



Universiteit  
Leiden  
The Netherlands

## **Moving towards coexistence and cooperation: the Spratly Islands and international law**

Ma, X.

### **Citation**

Ma, X. (2020, May 19). *Moving towards coexistence and cooperation: the Spratly Islands and international law*. Retrieved from <https://hdl.handle.net/1887/90129>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/90129>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/90129> holds various files of this Leiden University dissertation.

**Author:** Ma, X.

**Title:** Moving towards coexistence and cooperation: the Spratly Islands and international law

**Issue Date:** 2020-05-19

## 3 | Identifying Disputed Marine Areas

### 3.1 INTRODUCTION

One of the essential respects of the management of the Spratly Islands area according to international law is the application of relevant international obligations preceding delimitation - such as the obligations to negotiate in good faith and not to jeopardize delimitation as stipulated in Articles 74(3) and 83(3) of UNCLOS - to regulate the unilateral behaviours of the disputant States. Identifying the seaward limit of the disputed marine areas in this region is necessary before applying such obligations to the disputant States and thus of relevance if the role of international law in the management of the Spratly Islands area is to be discussed. International courts and tribunals tend to define the areas of overlapping claims as disputed marine areas. For instance, in *Aegean Sea*, the ICJ considered the areas of overlapping claims, to which both Greece and Turkey claimed rights of exploration and exploitation, to be areas in dispute.<sup>1</sup> Similarly, the ITLOS decided in *Ghana/Côte d'Ivoire* that the spatial extent of the marine area in dispute between Ghana and Côte d'Ivoire for applying provisional measures was "a triangular disputed area" defined by the competing claims of the Parties'.<sup>2</sup>

The identification process can, however, sometimes be difficult, especially in the presence of ambiguous claims put forward by the disputant parties, or where other disputant parties view a claim as being excessive. This chapter terms these two difficulties 'ambiguity' and 'alleged excessiveness'. In terms of maritime claims, 'ambiguity', denoting the quality of being open to more than one interpretation,<sup>3</sup> means that when a State makes a claim, it does not specify either the scope of a claim or the legal basis on which a claim relies. 'Excessiveness' means that a claim exceeds what is entitled to the

---

<sup>1</sup> *Aegean Sea Continental Shelf* (Greece v. Turkey), Order of 11 September 1976, Request for the Indication of Interim Measures of Protection (ICJ), para.28.

<sup>2</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Order of 25 April 2015, Request for the prescription of provisional measures (ITLOS), para.45.

<sup>3</sup> 'Ambiguity', Oxford Dictionaries, available at <<https://en.oxforddictionaries.com/definition/ambiguity>>.

claimant according to international law. Accordingly, 'alleged excessiveness' means that other claimants view a claim as being excessive, regardless of whether there is final proof such as judicial findings or agreements mutually accepted by claimants. 'Ambiguity' and 'alleged excessiveness' are interconnected. A claim being ambiguous either in its scope or legal basis is prone to be viewed as being excessive by other claimants.

The maritime dispute in the Spratly Islands area is fraught with both difficulties, thereby making the identification of disputed marine areas therein a challenging task. Only a few pieces of literature have addressed how to identify disputed marine areas, often in an incidental manner, which adds more difficulties to this task.<sup>4</sup> This chapter aims to address this challenge. For this purpose, this chapter explores the typology of maritime claims put forward by the disputant States with respect to the Spratly Islands area and analyses the extent of ambiguity and alleged excessiveness associated with different types of claims (section 3.2). This chapter continues to discuss the application of two different approaches in identifying disputed marine areas in the Spratly Islands setting: (1) the areas of overlapping claims approach taking into account all claims, and (2) an alternative approach excluding unreasonable claims (section 3.3). The implementation of these two approaches requires an examination of three questions: What are the categories of maritime claims that ought to be taken into account under each approach? What are unreasonable claims? And what is the impact of the *South China Sea Arbitration* award on the categorization of disputed marine areas? (subsections 3.3.1-3.3.2) After tackling these questions, this chapter continues to discuss which approach is more apt for the Spratly Islands area (subsection 3.3.3).

## 3.2 MARITIME CLAIMS: TYPOLOGY, AMBIGUITY AND ALLEGED EXCESSIVENESS

### 3.2.1 Typology

According to different legal bases, the maritime claims put forward by the disputant States can be grouped into three types: (1) claims

---

<sup>4</sup> See e.g. S.P. Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijhoff Publishers. 2004), 56; BIICL, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas* (2016), paras.100-107; S.D. Murphy, *Obligations of States in Disputed Areas of the Continental Shelf*, forthcoming in T. Heider (ed.) *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill. 2019), 3-4; Y. van Logchem, *Disputed Maritime Areas: The Rights and Obligations of States under International Law* (PhD Dissertation, Utrecht University, defended on 8 January 2019), 5-6.

based on entitlements generated by mainland territories, (2) claims based on entitlements generated by islands, and (3) claims based on the U-shaped line. For clarity, it might be helpful to point out the conceptual distinction between the terms 'claim' and 'entitlement' used in this section. A legal 'claim', as opposed to a factual claim, is an assertion, demand or request put forward by a legal entity (such as a State, individual, or organization) of something considered one's right or title.<sup>5</sup> An 'entitlement' describes the fact that a legal entity has a right to something specified especially by law or contract.<sup>6</sup> Whereas a legal 'claim' expresses a subjective belief of rights, an 'entitlement' corresponds to an objective assessment of whether a legal entity has a certain right in light of the law. An entitlement might be contingent on meeting certain factual conditions or requirements. For example, pursuant to Article 121(3) of UNCLOS, for an island to generate entitlements related to an EEZ and continental shelf, it must be capable of sustaining human habitation or economic life of its own. Moreover, an entitlement and its realization are two separate things. The realization of the maximum potential of entitlement cannot always be guaranteed. For example, a coastal State is entitled to a 200-M EEZ emanating from its mainland territory according to Article 57 of UNCLOS. However, in case this State's entitlement overlaps with the same entitlement held by another State with an opposite or adjacent coast, the former might not get a 200-M EEZ after delimitation.

### 3.2.1.1 Claims Based on Entitlements Generated by Mainland Territories

The first type of maritime claim is based on entitlements related to the EEZ and continental shelf, including the extended continental shelf, generated by mainland territories. In the South China Sea, Malaysia, Vietnam, the Philippines and Brunei assert this type of claim.

Malaysia first claimed a continental shelf from its mainland territory when it enacted the Continental Shelf Act in 1966.<sup>7</sup> In 1984, Malaysia enacted the Exclusive Economic Zone Act, claiming a 200-M EEZ from its mainland territory.<sup>8</sup> In its joint submission with Vietnam to the Commission on the Limits of the Continental Shelf (CLCS) in 2009, Malaysia claims a continental shelf extending beyond 200 M measured from the baselines along its mainland coast, which extends over the Spratly Islands area.<sup>9</sup>

---

<sup>5</sup> 'Claim', Oxford Dictionaries, available at

<<https://en.oxforddictionaries.com/definition/claim>>.

<sup>6</sup> 'Entitlement', Oxford Dictionaries, available at <<https://www.merriam-webster.com/dictionary/entitlement>>.

<sup>7</sup> Malaysia, Continental Shelf Act 1966 (28 July 1966).

<sup>8</sup> Malaysia, Exclusive Economic Zone Act 1984 (1984).

<sup>9</sup> Malaysia and Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations

Vietnam uttered its official claim over the maritime spaces in 1977 when it issued the Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf.<sup>10</sup> Vietnam further indicated the outer limits of its continental shelf derived from its mainland coast in the maps contained in its joint submission with Malaysia to the CLCS in 2009.<sup>11</sup> In this joint submission,<sup>12</sup> Vietnam claims a continental shelf extending beyond 200 M measured from the baselines along its mainland coast, which extends over the Spratly Islands area.<sup>13</sup>

The Philippines, in its 1978 Presidential Decree No. 1599, claimed an EEZ emanating from its mainland coast that extends over the Spratly Islands area.<sup>14</sup> When the Philippines submitted information on the continental shelf beyond 200 M in the Benham Rise region to the CLCS in 2009, it declared that this submission was 'made without prejudice to the right of the Philippines to make other submissions for other areas at a future time'.<sup>15</sup> Hence, the Philippines might claim an extended continental shelf generated by its archipelago that extends over the Spratly Islands area in the future.

Brunei inherited a continental shelf partially delimited by the UK at its independence in 1984, which laid between parallel lines drawn to the 100-fathom isobath.<sup>16</sup> In 1993, Brunei published the Declaration on the Exclusive Economic Zone, establishing a 200-M EEZ measured from its mainland coast.<sup>17</sup> Moreover, in its preliminary submission to the CLCS concerning the outer limits of the continental shelf in 2009,<sup>18</sup> Brunei made a general claim to a continental shelf extending beyond 200 M measured from the

---

Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (7 May 2009).

<sup>10</sup> Vietnam, Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (12 May 1977).

<sup>11</sup> Malaysia and Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (7 May 2009).

<sup>12</sup> In addition to this joint submission with Malaysia, Vietnam also made a separate submission to the CLCS to claim a continental shelf extending beyond 200 M in the north area of the South China Sea, which was less likely to overlap with the Spratly Islands area. See Vietnam, Outer Limits of the Continental Shelf beyond 200 nautical miles in respect of the North Area (VNM-N) (7 May 2009).

