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China, UNCLOS and the South China Sea

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ABSTRACT

The fundamental issue in the South China Sea is over who has sovereignty over the islands and their adjacent waters as well as sovereign rights and jurisdiction in the exclusive economic zone and continental shelf measured from the islands. The 1982 Convention on the Law of the Sea (UNCLOS) has no provisions on how to determine sovereignty over offshore islands. However, the provisions of UNCLOS on baselines, the regime of islands, low-tide elevations, the exclusive economic zone, the continental shelf, maritime boundary delimitation and dispute settlement are all applicable to the South China Sea.

Since 2009 the ASEAN claimants have taken measures to clarify their claims and bring them into conformity with UNCLOS. They maintain that under UNCLOS claims to the natural resources in and under the waters in the South China Sea can only be derived from claims to land features. China has clarified its claim to some extent, but it is still not clear to the ASEAN claimants whether China is making claims to the resources in the South China Sea based on its claim to sovereignty over the land features or whether it is claiming rights in all of the maritime areas inside the nine-dashed lines.

If China fully clarifies its position on the nine-dashed line map it will be clearer which maritime areas are in dispute, and the claimants will be able to begin serious discussions about setting aside the sovereignty disputes and pursuing joint development of the natural resources. If China does not clarify its position and asserts rights in maritime areas which the ASEAN claimants believe are not in dispute, one or more of the ASEAN claimants may believe they have no choice but to refer legal issues to an international court or tribunal.

Although China has exercised its right to opt out of the system of compulsory binding dispute settlement for disputes relating to maritime boundary delimitation and historic waters, some legal disputes relating to the interpretation or application of the provisions of UNCLOS are subject to the compulsory binding dispute settlement under Part XV. In addition, it may also be possible for the ASEAN claimants to seek an advisory opinion from the International Tribunal for the Law of the Sea on one or more legal questions relating to the South China Sea disputes.

I. INTRODUCTION¹

1. The South China Sea consists of four groups of islands. The Pratas Islands are located just over 200 miles southwest of Hong Kong, and are claimed only by China and Taiwan. The Paracel Islands are located in the northern part of the South China Sea, approximately equidistant from the coastlines of Viet Nam and China (Hainan), and are claimed by China, Viet Nam and Taiwan. China forcibly ejected South Vietnamese troops from the Paracels in 1974, and they are now occupied exclusively by China. The Paracels are a continual source of tension between China and Viet Nam.

¹ On the South China disputes generally, see Robert W. Smith, “Maritime Delimitation in the South China Sea: Potentiality and Challenges”, 41 *Ocean Development & International Law* (2010), 214-236; Clive Schofield and Ian Storey, “The South China Sea Dispute” *Increasing Stakes and Rising Tensions* (The Jamestown Foundation, November 2009); *South China Sea WWW Virtual Library* (David Rosenberg, ed.) (www.southchinasea.org/index.html).

2. Scarborough Reef and Macclesfield Bank are located in the northern part of the South China Sea between the Philippines and the Paracels, and are claimed by the Philippines, China and Taiwan. Scarborough Reef is located about 130 miles from Philippine island of Luzon. Macclesfield Bank, a large sunken reef that is completely submerged at low tide, is located between Scarborough Reef and the Paracels. Macclesfield Bank and Scarborough Reef are a source of tension between China and the Philippines.

3. The Spratly Islands are the source of the most tension and even potential conflict. They are located in the central part of the South China Sea, north of the island of Borneo (which comprises Brunei Darussalam and the east Malaysian States of Sarawak and Sabah), east of Viet Nam, and west of the Philippines and south of Hainan. The Spratly Islands are claimed in their entirety by China, Taiwan, and Viet Nam, while some islands and other features are claimed by Malaysia and the Philippines. Brunei has established a maritime zone that overlaps a southern reef, but it has not made any formal claim.

4. Like many disputes over territorial sovereignty, the disputes over the islands in the South China Sea invoke strong feelings of nationalism. The islands and reefs are strategically important because they are located near vitally important routes used for international navigation. They are also seen as a potential source of wealth because of the fishing resources and the potential hydrocarbon resources² in and under the waters surrounding the disputed islands.

5. The rules of international law governing the acquisition and loss of territorial sovereignty over land territory and islands are set out in the decisions of international courts and arbitral tribunals.³ The dispute over which claimant has the better claim to sovereignty over the islands cannot be resolved by an international court or tribunal unless all the claimants consent. Because the disputes are very sensitive and highly complex, it is unlikely that all of the claimants will ever agree to refer the sovereignty disputes to an international court or tribunal for resolution. Therefore, the only solution in the near term seems to be to accept the position advocated by the late Deng Xiaoping of China of “shelving the disputes and pursuing joint development”.⁴

6. All of the claimants except Brunei have attempted to bolster their sovereignty claims by occupying some of the islands and reefs and constructing air strips, research stations, tourist and military facilities on them. Taiwan occupies the largest island, Itu Aba. The other larger islands are occupied by Viet Nam and the Philippines. It was reported in 2009 that Viet Nam occupies 21 features, the Philippines 9, China 7 and Malaysia 5.⁵ Many claimants have also taken unilateral action to conduct seismic surveys to locate potential hydrocarbon resources. As a result, the disputes over the islands in the South China Sea are a major source of potential instability in the region.

² Although the islands are usually described as “oil rich” or “potentially oil rich”, estimates on the potential oil and gas vary widely. In fact, until seismic surveys are completed and exploratory drilling is done, the potential wealth will remain unknown. See Clive Schofield, “Dangerous Ground,” in: Sam Bateman & Ralf Emmers, eds., *Security and Politics in the South China Sea* (Routledge, 2009), 7-25, 14-15.

³ See generally, Robert Jennings & Alan Watts, eds., *Oppenheim’s International Law* (9th ed. 1992), 677-718; Ian Brownlie, *Principles of Public International Law* (5th ed. 1998), 125-168.

⁴ “Set Aside Dispute and Pursue Joint Development,” 17 November 2000, available online at the Ministry of Foreign Affairs of the People’s Republic of China Website (www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm).

⁵ Schofield and Storey, above n.1 at 10.

II. THE IMPORTANCE OF UNCLOS

7. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁶ establishes a legal framework to govern all uses of the oceans. UNCLOS was adopted in 1982 after nine years of negotiations. It entered into force in 1994 and has been almost universally accepted. China, Viet Nam, Malaysia, Philippines and Brunei are all parties.⁷ Taiwan is not able to ratify UNCLOS because it is not recognized as a State by the United Nations, but it has taken steps to bring its domestic legislation into conformity with UNCLOS.⁸

8. UNCLOS has no provisions on how to determine sovereignty over offshore islands. Therefore, UNCLOS is not directly relevant to resolving the dispute over which State has the better claim to sovereignty over the islands. However, UNCLOS has numerous provisions which are relevant to the South China Sea and which are legally binding on the claimants. This article will explain the relevance of those provisions, and examine how UNCLOS and the international institutions it has established might play a role in the South China Sea disputes.

9. Once a State becomes a party to UNCLOS, it is under an obligation to bring its maritime claims and national laws into conformity with its rights and obligations under the Convention. Once UNCLOS enters into force for a State, its rights and obligations vis-à-vis other States Parties are governed by the provisions of the Convention. It is a fundamental principle of international law that a State cannot use its domestic law as an excuse not to conform to its obligations under an international treaty.⁹ Therefore, in its relations with other States Parties, the provisions of UNCLOS prevail over any contrary provisions in the national laws of the State. As will be explained later, this principle also applies to any “historic rights” to the resources of the oceans.

III. MARITIME ZONES UNDER UNCLOS

10. Under UNCLOS, States with sovereignty over land territory are permitted to claim maritime zones from such land territory. These maritime zones are measured from baselines. The normal baseline for measuring maritime zones is the low-water line along the coast.¹⁰ Straight baselines may be employed if the coast is deeply indented or has a fringe of islands, provided that the baseline does not depart to an appreciable extent from the general direction of the coast.¹¹ The waters inside the baselines are known as internal waters.¹²

⁶ 1833 UNTS 397, adopted in Montego Bay, Jamaica, on 10 December 1982, entered into force on 16 November 1994. As of 1 July 2011, 161 States and the European Union were parties to UNCLOS.

⁷ The dates of ratification of the 5 claimant States are: Brunei Darussalam, 5 November 1996; China, 7 June 1996, Malaysia, 14 October 1996, Philippines, 8 May 1984, and Viet Nam, 25 July 1994. UN Treaties Collection, Status of Treaties (<http://treaties.un.org/>)

⁸ For the action taken by Taiwan to pass legislation claiming maritime zones as provided in UNCLOS, as well as a comparison of the positions of China and Taiwan, see YANN-HUEI Song and ZOU Keyuan, “Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States”, 31 *Ocean Development and International Law* (2000), 303-345, 310-312.

⁹ Article 27, Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, adopted 22 May 1969, entered into force 27 January 1980, 111 State Parties as of 1 July 2011. Article 27 states that “A party may not invoke the provisions of its internal law as justification for failure to perform a treaty.” The provisions of the Vienna Convention are generally regarded as binding on all States under customary international law.

¹⁰ UNCLOS, art. 5, see above n.6.

¹¹ UNCLOS, art. 7, see above n.6.

¹² UNCLOS, art. 8, see above n.6.

11. Special baseline rules apply to archipelagic States which consist entirely of island archipelagoes, such as Indonesia and the Philippines.¹³ Archipelagic States are permitted to draw straight baselines connecting the outermost points of the outermost islands in their archipelago.¹⁴ The waters inside the archipelagic baselines are called archipelagic waters. If a continental State has sovereignty over offshore island archipelagoes, the normal baselines rules apply to such archipelagoes because continental States do not fall within the definition of “archipelagic States” under UNCLOS.¹⁵

12. There are potential disputes in the South China Sea over the baselines from which the maritime zones are measured from land territory or islands. The baselines deployed by Viet Nam have been criticised by the United States as inconsistent with UNCLOS.¹⁶ China has declared straight baselines around the Parcel islands even though continental States like China are not permitted under UNCLOS to employ straight baselines around mid-ocean archipelagoes. China’s use of straight baselines along its coast has been criticized by the United States as inconsistent with UNCLOS.¹⁷ Taiwan’s use of straight baselines has also been criticized by the United States as inconsistent with UNCLOS.¹⁸ It is generally accepted that the archipelagic baselines declared by the Philippines in 2009 pursuant to its 2009 baselines legislation are consistent with UNCLOS.¹⁹ Malaysia issued a map in 1979 setting out its continental shelf claim off the States of Sabah and Sarawak, but it did not publish the baselines from which the zone was measured. Malaysia passed a Baselines of Maritime Zones Act 2006, but it has yet to officially designate its baselines under the Act.

13. UNCLOS provides that coastal States have sovereignty in the 12 nautical mile (nm) belt of sea adjacent to their coast called the territorial sea.²⁰ Archipelagic States also have sovereignty in their “archipelagic waters”.²¹ However, sovereignty in the territorial sea and in archipelagic waters is subject to the passage regimes in UNCLOS and to other rules of international law.²²

14. UNCLOS made a revolutionary change in the law of the sea by establishing a new resource zone called the exclusive economic zone (EEZ)²³ which is adjacent to the territorial sea and which extends to 200 nm

¹³ See Part IV of UNCLOS on Archipelagic States, see above n. 6.

¹⁴ UNCLOS, art. 47, see above n.6.

¹⁵ See Article 46 (b), UNCLOS, above n. 6 for definition of “archipelagic State.”

