

**Settlement of disputes under the 1982  
United Nations Convention on the Law of the Sea  
The case of the South China Sea dispute**

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**New York, December 2005**

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## I. Introduction

Disputes are an inevitable part of international relations<sup>1</sup> and it is hardly deniable that, among international disputes, territorial and territorial-related disputes are the most complicated ones. Undoubtedly, these disputes have been the primary source of the growing tension in relations among States which is likely to lead to armed conflicts or eventual wars<sup>2</sup> when they are not settled amicably and peacefully. The sanctity of the territorial issue to the peoples in question - nationalism and the associated passions - have made these disputes extremely difficult to resolve. Furthermore, these disputes have been further complicated by historical, cultural, political, military and economic phenomena. Nevertheless, States are required, under international law, to resolve their international disputes by peaceful means and in conformity with the principles of justice and international law so that international peace, security, and justice will not be breached.<sup>3</sup>

Known to many as the constitution for the oceans,<sup>4</sup> the 1982 United Nations Convention on the Law of the Sea (LOS Convention)<sup>5</sup> was considered as one of the most successful of the codifications and progressive developments of international law made by the United Nations since the end of the World War II. The LOS Convention has set

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<sup>1</sup> J.G. Merrills, *International Dispute Settlement*, Third edition, (1998), at 1.

<sup>2</sup> Tuomas Forsberg, "Explaining Territorial Disputes: From Power Politics to Normative Reason", (1996), Vol. 33. No. 6, *Journal of Peace Research*, at 443; see also Catley and Makmur Keliat, *Spratlys: The Dispute in the South China Sea*, (1997), at 2. According to the authors, there were 86 serious international conflicts between 1919 and 1975, and of this number, 39 originated from territorial dispute.

<sup>3</sup> Article 1 and 2 of the Charter of the United Nations.

<sup>4</sup> Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea at the final session of the Conference.

<sup>5</sup> The LOS Convention was adopted on 30 April 1982 as the result of the long nine years of tireless negotiation took place at the Third United Nations Conference on the Law of the Sea. The LOS Convention came into force on 16 November 1994 and currently 149 countries are parties to the LOS Convention (source: [http://www.un.org/depts/los/reference\\_files/status2005.pdf](http://www.un.org/depts/los/reference_files/status2005.pdf)).

out an international legal order within which all activities in the oceans and seas must be carried out. As a comprehensive legal framework for the law of the sea, the LOS Convention has elucidated the rights and obligations of all States, including: coastal, land-locked and geographical disadvantaged States and other international actors in various functional maritime areas; the protection of marine environment; marine scientific research; activities in the Area..., as well as settlement of disputes mechanism applicable for disputes that may arise during the implementation and interpretation of the LOS Convention. The settlement of disputes mechanism contained in Part XV of the LOS Convention, which is characterized by the compulsory procedures entailing binding decisions, has made the LOS Convention unique among major law-making treaties and “one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from interpretation and application of its terms”.<sup>6</sup>

Since the LOS Convention came into effect it has made pre-eminent contributions to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights. The LOS Convention has also played an important role in promoting of the economic and social advancement of all peoples of the world, in accordance with the purpose and principles of the United Nations as embodied in the Charter of the United Nations, as well as for the sustainable development of oceans and seas. Such contributions made by the LOS Convention have always been fully recognized and highly appreciated by the States and international community.<sup>7</sup>

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<sup>6</sup> Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, (2005), at 2.

<sup>7</sup> United Nations Resolution A/Res/59/24.

The South China Sea (SCS) dispute is composed of two aspects: the overlapping jurisdictional claims and the territorial dispute over groups of mid-ocean islands. It is regarded as one of the most complex disputes in the East Asia, if not of the world,<sup>8</sup> and remains a dangerous source of potential conflict<sup>9</sup> which could turn into a serious international conflict<sup>10</sup> if it is not properly managed and resolved. Complicated by many factors such as number of claimants, the economic and strategic nature of the area, the SCS dispute of which the dispute over the sovereignty of the Spratly islands is a main problem has long attracted the attention of international community and many attempts have been made to investigate the real causes of the dispute as well as to introduce possible resolutions.<sup>11</sup> The complexity of situation has made the SCS dispute more vulnerable to armed conflict. In fact, a number of armed conflicts relating to the SCS and the Spratly islands dispute have occurred.<sup>12</sup>

The aim of this paper is to examine the relationship between the LOS Convention and the SCS dispute, in particular the effects of the LOS Convention as well as its settlement of dispute mechanism may have or may not have on the SCS dispute. The paper is composed of 3 Parts. Part I describes the geopolitical context of the SCS region, the origin and

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<sup>8</sup> Robert W. Smith and Bradford Thomas, "Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation of Disputes" in Myron H. Norquist and John Norton Moore (eds), *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, 1997, at 59.

<sup>9</sup> Scott Snyder, *The SCS Dispute, Prospects for Preventive Diplomacy* (Special Report No.18 of the United States Institute of Peace). Available at: [http://usip.org/pubs/specialreports/early/snyder/south\\_china\\_sea1.html](http://usip.org/pubs/specialreports/early/snyder/south_china_sea1.html), last visited 15 April 2005).

<sup>10</sup> Micheal Bennet, "The People's Republic of China and the use of International Law in the Spratly Islands disputes", (1992), Vol. 28, *Stanford Journal of International Law*, at 425.

<sup>11</sup> See complete bibliography on the SCS Disputes in Timor Kivimaki (ed), *War or Peace in the SCS*, (2003), at 171-210.

<sup>12</sup> Samuel S. G. Wu; Bruce Bueno de Mesquita, "Assessing the Dispute in the SCS: a Model of China's Security Decision Making", (2001), Vol. 38, No. 3 *International Studies Quarterly*, at 381; Mark J. Valencia, *China and the SCS Disputes*, (1998) at 3; Epsy Cooke Farrel, *The Socialist Republic of Vietnam and the Law of the Sea*, (1998), at 257; Marko Milivojevic, "The Spratly and Paracel Islands conflict", (1989), Vol. 1/2, *Survival*, at 70-71; Choon-ho Park, *East Asia and the Law of the Sea*, (1983), at 177.

development of the SCS dispute. Part II will focus on the settlement of disputes mechanism provided in the LOS Convention, while Part III examines the relationship between the LOS Convention and the SCS dispute as well as the possibility of the application of the settlement of disputes mechanism to the SCS dispute and the latest developments with respect to the SCS dispute. This paper will pay particular attention to the Spratly dispute, where ownership of the islands is claimed wholly or partly by Vietnam, China, the Philippines, Malaysia, Brunei or Taiwan.

## PART I - THE SOUTH CHINA SEA DISPUTE

### I. The Geo-political context of the South China Sea

#### *1. Geography of the South China Sea*

In order to comprehend the complexity of the SCS dispute, it is necessary to grasp the correspondingly complex geography of the SCS. The SCS is categorised as a semi-enclosed sea,<sup>13</sup> covering an area of 648,000 square miles (equivalent to 3,000,000 square kilometres) of the Pacific Ocean, stretching roughly from the Strait of Malacca in the southwest, to the Strait of Taiwan in the northeast.<sup>14</sup> The SCS is surrounded by most of the ASEAN States,<sup>15</sup> China and Taiwan territory, that is, to the north by China and Taiwan, to the west by the Socialist Republic of Vietnam, to the south and southwest by Malaysia, Brunei, Indonesia and Singapore, and to the east by the Philippines.<sup>16</sup>

The SCS seabed was described by Prescott on the basis of its topographic characteristic as follows:

The seabed can be divided into three zones: First, there is a broad, shallow continental shelf which occupied the entire Gulf of Thailand and continues south eastwards to the western tip of the island of Borneo. Second, this shelf is continued in two arms skirting the shores of the sea. This section which follows the coast of Vietnam narrows to

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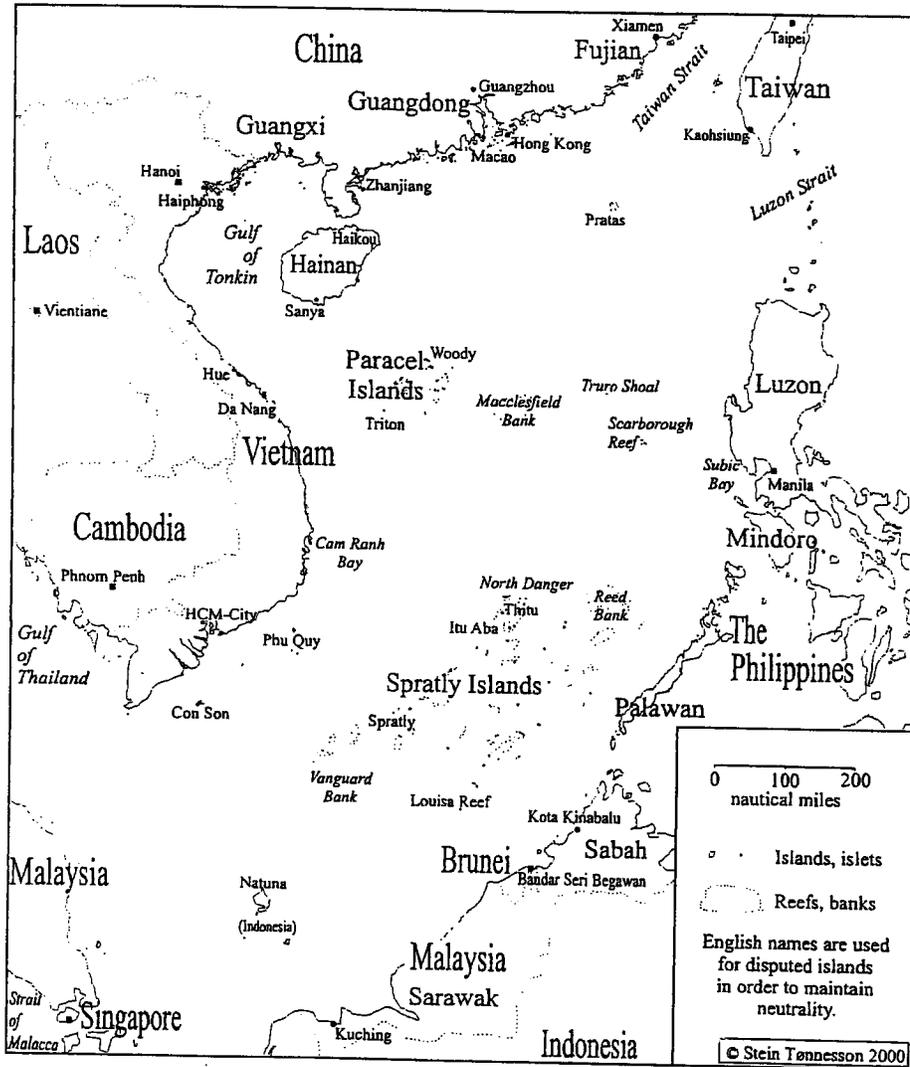
<sup>13</sup> Article 122 of the UNCLOS defines the closed or semi-closed sea as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.

<sup>14</sup> J. Peter Burgess, “The Politic of the SCS: Territoriality and International Law”, *Security Dialogue*, (2003) Vol. 34, No. 1, at 7.

<sup>15</sup> ASEAN stands for the Association of Southeast Asia Nations which was founded in 1967. The current state members of the ASEAN are: Brunei, Burma, Cambodia, Indonesian, Lao, Malaysia, Philippines, Singapore, Thailand and Vietnam.

<sup>16</sup> J. Peter Burgess, *ibid.*

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about 30 nautical miles before broadening again to occupy the Gulf of Tonkin and to measure more than 120 nautical miles in width off Hong Kong. The eastern continuation of the main continental shelf, a long the north coast of Borneo, remains narrow throughout its length. The third zone occupied the main basin of the SCS, and this is an area of confused topography. Northeast of the main continental shelf the slope descends by a series of terraces covered with material derived from the continental shelf. This transition zone is succeeded by volcanic seamounts which are sometimes crowned by a coral reefs and islands in the Spratly Group. To the northeast again, the mass of islands is replaced by an abyssal plain with depths of more than 4000 metres. Even in this zone there are some seamounts marked by the Paracel islands.<sup>17</sup>

Dr. Hasjim Djalal, an Indonesian senior diplomat and well-known expert on the law of the sea, on the other hand, pointed out that the seabed of the SCS consists of about 1,000,000 square kilometres of continental shelf above the 200 meters isobaths, and about 2,000,000 square kilometres of seabed area deeper than 200 meters.<sup>18</sup> Of the seabed area of the SCS, the continental shelf area is mainly located in the western and southern parts (Sunda Shelf), while the deeper part is located much more to the north-east. The deeper part, reaching more than 5000 meters in some areas (SCS Basin), is dotted by various shallow banks and coral reef islands.<sup>19</sup>

There are a numerous of islands, islets, rocks and reefs, banks which are scattered in the SCS. However, no exact number of these features is available since many of these features are not always above

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<sup>17</sup> J. R. V. Prescott, *the Political Boundaries of the World*, (1985), at 210.

<sup>18</sup> Hasjim Djalal, "South China Sea Disputes" in Myron H. Norquist and John Norton Moroe (eds), *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, (1997), at 109.

<sup>19</sup> *Ibid.*

sea level.<sup>20</sup> According to a Taiwan-sponsored survey conducted between 1946 and 1947, the SCS contains 127 inhabited islets, shoals, corals reefs, banks, cay and rocks.<sup>21</sup> Other research states that there are more than 200 islets, rocks and reefs in this area.<sup>22</sup> Nevertheless, it is generally agreed that most of these features are not suitable for human habitation but they are of vital economic, strategic, political and legal importance.<sup>23</sup> These features are grouped into four mid-ocean groups of islands, namely: (i) the Pratas islands, (ii) the Paracel islands; (iii) the Spratly islands, and (iv) Macclesfield Bank.<sup>24</sup>

*a) Pratas islands:* Pratas islands are made up a group of one island 6 km long and 2 km wide and two small banks - South Vereker and North Vereker - just located west of Pratas Island.<sup>25</sup> Pratas island is located at latitude 20<sup>0</sup> 30' to 21<sup>0</sup> 31' N., longitude 116<sup>0</sup> to 117<sup>0</sup> E., 170 nautical miles from southeast of Hong Kong, 240 nautical miles from southeast of Taiwan and 269 nautical miles north of Paracel.<sup>26</sup>

*b) The Paracel islands:* Located at latitude 15<sup>0</sup> 46'N., longitude 111<sup>0</sup> 11' to 112<sup>0</sup> 54' E., the Paracel islands consists of two main groups of islets, the western group, the Amphirite group and southern group, the Crescent group with more than 30 islands, islet, cays and reefs, occupying an area of 15,000 square kilometres of the SCS.<sup>27</sup> The total of area of land

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<sup>20</sup> Bob Catley and Makmur Keliat, note 2, at 2.

<sup>21</sup> Hungdah Chiu, "SCS Islands: Implication for Delimiting the Seabed and Future Shipping Routes", (1977), No. 72, *China Quarterly*, at 15.

<sup>22</sup> Hasjim Djalan, note 18, at 110.

<sup>23</sup> Christopher C. Joyner, "Toward a Spratly Resource Development Authority: Precursor Agreements and Confidence Building Measures", in Myron H. Norquist and John Norton Moroe (eds), *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, (1997), at 214.

<sup>24</sup> *Ibid.*

<sup>25</sup> Marwyn S. Samuels, *Contest for the SCS*, (1982), at 183.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*; "Gloi thieu mot so van de co ban cua luat bien o Vietnam", Bo Ngoai giao, Nha Xuat ban chinh tri quoc gia (the introduction of the main issues of the law of the sea in Vietnam, Ministry of Foreign Affairs of Vietnam, the National Political Publisher), (2003), at 161.

that is above the high water mark in Paracel islands is about 10 square kilometres.<sup>28</sup> Woody island, the 2 km long and 1 km wide island, is the most important island in the Paracel islands.<sup>29</sup>

c) *The Spratly islands*: Consisting of more than 235 features,<sup>30</sup> the Spratly islands are a chain of islands, isles, shoals, banks, atolls, cay and reefs<sup>31</sup> of which 148 have been named.<sup>32</sup> These features stretch approximately 500 nautical miles from north to south and 400 nautical miles from east to west.<sup>33</sup> Many of these features are almost entirely below the high water mark and of 20 islands that protrude above sea level at the high tide, the largest one is Taiping island which is only 0,43 square kilometres.<sup>34</sup> The Spratly islands are situated in the centre of the SCS, more than 900 nautical miles south of the Chinese island of Hainan, 230 nautical miles east of the Vietnamese port of Nha Trang, and 120 nautical miles west of the Philippine island of Palawan, and 150 nautical miles northwest of the Malaysian State of Sabah.<sup>35</sup> The Spratly islands have no permanent inhabitants and are too small to sustain permanent, independent settlements,<sup>36</sup> all claimants with the exception of Brunei, have sustained military garrisons on the Spratly islands.<sup>37</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Marwyn S. Samuels, *ibid.*, at 3.

