Thinking Outside the Box: The South China Sea Issue and the United Nations Convention on the Law of the Sea (Options, Limitations and Prospects)

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A dispute over ownership is generally a legal issue. But the present case is replete with highly complicated extralegal factors that will tend to limit the role of international law as a means of settlement greatly. The prospect of a legal solution is not encouraging.

- Choon-Ho Park[1]

Introduction

The South China Sea issue is a geopolitical tinder box waiting to explode.[2] It is clear that the primary reason for the claims is based on its strategic location and its hydrocarbon potential.[3] However, this is more than a simple conflict over resources.[4] The issue goes beyond the question

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[1] CHOON-HO PARK. EAST ASIA AND THE LAW OF THE SEA 216 (1983).

[2] NING LU, FLASHPOINT SPRATLYSl 74 (1995). *See also*, JOHN LESLIE BERRY, THE CONTEST FOR THE SPRATLY ISLANDS WITH SPECIAL REFERENCE TO THE INCREASING TENSION IN THE SOUTH CHINA SEA BETWEEN VIETNAM AND CHINA AND THE RELATIONSHIP OF THE ARCHIPELAGO TO OTHER REGIONAL TENSIONS (MA Thesis, Monash University, 1995)

[3] Stephen W. Ritterbush, *Marine Resources and the Potential for Conflict in the South China Sea*, 2 THE FLETCHER FORUM 64 (1978); MARK J. VALENCIA, ET AL., SHARING THE RESOURCES OF THE SOUTH CHINA SEA (1997).

[4] MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT 109 (2001).

of territorial sovereignty and natural resource jurisdiction.[5] This is more than a legal question of ownership.[6]

The South China Sea territorial dispute is a complex issue in international law. The islands are claimed by six nations: the People's Republic of China (PRC), the Republic of China (Taiwan), Vietnam, Malaysia, Brunei, and the Philippines.[7] All claims maintain to be based on principles of international law, and in particular, on the United Nations Convention on the Law of the Sea (LOS Convention).[8] All the parties to the dispute, with the exception of Taiwan,[9] are parties to the LOS Convention[10] and avow to settle the issue within its framework.[11]

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[5] GERARDO MARTIN C. VALERO, SPRATLY ARCHIPELAGO: IS THE QUESTION OF SOVEREIGNTY STILL RELEVANT? (1993); MARIS AGAN, THE SOVEREIGNTY DISPUTE OVER THE SPRATLY ISLANDS (LLM Thesis, University of Melbourne, 1998).

[6] *See* MONIQUE CHEMILLIER-GENDREAU, SOVEREIGNTY OVER THE PARACEL AND SPRATLY ISLANDS 21 – 29 (2000) for discussion of the legal issue. *See also*, Christopher C. Joyner, *The Spratly Islands Dispute: Legal Issues and Prospects for Diplomatic Accommodation, in* COOPERATIVE MONITORING IN THE SOUTH CHINA SEA: SATELLITE IMAGERY, CONFIDENCE-BUILDING MEASURES, AND THE SPRATLY ISLANDS DISPUTES 17 – 34 (John C. Baker & David G. Wiencek, eds., 2002).

[7] There are some analysts who include Indonesia as a possible seventh claimant country. Indonesia does not claim any of the islands in the South China Sea. However, the Chinese and Taiwanese claims in the South China Sea extend into Indonesia's EEZ and continental shelf, including Indonesia's Natuna gas field. There are some authors, notably Chinese scholars, who do not regard Taiwan as a claimant country since it is not recognized as a country in international law but merely as a province of China. See for example, Jianming Shen, *China's Sovereignty over the South China Sea Islands: a Historical Perspective*, 1 CHINESE J. INT'L L. 94, 96 (2002) which refers to Taiwan as a province of China.

[8] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, Montego Bay, 10 December, 1982, entry into force 14 November 1994, UN Doc. A/Conf.62/122 (1982), 21 I.L.M. 1261 [hereinafter LOS CONVENTION].

[9] The United Nations and the majority of the international community of states do not recognize Taiwan as an independent state. Please refer to UN GA Res. 2758 (1971) which resolved the issue of China's representation in the United Nations. The ASEAN upholds the "One China Policy" and does not accord independent status to Taiwan. *See*, Christopher C. Joyner, *The Spratly Islands Dispute: What Role For Normalizing Relations between China and Taiwan?* 32 NEW ENGLAND L. REV. 819-852 (1998). For the international legal status of Taiwan, *see*: FRANK P. MORELLO, THE INTERNATIONAL LEGAL STATUS OF FORMOSA (1966); JOHN FRANKLIN COPPER, TAIWAN: NATION-STATE OR PROVINCE? (1990); HUNGDAH CHIU, THE INTERNATIONAL LEGAL STATUS OF THE REPUBLIC OF CHINA (1992); JEAN-MARIE HENCKAERTS, ED., THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS (1996); CHEN YI-SHEN, ET AL., EDS., TAIWAN'S INTERNATIONAL STATUS: HISTORY AND THEORY (2005); WINSTON CHUNG, THE MAKING OF A NATION: TAIWAN SHAPED BY GEOECONOMIC MANDATE (2000).

[10] The parties to the dispute and their respective date of ratification of the LOS Convention: Brunei Darussalam (5 November 1996); China (7 June 1996); Indonesia (3 February 1986); Malaysia (14 October 1996); Philippines (8 May 1984); and Vietnam (25 July 1994). The chronological lists of ratifications, accessions and successions to the LOS Convention and its related Agreements (as of 31 May 2007) online: http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm

[11] PHIPHAT TANGSUBKUL, ASEAN AND THE LAW OF THE SEA 3 -20 (1982); Michael Bennet, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425 (1991 – 1992).

However, while the legal framework under the LOS Convention offers some options, the highly complicated nature of the dispute tests the limits of international law and obscures the possibility of a legal solution. The cultural aversion of Asians against a judicial settlement, where there are victors and losers, almost renders this option illusory.[12]

The dispute over the legal status of the islands of the South China Sea also stokes intense patriotic fervor among all the claimant countries that render their positions almost intractable.[13] This heightens the possibility of bloodshed and a military conflict.[14] The facile appearance of tranquility within the region is deceptive. The situation remains volatile.

The South China Sea issue has been a longstanding regional and global concern. Although the agenda in the negotiating table has hardly changed, it is still a welcome thought that parties still sit down and talk. Peace, albeit ephemeral, is always better than war. The pacific settlement of this issue is the common thread that runs through the positions of all the claimant countries.[15]

The claimant countries,[16] and indeed almost all scholars,[17] invoke the LOS Convention in finding a solution to this imbroglio. Within this context, the central question is always the issue of sovereignty.[18] This is without doubt a legal question. Since all parties claim to have sound basis in law for claiming ownership over these islands, inevitably, the debate shifts to who has the better or best claim.[19] This always results in an impasse.

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[12] PARK, *supra* note 1 at 217.

[13] BYRON N. TZOU, CHINA AND INTERNATIONAL LAW (THE BOUNDARY DISPUTES) 1 (1990).

[14] MARWYN S. SAMUELS, CONTEST FOR THE SOUTH CHINA 98 – 117 (1982); Daojiong Zha and Mark J. Valencia, *Mischief Reef: Geopolitics and Implications*, 31 J. OF CONTEMP. ASIA 86 (2001).

[15] Zhiguo Gao, *The South China Sea: From Conflict to Cooperation?* 25 OCEAN DEV. & INT'L L. 345 (1994).

[16] *See e.g.*, the official policy of the PRC in resolving the South China Sea issue, Ministry of Foreign Affairs of the People's Republic of China, *Basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue*, available online: http://www.fmprc.gov.cn/eng/topics/3754/t19230.htm.

[17] Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J INT'L L. 724 (1995); Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea* 25 Ocean Dev. & Int'l L. 61(1994). See also David Whitting, *The Spratly Islands Dispute and the Law of the Sea* 26 DENV. J. INT'L L. & POL'Y 897 (1997 – 1998).

[18] *See especially*, Ian Townsend-Gault, *Legal and Political Perspectives on Sovereignty over the Spratly Islands*, online: http://www.sum.uio.no/southchinasea/Publications/pdf-format/Townsend-Gault.pdf> at 9.

[19] H. Harry L. Roque, *China's Claim to the Spratlys Islands under International Law* 15 J. ENERGY & NAT'L RES. L. 189, 199 (1997). *See also*, Townsend-Gault, *id.*, at 9, 13.

However, the trend in recent scholarship underscores the imperative of joint development arrangements and co-management regimes[20] on the premise that the basis of the claims of *all* the claimant countries are inherently weak in international law and vis-a-vis each other. This paper proceeds from this critical point.

The elaborate backdrop just discussed constitutes the *box* referred to in this paper. The challenge that this paper poses is to think outside of this box.

In order to do this, this paper will aim to: **first**, explain the complex nature of the South China Sea issue; **second**, discuss the bases of the conflicting claims and proffer a brief evaluation of their relative strengths and weaknesses as well as their validity under international law; **third**, outline and examine the relevant provisions of the LOS Convention and identify their promises as well as their shortcomings in addressing the South China Sea issue; and **fourth**, explore possible solutions toward the pacific settlement of the issue primarily within the legal framework of the LOS Convention and outside of it.

I. The South China Sea Issue

A. Geographical Background

The South China Sea,[21] named after its location, simply pertains to the sea south of China.[22] The South China Sea encompasses a portion of the Pacific Ocean stretching roughly from Singapore and the Strait of

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[20] Charles Liu, *Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands* 18 LOY. L.A. INT'L & COMP. L. J. 865 (1996); Mito, *infra* note 98.

[21] A number of nations, particularly the Philippines, object to the name "South China Sea", in that it implies Chinese sovereignty over the sea, which they dispute. Ironically, the Chinese name for the sea does not contain the name "China" in it. The use of the term in this paper is merely descriptive and follows most literature on the subject. This paper recognizes the political sensitivity of using this term. Throughout this paper, the names of the various features of the South China Sea will be proceeded by the respective names given by the other countries, if available. *See* CHEMILLIER-GENDREU, *supra* note 6 at 15.

[22] More specifically, it refers to the area south of Hainan Island. The South China Sea is defined by the International Hydrographic Bureau as the body of water stretching in a Southwest to Northeast direction, whose southern border is 3 degrees South latitude between South Sumatra and Kalimantan (Karimata Straits), and whose northern border is the Strait of Taiwan from the northern tip of Taiwan to the Fukien coast of China. Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millenium* 15 AM. U. INT'L L. REV. 527, 530 (2000).

