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**Disputes in the South China Sea: International Legal Aspects**

**Disputed Areas in the South China Sea:  
Prospects for Arbitration or Advisory Opinion**

by

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# **Disputed Areas in the South China Sea: Prospects for Arbitration or Advisory Opinion**

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## **Abstract**

The Philippines has recently proposed that a zone of peace, freedom, friendship and cooperation be established in the South China Sea. As noted by the Philippines, the establishment of such a zone would require a determination of which areas are in dispute and which areas are not in dispute. The Philippines' proposal recognizes that the claimant States must reach an agreement on the areas in dispute before they can undertake serious cooperative measures.

This article will examine the above issues and the major obstacles which are preventing agreement on the areas in dispute. It will also examine the international law obligations of claimant States with regard to areas in dispute, including the limits under international law on what unilateral actions can be undertaken by States in areas in dispute.

Finally, the article will examine whether the Claimant States can use the dispute settlement mechanisms under 1982 United Nations Convention on the Law of the Sea (UNCLOS or 'the Convention') to clarify which areas are in dispute and which areas are not in dispute. It will explore whether efforts to reach an agreement on the areas in dispute might include referral of certain legal issues to compulsory binding arbitration under Annex VII of UNCLOS. In addition, it will examine whether it might be possible for two or more of the claimant States to seek an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS or 'the Tribunal') on legal issues arising from efforts to define the area in dispute.

## **I. BACKGROUND**

China, Taiwan and Viet Nam claim sovereignty over all the features in the Spratly Islands. The Philippines claims fifty-three (53) of the features which they call the Kalayaan Island Group (KIG) and Malaysia claims sovereignty over eleven (11) features. Brunei Darussalam reportedly claims part of the area of water in the Spratly Islands nearest to it, including two features, namely Louisa Bank and Rifleman Bank, as part of its continental shelf.

The dispute over sovereignty over features in the Spratly Islands is governed by customary international law on the acquisition of territory as articulated by international courts and tribunals in cases concerning sovereignty disputes. The sovereignty disputes cannot be taken to any form of third party dispute settlement unless the States agree to do so. The sovereignty disputes are unlikely to be resolved in the immediate or near-term future given the national sensitivities associated with the dispute and the potential access to resources which might come with sovereignty. It is, hence, generally agreed that the most viable interim solution for the disputes in the South China Sea is for the claimant States to set

aside the sovereignty disputes and jointly develop the natural resources. Such arrangements can be provisional arrangements of a practical nature as called for in Articles 74 and 83 of UNCLOS.<sup>1</sup>

Before serious negotiations can begin on joint development arrangements, the States concerned must agree on the area or areas in dispute which will be subject to joint development arrangements. This is difficult because China has not clarified the basis of its claim to maritime space in the South China Sea and the areas of overlapping claims are therefore uncertain. The area in dispute is also not clear because there is no consensus on the status of the disputed insular features -- which are islands entitled to an Exclusive Economic Zone (EEZ) and continental shelf of their own, which are rocks entitled only to a twelve (12) nautical mile (nm) territorial sea, and which are low-tide elevations entitled to no maritime zones of their own. It is, therefore, important for claimant States to reach a consensus on the areas of overlap between the EEZ claimed by States from their mainland coast or main archipelago and the maritime zones measured from disputed islands.

## **II. CLAIMS TO MARITIME SPACE UNDER UNCLOS 1982**

UNCLOS establishes a legal framework for all activities in the oceans.<sup>2</sup> It does not, however, contain any provisions on how to decide the competing sovereignty claims over the features. UNCLOS assumes that it is known which State has sovereignty over land territory and off-shore features. It then sets out the maritime zones which can be claimed from such territory and / or features.

The sovereignty of a State extends beyond its land territory to a 12nm adjacent belt of sea known as the territorial sea, which includes the sea-bed and subsoil.<sup>3</sup> States can also claim sovereign rights and jurisdiction to explore and exploit the natural living and non-living resources on their continental shelf and in a 200nm Exclusive Economic Zone (EEZ) measured from the baselines from which the territorial sea is measured.<sup>4</sup>

With regards to claims to maritime zones from offshore features, UNCLOS distinguishes between islands, rocks, low-tide elevations and artificial islands:

1. *Islands* are in principle entitled to the same maritime zones as land territory, including a 12nm territorial sea, a 200nm EEZ and a continental shelf which could extend beyond 200nm. An island is a naturally formed area of land above water at high tide.<sup>5</sup>

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<sup>1</sup> The *United Nations Convention on the Law of the Sea*, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994), online: United Nations <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm)> [UNCLOS].

