The 5th International Workshop

"The South China Sea: Cooperation
for Regional Security and Development"

10-12 November, 2013, Hanoi, Viet Nam

Diplomatic Academy of Vietnam

Vietnam Lawyers Association

Disputed Areas in the South China Sea

Robert Beckman

Centre for International Law

National University of Singapore

INTRODUCTION

The features in the South China Sea, especially those in the Spratly Islands, have been a source of tension and potential conflict in the region for many years. Some or all of the features in the Spratly Islands are claimed by Brunei Darussalam, China, Malaysia, the Philippines, Vietnam and Taiwan (the claimants). In addition, the Paracel Islands are claimed by China, Taiwan and Vietnam, and Scarborough Shoal is claimed by China, Taiwan and the Philippines.[1] It is generally assumed that given the number of claimants and the sensitivity of the disputes on sovereignty over the islands, it will not be possible for the claimants to resolve the disputes through negotiation in the foreseeable future. Further, it is assumed that the claimants will not agree to refer the sovereignty disputes to an arbitral or judicial tribunal.

Since the 1980s, it has been suggested that the best way to diffuse tension in the Spratly Islands is first, to agree upon a Code of Conduct for the South China Sea, and second, to set aside the sovereignty disputes and jointly develop the resources in and under the waters surrounding the islands. One of the major obstacles in negotiating either a Code of Conduct or joint development arrangements is agreeing on the geographic area where they will apply. It is often assumed that both should apply in the 'disputed areas' in the South China Sea. However, there is little agreement on what is meant by the phrase 'disputed areas' in the South China Sea.

The purpose of this paper is to attempt to identify the types of disputed areas in the South China Sea, the rules of international law that apply in the disputed areas, and the measures which must be taken by the coastal States before the disputed areas can be clearly identified. The 1982 United Nations Convention

[1] Brunei Darussalam enacted the Territorial Waters of Brunei Act, 1982; China issued the Declaration on the Baselines of the Territorial Sea (May 15, 1996), the Law on the Territorial Sea and the Contiguous Zone (Feb. 25, 1992), the Law on Exclusive Economic Zone and Continental Shelf (Jun. 26, 2008). Indonesia issued Law No. 1/1973 concerning Continental Shelf (Jan. 6, 1973); Law No. 5/1983 concerning Indonesia Exclusive Economic Zone (Oct. 18, 1983); Law No. 6/1996 concerning Indonesian Water (Aug. 8, 1996); Government Regulations No. 38/2002 on the Geographical List of Coordinates of the Indonesian Archipelagic Baselines (Jun. 28, 2002) and Government Regulations No. 37/2008 amending Regulations No. 38/2002 (May 19, 2008). Malaysia enacted the Baselines of Maritime Zones Act 2006 - Act 660 (Dec. 29, 2006) and the Territorial Sea Act 2012 - Act 750 (Jun. 18, 2012). The Philippines passed the Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines and for other Purposes (Mar. 10, 2009). Viet Nam adopted the Law of the Sea of Viet Nam, Law No. 18/2012/QH13 (Jun. 21, 2012), and issued the Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (May 12, 1977) and the Statement on the Territorial Sea Baseline (Nov. 12, 1982). Taiwan enacted the Law on the Territorial Sea and Contiguous Zone of the Republic of China (Jan, 21, 1998) and the Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China (Jan. 21, 1998).

on the Law of the Sea (UNCLOS)[2] establishes a legal framework to govern all uses of the oceans. The provisions in UNCLOS which govern these issues, as well as the relevant rules of general international law, will be examined.

DISPUTED AREAS DUE TO TERRITORIAL SOVEREIGNTY DISPUTES

A territorial sovereignty dispute is a dispute between two or more States over which has the better claim to sovereignty under international law over land territory including islands. UNCLOS has no provisions on how to determine which State has the better claim to sovereignty over disputed islands. This issue is governed by the principles and rules of customary international law on the acquisition and loss of territory which are set out in the decisions of international courts and arbitral tribunals.[3]

UNCLOS provisions on claims to islands and other offshore geographic features

Under UNCLOS and international law only land territory, including islands, is subject to a claim to sovereignty.[4] An island is defined in Article 121(1) of UNCLOS as a naturally formed area of land which is surrounded by and above water at high tide. The sovereignty of a State extends to a 12 nm territorial sea adjacent to its coast or to islands under its sovereignty.[5]

Geographic features which meet the definition of an island are subject to a claim to sovereignty and are entitled in principle to the same maritime zones as land territory, that is to a territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf. However, Article 121(3) creates an exception to this rule. It provides that 'rocks which cannot sustain human habitation or economic life of their own' shall have no EEZ or continental shelf.