Malacca in the southwest, to the Strait of Taiwan in the northeast. The South China Sea is a semi-enclosed sea[23] encompassing an area of around 3,500,000 km² bordering several countries.[24]

The South China Sea Islands is an archipelago[25] of over 250 islands,[26] atolls,[27] cays, shoals, reefs,[28] and sandbars, most of which have no native inhabitants. The islands of the South China Sea can be further subdivided into four sub-archipelagos, listed by area size: (1) The Spratly

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[23] The LOS CONVENTION in Article 122 defines an enclosed or semi-enclosed sea as: "A gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States." Article 123 of the LOS CONVENTION underlines the duty of States bordering on enclosed or semi-enclosed seas to cooperate in the conservation, management, exploration and exploitation of the living marine resources; *See* VIVIAN LOUIS FORBES, CONFLICT AND COOPERATION IN MANAGING MARITIME SPACE IN SEMI-ENCLOSED SEAS 135, 243 (1997).

[24] The sea is bordered by Borneo to the south; China and Taiwan to the north; Vietnam, Thailand and Peninsular Malaysia to the west, and the Philippines to the east. It encompasses a continuation of the Pacific Ocean stretching roughly from Singapore and the Straits of Malacca in the southwest, to the Straits of Taiwan (between Taiwan and China) in the northeast.

[25] The LOS CONVENTION in Article 46 defines an *archipelagic State* as "a State constituted wholly by one or more archipelagos and may include other islands;" and an *archipelago* as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such." For academic literature on the regime of archipelagoes in international law, *see* W. H. Mcconnell, *The Legal Regime of Archipelagoes,* 35 SASKATCHEWAN L. REV. 121 (1970), C. F. Amerasinghe, *The Problem of Archipelagoes in the International Law of the Sea,* 23 INT'L & COMP. L. Q. 539 (1974); MOHAMMED MUNAVVAR, OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA (1995); D. P. O'connel, *Mid-Ocean Archipelagoes in International Law,* 45 BRIT. Y.B. INT'L L. 1 (1971); Miriam Defensor Santiago, *The Archipelago Concept in the Law of the Sea: Problems and Perspectives* 49 PHIL. L. J. 315 (1974).

[26] The LOS CONVENTION defines an island in Article 121. Almost all the islands in the South China Sea have land areas rarely exceeding 1 km². An island is any piece of land smaller than a continent and larger than a rock that is completely surrounded by water. Very small islands are called islets. Although seldom adhered to, it is also proper to call an emergent land feature on an atoll an islet, since an atoll is a type of island. A key or cay is also another name for a relatively small island. Groups of related islands are called archipelagos. There are three main types of islands: continental islands, river islands, and volcanic islands. There are also some artificial islands. Wikipedia, *South China Sea Islands,* available online: http://en.wikipedia.org/wiki/South_China_Sea_Islands. [Hereinafter SOUTH CHINA SEA ISLANDS]

[27] An atoll is a type of low, coral island found in the tropical ocean consisting of a coral-algal reef surrounding a central depression. The depression may be part of the emergent island or part of the sea (that is, a lagoon), or more rarely an enclosed body of fresh, brackish, or highly saline water. SOUTH CHINA SEA ISLANDS, *id.*

[28] In nautical parlance, a reef is a rock, sandbar, or other feature beneath the surface of the water, but shallow enough to be a hazard to ships. Many reefs result from abiotic processes—deposition of sands, wave erosion planning down rock outcrops—but the best-known reefs are those of tropical waters developed through biotic processes dominated by corals and calcareous algae. SOUTH CHINA SEA ISLANDS, *id.*

Islands;[29] (2) the Macclesfield Islands;[30] (3) the Paracel Islands;[31] and (4) the Pratas Islands.[32] The majority of the disputed islands are located in the Paracel and Spratly Island chains.[33]

The greater number of these islands are partially submerged islets, rocks, and reefs that are little more than navigational hazards not suitable for habitation.[34] These islands, however, are important for strategic, political and economic reasons.

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[29] The Spratly Islands, which the Chinese call *nánshā qúndǎo* or "Southern sands"; the Vietnamese call the *Tr□□ng Sa* or "Long Sands" and the Filipinos call the *Kalayaan* or "Freedom", are a disputed group of approximately 100 reefs and islets in the South China Sea. The Spratlys are surrounded by rich fishing grounds and gas and oil deposits. The People's Republic of China (PRC), the Republic of China (Taiwan), and Vietnam each claim sovereignty over the entire group, while Malaysia, the Philippines, and Brunei claim parts of the group. Several of the nations involved have soldiers stationed in the Spratlys: the PRC has about 450 troops, Malaysia 70–90, the Philippines about 100, and Vietnam about 1,500. Taiwan also maintains a military presence in the group's largest island, Itu Aba. SOUTH CHINA SEA ISLANDS, *id.*

[30] MacClesfield Bank (which the Chinese call as *Zhongsha Qundao* or literally Central Sand Islands) is an elongated atoll of underwater reefs and shoals in South China Sea and part of the disputed South China Sea Islands. It is claimed by the Republic of China, the People's Republic of China, and Vietnam. It is located ESE of the Paracel Islands, distantly SW of the Pratas Islands and north of the Spratly Islands. There are no military stations here. It's a rich fishing ground and difficult to navigate due to the shallow submerged reefs.

[31] The Paracel Islands (which the Chinese call the *Xisha Islands* and the Vietnamese call *Hoàng Sa*) are a group of small islands and reefs in the South China Sea and part of the South China Sea Islands, about one-third of the way from central Vietnam to the northern Philippines. SOUTH CHINA SEA ISLANDS, *id.*

The Paracel Islands are surrounded by productive fishing grounds and by potential oil and gas reserves. In 1932, French Indochina annexed the islands and set up a weather station on Pattle Island; maintenance was continued by its successor, Vietnam. The People's Republic of China has occupied the Paracel Islands since 1974, when its troops seized a South Vietnamese garrison occupying the western islands. The islands are claimed by the Republic of China (Taiwan) and Vietnam. SOUTH CHINA SEA ISLANDS, *id.*

The islands have no indigenous inhabitants. The PRC announced plans in 1997 to open the islands for tourism. The small Chinese port facilities on Woody Island and Duncan Island are being expanded. There is one airport. SOUTH CHINA SEA ISLANDS, *id.*

[32] The Pratas Islands (which the Chinese call the *Dongsha* Islands or "East Sand Islands") are located in the middle of the South China Sea. It has historically been uninhabited, and nations like China and Japan claimed it to be their overseas territory. After World War II, the islands and the sea area around it were mandated by United Nations. Today they are administered by the Republic of China and even assigns the place a postal code (817). SOUTH CHINA SEA ISLANDS, *ibid.*

[33] The Spratlys links the Pacific Ocean and the Indian Ocean. All its islands are coral, low and small, about 5 to 6 meters above water, spread over 160,000 to 180,000 square kilometers of sea zone (or 12 times that of the Paracels), with a total land area of 10 square kilometers only. The Paracels also has a total land area of 10 square kilometers spread over a sea zone of 15,000 to 16,000 square kilometers. SOUTH CHINA SEA ISLANDS, *id.*

[34] The islands of the South China Sea sits on a shallow humite-layer continental shelf with an average of 200 metres deep. However, in the Spratlys, the sea floor drastically change its height in thousands, and near the Philippines, the Palawan Trough is more than 5,000 metres deep. Also, there are some parts that are so shallow that navigation becomes difficult, and prone to accidents. SOUTH CHINA SEA ISLANDS, *id.*

B. The Strategic Importance of the South China Sea

The South China Sea region is strategically located.[35] It is a major international artery for trade, transportation and military affairs.[36] The South China Sea is the world's second busiest international sea lane.[37] Over half of the world's supertanker traffic passes through the region's waters. This is the reason why the stability of the region and the assurance of unimpeded freedom of navigation within its waters hold vital global significance.

C. The Economic Resource Potential of the Region

The South China Sea is rich in natural resources. The conflicting territorial claims to establish sovereignty over these islands are vital to claim their surrounding sea and their resources. Aside from its hydrocarbon potential in terms of oil and natural gas, the South China Sea is also a valuable marine resource.[38] The total fisheries production of the South China Sea is estimated at 30 million tons annually, with a mere 13 percent currently harvested.[39] The vast ecological ecosystem of the South China Sea,[40] being home to more 70 coral genera,[41] is one of the most productive areas for commercial fisheries in the world.[42]

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[35] Christopher C. Joyner, *The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geopolitics in the South China Sea* 13 INT'L J. MAR. & COAST. L. 193 (1998).

[36] JOHN H. NOER, CHOKEPOINTS: MARITIME ECONOMIC CONCERNS IN SOUTHEAST ASIA 1 (1996). [Hereinafter NOER]

[37] In terms of world annual merchant fleet tonnage, over 50% passes through the straits of Malacca, the Sunda Strait, and the Lombok Strait. Over 1.6 million m^3 (10 million barrels) of crude oil a day are shipped through the Strait of Malacca, where there are regular reports of piracy, but much less frequently than before the mid-20th century. NOER, *id.* at 1.

[38] SUSUMU KUME, TUNA RESOURCES IN THE SOUTH CHINA SEA (1973); TSUNEO AOYAMA, THE DEMERSAL FISH STOCKS AND FISHERIES OF THE SOUTH CHINA SEA (1973); D. MENASVETA, S. SHINDO AND S. CHULLARSORN, PELAGIC FISHERY RESOURCES OF THE SOUTH CHINA SEA AND PROSPECTS FOR THEIR DEVELOPMENT (1973); M. N. MISTAKIDIS, THE CRUSTACEAN RESOURCES AND RELATED FISHERIES IN THE COUNTRIES BORDERING THE SOUTH CHINA SEA (1973).

[39] World Resources Institute, *South China Sea: Spratly and Paracel Islands,* citing LAURETTA BURKE, ET AL., REEFS AT RISK IN SOUTHEAST ASIA (2002), and D. Pauly & V. Christensen, *Stratified Models of Large Marine Ecosystems: A General Approach and An Application to the South China Sea,* in LARGE MARINE ECOSYSTEMS: STRESS, MITIGATION AND SUSTAINABILITY 148-74 (K. Sherman, et al. eds., 1993) available online at <http://marine.wri.org/pubs_content_text.cfm?ContentID=108> [Hereinafter WORLD RESOURCES INSTITUTE].

[40] J.E.N. VERON, CORALS IN SPACE AND TIME: THE BIOGEOGRAPHY AND EVOLUTION OF THE SCLERACTINIA 321 (1995); P.M. Aliño et al., *The Fisheries Potential of the Kalayaan Island Group, South China Sea,* in THE MARINE BIOLOGY OF THE SOUTH CHINA SEA, PROCEEDINGS OF THE THIRD

In the whole, the hydrocarbon resources in the South China Sea is marked by exaggerated optimism and conflicting estimates[43] The most optimistic Chinese estimate suggests that potential oil resources (not proved reserves) of the Spratly and Paracel Islands could be as high as 105 billion barrels of oil, and that the total for the South China Sea could be as high as 213 billion barrels.[44] Even on the hope that 10% of this potential resource can be economically recovered, the Chinese estimates imply potential production levels for the Spratly Islands of 1.9 million barrels/day.[45]

The speculation that the region contains extensive hydrocarbon deposits is hardly supported by any evidence independent of the claims of China. The optimism of China with respect to the hydrocarbon potential of the South China Sea is not shared by non-Chinese analysts.[46] The United States Geological Survey estimated the sum total of discovered reserves and undiscovered resources in the offshore basins of the South China Sea at 28 billion barrels. The United States Energy Information Administration statistics state that the region has proven oil reserves of around 1.2 km^3 (7.7 billion barrels), with an estimate of 4.5 km^3 (28 billion barrels) in total. Natural gas reserves are estimated to total around 7,500 km^3 (266 trillion cubic feet).