<sup>2</sup> UNCLOS sets out a legal order for the seas and oceans to facilitate international communication and promote peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources and study, protection and preservation of the marine environment; see the Preamble of UNCLOS, *ibid*.

<sup>3</sup> UNCLOS, Articles 2 and 3, *supra* note 1.

<sup>4</sup> UNCLOS, Articles 56(1) and 57, *supra* note 1.

<sup>5</sup> UNCLOS, Articles 121(1) and (2), *supra* note 1.

2. *Rocks* are a sub-category of islands. Rocks which cannot sustain human habitation or economic life of their own are not entitled to an EEZ or continental shelf. They are only entitled to a 12nm territorial sea.<sup>6</sup>
3. *Low-tide elevations* are not entitled to any territorial sea of their own, but can be used as base points in measuring the territorial sea if they are within 12nm from the mainland or another island. Low-tide elevations are above water at low tide but submerged at high tide.<sup>7</sup>
4. *Artificial islands* are entitled to no maritime zones, except for a 500 metre safety zone.<sup>8</sup>

There are no definite accounts of the number of offshore features there are in the Spratly Islands group nor are there any definite and up-to-date accounts of which feature is an island, rock, low-tide elevation or artificial island as defined under UNCLOS. The majority of the geographic features in the Spratly Islands are rocks, reefs or shoals, which are either permanently submerged or above water only at low-tide.<sup>9</sup> These features have no capacity to generate claims to maritime jurisdiction unless they are low-tide elevations within 12nm of an island.

The features that can be considered as islands in the Spratlys are small, remote and uninhabited save for the presence of military garrisons. Many of these islands are not capable of sustaining human habitation or economic life of their own as provided for in Article 121(3). Therefore, they are likely to be classified as rocks, and would only be entitled to a 12nm territorial sea. However, there may be a small number of islands which may be large enough to sustain human habitation or economic life of their own. These islands would in principle be entitled to a 200nm EEZ and a continental shelf of their own.

#### **A. Maritime Claims in the Spratly Islands**

Apart from the status / classification of these features under international law, it is also not clear what maritime zones, if any, the Claimants are claiming from the features in the Spratly Islands. None of the ASEAN Claimants (Viet Nam, Malaysia, Philippines or Brunei Darussalam) have officially claimed any maritime zones (territorial seas, EEZ or continental shelf) from any of the features in the Spratly Islands, i.e., they have not drawn baselines around the features and established the outer limits of territorial seas, EEZ or continental shelf by defined coordinates.

Viet Nam and Malaysia, however, have made a Joint Submission to the Commission on the Limits of the Continental Shelf (CLCS) in 2009 in which they claimed an extended continental shelf from their

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<sup>6</sup> UNCLOS, Article 121(3), *supra* note 1.

<sup>7</sup> UNCLOS, Article 13, *supra* note 1.

<sup>8</sup> UNCLOS, Articles 60(5) and (8), *supra* note 1.

<sup>9</sup> For further details on the geographical description of the features in the Spratly Islands, see David Hancox & Victor Prescott, "A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst those Islands" (1995) 1:6 IBRU Maritime Briefings 1.

respective mainland territories.<sup>10</sup> The map showing their extended continental shelf claims also shows their claimed 200nm EEZs from their mainland coasts. By not claiming any EEZs and extended continental shelf from any of the Spratly Islands, Malaysia and Viet Nam appear to be taking the position that sovereign rights to explore and exploit the resources in the South China Sea should be determined primarily by the EEZ and continental shelf measured from the mainland of Malaysia and Viet Nam; and that the Spratly Islands should either be treated as rocks entitled only to a 12nm territorial sea or low-tide elevations entitled to no maritime zones.

The Philippines has also not claimed any maritime zones from the Spratly Islands. It has, however, clarified its archipelagic baselines in its 2009 baselines law and states that the baselines around the KIG shall be determined according to the 'Regime of Islands' in Article 121 of UNCLOS.<sup>11</sup>

China has not officially claimed any maritime zones from the features in the Spratly Islands. China's claim to the waters surrounding the Spratly Islands is complicated by its controversial U-shaped line map. While the U-shaped line was officially published by the Republic of China (presently Taiwan) in 1947, China officially relied on the map for the first time in its response to the 2009 Joint Submission of Viet Nam and Malaysia. In the communication to the United Nations (UN) on the Malaysia-Viet Nam Joint Submission, China asserted that '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 (see attached map)'.<sup>12</sup> The map attached to that statement was the U-shaped line map, and the use of this map in official communications raised old concerns that China was claiming all the waters within the U-shaped line, based on a historic claim or historic rights concepts which are not recognized under UNCLOS.