¹⁶ J. Ashley Roach & Robert W. Smith, *United States Responses to Excessive Maritime Claims* (Boston: Martinus Nijhoff Publishers, 2nd Ed., 1996), 101-103; US State Department, *Limits in the Seas No. 99, Straight Baselines: Viet Nam*, 12 December 1983 (www.law.fsu.edu/library/collection/limitsinseas/LS099.pdf).

¹⁷ US State Department, *Limits in the Seas No. 117, Straight Baselines Claim: China* (9 July 1996), (www.state.gov/documents/organization/57692.pdf).

¹⁸ US State Department, *Limits in the Seas No. 127, Taiwan’s Maritime Claims* (15 November 2005), (www.state.gov/documents/organization/57674.pdf).

¹⁹ Republic Act No. 9522, *An act to amend certain provisions of Republic Act No. 3046, as amended by Republic Act No. 5466, to Define the Archipelagic Baselines of the Philippines* (Enacted into Law on March 10, 2009). (www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/PHL.htm).

²⁰ UNCLOS, art. 2 and 3, see above n.6.

²¹ UNCLOS, art. 48, see above n.6.

²² Sovereignty over the territorial sea is exercised subject to the right of innocent passage of all vessels and to other rules of international law (Article 2 (3) and Section 3 of Part II of UNCLOS) as well as the right of transit passage through straits used for international navigation as set out in Part III of UNCLOS. Sovereignty over archipelagic waters is subject to the right of both innocent passage and archipelagic sea lanes passage (Article 52 and 53, UNCLOS).

²³ See generally, Part V, UNCLOS, see above n.6.

from the baselines from which the territorial sea is measured.²⁴ In their EEZ, coastal States have sovereign rights and jurisdiction for the purpose of exploring and exploiting the living and non-living natural resources of the waters superjacent to the seabed and of the seabed and its subsoil.²⁵ The EEZ regime in effect gives coastal States the vast majority of the oceans' fishing resources and hydrocarbon resources.

15. The other major resource zone in UNCLOS is the continental shelf.²⁶ The coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.²⁷ The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, 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 extends to less than this distance.²⁸

16. In effect, this means that a coastal State has the sovereign right to explore and exploit the hydrocarbon resources off its coast out to the 200 nm limit under both the continental shelf regime and the EEZ regime. However, if a coastal State has a broad shelf off its coast, it has a right to claim a continental shelf out to 350 nm or even further by submitting technical information to a special body established under UNCLOS called the Commission on the Limits of the Continental Shelf (CLCS).²⁹

17. When States become parties to UNCLOS, they agree that the sovereign right to explore and exploit the natural resources in and under the oceans off their coasts and islands will be governed by the provisions in UNCLOS. States Parties have in effect abandoned any traditional fishing rights or historic rights to natural resources, unless there are specific provisions in UNCLOS recognizing such rights.³⁰

A. Offshore Features and their Maritime Zones

18. UNCLOS makes important distinctions between islands, rocks, low-tide elevations and artificial islands. The distinctions are significant because different maritime zones can be claimed from different features. The distinctions are as follows:

- *Islands* are entitled to the same maritime zones as land territory, including a 12 nm territorial sea, a 200 nm EEZ and a continental shelf which could extend beyond 200 nm.³¹
- *Rocks* are only entitled to a 12 nm territorial sea.³²
- *Low-tide elevations* are not entitled to any territorial sea of their own, but can be used as base points to measure the territorial sea if they are within 12 nm from the mainland or an island.³³
- *Artificial islands* are entitled to no maritime zones, except for a 500 metre safety zone.³⁴

²⁴ UNCLOS, art. 57, see above n.6.

²⁵ UNCLOS, art. 56, see above n.6.

²⁶ See generally, Part VI, UNCLOS, above n.6.

²⁷ UNCLOS, art. 77, see above n.6.

²⁸ UNCLOS, art. 76(1), see above n.6.

²⁹ UNCLOS, art. 76(4) and 76(8), see above n.6.

³⁰ An example of this is Article 51 of UNCLOS, which provides that an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.

³¹ UNCLOS, art. 121(2), see above n.6.

³² UNCLOS, art. 121(3), see above n.6.

³³ UNCLOS, art. 13, see above n.6.

19. Because of their significance for claims to resources, the status of each feature is critically important. If a feature is an island entitled to an EEZ of its own, the State with sovereignty over the island has the sovereign right to explore and exploit all of the living and non-living natural resources in and under the island's EEZ, including fisheries and hydrocarbons. On the other hand, if a feature is only a low-tide elevation or an artificial island, the State with sovereignty obtains no rights to the natural resources in or under the waters adjacent to the low-tide elevation or artificial island.

20. An island is defined in Article 121 of UNCLOS as a naturally formed area of land above water at high tide.³⁵ State practice suggests that any insular feature meets this definition, including rocks, coral reefs and shoals, provided that part of it is naturally formed and above water at high tide.³⁶

21. A low-tide elevation is a feature which is above water at low-tide but submerged at high tide, so it is not an island.³⁷ If a low-tide elevation is built up through land reclamation or if structures are built on it, it may either remain a low-tide elevation or become an artificial island. It does not become an island because it is not a "naturally formed" area of land above water at high tide. Because it is either a low-tide elevation or an artificial island, it is not entitled to any maritime zones of its own. In addition, as the ICJ pointed out in the *Pedra Branca* case and the *Qatar/Bahrain* case, it is not clear whether a State may lawfully claim sovereignty over a low-tide elevation situated more than 12 nm from the mainland coast or another island.³⁸

22. Article 121(3) of UNCLOS provides that some islands which are naturally formed areas of land above water at high tide are not entitled to an EEZ or continental shelf of their own. It provides that "rocks which cannot sustain human habitation or economic life of their own" shall have no EEZ or continental shelf. This phrase is deliberately vague because States at the UN Conference negotiating UNCLOS could not agree on more precise language.³⁹ The obvious intent was to provide that certain very small, uninhabitable features should not generate large resource zones. Article 121(3) has generated a considerable amount of academic comment and debate,⁴⁰ but there has been no authoritative interpretation by any court or tribunal providing guidance on how it should be interpreted and applied.

³⁴ UNCLOS, art. 60(8), see above n.6.

³⁵ UNCLOS, art. 121(1), see above n.6.

³⁶ Clive Symmons, "When is an 'Island' Not an 'Island' in International Law? The Riddle of Dinkum Sands in the Case of U.S. v. Alaska", *Maritime Briefing*, Volume 2, Number 6 (1999); Peter B. Beazley, "Coral Reefs and the 1982 Convention on the Law of the Sea" in: Gerald H. Blake, editor, *Maritime Boundaries* (Routledge, 1994), 59-72.

³⁷ UNCLOS, art. 13, see above n.6.

³⁸ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports 2008, 12, paras. 295-296; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, 40, paras. 205-206.

³⁹ For a brief history of the provision and State practice in the Pacific region, see Yuen-Huei Song, "The Application of Article 121 of the Law of the Sea Convention to Selected Geographical Features Situated in the Pacific Ocean", 9 *Chinese JIL* (2010), 663-698. For the detailed legislative history, see *The Law of the Sea, Regime of Islands, Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea*, Office for Ocean Affairs and the Law of the Sea, (UN, New York, 1988).

⁴⁰ Jon M. Van Dyke & Robert A. Brooks, "Uninhabited Islands: Their Impact on the Ownerships of the Oceans' Resources", 12 *Ocean Development & International Law* (1983), 265-300; J.I. Charney, "Rocks that Cannot Sustain Human Habitation," 93 *AJIL* (1999), 863-877; B. Kwiatkowska & A.H.A. Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own," 21 *Netherlands Yearbook of International Law* (1990), 139-181.

23. The ICJ was invited to rule on this issue in the *Black Sea Case* between Romania and Ukraine.⁴¹ Romania argued that Serpent's Island was a rock which cannot sustain human habitation or economic life of its own because it is a rocky formation in the geomorphologic sense and is devoid of natural water sources and virtually devoid of soil, vegetation and fauna. Further, Romania argued that human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there do not support the development of economic activities. It added that the presence of some individuals on the island because they have to perform an official duty such as maintaining a lighthouse, does not amount to sustained human habitation. In response, Ukraine argued that Serpents' Island is indisputably an "island" under Article 121 (2), of UNCLOS, rather than a "rock". Ukraine contended that the evidence shows that Serpents' Island can readily sustain human habitation and that it is well established that it can sustain economic life of its own. In particular, the island has vegetation and a sufficient supply of fresh water.⁴² Ukraine further asserted that Serpents' Island "is an island with appropriate buildings and accommodation for an active population".⁴³ Unfortunately, the ICJ decided that it did not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 of UNCLOS to determine the maritime boundary.⁴⁴ Nevertheless, the arguments put forward in that case provide guidance on how a case concerning the interpretation of Article 121(3) is likely to be argued.

24. One former member of the International Tribunal for the Law of the Sea, Judge Budislav Vukas of Croatia, made a Declaration in one of its cases on how article 121(3) should be interpreted. He concluded his statement as follows:

10. The purpose of this brief text is to explain my belief that the establishment of exclusive economic zones around rocks and other small islands serves no useful purpose and that it is contrary to international law.

It is interesting to note that Ambassador Arvid Pardo – the main architect of the contemporary law of the sea – warned the international community of the danger of such a development back in 1971. In the United Nations Seabed Committee he stated:

If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.

The annexed map showing Australia's exclusive economic zone around Heard Island and the McDonald Islands, provided by the Agent of the Respondent, confirms that Ambassador Pardo's fear has been borne out.⁴⁵

25. It is not clear how many geographic features there are in the South China Sea, and how many would be classified as islands, being naturally formed areas of land above water at high tide.⁴⁶ One analyst has noted that there may be more than 170 geographic features in the South China Sea, but that only about 36 of them

⁴¹ Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, 61

⁴² *Ibid.*, para. 180.

⁴³ *Ibid.*, para. 184.

⁴⁴ *Ibid.*, para. 187.

⁴⁵ Declaration of Vice-President Voukas, The "Volga" Case (Russian Federation v. Australia), Prompt Release, Judgment of 23 December 2002 (www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/decl.Vukas.E.pdf)

⁴⁶ For descriptions of the geographic features in the Spratly Islands, see David Hancox and Victor Prescott, "A Geographical Description of the Spratly Islands and an Account of the Hydrographic Surveys Amongst those Islands", Maritime Briefing (Volume 1, Number 6, International Boundaries Research Unit, Durham, 1995); Daniel J Dzurek, "The Spratly Islands Dispute: Who's on First?", Maritime Briefing (Volume 2, Number 1, International Boundaries Research Unit, Durham, 1996); Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, Sharing the Resources in the South China Sea (University of Hawaii Press, 1997), Appendix 1: Descriptions of the Spratly Features, 225-235. The latter descriptions are available online under the title Digital Gazetteer of the Spratly Islands (<http://southchinasea.org/macand/gazetteer.htm>).

are islands above water at high tide⁴⁷. A map of the South China Sea was issued by the United States Government through the Office of the Geographer in the State Department in January 2010.⁴⁸ The Gazetteer on the reverse side of the map lists only 14 features in the Spratly Islands as “islands” and the remaining features as reefs, shoals or atolls. The Gazetteer states that 24 of the reefs are “visible at high tide”, but on the map itself a 12 nm territorial sea line is drawn around some reefs which are not stated to be visible at high tide. Nevertheless, an examination of the map provides a useful tool for analyzing which areas of the South China Sea may give rise to disputes.