The maritime zones of islands are measured from baselines. The normal rule for baselines is the low water line along the coast,[6] but in certain circumstances, States are permitted to employ straight baselines.[7]

---

2 United Nations Conventions on the Law of the Sea, adopted in Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397. As of 2 November 2013, there are 166 Parties, including the European Union.

3 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford, 2012) at 215-244.

4 *Ibid*, at 203.

5 UNCLOS, Art 2.

6 UNCLOS, Art 5.

7 UNCLOS, Arts 7 and 47.

Low-tide elevations are above water at low-tide but submerged at high tide.[8] If they are within 12 nm of an island or the mainland coast, they are within the territorial sea of the island, so they are under the sovereignty of the coastal State. If they are located more than 12 nm from an island or the mainland coast they are not subject to a claim to sovereignty, but are part of the seabed.[9] Reefs, shoals and other geographic features that are completely submerged even at low tide are considered part of the seabed. They are not subject to appropriation by any State and they are not entitled to any maritime zones of their own.

Disputes on whether there is a dispute over territorial sovereignty

In Asia there are a number of cases of claimant States occupying a disputed island but refusing to acknowledge that a dispute over sovereignty exists. In the East China Sea, Korea does not recognize that Japan also claims sovereignty over Dokdo/Takeshima,[10] and Japan does not recognize that China/Taiwan also claims sovereignty over Sengkaku/Diaoyu.[11] In the South China Sea, China does not recognize that Vietnam also claims sovereignty over the Paracel Islands.[12]

This raises the question of how one determines whether a territorial sovereignty dispute in fact exists over disputed islands. The classic definition of a 'dispute' under international law was set out by the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* Case. It stated that '[a] dispute is a disagreement on a point of law or fact, a conflict of legal views of or interests between two persons.'[13] If one examines the official statements and legislation of the States concerned in the above 'disputes', it seems that there is a dispute to territorial sovereignty over the islands in question. However, the State occupying the island has taken a political decision not to recognize the existence of a dispute. They may feel that if they admit that there is a dispute over sovereignty, it would weaken their position by implying that the other State has a legitimate claim to sovereignty. Also, in some cases the sovereignty issue is so sensitive that there would be serious domestic political repercussions if a government admits that its claim to sovereignty is in dispute.

---

8 UNCLOS, Art 13.

9 UNCLOS Art 13(1)-(2).

10 Basic Position of the Government of the Republic of Korea on Dokdo, <http://www.mofa.go.kr/ENG/policy/focus/dokdo/basic/index.jsp?menu=m_20_10_10&tabmenu=t_1>.

11 The Basic View on the Sovereignty over the Senkaku Islands, May 2013, <http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html>.

12 Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 21, 2012, <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t945296.shtml>.

13 *The Mavrommatis Palestine Concessions*, Publications of the Permanent Court of International Justice, Series A – No 2, 30 August 1924, at 11, <http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf>.

Disputes on claims to sovereignty over offshore features in the South China Sea

The Paracel Islands are claimed by China/Taiwan and Vietnam. China has not declared which individual islands it claims sovereignty over, but rather makes a claim to the Paracels as an island group. A claim to a group of islands is not provided for in UNCLOS. In practice States may make a general claim to sovereignty over a group of islands, but under the law of the sea they are only entitled to claim sovereignty to insular features within the group of islands which meet the definition of an island in Article 121(1). China has declared straight baselines around the Paracel Islands, but its use of straight baselines is not consistent with UNCLOS.[14] Under UNCLOS only 'archipelagic States' such as the Philippines and Indonesia are permitted to use straight baselines enclosing mid-ocean archipelagos.[15] Other States claiming sovereignty over islands in mid-ocean archipelagos must draw their baselines in accordance with the usual rules for baselines under UNCLOS.[16] China claims an EEZ from the islands, but it has not indicated the outer limit of its EEZ claim as required in Article 75 of UNCLOS.[17] Vietnam also claims sovereignty over the Paracels as a group. It has not declared which of the islands it believes are subject to a claim of sovereignty, nor has it declared baselines around any of the islands or indicated what maritime zones it believes can be generated by the islands.

