1-1-2007


Lowell Bautista

University of Wollongong, lowell@uow.edu.au

Follow this and additional works at: https://ro.uow.edu.au/lhapapers

Part of the Arts and Humanities Commons, and the Law Commons

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Abstract
The South China Sea issue is a geopolitical tinder box waiting to explode. It is clear that the primary reason for the claims is based on its strategic location and its hydrocarbon potential. However, this is more than a simple conflict over resources. The issue goes beyond the question of territorial sovereignty and natural resource jurisdiction. This is more than a legal question of ownership.

Keywords
issue, sea, china, south, box, prospects, limitations, options, law, convention, outside, nations, thinking, united

Disciplines
Arts and Humanities | Law

Publication Details

This journal article is available at Research Online: https://ro.uow.edu.au/lhapapers/774

Lowell B. Bautista*

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

-Choon-Ho Park

Introduction

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

---

* PhD Candidate, Australian National Centre for Ocean Resources and Security, Faculty of Law, University of Wollongong, NSW, Australia (2006 to present); LL.M., Dalhousie University (Halifax, Nova Scotia, Canada) (2005); Diploma, Rhodes Academy of Ocean Law and Policy (Rhodes, Greece) (2003); LL.B, University of the Philippines (2002); BA Political Science, University of the Philippines (1998). This is a revised and updated version of a paper submitted for the author’s course on the Law of the Sea at Dalhousie University under Professor David L. VanderZwaag in 2004:

3 Stephen W. Ritterbush, Marine Resources and the Potential for Conflict in the South China Sea, 2 The Fletcher Forum 64 (1978); Mark J. Valencia, et al., Sharing the Resources of the South China Sea (1997).
of territorial sovereignty and natural resource jurisdiction. This is more than a legal question of ownership.

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

---


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


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

THINKING OUTSIDE THE BOX: THE SOUTH CHINA SEA ISSUE AND THE UNCLOS

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

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

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

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

\(^{12}\) PARK, supra note 1 at 217.

\(^{13}\) BYRON N. TZOU, CHINA AND INTERNATIONAL LAW (THE BOUNDARY DISPUTES) 1 (1990).


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


\(^{18}\) See especially, Ian Townsend-Gault, Legal and Political Perspectives on Sovereignty over the Spratly Islands, online: http://www.sum.uio.no/southchinasea/Publications/pdf-format/Townsend-Gault.pdf at 9.

\(^{19}\) H. Harry L. Roque, China's Claim to the Spratly Islands under International Law 15 J. ENERGY & NAT'L RES. L. 189, 199 (1997). See also, Townsend-Gault, id., at 9, 13.
However, the trend in recent scholarship underscores the imperative of joint development arrangements and co-management regimes\(^{20}\) on the premise that the basis of the claims of all the claimant countries are inherently weak in international law and vis-a-vis each other. This paper proceeds from this critical point.

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

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

I. The South China Sea Issue

A. Geographical Background

The South China Sea,\(^{21}\) named after its location, simply pertains to the sea south of China.\(^{22}\) The South China Sea encompasses a portion of the Pacific Ocean stretching roughly from Singapore and the Strait of


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

\(^{22}\) More specifically, it refers to the area south of Hainan Island. The South China Sea is defined by the International Hydrographic Bureau as the body of water stretching in a Southwest to Northeast direction, whose southern border is 3 degrees South latitude between South Sumatra and Kalimantan (Karimata Straits), and whose northern border is the Strait of Taiwan from the northern tip of Taiwan to the Fukien coast of China. Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millennium* 15 Am. U. Int'l L. Rev. 527, 530 (2000).
Malacca in the southwest, to the Strait of Taiwan in the northeast. The South China Sea is a semi-enclosed sea\(^23\) encompassing an area of around 3,500,000 $\text{km}^2$ bordering several countries.\(^{24}\)

The South China Sea Islands is an archipelago\(^{25}\) of over 250 islands,\(^{26}\) atolls,\(^{27}\) cays, shoals, reefs,\(^{28}\) and sandbars, most of which have no native inhabitants. The islands of the South China Sea can be further subdivided into four sub-archipelagos, listed by area size: (1) The Spratly
Islands;29 (2) the Macclesfield Islands;30 (3) the Paracel Islands;31 and (4) the Pratas Islands.32 The majority of the disputed islands are located in the Paracel and Spratly Island chains.33