26. It is also not clear how many of the islands in the Spratly Islands would be entitled to an EEZ and continental shelf because they are capable of sustaining human habitation or economic life of their own. The largest island, Itu Aba, which is occupied by Taiwan, is reportedly approximately 1400 metres long and 400 metres wide or about 0.46 square kilometres.⁴⁹ All of the largest islands in the Spratlys are within the Kalayaan Islands Group (KIG) claimed by the Philippines, except for Spratly Island⁵⁰, which is occupied by Viet Nam.⁵¹ One writer has addressed the issue of whether the islands in the Spratlys are rocks or islands and concluded that none of the islands would be capable of sustaining human habitation or economic life of their own⁵². However, the argument can certainly be made that the larger islands with land and vegetation are capable of sustaining human habitation or economic life of their own, even if some of them do not have a natural source of water. This is true of some of the islands in the Paracels as well as the Spratlys.

27. Another issue which could arise in the South China Sea is the status of features which are permanently submerged, even at low tide. The UNCLOS provisions imply that such features would be treated as part of the seabed and subsoil. If they were within the EEZ or on the continental shelf of a State, the State would have sovereign rights and jurisdiction to explore and exploit the natural resources. If they were outside the EEZ or continental shelf of any State, they would be part of the deep seabed, or “the Area”, and would be subject to the jurisdiction of the International Seabed Authority. This issue could arise with respect to several features in the South China Sea, including Macclesfield Bank, a sunken atoll which is reported to be completely submerged, even at low-tide.⁵³ China has traditionally claimed Macclesfield Bank.

B. Effect of UNCLOS on Historic Claims, Maps and National Legislation

28. International courts and tribunals frequently consider maps as evidence of claims to sovereignty over islands and other features. Maps sometimes contain lines which are intended to indicate which islands or other geographic features are claimed by a State. For example, the Philippines claims sovereignty over certain features in the Spratly Islands which they call the Kalayaan Islands Group (KIG). Philippines’ claim to the

⁴⁷ Dzurek, *ibid.*, 54.

⁴⁸ South China Sea, Map and Gazetteer, US Government, 803425AI (G02257) 1-10, January 2010. The map is available online at the website of the Centre for International Law, National University of Singapore (<http://cil.nus.edu.sg/research-projects/south-china-sea/>).

⁴⁹ Valencia, Van Dyke & Ludwig, see above n.56, 230.

⁵⁰ Although the group of islands is known as the “Spratly Islands”, there is also an individual island in the group known as “Spratly Island”.

⁵¹ In addition to Itu Aba, the largest features in the Spratlys are four islands occupied by Viet Nam (Spratly Island, Namyit Island, Southwest Cay and Sin Cowe Island) and three occupied by the Philippines (Thitu Island, Loaita Island and Northwest Cay).

⁵² Marius Gjetnes, “The Spratlys: Are They Rocks or Islands?”, 32 *Ocean Development & International Law* (2001), 191-204.

⁵³ Alex G. Oude Elferink, “The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?”, 32 *Ocean Development & International Law*, 169-190, 177.

KIG is indicated on maps by a polygon shaped line. The Philippines is not claiming sovereign rights or jurisdiction over the waters inside this polygon-shaped line. Rather, it is claiming sovereignty over the islands inside the polygon-shaped line, as well as sovereignty over the territorial sea adjacent to the islands. In other words, the polygon-shaped line around the KIG is a short-hand reference indicating which islands are claimed by the Philippines.

29. Historically, the Philippines claimed sovereignty over the waters inside a large rectangular box based on coordinates in the 1898 Treaty between the United States and Spain under which the United States obtained sovereignty over the Philippines. The Philippines' position was that its "international treaty limits" were established under three international treaties, namely the 1898 Treaty of Paris,⁵⁴ the Cession Treaty of 1900⁵⁵ and the 1930 Treaty of Washington.⁵⁶ Under Section 1 of the 1935 Philippines Constitution, the territory of Philippines is described as consisting of:

[A]ll the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits which are set forth in Article III of the said Treaty, together with all the islands embraced in the treaty concluded at Washington between the United States and Spain on the seventh day of November, nineteen hundred and the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.⁵⁷

Philippines claimed that the treaty limits established by these treaties, which formed a large rectangle around the main archipelago of Philippines, established the territorial borders of Philippines, and that all waters from the baselines to the so-called "international treaty limits" were considered the territorial sea of Philippines.⁵⁸

30. However, the international community, including the United States as a party to the 1898 Treaty, did not accept the position of the Philippines on the status of the waters inside the rectangular box established by the treaties.⁵⁹ In response to an objection by Australia, the Philippines submitted a statement to the UN Secretary-General dated 26 October 1988 that it would harmonize its domestic legislation with UNCLOS.⁶⁰ This harmonization took more than 20 years. In 2009, the Philippines passed a new baselines law which brought its claim into conformity with UNCLOS.⁶¹ Without addressing the issues directly, the new baselines

⁵⁴ The Treaty of Paris between Spain and the United States, signed at Paris, 10 December 1898, TS No. 343.

⁵⁵ The Treaty between Spain and the United States for the Cession of Outlying Islands for the Philippines, signed at Washington, 7 November 1900, T.S. No. 345.

⁵⁶ Convention between the United States and Great Britain Delimiting the Philippine Archipelago and the State of Borneo, signed at Washington, 2 Jan 1930, TS No. 856.

⁵⁷ While the 1987 Philippines Constitution does not make any reference to the 1898 Treaty of Paris, the 1900 Cession Treaty and the 1930 Treaty of Washington, constitutional deliberations show that Philippines relies on these international treaties as the basis for the territorial borders of the Philippines: See Mary Ann Palma, "The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges and Perspectives," RSIS Working Paper No. 182 (21 July 2009), 3 (www.rsis.edu.sg/publications/workingpapers/wp182.pdf).

⁵⁸ Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines, (17 June 1961) at the UNDOALOS National Legislation Database (www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf).

⁵⁹ J. Ashley Roach & Robert W. Smith, *United States Responses to Excessive Maritime Claims* (Martinus Nijhoff, 2nd ed., 1996), 216-222.

⁶⁰ *Ibid*, 222.

⁶¹ Republic Act No. 9522, An 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 Approved by the President on March 10, 2009.

law in effect abandoned the claim that the waters inside the large rectangular were the territorial sea of the Philippines.

31. It is undeniable that China has a historic claim to sovereignty over all of the islands, reefs and banks in the South China Sea, which it groups into four major archipelagic groups - Dongsha (Pratas), Xisa (Paracels), Zongsha (Macclesfield Bank) and Nansha (Spratlys) - as well as the Huangyan Island (Scarborough Reef). Articles summarizing China's historic claim make it clear that China has claimed the geographic features in these areas since ancient times. They do not purport to assert that China has a historic claim to all of the waters in the South China Sea.⁶²

32. In recent years controversy has arisen over whether China's claim is not just to the features, but also to the waters inside the lines on its maps. This has raised questions and debate about the significance of the infamous "nine-dashed line" map of China and Taiwan and the nature of its claim. The Chinese nine-dashed lines first appeared in a Chinese map in 1914 by Chinese cartographer Hu Jin Jie.⁶³ In 1947, the Government of the Republic of China (presently Taiwan) published an official map of the archipelago of the South China Sea using 11 interrupted lines drawn in a 'u-shape' around most of the features of the Spratly Islands.⁶⁴ Two of these lines in the Tonkin Gulf area were later deleted and the line has come to be known as the "interrupted lines" or "nine-dashed lines". The map was subsequently adopted by the People's Republic of China.

33. Questions arose in the 1990s on the status of China's nine-dashed line. Some commentators took the view that China was using the nine-dashed line to claim all the waters as historic waters in which China would have historic rights.⁶⁵ Other commentators, however, are of the view that China only claims the islands and their adjacent waters inside the nine-dashed line.⁶⁶ Interestingly, this view was also expressed by Zhiguo Gao, China's judge on the International Tribunal for the Law of the Sea (ITLOS). In a 1994 article, Judge Gao opined that "the boundary line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense."⁶⁷

34. Some Chinese scholars have argued that among the "historic rights" which China has enjoyed in the South China Sea is the right to fish in the waters of traditional fishing grounds in the South China Sea.⁶⁸ Chinese fishermen have traditionally fished in the South China Sea in waters now claimed as the EEZ of other claimant States in the South China Sea and possibly even the waters claimed as the EEZ of Indonesia. However, when China ratified UNCLOS in 1996, it in effect agreed that access to fishing resources in the oceans would be determined by the provisions of UNCLOS. Under UNCLOS, coastal States have the right to claim an EEZ of 200 nm miles from their baselines, as well as the sovereign right to explore and exploit

⁶² For excellent summaries of the historic claim of China, see Jiangming Shen, "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands" 21 *Hastings Int'l & Comp. L. Rev.* (1997-98), 1-75; Jiangming Shen, "China's Sovereignty over the South China Sea Islands: A Historical Perspective" 1 *Chinese JIL* (2002), 94-157.

⁶³ ZOU Keyuan "The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the dispute over the Spratly Islands", 14 *International Journal of Marine and Coastal Law* 1 (1999), 27 – 55, 52.

⁶⁴ *Ibid.*

⁶⁵ LI Jinming & LI Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note", 34 *Ocean Development and International Law* (2003). 287-195

⁶⁶ ZOU Keyuan, see above n.62, 52; Yann-huei Song & Peter Kien-hong Yu, "China's 'historic waters' in the South China Sea: An Analysis from Taiwan, R.O.C.", 12 *American Asian Review* (1994), 83-101.

⁶⁷ Zhiguo Gao, "The South China Sea: From Conflict to Cooperation?" 25 *Ocean Development and International Law* (1994), 345-359, 346.

⁶⁸ Yann-huei Song & ZOU Keyuan, see above n.8, 118.

the living resources in that EEZ. The UNCLOS provisions on the EEZ do not require the coastal State to allow foreign fisherman to continue to fish in their traditional fishing grounds within its EEZ. The only obligation of the coastal State with respect to economic dislocation is set out in Article 62 granting access to “surplus” when a State’s “capacity to harvest” the fishing resources in its EEZ is less than the “allowable catch” determined in order to promote optimal utilization of the fishing resources in its EEZ.⁶⁹ Article 62(3) provides that when giving access to any surplus, one of the factors which the coastal State shall take into account is “the need to minimize economic dislocation in States whose nationals have habitually fished in the zone”. However, this is only one of several factors the coastal State must consider when granting access to any surplus, and the coastal State has discretion to decide whose nationals shall be given access to the surplus.

35. The concern with regards to China’s claim to “historic rights” outside its territorial sea is reinforced by the fact that its 1998 Law on the Exclusive Economic Zone and Continental Shelf contains a provision which seems to be intended to preserve its historic rights beyond its territorial sea. Article 14 of China’s 1998 Law provides that the provisions of this Law “shall not affect the historic rights enjoyed by the People’s Republic of China”.⁷⁰ Therefore, China has included a position in its domestic legislation which could be intended to preserve certain “historic rights” in the South China Sea. However, there is serious doubt whether a provision in China’s domestic legislation could preserve the rights of Chinese nationals in areas outside China’s national jurisdiction. Also, as stated earlier, when China ratified UNCLOS in 1996, it gave up whatever historic rights it had to the natural resources in areas that are now the EEZ or continental shelf of other States. China’s legal relations with other Parties to UNCLOS are now governed by UNCLOS, and China cannot use its domestic law as an excuse not to fulfill its international obligations under UNCLOS.

36. Finally, it should be noted that under UNCLOS the waters in the South China Sea seaward of the outer limit of the 12 nm territorial sea measured from the land territory or from islands would be either EEZ or high seas. Article 58(1) provides that in the EEZ, all States enjoy the high seas freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines. This ensures that notwithstanding who has sovereignty over the islands and the territorial sea adjacent to them, the freedom of all States to enjoy high seas freedoms in those waters cannot be impeded.