The Spratly Islands are claimed in whole or in part by Brunei, China/Taiwan, Malaysia, the Philippines and Vietnam. Again, the land and sea areas subject to the sovereignty disputes are not clear because the claimants have not identified the islands over which they claim sovereignty. China/Taiwan and Vietnam seem to claim the Spratly Islands as a group, even though under international law only those features which meet the definition of an island are subject to a claim to sovereignty. The Philippines seems to claim all of the geographic features within the Kalayaan Island group enclosed by a polygon shaped line on its map, without distinguishing which of the features meet the definition of an island. Similarly, Brunei and Malaysia have claimed particular features without indicating whether those features are islands subject to appropriation.

It is reported that only about 40 of the 160 or so geographic features in the Spratly Islands meet the definition of an island in Article 121(1) and are subject to a claim to sovereignty. However, more than 60

---

14 Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf>.

15 UNCLOS, Art 47(1).

16 UNCLOS, Arts 5 and 7. For list of States that have used straight baselines around mid-ocean archipelagoes even though they are not archipelagic States as defined in UNCLOS, see J. Ashley Roach and Robert W. Smith, Excessive Maritime Claims (3rd edition, 2012) at 108-115.

17 China – Exclusive Economic Zone and Continental Shelf Act, 26 June 1998, Art 2, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf>.

features in the Spratly Islands are occupied and have installations and structures built on them.[18] The occupied features that are not islands are not capable of being appropriated. They are either low-tide elevations or submerged features that are not entitled to a separate claim to sovereignty or to any maritime zones of their own. Nevertheless, given that they are occupied, they are within the 'areas in dispute' in the South China Sea.

Scarborough Shoal is another island group that is the subject of a territorial sovereignty dispute. China/Taiwan and the Philippines claim sovereignty over the shoal, which consists of a large reef which includes four to six small rocks that are islands within the definition in Article 121(1) of UNCLOS because they are naturally formed areas of land surrounded by and above water at high tide.[19] It appears that China and Taiwan claim sovereignty over the reef as whole, without making separate claims from the rocks that meet the definition of an island. The Philippines has taken the position that the four to six rocks on the reef are islands subject to a claim to sovereignty, but it has also maintained that they are rocks within Article 121(3) that are not entitled to an EEZ and continental shelf of their own.[20] The claimants have not declared baselines from which the maritime zones from Scarborough Shoal would be measured. Although the area in dispute is not precisely defined, it is clear that the reef and the 12 nm around it would be a disputed area.

Disputes over maritime claims from disputed islands

The disputed areas in the South China Sea could be more accurately defined if all of the claimants would bring their claims into conformity with the provisions in UNCLOS. First, they should identify which features they claim sovereignty over are islands entitled to maritime zones of their own. Second, they should state which islands they claim sovereignty over are entitled to an EEZ and continental shelf of their own, and which are rocks within Article 121(3) entitled only to a territorial sea and contiguous zone. Third, they should declare the baselines for the islands over which they claim sovereignty using the baselines provisions in UNCLOS, and they should give publicity to their baselines as required by Article 16 of UNCLOS.

Disputes can arise on the interpretation or application of the provisions in UNCLOS relating to maritime claims from disputed offshore geographic features. First, disputes can arise on whether a feature

---

[18] Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea', (2013) 107 *AJIL* at 143. (1984) 78 *AJIL* 142 at 143.

[19] Zou Keyuan, 'Scarborough Reef: A New Flashpoint in Sino-Philippine Relations?' IBRU BOUNDARY SECURITY BULL., Summer 1999, at 71.