<sup>30</sup> Bob Catley and Makmur Keliat, note 2, at 3.

<sup>31</sup> Christopher C. Joyner, *ibid.*, at 219.

<sup>32</sup> Marius Gjetnes, “*Maritime Zones generated by the Spratlys: Legal Analysis and Geographical Overview*”, Energy and Security in the SCS Project, University of Oslo, 24-26/4/1999.

<sup>33</sup> Micheal Bennet, note 10, at 429.

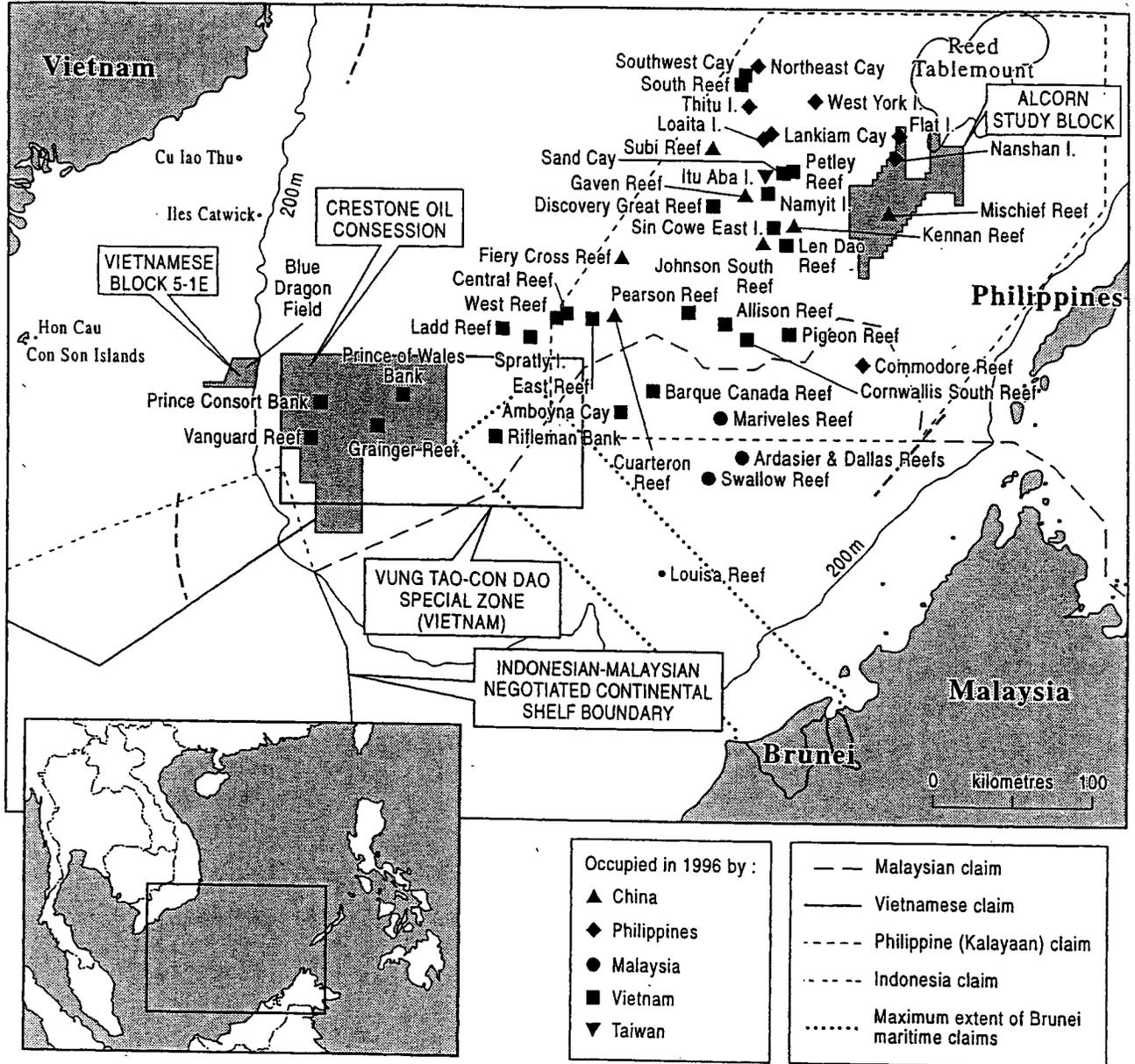
<sup>34</sup> Ibid.

<sup>35</sup> Barry Hart Dubner, “The Spratly “Rock” dispute-A “Rockapelago” defies norms of international law”, (1995), *Temple International and Comparative Law Journal*.

<sup>36</sup> Ibid.

<sup>37</sup> Bjorn Moller, “Military Aspect of the Disputes”, in Timor Kivimaki (ed), *War or Peace in the SCS*, (2003) p 64. According to the author, as of 1998, China occupied 7 positions, the Philippine 9, Vietnam 24, Malaysia 3, Taiwan 1.

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d) *The Macclesfield Bank*: located at latitude 15<sup>0</sup> 20'N., longitude 113<sup>0</sup> 40' to 115<sup>0</sup> E., 60 nautical miles east of Paracel Islands, the bank is about 75 nautical miles long and 33 nautical miles wide.<sup>38</sup>

## 2. *The importance of the SCS to the region and the global community*

The manner in which the States of the SCS region perceive the importance of the SCS to their national interests has a great influence on their positions with regards to a resolution of the SCS dispute. Situated at the crossroad of Europe, West Asia and India on one side, and Japan and China on the other, together with abundant wealth of natural resources,<sup>39</sup> the SCS is of vital commercial and strategic significance to the States of the regions. For thousand years, the SCS has been sustained trade relations amongst peoples of Southeast Asia, and between them and other people of the world such as Persian, Arabia, India and China. Consequently, in the course of history, the prosperity of various Kingdoms in the region had depended largely upon the SCS and, to some extent, the rise and fall of some of these Kingdoms were determined by their capability to use the sea between East and Southeast Asia.<sup>40</sup> The continued strategic importance of this area has been demonstrated by the Japanese Navy's activities during World War II. The Spratly islands, at that time, were used as a submarine base for Japanese Navy. The SCS, therefore, become an area in which great powers involved their interests and wanted to expand their military and political influence. During the Cold War, with the presence of foreign military troops, the geopolitical

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<sup>38</sup> Marwyn S. Samuels, note 25, at 187.

<sup>39</sup> Phiphat Tangsubkul, "The New Zones of National Jurisdiction in the Law of the Sea: Developmental Implication for Southeast Asia" in John P. Craven, Jan Schneider and Carol Stimson (eds), *The International Implication of Extended Maritime Jurisdiction in the Pacific*, (1989), at 50.

<sup>40</sup> Bob Catley and Makmur Keliat, note 2, at 3.

competition between super powers and their allies was also particularly tense in this area.<sup>41</sup>

a) *Strategic location*: the SCS is one of the most strategic waterways in the world<sup>42</sup> which links Northeast Asia and the Western Pacific to the Indian Ocean and the Middle East. Being mostly export-oriented and resources-deficient, Asian Pacific States depend heavily on seaborne trade.<sup>43</sup> It is estimated that more than 41,000 ships – over half the world’s shipping tonnage – sail through the sea each year and more than 80 percent of the oil imported by Japan, South Korea, and Taiwan transits through the area.<sup>44</sup> Furthermore, liquefied natural gas (LNG) shipments through the SCS constitute two-thirds of the world’s overall LNG trade.<sup>45</sup> Accordingly, two way trades transiting the region’s sea lines of communications is important not only for the economies of Southeast Asia, but also for those of Northeast Asia, Europe, and the United States.<sup>46</sup> Not only used for international trade and commercial purpose, the sea lanes of communication in the SCS are also utilized for military purpose. For the United States, freedom and safety of navigation and overflight in the SCS region are critical strategic interests because the SCS can be used as a transit point and operating area for the United States Navy and Air Force between military bases in Asia and the Indian Ocean and Persian Gulf areas.<sup>47</sup> Snyder therefore argued that any military conflict in the SCS which threatens the strategic interests of the United States, or the security and economic interests of Japan, might be seen as

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<sup>41</sup> Ibid, at 7.

<sup>42</sup> Hasjim Djalal, note 18, p 111.

<sup>43</sup> Ji Guoxing, “*Asian Pacific SLOC security: The China Factor*”, Royal Australia Navy, Working Paper No. 10, at 8.

<sup>44</sup> Scott Snyder, Brad Glosserman and Ralph A. Cossa, “Confidence Building Measures in the SCS”, (2001), No.2, *Issue and Insights*, at 10.

<sup>45</sup> Ji Guoxing, *ibid*, at 9.

<sup>46</sup> Citing John Noer and David Gregory in Ji Guoxing, *ibid*, at 8.

<sup>47</sup> Scott Snyder, note 9.

sufficiently destabilizing to invite United States involvement to preserve navigational freedom in these critical sea lanes.<sup>48</sup> Meanwhile, the Spratly islands are located approximately in the centre of the SCS, and thus the control over these islands would allow the controlling States to place a substantial part of the SCS under its jurisdiction<sup>49</sup> and monitor all sea traffic through the SCS. This, in turn, would affect all activities in the SCS. The significance of the Spratly islands dispute is therefore more wide-ranging than the area confined by the SCS.<sup>50</sup>

*b) Natural resources:* The SCS is proved to be rich in both living and non-living resources.

In Southeast Asia, fish and fishery products traditionally have been major source of protein. Fish and the fishing industry remain an important economic activity since most of the States bordering the SCS are developing countries in which the agricultural economic sector still accounts for a considerable part of their national economies. The fisheries industry plays an important role in securing sources of food and income for the States in the region. Statistics showed that in the mid-1990 the value of the annual fish catch was possibly worth over US \$ 3 billion.<sup>51</sup> It is estimated that roughly 70% of the South East Asia population are coastal dwellers, representing approximately 270 million people, nearly 5% of the world population.<sup>52</sup> The SCS provides 25% of the protein needs for 500 million people and 80% of the Philippine diet.<sup>53</sup> The SCS ranks the fourth among the world's 19 fishing zones in terms of total

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<sup>48</sup> Ibid.

<sup>49</sup> Hungdah Chiu, note 21, at 757.

<sup>50</sup> Bob Catley and Makmur Keliat, note 2, at 1

<sup>51</sup> Ibid., at 35.

<sup>52</sup> Tom Nass, "Danger to the environment", in Timo Kivimaki (ed), *War or Peace in the SCS*, (2002), at 44.

<sup>53</sup> Hasjim Djalal, note 18, at 112.

annual marine production with a catch of over 8 million metric tons (live weight) of marine fish: this represents about 10% of the total world catch and 23% of the total catch in Asia.<sup>54</sup>

With respect to non living resources, the SCS is widely known for its rich oil and gas reservoirs and oil and gas have been discovered in most parts of the SCS.<sup>55</sup> The discovery of oil and gas reservoirs in the West Pacific has made Indonesia one of the world's leading oil exporting state. The combination of onshore and offshore petroleum has given Brunei the highest per capita gross national production in the region.<sup>56</sup> For the other States, the revenue from oil and gas activities has also contributed considerably to their national economies. Therefore, offshore petroleum development is now given priority by the States in SCS region. Since the end of the Cold War, the world has witnessed certain Southeast Asian economies surpass global growth rate. Accordingly, these high rates of economic growth naturally lead to a corresponding increased consumption resource. In the context of globally increased demand for oil and gas resources and the instability and shortage of the oil and gas supplying resources due the political turmoil in the Gulf, it is clear that the SCS is expected to accommodate the need for oil and gas resources for the States in the region thus amplifying the potential for conflicting claims. There are conflicting numbers of the oil and gas potential in the Spratly islands area because of the lack of full assessments. According to the 1995 assessment made by the Russia's Research Institute of Geology of Foreign Countries, the Spratly Islands area might contain 6 billion barrels of oil equivalent, of which 70% would be natural gas.<sup>57</sup> While the

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<sup>54</sup> Tom Nass, *ibid.*

<sup>55</sup> Bob Catley and Makmur Keliat, note 2, at 45.

<sup>56</sup> Douglas M. Johnston and Mark J. Valencia, *Pacific Ocean Boundary Problems: Status and Solution* (1990), at 51.

<sup>57</sup> Scott Snyder, note 9.

Chinese media called the SCS "the second Persian Gulf," estimating oil resources near the Spratly islands to range from 105 billion barrels to 213 billion barrels.<sup>58</sup>

## **II. The South China Sea dispute**

### *1. History of the Spratly islands dispute*

Essentially, as outlined above, the SCS dispute consists of two aspects: maritime boundary disputes and territorial disputes. The latter was the most contentious, with the involvement of six parties in the region. Despite the fact that the Paracel and Spratly islands have always been parts of the Vietnamese territory, and sovereignty over these islands has been exercised peacefully, continuously and effectively by Vietnam at least since the 17<sup>th</sup> century,<sup>59</sup> these islands have recently been the subject of bilateral and multilateral territorial disputes between Vietnam and other countries/territory in the region. The Paracel islands are disputed between Vietnam and China, while the sovereignty over the Spratly islands is also claimed wholly or partly by Vietnam, China, Philippines, Malaysia, Brunei or Taiwan. The strategic and economic importance of the Spratly islands is the driving force behind the motivations that led the other States/territory to contest the sovereignty of Vietnam over the Paracel and Spratly islands.

To challenge Vietnam's long standing sovereignty over these islands, as well as advance their claims, a series of different historical records, version of events, archaeological evidence and legal grounds

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<sup>58</sup> Scott Snyder, Brad Glosserman and Ralph A. Cossa, note 44, at 10- 12.

<sup>59</sup> See details in the White Papers on the Truong Sa (Spratly) and Hoang Sa (Paracel) islands published by the Ministry of Foreign Affairs of Vietnam in 1981 and 1988 respectively.

have been presented by the other disputants. More importantly, all but Brunei have occupied and fortified various features of the Spratly islands as a way to demonstrate their sovereignty: “possession is nine-tenth of the law”.<sup>60</sup>

Both China and Taiwan base their claims to sovereignty over Spratly islands on historical evidence, by referring to archaeological finds and ancient documents,<sup>61</sup> and they argue that they were the first to discover the Spratly Islands and their discovery dated back to as early as 200 B.C. However, the validity of the evidence presented by China is questionable. Although an archaeological object may feature Chinese style, or was originally made in China, it cannot be assumed that the object was brought to the island by someone who represented China as a state.<sup>62</sup> Furthermore, it was in 1988, for the first time, by attacking the Vietnamese Navy force who have garrisoned in the Spratly islands, that China established control of certain features in the Spratly islands.

The Philippines’s claim to most of the Spratly islands is principally based on the discovery of several islands in 1947 by a Filipino citizen, Thomas Cloma, who then individually claimed and attempted to establish the new State of “Kalayaan” in 1956.<sup>63</sup> However, when Thomas Cloma made claims to the Spratly islands, the Philippines government seemed

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<sup>60</sup> Brian K. Murphy, “Dangerous Ground: The Spratly Islands and International Law”, (1994-1995), *Ocean and Coastal Law Journal*, at 190.

<sup>61</sup> *Ibid.*

<sup>62</sup> Stein Tonnesson, “The History of the Dispute” in Timo Kivimaki (ed), *War or Peace in the SCS*, (2002), at 7.

<sup>63</sup> Park Hee Kwon, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, (1990), at 92. See also Brian K. Murphy, *ibid.*, at 196.

not to support him<sup>64</sup> and the first official claim by the Philippine government came in 1971.<sup>65</sup>

Malaysia and Brunei were the latest States to enter into the dispute over the Spratly islands and unlike other disputants, their claims were not based on the on historical evidence, but on the interpretation of the law of the sea.

