South China Sea disputes arise again

Robert Beckman
For The Straits Times

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

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

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

The objective of this commentary is to explain the significance of Malaysia’s submission to ongoing legal disputes in the South China Sea.

WHAT AN EXTENDED CONTINENTAL SHELF? Under the 1982 UN Convention on the Law of the Sea (UNCLOS), coastal states are permitted to extend their EEZ extending to 200 nautical miles from the baselines along their coasts.

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

Unilateral partial submissions to extend the EEZ beyond 200 nautical miles are considered outside the scope of the UNCLOS.

Claims to an extended continental shelf, on the other hand, are within the scope of the UNCLOS. An extended continental shelf would give a coastal state greater access to natural resources on its continental shelf.

On May 4, 2009, Malaysia and Vietnam made a joint submission to the CLCS claiming an extended continental shelf in the southern part of the South China Sea.

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

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

After more than 10 years, Malaysia finally made that submission on Dec 12 last year. When they made their submissions to the CLCS in 2009, Malaysia and Vietnam anticipated that the Philippines would also make a submission for an extended continental shelf in the same area of the South China Sea. In fact, Manila went official communication to the CLCS in 2009 stating that the submissions of both Vietnam and Malaysia for an extended continental shelf overlap with those of the Philippines.

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

SIGNIFICANCE OF SUBMISSIONS TO THE SOUTH CHINA SEA DISPUTES

When analysed from the perspective of the ongoing sovereignty and maritime disputes over the islands in the South China Sea, the extended continental shelf claims of Malaysia, Vietnam and the Philippines are very significant.

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

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

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

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

CHINA’S OBJECTIONS IN MAY 2009

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

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

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

With the statement, an "attached map" - the now infamous "nine-dash line" map - was issued. This was the first time that this map had been circulated by China to the US.

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

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

The communications are evidence that neither China nor the ASEAN states bordering the South China Sea are backing away from their legal positions on rights to resources in the South China Sea.

Therefore, their legal disputes are likely to continue, notwithstanding the efforts of the Chinese to agree to a code of conduct for the South China Sea.

Stopn slingpsmp.com.sg

Robert Beckman is head of the Deal Law and Policy Centre for International Law, National University of Singapore.