A more legally acceptable interpretation of the map would be that the U-shaped line merely indicates the features in the South China Sea over which China claims sovereignty. China's claims to the sea-bed and waters surrounding the Spratly Islands would thus be based on claiming maritime zones from the features. Such an interpretation claim would be consistent with UNCLOS. China has in fact stated in a 2011 communication to the UN that the Spratly Islands are fully entitled to territorial seas, EEZ and continental shelf.<sup>13</sup> However, China has not clarified the meaning of the U-shaped line map or made any claims to maritime zones from the islands.

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<sup>10</sup> Commission on the Limits of the Continental Shelf [CLCS], *Submissions to the Commission: Joint Submission by Malaysia and the Socialist Republic of Viet Nam* (2009) CLCS.33.2009.LOS.

<sup>11</sup> 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* (2009).

<sup>12</sup> CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 7 May 2009, online: United Nations <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf)>.

<sup>13</sup> CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 14 April 2011, online: United Nations <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf)>.

## **B. Delimitation of Maritime Boundaries in the Spratly Islands**

The UNCLOS provisions on the delimitation of boundaries in overlapping maritime zones in the EEZ and continental shelf are set out in Articles 74 and 83. The general principle is that boundaries are to be delimited by agreement on the basis on international law in order to reach an equitable solution.<sup>14</sup>

While there are potentially overlapping maritime claims in the South China Sea between the Claimants, the areas of overlapping claims have yet to crystallize. If China treats the Spratly Islands (or at least the larger features) as ‘islands’ entitled to EEZ and continental shelf, there would be an overlap with the EEZ and continental shelf claimed by Malaysia, Viet Nam and the Philippines from their mainland coast or main archipelago.

Even with such an overlap, it is not clear what effect should be given to the islands in any maritime boundary delimitation. International courts and tribunals have consistently held that small islands should not be given full effect in delimiting maritime boundaries against the mainland of a large State.<sup>15</sup> It is also not clear whether islands near the 200nm limit of any of the coastal States should be given greater effect in the direction of the high seas. This is further complicated by the fact that Malaysia and Viet Nam have made a joint submission to the CLCS claiming an extended continental shelf beyond their 200nm limit.<sup>16</sup> Given these complexities, agreement on maritime delimitation in the South China Sea is unlikely to occur any time soon.

## **III. PROVISIONAL ARRANGEMENTS OF A PRACTICAL NATURE**

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 areas of the South China Sea surrounding the Spratly Islands. UNCLOS purports to provide a temporary solution to this situation in paragraph 3 of Articles 74 and 83. 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.

There are two aspects to the obligation under Articles 74(3) and 83(3). First, States should make every effort to enter into provisional arrangements of a practical nature. This imposes on parties a ‘duty to

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<sup>14</sup> See *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (1985) ICJ Rep. 13 at 51; *Eritrea v Yemen* (1999) Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) at 116; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (2009) ICJ Rep. 61 at 120.

<sup>15</sup> See *Anglo-French Continental Shelf Arbitration* (1979) 18 ILM 397 at 251; *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, *ibid* at 129; *Eritrea v Yemen*, *ibid* at 147; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, *ibid* at 187-188.

<sup>16</sup> *Submissions to the Commission: Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, *supra* note 10.

negotiate in good faith'<sup>17</sup> and to take 'a conciliatory approach to negotiations in which they would be prepared to make concessions in the pursuit of a provisional arrangement'.<sup>18</sup>

Second, during this transitional period before there is final agreement on the boundaries, States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. 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.<sup>19</sup> 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.<sup>20</sup>

Provisional arrangements of a practical nature are 'without prejudice to the final delimitation'.<sup>21</sup> This means that nothing in the arrangement can be deemed as a renunciation of the claim of any party to sovereignty over the features or sovereign rights in the surrounding waters. Also, the provisional arrangement) does not constitute an explicit or implicit acknowledgement of the legitimacy of the claim of any other party.<sup>22</sup>

Articles 74(3) and 83(3) do not mandate the type of provisional arrangements States can enter into, but leave it to the discretion of the States concerned.<sup>23</sup> Provisional arrangements can include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas,<sup>24</sup> joint development or cooperation on fisheries,<sup>25</sup> joint development of hydrocarbon resources,<sup>26</sup> agreements

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<sup>17</sup> *Guyana/Suriname Arbitration*, UN Law of the Sea Annex VII Arb Trib, award on 17 September 2007, at para 461, online: Permanent Court of Arbitration <<http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>>.