In 1979, by publishing the official map of the Malaysian outer limit of the continental shelf, Malaysia asserted for the first time its claims to the sovereignty over twelve features of the Spratly islands.<sup>66</sup> The Malaysian claim is based on geography and relevant provisions of the LOS Convention. The general approach taken by Malaysia is rooted in the assumption that a state possessing a continental shelf also possesses sovereign rights over land formations arising from that continental shelf.<sup>67</sup> In evaluating the Malaysian claim, Christopher C. Joyner argued that such claims appeared ill-founded, misguided and flawed under contemporary international law.<sup>68</sup> Indeed, there is no provision in international law to support acquisition of territory by using the principle of the continental shelf.<sup>69</sup>

As recognized in international law, there are five principal modes of acquiring territory, namely: occupation, cession, subjugation,

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<sup>64</sup> Park Hee Kwon, note 63, at 92.

<sup>65</sup> Christopher C. Joyner, "The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the SCS", (1998), Vol. 13, No.2, *The International Journal of Marine and Coastal Law*, at 202; See also Chi kin Lo, *China's Policy Towards Territorial Disputes: The Case of The South China Sea Islands*, (1989), at 141

<sup>66</sup> Chi kin Lo, *ibid.*, at 153.

<sup>67</sup> Park Hee Kwon, *ibid.*, at 93.

<sup>68</sup> Christopher C. Joyner, *ibid.*

<sup>69</sup> Bob Catley and Makmur Keliat, note 2, at 38

prescription and accretion.<sup>70</sup> Cession is the transfer of the sovereignty over territory by the owner state to another state while occupation is perceived as “the act of appropriation by a States through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State”.<sup>71</sup> Subjugation is a mode of acquiring the enemy territory<sup>72</sup> but it was no longer prevailed in international law since the use of force to occupy the other’s territory was prohibited by international law. Accretion is the acquisition of territory through new formations. The prescription, to some extent, is the same with occupation but differs from occupation in the status of the occupied territory and period time of uninterrupted occupation.

Brunei claims jurisdiction over the seas surrounding the Louisa Reef in the southern part of the Spratly islands and like Malaysia, Brunei claim is also based on the provision of the LOS Convention.

To establish a legally recognized sovereignty over no State’s land (terra nullius) or an island, the claiming states must meet the criteria for the acquisition of territory as provided in international law. The principle of “effectiveness” which was created and developed by the international tribunals through following cases: the island of Palmas of 1928, the island of Clipperton of 1931 and the Legal Status of Eastern Greenland of 1934. These judgements have set the international standard for the acquisition of sovereignty over islands and thus became international customary law. This principle was refined in the judgments given by the International Court of Justice (ICJ) in cases concerning islands disputes brought to it. For instance the recent case concerning the sovereignty dispute between

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<sup>70</sup> Lauterpacht, *Oppenheim’s International Law*, Seventh edition, (1953), at 498

<sup>71</sup> *Ibid.*, at 507

<sup>72</sup> *Ibid.*, at 521.

Indonesia and Malaysia over the islands of Ligitan and Sepadan, the ICJ reaffirmed in its judgement the content of the principle of “effectiveness” made by the Permanent International Court of Justice of 1934 to which the principle of “effectiveness” includes many factors of which the most important element is

the continued display of authority, [which] involve two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority.<sup>73</sup>

The strength and weakness of each disputant’s claims to the Spratly islands in light of international law has been subject to many analyses made by the commentators inside and outside the regions. However, due to the complex nature of the Spratly islands dispute, no common view has been reached among the commentators.

## *2) Maritime boundary disputes and the law of the sea:*

Regarded as a main source of disputes in the law of the sea, maritime boundary disputes, by their nature, are broadly considered as those relating the delimitations of the sea areas over which the coastal States can exercise jurisdiction in conformity with international law in general and the law of the sea in particular. As the national jurisdiction of coastal States over maritime space has been expanded relatively in parallel with the evolution of the law of the sea, maritime boundary

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<sup>73</sup> See ICJ Summary report of the Pulau Ligitan and Pulau Sepadan case.

disputes can be seen as an unavoidable consequence of this extension of jurisdiction.<sup>74</sup>

Delimitation of sea areas always has an international aspect; it cannot be dependent merely upon the will of the coastal States as expressed in its domestic law.<sup>75</sup> Although the establishment of limits at sea is a unilateral act- as only the coastal State is competent to undertake it- the validity of these limits, depends upon other States recognition and international law.<sup>76</sup> Thus, according to Robert W. Smith and Bradford Thomas, delimitation of maritime boundaries takes on two related meanings: in the first instance, delimitation as it pertains to the establishment and definition of maritime zones to which States are entitled to under the provisions of the LOS Convention; and secondly, as it pertains to the delimitation of marine space between neighbours in areas where claims overlap.<sup>77</sup>

Traditionally, the maritime zones over which State sovereignty is exercised have been grouped into three successive categories: internal waters, territorial sea, and the contiguous zone.<sup>78</sup> This reflected the struggle between two conflicting trends of thought in the law of the sea that emerged in 17<sup>th</sup> century: freedom of the sea and the dominion of the sea. The former trend was represented by Hugo Grotius, a Dutch author who defended the freedom of the sea, while the latter was supported by a British author, John Selden, who argued for the right of States to extend

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<sup>74</sup> Christopher D. Beeby, "Extended Maritime Jurisdiction: A South Pacific Perspective" in John P. Craven, Jan Schneider and Carol Stimson (eds), *The International Implication of Extended Maritime Jurisdiction in the Pacific*, (1989), at 23.

<sup>75</sup> Fisheries case, ICJ Report, (1950), p 20.

Available at [http://www.icj-cij.org/icjwww/icasess/iukn/iukn\\_judgment/iukn\\_judgment\\_19511218.PDF](http://www.icj-cij.org/icjwww/icasess/iukn/iukn_judgment/iukn_judgment_19511218.PDF)

<sup>76</sup> Ibid.

<sup>77</sup> Robert W. Smith and Bradford Thomas, note 8, at 56.

<sup>78</sup> Bernard H. Oxman, 'The Sea under National Competence' in Dupuy Vignes (ed), *A Handbook on the New Law of the Sea*, (1991), at 247.

their jurisdiction over the sea.<sup>79</sup> The law of the sea, therefore, has always been in the middle, attempting to balance these conflicting forces.<sup>80</sup>

However, since the 17<sup>th</sup> century, the freedom of the high seas doctrine had prevailed in the law of the sea.<sup>81</sup> Consequently, the national jurisdiction of the coastal State was limited to a narrow belt of the sea along a state's coastline: the territorial sea. Although coastal States had relied on different criteria for the establishment of the breadth of the territorial sea, the "cannon shot", or 3 nautical miles rule, was widely recognized as limit of the territorial sea and became almost universally accepted.<sup>82</sup>

The first international attempt to codify the breadth of the territorial sea occurred during the 1930 Hague Conference for Codification of International Law which was held under auspice of the League of Nations with the participation of 48 States.<sup>83</sup> However, the Hague Conference failed to reach agreement on the breadth of the territorial sea due largely to the fact that each country refused to compromise its own interests to achieve uniformity. The views among participating States were so divergent, some of which argued for the 3-mile rule, while other advocated for a wider territorial sea.<sup>84</sup> In the end, 20 States favoured the 3-mile territorial sea, but eight of them would accept this limit only on the condition that a contiguous zone of some

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<sup>79</sup> See Louis B. Sohn and John E. Noyes, *Case and Materials on the Law of the Sea*, (2003), at 2-3.

<sup>80</sup> Bernard H. Oxman, note 78, at 247.

<sup>81</sup> Historical perspective of the Convention. Available at: [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm) (last visited 15 June 2005).

<sup>82</sup> Tommy T.B. Koh, "The Origin of the 1982 Convention on the Law of the Sea", (1987), Vol. 29, *Malaya Law Review*, at 4-7.

<sup>83</sup> See the list of the 48 participating Government to the 1930 Hague Conference for Codification of International Law at *American Journal of International Law*, Sup.Vol 24, at 169.

<sup>84</sup> Tommy T.B. Koh, *ibid.*, at 7- 8.

kind be recognized; 12 States demanded for a 6-mile territorial sea, the Scandinavian States supported a 4-mile territorial sea, while others proposed not fixing a uniform distance for all purposes and for all countries.<sup>85</sup> Despite the failure of the Hague Conference, the participating States did not give up their efforts to continue to work on this important issue and, in the final recommendation the Conference, requested the Council of the League of Nations to invite the Governments to continue to examine the issue in the light of the Conference's discussion and related questions.<sup>86</sup>

On one hand, the sea area beyond the "cannon shot" was regarded as high seas: the seas proclaimed to be free to all and belonging to none. On the other hand, the coastal states were concerned that a territorial sea of 3 miles seemed to be too narrow and proved to be inadequate for the protection of certain interest of the coastal state, especially with respect to custom and fiscal matters. These considerations gave rise to the idea of the establishment of the contiguous zone.<sup>87</sup> The question of the nature and legal regime of the contiguous zone was also discussed at the 1930 Hague Conference.<sup>88</sup> During the Hague Conference, a proposal was put forward to create a contiguous zone beyond the territorial sea in which coastal state would be empowered to prevent and punish infringements by foreign vessels of coastal states' regulations regarding custom, sanitation and nations security.<sup>89</sup> However, like the issue of the breadth of the territorial sea, the Conference failed to reach a compromise on the

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<sup>85</sup> R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited*, (1983), at 141.

<sup>86</sup> *American Journal of International Law*, Sup.Vol 24, at 238.

<sup>87</sup> Bernard H. Oxman, note 73, at 248.

<sup>88</sup> *American Journal of International Law*, Sup.Vol 24, at 235-237.

<sup>89</sup> Tommy T.B. Koh, note 82, at 8.

establishment of the contiguous zone due to the opposition from by maritime powers, especially Britain.

In addition to the traditional uses of oceans which were confined chiefly to navigation and fishing, the advance of technology in the 20<sup>th</sup> century, especially after the World War II, has made possible the exploration and exploitation of offshore natural resources by the coastal States. Though the first international agreement on the delimitation of seabed area was concluded in 1942 between the United Kingdom, on behalf of Trinidad and Tobago, and Venezuela relating to the submarine areas of the Gulf of Paria,<sup>90</sup> the proclamation made by President Truman of the United States on 28 August 1945, marked the birth of the new regime in the international law of the sea: the continental shelf. The Truman Proclamation could also be regarded as the starting point of the positive law on the subject.<sup>91</sup> The Truman Proclamation stated that the Government of the United States

regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as pertaining to the United States, subject to its jurisdiction and control.<sup>92</sup>

Following the Truman Proclamation, many states all over the world passed laws and regulations to unilaterally assert their rights over the continental shelf and its resources.<sup>93</sup> These claims to the continental

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<sup>90</sup> Anselm Francis, "Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of the marine and submarine area: an analysis", (1991), Vol. 6, *International Journal of Estuaries and Coastal Law*, p 169.

<sup>91</sup> Summary of the ICJ Judgment of the 1969 North Sea Continental Case. Available at: <http://www.icj-cij.org/icjwww/idecisions/isummaries/icsummary690220.htm>.

<sup>92</sup> *American Journal of International Law*, Sup., Vol. 40 (1946), p 46; See also in Louis B.Sohn and John E. Noyes, note 79, at 496.

<sup>93</sup> Shigeru Oda, *Fifty years of the Law of the Sea*, (2003), at 18-22.

shelf gave rise to the need for a uniform rule relating the regime of the continental shelf.

Aware of the importance of the law of the sea to the international community and prompted by state practice, the International Law Commission (ILC)- which was created by the United Nations in 1947 with the task of promoting the codification and progressive development of international law- had incorporated the law of the sea in its very first works. From 1950 to 1956, the legal regime of the continental shelf was debated within the ILC and then adopted at the First United Nations Conference on the Law of the Sea (UNCLOS). Under the 1958 Geneva Convention on the Continental Shelf, the continental shelf was defined as:

seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas [under which] the coastal States exercise sovereignty rights for the purpose of exploring it and exploiting its natural resources.<sup>94</sup>

However, the tendency towards the extension of national jurisdiction over the seas continued to increase, with some States, especially the Latin America States, claiming not only the continental shelf but also the superjacent water.<sup>95</sup> In 1952, a conference on exploitation and conservation of the marine wealth of the South Pacific was held in Santiago (Chile) with participants from Chile, Ecuador and Peru. As the result of the conference, these States adopted the Santiago

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<sup>94</sup> Article 1 and 2 of the 1958 Geneva Convention on the Continental Shelf.

<sup>95</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Third edition, (1999), at 144.

Declaration in which they fixed 200 nautical miles as their limits of sovereignty and jurisdiction over the sea adjacent to their coasts.<sup>96</sup> Again, during the 1970s, a number of Declarations were made by Latin American countries to assert their sovereign rights over the renewable and non-renewable resources in the water, seabed, subsoil of the area adjacent to the territorial sea that not exceed to 200 nautical miles.<sup>97</sup> However, not until 1971 was the concept of exclusive economic zone first introduced by Kenya at the Asian-Africa Legal Consultative Committee held in Lagos, Nigeria.<sup>98</sup> With the overwhelming support from the developing countries, the regime of the exclusive economic zone was finally accepted at the Third UNCLOS in the framework of the “package deal”.

Obviously, as compared with the 1958 Geneva Conventions on the law of the sea, under the LOS Convention, the maritime zones under a coastal state’s national jurisdiction expanded significantly. The LOS Convention permits coastal state to establish functional maritime jurisdiction in several areas, namely: the territorial sea up to 12 nautical miles, the contiguous zone up to 24 nautical miles, the exclusive economic zone up to 200 nautical miles, and a continental shelf of 200 to 350 nautical miles.<sup>99</sup> The breadth of the said areas is measured from the baselines which can be either normal baselines or straight baselines, depending on the coastal state’s geographical features.<sup>100</sup> With the extension of the exclusive economic zone to 200 nautical miles and the broadening of the continental shelf, it is estimated that more than one-third of world oceans which was traditionally considered as the high seas

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<sup>96</sup> Koh, “The Exclusive Economic Zone”, (1989), *Malaya Law Review*, at 5.

<sup>97</sup> *Ibid*, at 7.

<sup>98</sup> R. R. Churchill and A. V. Lowe, note 95 at 160. See also Shigeru Oda, note 93, at 624.

<sup>99</sup> Articles 3, 33, 57 and 76 of the LOS Convention.

<sup>100</sup> Articles 5, 7 and 47 of the LOS Convention.

would be placed under coastal state jurisdiction. Consequently, according to Hodgson, “every coastal state in the world will eventually have to negotiate at least one maritime boundary with at least one neighbour”,<sup>101</sup> and disputes about delimitation are the price coastal States will have to pay for the extension of their jurisdiction over the seas.<sup>102</sup>

### *3. Maritime boundary disputes in the South China Sea region:*

There have been two factors that constitute the maritime boundary disputes in the SCS: (i) the progressive development and codification of the law of the sea which prompted States in the region to unilaterally claim their maritime areas; (ii) the geographical circumstances in the region does not allow coastal States to establish maritime jurisdiction to the maximum possible extent as recognized by the law of the sea without overlapping with others. Therefore, the following areas in the SCS were identified by Ramses Amer as overlapping maritime areas among countries in the region that need to be delimited between and among States concerned:<sup>103</sup>

- In the north western part of the SCS, the Philippines and Taiwan have overlapping claims to the exclusive economic zone and the continental shelf areas to the north of the Philippines and to the South of Taiwan

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<sup>101</sup> Robert D. Hodgson and Robert W. Smith, “Boundary Issues Created by Extended National Marine Jurisdiction”, (1979), Vol.69, *Geographical Review*, at 423.

<sup>102</sup> Reiner Logoni, “Interin Measures Pending Maritime Delimitation Agreements”, (1994), Vol. 78, No.2, *American Journal of International Law*, at 863.

<sup>103</sup> Ramses Amer, “Claims and Conflict Situations” in Timor Kivimaki (ed), *War or Peace in the SCS?* (2002), at 31.