[20] Republic of the Philippines Department of Foreign Affairs Manila, No. 13-0211, 22 January 2013, Notification and Statement of Claims, <https://www.dfa.gov.ph/>.

is subject to a claim to sovereignty because it meets the definition of an island in Article 121(1). Second, disputes can arise on whether a feature with meets the definition of an island is only entitled to a territorial sea and contiguous zone because it is a rock which cannot sustain human habitation or economic life of its own within Article 121(3). Third, a dispute can arise on which State has jurisdiction under UNCLOS and international law over occupied features that do not meet the definition of an island in Article 121(1). Fourth, disputes could arise on whether a State claiming maritime zones from a disputed island has measured those maritime zones from baselines that were drawn in accordance with the provisions in the Convention.

Rights and obligations of claimant States in disputed areas surrounding disputed features

If, under international law, the islands and the territorial seas around them are areas subject to a territorial sovereignty dispute, what are the rights and obligations of the claimant States and other States in the disputed areas? First, a claimant State has a claim to sovereignty over the island and the 12 nm territorial sea adjacent to the island.[21] Second, a claimant State has sovereign rights and jurisdiction to explore and exploit natural resources in the 200 nm EEZ surrounding the island.[22] At the same time, a claimant State must recognize that all States, including other claimant States, have a right of innocent passage through the territorial sea adjacent to the disputed islands,[23] as well as the right to exercise the high seas freedoms of navigation, overflight, the right to lay submarine cables and pipelines, etc., in the EEZ surrounding the disputed islands.[24]

When two or more States claim sovereignty over the same island, the island and the maritime zones claimed from it would be 'disputed areas'. However, since UNCLOS assumes that it is known which State has sovereignty over land territory and islands, it has no provisions governing the rights and obligations of the competing claimants in these disputed areas, except perhaps the general provision in Article 301 with respect to abuse of rights.

Although they are not themselves capable of a separate claim of sovereignty, low-tide elevations can be within the areas in dispute. If a low-tide elevation occupied by one of the claimants is located within 12 nm of a disputed island, the State which has sovereignty over the disputed island would have

---

21 UNCLOS, Art 3.

22 UNCLOS Art 56(1).

23 UNCLOS, Art 17.

24 UNCLOS, Art 58(1).

sovereignty over the low-tide elevation.[25] Therefore, the low-tide elevation would be within the disputed area.

The only applicable rules of international law governing the conduct of competing claimant States in such disputed areas may be the general obligation in the United Nations Charter prohibiting the threat or use of force.[26] The prohibition on the threat or use of force clearly applies to disputes on territorial sovereignty, as is made clear by the following language in the 1970 Resolution of the United Nations General Assembly known as the Declaration on Friendly Relations: 'Every State has the duty to refrain from the threat or use of force . . . as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.'[27] That Declaration also states that '[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.'[28] The other general principle in the United Nations Charter which applies to territorial sovereignty disputes is the principle that all members of the United Nations should settle their disputes by peaceful means.[29]

The absence of rules governing the actions of claimant States towards each other in disputed areas is a potential source of tension and even conflict. If two States both believe they have sovereignty over an island and the right as the sovereign to exercise jurisdiction in the waters surrounding a disputed island, serious problems could arise if a coast guard vessel of one claimant State confronts the coast guard vessel of another claimant State in the disputed waters. Similarly, tensions and incidents can occur if a coast guard vessel of one claimant States arrests a fishing vessel of another claimant State for illegally fishing in the disputed waters.

The 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea recognized this problem. It provides that '[t]he Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability.'[30] Given the lack of international rules and the potential for incidents in disputed areas which could threaten peace and stability in the

---

25 UNCLOS, Art 7.

26 Charter of the United Nations, adopted on 26 June 1945, Art 2(4), <http://cil.nus.edu.sg/rp/il/pdf/1945%20Charter%20of%20the%20United%20Nations-pdf.pdf>.

27 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, adopted by the UN General Assembly Resolution 2625 (XXV) of 24 October 1970, <http://cil.nus.edu.sg/rp/il/pdf/1970%20Declaration%20on%20Principles%20of%20International%20Law%20Concerning%20Friendly%20Relations-pdf.pdf>

28 *Ibid*.

