Delimitation of Maritime Boundaries Between Neighbouring States

A Case of Fiji

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ABSTRACT

The delimitation of maritime boundaries is a crucial component of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as it provides the fundamental legal principles for the delimitation of maritime boundaries and set the rights and obligations for States over their maritime zones. This has served as useful guidance for coastal States who have been working on the delimitation of their maritime boundaries. However, issues concerning overlapping and disputes among States with adjacent or opposite coast continue to persist. Some disputes may include overlapping boundaries, while some disputes include historic claim, which has created some misunderstanding on how the rule of delimitation applies under international law, and the provisions set out under UNCLOS.

This paper will critically identify the issues surrounding the delimitation of the Republic of Fiji's maritime boundary with the Kingdom of Tonga over the Minerva reefs, which is located within Fiji's Exclusive Economic Zone (EEZ). Minerva reefs has been seen as a major stop over destination for most yachters and scuba divers who enjoy the uniqueness of travelling to such remote location to explore the pristine marine ecosystem and the existing submerged wrecks. The stakes are high because Minerva reefs are located within Fiji's EEZ but have been claimed by Tonga as their traditional fishing ground on the basis of historic title claim. In this regard, this paper considers: (1) the contradicting legal interpretations of the concept of a historic title claim under international law, (2) the geographical description of Minerva as low-tide elevation, rock or island, and (3) how the 1982 Law of the Sea Convention (LOSC) deals with such formations in terms of generating maritime zones.

It is in the framework of legal and technical analysis of delimitation that this paper aims to describe Fiji's position and discuss the problems involved in the delimitation and negotiation of jurisdiction over the Minerva reefs. The paper will also consider options for delimitation and dispute settlement through negotiation of maritime claims, and outline critical State practice and jurisprudence held before the International Court of Justice (ICJ) as a model of a possible way forward.

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LIST OF ACRONYMS

TS: territorial sea

EEZ: Exclusive Economic Zone

NM: nautical miles

CS: Continental Shelf

ECS: Extended Continental Shelf

UN: United Nations

UNCLOS: United Nations Convention on the Law of the Sea

LOSC: Law of the Sea Convention

CLCS: Commission on the Limits of the Continental Shelf

LTE: Low-tide elevation

MACC: Maritime Affairs Coordinating Committee

ICJ: International Court of Justice

ITLOS: International Tribunal on the Law of the Sea

Convention: Law of the Sea Convention

Commission: UN-Commission on the Limits of the Shelf

PCA: Permanent Court of Arbitration

SCS: South China Sea

SPC: Secretariat of the Pacific Community

NOC: National Oceanography Centre

DOALOS: Division for Ocean Affairs and the Law of the Sea

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Introduction

Maritime delimitation may be defined as the process of establishing lines separating the spatial ambit of coastal jurisdiction over maritime spaces where the legal title overlaps with that of another State.[1] The delimitation of maritime boundaries is a significant requirement for peaceful relations between States. Traditionally, States have been concerned about land boundaries; their interest in maritime boundaries came relatively late when, at the beginning of the 20th century, they discovered the economic potential of the sea in terms of living marine resources as well as hydrocarbons and deep sea minerals.[2]

The 1982 LOSC articulates the rights and responsibilities that coastal States have over their territorial sea out to 12 nautical mile (nm), as well as specific rights within contiguous zone out to 24nm and sovereign rights over the Exclusive Economic Zones (EEZ) out to 200nm and the extended continental shelf.[3] The delimitation principles set out in the LOSC provides the guidelines in defining these maritime zones for coastal States and establishes a comprehensive framework for addressing the issues associated with the uses of the ocean space. On 10 December 1982 the LOSC, commonly known as the Constitution for the Oceans was opened for signature, in which it made a historical landmark in the international legal arena which the Convention was signed by 119 countries on the day it was opened for signature.[4] Fiji is a party to the United Nations Convention on the Law of the Sea (UNCLOS) and was the first country to sign and ratify the treaty in 1982. The 1982 United Nations Conference on the Law of the Sea (UNCLOS) established the Exclusive Economic Zone (EEZ) regime which created a new fisheries regime for coastal States. The EEZ regime under Part V of the 1982 United Nations

[1] Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (North America, Portland, USA: Hart Publishing, 2006).

[2] López. J.A, Maritime Delimitation, University of Oxford, 2015.

[3] C. H. Schofield, 2010. The Delimitation of Maritime Boundaries of the Pacific Island States. Delimitation of Maritime Boundaries of the Pacific Island States', Research Online University of Wollongong, pp. 159, 2010.

[4] Remarks by Tommy T.B. Koh, "A Constitution for the Oceans", President of the Third United Nations Conference on the Law of the Sea.

Convention on the Law of the Sea (LOS Convention)[5] grants coastal States exclusive rights to fisheries resources as far as 200 nautical miles (nm) from their coastlines.

The International Court of Justice (ICJ) has dealt with disputes over small islands and other territory by examining evidence related to the issues of: (a) discovery, (b) effective occupation, (c) acquiescence, and (d) contiguity.[6] Sometimes a claim based on "effective occupation" and acquiescence will also be characterized as a claim of prescription or acquisitive prescription.[7] The Tribunal almost always emphasize recent effective displays of sovereignty as the most important factor, but historical evidence can also be important under special circumstances. Thus, the 1982 LOSC sets out the procedures for achieving maritime boundary delimitation by agreement. The LOSC establishes a special procedure of the general norm for the peaceful settlement of disputes and puts emphasis on a State obligation to negotiate in good faith with a view to concluding agreement. Fiji and Tonga have a conflicting interest in regards to the Minerva reefs; the misunderstanding of the jurisdictional rights over the reefs under the 1982 LOSC, the historic title claim by Tonga under international law, and the legal status of the features as a low-tide elevation, rock or island under the LOSC.

Therefore, this paper will analyze both States claim over the Minerva reefs and try to identify a possible way forward to peacefully settle their claim through proper bilateral negotiation. Various maritime boundaries for both countries have been agreed upon but this Minerva reefs case is contentious. There have been some contradicting issues regarding the legal interpretation of historic title under international law and the delimitation provisions under UNCLOS, therefore this paper will examine how this affect the process of delimitation. In accordance with Article 74 of the LOSC, "the delimitation of the exclusive economic zone with the opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article

[5] *United Nations Convention on the Law of the Sea*, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994) [LOS Convention]. As of 19 February 2013, the LOS Convention have 165 parties (including the European Union), with Timor Leste acceded to the Convention on 8 January 2013.

[6] Jon M. Van Dyke, 'Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary', *Ocean Development & International Law*, 38/1-2 (2007), 157-224.

[7] Ibid.

38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".[8] In addition, what are the accepted legal and scientific definition of an island, rock and a low tide elevation? In this regard, the paper will provide an overview of the intricate legal and technical analysis of low-tide elevation (LTE), rock and island under the LOSC and using relevant jurisprudence cases. The paper will further, discover the regimes of 'historic title' under international law by considering the principles of boundary delimitation used by the ICJ.

The study is divided into two main parts: The first part of the paper is entitled *"General Overview of the Legal Regimes for Maritime Zones"* this part will examine the legal framework of delimitation post 1945. It presents a road map of how the legal principle of maritime delimitation was prepared and describes the historical development of the LOSC in regards to delimitation. In this part, the paper will outline the regime of islands and rocks under article 121 of the Convention and the basis of historic title/claim under international law. It will further examine the role of historic fishing rights and how it affects maritime delimitation by providing relevant case studies. In Chapter 2 of the paper it will mainly focus on jurisprudence cases provided by the ICJ which deals with some of the methods of delimitation. The second Part entitled "*An Analysis of the Claims Made by Fiji and Tonga over the Minerva Reefs*" will analyze and identify the effects it will create to both States if the features are rocks or islands. Part 2 of the paper will further focus more on the technical issues associated with Fiji and Tonga's maritime boundary particularly the delimitation of Minerva reefs. It will seek options and provide scenarios for delimitation by creating a possible way forward.

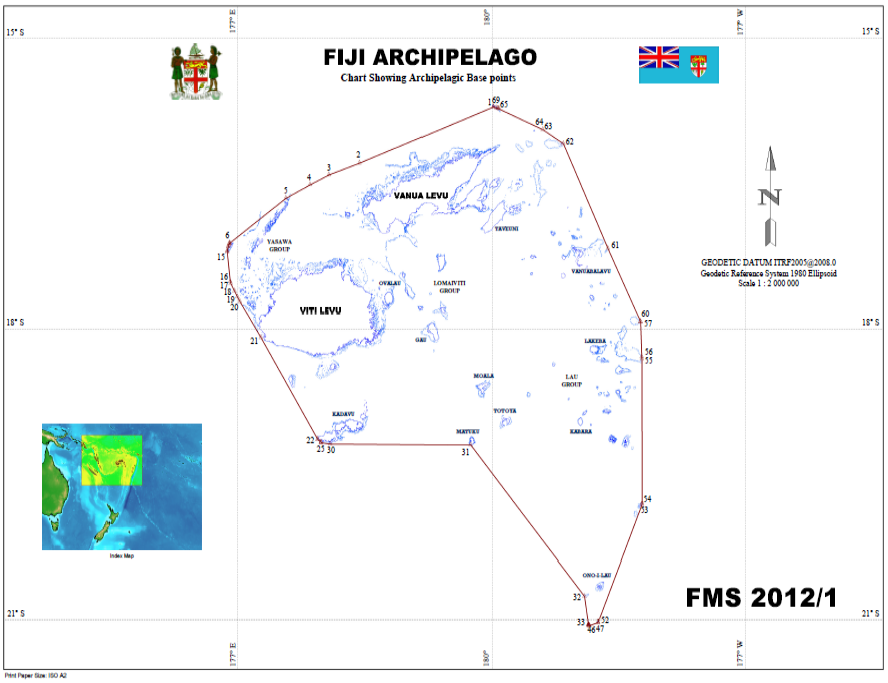
1.0 Background

The island communities of the South Pacific have a unique relationship to the sea because the land area of their islands is small compared to that of the surrounding ocean. They have developed economies and cultures highly dependent on the sea. The sovereign nation of Fiji has about 320 islands, which together contain approximately 18,272 square kilometers of land (see

[8] Article 74, 1982 LOS Convention, para. 1

Figure 1).[9] About 150 of these islands are inhabited. On December 15, 1977, Fiji passed a legislation called the Marine Spaces Act [Cap 158A] declaring itself an archipelago and claiming a 200nm EEZ.[10] Under the 1977 Marine Spaces Act, Fiji enclosed its main islands within archipelagic baselines (see Figure 1).

In 1874, the King and chiefs of Fiji transferred sovereignty over most of its territory of Fiji to Queen Victoria of Great Britain.[11] Fiji is surrounded by many small islands that is spread all over its waters, however, Fiji still qualifies in meeting the requirements of an "archipelagic State" under article 46(a) of the 1982 LOSC, which defines an archipelagic State as a State constituted wholly by one or more archipelagos and may include other islands. The archipelagic baselines, joining the outmost points of the country's islands to form Fiji Archipelago; seaward of those baselines is the territorial sea and high seas, landward of them are archipelagic waters and internal waters.



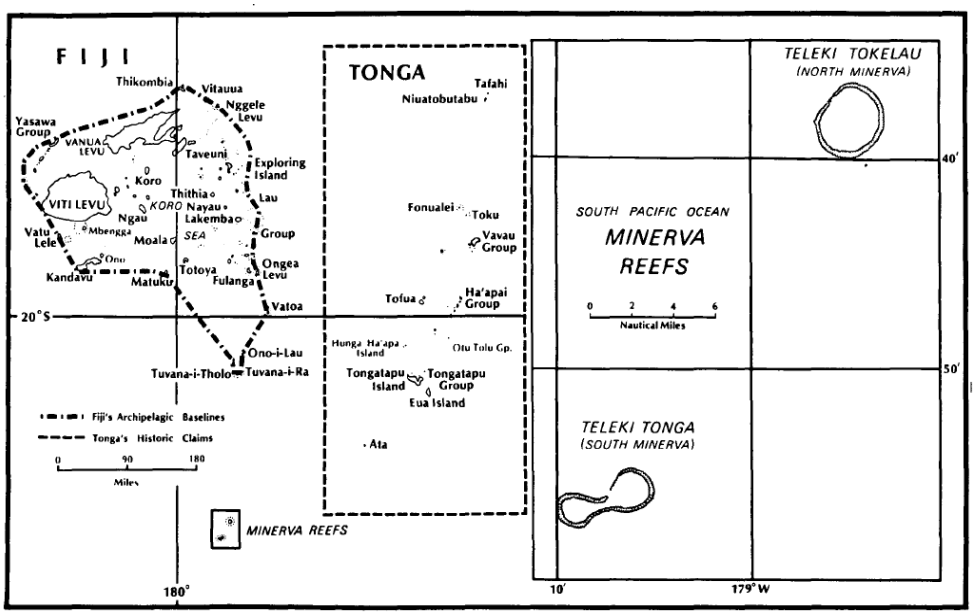
[9] PAC. ISLANDS Y.B., at 89, 97. On October 10, 1874, Fiji was ceded by its chiefs to Great Britain, and Fiji became a crown colony. On October 10, 1970, Fiji became independent. HANDBOOK OF FIJI 6 (J. Tudor ed. 1972).

[10] Fiji Marine Spaces Act of 1977, 2.-(1), 6.-(1).

[11] O'Connell, at 48. "[The Deed of Cession included the whole island of Rotuma, and over the inhabitants thereof, and of and over all ports, harbours, roadsteads, streams and waters, and all foreshores and all islets and reefs adjacent thereto." *Id.* Quoting 66 BRITISH AND FOREIGN STATE PAPERS 953.

Figure 1: Map showing the Archipelagic Baselines of Fiji. Source: Technical Team of the Fiji Maritime Affairs Coordinating Committee (MACC).

One of the major concerns for Fiji's maritime jurisdiction is the conflicting interest of sovereign rights over the Minerva reefs which is located within Fiji's EEZ but is claimed by Tonga based on historical involvement. The main issue at hand is based on three contradicting factors; 1.) the legal status of the Minerva reefs, whether it is a low-tide elevation, rock or an island, 2.) Whether these features qualifies to have maritime entitlement (Territorial Sea, EEZ or Continental Shelf), and, 3.) The contradicting issue of a historic claim under international law and the principles under the 1982 LOSC. These reefs consist of two submerged atolls which were named after the whale ship *Minerva* in 1829, that wrecked on what became known as South Minerva reef.[12] The people of Ono-i-Lau island in Fiji's Lau Group has claimed that the Minerva reefs were their 'qoliqoli' (traditional fishing ground) and have been using the reef since the survival of their elders. The reefs are part of the chain of islands called Lau in Fiji and by this, the ridge along the continental shelf is in fact called the Lau Ridge. The elders of Ono-i-Lau raised the matter of ownership of Minerva reefs in a Lau Provincial meeting and asked the Fiji government to protect it for them.[13]



[12] See online: http://www.stuff.co.nz/world/south-pacific/5008060/Fiji-Tonga-war-over-Minerva-Reef

[13] Available at: http://www.pireport.org/articles/2005/11/07/international-body-decide-fiji-tonga-dispute

Figure1.2: Shows Fiji's archipelagic baselines and Tonga's historical rectangle with Minerva reefs in the far south. Source: Broder, Sherry, et al. (1982), 'Ocean boundaries in the South Pacific', U. Haw. L. Rev.[14]

The issue over the Minerva reefs stems out about 25 years ago when Fiji opposes Tonga's claims by referring to the 1982 LOSC and affirms that the people of Ono-i-Lau Island regard Minerva reefs as their ancestral fishing ground and that it is within Fiji's Exclusive Economic Zone (EEZ). Tonga contested in return through the media that it has been in possession of Minerva reefs since 1972 under international law, during which Fiji made no objection towards ownership of the reefs. It is said that the current geographical coordinates obtained to generate Fiji's exclusive economic zone goes beyond the Minerva reefs which determine that the reefs are within Fiji's jurisdiction and therefore Fiji was exercising its rights in accordance with the LOSC. Tonga's 2014 partial submission on their extended the continental shelf (ECS) to the Commission on the Limits of the Continental Shelf (CLCS), was made in reference to a Royal Proclamation done by King of Tonga King George Tupou I in 1887 and quoted:

> *'The Royal Proclamation issued by His Majesty George Tupou, King of Tonga, on 24 August 1887 claims national jurisdiction by the Kingdom of Tonga over 'all, islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and a half degrees of south latitude and between the one hundred and seventy-third and the one hundred and seventy-seventh degrees of west longitude from the Meridian of Greenwich.'*[15]

[14] Map on Figure 1.3 shows that North Minerva reef was locally name by Tonga as Teleki Tokelau and South Minerva reef as Teleki Tonga.

[15] Tonga's Partial Submission to the Commission on the Limits on the Continental Shelf, 2014

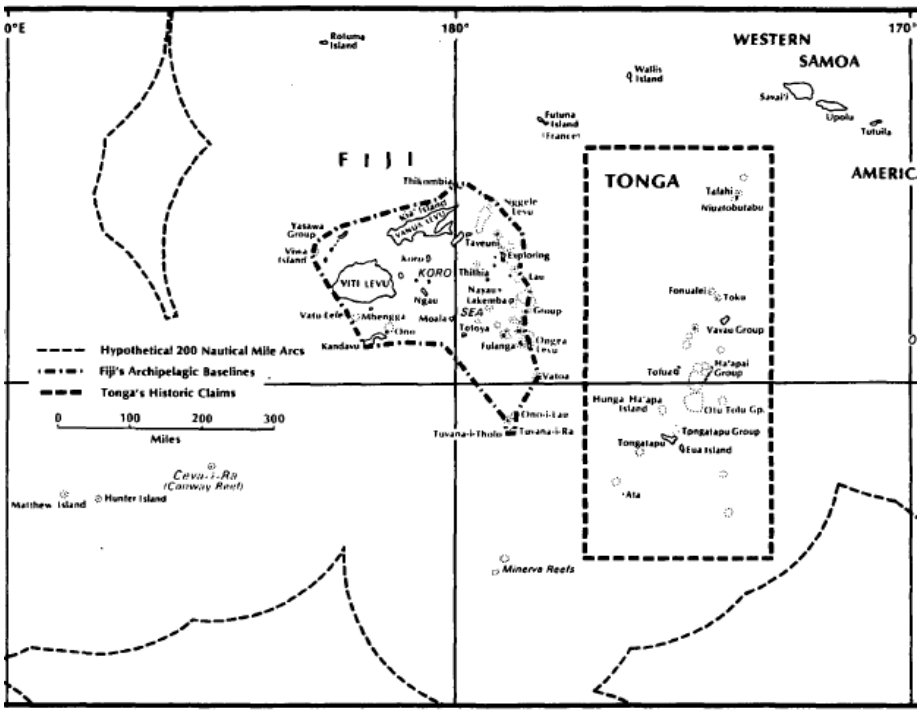


Figure 1.3: The Rectangle around Tongan Islands illustrates the 1887 historic title claim. Source: Broder, Sherry, et al. (1982), 'Ocean boundaries in the South Pacific', U. Haw. L. Rev., 4, 1.

The above royal claim by Tonga was drawn in a shape of a rectangle and was known as the historical rectangle which only claims the above territories that belong to the Kingdom of Tonga within that rectangle including the reefs, islands, and rocks. Thus, this royal claim does not include the Minerva reefs until after eighty-five years the great, great, grandson, of King George Tupou I, King Taufa'ahau Tupou IV made another royal proclamation in 1972 asserting that the Minerva reefs belongs to the Kingdom of Tonga. It is proven that Tonga has claimed the reefs under the consideration of its history but it is also important to note that all countries contain their own piece of history and this can be written or non-written stories. Later in 15 June 1972, a Royal Proclamation was again made and was published in the gazette of the Government of the Kingdom of Tonga asserting jurisdiction and control over the reefs:

His Majesty King Taufaahau Tupou IV in Council DOES HEREBY PROCLAIM:

WHEREAS the Reefs known as North Minerva Reef and South Minerva Reef have long served as

fishing grounds for the Tongan people and have long been regarded as belonging to the Kingdom of Tonga has now created on these Reefs islands known as Teleki Tokelau and Teleki Tonga; AND WHEREAS it is expedient that we should now confirm the rights of the Kingdom of Tonga to these islands; THEREFORE we do hereby AFFIRM and PROCLAIM that the islands, rocks, reefs, foreshores and waters lying within a radius of twelve miles [19.31 km] thereof are part of our Kingdom of Tonga[16].

Thus, in 1977, Mr. Joji Kotobalavu, then the Foreign Affairs Minister of Fiji, later realizes the existence of the historical claim by Tonga; need to be taken into account in negotiations.[17] Fiji's position appears to establish evidence of validation and, in conjunction with the longstanding absence of challenge to Tonga's boundaries, may be an influential indication of acceptance. It is said that Fiji's tolerance is especially significant for Tonga, because Fiji and Tonga are neighbors who most certainly will be involved in negotiations, and Fiji is one of the potential users of the Minerva reefs claimed by Tonga. In addition, the fact that no other nation has yet disputed Tonga's claim further strengthens Tonga's position. The 1958 Convention on the Territorial Sea and Contiguous Zone explicitly allows for modification in delimiting the territorial sea between two opposite or adjacent States where necessary to accommodate historic title claims.[18] The Draft Convention also adopts this historic title exception. However, neither the Geneva Convention nor the Draft Convention defines the criteria for determining the validity of a claim to historic title.[19]

During the Pacific Island Forum (PIF) meeting in 1972, Pacific island countries acknowledged Tonga's involvement over the Minerva reefs. In this Pacific Forum meeting, member countries were not fully aware of the exact geographical location of the Minerva reefs given the nature of claim by Tonga and whether it's an island or a rock. The question is "whether the Tongan's claim could be successfully pursued", in view of the fact that Minerva reefs was submerged at

[16] Executive summary, A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Kingdom of Tonga to the Commission on the Limits of the Continental Shelf in the Western Part of the Lau-Colville Ridge, pp.2, April 2014.

[17] Kotobalavu, *The South Pacific and the Law of the Sea,* in Regionalization on the Law of the Sea, 317 (D. Johnston ed. 1977).

[18] Convention on the Territorial Sea and Contiguous Zone 12(1).

[19] Broder, Sherry, et al. "Ocean boundaries in the South Pacific." *U. Haw. L. Rev.* 4 (1982), p. 1.

high tide; or whether alternatively it could be pursued if a man-made island were established. The question is that remains is "does a historic claim strongly considered before the Court or Tribunal for a disputed feature within an EEZ of another coastal State?" while referring to the principles of the 1982 LOSC as the main legally binding instrument that provide the rights and obligations of coastal States over their maritime zones.

When scrutinizing the nature of claims done by Tonga in its 2014 submission to the Commission on the Limits of the Continental Shelf (CLCS), it has been discovered that Tonga has drawn 200nm from the Minerva reefs to claim their extended continental shelf. In its submission, the claim based on Article 15 of the LOSC and subsequently considers the reef as islands known as Teleki Tonga and Teleki Tokelau. Further, Tonga claims and stated in their submission that the Minerva reefs has always served to be their traditional fishing ground and claimed the reefs on the basis of historic title. Tonga's claim over the Minerva Reefs seems to presents additional delimitation problems to its neighbours in particular Fiji. In this regards, Fiji has stated that Minerva is not an island but a low tide elevation (LTE), referring to the features as tiny coral rings that are submerged at high tide, yet, Tonga declares and claims Minerva as an island.

Part One: General Overview of the Legal Regime of Maritime Delimitation

Chapter 1: The Development of the Law of Maritime Delimitation

1.1 History of Delimitation under the Law of the Sea Convention

The development of the international regime relating to the oceans has been the tension between the pressure from coastal States towards advancing national claims over the maritime spaces off their coasts and the concept of the freedom of the seas, and in particular freedom of navigation, for all States. These competing views are often associated with the classic works of Hugo Grotius who published *Mare Liberum* (Freedom of the Seas)[20] in 1609, and John Selden‟s

[20] Hugo Grotius, The Freedom of Seas or The Right Which Belongs to the Dutch to Take Part In the East Indian Trade (The Lawbook Exchange 2001) (translated with a revision of the Latin text of 1633 by R. Van Deman Magoffin, Division of

opposing view, *Mare Clausum* (Closed Seas), published in 1635.[21] On one hand Grotius argued that "no ocean can be the property of a nation because it is impossible for any nation to take it into possession by occupation and that for a State to attempt to do so would be contrary to the laws of nature. Selden, in contrast, provided an early articulation of the concept of State sovereignty over the oceans.[22]

For a long period, the demand for freedom of the seas in the interests of ensuring global trade prevailed, with the broad consensus being that coastal State rights should be restricted to a narrow coastal belt of territorial waters whose maximum breadth was not specifically defined through international agreement but was generally thought not to extend more than three nautical miles (nm) offshore in accordance with the so-called "cannon shot rule."[23] While efforts were made towards the codification of the international law of the sea, for example the Hague Conference on the Codification of International Law of 1930, little progress had been achieved by the mid-Twentieth Century.

The Hague Conference for the Codification of International Law, which convened in 1930, was requested by the League of Nations to deal with the concept of maritime delimitation. A team of experts was formed, and within this group, there emerged two contrasting opinions regarding the concept of maritime delimitation.[24] The first idea on delimitation was the equitable solution, which excluded the use of any obligatory method. The other notion preferred the use of an obligatory method using the median or equidistance line, [25] as a general rule between coastal

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International Law, Carnegie Endowment for International Peace). *available from* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Fperson=3775&Itemid=28.

[21] First published in Latin as John Selden, "Mare Clausum Seu De Domino Maris," republished as "Of the Dominion, Or Ownership of the Sea" translated into English and set forth with some [sic] additional evidences and discourses by Marchmont Nedham (London: William Du-Gard, by appointment of the Council of State, 1652) (reprinted Lawbook Exchange 2004).