<sup>13</sup> Malaysia and Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (7 May 2009).

<sup>14</sup> The Philippines, Presidential Decree No. 1599 establishing an Exclusive Economic Zone and for other purposes (11 June 1978).

<sup>15</sup> The Philippines, A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf in Benham Rise Region (8 April 2009), para.1.

<sup>16</sup> D.J. Dzurek, *The Spratly Islands Dispute: Who's On First?* (IBRU. 1996), 35.

<sup>17</sup> *Id.*, 58.

<sup>18</sup> The reason why Brunei, Malaysia, the Philippines and Vietnam all made submissions to the CLCS in 2009 was probably to catch the submission deadlines. For more details, see chapter 5, section 5.3.2.1.

baselines along its mainland coast.<sup>19</sup> The preliminary submission does not specify the coordinates of the outer limits of the continental shelf, and Brunei has not yet sent a full submission to the CLCS.<sup>20</sup> Nevertheless, due to Brunei's geological setting, its alleged extended continental shelf would undoubtedly extend over the Spratly Islands area. (see Map 3-2)

China does not have this type of claim because its mainland territory is so distant from the Spratly Islands area that it could not generate maritime entitlements extending over the latter.

### 3.2.1.2 Claims Based on Entitlements Generated by Islands

The second type of claim is connected with maritime entitlements generated by islands. As mentioned in chapter 2, China, Malaysia, Vietnam and the Philippines claim territorial titles to part or all of the islands in the Spratly Islands, and therefore, these four States assert entitlements emanating from islands.

Entitlements derived from islands in this region can be further divided into two sub-types: (1) entitlements related to the territorial sea and contiguous zone, and (2) entitlements related to the EEZ and continental shelf, including the extended continental shelf. Both sub-types are contingent on the sovereignty of the islands concerned. However, the relationships between these two sub-types and territorial sovereignty have a critical difference. The sovereignty over islands would undoubtedly entail entitlements related to the territorial sea and contiguous zone, but on its own does not necessarily lead to entitlements related to the EEZ and continental shelf. It is because apart from sovereignty, the latter depends on an extra requirement that the islands at issue must be capable of sustaining human habitation or economic life of their own according to Article 121(3) of UNCLOS. For this reason, when a State claims sovereignty over a specific island, it is natural to expect that this State also claims maritime entitlements related to the territorial sea and contiguous zone generated around that island, but whether this State can have entitlements connected with the EEZ and continental shelf would require further examination. Hence, the following analysis places more focus on entitlements related to the EEZ and continental shelf generated around islands.

Turning to specific claims, China made its first official claim on the maritime entitlements over the Spratly Islands area through the Declaration on Territorial Sea in 1958. In that Declaration, China

---

<sup>19</sup> Brunei, Preliminary Submission concerning the Outer Limits of its Continental Shelf (12 May 2009).

<sup>20</sup> See Submissions, through the UN Secretary-General, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982 (as of 21 November 2019), available at <[https://www.un.org/Depts/los/clcs\\_new/commission\\_submissions.htm](https://www.un.org/Depts/los/clcs_new/commission_submissions.htm)>.

claimed a 12-M territorial sea for all its territories including the Spratly Islands.<sup>21</sup> In 1992, China reiterated this position in the Law on the Territorial Sea and the Contiguous Zone.<sup>22</sup> In 1998, China enacted the Law on the Exclusive Economic Zone and the Continental Shelf, which set out a 200-M EEZ and continental shelf for its land territories including the Spratly Islands.<sup>23</sup> China publicly stated that: 'China's Nansha Islands [the Spratly Islands] is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.'<sup>24</sup> Moreover, when China submitted the information on the limits of the continental shelf beyond 200 M in the East China Sea to the CLCS in 2012, it declared that '[t]his submission of the Chinese Government is without prejudice to any future submission by China on delineation of the outer limits of the continental shelf in [the] East China Sea and other seas.'<sup>25</sup>

Malaysia did not explicitly claim the EEZ or continental shelf from islands under its control in the Spratly Islands area in its 1966 Continental Shelf Act and 1984 Exclusive Economic Zone Act. However, in its joint submission with Vietnam to the CLCS in 2009, Malaysia drew the outer limits of its alleged continental shelf generated only from its mainland coast but not from any island in the Spratly Islands.<sup>26</sup> Clive Schofield commented that these outer limits as shown in this joint submission implied that Malaysia did not claim any continental shelf generated by the islands therein.<sup>27</sup> Moreover, Malaysia claims a single maritime boundary for its EEZ and continental shelf according to its Declaration upon the Ratification of UNCLOS on 14 October 1996.<sup>28</sup> It follows that Malaysia might not claim any EEZ emanating from the islands therein either.<sup>29</sup>

As to Vietnam, its 1977 Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf stipulated that Vietnam's islands and archipelagos, including

---

<sup>21</sup> China, Declaration on China's Territorial Sea (1958), para.1.

<sup>22</sup> China, Law on the Territorial Sea and the Contiguous Zone (25 February 1992).

<sup>23</sup> China, Law on the Exclusive Economic Zone and the Continental Shelf (26 June 1998).

<sup>24</sup> China, Note Verbale addressed to UN Secretary-General (14 April 2011).

<sup>25</sup> China, Submission on the Outer Limits of the Continental Shelf in Part of the East China Sea (14 December 2012).

<sup>26</sup> Malaysia and Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (7 May 2009).

<sup>27</sup> C. Schofield, Untangling A Complex Web: Understanding Competing Maritime Claims in the South China Sea, in I. Storey & C.Y. Lin (eds.) *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (Singapore: ISEAS Yusof Ishak Institute. 2016), 31-32.

<sup>28</sup> Malaysia, Declaration upon the ratification of UNCLOS (14 October 1996).

<sup>29</sup> C. Schofield, Untangling A Complex Web: Understanding Competing Maritime Claims in the South China Sea, in I. Storey & C.Y. Lin (eds.) *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (Singapore: ISEAS Yusof Ishak Institute. 2016), 31-32.

the Spratly Islands, had their own territorial sea, contiguous zone, EEZ and continental shelf.<sup>30</sup> However, Vietnam has indicated the outer limits of its continental shelf generated only by its mainland territory but not by any island in the Spratly Islands in the maps contained in its joint submission with Malaysia to the CLCS in 2009.<sup>31</sup> Similar to the situation of Malaysia, these outer limits as shown in the joint submission probably implies that Vietnam does not claim any continental shelf generated by the islands.<sup>32</sup>

Whether the Philippines intended to claim entitlements related to the EEZ or continental shelf for the Kalayaan Island Group in the Spratly Islands was not evident before the *South China Sea Arbitration* case. In the 2009 Republic Act No. 9522, the Philippines stated that its jurisdiction over the Kalayaan Island Group should be determined according to Article 121 of UNCLOS.<sup>33</sup> However, during the merits hearing of *South China Sea Arbitration* in 2015, the Philippines clarified that it would not claim 200-M maritime entitlements measured from the baselines of the islands in the Spratly Islands, probably for ensuring the tribunal's jurisdiction over its submissions.<sup>34</sup> Notably, China's reservation in relation to UNCLOS excluded the tribunal's jurisdiction over disputes 'relating to sea boundary delimitation'.<sup>35</sup> The tribunal admitted that it would not have jurisdiction over some of the Philippines' submissions if any disputed island therein was entitled to an EEZ or continental shelf, because such an EEZ or continental shelf would extend over most of the Spratly Islands area, whereby relevant submissions could be characterized as 'relating to sea boundary delimitation'.<sup>36</sup>

### 3.2.1.3 Claims Based on the U-shaped Line

In addition to the above two types of claims, China appears to assert maritime claims based on a U-shape line. China published the first

---

<sup>30</sup> Vietnam, Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf (12 May 1977).

<sup>31</sup> Malaysia and Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (7 May 2009).

<sup>32</sup> C. Schofield, Untangling A Complex Web: Understanding Competing Maritime Claims in the South China Sea, in I. Storey & C.Y. Lin (eds.) *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (Singapore: ISEAS Yusof Ishak Institute, 2016), 31-32.

<sup>33</sup> The Philippines, Republic Act No. 9522 (10 March 2009).

<sup>34</sup> Transcript on Merits Hearing of the Republic of Philippines v. the People's Republic of China Arbitration, 24 November 2015.

<sup>35</sup> See UNCLOS, Article 298. Also see China, *Declaration made after ratification of UNCLOS* (25 August 2006), available at <[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#China after ratification](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification)>.

<sup>36</sup> South China Sea Arbitration (The Philippines v. China), Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), paras.156, 368-369.

U-shaped line map titled ‘Map of South China Sea Islands’ in 1947,<sup>37</sup> and it attached a U-shaped line map to its note *verbale* addressed to the UN in 2009 as a response to the joint submission to the CLCS made by Malaysia and Vietnam regarding their alleged extended continental shelf in the Spratly Islands area.<sup>38</sup> China itself has never clarified its claim in relation to the U-shaped line.<sup>39</sup> Nevertheless, as rightly pointed out by the tribunal in *South China Sea Arbitration*, even though China had not clarified the meaning of the U-shaped line, it was apparent that China had ‘a seemly expansive claim to maritime entitlements’ based on the U-shaped line, which the Philippines disputed.<sup>40</sup>

### 3.2.1.4 Summary

Table 3-1 summarizes three types of maritime claims put forward by the disputant States respecting the Spratly Islands area.

