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No. 122/2014 dated 1 July 2014

China's James Shoal Claim: Malaysia the Undisputed Owner

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Synopsis

Malaysia owns James Shoal, a submerged feature that is within its continental shelf. Being one thousand nautical miles from Hainan, James Shoal is outside the continental shelf of China; it is also outside the continental shelf of Taiwan, Vietnam, the Philippines, Brunei and Indonesia.

Commentary

JAMES SHOAL, a feature that is permanently 22 metres (66 feet) under water in the South China Sea, should not have attracted public attention regionally but for geopolitics and ignorance of international law. Malaysians have been alarmed by recent reports of vessels of the People's Republic of China Liberation Army (Navy), gathering and celebrating above the feature on more than one occasion.

China cannot appropriate any submerged features that are *not* part of its continental shelf and in its Exclusive Economic Zone (EEZ). James Shoal is more than 1,000 nautical miles (nm) from Hainan, well outside China's Exclusive Economic Zone (EEZ) and not part of its continental shelf.

James Shoal and international law

The whole affair could have been quietly resolved if the PLA Navy commanders acknowledged the international law governing a permanently submerged feature, embedded to the continental shelf of a coastal state. Unlike islands, rocks and low-tide elevations, permanently submerged features, cannot generate any maritime zone under international law.

Islands are entitled to a belt of territorial sea, continental shelf and EEZ. Low-tide Elevations (LTEs), on the other hand, belong to the state in whose territorial sea they are located. LTEs can be used to draw the state's baseline if they are located within its 12 nm territorial sea.

International law defines continental shelf as a natural extension of a country's landmass to a distance of 200 nm (maximum 350 nm). Drawn from the mainland or any of its islands in the South China Sea, the continental shelf of China is well short of James Shoal. Similarly, contrary to some suggestions, James Shoal is also not part of the extended continental shelf of Vietnam, the Philippines or Taiwan.

In May 2009, Vietnam and Malaysia put up a Joint submission on the Extended Continental Shelf to the UN

Committee on the Limit of Continental Shelf (CLCS) whereby Vietnam acknowledged that James Shoal is not part of its extended continental shelf.

James Shoal is 500 nm from Pagasa Island in the Spratlys that the Philippines has occupied since 1971. The Shoal is more than 400 nm from Itu Aba, an island that Taiwan has occupied since 1956. James Shoal is also outside Brunei's extended maritime zone which the 2009 Letter of Exchange Brunei had with Malaysia attested to. In 1969, Malaysia and Indonesia signed a Treaty on the continental shelf, off Tanjung Datu, Sarawak, which has placed James Shoal on the Malaysian side.

Contiguity not an issue

James Shoal, located 63 nm from the nearest base point (Batuan Likau) on Sarawak coast, is embedded in the continental shelf of Malaysia and within its EEZ.

Although the feature is nearer to Malaysia, Kuala Lumpur's ownership of James Shoal is not premised on geographical contiguity but on customary international law. In the *Island of Palmas (or Miangas) (United States v. The Netherlands)*, Arbitral Award, 1928 Judge Huber stated, "it is impossible to show the existence of a rule of positive international law" on contiguity to "the effect that islands situated outside territorial waters should belong to the state".

China claims James Shoal is within the disputed nine-dash line boundary which China has drawn, incorporating close to ninety percent of the South China Sea, and overlapping with the maritime domains of five other states (Brunei, Indonesia, Malaysia, Philippines, Vietnam) as well as Taiwan.

Some experts believe China did not even know of the existence of James Shoal as a submerged feature when it drew the controversial nine-dash line maritime boundary *over* it in 1947/1948. After all, China was *not* the first state to conduct any physical survey of the maritime area. Besides, there is no evidence that China discovered and administered the feature.

The British discovered James Shoal

The British discovered the Shoal and its two nearby features (Parsons' Shoal and Lydie Shoal) in the early 19th Century via many of its surveys. James Shoal first appeared on the British Admiralty Chart in the 1870s; China renamed the feature (as Tseng Mu Reef) circa 1947/1948 (1912 in some documents), when it published the nine-dash line.

The only possibility for China to "acquire" the feature, according to some experts, is via cut- and-paste method. While the international law recognises five traditional methods of territorial acquisition, the cut- and- paste method is not one of them.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) and 1958 Geneva Convention on the Continental Shelf (Malaysia and China subscribe to both Treaties) stipulate, "The rights of a coastal state over the continental shelf do not depend on occupation, effective or notional, or in any express proclamation".

In other words, Malaysia does not have to do anything under UNCLOS to own the submerged feature that is embedded on its continental shelf.

Malaysia's extensive activities on James Shoal

This notwithstanding, Malaysia has effectively asserted its jurisdiction over its continental shelf including the areas in and around James Shoal, Parson's Shoal and the Lydie Shoal. As in nearby Laconia shoals, where currently a large chunk of Malaysia's hydrocarbon resources comes from, the entire area has been explored for gas and oil.

The activities of the Malaysian authorities, which are extensive, peaceful, continuous and public in nature, include the construction and maintenance of a light-buoy on nearby Parsons Shoal on a 24/7 basis; daily patrolling and policing of the area by the Royal Malaysian Navy and the Malaysian Maritime Enforcement Agency; and undertaking economic activities like exploration for and production of hydrocarbon resources on a sustained basis.

Under international law, such display of peaceful and continuous activities over a long period is tantamount to establishing a *titre de souverain* (acts of the sovereign). This legal principle is critical in determining ownership of disputed islands, rocks and low tide elevations and by inference, submerged features on continental shelf.

The International Court of Justice (ICJ) and International Arbitration have applied this principle on numerous occasions. Two recent ICJ Cases on territorial disputes, decided on this principle, involved Malaysia with Indonesia (*Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan*) and Indonesia (2002) and Malaysia with Singapore (*Case concerning sovereignty over Pedra Branca and Pulau Batu Putih*) (2008).

In sum, the activities of the Malaysian authorities (*effectivité* to some) are by themselves sufficient to demonstrate that Malaysia is the bona fide owner of James Shoal.

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