[22] Robin Churchill and Vaughan Lowe, The Law of the Sea 4 (Manchester University Press, 3rd ed. 1999).

[23] The "cannon shot rule" purportedly equated to the distance a cannon could throw a ball, as proposed by the Dutch in negotiations with the English as early as 1610. See Clyde Sanger, Ordering the Oceans: The Making of the Law of the Sea 12 (1986).

[24] Tanaka 2006, pp. 34–35.

[25] A median line or equidistant line is that line every point of which is mathematically equidistant from the coastlines of each state. A strict median line would take into account all coastal extremities in calculating the line, while a normal median line

States with opposite and adjacent coast, allowing for significant modifications in order to achieve an equitable result.[26] The outcome of the equity approach gives the court or tribunal a large margin of options, allowing it to decide on a case-by-case basis without being sure by any specific method.[27]

After World War II in September 1945, the United Nations was formed on October 24 of the same year. During this era, the leaders of the United Nations requested the International Law Commission to consider the codification of existing customary international law relating to the oceans.[28] The International Law Commission began its work in 1949 to 1956 and prepared four separate draft conventions which adopted the first UN Conference on the Law of the Sea (UNCLOS I) in 1958.[29] The Geneva Convention of 1958 led to the development of a territorial sea and contiguous zone, the high seas, continental shelf, fisheries, and the conservation of living resources of the high seas. These agreements, often referred to as the UNCLOS I treaties, and are described as follows: the Convention on the Territorial Sea (TS) and Contiguous Zone (CZ),[30] the Convention on the Continental Shelf (CS),[31] the Convention on the High Seas,[32] and the Convention on Fishing and Conservation of Living Resources of the High Seas.[33]UNCLOS II was unsuccessful in reaching an agreement on, among other things, the breadth of the territorial sea, and did not adopt an instrument. On 10 December 1982, the Third United Nations Convention on the Law of the Sea (UNCLOS III) was opened for signature that made record in

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would only take into account coastal base points permitted under international law.

[26] Tanaka 2006, p. 7.

[27] Pal Jakob Aasen, pp.8, para 2.3, 2010

[28] Peter J. Cook and Chris Carleton, Continental Shelf Limits: The Scientific and Legal Interface, pp. 8

[29] PåL Jakob Aasen, 'The Law of Maritime Delimitation and the Russian–Norwegian Maritime Boundary Dispute', (Lysaker, Norway: Fridtjof Nansen Institute, 2010b), 4-13.

[30] Entered into force 10 Sept 1964, UNTS Vol. 516, No. 7477.

[31] Entered into force 10 June 1964, UNTS Vol. 499, No. 7302.

[32] Entered into force 20 March 1966, UNTS Vol. 559, No. 8164.

[33] Entered into force 20 March 1966, UNTS Vol. 559, No. 8164.

legal history, that in the chronicles of international law had a Convention been signed by 119 countries on the very first day on which it was opened for signature.[34]

Figure 1.4: Above image shows the signing of the Final Act of the United Nations Convention on the Law of the Sea in Montego Bay, Jamaica on 10 December 1982. Source: http://www.un.org/depts/los/convention_agreements/

The 1982 United Nations Convention on the Law of the Sea (UNCLOS III) was recognized as a universal legal binding document of the seas that sets out the provisions for all maritime zones. The Convention came into force in 1994 and contains the legal provisions governing maritime zones such as the territorial sea, contiguous zone, exclusive economic zone, and the continental shelf, which shall be established by coastal States. In these maritime zones, the exclusive economic zone and the area beyond national jurisdiction were new legal concepts in the international law of the sea; the others were known from earlier treaties and customary law.[35] The delimitation of maritime boundaries, although not a new phenomenon, has certainly become an important element of the practice of States in the modern law of the sea.[36] Hypothetically, the

[34] Adapted from statements by President Koh on 6 and 11 December 1982 at the final session of the Conference at Montego Bay. Reprinted by permission of the United Nations from *The Law of the Sea: United Nations Convention on the Law of the Sea.* Copyright, United Nations 1983, Publication Sales No. E.83. V.5.

[35] Aasen, Pål Jakob (2010), 'The Law of Maritime Delimitation and the Russian NorwegianMaritime Boundary Dispute', (Lysaker, Norway: Fridtjof Nansen Institute), p 8.

[36] United Nations Doalos, *Handbook on the Delimitation of Maritime Boundaries* (Handbook; New York, NY, USA: United Nations, 2000).

development of maritime zones in accordance with international law, as reflected in the 1982 LOSC, may create overlapping claims requiring maritime boundary delimitation.[37]

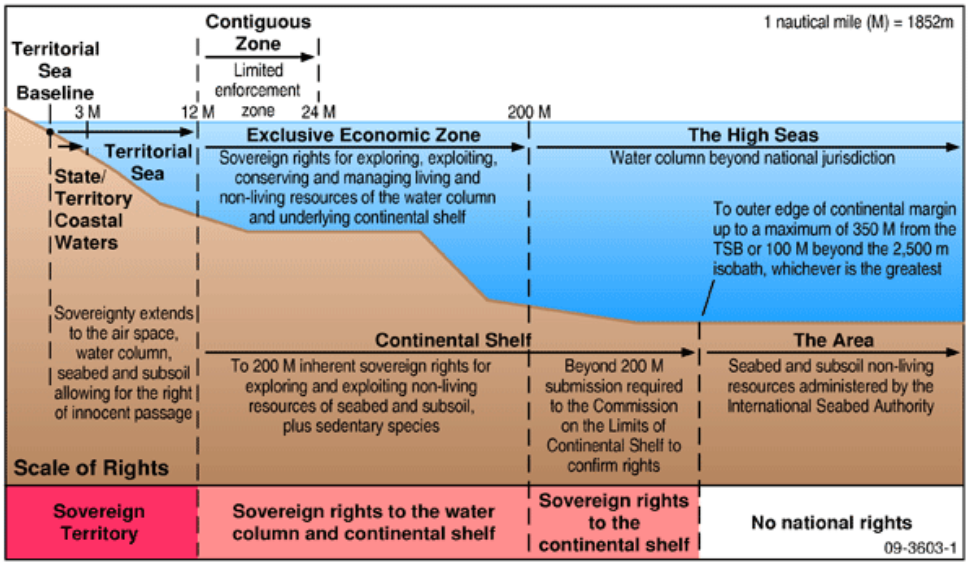

Figure 1.5: Image showing different maritime zones and rights under the 1982 UNCLOS. Source: Geoscience Australia (Available from http://www.ga.gov.au/webtemp/image)

According to Article 3 of the 1982 LOSC, the breadth of the territorial sea is measured from the baselines up to 12nm[38] in which coastal States have sovereignty over its territorial waters, seabed, subsoil with certain restrictions and rights of other States in terms of shipping in the innocent passage.[39] The maximum permissible breadth of the contiguous zone[40] under LOSC is 24nm measured from the baselines from which the breadth of the territorial sea is measured.[41] Under article 57 of the 1982 LOSC States can claim EEZ that shall not extend beyond 200nm measured from the baselines from which the breadth of the territorial sea is measured.[42]

[37] *Ibid*

[38] LOS Convention, article 3

[39] LOS Convention, article 2

[40] The contiguous zone is an area seaward of the territorial sea in which the coastal State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea.

[41] LOS Convention, article 33(2)

[42] *Ibid. P. 57*

1.2 **Territorial Sea**

This section of the paper will focus on the delimitation principles of the territorial sea in accordance with the LOSC. The idea of formulating a regime for the territorial sea was discussed in the Geneva Convention where States try to put up provisions to govern the territorial waters of a coastal State. The Convention on the Territorial Sea and Contiguous Zone of 1958 is an international treaty ratified by 52 States, which entered into force on 10 September 1964. In this Convention, the provision for the delimitation of the territorial sea of adjacent or opposite coast was introduced in Article 12.[43] The same principle was reflected in the 1982 LOSC under Article 15 for the delimitation of the territorial sea. The breadth of the territorial sea was agreed in the LOSC under Article 3 in accordance with Article 5 and Article 7 on baselines. In contrast to the first and second Law of the Sea Conferences, which could not reach an agreement on the maximum breadth of the territorial sea, UNCLOS III rather found a solution.[44] In order to generate a territorial sea of a coastal State, it was then decided during the 1982 LOSC that States has the right to establish the breadth of the territorial sea up to a limit not exceeding 12nm.

The normal baseline for calculating the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.[45] The low-water line is the standard position of measuring the baselines of the territorial sea. Straight baselines may apply in exceptional circumstances, in a particular geographic situation provided for in the LOSC under Article 7. As a narrow exemption to normal baseline rules, the LOS Convention permits the establishment of straight baselines in two limited geographic circumstances, that is, (a) in localities where the coastline is deeply indented and cut into, or (b) if there is a fringe of islands.[46]

[43] Convention on the Territorial Sea and the Contiguous Zone, 1958, article 12

[44] Peter J Cook and Chris M Carleton, *Continental Shelf Limits: The Scientific and Legal Interface: The Scientific and Legal Interface* (Oxford University Press, USA, 2000).p.9

[45] LOS Convention, article 5

[46] J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (Brill, 2012).

According to Article 15 of the LOSC, it articulates that:

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 the contrary, to extends 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 two States is measured. The provisions of this paragraph shall 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.*

This article provides that failure to make an agreement on the territorial sea delimitation between States of the opposite or adjacent coasts the use of equidistance method, in this case, may apply. The same delimitation principle can also be found in Article 6 of the Convention on the Continental Shelf on the delimitation of opposite coasts:

> *Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.*[47]

Apart from using the words of 'median line' for opposite coast and the 'principle of equidistance' for adjacent coasts, paragraphs 1 and 2 contain exactly the same rules – the three rule of agreement–equidistance–special circumstances.[48] The term median line and equidistance line has the same meaning when applied to the technical methods of delimitation.

The term of historic title in the delimitation rule is applicable only to the territorial sea under Article 15, which need to be examined further because some State practice involves historic title

[47] See Convention on the Continental Shelf, 1958, article 6

[48] Aasen, 'The Law of Maritime Delimitation and the Russian–Norwegian Maritime Boundary Dispute'.

within the EEZ of another coastal State. In this case, it serves to underscore that State parties are not in a position to act in a direct unilateral delimitation process if there is an existing dispute with neighbouring countries. It should be arranged through proper bilateral negotiations between States thus, failure to make an agreement on delimitation would result in state parties resorting to the dispute settlement mechanisms under the LOSC.

In the case for historic title claim, it signifies that no other State can potentially be entitled to exercise powers over the area to which the title is referred.[49] On the other hand, historic rights have a non-exclusive nature and are reconcilable with a maritime title vested in another State.[50] The concept of historical title "can apply to waters other than bays, i.e., to straits, archipelagos, and generally to all those waters which can be included in the territorial sovereignty of a State within its territorial sea.[51] More to this historic title will be discussed later in this chapter to align the role and nature of historic claim under international law given the contradicting issues of its application to maritime delimitation with States of the adjacent or opposite coast.

1.3 **Interpretation of Article 74 under the 1982 LOSC**

The provisions for the EEZ was introduced in the 1982 LOSC which States agreed that the breadth of the EEZ shall not extend beyond 200 nautical miles from the baselines from which the territorial sea is measured.[52] For archipelagic States like Fiji, the breadth of the EEZ shall be measured from the archipelagic baselines drawn in accordance with article 47. The norms of the delimitation of the EEZ between neighbouring States are contained in article 74 of the Convention that ascertain "the delimitation between States with opposite or adjacent coasts shall be effected by agreement as referred to in Article 38 of the Statute of the International Court of

[49] Nugzar Dundua, *Delimitation of Maritime Boundaries between Adjacent States* (United Nations, Division for Oceans Affairs and the Law of the Sea, 2007).

[50] Nuno Marques Antunes. *Towards the conceptualization of maritime delimitation. Legal and technical aspects of a political process.* 2003. P. 36.

[51] *Juridicial Regime of Historic Waters, Including Historic Bays*. ILC Yearbook, 1962 (I). P. 6.

[52] LOSC, article 57

Justice, in order to achieve an equitable solution".[53] Thus, Article 38 of that Statute does not provide much assistance; it enjoins the Court to reach decisions by applying international conventions expressly recognized by the contesting states, by international custom, by general principles of law recognized by civilized nations, and by judicial decisions.[54] The applicable article for the delimitation of the controversial Minerva reefs is article 74 of the LOSC, which states that:

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to ***jeopardize*** *or* ***hamper*** *the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.*
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement. (Source: 1982 LOSC, Article 74)

According to Article 74, it provides a reference point to a method for delimitation through the process of an agreement between States concerned through peaceful means. This mechanism was considered insignificant for some States as they lack any form of guidance, leaving it to the court or tribunal to decide what method to employ.[55] Therefore, when using the term 'agreement' with the terms 'in order to achieve an equitable solution' indicates that it may challenge the general principles of international law. It is a general principle that States are free to conclude any

[53] LOSC, Article 74(1)

[54] Jorge Moreno León, 'The Chile - Peru Maritime Boundary Controversy: Prospects for a Solution', International Relations (King's College London, 2004)..

[55] Tanaka 2006, p. 39

agreement as long as it is not in violation of *jus cogens.*[56] Consequently, assuming that Articles 74 and Article 83 do not qualify as the principles, which form the norms of international law that cannot be set aside, States may conclude valid international agreements for delimiting their maritime boundaries even if such agreement are considered prejudiced.[57] Under international law of maritime delimitation, both conventional and customary, base the rights of a coastal State on their maritime spaces on the principle that "the land govern the sea", which establishes that the State's sovereignty and jurisdiction over the sea adjacent to its coast is a result of the exercise of the State's sovereignty over its territory.[58] This means that any State with a sea territory, just for that fact, can expand its sovereign rights over such maritime spaces up to a distance of 200 nautical miles.

Cooperation amongst States is fundamental for maritime delimitation in cases, which involve overlapping or disputed boundaries. Fiji and Tonga, in this case, need to understand both their positions and study the nature of their claims over the Minerva reefs in order to cooperate and exchange views before concluding on a mutual agreement. Article 74 (1) provides that delimitation is a process to be effected through agreement by two or more States if their legal titles compete and where each State obtains to exercise spatial jurisdiction over the same maritime area. For instance, in the Gulf of Maine case, the ICJ stated that:

> *No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.*[59]

Maritime delimitation is an international operation in the sense that it cannot be affected

[56] Jeffrey L Dunoff, Steven R Ratner, and David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented, Approach* (59,: Aspen Pub,, 2006)..

[57] Pål Jakob Aasen, 'The Law of Maritime Delimitation and the Russian–Norwegian Maritime Boundary Dispute', (Lysaker, Norway: Fridtjof Nansen Institute, 2010a).

[58] Manuel Rodríguez Cuadros, 'Maritime Delimitation with Equity: The Case of Peru Vs. Chile', (2011).

[59] Icj, *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement,* (I.C.J. Reports, 1984, Para. 87, 1984) 246.

unilaterally, but must result from a process between two or more States.[60] With reference to article 74(1) if a coastal State maritime zone are not in contact or overlaps with those of another coastal State boundary then the delimitation may be done unilaterally in accordance with the provisions of the Convention. Referring to Tonga's 2014 submission to the Commission, it has been noted that Tonga did not exercise proper bilateral negotiation with Fiji in which they claim sovereignty over the Minerva reefs despite that the reefs are within Fiji's EEZ. Under articles 74 and 83, the delimitation of the exclusive economic zone or the continental shelf shall be effected by agreement under international law. As a focal point, delimitation through 'agreement' is the fundamental rule that should be practiced by coastal States to provide the initial solutions to some maritime boundary disputes. In the Gulf of Maine case the International Court of Justice stated that:

> *"…any delimitation must be effected by agreement between the two States concerned, either by conclusion of a direct agreement or, if need be, by some alternative method, which must, however, be based on consent"*[61]

It is the fundamental rule of delimitation through an agreement that the parties are free to adopt whatever delimitation line they wish, whether that line is based on political, economic, geographic or any other kind of consideration.[62] Given today's complexity of delimitation talks over Minerva reefs between Fiji and Tonga, it has been encouraged by the international community that maritime delimitation by agreement is the foundation of political operation in the initial stages of delimitation processes. This process has been practiced previously by Fiji and Tonga in the delimitation of their EEZ between France-Fiji (1983) and France-Tonga (1980). Furthermore, in October 2014 marked a remarkable milestone event for the government of Fiji and Tuvalu as a maritime boundary agreement was signed by the Prime Minister of Fiji, Honourable Voreqe Bainimarama and the Prime Minister of Tuvalu, Honourable Enele Sopoaga. Fiji and Tuvalu's exclusive economic zone overlap each other, therefore, after so many years of negotiation and dialogue with both countries concluded a mutual agreement for their maritime

[60] Aasen, 2010,p. 23

[61] Gulf of Maine Area, Judgement, ICJ Reports, p. 292, para. 89

[62] Doalos, *Handbook on the Delimitation of Maritime Boundaries*., p. 17, para. 93

boundaries.

Two months after Fiji signed the maritime boundary treaty with Tuvalu, on 17 October 2014 the two neighboring Pacific Island countries met again in London with the France delegation on 9 December and agreed on a common tripoint shared between the three countries. Aside from agreeing on this common tripoint, Fiji and Tuvalu also finalized pending amendments to maritime boundary coordinates. In September 2015 Fiji, Tuvalu, and France (Wallis & Futuna) met in Suva, Fiji and signed a historic tripartite agreement that defines the maritime boundaries of the three countries. After years of negotiations between the three countries, they have managed to conclude in an agreement for their maritime boundaries in accordance with the relevant provisions of the LOSC. The Secretariat of the Pacific Community (SPC) through the Maritime Boundary Unit of the Geoscience Division has played a vital role in providing technical advice to Pacific island countries on boundary delimitation and has greatly involved in the negotiation of overlapping boundaries in the Pacific region.

In the case of Fiji-Tuvalu, the line of delimitation used in this agreement (Fiji-Tuvalu) is based on the 'equidistance principle'. The delimitation line between the EEZ and continental shelf of Fiji and Tuvalu lies seaward of Rotuma islands in Fiji on one hand and Niulakita, Nukulaelae, Funafuti, Nukufetau, Niu in Tuvalu Islands on the other hand by connecting the points defined by geographical coordinates stated under the agreement.[63] The primary principle and method used in the Fiji-Tuvalu agreement were made in accordance with articles 74 and 83 of the LOSC. The International Court of Justice (ICJ) has referred to the method outlined in Articles 74 and 83 as the equitable principles/relevant circumstances method.[64] Also, they have stated that this method is very similar to the "equidistance/special circumstances" rule which is stated in Article 15 of the Convention in the delimitation of the territorial sea.[65] Given the fact that Fiji has concluded in the recent agreement with Tuvalu, Fiji is yet to effectively meet with the Tonga to draw the initial negotiation stages of Minerva reefs claim.

[63] Agreement between Fiji and Tuvalu concerning their maritime boundaries, article 1, 2014

[64] See example, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening), [2002] *I.C.J. Reports* 303, at para. 288.

[65] *Ibid.*

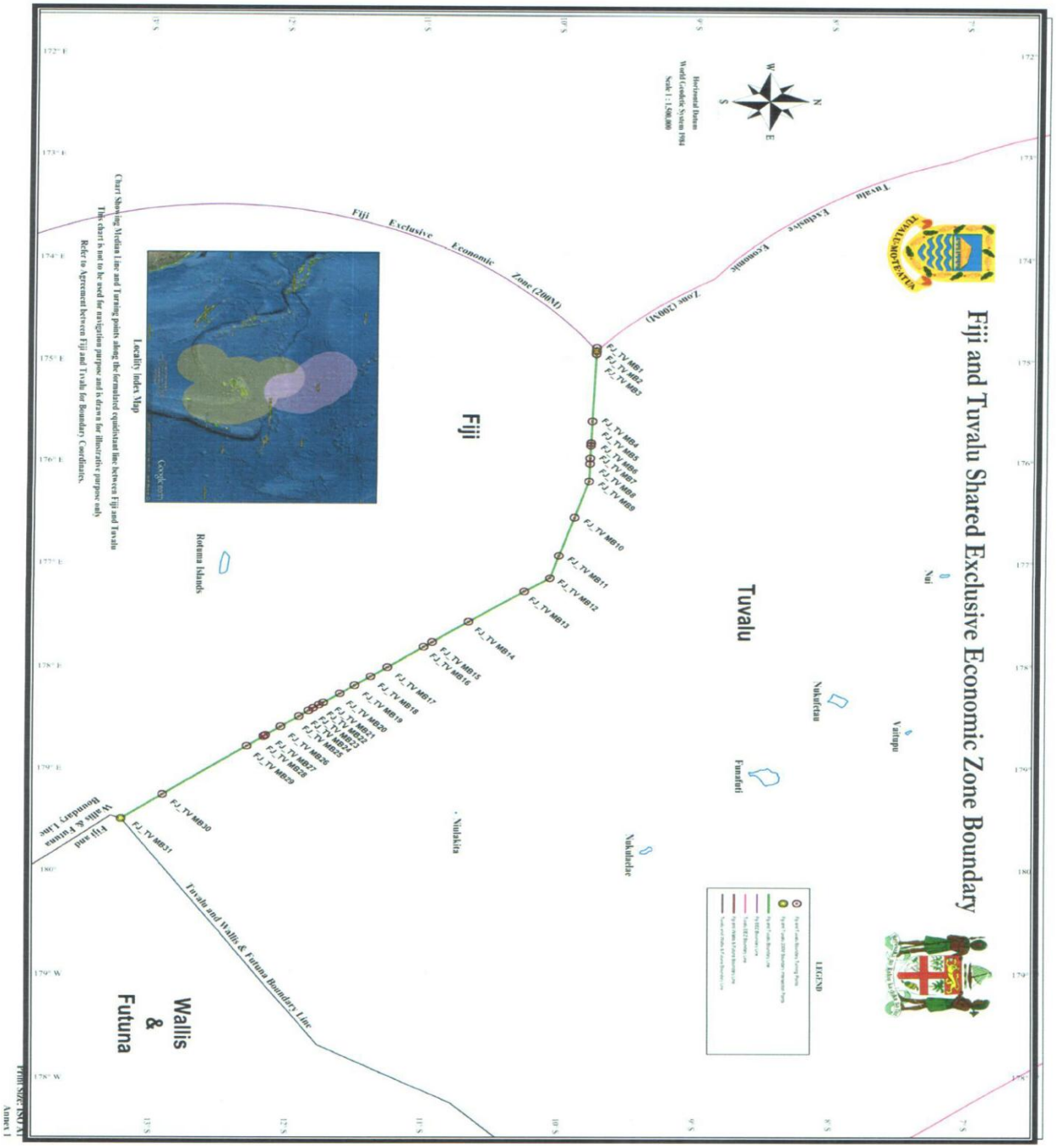

Figure 1.6: Map showing the "Agreed Maritime Boundary line between Fiji and Tuvalu," 2015. Source: Fiji-Tuvalu Maritime Boundary Agreement, 2015.

Moreover, it is noted that the negotiation of Minerva reefs has been left unattended given its stake and nature of claims by both Fiji and Tonga. The strategies used by Fiji-Tuvalu under article 74 of the convention can be utilized to initiate bilateral negotiations between Fiji and Tonga in order to achieve an equitable solution. While referring to article 74 (3) which states that "...States concerned in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to *jeopardize* or *hamper* the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[66] At this point of time Fiji and Tonga have not anticipated into an agreement, in conformity with the relevant rules of international law, for a specific treaty of maritime delimitation over the Minerva reefs.

The Fiji government maintain its position basically that, Fiji has the rights under the 1982 LOSC to access the Minerva reefs and to explore, exploit, conserve and manage the resources within its EEZ. Fiji further sustains its position that in exercising its rights under article 56, neighboring coastal States before finalizing its boundaries that are affected by Fiji's EEZ need to arrange prior negotiations before their submissions to the United the Nations to avoid future disputes. As a matter of theory, the Tribunal considers that the Convention is clear in according to sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State alone. In the case of the South China Sea between the Philippines and China the notion of *sovereign* rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources, in particular, if such historic rights are considered exclusive, as China claim to historic rights appears to be contradicting with the rights outlined under the LOSC.[67]

[66] LOSC, article 74, para 3.

[67] South China Sea PCA Award, *Philippines v. China*, 2016, p.102, para. 243.

1.4 **Historic Title in Maritime Delimitation**

Historic title claim has been practiced by some coastal States way before the LOSC was being negotiated and passed under international law. The concept originated in State practice at the end of 19th century in order to exercise sovereignty over coastal States territorial waters including certain historic bays and internal waters, despite the on-going attempt to develop restrictive general rules on the determination of the baseline of the territorial sea.[68] The term 'title' is used in the international legal literature to denote the source of a particular right, but it can also designate the evidence which may establish the existence of such a right.[69]

A historic claim to territory is based on historical priority (first possession) or duration (length of possession).[70] Although effective control (possession) presents the strongest claim under property law, historical claims create an underlying entitlement to the territory, regardless of whether a State has actual or constructive possession of the land at the time of the claim.[71] A claim of historic right is supported by the course of time; when the encroached State does not act to counter the claimant's right, it is deemed to have accepted in that right and is prevented from rejecting the title for lack of consent.[72] Claims based on historical precedence are most closely related to claims based on the historic title under international law because, such titles are generally derived from first-in-time claims to a particular area, and therefore, this process is done unilaterally.

The term 'historic title' is similarly used to denote both the source and the evidence of a right over land or maritime territory acquired by a State through a process of historical consolidation

[68] Andrea Gioia, 'Historic Titles,' *Max Planck Encyclopedia of Public International Law, ,* (2013), p. 1-11.

[69] *Ibid*

[70] Burghardt, A.F., 1973. The Bases of Territorial Claims. *Geographical Review*, pp.225-245.