29 1945 Charter of the United Nations, Art 2(3), *supra* note 26.

30 2002 Declaration on the Conduct of Parties in the South China Sea signed on 4 November 2002, Article 5, <http://cil.nus.edu.sg/rp/pdf/2002%20Declaration%20on%20the%20Conduct%20of%20Parties%20in%20the%20South%20China%20Sea-pdf.pdf>.

region, it is hoped that the Code of Conduct currently under discussion will contain a clear provision obligating the parties to exercise restraint in such disputed areas and to refrain from any actions towards other claimants or their nationals that might exacerbate tensions or threaten peace and security. Such a provision should also make it clear that any decision by a State to exercise restraint is without prejudice to its position on the underling sovereignty disputes and its rights and jurisdiction in the disputed area.

DISPUTED AREAS DUE TO OVERLAPPING EEZ AND CONTINENTAL SHELF CLAIMS

One of most important features of UNCLOS is that it gives coastal States sovereign rights to explore and exploit natural resources adjacent to its territorial sea in two resource zones – the EEZ and the continental shelf. First, coastal States have the right to establish an EEZ extending to 200 nm from the baselines from which their territorial sea is measured.[31] In the EEZ a coastal State has sovereign rights for the purpose of exploring and exploiting the living and non-living natural resources of the seabed and its subsoil and of the waters superjacent to the seabed.[32] Second, coastal States also have sovereign rights to explore and exploit the natural resources of the continental shelf.[33] The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the coastal State's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin (depending on whether it meets certain geophysical criteria), or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to this distance.[34]

UNCLOS provisions relating to overlapping EEZ and continental shelf claims

UNCLOS has provisions on the delimitation of overlapping EEZ[35] and continental shelf[36] claims. Articles 74(1) and 83(1), which are identical, state that:

> The delimitation of the [EEZ/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

---

31 UNCLOS, Art 57.

32 UNCLOS, Art 56.

33 UNCLOS, Art 77.

34 UNCLOS, Art 76(1).

35 UNCLOS, Art 74.

36 UNCLOS, Art 83.

This provision is undeniably vague and over the years, international courts and tribunals have attempted to articulate what is meant by 'equitable solution' through the delimitation cases brought before them. Some international courts and tribunals have described the method provided for in Articles 73 and 84 as the 'equitable principles-relevant circumstances method'[37] and in the most recent cases, have set out a three-step methodology for delimitation.[38]

UNCLOS assumes that it may be extremely difficult for States to reach agreement on a maritime boundary in areas of overlapping EEZ and continental shelf claims. As a result, Articles 74 and 83 provide two options for States who are unable to reach agreement through negotiations. The first option is set out in paragraph 2 of Articles 74 and 83, and provides that '[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.'[39] This provision in effect gives States the option of invoking the procedures for the Settlement of Disputes contained in Part XV of UNCLOS. If the boundary dispute cannot be resolved by an exchange of views and direct negotiations, either party to the dispute has the right to unilaterally invoke the compulsory procedures entailing binding decisions provided for in section 2 of Part XV and ask an international court or arbitral tribunal to delimit the maritime boundary.[40] This is what happened when Bangladesh invoked the disputed settlement system in its boundary disputes with both Myanmar[41] and India[42]. However, this option cannot be invoked against States such as China that have made a declaration under Article 298 of UNCLOS to exclude disputes concerning the interpretation or application of Articles 15, 74 or 83 relating

---

37 See, for example, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening) [2002] ICJ Rep. 303 at para 288, <http://www.icj-cij.org/docket/files/94/7453.pdf>.

38 See, for example, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine) (Judgment) [2009] ICJ Rep. 61 at paras 115–122, <http://www.icj-cij.org/docket/files/132/14987.pdf>.

