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Maritime Boundary Disputes in the South China Sea: International Legal Issues

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1. Introduction

Energy security is now one of the world's foremost concerns, most particularly of developing states within the Asian region. As oil prices rose in 2008 to unprecedented levels, states have become increasingly anxious to protect their access to reliable energy sources. Overlapping and disputed claims to offshore zones, and to potentially rich seabed hydrocarbons, have thus become linked to the politics of energy security. It has become trite to observe that, for so long as the conflicting claims to territorial sovereignty and overlapping maritime boundaries in the South China Seas remain irresolvable, the oil and gas resources of the region remain inaccessible for exploitation. The historical inability of claimant states to resolve their differing juridical positions does not necessarily reflect on the adequacy of international law. Rather, there has been a lack of political will to accept any compromise of respective claims to valuable energy resources and a deep reluctance to submit disputes to an international tribunal for a judicial ruling. It is the argument of this paper that cooperative joint development -under which the irresolvable question of sovereignty is put to one side – can be effective in unlocking the non-renewable resources of the South Chinas Sea so that all claimants have an opportunity to benefit. Moreover, were states to collaborate, this might stimulate confidence and trust, and facilitate cooperative management of regional concerns including protection of strategic navigation and trade routes, and control of piracy, drug trafficking , fisheries and the marine environment.

In principle, territorial and maritime disputes are amenable to resolution under the international rule of law. Jurisprudence governing the acquisition of sovereignty and delineation of continental shelf and exclusive economic zone boundaries has been well developed by the International Court of Justice and *ad hoc* international arbitral tribunals over the last 40 years or so. Most recently, for example, the ICJ, in disputes between Indonesia and Malaysia over the Sipidan and Ligitan Islands, between Singapore and Malaysia over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge and between Ukraine and Rumania over maritime zones in the Black sea, has given clear direction as to how these legal principles might apply to the particular facts. It is acknowledged, however, that the jurisprudence of international law has little practical application if states remain unwilling to allow their claims to be the subject of judicial determination. As secure access to energy moves higher on national priorities, there are encouraging signs that the states of the South China Sea are increasingly open to some form of judicial resolution or to seek a negotiated resolution to the contested resources.

This paper will examine the international legal principles that apply in the South China Sea. It is proposed that agreement jointly to exploit energy resources of the seabed – on a strictly non-prejudicial and sovereignty neutral basis- offers the most fruitful way forward. Indeed, joint development ensures a sharing of non-renewable resources that might otherwise be placed on the 'wrong' side of an adjudicated line were a tribunal to be granted jurisdiction to determine a permanent boundary.

2. Disputed and overlapping claims in the South China Sea

The South China Sea is defined for the purpose of this analysis as the body of water bordered to the south by 1 degree South Latitude between South Sumatra and Kalimantan and to the north by the Strait of Taiwan from the northern tip of Taiwan to the Fukien coast of China. This area of around 3million square kilometres of water lies above a continental shelf, (the Sunda Shelf) of one million square kilometres of less than 200 meters isobath and 2 million square meters of seabed deeper than 200meters isobath. The Sunda Shelf is predominantly on the western and southern parts of the South China Sea, where extensive deposits of hydrocarbon and fossil oil and natural gas are thought to lie.

The deeper parts of the shelf lie further to the north-east.[1] In addition to rich and varied fisheries, the South China Sea is one of the most important strategic seas in the world for both military and economic reasons for all the states of the region.

2.1 The Spratly islands

The Spratly Islands are an archipelago of over 400 rocks, reefs and islands located in the southern part of the South China Sea, comprising 36 islands (or rocks) that are above water at high tide. Potentially, these features provide a basis for claims to seas and seabed of up to 617,000 square km.[2] It is notable that these islands and rocks have formed atop columns arising from the seabed and are not surrounded by a continental shelf as are the mainland coasts of China, Malaysia and Vietnam.[3] Speculation has it that the Spratly Islands lie above a lucrative hydrocarbon deposit of up to 225 billion barrels.[4] The US Institute of Peace reports Chinese estimates of 130 million barrels of oil and gas.[5] Six states – Vietnam, Philippines, China, Malaysia, Taiwan and Brunei make overlapping and indistinct claims primarily on the basis of discovery, proximity, history, occupation and the principle of the natural prolongation of the land territory. [6]