*Table 3-1: Three types of maritime claims advanced by the disputant States*

	(1) Claims based on entitlements generated by mainland territories	(2) Claims based on entitlements generated by islands	(3) Claims based on the U-shaped line
<b>Brunei</b>	√	--	--
<b>China</b>	--	√	√
<b>Malaysia</b>	√	√	--
<b>Philippines</b>	√	√	--
<b>Vietnam</b>	√	√	--

Notes: The symbol ‘√’ means that the State concerned advances the maritime claim, and the symbol ‘--’ indicates the opposite.

## 3.2.2 Ambiguity and Alleged Excessiveness

For the first type of maritime claim, namely claims based on entitlements generated by mainland territories, Brunei, Malaysia, the

<sup>37</sup> OES, China: Maritime Claims in the South China Sea, *Limits in the Seas* (5 December 2014), 3.

<sup>38</sup> China, Note Verbale addressed to UN Secretary-General (7 May 2009).

<sup>39</sup> As rightly pointed out by G. Xue, ‘[a]lthough the U-shaped line has long been on official Chinese maps, China neither explained the exact legal value of the line nor the status of the waters inside the line’. See G. Xue, *The South China Sea: Competing Claims and Conflict Situations*, in C. Schofield, et al. (eds.), *The Limits of Maritime Jurisdiction* (Brill, 2014), 243. E. Usuki also opined that it was ‘*prima facie* not known’ whether the U-shaped line meant to indicate the assertion for historic titles to waters or merely for historic rights falling short of historic titles. See E. Usuki, *China’s Three Distinctive Assertions under the ‘Nine-dash-line’ Claims and the Annex VII Arbitral Tribunal’s Interpretation of Article 121 Regarding an Island and Rocks under the 1982 UN Convention on the Law of the Sea*, 21 *Asian Yearbook of International Law* (2015), 146-147.

<sup>40</sup> *South China Sea Arbitration (The Philippines v. China)*, Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), para.167.

Philippines and Vietnam have published coordinates of the baselines along their mainland coasts and the 200-M outer limits of their respective EEZ and continental shelf. Since the sovereignty over their mainland territories is not disputed, these States undoubtedly have entitlements to the EEZ and continental shelf generated by such territories. Hence, in general, these claims are neither ambiguous or viewed as being excessive. There is one exception, that is, the claims or potential claims regarding the extended continental shelf. Neither Brunei nor China or the Philippines has specified the outer limits of their alleged continental shelf extending over the Spratly Islands area. Hence, potential claims of these three States regarding the areas of the extended continental shelf in this region remain ambiguous in their scope. Malaysia and Vietnam's claims on the extended continental shelf are regarded as being excessive by China and the Philippines.<sup>41</sup>

The situation becomes complicated when it comes to the second type of maritime claim, namely claims based on entitlements generated by the islands. The legal basis for these claims is clear, namely the alleged sovereignty over relevant islands. However, the scope of these claims remains undefined, since none of the countries claiming sovereignty has published coordinates for baselines that can be used to measure the maritime entitlements that they may claim in this region. Moreover, the four States dispute the sovereignty over the islands in the Spratly Islands area as well as the question of whether these islands could generate entitlements related to the EEZ and continental shelf. As a result, among these States, one views another's claims based on entitlements generated by the islands as being excessive.

With respect to the third type of maritime claim, namely China's potential claim based on the U-shaped line, it is patent that both the scope of and legal basis for this claim remain ambiguous, as China has not provided any clarification. Other claimants have viewed this claim as being excessive.<sup>42</sup>

Neither the ambiguity nor the alleged excessiveness of a party's claim affects the existence of a dispute. In *Cameroon v. Nigeria*, the ICJ stated that 'the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties'.<sup>43</sup> The tribunal in *South China Sea Arbitration* endorsed this position, concluding that the 'existence of a dispute over [relevant] issues is not diminished by the fact that China has not clarified the meaning

---

<sup>41</sup> China, Note Verbale addressed to UN Secretary-General (7 May 2009); The Philippines, Note Verbale addressed to UN Secretary-General (4 August 2009), para.2.

<sup>42</sup> Examples include: Vietnam, Note Verbale addressed to UN Secretary-General (8 May 2009), para.3; The Philippines, Note Verbale addressed to UN Secretary-General (5 April 2011).

<sup>43</sup> Land and Maritime Boundary (*Cameroon v. Nigeria*), Judgment of 11 June 1998 (Preliminary Objections) (ICJ), para.93.

of the nine-dash line or elaborated on its claim to historic rights'.<sup>44</sup> Whether a claim is excessive under international law is also of no relevance to the existence of a dispute. International jurisprudence has widely recognized the necessity to 'distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute'.<sup>45</sup> The tribunal in *South China Sea Arbitration* pointed out that international law did not require a State to expound its legal arguments in order for a dispute to arise.<sup>46</sup>

The diplomatic correspondence between and among China, Vietnam, Malaysia and the Philippines from 2009 to 2011 have shown that these claimants are positively against one another's maritime claims in relation to the Spratly Islands area, whereby a maritime dispute apparently exists.<sup>47</sup> In 2009, Malaysia and Vietnam submitted jointly to the CLCS the information on the limits of the continental shelf beyond 200 M from the baselines along their mainland coasts, which extended over the Spratly Islands area.<sup>48</sup> The joint submission received strong protests from China and the Philippines.<sup>49</sup> China attached a U-shaped line map in its response to the joint submission,<sup>50</sup> which fuelled strong objections from Vietnam and the Philippines.<sup>51</sup> Brunei did not express its objection to the joint submission, probably because the maritime boundaries between Brunei and Malaysia out to 200 M have been delimited by an

---

<sup>44</sup> *South China Sea Arbitration (The Philippines v. China)*, Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), para.167.

<sup>45</sup> *Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998 (ICJ), para.32; *South China Sea Arbitration (The Philippines v. China)*, Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), para.170.

<sup>46</sup> *Id.*

<sup>47</sup> The key to finding the existence of a dispute is that 'the claim of one party is positively opposed by the other'. Such positive opposition is normally apparent from the diplomatic correspondence of the parties, as views are exchanged and claims are made and rejected. See *Mavrommatis Palestine Concessions (Greece v. Britain)*, Judgment of 30 August 1924, PCIJ Series A No. 2, 11; *South West Africa (Ethiopia/Liberia v. South Africa)*, Judgment of 21 December 1962 (ICJ), 328; *Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998 (ICJ), para.31; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006 (Jurisdiction of the Court and Admissibility of the Application) (ICJ), para.90; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment of 1 April 2011 (Preliminary Objections) (ICJ), para.23; *South China Sea Arbitration (The Philippines v. China)*, Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), para.159.

<sup>48</sup> Malaysia and Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (7 May 2009).

<sup>49</sup> China, Note Verbale addressed to UN Secretary-General (7 May 2009), para.2; The Philippines, Note Verbale addressed to UN Secretary-General (4 August 2009), para.2.

<sup>50</sup> China, Note Verbale addressed to UN Secretary-General (7 May 2009), para.2.

<sup>51</sup> Vietnam, Note Verbale addressed to UN Secretary-General (8 May 2009), para.3; The Philippines, Note Verbale addressed to UN Secretary-General (5 April 2011).

exchange of letters dated 16 March 2009.<sup>52</sup> These letters, however, are not publicly available,<sup>53</sup> and neither Malaysia nor Brunei has given the due publicity to these maritime boundaries as required by Articles 75(2) and 84(2) of UNCLOS.<sup>54</sup> Even so, Brunei and Malaysia still dispute the continental shelf beyond 200 M,<sup>55</sup> which is confirmed in Brunei's preliminary submission concerning the outer limits of the continental shelf in 2009.<sup>56</sup> A maritime dispute also exists between China and Brunei.<sup>57</sup> For instance, when China conducted survey research in the Spratly Islands area in 2003, Brunei affirmatively opposed and rejected the maritime claims of China by making protests against China's conduct in its alleged EEZ.<sup>58</sup>

### 3.3 TWO COMPETING APPROACHES TO IDENTIFYING DISPUTED MARINE AREAS

Though the presence of ambiguity and alleged excessiveness associated with maritime claims does not impact the existence of the maritime dispute in the Spratly Islands area, it may add difficulties to identifying the exact geographical extent of disputed marine areas therein. As mentioned at the beginning of this chapter, areas of overlapping claims would normally be identified as disputed marine

---

<sup>52</sup> Brunei, Preliminary Submission concerning the Outer Limits of its Continental Shelf (12 May 2009), para.10. Also see C. Schofield, Untangling A Complex Web: Understanding Competing Maritime Claims in the South China Sea, in I. Storey & C.Y. Lin (eds.) *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (Singapore: ISEAS Yusof Ishak Institute. 2016), 31.

<sup>53</sup> Scholars comment that the absence of this exchange of letters between Malaysia and Brunei in the public domain may explain why China did not make a formal response to it. See e.g., I. Storey, Brunei's Contested Sea Border with China, in B. Elleman, et al. (eds.) *Beijing's Power and China's Borders: Twenty Neighbors in Asia* (Taylor and Francis. 2014), 41; J.A. Roach, Malaysia and Brunei: An Analysis of their Claims in the South China Sea, *Center for Naval Analyses Occasional Paper* (2014), 4, fn. 23.