[71] Ibid

[72] See BLUM, at 55, 90–91 ("[I]n certain situations one party's failure to act or his acquiesence 'will prejudice his rights against another who has been misled by that party's inaction or silence.'" (quoting O.W. Bowett, Estoppel Before International Tribunals and Its Relation to Acquiescence, 33 BRIT. Y.B. INT'L L. 198 (1957))). In this respect, claims based on history and effective control can overlap.

(*Territory, Acquisition*).[73] In concluding the First Conference, a resolution was adopted on the initiative of India and Panama, requesting the General Assembly to "make appropriate arrangements for the study of the juridical regime of historic waters including historic bays, and for the result of these studies to be sent to all Member States of the United Nations."[74] In 1962, following the Second UN Conference on the Law of the Sea, the UN Secretariat produced a memorandum on historic waters, which considered the term as equivalent to historic title. As with historic bays, the UN Secretariat noted that such historic waters "would be internal waters or territorial sea according to whether the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or sovereignty as over the territorial sea."[75]

The first reference to historic title in the treaties earlier to the Convention appears in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 12 which dealt with the delimitation of territorial sea, but provides that "the provisions of this paragraph shall 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 with this provision."[76] This provision was introduced by Norway, reflecting its experience before the International Court of Justice. In the case of maritime boundaries dispute prior to the LOS Convention historic fishing rights played a significant role in the 1951 *Anglo- Norwegian Fisheries.* It is noted that Norway sought to rely on 'historic title clearly referable to the waters of Lopphavet, namely the exclusive privilege to fish and hunt whales granted at the end of the 17th century.[77] The ICJ acknowledged that traditional fishing rights of Norway in Lopphavet basin, based on very

[73] *Ibid, para. 1*

[74] India and Panama, "Revised Draft Resolution," UN Doc. A/CONF.13/C.l/L.158/Rev.l (17 April 1958), *Official Records of the United Nations Conference on the Law of the Sea, Volume III (First Committee)*; "Summary Records of the 20th Plenary Meeting," UN Doc. A/CONF.13/38 at p. 68 (27 April 1958), *Official Records of the United Nations Conference on the Law of the Sea, Volume II (Plenary Meetings)*.

[75] United Nations, *Juridical Regime of Historic Waters, Including Historic Bays*, UN Doc. A/CN.4/143, para. 167 (9 March 1962).

[76] Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 UNTS 205 (hereinafter "1958 Convention on the Territorial Sea and the Contiguous Zone").

[77] *Anglo-Norwegian Fisheries* case, *supra* note 6, at 142.

ancient and peaceful usage, should be taken into account in drawing the delimitation line.[78]This consideration of historic rights was used by the ICJ to support the use of straight baselines in closing the Lopphavet basin, which extended over 44nm across.[79]

The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, lacking particular historical circumstances.[80] Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty.[81] 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas.[82] 'Historic waters' is simply a term for the historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "general international law does not provide for a single regime for historic waters or historic bays, but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'."[83] In addition, a 'historic bay' as described under the Convention is simply a bay in which a State claims historic waters which are regarded as internal waters.

In the case between the Philippines and China in the South China Sea, the Philippines challenge, "the concept of 'historic title' as used in Article 298 has a precise and limited meaning: it applies only to near-shore areas of sea that are vulnerable to a claim of sovereignty as such."[84] In this regard article 15 of the Convention which stated about historic title applies only to maritime areas within coastal States territorial waters and not the exclusive economic zone or beyond

[78] *Ibid,* p. 142

[79] Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation', *Securing the Ocean for the Next Generation, Proceedings from the 2012 LOSI-KIOST Conference* (UC Berkeley School of Law Berkeley, CA, USA, 2012), 327-54.

[80] Pca, *The South China Sea Arbitration Award, Philipines V. China,* (Pca Report, 2016, PCA Case Nº 2013-19: Permanent Court of Arbitration, 2016) 1..p. 96, para. 225.

[81] *Ibid*

[82] *Ibid, para 225.*

[83] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982*, p. 18 at pp. 73-74, para. 100.

[84] South China Sea PCA Award, *Philippines v. China*, 2016, p.79

200nm. Taking into account the above case, even, if Tonga's claim were to a historic title in the Minerva reefs, however, it is said that articles 15 would, however, be inappropriate because the article applies only to the *delimitation* of the territorial sea. Therefore, looking at the location of Minerva reefs it is clear that the reefs is situated way outside of Tonga's EEZ and sits exactly on Fiji's exclusive economic zone. In Tonga's 2014 submission to the Commission, it is noted that they have two Royal Proclamation the second proclamation was in 1972 which asserts that Tonga owns and have jurisdiction over the Minerva reefs on the basis that the reefs were long served as their traditional fishing grounds.

According to the Philippines, international law prior to the adoption of the Convention did not accept "assertions of historic rights over such a vast area" as China now claims in the South China Sea.[85] Prior to the Convention, the Philippines argues, "the sea was subject only to two principles: the principle of the freedom of the seas, which prohibits appropriation by any State; and the principle of control over a limited area by the immediately adjacent coastal state, which prohibits appropriation by any other state."[86] In the Philippines' view, "China's claim is inconsistent with both principles."[87] The concept of a historic bay or title is well understood in international law[88] and, as a matter of simple geography, the South China Sea is not a bay.[89] Referring to the South China Sea case the question that will arise in the controversial Minerva reefs is, if, Tonga potentially claims historic title within Fiji's EEZ, 'what are the implications that it may cause to Fiji's jurisdiction and maritime boundaries'? It is well defined in the Convention that historic title only applies to internal water and territorial seas. There is a growing tendency to describe these areas as "historic waters", not as "historic bays".[90]

[85] *Ibid*

[86] *Ibid*

[87] *Ibid*

[88] *See generally* United Nations, *Historic Bays: Memorandum by the Secretariat of the United Nations*, UN Doc. A/CONF.13/1 (30 September 1957); United Nations, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc A/CN.4/143 (9 March 1962).

[89] See the definition of a bay in Article 10 of the Convention.

[90] United Nations, *Historic Bays: Memorandum by the Secretariat of the United Nations*, UN Doc. A/CONF.13/1, para. 8 (30 September 1957).

More study would need to be done on the Minerva reefs on its legal status, if, the reefs are above water at high tide than the claim by Tonga would refer to a claim over historic fishing waters which is inapplicable with the LOSC because historic waters are well defined as internal waters. On the other hand, if Minerva is an island or rock than the nature of historic claim by Tonga seem to be based on international law and the Convention of articles 15, 46 and 311 in relation to other conventions and international agreements. Historically, Fiji also claims that the Minerva Reefs have been part of the fishing grounds belonging to the people of Ono-i-Lau, an island in the Fiji Lau Group.[91] However, in 1972, Tonga asserted its claim over the reefs, which was acknowledged by Pacific island countries during the Pacific Forum meeting. This was not objected by any State, but it has been noted that Fiji doesn't seem to recognize the annexation by Tonga, and considers the reefs to lie within its jurisdiction.[92] According to the South Pacific Forum meeting held in Canberra from 23-25 February, 1972 it was noted in its communiqué, that this meeting was regarded as an informal meeting attended by the President of Nauru, the Prime Ministers of Western Samoa, Tonga, Fiji, the Premier of the Cook Islands, and the Foreign Ministers of Australia and New Zealand.[93]

The objective of the 1972 Pacific Forum meeting was to hold informal discussions of many issues affecting the lives and welfare of the people of the South Pacific. All participants acknowledged the value of meeting again to build upon the foundations laid at the inaugural session of the Forum held in Wellington in 1971.[94] One of the agenda items of this informal discussion was the subject of Law of the Sea issues in which the Forum supported the position of Tonga in relation to the Minerva Reefs and noted that the legal steps to be taken were being put under study.[95] To critically analyze the nature of this meeting it is noted that it held informal discussions, according to some scholar "an informal discussion is a meeting which is far less

[91] "Tonga et Fidji se disputent le Récif de la Minerve", ABC Radio Australia (in French), 9 February 2011 (Archived from the original on 7 July 2011.). Source: http://www.radioaustralia.net.au/french/2011-02-09/354457

[92] *Abid, ABC Radio Australia in French, 2011*

[93] *South Pacific Forum Meeting, Communiqué*, Canberra, Australia, 23-25 February, 1972. Available at the Pacific Island Forum Secretariat website on; http://www.forumsec.org/resources/uploads/attachments/documents/1972%20Communique-Canberra%2023-25%20Feb.pdf

[94] *Ibid*

[95] *Ibid, p. 2*

heavily planned and regulated than a formal business meeting, and so lacks many of the defining features of a formal business meeting, such as minutes, a chairperson, and a set of agenda.[96] Therefore, some decisions cannot be taken at informal meetings, because they must be put to a larger group of people at a formal meeting, due to legal restrictions.[97]

The question raised was 'are the claims made by Tonga during the 1972 meeting in Canberra officially consented and endorsed by the Forum member countries'? The answer is no according to the Forum communiqué, but, later in September 12 – 14 of the same year the third South Pacific Forum meeting was held in Suva, Fiji where Forum member countries recognized Tonga's historical involvement with the Minerva reefs and welcomed Tongan's government continue interest in the area and agreed that there could be no question of recognizing other claims, but this was not legally binding.[98]

According to the South China Sea (SCS) case the Tribunal is of the view that this practice of historic title claim was understood by the drafters of the Convention and that the reference to 'historic titles' in Article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances.[99] In fact, this accords with another direct usage of the term, in Article 15 of the Convention, where historical sovereignty would understandably bear on the delimitation of the territorial sea.[100] For other "historic rights", in compare, are nowhere mentioned in the Convention, and the Tribunal sees nothing to propose that Article 298(1) (a) (i) was anticipated to also exclude jurisdiction over a wide and undetermined category of possible claims to historic rights falling short of sovereignty.[101]

[96] Baskerville.P, Informal meeting, 2013. Available at: http://www.skillmaker.edu.au/informal-meeting/

[97] *Ibid*

[98] South Pacific Forum Meeting, *Communiqué*, Suva, Fiji, 23-25 February, 1972.

[99] South China Sea PCA Award, *Philippines v. China*, 2016, p. 98, para 226

[100] *Ibid, para 226*

[101] *Ibid, para 226*

According to Article 298 (1) (a) (i) it assert that;

> *"disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving* ***historic bays or titles****, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission."*[102]

Having concluded that the exception to jurisdiction in Article 298(1) (a) (i) is limited to disputes involving historic titles and that in the South China Sea case, China does not claim historic title to the waters of South China Sea, but rather a collection of historic rights short of the title.[103] As far as the Tribunal is aware, however, the most understanding conception of China's claim in the SCS, beyond its claim to sovereignty over islands and their adjacent waters, is as a claim to "relevant rights in the South China Sea, formed in the long historical course".[104]

1.5 **Role of Historic Fishing Rights in Boundary Delimitation**

The term historic fishing rights should not be confused with the term historic waters. Historic waters are 'waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercise sovereign rights with the acquiescence of the community of States'.[105] The International

[102] LOSC, Article 298 (1), (a) (i)

[103] South China Sea Arbitration Award, *Philippines v. China*, 2016, p. 97, para 229

[104] *Ibid, para 97*

[105] LJ Bouchez, *The Regime of Bays in International Law* (Leyden: Sythoff, 1964) at 281; United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas,* No 112, United States Responses to

Court of Justice (ICJ) in the *Fisheries Jurisdiction* case stated that historic waters mean 'waters which are treated as internal waters but which would not have that character were it not for the existence of a historic title'.[106] Generally, there are three factors that must be proven in order to successfully establish the title of historic waters over a certain ocean space: the effective exercise of sovereignty, prolonged usage, and the recognition of other States.[107] In comparison, a claim of *historic rights* means that a State is claiming to exercise certain rights, usually fishing rights, in what are usually deemed to be international waters.[108]

Accordingly, historic rights claims do not amount to a sovereignty claim.[109] As the ICJ stated in the *Qatar/Bahrain* case, the historic pearling activities of Bahrain have never led to the recognition of a 'quasi-territorial right' to the fishing ground itself. This means that even if the historic pearling rights of Bahrain were recognized, it would not have amounted to sovereignty or any form of 'quasi- sovereignty' over the pearling banks or to the superjacent waters.[110] It would be easier for a State to provide evidence of historic fishing activities in an area of water as opposed to trying to establish a historic exercise of sovereignty over the area. It is important to remember that a State's claim to historic rights does not mean that this right gives the claiming State sovereignty over the relevant body of water or geographical feature.[111] Some States,

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Excessive National Maritime Claims (9 March 1992), at 8 [*Limits in the Seas*]; for general discussion of historic waters, see Clive R Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Leiden/Boston: Martinus Nijhoff Publishers, 2008).

[106] *Fisheries Case (United Kingdom v Norway)* (1951) ICJ Rep 116 [*Anglo-Norwegian Fisheries Case*], at 130; see also *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* (1992) ICJ Rep 351, at para 384.

[107] *Tunisia/Libya*, *ibid*, at 74*; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (1992) ICJ Reports, at 589; see International Law Committee, 'Juridical Regime of Historic Waters, Including Historic Bays', in *International*

Law Commission Yearbook, vol II (1962) at 6; see also LJ Bouchez, *supra* note 5; Yehuda Z Blum, 'Historic Rights' in Rudolf Bernhardt, ed, *Encyclopedia of Public International Law*, Installment 7 (Amsterdam: North-Holland Publishing Co, 1984) at 121; Epsey Cooke Farrel, *The Socialist Republic of Vietnam and the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1998) at 68-69.

[108] Clive R Symmons, *supra* note 5, at 4.

[109] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation'.

[110] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits,
Judgment (2001) ICJ Reports 40, at paras 235-236.

[111] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation'., p. 5, para. 2

however, have continued to assert historic fishing rights within the EEZ of other States, the most prominent example being China, which has consistently made claims to historic fishing rights within its nine-dashed line in the South China Sea, which overlaps with the EEZs of the Philippines, Viet Nam, Malaysia and Brunei Darussalam.[112] Historic fishing rights may play a role in the delimitation of overlapping EEZ, but only in special circumstances. For instance, in the *Eritrea/Yemen* arbitration case, the Tribunal stated that 'Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihood of this poor and industrious order of men' around the islands of *Hanis* and *Zuqar,* as well as around the islands of *Jabal al-Tayr* and the *Zubayr* group.*[113]*

Furthermore, a claim of historic rights is exact, whether it is a historic right to fishing activities or historic rights over the fishing resources. In some previous cases, when a State has claimed historic rights to fishing activities they provide the specific activities and the specific fish species were obviously described.[114] For example in *Qatar/Bahrain,* Bahrain claimed the historic rights of pearling; in *Barbados/Trinidad and Tobago,* Barbados argued that it had historic rights of fishing for the flying fish in the waters of Trinidad and Tobago;[115] and in the *Jan Mayen* case, Norway claimed that its fishermen had traditionally conducted whaling, sealing and fishing for capelin in the waters between Jan Mayen and Greenland.[116] The question, however, is how to reconcile the existence and recognition of historic fishing rights with the EEZ regime contained in the LOSC, which is binding on all States parties.

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[112] CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 7 May 2009, available from: United Nations;
<http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vn m_e.pdf>.

[113] *Eritrea v Yemen* (1998) Award of the Arbitral Tribunal in the First Stage – Territorial Sovereignty and Scope of the Dispute [*Eritrea/Yemen – Phase I*], at paras 525-526.

[114] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation'., p. 5

[115] *Barbados v Trinidad & Tobago,* Award of the Arbitral Tribunal (2006) 45 ILM 798 [*Barbados/Trinidad and Tobago*], at para, 247.

[116] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v Norway*) (1993) ICJ Report 38 [*J an Mayen* case], at para 15.

1.6 **Interpretation of Island and Rock under Article 121**

In this section, the paper will look into how scholars interpret Article 121 of the convention in defining islands and rocks under the LOS Convention. This article is not well spelled out under the LOSC in the scientific and legal status of an island and rock as it needs more study especially article 121 (3) on the definition of rocks. Article 121 has been a major cause of controversial in maritime boundary disputes as States continue to generate territorial sea, exclusive economic zone and continental shelf on a geographical feature that is disputed by another state given its status to have maritime entitlements.

Article 121: Regime of Islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at 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.[117]

According to Tonga's preliminary submission of 2014, it has been noted that they define Minerva reefs as islands, which is still unclear under which analysis it is based on when the features are said to be submerged at high tide. In delimitation, determining the legal status of such geographical features are determined under the LOSC that if it is not an island then it should be a rock that is above water during high tide. A reef under the convention is only stated for the purpose of baselines for measuring the breadth of the territorial sea, which is the seaward low-water line of the reef, as shown by appropriate symbols on charts officially recognized by the coastal State.[118] It is believed, that part of the Minerva reefs have some small volume of rocks that is above water during high tide which Tonga regard it as islands. Referring to article

[117] LOSC, Article 121.

[118] *See*: Islands, LOSC, article 6

121 if Tonga considers Minerva to be Islands then the question is, can the feature sustain human habitation or economic life?

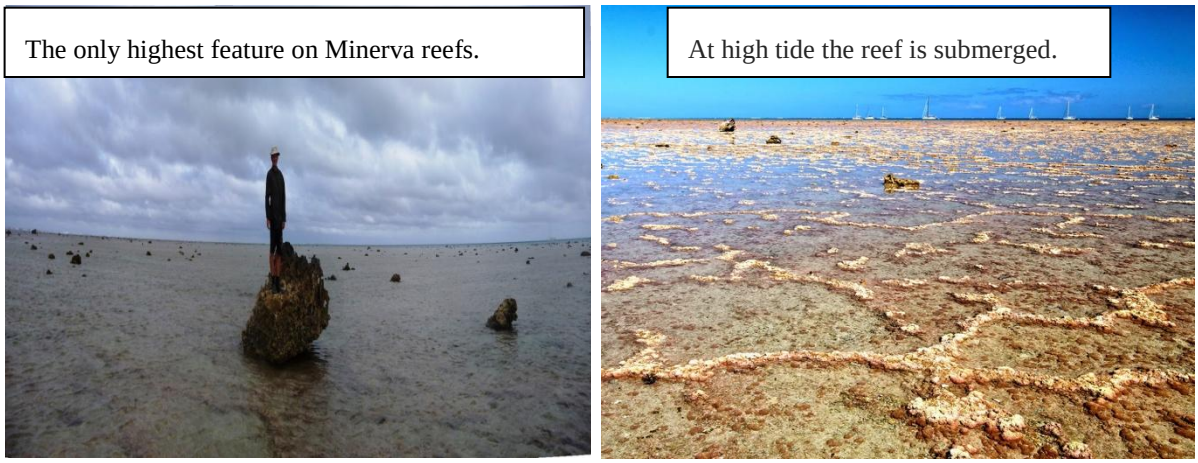

Figure 1.7: Image showing the physical status of the Minerva reefs during high tide. Source:http://smithtribesailing.blogspot.co.uk/2014/02/minerva-reef-23-degrees-south.html?view=classic.

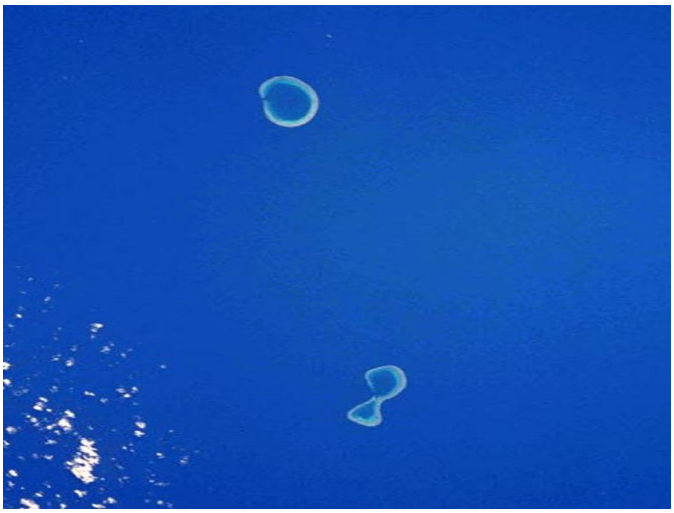

Figure 1.8: Satellite image showing North and South Minerva reefs.
Source: National Oceanic and Atmospheric Administration (NOAA).

The ability of islands to generate maritime zones and to influence the application of maritime boundaries was a concern in the international legal arena way before a concise provision in the LOSC took observation of a particular category for a regime of islands including, "[r]ocks which

cannot sustain human habitation or economic life of their own".[119] Disputes have arisen in the East Asian region in regard to features in the South China Sea Reef, the Paracel Islands, Scarborough Reef and the Spratly Islands), the East China Sea (the Senkaku/Dioayuta/Tioa-yu-tai Islands, Danjo Gunto and certain of the Ryukyu Islands), and the Sea of Japan/East Sea (Liancort Rocks/Tok-do/Takeshima Islands).[120] The Caribbean Sea (Aves Island), among others, also shares similar implications in defining maritime entitlements.

In the North Atlantic Ocean, Rockall has been a good example when dealing with the status of a "rock". Rockall is a rock located within the United Kingdom's EEZ in which several States have claimed interests over the seabed adjoining Rockall. Denmark (for the Faroe Islands), Iceland, Ireland and the United Kingdom have made submissions to the CLCS but this doesn't have an impact to Rockall. In 1997, the UK Government declared that Rockall was, in fact, a "rock" under Article 121 (3), and thus not a valid basepoint for its fishery zone.[121] This seems appropriate, as Rockall has been termed a "classic example of a rock that fails the tests of human habitation and economic life under the 1982 LOSC.[122] Therefore, Rockall was only entitled to merely generate a 12nm territorial sea setting an example to date of a State voluntarily declines an insular feature to "a rock" and thus reducing the area of its maritime entitlement. Under customary international law, it defines an island by reference to whether it is 'naturally formed whether it is above water at high tide, and whether it can sustain human habitation or economic life, not by reference to its geological composition.[123] In fact, only a tiny part of the Minerva reefs is said to be composed of rocks which are irrelevant to define both the Minerva reefs as islands, given its geomorphological status and the high tide elevations. Fiji has maintained its position that the Minerva reefs are not islands but reefs and that Minerva is not entitled to a 200nm EEZ or continental shelf.

[119]LOSC, Article 121(3)

[120] *See* Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AJIL 724 (1995).

[121] Maritime Boundary Disputes, (2009), Settlement Processes, and the Law of the Sea By Seoung-Yong Hong, Jon M. Van Dyke, Martinus Nijhoff, p. 29.

[122]1987 UNCLOS, Article 121 (3).

[123] Merits Judgment, 'Icj, Territorial and Maritime Dispute (Nicaragua V. Colombia)', *ICJ Report* (2012), 624., Merits Judgment, 2012, p. 624 at p. 645, para. 37

According to Fiji's Foreign Affairs official, "the government of Fiji reiterates its position that as far as its concerned Minerva are reefs which lie within Fiji's EEZ and that the government of Fiji reserves its right within its directory.[124] To date, officials from the two countries Fiji and Tonga are yet to hold concrete discussions and dialogue to determine their claims over the features and discuss the legal status of Minerva as low-tide elevation, islands or rocks under the LOSC. States almost always have claimed a continental shelf and exclusive economic zone for all the islands under their sovereignty. The one notable exception is the United Kingdom, which, upon becoming a party to the LOSC, rolled back its claim to a 200-nautical-mile zone from Rockall and Shag Rocks. Certain other islands are almost likely to be captured by any reasonable interpretation of article 121(3) of the LOSC. An apparent example is Japan's Okinotorishima, which is comparable in size to the rocks on Scarborough Reef and is an issue in regards to maritime entitlement.

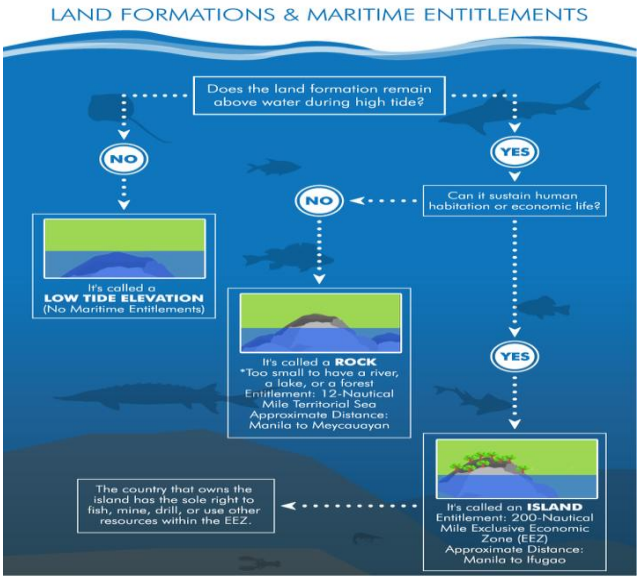

Figure 1.9: The above image demonstrates the categories of rock, island and low-tide elevation, and identify whether the features can generate maritime zones or not. Source: http://cnnphilippines.com/news/2015/07/14/west-philippine-sea-101-maritime-entitlements.html.

[124]RadioNZ, Fiji and Tonga take wrestle over Minerva Reef to the United Nations. Source: http://www.radionz.co.nz/international/pacific-news/195315/fiji-and-tonga-take-wrestle-over-minerva-reef-to-the-united-nations, February, 2011.

If a land formation sticks out of the water surface at low tide but, submerged during high tide then it's called a 'low tide elevation' which is not permitted to have any maritime entitlement whatsoever. On the other hand, if a feature is above water during high tide at all time but cannot support human habitation or economic life than it is identified as a 'rock', which is only entitled to a 12nm territorial sea. According to Article 121, if a feature is above water during high tide and can sustain human habitation or economic life then it is considered as an island, which is entitled to a 200nm EEZ and continental shelf.