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

29 The Spratly Islands, which the Chinese call nánshā gùndào or “Southern sands”; the Vietnamese call the Tên Ng Sa or “Long Sands” and the Filipinos call the Kalayaan or “Freedom”, are a disputed group of approximately 100 reefs and islets in the South China Sea. The Spratlys are surrounded by rich fishing grounds and gas and oil deposits. The People’s Republic of China (PRC), the Republic of China (Taiwan), and Vietnam each claim sovereignty over the entire group, while Malaysia, the Philippines, and Brunei claim parts of the group. Several of the nations involved have soldiers stationed in the Spratlys: the PRC has about 450 troops, Malaysia 70–90, the Philippines about 100, and Vietnam about 1,900. Taiwan also maintains a military presence in the group’s largest island, Itu Aba. SOUTH CHINA SEA ISLANDS, id.

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

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

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

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

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

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

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

B. The Strategic Importance of the South China Sea

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

C. The Economic Resource Potential of the Region

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

---

37 In terms of world annual merchant fleet tonnage, over 50% passes through the straits of Malacca, the Sunda Strait, and the Lombok Strait. Over 1.6 million m³ (10 million barrels) of crude oil a day are shipped through the Strait of Malacca, where there are regular reports of piracy, but much less frequently than before the mid-20th century. Noer, id at 1.
38 Susumu Kume, Tuna Resources in the South China Sea (1973); Tsuneo Aoyama, The Demersal Fish Stocks and Fisheries of the South China Sea (1973); D. Menasveta, S. Shindo and S. Chullarsorn, Pelagic Fishery Resources of the South China Sea and Prospects for Their Development (1973); M. N. Mistakidis, The Crustacean Resources and Related Fisheries in the Countries Bordering the South China Sea (1973).
39 World Resources Institute, South China Sea: Spratly and Paracel Islands, citing Lauretta Burke, et al., Reefs at Risk in Southeast Asia (2002), and D. Pauly & V. Christensen, Stratified Models of Large Marine Ecosystems: A General Approach and An Application to the South China Sea, in Large Marine Ecosystems: Stress, Mitigation and Sustainability 148-74 (K. Sherman, et al. eds., 1993) available online at <http://marine.wri.org/pubs_content_text.cfm?ContentID=108> [Hereinafter World Resources Institute].
40 J.E.N. Veron, Corals in Space and Time: The Biogeography and Evolution of the Scleractinia 321 (1995); P.M. Alilio et al., The Fisheries Potential of the Kalayaan Island Group, South China Sea, in The Marine Biology of the South China Sea, Proceedings of the Third
In the whole, the hydrocarbon resources in the South China Sea is marked by exaggerated optimism and conflicting estimates. The most optimistic Chinese estimate suggests that potential oil resources (not proved reserves) of the Spratly and Paracel Islands could be as high as 105 billion barrels of oil, and that the total for the South China Sea could be as high as 213 billion barrels. Even on the hope that 10% of this potential resource can be economically recovered, the Chinese estimates imply potential production levels for the Spratly Islands of 1.9 million barrels/day.

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

D. The Complexity of the Issue

44 Please see Table 4, United States Energy Information Administration, South China Sea Tables and Maps, online: http://www.eia.doe.gov/emeu/cabs/schinstab.html.
45 This estimate, if founded, would make the South China Sea oil reserves 20 percent of global oil reserve figures. Id.
46 Noel L. Caagusan, The Contest for Energy Resources in Baviera, supra note 42 at 26 – 32. See especially, Teodoro M. Santos, Reactions in Baviera, supra note 42 at 33 – 35.
The issue of the South China Sea is complex for the following reasons: **first**, because of the number of parties directly\(^{47}\) and indirectly involved; **second**, because of its geo-political\(^{49}\) and strategic importance; \(^{50}\) and **third**, because of its economic resource potential.\(^{51}\)

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

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

**F. Recent Developments**

---


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


\(^{52}\) Townsend, *supra* note 16 at 9.

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

\(^{54}\) **DOUGLAS M. JOHNSTON, ENVIRONMENTAL MANAGEMENT IN THE SOUTH CHINA SEA: LEGAL AND INSTITUTIONAL DEVELOPMENTS** (1982).