<sup>54</sup> See Malaysia, Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea, available at <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/MYS.htm>>. Brunei, Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea, available at <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/BRN.htm>>.

<sup>55</sup> Brunei, Preliminary Submission concerning the Outer Limits of its Continental Shelf (12 May 2009), para.12.

<sup>56</sup> Brunei stated that 'there may exist areas of potential overlapping entitlements in respect of its continental shelf beyond 200 nautical miles'. See *id.*

<sup>57</sup> I. Storey, Brunei's Contested Sea Border with China, in B. Elleman, et al. (eds.) *Beijing's Power and China's Borders: Twenty Neighbors in Asia* (Taylor and Francis. 2014), 41-43.

<sup>58</sup> O. Ward, The Silent Claimant in the South China Sea (16 July 2017), available at <<https://www.aseantoday.com/2017/07/the-silent-claimant-in-the-south-china-sea/>>.

areas. This approach can be attractive to the disputant States because the spatial scope of contested areas is determined solely based on the overlapping areas of their unilateral claims. However, if without any constraint, a State may abuse this approach by making plainly unreasonable claims or mere assertions of rights manifestly incapable of existing under international law. For example, China's claims in relation to the U-shaped line are often criticized as 'expansive'.<sup>59</sup> An alternative approach is to exclude unreasonable claims when determining the spatial extent of contested marine areas. In light of this, this section discusses the application of two different approaches in the Spratly Islands setting.

### 3.3.1 The Areas of Overlapping Claims Approach: Taking into Account All Claims

#### 3.3.1.1 Categorization of Disputed Marine Areas

Implementing the areas of overlapping claims approach in the Spratly Islands setting requires taking into account all the three types of maritime claims as specified in section 3.2.1. Accordingly, the disputed marine areas therein can be categorized into two general groups: (1) areas of overlapping claims related to the same type of maritime zone, and (2) areas of overlapping claims related to different types of maritime zones. This categorization is of critical importance to the analysis of applicable international law preceding delimitation in chapter 4.

#### *Areas of Overlapping Claims Related to the Same Type of Maritime Zone*

The claims of the disputant States can be associated with the same type of maritime zone, being either the territorial sea, contiguous zone, EEZ or continental shelf.

One category of disputed areas in this group is the disputed areas of the territorial sea or contiguous zone generated around the disputed islands. The overlapping claims can occur in two scenarios. First, since the claimants dispute the sovereignty over the islands in this region, each territorial sea or contiguous zone generated by any one of these islands is itself a contested area. Second, the territorial sea or contiguous zone generated by one island might overlap with the same type of maritime zone generated by another island.

Another category is the disputed areas of the EEZ or continental shelf including the extended continental shelf. First, to the extent that only China claims entitlements to an EEZ or a continental shelf

---

<sup>59</sup> D. French, In the Matter of the South China Sea Arbitration: Republic of Philippines v People's Republic of China, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013-19, Award of 12 July 2016, 19(1) *Environment Law Review* (2017), 49.

emanating from the islands in the Spratly Islands area, this claim would overlap with entitlements to the EEZ or continental shelf generated by the mainland territories of Brunei, Malaysia, the Philippines and Vietnam opposing to the coasts of these islands.<sup>60</sup> Second, though neither Brunei nor China or the Philippines has specified the outer limits of their alleged areas of the extended continental shelf extending over the Spratly Islands area, potential overlaps between or among the disputant States' claims related to the areas of the extended continental shelf might occur in the future.

#### *Areas of Overlapping Claims Related to Different Types of Maritime Zones*

In the context of the Spratly Islands area, the claim of a territorial sea generated by an island might overlap with the claim of a contiguous zone, EEZ or continental shelf generated by another island, or with the claim of an EEZ or continental shelf derived from a mainland territory. However, this overlap would not lead to a disputed marine area, because in no case can a contiguous zone, EEZ or continental shelf of one State encroach upon a territorial sea of another State. This position, albeit not stipulated in UNCLOS, has been widely supported by international jurisprudence, State practice and legal commentators.<sup>61</sup> For instance, in *Bangladesh/Myanmar*, the ITLOS

---

<sup>60</sup> Some pronouncements of international jurisprudence might be taken to suggest that small islands are not given much weight in maritime boundary delimitation. However, this does not apply to the situation of the Spratly Islands, since the islands therein are 'one of the principal elements in the delimitation and not an incidental feature in a larger geographical setting'. For more discussions in this regard, see A.G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Sea and Area and the Maritime Zones of the Mainland Coasts*, 32(2) *ODIL* (2001), 178-182.

<sup>61</sup> For relevant international jurisprudence, see *e.g.*, *Dubai/Sharjah Border Arbitration*, Award of 19 October 1981, 91 *International Law Reports* 674 (The tribunal found that Abu Musa as an island was entitled 'ex principio to a belt of territorial sea quite independently and separately from either the actual or potential continental shelf claims of neighbouring states'); *Second Stage of the Proceedings between Eritrea/Yemen (Maritime Delimitation)*, Decision of 17 December 1999, paras.160-161 (The tribunal concluded that the maritime boundary line must not cut through the 12-M territorial sea generated by Zuqar and Hanish, respectively.); *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012 (ITLOS), para.169. For relevant State practices, which mainly include treaties concerned with the delimitation of EEZs or continental shelves which establish the boundary in such a way that islands are attributed at least a 12-M territorial sea, see *e.g.*, *Agreement Concerning the Sovereignty over the Islands of Al-'Arabiyyah and Farsi and the Delimitation of the Boundary Line Separating the Submarine Areas Between the Kingdom of Saudi Arabia and Iran*, adopted 24 October 1968, entered into force 29 January 1969, 696 *UNTS* 212; *Agreement concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to Japan and South Korea (with map, appendix, agreed minutes and exchanges of notes)*, adopted 30 January 1974, entered into force 22 June 1978, 1225 *UNTS* 113. For relevant scholarly literature, see *e.g.*, A.G. Oude Elferink, *Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue*, 3 *IJMCL* (1998), 153-154, 159-160, 164-165; A.G. Oude Elferink, *The Islands in the South China Sea: How Does*

decided that Bangladesh had the right to a 12-M territorial sea around St. Martin's Island in the area where an overlap occurred with the EEZ or continental shelf claims of Myanmar.<sup>62</sup> The underlying rationale, according to the ITLOS, is that in case of an overlap, more weight has to be attributed to sovereignty over the territorial sea rather than sovereign rights over the EEZ or continental shelf.<sup>63</sup>

The second category is the areas of overlapping claims related to a contiguous zone and an EEZ. The claim of a contiguous zone generated by an island might overlap with the claim of an EEZ generated by another island, or with an EEZ emanating from a mainland territory.

Third, an EEZ claimed by one party might overlap with a continental shelf claimed by another. This overlap may occur because according to Article 56(1) of UNCLOS, the rights of a coastal State in the EEZ consists of '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 the seabed and of the seabed and its subsoil'.<sup>64</sup> [emphasis added] Three scenarios are relevant here. Firstly, an EEZ generated by an island overlaps with a continental shelf generated by another island. Secondly, an EEZ generated by an island overlaps with a continental shelf derived from a mainland territory. Thirdly, an EEZ derived from a mainland territory overlaps with a continental shelf based upon another mainland territory, or the other way around. For instance, as shown in Map 3-2, Malaysia's outer limits of the EEZ emanating from its mainland territory intersect with the outer limits of the extended continental shelf jointly claimed by Malaysia and Vietnam.

Fourth, the maritime zones encompassed by the U-shaped line overlap with all maritime zones generated by the islands in the Spratly Islands and with the EEZ and continental shelf derived from the mainland territories of Brunei, Malaysia, the Philippines and Vietnam.

### 3.3.1.2 Mapping the Extent of Disputed Marine Areas

The geographical extent of disputed marine areas identified according to the areas of overlapping claims approach must take into account two categories of disputed marine areas as specified in

---

Their Presence Limit the Extent of the High Sea and Area and the Maritime Zones of the Mainland Coasts, 32(2) *ODIL* (2001), 175; Y. van Logchem, *Disputed Maritime Areas: The Rights and Obligations of States under International Law* (PhD Dissertation, Utrecht University, defended on 8 January 2019), 22.

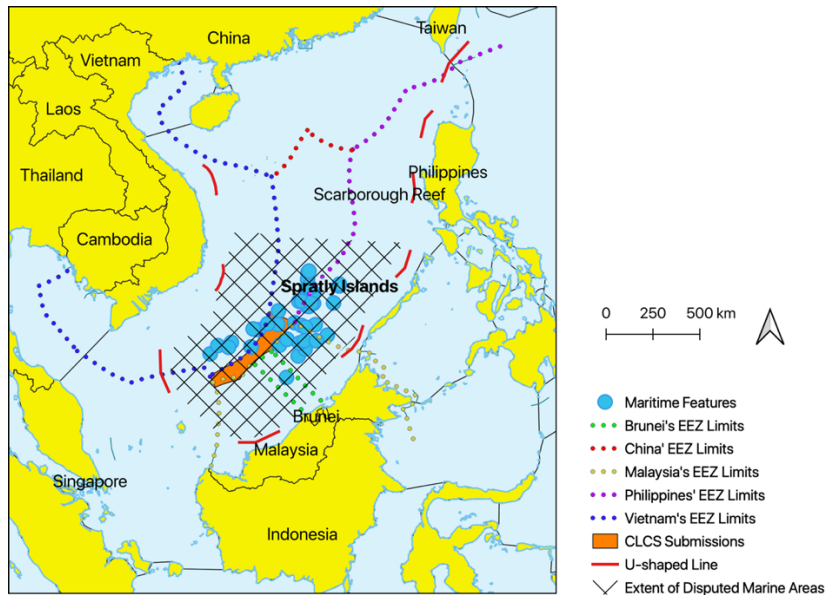
<sup>62</sup> Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012 (ITLOS), para.169.