- In the Gulf of Tonkin, Vietnam and the People's Republic of China have overlapping claims to the exclusive economic zone and continental shelf. However, the author omitted that in the Gulf of Tonkin, not only the exclusive economic zone and the continental shelf between Vietnam and China overlap, but there exists an overlap in the territorial sea claims between the two countries.<sup>104</sup>

- The People's Republic of China's and Taiwan's claim to the so-called "historic water" in the SCS overlap to varying degrees with claim to the exclusive economic zone and the continental shelf areas made by Vietnam, by Indonesia to the northeast of Natuna, by Malaysia to the north of the coast of the State of Sarawak, and to the northwest of the State of Sabah, by Brunei to the north of its coast, and by the Philippines to the west of the Filipino archipelago. However, the validity of this claim is rejected by all countries in the region,<sup>105</sup> even certain Chinese academics accepted "the nine-dashed line and the historic water claims do not conform to the provisions of UNCLOS, it is expected that China would abandon them in the coming years".<sup>106</sup>

- Brunei and Malaysia have overlapping claims to the exclusive economic zone and continental shelf areas off the coast of Brunei and Sarawak.

- Vietnam's exclusive economic zone and continental shelf claim to the south and southeast of its coast overlap with Indonesia's continental shelf claims to the north of the Natuna Islands.

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<sup>104</sup> See note 27, at 86.

<sup>105</sup> Hasjim Djalal, note 16, at 113.

<sup>106</sup> Ji Guoxing, note 43, at 42.

- Indonesia and Malaysia have overlapping claims to EEZ and continental shelf areas in an zone to the east of Peninsular Malaysia and to the west and north of Anambas islands, as well as to the east-northeast of the Natuna Islands and to the Northwest of Kalimantan (Indonesian part of Boneo) and to the west of Sarawak.

- Vietnam and Thailand, Vietnam and Malaysia and Vietnam, Malaysia and Thailand respectively have overlapping continental shelf and exclusive economic zone overlapping in the Gulf of Thailand.

- Another zone of overlapping claims to EEZ and continental shelf areas can be found to the southwest of Vietnam, to the east-northeast of the east coast of Peninsular Malaysia and to the southeast of the coast of Thailand. The claims of Malaysia, Thailand and Vietnam overlap in one area. In other areas, bilateral claims overlap between Malaysia and Thailand, Malaysia and Vietnam and Between Thailand and Vietnam respectively. There also existed a tripartite overlapping of continental shelf and EEZ among Vietnam, Thailand and Malaysia in this area.

- There are overlapping claims to EEZ and continental shelf areas in the Gulf of Thailand off the coast of Cambodia, Thailand and Vietnam. The Cambodia, Thailand and Vietnam overlap in one area. In other areas bilateral claims overlap between Cambodia and Thailand, Cambodia and Vietnam and between Vietnam and Thailand respectively.

## **PART II – THE SETTLEMENT OF DISPUTES MECHANISM IN THE LAW OF THE SEA CONVENTION**

### **I. Development of the settlement of dispute in the law of the sea**

It is important to note that, the rules and principles for the settlement of disputes in the law of the sea is unalienable part of the process of codification and progressive development of the law of the sea. The League of Nations convened in 1930 the Hague Conference for codifying the law of the sea in which, for the first time, 48 countries examined legal question of the territorial sea and the contiguous zone and related issues. With regard to the settlement of disputes at the Conference, according to Gerard J. Tanja, although the topic of the delimitation of territorial sea was hardly addressed at the Conference, it seemed that the preference for the adoption of a median line rule was obvious.<sup>107</sup>

After the failure of the 1930 Hague Conference, the political environment of the world was not conducive for the countries to continue their attempts to form the rules governing the ocean and sea issues. Since the World War II, the demand for the natural resources was so high, the ocean was beginning to be perceived to be amenable to a widening range of human activity driven from platform as well as technology. The discovery of offshore hydrocarbons in the seabed and subsoil and the means to exploit these resource, led to increasing claims of exclusive control over widens of areas of seas adjacent to coastal states.<sup>108</sup>

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<sup>107</sup> Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries* (1990), at 7.

<sup>108</sup> Natalie Klein, note 6, at 14.

In this context, the First UNCLOS was held in 1958 under the auspices of the United Nations to codify the law of the sea. As the results of the Conferences, four conventions on the law of the Sea and an Optional Protocol on the Settlement of Dispute were adopted.<sup>109</sup> These legal instruments served as a legal framework governing the uses of the seas and oceans and related issues. The Geneva Conventions on the law of the sea had contributed significantly to the settlement of disputes in the law of the sea through establishing rules and principles applicable to the delimitation of territorial sea and the continental shelf. Douglas M. Johnson and Mark J. Valencia had figured out the several important elements that the First UNCLOS had contributed to the ocean boundary delimitation practices in 1960s.<sup>110</sup> They include: (i) recognition coastal state's jurisdiction on the continental shelf and its resources, consequently leads to the delimitation of the continental shelf between States concerned; and (ii) establishment of criteria for the delimitation of the territorial sea and continental shelf between opposite and adjacent States.

However, the Geneva Conventions on the law of the sea also contained a lot of uncertainties, such as the breadth of the territorial sea and definition of the continental shelf. The easily abused definition of the continental shelf had created confusion in States practice and encouraged States to take the advantage of the language of the convention to claim their continental to the fullest possible extent. In 1960, the Second UNCLOS failed to solve the issues that had not achieved at the First UNCLOS.

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<sup>109</sup> Four Conventions on the Law of the Sea adopted by the First UNCLOS are: Convention on Territorial Sea and Contiguous Zone; Convention on the High Seas; Convention on Continental Shelf and Convention on Fishing and Conservation of Living Resources of the High Seas.

<sup>110</sup> Douglas M. Johnston and Mark J. Valencia, note 56, at 6.

Furthermore, by the mid-1960s, a need for a new legal order for the oceans was well perceived by both the great powers and the coastal States, and the four Geneva Conventions on the Law of the sea were being rapidly overtaken by state practice.<sup>111</sup> Additionally, the newly independent nations that were born as result of the movement of decolonization in 1960s also sought to reform those parts of international law in whose formation they did not participate, which they perceived to be detrimental to their interests.<sup>112</sup> Increased interests in the seas as a source of food had led to the development of distant water fishing fleets. Coastal states become very anxious to protect these resources and developing states considered their geographical advantage as an opportunity to achieve economic development.

Moreover, on 1 November 1967, Malta's Ambassador to the United Nations, Arvid Pardo, pronounced a historic speech before the United Nation General Assembly in which he called for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction" and the recognition of seabed and ocean floor outside the limits of the national jurisdiction as "common heritage of mankind". The General Assembly adopted the Pardo's proposal and allocated it to the agenda of the United Nation's First Committee. The First Committee supported for the establishment of the Ad hoc Seabed Committee whose task was to study the peaceful uses of the seabed and ocean floor beyond national jurisdiction. At the suggestion of the Seabed Committee, in 1970 the General Assembly adopted Declaration of Principles governing the Deep Ocean Floor and the Resolution on the Convening of the Third Law of the Sea Conference.

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<sup>111</sup> Tommy T.B. note 77, at 16.

<sup>112</sup> Choon-ho Park, note 12, at 218.

The LOS Convention was the result of the tremendous efforts to achieve “a new and generally acceptable convention on the Law of the sea” made by the States participating in the Third United Nations Conference on the Law of the Sea. Comprising 320 Articles and 9 annexes, the LOS Convention has a quite comprehensive objective: it establishes a legal order for the seas and oceans, including the deep seabed and subsoil thereof.<sup>113</sup> Such legal order, explained by the Wolfrum, “is meant to promote the peaceful uses of the seas and oceans by providing the balance between the different forms of usages and by coordinating the various rights and interests of States parties”.<sup>114</sup> The LOS Convention indeed provides a board legal framework determining the legal status of all oceans spaces and governing the legal regime of all major uses of the sea and their natural resources.

Considered as the most important development in the settlement of international disputes since the adoption of the United Nations Charter and the Statute of the International Court of Justice,<sup>115</sup> the settlement of dispute mechanism in the LOS Convention has been constructed to safeguard the agreed package of compromises against destruction through unilateral and conflicting interpretation. Furthermore, the settlement of dispute mechanism in the LOS Convention is aimed at contributing to the maintenance and strengthening of international peace and security through the reaffirmation of the obligation of the States parties to solve their disputes arising from the convention by peaceful means in conformity with international law and justice.

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<sup>113</sup> Rudiger Wolfrum, ‘The Legal Order for the Seas and Oceans’ in Myron H. Norquist and John Norton Moroe (eds), *Entry into force of the Law of the Sea Convention*,(1995), at 161.

<sup>114</sup> Ibid.

<sup>115</sup> Alan E. Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’, (1997), Vol. 46, No.1, *The International and Comparative Law Quarterly*, p 37.

## **II. The content of the settlement of disputes mechanism in the Law of the Sea Convention**

With more than hundred Articles, the LOS Convention devotes a large part of its provisions to the settlement of disputes relating to law of the sea.<sup>116</sup> The inclusion of all provisions concerning the settlement of disputes in the main body of a convention makes it quite different from the 1958 Conventions where an optional protocol for the settlement of disputes was prepared in parallel but separately. Although these four Conventions became effective successively between 1962 and 1964, the optional protocol has so far received only a few ratifications and never been applied for the last twenty years.<sup>117</sup>

Settlement of disputes mechanism in the LOS Convention is recognized as being both simple and complex<sup>118</sup> and can be approached from different perspectives:

*From the structural perspective*, the settlement of disputes system in Part XV can be divided into three parts: the first section deals with voluntary procedure; the second with compulsory procedures entailing a binding decision; and the third part sets out the limitations and optional exceptions to the compulsory procedures.<sup>119</sup> Besides that, the provisions

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<sup>116</sup> Part XV: Settlement of dispute with 21 Articles; Annex V: Conciliation with 14 Articles; Annex VI: Status of the International Tribunal for the Law of the Sea with 41 Articles; Annex VII: Arbitration with 17 Articles; Annex VIII: Special Arbitration with 5 Articles. Besides that, Articles deal with dispute settlement can be found in Articles 15, 74 and 83 relating to the delimitation of territorial sea, exclusive economic zone and continental shelf ; Article 59, Article 263, Article 265 and Part XI.

<sup>117</sup> Shigeru Oda, note 93, at 574.

<sup>118</sup> Louis B. Sohn and John E. Noyes, note 74, at 800.

<sup>119</sup> L. Dolliver M. Nelson, "The International Tribunal for the Law of the Sea: Some Issues" in Chandrasekhara Rao and Rahmatullah (eds), *The International Tribunal for the Law of the Sea: Law and Practice*, 2001, pp 49-50; A. O. Adede, *The System of the Settlement of Dispute in the United Convention on the Law of the Sea*, (1987), at 248.

for the settlement of deep seabed mining disputes are found in the Part XI of the LOS Convention while the provisions for the delimitation of maritime areas can be found in Article 15, 74 and 83.

*From the subject-matter jurisdiction perspective*, the settlement of disputes mechanism can be categorized into disputes pertaining to the delimitation of maritime boundaries; disputes concerning the exercise of rights and duties of coastal States and other international actors in maritime zones of national jurisdiction and disputes relating to the activities in the Area.

From *rationae-materiae jurisdiction perspective*, the settlement of disputes mechanism can be classified as disputes arising between and among States themselves, and disputes involving the participation of international organizations, corporations and individuals. Another way to classify disputes in the LOS Convention is that disputes may be brought to the compulsory third party dispute settlement and disputes may be excluded or exempted from this mechanism.

The system of dispute settlement in the LOS Convention was built on the basis of the fundamental principle in international law that the parties to the dispute would be able to freely select by agreement any dispute settlement procedure they desire.<sup>120</sup> The principle of free choice of means for the resolution of dispute was a manifestation of the principle of equality of state under international law to which all States, regardless of their differences in terms of geographical size, population, military power, economic strength, development stage, socio-political regime, are

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<sup>120</sup> Louis B. Sohn, "The importance of the Peaceful Settlement of Disputes Provisions of the United Nations Convention on the Law of the Sea" in Myron H. Norquist and John Norton Moroe (eds), *Entry into force of the Law of the Sea Convention*, (1995), at 266.

free from any pressure from other States in choosing the method for the settlement of their disputes emanating from the LOS Convention.

Article 279 of the LOS Convention states: “States parties shall settle any dispute between them concerning the interpretation and application of this convention by peaceful means in accordance with Article 2, para.3 of the Charter of the United Nations”. As provided in Article 33 of the Charter of the United Nations, international disputes are typically settled, subject to the free choice of States, through either negotiation (informal bilateral process) or through recourse to the third party (formal) procedures. The third party procedures produce different results, ranging from binding to non binding decisions, dependening on the types of the third party mechanism chosen. Traditionally, third party procedures can be classified into adjudicative and non-adjudicative procedures. The adjudicative third party procedures always lead to binding results and take the form of arbitration and tribunals. On the other hand, the non-adjudicative procedures’ results are not binding to the parties and may take the form of good offices, mediation, enquiry, fact-finding, conciliation. Under the LOS Convention, both informal and formal procedures are available to States parties.

Article 279 of the LOS Convention, however, has a broader scope of applicability. According to J.G Merrills, it has double effects: firstly, it extends the obligation contained in the Charter to non-member States of the United Nations if they become parties to the LOS Convention; secondly, it confirms that disputes relating to the LOS Convention must be settled in accordance with justice.<sup>121</sup> Besides the general obligation to peacefully settle disputes as enumerated in Article 279 of the LOS

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<sup>121</sup> J.G Merrills, note 1, at 171.

Convention, the States parties may agree “at any time” to solve their dispute by “any peaceful means of their own choice”.<sup>122</sup> This possibility allows States parties to become the “complete master” of how their disputes are settled.<sup>123</sup> When the States parties have chosen the dispute settlement methods or procedures that they preferred, their choice will prevail over the procedures provided in the Convention.<sup>124</sup> This emphasis on the parties’ autonomy is of course consistent with general practice and was not controversial. The LOS Convention also imposed upon States parties, who are parties to a dispute, the obligation to exchange of views. Under Article 283, the States parties are required to proceed expeditiously to exchange views regarding settlement of dispute by negotiation or other peaceful means as well as in cases no settlement of dispute was reached or the circumstances require consultation regarding the manner of implementing the settlement.

Although the LOS Convention accords the primary importance to informal mechanisms to settlement of dispute,<sup>125</sup> “compulsory procedures entailing binding decisions” is the main characteristic of the settlement of dispute system in the LOS Convention. It is a new development as most treaties relating to the international law of the sea have not provided for obligatory binding third party dispute settlement.

Under this scheme, any dispute concerning the interpretation and application of the LOS Convention shall, where no settlement has been reached by recourse to negotiation or other mechanisms contemplated in section 1, be submitted at the request of any party to the dispute to the

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<sup>122</sup> Article 280 of the LOS Convention.

<sup>123</sup> Note 128, at 20.

<sup>124</sup> Articles 281 and 282 of the LOS Convention.

<sup>125</sup> Louis B. Sohn, note 112, at 265.

court or tribunal having jurisdiction under this section.<sup>126</sup> This meant that by becoming a party to the convention, a state becomes bound by the compulsory procedure laid down in Part XV<sup>127</sup> and can not “escape” from legal obligation to have its dispute solved by third party, subject to the conditions provided for in the LOS Convention.

With regard to the free choice of procedures for compulsory settlement under Part XV, when signing, ratifying or acceding to the LOS Convention or at any time thereafter, a state party could declare its acceptance of one or more of the following:

- (i) the International Tribunal for the Law of the Sea;
- (ii) the International Court of Justice;
- (iii) an arbitral tribunal; and
- (iv) a special arbitral tribunal.<sup>128</sup>

The following table is a very basic recapitulation of legal status and jurisdiction of each above mentioned judicial institutions with respect to the settlement of disputes.

	<b>Legal status</b>	<b>Jurisdiction <i>ratione materiae</i></b>	<b>Jurisdiction <i>ratione personae</i></b>
<b>ICJ</b>	Principal judicial organ	All international	States only.

<sup>126</sup> Article 286 of the LOS Convention.

<sup>127</sup> Shabtai Rosenne, *Settlement of Disputes: a linchpin of the Convention - Reflections on fishery management dispute*, a paper presented at the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea.

