



NOTE NUMBER: 08/21/02

The Permanent Mission of New Zealand to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the submission by Malaysia HA 59/19 dated 12 December 2019 to the Commission on the Limits of the Continental Shelf and the views expressed in the Notes Verbale No. CML/14/2019 dated 12 December 2019, No. CML/11/2020 dated 23 March 2020, No. CML/42/2020 dated 17 April 2020, No. CML/46/2020 dated 2 June 2020, No. CML/48/2020 dated 18 June 2020, No. CML/54/2020 dated 29 July 2020, No. CML/56/2020 dated 7 August 2020, No. CML/63/2020 dated 18 September 2020, No. CML/1/2021 dated 28 January 2021 and the Annex to the letter dated 9 June 2020 addressed to the Secretary-General.

New Zealand reiterates that it does not take a position on competing claims of territorial sovereignty in the South China Sea.

This Note does not comment on the substance of the submission by Malaysia, but rather affirms New Zealand's position in respect of certain aspects of the United Nations Convention on the Law of the Sea (UNCLOS):

- New Zealand underscores the universal and unified character of UNCLOS, which sets out the definitive legal framework within which all activities in the oceans and seas must be carried out.
- The establishment of maritime zones must therefore be made in accordance with UNCLOS. UNCLOS was intended to "settle...all issues relating to the law of the sea".¹ While matters not regulated by UNCLOS continue to be governed by the rules and principles of international law², this is not relevant to the establishment of maritime zones or to the rights and responsibilities of states within those zones, which are comprehensively regulated by UNCLOS.
- While New Zealand is party to a number of multilateral agreements relating to the maritime sphere negotiated subsequent to the entry into force of UNCLOS, these agreements broadly implement and are consistent with UNCLOS, and do not derogate from the overarching rules it provides. With respect to the current negotiation of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, the United Nations General Assembly has explicitly reaffirmed

¹ UNCLOS, Preamble, paragraph 1.

² UNCLOS, Preamble, paragraph 8.

that the work and results of the conference should be fully consistent with the provisions of UNCLOS.³

- UNCLOS explicitly preserves the freedom of the high seas, including freedom of navigation and overflight, as well as the right of innocent passage within the territorial sea. These freedoms apply to all states and to all regions of the world.
- There is no legal basis for states to claim “historic rights” with respect to maritime areas in the South China Sea, as confirmed in the 2016 South China Sea Arbitral Award (the Arbitral Award).⁴
- Furthermore, there is no legal basis for continental states to claim archipelagic status. UNCLOS provides that archipelagic states must consist *wholly* of one or more archipelagos.⁵ There is therefore no legal basis on which to draw straight archipelagic baselines⁶ in the South China Sea, nor any legal basis to draw straight baselines around island groups in the South China Sea.⁷
- With respect to the regime of islands, UNCLOS provides that rocks that cannot sustain “human habitation or economic life of their own” do not generate an exclusive economic zone or continental shelf.⁸ Whether a maritime feature is a rock or an island or a low-tide elevation will depend on the classification of that feature as naturally formed.⁹ This classification cannot be changed through land building activities or other means of artificial modification. UNCLOS further provides that “[a]rtificial islands, installations and structures do not possess the status of islands” and do not generate a territorial sea of their own, nor do they affect the delimitation of the territorial sea, exclusive economic zone or continental shelf.¹⁰
- UNCLOS provides that low-tide elevations situated beyond a coastal state’s territorial sea do not generate maritime zones. Entirely submerged features similarly do not give rise to any maritime entitlements. Such features cannot be the subject of sovereignty claims or appropriation.

³ Resolution 72/249, 24 December 2017.

⁴ South China Sea Arbitration Award (Merits), 12 July 2016, PCA Case No 2013-19 at [261] and [272].

⁵ UNCLOS, Article 46(a).

⁶ UNCLOS, Article 47(1).

⁷ UNCLOS, Article 7.

⁸ UNCLOS, Article 121(3).

⁹ UNCLOS, Articles 13(1) and 121(1).

¹⁰ UNCLOS, Article 60(8).

- The Arbitral Award is final and binding on both parties.¹¹ UNCLOS further provides that non-participation by one party to a dispute does not constitute a bar to proceedings.¹²

The Permanent Mission of New Zealand to the United Nations has the honour to request that this Note Verbale be circulated to all States Parties to UNCLOS and all United Nations Member States by publication on the website of the Division for Ocean Affairs and the Law of the Sea.

The Permanent Mission of New Zealand to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.



New Zealand Permanent Mission to the United Nations
NEW YORK

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¹¹ UNCLOS, Article 296(1) and Annex VII, Article 11.

¹² UNCLOS, Annex VII, Article 9.