37. China has officially recognized that the high seas freedoms of navigation and overflight apply in the South China Sea. In response to concerns expressed by the US State Department in May, 1995,⁷¹ the PRC Foreign Ministry Spokesman Chen Jian stated that China while safeguarding its sovereignty over the Nansha Islands, and its marine rights and interests, China will fulfill its duty of guaranteeing freedom of navigation and overflight in the South China Sea according to international law.⁷² China reiterated this position as recently as 21 June 2011.⁷³

⁶⁹ Article 61 sets out the requirements for determining the allowable catch and capacity to harvest.

⁷⁰ Economic Zone and Continental Shelf Act, adopted at the third session of the Standing Committee of the Ninth National People’s Congress of the People’s Republic of China (26 June 1998), (www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm).

⁷¹ The US State Department stated that it takes no position on the competing claims to sovereignty in the South China Sea, but that it would view with serious concern any maritime claim, or restriction on maritime activity, that was not consistent with international law, including UNCLOS. “Spratlys and the South China Sea,” Daily Press Briefing (10 May 1995), statement by Christine Shelly, Acting Spokesperson, U.S. Department of State (http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html).

⁷² Statement of PRC Foreign Ministry Spokesman CHAN Jian, “News Briefing by Chinese Foreign Ministry,” Beijing Review (8-14 May 1995), 22, cited in Yann-huei Song & ZOU Keyuan, see above n.8.

⁷³ At Foreign Ministry Spokesperson HONG Lei’s Regular Press Conference on June 21, 2011, he stated that “China’s position on the South China Sea is clear and consistent. China safeguards its sovereignty and maritime rights and interests in the South China Sea, which does not affect freedom of navigation in the South China Sea

IV. EXTENDED CONTINENTAL SHELF CLAIMS IN THE SOUTH CHINA SEA

A. Rules and Procedures Concerning Claims to Continental Shelf Beyond 200 nm

38. As mentioned above, Article 76 of UNCLOS permits states to make continental shelf claims beyond 200 nm out to a maximum of 350 nm or even further,⁷⁴ by submitting technical information to the CLCS.⁷⁵ The deadline for submission of claims for most States Parties was 13 May 2009.⁷⁶

39. Article 76 provides that the Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf⁷⁷. It also provides that the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding⁷⁸. However, it further provides that the provisions of Article 76 are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts⁷⁹.

40. The effect of a submission to the Commission on “existing maritime disputes” is dealt with specifically in the Rules of Procedure of the Commission⁸⁰. Article 5(a) of Annex I provides that in cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.⁸¹

B. Submissions by ASEAN Claimant States and Related Communications

41. In May 2009, Malaysia and Viet Nam made a joint submission to the Commission to extend their continental shelves beyond 200 nm into the South China Sea⁸². Viet Nam also made a separate submission⁸³.

enjoyed by countries according to international law. In fact, freedom of navigation in the South China Sea is out of question.” (www.fmprc.gov.cn/eng/xwfw/s2510/t833157.htm).

⁷⁴ UNCLOS, art. 76(4), see above n.6.

⁷⁵ UNCLOS, art. 76(8), see above n.6.

⁷⁶ At a Meeting of States Parties to UNCLOS on 29 May 2001, it was decided that, for a State for which the Convention entered into force before 13 May 1999, the date of commencement of the 10-year time period for making submissions to the Commission was 13 May 1999. The effect of this decision was that the deadline for making submissions to the CLCS for States with claims to islands in the South China Sea was 13 May 2009.

⁷⁷ *Ibid*

⁷⁸ *Ibid*. This clause is not without ambiguity. It can be argued that the limits would be final and binding only on the coastal State extending its shelf on the basis of the recommendations.

⁷⁹ UNCLOS, art. 76(10), see above n.6.

⁸⁰ See Annex I of Rules of Procedure of the Commission on the Limits of the Continental Shelf (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement>)

⁸¹ *Ibid*.

⁸² Joint Submission dated 6 May 2009 by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, through the UN Secretary-General, in accordance with Article 76, paragraph 8, of UNCLOS; Communication dated 4 August from the Republic of the Philippines with regard to the Joint Submission of Malaysia and Viet Nam; and Communication dated 21 August 2009 from the Malaysia with regard to the Joint Submission of Malaysia and Viet Nam. The Joint Submission of Malaysia and Viet Nam, as well as the Communications submitted to the UN Secretary-General by China, Malaysia, the Philippines, Viet Nam and Indonesia with regard to the Joint Submission of Malaysia and Viet Nam, are available online (www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm).

⁸³ See Submission by Socialist Republic of Viet Nam dated 7 May 2009, see above n.82.

The submissions had one significant side effect. Maps included in the submissions clarified the 200 nm EEZ claims of Malaysia and Viet Nam. The submissions were also significant because Malaysia and Viet Nam claimed an EEZ only from the baselines along their mainland. They did not claim an EEZ from any of the islands they claimed in the Spratly Islands.

42. China immediately objected to these submissions through a Note Verbale dated 7 May 2009 to the UN Secretary-General in response to the Joint Submission of Malaysia and Viet Nam to the CLCS. China stated that the joint submission of Malaysia and Viet Nam “seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea”⁸⁴. China referred to Article 5(a) of Annex I of the Rules of Procedure of the Commission, and requested the Commission not to consider the submissions of Malaysia and Viet Nam⁸⁵. Given that a maritime dispute exists in the South China Sea, China’s objection was a lawful response to the submissions, and the Commission will not be able to consider the submissions of Malaysia and Viet Nam.

43. In its Note Verbale of 4 August 2009 the Philippines also objected to the Joint Submission of Malaysia and Viet Nam because it lays claim to areas that are disputed. The Philippines stated that not only does the joint submission overlap with claims of the Philippines in the South China Sea, but also because there are conflicting claims to sovereignty over some of the islands and over the area known as North Borneo. This revived the historic claim of the Philippines to the Malaysian State of Sabah, which the Philippines refers to as North Borneo. The Philippines also pointed out that under its Rules of Procedure, the CLCS cannot consider a submission in cases where a land or maritime dispute exists.⁸⁶

44. In its Note Verbale dated 7 May 2009 China included one sentence which has created considerable controversy. It reads as follows:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map)⁸⁷.

45. The attached map which was referred to was the nine-dashed line map. By attaching that map to a communication sent to the UN Secretary-General and asking that it be circulated to UN members, China had for the first time indicated that its claim in the South China Sea was based in part on the map. Because the wording of the note was ambiguous and the map was attached, it raised old suspicions in ASEAN countries about the nature of China’s claim in the South China Sea. This resulted in a series of communications to the UN Secretary-General concerning the joint submission of Malaysia and Viet Nam.

46. Indonesia and the Philippines responded to China’s Note Verbale by sending official communications to the UN Secretary-General stating that any claim to sovereign rights and jurisdiction in and under the waters inside the nine-dashed lines would be inconsistent with UNCLOS unless such claim to sovereign rights and jurisdiction was limited to maritime zones claimed from the islands.⁸⁸

47. In its Note Verbale of 8 July 2010, Indonesia recalled China’s position on the Japanese island of Okinotorishima, where China maintained that small uninhabited islands should be treated as rocks and should not be given a continental shelf or EEZ of their own, and stated that a similar practice should be followed in the South China Sea.⁸⁹

⁸⁴ See Note from China dated 7 May 2009, see above n.82.

⁸⁵ *Ibid.*

⁸⁶ See Note from the Philippines dated 4 August 2009, see above n.82 .

⁸⁷ See Note from China dated 7 May 2009, see above n. 82.

⁸⁸ See Note from Indonesia dated 8 July 2010, and Note from the Philippines dated 5 April 2011, see above n.82.

⁸⁹ *Ibid.*

48. In its Note Verbale of 5 April 2011, the Philippines emphasized the principle that the land dominates the sea, and stated that UNCLOS provides no legal basis for any claim to sovereign rights and jurisdiction over 'relevant' waters (and the seabed and subsoil thereof) within the nine-dashed lines outside of the claims to waters that are 'adjacent' to islands as defined in Article 121.⁹⁰ In its Note Verbale of 14 April 2011 in response to the Note of the Philippines, China made the following statement regarding its claims in the South China Sea:

Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.⁹¹

49. China's statement dated 14 April 2011 suggests that its claim consists only of a claim to the islands, and that the islands are entitled not only to a territorial sea, but also to an EEZ and continental shelf of their own. There is no suggestion in the statement that China is claiming the waters inside the nine-dashed lines as historic waters, or that it is claiming any historic rights in the waters inside the nine-dashed lines. Like the Southeast Asian claimants, it seems to be bringing its claim to the Spratly Islands into conformity with UNCLOS. At the same time, however, China seems to be continuing its policy of "deliberate ambiguity" with respect to the significance of the nine-dashed line map. Also, incidents in May and June of 2011, where Chinese vessels interfered in seismic surveys being carried out in the EEZ of Viet Nam and undertook seismic survey activities in the EEZ of the Philippines, indicate that some Chinese agencies appear to have a policy of enforcing China's "sovereign rights and jurisdiction" in all ocean areas within the nine-dashed line, notwithstanding the language in its official notes to the United Nations. This has been a cause for serious concern in Southeast Asia and beyond.⁹²

C. Implications of 2009 Continental Shelf Claims and Related Communications

50. The maps submitted to the CLCS in conjunction with Malaysia and Viet Nam's extended continental shelf claim clarified the outer limit of the EEZ of these States. Although the Philippines has not issued a map indicating the outer limit of its EEZ claim in the South China Sea, it has clarified its archipelagic baselines in its 2009 baselines law, and it is easy to calculate where its EEZ boundary would be by measuring 200 nm from its archipelagic baselines.

51. Despite the clarification in its Note Verbale of 14 April 2011, China has not designated baselines around any of the islands or officially claimed maritime zones from any of the islands. Therefore, it is not possible to identify the areas of overlapping claims between China and the ASEAN claimant States. The current controversies are caused in part by the fact that some Chinese agencies appear to have a policy of enforcing China's rights and jurisdiction in all of the waters inside the nine-dashed lines.

52. It is possible to discern a common strategy among the ASEAN claimant States with regard to the Spratly Islands from their submissions and communications to the CLCS. First, the ASEAN claimant States are asserting that any claim to sovereign rights and jurisdiction in and under the waters in the South China Sea must be based on maritime zones claimed from land territory. They will not recognize any claim by China to sovereign rights and jurisdiction based on the fact that the maritime areas are inside the nine-dashed lines on China's map.

⁹⁰ See Note of 5 April 2011 of the Philippines, see above n.82.

⁹¹ See Note of 14 April 2011 of China, see above n.82.

⁹² See Carlyle A. Thayer, "China's New Wave of Aggressive Assertiveness in the South China Sea", paper presented at Conference on Maritime Security in the South China Sea, sponsored by the Center for Strategic and International Studies, Washington, D.C. (June 20-21, 2011) (<http://dotchuoinon.files.wordpress.com/2011/06/thayer-csis-south-china-sea.pdf>)

53. Second, by claiming an EEZ and an extended continental shelf from the baselines along their mainland coast or main archipelago, and not from any off-shore islands, the ASEAN claimant States are taking the position that the sovereign right to explore and exploit the hydrocarbon resources in the South China Sea should be determined primarily by the EEZ and continental shelf measured from the baselines along the mainland of Viet Nam and Malaysia and the baselines of the main archipelago of the Philippines.