D. The Complexity of the Issue

INTERNATIONAL CONFERENCE ON THE MARINE BIOLOGY OF THE SOUTH CHINA SEA 219-25 (B. Morton, ed., 1998). *Id.*

[41] MARK SPALDING, ET AL., EDS., WORLD MANGROVE ATLAS (1997); TOMAS TOMASCIK ET AL., EDS., THE ECOLOGY OF THE INDONESIAN SEAS (1997).

[42] Herminio R. Rabanal & Ruben Ganaden, *The Contest for Fishery Resources in the South China Sea, in* THE SOUTH CHINA SEA DISPUTES: PHILIPPINE PERSPECTIVES 37 – 47 (Aileen San Pablo-Baviera, ed., 1992). [Hereinafter BAVIERA].

[43] For a detailed discussion on the hydrocarbon potential in the region and other related issues, see MARK J VALENCIA, SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS (HYDROCARBON POTENTIAL, JURISDICTIONAL ISSUES AND INTERNATIONAL RELATIONS (1985). See also MARK J. VALENCIA, ET. AL., EDS. SHIPPING, ENERGY AND ENVIRONMENT: SOUTHEAST ASIAN PERSPECTIVES FOR THE EIGHTIES (1982).

[44] Please see Table 4, United States Energy Information Administration, *South China Sea Tables and Maps*, online: http://www.eia.doe.gov/emeu/cabs/schinatab.html.

[45] This estimate, if founded, would make the South China Sea oil reserves 20 percent of global oil reserve figures. *Id.*

[46] Noel L. Caagusan, *The Contest for Energy Resources* in BAVIERA, *supra* note 42 at 26 – 32. See especially, Teodoro M. Santos, *Reactions* in BAVIERA, *supra* note 42 at 33 – 35.

The issue of the South China Sea is complex for the following reasons: **first**, because of the number of parties directly[47] and indirectly involved;[48] **second**, because of its geo-political[49] and strategic importance;[50] and **third**, because of its economic resource potential.[51]

The characterization, nay obsession, of scholars, diplomats, policy makers and analysts, of the dispute over the islands of the South China Sea as primarily or mainly a legal question is far too simplistic and must be rejected. At the core of the legal nature of the dispute is the issue of sovereignty over the South China Sea which obscures other issues.[52]

The debate is likewise puerile because scholars argue the issue from the viewpoint of the contesting states.[53] The legal facet of the issue is just one among many. There are other potential points for cooperation and mutual agreement. For example, the following areas may offer some promise: marine scientific research, marine environmental protection,[54] safety of navigation and communication,[55] resource assessment and means of development.

F. Recent Developments

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[47] *See especially* HANNS J. BUCHHOLZ, LAW OF THE SEA ZONES IN THE PACIFIC OCEAN 30 – 56 (1987).

[48] *See e.g.* Richard D. Beller, *Analyzing the Relationship Between International Law and International Politics in China's and Vietnam's Dispute Over the Spratly Islands* 29 TEX. INT'L L. J. 293 (1994). See also Ji Guoxing, *Rough Waters in the South China Sea: Navigation Issues and Confidence-Building Measures,* 53 ASIA PAC. ISSUES 1 (2001).

[49] LIM JOO-JOCK, GEO-STRATEGY AND THE SOUTH CHINA SEA BASIN (1979).

[50] *See* Liselotte Odgaard, *Deterrence and Co-operation in the South China Sea,* 23 CONTEMP S.E. ASIA 292 (2001). The article argues that the Spratlys dispute promotes the emergence of a regional order combining deterrence with consultation and limited cooperation. For an examination of China's policy towards the South China Sea after the post-Cold War era, *see* Shee Poon Kim, *The South China Sea in China's Strategic Thinking,* 19 CONTEMP. S.E. ASIA 369 (1998).

[51] BOB CATLEY & MAKMUR KELIAT, SPRATLYS: THE DISPUTE IN THE SOUTH CHINA SEA 44 – 59 (1997).

[52] TOWNSEND, *supra* note 16 at 9.

[53] This raises serious issues of academic objectivity as well. The great bulk of the scholarly material on the South China Sea is invariably by Chinese scholars. It is perhaps not a coincidence that the positions these scholars write is that of China's. It is not suggested that one's nationality is an automatic source of bias, but that the reader should be wary of work which are scholarly in appearance but contains political propaganda. *See,* LENI STENSETH, NATIONALISM AND FOREIGN POLICY: THE CASE OF CHINA'S NANSHA RHETORIC (1998).

[54] DOUGLAS M. JOHNSTON, ENVIRONMENTAL MANAGEMENT IN THE SOUTH CHINA SEA: LEGAL AND INSTITUTIONAL DEVELOPMENTS (1982).

[55] Ramses Amer, *Towards a Declaration on "Navigational Rights" in the Sea-lanes of the Asia-Pacific,* 20 CONTEMP. S.E. ASIA 88 (1998).

The general climate in the South China Sea can be characterized as one of subdued hostility. There are a number of factors that can account for this: **first**, the increasing recognition of multilateralism especially within the aegis of ASEAN; **second**, the exercise of military restraint and pragmatic diplomacy among all claimant countries; and **third**, the various multilateral declarations and joint statements produced through the proliferation of opportunities for regional dialogue and forum on a broad range of issues all contribute to this current state.[56]

The South China Sea region has been the stage for a number of recent developments.[57] The situation in the region is largely a function of the interplay of the various activities and counter-activities of the claimant countries. These actions can be characterized as mainly individual attempts from all of the claimant countries to reinforce their respective territorial claims; maintain and strengthen existing control over occupied territories; and prevent encroachment.

In addition, the state of affairs within the South China Sea, is also influenced by both regional and global factors.[58] These same factors impinge upon and shape the foreign policy directions of the claimant countries. In the recent past military tension that sometimes led to violence mar the dynamics of geopolitics in the region.[59] Currently, however, there seems to be an emergent trend towards cooperation.

This paper will not elaborate on the military tension and skirmishes mentioned briefly above.[60] This section will discuss the Declaration on the Code of Conduct for the South China Sea, and the joint seismic exploration agreement by China, Vietnam and the Philippines, both recent developments of notable significance to the South China Sea issue.

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[56] For example, Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China, Memorandum of Understanding on Agricultural Cooperation, Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, among others. See ASEAN Secretariat Website, online: http://www.aseansec.org/home.htm.

[57] *See especially*, Yann-Huei Song, *The South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks*, 34 OCEAN DEV. & INT'L L. 229, 239 -245 (2003).

[58] MARK J. VALENCIA, CHINA AND THE SOUTH CHINA SEA DISPUTES: CONFLICTING CLAIMS AND POTENTIAL SOLUTIONS IN THE SOUTH CHINA SEA 3 (1995).

[59] *See e.g.* discussion in CHI-KIN LO, CHINA'S POLICY TOWARDS TERRITORIAL DISPUTES (THE CASE OF THE SOUTH CHINA SEA ISLANDS) 84 – 132 (1989) detailing China's disputes with Hanoi during the turbulent decade of 1974 -1984. *See also* SAMUELS, *supra* note 14 at 98 – 110.

[60] *See e.g.*, Ian James Storey, *Creeping Assertiveness: China, the Philippines and the South China Sea* 21 CONTEMP. S.E. ASIA 95 (1999).

1. The Declaration on the Code of Conduct for the South China Sea

The Declaration on the Code of Conduct for the South China Sea,[61] signed by the ASEAN[62] and China on 2 November 2002,[63] is a milestone in many respects. This is the first time that China has signed a multilateral agreement on the issue of the South China Sea.[64] The Declaration is a testimony to regional efforts that spanned almost a decade of intense negotiations.[65] It underscored the importance of regional security

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[61] For a concise background on the Declaration on the Conduct of Parties in the South China Sea, *see* Wu Shicun, & Ren Huaifeng, *More than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea*, 2 CHINESE J. INT'L L. 311 (2003).

[62] ASEAN, the Association of Southeast Asian Nations, was established by the ASEAN Declaration of August 8, 1967 in Bangkok, Thailand, with five founding members: Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Brunei Darussalam was admitted as the sixth member of ASEAN by the Declaration of January 7, 1984 in Jakarta, and Vietnam became the seventh member on July 28, 1995. Burma (Myanmar), Cambodia, and Laos were unanimously approved to join ASEAN in December 1995. Burma became the eighth and Laos the ninth member of ASEAN on July 23, 1997 as ASEAN celebrated its 30th anniversary. Cambodia became ASEAN's tenth member on April 30, 1999. See ASEAN's home page, online: <http://www.aseansec.org/history/overview.htm>.

[63] Declaration on the Conduct of Parties in the South China Sea was signed on 4 November 2002 during the Eighth ASEAN Summit in Phnom Penh, Cambodia by leaders of ASEAN and China. Full text available online: < http://www.aseansec.org/13163.htm>. [Hereinafter SCS DECLARATION]

[64] In June 2003, Beijing signed the Treaty of Amity and Cooperation, a dispute procedure instituted within the ASEAN countries in June 1976 thereby agreeing not to "participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity" of the other signatory states. *See* website of the ASEAN Secretariat, online: <http://www.aseansec.org/home.htm>.

Taiwan, one of the six parties directly involved in the sovereignty and maritime jurisdictional dispute in the South China Sea, was excluded from the regional efforts to formulate the code of conduct because of ASEAN's adherence to the "One-China Policy." Taiwan has also been barred from participating in other regional security dialogue processes, such as the ASEAN Regional Forum (ARF). For a discussion of the position of Taiwan on this issue, please see Yann-Huei Song, *Codes of Conduct in the South China Sea and Taiwan's Stand* 24 MARINE POL'Y 449 (2000).

