Malaysia with the aim of growing the number of IUU fishing cases by 10 per cent annually from 2012-2020.³⁶ In response to the European Union legislation, the Department is also interested in issuing catch certificates to discourage IUU fishing for wild caught fish and fishery products. The NPOA-IUU was established in line with the 2001 FAO International Action Plan to Discourage, Decide and Eradicate IUU Fishing. The IPOA-IUU was established within the context of the FAO Code of Conduct for Responsible Fisheries as a voluntary instrument. The IPOA's objective is to avoid, discourage, and eradicate IUU by providing comprehensive, efficient, and clear steps for all States to act, including through appropriate Regional Fisheries Management Organizations (RFMOs) developed under international law. The IPOA-IUU calls on States to establish and adopt NPOAs by June 2004 in order to further achieve the IPOA's goals and fully incorporate its requirements as an integral part of its fisheries management programmes and budgets.

The Strategic Plan (2011-2020) of the Department of Fisheries Malaysia also provides for efforts to tackle IUU fishing in Malaysia with a view to the number of IUU fishing cases by 10 per cent annually from 2012-2020. The Department is also involved in issuing catch certificates in response to European Union legislation to prevent IUU fishing for widely captured fish and fishery products. In line with the 2001 FAO

International Action Plan to Discourage, Determine and Eliminate IUU Fishing, the Malaysian NPOA-IUU was developed. The IPOA-IUU was developed as a voluntary instrument, within the framework of the FAO Code of Conduct for Responsible Fisheries. The goal of the IPOA is to prevent, discourage and eliminate IUU by providing thorough, effective and consistent steps for all States to act, including through appropriate RFMOs established under international law. The IPOA-IUU calls on States to develop and implement NPOAs by June 2004 with a view to further achieving the objectives of the IPOA and completely integrating its requirements as an integral part of its fisheries management programmes. Approximately 980,000 metric tons of fish (worth RM6 billion) are said to be stolen annually by illegal foreign vessels, typically from Thailand, Vietnam and Indonesia, in Malaysian waters (mainly East Coast).³⁷ Just 50 percent of the fish captured in Malaysian waters have been known to be landed; the remainder are 'unreported' mostly due to territorial sea encroachment by foreign fishing vessels.³⁸ Infringement of foreign fishermen on the eastern coast of the Malaysian Peninsula not only affects local fishermen's livelihood, but also causes degradation of marine biodiversity, as well as being tangled with drug and weapons trafficking.

IUU fishing puts the Malaysian fish harvest at risk, as well as the long-term survival of Malaysia's fishing industries and the livelihood of its coastal communities, especially on Malaysia's eastern coastline. IUU fishing has adverse effects on fish populations and marine habitat resulting from the use of illegal fishing gears. Malaysia has introduced several pieces of IUU fishing regulation legislation in Malaysian waters. Notably, Malaysia's legislative authority is split between federal and state governments, as enumerated in the Federal Constitution's Ninth Schedule, which was divided into three lists. Matters relating to land management include coastal areas that fall under the control of the states, while the federal government has authority over matters related to the sea and marine resources, including coastal fisheries. By virtue of that list, Malaysia's federal government passed the *Fisheries Act*, 1985 to regulate fisheries-related matters, including the protection, management and production of marine and estuarine fisheries and fisheries.³⁹

To improve governance in Malaysian waters, the *Fisheries Act*, 1985 had undergone multiple amendments until 2012. Regional cooperation

between Thailand and Malaysia has expanded further by information sharing to achieve a shared maritime-security aim. This legislation provides regulatory and enforcement measures to combat unauthorized marine-related activities, especially illegal maritime invasion of Malaysian territorial waters by foreign fishing vessels, including the SCS.⁴⁰