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

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

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

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

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


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

60 See e.g., Ian James Storey, Creeping Assertiveness: China, the Philippines and the South China Sea 21
CONTEMP. S.E. ASIA 95 (1999).
1. The Declaration on the Code of Conduct for the South China Sea

The Declaration on the Code of Conduct for the South China Sea,\(^61\) signed by the ASEAN\(^62\) and China on 2 November 2002,\(^63\) is a milestone in many respects. This is the first time that China has signed a multilateral agreement on the issue of the South China Sea.\(^64\) The Declaration is a testimony to regional efforts that spanned almost a decade of intense negotiations.\(^65\) It underscored the importance of regional security...
and the establishment of mutual trust and confidence among all the claimant countries. Towards this end, the Declaration reaffirmed the commitment of all the claimant countries to universally-recognized principles of international law including the Charter of the United Nations,66 and the LOS Convention.67

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

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

---

68 SCS DECLARATION, supra note 63.
70 For example, the Joint Oceanographic Marine Scientific Expedition in the South China Sea (JOMSRE-SCS), an initiative launched by Vietnam and the Philippines has been implemented since 1996. The first expedition was undertaken in April 1996, the second in May 2000, third in April 2005.
2. China-Vietnam-Philippine Joint Seismic Exploration Agreement

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

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

The pact merely covers a pre-exploration study for the sole purpose of collecting, processing and analyzing seismic data and does not include drilling or development nor is there reference to joint petroleum production, a reality emphasized in a communique by the Philippine Government. Cooperative agreements of this nature are actually specifically permitted under the SCS Declaration. And, most important of
all, the legal caveat that the agreement is without prejudice to their respective territorial claims in the South China Sea.

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

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

---


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

II. An Analysis of the Dispute

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

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

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

1. The People’s Republic of China

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

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

80 For an analysis of the traditional Chinese maritime boundary in the South China Sea (the Chinese broken u-shaped line), please see Peter Kien-Hong Yu, The Chinese (Broken) U-Shaped Line in the South China Sea: Points, Lines and Zones, 25 CONTEMP. S.E. ASIA 405 (2003). For a history of the creation and the opinions that have been expressed concerning the juridical status of the dotted line, see Li Jimming & Li Dexia, The Dotted Line on the Chinese Map of the South China Sea: A Note 34 OCEAN DEV. & INT’L L. 287 (2003). The PRC claims the waters within these lines as historic waters, which to China is akin to the concept of “internal waters” and signifies ownership of all the living and non-living resources within these lines. See also Zou Keyuan, The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands, 14 INT’L J. MAR. & COAST. L. 52 (1997).

81 The academic literature by Chinese scholars in support of the Chinese claim is numerous, well-documented and voluminous. See for example, Jianming Shen, China’s Sovereignty over the South China Sea Islands: A Historical Perspective 1 CHINESE J. INT’L L. 94 (2002); Jianming Shen, International Law Rules and
and China, which delimited the territories of China and Vietnam, which was then a French protectorate.\textsuperscript{82} China maintains troops on at least seven of the islands\textsuperscript{83} since 1988 and has erected structures on some of them, including a naval airfield on Fiery Cross Reef.

2. Taiwan

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

3. Vietnam

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

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

5. Malaysia

Malaysia claims and occupies three islands in the southern portion of the Spratlys based on the principle of geographic proximity founded on the continental shelf principle. Malaysia argues that these islands lie within the 1951 San Francisco Peace Conference. In 1956, South Vietnam strongly protested the Philippine explorer Tomas Cloma's alleged discovery of the Spratlys. For a discussion of the policy of Vietnam in the South China Sea and its use of the LOS CONVENTION to establish its claim on the entire of the Paracel and the Spratly islands, see Tonneson, id.

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

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


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

92 On 11 June 1978, President Marcos issued Presidential Decree 1596, placing most of the islands, cays, shoals, and reefs within Philippine territory and naming them collectively as the "Kalayaan Island Group". These have been integrated as a municipality of the province of Palawan. Presidential Decree 1596 and Presidential Decree 1509, proclaiming a 200-mile exclusive economic zone for the Philippines also include the Kalayaan Island Group. The Philippine Government registered its claim with the United Nations Secretariat on May 20, 1980, with a technical description of Kalayaan. See Yorac, supra note 89 at 44 – 46.