[65] It was in the ASEAN Declaration on the South China Sea of 1992 that a possible code of conduct was first mentioned which provides that all parties are to apply the principles contained in the Treaty of Amity and Co-operation in Southeast Asia (TAC) as the basis for establishing a code of international conduct for the South China Sea. Paragraph 11 of The Joint Communiqué of the 29th ASEAN Ministerial Meeting, held in Jakarta in 1996, in Paragraph 11 "endorsed the idea of concluding a regional code of conduct in the South China Sea which will lay the foundation for lone [sic] term stability in the area and foster understanding among claimant countries." The Declaration of Hanoi, in paragraph 7,6 adopted at the Sixth ASEAN Summit in 1998 called for the ASEAN members countries to promote efforts for establishing a regional code of conduct in the South China Sea. The initiative to have an ASEAN–China code of conduct, proposed by ASEAN in Kuamin, China, on 6 April 1999, commenced the process of negotiations between Beijing and ASEAN member countries on the future of a code of conduct for the region. The Joint Communiqué of the 35th ASEAN Ministerial Meeting, held in Bandar Seri Begawan in 2002, in paragraph 40 reaffirmed "that the adoption of a code of

and the establishment of mutual trust and confidence among all the claimant countries. Towards this end, the Declaration reaffirmed the commitment of all the claimant countries to universally-recognized principles of international law including the Charter of the United Nations,[66] and the LOS Convention.[67]

The Declaration clearly enunciates the agreement of the states "to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the LOS Convention." The states also pledged "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability" by refraining from inhabiting presently uninhabited features.[68]

It must be added that the Declaration is a political document, and consequently, not legally binding.[69] It does not resolve the competing claims of territorial sovereignty issues in the South China Sea nor does it impose any enforceable obligations on the parties. However, the greater significance of the Declaration lies in the commitment of the parties to the maintenance of peace and stability, which are requisites to regional growth and development. The Declaration evinces the intent of all the parties to sustain negotiations conducted in good faith towards the eventual resolution of the issue. Most importantly, the Declaration has substantially improved the level of trust and confidence among the claimant countries and has been instrumental in other bilateral and multilateral initiatives that build upon its principles.[70]

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conduct in the South China Sea would further promote peace and stability in the region and agreed to work towards a Declaration on the Conduct of Parties in the South China Sea." Please see Nguyen Hong Thao, *The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 279, 279 – 280 (2003).

[66] Charter of the United Nations, 59 Stat. 1031; TS 993; 3 Bevans 1153.

[67] Preamble of the SCS DECLARATION, *supra* note 63. The SCS DECLARATION likewise affirmed the Treaty of Amity and Cooperation in Southeast Asia between ASEAN members in 1976 and the Five Principles of Peaceful Coexistence.

[68] SCS DECLARATION, *supra* note 63.

[69] Leszek Buszynski, *ASEAN, the Declaration on Conduct, and the South China Sea*, 25 CONTEMP. S.E. ASIA 343 (2003). See also, Nguyen Hong Thao, *Vietnam and the Code of Conduct for the South China Sea* 32 OCEAN DEV. & INT'L L. 105 (2000).

[70] For example, the Joint Oceanographic Marine Scientific Expedition in the South China Sea (JOMSRE-SCS), an initiative launched by Vietnam and the Philippines has been implemented since 1996. The first expedition was undertaken in April 1996, the second in May 2000, third in April 2005

2. China-Vietnam-Philippine Joint Seismic Exploration Agreement

On September 2005, Chinese Premier Wen Jiabao and his Vietnamese counterpart Phan Van Khai, together with Philippine President Gloria Macapagal-Arroyo, agreed to conduct a joint survey of possible oil deposits in areas they all claim in the South China Sea.[71] In addition, the three countries also agreed to enhance consultation and cooperation on border issues.[72]

The three-nation accord on the joint exploration over the disputed areas on the South China Sea -- safely called the Joint Marine Seismic Undertaking (JMSU) -- was forged during the sidelines of the second summit of the Greater Mekong Subregion (GMS) Economic Cooperation in Kunming, the capital of southwest China's Yunnan Province, where the summit was held. The JMSU is actually characterized as a "marine scientific research," a confidence building measure outlined in the SCS Declaration.[73]

The pact merely covers a pre-exploration study for the sole purpose of collecting, processing and analyzing seismic data and does not include drilling or development nor is there reference to joint petroleum production, a reality emphasized in a *communique* by the Philippine Government.[74] Cooperative agreements of this nature are actually specifically permitted under the SCS Declaration.[75] And, most important of

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even had American and Canadian participants. In April 2007, for JOMSRE-SCS IV, China expressed its willingness to join as a signatory to the Declaration on Code of Conduct on the South China Sea and Korea showed interest to learn the experience of JOMSRE-SCS for its own dispute in the Japanese Sea.

[71] Radio Free Asia, *China, Philippines, Vietnam Sign Joint South China Sea Oil Search Accord,* 14 March 2005. Available online: http://www.rfa.org/english/news/business/2005/03/14/china_vietnam_spratlys/.

[72] Xinhua News Agency, *Pledge for Joint S. China Sea Exploitation Repeated,* July 20, 2005. Online at: http://www.china.org.cn/english/2005/Jul/135427.htm.

[73] Ian Storey, *China and the Philippines: Moving Beyond the South China Sea Dispute,* 6 China Brief (16 August 2006), available online: http://www.jamestown.org/publications_details.php?volume_id=415&issue_id=3837&article_id=2371392

[74] Alan Boyd, *Oil Worries Lubricate South China Sea Pact,* Asia Times Online, 4 September 2004. Online at: http://www.atimes.com/atimes/China/FI04Ad04.html.

[75] SCS DECLARATION, *supra* note 63, which states:

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6. **Pending a comprehensive and durable settlement of the disputes**, the Parties concerned may explore or undertake **cooperative activities**. These may include the following: a. marine environmental protection; b. **marine scientific research**; c. safety of

all, the legal caveat that the agreement is without prejudice to their respective territorial claims in the South China Sea.

The national oil companies from the three countries -- China National Offshore Oil Corporation, Philippine National Oil Corporation and PetroVietnam -- have agreed to conduct joint pre-exploration seismic surveys of the South China Sea with each country contributing $5 million to the $15 million initial cost of the three-year project. The tri-partite agreement covers an area of about 143,000 square kms. (55,000 square miles).[76]

It is fairly obvious that the energy security of all the individual claimant countries and even the South-east Asian region as a whole is one of the most major driving factors in the South China Sea issue.[77] Since energy demands, much like the hydrocarbon deposits in the South China Sea, are independent of the boundary disputes between the claimant countries, it will be for the benefit of all parties to cooperate in multilateral initiatives which temporarily shelve territorial claims and further goals that transcend the question of sovereignty.[78] Ultimately, a comprehensive arrangement along the same lines embodied in a legally-binding multilateral instrument in respect of the South China Sea has the greatest potential to improve political, military and economic stability throughout the region.

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navigation and communication at sea; d. search and rescue operation; and e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms. The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation (emphasis supplied)."

[76] Ling Zhu, *Joint Exploration Project in South China Sea Finishes 1st Phase*, 17 November 2005. Available online at the Chinese Government's official web portal: http://english.gov.cn/chinatoday/2005-11/17/content_100828.htm.

[77] Clive Schofield & Ian Storey, *Energy Security and Southeast Asia: the Impact on Maritime Boundary and Territorial Disputes*, 9 HARV. ASIA Q. 36 (2005). The ever-increasing demand for oil to support China's growing economy has driven China National Offshore Oil Corporation (CNOOC) to partner with U.S. Devon Energy Corporation to develop oil and natural gas reserves in the eastern part of the South China Sea, the fourth deal on deep sea oil exploitation that CNOOC has signed with foreign partners. See Yingling Liu, *China, U.S. Join in Oil and Gas Development in South China Sea*, December 9, 2005. Available online at: http://www.worldwatch.org/node/1469.

[78] Mark Valencia, *China's Push for Offshore Energy Resources has Implications for Taiwan's National Security and Energy Policy*, Taiwan Review, 1 January 2006. Online at: http://taiwanreview.nat.gov.tw/ct.asp?xItem=1167&CtNode=128. Chinese Embassy in the Philippines, *Oil Companies of China, the Philippines and Vietnam signed Agreement on South China Sea Cooperation*, 15 March 2005. Available online: http://www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t187333.htm

II. An Analysis of the Dispute

The six nations that have overlapping and conflicting claims over the islands that speck the South China Sea: China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei, all base their claims on principles of international law, both customary and conventional, and in particular on provisions of the LOS Convention. These principles are principally discovery and effective occupation.[79]

Inasmuch as the focus of this paper is not on the validity of the respective claims nor of their relative strengths and weaknesses vis-à-vis each other, this section will be brief. This section aims: **first**, to provide the basis of the claim of each of the claimant countries; and **second,** to give a short analysis of each claim.

A. The Claimant Countries and the Basis of their Respective Claims

1. The People's Republic of China

The People's Republic of China (PRC) claims territorial sovereignty over the entire South China Sea.[80] The PRC primarily anchors its claim on the principle of discovery on the basis of historical records that date as far back as the 200 B.C.[81] China also relies on the 1887 Treaty between France

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[79] For academic literature on the acquisition of territory in international law, *see* John Mchugo, *How to Prove Title to Territory: A Brief, Practical Introduction to the Law and Evidence*, 2(4) BOUNDARY & TERRITORY BRIEFING (1998); Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT'L L. 308 (1957); J.G. Starke, *The Acquisition of Title to Territory by Newly Emerged States*, 41 BRIT. Y.B. INT'L L. 411 (1965-1966); JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS (2003).

[80] For an analysis of the traditional Chinese maritime boundary in the South China Sea (the Chinese broken u-shaped line), please see Peter Kien-Hong Yu, *The Chinese (Broken) U-Shaped Line in the South China Sea: Points, Lines and Zones*, 25 CONTEMP. S.E. ASIA 405 (2003). For a the history of the creation and the opinions that have been expressed concerning the juridical status of the dotted line, *see* Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note* 34 OCEAN DEV. & INT'L L. 287 (2003). The PRC claims the waters within these lines as historic waters, which to China is akin to the concept of "internal waters" and signifies ownership of all the living and non-living resources within these lines. See also 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 INT'L J. MAR. & COAST. L. 52 (1997).

[81] The academic literature by Chinese scholars in support of the Chinese claim is numerous, well-documented and voluminous. See for example, Jianming Shen, *China's Sovereignty over the South China Sea Islands: A Historical Perspective* 1 CHINESE J. INT'L L. 94 (2002); Jianming Shen, *International Law Rules and*

and China, which delimited the territories of China and Vietnam, which was then a French protectorate.[82] China maintains troops on at least seven of the islands[83] since 1988 and has erected structures on some of them, including a naval airfield on Fiery Cross Reef.

2. Taiwan

The claim of Taiwan to the South China Sea is based on the principles of discovery and occupation.[84] In 1946, Taiwan was the first to establish its presence in the Spratlys following the Japanese withdrawal after World War II. It has physically occupied and exercised sovereignty over Itu Aba, the largest island in the Spratlys chain since 1956.[85]

3. Vietnam

The claim of Vietnam covers an extensive area of the South China Sea including all of the Spratly Islands.[86] The Vietnamese claim is based on historical evidence and its right of succession to the French claim.[87] Currently, Vietnam occupies twenty-three of the Spratly Islands.[88]

Historical Evidences Supporting China's Title to the South China Sea Islands, 21 HASTING INT'L & COMP. L. REV. 1 (1997-1998); Chang The-Kuang, *China's Claim of Sovereignty Over Spratly and Paracel Islands: A Historical and Legal Perspective*, 23 CASE W. RES. J. INT'L L. 399 (1991), among others.