According to Article 121 (3), it states that rocks are not entitled to certain zones but does not specifically provide that rocks are entitled to a territorial sea or a contiguous zone; one might argue that this question of maritime entitlement on rocks was left unresolved. But, it is hard to maintain in the face of a complete definition of islands in Article 121 (1) exclusively on the basis of elevation.[125] The use of the word "cannot" in Article 121(3) indicates a concept of capacity. Does the feature in its natural form have the capability of sustaining human habitation or an economic life? If not, it is a rock. This question is not concerned with whether the feature actually does sustain human habitation or an economic life. It is concerned with whether, objectively, the feature is appropriate, able to, or provides itself to human habitation or economic life.[126] That is, the fact that a feature is currently not inhabited does not prove that it is uninhabitable. The fact that it has no economic life does not prove that it cannot sustain an economic life

Although the legal issue to arise is normally the question of national sovereignty, most disputes over these features are triggered by questions regarding their legal effect on national maritime zones jurisdiction and the delimitation of international maritime boundaries.[127] To understand the role of rocks in maritime delimitation, one must begin by analyzing those parts of the LOS

[125]Article 13 of the LOSC, articulates on the role of low-tide elevations which includes rocks that only meet the elevation requirement. Since the Convention carries two classification system based on elevation, rocks whose elevation is permanently above high tide fall within the "Regime of islands. ***See,*** Jonathan I Charney, *Rocks that cannot sustain Human Habitation*, 1999, p. 865.

[126]Permanent Court of Arbitration (PCA), The South China Sea Arbitration Award, *Philippines v. China*, 2016, p. 205, para. 483

[127] Jonathan I Charney, 'Rocks That Cannot Sustain Human Habitation,' *The American Journal of International Law,*, Volume 93, (1999), p. 863-78.

Convention that concern islands and the rules for identifying the baselines from which the various maritime zones are calculated. The normal baseline is formed by the "low-water line along the coast"[128] and the closing lines of bays and river mouths. Under certain conditions, the coastal State may establish systems of straight baselines or archipelagic baselines to substitute for the normal baseline to locate the limits of the various maritime zones.[129] Article 121(2) of the 1982 LOS Convention clearly provides that islands are entitled to all maritime zones: a territorial sea, a contiguous zone, an exclusive economic zone and a continental shelf.

The title, "Regime of islands," under the Convention indicates that all the features addressed in the article are islands, including rocks in paragraph 3.[130] Since Article 121(2) expressly recognizes the entitlement of islands to all four zones of maritime jurisdiction mentioned above (except as not permitted by Article 121(3), the subsection on rocks), the exemption regarding the entitlement of rocks to certain maritime zones would have been unnecessary if such rocks were not islands.[131] Article 121(3) denies only an exclusive economic zone and a continental shelf to rocks; it, therefore, implies that rocks otherwise qualifying as islands (because they are above water at high tide) are entitled to the remaining maritime jurisdiction a territorial sea and a contiguous zone.[132] Thus, rocks under article 121(3) has certain conditions and legal concept being used which make it more contentious to interpret, such words are; (a) rocks, (b) cannot, (c) sustain, (d) human habitation, (e) or, and (f) economic life of their own.

According to the South China Sea Arbitration award, the use of Article 121(3) of the term “rocks” raises the question of whether any geological or geomorphological criteria were intended.[133] In other words, was Article 121(3) intended to apply only to features that are composed of solid rock or that are otherwise rock-like in nature? The dictionary meaning of “rock” does not confine the term so strictly, and rocks may “consist of aggregates of minerals

[128] LOS Convention, supra note 1, Art. 5; Convention on the Territorial Sea and the Contiguous Zone, supra note 4, Art. 3. The LOS Convention adds the low-water line of fringing reefs, LOS Convention, *supra*, Art. 6.

[129] *See,* LOSC, Articles 7, 47, 48

[130] Jonathan I Charney, p. 864

[131] *Ibid, p. 864*

[132] PCA, *Philippines v. China*, 2016, p. 205, para 479.

[133] *Ibid*

and occasionally also organic matter. They vary in hardness, and include soft materials such as clays."[134] However, in the conclusion of judgment reached by the International Court of Justice in the *Territorial and Maritime Dispute (Nicaragua v. Colombia) case*, it held Colombia's Quitasueño, a tiny projection of coral, to be an Article 121(3) rock:

> *International law defines an island by reference to whether it is 'naturally formed' and whether it is above water at high tide, not by reference to it's geological composition, the fact that the feature is composed of coral is irrelevant.*[135]

Introducing a geological qualification in paragraph (3) would mean that any high-tide features formed by sand, mud, gravel, or coral irrespective of other characteristics would always generate extended maritime entitlements, even if they were incapable of sustaining human habitation or an economic life of their own.[136] These would include the presence of water, food, and shelter in sufficient quantities to enable a group of people to live on the feature for an undefined period of time.[137] Such factors would also include considerations that would bear on the conditions for inhabiting and developing an economic life on a feature, including the prevailing climate, the proximity of the feature to other inhabited areas, populations, and the potential for livelihoods on and around the feature.[138] The relative contribution and importance of these factors to the capacity to sustain human habitation and economic life, however, will differ from one feature to another.[139]

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[134] 'Rock,' *Oxford English Dictionary*

[135] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Merits Judgment, ICJ Reports 2012*, p. 624 at p. 645, para. 37.

[136] PCA, *South China Sea Arbitration*, 2016.

[137] Ibid, p.229, para. 546.

[138] *Ibid*

[139] *Ibid*

Chapter Two: Jurisprudence of Maritime Delimitation

This chapter will outline the jurisprudence cases of maritime delimitation that is kind of relevant to the controversial Minerva reefs and to identify delimitation principles adopted by coastal States and the International Court of Justice. It is necessary to consider an analysis of cases of maritime delimitation, which were decided by the International Court of Justice and Arbitral Tribunals that can assist coastal states to identify delimitation principles that might be of relevant to their current situation in terms of disputed maritime boundary. Some of the questions that are raised in jurisprudence cases are, have courts and tribunals, in interpreting Articles 74(1) and 83(1) of the LOS Convention, followed the growing trend towards the more expected equity approach in maritime delimitation? Or have they shifted direction once again, to the more flexible result-oriented case-by-case method, as in the past? The international law of maritime delimitation has been the subject of significant examination during the past century. The history of the development of the law of delimitation came through the cases, starting from the 1969 *North Sea Continental Shelf* case, which has been well documented elsewhere and its principle has been cited by many coastal States.[140]

1. *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain, 2001)*

The Qatar v. Bahrain case was first brought before the ICJ in 1991 which involved issues of maritime delimitation with those of territorial sovereignty.[141] The oral hearings were held in 2000 and the decision on the merits of the dispute was issued in 2001.[142] The nature of the *Qatar v. Bahrain* case involves a claim to settle a dispute involving sovereignty over certain islands,

[140] Volterra.R, Recent Developments in Maritime Boundary Delimitations: Brief Reflections on Certain Aspects of the two UNCLOS Cases (Eritrea/Yemen and Qatar v Bahrain), p. 2, 2016. Available from http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf2/VOLTERRA.PDF

[141] Barbara Kwiatkowska, 'The Qatar V. Bahrain Maritime Delimitation and Territorial Questions Case', *Ocean Development & International Law, Netherlands Institute for the Law of the Sea, The Netherlands,*, v. 33,/3-4 (2002), pp. 227-62..

[142] Maritime Delimitation, 'Territorial Questions between Qatar and Bahrain (Qatar V. Bahrain),[2001]', *ICJ Reports*, 40 (204-06..

sovereign rights over certain shoals and delimitation of a maritime boundary which was filed by Qatar in the International Court of Justice against Bahrain. The Qatar v. Bahrain was one of the longest-running cases ever brought before the Court. It survived ten years on the Court's docket.[143] The dispute between the two Arab States in the Gulf of Arabia was centered more closely, in the self-conceived interests of the Parties, on the issue of sovereignty over the Hawar Islands than on the delimitation of their maritime boundary.[144]

This section of the paper will refer to the Qatar v Bahrain case on its contradictory interpretation over islands and low-tide elevation which can be related to the Fiji-Tonga Minerva reefs situation. In the Qatar v. Bahrain judgment, one of the most interesting findings of the Court in the case was that low-tide elevation (*LTEs*) are territory that is capable of generating maritime rights in certain circumstances.[145] This finding included not only LTEs located within a State's territorial sea, but also those found in its EEZ and Continental Shelf.[146] The Court observed that international treaty law was silent on the question of whether LTEs could be considered to be the land territory.[147] It went on to state that low tide elevations could not be "fully incorporated" with islands or another land territory, but it clearly viewed LTEs as a form of quasi-land territory.[148] Bahrain claimed that its historical dominance over the pearling grounds in the Gulf of Arabia to the north of the Qatar peninsula constituted a special circumstance that justified shifting of the provisional equidistance boundary line further to the east. The Court rejected Bahrain's arguments on the facts, but it did not reject the possibility of such a claim constituting a special circumstance.[149] This is particularly interesting, of course, given the fact that the maritime boundaries at issue were not only just an EEZ boundary and include other maritime affair issues.

[143] Volterra.R, (Eritrea/Yemen and Qatar v Bahrain).

[144] *Ibid*

[145] ICJ Reports. 2001 paras. 203-207. The rights derived from LTEs situated in the overlapping territorial seas of two States "neutralise" each other, as they would appertain to both States. See para. 202.

[146] ICJ Reps. 2001 para. 245

[147] ICJ Reps. 2001 para. 205.

[148] ICJ Reps. 2001 para. 206

[149] The Court held that the pearling industry in the Gulf was long finished and that, in any event, local practice had never recognised that control over pearl fisheries gave rise to ˙ territorial rights to the pearl grounds or the superadjacent waters. ICJ Reps. 2001 paras. 235 and 236.

The Court confirmed that an island was capable of generating full maritime rights; regardless of its size.[150] This was important in the context of a maritime feature called Qit'at Jaradah. Qit'at Jaradah is located between Qatar and Bahrain overlapping territorial seas to the northeast of the main island of Bahrain and northwest of the Qatar peninsula. It had been referred to as an island in historical documents, but some more recent documents referred to it as a low-tide elevation. Bahrain claimed that in the years after 1986, Qit'at Jaradah had returned to its historical state as an island through the natural build up.

According to the Court, Bahrain established through satellite imagery and expert onsite examination that Qit'at Jaradah had become an island again: a very small portion of its surface remained above water at high tide. The fact that Qit'at Jaradah was found to be an island meant that the international law relating to the title was applied.[151] Bahrain's historical association of sovereignty over Qit'at Jaradah resulted in its being recognized as Bahraini land territory.[152] However, despite having stated in the verdict that even a small island is capable of generating full maritime rights, the Court held that the maritime boundary line should pass just to the east of Qit'at Jaradah, giving it no effect. The court further held that the disproportion that would result from giving the island any effect, let alone partial or full effect, constituted a special circumstance that justified this decision.[153]

[150] ICJ Reps. 2001 para. 185.

[151] Volterra.R, Recent Developments in Maritime Boundary Delimitations: Brief Reflections on Certain Aspects of the two UNCLOS Cases (Eritrea/Yemen and Qatar v Bahrain)

[152] *Ibid*

[153] ICJ Reps. 2001 para. 219.

Figure 2: Map showing maritime claim by Qatar and Bahrain. Source: http://catnaps.org/islamic/history.html#top

Further to the "Qatar v. Bahrain" case the International Court of Justice noted that article 15 of the 1982 LOSC, about the delimitation of the territorial sea, was to be regarded as having a customary law character; the Court went to declare that the most logical and widely practised approach is first to draw conditionally an equidistance line and then to consider whether that line must be adjusted in the light of existence of special circumstances.[154]Amongst the range of factors of delimitation principle exist proportionality, which is used as a criterion of fairness and justice.[155] In the "Anglo-French Continental Shelf" case, both States were parties to the Continental Shelf Convention in which the ICJ held that article 6 contained one overall rule, a combined equidistance-special circumstances rule, which in effect gives particular expression to a general norm that, failing agreement, the boundary between States adjoining on the same continental shelf is to be determined on equitable principles.[156] The International Court of Justice

[154] *ICJ Reports, 2001, Qatar-Bahrain case, paragraph* 176.

[155] *Ibid*. pp. 3, 52.

[156] Shaw, Malcom N. *"International Law"*, Cambridge University Press, fifth edition, Cambridge, 2003, p. 529.

then stated that "equity is not a method of delimitation, but solely an aim that should be tolerated in effecting the delimitation".[157] Although the equidistance line has been applied to a great number of boundary delimitations affected by judicial decisions, the jurisprudence clearly recognizes that special circumstances also need to be considered.

In the *Qatar v. Bahrain* case, the treatment of islands and low-tide elevations formed the central part of applying equity to maritime delimitation by means of a single all-purpose boundary line. By delimiting the respective territorial seas in the southern sector and the continental shelf and EEZs in the northern sector, in accordance with the preceding jurisprudence and the rules codified in Articles 15 and 74/83 of the LOSC, respectively.[158] The *Qatar v. Bahrain* Judgment certainly strengthens the remarkable record of implementation of judicial and arbitral decisions involving territorial and/or maritime delimitation questions, which were all implemented through bilateral treaty practice of the respective parties to the disputes concerned.[159] It also provides an incentive for other coastal States to complete, in good faith and spirit of cooperation, the remaining boundary delimitations, coupled with mutual understanding and acceptance, in these sensitive areas of disputed maritime boundaries.

2. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 2007)*

With respect to the dispute relating to territorial sovereignty over the islands, the Court generally found that Honduras has sovereignty over the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay on the basis of the post-colonial *effectivités*.[160] The issue of concern in the delimitation around the islands in the disputed area has been strongly argued by Nicaragua that these islands should be enclaved within only a 3 nautical mile territorial sea since a full 12 nautical mile territorial sea would result in giving a disproportionate amount of the maritime

[157] *Ibid*, p. 294.

[158] Kwiatkowska, 'The Qatar V. Bahrain Maritime Delimitation and Territorial Questions Case', (.

[159] *Ibid.*

[160] ICJ Judgement, Nicaragua v. Honduras, para. 321; 62, para. 227.

areas in dispute to Honduras.[161] It follows that the territorial seas attributed to the Honduran islands and the Nicaraguan island of Edinburgh Cay would lead to an overlap in the territorial seas of the Parties. Concerning the delimitation method applicable to the overlapped area, the Court referred to the *Qatar/Bahrain* case, which stated that:

> *The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.*[162]

Like equidistance, the angle bisector method was used in this case and is based on coastal geography. A bisector is "the line formed by bisecting the angle created by the linear approximations of coastlines".[163]

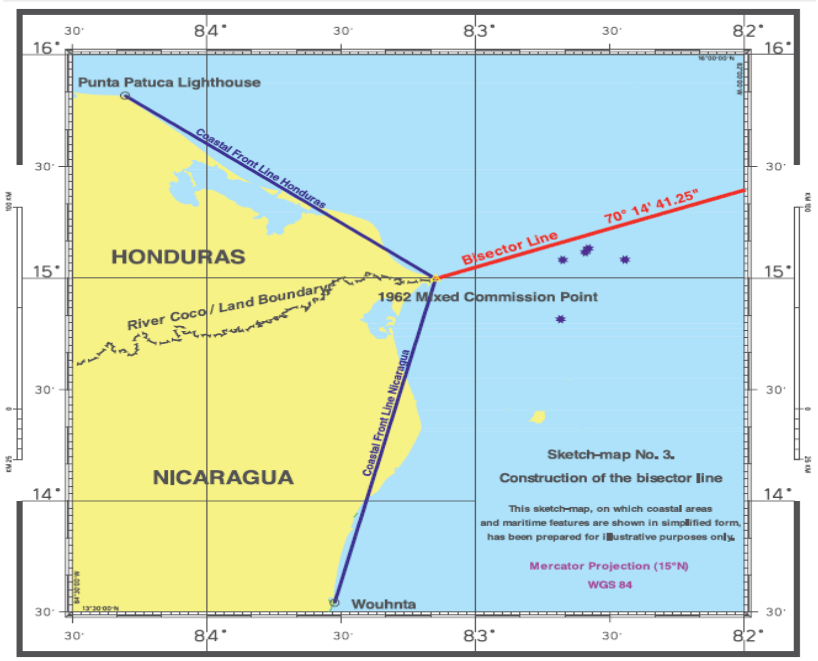


Figure 2.1: Map showing the bisector line drawn between Honduras and Nicaragua. Source: Sketch-map No. 3 annexed to the *Nicaragua/Honduras* Judgment, ICJ Reports 2007, p. 98.

[161] *Yoshifumi Tanaka, 'Reflections on Maritime Delimitation in the Nicaragua/Honduras Case,' Heidelberg Journal of International Law, p. 906., v. 68,/4 (2008,).*

[162] ICJ Reports, Qatar v. Bahrain, 2001, para. 176.

[163] ICJ Reports (Merits), 2007, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, para. 287.

Unlike equidistance, which response to only the most prominent features, the angle bisector method generalizes irregular coastal features.[164] The Court's bisector, which bisected only the relevant parts of the mainland coasts, taking no account of offshore islands, ran to the north of the Honduran islands, thereby placing them on Nicaragua's side of the bisector. The Court's solution is shown on the map that it created a Honduran semi-enclave to the south of the bisector consisting of the arcs of the territorial sea limits of Bobel Cay (arc A-B) and South Cay (arc E-F) joined by the multi-segment equidistance line between Nicaragua's Edinburgh Cay and Honduras's Bobel, Port Royal, and South Cays (line B-C-D-E).[165]

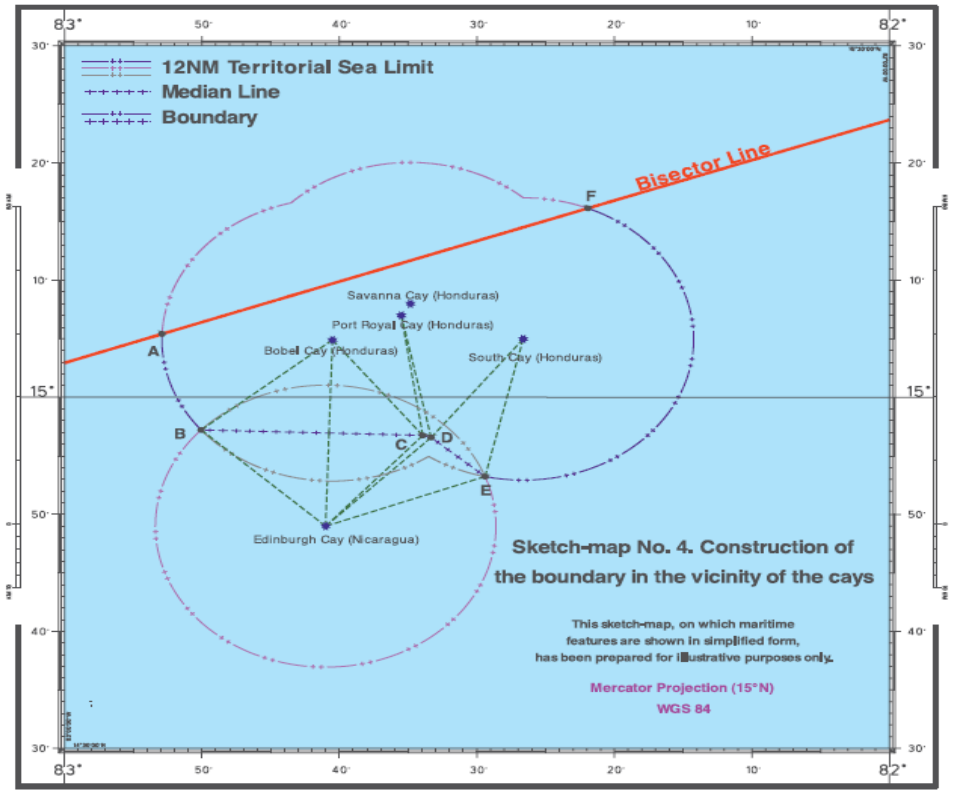
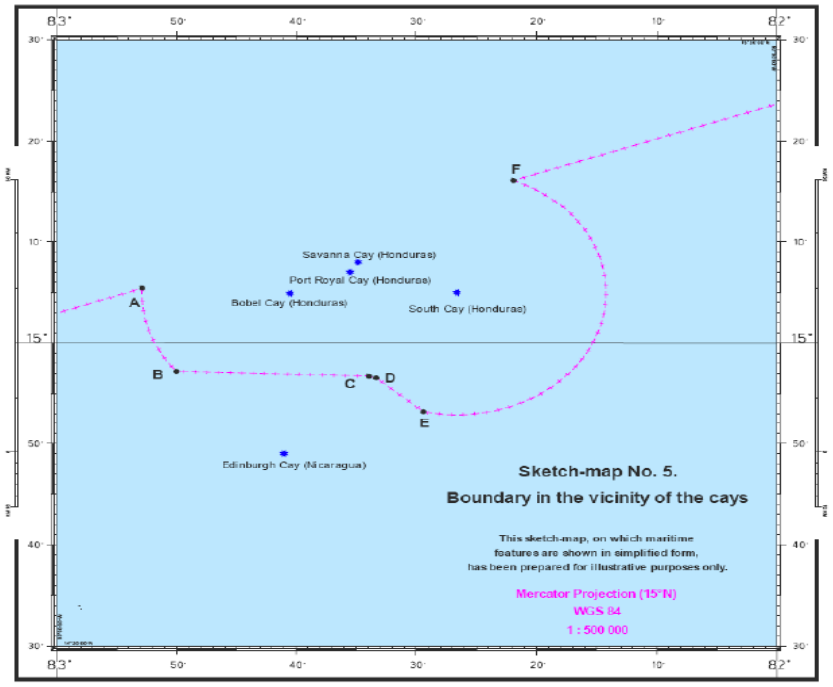


Figure 2.2: Map showing the construction of the boundary lines between the disputed features. Source: Sketch-map No. 4 annexed to the *Nicaragua/Honduras* Judgment, ICJ Reports 2007, p. 98.

[164] Coalter G Lathrop, 'Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua V. Honduras)', *The American Journal of International Law*, 102/1 (2008), 113-19.

[165] ICJ Reports, 2007, para. 305.

The use of the angle bisector method had a secondary impact with respect to the analysis of the effect of islands, rocks, and low-tide elevations on the delimitation. In applying the two - step equidistance process, the Court, and other boundary tribunals have given full effect to the base points on all features, regardless of size, in the first step of the analysis: the construction of the provisional equidistance line.[166] In the second step of the analysis, the effect of these features on the equidistance line has then been discounted either partially or fully, if necessary, to achieve an equitable result.[167] In contrast, the large-scale geographic angle bisector method presumes a mainland-to-mainland delimitation. Here, the chosen method led the Court to treat the offshore features as an afterthought was to enclave them after the mainland-to-mainland boundary had been decided.[168] Taking into account the position of the Kerkennah Islands, and the low-tide elevations (LTEs) around them, the Court considers that it should go far as to attribute to the Island a "half-effect" of a similar kind.[169]



[166] See, e.g., Maritime Delimitation and Territorial Questions Between Qatar and Bahrain; Maritime Delimitation, Phase II (Eri./Yemen).

[167] Lathrop, Coalter G (2008), 'Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)', *The American Journal of International Law*, 102 (1), 113-19.

[168] ICJ Rep, 2007, para. 262.

[169] ICJ Reports 1982, 89, para. 129.

Figure 2.3: Sketch map showing the enclaved islands to Honduras using the bisector line. Source: *Nicaragua/Honduras* Judgment, ICJ Reports 2007, p. 99.

As illustrated on the above map, the equidistance line became the delimitation line in this area in order to also enclave the islands. One possible technique for this purpose, in the context of a geometrical method of delimitation, is that of the "half-effect".[170] Enclaving occurs when no effect or partial effect is given to an island. In such case, though, as the maritime jurisdiction of such island cannot be denied, a maritime belt of a certain breadth is drawn around that island by means of a line made of arcs of circles drawn from the most seaward base points.[171]

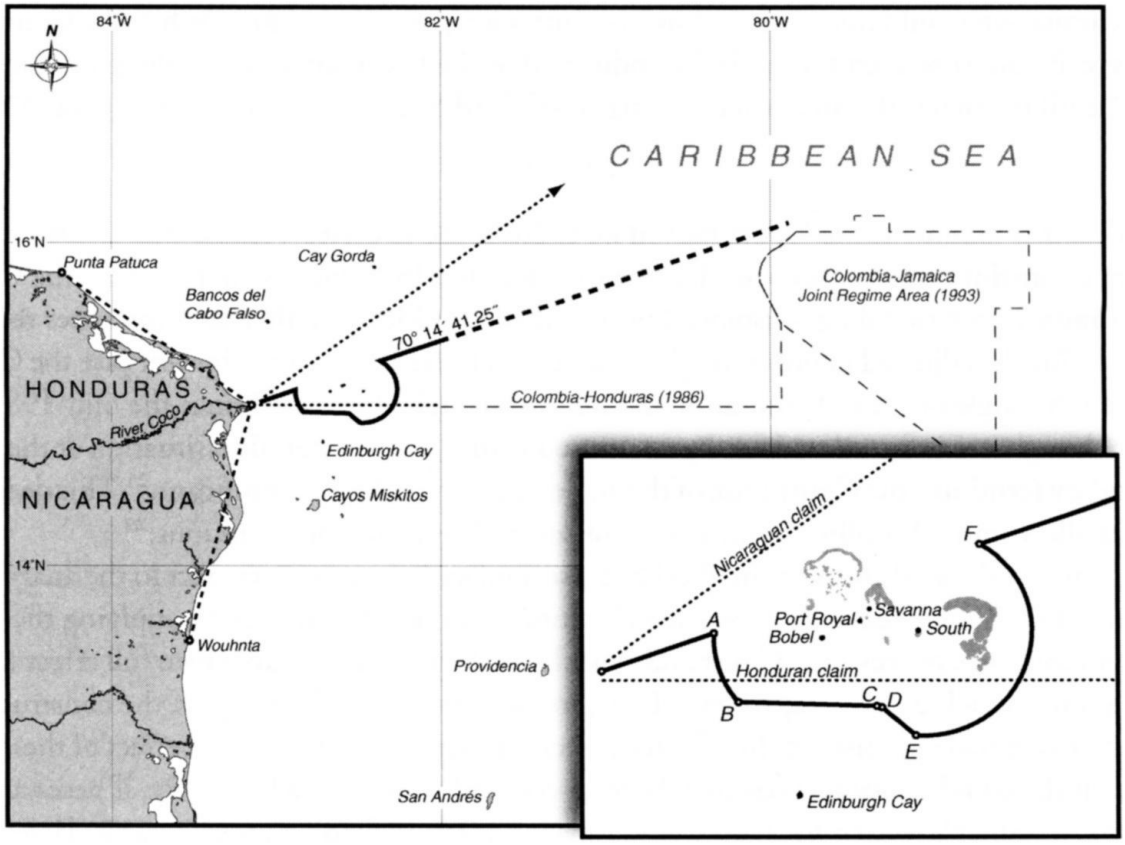


Figure 2.4: Map shows the enclaved islands of Honduras. Source: Lathrop CG, Nicaragua v. Honduras, the American Journal of International Law, 2008.