93 Malaysia controls the following islands in the Spratlys: (1) Da Ky Van (Mariveles Reef or Terumbu Mantanani); (2) Da Kieu Nguu (Ardasier Reef or Terumbu Ulu); and (3) Da Hoa Lau (Swallow Reef or Terumbu Layang). LASERNA, supra note 83.
the prolongation of its continental shelf and relies on Article 76 of the LOS Convention to claim these Spratly Islands. Malaysia has established a garrison on Layang Layang Island, the largest of the three islands it occupies in 1983. It has also succeeded in developing Swallow Reef into a resort.

6. Brunei

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

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

The claim of China to the entire South China Sea which relies heavily on historical records is merely proof of inchoate title at best. While it cannot be disputed that the Chinese had the earliest contact with the islands of the South China Sea, China has not adduced evidence that it has shows it exercised conclusive proof of effective, peaceful and continuous occupation. The ambiguity of Taiwan's status in international law severely weakens its bargaining position and the absence of diplomatic relations, renders bilateral negotiations almost impossible.


96 The ambiguity of Taiwan's status in international law severely weakens its bargaining position and the absence of diplomatic relations, renders bilateral negotiations almost impossible.
Vietnam's claim to the Spratly Islands suffers from the following weaknesses: first, the historical basis of its claim is inconclusive; second, the issue of succession to the French claim is tenuous; third, there are gaps in the control of Vietnam over the Spratlys; and fourth, the statements made by the former North Vietnamese government supporting the Chinese claim substantially weakens Vietnam's current claim to the Spratlys.\footnote{Before the fall of Saigon in April 1975, North Vietnam had recognized and supported Chinese sovereignty over the Nansha islands. However, after its reunification, it now declares that the Spratlys have always belonged to Vietnam. Murphy, supra note 82 at 205.}

The claim of the Philippines hinges on the premise that the islands were \textit{terra nullius} or unclaimed and unoccupied at the time of their discovery by Cloma. There seems to be two flaws to this claim: first, the argument that the islands are \textit{terra nullius} is tenuous and may not find support in fact;\footnote{Prior to Cloma's "discovery" of the Spratlys in 1947, it has been undoubtedly been discovered and explored numerous times. Lian A. Mito, \textit{The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands}, 13 AM. U. INT'L L. REV. 727, 743 (1998).} second, the argument that the Philippine government succeeded from the claim of Cloma, a private person acting in an individual capacity, is questionable. However, the fact that the Philippines has exercised sovereignty and peacefully occupied eight of the islands in the South China Sea since 1978 may prevail in international law.

The claim of Malaysia rests primarily on a misinterpretation of the LOS Convention. The regime of the continental shelf under Article 76 of the LOS Convention merely gives the coastal state the right to claim the seabed resources appurtenant to it, but does not legally support a claim to sovereignty over islands located in its continental shelf.\footnote{DONAT PHARAND \& UMBERTO LEANZA, EDs., \textit{THE CONTINENTAL SHELF AND THE EXCLUSIVE ECONOMIC ZONE: DELIMITATION AND LEGAL REGIME} (1993).} However, the claim of Malaysia may still prevail under international law, albeit on a different legal standard. The reason for this is Malaysia's peaceful and continuous occupation of the islands it claims which are neither claimed nor ever occupied by any other state claiming the Spratlys.

Brunei's claim to Louisa Reef, which is a submarine feature,\footnote{Louisa Reef appears to be geologically a submarine feature, as opposed to an island. It is essentially part of the seabed and has no permanent dry land nor is it habitable. Murphy, supra note 82 at 208.} may prevail rightfully in international law on the basis of Article 76 of the LOS Convention. However, Brunei must prove that the reef lies within the
extension of its continental shelf. On the other hand, Brunei's claim to Rifleman Bank, which is likewise asserted on the basis of the extended continental shelf principle, may not satisfy the LOS Convention requirement since the East Palawan Trough separates Rifleman Bank from Brunei and terminates the natural prolongation of its continental shelf.