[82] Hungdah Chiu & Choon-Ho Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. & INT'L L. 1, 11 (1975) citing the Convention Respecting the Delimitation of the Frontier Between China and Tonkin (Vietnam), signed on June 26, 1887. The 1887 Treaty created a boundary line ("west of 105 degrees 43 minutes east of Paris") which ceded to the China all territory east of this line. China posits that since the Spratlys lie east of this line, it belongs to China. On this point, *see also* Brian K. Murphy, *Comment, Dangerous Ground: The Spratly Islands and International Law*, 1 OCEAN & COASTAL L. J. 187, 191 (1995).

[83] China controls the following islands in the Spratlys: (1) Da Chu Thap (Fiery Cross Reef); (2) Da Chau Vien (Cuarteron Reef); (3) Da Gac Ma (Johnson Reef); (4) Da Hu-go (Hughes Reef); (5) Da Gaven (Gaven Reef); (6) Da Su-bi (Subi Reef); and (7) Mischief Reef. Manuel J. Laserna, Jr., *The Spratlys: Legal Basis of the Claim of the Socialist Republic of Vietnam*, available online at Pinoylaw.com: http://www.pinoylaw.com/library/features/The%20Spratlys,%20Legal%20Basis%20of%20the%20Claims%20of%20Vietnam%20and%20the%20Philippines.htm. [Hereinafter LASERNA].

[84] China incorporates the claim of Taiwan into its own because China does not recognize Taiwan as an independent state separate from the PRC. See Michael Bennet, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 448 (1992).

[85] Cheng-Yi Lin, *Taiwan's South China Sea Policy* 37 ASIAN SURV. 323 - 325 (1997).

[86] For a discussion of the policy of Vietnam in the South China Sea and its use of the LOS CONVENTION to establish its claim on the entire of the Paracel and the Spratly islands, *see* Stein Tonneson, *Vietnam's Objective in the South China Sea: National or Regional Security?*, 22 CONTEMP. S.E. ASIA 199 (2000).

[87] Vietnam asserts its historical ties with the Spratly Islands can be traced as far back as A.D. 1650. It also maintains that it succeeded France's 1933 Spratly claim despite France's insistence that it never ceded the Spratlys to Vietnam. Vietnam made its first modern declaration of sovereignty over the

4. The Philippines

The Philippines principally bases its claim on the principle of discovery.[89] The Philippines asserts that the Spratly Islands were *terra nullius* when Tomas Cloma, a Filipino lawyer and businessman, discovered them in 1947.[90] The Philippine claim to the Spratlys has clearly defined coordinates. The Philippines occupies 8 islands[91] which it refers as the Kalayaan Island Group, which was made a part of Palawan Province by Presidential Decree in 1972.[92]

5. Malaysia

Malaysia claims and occupies three islands in the southern portion of the Spratlys based on the principle of geographic proximity founded on the continental shelf principle.[93] Malaysia argues that these islands lie within

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Spratlys at the 1951 San Francisco Peace Conference. In 1956, South Vietnam strongly protested the Philippine explorer Tomas Cloma's alleged discovery of the Spratlys. For a discussion of the policy of Vietnam in the South China Sea and its use of the LOS CONVENTION to establish its claim on the entire of the Paracel and the Spratly islands, *see* Tonneson, *id.*

[88] In the Spratlys, Vietnam controls the following islands, reefs, shoals, and cays: (1) Da Lat (Ladd Reef); (2) Dao Truong Sa (Spratly Island); (3) Da Tay (West London Reef); (4) Da Giua (Central London Reef); (5) Da Dong (East London Reef); (6) Dao An Bang (Amboyan Reef); (7) Thuyen Chai (Barque Canada Reef); (8) Da Phan Vinh (Pearson Reef); (9) Bai Toc Tan (Alison Reef) (10) Da Nui Le (Cornwallis South Reef); (11) Da Tien Nu (Tennent Reef); (12) Da Lon (Great Discovery Reef); (13) Da Len Dao (Landsdowne Reef); (14) Da Hi Gen; (15) Dao Sinh Ton (Sin Cowe Island); (16) Da Gri-san; (17) Dao Nam Yet (Namyit Island); (18) Dao Son Ca (Sand Cay); (19) Da Nui Thi (Petley Reef); (20) Dao Song Tu Tay (South West Cay); and (21) Da Nam (South Reef). LASERNA, *supra* note 83.

[89] For a more thorough discussion of the Philippine claim, please see Haydee Yorac, *The Philippine Claim to the Spratly Islands Group*, 58 PHIL. L. J. 172 (1983). Also see BAVIERA, *supra* note 42 at 10 – 17; 52 – 53.

[90] JUAN ARREGLADO, KALAYAAN: HISTORICAL, LEGAL, POLITICAL BACKGROUND (1982).

[91] The islands occupied by the Philippines: (1) Dao Song Tu Dong (Parola or North East Cay); (2) Dao Dua (Ben Lac) (Likas or West York Island); (3) Dao Thi Tu (Pag-asa or Thitu Island); (4) Dao Binh Nguyen (Patag or Flat Island); (5) Dao Vinh Vien (Lawak or Nansham Island); (6) Dao Cong Do (Rizal or Commodore Reef); (7) Con San Ho Lan Can (Panata or Lamkian Cay); and (8) Dao Loai Ta (Kota or Loaita Island). LASERNA, *supra* note 83.

[92] On 11 June 1978, President Marcos issued Presidential Decree 1596, placing most of the islands, cays, shoals, and reefs within Philippine territory and naming them collectively as the "*Kalayaan Island Group*". These have been integrated as a municipality of the province of Palawan. Presidential Decree 1596 and Presidential Decree 1599, proclaiming a 200-mile exclusive economic zone for the Philippines also include the Kalayaan Island Group. The Philippine Government registered its claim with the United Nations Secretariat on May 20, 1980, with a technical description of Kalayaan. See Yorac, *supra* note 89 at 44 – 46.

[93] Malaysia controls the following islands in the Spratlys: (1) Da Ky Van (Mariveles Reef or Terumbu Mantanani); (2) Da Kieu Ngua (Ardasier Reef or Terumbu Ubi); and (3) Da Hoa Lau (Swallow Reef or Terumbu Layang). LASERNA, *supra* note 83.

the prolongation of its continental shelf and relies on Article 76 of the LOS Convention to claim these Spratly Islands. Malaysia has established a garrison on Layang Layang Island, the largest of the three islands it occupies in 1983. It has also succeeded in developing Swallow Reef into a resort.

6. Brunei

Brunei does not claim nor occupy any of the islands in the South China Sea but claims Louisa Reef and Rifleman Bank, both located in the southern portion of the Spratlys as part of its continental shelf and Exclusive Economic Zone (EEZ) based on the principle of geographic proximity and the relevant provisions of the LOS Convention. In 1984, Brunei declared an EEZ that includes Louisa Reef, which is likewise claimed by Malaysia. The two countries have been engaging in negotiations since 1984 to resolve their competing claims.

B. An Evaluation of the Claims to Territorial Sovereignty under International Law

The claim of **China** to the entire South China Sea which relies heavily on historical records is merely proof of inchoate title at best. While it cannot be disputed that the Chinese had the earliest contact with the islands of the South China Sea, China has not adduced evidence that it has shows it exercised conclusive proof of effective, peaceful and continuous occupation.[94]

Taiwan's claim, aside from being substantially similar to that of China's, is also based upon the same historical evidence. [95]Consequently, it suffers from the same weaknesses. However, Taiwan's continuous and peaceful occupation of Itu Aba Island since 1956 constitutes an effective exercise of sovereignty which may find basis in international law.[96]

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[94] *See* John W. Garver, *China's Push through the South China Sea: The Interaction of Bureaucratic and National Interests,* 132 THE CHINA Q. 999 (1992) which discusses the geo-strategic and economic rationale for the aggressive military policy of China in the South China Sea. *See also,* Eric Hyer, *The South China Sea Disputes: Implications of China's Earlier Territorial Settlements,* 68 PAC. AFF. 34 (1995).

[95] Kristen Nordhaug, *Explaining Taiwan's Policies in the South China Sea, 1988-99,* 14 THE PAC. REV. 487 (2001).

[96] The ambiguity of Taiwan's status in international law severely weakens its bargaining position and the absence of diplomatic relations, renders bilateral negotiations almost impossible.

Vietnam's claim to the Spratly Islands suffers from the following weaknesses: first, the historical basis of its claim is inconclusive; second, the issue of succession to the French claim is tenuous; third, there are gaps in the control of Vietnam over the Spratlys; and fourth, the statements made by the former North Vietnamese government supporting the Chinese claim substantially weakens Vietnam's current claim to the Spratlys.[97]

The claim of the **Philippines** hinges on the premise that the islands were *terra nullius* or unclaimed and unoccupied at the time of their discovery by Cloma. There seems to be two flaws to this claim: first, the argument that the islands are *terra nullius* is tenuous and may not find support in fact;[98] second, the argument that the Philippine government succeeded from the claim of Cloma, a private person acting in an individual capacity, is questionable. However, the fact that the Philippines has exercised sovereignty and peacefully occupied eight of the islands in the South China Sea since 1978 may prevail in international law.

The claim of **Malaysia** rests primarily on a misinterpretation of the LOS Convention. The regime of the continental shelf under Article 76 of the LOS Convention merely gives the coastal state the right to claim the seabed resources appurtenant to it, but does not legally support a claim to sovereignty over islands located in its continental shelf.[99] However, the claim of Malaysia may still prevail under international law, albeit on a different legal standard. The reason for this is Malaysia's peaceful and continuous occupation of the islands it claims which are neither claimed nor ever occupied by any other state claiming the Spratlys.

Brunei's claim to Louisa Reef, which is a submarine feature,[100] may prevail rightfully in international law on the basis of Article 76 of the LOS Convention. However, Brunei must prove that the reef lies within the

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[97] Before the fall of Saigon in April 1975, North Vietnam had recognized and supported Chinese sovereignty over the Nansha islands. However, after its reunification, it now declares that the Spratlys have always belonged to Vietnam. Murphy, *supra* note 82 at 205.

[98] Prior to Cloma's "discovery" of the Spratlys in 1947, it has been undoubtedly been discovered and explored numerous times. Lian A. Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands*, 13 AM. U. INT'L L. REV. 727, 743 (1998).

[99] DONAT PHARAND & UMBERTO LEANZA, EDS., THE CONTINENTAL SHELF AND THE EXCLUSIVE ECONOMIC ZONE: DELIMITATION AND LEGAL REGIME (1993).

[100] Louisa Reef appears to be geologically a submarine feature, as opposed to an island. It is essentially part of the seabed and has no permanent dry land nor is it habitable. Murphy, *supra* note 82 at 208.

extension of its continental shelf. On the other hand, Brunei's claim to Rifleman Bank, which is likewise asserted on the basis of the extended continental shelf principle, may not satisfy the LOS Convention requirement since the East Palawan Trough separates Rifleman Bank from Brunei and terminates the natural prolongation of its continental shelf.

