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**Historic fishing rights and the nine-dash line (A response to *PacNet* #88 "Testing China's – and the State Department's – nine-dash line claims")** by Leonardo Bernard

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In *PacNet* #88, "Testing China's – and the State Department's – nine-dash line claims," Sourabh Gupta challenged the US Department of State's Study of China's nine-dash line claims. He argues that the US study failed to consider the nine-dash line as 'a geographic limit of China's historically-formed and accepted traditional fishing rights in the semi-enclosed waters of the South China Sea which are exercised today on a non-exclusive and non-exclusionary basis', which in his view is the most compelling legal basis for the nine-dash line. His arguments, however, overlook relevant facts and the finer points of law as laid down in the UN Convention on the Law of the Sea (UNCLOS), and thus yield inaccurate conclusions regarding China's historic fishing rights in the nine-dash line.

Gupta contends that traditional/historic fishing rights under international law are (i) historically formed and transmitted by way of long-usage, (ii) exercised on a non-exclusive/non-exclusionary basis and (iii) accepted by way of practice by regional peers. The application of the law and facts to these elements does not support his analysis or conclusions.

With regard to the first element, Gupta claims that the US study conflates the traditional/historic rights with 'historic waters' and thus confines the application of these rights to China's internal waters. The US study, however, differentiated between historic rights and historic waters and explained that unlike historic waters (a body of water treated like internal water, i.e., sovereign territory), historic rights cover a lesser set of rights to the maritime space (which do not translate into sovereignty). The US study concludes that China has not actually made a cognisable claim to either 'historic waters' *or* 'historic rights' to the waters within the nine-dash line. Thus, Gupta's argument that China can continue fishing on a non-exclusive basis is irrelevant, not only because China has made no such claim, but because China's actions indicate that it does not recognize the rights of other littorals to the resources within the nine-dash line.

Even if China had made a claim for historic fishing rights within the nine-dash line, that claim would be superseded by the exclusive economic zone (EEZ) regime under UNCLOS. It is clear from the negotiations of the EEZ provisions that claims of traditional/historic fishing rights made by non-coastal States were not compatible with the EEZ regime. Under UNCLOS, the freedom of fishing beyond the territorial sea, including historic or high seas fishing, are superseded by a coastal State's sovereign rights over all living resources within its EEZ.

Gupta argues that Article 62 of UNCLOS enjoins the coastal State to give access to the surplus of the allowable catch in its EEZ. His argument ignores the fact that such access is given by the coastal State based on the allowable catch *as determined by the coastal State*, taking into consideration the *coastal State's national interest*. Article 62 does not require the coastal State to recognize traditional fishing rights in what is now its EEZ. On the contrary, it affirms that when giving access to other States to any 'surplus' of its 'allowable catch', the coastal State shall consider, along with several other factors, 'the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.'

With regard to the second element, Gupta argues that if Article 123 (which pertains to semi-enclosed seas) and Article 62 (which relates to the EEZ) are read together, they provide the basis for the non-exclusive exercise of traditional fisheries rights in semi-enclosed seas, such as the South China Sea. This expansive reading of these provisions is not permitted because (i) Article 123 does not create new rights for coastal States beyond what is provided under the EEZ regime, nor does it allow coastal States to claim *traditional rights* in semi-enclosed seas beyond their EEZ and (ii) the littoral States' duty to cooperate in the exercise of their rights under Article 123 is limited to those provided *under the Convention*.

With regard to the third element, assuming that China is exercising its traditional fishing rights in the South China Sea on a 'non-exclusive' basis, Gupta overlooks the fact that such rights must be *accepted by way of practice by regional peers*. There is no indication that any littoral States in the South China Sea have accepted that China has traditional fishing rights in the waters within the nine-dash line, whether non-exclusively or otherwise.

Interestingly, Gupta cites a fishing agreement concluded between China and Japan in 1997 to support his argument, yet this agreement demonstrates how the concept of EEZ has replaced the notion of historic fishing. Following the conclusion of UNCLOS, Chinese fishermen no longer had the legal right to fish within Japan's claimed EEZ, even though they had done so historically. The 1997 Agreement created a common fisheries zone within the areas of overlapping EEZ claims. The very existence of this agreement, allowing China the right to continue fishing in its traditional fishing ground within Japan's claimed EEZ, demonstrates that a unilateral claim of historic fishing rights does not supersede an EEZ claim under UNCLOS, unless the other State agrees to recognize such historic rights.