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

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

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

A. Relevant Provisions of the LOS Convention

1. Baselines

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

---

102 Article 3, LOS CONVENTION, which establishes that "every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles."
103 Article 33(2), LOS CONVENTION.
104 Article 57, LOS CONVENTION. Articles 55 - 75 define the concept of an Exclusive Economic Zone (EEZ), which is an area up to 200 nautical miles beyond and adjacent to the territorial sea. The
the same baseline. The territorial sea baseline may be of various types depending on geographical configuration of the coastline. The normal baseline is the low-water line along the coast, including the coasts of islands, as marked on large-scale charts officially recognized by the coastal State. The baseline for an island on an atoll or having fringing reefs is the seaward low-water line on the reef. Low-tide elevations, defined by the LOS Convention as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide," may only be used as a baseline if they are wholly or partly within 12 nautical miles from the mainland or an island.

2. The Regime of Islands

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

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

- Article 76, LOS CONVENTION. Articles 76 defines the continental shelf of a nation, which "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles...". This is important because Article 77 allows every nation to exercise "over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources".

- Articles 7 and 47, LOS CONVENTION (Straight and Archipelagic Baselines).

- Articles 5 and 121(2), LOS CONVENTION.

- Article 6, LOS CONVENTION.

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

- Article 121 (1), LOS CONVENTION. For academic literature on the legal regime of islands in international law, see MARIUS GJE1NES, THE LEGAL REGIME OF ISLANDS IN THE SOUTH CHINA SEA (LLM Thesis, University of Oslo, 2000); HIRAN W. JAYEWARDENE, THE REGIME OF ISLANDS IN INTERNATIONAL LAW, PUBLICATIONS ON OCEAN DEVELOPMENT (1990) and D. W. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW (1979).

- The word used in the LOS CONVENTION is actually "rocks." The LOS CONVENTION does not define the term rock. It has been interpreted as a particular type of island in a geological sense and within the context of Article 121, LOS CONVENTION.
zone or a continental shelf112 but still entitled to its own territorial sea and a contiguous zone measured from that same baseline.113

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

3. The Outer Limits of the Maritime Zones115

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

4. The Relevance of these Provisions

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

112 Article 121 (3), LOS CONVENTION.
114 Article 60(8) in relation with Article 11, LOS CONVENTION. For the legal regime of artificial islands in international law, see NIKOS PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIALISLANDS (1977).
115 Jorge R. Coquia, Maritime Boundary Problems in the South China Sea, 24 BRIT. COLUM. L. REV. 11, 118 (1990) who opines that there will be actual overlapping EEZs and continental shelves if the maritime zone measurements are drawn from archipelagic baselines.
116 Articles 3 and 57, LOS CONVENTION.
117 The continental shelf can extend to 350 nautical miles from the baseline or 100 nautical miles beyond the 2500 meter isobath. See Article 76 (5), LOS CONVENTION.
118 Article 76 provides two rules for establishing the outer limit line and two restraint lines, beyond which the continental shelf cannot extend in any case. Due to the dimensions of the South China Sea, these restraint lines probably are of limited significance. See, PETER J. COOK & CHRIS M. CARLETON, EDS., CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE (2000).
disputed islands in the South China Sea should be viewed. The provisions are closely intertwined issues. The normative guidelines in these provisions provide essential guideposts for the kind of questions that need to be preliminarily addressed. For example, which among the features in the South China Sea is or is not an island? This is vital to identify which features can generate one or more zones of maritime jurisdiction. But as a prelude to that question, one must determine which of these features support human habitation or economic life. This is crucial in order to indicate which features can claim an EEZ and a continental shelf. The point where all these maritime zones will be measured will depend on the baseline. Thus, the baselines must be determined and which applicable baseline will be used. The other questions that the LOS Convention provisions provide are more complex. This includes the identification of the outer limits of the continental margin beyond 200 nautical miles.

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

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

122 Those features which do not pass the test of Article 121(1) cannot generate zones of maritime jurisdiction except a 500 meter safety zone.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
China Sea. The reason for this is simple: the claims may still overlap. This is not a remote possibility given the fact that a large portion of the South China Sea is not located more than 200 nautical miles from the mainland coasts and the area beyond 200 nautical miles from the mainland coasts is within 200 nautical miles from the various islands throughout the South China Sea.