<sup>18</sup> *Ibid*, at paras 471-478.

<sup>19</sup> *Guyana/Suriname Arbitration*, *supra* note 17, at para 480.

<sup>20</sup> *Guyana/Suriname Arbitration*, *supra* note 17, at para 479.

<sup>21</sup> UNCLOS, Articles 74(3) and (83(3), *supra* note 1; *Guyana/Suriname Arbitration*, *supra* note 17; see also Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" (1984) 78 AJIL 345 at 358.

<sup>22</sup> See for example *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989 [1991] ATS 9, Article 2(3), (entered into force 9 February 1991) [Timor Gap Treaty]; generally, see also 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 at 639.

<sup>23</sup> Natalie Klein, "Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes" (2006) 21 Int'l J Mar & Coast L 423, at 444; see also Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Netherlands: Martinus Nijhoff Publishers, 2004) at 94.

<sup>24</sup> *Maritime Delimitation Treaty between Jamaica and the Republic of Colombia*, 12 November 1993, Article 3, online: United Nations <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/JAM-COL1993MD.PDF>>.

<sup>25</sup> *Agreement on Fisheries between the Republic of Korea and the People's Republic of China*, 3 August 2000 (entered into force 30 June 2001), reprinted in Sun Pyo Kim, *supra* note 23, at 347.

on environmental cooperation<sup>27</sup> and agreements on allocation of criminal and civil jurisdiction.<sup>28</sup> The term ‘arrangements’ implies that the arrangement can include both informal documents such as Notes Verbale, Exchange of Notes, Agreed Minutes, or Memorandum of Understanding; as well as more formal agreements, such as treaties.<sup>29</sup>

#### **A. Setting Aside the Disputes and Jointly Developing the Resources**

Since the 1980s, it has been suggested that the best way to diffuse tension in the Spratly Islands is to set aside the sovereignty disputes and jointly develop the resources in and under the waters surrounding the Islands. Deng Xiaoping, the late paramount leader of China, promoted the principle of ‘setting aside disputes and pursuing joint development’. This concept was first openly advanced by Deng on 11 May 1979 in relation to China’s dispute with Japan over Diaoyu (Senkaku) Islands.<sup>30</sup> He stated that consideration may be given to joint development of the resources adjacent to Diaoyu Islands without touching upon its territorial sovereignty.<sup>31</sup>

When China entered into diplomatic relations with Southeast Asian countries in the 1970s and 1980s, Deng Xiaoping made the same proposal for resolving disputes over the Nansha (Spratly) Islands. He stated that:

The Nansha Islands have been an integral part of China’s territory since the ancient times. But disputes have occurred over the islands in the 1970s. Considering the fact that China has good relations with the countries concerned, we would like to set aside this issue now and explore later a solution acceptable to both sides. We should avoid military conflict over this and should pursue an approach of joint development.<sup>32</sup>

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<sup>26</sup> *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources in the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, 21 February 1979 (entered into force 24 October 1979), reprinted in David M Ong, “Thailand/Malaysia: The Joint Development Agreement 1990” (1990) 6:1 Int’l J Mar & Coast L 57, at 61.

<sup>27</sup> *Agreement between the Government of Jamaica and the Government of the Republic of Cuba on the Delimitation of the Maritime Boundary Between the Two States*, 18 February 1994, Article 5, reprinted in 34 *Law of the Sea Bulletin*, Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, at 64.

<sup>28</sup> *Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority*, 30 May 1990.

<sup>29</sup> Sun Pyo Kim, *supra* note 23 at 47. Kim notes that ‘some States may prefer MOUs to formal agreements for provisional arrangements because these have some advantages in several aspects: no need to publish them as these are not treaties; no need for elaborate final clauses or the formalities surrounding treaty-making; easy amendment; and no need to be submitted for an approval of the parliament.’; see also Ranier Lagoni, *supra* note 21.

<sup>30</sup> “Set Aside Dispute and Pursue Joint Development”, 17 November 2000, online: Ministry of Foreign Affairs of the People’s Republic of China <<http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm>>.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra* note 30.