III. The United Nations Convention on the Law of the Sea

The LOS Convention constitutes the primary legal framework in addressing the conflicting maritime claims in the South China Sea. The LOS Convention is binding upon all claimant countries, with the exception of Taiwan, all being parties to it. This fact need not be overstressed since all the parties to the dispute invariably invoke the provisions of the LOS Convention as a basis for their respective claims.

This part of the paper will discuss the inextricable link between the legal framework of the LOS Convention and the South China Sea issue. In order to establish this connection, this section aims to: **first**, discuss the salient provisions of the LOS Convention relevant to the South China Sea dispute; **second**, examine the options within the legal framework of the LOS Convention with particular regard to its dispute settlement mechanism provisions; and **third**, identify its limitations and issues in addressing the South China Sea question.

A. Relevant Provisions of the LOS Convention

1. Baselines

The baseline is the line from which the seaward limits of a state's maritime zones of jurisdiction are measured.[101] The measure of the breadth of the territorial sea[102] and the seaward limits of the contiguous zone,[103] the exclusive economic zone,[104] and the continental shelf[105] are measured from

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[101] *See especially*, UNITED NATIONS, OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA., BASELINES: AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1989).

[102] Article 3, LOS CONVENTION, which establishes that "every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles."

[103] Article 33(2), LOS CONVENTION.

[104] Article 57, LOS CONVENTION. Articles 55 - 75 define the concept of an Exclusive Economic Zone (EEZ), which is an area up to 200 nautical miles beyond and adjacent to the territorial sea. The

the same baseline. The territorial sea baseline may be of various types depending on geographical configuration of the coastline.[106] The normal baseline is the low-water line along the coast, including the coasts of islands, as marked on large-scale charts officially recognized by the coastal State.[107] The baseline for an island on an atoll or having fringing reefs is the seaward low-water line on the reef.[108] Low-tide elevations, defined by the LOS Convention as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide," may only be used as a baseline if they are wholly or partly within 12 nautical miles from the mainland or an island.[109]

2. The Regime of Islands

An island is defined in the LOS Convention as "a naturally formed area of land, surrounded by water, which is above water at high tide."[110] The LOS Convention qualifies that islands[111] generate their own maritime entitlements with the exception that "rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic

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EEZ gives coastal states "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to" (above) "the seabed and of the seabed and its subsoil..." However, in exercising its rights and duties within the EEZ, the coastal State is to have due regard to the rights and duties of other States and act in a manner compatible with the Convention (Article 56(2)).

[105] Article 76, LOS CONVENTION. Articles 76 defines the continental shelf of a nation, which "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 nautical miles...". This is important because Article 77 allows every nation to exercise "over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources".

[106] Articles 7 and 47, LOS CONVENTION (Straight and Archipelagic Baselines).

[107] Articles 5 and 121(2), LOS CONVENTION.

[108] Article 6, LOS CONVENTION.

[109] Article 13, LOS CONVENTION. However, in certain instances low-tide elevations can be used for establishing straight (archipelagic) baselines. See Article 7(4) and 47(4), LOS CONVENTION.

[110] Article 121 (1), LOS CONVENTION. For academic literature on the legal regime of islands in international law, *see* MARIUS GJETNES, THE LEGAL REGIME OF ISLANDS IN THE SOUTH CHINA SEA (LLM Thesis, University of Oslo, 2000); HIRAN W. JAYEWARDENE, THE REGIME OF ISLANDS IN INTERNATIONAL LAW, PUBLICATIONS ON OCEAN DEVELOPMENT (1990) and D. W. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW (1979).

[111] The word used in the LOS CONVENTION is actually "rocks." The LOS CONVENTION does not define the term rock. It has been interpreted as a particular type of island in a geological sense and within the context of Article 121, LOS CONVENTION.

zone or a continental shelf"[112] but still entitled to its own territorial sea and a contiguous zone measured from that same baseline.[113]

The LOS Convention is explicit that artificial islands, installations, and structures do not possess the status of islands, do not have a territorial sea of their own, and do not affect the delimitation of the territorial sea, the EEZ, or the continental shelf.[114]

3. The Outer Limits of the Maritime Zones[115]

The LOS Convention clearly sets out the limits of the various maritime zones. The territorial sea can extend to 12 nautical miles from the baselines determined in accordance with the Convention and the EEZ up to 200 nautical miles from the same baselines.[116] The continental shelf extends up to 200 nautical miles from these baselines, or in certain instances, to the outer edge of the continental margin.[117] The criteria to determine the outer limit of the continental shelf where it extends beyond 200 nautical miles is provided in Article 76 of the LOS Convention.[118]

4. The Relevance of these Provisions

The above provisions of the LOS Convention form the underlying layers upon which the core question of sovereignty or ownership over the

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[112] Article 121 (3), LOS CONVENTION.

[113] Articles 3 and 33, LOS CONVENTION. Please see, Barry Hart Dubner, *The Spratly 'Rocks' Dispute--A 'Rockapelago' Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L. J. 291 (1995).

[114] Article 60(8) in relation with Article 11, LOS CONVENTION. For the legal regime of artificial islands in international law, *see* NIKOS PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS (1977).

[115] Jorge R. Coquia, *Maritime Boundary Problems in the South China Sea*, 24 BRIT. COLUM. L. REV. 117, 118 (1990) who opines that there will be actual overlapping EEZs and continental shelves if the maritime zone measurements are drawn from archipelagic baselines.

[116] Articles 3 and 57, LOS CONVENTION.

[117] The continental shelf can extend to 350 nautical miles from the baseline or 100 nautical miles beyond the 2500 meter isobath. See Article 76 (5), LOS CONVENTION.

[118] Article 76 provides two rules for establishing the outer limit line and two restraint lines, beyond which the continental shelf cannot extend in any case. Due to the dimensions of the South China Sea, these restraint lines probably are of limited significance.51 The maximum extent of the continental shelf is either a line defined by fixed points not more than 60 nautical miles from the foot of the continental slope, or fixed points at each of which the sedimentary thickness is at least 1% of the shortest distance from such point to the foot of the continental slope. Article 76(4), LOS CONVENTION. *See*, PETER J. COOK & CHRIS M. CARLETON, EDS., CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE (2000).

disputed islands in the South China Sea should be viewed.[119] The provisions are closely intertwined issues.[120] The normative guidelines in these provisions provide essential guideposts for the kind of questions that need to be preliminarily addressed. For example, which among the features in the South China Sea is or is not an island?[121] This is vital to identify which features can generate one or more zones of maritime jurisdiction.[122] But as a prelude to that question, one must determine which of these features support human habitation or economic life.[123] This is crucial in order to indicate which features can claim an EEZ and a continental shelf.[124] The point where all these maritime zones will be measured will depend on the baseline. Thus, the baselines must be determined and which applicable baseline will be used.[125] The other questions that the LOS Convention provisions provide are more complex. This includes the identification of the outer limits of the continental margin beyond 200 nautical miles.[126]

It must be emphasized that the LOS Convention does not address the issue of ownership or sovereignty to the South China Sea. In order to answer this matter, one must refer to the international legal rules pertaining to the acquisition and loss of territory under international law which have developed largely from state practice, customary international law and from the interpretation of international judicial and arbitral tribunals.[127]

On another point, it must likewise be understood that the answers to the above questions may not directly resolve the dispute in the South

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[119] *See especially*, 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 DEV. & INT'L L. 169 (2001).

[120] Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INT'L L. 191 (2001).

[121] Applying Article 121(1), LOS CONVENTION. See literature that discuss this issue: Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AM. J. INT'L L. 863 (1999); Barry Hart Dubner, *The Spratly "Rocks" Dispute – A "Rockapelago" Defies Norms Of International Law'* 9 TEMPLE INT'L & COMP. L. J. 291 (1995); Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?* 32 OCEAN DEV. & INT'L L. 191 (2001).

[122] Those features which do not pass the test of Article 121(1) cannot generate zones of maritime jurisdiction except a 500 meter safety zone.

[123] Article 121 (3), LOS CONVENTION.

[124] *Id.*

[125] Articles 5, 6, 7, and 47, LOS CONVENTION.

[126] Article 76, LOS CONVENTION.

[127] Robin R. Churchill, *The Role of the International Court of Justice in Maritime Boundary Delimitation*, in OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 125 (Alex G. Oude Elferink & D.R. Rothwell, eds., 2004); Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 OCEAN DEV. & INT'L L. 1 (2001), Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1779 (2003 - 2004) .

China Sea. The reason for this is simple: the claims may still overlap. This is not a remote possibility given the fact that a large portion of the South China Sea is not located more than 200 nautical miles from the mainland coasts and the area beyond 200 nautical miles from the mainland coasts is within 200 nautical miles from the various islands throughout the South China Sea.

B. Options within the Framework of the LOS Convention

1. The Dispute Settlement Provisions of the LOS Convention

The dispute settlement mechanism provided under the legal framework of the LOS Convention establishes a compulsory and binding framework for the pacific settlement of all ocean-related disputes.[128] The LOS Convention in Part XV[129] requires States Parties to settle any dispute between them concerning the interpretation or application of the Convention by peaceful means in accordance with Article 2 (3),[130] of the Charter of the United Nations and shall seek a solution by the means indicated in Article 33 (1),[131] of the Charter. [132]

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[128] Please see excellent text outlining the history and development of the dispute procedures under the LOS CONVENTION in NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA (2005). See also, Edward Duncan Brown, *Dispute Settlement and the Law of the Sea: The UN Convention Regime*, 21 MARINE POL'Y 17-43 (1997). See also A.O. Adede, *Notes and Comments, Law of the Sea – The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole*, 72 AM. J. INT'L L. 84 (1978). Compare with Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976-1977).

[129] See article evaluating the dispute resolution provision in Part XV of the LOS CONVENTION in Rosemary Rayfuse, *The Future of Compulsory Dispute Settlement under the Law of the Sea Convention*, 36 VIC. U. WELLINGTON L. REV. 683 (2005) and Andrew Serdy, *The Paradoxical Success of UNCLOS Part XV: a Half-hearted Reply to Rayfuse*, 36 VIC. U. WELLINGTON L. REV. 713 (2005).

[130] Article 2(3), Chapter 1, UN Charter states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Full text of the UN Charter online: < http://www.un.org/aboutun/charter/>.

[131] The UN Charter lists the following means of peaceful settlement, which should be used by member states in settling their disputes: "... negotiation, inquiry, mediation, conciliation, judicial settlement, resort to regional agencies or arrangements, other peaceful means of their choice." Article 33, Chapter VI, UN Charter.