<sup>128</sup> Article 287 of the LOS Convention.

	of the United Nations. Its operation and function is based on Charter of the United Nations and the Status of the ICJ which is an integral part of the Charter. ICJ is composed of 15 members who are elected by the United Nations.	disputes of legal nature brought to it.	
<b>ITLOS</b>	Established and operated based on the LOS Convention and Annex to the Convention. ITLOS is composed of 21 members elected by the Meeting of States parties to the LOS Convention. ITLOS is a permanent judicial institution.	Disputes concerning the interpretation and application of the LOS Convention.	<ul style="list-style-type: none"> <li>- States parties to the LOS Convention.</li> <li>- The International Sea Bed Authority.</li> <li>- Enterprise, state enterprise, natural or judicial persons</li> </ul>
<b>Arbitral tribunal</b>	Established and operated based on the LOS Convention and Annex to the LOS Convention. Arbitral is an ad hoc institution.	Disputes concerning the interpretation and application of the LOS Convention. An Arbitral tribunal is an adhoc institution.	States parties to the LOS Convention.
<b>A special Arbitral tribunal</b>	Established and operated based on the LOS Convention and	Disputes concerning the interpretation and application of the	States parties to the LOS Convention

	Annex to the LOS Convention. A special Arbitral tribunal is an ad hoc institution.	articles of the LOS Convention relating to: (i) fisheries, (ii) protection and preservation of the marine environment; (iii) marine scientific research; and (iv) navigation, including pollution from vessels by dumping.	
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A written declaration indicating their preferred choice of compulsory mechanism can be made by States parties at any time and revoked or modified on three month's notice.<sup>129</sup> If a State fails to declare the preference or if the state party instituting a proceeding and the respondent state party has not chosen the same forum, arbitration will be used.<sup>130</sup> In addition, a State's failure to appoint an arbitrator will not prevent the constitution of an arbitral tribunal and a State's non-appearance before the tribunal will not prevent the tribunal from reaching a decision.<sup>131</sup>

The compulsory jurisdiction scheme in the 1982 Convention was seen as a success of the Third UNCLOS because it was the first time not only the developed countries, but also the developing countries and the countries of Eastern Europe and Russia, were able to codify a dispute

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

settlement mechanism.<sup>132</sup> The wide acceptance of this mechanism of compulsory settlement was due to “many negotiators at UNCLOS III thought that compulsory dispute settlement mechanisms could help cement the compromises embodied in the Law of the Sea Convention”.<sup>133</sup> During the course of negotiation at the Third UNCLOS, views on the settlement of disputes in the LOS Convention by the third party were very divergent: many developing States and a few States (such as France) would not accept the International Court of Justice, but some would accept a differently constituted specialist tribunal for the law of the sea, while the Soviet block continued to oppose any form of judicial settlement but would accept arbitration.<sup>134</sup> Finally, to break the deadlock, the so-called “Montreux formula”, proposed by Professor Willem Riphagen of Netherlands was adopted and embodied in Article 287.<sup>135</sup>

However, there have also been some limitations and exceptions which are governed by the 3rd section of Part XV, “limitations and exceptions to the applicability of section 2”, that preclude States parties to apply the compulsory procedure in the LOS Convention. If the provisions in section 2 of Part XV allow States parties to unilaterally bring the case to one of the four procedures, section 3 proceeds on the assumption that certain disputes ought not to be subject to obligatory settlement at all. The exclusion of certain disputes from the compulsory procedure was prerequisite condition for the acceptance of the provision for the

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<sup>132</sup> John E. Noyes, “The Third Party Dispute Settlement Provisions of the 1982 United Conventions on the Law of the Sea: Implication for State Parties and for Non Parties” in Myron H. Norquist and John Norton Moroe (eds), *Entry into force of the Law of the Sea Convention*, 1995, at 214.

<sup>133</sup> John E. Noyes, “The International Tribunal for the Law of the Sea”, (1999), 32 *Cornell International Law Journal*, at 115.

<sup>134</sup> Boyle, note 107, at 40.

<sup>135</sup> *Ibid.*

settlement of dispute in the LOS Convention by the participants at the Third UNCLOS.<sup>136</sup>

Under section 3 of Part XV, there are two categorises of exception to compulsory jurisdiction, namely automatic and exceptional.<sup>137</sup> The automatic exception is governed by Article 297 while the latter is regulated by Article 298. Under Article 297, a certain disputes will be excluded from the compulsory procedures; these disputes include: disputes involving rights of navigation, overflying, lying submarine cable, the protection and preservation of marine environment, etc. It means that, with respect to these disputes, States parties to the LOS Convention are not bound by the compulsory procedures. On the other hand, under Article 298, if a State party to the LOS Convention declares at any time that it does not accept any one or more of the compulsory procedures with respect to certain disputes, the other party to the dispute could not use the compulsory procedure against them. According to J.G.Merrills, Article 297 reflects the view of coastal States that certain decisions relating to the exercise of sovereign rights or jurisdiction, especially those concerning the exercise of discretion, should not be subject to challenge in any form of adjudication.<sup>138</sup>

In short, the dispute settlement system in the LOS Convention is a positive development in the settlement of international disputes in which all disputes arising from the LOS Convention, to some extent, would be resolved by international institutions in conformity with international law

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<sup>136</sup> Shabtai Rosenne and Louis B. Sohn, *The United Nations Convention on the Law of the Sea: A Commentary*, Vol.5 (1989), at 87.

<sup>137</sup> H. Oxman, "The Third Party Dispute Settlement Provisions of the 1982 United Conventions on the Law of the Sea: Implication for State Parties and for Non Parties" in Myron H. Norquist and John Norton Moroe (eds), *Entry into force of the Law of the Sea Convention*, (1995), at 214.

<sup>138</sup> J.G. Merrills, note 1, at 176.

and justice through the compulsory procedures. On the other hand, rights to control and retain the full autonomy over the process of dispute settlement of some “sensitive” disputes are also recognized and guaranteed. The following table is a summary of the settlement of dispute mechanism in the LOS Convention made by Judge O. Da of the International Court of Justice:<sup>139</sup>

<b>Topic</b>	<b>Subject to the compulsory settlement procedures:</b>	<b>Not subject the compulsory settlement procedures:</b>
<b>Exercise by a coastal state of its sovereign rights or jurisdiction provided in the LOS Convention</b>	<ul style="list-style-type: none"> <li>- Disputes with regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or other internationally lawful uses of the sea specified in Article 58 and Article 297, Para 1 (a) and (b).</li> <li>- Disputes relating to the alleged contravention by a coastal state of specified international rules and standards for the protection or preservation of the marine environment (Article 297, Para 1. c),</li> </ul>	All other disputes
<b>Marine scientific research:</b>	All other dispute	- Disputes relating the exercise by the coastal

<sup>139</sup> Shigeru Oda, note 93, at 575 - 576.

		<p>state of a right or discretion in accordance with Article 264 (Article 297, Para 2 (a) (i)).</p> <p>- Disputes relating decision by the coastal state to order suspension or cessation of a research project in accordance with Article 253 (Article 297, Para 2 (a) (ii)).</p>
<b>Fisheries</b>	All other disputes	Disputes relating the sovereignty rights with respect to the living resources in the exclusive economic zone or their exercise (Article 297, Para 3 (a)).
<b>Sea boundary delimitation or historic bays or titles</b>		A state may declare not to accept the compulsory procedures (Article 298, Para. 1 (a)).
<b>Military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction</b>		A state may declare not to accept the compulsory procedures (Article 298, Para, 1 (b)).
<b>In respect of which the United Nations Security Council exercises the functions assigned to it by the United Nations Charter</b>		A state may declare not to accept the compulsory procedure (Article 298, Para, 1(c)).

## **PART III – THE RELEVANCE OF THE LOS CONVENTION TO THE SOUTH CHINA SEA DISPUTE**

### **I. The relation between the LOS Convention and the Spratly islands dispute**

It is necessary to understand the nature of the relationship between the LOS Convention and the SCS dispute in order to precisely elaborate the roles that the LOS Convention may or may not have on the SCS dispute as well as the possibility of utilizing the settlement of dispute mechanism to the SCS dispute.

*Firstly*, and as explained above, the maritime boundary dispute in the SCS dispute was principally driven by the substantial expansion of national jurisdiction over the seas since the mid-20<sup>th</sup> century, while the causes of the sovereignty dispute over Spratly islands were numerous, including, but not limited to, the historic, legal, economic, geopolitical, etc, reasons.<sup>140</sup> Thus, it is incorrect to blame the LOS Convention as a cause of the sovereignty dispute over islands in general, and for the Spratlys islands in particular, since all disputes concerning the islands existed long before the Third UNCLOS was convened.<sup>141</sup> However, as a matter of fact, the dispute over the ownership of the islands has been prompted and intensified by the adoption of the LOS Convention as it allows the islands to be treated as landmass territory thus possessing a maritime space of its own.<sup>142</sup>

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<sup>140</sup> Bob Catley and Makmur Keliat, note 2, at 9 - 17.

<sup>141</sup> Robert W. Smith and Bradford Thomas, note 8, at 66.

<sup>142</sup> Article 121 of the LOS Convention.

The SCS countries, therefore, encountered serious conflicts of interests arising from the ownership as well as the legal status of the islands in dispute<sup>143</sup> since the islands could serve as legal base points for the disputants to project claims of exclusive jurisdiction over water and resources in the SCS.<sup>144</sup> The LOS Convention, therefore, has also motivated claimant States to put a higher priority on protecting their claimed sovereignty over offshore islands and their rights to marine resources.<sup>145</sup>

*Secondly*, different views exist on whether the dispute settlement mechanism under the LOS Convention can be applied to sovereignty disputes over the Spratly islands. Article 293 of the LOS Convention authorise a court or tribunal “having jurisdiction” to seize the dispute arising from the interpretation and application of the LOS Convention to apply the LOS Convention and other rules of international law not incompatible with the convention.<sup>146</sup> David Whiting, therefore, argues that according to Article 293, if the court, under the part XV of the LOS Convention, is asked to consider a case of territorial disputes, “previously existing international law is to be taken into account”.<sup>147</sup> He then referred to the customary international law applicable to territorial disputes as the courts based their decisions on the cases relating the island disputes which are: the island of Palmas case, the Clipperton islands case and the Legal status of Eastern Greenland case.<sup>148</sup> On the other hand, Robert W. Smith insisted that the provisions in the LOS Convention could not be

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<sup>143</sup> Choon-ho Park, note 12, at 229.

<sup>144</sup> Christopher C. Joyner, note 65, at 197; see also Hungdah Chiu, note 21, at 744.

<sup>145</sup> Park Hee Kwon, note 63, at 90-91.

<sup>146</sup> Article 293 of the Los Convention.

<sup>147</sup> David Whiting, “The Spratly Islands Dispute and the Law of the Sea”, (1997-1998), 26 *Denver Journal of International Law*, at 898.

<sup>148</sup> *Ibid*, at 898-900.

applied to the sovereignty dispute at all<sup>149</sup> because the Convention itself does not contain any provisions relating to the resolution of disputes over territory, islands, or other types of territory.<sup>150</sup> Furthermore, while the LOS Convention creates several bodies for adjudicating disputes and a Commission to oversee claims to continental shelf beyond 200 miles, there is nothing in the body of the LOS Convention which addresses sovereignty issues.<sup>151</sup> This view seemed to be supported by Park Hee Kwon as he observes that the LOS Convention rules out the application of the LOS Convention's dispute settlement mechanism in disputes related to sovereignty.<sup>152</sup>

The LOS Convention, indeed, does not deal with disputes over the sovereignty of islands, nevertheless, and to some extent, it can be seen as one of the factors that led to the intensification of sovereignty claims over the islands. The LOS Convention instead addresses mainly the relationship between States with regard to the use of seas and oceans through the establishment of maritime jurisdiction zones and the exercise of State jurisdiction in these zones. In fact, during the negotiation at the Third UNCLOS, a drafted article concerning sovereignty disputes over islands was deleted from the draft of the LOS Convention.<sup>153</sup> The application of the LOS Convention is premised on the assumption that a particular State has undisputed title over the territory from which the maritime zone is claimed.<sup>154</sup> As one author has recognized, "indeed it would be beyond the substantive scope of the convention to determine the

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<sup>149</sup> Robert W. Smith, "The Effect of Extended Maritime Jurisdictions" in Albert W. Koers and Bernard H. Oxman (eds), (1983), *The 1982 Convention on the Law of the Sea*, at 343.

<sup>150</sup> Robert W. Smith and Bradford Thomas, note 8, at 67.

<sup>151</sup> Ibid.

<sup>152</sup> Park Hee Kwon, note 63, p 94.

<sup>153</sup> Robert W. Smith and Bradford Thomas, *ibid.*, at 69.

<sup>154</sup> Ibid.

status of land territory”.<sup>155</sup> Due to its capacity to generate a maritime space, the disputes involving an island can be classified into: dispute over the sovereignty of the island itself; and dispute over the effect that the island may have on the delimitation of the adjacent maritime space. However, these two issues are, by their nature, totally different from one another. The maritime dispute issue is understood as dispute regarding the delimitation of maritime spaces over which the coastal State would carry out its national jurisdiction; whilst the territorial dispute was defined as a legal dispute of a nature between two or more international persons over the attribution of territory.<sup>156</sup> In practice, when a question of sovereignty over an island is solved bilaterally or by a third party mechanism, the issue of maritime boundary of that island is usually solved as a part of the same resolution.<sup>157</sup> In other words, the resolution of a dispute over sovereignty of an island is prerequisite for the settlement of the maritime boundary of the island.

*Fourthly*, the provisions of the Vienna Convention on the Law of Treaties of 1969 stipulates that, when a State becomes a full party to an international legal instrument, it is entitled to all the rights and must perform all the obligations specified therein. The State party may not invoke provisions of its internal law as justification for its failure to perform a treaty.<sup>158</sup> The LOS Convention also obliges States parties to fulfil the obligations provided for in the Convention in good faith and to exercise rights, jurisdiction and freedom in a manner “which not constitute an abuse of rights”.<sup>159</sup> As most of the States in the SCS region

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<sup>155</sup> Ibid.

<sup>156</sup> Enrico Milano, “Territorial Disputes, Wrongfull Occupations and State Responsibility: Should the International Court of Justice go the Extra Mile?”, (2004), Vol.3, *The Law and Practice of International Court of Justice and Tribunals*, p 509.

<sup>157</sup> In practice, the ICJ

<sup>158</sup> Article 27 of the 1969 Vienna Convention on the Law of treaties.

<sup>159</sup> Article 300 of UNCLOS.

so far have ratified and become parties to the LOS Convention,<sup>160</sup> they are required to interpret and apply the provisions of the Convention “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Such obligation would have a great effect on the SCS dispute, in particular on the Spratly islands whose legal status as islands or rocks is not clearly defined among disputants.

## **II. Rules applicable to the delimitation of maritime boundary**

Having an overlapping maritime boundary claim resolved is a prerequisite condition for a coastal State to exercise its national jurisdiction over maritime space in conformity with the law of the sea. If the overlapping areas can not be solved, the possibility of conducting exploration and exploitation of marine resources, both living and nonliving, in the overlapping areas is very limited. Thus, in case of overlapping maritime boundary claims, the States concerned should attempt to resolve the delimitation issue through either negotiation or by the third party mechanisms. The methods and principles applicable to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf are stipulated in Article 15, 74 and 83 of the LOS Convention.

With reference to the delimitation of the territorial sea, Article 15 sets forth:

Where the coasts of two States are opposite or adjacent to each other,  
neither of the two States is entitled, failing agreement between them to

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<sup>160</sup> Philippines 1984, Indonesia 1986, Vietnam 1994, Singapore 1994, China 1996, Malaysia 1996, and Brunei Darrussalam 1996.

the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each countries is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

It is recognized that Article 15 of the LOS Convention repeats, almost verbatim, the substance of the 1958 Convention on the Territorial Sea and Contiguous Zone. Under Article 15 of the LOS Convention, the combined equidistance-special circumstance principle was perceived as applicable rules for the delimitation of territorial sea.<sup>161</sup>

Article 74 and 83 of the LOS Convention do not indicate what substantive rules of delimitation law should be applied in the delimitation of the exclusive economic zone and continental shelf. The regime prescribed thus permits States parties to adopt a more flexible approach to the delimitation of their continental shelf and the exclusive economic zone, all the while respecting the principle of “equitable solution” and “on the basis of international law”. The most common method used in the delimitation of the continental shelf and the exclusive economic zone is to firstly determine a provisional equidistance line, then consider whether there are any special circumstances or relevant factors requiring this initial line to be adjusted with a view to achieving equitable results.<sup>162</sup> Under States practice as well as jurisprudence developed by the ICJ and other international tribunals with respect to the delimitation of maritime

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<sup>161</sup> Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World*, Second Edition, 2005, p 219.