39 UNCLOS, Arts 74(2) and 83(2).

40 UNCLOS, Art 286.

41 *Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Case No. 16, International Tribunal for the Law of the Sea (ITLOS). The dispute had initially been submitted to an arbitral tribunal to be constituted under Annex VII UNCLOS through a notification dated 8 October 2009, made by the People's Republic of Bangladesh to the Union of Myanmar. However, on 14 December 2009, proceedings were instituted before ITLOS after both States submitted declarations to ITLOS accepting its jurisdiction to hear the case. ITLOS delivered its Judgment on 14 March 2012, <www.itlos.org/index.php?id=108>.

42 On 8 October 2009, the People's Republic of Bangladesh instituted arbitral proceedings concerning the delimitation of the maritime boundary between Bangladesh and the Republic of India pursuant to Art 287 and Annex VII, Article 1 of UNCLOS. The Permanent Court of Arbitration acts as Registry in this arbitration. <www.pca-cpa.org/showpage.asp?pag_id=1376>.

to sea boundary delimitation from the compulsory procedures entailing binding decisions in section 2 of Part XV.[43]

The second option available to States who cannot reach agreement on their overlapping EEZ or continental shelf boundaries is found in paragraph 3 of Articles 74 and 83, which provides that if delimitation cannot be effected by agreement:

> [T]he States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

It is clear that there are two aspects to the obligation set out in Articles 74(3) and 83(3). First, States concerned shall make every effort to enter into provisional arrangements of a practical nature. Second, States, in good faith, shall make every effort not to jeopardize or hamper the reaching of the final delimitation agreement.

In the 2007 case between Guyana and Suriname, an arbitral tribunal constituted under Annex VII of UNCLOS acknowledged that the language 'every effort' leaves 'some room for interpretation by the States concerned, or by any dispute settlement body,' it imposes on the parties 'a duty to negotiate in good faith.'[44] This requires the parties to take 'a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement.'[45] Further, the obligation to negotiate in good faith 'is not merely a nonbinding recommendation or encouragement but a mandatory rule whose breach would represent a violation of international law.'[46]

The second part of the obligation provides that during this transitional period States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. It is said that a court or tribunal's interpretation of this obligation must reflect the delicate balance between preventing unilateral activities

---

43 China – Declaration made after Ratification, 25 August 2006, <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China Upon ratification>.

44 *Guyana v Suriname*, Award of the Arbitral Tribunal, 17 September 2007, para 461, <http://www.pca-cpa.org/showpage.asp?pag_id=1147>.

45 *Ibid*, at para 461.

46 Ranier Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *AJIL* 345 at 354.

that affect the other party's rights in a permanent manner but, at the same time, not stifling the parties' ability to pursue economic development in a disputed area during a time-consuming boundary dispute.[47]

International courts and tribunals have found that 'any activity which represents an irreparable prejudice to the final delimitation agreement'[48] is a breach of this obligation and that 'a distinction is to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.'[49] For example, in the *Guyana and Suriname* Arbitration it was found that allowing exploratory drilling in disputed waters was a breach of the obligation to make every effort not to hamper or jeopardize the reaching of a final agreement as this could result in a physical change to the marine environment and engenders a 'perceived change to the status quo.'[50] This was in contrast to seismic testing, which did not cause a physical change to the marine environment.

One type of provisional arrangement which could be agreed upon in the South China Sea is the joint development of hydrocarbon resources and fisheries resources. Articles 74(3) and 83(3) provide a clear legal basis for joint development arrangements in the South China Sea. However, at present there are no clearly defined overlapping claim areas in the South China Sea which could serve as areas for joint development.

Overlapping EEZ and Continental Shelf Claims in the South China Sea

Although the claimant States bordering the South China Sea claim an EEZ measured from the baselines along their mainland coast, or in the case of the Philippines, from the archipelagic baselines surrounding its main archipelago, the outer limits of some of their EEZ claims are unclear. The claims of Malaysia and Vietnam are indicated on the map they submitted on 6 May 2009 in their Joint Submission to the Commission on the Limits of the Continental Shelf (CLCS).[51] The outer limits of the EEZ claims of Brunei and China are not clear. The Philippines has not indicated the outer limit of its EEZ claim from its main archipelago.

---

47 *Guyana v Suriname*, *supra* note 44, at para 470.

48 Lagoni, *supra* note 46, at 366.

49 *Guyana v Suriname*, *supra* note 44, at para 467.