China and ASEAN have also taken steps which could lead to setting aside the sovereignty and maritime boundary disputes and jointly developing the resources. The *2002 Declaration on the Conduct of Parties in the South China Sea* (2002 DOC) was adopted by the Foreign Ministers of ASEAN and the People's Republic of China at the 8<sup>th</sup> ASEAN Summit in Phnom Penh on 4 November 2002.<sup>33</sup> The 2002 DOC contains provisions on the following: (1) peaceful resolution of the territorial and jurisdictional disputes; (2) self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability; (3) confidence-building measures; and (4) cooperative activities.<sup>34</sup>

## **B. Defining Areas for Joint Development**

One practical obstacle to any joint development arrangements being negotiated in the South China Sea is that there will have to be an agreement on the geographic area or areas which will be subject to joint arrangements. In recent months, the Philippines and Viet Nam have maintained that certain areas of their EEZ are not in dispute because they are close to the coast of their mainland territory or main archipelago and far from any of the disputed islands.<sup>35</sup> Their position is that joint development arrangements must be limited to those maritime areas which are in dispute.<sup>36</sup>

It will be difficult to agree on the areas in dispute and subject to joint development in the Spratly Islands unless agreement can be reached on the status of the geographic features and the maritime zones to which such features are entitled. There is no agreement on which features in the Spratly Islands are 'islands' entitled to maritime zones of their own because they are naturally formed areas of land above water at high tide as set out in Article 121(1) of UNCLOS. Scholars have estimated that less than one-third of the features in the Spratly Islands are naturally formed areas of land above water at high tide.<sup>37</sup> Furthermore, many of the features which do meet the definition of island in Article 121(1) are very tiny and might be classified as 'rocks' which cannot sustain human habitation or economic life of their own

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<sup>33</sup> *2002 Declaration on the Conduct of Parties in the South China Sea*, signed at the 8<sup>th</sup> ASEAN Summit on 4 November 2002 in Phnom Penh, Cambodia by the Foreign Ministers of ASEAN and the People's Republic of China, online: CIL Documents Database <<http://cil.nus.edu.sg/2002/2002-declaration-on-the-conduct-of-parties-in-the-south-china-sea-signed-on-4-november-2002-in-phnom-penh-cambodia-by-the-foreign-ministers/>>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Albert F Del Rosario, "Philippine Policy Response and Action" (Forum on "The Spratly Islands Issue: Perspective and Policy Responses", delivered at the Department of Political Science, Ateneo De Manila University, 5 August 2011) online: Philippines Department of Foreign Affairs <<http://dfa.gov.ph/main/index.php/newsroom/dfa-releases/3531--philippine-policy-response-and-action-by-the-hon-albert-f-del-rosario-secretary-of-foreign-affairs>>; Viet Nam Ministry of Foreign Affairs, Spokesperson's Statement, "Press Conference on Chinese maritime surveillance vessel's cutting exploration cable of Petro Viet Nam Seismic Vessel" (29 May 2011) online: <[http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns110530220030/view#1W4QVp9GHQ4R](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110530220030/view#1W4QVp9GHQ4R)>.

<sup>36</sup> Albert F Del Rosario, *ibid.*

<sup>37</sup> Dzurek suggested that out of around 170 features with English names in the Spratly Islands, only about 36 are above water at high tide; see Daniel J Dzurek, "The Spratly Islands: Who's On First?" (1996) 2:1 IBRU Maritime Briefings 54.

as provided in Article 121(3) of UNCLOS.<sup>38</sup> If so, such features would not be entitled to an EEZ or continental shelf of their own, but only a 12nm territorial sea.

Uncertainty as to the status of the features and the maritime zones they generate could be a serious obstacle to the Claimants reaching agreement on the areas in dispute which are subject to joint development. The Philippines maintains that Reed Bank is not an area in dispute because is a submerged bank which is part of its continental shelf and which is outside the maritime zone that can be measured from any disputed island.<sup>39</sup> Their position seems to be that the disputed features near Reed Bank either do not meet the definition of an island in Article 121, or if they are islands, they are rocks within Article 121(3) which are not entitled to an EEZ or continental shelf of their own.<sup>40</sup> Therefore, their position is that the Reed Bank area is not an area in dispute and is not be subject to joint development.<sup>41</sup>

Currently, the only areas which are clearly 'in dispute' in the Spratly Islands are the features which are islands because they are naturally formed areas of land above water at high tide, and the 12nm territorial sea adjacent to such islands. One approach to reaching any agreement on the areas in dispute in the Spratly Islands would be to determine the status of every geographic feature and the maritime zones to which it is entitled.<sup>42</sup> Nevertheless, reaching an agreement on which of the islands are rocks entitled only to a 12nm EEZ is likely to be exceedingly difficult because the claimants are likely to take positions on the features which favour their national interest. One possible way this could be done is for the claimants to agree to have a neutral third party do a study on the status of the various features. However, it would still be difficult to reach agreement because of the ambiguity of the definition of a rock in Article 121(3).