54. The position of the ASEAN claimants is also likely to be that the majority of the features in the South China Sea are not islands because they are not naturally formed areas of land above water at high tide. Rather, they are either low-tide elevations or artificial islands and therefore have no maritime zones of their own, not even a 12 nm territorial sea. They are likely to maintain that all of the features which do meet the definition of “islands” should be treated as “rocks” within article 121(3), and should not be entitled to an EEZ or continental shelf of their own because they are too small to sustain human habitation or economic life of their own.

55. Consequently, the position of the ASEAN claimants is likely to be that a significant portion of the sea space in the South China Sea is not in dispute, because it is within the EEZ or continental shelf of the ASEAN claimant States. The only areas in dispute would be the features themselves and the 12 nm territorial sea adjacent to the features.

56. China will obviously dispute this position. It seems to have only two options. First, it can argue that at least some of the features in the South China Sea are large enough to be islands entitled to an EEZ and continental shelf of their own. Therefore, since China claims sovereignty over all of the islands in the South China Sea, there will be a substantial overlap between the EEZ of those islands and the EEZ of the ASEAN claimants. With respect to the extended continental shelf claims, they will argue that first, the CLCS is not able to consider the submissions of Malaysia, Viet Nam and the Philippines, and second, that a State cannot claim an extended shelf which would overlap with the EEZ claimed from an offshore island.

57. China’s second option seems to be to try to argue that it has sovereignty or sovereign rights and jurisdiction in and under all of the waters inside the nine-dashed lines, based on some historic claim or historic rights and that as a consequence, all of the ocean space within the nine-dashed lines is in dispute. However, such a position is not consistent with UNCLOS (see above) and is likely to be vigorously challenged by the ASEAN claimants. Other interested States may also challenge the Chinese position as contrary to UNCLOS.⁹³ As explained above, challenging States would likely argue that whatever historic rights China may have had in the waters surrounding the features, its rights in those waters are now determined by UNCLOS.

58. The problem China faces is that the ASEAN claimants and many other interested States are of the view that the only basis for China to legitimately claim a right to explore and exploit the natural resources in the South China Sea is from maritime zones measured from islands as provided in UNCLOS. The fact that China seems to be continuing a policy of deliberate ambiguity by refusing to clarify the nature of its claim and the significance of the nine-dashed line map has raised doubts and concerns about whether China is willing to abide in good faith with its rights and obligation under UNCLOS.

59. The concern about whether China intends to comply in good faith with UNCLOS must be seen in light of the concerns continually expressed in the international media about the fact that China is building a blue water navy and is significantly increasing the number of enforcement vessels in the South China Sea. These

⁹³ In a Press Statement issued on 22 July 2011 on the South China Sea, US Secretary of State Hillary Clinton stated: “We also call on all parties to clarify their claims in the South China Sea in terms consistent with customary international law, including as reflected in the Law of the Sea Convention. Consistent with international law, claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.” <http://www.state.gov/secretary/rm/2011/07/168989.htm>.

concerns are reinforced by statements from the United States that China is attempting to place limits on the activities of US warships in its EEZ in a manner that is inconsistent with UNCLOS.

60. The best way for China to alleviate the doubts, fears and concerns of the ASEAN countries is for it to clarify its claim in a manner that is accepted by the ASEAN claimants and the international community as consistent with UNCLOS. If China fails to clarify its claim, conflicts will continue to arise over which areas are in dispute in the South China Sea, and the doubts, fears and concerns of the ASEAN countries about China's intentions will continue. As a result, some ASEAN claimants are likely to feel it necessary to increase their cooperation with the United States so that the United States will establish a greater presence in the region.

V. DELIMITATION OF MARITIME BOUNDARIES

A. UNCLOS Provisions on Maritime Boundary Delimitation

61. Coastal States are often not able to claim the full extent of their maritime zones because of the proximity of other States. Where maritime zones overlap, a potential maritime boundary exists. UNCLOS sets out principles for the delimitation of maritime boundaries between such opposite and adjacent States where the maritime zones overlap.

62. Article 15 sets out the rules for the delimitation of the territorial sea boundary, providing that failing agreement between opposite and adjacent States to the contrary, the boundary should be a median line, every point of which is equidistant from the nearest points on baselines. However, a departure from the median line may be justified on the grounds of historic title or other special circumstances. Article 15 on the delimitation of territorial sea boundaries would apply in the South China Sea if it were decided that different claimant States had sovereignty over different islands, and there was a distance of less than 24 nm between the islands.

63. Articles 74 and 83 respectively govern the delimitation of the EEZ and continental shelf boundaries between opposite or adjacent States. The wording of both articles is near identical and provides that the general principle is that delimitation shall be effected by agreement on the basis of international law in order to achieve an equitable solution. These articles were among the last to be agreed upon during the negotiation of UNCLOS because of a division between States which preferred an "equidistance-special circumstances" rule and States which preferred a rule to delimit on the basis of "principles of equity." The end result was a compromise on a text which is vague and which does not contain the language preferred by either group. The requirement that the delimitation is to achieve an "equitable solution" places emphasis on the objective of the delimitation, thus differing from the use of equitable principles as a method or procedure for delimitation.

B. Practice of Courts and Tribunals on Maritime Boundary Delimitation

64. Scholars who have studied boundary delimitation cases have concluded that the delimitation provisions in Articles 74 and 83 are identical to the rules of customary international law that have been developed by courts and tribunals on the delimitation of continental shelf and EEZ boundaries.⁹⁴

65. Courts have referred to the method called for in Articles 74 and 83 (and in customary international law) as the equitable principles-relevant circumstances method.⁹⁵ Also, they have stated that this method is very

⁹⁴ E.D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime*, Vol. 1, *The Continental Shelf*, (Kluwer/Martinus Nijhoff, 1992), 360; A.G. Oude Elferink, "The Impact of the Law of the Sea Convention on the Delimitation of Maritime Boundaries," in: D. Vidas and W. Ostreng, (eds.) *Order for Oceans at the Turn of the Century* (The Fridtjof Nansen Institute, 1999), 457-469, 462.

⁹⁵ See, for example, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening), [2002] ICJ Reports 303, para. 288.

similar to the “equidistance-special circumstances” rule that is called for in Article 15 of UNCLOS regarding the delimitation of territorial sea boundaries.⁹⁶

66. In the 2009 *Black Sea Case*, the ICJ articulated a three-stage test. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in a particular case. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. At the second stage, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. During this stage the Court will consider factors such as the configuration of the coasts concerned and the presence of islands. Finally, at the third stage, the Court will verify that the line does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. This final check for an equitable outcome entails a confirmation that no great disproportionality of the delimited maritime areas can be evident by comparison to the ratio of coastal lengths.⁹⁷

C. Effect of Small Offshore Islands on Delimitation of Maritime Boundaries

67. Although, as noted above, there has been no authoritative ruling on how Article 121(3) is to be interpreted, international courts and tribunals have on a number of occasions been faced with the question of how islands should affect the delimitation of maritime boundaries.

68. Even if an island is large enough to have an EEZ of its own, this does not mean it would be given full effect in a maritime delimitation. It is not simply a question of drawing an equidistance line between the island and the mainland territory. If there are overlapping maritime claims between an EEZ measured from a small, remote island and an EEZ measured from the mainland or from an archipelagic State, the practice of courts and tribunals is to give a significantly reduced effect to the island when delimiting the maritime boundary.⁹⁸

69. If the practice of international courts and tribunals is followed, the larger islands in the Spratlys and Paracels would be given significantly less effect in the direction of the mainland coasts of the claimant States. However, many of the larger islands are located near the 200 nm EEZ limits of the ASEAN claimant States. The EEZ of these islands could extend into the areas beyond the outer limits of the 200 nm EEZ of the claimant States and thus reduce or completely eliminate the pocket of high seas in the middle of the South China Sea. The effect of the islands on the pocket of high seas and deep seabed in the middle of the South China Sea will now be addressed.

D. Areas of High Seas and Deep Seabed in the South China Sea

70. Areas beyond the outer limit of the 200 nm EEZ are subject to the regime of the high seas in Part VII UNCLOS.⁹⁹ All States have the right to exercise the freedom of fishing on the high seas,¹⁰⁰ subject to the provisions on the conservation and management of the living resources of the high seas in articles 116 to 119 of UNCLOS.

71. The situation with respect to the natural resources of seabed and subsoil beyond the outer limit of 200 nm EEZ is governed by the provisions on the deep seabed in Part XI of UNCLOS, as amended by the 1994

⁹⁶ *Ibid.*

⁹⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports 2009, 61, paras. 115-122.

⁹⁸ Beckman & Schofield, see above n.32, 13-16.

⁹⁹ UNCLOS, art. 86, see above n.6.

¹⁰⁰ Article 87, *Ibid.*

Agreement on the Implementation of Part XI.¹⁰¹ Under UNCLOS the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, is called “the Area”.¹⁰² This means in effect that if a coastal State claims no extended continental shelf, the seabed and subsoil beyond 200 nm is part of the Area. The area and its resources are the common heritage of mankind.¹⁰³ No State may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources.¹⁰⁴ The International Seabed Authority (ISA), a body established in UNCLOS whose headquarters are in Jamaica, has responsibility for administering activities in the Area.¹⁰⁵

72. The extent of high seas and deep seabed in the South China Sea depends on two factors. First, whether any of the islands in the South China Sea are entitled to an EEZ and continental shelf of their own. Second, whether the ASEAN claimants are entitled to an extended continental shelf.

73. If the ASEAN claimants all claim an EEZ from the baselines along their mainland coast or from their archipelagic baselines, there is a “kite-shaped” area outside the 200 nm EEZ limits. [See map in Appendix A]. In agreeing on the extent of the disputed areas, there are at least four scenarios.

74. In the first scenario, the claimants could treat all the islands as rocks and do not recognize extended shelf claims. If none of the islands are entitled to an EEZ and continental shelf of their own, and if none of the claimant States can claim an extended continental shelf in the area, then the entire kite-shaped area will be governed by the high seas and deep seabed regimes, except to the extent there are islands within the area with a 12 nm territorial sea.

75. In the second scenario, the claimants could treat all the islands as rocks but recognize extended continental shelf claims. Malaysia and Viet Nam have made a joint submission for an extended continental shelf claim in the southern section, Viet Nam has made a separate submission, and the Philippines and China have submitted preliminary information. If the claimants agree to recognize all those claims as valid, even though they cannot be considered by the CLCS, then those areas will be the extended continental shelf of those States, and they will have the exclusive right to the resources of the seabed and subsoil. It will be up to them to agree on maritime boundaries separating their claims, or to develop the resources jointly. With respect to living resources in the water, the kite-shaped area would be subject to the high seas regime, and all States would have freedom of fishing. Within the extended shelf claims there may be pockets of disputed areas as a result of the presence of disputed islands entitled to a 12 nm territorial sea.

76. In the third scenario, the claimants could treat some of the islands as entitled to an EEZ of their own. If the claimants could agree that some of the islands in the Spratlys and in the Paracels can sustain human habitation or economic life of their own, then those islands would be entitled to an EEZ of their own. The EEZ from those islands may extend into most of the areas beyond the 200 nm EEZ claims from the mainland coast or from the archipelagic baselines of the Philippines. Therefore, the southern two-thirds of the kite-shaped area would become the EEZ of the islands, even though sovereignty over the islands is in dispute. In such case, the extended shelf claims would be treated as invalid. If some of the islands in the Paracels (e.g., Woody Island) can sustain human habitation or economic life of their own, then an EEZ from those islands could extend to the east over Macclesfield Bank. However, it would not extend far enough east

¹⁰¹ Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1836 UNTS 3. The Agreement was adopted in New York on 28 July 1994 and entered into force provisionally on 16 November 1994 and definitively on 28 July 1996. All States Parties to UNCLOS are also parties to the 1994 Agreement. For background on the 1994 Agreement, see www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm.