B. Options within the Framework of the LOS Convention

1. The Dispute Settlement Provisions of the LOS Convention

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


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

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

132 The United Nations framework is the principal global dispute settlement system in contemporary international law. The Charter of the U.N. prohibits the use of force in settling international disputes. It contains two parallel obligations: first, the obligation to settle international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered; and second, to refrain “from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations.” Articles 2(3) and Article 33(1), UN Charter. Please see Marine Dre!.
THINKING OUTSIDE THE BOX: 
THE SOUTH CHINA SEA ISSUE AND THE UNCLOS

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

2. The Delimitation of Boundary Disputes

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

The LOS Convention contains provisions for the delimitation of the territorial sea, the EEZ and the continental shelf. However, the LOS Convention provisions do not clearly establish what substantive rules of delimitation law have to be applied to delimit the EEZ and the continental shelf. The LOS Convention merely mentions that the...
delimitation is to be effected by agreement on the basis of, *inter alia*, international agreements, customary international law and general principles of law, to achieve an equitable solution. In addition, pending agreement on the delimitation, States are urged to “make every effort to enter into provisional arrangements of a practical nature”.

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

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

3. The Options Available to the Parties

---

141 Article 74(1), LOS CONVENTION.
144 Barbara Kwiatkowska, Equitable Maritime Boundary Delimitation, as Exemplified in the Work of the International Court of Justice During the Presidency of Sir Robert Yewdall Jennings and Beyond, 28 OCEAN DEV. & INT’L L. 91-145 (1997).
145 Articles 74(2) and 83(2), LOS CONVENTION.
146 Article 298(1)(a)(i), LOS CONVENTION. The submission to the compulsory procedures is not automatic since States may still reserve the right under Article 298 to have such disputes exempted from the compulsory forums.
The dispute settlement mechanism within the framework of the LOS Convention clearly creates an obligation among the claimant countries to settle their conflicting claims peacefully. However, the principle of peaceful settlement of international disputes operates on the basis of the sovereign equality of states. The compulsory settlement mechanism within the framework of the LOS Convention is triggered only as an option where the parties are not able to settle their differences by peaceful means of their choice. But, even then, the submission of a dispute to such a forum depends on the willingness of the parties. This means that it is only as good as the claimant states are willing to formally invoke it.

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


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

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


152 This should be seen as a precondition for establishing a precise claim to 12 nautical-mile territorial waters, a further 12 nm contiguous zone, a continental shelf and a 200 nm Exclusive Economic Zone. See International Peace Research Institute, Oslo (PRIO). Maritime Conflict in Asia. Energy and Security in the South China Sea, Main Findings (Finding 10) online: <http://www.prio.no/page/Project_detail/19244/42207.html>. 
While all the claimant countries invoke the provisions of the LOS Convention in support of their respective claims and even in assailing the claim of others, the compulsory dispute resolution mechanism provided within the LOS Convention is not seen as a viable option in addressing the South China Sea issue. There are several possible reasons for this view:

first, the realization of the parties that their respective territorial claims do not find solid basis in law and not unassailable; second, the notion of a court adjudicated settlement connotes victors and losers which is Asians are culturally averse; third, the logistical and financial expense of bringing a case to an international tribunal is staggering which some of the claimant states can ill afford; and fourth, there exists substantial divergences in interpretation of vital LOS Convention provisions among the parties.