[170] Tanaka, 'Reflections on Maritime Delimitation in the Nicaragua/Honduras Case,' (

[171] Doalos, *Handbook on the Delimitation of Maritime Boundaries*., 2000, p. 59.

Basically, there are two methods that can be observed: first, the "full enclave", where the maritime belt of the island is completely isolated; second, the "semi-enclave", where the maritime belt of the island is partially connected to the maritime area under the sovereignty or jurisdiction of the same State.[172] This method may be used independently or in conjunction with some other method of delimitation. In the case of Nicaragua v. Honduras, the method of semi-enclave was used to enclave the islands, this system applies mainly when the islands are situated close to the bisector line drawn without taking account of the islands concerned.[173]

3. *Case Concerning Territorial and Maritime Dispute (Nicaragua v. Colombia)*

On November 19, 2012, the International Court of Justice rendered its judgment in a dispute involving territorial and maritime claims raised by Nicaragua against Colombia in the Caribbean Sea.[174] The Court considered Nicaragua's requests for a declaration of Nicaraguan sovereignty over seven disputed maritime features and delimitation of a single maritime boundary between the continental shelf and EEZ appertaining to Nicaragua and Colombia. The Court awarded all disputed territory to Colombia and delimited the maritime boundary between the States' continental shelf and exclusive economic zones by using a novel mix of weighted base points, geodetic lines, parallels of latitude, and enclaving.[175]

[172] *Ibid.*

[173] DOALOS, 2000.

[174] Territorial and Maritime Dispute (Nicaragua. v. Colombia) (ICJ, Nov. 19, 2012) [hereinafter Judgment]. Available from; http://www.icj-cij.org.

[175] Nienke Grossman, 'Territorial and Maritime Dispute (Nicaragua V. Colombia),' *American Journal of International Law,*, v. 107,/2 (2013,), p. 396 - 403.

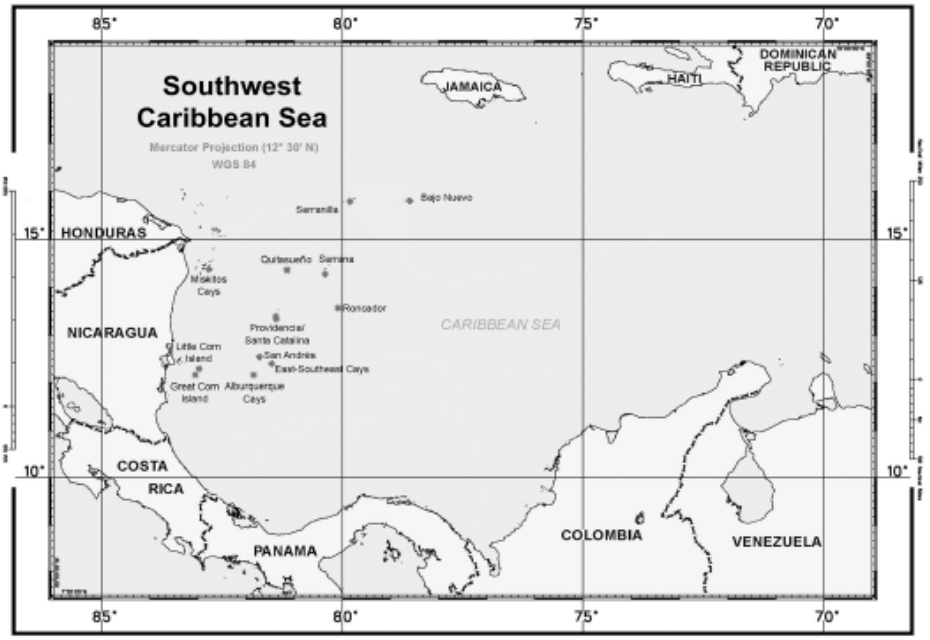


Figure 2.5: Map showing the locality of Honduras and Nicaragua in the Caribbean Sea. Source: Judgment of the International Court of Justice of November 19, 2012, in the *Territorial and Maritime Dispute* (Nicaragua. v. Colombia.), Sketch-map No. 1, at 16.

Nicaragua lies in the southwestern portion of the Caribbean Sea, bordering Honduras to the north and Costa Rica to the south, while Colombia's mainland is located in the south of the Caribbean Sea (see figure 2.6). San Andre´s, Providencia, and Santa Catalina Islands are situated about 100 nautical miles from the Nicaraguan coast and about 380 nautical miles from Colombia's mainland coast.[176] Various reefs, cays, atolls, and banks lie in the western Caribbean, within 200nm of Nicaragua's coast, but beyond 200 nautical miles of Colombia's mainland coast. Nicaragua filed its application with the ICJ on December 6, 2001.[177] In addition to the disputed claims examined by the Court in the judgment on the merits, Nicaragua claimed sovereignty over San Andre´s, Santa Catalina, and Providencia. It sought to base jurisdiction on the Pact of Bogota,[178] as well as the party's declarations under Article 36 of the Statute of the Permanent

[176] Ibid.

[177] *Ibid.*

[178] American Treaty on Pacific Settlement, Apr. 30, 1948, OASTS Nos. 17 & 61, 30 UNTS 55 [hereinafter Pact of Bogota´].

Court of International Justice.[179] Colombia raised preliminary objections to jurisdiction on July 21, 2003. In a judgment of December 13, 2007, the Court concurred with Colombia that a 1928 treaty and 1930 protocol between the parties had "settled" any dispute over San Andre´s, Providencia, and Catalina within the meaning of Article XXXI of the Pact of Bogota.[180] Thus, the issue of title to these three islands lay outside its jurisdiction.

The Court began its judgment of November 19, 2012, by addressing sovereignty over the maritime features.[181] The parties agreed that six of the seven features were islands, remaining above water at high tide, and were, therefore, capable of appropriation consistent with the Court's practice.[182] They presented conflicting evidence, however, regarding the status of Quitasueño. Given the area attributed to Colombia by the new delimitation line, the Court rejected Nicaragua's request for a declaration concerning its rights to natural resources east of the 82nd meridian.[183] The Court constructed an equiratio line using weighted base points,[184] utilized geodetic lines to simplify the equiratio line, and employed parallels of latitude from the end points of the boundary to 200 nautical miles from Nicaragua's base points and enclaving. When faced with similarly challenging geographic circumstances, the Court has adopted various methods and techniques such as applying angle bisectors, granting half effect to islands, and shifting equidistance lines,[185] but this appears to be its first use of equiratio lines.

[179] Statute of the International Court of Justice Art. 36(5); Statute of the Permanent Court of International Justice Art. 36.

[180] Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, 2007 ICJ REP. 832 (Dec. 13). 396

[181] ICJ Reports (Merits), Nicaragua v. Colombia, 2012, para. 25.

[182] Grossman, 'Territorial and Maritime Dispute (Nicaragua V. Colombia),' (

[183] *Ibid*, para. 250.

[184] Shortly after UNCLOS was concluded, Wijnand Langeraar proposed equiratio lines as an alternative when equidistance lines engender inequitable results. Wijnand Langeraar, *Maritime Delimitation: The Equiratio Method—A New Approach*, 10 MARINE POL'Y 3 (1986), *See also*, "An Algorithmic Solution to the Randomness of Equitable Boundary Lines", para 3, p. 3. *Available from; http://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S5P2-P.pdf*

[185] *See, e.g.*, Nicaragua v. Honduras, 2007 ICJREP. at 695 (angle bisectors); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Oct. 12) (half effect to islands); Continental Shelf (Libya/Malta), 1985 ICJ REP. 13 (June 3) (shifting equidistance lines).

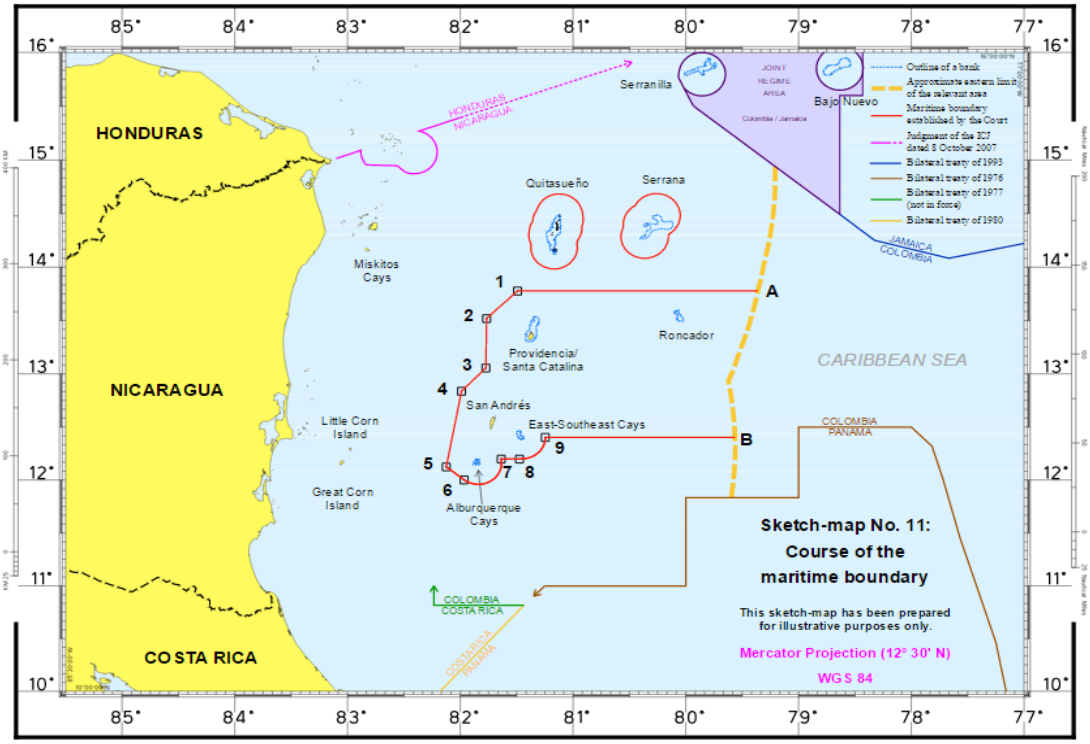


Figure 2.6: Map shows the disputed features between Nicaragua and Columbia in the Caribbean Sea. Source: Judgment of the International Court of Justice of November 19, 2012, in the *Territorial and Maritime Dispute* (Nicaragua. v. Colombia.), Sketch-map No. 11, at p. 94.

From the southernmost point of the adjusted line, the delimitation line travels southeast until it reaches the 12-nautical-mile envelope of arcs of the South Cay of Alburquerque Cays. A parallel line connects this area to the 12-nautical-mile envelope of arcs of the East-Southeast Cays at the latter's southernmost point. The delimitation line follows the envelope of arcs until the East-Southeast Cays' easternmost point and then runs out to 200 nautical miles from Nicaragua's baselines along a parallel of latitude. The Court turned, next, to Quitasuen˜o and Serrana, Colombian features on the Nicaraguan side of the delimitation line.[186] It chose not to extend the boundary line to these islands because of their size, remoteness, and distance from the larger Colombian islands, finding that the "use of enclaves" would yield the "most equitable solution".[187] After determining that Qui-tasuen˜o was a rock by referring to Article 121(3), the

[186] Judgment, 'Icj, Territorial and Maritime Dispute (Nicaragua V. Colombia)'..

[187] *Ibid*, para. 238.

Court ruled that it was entitled only to a 12-nautical-mile territorial sea. By virtue of its small size and remoteness, Serrana was granted only a 12-mile territorial sea.[188]

The Court based its award of title over all disputed territory to Colombia on *effectivités* after considering historical evidence regarding interpretation of the 1928 treaty and 1930 protocol concerning the geographic scope of the "San Andre´s Archipelago" inconclusive.[189] After tracing the critical date to a 1969 exchange of notes between the parties (para. 71), the Court determined that Colombia had acted *sovereignty* concerning all of the disputed features through public administration and legislation, regulation of economic activities, public works, law enforcement measures, naval visits and rescue operations, and recognition of consular representation.[190] The Court found additional support for Colombia's claims in Nicaragua's failure to protest a 1900 arbitral award involving Colombia and Costa Rica,[191] maps, and third-state practice, including the 1972 Va´zquez-Saccio Treaty between Colombia and the United States, in which the United States give up sovereignty over two of the disputed cays .[192] In this case, Nicaragua provided no evidence of having acted to have *sovereign title* over the disputed maritime features.

The Court reiterated its commitment to its long-established three-step methodology for maritime delimitation: (1) construction of a provisional equidistance/median line, (2) consideration of relevant circumstances requiring adjustment or shifting of the line, and (3) determination of whether the parties' "respective shares of the relevant area are markedly disproportionate to their respective relevant coasts".[193] It rejected Nicaragua's arguments for a different methodology because of the unique geographical circumstances in this case, but it noted that the methodology could be used in conjunction with the enclaving of islands.[194]

[188] Grossman, 'Territorial and Maritime Dispute (Nicaragua V. Colombia),' (.

[189] *Ibid*, para. 66, p.32.

[190] *Ibid*, para. 82-84.

[191] *Ibid*, para. 88.

[192] *Ibid*, para. 95.

[193] *Ibid*, para. 193.

[194] *Ibid*, para.197-199

4. *The South China Sea Arbitration between the Philipines and China (PCA Judgement)*

The issues of the Minerva reefs rises great concern as Tonga has continuously considered the reefs as an island, whereby Fiji says it's a reef on low tide elevation. The recent Award of the South China Sea (SCS) between the Republic of the Philipines and the Peoples Republic of China provides good decisions on analyzing the legal status of some features that are claimed by China to be islands. The *Philippines v. China* case was brought before the Permanent Court of Arbitration (PCA) in 2013. On July 12, 2016, the PCA published the Award by the tribunal which is said to be final and binding under the provisions of the 1982 LOSC. The case known as the South China Sea Arbitration was an arbitration case brought by the Philippines to the PCA in the Hague, under the provisions of UNCLOS against China relating to certain features in the South China Sea including the legality of China's so-called historic "nine-dash line" claim. China follows a historical precedent set by the "nine-dash line" that Beijing drew in 1947 following the surrender of Japan.

The PCA in The Hague backed the Philippines in the case of the disputed waters of the South China Sea, ruling that features claimed by China some of which are exposed only at low tide cannot be used as the basis of maritime entitlement as they are LTEs. The Court discovered that part of the features in dispute is "within the EEZ of the Philippines which China claims to some extent. The Court further stated that China had violated the Philippines sovereign rights under the 1982 LOSC in those waters by interfering with its fishing and petroleum exploration and by constructing artificial islands within Philippine's waters. Dispute of the South China Sea is one of the most contentious and complicated political subjects in the East Asia region, with China asserting sovereignty over maritime areas that are also claimed by Vietnam, Taiwan, Malaysia, Brunei, the Philippines and Japan.

Figure 2.7: Image showing the South China Sea and the disputed islands, reefs, rocks and low-tide elevations within the so-called nine-dash line claimed by China. Source: https://www.theguardian.com/news/2016/jul/12/south-china-sea-dispute-what-you-need-to-know-about-the-hague-court-ruling.

China has been seen to be increasingly involved in the activities in the SCS in recent years to further establish its presence in the region in order to have an effective claim over the SCS. China had build structures on reefs and turns them into artificial islands. The Court stated that China's construction activities in the SCS region violate the sovereign rights of the Philippines in its EEZ and continental shelf. According to the 1982 UNCLOS, China's construction activities on the features cannot be the basis of additional maritime entitlements and that it interferes with Philippine's exercise of sovereign rights in its EEZ.

4.1 The Gaven Reefs

The Gaven Reefs consist of a group of reefs at the Spratly Islands located within the South China Sea. They are controlled by China as part of Sansha and claimed by Taiwan, the Philippines, and Vietnam. The north reef (Naxun Jiao) comprises 86 hectares (210 acres) and its highest point is 1.9 meters (6 feet 3 inches) above sea level. The south reef (Xinan Jiao) comprises 67 ha (170 acres).[195] In the Tribunal's view, the proper geographical interpretation of these features is that the reef platform is submerged at high tide, while the sand cay remains exposed.[196] Therefore, in the absence of an indication that a rock or cay covers at high water, the Tribunal understands such a description to refer to a high-water feature, even in the absence of an express indication of that fact.[197]

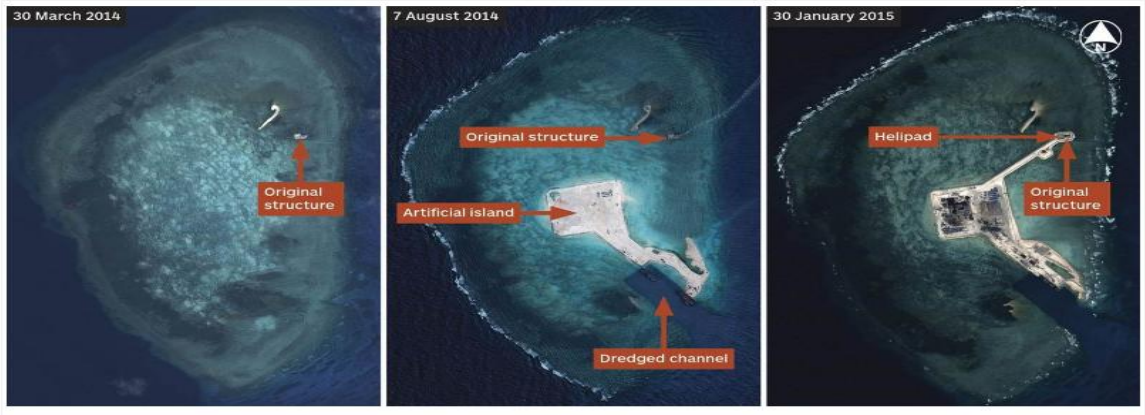


Figure 2.8: Image showing Gaven reef (North) from the year 2014 – 2015 being transformed into an artificial island by China. Source: http://thehigherlearning.com/2015/02/21/china-building-artificial-islands-to-bolster-strategic-positions-in-south-china-sea/.

On 12 July 2016, the Tribunal stated that Gaven Reef (North) is a high-tide feature which can only qualify for a 12nm territorial sea.[198] Further, the Court also concluded that Gaven Reef (South) is, or in its natural condition was, exposed at low tide and submerged at high tide and

[195] D. J. Hancox, John Robert Victor Prescott (1995). *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands, Volume 1*. IBRU. Retrieved 2012-07-25.

[196] The South China Sea Arbitration, *Philippines v. China*, 2016, p. 163, para 364 (a).

[197] *Ibid*

[198] PCA, The South China Sea Arbitration, *Philippines v. China*, para. 365

are, accordingly low-tide elevations that do not generate any maritime zone to a territorial sea, exclusive economic zone or continental shelf.[199] In the Tribunal's view, Gaven Reef (North) is a "rock" under the principle of Article 121(3). As discussed above it is a high tide feature, therefore, the Tribunal discovered that Gaven Reef (North), in its natural condition, had a small sand cay in its north-east corner that remains exposed at high tide and is accordingly a high-tide feature. It is a very small, unproductive feature obviously incapable, in its natural condition, of sustaining human habitation or an economic life of its own.

While China has constructed an installation and engaged in significant reclamation work at Gaven Reef (North), referring, to the above image, this is only possible through dredging and the elevation of the portion of the reef platform that submerges at high tide. According to the SCS Arbitration the other high-tide features that have been the subject of construction and reclamation work, the status of a feature for the purpose of Article 121(3) is to be assessed on the basis of its natural condition, prior to human modification. China's construction on Gaven Reef (North), however extensive, cannot promote its status from rock to fully entitled island.

4.2 Scarborough Shoal

Scarborough Shoal is a shoal located between the Macclesfield Bank and Luzon Island in the SCS. China does not occupy Scarborough Shoal, but controls access to the area, having forced Philippine fishermen from their historic fishing grounds. According to the SCS Arbitration, the Tribunal found out that Scarborough Shoal consists of five to seven rocks that are exposed at high tide and is accordingly a high-tide feature.[200] The Tribunal further stated that Scarborough Shoal could not sustain human habitation in their naturally formed state; they have no fresh water, vegetation, or living space and are remote from any feature possessing such factors.[201] Therefore, in the Tribunal's view, Scarborough Shoal is a "rock" under Article 121(3) of the

[199] *Ibid*, para. 366

[200] *Ibid*, para. 555

[201] *Ibid*, para 556.

1982 LOSC.[202] Scarborough Shoal has traditionally been used as a fishing ground by fishermen from different States, but the Tribunal recalls that economic activity in the surrounding waters must have some physical link to the high-tide feature itself before it could begin to constitute the economic life of the feature. There is no evidence that the fishermen working on the reef make use of, or have any connection to, the high-tide rocks at Scarborough Shoal.[203] Nor is there any evidence of economic activity beyond fishing. There is, accordingly, no evidence that Scarborough Shoal could independently sustain an economic life of its own.

Furthermore, with regards to traditional fishing rights, the Tribunal is of the view that Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities, including the Philippines, China (including from Taiwan), and Viet Nam.[204] The stories of most of those who have fished at Scarborough Shoal in generations past have not been the subject of written records, and the Tribunal considers that traditional fishing rights constitute an area where matters of evidence should be approached with sensitivity.[205] With respect to Scarborough Shoal, the Tribunal accepts that the claims of both the Philippines and China to have traditionally fished at the shoal are accurate and advanced in good faith.[206] Based on the considerations outlined above, the Tribunal finds that China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal.[207] Finally, the Tribunal stated that the decision of the Court is entire without prejudice to the question of sovereignty over Scarborough Shoal.[208]

[202] *Ibid.*

[203] *Ibid*

[204] *Ibid*, para. 805

[205] *Ibid*

[206] *Ibid*

[207] *Ibid*

[208] *Ibid*

5. *Okinotorishima: Low-tide elevation (LTE), Rock, or Island*

Okinotorishima (Okinotori) is located in the western Pacific Ocean, 1, 740 kilometers from the Japanese mainland and consists of atoll reefs. Okinotori is considered a Japanese uninhabited atoll with a total area of 8,482 m^2 (2.096 acres). It's dry land area, however, is mostly made up by three concrete encasings; it furthermore has a 100 by 50 m (330 by 160 ft) platform in its lagoon housing a research station. China and Taiwan dispute the Japanese EEZ around the atoll, stating that the atoll is not an island and therefore cannot have an EEZ. Okinotori has been a source of contention between Japan and China since 2004 when Chinese officials started to refer to the feature as "rocks" not as an "island."[209] Since the ruling of the Permanent Court of Arbitration in The Hague in favor of the Philippines case against China's claim to sovereignty over large part of the South China Sea created effects that went far beyond the area involved. If Okinotori were recognized as an island, Japan would be entitled to a 200nm EEZ which China oppose given the physical status of the features. While China recognized Japan's territorial rights to Okinotorishima, China insisted that the features are rocks and not islands. Okinotori has never been occupied and its economic life is disputable.

Figure 2.9: Above image shows the status of the Okinotori reefs.
(Source:http://www.japantimes.co.jp/news/2012/04/29/national/u-n-oks-japan-claim-to-expand-shelf/#.WBjHXS2LRdg)

[209] Yukie Yoshikawa, 'The Us-Japan-China Mistrust Spiral and Okinotorishima', *Japan Focus*, 11 (2007).

Figure 2.10: The above image shows that Japan has developed part of the Okinotori reef concrete titanium.
Source:http://www.japantimes.co.jp/news/2012/04/29/national/u-n-oks-japan-claim-to-expand-shelf/#.WBjHXS2LRdg.

To stop the features from disappearing due to sea level rise and to use them to extend its EEZ and continental shelf, Japan has constructed concrete titanium on part of the reef to make Okinotori meet the criteria of an "island", but this is unacceptable under international law. The breeding of the coral reef and sand by Japan were to enlarge the “island”, considering the trend of a rise in the sea level due to global warming, along with securing space for human habitation. Because, China’s interests are broader, encompassing other resources as well as security issues, it will doubtless continue to object Japan’s claim to the features as islands. Since Okinotori cannot, at least at present, sustain either significant economic activity or human habitation, Japan’s case would appear to be weak before the Court. Since April 2004, the Chinese government has been saying that it is prepared to recognize the territorial rights of Japan to Okinotorishima, but not on the basis that it is regarded as “islands”.