Furthermore, all the cases cited by Gupta emphasize that such traditional fishing rights must be recognized by other

States in order to be accepted. In *Jan Mayen*, Norway and Greenland recognized that fishermen from both countries had traditionally fished in the disputed waters. In *Eritrea/Yemen*, Yemen recognized that Eritrean fishermen had traditionally fished around their islands. In the absence of such recognition, the claim of Barbados to historic fishing rights in the EEZ of Trinidad & Tobago was rejected.

In conclusion, the US study considered and concluded correctly that China has not made a cognisable claim of historic fishing rights within the nine-dash line. Even if China had made such a claim, it would not stand the test of international law. No littoral States in the South China Sea have accepted China's claim of historic fishing rights, and it is unlikely they will.

As a party to UNCLOS, China has accepted that each coastal State is entitled to a 200-nautical mile EEZ. By insisting that China's historic rights in the South China Sea continue despite the EEZ regime in UNCLOS, China appears to be picking and choosing which provisions of UNCLOS it willl follow. The object and purpose of UNCLOS and the whole EEZ regime provided therein will be undermined if States are allowed to freely derogate from the Convention just because they claim to have rights that existed before UNCLOS. Thus, China needs to clarify the meaning of the nine-dash line map and bring it into conformity with UNCLOS if it wants to avoid further misunderstandings in the South China Sea dispute.

**Response to Leonardo Bernard** by Sourabh Gupta

I thank Leonardo Bernard for his spirited comments. He has done useful work in this area and I welcome his criticisms. Regarding their substance, let me put them to bed in descending order of importance.

Bernard's most substantive criticism is that traditional rights claims in ocean space, such as historic fishing rights, have been superseded by the EEZ regime under UNCLOS, and that such rights are now regulated in great detail by the Convention. The argument is false. According to the unanimous verdict of the international arbitrators in the ***Eritrea/Yemen*** maritime delimitation case of the late 1990s --- a case that dealt with the historic rights of the parties in the Red Sea, a semi-enclosed sea which hosts vital shipping lanes (and hence not dissimilar to the South China Sea), even in circumstances where parties held undisputed sovereignty over various islands/land features, "*such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime* in these waters … *by its very nature, [this traditional fishing regime] is not qualified by the maritime zones specified under UNCLOS, but operates throughout those waters beyond the territorial waters of each of the Parties* …" Indeed, the common use of these waters since time immemorial is an "*important element capable of creating certain 'historic rights" which accrue in favor of both parties through a process of historical consolidation."* Aspects of the ***Jan Mayen*** award as well as the ***Barbados/Trinidad & Tobago*** award are worth quoting too but in interest of brevity I will rest my case here.

Second, Bernard charges that I overlook the fact that even if China is exercising its traditional fishing rights on a 'non-exclusive' basis within the nine-dashed line, such rights must be accepted by way of practice by regional peers – which presumably he feels they are not. Again, this charge simply does not comport with the reality of fishing practices in the South China Sea. Chinese fishing vessels as well as those of littorals have crossed these waters since time immemorial and, aside from observing territorial sea limits in principle, continue to do so today. Beijing's fishing and conservation regulations for roughly the northern half of the sea are also observed in practice, albeit reluctantly and under protest. That said, it is correct to argue that littorals have not formally accepted the nine-dash line as a Chinese "historic rights" line (as in their interests they shouldn't) – and Beijing too has not declared any such claim. I simply argued that if Beijing did furnish this basis for the alignment of the line, it would in principle comply with international law.

Finally, Bernard is correct to point out that the State Department did differentiate between "historic rights" and "historic waters" in its study. What he – and the study – fail to point out/admit though is that "historic rights," as opposed to "historic waters"-based claims, can: (a) exist beyond the territorial waters of a littoral state in a semi-enclosed sea (which ***Eritrea/Yemen*** found to be the case), and (b) be exercised on a non-exclusive basis (which ***Barbados/Trinidad & Tobago*** found could be the case). Bernard, and State's, interpretation that such traditional rights are effectively limited to the littorals' territorial sea is not just restrictive; it is erroneous.

*PacNet commentaries and responses represent the views of the respective authors. Alternative viewpoints are always welcomed.*