¹⁰² UNCLOS, art. 1, see above n.6.

¹⁰³ Article 136, *ibid.*

¹⁰⁴ Article 137, *ibid.*

¹⁰⁵ For information on the International Seabed Authority, see www.isa.org.jm/en/home.

to make all of the kite-shaped area EEZ, unless Scarborough Reef were also treated as an island entitled to an EEZ of its own. However, Scarborough Reef appears to be so small that an objective observer is likely to say that it is not capable of sustaining human habitation or economic life of its own. However, almost all of the kite-shaped area would be part of the disputed area under this scenario.

77. In the fourth scenario, China/Taiwan, Viet Nam and the Philippines could conclude that it would be in their common interest to agree that the EEZ from the disputed islands extends to the entire kite-shaped area. In other words, they could agree that the entire northern three-quarters of the kite-shaped area should be part of the area in dispute which is claimed by China/Taiwan, the Philippines and Viet Nam. This area would then be subject to joint development arrangements between those claimants for both fishing resources and hydrocarbon resources. This would give these four claimants all of the natural resources within the agreed disputed area, to the exclusion of any third States who may demand the freedom to fish in that area if it were considered part of the high seas. The same could also be said of the southern one-quarter, except that the fourth party to the arrangement would be Malaysia, rather than the Philippines. This scenario recognizes that the areas outside of 200 nm from the mainland coasts are not likely to be rich in hydrocarbons, but do have substantial fisheries resources.

78. Other scenarios are also possible. What the four scenarios above are intended to show is that if the necessary political will is present, and the claimants are willing to consider the interests of the other claimants as well as their own interests, and focus in particular on their common interests, it should be possible to reach an agreement, especially if such agreement is a provisional arrangement of a practical nature which is without prejudice to the sovereignty claims over the islands and the final determination of the maritime boundaries. Provisional arrangements of practical nature will be discussed below.

E. Provisional Arrangements of a Practical Nature under Articles 74 (3) and 83 (3)

79. Unless the fundamental and intractable disagreements on sovereignty over the islands can be resolved, it will not be possible to negotiate any boundary agreements in the South China Sea. UNCLOS purports to provide a solution to this in articles 74(3) and 83(3). It 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 final agreement. Such arrangements shall be without prejudice to the final delimitation.

80. This provision is designed to “promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation” and “constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area.”¹⁰⁶

81. The obligation to make every effort to enter into provisional arrangements of a practical nature was considered by an Arbitral Tribunal constituted under Annex VII of UNCLOS in a case between Guyana and Suriname. While it was acknowledged that the language “every effort” leaves “some room for interpretation by the States concerned, or by any dispute settlement body,” the Tribunal stated that it imposes on the Parties “a duty to negotiate in good faith.” 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.”¹⁰⁷

82. The obligation to negotiate in good faith appears to include an obligation to consult with each other if carrying out unilateral activities in the disputed area and to continue to negotiate even after such unilateral activities take place. In the *Guyana v. Suriname* Arbitration, it was found that the Parties had breached their obligation to negotiate provisional arrangements of a practical nature pending maritime delimitation of its

¹⁰⁶ *Guyana v. Suriname* (UN Law of the Sea Annex VII Arb.Trib. Sept. 17, 2007), para. 60 at (www.pca-cpa.org)

¹⁰⁷ *Guyana v. Suriname*, *ibid*, para. 461.

territorial sea, EEZ and continental shelf boundary. This stemmed from an incident in 2000 where an oil rig and drill ship engaged in seismic testing under a Guyanese concession was ordered to leave the disputed area by two Surinamese vessels. It was found that Guyana had violated its obligation under Article 83 (3) as it should have, in a spirit of co-operation, informed Suriname of its exploratory plans, given Suriname official and detailed notice of the planned activities, offered to share the results of the exploration, given Suriname an opportunity to observe the activities, and offered to share all the financial benefits received from the exploratory activities.¹⁰⁸ Similarly, the Tribunal found that when Suriname became aware of Guyana's exploratory efforts in disputed waters, "instead of attempting to engage it in a dialogue which may have led to a satisfactory solution for both Parties, Suriname resorted to self-help in threatening the oil rig and drill ship in violation of [UNCLOS]."¹⁰⁹

83. 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 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.¹¹⁰

84. International courts and tribunals have found that "any activity which represents an irreparable prejudice to the final delimitation agreement" 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."¹¹¹ In the *Guyana v. 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 engender a "perceived change to the status quo."¹¹² This was in contrast to seismic testing, which did not cause a physical change to the marine environment.

85. Notably, it was also found that Suriname's actions in using the threat of force in getting the Guyana-licensed vessel to leave was not only a breach of its obligation not to jeopardize the final agreement, but also a breach of its obligation not to use force under UNCLOS, the UN Charter and general international law.¹¹³

86. The decision of the arbitral tribunal in the Guyana-Suriname Arbitration on the obligations in Articles 74(3) and 83(3) is obviously very relevant to the South China Sea, given that there have been accusations of interference with seismic surveys in the area.

87. The key aspect of provisional arrangements of a practical nature is that they are "without prejudice" to the final delimitation." The effect of such a feature is that:¹¹⁴

- Nothing in the arrangement can be interpreted as a unilateral renunciation of the claim of any party or as mutual recognition of any other party's claim;

¹⁰⁸ *Guyana v. Suriname*, *ibid*, para. 478.

¹⁰⁹ *Guyana v. Suriname*, *ibid*, para. 476.

¹¹⁰ *Guyana v. Suriname*, *ibid*, para. 470.

¹¹¹ *Guyana v. Suriname*, *ibid*, para. 467.

¹¹² *Guyana v. Suriname*, *ibid*, para. 480.

¹¹³ *Guyana v. Suriname*, *ibid*, para. 445.

¹¹⁴ As succinctly summarized by Judge GAO Zhiguo in GAO Zhiguo, "Legal Aspects of Joint Development in International Law," in: M. Kusuma-Atmadja, TA Mensah, BH Oxman (eds.), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21* (Honolulu, Law of the Sea Institute, 1997), 625, 639 (Gao [1997]).

- The arrangement itself does not create any legal basis for any party to claim title over the area and its resources;
- The States concerned cannot claim any acquired rights from the interim arrangement;
- Final delimitation does not have to take into account either any such preceding arrangement or any activities undertaken pursuant to such arrangement.

88. Essentially, parties are preserving their claims either to sovereignty over disputed territory or to sovereign rights over the waters surrounding such territory, and at the same time, temporarily shelving the issues of the sovereignty disputes and the final boundary delimitation¹¹⁵.

F. Maritime Boundary Disputes in the South China Sea

89. Until China clarifies its claim, it is not possible to identify the overlapping claim areas in the South China Sea. China has not claimed an EEZ from any of the islands in the South China Sea. If it were to do so, and it issued a map indicating the EEZ claimed from the islands, there would then be overlapping claim areas between the EEZ claimed from the islands and the EEZ and continental shelf claimed by the ASEAN claimants from their mainland coast or archipelagic baselines.

90. However, since the islands in question are also claimed by one or more of the ASEAN claimant States, and the ASEAN claimants appear not to be claiming an EEZ from such islands, there is likely to be a dispute between China and the ASEAN claimant States on the interpretation and application of Article 121 on the regime of islands, rather than a maritime delimitation dispute. Furthermore, given the fact that two or more other States also claim sovereignty over the islands, it would not be possible for the claimant States to even discuss boundary delimitation at this point in time.

91. There are also likely to be overlapping maritime boundary claims between Malaysia and the Philippines on their adjacent EEZ boundary. However, given the fact that the Philippines claims sovereignty over the East Malaysian State of Sabah, it may be impossible for them to agree on a maritime boundary until they first resolve this sovereignty dispute.

VI. PROVISIONS ON REGIONAL COOPERATION

A. Cooperation of States Bordering Semi-Enclosed Seas

92. Part IX of UNCLOS on semi-enclosed seas is applicable to the South China Sea because it is a sea “consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.¹¹⁶ Article 123 imposes a general obligation on States bordering a semi-enclosed sea to cooperate with each other in the exercise of their rights and in the performance of their obligations under the Convention. In particular, these States are obliged to endeavour, directly or through an appropriate regional organization, to coordinate their activities in three areas: (a) the management, conservation, exploration and exploitation of the living resources; (b) the protection and preservation of the marine environment; and (c) marine scientific research.

¹¹⁵ Hazel Fox, Paul McDade, Derek Rankin Reid, Anastasia Strati, Peter Huey, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*, (Great Britain: British Institute of International and Comparative Law, 1989), 378.

¹¹⁶ UNCLOS, art. 122, see above n.6.

B. Regional Cooperation on Pollution of the Marine Environment

93. There are also other provisions in UNCLOS calling for regional cooperation to protect and preserve the marine environment, which could apply to the States bordering the South China Sea.

94. Article 197 provides that States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

95. Article 207 provides that States shall endeavour to harmonize their policies to prevent, reduce and control pollution of the marine environment from land-based activities at the appropriate regional level. It also obliges States to endeavour to establish regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources.

96. Article 208 contains similar obligations with respect to the prevention and reduction of pollution of the marine environment from sea-based activities subject to national jurisdiction, such as pollution from off-shore installations and structures.

97. Article 210 provides that States shall endeavour to establish regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from dumping. Article 212 contains a similar obligation with respect to pollution of the marine environment from or through the atmosphere.

VII. UNCLOS SYSTEM OF DISPUTE SETTLEMENT

98. The dispute settlement regime in UNCLOS is the most complex system ever included in any global convention.¹¹⁷ It was part of the “package deal” agreed to at the start of the nine year negotiations leading to the adoption of UNCLOS in 1982. Under the package deal, States agreed to accept the Convention in its entirety, with no right to make reservations, and that as a general principle, all disputes concerning the interpretation or application of any provision in the Convention would be subject to compulsory binding dispute settlement.¹¹⁸ In other words, when States become parties to UNCLOS, they consent in advance to the system of compulsory binding dispute settlement in the Convention.

A. The Choices for Arbitration or Adjudication

99. The “default” rule in UNCLOS is that if there is a dispute between two States concerning the interpretation or application of any provision in the Convention, it is subject to the system of compulsory binding dispute settlement in section 2 of Part XV. States are obligated to first exchange views to try to resolve the dispute by following the procedures set out in section 1 of Part XV.¹¹⁹ However, where no settlement has been reached by recourse to section 1, the dispute may be unilaterally submitted *at the request of any party to the dispute* to the court or tribunal having jurisdiction under this section.¹²⁰

¹¹⁷ On the UNCLOS dispute settlement system generally, see Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

¹¹⁸ Tommy Koh and S Jayakumar, “Negotiating Process of the Third United Nations Conference on the Law of the Sea”, in: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Myron H. Nordquist, ed., Martinus Nijhoff, Volume 1, 1985), 29-134.

¹¹⁹ UNCLOS, art. 238, see above n.6.

¹²⁰ UNCLOS, art. 286, see above n.6.