Part 2: Analysis of the Claims Made by Fiji and Tonga over the Minerva Reefs

Chapter One: Implications of Tonga's Claim on Fiji's Maritime Boundaries

What makes the Minerva reefs complicated is not only the controversy regarding the ownership but also the ability for the features to have maritime zones. From a political perspective, the issue is implicative to both Fiji and Tonga in terms of their domestic legitimacy and their bilateral relations in general. For Fiji, the sovereignty claim by Tonga over the Minerva reefs has strong implications as a concern to Fiji's rights and obligations within their EEZ under the LOSC. Since international credibility is taken into account, the two neighbouring States are adamant and committed in their claims over the reefs. Both Fiji and Tonga claimed the uninhabited Minerva reefs, yet, no formal dispute exists between the two countries regarding these claims, but whether these reefs can or should generate 200nm EEZ and a continental shelf remains an uncertainty. The Tongan situation is particularly complex, because the Tongans have built a lighthouse, and in 1971 the Ocean Life Research Foundation buried part of the submerged reefs with sand in which Tonga claims the reefs to be islands.

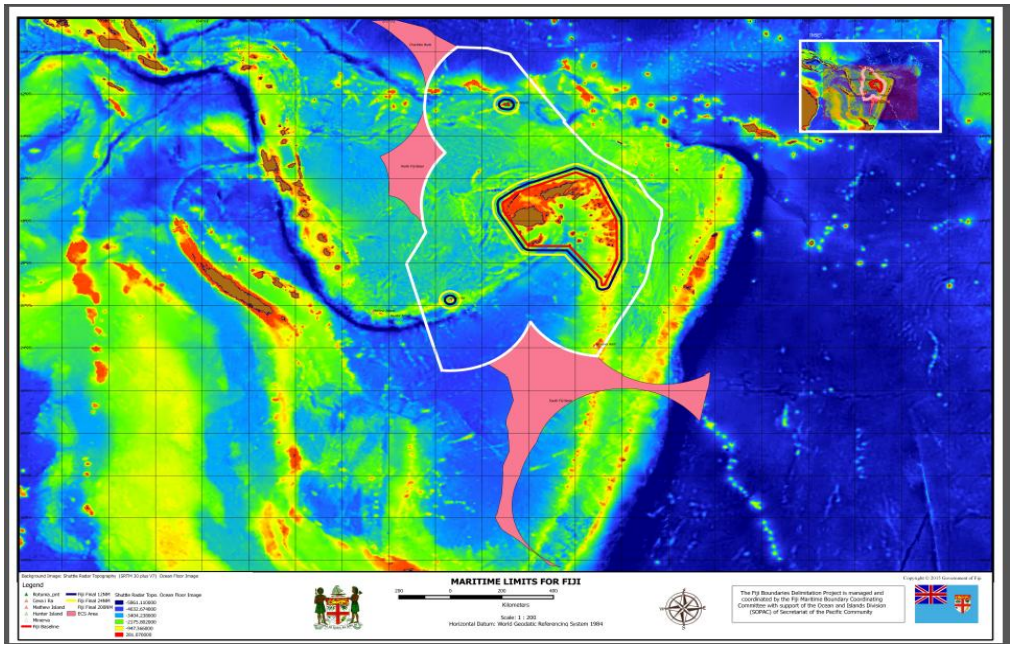


Figure 3: Map showing Fiji's Maritime Claims including its Extended Continental Shelf. The Fiji Boundary Delimitation Project is managed and coordinated by the Maritime

Affairs Coordinating Committee (MACC) with the support of the Oceans and Islands Division (SOPAC) of the Secretariat of the Pacific Community (SPC). Source: Maritime Affairs Coordinating Committee (MACC).

In addition, Tonga's historic Proclamation of 1972 may also create difficulties not only for Fiji but also neighboring Pacific countries such as New Zealand. The question is, does the Proclamation originally issued to claim the waters themselves or only to give clear guidance to the locations of the features claimed? A historic claim should certainly be given due consideration in any ultimate resolution, but the actual weight to be given must be determined through good-faith negotiations. Tonga's claim to the Minerva Reefs may complicate Fiji-Tonga maritime boundary negotiations. Although Pacific island countries did acknowledge Tonga's association to these reefs during the 1972 Pacific Island Forum meeting, it is believed that Fiji's EEZ enclose the reefs. If indeed the reefs themselves are only low-tide elevations,[210] they would not have a territorial sea under Article 13(2) of the 1982 LOSC.

In this regards, if the Minerva reefs are low-tide elevations it is not permitted to have any maritime entitlement under the LOSC. In the case of rights of coastal States in their EEZ, it can be said that Tonga may have violated Fiji's jurisdictional rights under the 1982 LOSC in those waters at the Minerva reefs by constructing artificial structures in Fiji's waters. The conflicting interest under the principles of the 1982 LOSC and the historic title claim by Tonga under international law need to be negotiated between the two States effectively to enable a mutual understanding. This will provide a sympathetic idea of how to deal with such sensitive issues given their common interest. It should be noted here that North and South Minerva reef would fall within Fiji's EEZ. If Tonga were to claim EEZ around the Minerva reefs than it would undermine Article 121 of the 1982 LOSC. It is important to note the legal interpretation of island, rock and low-tide elevation under the LOSC in order to ensure whether the feature is

[210] A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (art. 13(1). Low-tide elevation is a legal term for what are generally described as drying banks or rocks. On nautical charts they should be distinguished from islands. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own. *See Article 13 (2), 1982 UNCLOS*.

entitled to have maritime zones. Below are some of the pictures taken at the Minerva reefs that give an understanding of its physical status;

Figure 3.1: Image showing that the reef is submerged at high tide.
Source: Al Grant, Auckland, New Zealand, August 14, 2007. Available at https://plus.google.com/+AlGrantnz/photos.

Figure 3.2: Image showing a rock, believed to be the highest feature on the reef. The photo was taken by yachters that visit the Minerva reefs.
Source:http://smithtribesailing.blogspot.co.uk/2014/02/minerva-reef-23-degrees-south.html?view=classic

Figure 3.3: Image showing a tourist visiting part of the Minerva reefs. By looking at the image it is believed that the reef is submerged, which cannot sustain human habitation. Source:http://smithtribesailing.blogspot.co.uk/2014/02/minerva-reef-23-degrees-south.html?view=classic.

Many tourists that visit Minerva reveal that the reefs are submerged at high tide. If the tourists during the visit (anchor) at the Minerva reefs witnessed that the reefs are submerged at high tide than the features is a low-tide elevation and under the LOSC it doesn't qualify to have any maritime zone. Unless if there is sufficient evidence to prove that the reefs are above water during high tide than it is regarded as a rock. By referring to the above images it shows that Minerva may not have the capability to sustain human habitation or economic life of its own because most parts of the reefs are said to be submerged. In this regard, the reefs don't qualify as an island under Article 121 of the 1982 LOSC, but, if the reefs are said to be above water at high tide than it is a "rock" and is only entitled to a 12nm territorial sea.

The legal interpretation of islands under the LOSC has been adopted without change as underlined in Article 121. Under this classification, the Minerva Reefs, being totally submerged at high tide under "natural" conditions, would not seem to qualify as islands.[211] Instead, the reefs

[211] Broder, Sherry, et al. (1982).

would probably be classified as low tide elevations which, according to the LOSC, are not entitled to a territorial sea.[212] Such low tide feature can be used as base points for measuring a territorial sea if they are within twelve miles of another territory within a country's jurisdiction, but if not, they can have no impact on the delimitation of maritime space. Because the reefs are approximately 170 miles from the closest Tongan territory, the island of Ata, the reefs, therefore, cannot be used as base points for measuring Tonga's territorial sea. In a session of the Law of the Sea Institute in November 1977, Fiji's then Foreign Minister, Joji Kotobalavu, responded to a question on the status of the Minerva Reefs as follows:

> *The status of the Minerva Reefs], of course, is a matter that will have to be resolved by Fiji and Tonga. New Zealand also has an interest in this. If it is accepted that Minerva Reefs can generate its own economic zone, that will have some effect on the manner in which the economic zones of Fiji and New Zealand are drawn. This situation has not yet been resolved, but, again, we hope it will be settled in a Pacific way. Under the ICNT [Informal Composite Negotiating Text of the Law of the Sea Conference], as you know, a drying reef (that is a low-tide elevation) cannot generate a territorial sea or an EEZ [exclusive economic zone], if it is wholly situated more distant than the breadth of the territorial sea from the adjoining or adjacent territory.*[213]

According to the above statement, Fiji is willing to resolve these conflicting interests through direct negotiations with Tonga and New Zealand as Tonga's action on the reefs will greatly affect their maritime zones. The statement precisely outlined that if the Minerva reefs are to be considered islands than it will have some implications for Fiji given that Tonga will draw 200nm EEZ around the reefs. Tonga has constructed a lighthouse on part of the reef and this has cause some misunderstanding between Fiji and Tonga in terms of first trying to negotiate on the legal status of the reefs. Construction of a lighthouse on a reef won't fully give weight to a State to

[212] Article 60(8) states, "Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."

[213] Kotobalavu, The Informal Composite Negotiating Text was an earlier version of the Draft Convention, 316-17. *Also see, Broder, Sherry, et al. (1982).*

have maritime entitlement given the physical status of the features. At the 1952 meetings of the International Law Commission, a scholar examined prior statements of the draft provisions of the LOSC concerning continental shelf and concluded that the concept of safety zones could apply to lighthouses placed on low tide elevations. He further noted that lighthouses on an area of land permanently above the high water mark would present no difficulties because the land would of itself be an island and have its own territorial sea.[214] Because Tonga has not yet declared an EEZ from the breadth of its territorial, the waters around the Minerva Reefs are considered to be under Fiji's jurisdiction as it is within Fiji's EEZ. It may, therefore, be necessary to consider whether the construction made on the reefs could qualify as islands.

When scrutinizing the natural status of the Minerva reefs and referring to relevant jurisprudence cases outlined in this paper, it can be said that the reefs could either fall within the context of a low-tide elevation or a rock. The classification of the reefs to be islands is irrelevant under Article 121 of the 1982 LOSC. If the features have tangible evidence to be classified as a rock than it can only be entitled to a 12nm territorial sea with no EEZ and no continental shelf. This is clear under Article 121 (3) which states that; "Rocks which cannot sustain human habitation or economic life shall have no exclusive economic zone or continental shelf". By assessing the features on the basis of its natural condition and according to the analysis in this paper the reefs don't have the ability to sustain human habitation, therefore, the reefs cannot be considered as islands. The Minerva reefs have neither been inhabited nor have any sign of a stable environment to sustain human dwelling. The habitability[215] of the Minerva reefs should be evaluated against whether the natural condition thereof permits the life of a stable civilian community. Little is known about its ability to sustain an economy and provide for human permanent residence, except that the surrounding sea is reported to have rich marine resources. The reefs, therefore, may not satisfy the conditions set forth in Article 121(3).

[214] Broder, Sherry, et al. (1982).

[215] Oxford dictionary definition of "habitable"; *Suitable or good enough to live in*. Habitability is the conformance of a residence or abode to the implied warranty of a habitat.

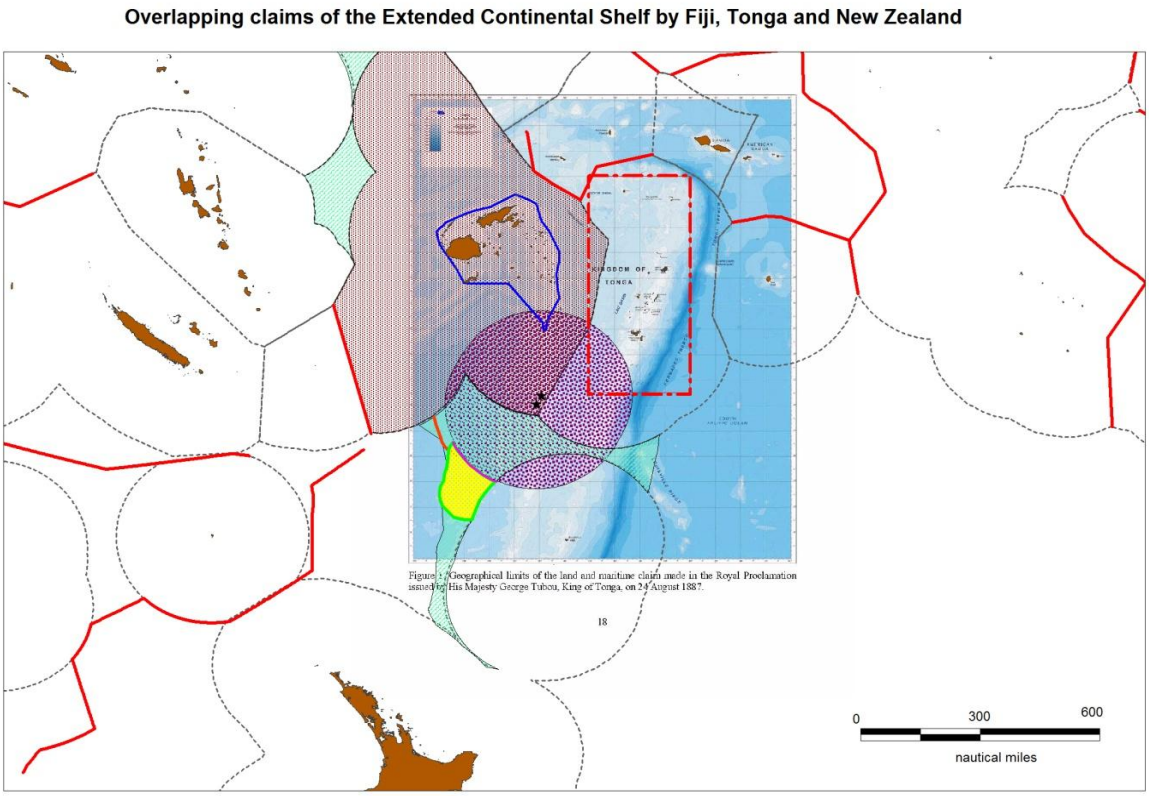


Figure 3.4: Map shows the outer limits of the continental shelf of both Fiji (shown in green) and the Kingdom of Tonga (shown in yellow). Source: Technical Advisory Team of the Maritime Affairs Coordinating Committee of Fiji (MACC).

According to the above map, the Fijian government has assumed that Tonga did draw 200nm EEZ around the Minerva reefs in order to claim its ECS as shown in yellow. The implication this will have on Fiji is huge as Fiji will lose some of its waters including the marine resources, its potential ECS, and part of the features and reefs located in the Southern Lau group of Fiji. According to Tonga's 2014 submission to the CLCS, it has been discovered that Tonga has considered the reefs as islands and have claimed extended continental shelf generated from a 200nm EEZ as of Minerva reefs. This is said to have serious implications to Fiji's EEZ and ECS claim in the South Fiji basin. An EEZ extending from Minerva will create a significant loss to Fiji's waters including its marine resources. Nonetheless, for the purpose of this paper, it is necessary to analyze the competing claims in detail and to view the facts through the legal principles that would be applied under international law. The process of addressing the

disagreement over Minerva reefs is particularly challenging because Tonga does not recognize this as a disputed matter and contends that Tonga's claim over the Minerva reefs cannot be questioned. Thus, it is likely to be noticed that in future this issue may turn into a territorial maritime dispute between the two countries given the fact that Tonga has submitted its continental shelf (CS) claim to the CLCS. As shown on the above map (Figure 3.4), Tonga's CS claim has been generated from an EEZ drawn from the Minerva reefs, according to the coordinates provided in the Tonga's 2014 submission.

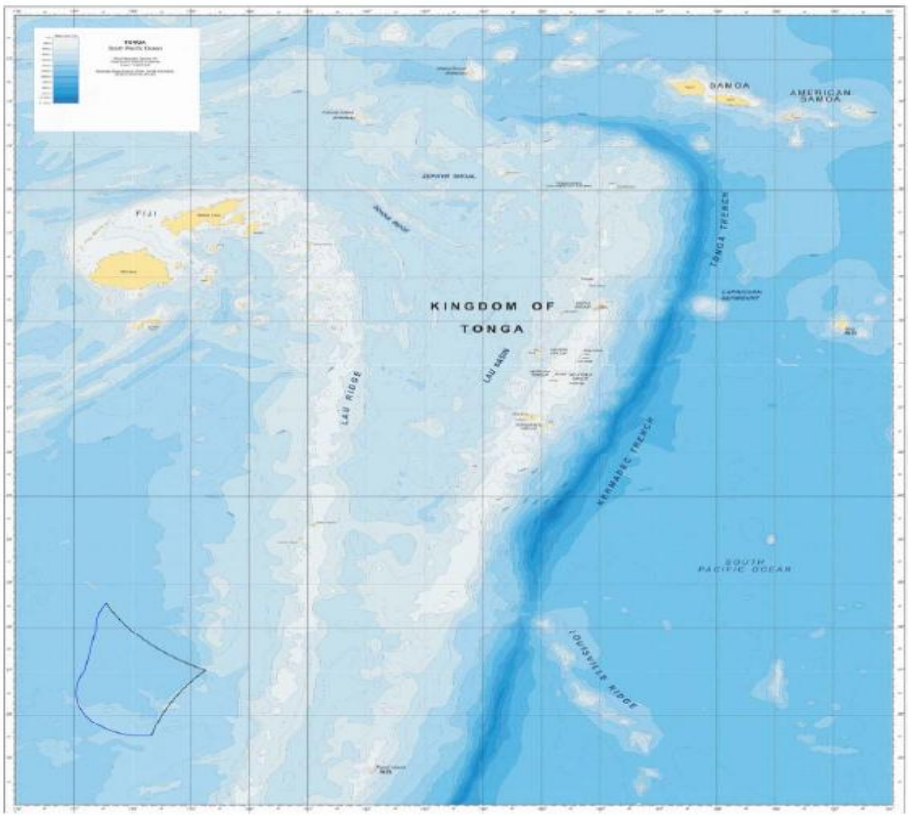


Figure 3.5: Map shows the 2014 continental shelf claim of the Kingdom of Tonga (shown in blue) beyond 200 nautical miles, from the baselines of the Minerva reefs. Source: Tonga's Continental Shelf Submission of 2014 to the CLCS, available from:http://www.un.org/depts/los/clcs_new/submissions_files/submission_ton_73_2014.htm.

Fiji's 2009 partial submission on the continental shelf is produced from the very distinctive Lau Ridge in the Southern Pacific region which comprises growing coral-capped parts of the remnant

volcanic arc, and the South Fiji Basin.[216] The latter is a back-arc basin flanked by the Lau Ridge in the east. Fiji is of the view that the natural geological processes that contributed to the formation of the Lau Ridge formed also the southern-most island, Tuvana-i-ra, of the Lau Islands Group and hence the Lau Ridge is in geological continuity with, and comprises the submerged prolongation of the landmass of Fiji in the Lau Ridge-northern South Fiji Basin Region.[217]The outer limit of the ECS in the Lau Ridge - northern South Fiji Basin Region encloses an area extending beyond 200nm from the territorial sea baseline of Fiji.

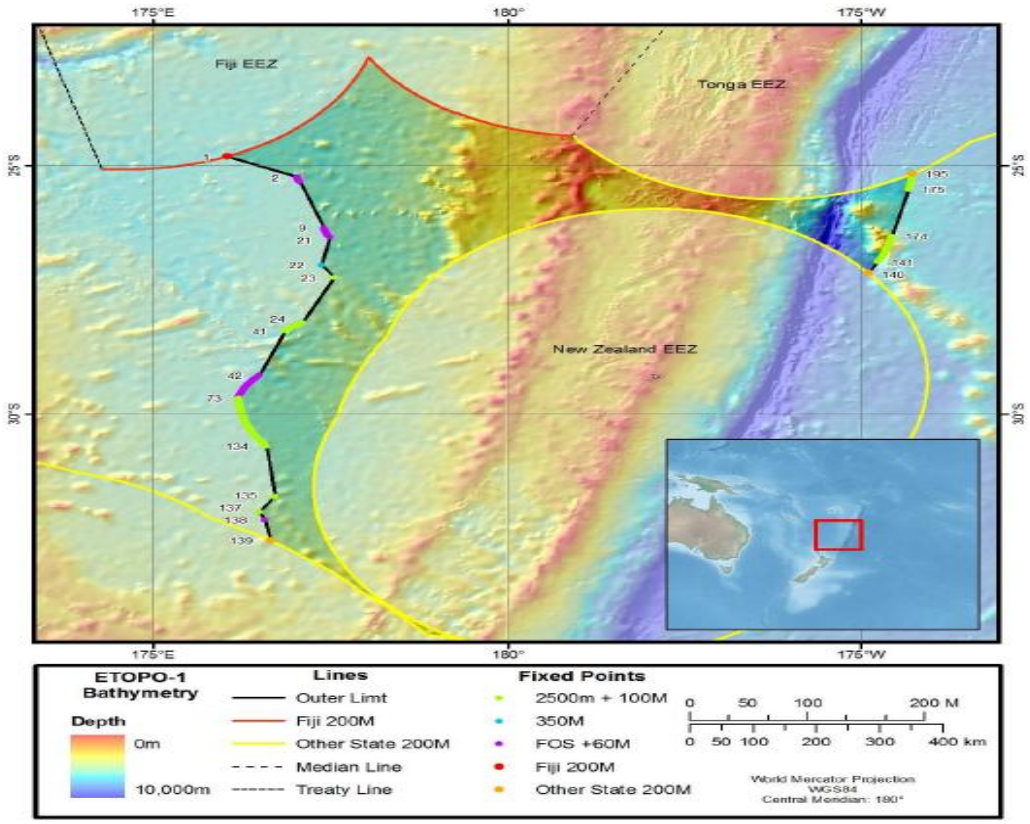


Figure 3.6: Map showing Fiji's Outer Limits of the Continental Shelf in the South Fiji Basin Region of the Lau-Colville and Tonga-Kermadec Complex. Source: Technical team of the Fiji Maritime Affairs Coordinating Committee (MACC).

[216] Fiji's Partial Submission to the Commission on the Limits of the Continental Shelf, 2009, available from; http://www.un.org/depts/los/clcs_new/submissions_files/submission_fji_24_2009.htm

[217] *Ibid*

It is likely that Tonga's submission to the CLCS could influence the relations between the two neighbouring Pacific island nations given that the ocean plays a vital role in both countries economy. The principles applied by Tonga in its continental shelf submission to the Commission could be seen as a focal point where Fiji will officially oppose, by submitting a note verbal to the CLCS stating the nature of claims and the effects it may cause to Fiji's maritime boundaries including its continental shelf.

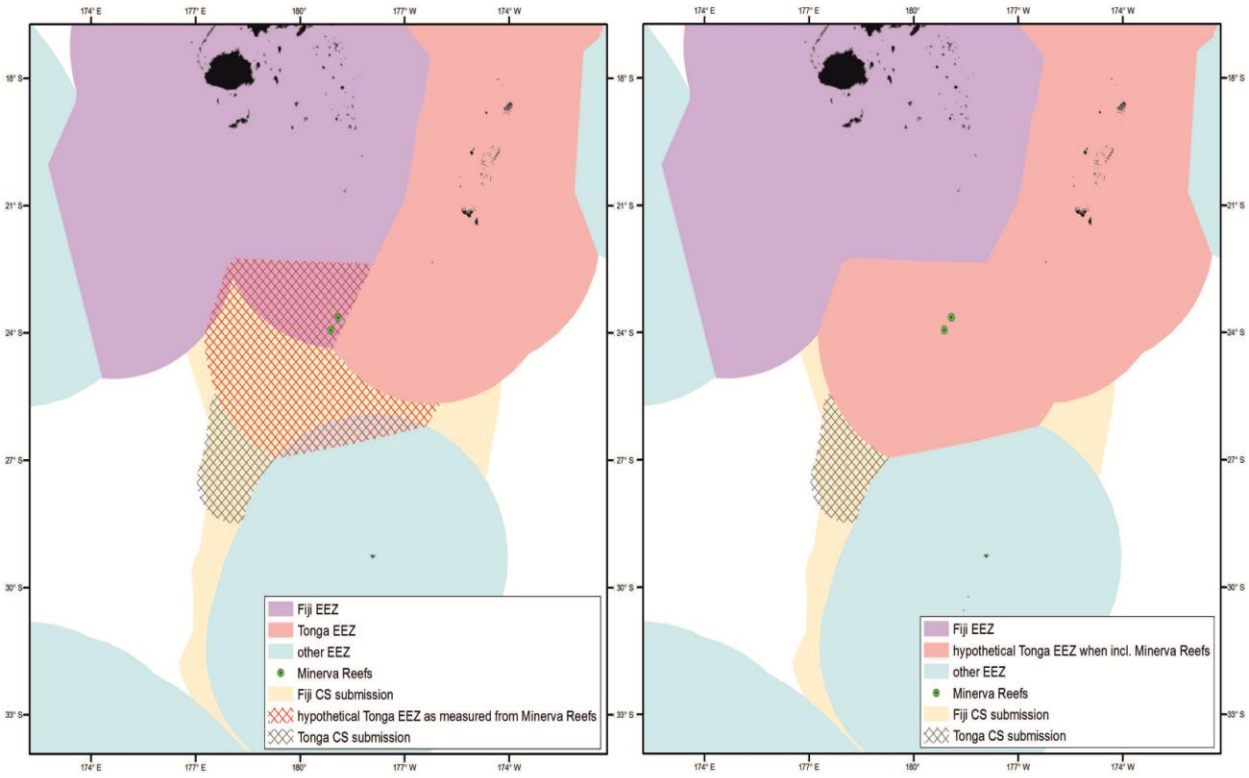


Figure 3.7: Shows a hypothetical Tonga EEZ as measured from the Minerva reefs which also show the implications it may cause to Fiji's maritime space including its ECS. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

Tonga's continued interest in claiming an EEZ and ECS from the Minerva reefs overlaps Fiji's continental shelf claim as shown on the above map (Figure 3.4). This has made the matter become more complicated as it could cause serious impact to Fiji. Tonga's action and involvement around the reefs may challenge Fiji's position that Tonga's claimed EEZ around the reefs violates the provisions of the LOSC and international law, as the features don't qualify to be considered as islands under Article 121. Tonga, however, may feel reluctant to accept the idea

that the Minerva reefs should not be able to generate an EEZ and continental shelf as they have considered the reefs as islands since 1972. Thus, because of its concern about how such action would affect Fiji's claims to its ocean space would bring about a possibility of a territorial maritime dispute between the two countries if the issue is not properly negotiated.