<sup>162</sup> A paper presented at the Twentieth Anniversary Commemoration of the Opening for Signature of the United Nations Convention on the Law of the Sea by Judge Raymond Ranjeva on behalf of Judge Gilbert Guillaume, President of the International Court of Justice, at 48.

boundaries, the special circumstances are those which might modify the result produced by an unqualified application of the equidistance principle.<sup>163</sup>

If no agreement can be reached in a reasonable period of time, the States concerned shall resort to the dispute settlement procedures provided for in Part XV of the LOS Convention.<sup>164</sup> However, under Article 298 of the same Part, States may declare that they do not accept third party settlement mechanism for disputes concerning the delimitation of the territorial sea, exclusive economic zone and continental shelf or those involving the historic titles and historic bays. Disputes concerning the delimitation of maritime boundaries are excluded from the compulsory procedure provided for in the LOS Convention because of its intimate ties to a State's identity or perceived security.<sup>165</sup>

### **III. Delimitation of the maritime boundaries in the SCS region**

In the last few decades, especially during the Cold War, the diplomatic and political environment in the SCS region was not suitable for States to undertake the delimitation of their maritime boundaries. The relationships among States in the region were first strained by the Vietnamese war and the subsequent ideological differences. Furthermore, the outer limits of the coastal State's national jurisdiction on maritime space were yet to be defined clearly and the concept of the exclusive economic zone had not yet been accepted. With the end of the Cold War, relationships among States in the region have improved dramatically, thus providing opportunities for the peaceful settlement of the SCS dispute.

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<sup>163</sup> Greenland and Jan Mayen case, ICJ Judgment of 1993, at 62.

<sup>164</sup> Article 74 and 83 of the LOS Convention.

<sup>165</sup> John E. Noyes, note 124, at 215.

The first agreement on the delimitation of the overlapping continental shelf was between Indonesia and Malaysia in 1969. This agreement delimited the overlapping continental shelf claims between the two countries in the Strait of Malacca and in the SCS. At the time of signature, both States were parties to the 1958 Convention, and their overlapping claims arose when Indonesia and Malaysia made unilateral claims in 1960 and in 1966 respectively. A second treaty between the two countries signed in 1970 was related to the delimitation of territorial sea in the Strait of Malacca. In the case of Indonesia, the territorial sea boundary coincides with the continental shelf boundary. For Malaysia, however, the territorial sea boundary does not coincide with the continental shelf, but slightly deviates in favour of Malaysia.<sup>166</sup> Both Indonesia and Malaysia claimed a 12 nautical mile territorial sea at the time of signature.

Another agreement on the delimitation of the territorial sea was concluded in 1973 between Indonesia and Singapore, to divide their overlapping territorial sea claims in the Strait of Malacca. At that time, Indonesia claimed a 12 nautical mile territorial sea, while Singapore claimed only a 3 nautical mile territorial sea.

In 1979, Malaysia and Thailand signed a number of agreements relating to delimitation of their overlapping maritime areas. Firstly, the Treaty between the Kingdom of Thailand and Malaysia relating to the delimitation of the territorial seas of the two countries of 24 October 1979, addressed the overlapping claims between the two States in both the Malacca Strait and in the Gulf of Thailand. At the time of signature, both states were parties to the 1958 Geneva Convention and signatories to

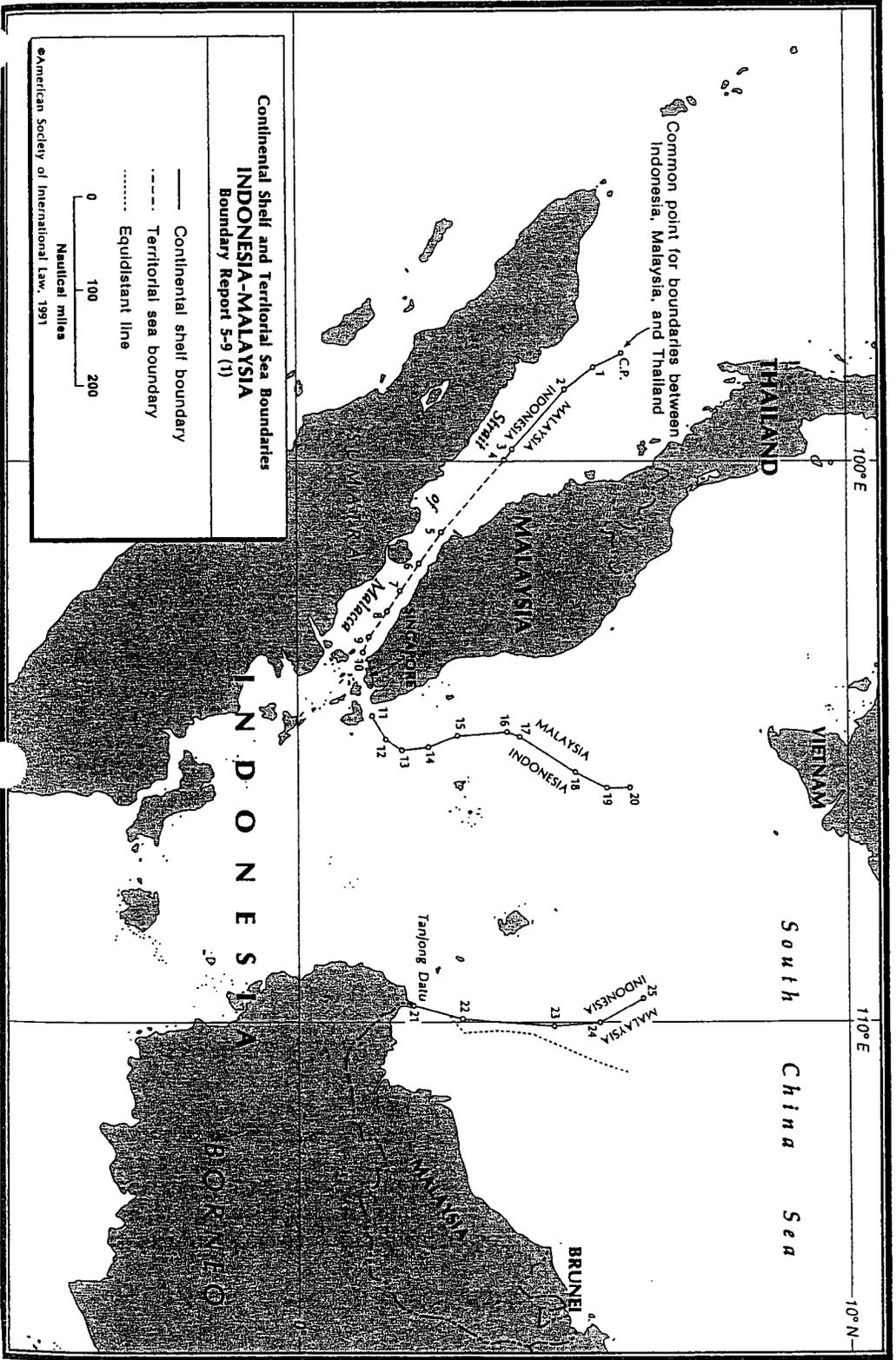
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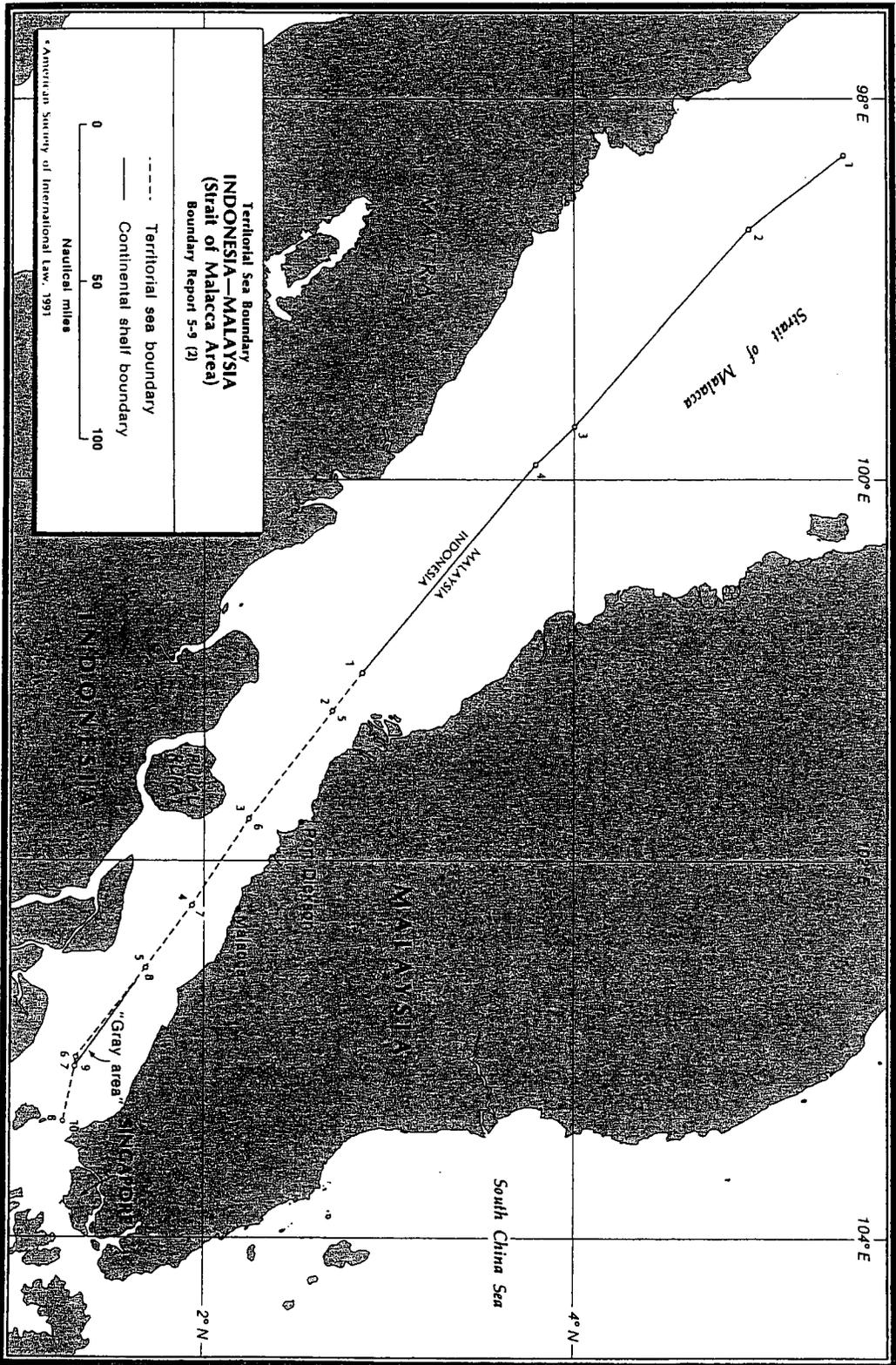
<sup>166</sup> J. I Charney and L.M. Alexander, note 160, at 1029.

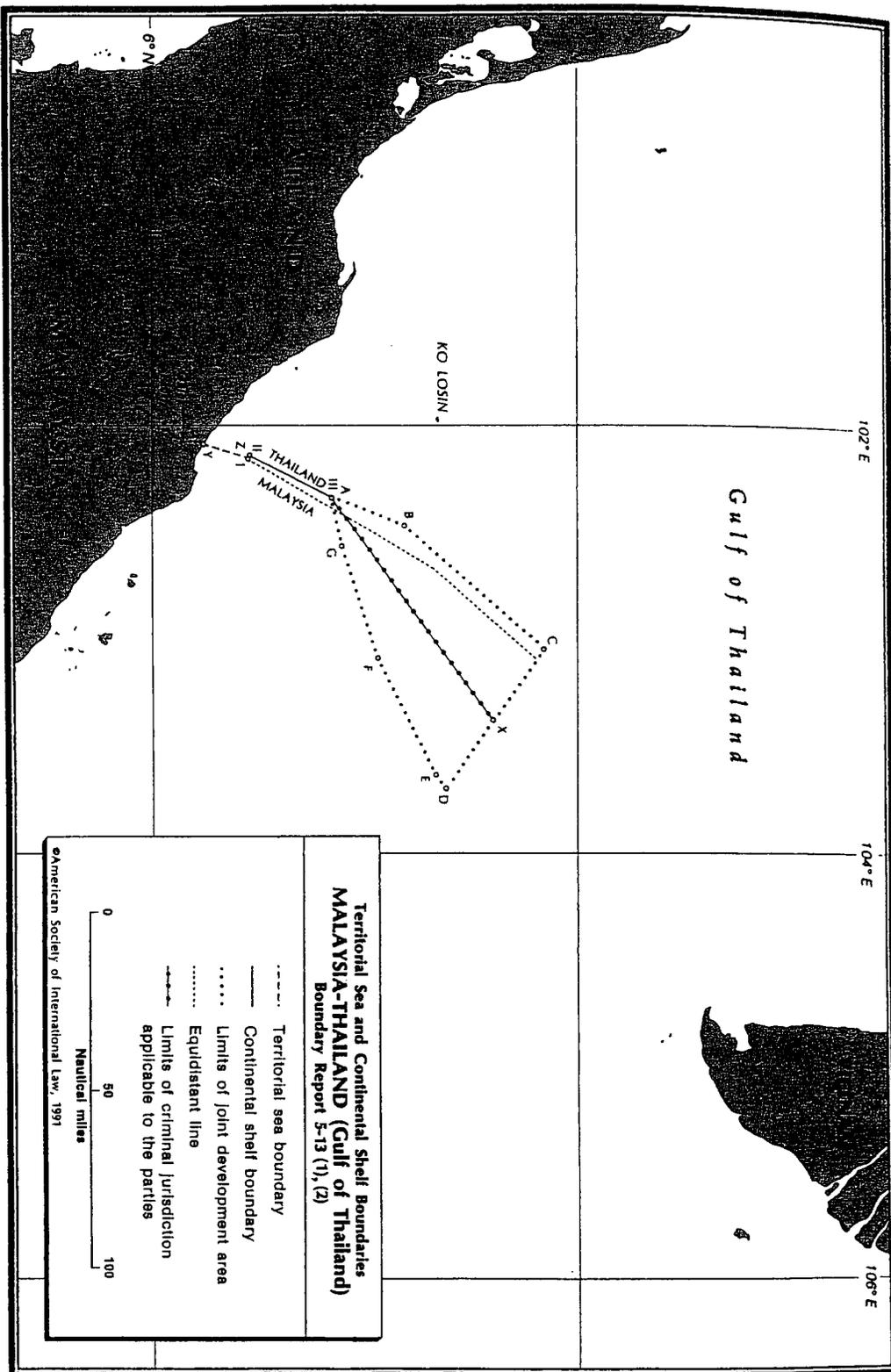
the LOS Convention. The Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the delimitation of the continental shelf boundary between the two countries in the Gulf of Thailand was also signed at the same day. However, the delineation of the continental shelf boundary was limited. The continental shelf between the two countries starts at the seaward terminus of the territorial sea boundary, but the parties disagreed on the further offshore limit. Thus a provisional measure was applied in the form of memorandum of understanding on the establishment of a joint authority for the exploration and exploitation of the resources of the seabed with respect to the disputed area. The memorandum defined an area of joint development of oil and gas for a period of 50 years commencing on the date on which the memorandum come into force.

The Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand of 9 August 1997 was the first time Vietnam defined a maritime boundary. The delimitation line constitutes the continental shelf and the economic zone boundary in which the Vietnamese side received 32.50 % of the overlapping area.