IV. Options, Alternatives and Recommendations


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

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

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

---

159 See LEE LAY TO, *CHINA AND THE SOUTH SEA DIALOGUES* (1999) which confirms China's well-understood emphasis on discussing the issues bilaterally with the various claimants (which gives Chinese an undue advantage based on its size and power), and demonstrates that Beijing did not rule out the possibility of multilateral discussions, and has even come (albeit somewhat grudgingly) to accept these as long as they are held in the context of ASEAN.
160 China, in particular, has engaged most claimant countries on a bilateral basis to discuss its claim and/or to reduce tensions. China has had successful bilateral discussions with Malaysia, Vietnam, and the Philippines. Malaysia and Vietnam have also intensified their bilateral discussions and have even entered into joint development agreements over disputed areas in the Gulf of Thailand. See, Peter Kien-Hong Yu, *Setting Up International (Adversary) Regimes in the South China Sea: Analyzing the Obstacles from a Chinese Perspective*, 38 OCEAN DEV. & INT'L L. 151 (2007).
163 The UNEP/GEF South China Sea Project, entitled, “Reversing Environmental Degradation Trends in the South China Sea and Gulf of Thailand,” funded by the Global Environment Facility (GEF) and implemented by the United Nations Environment Programme (UNEP) in partnership with seven littoral states bordering the South China Sea (Cambodia, China, Indonesia, Malaysia, Philippines, Thailand and Vietnam) is the first attempt to develop regionally coordinated programmes of action designed to reverse environmental degradation particularly in the area of coastal habitat degradation and loss, halt land-based pollution and address the issue of fisheries over-exploitation.
safety of navigation and communication at sea; search and rescue operation; marine environmental protection; and marine scientific research.165

B. Developing Interim Joint Management Arrangements

The creation of an authority that will jointly manage166 the resources of the South China Sea is not a novel idea.167 In fact, there are numerous scholars who have put forth a range of options for consideration as part of a multilateral joint resource development authority.168 The legal norm of joint development in disputed areas pending the settlement of a disputed maritime boundary is likewise provided in the LOSC Convention.169 There are also existing international arrangements in other parts of the world from which this proposed body can be patterned after.170

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

165 See e.g., David Rosenberg, Environmental Pollution around the South China Sea: Developing a Regional Response, 21 CONTEMP. S.E. ASIA 119 (1999).
166 However, the Chinese concept of "joint resource development" appears to be defined as bilateral cooperation in disputed areas, while ASEAN claimants appear to prefer a multilateral joint development scheme. A series of bilateral development agreements would in effect expand the Chinese claim to resources in contested areas that would most likely not be open to Chinese participation following a final settlement. See for example analysis of Chinese position in Allan Edmiston III, Showdown in the South China Sea: An International Incident Analysis of the So-Called Spy Plane Crisis, 16 EMORY INT'L. REV. 693 (2002).
168 The idea of joint resource development has been proposed in various forms, including as part of the Indonesian-hosted workshops. University of Hawaii and East-West Center researchers Mark Valencia, Jon Van Dyke, and Noel Ludwig. Wei Cui, Multilateral Management as a Fair Solution to the Spratly Dispute, 36 VAND. J. TRANSNAT'L L. 799, 804 (2003).
169 Articles 74 (3) and 83 (3), LOS CONVENTION, which provide that pending agreement reached between states on the delimitation of the EEZ and the continental shelf, the states concerned, in a spirit of understanding and cooperation, are required to "make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardize or hamper the reaching of the final agreement." Masahiro Miyoshi, The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation, 2 MARITIME BRIEFING 5 (1999). Also see, Masahiro Miyoshi, Is Joint Development Possible in the South China Sea?, in SUSTAINABLE DEVELOPMENT AND PRESERVATION OF THE OCEANS: THE CHALLENGES OF UNCLOS AND AGENDA 21, 613-614 (Mochtar Kusumaatmadja, et al., eds., 1997).
170 The range of possible options for a multilateral joint resource development authority can be made similar to the Antarctic Treaty, a multilateral agreement to share resources in Antarctica. The Timor Gap Treaty between Australia and Indonesia, agreements in the Persian Gulf, and other bilateral resource development agreements provide ample precedent for considering this approach; however, a multilateral maritime development authority, if implemented, would be the first of its kind. Mito, supra note 98 at 750.
seen as an interim measure. The eventual resolution of the issue of ownership over the disputed islands must still be addressed.

C. Capacity Building among all the Claimant States

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

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

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

---


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

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

Conclusion

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

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

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

173 Brinton Scott, Resolving the Question of Sovereignty over the Spratly Islands, 3 WILLAMETTE BULL.
INT’L L. & POL’Y 37 (1995). See also Seokwoo Lee, Continuing Relevance of Traditional Modes of Territorial
175 Tullio Treves, Dispute Settlement Clauses in the Law of the Sea Convention and their Impact on the
Convention and identified their promises as well as their shortcomings in addressing the South China Sea issue. In the last part, possible solutions were explored toward the pacific settlement of the issue primarily within the legal framework of the LOS Convention and outside of it.

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