The geographical location of Fiji and Tonga in the South Pacific Ocean shows that both countries are heavily dependent on the sea. But due to the conflicting claims by these neighbouring States, Fiji could not realize that the claims made by Tonga to have an EEZ and continental shelf from the Minerva reefs could create a disproportionate burden on their efforts to finalise their maritime boundaries. Therefore, the issue could become significant in the context of both States sharing the same resources and the issue of safety and security of their citizens can become a concern as both countries navy ship use to conduct patrol exercise on the reefs. The last few pages of this chapter will provide some scenarios in which both Fiji and Tonga may need to consider in order understand the implications of boundary delimitation from Minerva reefs if the features are thought to be islands, rock or LTEs. These scenarios will describe how the reefs will affect both States if the features are regarded as LTEs, rocks or islands and will provide options as the method of delimitation that is appropriate for this case.

Scenario 1: If Minerva reefs are Low-tide elevations (LTEs)

According to the 1982 LOSC, a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. If the Minerva reefs are considered to be LTEs, it will not be entitled to have any maritime zone, therefore, has no effect on delimitation. By ignoring the reefs itself, the EEZ of Fiji and Tonga will only be the existing boundary lines having no effect from the features itself. According to Article 13 (2), "[w]here a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."[218] Thus, low-tide elevations do not have a contiguous zone, continental shelf or exclusive economic zone. However, if the

[218] United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 13, 1833 U.N.T.S., 397, 403 *available from;* http://www.un.org/Depts/los/convention-agreements/texts/unclos/part2.htm [hereinafter UNCLOS].

distance requirement is met, the low-water line of the low-tide elevation can be used as a baseline. As a result, the ultimate existence of these features in the delimitation area shall not affect the delimitation of the continental shelf or that of the EEZ.[219] In this case, if the Minerva reefs are LTEs than the features has no effect to the delimitation of the continental shelf or EEZ.

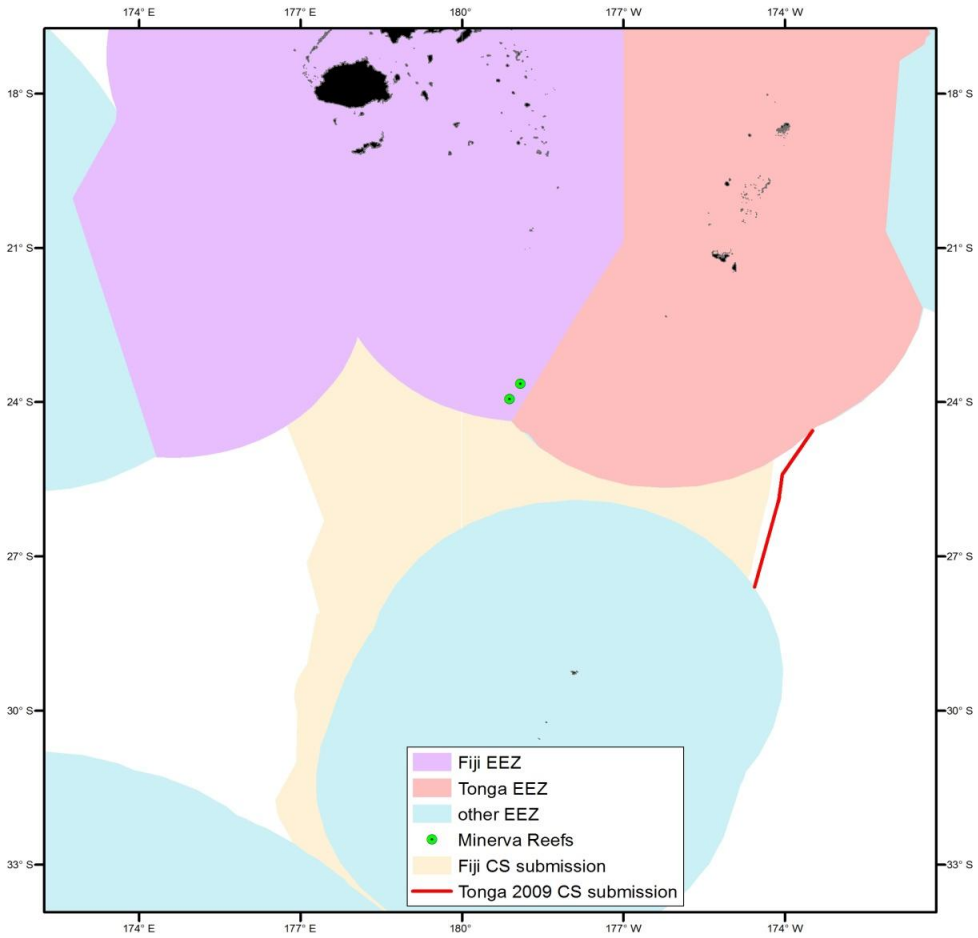


Figure 3.8: The above image shows, an example if the Minerva reefs are low-tide elevations than they will have no implications to the existing maritime boundary and the continental shelf. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

[219] *Ibid at 488.*

Scenario 2: If the features are Rocks

Rocks can have a territorial sea and can be used as a base point for measuring maritime boundaries. It cannot be used as a base point for measuring the EEZ and Continental Shelf. For instance, the Tribunal in its award for the South China Sea Arbitration carries out a detailed assessment to determine whether the Spratly Islands and Scarborough Reef are covered by article 121(3) of the LOSC.[220] On the basis of this consideration, the tribunal reaches the conclusion that none of these features can sustain human habitation or economic life of their own, meaning that they do not have an EEZ and CS.[221]

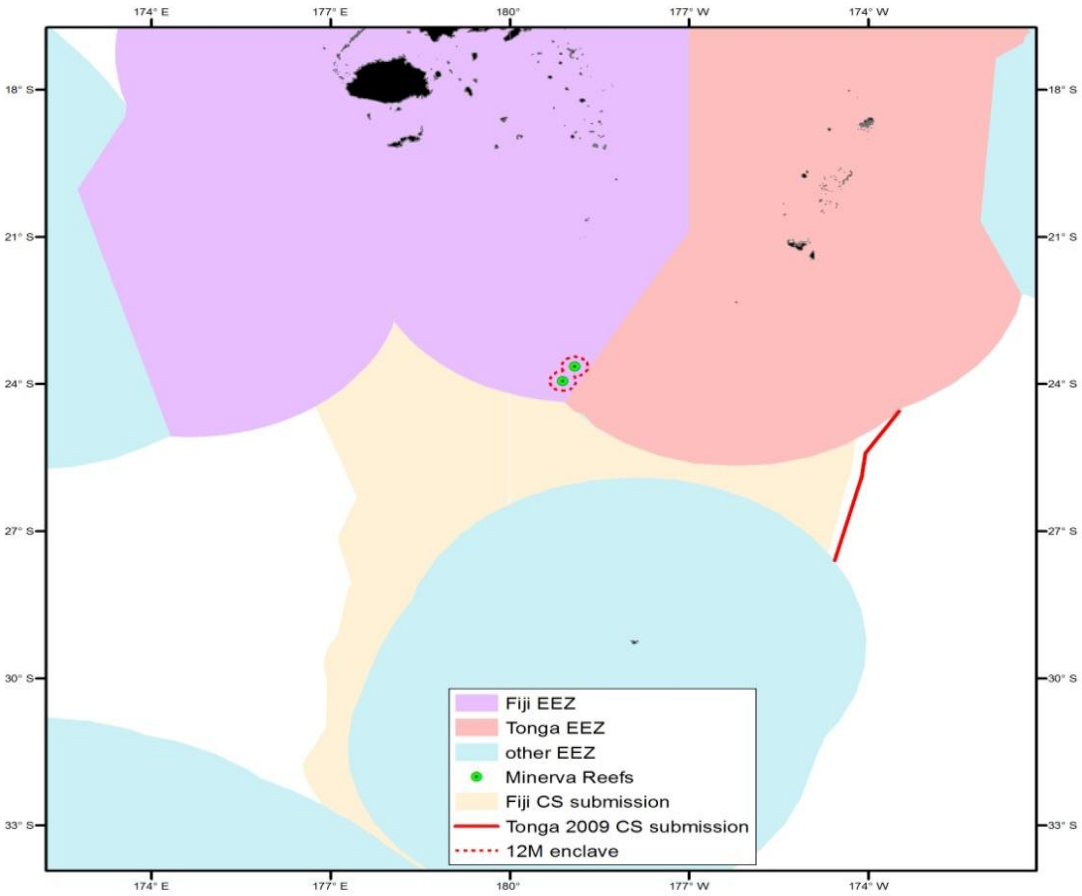


Figure 3.8: If the reefs are regarded as rocks and are given 12M Territorial Sea and fully enclaved within Fiji's EEZ. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

[220] South China Sea Arbitration, para 554-626

[221] *Ibid. 626.*

According to the above figure, if the Minerva reefs are hypothetically rocks it will only be entitled to have a 12nm territorial sea with no EEZ and no continental shelf. Hence, if the features are said to be under Tonga's jurisdiction they will only have a 12nm TS by enclaving the reefs giving it a full effect (see figure 3.8). The delimitation method used will still have an implication to Fiji's marine space. This will cause Fiji to lose part of its EEZ, while Tonga will lose its continental shelf claim in the South Fiji basin of the Lau-Colville Ridge region. The method of enclaving the reefs can be applied to enable Tonga to only have limited rights within 12nm around the reefs instead of benefiting from a 200nm EEZ and extended CS which will affect both Fiji and New Zealand maritime space. The method of enclaving the reefs can be seen as a convenient way to be used in the case of Tonga claiming sovereignty over the features. In this case, the process of enclaving the reefs need to be negotiated efficiently and peacefully by both States by first determining the sovereignty of the features and establish the method to be applied.

Scenario 3: Options if the reefs are Islands

When providing options on how to deal with such sensitive issues of trying to define whether the features are islands, rocks or low-tide elevation, it is important to take into account how these different categories affect both States in terms of boundary delimitation. The circumstances of the reefs to be classified as islands has been strongly been affirmed by Tonga, and this position has been discovered after they submitted their extended continental shelf claim to the CLCS. Analysing Tonga's 2014 submission to the CLCS it can be said that their CS claim could be generated from a 200nm EEZ from the Minerva reefs, as shown on the map (Figure 3.7). Assume that the features are accepted as islands and if it is under Tonga's sovereignty, it will definitely have a serious impact on Fiji's maritime space which is a worrying matter. But, on the other hand, if the reefs are islands and if it is under Fiji's jurisdiction than Fiji will also draw a 200nm EEZ from the reefs (see map on figure 3.9 (a)). This will also create some implications to Tonga's marine space as they will lose part of their EEZ and continental shelf.

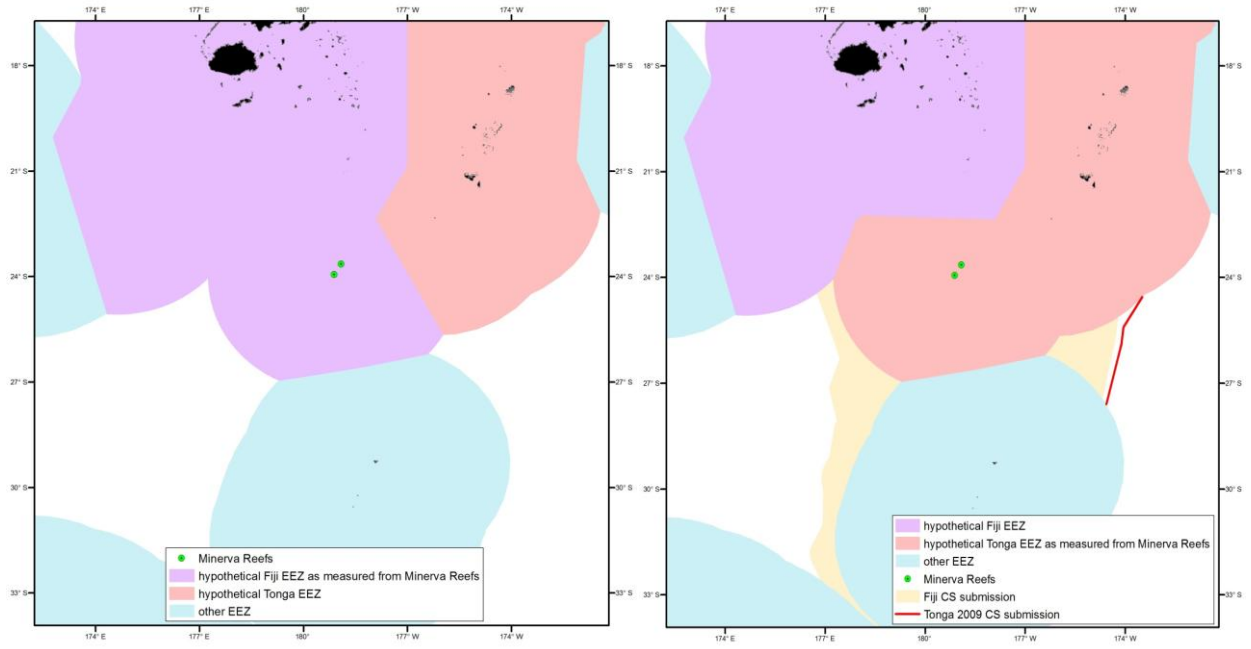


Figure 3.9 (a) Figure 3.9 (b)

Figure 3.9 (a, b): The above figures show the implications if the features are islands. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

According to figure 3.9 (a) it shows if the reefs are islands and if it's under Fiji's jurisdiction, Fiji would generate a 200nm from the reefs which will cause Tonga to lose part of their EEZ and continental shelf. On the other hand, if the features are islands and if it is under Tonga's sovereignty then Tonga will also generate a 200nm which also cause Fiji to lose part of its maritime space. In some situations, no effect has been granted to an island because of its sovereignty was disputed. Generally, however, islands are discounted; the smaller the feature, the more limited role it will play in the delimitation.[222] This occurred, for instance, in the Iran-Qatar delimitation (1969), in which the island of Halul was ignored. The state of affairs between Fiji and Tonga is critical but looks complicated especially as we get into how to analyze and apply which delimitation principles or methods are equitable for both States if the features are islands.

[222] Jonathan I. Charney, "Rocks that cannot sustain human habitation", The American Journal of International Law, vol. 93, No. 4 (October 1999), p. 876.

The effect of the Minerva reefs should be the key issue regarding the final decision in the negotiation for its ability have maritime zones or not. If the reefs are islands rather than a rock (according to Article 121 of the LOSC) it would be entitled to claim all maritime zones. However, even if the reefs are regarded as an island, under Article 121 of the LOSC, modern international law, as evident in some cases, tends not to allow a small feature to have a disproportionate effect that may then result in inequitable maritime boundaries. It is worth to note that the final method of boundary delimitation is subject to negotiations between Fiji and Tonga. The options provided in this chapter, lack official character but can be used as a preliminary model.

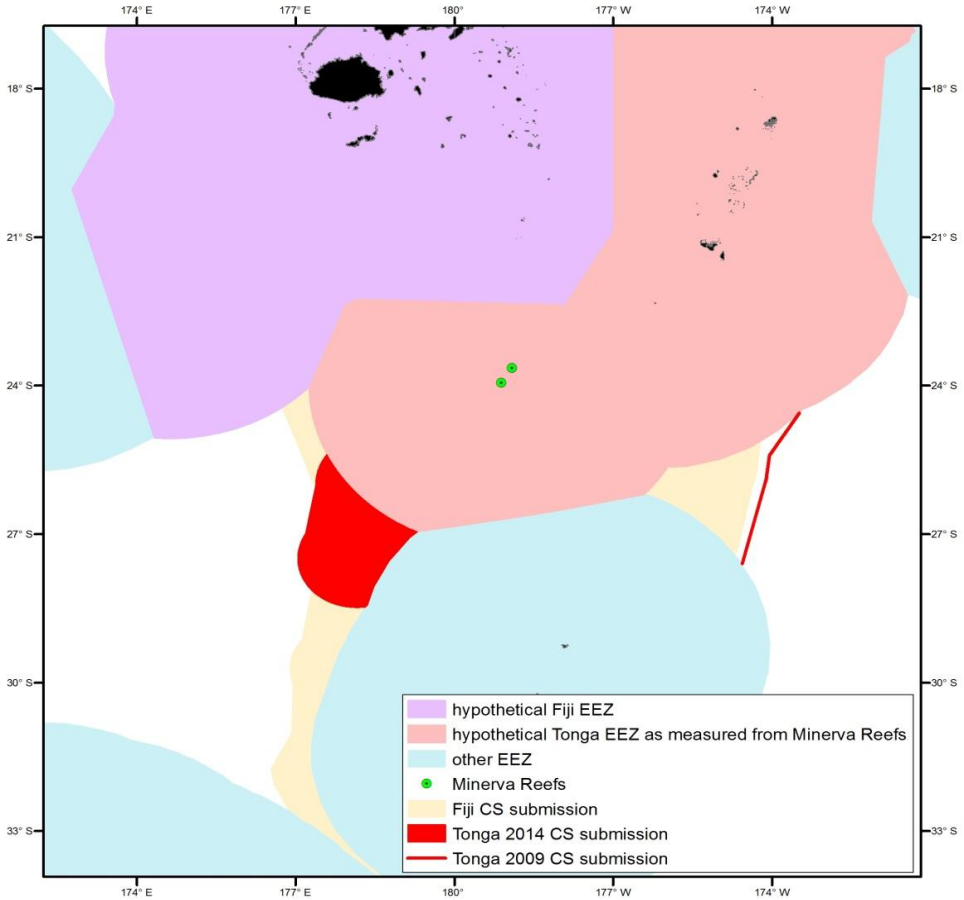


Figure 4.0: Map showing if figure 3.9 is accepted as islands then Tonga will delineate to claim extended continental shelf from the reefs as shown in red on Tonga's 2014 CS submission. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

According to figure 4.0, it is also important to note that Tonga has also claimed ECS in its Southern region as indicated in its 2009 submission to the CLCS. This as a result could further expand Tonga's maritime space and cause serious implication to Fiji's EEZ and CS. When analysing both Tonga's 2009 and 2014 CS submission to the CLCS, Tonga's maritime space will expand significantly and this will have huge affect to Fiji if the legal titles of the features are islands (see figure 4.1).

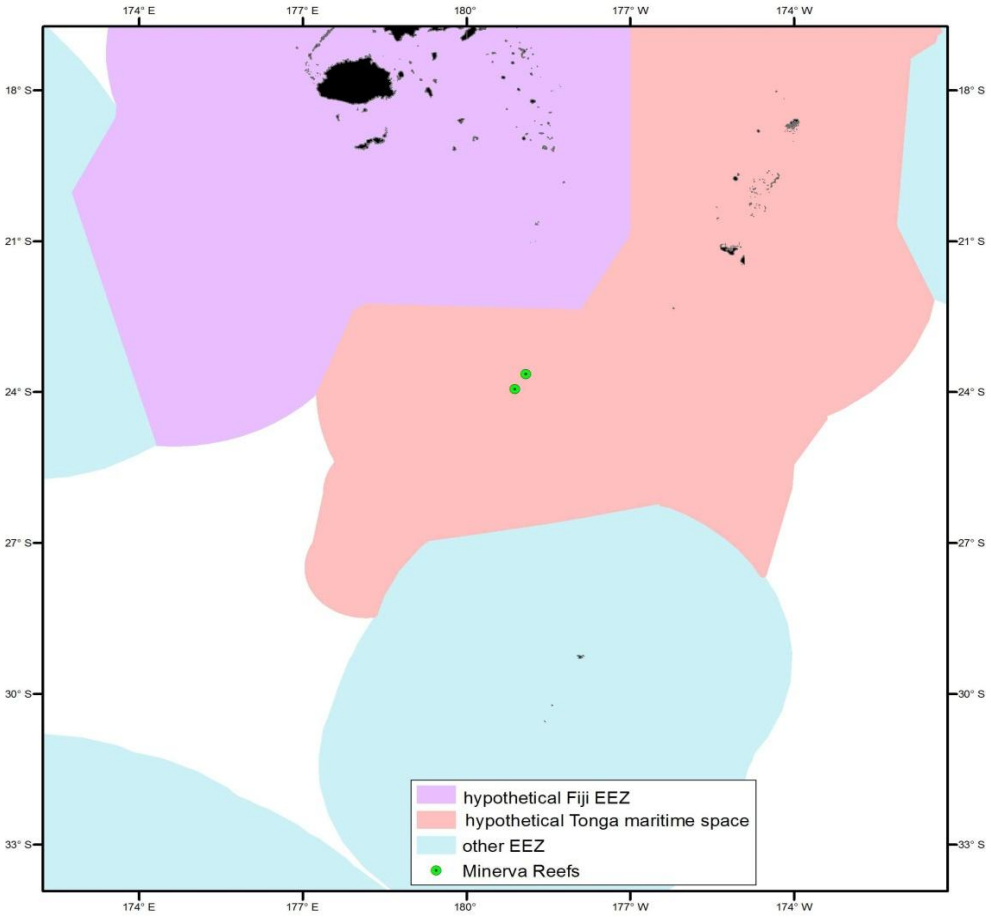


Figure 4.1: The above figure shows Tonga's potential maritime space if the reefs are islands. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

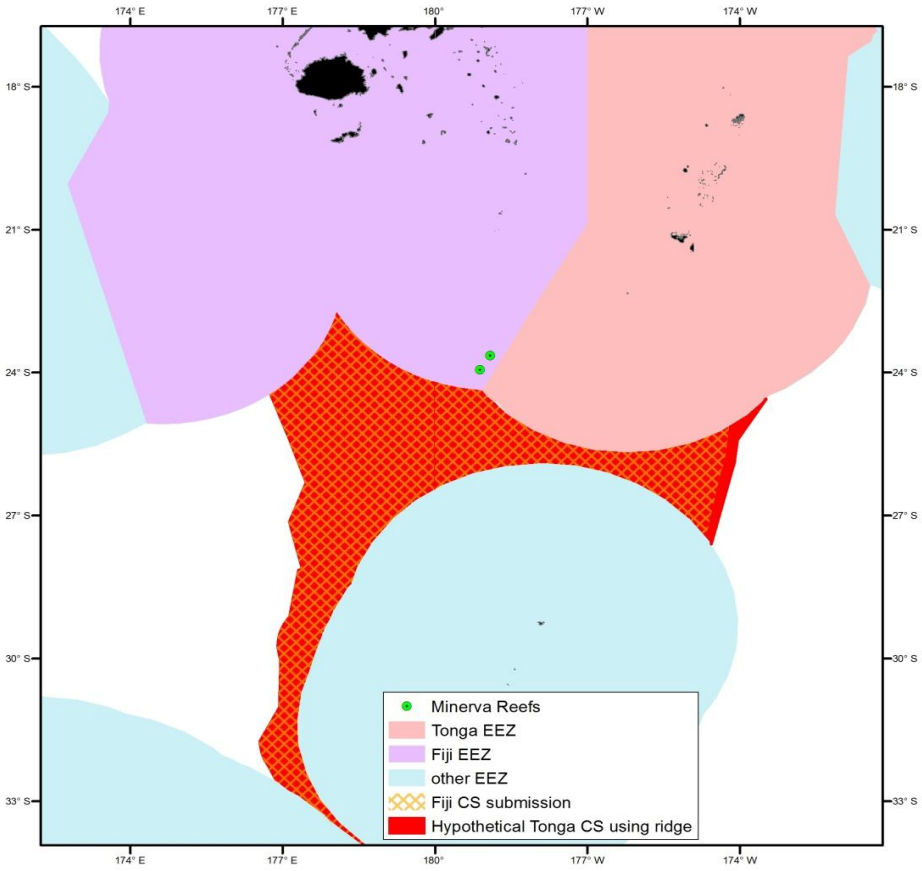


Figure 4.2: This is how it will appear, if Tonga ignores the reefs and uses the Lau-Colville Ridge and Tonga-Kermadec Complex, instead can have a similar western edge CS claim with that of Fiji's, resulting in significant overlap. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

Since Fiji and Tonga's CS claim overlaps, the option of adopting the equitable principle, in this case, is important to ensure that peace is maintained in the region. The question is how to implement this equitable principle? In fact, both Fiji and Tonga doesn't want to lose out on their continental shelf claim and part of the EEZ. So, by drawing an equidistance line extending from their EEZ down south of the Lau-Colville Ridge it could provide an equitable solution for both parties to still have CS. Thus, for the reefs, if it is under Tonga's jurisdiction then the practice of enclaving the reefs within 12M are also applicable in this case.