#### **IV. PROSPECTS FOR USE OF UNCLOS DISPUTE SETTLEMENT MECHANISMS**

The dispute settlement regime in UNCLOS is the most complex system ever included in any global convention.<sup>43</sup> 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.<sup>44</sup> Under the package deal, States agreed to accept the

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<sup>38</sup> Clive Schofield, "What's at Stake in the South China Sea? – Geographical and Geopolitical Considerations" (Paper presented at the CIL Conference on Joint Development and the South China Sea, 16-17 June 2011) [unpublished].

<sup>39</sup> Albert F Del Rosario, *supra* note 35.

<sup>40</sup> See CLCS, *Communication received from the Philippines with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 5 April 2011, online: United Nations <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf)>.

<sup>41</sup> Albert F Del Rosario, *supra* note 35.

<sup>42</sup> Robert Beckman *et al*, "CIL Conference on Joint Development and the South China Sea" (Conference Report, 16-17 June 2011) at paras 150-153 [unpublished].

<sup>43</sup> 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).

<sup>44</sup> Tommy TB Koh, "A Constitution for the Oceans" (Statements by President Koh at the final session of the Conference at Montego Bay, 6 and 11 December 1982), reprinted in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea* (1983) E.83.V.5.

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.<sup>45</sup> 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**

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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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 International Court of Justice (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.<sup>49</sup>

If two State Parties to a dispute have elected the same procedure, the dispute will be referred to that procedure. If the State 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.<sup>50</sup> For example, in 2009, Bangladesh invoked the dispute settlement system in UNCLOS against both India and Myanmar concerning the UNCLOS provisions on maritime boundary delimitation.<sup>51</sup> None of the three States concerned had made a choice of procedure under Article 287.

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<sup>45</sup> Tommy TB Koh and S Jayakumar, "Negotiating Process of the Third United Nations Conference on the Law of the Sea", in Myron H Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 1 (Martinus Nijhoff, 1985), at para 29-134.

<sup>46</sup> UNCLOS, Article 238, *supra* note 1.

<sup>47</sup> UNCLOS, Article 286, *supra* note 1.

<sup>48</sup> UNCLOS, Article 288, *supra* note 1.

<sup>49</sup> UNCLOS, Article 287, *supra* note 1.

<sup>50</sup> UNCLOS, Article 287(5), *supra* note 1.

<sup>51</sup> 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 a Registry in this arbitration, online: Permanent Court of Arbitration <[www.pca-cpa.org/showpage.asp?pag\\_id=1376](http://www.pca-cpa.org/showpage.asp?pag_id=1376)>.

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.<sup>52</sup> Consequently, Bangladesh will be going to arbitration under Annex VII in its dispute with India and to ITLOS in its dispute with Myanmar.

None of the States which claim sovereignty over features in the South China Sea have made an election under Article 287.<sup>53</sup> 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 UNCLOS.<sup>54</sup>

### 1. *Applicable Law and Finality of Decisions*

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 only 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.<sup>55</sup> 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.<sup>56</sup>

### 2. *Request for Provisional Measures*

A State Party to a dispute which is referred to dispute settlement under Section 2 of Part XV may also request provisional measures to either (a) preserve the respective rights of the parties; or (b) prevent serious harm to the marine environment.<sup>57</sup> 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. Such provisional measures are legally binding.<sup>58</sup> Even if a dispute is being referred to an arbitration tribunal, a

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<sup>52</sup> *Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Case No 16, 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, "Proceedings Instituted in the Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal" (16 November 2009), online: ITLOS <[http://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR.140-E.pdf](http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.140-E.pdf)>.

<sup>53</sup> For the up-to date official texts of declarations and statements which contain the choice of procedure under Article 287 of the UNCLOS, see online: UN Division for Ocean Affairs and the Law of the Sea <[http://www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm)>.

<sup>54</sup> UNCLOS, Article 287(5), *supra* note 1.