[132] The United Nations framework is the principal global dispute settlement system in contemporary international law. The Charter of the U.N. prohibits the use of force in settling international disputes. It contains two parallel obligations: **first**, the obligation to settle international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered; and **second,** to refrain "from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations." Articles 2(3) and Article 33(1), UN Charter. Please see Marine Drel. *The Dispute Settlement*

If a settlement has not been reached, the LOS Convention stipulates that the dispute be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction in this regard. [133] The LOS Convention defines those courts or tribunals as: (a) the International Tribunal for the Law of the Sea (established in accordance with Annex VI of the Convention) including the Seabed Disputes Chamber; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII of the Convention; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[134]

2. The Delimitation of Boundary Disputes

The rules on delimitation laid down in the LOS Convention proceeds from the premise of existing land boundaries.[135] In this sense, they could not be invoked as a source of title to territory. The LOS Convention likewise does not address disputes over sovereignty.[136] However, the substantive or procedural rules of the LOS Convention provide the guidelines by which a delimitation of maritime space can be carried out.

The LOS Convention contains provisions for the delimitation of the territorial sea,[137] the EEZ[138] and the continental shelf.[139] However, the LOS Convention provisions do not clearly establish what substantive rules of delimitation law have to be applied to delimit the EEZ and the continental shelf.[140] The LOS Convention merely mentions that the

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System in the 1982 United Nations Convention on the Law of the Sea (LLM Thesis, Dalhousie Law School, 1992) [unpublished] at 20 – 23. *See also*, JAMES S. SUTTERLAND, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL SECURITY: A CHALLENGE TO BE MET (1995).

[133] Article 286, LOS CONVENTION.

[134] Article 287, LOS CONVENTION. The availability of a variety of forums was a compromise to secure consensus during the negotiations for the compulsory dispute settlement provisions of the LOS CONVENTION. Please see Jonathan Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law the Sea*, 90 AM. J. INT'L. L. 69, 71 (1996); Ted L. McDorman, *Global Ocean Governance and International Adjudicative Dispute Resolution*, 43 OCEAN & COASTAL MGMT. 255 (2000).

[135] R. HALLER TROST, THE SPRATLY ISLANDS: A STUDY ON THE LIMITATIONS OF INTERNATIONAL LAW 78 (1990).

[136] *See*, Alex G. Oude Elferink. *Does Undisputed Title to a Maritime Zone Always Exclude Its Delimitation: The Grey Area Issue (with Appendices of State Practice)*, 13 INT'L J. MAR. & COAST. L. 143 (1998).

[137] Article 15, LOS CONVENTION.

[138] Article 74, LOS CONVENTION.

[139] Article 83, LOS CONVENTION

[140] Please refer to Articles 74 (1) and 83 (1), LOS CONVENTION.

delimitation is to be effected by agreement on the basis of, *inter alia*, international agreements, customary international law and general principles of law, to achieve an equitable solution.[141] In addition, pending agreement on the delimitation, States are urged to "make every effort to enter into provisional arrangements of a practical nature"[142]

The LOS Convention provisions on maritime boundary delimitation enunciate broad principles.[143] This does not render it possible to predict with accuracy the results when applied to a particular dispute. However, the interpretation of these provisions in jurisprudence by the International Court of Justice and other arbitral tribunals that dealt with maritime delimitation has greatly enriched their application and contributed to the development of customary international law.[144]

The LOS Convention provides that when States have been unable to reach agreement within "a reasonable time,"[145] States are required to submit to compulsory conciliation.[146] However, the optional exceptions to the compulsory procedure in Article 298 show the clear intention to remove maritime boundaries delimitation disputes from compulsory judicial settlement. These elaborate mechanisms are designed to preserve the sovereignty of States by giving the State parties the freedom to choose the manner by which they will settle their differences.[147]

3. The Options Available to the Parties

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[141] Article 74(1), LOS CONVENTION.

[142] Article 74(3), LOS CONVENTION. SUN PYO KIM, MARITIME DELIMITATION AND INTERIM ARRANGEMENTS IN NORTH EAST ASIA 38 – 60 (2004), Natalie Klein, *Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes*, 21 INT'L J. MAR. & COASTAL L. 423 (2006).

[143] *See*, Coalter Lathrop, *The Technical Aspects of International Maritime Boundary Delimitation, Depiction, and Recovery*, 28 OCEAN DEV. & INT'L L. 167-197 (1997); Bernard H. Oxman, *International Maritime Boundaries: Political, Strategic and Historical Considerations*, 26 U. MIAMI INTER-AM. L. REV. 243 (1994-1995).

[144] Barbara Kwiatkowska, *Equitable Maritime Boundary Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond*, 28 OCEAN DEV. & INT'L L. 91-145 (1997).

[145] Articles 74(2) and 83(2), LOS CONVENTION.

[146] Article 298(1)(a)(i), LOS CONVENTION. The submission to the compulsory procedures is not automatic since States may still reserve the right under Article 298 to have such disputes exempted from the compulsory forums.

[147] *See and compare*, Annex V, Article 3; Annex VI, Article 4; Annex VII, Article 3; and Annex VII, Article 3, LOS CONVENTION. Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*" 31 INT'L L. & POL. 809 (1999); A. O. Adede, *Notes and Comments. "Law of the Sea: The Scope of the Third Party, Compulsory Procedures for Settlement of Disputes*, 71 AM. J. INT'L. L. 305 (1977).

The dispute settlement mechanism within the framework of the LOS Convention clearly creates an obligation among the claimant countries to settle their conflicting claims peacefully.[148] However, the principle of peaceful settlement of international disputes operates on the basis of the sovereign equality of states.[149] The compulsory settlement mechanism within the framework of the LOS Convention is triggered only as an option where the parties are not able to settle their differences by peaceful means of their choice. But, even then, the submission of a dispute to such a forum depends on the willingness of the parties.[150] This means that it is only as good as the claimant states are willing to formally invoke it.[151]

On another level, even without going through the formal compulsory procedure in any of the forums available, the claimant countries using the other substantive provisions of the LOS Convention may define their maritime zone claims in accordance with the rules established in the LOS Convention. These may include the following: (1) specification of their precise claims; (2) drawing and publishing the proper basepoints and baselines along their coasts;[152] and (3) negotiating to agree which features are islands.

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[148] A. O. Adede, *Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention*, 10 N. Y. U. J. INT'L L. & POL. 253 (1977-1978); Howard Schiffmann, *The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management* 12 J. INT'L WILDLIFE L. & POL'Y 293 (1998); Louis B. Sohn, SETTLEMENT OF DISPUTES ARISING OUT OF THE LAW OF THE SEA CONVENTION, 12 SAN DIEGO L. REV. 495 (1974-1975).

[149] *See*, Ted L. McDorman, *Global Ocean Governance and International Adjudicative Dispute Resolution*, 43 OCEAN & COASTAL MGMT 255, 259 (2000). He asserts that dispute settlement procedure of the LOS CONVENTION is not part of customary law and, thus, are only binding upon those states which are parties to the LOS CONVENTION.

[150] In this regard, the dispute resolution mechanism may appear to offer no progress over previous regimes. This is actually not the case. In international law there is really no judicial forum with compulsory jurisdiction. Any form of third party dispute resolution is founded upon the assent of the parties involved. The lack of compulsion to submit to compulsory judicial forums under the LOS CONVENTION is neither a serious drawback nor does it fall short of legitimate expectations. The LOS CONVENTION dispute settlement regime improves upon the Optional Protocol system in the sense that in the case of the former States become automatically bound by the compulsory procedures upon ratification of the LOS Convention; whereas under the latter States become bound only when they become parties to the Protocol.

[151] Barbara Kwiatkowska, *The International Court of Justice and the Law of the Sea: Some Reflections*, 11 INT'L J. MAR. & COAST. L. 491 (1996). On the potential contribution and the limitations of the LOS CONVENTION to resolve the South China Sea issue, please see, Xavier Furtado, *International Law and the Dispute over the Spratly Islands: Whither UNCLOS?*, 21 CONTEMP. S.E. ASIA 386 (1999).

[152] This should be seen as a precondition for establishing a precise claim to 12 nautical-mile territorial waters, a further 12 nm contiguous zone, a continental shelf and a 200 nm Exclusive Economic Zone. *See* International Peace Research Institute, Oslo (PRIO). Maritime Conflict in Asia. *Energy and Security in the South China Sea*, Main Findings (Finding 10) online: <http://www.prio.no/ page /Project _detail//9244/42207.html>.

C. Issues and Limitations

While all the claimant countries invoke the provisions of the LOS Convention in support of their respective claims and even in assailing the claim of others, the compulsory dispute resolution mechanism provided within the LOS Convention is not seen as a viable option in addressing the South China Sea issue.[153] There are several possible reasons for this view: **first**, the realization of the parties that their respective territorial claims do not find solid basis in law and not unassailable;[154] **second**, the notion of a court adjudicated settlement connotes victors and losers which is Asians are culturally averse;[155] **third**, the logistical and financial expense of bringing a case to an international tribunal is staggering which some of the claimant states can ill afford;[156] and **fourth**, there exists substantial divergences in interpretation of vital LOS Convention provisions among the parties.[157]

IV. Options, Alternatives and Recommendations

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[153] For a discussion of the issue of the South China Sea from a regional perspective, *see* DOUGLAS M. JOHNSTON AND MARK J. VALENCIA, PACIFIC BOUNDARY PROBLEMS: STATUS AND SOLUTIONS (1991); JAMES CRAWFORD AND DONALD R. ROTHWELL. THE LAW OF THE SEA IN THE ASIAN PACIFIC REGION (1995).

[154] Jane E. Ellis, *International Law and Oily Waters: A Critical Analysis*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 31 (1995). But see Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEV. & INT'L L. 160 (2001).

[155] Ian Townsend-Gault, *Compliance with the United Nations Convention on the Law of the Sea in the Asia-Pacific Region*, 33 U. BRIT. COLUM. L. REV. 227 (1999-2000).

[156] Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69 (1996).

[157] For example, on the interpretation and application of the provision of the LOS CONVENTION on baselines. The LOS CONVENTION only allows the utilization of straight baselines in cases where Article 7 is applicable. The Philippines and Indonesia as 'archipelagic' states, have the right to use archipelagic baselines running between basepoints on the outermost islands. Although the Philippines has, *prima facie*, done so in accordance with the rules established in LOS CONVENTION, it has not made clear that it is using the principle of archipelagic baselines. It has also refrained from fulfilling its duty to designate international sea-lanes through its archipelagic waters. Malaysia has published a precise claim to a continental shelf and EEZ but has not published any baselines. Vietnam, China and Taiwan have all made illegitimate use of straight baselines. The 1982 baseline legislation of Vietnam's, published just before LOS CONVENTION was signed, is one of the most radical in the world. The PRC's illegitimate system of unique straight baselines, which it published in 1996 even drew a line around the Paracels treating them as they were an archipelagic state. The ROC (Taiwan) published a similarly illegitimate system of baselines in 1999. These illegitimate baselines impede rather than facilitate the resolution of disputes. The claimant states must realize that they neither enhance national interests. Maritime zones based on illegitimate baselines will not be respected by other seafaring states and will not be considered valid in conflicts involving other states. They will likewise be considered unacceptable by the opposite party in negotiations concerning median lines. HALLER-TROST, *supra* note 135 at 63.