The second maritime boundary agreement between Vietnam and its neighbouring countries was the [Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/Gulf of Tonkin of 25 December 2000](#). The agreement was a culmination of a negotiation process between Vietnam and China that had started in 1974. According to the agreement,



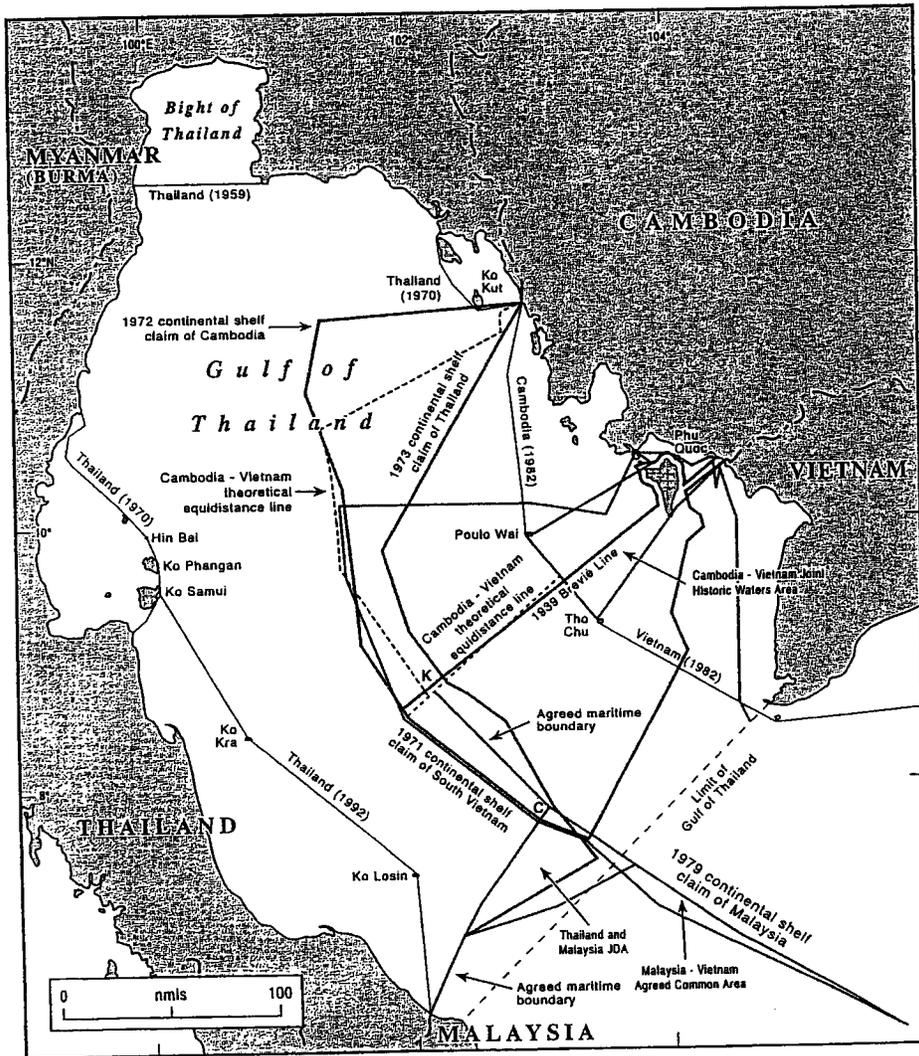




**Territorial Sea and Continental Shelf Boundaries  
MALAYSIA-THAILAND (Gulf of Thailand)**  
Boundary Report 5-13 (1), (2)

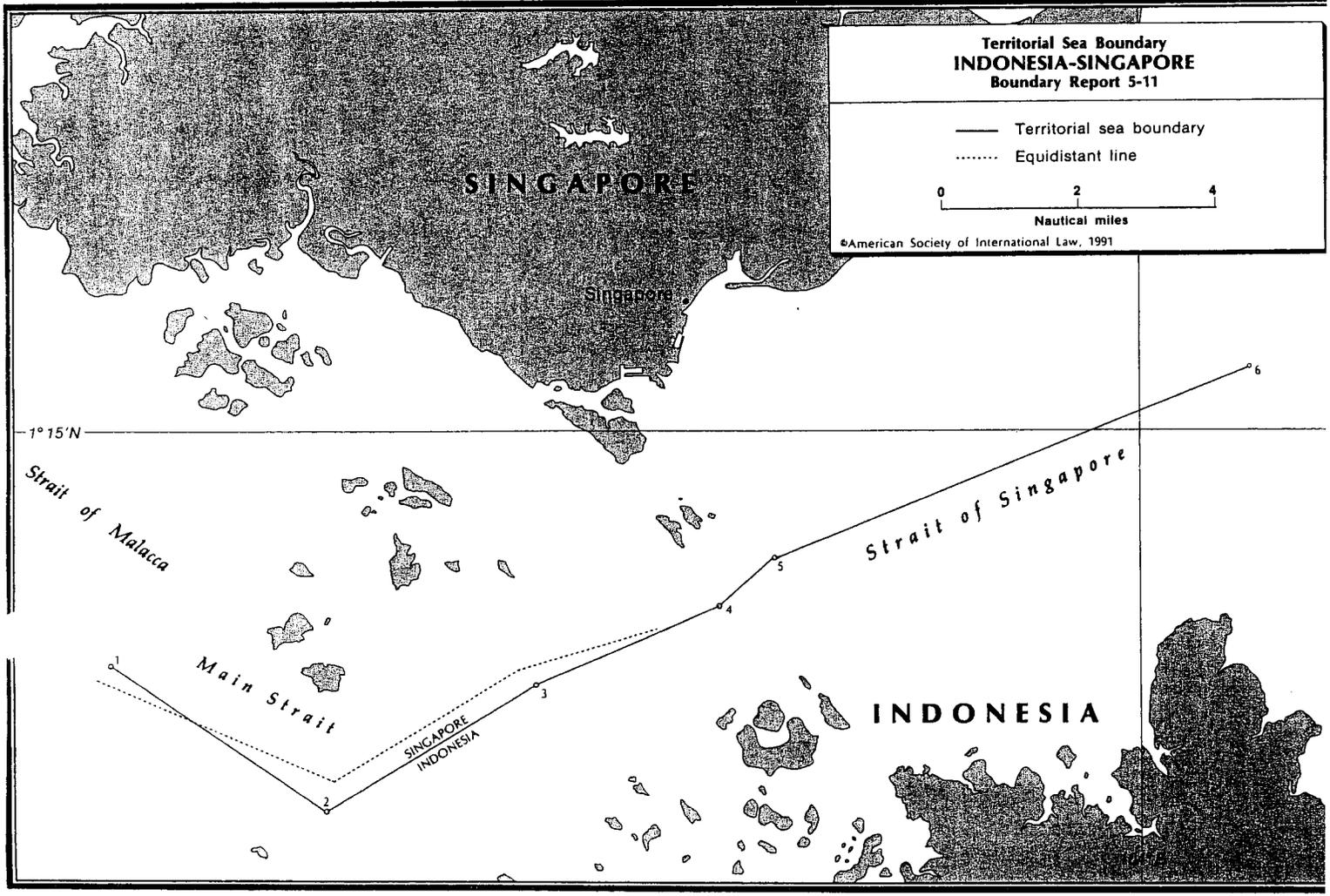
- Territorial sea boundary
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- ..... Limits of joint development area
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- ⊥ Limits of criminal jurisdiction applicable to the parties

0 50 100  
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American Society of International Law, 1991



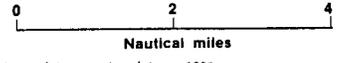
Maritime boundary delimitation in the Gulf of Thailand  
 (Source: International Boundaries Research Unit).

Excerpt from: Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World*, Second Edition, 2005



**Territorial Sea Boundary  
INDONESIA-SINGAPORE  
Boundary Report 5-11**

- Territorial sea boundary
- ..... Equidistant line



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*Main Strait*

SINGAPORE  
INDONESIA

*Strait of Singapore*

**INDONESIA**

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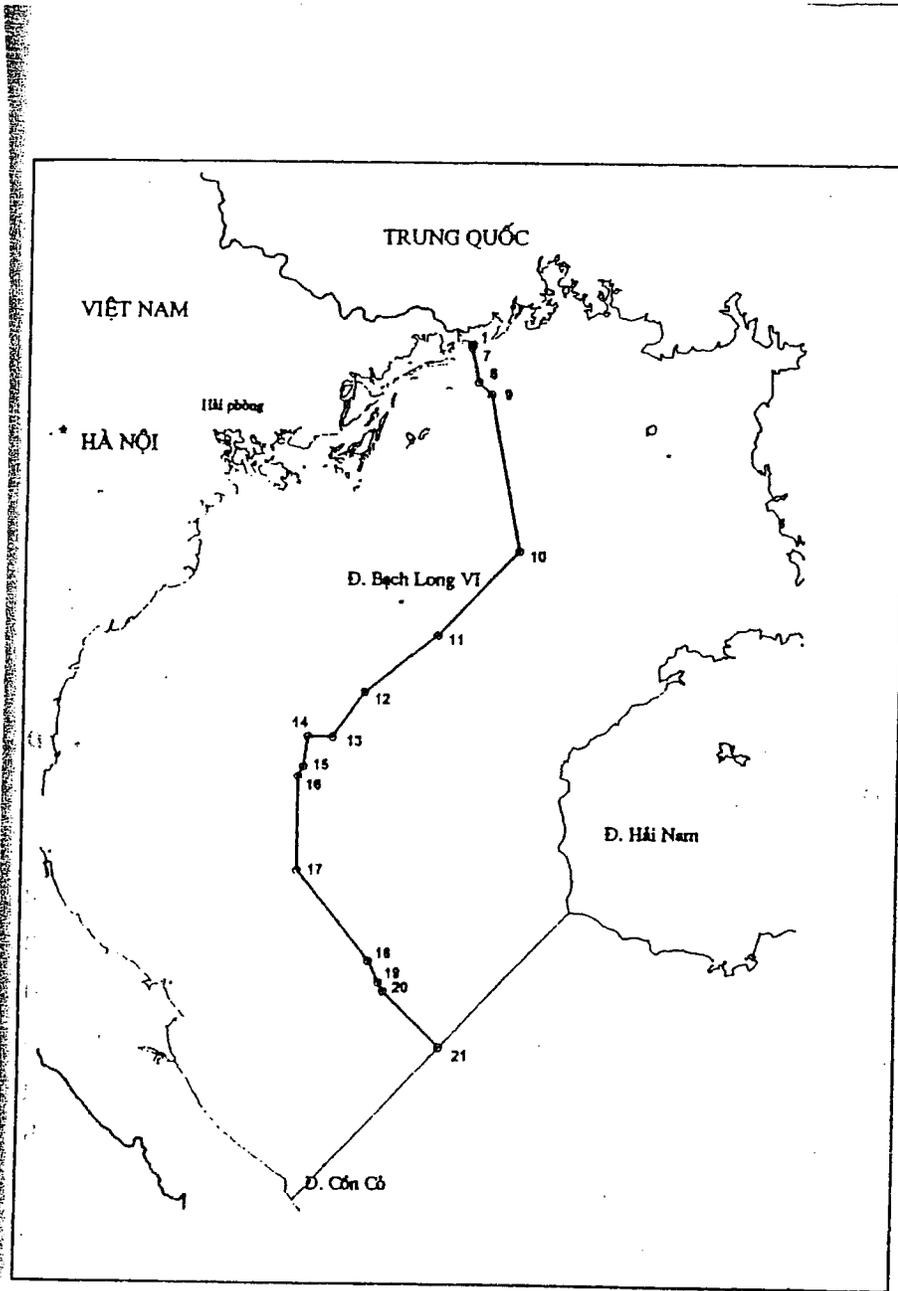
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Maritime boundary delimitation on the Gulf of Tonkin between Vietnam and China  
 Source: The introduction of the main issues of the Law of the Sea in Vietnam, 2003.

Vietnam was given 53.23% of the overlapping area, while China received 46.77% of the overlapping area.

The latest agreement on maritime boundary which Vietnam entered into was the Agreement between the Government of Vietnam and the Government of the Republic of Indonesia on the delimitation of continental shelf between the two countries of 25 June 2003 (not yet enter into force).

Besides agreements on the permanent delimitation of maritime boundaries, States have also opted for joint development agreements (oil and gas) in the disputed area. These include agreements reached between Thailand and Malaysia; and Vietnam and Malaysia. These provisional arrangements are fully in conformity with the provisions of the LOS Convention, since the LOS Convention encourages States concerned, pending agreement on delimitation, to enter into provisional arrangements of a practical nature which do not jeopardize the reaching of the final agreement.<sup>167</sup>

### **III. Regime of island in the 1982 LOS Convention**

The capacity of islands to generate maritime zones and to influence to the location of international maritime boundaries was an international concern long before the LOS Convention was adopted.<sup>168</sup> During the Third UNCLOS, these issues were perhaps the most controversial topics and subject of a heated negotiating battle.<sup>169</sup>

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<sup>167</sup> Article 74 and 83 of the LOS Convention.

<sup>168</sup> See Jonathan I. Charney, "Rocks that Cannot Sustain Human Habitation", (1995), Vol. 93, *American Journal of International Law*, at 863.

<sup>169</sup> Janusz Symonides, "The Legal Status of Islands in the New Law of the Sea" in Hugo Caminos (ed), *The Law of the Sea*, (2001), at 119.

The treatment of islands as mainland territory in their ability to create the maritime space under the LOS Convention is not an innovation. Under generally accepted principles of international law, there was not difference in what nature of territory may generate a maritime zone.<sup>170</sup> In principle, all areas of land, including small islands and rocks above water at high tide, are entitled to some maritime jurisdiction.<sup>171</sup> The right of an island to have maritime areas around it was recognized in both of the LOS Convention and the 1958 Conventions on the law of the sea<sup>172</sup> and there are no differences in the legal definition of an island between these conventions.<sup>173</sup> However, with the introduction of the concept of the exclusive economic zone and the broadening of the continental shelf margin in the LOS Convention,<sup>174</sup> islands started to represent a remarkable potential for the States to which they belonged. The value of even the smallest and remotest islands therefore has suddenly been realized.<sup>175</sup> It is estimated that, a zone of 200 nautical mile around a small island can generate about 125,660 square nautical miles of ocean space<sup>176</sup> in which the state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or nonliving of the waters-superjacent to the sea bed and of the sea bed and its subsoil.<sup>177</sup>

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<sup>170</sup> Clive Ralph Symmons, *The Maritime Zones of Islands in International Law*, (1979), at 9.

<sup>171</sup> B.H. Oxman, "Political, Strategic, and Historical Considerations" in J.I. Charney and L.M. Alexander (eds), (1993), *Interntaional Maritime Boundaries*, at 20

<sup>172</sup> See Article 121 of the LOS Convention; Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone; and Article 1 of the 1958 Convention on Continental Shelf.

<sup>173</sup> In both of the LOS Convention and 1958 Convention island was defined as "*a naturally formed area of land, surrounded by water which is above water at the high tide*".

<sup>174</sup> According to the Convention on Continental shelf of 1958, the outer limit of the continental shelf was defined to "a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" while under the LOS Convention, the outer limit of the continental shelf is either 200 nm or to maximum 350 nm.

<sup>175</sup> Clive Ralph Symmons, note 170, at 9.

<sup>176</sup> See Robert W. Smith and Bradford Thomas, note 8, at 66.

<sup>177</sup> Article 56 (1.a) and 77 of the 1982 LOS Convention

Regarding the regime of islands, the LOS Convention states in its Article 121; entitled “Regime of islands”:

1. An island is a naturally formed area of land, surrounded by water, which is above water at the high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Although the geographical feature island is broadly defined as a small piece of land surrounded by water, the legal definition of such a feature draws on nuances in its origin, size, geographical location, ecologic conditions and, last but not least, political status.<sup>178</sup> These elements have a great effect on the role and value of islands in the maritime boundary delimitation process. In term of geomorphologic origin, there are two kinds of islands: continental and oceanic islands, in which the former are built from granite or slate that has been exposed to very high temperatures and extreme pressure similar to that occurring in continents or along its fringes. The latter are mainly volcanic or volcanic coral type.<sup>179</sup>

According to the Prescott, the first two paragraphs of the Article 121 of the LOS Convention have not caused any significant disagreement between academic commentators since they repeat the content of the legal regime of islands in the 1958 Geneva Conventions on the law of the

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<sup>178</sup> Janusz Symonides, note 158, at 115.