Pursuant to NPOA-IUU, Section 6 of the Act empowers the Director General of Fisheries to control IUU fishing matters in Malaysia. In view of the fact that IUU can also include local fishermen or vessels, Section 8 stipulates that any fishing operation in Malaysia's fishing waters requires a valid license issued and that the vessel shall not contravene any provision of the license. As far as foreign fishing vessels are concerned, Part V of the *Fisheries Act*, 1985 sets out their rights and obligations to access fishery resources in Malaysian fishing waters. Section 15 prohibits any fishing operation by foreign fishing vessels unless allowed under an international fisheries agreement between Malaysia and another state or international organization under which the vessel is flagged. To ensure compliance with the rules and regulations, Section 46 prescribes measures to be taken where any authorized officer may act without warrant if they believe there is a violation. This provision allows an authorized officer to halt and search any vessel or vehicle transporting fish, and further to inspect all the documents and anything else on board, including the crew, equipment and the catch.⁴¹

The enactment, amendment and implementation of the *Fisheries Act*, 1985 is a reflection of Malaysia's commitment to improving its local fisheries sector and ensuring its compliance with international legal requirements and management practices. This Act has well interpreted the duties of the state as mentioned in the UNCLOS. Malaysia also has several others in place procedures of federal legislation that help reinforce and complement the implementation of the *Fisheries Act*, 1985, particularly those relating to fisheries management and compliance in the EEZ.⁴² These laws are defined in the 1984 Exclusive Economic Zone Act, the 1966 Continental Shelf Act, the 2012 Territorial Sea Act, and the 2004 Maritime Enforcement Agency Act, which are also necessary for the management of maritime-related activities and resources in the EEZ of Malaysia. The first three laws have been enacted to establish national sovereignty and sovereign rights in maritime space, while the fourth law

has been enacted. Malaysia is either a party to or a member of a variety of instruments or agreements as part of the national action plan to discourage, deter and eradicate illicit, unreported and unregulated fishing. Although many international instruments have underlined the principles of responsible fisheries for coastal states to regulate matters in relation to sustainable marine-resources management, it is also important to ensure that comprehensive regional fisheries management considers the measures to protect marine ecosystems at the regional level.

As part of the national plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing, Malaysia is either a party or member to a number of instruments or arrangements. To this end, Malaysia subscribes, adapts and adopts certain principles and standards promoted under these arrangements such as the “1982 United Nations Convention on the Law of the Sea (UNCLOS), Indian Ocean Tuna Commission (IOTC), Asia-Pacific Fishery Commission (APFIC), Southeast Asian Fisheries Development Center (SEAFDEC), Association of Southeast Asian Nations (ASEAN), ASEAN-SEAFDEC MOU on Sea Turtle Conservation and Management, IOSEA Marine Turtle Memorandum of Understanding, Turtle Island Heritage Protected Area (TIHPA) - a bilateral agreement between the Government of Malaysia and the Government of the Philippines, Intergovernmental Organization for Marketing Information and Technical Advisory Services for Fishery Products in the Asia and Pacific Region (INFOFISH), Asia-Pacific Economic Cooperation (APEC), Bay of Bengal Large Marine Ecosystem Project (BOBLME), Coral Triangle Initiative (CTI), 1978 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biological Diversity 1992 and FAO Code of Conduct for Responsible Fisheries (CCRF)”.⁴³ Although many international instruments have underlined the principles of responsible fisheries for coastal states to regulate matters in relation to sustainable marine-resources management, it is also important to ensure that comprehensive regional fisheries management considers the measures to protect marine ecosystems at the regional level.

Through regional efforts, several measures can be adopted such as preventive actions against the adverse effects of IUU fishing on marine ecosystems and the sustainability of fishing industries (**Table 3**).

Table 3: Regional Instruments to Combat IUU Fishing

<i>SEAFDEC</i>	<i>ASEAN</i>	<i>CTI-CFF</i>
SEAFDEC Regional Fishing Vessels Record (RFVR)	“ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain”	CTI-CFF Regional Plan of Action (RPOA)
	ASEAN Catch Documentation Scheme (ACDS)	

(Source: Farahdilah Ghazali et.al.)