<sup>63</sup> *Id.*

<sup>64</sup> UNCLOS, Article 56(1).

section 3.3.1.1: (1) areas of overlapping claims related to the same type of maritime zone, and (2) areas of overlapping claims related to different types of maritime zones. Accordingly, Map 3-2 depicts the extent of disputed marine areas in the Spratly Islands area. This figure allows two observations. First, the extent of disputed marine areas basically covers the whole of the Spratly Islands area. Second, following this approach, there would be no high seas in the Spratly Islands area.

Map 3-2: The extent of disputed marine areas in the Spratly Islands area according to the areas of overlapping claims approach



Notes: The author produced this illustrative map using the QGIS software. The coordinates of the maritime features are obtained from GoogleEarth. The data about the CLCS Submissions are obtained from: ESRI shapefile data for Malaysia and Vietnam ECS polygons, available online at <<http://continentalshelf.org/onestopdatashop/6350.aspx>>. The data about the EEZ limits are obtained from: Flanders Marine Institute (2018) Maritime Boundaries Geodatabase: Maritime Boundaries and Exclusive Economic Zones (200NM), version 10, available online at <<https://doi.org/10.14284/312>>.

### 3.3.2 An Alternative Approach: Excluding Unreasonable Claims

#### 3.3.2.1 Standard Setting: What are 'unreasonable claims'?

The key to the alternative approach is defining and excluding 'unreasonable claims'. Some scholars regard claims not asserted in good faith as 'unreasonable claims', arguing that contested marine areas must only be 'zones of overlapping boundaries claimed *bona fide*'.<sup>65</sup> This argument is, arguably, inappropriate. Even if there is no possible legal basis for a State's claims, this State may still have asserted these claims in good faith. Yet, what matters here is not whether relevant claims have not been genuinely held but whether the claims are unreasonable. Hence, the good faith argument could be omitted.

The test of plausibility, which is widely recognized and used as a criterion for the indication of provisional measures in international jurisprudence which requires that the rights a party seeks to protect are plausible,<sup>66</sup> can be a good criterion for filtering out unreasonable claims.<sup>67</sup> The arbitral tribunal in *Guyana v. Suriname* has used the test of plausibility to guide itself in deciding the types of activities that are permissible in disputed marine areas.<sup>68</sup> In the tribunal's view, provisional measures can only be prescribed in exceptional circumstances.<sup>69</sup> It means that a court or tribunal will not prescribe provisional measures unless it finds there is 'a real and imminent risk that irreparable prejudice may be caused to the rights of the parties

---

<sup>65</sup> See *e.g.*, S.P. Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijhoff Publishers. 2004), 56; N.A. Ioannides, The China-Japan and Venezuela-Guyana Maritime Disputes: How the Law on Undelimited Maritime Areas Addresses Unilateral Hydrocarbon Activities, *EJIL: Talk!* (25 January 2019), available at <<https://www.ejiltalk.org/the-china-japan-and-venezuela-guyana-maritime-disputes-how-the-law-on-undelimited-maritime-areas-addresses-unilateral-hydrocarbon-activities/>>.

<sup>66</sup> See *e.g.*, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Order of 28 May 2009 (Request for the indication of provisional measures) (ICJ), para.57; Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures Order of 8 March 2011 (ICJ), paras.53, 57; Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Order of 18 July 2011 (Request for the Indication of Provisional Measures) (ICJ), para.33; Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Order of 25 April 2015, Request for the prescription of provisional measures (ITLOS), para.58.

<sup>67</sup> S.D. Murphy supported this idea in his recent article. See S.D. Murphy, Obligations of States in Disputed Areas of the Continental Shelf, forthcoming in T. Heider (ed.) *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill. 2019), 3.

<sup>68</sup> *Guyana v. Suriname*, Arbitral Award dated 17 September 2007 (PCA), para.469.

<sup>69</sup> *Id.* Also see Aegean Sea Continental Shelf (Greece v. Turkey), Order of 11 September 1976, Request for the Indication of Interim Measures of Protection (ICJ), para.31.

in dispute'.<sup>70</sup> On this basis, the tribunal has further concluded that the regime of provisional measures is 'far more circumscribed' than the regime that regulates activities in disputed marine areas.<sup>71</sup> It follows that if a claim could justify the use of exceptional power of a court or tribunal to indicate provisional measures, then such a claim must not be deemed unreasonable in the context of disputed marine areas.<sup>72</sup>

An important question is to what exact extent the rights that a State claims over a disputed area can be considered as 'plausible' and thus being 'reasonable'. In the author's view, the 'possibility' standard rather than 'probability' is more appropriate. The 'possibility' standard is widely accepted in international jurisprudence.<sup>73</sup> For instance, in *Belgium v. Senegal*, in examining the link between the right protected and the measures requested, the ICJ held that 'the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible'.<sup>74</sup> The ICJ further explained that it did not need to establish *definitively* the existence of the rights that Belgium sought to be protected.<sup>75</sup> Rather, provided that the rights asserted by Belgium were grounded in a *possible* interpretation of the Convention against Torture, the ICJ considered such rights to be plausible.<sup>76</sup> Therefore, the author argues that it is sufficient for a disputant State's rights over the area in dispute to be considered as plausible and thus reasonable, provided that such rights constitute a *possible* interpretation and application of the applicable international law such as UNCLOS provisions.

### 3.3.2.2 The Impact of the South China Sea Arbitration Award

In implementing the alternative approach in the Spratly Islands setting, the *South China Sea Arbitration* award might deem some of

---

<sup>70</sup> Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Order of 25 April 2015, Request for the prescription of provisional measures (ITLOS), para.41. Also see *Guyana v. Suriname*, Arbitral Award dated 17 September 2007 (PCA), para.469.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *e.g.*, *Passage through the Great Belt (Finland v. Denmark)*, Separate Opinion of Judge Shahabuddeen attached to Order of 29 July 1991 (Request for the Indication of Provisional Measures) (ICJ), 31, 36; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Order of 28 May 2009 (Request for the indication of provisional measures) (ICJ), para.60; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Order of 25 April 2015, Request for the prescription of provisional measures (ITLOS), paras.61-62.

<sup>74</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Order of 28 May 2009 (Request for the indication of provisional measures) (ICJ), para.57.

<sup>75</sup> *Id.*, para.60.

<sup>76</sup> *Id.*

China's maritime claims implausible, thereby excluding these claims from consideration in determining disputed marine areas.

In *South China Sea Arbitration*, the Philippines argued that China's alleged U-shaped line contradicted UNCLOS, and that China could not enjoy any maritime entitlement based on the U-shaped line.<sup>77</sup> The Philippines also claimed that none of the nine selected maritime features in the Spratly Islands (including Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef, Hughes Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef) constituted islands that could generate an entitlement to an EEZ or continental shelf.<sup>78</sup>

The tribunal concluded that China's maritime claim based on the U-shaped line was unsubstantiated under international law, because UNCLOS superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.<sup>79</sup> Moreover, in addition to the nine maritime features mentioned in the Philippines' submissions, the tribunal took a *proprio motu* move to examine the factual conditions of all the other maritime features in the Spratly Islands area and concluded that none of them was capable of sustaining human habitation or an economic life of their own within the meaning of those terms in Article 121(3) of UNCLOS so as to generate an entitlement to an EEZ or continental shelf.<sup>80</sup>

Obviously, the above arbitral decisions have an adverse impact on the plausibility of some of China's maritime claims. These decisions entail that China's maritime claims, including those based on the U-shaped line and entitlements to the EEZ and continental shelf generated by the islands in the Spratly Islands area, cannot be a possible interpretation and application of UNCLOS. Therefore, according to the *South China Sea Arbitration* award, these maritime claims would be deemed implausible and thus unreasonable. Though the decisions in this case only bind upon the Philippines and allegedly China, these decisions, by impacting China's maritime claims, might also affect the maritime disputes between China and other claimants, namely Vietnam, Malaysia and Brunei.<sup>81</sup>

Some scholars commented that 'the award has succeeded in clearly demarcating the disputed areas in the South China Sea as being confined to the territorial sea around each disputed high-tide feature'.<sup>82</sup> The author, however, cannot fully agree with this comment. Importantly, the *South China Sea Arbitration* award only affects part of the second type of maritime claim (China's claims

---

<sup>77</sup> *South China Sea Arbitration* (The Philippines v. China), Award on Jurisdiction and Admissibility of 29 October 2015 (PCA), para.101.

<sup>78</sup> *Id.*

<sup>79</sup> *South China Sea Arbitration* (The Philippines v. China), Award of 12 July 2016 (PCA), para.278.