A. Sustaining Mechanisms for Multilateral Negotiations in Good Faith

The resolution of the South China Sea issue will largely depend upon the extent the parties are willing to cooperate with one another.[158] If all the parties are truly desirous of a pacific solution to this imbroglio, then, the mechanisms for continued multilateral dialogue conducted in good faith and in the spirit of genuine cooperation must be sustained.[159] In addition, previously existing bilateral and trilateral initiatives must be continued.[160]

The promising initiatives made recently under the aegis of the ASEAN must be maintained.[161] On a substantive level, the agenda on the negotiating table must be dramatically expanded. The parties must be willing to agree to negotiate, and hopefully arrive at mutually acceptable positions, with respect to issues other than the resolution of the sovereignty question.[162] The negotiations agenda must transcend traditional confidence building measures and shift towards regional concerns upon which consensus can be established.[163] The following areas will be worthy of inclusion: piracy and armed robbery at sea;[164] maritime terrorism; drug trafficking; human smuggling; combating transnational crime; illegal fishing;

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[158] Louis B. Sohn, *Settlement of Law of the Sea Disputes*, 10 INT'L J. MAR. & COAST. L. 205 (1995).

[159] *See* LEE LAI TO, CHINA AND THE SOUTH SEA DIALOGUES (1999) which confirms China's well-understood emphasis on discussing the issues bilaterally with the various claimants (which gives Chinese an undue advantage based on its size and power), and demonstrates that Beijing did not rule out the possibility of multilateral discussions, and has even come (albeit somewhat grudgingly) to accept these as long as they are held in the context of ASEAN.

[160] China, in particular, has engaged most claimant countries on a bilateral basis to discuss its claim and/or to reduce tensions. China has had successful bilateral discussions with Malaysia, Vietnam, and the Philippines. Malaysia and Vietnam have also intensified their bilateral discussions and have even entered into joint development agreements over disputed areas in the Gulf of Thailand. *See*, Peter Kien-Hong Yu, *Setting Up International (Adversary) Regimes in the South China Sea: Analyzing the Obstacles from a Chinese Perspective*, 38 OCEAN DEV. & INT'L L. 151 (2007).

[161] Niklas Swanstrom, *Conflict Management and Negotiations in the South China Sea: The ASEAN Way?*, online: <http://www.sum.uio.no/southchinasea/Publications/pdf-format/ Swanstrom. pdf>.

[162] Ian Townsend-Gault, *Preventive Diplomacy and Pro-Activity in the South China Sea*, 20 CONTEMP. S.E. ASIA 171 (1998). *See also*, Liselotte Odgaard, *The South China Sea: ASEAN's Security Concerns About China*, 34 SECURITY DIALOGUE 11 (2003).

[163] The UNEP/GEF South China Sea Project, entitled, "Reversing Environmental Degradation Trends in the South China Sea and Gulf of Thailand," funded by the Global Environment Facility (GEF) and implemented by the United Nations Environment Programme (UNEP) in partnership with seven littoral states bordering the South China Sea (Cambodia, China, Indonesia, Malaysia, Philippines, Thailand and Vietnam) is the first attempt to develop regionally coordinated programmes of action designed to reverse environmental degradation particularly in the area of coastal habitat degradation and loss, halt land-based pollution and address the issue of fisheries over-exploitation.

[164] Zou Keyuan, *Issues of Public International Law Relating to the Crackdown of Piracy in the South China Sea and Prospects for Regional Cooperation*, 3 SINGAPORE J. INTL & COMP. L. 524 (1999).

safety of navigation and communication at sea; search and rescue operation; marine environmental protection; and marine scientific research.[165]

B. Developing Interim Joint Management Arrangements

The creation of an authority that will jointly manage[166] the resources of the South China Sea is not a novel idea.[167] In fact, there are numerous scholars who have put forth a range of options for consideration as part of a multilateral joint resource development authority.[168] The legal norm of joint development in disputed areas pending the settlement of a disputed maritime boundary is likewise provided in the LOSC Convention.[169] There are also existing international arrangements in other parts of the world from which this proposed body can be patterned after.[170]

It must be emphasized though that the creation of a multilateral authority which will manage the resources of the South China Sea should be

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[165] *See e.g.*, David Rosenberg, *Environmental Pollution around the South China Sea: Developing a Regional Response*, 21 CONTEMP. S.E. ASIA 119 (1999).

[166] However, the Chinese concept of "joint resource development" appears to be defined as bilateral cooperation in disputed areas, while ASEAN claimants appear to prefer a multilateral joint development scheme. A series of bilateral development agreements would in effect expand the Chinese claim to resources in contested areas that would most likely not be open to Chinese participation following a final settlement. See for example analysis of Chinese position in Allan Edmiston III, *Showdown in the South China Sea: An International Incidents Analysis of the So-Called Spy Plane Crisis*, 16 EMORY INT'L L. REV. 693 (2002).

[167] David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?*, 93 AM. J. INT'L L. 771 (1999).

[168] The idea of joint resource development has been proposed in various forms, including as part of the Indonesian-hosted workshops. University of Hawaii and East-West Center researchers Mark Valencia, Jon Van Dyke, and Noel Ludwig. Wei Cui, *Multilateral Management as a Fair Solution to the Spratly Disputes*, 36 VAND. J. TRANSNAT'L L. 799, 804 (2003).

[169] Articles 74 (3) and 83 (3), LOS CONVENTION, which provide that pending agreement reached between states on the delimitation of the EEZ and the continental shelf, the states concerned, in a spirit of understanding and cooperation, are required to "make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardize or hamper the reaching of the final agreement." Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, 2 MARITIME BRIEFING 5 (1999). Also see, Masahiro Miyoshi, *Is Joint Development Possible in the South China Sea?*, *in* SUSTAINABLE DEVELOPMENT AND PRESERVATION OF THE OCEANS: THE CHALLENGES OF UNCLOS AND AGENDA 21, 613-614 (Mochtar Kusumaatmadja, et al., eds., 1997).

[170] The range of possible options for a multilateral joint resource development authority can be made similar to the Antarctic Treaty, a multilateral agreement to share resources in Antarctica. The Timor Gap Treaty between Australia and Indonesia, agreements in the Persian Gulf, and other bilateral resource development agreements provide ample precedent for considering this approach; however, a multilateral maritime development authority, if implemented, would be the first of its kind. Mito, *supra* note 98 at 750.

seen as an interim measure.[171] The eventual resolution of the issue of ownership over the disputed islands must still be addressed.

C. Capacity Building among all the Claimant States

The imperative to capacitate the claimant states definitely go beyond the issue of the South China Sea. The disputant states are all in varying stages of economic development. It is not a surprise that they all turn their direction towards the South China Sea for the potential economic benefits they may reap from its touted hydrocarbon reserves. However, as long as the issue of sovereignty over the South China Sea is unresolved, there are no winners to the game.

The potential solution within the LOS Convention framework is neither easy nor inexpensive. The checklist of things that can be done within this framework is long. For example, the determination of basepoints and the drawing of baselines and its publication; the identification of which features can qualify as islands; the identification of the outer limits of the continental margin exceeding 200 nautical miles; among others. To carry out these activities necessitates the pooling of huge resources on the part of these cash-strapped economies. In addition, the costs of externalities to the dispute are likewise as staggering. For example, the costs for maintaining garrisons, military installations and other types of physical presence in the islands; the expense of border patrol and maritime enforcement; the impact of rising defense budget allocation to preserve and assert their respective claims. These do not even include the damage to the environment due to illegal and unregulated fishing, and marine pollution.

The scramble over the flyspecks of land masses that jut out of the South China Sea figuratively go deep below the surface. It has been reduced by many analysts as simply a resource war over oil.[172] The analysis is sound albeit much simplified. The claimant countries are all developing nations, with the possible exception of Taiwan, with a desperate need to broaden their resource base. In fact, the territorial dispute over the South China Sea

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[171] Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 AM. J. INT'L L. 345 (1984). *See also* Charles Liu, *Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute*, 18 LOY. L. A. INT'L & COMP. L. J. 865 (1996).

[172] Cole R. Capener, *Legal Aspects of Sino-American Oil Exploration in the South China Sea*, 14 J. INT'L L.& ECON. 443 (1979 – 1980).

only gained prominence when oil and natural gas was discovered off the coast of the Philippines in the 1970s. The potential hydrocarbon resources of the South China Sea have only added fuel to the already fiery sense of nationalistic fervor of the disputant countries.

Capacity building not only entails the mobilization of resources in order to enable the parties to carry out the above outlined activities within the LOS Convention framework. It may be as simple as ensuring that the parties are aware of the options available to them under international law to settle this dispute.

Conclusion

The legal framework of the LOS Convention constitutes the paradigmatic "box" referred to in this paper. At the center of this box is the question of who owns the islands of the South China Sea. The reduction of the complex issue of the South China Sea into this legal formulation anchored on the question of sovereignty has only resulted in a longstanding impasse.[173] It has also obscured other issues, equally relevant that need to be addressed such as regional security[174] and the marine environment.[175]

This paper does not suggest nor imply that the legal framework of the LOS Convention should be abandoned or has lost its relevance in addressing the issue of the South China Sea. The challenge posed by this paper was to think outside of this box. Outside of the box is still another box – albeit a bigger one. The bigger box does not discard the LOS Convention, but builds upon it.

Towards this end, this paper first explained the complex nature of the South China Sea issue. In the second part, it discussed the bases of the conflicting claims and provided a brief evaluation of their relative strengths and weaknesses as well as their validity under international law. In the third part, it outlined and examined the relevant provisions of the LOS

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[173] Brinton Scott, *Resolving the Question of Sovereignty over the Spratly Islands*, 3 WILLAMETTE BULL. INT'L L. & POL'Y 37 (1995). See also Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1 (2000).

[174] DAVID L. LARSON, SECURITY ISSUES AND THE LAW OF THE SEA (1994).

[175] Tullio Treves, *Dispute Settlement Clauses in the Law of the Sea Convention and their Impact on the Protection of the Marine Environment: Some Observations*, 8 REV. EUR. COMUN. & INT'L ENVT'L L. 6 (1999).

Convention and identified their promises as well as their shortcomings in addressing the South China Sea issue. In the last part, possible solutions were explored toward the pacific settlement of the issue primarily within the legal framework of the LOS Convention and outside of it.

In conclusion, there are three main points that this paper has emphasized: **first**, that the conflicting claims of sovereignty over the South China Sea is indeed a complex issue in international law; **second**, that the legal framework within the LOS Convention provides guideposts in addressing the dispute but is not the only solution to this issue; and **last**, that the resolution of the South China Sea issue lies upon the willingness of the parties to continue negotiations in good faith in order to find a solution that is mutually acceptable to all the claimant states.

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