50 *Ibid*, at para 480.

51 Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf beyond 200 nautical miles from the Baselines: Submission to the Commission, Joint Submission by Malaysia and the Socialist Republic of Viet Nam, 6 May 2009, Executive Summary, <http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm>.

With respect to extended continental shelf claims from the mainland territory beyond the 200 nm outer limit of the EEZ, the claims of Malaysia and Vietnam have been submitted to the CLCS. The Philippines has indicated that it intends to claim an extended continental shelf in the South China Sea, but has yet to do.[52] Brunei and China have submitted partial information indicating that they intend making claims to an extended continental shelf from their coasts.[53] When China, Brunei and the Philippines make an extended continental shelf claim they will have to include maps indicating the outer limit of their EEZ claims.

If China, the Philippines and Brunei make extended continental shelf claims in the South China Sea these claims will overlap with the EEZ and continental shelf claims of the other claimant States. The areas of overlapping claims will then be disputed areas.

The areas of overlapping EEZ and continental shelf claims will be even more extensive if any of the claimant States claim an EEZ from the Paracel and Spratly Islands. China has claimed an EEZ from the Paracel Islands but it has not indicated the outer limit of its EEZ claim from the islands. An EEZ claim from the larger islands in the Paracels could be given full effect to the east and to the south. The EEZ claim would include all of Macclesfield Bank and give China sovereign rights and jurisdiction to explore and exploit the natural resources in Macclesfield Bank. This is important because although Macclesfield Bank is one of the four island groups in the South China Sea over which China has claimed sovereignty, it is not subject to a claim of sovereignty because the entire bank is completely submerged even at low tide. An EEZ claim from the Paracels could also be given full effect to the south, in the direction of the Spratly Islands.

China also claims sovereignty over all of the islands in the Spratly Islands, even though the largest islands are occupied by the Philippines, Taiwan and Vietnam. China is the only claimant to assert that the islands in the Spratlys area entitled to an EEZ and continental shelf of their own.[54] It has not declared baselines for any islands in the Spratlys, but could do so and claim an EEZ from the 10 or so largest islands. If it claims an EEZ from the islands, it would not be necessary to also claim a continental shelf since the EEZ also gives the coastal State sovereign rights and jurisdiction to explore and exploit the natural resources of the seabed and subsoil.

---

[52] CLCS: Submission by the Republic of the Philippines, 19 July 2012, <http://www.un.org/depts/los/clcs_new/submissions_files/submission_phl_22_2009.htm>.

[53] Preliminary Information Indicative of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles, Brunei Darussalam (12 May 2009), China (11 May 2009), <http://www.un.org/depts/los/clcs_new/commission_preliminary.htm>.

[54] Communications received with regard to the Joint Submission made by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf, China – 14 April 2011, *supra* note 51.

If China were to make an EEZ claim from both the Spratly and Paracel Islands, it should do so in a manner that is consistent with UNCLOS. First, it should only claim an EEZ from the 10 or so largest islands that arguably are capable of sustaining human habitation or economic life of their own. Second, it should declare baselines in accordance with UNCLOS for measuring the maritime zones from those islands. Third, it should indicate the outer limit of its EEZ claim from the islands, and such outer limits should be consistent with the jurisprudence of international courts and tribunals on the effect of islands on maritime delimitation. When delimiting the maritime boundary between offshore islands and the mainland of a coastal State, the court or tribunal begins with an equidistance line. It then determines whether that line should be adjusted to take account of the difference in the lengths of the coasts so that small uninhabited islands do not have a disproportionate effect on the boundary.[55] Therefore, for an EEZ claim from a small island to be made in good faith, it should not extend beyond the equidistance line in the direction of a coastal State like the Philippines and Vietnam. However, in the direction of the high seas, the EEZ claim from an island could extend to a full 200 nm.