100. The Court or tribunal which has jurisdiction to hear a dispute depends in part on whether the parties to the dispute exercise their right to select a procedure for resolving disputes to which they are parties.¹²¹ Under Article 287, a State is free to choose, by means of a written declaration, one or more of four procedures for the settlement of disputes concerning the interpretation or application of the Convention. States have a choice between two methods of adjudication and two methods of arbitration. The choices are: adjudication before the ICJ; adjudication before ITLOS; arbitration under Annex VII of UNCLOS; or special arbitration under Annex VIII of UNCLOS. The choice of procedure may be made when signing, ratifying or acceding to UNCLOS, or at any time thereafter.¹²²

101. If two States Parties to a dispute have elected the same procedure, the dispute will be referred to that procedure. If the States Parties to the dispute have not elected the same procedure, or if one of them has not made a choice of procedure, the dispute will go to arbitration under Annex VII, unless the parties otherwise agree.¹²³ For example, in 2010, Bangladesh invoked the dispute settlement system in UNCLOS against both India and Myanmar concerning the UNCLOS provisions on maritime boundary delimitation.¹²⁴ None of the three States concerned had made a choice of procedure under Article 287. Therefore, the dispute between Bangladesh and India as well as the dispute between Bangladesh and Myanmar would normally go to arbitration under Annex VII. However, Bangladesh and Myanmar subsequently agreed to take their dispute to ITLOS rather than to arbitration.¹²⁵ Consequently, Bangladesh will be going to arbitration under Annex VII in its dispute with India and to ITLOS in its dispute with Myanmar.

102. None of the States which claim sovereignty over features in the South China Sea have made an election under Article 287.¹²⁶ Therefore, if the compulsory binding dispute settlement system in section 2 of Part XV were invoked in a dispute between two claimant States relating to the South China Sea, the dispute in question would automatically go to arbitration under Annex VII of UNCLOS¹²⁷.

B. Applicable Law and Finality of Decisions

103. The court or tribunal resolving the dispute has jurisdiction because the dispute concerns the interpretation or application of a provision in UNCLOS. However, in resolving the dispute, the court or tribunal is not restricted to applying the provisions of UNCLOS. Article 293 of UNCLOS provides that a court or tribunal having jurisdiction shall apply the Convention as well as other rules of international law not incompatible with the Convention.

¹²¹ UNCLOS, art. 288, see above n.6.

¹²² UNCLOS, art. 287, see above n.6.

¹²³ UNCLOS, art. 287(5), see above n.6.

¹²⁴ On October 8, 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 Article 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).

¹²⁵ 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. See ITLOS Press Release 140 of 16 November 2009 (www.itlos.org).

¹²⁶ The up-to date official texts of declarations and statements which contain the choice of procedure under Article 287 of the UNCLOS are available online on the web page of the UN Treaties Collection under Status of Treaties (<http://treaties.un.org/Pages/ParticipationStatus.aspx>).

¹²⁷ UNCLOS, art. 287(5), see above n.6.

104. Whether the dispute goes to one of the two methods of adjudication or to one of the two methods of arbitration, the decision rendered by a court or tribunal having jurisdiction is final, and must be complied with by all the parties to the dispute.¹²⁸

C. Request for Provisional Measures

105. A State Party to a dispute which is referred to dispute settlement under section 2 may also request provisional measures to either (1) preserve the respective rights of the parties; or (2) prevent serious harm to the marine environment.¹²⁹ The only prerequisite is that ITLOS must first determine that, prima facie, the arbitral tribunal to be constituted would have jurisdiction to hear the case.

106. Such provisional measures are legally binding.¹³⁰ Even if a dispute is being referred to an arbitration tribunal, a State party may request provisional measures from ITLOS pending the establishment of the arbitral tribunal.¹³¹

D. Limitations and Exceptions to Compulsory Binding Dispute Settlement

107. Section 3 of Part XV provides for exceptions and limitations to the system of compulsory binding dispute settlement in Section 2. Specifically, Article 297 excludes two types of disputes from the compulsory binding dispute settlement system in section 2: (i) disputes with respect to discretionary decisions on fisheries in their EEZ; and (ii) disputes with respect to discretionary decisions on permits for marine scientific research in their EEZ.

108. Section 3 of Part XV also gives States the right to “opt out” of the compulsory binding dispute settlement system in section 2 for certain categories of disputes. Article 298 provides that States parties have the option to formally declare to the UN Secretary-General that they do not accept Section 2 for the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles ...

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

109. Several States in Asia, including Australia, China, Korea and Thailand, have exercised their right to exclude these categories of disputes from the system of compulsory binding dispute settlement in section 2 of Part XV.¹³² Significantly, on 25 August 2006, China submitted a declaration under Article 298 providing that:

The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.

¹²⁸ UNCLOS, art. 296, see above n.6.

¹²⁹ UNCLOS, art. 290, para. 1, see above n.6.

¹³⁰ UNCLOS, art. 290, para 1, see above n.6.

¹³¹UNCLOS, art. 290, para 5, see above n.6.

¹³² The up-to date official texts of declarations and statements which contain optional exceptions to the applicability of Part XV, Section 2, under Article 298 of UNCLOS are available online on the web page of the UN Treaties Collection under Status of Treaties (<http://treaties.un.org/Pages/ParticipationStatus.aspx>).

E. Effect of China's declaration under Article 298

110. China has exercised its right under article 298 to opt out of the compulsory binding dispute settlement regime in section 2 of Part XV for disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention. The question is what types of legal disputes relating to activities in the South China are excluded by this declaration.

111. First, the declaration excludes disputes concerning the interpretation or application of articles 15, 74 and 83 on maritime boundary delimitation. Therefore, if Vietnam and China cannot agree to their EEZ boundary near the Paracel Islands, neither State would be able to invoke the compulsory dispute settlement system in UNCLOS. The issue then is whether the EEZ boundary could be referred to non-binding conciliation under Annex V. Article 298, paragraph 1(a) provides as follows:

(i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

112. Even if the dispute with China on the delimitation provisions arose after UNCLOS entered into force on 16 November 1994, the dispute on the China-Vietnam EEZ boundary near the Paracel Islands would necessarily involve consideration of an unsettled sovereignty dispute over the Paracel Islands, which is “insular land territory”. Therefore, the last proviso in the paragraph would apply, and the dispute would be excluded from submission to conciliation. This same reasoning would apply to disputes concerning delimitation of maritime boundaries in the Spratly Islands.

113. China's declaration excludes all disputes relating the interpretation or application of articles 74 and 83, including a dispute on whether a claimant State has breached its obligation under Articles 74(3) and 83(3) to make every effort to enter into provisional arrangements of a practical nature, or a dispute on whether a claimant State has breached its obligation not to take unilateral action in areas of overlapping claims that would jeopardize or hamper the reaching of the final agreement on the maritime boundary. However, if a claimant State were to take unilateral action in a disputed area such as drilling for gas or oil, other claimants may be able to invoke the dispute settlement system in UNCLOS by arguing that such unilateral action is an abuse of rights under article 300 of UNCLOS.

114. Second, the declaration excludes disputes concerning the interpretation of the provisions of UNCLOS involving historic bays and titles.¹³³ Therefore, a dispute on the interpretation of article 10(6) on historic bays would be excluded. Similarly, a dispute on whether the equidistance line should not be followed in a territorial sea boundary delimitation under article 15 because of the “historic title” of one of the parties would be excluded. However, disputes concerning the interpretation or application of article 15 on the delimitation of the territorial sea are already excluded. UNCLOS contains no other provisions on historic title. Article 15 mentions historic title, but not historic rights, and there are no provisions in UNCLOS on historic rights. Therefore, if China were to argue that it has the right under international law to exercise historic rights in the waters inside the nine dashed lines, a dispute could arise over whether such rights are consistent with UNCLOS, and such dispute would not be excluded by the declaration.

115. Third, the declaration excludes disputes relating to military activities. Therefore, any dispute on whether a State has a right under article 58 of UNCLOS to conduct military activities such as military surveys or military exercises in the EEZ of China would be excluded from the compulsory binding dispute settlement

¹³³ On historic title generally, see Clive R. Symmons, *Historic Waters in the Law of the Sea* (Martinus Nijhoff, 2008)

system in UNCLOS. Any dispute concerning military activities by China in the maritime zones of another State would also be excluded.

116. Fourth, the declaration excludes disputes relating to law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3. This in effect excludes only a narrow category of law enforcement activities, that is, those relating to the enforcement of fisheries activities and marine scientific research activities which are excluded from the compulsory binding dispute settlement system under article 297 (2) and (3). Disputes relating to other types of law enforcement activities, such disputes concerning interference with seismic surveys or disputes concerning the arrest of foreign fishing vessels in areas of overlapping claims would not be excluded by the declaration.

117. Fifth, the declaration excludes disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this UNCLOS. The purpose of this exception is to avoid a conflict between a dispute settlement procedure initiated under Part XV of UNCLOS and action that the United Nations Security Council might be taking in the exercise of its responsibility to maintain international peace and security under Chapter VII of the United Nations Charter. For example, if armed conflict were to break out between claimant States over the disputed islands in the South China Sea, the matter may be referred to the Security Council. In such case, one of parties to the dispute could not invoke the dispute settlement procedures in UNCLOS on the issue of whether the use of military force by a claimant State was a violation of UNCLOS.

118. Finally, it should also be noted that the exceptions in Article 298 are not ‘self-judging.’ A party to a dispute cannot determine whether the exceptions do or do not apply in a given case. Article 288 (4) makes it clear that in the event of dispute on whether a court or tribunal has jurisdiction, the matter shall be settled by a decision of that court or tribunal.

F. Disputes Subject to Compulsory Binding Dispute Settlement

119. Except for the limited categories of disputes which are excluded, all other disputes between States Parties to UNCLOS on the interpretation or application of a provision in UNCLOS are subject to the compulsory binding dispute settlement system in UNCLOS.

120. With respect to provisions discussed in this paper, disputes on the following issues would be subject to dispute settlement by an international court or tribunal:

- A dispute on whether a State’s straight baselines along its coast are in conformity with article 7 of UNCLOS;
- A dispute on whether straight baselines can be drawn from a mid-ocean archipelago such as the Spratlys or Paracels;
- A dispute on whether a feature is an island under article 121 or a low-tide elevation under article 13;
- A dispute on whether a feature is an island under article 121 or an artificial island under article 60;
- A dispute on whether an island is a rock which cannot sustain human habitation or economic life of its own under article 121 (3);
- A dispute on whether a State has unlawfully interfered with the sovereign rights and jurisdiction of another State in its EEZ under articles 56 and 77;
- A dispute on whether a State’s domestic laws and regulations on survey activities in its EEZ or on its continental shelf are consistent with UNCLOS.

VIII. ITLOS ADVISORY OPINIONS

121. There is no provision in UNCLOS or in the Statute of ITLOS which permits States Parties or institutions created by UNCLOS to request an advisory opinion from ITLOS on legal questions. However, the Rules of the Tribunal, adopted in 1996 by the Tribunal pursuant to Article 16 of its Statute, give the Tribunal the authority to give advisory opinions in certain circumstances. The Tribunal's advisory jurisdiction is based on article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

122. Article 138 of the Rules of the Tribunal reads as follows:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

123. The status and legal basis of Article 138 (1) has been the subject of analysis by government officials and judges of the tribunal.¹³⁴ Although some concern has been raised on whether the Tribunal exceeded its powers in providing for advisory jurisdiction in Article 138 (1) of the Rules of the Tribunal, commentators have concluded that there has largely been a positive reaction to the rule empowering ITLOS to give advisory opinions in certain circumstances.¹³⁵

124. If a body were to request an advisory opinion pursuant to article 138 (1), it would be difficult for any State to challenge the authority of the Tribunal to give an Advisory Opinion. In any case, even if such a challenge could be made, article 288 (4) of UNCLOS provides in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal. Therefore, it would be up to the Tribunal itself to determine whether it has the authority it has vested in itself under its Rules.

125. Under article 138 (1), the Tribunal can give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion. Three requirements must be met.

126. First, there must be an agreement between States that is related to the purposes of the UNCLOS. This could be a multilateral agreement, a regional agreement or even a bilateral agreement, so long as the agreement is related to the purposes of the Convention.