<sup>80</sup> *Id.*, para.646.

<sup>81</sup> L. Reed & K. Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 *AJIL* (2016), 760.

<sup>82</sup> *Id.*, 759.

based on entitlements related to the EEZ and continental shelf generated by the islands) and the third type of maritime claim (China's potential claim based on the U-shaped line), as identified in section 3.2.1. By contrast, the first type of maritime claim (claims based on entitlements generated by mainland territories) and the rest of the second type of maritime claim (claims based on entitlements generated by the islands) remain unaffected. Thus, in the author's view, even taking full account of the *South China Sea Arbitration* award, the disputed marine areas therein would consist of not only (1) 'the territorial sea around each disputed high-tide feature', but also other types of disputed marine areas, including, at least: (2) the contiguous zone generated around the disputed islands; (3) the overlaps between the contiguous zone generated around the disputed islands and the EEZ generated by the mainland territories of Brunei, Malaysia, the Philippines and Vietnam; (4) the overlaps between an EEZ derived from a mainland territory and a continental shelf based upon another mainland territory (e.g., the intersect of Malaysia's outer limits of the EEZ emanating from its mainland territory with the outer limits of the extended continental shelf jointly claimed by Malaysia and Vietnam, as shown in Map 3-2); and (5) the potential disputed areas of the extended continental shelf. Table 3-3 compares the categories of disputed marine areas before and after taking full account of the impact of the *South China Sea Arbitration* award.

Table 3-3: The categories of disputed marine areas before and after taking into account the impact of the South China Sea Arbitration award

Categories			Before	After
General categories	Types of maritime zones that overlap	Specific scenarios		
Areas of overlapping claims related to the same type of maritime zone	TS-TS	Disputed TS generated by an island	√	√
		A TS generated by an island overlaps with a TS generated by another island	√	√
	CZ-CZ	Disputed CZ generated by an island	√	√
		A CZ generated by an island overlaps with a CZ generated by another island	√	√
	EEZ-EEZ	An EEZ generated by an island overlaps with an EEZ generated by a mainland territory	√	--
	CS-CS	A CS generated by an island overlaps with a CS generated by a mainland territory	√	--
A CS generated by a mainland territory overlaps with a CS generated by another mainland territory (mainly involving extended CS)		√	√	
Areas of overlapping claims related to different types of maritime zones	TS-Others	A TS generated by an island overlaps with a CZ/EEZ/CS generated by another island/mainland territory	--	--
	CZ-EEZ	A CZ generated by an island overlaps with an EEZ generated by another island	√	--
		A CZ generated by an island overlaps with an EEZ generated by a mainland territory	√	√
	EEZ-CS	An EEZ generated by an island overlaps with a CS generated by another island	√	--
		An EEZ generated by an island overlaps with a CS generated by a mainland territory, or the other way around	√	--
		An EEZ generated by a mainland territory overlaps with a CS generated by another mainland territory	√	√
	U-shaped line- Others	Areas encompassed by the U-shaped line overlap with all maritime zones generated by the islands and with the	√	--

		EEZs/CSs emanating from the mainland territories		
--	--	---	--	--

Notes: (1) 'TS' stands for 'territorial sea', 'CZ' for 'contiguous zone', and 'CS' for 'continental shelf'; (2) The symbol '√' means that the category of disputed marine area exists in the Spratly Islands area, and the symbol '--' indicates the opposite.

It needs to be clarified that the *South China Sea Arbitration* award itself does not go so far to address all disputed marine areas in the Spratly Islands area. In fact, both the Philippines' submissions and the tribunal's award are rather cautious and limit most of the disputes discussed to concern only a few particular locations around several offshore features such as Mischief Reef and Second Thomas Shoal.<sup>83</sup> The underlying rationale is to avoid triggering the jurisdictional exception under Article 298(1)(a)(i) of UNCLOS in case of overlapping entitlements that would call for the application of Articles 15, 74 and 83 to delimit the overlap.<sup>84</sup> Consequently, the locations that the tribunal explicitly established as undisputed parts of the EEZ and continental shelf of the Philippines are only a few, namely the areas of Mischief Reef and Second Thomas Shoal, and several petroleum blocks (i.e., the GSEC101 block, Area 3, Area 4, and the SC58 block) (Map 3-4).<sup>85</sup>

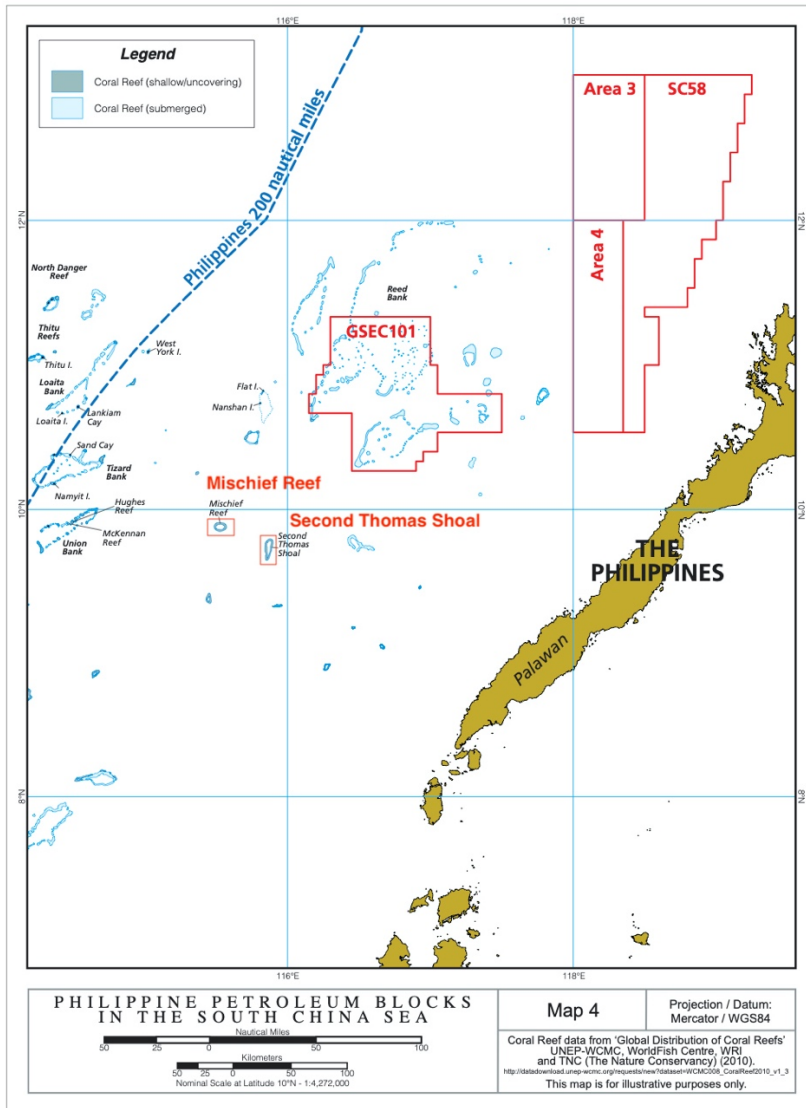
---

<sup>83</sup> South China Sea Arbitration (The Philippines v. China), Award of 12 July 2016 (PCA), paras. 169 (submissions No. 1-2 concerning nine-dash line and historic rights), 281, 385 (submissions No. 3-7 concerning the status of features), 649, 652-667, 669, 679 (submission No. 8 concerning the activities of Chinese officials and vessels in the areas of several petroleum blocks declared by the Philippines, Mischief Reef, and Second Thomas Shoal), 718 (submission No. 9 concerning China's toleration of fishing by its vessels in the areas of Mischief Reef and Second Thomas Shoal), 758 (submission No. 10 concerning the territorial sea of Scarborough Shoal), 815 (submission No. 11 concerning the protection and preservation of the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef), 816, 994 (submission No. 12 concerning China's occupation of and construction activities on Mischief Reef), 1044 (submission No. 13 concerning China's operation of its law enforcement vessels near Scarborough Shoal), 1110 (submission No. 14 concerning China's actions since the commencement of the arbitration), and 1182 (submission No. 15 concerning the future conduct of the parties).

<sup>84</sup> *Id.*, para.6.

<sup>85</sup> *Id.*, paras. 633, 647, 1025, 1153, 1203(B)(7) (concerning Mischief Reef and Second Thomas Shoal), and 694, 697 (concerning the GSEC101 block, Area 3, Area 4, and the SC58 block).