If China were to make an EEZ claim from the Paracel and Spratly Islands in a manner that is consistent with UNCLOS, there would be a substantial overlap between its EEZ claim from the islands and the EEZ and continental shelf claims of the ASEAN claimants from their mainland coasts or main archipelago. These areas of overlapping claims would then be disputed areas within Articles 74 and 83. This could set the stage for serious discussions on joint development arrangements in the disputed areas. It could also define the disputed areas where some of the provisions in the Code of Conduct would apply. Furthermore, any dispute between China and an ASEAN claimant on the interpretation of Articles 74 and 83 would not be subject to the compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS because China has excluded disputes on these provisions by its 1996 Declaration under Article 298.

The nine-dash line map and disputed areas

When China attached its nine-dash line map to its Note Verbale of 6 May 2009 to the UN Secretary-General, questions arose as to the significance of the map with respect to China's maritime claims in the South China Sea. The Note Verbale made it clear that China claims sovereignty over the island groups inside the nine-dash line, and that it claims sovereign rights and jurisdiction in the EEZ measured from the islands.

---

[55] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ Judgment of 3 June 1985; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Merits, Judgment of 16 March 2001; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ, Judgment, 19 November 2012.

The question has arisen as to whether China is also claiming historic title to the waters inside the nine-dash line or historic rights to the resources everywhere inside the nine-dash line. There appears to be no official statement by the Government of China claiming 'historic title' to the waters inside the nine-dash line or claiming that such waters are 'historic waters'.[56] Furthermore, there appears to be no official statement of the Chinese Government claiming that it has 'historic rights' in the waters inside the nine-dash line. The only reference to 'historic rights' in any official document is that in Article 14 of China's national legislation on the EEZ, which states that 'The provisions of this Act shall not affect the historical rights of the People's Republic of China.'[57] However, that Act gives no indication as to where China may have 'historical rights'.

Unless the Chinese Government officially clarifies its position by stating that it claims historic title over all the waters inside the nine-dash line or that it claims historic rights to the resources in and under the waters everywhere within the nine-dash line, the entire sea area inside the nine-dashed line cannot be described as an area in dispute. Therefore, the disputed areas inside the nine-dash line are (a) the territorial seas adjacent to the disputed islands; and (b) the areas where there will be an overlap in the EEZ claims from the islands and the EEZ and continental shelf claims from the mainland coast or archipelagic baselines of the States bordering the South China Sea.

CONCLUSIONS

There are two categories of disputed areas in the South China Sea. First, there are disputes concerning territorial sovereignty over islands in the South China Sea and over the maritime space surrounding the disputed islands. The disputed maritime areas are not clear because many of the claims to sovereignty over island groups and many of the claims to maritime areas surrounding the islands are not consistent with UNCLOS and international law. If the claimant States clarified which features they claim are islands capable of appropriation, it would be possible to identify the disputed areas. The disputed areas would include the islands over which more than one State claims sovereignty, as well as the maritime zones measured from the disputed islands. The disputed areas could also include low-tide elevations or submerged features that are occupied by claimant States. There are very few rules of international law governing the conduct of the claimant States in the waters surrounding disputed islands. Therefore, a Code of Conduct governing activities in such disputed areas is essential to prevent or manage potential conflicts between claimant States in the maritime areas surrounding the disputed islands.

---

[56] Yann-Huei Song, *United States and Territorial Disputes in the South China Sea: A Study of Ocean Law and Politics* (School of Law, University of Maryland, 2001) at 72-73.

[57] China – Exclusive Economic Zone and Continental Shelf Act of 26 June 1998, Art 14, *supra* note 17.

The second category of disputed areas is the areas of overlapping EEZ and continental shelf claims. The areas of overlapping EEZ and continental shelf claims in the South China Sea are not clear. This is because several claimant States have not indicated the outer limit of the EEZ they claim from their mainland territory and because some States have yet to make their claim to an extended continental shelf in the South China Sea. Furthermore, although China has indicated that the Paracel and Spratly Islands are entitled to an EEZ and continental shelf of their own, it has not made clear its claim to maritime zones from those islands. If all of the claimant States were to clarify their EEZ and continental shelf claims in the South China Sea, the areas of overlapping EEZ and continental shelf claims subject to the obligations in Articles 74 and 83 of UNCLOS would be clear. This would set that stage for negotiations on provisional arrangements of a practical nature in the areas of overlapping claims.