127. Second, the agreement must specifically provide for the submission of a request for an advisory opinion from the Tribunal. The international agreement should state who can request an advisory opinion and set out the procedure for making such request. The agreement could provide that the States Parties to the agreement can make the request when there is a consensus to do so. The agreement could also establish a body and authorize that body to request an advisory opinion if it believes an opinion would assist it in carrying out its functions and objectives.

¹³⁴ See Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited" 39 *Ocean Development & International Law* (2008), 360-371; Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea" 9 *Chinese JIL* (2010), 565-587.

¹³⁵ Ki-Jun You, *ibid*, at 364.

128. Third, the advisory opinion must be on a legal question. This presumably would be a legal question relating to the Convention. The Tribunal is likely to follow the jurisprudence of the International Court of Justice in determining whether there is a legal question.¹³⁶

129. Would it be possible for some or all of the claimant States in the South China Sea to request an advisory opinion on legal issues relating to the interpretation and application of UNCLOS? It could be possible if two or more claimant States entered into an agreement relating to the purposes of the Convention, such as an agreement to cooperate to prevent pollution of the marine environment in the South China Sea from ocean dumping. That agreement could establish a body to institute rules and standards to prevent pollution of the marine environment in the South China Sea from ocean dumping. It could also authorize that body to request an advisory opinion from ITLOS on legal questions relating to their functions and purposes. For example, the body created under the international agreement could request an advisory opinion on whether there are any international rules and standards on the decommissioning and abandonment of offshore platforms which are legally binding on States Parties to UNCLOS who are not parties to the 1972 London Convention or its 1996 Protocol.¹³⁷

130. It may also be possible for claimant States to enter into an international agreement which would enable them to request an advisory opinion on more controversial legal issues such as how to interpret article 121 (3) on rocks which cannot sustain human habitation or economic life of their own. The claimant States could enter into an international agreement to cooperate to clarify the status of the features in the Spratly Islands. The agreement could establish a technical body to review the features to determine which are completely submerged at low tide, which are low tide elevations, which meet the definition of islands in article 121 (1), and which may be rocks as defined in article 121 (3). The treaty could then authorize the technical body to request an advisory opinion from ITLOS on legal questions relating to their functions and responsibilities.

131. One question which could arise is whether States not parties to the agreement would have the right to present arguments to the Tribunal on a legal question if they believe that they have an interest in the issue. A more difficult question would be whether a claimant State which is not a party to the agreement could intervene to argue that the Tribunal should not give an advisory opinion on a particular legal question because the opinion might irreparably prejudice their rights in an ongoing territorial sovereignty dispute.

IX. CONCLUSION

132. Developments since 2009 with respect to extended continental shelf claims have resulted in a paradigm shift in the South China Sea disputes. Previously the dispute was primarily about who had the better claim to sovereignty over the islands. The assumption seemed to be that whoever had sovereignty over the islands would have the right to exploit the natural resources in and under the waters of the South China Sea.

133. In preparing to make claims to an extended continental shelf, the ASEAN claimants have recognized the importance of UNCLOS in determining who has sovereign rights to explore and exploit the natural resources of the South China Sea. They have recognized under UNCLOS States have the right to claim an EEZ and continental shelf from baselines along their mainland territory or from their archipelagic baselines, and that they have sovereign rights to explore and exploit the natural resources in and under the seas in these zones. In addition, they may have a right to claim an extended continental shelf beyond 200 nm. Consequently, the ASEAN claimants have brought their claims into conformity with UNCLOS, and made claims to maritime zones measured from their mainland territory or main archipelago. They have also made it clear that they

¹³⁶ On this issue, see *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, ICJ Reports 1996, 226, para. 13.

¹³⁷ *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972, 1046 UNTS 120; *ATS 1985 No 16*; *1996 Protocol to the 1972 Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 2006 ATS 11.

support the principle in UNCLOS that the land dominates the sea, and that the rights to the resources of the South China Sea can only be claimed in maritime zones measured from the mainland coasts or from islands.

134. The ASEAN claimants are fully aware of the fact that the sovereignty disputes over the features will not be resolved in the foreseeable future. They are also aware that they cannot unilaterally exercise sovereign rights and jurisdiction in and under the waters adjacent to disputed islands within their EEZ because such areas are in dispute. Consequently, they have taken the position that the only maritime areas which are in dispute are the areas adjacent to disputed geographic features which meet the definition of an island in article 121 of UNCLOS, that is, naturally formed areas of land which are above water at high tide. Further, they seem to be taking the position that almost all of the features which do prima facie meet the definition of an island are so small that they are not capable of sustaining human habitation or economic life of their own, and are thus not entitled to an EEZ or continental shelf of their own. In other words, most of the islands are rocks under article 121(3).

135. As a result of their position on the application of UNCLOS in the South China Sea, the ASEAN claimants maintain that large maritime areas in the South China Sea are solely within the EEZ or continental shelf of the ASEAN claimant States. The only overlapping areas, or areas in dispute, are the islands themselves and the 12 nm territorial sea adjacent to the islands. They may concede that a small number of islands may be large enough to generate an EEZ of their own, but they are likely to maintain that the number of such features is very small, and most of them are located in the same area. Therefore, the areas in dispute are still relatively small.

136. China appears to be unsure of how to respond to these developments. China's official statements in its Notes Verbales to the UN Secretary-General with respect to the CLCS claims are carefully crafted so as not to be contrary to UNCLOS. However, in actual practice China seems to have decided to maintain its policy of deliberate ambiguity with respect to the nature of its claim to sovereign rights to resources in and under the waters inside the nine-dashed line map.

137. China could clarify its position regarding its claim in the South China Sea without abandoning the nine-dashed line map. All China need do is make it clear, as implied by its language in its Notes Verbales and in its historic documents, that it is claiming sovereignty over the islands and their adjacent waters inside the nine-dashed line, as well as sovereign rights and jurisdiction in the EEZ and continental shelf measured from the islands. It could also issue a map of its EEZ in the South China Sea based on an approximate median line between the islands and the baselines employed by the ASEAN claimants from their mainland or main archipelago. This would then clarify which areas of the South China Sea are in dispute, and which are not in dispute. This would set the stage for serious discussion on setting aside the sovereignty disputes and jointly developing the resources in the areas in dispute.

138. Such a clarification would send an important signal to the ASEAN States that China is willing to comply with its rights and obligations under UNCLOS in good faith. This would be a major confidence-building measure and would lay the groundwork necessary to enable China to work with the ASEAN States to implement the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea.¹³⁸ It would also be a significant step towards setting aside the sovereignty disputes and jointly developing the resources, which was suggested by the late Deng Xiaoping.¹³⁹ Finally, all these actions would be without prejudice to China's claims to sovereignty over the islands and to the final delimitation of the maritime boundaries.

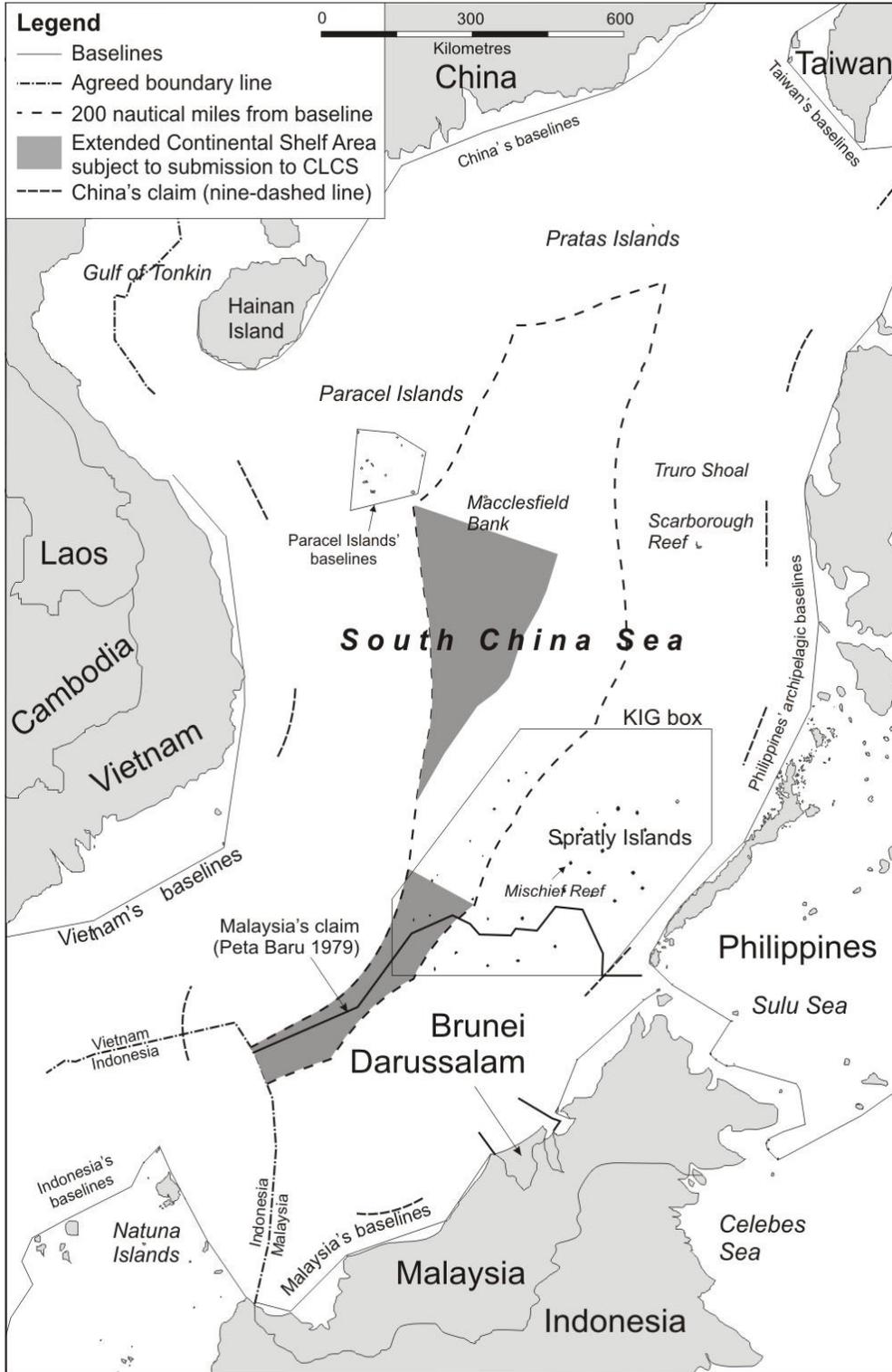
139. China seems to have little choice in the long run except to clarify its claims and bring them into conformity with UNCLOS. As a party to UNCLOS it is bound by its provisions. If it fails to clarify its claim

¹³⁸ 2002 Declaration on the Conduct of Parties in the South China Sea, signed on 4 November 2002 in Phnom Penh, Cambodia by the Foreign Ministers of China and the 10 ASEAN member States (www.aseansec.org/13163.htm).

¹³⁹ See above n.4

and asserts rights in the South China Sea close to the coasts of the ASEAN claimants and a considerable distance from any disputed island, the ASEAN claimants may feel they have little choice but to seek the assistance of an international court or tribunal in clarifying the areas in dispute. They could do this by either invoke the compulsory binding dispute settlement system in section 2 of Part XV of UNCLOS or enter into an agreement which will give them the right to seek an advisory opinion from ITLOS.

X. APPENDIX 1. MAP OF THE SOUTH CHINA SEA¹⁴⁰



¹⁴⁰ Prepared by Andi Arsana, Australian Centre for Ocean Resources and Security (ANCORS), University of Wollongong, Australia. Included with permission.