<sup>55</sup> See Natalie Klein, *supra* note 43 at 58.

<sup>56</sup> UNCLOS, Article 296, *supra* note 1.

<sup>57</sup> UNCLOS, Article 290(1), *supra* note 1.

<sup>58</sup> UNCLOS, Article 290(1), *supra* note 1.

State party may request provisional measures from ITLOS pending the establishment of the arbitral tribunal.<sup>59</sup>

### *3. Disputes Subject to Compulsory Binding Dispute Settlement*

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. 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) A dispute on whether a State's straight baselines along its coast are in conformity with article 7 of UNCLOS;
- b) A dispute on whether straight baselines can be drawn from a mid-ocean archipelago such as the Spratlys or Paracels;
- c) A dispute on whether a feature is an island under Article 121 or a low-tide elevation under Article 13;
- d) A dispute on whether a feature is an island under Article 121 or an artificial island under Article 60;
- e) A dispute on whether an island is a rock which cannot sustain human habitation or economic life of its own under Article 121(3);
- f) 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;
- g) 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.

### *4. Limitations and Exceptions to Compulsory Binding Dispute Settlement*

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 of Part XV: (a) disputes with respect to discretionary decisions on fisheries in their EEZ; and (b) disputes with respect to discretionary decisions on permits for marine scientific research in their EEZ. 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

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<sup>59</sup> UNCLOS, Article 290(5), *supra* note 1.

do not accept the compulsory binding dispute settlement under Section 2 for the following categories of disputes:<sup>60</sup>

(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.

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.<sup>61</sup> Significantly, on 25 August 2006, China also submitted a declaration under Article 298, providing that:<sup>62</sup>

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.

## **B. Effect of China's Declaration under Article 298**

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 Article 298(1)(a), (b) and (c) of the Convention. The question is what types of legal disputes relating to activities in the South China are excluded by this declaration.

First, the declaration excludes disputes concerning the interpretation or application of Articles 15, 74 and 83 on maritime boundary delimitation. Therefore, if Viet Nam 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(1)(a) provides as follows:

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<sup>60</sup> UNCLOS, Article 298(1), *supra* note 1.

<sup>61</sup> For 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, see online: UN Division for Ocean Affairs and the Law of the Sea, *supra* note 53.

<sup>62</sup> Declaration under Article 298 by the Government of the People's Republic of China (25 August 2006), see online: UN Division for Ocean Affairs and the Law of the Sea <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China after ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification)>.

(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;

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-Viet Nam 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.

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.<sup>63</sup>

Second, the declaration excludes disputes concerning the interpretation of the provisions of UNCLOS involving historic bays and titles.<sup>64</sup> Therefore, a dispute on the interpretation of Article 10(6) on historic bays would be excluded. Similarly, a dispute on whether the 'historic title' of one of the parties should be taken into account in territorial sea boundary delimitation would be excluded.<sup>65</sup> However, disputes concerning the interpretation or application of Article 15 on the delimitation of the territorial sea are already excluded,<sup>66</sup> and UNCLOS contains no other provisions on historic title. Furthermore, although Article 15 mentions historic title, it does not mention historic rights, and there are no provisions in UNCLOS on historic rights.<sup>67</sup> 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

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<sup>63</sup> UNCLOS, Article 300 provides that States exercise the rights under the Convention in a manner that would not constitute an abuse of right, *supra* note 1.

<sup>64</sup> On historic title generally, see Clive R Symmons, *Historic Waters in the Law of the Sea* (Martinus Nijhoff, 2008).

<sup>65</sup> UNCLOS, Article 15, *supra* note 1.

<sup>66</sup> UNCLOS, *supra* note 60.

<sup>67</sup> There is no mention of 'historic 'rights' in UNCLOS, but some provisions of UNCLOS arguably can be seen as the continuation of international recognition of 'established rights', such as Article 62(3) on the giving of access to fish stocks by other States in an EEZ. See Clive R Symmons, *supra* note 64, at 5.

whether such rights are consistent with UNCLOS, and such dispute would not be excluded by the declaration.

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

Fourth, the declaration excludes disputes relating to law enforcement activities in regard to the exercise of sovereign rights or jurisdiction from the jurisdiction of a court or tribunal under Article 297(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 activities are already excluded from the compulsory binding dispute settlement system under Articles 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.

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.

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.

### **C. Advisory Opinion from ITLOS**

There is no provision in UNCLOS or in the Statute of ITLOS which permits State 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 (the 'Rules'), give the

Tribunal the authority to give advisory opinions in certain circumstances.<sup>68</sup> 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.