Malaysia conducted Operation Naga in April 2019, the multi-agency task force operation led by the Malaysian Maritime Enforcement Agency (MMEA), which included Royal Malaysian Navy, Royal Malaysian Air Force, Marine Police, Air Wing Unit Police and Fisheries Department, was a big success in ensuring that Malaysian waters are free of illicit foreign vessels. Op Naga is an initiative of the Ministry of Home Affairs (KDN) following the government's approval of the proposal paper forming a Task Force to eliminate the invasion of international fishing boats by Malaysian Maritime. This KDN-led task force is a joint venture with the Ministry of Defense and Agriculture and Agri-based Industry which aims to address these issues in a comprehensive manner. At the start of the implementation of Op Naga, compliance was concentrated in the waters of West Malaysia, covering in particular the Kelantan, Terengganu and Pahang states. Op Naga Timur then activated in Sabah and Sarawak on 1 August 2019. During the implementation of Op Naga Barat conducted a total of 3,951 inspections on local and foreign fishing vessels for a period of 380 days on 16 April 2019.⁴⁴ As a result, there were 141 arrests involving 95 international fishing boats, 46 local fishing boats and 1,295 crew or crew members, most of whom were Vietnamese nationals, totaling 1,069 individuals.⁴⁵ Op Naga Timur has reported 2,572 inspections involving the detention of 182 crew or Vietnamese crew with 38 arrest cases. Together with other agencies, Maritime Malaysia, as the leader of enforcement agencies in Op Naga, is constantly working to optimize the allocation and placement of marine and air assets, especially in combating the threat of illegal entry of illegal immigrants (PATI),

international fishing boats and the spread of the COVID-19 pandemic, particularly in the SCS. The operational area included Malaysian waters and airspace in Pahang, Terengganu, and Kelantan, namely Operation Naga Timor and Op Naga Barat, which was performed in May 2019 and included all states of Perlis, Kedah, Penang, Perak, Selangor, and Johore. This operation managed to inspect 266 vessels and 25 Vietnamese fishing vessels detained by 123 crew members. The operation helped curb smuggling operations, selling subsidized diesel and gasoline to foreign fishermen, as well as illegal actions at sea.

Conclusion

IUU fishing is also triggered by high and increasing demand for seafood, particularly in Southeast Asia, where people are deeply dependent on marine food and income resources. IUU still pose a challenge to all SCS sharing nations like Malaysia. The migratory essence of fishes and the maritime laws in place demand that nations understand the situation and curb all stability constraints. There are many factors that contribute to the incidence of such fishing activities, one of them being weak governance, explicitly referring to the restricted and overlapping regulation by the relevant authorities. The operationalization of a multi-agency special task force to resolve the problem was one of the manifestations of Malaysia's response to tackling IUU fishing particularly in SCS. While the plan has been mulled for a long time and its initial development was seen, its operationalization was supposed to occur only after the details and procedures had been finalized. There has also been a strengthening of regional cooperation between the ASEAN countries to tackle illegal fishing. This has shown that apart from having a regulatory framework to address IUU fishing in Malaysia, an effective institutional structure and compliance agencies are essential for enforcing and coordinating such initiatives and maintaining responsible fishing practices, not only among the local stakeholders but also among their regional counterparts. While several international instruments have highlighted the principles of responsible fisheries for coastal states to control issues related to sustainable management of marine resources, it is also important to ensure that effective regional fisheries management takes into account the measures for the conservation of marine ecosystems. However, the

political will of each country's authorities is very critical as this will lead the nations to tackle such problems. It is important to achieve the shared objectives as well as shared areas of interest such as capacity building and knowledge sharing, increased collaboration, involvement and support from interested parties such as policy-makers, stakeholders from both the government and private sector.

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