Map 3-4: The locations of Mischief Reef, Second Thomas Shoal, the GSEC101 block, Area 3, Area 4, and the SC58 block

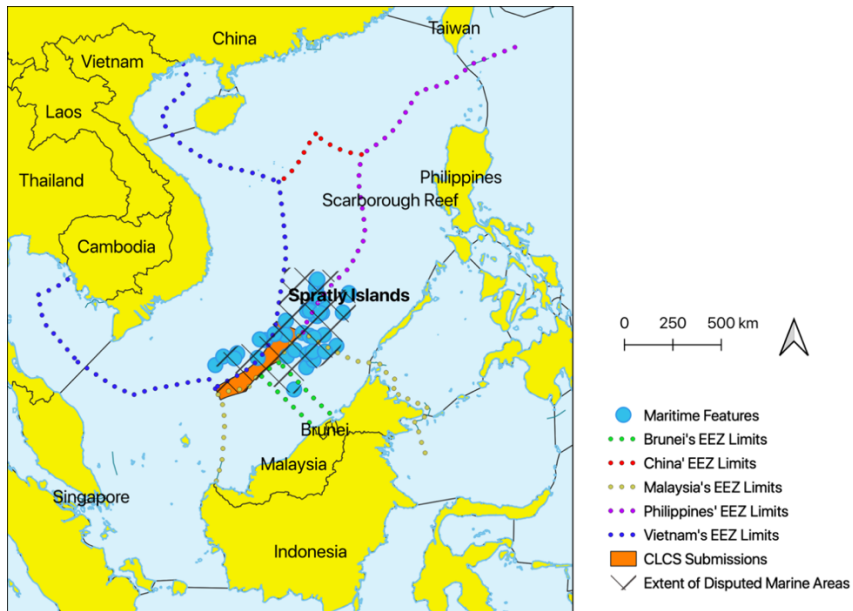


Notes: This map is adapted from: *South China Sea Arbitration (The Philippines v. China)*, Award of 12 July 2016 (PCA), 269.

### 3.3.2.3 Mapping the Extent of Disputed Marine Areas

Taking into full account the impact of the *South China Sea Arbitration* award, the extent of disputed marine areas according to the alternative approach must reflect the categories of disputed marine areas as identified in Table 3-3, including: (1) the territorial sea generated around the disputed islands; (2) the contiguous zone generated around the disputed islands; (3) the overlaps between the contiguous zone generated around the disputed islands and the EEZ generated by the mainland territories of Brunei, Malaysia, the Philippines and Vietnam; (4) the overlaps between an EEZ derived from a mainland territory and a continental shelf based upon another mainland territory; and (5) the potential disputed areas of the extended continental shelf. Accordingly, Map 3-5 depicts the extent of disputed marine areas in the Spratly Islands area. This figure allows three remarks.

Map 3-5: The extent of disputed marine areas in the Spratly Islands area according to the alternative approach excluding unreasonable claims



Notes: The author produced this illustrative map using the QGIS software. The coordinates of the maritime features are obtained from GoogleEarth. The data about the CLCS Submissions are obtained from: ESRI shapefile data for Malaysia and Vietnam ECS polygons, available online at <<http://continentalshef.org/onestopdatashop/6350.aspx>>. The data about the EEZ limits are obtained from: Flanders Marine Institute (2018) Maritime Boundaries Geodatabase: Maritime Boundaries and Exclusive Economic Zones (200NM), version 10, available online at <<https://doi.org/10.14284/312>>.

First, the size of disputed marine area according to the alternative approach is smaller than that according to the areas of overlapping claims approach. (see a comparison of Maps 3-2 and 3-5, or Table 3-3)

Second, in the author's view, the size of disputed marine area according to the alternative approach can vary depending on the drawing of the baselines from which the territorial sea and contiguous zone generated around the disputed islands are measured. Many States, most of which are non-parties to the Spratly Islands disputes, have applied baselines to encompass geographical features within a dependent archipelago or an island group for measuring maritime entitlements.<sup>86</sup> A possible legal argument relates to the regime of straight baselines as outlined in Article 7(1) of UNCLOS, which provides that the method of straight baselines 'joining appropriate points' may be used in localities 'where the coastline is deeply indented and cut into', or 'if there is a fringe of islands along the coast in its immediate vicinity'.<sup>87</sup> Article 7(1) does not set limits on water-land ratio and baseline length.<sup>88</sup> Moreover, the phrase 'joining appropriate points' leaves room for employing straight baselines to enclose a group of offshore islands.<sup>89</sup> Albeit not without controversies,<sup>90</sup> it is arguable that the disputant States are

---

<sup>86</sup> Relevant practices can be divided into three categories. The first and also the most popular category is to apply a set of straight baselines to enclose a dependent archipelago as a whole. Examples include: Canary Islands – Spain, Coco Islands and Preparis Islands – Myanmar, Falkland Islands – the United Kingdom, Faroe Islands – Denmark, Galapagos Islands – Ecuador, Lakshadweep Islands – India, Paracel Islands – China, and Svalbard Archipelago – Norway. The second category is to apply a combination of straight baselines and normal baselines to encircle a dependent archipelago as a whole. Examples include: Guadeloupe – France, Houtman Abrolhos Islands – Australia, Kerguelen Islands – France, and Turks and Caicos Islands – the United Kingdom. The third category does not enclose an archipelago as a whole but applies several sets of straight baselines to encompass subgroups of islands within a dependent archipelago separately. Examples include: Azores and Madeira Islands – Portugal, Balearic Islands – Spain, Diaoyu (Senkaku) Islands – China, Falkland Islands – Argentina, and New Caledonia – France. See S. Kopela, *Dependent Archipelagos in the Law of the Sea* (Martinus Nijhoff Publishers, 2013), 99-148. OES, Straight Baselines: The Faeroes, *Limits in the Seas* (12 March 1970), 2-4. OES, Straight Baselines: Ecuador, *Limits in the Seas* (23 May 1972), 2. OES, Straight Baselines Claim: China, *Limits in the Seas* (9 July 1996), 8. OES, Straight Baselines: Svalbard, *Limits in the Seas* (6 March 1972), 2. China, Statement on the Territorial Sea Baselines for Diaoyu Dao and Its Affiliated Islands (10 September 2012), *Law of the Sea Bulletin No. 80* (2012).

<sup>87</sup> UNCLOS, Article 7.

<sup>88</sup> This is in contrast to the regime of archipelagic baselines as stipulated in Article 47 of UNCLOS.

<sup>89</sup> South China Sea Arbitration (The Philippines v. China), Award of 12 July 2016 (PCA), para.575.

<sup>90</sup> For the support of this argument, see e.g., T. Scovazzi, Baselines, *MPEPIL* (2007), para.25; C. Whomersley, The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique, 16 *CJIL* (2017), para.55; J.A. Roach, Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?, *ODIL* (2018), 3. For the opposition, see e.g., Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v.

entitled to apply one set or several sets of baselines to enclose the whole or part of the offshore features in the Spratly Islands area according to Article 7(1), to the extent that any of the disputed islands could be regarded as having a deeply indented and cut-into coastline or a fringe of islands along the coast in their immediate vicinity.

Third, it is difficult to know exactly how large or small the high seas remain in the Spratly Islands area because none of the claimant States has ever established baselines for the islands therein from which the limits of the territorial sea and contiguous zone shall be measured. Notably, the *South China Sea Arbitration* award has, at least, identified 19 maritime features in the Spratly Islands area as 'above water at high tide' under Article 121(1) of UNCLOS, which, thereby, as islands, are entitled to generate a territorial sea and contiguous zone.<sup>91</sup> Having said that, one thing is sure that a narrow selection of high seas freedoms especially those regarding navigation and overflight enjoyed by all States (either parties or non-parties to the Spratly Islands territorial and maritime disputes) remains applicable in this region according to Articles 58 and 87 of UNCLOS,<sup>92</sup> except in the territorial sea generated around islands where third States enjoy only a right of innocent passage pursuant to Article 17 of UNCLOS.<sup>93</sup> Moreover, one has to bear in mind that the Spratly Islands area is part of the South China Sea, a semi-enclosed sea primarily covered by the EEZs of surrounding countries. In terms of the Spratly Islands area (not the whole South China Sea), only a part (which approximates the orange zone indicated in Map 3-5) remains

---

Bahrain), Judgment of 16 March 2001 (ICJ), para.212; *South China Sea Arbitration* (The Philippines v. China), Award of 12 July 2016 (PCA), para.575.

<sup>91</sup> There are at least 19 islands in the entire Spratly Islands area: Itu Aba Island, Thitu Island, West York Island, Spratly Island, North-East Cay, South-West Cay, Sin Cowe Island, Nanshan Island, Sand Cay, Loaita Island, Swallow Reef, Namyt Island, Amboyna Cay, Flat Island, Fiery Cross Reef, Mckennan Reef, Gaven Reef (North), Cuarteron Reef, and Johnson Reef. This list is based on the *South China Sea Arbitration* award: first, the tribunal has conducted a detailed examination on the status of eleven (11) maritime features identified in the Philippines' submissions and concluding that Scarborough Shoal (not a part of the Spratly Islands), Fiery Cross Reef, Mckennan Reef, Gaven Reef (North), Cuarteron Reef and Johnson Reef are high-tide elevations and hence islands in the sense of Article 121 of UNCLOS; and second, by passage, the tribunal has confirmed that Itu Aba Island, Thitu Island, West York Island, Spratly Island, North-East Cay, South-West Cay, Sin Cowe Island, Nanshan Island, Sand Cay, Loaita Island, Swallow Reef, Namyt Island, Amboyna Cay and Flat Island are high-tide elevations. See *South China Sea Arbitration* (The Philippines v. China), Award of 12 July 2016 (PCA), paras.382 (regarding Fiery Cross Reef, Mckennan Reef, Gaven Reef (North), Cuarteron Reef and Johnson Reef), 401 (regarding Itu Aba Island), 402 (regarding Thitu Island), 403 (regarding West York Island), 404 (regarding Spratly Island), 405 (regarding North-East Cay), 406 (regarding South-West Cay), 407 (regarding Amboyna Cay, Flat Island, Loaita Island, Namyt Island, Nanshan Island, Sandy Cay, Sin Cowe Island, and Swallow Reef).