<sup>179</sup> Ibid.

sea.<sup>180</sup> In interpreting the concept of island in Article 121, Prescott has identified four requirements that a feature has to fulfil in order to be recognized as an island. They are: (i) naturally formed; (ii) area of land; (iii) surrounded by water; and (iv) above the water at high tide.<sup>181</sup> The most controversial one is paragraph 3 of the Article 121 of the LOS Convention. Under this paragraph, a rock “cannot sustain human habitation or economic life of its own” is denied to have exclusive economic zone and continental shelf; despite that under this paragraph a rock is also considered a particular type of island.<sup>182</sup> The criteria of sustainability of human habitation and economic life are very elusive and easily abused or misunderstood. With the advance of the technology and new human activities, it is the ocean features that previously were not capable of sustaining human habitation or did not have an economic life, are now increasingly able to develop these capabilities. It would thus seem that such features could no longer be regarded as rocks in the meaning of the paragraph 3 of the Article 121.<sup>183</sup>

The international law of the sea makes a clear distinction between a State’s territorial entitlement to an island and the weight given to such a feature in its maritime boundary delimitation. Although the entitlement to maritime area of an island is recognized, it is not necessarily meant that an island will be given full weight in the delimitation of maritime boundary. States’ practice and jurisprudence of international tribunals has clearly demonstrated the different roles of island in maritime delimitation, ranging from: (i) island ignored in maritime delimitation; (ii) island given

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<sup>180</sup> Victor Prescott and Clive Schofield, note 132, p 58.

<sup>181</sup> Ibid.

<sup>182</sup> See Marius Gjetnes, note 36, p 70; See also Jonathan I. Charney, note 157, at 864.

<sup>183</sup> Jonathan I. Charney, note 157, at 867

partial effect; and (iii) island given full effect.<sup>184</sup> Such treatment of islands in maritime delimitation depends on a number of elements such as size, location, capacity to sustain habitation, economic importance,...etc. According to some authors:

[...recent arbitration, judicial decisions and negotiations have been relatively consistent in refusing to give full effect to islands in delimiting maritime boundaries. The Anglo-French arbitration, the opinions of the ICJ and many bilateral treaties all stand for the proposition that islands do not generate extended maritime jurisdiction in the same that other landmasses do. Even the habited islands such as New Jersey, Guernsey in the English Channel, Kerkennah island near Tunisia, Seal island in the Gulf of Maine, and the main island of Malta do not generate full extended maritime zones if the impact of such an extension is to interfere with the claim of another nation based on a continental landmass].<sup>185</sup>

With regard to the Spratly islands, the disputants have different and confused views on the application of Article 121 (3) to the features in the SCS.<sup>186</sup> The Philippines and Malaysia might support the position that rocks and islets have only a 12 nautical mile territorial sea and the waters beyond 12 nautical miles are under the management of adjacent countries.<sup>187</sup> While others, inspired by new development of the law of the sea, adopted legislations to regulate the legal status of the waters surrounding the Spratly islands on the assumption that the Spratly Islands could generate full maritime zones including an exclusive economic zone

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<sup>184</sup> See Lewis M. Alexander, "Baseline Delimitation and Maritime Boundaries" in Hugo Caminos (ed), *The Law of the Sea*, (2001), at 24-29.

<sup>185</sup> Jon M. Van Dyke and Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the SCS" in Elisabeth Mann Borgese, Norton Ginsburg and Joseph R. Morgan (eds), *Ocean Yearbook No.10*, (1993), at 87-88.

<sup>186</sup> Nguyen Hong Thao, "Vietnam and the Code of Conduct for the SCS", (2001), Vol. 32, *Ocean Development and International Law*, at 109.

<sup>187</sup> *Ibid.*

and continental shelf despite the question of how much the sea around islands country can claim remains unsettled.<sup>188</sup> For instance, in the 1998 Exclusive Economic Zone and Continental Shelf Act, China implied that the Spratly islands have its own continental shelf and the exclusive economic zone.

In this regard, the attempts made by countries to assume that once sovereignty over disputed rocks or small islands was solved, the victor would automatically enjoy the rights to the vast areas of maritime space around these structures are unfounded. In fact, as written by Jonathan I. Charney, this assumption

is misplaced with respect to a true Article 121 (3) rock located in the middle of the ocean, beyond the exclusive economic zone or the continental shelf of any other feature, for Article 121 (3) allows only a 12-nautical-mile territorial and a 12-nautical-mile contiguous zone seaward.<sup>189</sup>

#### **IV. Recent developments in the SCS region**

##### *1. Declaration on the Conduct of Parties in the SCS*

The Declaration on the Conduct of the Parties in the SCS (hereafter referred to as DOC) was signed between ten ASEAN countries and China on 4<sup>th</sup> November, 2002 at the Eighth ASEAN summit held in Phnomphenh, Cambodia. The significance of the DOC, the first document between ASEAN and China on the SCS, was regarded as “an important step towards a Code of Conduct in the SCS and as a valuable

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<sup>188</sup> Michael Bennet, note 10, at 427.

<sup>189</sup> See Jonathan I. Charney, note 157, at 866.

contribution to peace and stability in the region”,<sup>190</sup> and promotion of development and cooperation.<sup>191</sup> Since the adoption of the DOC, the situation in the SCS region has remained relatively stable in comparison to previous decades.

The genesis of the Code of Conduct for the SCS can be traced to the ASEAN Declaration on the SCS in Manila on 22 July 1992 (the 1992 Declaration) issued by the Foreign Ministers of the ASEAN countries.<sup>192</sup> The ASEAN countries adopted the 1992 Declaration as they were worried about the complicated developments in the SCS in late 1980’s and early 1990’s. These worries stemmed from China’s policy in the SCS with regard to the use of force to establish get a foothold in Spratly, China’s signing of a contract with the US Creston Company to explore oil and gas on the Viet Nam’s continental shelf, and China’s promulgation of law on the territorial sea that could badly affect peace, security and stability in the region,<sup>193</sup> The 1992 Declaration stressed the need to solve “all sovereignty and jurisdictional issues pertaining to the SCS by peaceful measures, without resort to force” and, at the same time, called for “parties concerned to exercise restraint with a view to creating a positive climate for the eventual resolution of all disputes”.<sup>194</sup>

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190 Joint Communiqué of the 36<sup>th</sup> ASEAN MINISTERIAL MEETING, Phnom Penh, 16-17 June 2003. Source: <http://www.aseansec.org/14833.htm> (last visited 20 June 2005). See also the Joint Communiqué of the 37<sup>th</sup> and 38<sup>th</sup> ASEAN MINISTERIAL MEETING.

191 Nguyen Hong Thao, “The 2002 Declaration on the Conduct of the Parties in the SCS: a Note”, *Ocean development and International Law*, p 279.

192 Kriangsak Kittichai, “A Code of Conduct for Human and Regional Security around the SCS”, (2001), Vol. 32, *Ocean Development and International Law*, at 133.

193 Nguyen Hong Thao, “Vietnam and the Code of Conduct for the SCS”, (2001), Vol. 32, *Ocean Development and International Law*, at 2-4.

194 The main content of the 1992 Manila Declaration on the SCS:

- “ 1. Emphasize the necessity to resolve all sovereignty and jurisdictional issues pertaining to the SCS by peaceful means, without resort to force;
2. Urge all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes;
3. Resolve, without prejudicing the sovereignty and jurisdiction of countries having direct interests in the area, to explore the possibility of cooperation in the SCS relating to the safety of maritime navigation and communication, protection against pollution of the marine environment, coordination of

Nevertheless, both the 1992 Declaration as well as two 1995 “Codes of Conduct” between Viet Nam and the Philippines, and China and the Philippines, failed to prevent China from expanding structures it built on the disputed Mischief Reef in the Spratly archipelago, and the Philippines from firing at, or arresting, Chinese fishing boats operating close to the disputed Scarborough Shoal.

Against this backdrop, there was an urgent need to quickly formulate a Code of Conduct (COC) in the SCS that would serve as a framework to govern the conduct of parties concerned in the region. But it was not until the sixth ASEAN Summit, held in Hanoi in December 1996, that the formulation of such a code of conduct tabled for discussion and recorded in the Hanoi Plan of Action.

The item “strengthen regional peace and security in the Hanoi Plan of Action” reads:

“7.1. Consolidate and strengthen ASEAN’s solidarity, cohesiveness and harmony by strengthening national and regional resilience through enhanced cooperation and mutual assistance to further promote Southeast Asia as a Zone of Peace, Freedom and Neutrality.

7.4. Encourage and facilitated the accession by ASEAN’s Dialogue Partners and other interested countries to the Treaty of Amity and Cooperation with a view to developing the TAC into a code of conduct governing relations between Southeast Asia States and those outside the region.

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search and rescue operations, efforts towards combatting piracy and armed robbery as well as collaboration in the campaign against illicit trafficking in drugs;

4. Commend all parties concerned to apply the principles contained in the Treaty of Amity and Cooperation in Southeast Asia as the basis for establishing a code of international conduct over the SCS”. Source: <http://www.aseansec.org/1196.htm>. (last visited 10 May 2005).

7.6. Encourage greater efforts towards the resolution of outstanding problems of boundaries delimitation between ASEAN member States.

7.8. Encourage Member Countries to cooperate in resolving border-related problems and other matters with security implications between ASEAN member countries.

7.12. Encourage ASEAN member countries parties to a dispute to engage in friendly negotiation and use the bilateral and regional process of peaceful settlement of dispute or the procedures provided for in the UN Charter.

7.13. Enhance efforts to settle disputes in the SCS through peaceful means among the parties concerned in accordance with universally recognized international law, including the 1982 UN Conventional on the Law of the Sea.

7.14. Continue efforts to promote confidence-building measures in the SCS between and among parties concerned.

7.15. Encourage all other parties concerned to subscribe to the ASEAN Declaration on the SCS.

7.16. Promote efforts to establish a regional code of conduct in the SCS among the parties directly concerned.”

Since 1999, ASEAN and China have conducted discussions at the Working Group and Senior Official Meeting levels to implement the decisions made during the sixth ASEAN Summit through the formation of a Code of Conduct. After four years of strained and complicated negotiations, due to diverged interest and political strategies, as well as the complex nature of the sovereignty disputes in the SCS, the elaboration

of an agreed-upon Code of Conduct seemed to be unreachable. In its place, the ASEAN countries and China reached a transitional solution by adopting the Declaration on the Conduct of Parties in the SCS, at the same time reaffirming their commitment to eventually elaborate a Code of Conduct in the SCS.

The main content of the DOC can be categorized into three major groups:

(i) Group of issues pertaining to international law:

- The parties reaffirm their commitment to the principles of the Charter of the United Nations, the LOS Convention, the Treaty of Amity and Cooperation in Southeast Asia, the five principles of Peaceful Coexistence, which are underlying principles governing State-to-State relations; and to resolve disputes in the SCS through peaceful means and without resorting to the use of force.

- Respect of the freedom of navigation in, and overflight above, the SCS in accordance with international law, and especially the LOS Convention.

- Undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability, including refraining from occupying islands, reefs, shoals or uninhabited features.

(ii) Group of issues pertaining to building trust and confidence measures:

- The parties reaffirm their efforts in the spirit of cooperation and understanding to seek ways to promote trust and confidence building measures, including holding dialogues among defense officials, providing humane treatment to refugees, and exchanging information on a voluntary basis;

- Readiness to intensify consultations and dialogues concerning relevant issues, through modalities to be agreed upon by parties concerned, including through regular consultations on the observance of the DOC.

(iii) Group of issues pertaining to cooperative activities:

- The parties view that, pending a long term and durable solution to the disputes in the SCS, parties concerned may explore or undertake cooperative activities in a number of less sensitive areas such as: environmental protection, marine scientific research, safety of navigation, search and rescue operations, and combating transnational crime. However, in order to deter parties concerned from taking advantage of the cooperative activities for their own interests which may be detrimental to the others', the DOC provides for modalities, scopes, and locations, with respect to bilateral and multilateral cooperation, which should be agreed-upon by the parties concerned prior to their actual implementation.

In addition to the above-mentioned provisions, the DOC one again reaffirms the determination of the parties concerned to further intensify their cooperation with a view to concluding a Code of Conduct in the SCS in the future.

*2. Tripartite Agreement for the Joint Marine Seismic Undertaking in the Agreement Area in the SCS between Vietnam, China and the Philippines*

On 14 March 2005, the National Oil Companies of Vietnam, China and the Philippines signed a landmark “Tripartite Agreement for the Joint Seismic Undertaking in the Agreement Area in the SCS”. According to the agreement, the three oil companies of Vietnam, the Philippines and China will undertake joint research for petroleum resources in an area of the SCS, as defined by specific geographic coordinates, and for a period of three years.<sup>195</sup> The "agreement area" covers about 143,000 square kilometers, including the disputed Spratlys.<sup>196</sup>

The signature of the 3-year Agreement was hailed as a success by the governments concerned: the Philippines president Gloria Macapagal-Arroyo described the agreement with the China National Offshore Oil Corp. (CNOOC) and Vietnam Oil and Gas Corp. (VOGC) as

a historic event because it is the breakthrough in implementing the provisions of the code of conduct in the SCS among ASEAN and China to turn the SCS into an area of cooperation rather than an area of conflict" [and] "it is not only a diplomatic breakthrough for peace and security in the region, but also a breakthrough for our energy independence program because one of the elements of this program, is to work on strategic alliances with our friends and allies so that we can have more supply of energy for the region and our country.<sup>197</sup>

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<sup>195</sup> Source: <http://www.thanhniennews.com/business/?catid=2&newsid=5556>

<sup>196</sup> Kyodo News, Monday, March 14, 2005.

<sup>197</sup> Ibid.

The Vietnamese ambassador to the Philippines, Dinh Tich, stated that the agreement would help turn the SCS "into an area of peace, stability and cooperation and development",<sup>198</sup> while the Chinese ambassador, Wu Hongbo, stated that the trilateral cooperation, based on mutual understanding and common interest, would set a good example for the countries concerned to resolve the SCS issue in a peaceful way.<sup>199</sup>

Five months after the conclusion of the Tripartite Agreement, on 26 August 2005, the commencement of seismic work in the SCS was conducted by China Oilfield Services Ltd. (COS), a subsidiary company of the China National Offshore Oil Corporation (CNOOC) - which won the two-dimensional seismic exploration project through bidding which was jointly organized by the three national oil companies. This event marks a new progress in the cooperation among China, the Philippines and Vietnam in the disputed SCS area.

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<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

## **Conclusion**

Settlement of international disputes by peaceful means, especially disputes involving territorial issues, is not only an obligation but an aspiration that States concerned must adhere to if they wish to create an international environment conducive to their very own stability and development. However, the peaceful settlement of international disputes depends in large on many factors, including sound political relations and good faith between States, and a willingness to adopt a spirit of conciliation and mutual compromises.

As an international legal order for the seas and oceans, the LOS Convention regulates all aspects of the uses of the seas and oceans, including the settlement of disputes may arising from the interpretation and application of the LOS Convention. Regarded as one of the most important development in settlement of international dispute since the adoption of the Charter of the United Nations, the settlement of disputes mechanism in the LOS Convention provides a legal framework for the States parties to solve their disputes relating the law of the sea. Although the LOS Convention does not directly address sovereignty disputes over islands, many aspects of this dispute, such as question of the entitlement of the islands, the delimitation of maritime boundary, etc, are governed by LOS Convention. The LOS Convention therefore can serve as the starting point for the States concerned and provide them with certain fundamental, and internationally accepted legal approaches, to guide them through the peaceful resolution of the SCS conflict. Pending final solutions to the delimitation of maritime boundaries for the islands, the States concerned are able to enter into provisional arrangements which should not prejudice their ability to reach these final agreements.

Fully aware of the important role of the LOS Convention to the Spratly islands dispute, in the past few years, States of the SCS region have been striving for a long-term and durable resolution to the Spratly islands dispute on the basis of the LOS Convention. These efforts have proved fruitful as the situation in the SCS region remains relatively stable in comparison with the high tensions which was predominated the region in the early 1990s. For the first time, China and ASEAN countries have reached a Declaration which seeks to normalize the conduct of Parties in dealing with the SCS issues. Once again, in the Declaration, the parties to the Declaration reaffirmed and committed themselves to the principles and content of the LOS Convention. Not only does this document lay down the framework for the pursuit of activities in the SCS, but it also gave a blue print for cooperation in oceans affairs among the States for the future. The tripartite agreement on the joint seismic survey in the SCS signed between three national oil and gas companies of Vietnam, China and the Philippines is a good example. The tripartite agreement has a positive impact on promoting joint maritime exploration, stabilizing the situation, and generally strengthening good relations and mutual trust between the countries concerned.

A long-term, durable and comprehensive solution for the Spratly islands dispute depends on many factors of which the question of the geographic nature and legal status of the Spratly islands States may be considered as those of the most important elements. Giving too little or too much weight for the Spratly islands seems to be difficult to be accepted or compromised by the parties.

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