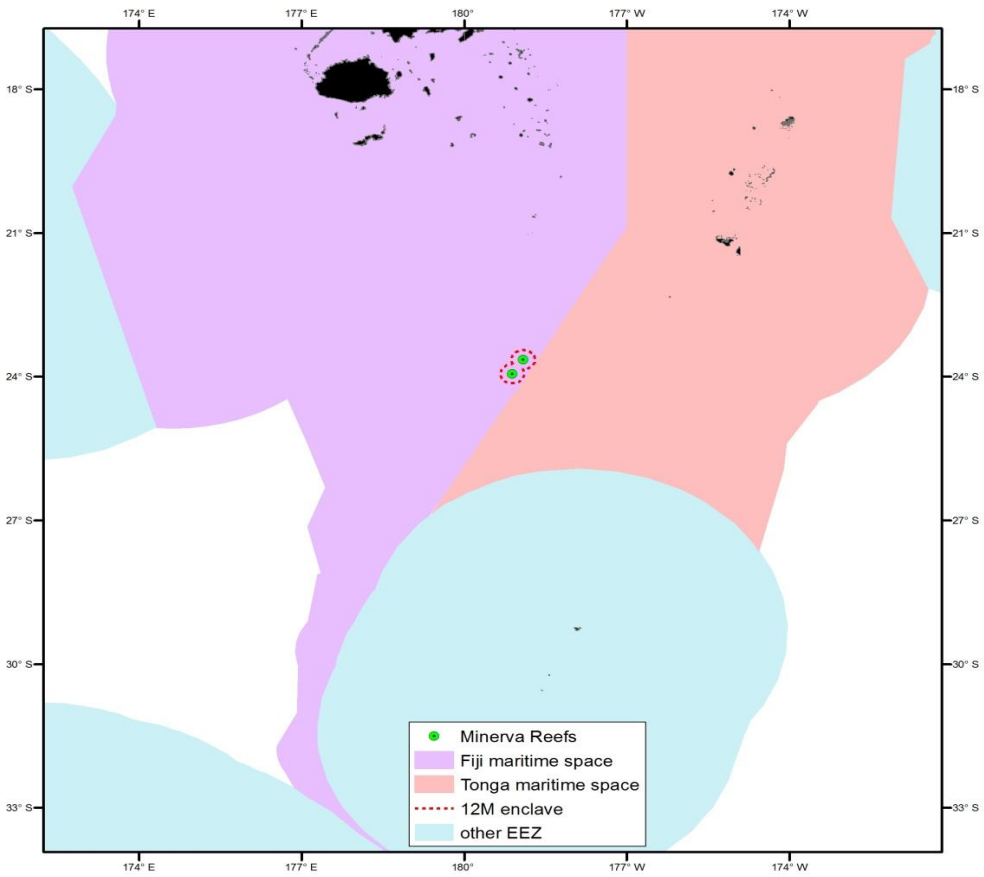


Figure 4.3: This would enable "conventional" delimitation of overlapping CS based on mainland baselines and given sovereignty of reefs to Tonga and accept as a rock also allow enclave. Source: Alan Evans, National Oceanography Centre (NOC), Southampton, United Kingdom.

The above map provides a practical option that both parties might want to consider during the negotiation process, as it presents a form of equitable solution for both States. In this situation, Fiji won't lose its CS claim in the south Fiji basin and Tonga if given evidence that they claim sovereignty over the reefs through historical link, they can have Minerva reefs enclaved within 12nm. Proportionality is another option that may work for the Minerva reefs case given the geographical nature of claims by Fiji and Tonga. It has been emphasized that proportionality does not, in itself, constitute a method for effecting delimitation and that it is nothing more than a

test of equitableness or a factor to be taken into account.[223] Therefore, the significance of the factor of proportionality should not be underestimated.The concept of proportionality plays an important role in various domains of international law and the law of the sea, and in particular maritime delimitation. Although in some instances there is security, navigation, economic or social factors to be considered, nonetheless, leaving such factors aside, it is this principle of proportionality that can be used as a test of equity.

Chapter 2: Methods for Resolving Maritime Boundary Disagreements

1. Settlement of Disputes by Peaceful Means

The United Nations Charter establishes that "all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered".[224] The United Nations Charter establishes that "states shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice".[225]

Disagreements in maritime boundary are usually resolved through negotiations among affected parties or by submission of the case to a third party. This third party can be arbitrators, mediators, courts or tribunal such as ICJ and the International Tribunal for the Law of the Sea (ITLOS). Under Articles 74 and 83 of the 1982 LOSC, it stated that countries which are having difficulty in delimiting their boundaries "shall make every effort to enter into provisional arrangements of a practical nature," which "shall be without prejudice to the final delimitation."[226] These Articles also state that "if no agreement can be reached within a

[223] Dh Anderson, 'Maritime Boundaries and Limits: Some Basic Legal Principles', *Báo cáo tại Hội nghị "Accuracies and Uncertainties in Maritime Boundaries and Outer Limits" tại Monaco,* (2001).

[224] United Nations Charter, article 2(3).

[225] Ibid. article 33 (1).

[226] *See* Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," 78 *American Journal of International Law* 345 (1984).

reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV of the LOSC."[227] Part XV of the Convention spells out the procedures for the "Settlement of Disputes."[228] International law has long stressed the "duty to cooperate"[229] and in recent years has emphasized the duty to settle disputes peacefully.[230]

The simplest and most utilized procedure is negotiation; it consists basically "of discussions between the interested parties with a view to reconciling different opinions, or at least understanding the different position maintained."[231] The use of the procedures of "Good Offices" and "Mediation" involves the use of a third party, whether an individual or individuals, a State or group of States or an international organization, to encourage the contending parties to come to a settlement. "Good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediations involve the active participation in the negotiating process of the third party itself."[232] Thus, the process of Conciliation involves a third-party investigation on the basis of the dispute and the submission of a report embodying suggestions for a settlement. Conciliation reports are only a proposal and as such do not constitute binding decisions.

There are two possible causes for maritime boundary disputes or differences:

1. *Disputed sovereignty over land*

Two countries can claim the same island (eg: arbitration case *Eritrea v. Yemen*) or the same area of the mainland (eg: Bakassi peninsula in ICJ *Cameroon v. Nigeria*). To resolve this issue, the

[227] LOSC, 1982, art. 74 (2) and 83 (2).

[228] *Ibid*, art. 279 – 299.

[229] *See*, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, U.N. G.A. Res. 2625, 25 U.N. GAOR, supp. no. 28, at 121, U.N. Doc. A/8028 (1971) ("States have a duty to co-operate with one another. . . ").

[230] *See*, United Nations Charter, art. 33.

[231] Shaw, Malcom, Op Cit. , p. 918.

[232] Ibid., p. 921.

relevant rules of international law include those on the acquisition of sovereignty; they look to human activity (occupation and administration) of the territory.[233]

2. Overlapping entitlements to maritime rights and jurisdiction

There can be overlapping claims between adjacent or opposite States for 12-mile territorial seas, 200 mile EEZs, and continental shelf, which may extend beyond 200 miles. Given the extension of rights to a 200-mile limit, overlaps are now more common than they used to be. To resolve issues of overlapping claims, the relevant rules of international law are those on the delimitation of maritime boundaries.[234] These rules can be found in the 1982 UNCLOS, state practice and jurisprudence.

2. **Methods of resolving maritime boundary disparity**

Article 33 of the UN Charter provides for the peaceful settlement of disputes by *means* of the parties own choice. According to Part XV, Article 279 of the LOSC, States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter. These means parties need to consider negotiation as the initial step for resolving disputes. If negotiations are not successful, recourse may be had to conciliation, good offices, arbitration (ad hoc or according to annex VII of the LOSC and international judicial settlement ICJ/ITLOS).[235] Methods of settling differences and disputes about overlapping entitlements include resolving any sovereignty differences, the establishment of a complete boundary, a partial boundary or a joint area, or combining some of those methods.[236]

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[233] David Anderson, 'Methods of Resolving Maritime Boundary Dispute', *International Law Discussion Group at Chathan House, February,* 14 (2006).

[234] Ibid.

[235] *Ibid.*

[236] *Ibid., p. 2*

Literally, it is known that maritime boundaries are to be established by agreement in accordance with international law. Disputes and differences regarding sovereignty over an area or a feature are resolved by examining which State has more activity on the disputed territory on the basis of effective historical involvement.[237] The potential political and security threat of boundary disputes are high. Unresolved boundaries may freeze economic activity, such as exploration work or fishing, because of tension and fear of action by the other State.[238] In addition, they may also unintentionally cause disputes, if a fisherman is detained for fishing in a border area or if an oil exploration is made in an area of overlapping claims, for instance.

On the other hand, reaching agreement on a boundary brings positive benefits. Legal certainty means that economic activity can start with the stable relationship between States.[239] For example, the oil industry can be licensed to work right up to the line. A maritime boundary removes the "disfigurement" caused by jurisdictional uncertainty.[240] To quote Robert Frost an American poet: *"Good fences make good neighbours"*. The delimitation of a maritime boundary has to be "effected by agreement on the basis of international law". It entails the application of normal legal principles of negotiation, such as good faith, listening to the other side and being prepared to move from an opening position. Maritime boundary negotiations should be conducted against the background of international law, preferably to the exclusion of irrelevant, short-term political factors.[241] Therefore it is best to choose a time when diplomatic relations are not clouded with political tensions, in a mood that will create an environment of integrity and willingness to negotiate in good faith. Maritime boundary law today is based from the LOSC and especially its articles on the limits of national jurisdiction, baselines, and delimitation of the territorial sea, EEZ and the continental shelf (15, 74 and 83).

[237] *Ibid.*

[238] *Ibid.*

[239] *Ibid.*

[240] *Ibid.*

[241] *Ibid.*

During negotiations geographical factors have to be taken into account, to avoid disproportion between lengths of coasts and marine areas generated by them.[242] The negotiators can also take national interests into consideration; including political, economic and social factors. Parties may consider Arbitration as their last option given the fact that maritime boundary disagreements can effectively be resolved through proper negotiations. Thus, if the matter becomes extremely sensitive in which the parties could not resolve than resort to arbitration through ICJ or ITLOS would be the preferable option in accordance with Part XV under Article 287 of UNCLOS for the settlement of the dispute.

3. **Practical Aspects of Negotiations**

Negotiating the delimitation of maritime boundaries requires multidisciplinary expertise covering the fields of political, legal and technical. At all stages of negotiations, from the preparatory work to finalizing the agreement, a great deal of attention should be given to the practical aspects.[243] Indeed, the preparation for the delimitation by agreement is in many ways different from and more demanding than the preparatory work for other types of bilateral negotiations. A number of geographical, historical, political, legal, economic, security and other factors concerning the maritime boundary delimitation and the particular area to be delimited should be collected as part of the preparation for the maritime boundary delimitation negotiations.

In this context, it may be useful to summarize and highlight some important aspects of boundary negotiation:

- The process of delimitation usually starts with an acknowledgement that there are potentially overlapping maritime claims between two States with adjacent or opposite coasts requiring the establishment of a maritime boundary;

[242] *Ibid.*

[243] Doalos, *Handbook on the Delimitation of Maritime Boundaries*.

- The process of delimitation may also take into account certain requirements of both States based on economic and political nature (eg., pressure by oil industry for delimitation of maritime boundaries to establish legal certainty for companies operations, or pressure from fishermen and/or commercial fishers and shipping;
- It is important before starting the negotiation , to examine the overall maritime policy and identify its key elements from the legal, geographic, economic and historical points of view;
- Priority should be established with the view to achieving a comprehensive and consistent negotiating position;
- Any studies related to those requirements, if necessary, can be conducted independently before engaging in preparatory negotiations.[244]

3.1 Preparatory guidelines for negotiators

The degree of success achieved in negotiating maritime boundary delimitation is usually directly proportional to the quality and depth of the preparatory work undertaken by the coastal State.[245] Accordingly, the following steps within the framework of the preparatory work are worthy of mention:

- Setting up the negotiating team; deciding on its composition; providing for its mandate and instructions; providing for the discussion of negotiating strategies;
- Gathering of information and preparation of documentation;
- Collate additional information, such as field data and other data, as appropriate;
- Acquisition of technical equipment and of software aiding maritime boundary negotiations;
- Assessment of financial implications.[246]

[244] *Ibid.*

[245] *Ibid.*

[246] *Ibid.*

In a negotiating process, States have a wide latitude and flexibility in trying to influence the outcome of the negotiations in favour of their rights and interest by using as many factors as they deem appropriate for the construction of the line or lines they consider equitable and satisfactory.[247] In other words, there is no limit to the factors which States may take into account when negotiating. The following processes could be considered during the preparatory work;

a) Prepare Thoroughly

Study the geography of the boundary area, the substance and common interests of both sides, the maritime legislation of both States applying to the area to be delimited, and the diplomatic history of both parties. Ascertain the relevant baselines of the two sides from the latest available large-scale charts. Find out whether there are any disputed features (e.g. LTEs, rocks or island), the political or technical status of which is uncertain. If there are any, examine to whom they belong, bearing in mind the working hypothesis that small features lying within the normal limit of the territorial sea belong to the coastal State in the absence of any known claim by another State (see the discussion in *Qatar v. Bahrain*).[248] The status may depend upon whether the feature is above water at low-tide, at high tide, or never above water.

b) Verify the applicable law

The negotiating team needs to consider whether their country has applied the customary international law or whether they should rely on treaty law. Is UNCLOS (articles 15, 74, 83) in force between the two parties or are the Geneva Conventions on the Territorial Sea and on the Continental Shelf still in force? Given the fact that to date 168 States (168 States and the EU) are now parties to UNCLOS, which includes over 80% of all coastal States, it is likely that UNCLOS will be applicable in this case.

[247] *Ibid.*

[248] Anderson, David (2006).

c) Make an attempt to resolve outstanding sovereignty issues first

There may be major differences over the land boundary (e.g. Cameroon/Nigeria over the Bakassi Peninsula) or uncertainty over offshore islands (Hanish Islands case between Eritrea v. Yemen). If this is the case, it is best to resolve the question of sovereignty before determining the maritime boundary or concluding the boundary agreement. If a dispute both over sovereignty issues and maritime boundaries are submitted to a court, it is best to resolve the outstanding sovereignty issue in a first stage of the proceedings, and the issue of the maritime boundaries in a second stage, to allow lawyers to prepare their arguments.[249] By doing so one avoids the need for hypothetical arguments over the course of the maritime boundary.

This two-stage approach has been followed in the *Hanish Islands* arbitration between Eritrea and Yemen. However, sometimes the two issues are taken together in a single phase on the merits, as was the case in *Qatar v. Bahrain* (sovereignty over Hawar Islands) and *Cameroon v. Nigeria* (title to Bakassi peninsula) in the ICJ. This may have been because the parties wished to proceed in that way.

As the Court stated in its 1969 Judgement in the North Sea Continental Shelf case:

> *"In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such consideration that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case".*[250]

For the court, not all factors can be taken into consideration as criteria to be applied to delimitation. They may be used when deciding on the equitable nature of the delimitation

[249] *Ibid*

[250] *Doalos, Handbook on the Delimitation of Maritime Boundaries.*

initially based on the physical and political geography.[251] The duty to cooperate is important in this case and includes the responsibility to exchange relevant data, to negotiate in good faith with the goal of reaching an agreement acceptable to both countries and address the issues at the highest level of decision making.[252] The ICJ requires that a matter brought before it should be a legal dispute[253]. In accordance with the Court, a dispute could be regarded as a disagreement over a point of law or fact, a conflict of legal views or of interests between two parties[254], but a simple claim is not sufficient, it must be shown that the claim of one party is positively opposed by the other.[255] It is important to note that a fail of diplomatic negotiations is not a prerequisite for taking the matter to the Court.[256] As the ICJ noted in the Gulf of Maine case, "no maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of the agreement; following negotiations conducted in good faith and with the genuine intention of achieving equitable results. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party (conciliation, good offices, and mediation) possessing the necessary competence".[257] In this case, the process aims at persuading the parties to reach satisfactory terms for the termination of the dispute by themselves.

ICJ jurisprudence in maritime boundary disputes shows aspects of essential importance for the equitable solution. The jurisdictional suggestion does not exclude the possibility of negotiation; on the contrary, it seeks to make both States realise the need to negotiate on the conflicting interest regarding the disputed area. This is the main possibility that can open the way to direct and effective negotiations. Delaying the maritime disputes to future generations will make it more sensitive and can produce pressure and more weight to the issue. Providing the relevant

[251] *Ibid.*

[252] Jon M. Van Dyke, "Sharing Ocean Resources—in a Time of Scarcity and Selfishness," in *The Law of the Sea—The Common Heritage and Emerging Challenges* ed. Harry N. Scheiber (The Hague: Kluwer, 2000).

[253] ICJ Statute, article 36(2).

[254] Shaw, Malcom, Op Cit., p. 969.

[255] ICJ, 1950, The Interpretation of Peace Treaties case.

[256] Shaw, Malcom, Op Cit. , p. 971,

[257] ICJ Reports, 1984, case Gulf of Maine.

jurisdictional mechanisms gives positive alternatives, and the emphasis on negotiation between parties in good spirit is necessary to solve the controversy and prevent the outbreak of tension.

Fiji, since 1974, has shown interest to establish negotiations with Tonga to define the legal status of the Minerva reefs, and since then there hasn't been any constructive negotiation established on this matter. In this moment, it is clear that Tonga does not consider negotiating; evidently, the status of the features, maybe because they claim sovereignty over the reefs and have considered the reefs as islands since 1972. Both Fiji and Tonga might need to look at preparing the machinery on the initial stages of negotiation regarding the Minerva reef issues so that the two neighbours can strengthen their relations in other areas and promote the mutual prosperity of their friendly Pacific island neighbours. The claim for Minerva reefs to have maritime zones cannot be determined until the two countries reach an agreement regarding sovereignty and the legal status of the features.

As outlined in this paper, Tonga's claim to sovereignty over the Minerva reefs should be discussed substantially with Fiji, based on the historical evidence of Tonga's exercise of sovereignty over the reefs and also the historical usage of the reefs by the people of Ono-i-Lau for fishing. The issues of sovereignty and the geological status of the Minerva reefs need to be consistently negotiated by Fiji and Tonga in order to identify first their positions on the matter and to allow them to exchange views and data. Both States have that certain duty to give expression to the ambitions of peace of their peoples and have the obligation to solve the controversy by peaceful means. Negotiations, of course, do not always succeed, since they depend on a certain degree of mutual goodwill, flexibility and sensitivity, thus, has an emphasis on the preliminary stages of discussions regarding the nature of claims.

Although Tonga has submitted their claim to the UN, the two neighbouring Pacific island countries need to negotiate in good spirit the issue surrounding sovereignty and the legal status of the reefs in order to maintain peace at all levels.The primary rule for maritime boundary delimitation accepted under the 1982 LOSC is that the delimitation must be effected by agreement. The process of dialogue and negotiation between States are very important for the achievement of a maritime boundary agreement. It is worth emphasizing that while maritime

boundary delimitation is clearly the preferred option of coastal States to define the limits of their maritime zones where they have the potential to overlap with the claims of other States to conclude to an agreement.

The misunderstanding of historic title and the application of Article 121 is a consequence of the uncertainty and inconsistency in the international law. The LOSC ascertain that the delimitation of the territorial sea is accomplished on the basis of the "equidistance and special circumstances" rule, and the delimitation of the continental shelf and EEZ is in terms of an "equitable solution". Therefore, the delimitation between adjacent or opposite coast on overlapping boundaries cannot be imposed unilaterally. It must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving equitable solutions. However, if such agreement cannot be achieved through negotiation and dialogue, delimitation should be effected by an alternative to binding third-party that has the necessary capability of applying equitable principles, particularly the ICJ or Arbitration.

4. **Arrangements for resolving maritime boundary disputes**

4.1 *Preliminary arrangements*

Deciding upon a definitive boundary in a treaty or agreement or a decision of an international court or tribunal should resolve all aspects of the maritime boundary dispute. International law, including the Vienna Conventions on the Law of Treaties and on State succession to Treaties, accords special protection to boundary treaties, including maritime boundary treaties.[258]

With regard to the possibility that oil, gas or deep sea minerals will be found in a disputed area in the future that overlap the boundary, it is general practice to include in a boundary treaty a provision to the effect that if a discovery of oil/gas or deep sea minerals. If there is potential oil or deep sea minerals found in the future in the vicinity of the agreed line the parties undertake to

[258] Anderson, David (2006).

exchange information to cooperate and draw up a new agreement for the joint exploitation or apportionment of the resource.[259] The common rule in this situation is solidarity, to equally discover that each State is entitled to whatever resources lie on its own side of the line.[260] Existing exploitation operations from a boundary zone may create problems for negotiators. For instance, where a State has issued a licence for fishing in a disputed area, and the State later agrees to a boundary treaty which means that area belongs to its neighbour, provision can be made for a hypothetical transfer of the licence to the neighbour.[261] This solution was adopted by Belgium and the Netherlands in 1996.[262] The Netherlands had issued a long-term licence to a company to extract gravel and as part of the overall agreement on the boundary matter; Belgium agreed to issue a similar Belgian licence to the same company on similar terms.[263]

4.2 *Provisional arrangements*

The provisions of paragraph 3 of Articles 74 and 83 of the Convention provide for the negotiation of provisional arrangements of a practical nature pending final delimitation of the EEZ and continental shelf. Different types of provisional arrangements feature in recent maritime boundary practice. They can be classified as follows: (a) provisional boundaries, (b) special areas, and (c) joint development.[264]

4.3 *Provisional boundaries*

Once a boundary is determined, it is meant to be final. A unique exception to this is the boundary agreement between Tunisia and Algeria, which establishes delimitation for only six years,

[259] *Ibid*

[260] *Ibid*

[261] *Ibid*

[262] *Ibid*

[263] *Ibid*

[264] *Ibid*

possibly to take into account problems with neighbouring countries, after which further talks are to be held.[265]

i. Fishing zone

There are several examples of arrangements for existing fisheries case; some examples include the Norway v. United Kingdom fisheries case and the matter of the Chagos Marine Protected Area Arbitration, between the Republic of Mauritius and the United Kingdom in regards to fishing rights. For instance, if the Minerva reefs are under Tonga's jurisdiction than Tonga through negotiations with Fiji could provide an exemption for Fijians to fish on the reefs on under certain condition. On the other hand, if the reefs are under Fiji's jurisdiction than Fiji through an agreement could provide exemptions to Tongans to fish in that area with certain terms and conditions for the sustainable management of its marine resources.

ii. Joint development

Joint development is another form of provisional arrangement. A study by the British Institute of International and Comparative Law undertaken in 1989 indicated the existence of 12 bilateral treaties providing for Joint Areas or Joint Development of resources of the continental shelf.[266] Since 1990, the concept of a joint area or joint zone or joint development has continued to attract interest on the part of negotiators as part of a wider agreement or settlement of a boundary issue.[267]

There are different types of the joint development agreement. Sometimes one State runs the oil and gas operations in the area under its law and simply pays an agreed proportion of the net

[265] *Ibid*

[266] *Ibid*

[267] *Ibid*

revenues to its partner, as is the case in the Bahrain-Saudi agreement.[268] In some cases, both States will be actively involved either directly or through a management Commission with a legal personality that holds licensing rounds.[269] This will especially be the case if the joint development arrangement is made after the agreement on a boundary, but before an oil or gas discovery is made. Some joint development zones operate by means of joint ventures between companies from the two parties.

According to former ITLOS Judge David Anderson, the key features of most Joint Areas are as follows:

- A treaty creating and defining the extent of the area. This is often but not always the area of the overlaps.
- A "without prejudice" clause, making clear that the arrangement is interim or provisional pending a final delimitation of the boundaries.
- Long duration (45 years in Nigeria/Sao Tome, with review after 30 years), because oil industry needs a long time span. The boundary can be agreed upon by negotiations during that time or at the end of the agreement.
- An arrangement for exploitation and an agreed figure of sharing out revenue (not always 50/50).

A court who is handling a maritime boundary case cannot order the parties to agree on a joint area, but it could encourage them.[270] An example of this is the *Hanish Islands* arbitration, between Eritrea and Yemen, where the tribunal stated that if discoveries were made close to the line it had laid down, the parties had a duty under the general international law to notify the other State and to consult each other.[271] The 1982 LOS Convention sets forth only the goal to achieve maritime delimitation and says nothing about the principles and methods for the achievement of the equitable result. Customary law, which plays an important role in the delimitation process,

[268] *Ibid*

[269] *Ibid*

[270] *Ibid*

[271] *Ibid*

also establishes that delimitation must be in accordance with equitable principles, taking into account the relevant circumstances. A maritime boundary, to be durable, must be fair and equitable and take into account the special circumstances in the area relevant to delimitation.

5. **Conclusion**

By being a party to the 1982 LOSC, a State is obliged to respect and to follow the rules related to maritime boundary delimitation in accordance with relevant international laws. This dissertation has noted important developments through examining jurisprudence that is related to the Fiji-Tonga case and outlined the fundamentals of maritime boundary delimitation principles. The study has identified the technical and legal applications of maritime boundary delimitation, in particular, the issue behind the Minerva reefs and has provided some options that may be useful for both countries. But, the issue of sovereignty of the reefs is best to be negotiated by both States during the negotiation process.

According to the findings provided in this paper, it can be concluded that the reefs cannot be considered as islands but fall into the category of rocks or low-tide elevations. To determine whether the features are LTEs or rocks should remain between both States to decide during negotiations. It is important for both governments to conduct consultations at the local level, in order to identify the ambitions of their people, who will be directly affected by the issue surrounding the Minerva reefs. Any agreement reached should cause no harm to the needs and rights of their people, especially fishermen, including those who have been using the area as a stopover destination for tourists navigating from Australia and New Zealand.

The question that remains, and that could not be addressed well here, is whether there, exist significant disproportion between historic title claim under international law and the principles of the 1982 LOSC in setting the rights and obligations of coastal States within their EEZ. If the legal position of Tonga continues to consider the Minerva reefs as “islands” should succeed, the significance of friendly relations between Fiji and Tonga will be at stake. In order for both countries to avoid serious conflicts in the future, they should begin with information sharing and consistent dialogues.

This process must be seen in the light of the fact that the Republic of Fiji and the Kingdom of Tonga must both consider the conflicting interest to be best resolved through negotiation and not litigation in good faith to achieve an equitable solution for both parties. Establishing the

negotiation process between Fiji and Tonga needs to be given a priority, in order to avoid future boundary uncertainty. Finally, the Pacific Island countries have a strong record of resolving their differences by mutual agreements reached with its friendly relations and history, culture, tradition, respect and understanding that is inherent in the "Pacific way".

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