The status and legal basis of Article 138(1) has been the subject of analysis by government officials and judges of the tribunal.<sup>69</sup> The Tribunal's advisory jurisdiction is based on Article 21 of the Statute of the Tribunal,<sup>70</sup> 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. 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, commentators have concluded that there has largely been a positive reaction to the rule empowering ITLOS to give advisory opinions in certain circumstances.<sup>71</sup>

If a body were to request an advisory opinion pursuant to Article 138(1), it would be difficult for any States 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 that 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.

Under Article 138(1) of the Rules, the Tribunal can give an advisory opinion if the following three requirements were met. 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.

Second, the agreement must specifically provide for the submission of a request for an advisory opinion from the Tribunal. The international agreement should provide who can request an advisory opinion and set out the procedure for making such request. The agreement could provide that the State Parties to the agreement can make the request when there is a consensus to do so. The agreement could also

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<sup>68</sup> ITLOS, *Rules of the Tribunal*, ITLOS/8, as amended on 17 March 2009, online: ITLOS <[http://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf)>.

<sup>69</sup> 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", (2008) 39 *Ocean Development & International Law*, 360-371; Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea", (2010) 9 *Chinese JIL*, 565-587.

<sup>70</sup> *Statute of the International Tribunal for the Law of the Sea (Annex VI, UNCLOS)*, *supra* note 1.

<sup>71</sup> Ki-Jun You, *ibid*, at 364.

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.

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.<sup>72</sup>

It would therefore 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 if they entered into an agreement relating to the purposes of the Convention. The agreement could also authorize a body to request an advisory opinion from ITLOS on legal questions relating to their functions and purposes. 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 considered as 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.

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.

## **V. CONCLUSION**

Since China has 'opted out' of the compulsory binding dispute settlement system in Section 2 for sovereignty and boundary delimitation disputes, the options for settling the dispute through a binding dispute settlement are limited. This, however, does not mean that the road for binding dispute settlement is completely closed.

Despite China's declaration opting out of the system of compulsory binding dispute settlement of disputes relating to historic title and maritime boundary delimitation, certain disputes relating to the interpretation or application of provisions of UNCLOS could be referred to the system of compulsory binding dispute settlement in Section 2, Part XV of UNCLOS. For example, if China interfered with the Philippine's exploration and exploitation of the natural resources in the Reed Bank, the Philippines might be able to invoke the dispute settlement system in Part XV by asserting that China has violated its rights under article 56 and 77 and by asserting that there is a dispute between the parties on the interpretation of article 121 and on the right of China to claim rights and jurisdiction inside the nine-dashed line. The Philippines could argue that such disputes are not excluded by China's declaration because they would not require the tribunal to delimit the maritime boundary in the area or determine

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<sup>72</sup> On this issue, see the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (I), at 226, para. 13.

which State has sovereignty over the islands and other geographic features in the area. If such a case were decided by an arbitral tribunal, it could be a major step in helping define the areas in dispute in the South China Sea as there would be an authoritative ruling on whether China has any rights and jurisdiction based on the nine-dashed line.

Another type of dispute which could be referred to the system of compulsory binding dispute settlement would be a dispute over whether one of the claimants has violated UNCLOS and applicable principles of international law by unilaterally authorizing seismic surveys or drilling in a disputed area in the South China Sea. If one of the other claimants challenged such actions by threatening the use of force, such a dispute could also be referred to compulsory binding dispute settlement.

Finally, it may also be possible for some of the Claimant States to obtain an advisory opinion from ITLOS on certain legal issues relating to the dispute in the South China Sea. They could enter into an agreement to cooperate and establish a technical body to clarify the status of the features in the Spratly Islands. The agreement could authorise the technical body to request an advisory opinion from ITLOS on legal questions relating to their functions and responsibilities. This could include guidance on what factors to consider when determining whether an island is a rock which cannot sustain human habitation or economic life of its own.

Although the referral of disputes on legal issues cannot solve the underlying sovereignty disputes, decisions of arbitral tribunals or an advisory opinion by ITLOS could contribute to a peaceful resolution of the underlying issues by clarifying whether certain claims or unilateral actions of the Claimants are consistent with UNCLOS and international law. Such decisions could provide the justification for Claimant States to clarify their claims or to cease provocative unilateral actions. Such decisions could also help States clarify the areas in dispute that would be subject to joint development arrangements.