<sup>92</sup> D. Guilfoyle, *The High Seas*, in D.R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (OUP, 2015), 212.

<sup>93</sup> UNCLOS, Articles 17, 58 and 87.

susceptible to the status of high seas. Furthermore, the remaining part susceptible to the status of high seas may well be partially covered by the disputed areas of the territorial seas generated around the disputed islands, and to a much lesser extent, the disputed areas of the contiguous zone generated around the disputed islands, and the overlaps between such contiguous zone and the EEZ generated by the mainland territories concerned. Admittedly, the extent of jurisdictional overlaps involving the contiguous zone is much less significant than those involving the territorial sea. It is because distinct from the territorial sea where a State enjoys exclusive jurisdiction over extensive matters,<sup>94</sup> a State's jurisdiction to the contiguous zone is confined to solely preventing or punishing infringements occurring within its territory or territorial sea of its customs, fiscal, immigration or sanitary laws and regulations.<sup>95</sup> Article 86 of UNCLOS corroborates this point by inferring that jurisdictional rights associated with the contiguous zone shall not interfere with navigation and other rights and freedoms enjoyed by other States on high seas.<sup>96</sup> Despite the limited coastal State rights concerning the contiguous zone, the disputed areas involving the territorial sea generated around the disputed islands *alone* are likely to reduce the remaining part susceptible to the status of high seas in the Spratly Islands area (which approximates the orange zone indicated in Map 3-5), especially when taking into account the possible application of one set or several sets of baselines to enclose the whole or part of the offshore features according to Article 7(1) of UNCLOS, as mentioned earlier.

### 3.3.3 'Areas of Overlapping Claims' versus 'Excluding Unreasonable Claims'

This subsection analyses the pros and cons of the two approaches and figures out which approach is the most appropriate in the Spratly Islands setting.

The bright side of the areas of overlapping claims approach is that almost all the unilateral action undertaken by the claimants in the undelimited areas, which may be detrimental to the legal interests of others, are put under regulation. A research project undertaken by the British Institute of International and Comparative Law (BIICL) echoed this approach by using undelimited maritime areas as the geographical extent to apply Articles 74(3) and 83(3) of UNCLOS.<sup>97</sup> According to the BIICL report, "undelimited" marine areas are areas where the continental shelves or EEZs of States

---

<sup>94</sup> UNCLOS, Articles 2.

<sup>95</sup> UNCLOS, Article 33.

<sup>96</sup> UNCLOS, Article 86.

<sup>97</sup> BIICL, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas* (2016), para.12.

overlap or may potentially overlap, and no final delimitation is in place'.<sup>98</sup> The report has clarified that the geographical scope of the obligation should cover the whole undelimited area including both those actively disputed areas and areas where the competing claim is implausible.<sup>99</sup> However, a considerable drawback of this approach is that States with a stronger claim would be reluctant to accept this argument. For instance, Mischief Reef, a low-tide elevation located in the Spratly Islands area, is currently under the control of China. However, the *South China Sea Arbitration* merits award concluded that the Philippines enjoyed exclusive sovereign rights over Mischief Reef.<sup>100</sup> Hence, the Philippines is probably unwilling to abandon this favourable finding and regard Mischief Reef as in dispute with China.

The alternative approach, which excludes unreasonable claims, can eliminate the risk of the States' abuse of the areas of overlapping claims approach to enlarge the geographical extent of contested marine areas. Adopting this approach, the *South China Sea Arbitration* award would deem China's maritime claims related to the U-shaped line and the EEZ and continental shelf generated by the islands in the Spratly Islands implausible under international law, thereby excluding these claims from being considered in determining the spatial extent of disputed marine areas. However, China has explicitly rejected the *South China Sea Arbitration* award as 'null and void'.<sup>101</sup>

The preceding analysis indicates that both approaches have little chance of obtaining unanimous support from the disputant States. The main difference between these two approaches is that the former encompasses a larger disputed marine area, and the latter a smaller one. Some scholars vouched for the latter and commented that a big success of the *South China Sea Arbitration* award was confining the disputed areas in the South China Sea to the territorial sea around each disputed island, which could facilitate cooperation.<sup>102</sup> However, in the author's view, chances of reaching cooperative arrangements respecting such confined disputed areas are slim, given China's non-acceptance and non-recognition of the award.<sup>103</sup>

---

<sup>98</sup> *Id.*, para.4.

<sup>99</sup> *Id.*, para.107.

<sup>100</sup> South China Sea Arbitration (The Philippines v. China), Award of 12 July 2016 (PCA), para.751.

<sup>101</sup> China, Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, available at <[http://www.xinhuanet.com/english/2016-07/12/c\\_135507744.htm](http://www.xinhuanet.com/english/2016-07/12/c_135507744.htm)>.

<sup>102</sup> L. Reed & K. Wong, Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China, 110 *AJIL* (2016), 759.

<sup>103</sup> Ministry of Foreign Affairs of China, Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (12 July 2016), available at <[https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379492.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm)>.

Arguably, a larger disputed marine area is a better and probably more realistic choice for four reasons.

First, excluding unreasonable claims probably would not prevent States from undertaking unilateral conduct in areas over which they assert such unreasonable claims. The other States with stronger claims in these areas are likely to take measures to suspend such unilateral conduct. As a result, excluding unreasonable claims might complicate and even intensify conflicts in the Spratly Islands area.

Second, the primary goal of the transitional period pending determination is to achieve and maintain the peaceful co-existence of the disputant States in the Spratly Islands area. As will be discussed in chapter 4, States are obliged to exercise mutual restraint and not to take unilateral conduct that could jeopardise or hamper the reaching of the final determination in disputed marine areas.<sup>104</sup> A larger disputed marine area amounts to imposing constraints on broader areas, thus more apt for achieving and maintaining peace in the region.

Third, identifying specific areas as in dispute for the application of certain international obligations in the transitional period does not alert or require predetermination of the plausibility of relevant claims and will not affect the final maritime delimitation.

Fourth, legally speaking, the *South China Sea Arbitration* award only binds upon the Philippines and allegedly China, and does not directly apply to disputes between China and other claimants. Instituting a new litigation between China and other claimants regarding the South China Sea is not absolutely impossible, although the chance might be relatively small. For example, a senior government official from Vietnam was reported to have publicly mentioned possible legal action against China over the South China Sea dispute on 6 November 2019.<sup>105</sup> Admittedly, such a new litigation, even if it happens, cannot directly concern or affect the rights of the Philippines, because judicial decisions are only binding *inter partes*.<sup>106</sup> However, it cannot be ruled out that future possible litigation might deal with some disputes that were addressed in the *South China Sea Arbitration* award, especially those which are difficult to be considered as exclusively between the parties to the proceedings. Examples may include disputes regarding China's maritime claim based on the U-shape line, and the evaluation of the legal status of the maritime features in the Spratly Islands area according to Article 121 of UNCLOS. In terms of these disputes, there is no guarantee that such a new litigation will have the same findings

---

<sup>104</sup> UNCLOS, Articles 74(3) and 83(3).

<sup>105</sup> See *e.g.*, J. Pearson and K. Vu, Vietnam mulls legal action over South China Sea dispute (6 November 2019), available at < <https://www.reuters.com/article/us-vietnam-southchinasea/vietnam-mulls-legal-action-over-south-china-sea-dispute-idUSKBN1XG1D6> >.

<sup>106</sup> See *e.g.*, the ICJ Statute, Article 59; UNCLOS, Annex VII, Article 11.

as the *South China Sea Arbitration* award, since the principle of *res judicata* - which requires that a question having been finally juridically decided on its merits cannot be litigated again between the same parties - does not apply in this circumstance.<sup>107</sup> Thus, the alternative approach excluding claims that are deemed impossible according to the *South China Sea Arbitration* award might not necessarily be appropriate.

Therefore, tailored to the Spratly Islands setting, the areas of overlapping claims approach that takes account of all claims, plausible or implausible, is a better and more realistic choice.

### 3.4 CONCLUSION

By sorting out relevant maritime claims of disputant States through the lens of international law, especially the law of the sea, the preceding analysis leads to four main conclusions. First, the presence of ambiguity and alleged excessiveness associated with maritime claims put forward by the disputant States adds difficulties in identifying disputed marine areas in the Spratly Islands area. Second, as a result of the significantly divided interests of these States in the region, neither the areas of overlapping claims approach nor the alternative approach would obtain unanimous support from these States. Third, the author argues that the areas of overlapping claims approach taking into account all claims is more apt for the Spratly Islands setting. The main underlying reason is that a larger disputed marine area contributes more to maintaining the peaceful co-existence of these States in the region by imposing constraints on State conduct in broader areas than the choice for a more limited area based upon excluding unreasonable claims. Fourth, following this approach, the geographical extent of disputed marine areas basically amounts to the entire Spratly Islands area. Accordingly, the disputant States are obliged to observe specific international obligations as set out in chapter 4 when behaving unilaterally in this region absent delimitation.

---

<sup>107</sup> W.S. Dodge, *Res Judicata*, *MPEPIL* (2006), paras.4-10.