- Vietnam occupies 19 islets and rocks and, as a unified state, claims full appurtenant continental shelf rights.
- The Philippines occupy nine rocks or islets and bases its claims on discovery, proximity, and occupation. It also occupies 'Kalayaan' Island (Freedomland) discovered by Tomas Cloma in 1956. It not yet clear whether the Philippines' claim includes the seas within the declared coordinates.
- China occupies eight islets or rocks and, in 1993, presented a map of its 'historic claims' to the islands, rocks and perhaps reefs of the South China Sea. A map drawn in 1947 by the Republic of China with nine undefined, dotted lines provides further evidence of China's claim. It is unclear whether the claim includes all the waters of the South China Sea. Such a claim is unlikely as, in 1947, the only maritime zone known to international law was the 3nm territorial sea. The coordinates indicate that China's maritime claim overlaps Indonesia's EEZ that had been agreed between Indonesia and Malaysia in 1969. China has assured Indonesia that it does not have any overlapping boundary claims with it.
- Malaysia occupies five islets or rocks in the southeast of the Spratly Islands and bases its claim on proximity and continental shelf rights.
- Taiwan has occupied the largest island in the Spratly group, Itu Aba (Taiping Dao) for about 20 years. The island is 1,400 meters in length with a width of approximately 370m, the highest point beng 2.4 meters above high tide. Taiwan and rests its claim on substantially the same historical grounds as China. This island was occupied by Japan during World War II, but the claim lapsed after it was defeated by the Allies.
- Brunei Darussalam claims an EEZ and continental shelf within the South China Seas (including a claim in 1984 to Louisa Reef in the Southern Spratly Islands). It uses a straight line projection under UNCLOS and makes no claim to the offshore reefs or to additional territory. Brunei's claim is based on the principle of prolongation of the land territory.

With the notable exception of Brunei, the claimants have attempted to demonstrate effective occupation by building structures and stationing military personnel on the islands. In light of the rich petroleum resources believed to exist in the area of the Spratly Islands, it is not surprising that the

[1] H. Djalal and Townsend-Gault, ' The Concept: Preventive Diplomacy and Disputes in South-East Asia', Herding Cats: Multiparty Mediation in a Complex World, US Institute of Peace Press, 1999 pp 107-133.
[2] J.V. Prescott and G. Triggs, *International Frontiers and Boundaries: Law, Politics and Geography,*at 341.
[3] Ibid, at 342
[4] C. Schofield and I. Story, "Energy Security and South East Asia: the Impact on Maritime Boundary and Territorial Disputes", *Harvard Asia Quarterly,*Vol. XI, No. 4, 2005.
[5] Special report No. 18, August 1996.
[6] Schofield and Story, op cit n.4.

islands have also been the subject of one major military conflict and several minor incidents. In 1988 the Chinese and Vietnamese disputed the occupation of Fiery Cross Reef and the PRC sank three Vietnamese vessels, killing 72 people. In 1992 the Chinese granted an oil concession to the United States' Crestone Company and occupied Da Lac Reef, deploying three submarines to patrol the area; this despite the earlier ASEAN Declaration calling for states not to use force in the region. In 1995 the Chinese and Philippines clashed over China's occupation of the appropriately named Mischief Reef within the EEZ of the Philippines.[7]

Despite the ASEAN Declaration on the Conduct of Parties in the South China Seas of 4 November 2002, tensions resumed in 2004 between China, Vietnam and Taiwan. More recently, China, the Philippines and Vietnam have agreed in September 2004 to conduct 3 year joint seismic study of the South China Seas to identify areas appropriate for further exploration and exploitation (Joint Marine Seismic Undertaking JMSU). Each of these states also agreed on 14 March 2005 to prospect for oil and gas jointly in the disputed waters. It is legally relevant that none of the remaining claimants has yet objected to the JMSU.

2.2 The Paracels

China, Taiwan and Vietnam claim the Paracel group of islands to the southeast of China. [8]After the defeat of the military regime in Vietnam in 1974, the Peoples Republic of China occupied the islands and continues to do so today. The respective territorial claims of China, (and through China, Taiwan) and Vietnam are largely historical in nature. Djalal and Townsend-Gault report that the issue is regarded as a bilateral matter subject to negotiation. [9]

2.3 Ambalat offshore area

Indonesia and Malaysia claim a part of the Celebes (Sulawesi) Sea, off the east coast of Borneo (Kalimantan to Indonesia), know as Ambalat. As is typical of estimates of hydrocarbons within the South China Sea, vast resources ranging from 100 to a billion barrels of oil have been suggested. While the ICJ resolved the question of sovereignty over the Sipidan and Ligitan islands, it did not delineate the maritime boundary between Indonesia and Malaysia. Not surprisingly in these circumstances, a dispute arose between them in February 2005 when Malaysia issued exploration licenses to its own petroleum company, Petronas, acting in partnership with the Royal Dutch and Shell exploration companies. The concessions overlap with blocks claimed by Indonesia, which had also issued concessions in the area to Italian and United States oil companies. Both states protested against the issue of these concessions and matters escalated in March 2005 when military forces were dispatched to area. The naval and military build up and numerous incidents of confrontation since that time (a formal protest was lodged October 2008) by Indonesia against Malaysian armed forces in the islands contrary to the ASEAN Charter[10]) indicate the great value placed on the respective claims in the area, ranging from national prestige and the security of navigational routes to energy security. Neither Indonesia nor Malaysia has given any indication that it will negotiate its claim.

2.4 Natuna Archipelago

The Natuna archipelago is yet another group of islands of the South China Sea that is in dispute. Indonesia claims the islands as part of its archipelago and Brunei over the last 15 years or so concerns the, comprising over 272 islands and situated 150 miles northwest of Borneo. Again, the islands are attractive because their oil and gas reserves are estimated, as reported by John C K Daly to be among the largest in the world at 210 trillion cubic feet.[11] Indonesia and China have a disputed claim over the waters North East of these islands

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[7] S.Snyder, " The South China Sea Dispute: Prospects for Preventive Diplomacy" August 1996, Special Report No. 18,*US Institute of Peace*.
[8] M.S. Samuels, *Contest for the South China Sea* (1982)
[9] Op cit n. 1.
[10] Singapore Institute of International Affairs, 23 October 2008
[11] *China Brief*, Vol 4, issue 24, 7 December 2004

Other notable disputes within the region are:

- Singapore and Malaysia re Strait of Johore and Strait of Singapore
- Gulf of Thailand : Malaysia, Cambodia, Thailand, and Vietnam
- Scarborough Shoal: Philippines and China
- Malampaya and Camago Gas Fields: Philippines and China

3 Efforts to achieve a diplomatic resolution

The competing national claims to sovereignty and maritime zones in the South China Sea are perceived to be serious threats to regional and international peace, prompting much analysis of the legal, political, resource and strategic implications. Multilateral diplomacy and bilateral negotiations have not yet proved to be successful. Attempts to assess the receptiveness of ASEAN nations to a negotiated settlement were made from 1989 with the support of the Indonesian Foreign Minister, Dr Ali Alatas. This initiative led to the first of many workshops on the South China Sea, held in Bali in January 1990 and attended by ASEAN participants. The process has been described as 'Track 2 Diplomacy' on the basis that discussions were informal and participants acted in their personal capacities.[12] The series of workshops and the emergence of Technical Working Groups on topics such as Zones of Cooperation, Navigation, Legal Matters, Resources Assessment, and Marine Environmental Protection are usefully described by Djalal and Townsend-Gault.[13] There has been agreement to seek and promote joint implementation of the agreed programmes of cooperation and this represents some progress within the region. However, while the negotiations have been effective in building confidence and in exploring areas of mutual interest, no progress has been made on the core question of conflicting territorial and maritime claims in the region.

4. What role can international law play in resolving territorial and boundary disputes?

Boundary disputes in the South China Seas raise fundamental questions of international law. Preeminent among such questions is the validity of contested sovereignty claims to the islands or territory. Determination of rights to territorial sovereignty is vital to all boundary delimitations for, as the International Court of Justice has reiterated, the rights of a state to the continental shelf and to an exclusive economic zone are 'based on the principle that the land dominates the sea through the projection of the coast or the coastal fronts".[14] In the *North Sea Continental Shelf cases* of 1969 this Court observed that 'the land is the legal source of the power which a state may exercise over territorial extensions seaward'.[15] Again in *Tunisia/ Libya*, the ICJ found that the 'coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it'.[16] Disputes over the maritime zones and continental shelf of the South China Sea rest ultimately upon where sovereignty lies over the Spratly Islands, the Paracels and other islands. Thus, before considering the legal principles of maritime delimitation, it is useful, first, to consider the principles governing territorial sovereignty.

Once the question whether a state has a valid title to the territory it claims has been resolved, inquiry can move to the second question as to the legal validity of the maritime boundaries delineated in respect of that territory. It is fortuitous that the International Court of Justice has recently delivered its opinion on the 3rd February 2009, in the dispute between Rumania and Ukraine over the delimitation of a single maritime boundary between them, known as the *Black Sea* Case. This decision confirms the earlier jurisprudence of the Court on maritime boundary delimitation and provides valuable guidance as to the legitimacy of boundaries delineated in the South China Sea.

[12] For a description of confidence building measures supported by ASEAN, see Schofield and Story op cit n. 4.
[13] Op cit n. 1.
[14] *Case Concerning Maritime Delimitation in the Black Sea (Romania v Ukraine) (Black Sea case)* ICJ Reps 2008 , para 77.
[15] ICJ Reps 1969, para 96
[16] Judgment ICJ Reps. 1982, para73

5. International principles of territorial acquisition

The international legal principles governing the acquisition of territorial sovereignty by a state have been the subject of many decisions of the International Court of Justice and other international arbitral bodies and analysis of the application of principles to the facts has absorbed many thousands of pages of Court analysis. While it is not intended to repeat these classical principles of sovereignty in any depth, it might be valuable for the purposes of the wider discussion to understand the complexity of reasoning that underlies judicial determinations of territorial sovereignty disputes upon which the maritime and continental shelf claims ultimately depend.

International legal authorities typically identify five modes of acquiring territorial sovereignty which may in theory be presented as distinct means of acquisition. They are:

- Occupation of *terra nullius*, ie territory that is owned by no-one
- Prescription, by which title is gained by possession adverse to the abstract title holder
- Cession, or transfer by treaty, which the dominant means by which territorial boundary is agreed
- Accretion, where a gradual deposit of soil changes the contours of the land
- Conquest.

These means of acquisition provide a convenient, though simplistic and misleading, framework for understanding the process by which international law recognizes title to territory. Rather, international courts and tribunals have been reluctant to place their decisions within the "neat classifications prepared for them by text writers". In practice courts and tribunals have tended to ignore the traditional roots of title or have relied upon two or more overlapping modes of acquisition, thereby confounding subsequent attempts to fit an award of title into any theoretical category. It is also important to remember that Article 4 of the United Nations Charter prohibits the "threat or use of force against the territorial integrity or political independence of any State" so that, at least since 1945, it is no longer possible for a State to acquire territory by conquest.

While the traditional modes of acquiring territory are well recognized, international courts and tribunals have been concerned primarily to apply the law to complex facts, rather than with abstract notions of property or title. Judges will, in practice, consider a bewildering range of legal and equitable doctrines – the roles of recognition, acquiescence and estoppel – along with evidence that does not go strictly to a formal root of title. Tribunals, have for example, taken into account the role of discovery, concepts of hinterland and of contiguity and the doctrine of inchoate title when determining the relative strength of competing claims to sovereignty. Some general comments might assist understanding of the complexity of issues raised by disputed and overlapping claims in the South China Sea. It is obvious that where there are two rival claimants to territorial sovereignty, an international tribunal in an adversarial proceeding will make a decision in favor of one or other of them, primarily because that will be the agreed task permitted the court. Less often observed is that a judgment determines only which of these states has the stronger or better title, the practical effect of which is to confer title and them *erga omnes*, that is, against the whole world. In principle, determination by a tribunal that title rests with one state rather than another cannot foreclose the rights of a third state. The consequence is that an award or decision of an international tribunal cannot be a formal means of acquiring title. In practice, however, it is true that no State has contested a title to territory that has been recognized by a tribunal in this way. Thus the victorious State emerges from an international adversarial determination with the full trappings of absolute sovereignty.

It is also true, that many of the classic decisions on territorial sovereignty have concerned apparently obscure islands, miles from the land mass of the claimant States where a more compelling conclusion might have been that neither claimant satisfactorily established sovereignty and that the territory remained *terra nullius.* These points underscore the possibility that it is open to an international tribunal to determine that neither contesting State has satisfactorily met the standards required at international law for territorial sovereignty. This point has particular the relevance in context of the Spratly Islands and Paracels, because it has not been practical for the claimants to undertake the traditional acts of sovereignty on these inhospitable, uninhabited and isolated islands

Mere discovery of territory, evidenced only by physical disembarkation or visual apprehension, is not, and probably never has been, a sufficient basis for title to *terra nullius*. As the father of International Law, Hugo Grotius has reasoned, "the act of discovery is sufficient to give a clear title to sovereignty only when it is accompanied by actual possession". This approach has been subsequently consolidated by the permanent Court of International Justice in the *Island of Palmas* case in which Judge Huber found that "the actual, continuous and peaceful display of State functions is in case of dispute the sound and natural criterium of territorial sovereignty". The Permanent Court of International Justice elaborated upon this concept of the display of state functions in the *Eastern Greenland Case* saying that:

> *"A claim to sovereignty based not upon some particular Act or Title such as a treaty of cession, but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority …"*

Subsequent international tribunals have confirmed the essential elements of territorial sovereignty as the intent and will to act as sovereign and the actual exercise of such authority. Courts have been careful to ascertain that the subjective element of intent requires the evidence to be directly referable to the hypothesis that sovereignty exists. Most disputes have concerned a detailed examination of the manifestations of state authority described as effectivités. The kinds of evidence that satisfy the requirement for manifestations of state authority are virtually infinite and it is not always clear why international tribunals have favored some acts above others. Examples of activities that have proved weighty in determinations are asserting criminal jurisdiction, maintaining a registry of fishing vessels, constructing mooring facilities, erecting signal posts and lighthouses, promulgating hunting and fishing licenses, commissioning magistrates, establishing meteorological stations, granting a grazing license and taxation. Such manifestations have little value in themselves as the relevant consideration will always be how the acts of one state are balanced with those of another.

It has been noted that international tribunals frequently take into consideration factors that are not strictly roots of title when considering which of the claimants has the better claim to sovereignty. In addition to the relative value of evidence and the adoption of a balancing process, tribunals have been concerned to promote international harmony by awarding title to one contender rather than another to avoid a legal vacuum. Significant among such factors are recognition, acquiescence and estoppel which facilitate an international decision based upon the express or tacit consent or good faith of the states concerned. In particular, recognition and acquiescence provide valuable probative evidence to supplement competing and inconclusive evidence of effective control and Government activities. In addition to these factors are contemporary influences upon the determination of acquisition of territory, in particular the right to self-determination of peoples, an element that played some importance in the *East Timor* case and the rights of indigenous peoples to territory. Other concepts, such as the 'common heritage of mankind', may play a role in the deep sea bed, outer space and Antarctica.

In addition to these concepts are some more technical rules such as the principle of inter-temporal law and the requirement that a 'critical date' be identified. The function of the concept of inter-temporal law is to give effect to the general rule against retro-activity and signifies that "the effect of an act is to be determined by the law of the time when it was done, not by the law of the time when the claim is made". The function of the so called "critical date" is to determine the legal weight to be given to the evidence of sovereignty. A rationale for determining the critical date lies in ensuring that the activities of a state have not been embarked upon with the purpose of improving its legal position through the "contrived manoeuvrs". In some cases, however, state activities taking place after the critical date may nonetheless prove useful in confirming or denying claims. Clearly, the date can be no later than the institution of legal proceedings.

The decision of the ICJ in the *Sipidan and Ligitan* case provides a useful precedent for the South China Sea because the Court awarded sovereignty over the islands to Malaysia on the basis of the effectivités it was able to demonstrate. Malaysia could point to various acts of administration that demonstrated an effective exercise of authority in respect of the islands. Malaysia was, moreover, able to rely on the earlier colonial measures adopted by Britain in North Borneo to regulate the taking of turtle eggs from the islands and the construction and operation of lighthouses there. It was also relevant to the court that Indonesia made no protest against these activities.

6. Maritime zones of islands

The territorial disputes in the South China Sea concern relatively barren islands remote from the continental land masses of the surrounding claimant states. There are at least three legal questions that arise for determination in the context of delimiting a single maritime boundary between states.

- First, when can a rock be characterised as an island?
- Secondly, when does an island generate a territorial sea, continental shelf and exclusive economic zone?
- Thirdly, is the presence of an island a 'relevant circumstance' warranting the correction of a provisional equidistance line identified by an international court or tribunal?

As to the legal definition of an island, Article 121 (3) of UNCLOS requires that an island should be capable of sustaining human habitation or an economic life of its own. Despite the ruling in favour of Malaysian sovereignty by the ICJ in the *Sipidan and Ligitan* case, Indonesia is likely to argue that, in any event, the islands do not generate maritime zone rights beyond the 12nm territorial sea. Unfortunately, the ICJ did not decide this crucial question and characterisation remains open in the context of the Spratly Islands and Paracels.

Even where an international tribunal or court decides that a rock has the status of an island, it may decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones if to do so has a disproportionate effect on the proposed delimitation line.[17]

7. Maritime Boundary Delimitation

Where there is no dispute about territorial sovereignty as such, the second kind of dispute concerns delimitation of the maritime and continental shelf between competing states. There has been a rich body of jurisprudence developed by the International Court of Justice and arbitral tribunals dealing with maritime and continental shelf delimitation. As was noted earlier, much of this jurisprudence was confirmed by the ICJ in the *Case Concerning Maritime Delimitation in the Black Sea (Romania v Ukraine) (Black Sea case).* This decision warrants close analysis because it illuminates the principles that will apply were the delimitation disputes in the South China Sea to be submitted to judicial or arbitral determination. This is especially so as the Black Sea, like the South China Sea, is an enclosed body of water that is connected to the Mediterranean Sea only by the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus.

The Court decided that it had jurisdiction to determine the matter in dispute between Romania and Ukraine under an agreement concluded by them in 1997 that the ICJ could solve the 'problem of delimitation of the continental shelf and the exclusive economic zones' in the Black Sea. The Court then set about to draw a single maritime boundary dividing the maritime areas of Romania and Ukraine in accordance with the terms of the 1982 UN Convention on the Law of the Sea (UNCLOS) to which both states are party. In short, the vital provisions are articles 74 and 83 requiring that delimitation of the continental shelf and EEZ respectively are to be effected by agreement based on international law to achieve an 'equitable solution'.

7.1 Role of proportionality

One of the preliminary tasks undertaken by the Court was to identify the respective coasts of Romania and Ukraine which generate their rights to a continental shelf and EEZ. One reason for doing so was to check, in the final stages of the delimitation process, whether any 'disproportionality exists in the ratios of the coastal length of each state and the maritime areas falling on either side of the delimitation line'. The Court also determined the 'relevant maritime area' saying that:

[17] *Libya/Malta*, ICJ Reps. 1985, Para 64; *Qatar v Bahrain*. ICJ Reps 2001, para 219; *Nicaragua v Honduras,* Judgment of 8 October 207, paras 302 et seq.

> *The purpose of delimitation is not to apportion equal shares of the area, nor indeed, proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts. [Para 110]*.

The ICJ agreed with the observations of the Arbitral Tribunal in the *Anglo-French Continental Shelf Case* (RIAA, Vol. XVII, para. 101) that:

> *…it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor…there can never be a question of completely refashioning nature…rather it is a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features.*

The Court found that the length of the relevant coast of Romania was approximately 248km and that of Ukraine was 705km, having a ratio to each other of 1:2.1. Despite this apparent disproportionality, the Court concluded in the final stage of its determination that there was no need to adjust the line because in its view 'no great disproportionality is evident'(para 122). The court confirmed that the 'sharing out of the areas is therefore a consequence of the delimitation, not vice versa'.

7.2 Delimitation methodology

Having determined the relevant maritime area, the Court observed that the method of delimitation has 'in recent decades been specified with precision', underscoring the point made earlier that international law, at least, provides relatively clear guidance. Delimitation of a single maritime boundary proceeds in three stages. First, the Court establishes a provisional line using geometrically objective lines that are appropriate for the regional geography. An equidistant line will be adopted between adjacent coasts, unless there are compelling reasons to do otherwise. In respect of opposite coasts, a median line will be adopted. These median and equidistant lines are drawn from base points, chosen by the Court, which are dependent upon the physical geography and the most seaward points of the two coasts. It is important to note that the Court will not necessarily adopt the base points selected by the disputing states to draw their territorial seas, for the obvious reason that states will choose the point most favourable to their interests. The Court observed that determining the baseline in order to measure the breadth of the continental shelf and EEZ and identifying base points for drawing an equidistance/ median line 'are two different issues'.[18] While both processes are subject to international law, the Court is not bound by the choice of base points made by the state. Rather, the Court is concerned to select points by reference to the 'physical geography' of the relevant coasts.

Secondly, the Court will consider whether there are factors calling for adjustment of the provisional line in order to achieve an equitable result. The Court also confirmed its earlier view expressed in the *Nicargua v Honduras* case that the 'so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result'.[19]

Thirdly, the Court will ensure that the provisional line, as adjusted where appropriate, does not lead to an inequitable result by reason of disproportionality.

Adopting this three stage methodology, the Court selected the relevant base points. Vital to this process was legal characterisation of an island - Serpents' Island- that proved crucial to the final decision. As this island lies alone, 20nm away from the mainland, it was not considered by the Court to be part of a cluster of fringe islands constituting part of the coast of Ukraine, as had been the case in the arbitration of the maritime line in *Eritrea and Yemen*.[20] The Court argued that:

[18] Para 137
[19] Judgement of 8 October 2007, para 271
[20] RIAA Vol XXII (2001) paras 139-146

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element on to Ukraine's coastline; the consequence would be judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes.

On this ground the Court concluded that Serpents' Island was not appropriate for the selection of base points for an equidistance line.

Another base point in contention was Sacalin Peninsula, Ukraine arguing that it was merely a 'spit of sand' that should be discarded. The Court rejected this view, and recognised the Peninsula as a base point on the ground that it belongs to the landmass, forms part of the Romanian mainland and is uncovered at high tide. (para 129). The Court also considered the role of 'material factors' such as the 7.5 km-long Sulina Dyke extending out to sea in identifying a base point. Article II of UNCLOS provides that states, when delimiting the territorial sea, may use the 'outermost permanent harbour works which form an integral part of the harbour system' and 'are regarded as forming part of the coast'. The Court found that no convincing evidence had been presented that the Sulina Dyke serves any direct purpose in port activities and thus excluded it as a base point. (para 138) The landward end of the Dyke was nonetheless accepted as a relevant base point because it represented a fixed point in the land.

7.3 Relevant Circumstances that might be used to shift the provisional equidistance line

Having identified which base points to adopt, the Court then turned to the question whether an 'equitable result' would be achieved. In order to determine the equity of the outcome of the provisional line drawn by the Court, (a line that was different to that selected by either Ukraine or Romania), it examined the possible 'relevant circumstances' that might require an adjustment. At this stage analysis returned to the disproportion between the lengths of the two coast lines. The Court observed that:

Para 163 …the respective length of the coast can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas…There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.

Para 164 Where disparities in the lengths of the coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.

On examination of earlier decisions by the Court on the circumstances that may be taken into account when considering whether to shift the equidistance line, the Court confirmed its jurisprudence that there need be 'no direct and mathematical application of the relationship between the length' of the respective coasts'. (para 166) The reasons for this lay with the absence of support for a direct relationship in state practice and the fact that a strict application of a proportionality principle would tend to exclude all other considerations. Only where there is a 'substantial disproportion' in the lengths of the coasts will this be a ground for correction of the provisional line. (para 167). On the geographical facts, the Court found there was no 'particularly marked' disparities between the relevant coasts of Ukraine and Romania and that no adjustment was required to ensure an equitable result.

It was also argued by Romania that the enclosed nature of the Black Sea and its 'general maritime geography', along with two delimitation agreements between Turkey and the USSR and Turkey and Bulgaria were 'relevant circumstances' requiring adjustment of the provisional line. The Court appeared to accept that these elements were relevant but, without further explanation, concluded that they did not indicate any adjustment was required (para 178)

7.4 Role of Islands as a Relevant Circumstance

Romania and Ukraine disagreed as to the characterisation and role of Serpents' Island for the purpose of delimitation. The Court considered whether the island was a 'relevant circumstance' calling for correction of the provisional line and concluded that it should have no effect on the delimitation, other than in respect of the 12nm arc of its territorial sea. The reason given for excluding the island as a relevant factor in achieving an equitable result is that any maritime entitlements:

> *...possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast because of the Southern limit of the delimitation areas as identified by the Court…Further, any possible entitlements generated by Serpents' Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. (para 187)*

In short, the island could not generate maritime seas beyond the limit of Ukraine's mainland. The consequence of this analysis was that, yet again, the Court was able to avoid reaching any view as to the legal status of an island under article 11of UNCLOS.

7.5 Conduct of the Parties: petroleum concessions, fishing and naval patrols

We have seen that the activities of states, including the award of oil and gas contracts, military operations or fishing, are legally relevant effectivités for determination of territorial sovereignty. International courts have, however, been reluctant to give weight to such acts in maritime zones and the role to be given to them remains unpredictable in individual disputes. Ukraine argued that the actual conduct of the parties to the dispute should be taken into account to assess the validity of respective maritime claims in the Black Sea. The Court pointed out that Ukraine was not attempting to argue that state activities could demonstrate the existence of a maritime line arising from tacit agreement or a *modus vivendi*. (para 189). Rather, Ukraine insisted that the activities, and lack of them, were inconsistent with Romania's claim to a pre-existing maritime delimitation in the disputed area.

The ICJ cited the jurisprudence of the Arbitral Tribunal in the *Barbados and Trinidad and Tobago* case to the effect that '[r]esource related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance'.[21] Moreover, the Court was disinclined to take into account fishing activities as Ukraine could not show that a line other than its own would have 'catastrophic repercussions for the livelihood and economic well-being of the population'. (para 198) On these grounds the Court chose not to take Ukraine's activities into account as a relevant circumstance.

7.6 Security Considerations

The ICJ has decided that 'legitimate security considerations of the parties may play a role in determining the final delimitation line'.[22] While Romania argued that the provisional equidistance line drawn by Ukraine runs unreasonably close to the Romanian coast and encroaches on its security interests, the Court found, without further explanation that its line 'fully respects the legitimate security interests' of both parties.

7.7 Jurisprudence of the ICJ in the Black Sea Case

The findings of the ICJ in the *Black Sea (Romania v. Ukraine)* case are consistent with its earlier jurisprudence and with that of other international tribunals. The three stage methodology is now settled practice in delimiting single maritime zones. The function of proportionality between the lengths of opposite and adjacent coasts is agreed, though in fact, proportionality is rarely employed in practice to adjust a provisional line. The application of article 11 in respect of port facilities has been usefully clarified along with identification of the relevant coast line and maritime area to be delineated. The role of islands in shifting this line is considered. The circumstances that are relevant to the question whether a provisional line achieves an equitable result can include the activities of a state in the disputed area including the grant petroleum concessions, fishing and military patrols. Security considerations and the obligation not to cut a state off from reasonable access to maritime areas are also relevant.

Despite the identification by the ICJ in the *Black Sea* case of the settled legal principles of delimitation, how an international tribunal will apply the law in the factual context of the dispute before it remains unpredictable for the purposes of providing precise legal advice.

[21] Award of 11 April 2006, RIAA, Vol. XXVII, para. 24
[22] *Libya/ Malta* ICJ Reps. 1985, para. 51

8. Enclosed or semi-enclosed seas

The 1982 Law of the Sea Convention deals specifically with enclosed or semi-enclosed seas which are defined to be a:

> *…gulf, basin, or sea surrounded by two or more States and connected to another seas or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States .art. 122.*

It is unclear whether the South China Sea satisfies this definition as it comprises significantly more than the EEZ and territorial seas of border states and is linked to other seas by relatively wide, rather than narrow, outlets. Interpretation of article 122 is, however a matter of judgement, The South China Sea might reasonably be characterised as semi-enclosed in light of the overlap of interests of the surrounding states. Were the South China Sea to be so defined, the Law of the Sea Convention imposes a general obligation on bordering states to 'co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention'. The obligation to co-operate requires them to co-ordinate management of living resources, protection and preservation of the marine environment and scientific research, including joint research where appropriate. Bordering states are also required to invite, where appropriate 'other interested States or international organisations to co-operate with them'. As issues such as piracy, drugs and weapons trading, marine pollution, transport of hazardous wastes and refugees require close collaboration within the region, it is rational to conclude that a general obligation to co-operate exists in respect of these matters.

Despite the obligation to co-operate on identified issues, article 122 does not refer to the exploitation of non-renewable oil and gas resources. No such obligation to co-operate in respect of mineral resources exists under this provision. Continental shelf resources are, however, considered separately by another provision of the Law of the Sea Convention imposing a similar obligation of co-operation where delimitation of the shelf has not yet been agreed between adjacent and opposite states. Article 83 requires that:

> *Pending agreement…the 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 in the final delimitation.*

These provisions of the Law of the Sea Convention support the principle that border-states of the South China Sea are required to cooperate to manage regional issues and, in good faith, to seek to enter into provisional arrangements for the continental shelf pending final agreement on a boundary. It is not at all clear, however, what is meant by 'arrangements of a practical nature'. It might merely be agreement on fishing or marine environmental issues. If, for example, one state were to embark on exploration for or exploitation of oil and gas, it is probable that article 83 would require an arrangement to preserve the rights of all interested states. In short, it is not possible to predict the content of the obligation under article 83; it is required only that states ensure arrangements are agreed to meet the practical needs of the circumstances, whatever they might be.

9. International law applied to disputed claims in the South China Sea

Having set out the governing principles of international law, the next and more difficult question is how they apply to the evidence of sovereignty in the South China Sea. More precisely, were the disputes to be submitted to international adjudication, what conclusion might a court or tribunal make?

The Paracels, being subject to only two claimants, are more readily analysed.[23] The historical evidence supports Vietnamese title since the beginning of the 18th century, effective administration having been ensured by the French during the colonial period. China's claim to the islands arose in 1909 and rests on forceful occupation since the 1960s. The better view is that China cannot claim title by conquest and

[23] A full analysis of the evidence is provided by M. Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands,* 2000.

Vietnam has protested repeatedly to maintain its historical title. In these circumstances, international law is likely to recognise that Vietnam has a better right to sovereignty over the Paracel Islands than China.

Sovereignty over the Spratly Islands is less readily determined. The claims by the Philippines, China,[24] Taiwan, and Malaysia are of relatively recent origin and not, arguably, supported by acts of effective occupation. Through French occupation and administration during the colonial period, Vietnam appears to have a relatively stronger claim to the Spratly Islands than do other states. It has an ancient claim through the emperors of Annam and, since 1956, has occupied many islands in the group. The Vietnamese claim is nonetheless by no means unequivocal and many other factors diminish the strength of the claim including conflicting government statements and discontinuity of occupation.

To characterise the legal problem in the South China Sea as one of satisfying the principles of territorial acquisition is to consign the territorial and maritime disputes to fruitless analysis of the historical and factual evidence that will be adduced to support the respective positions of the claimants. It is likely, however, that such sovereignty disputes are not capable of resolution by reference to the traditional principles of international law relating to the acquisition of territory.

As has been observed, any agreement to submit the Spratly Islands dispute to judicial determination is likely to request the court to determine that one claimant has the better title. Objectively, the conclusion might be that none of the claimants has made a convincing case for sovereignty over the Spratly Islands. Such a conclusion is politically and legally improbable. While Vietnam has indicated judicial resolution might be considered by it, Vietnam, Malaysia and China have not accepted the compulsory jurisdiction under article 36(2) of the Statute of the ICJ. The Philippines has signed the 'optional clause' but with a reservation that excludes the Spratly dispute.[25] Other means to resolve the dispute, or to avoid it with some form of 'sovereignty neutral' collaboration, need to be considered. It might be possible to agree upon a condominium structure by treaty under which several states can exercise power jointly over a single territory. Another suggestion is that the Spratly Islands could be managed by individual claimants by drawing sectors through the archipelago. The most likely temporary solution to the problems posed by exploitation of non-renewable resources is to agree upon joint development.

10 Joint development of continental shelf resources

.Where discussions are deadlocked, and they have been deadlocked despite 'track two' diplomatic efforts over the last decade, the only remaining option is to consider some form of joint development or other collaborative agreement. The proposal that states can 'unlock' oil and gas in contested maritime zones is by no means a novel suggestion. Cooperative joint management of non-renewable resources where boundaries have not been delineated, have been successful in East Timor and for Malaysia and Thailand, Vietnam and Cambodia in the Gulf of Thailand. Such collaboration offers a viable means of exploitation, while also leaving for another day the intractable problem of sovereignty.

Recent initiatives in the South China Sea and the region suggest that collaboration remains a viable option to manage the resources of the region and may be considered a pragmatic solution in the South China Seas. Some recent examples of collaboration include the following:

- June 1992 Malaysia and Vietnam MOU to explore and exploit petroleum of defined area of the continental shelf between them
- August 1997 Agreement Thailand and Vietnam re delimitation of the maritime boundary.

- The 2002 ASEAN's Declaration on the Conduct of Parties in the South China Sea eased tensions in the Spratly islands, but is not legally binding.

[24] M. Bennett, 'The PRC and the Use of International Law in the Spratly Islands Dispute', (1991-1992) *Stanford Journal of International Law,* at p. 448.
[25] (1993-1994) *Yearbook of the ICJ,* 117-118

- Diaoyu. Senkaku/ Tiayutai Islands (2,000 km south of Tokyo), claimed by China, Japan and Taiwan; Japan made a unilateral declaration to an equidistance line in the East China Sea where there is intensive exploration for hydrocarbons.

- Brunei and Malaysia agreed in September 2008 to resolve their offshore and deepwater seabed disputes, to resume hydrocarbon exploration and to renounce any further territorial claims.

- March 2005 national oil companies of China, Philippines and Vietnam signed a joint accord on marine seismic activities in the Spratly Islands

- Vietnam and China maritime boundary and fisheries agreements in June 2004, though they have not yet been implemented.

- Reports in 2008 of an agreement between Japan and China to develop cooperatively the oil fields of the northern areas of the East China Sea,

- 2008 China and Taiwan agreed jointly to exploit the oil and gas resources of the Taiwan Strait and the Diaoyutai/Senkaku islands (also claimed by Japan).

11. Conclusions

International law has developed a consistent jurisprudence applicable to contested territorial and maritime claims in the South China Sea. Scholarly and forensic investigations into the validity of national assertions of sovereignty can provide a foundation for legal analysis and judicial delimitation of these claims. However, research and diplomatic negotiations have thus far proved fruitless in resolving the several disputes in the South China Sea. As the respective claimants in the region become increasingly concerned to ensure their future energy security they may be even less inclined to compromise their sovereignty claims to potentially rich off shore petroleum resources. In the absence of international judicial or arbitral determination of these disputes, some form of joint collaboration may provide the most viable means of gaining access to the resources, albeit on a shared basis. Tentative efforts over the last few years to achieve regional cooperation in other matters of concern such as management of the marine environment, terrorism, piracy, and refugees may build confidence to resolve the more complex problem of sovereignty and maritime boundaries. The need for secure access to oil and gas resources may speed this process.

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