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Oceans and the law of the sea: oceans and the law of the sea

Letter dated 1 June 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General

I have the honour to refer to the note verbale sent by the Permanent Mission of the People's Republic of China to you on 12 December 2019 in response to the submission by Malaysia to the Commission on the Limits of the Continental Shelf dated 12 December 2019. The present communication concerns only the views expressed by China regarding its maritime claims in the South China Sea and does not comment on Malaysia's submission to the Commission. As China's note asserts excessive maritime claims that are inconsistent with the international law of the sea as reflected in the 1982 Convention on the Law of the Sea, and as those claims purport to unlawfully interfere with the rights and freedoms enjoyed by the United States and all other States, the United States considers it essential to reiterate its formal protests of these unlawful assertions and describe the relevant international law of the sea as reflected in the Convention.

In its note, China makes the following assertions:

- China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao
- China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao
- China has exclusive economic zone and continental shelf, based on Nanhai Zhudao
- China has historic rights in the South China Sea

China made similar assertions immediately following the 12 July 2016 award in *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)* issued by an arbitral tribunal constituted under Part XV of the Convention (hereinafter "the Tribunal"). The United States objected to those assertions in a demarche and note verbale on 28 December 2016.¹

¹ The note was subsequently published in the *Digest of United States Practice in International Law, 2016*, at 520–522, available at <https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-United-States.pdf>.



The United States reiterates its prior objections to China's maritime claims.

Specifically, the United States objects to China's claim to "historic rights" in the South China Sea to the extent that the claim exceeds the maritime entitlements that China could assert consistent with international law as reflected in the Convention.² The United States notes in this regard that the Tribunal unanimously concluded in its ruling – which is final and binding on China and the Philippines under article 296 of the Convention – that China's claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China's possible maritime zones as specifically provided for in the Convention.

Additionally, the United States reiterates its prior objections to any claim of internal waters between the dispersed islands China claims in the South China Sea, and to any claim of maritime zones derived from treating island groups in the South China Sea as a collective. The Convention clearly and comprehensively regulates the circumstances under which coastal States can deviate from the normal baseline. Article 5 of the Convention provides, in express and unambiguous terms, that the normal baseline applies "[e]xcept where otherwise provided in this Convention." No provision of the Convention establishes an applicable exception to the normal baseline that would allow China to enclose within a system of straight or archipelagic baselines the dispersed islands and other features over which China asserts sovereignty in the South China Sea. Moreover, the United States objects to any claimed maritime entitlements based on features that are not islands within the meaning of article 121(1) of the Convention³ and thus do not generate maritime zones of their own under international law. China may not assert sovereignty over, or claim maritime zones derived from, entirely submerged features like Macclesfield Bank or James Shoal, or features like Mischief Reef and Second Thomas Shoal, which in their natural state are low-tide elevations⁴ that lie beyond a lawfully generated territorial sea entitlement. Such features do not form part of the land territory of a State in a legal sense, meaning that they are not subject to appropriation and cannot generate a territorial sea or other maritime zones under international law.⁵ These positions are consistent with the decision of the Tribunal in *The South China Sea Arbitration*.

In asserting such vast maritime claims in the South China Sea, China purports to restrict the rights and freedoms, including the navigational rights and freedoms, enjoyed by all States. The United States objects to these claims to the extent they exceed the entitlements China could claim under international law as reflected in the Convention. The United States notes that the Governments of the Philippines,⁶

² A detailed assessment of China's South China Sea maritime claims was published in 2014 in the United States Department of State publication *Limits in the Seas No. 143 – China: Maritime Claims in the South China Sea*, available at <https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf>. That publication continues to reflect the views of the United States regarding the unlawfulness of China's claim of "historic rights" in the South China Sea.

³ An island is defined in article 121(1) of the Convention as "a naturally formed area of land, surrounded by water, which is above water at high tide".

⁴ As reflected in article 13(1) of the Convention, "[a] low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide".

⁵ Thus, with respect to the assertion that "China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao" the United States observes that while China and other South China Sea claimants assert competing territorial claims to islands situated within the South China Sea, no State could lawfully assert a territorial or sovereignty claim to features that are not islands (within the meaning of article 121(1) of the Convention) or to maritime areas beyond the territorial sea generated from the normal baseline (or other applicable baseline as reflected in the rules of the Convention) of such individual islands.

⁶ The Philippines note No. 000191-2020 (March 6, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf.

Viet Nam,⁷ and Indonesia⁸ have separately conveyed their legal objections to the maritime claims set out in China's note verbale No. CML/14/2019.⁹ The United States again urges China to conform its maritime claims to international law as reflected in the Convention; to comply with the Tribunal's 12 July 2016 decision; and to cease its provocative activities in the South China Sea.

I request that the present letter be circulated to all States Members of the United Nations as a document of the General Assembly, under agenda item 74 (a), and of the Security Council, and that it be posted on the web page of the Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea.

(Signed) Kelly **Craft**
Ambassador
United States Representative to the United Nations

⁷ Viet Nam note No. 22/HC-2020 (March 30, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf.

⁸ Indonesia note No. 126/POL-703/V/20 (May 26, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf.

⁹ Available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf.