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

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This thesis addresses the research question of to what extent international law provides a normative framework for the management of the Spratly Islands area preceding delimitation. For this purpose, the preceding chapters have analysed four sub-questions, which relate to the existing legal regulatory frameworks and their potential for providing an adequate normative framework for the disputant States on their coexistence and cooperation in the Spratly Islands area, especially concerning the following four aspects: (1) addressing the underlying territorial dispute, (2) identifying the disputed marine areas, (3) regulating unilateral conduct, and (4) promoting cooperation in resource and pollution management in respect of the Spratly Islands area. This chapter answers the research question and the four sub-questions (sections 8.1-8.4). It then looks into the future management of the Spratly Islands area on the basis of this research (section 8.5) and reflects on the functions and limitations of international law in the management process (section 8.6).

8.1 UNDERLYING TERRITORIAL DISPUTE AND LAW OF TERRITORY

The territorial dispute is the most fundamental dispute, as a State can only claim maritime entitlements over specific areas when it enjoys territorial sovereignty over certain land areas according to the legal principle of '*la terre domine la mer*'.¹ All the disputant States put forward multiple legal bases for their territorial claims, including historic title, *effectivités*, treaty title, cession, and discovery of *terra nullius*.² Chapter 2 addresses whether the legal arguments put forward by the disputant States for claiming territorial sovereignty over the Spratly Islands are substantiated under international law.

This chapter applies the dichotomy of titles and *effectivités* as the analytical framework, which is a well-accepted pattern of analysis in

¹ North Sea Continental Shelf (Federal Republic of Germany / Denmark), Judgment of 20 February 1969 (ICJ), para.96. Also see C. van Bijnkershoek, *De Dominio Maris Dissertatio* (OUP 2nd ed. 1744) (translated by R. Van Deman Magoffin), 43.

² See chapter 2, section 2.3.

cases involving territorial disputes.³ The titles / *effectivités* dichotomy is built upon the special nexuses between these two concepts.⁴ First, a legal title always prevails over *effectivités*. Where *effectivités* corresponds to the title to territory, *effectivités* are confirmatory of that title. In contrast, *effectivités* contradictory to an existing title are unlawful, which have been called '*effectivités contra legem*' in the *Cameroon/Nigeria* judgment.⁵ Second, in the absence of a title, the role of *effectivités* becomes significant and can be constitutive of a title. In this circumstance, *effectivités* become a 'law-establishing mechanism'.⁶ Third, where a legal title, or more precisely, the evidence of a legal title, is obscure or equivocal, *effectivités* can play a probative or interpretative role in clarifying the extent of that title.⁷

The settlement of territorial sovereignty dispute can never lead to a win-win situation for all the disputant States, as 'only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties'.⁸ Moreover, modern international law rejects the applicability of *terra nullius* and tends to attribute a certain territory to a country whenever possible: 'in many cases the tribunal [that deals with a territorial dispute] has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.'⁹ In the author's view, the rejection of *terra nullius* is necessary for attaining a stable territorial order and thus worth supporting, despite its side effect that picking the best argument out of a mediocre bunch might sometimes be difficult and thus has little chance to enjoy unanimous support.

³ See e.g., *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986 (ICJ), para.63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994 (ICJ), paras.75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002 (ICJ), para.68; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002 (ICJ), para.126; *Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005 (ICJ), para.77; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007 (ICJ), para.152; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012 (ICJ), para.66; *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award of 29 June 2017 (PCA), para.340.

⁴ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986 (ICJ), para.63. M.G. Kohen, *Titles and Effectivités in Territorial Disputes*, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing, 2018), 164.

⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002 (ICJ), para.223.

⁶ M.N. Shaw, *International Law* (CUP, 8th ed. 2017), 382.

⁷ M.G. Kohen, *Titles and Effectivités in Territorial Disputes*, in M.G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing, 2018), 164.

⁸ *Island of Palmas (The United States of America v. The Netherlands)*, Award of 4 April 1928 (PCA), 870.

⁹ *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, PCIJ Series A/B No. 53, 46.

A careful analysis in this thesis suggests that China's territorial claim based on historic title, among all the claims advanced by the disputant States, is the most plausible one when evaluated in terms of the law of territory.¹⁰ First, the activities taken by the disputant States respecting the Spratly Islands fail to amount to *effectivités* in the present case.¹¹ Second, there is no sufficient evidence to show that the 1887 China-France Treaty or the 1951 Treaty of Peace with Japan has a bearing on the disposition of the Spratly Islands.¹² Third, due to the presence of a pre-existing title enjoyed by China prior to the French occupation and the lack of agreement of cession between France and Vietnam, Vietnam's claim of a territorial title to the islands in the Spratly Islands by right of cession is untenable.¹³ Fourth, China and the Philippines' territorial claims based on discovery of *terra nullius* are unsubstantiated under international law, because of either the lack of an affirmation of sovereignty or the inapplicability of discovery after the middle of the 16th century.¹⁴

Nevertheless, owing to various factors such as China's resistance to any recourse to third-party settlement as well as the foreseeable difficulties in negotiations for claimant States to compromise their territorial interests, there appears to be little possibility of resolving this territorial dispute by either judicial or diplomatic methods in the foreseeable future.¹⁵ Thus, the settlement of this territorial dispute cannot be counted on as the only method to maintain the peaceful co-existence of the disputant States in the region. Alternative solutions are needed in order to coordinate the conduct of the claimants and to make efficient uses of marine natural resources therein in the absence of delimitation.

8.2 IDENTIFYING DISPUTED MARINE AREAS IN LIGHT OF COMPLEX MARITIME CLAIMS

Identifying the seaward limit of the disputed marine areas in the Spratly Islands area is necessary before applying relevant international obligations preceding delimitation, such as Articles 74(3) and 83(3) of UNCLOS, to the disputant States. Nevertheless,

¹⁰ See chapter 2, sections 2.4-2.9.

¹¹ See chapter 2, section 2.5.

¹² See chapter 2, section 2.6.

¹³ See chapter 2, section 2.7.

¹⁴ See chapter 2, section 2.8.

¹⁵ See H. Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources?*, 5 *ODIL* (1978), 34; B.K. Murphy, *Dangerous Ground: the Spratly Islands and International Law*, 1 *OCLJ* (1995), 189; U. Hideshi, *The Problems in the South China Sea*, *Review of Island Studies* (2013), 2-3; S. Wu, *China's Maritime Law Enforcement Practice in the South China Sea: Challenges and Prospects*, in M.H. Nordquist, et al. (eds.) *Legal Order in the World's Oceans: UN Convention on the Law of the Sea* (Brill | Nijhoff, 2017), 451.

the presence of ambiguity and alleged excessiveness associated with maritime claims put forward by the disputant States add difficulties to the identification process. There are two competing 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.

First, the geographical extent of disputed marine areas identified according to the areas of overlapping claims approach must take into account all claims advanced by the disputant States. Such claims would result in two categories of disputed marine areas as specified in 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.¹⁶ Accordingly, the extent of disputed marine areas basically covers the whole of the Spratly Islands area.¹⁷ Moreover, following this approach, there would be no high seas in this region.

Second, the key to the alternative approach is defining and excluding 'unreasonable claims'. 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,¹⁸ can be a good criterion for filtering out unreasonable claims.¹⁹ On this basis, 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 relevant international law such as UNCLOS provisions.²⁰ Notably, the *South China Sea Arbitration* award entails 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.²¹ According to this

¹⁶ See chapter 3, section 3.3.1.1.

¹⁷ See chapter 3, section 3.3.1.2 and Map 3-2.

¹⁸ 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.

¹⁹ 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.

²⁰ See chapter 3, section 3.3.2.1.

²¹ *South China Sea Arbitration* (The Philippines v. China), Award of 12 July 2016 (PCA), paras.278 and 646.

award, these maritime claims would be deemed implausible and thus unreasonable. Thus, 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 following categories of disputed marine areas, 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.²² Accordingly, the size of disputed marine area according to the alternative approach is smaller than that according to the areas of overlapping claims approach.²³ Moreover, it is difficult to know exactly how large or small the high seas remain in the Spratly Islands area. Nevertheless, this region, as part of a semi-enclosed sea primarily covered by the EEZs of surrounding countries, only has a part remaining susceptible to the status of high seas (which approximates the orange zone indicated in Map 3-5). This remaining part could be further covered by the disputed areas of the territorial sea 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.

Neither the areas of overlapping claims approach taking into account all claims nor the alternative approach excluding unreasonable claims would obtain unanimous support from these States.²⁴ On the one hand, a considerable drawback of the areas of overlapping claims approach is that States with a stronger claim would be reluctant to accept this approach. On the other hand, excluding unreasonable claims probably would not prevent States from undertaking unilateral conduct in areas over which they assert such unreasonable claims. The main difference between these two approaches is that the former encompasses a larger disputed marine area than the latter. In the author's view, a larger disputed marine area is, arguably, more apt for attaining the peaceful co-existence of the claimants in the region, as it imposes constraints on unilateral State conduct in broader areas prior to delimitation. Following this approach, the geographical extent of disputed marine areas basically amounts to the entire Spratly Islands area. Accordingly, the disputant States shall observe specific international obligations as outlined in chapter 4 when behaving unilaterally in this region.

²² See chapter 3, section 3.3.2.4.

²³ See a comparison of Maps 3-2 and 3-5, or Table 3-3.

²⁴ See chapter 3, section 3.3.

8.3 PERMISSIBLE SCOPE FOR UNILATERALISM: HYDROCARBON-RELATED, FISHERIES-RELATED AND LAW ENFORCEMENT CONDUCT

The UNCLOS regulatory framework is inadequate in determining the permissible scope for unilateralism under international law within the disputed marine areas in the Spratly Islands area, owing to the limited applicable scope and vagueness in the substantive content of relevant provisions, especially Articles 15, 74(3) and 83(3).²⁵ To remedy the limitation in applicable scope, it is recommended to implement Articles 74(3) and 83(3) of UNCLOS as a unified regulatory standard across the Spratly Islands area, regardless of the different categories of disputed marine areas. To remedy the vagueness in the substantive content of Articles 74(3) and 83(3), the author argues that their interpretation and application to the Spratly Islands setting can take into account other UNCLOS provisions, especially Part XII concerning environmental protection, and relevant general principles in customary international law, pursuant to the interpretation rules of Article 31(2) and (3)(c) of VCLT. Accordingly, the permissible scope for different types of unilateral acts in the Spratly Islands setting has been clarified as follows.

First, the obligation ‘not to jeopardize or hamper delimitation’ under Articles 74(3) and 83(3) of UNCLOS reflects a delicate balance between ensuring a party’s ability to pursue economic development and preventing irreparable harm to another party’s rights and is thus not meant to suspend all economic activities.²⁶ A review of relevant international jurisprudence suggests that the ‘permanent physical change to the marine environment’ test is the review standard for assessing the lawfulness of the unilateral hydrocarbon-related conduct that occurs within the Spratly Islands area preceding delimitation.²⁷ Accordingly, extracting oil or gas reserves, including exploitation and exploratory drilling, is prohibited, as such extraction activities would cause permanent physical change to the marine environment. By contrast, seismic surveys, to the extent of not causing irreversible harm to marine life, are permissible provided that the information related to marine natural resources collected through seismic surveys is communicated and made available to other disputant States.²⁸ The mere issuance or declaration of oil blocks without further action is unlikely to cause a permanent physical change to the marine environment directly and

²⁵ See chapter 4, section 4.2.

²⁶ UNCLOS, Articles 74(3) and 83(3).

²⁷ See *Guyana v. Suriname*, Arbitral Award dated 17 September 2007 (PCA), para.470. 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.30.

²⁸ See chapter 4, section 4.4.

thus is permissible under international law. This conclusion is also an inevitable result if seismic surveys are deemed lawful within contested waters, as in regular practice, States would need to designate oil lease blocks and grant concessions before seismic surveys can actually take place.

Second, under a general constraint set by a due diligence obligation in relation to environmental protection under Part XII of UNCLOS, the disputant States shall not engage in direct exploitation of depleted, threatened or endangered species or any activities that may indirectly destroy the habitats of such species.²⁹ Moreover, as a result of the *mutatis mutandis* application of the 'permanent physical change to the marine environment' test, harmful fishing practices, such as degrading habitats of important species and destroying the structure of seabed and subsoils by using explosives, are prohibited within the Spratly Islands area.³⁰ For non-harmful fishing, international jurisprudence indicates that they are generally permissible to the extent of not exceeding the current annual catch within the Spratly Islands area, unless the scientific evidence suggests otherwise.³¹ Last but not least, traditional or artisanal fishing practices, if any, remain permissible across the whole Spratly Islands area.³²

Third, the obligation 'not to jeopardize or hamper delimitation' under Articles 74(3) and 83(3) of UNCLOS also curtails how the disputant States can respond to another State's unilateral resources-related conduct. In the author's view, it is prudent to argue that there should be a *de minimis* threshold for a forcible act taken within a disputed marine area to be qualified as a threat or use of force under Article 2(4) of the UN Charter.³³ Thus, forcible acts taken by disputant States against a foreign vessel navigating within the Spratly Islands area falling below the *de minimis* threshold of the Article 2(4) prohibition are not generally prohibited and should, in principle, be seen as police enforcement. These forcible acts, albeit likely to have the risk of intensifying conflicts, could be essential to the protection of the legitimate interests of disputant States in those areas, especially when the rescue through the compulsory dispute settlement mechanism as outlined in UNCLOS is unavailable in certain circumstances. Most law enforcement measures that have occurred in this region are taken unilaterally by coast guard administrations of the disputant States, and are thus less likely to

²⁹ UNCLOS, Part XII, especially Article 194.

³⁰ See chapter 4, section 4.5.3.

³¹ Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Order of 17 August 1972, Provisional Measures (ICJ), para.26. Also see Fisheries Jurisdiction (Federal Republic of Germany v. Iceland) - Provisional Measures, Order of 17 August 1972 (ICJ), para.27. Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Order of 27 August 1999, Provisional Measures (ITLOS), paras.81, 90(1)(c).

³² See chapter 4, sections 4.5.5-4.5.6.

³³ See chapter 4, section 4.6.2.

trigger the application of Article 2(4).³⁴ Moreover, according to the principles applicable to law enforcement measures in general, a disputant State cannot take unilateral enforcement actions to halt another disputant State's fishing or seismic surveys, unless this State has a reasonable belief that the latter breaches its obligations under international law such as the obligation to protect and preserve the marine environment.³⁵

8.4 COOPERATION IN RESOURCE AND POLLUTION MANAGEMENT: SUBSTANTIVE NORMS AND COOPERATIVE INSTITUTIONS

Chapters 5-7 deal with the cooperative management of hydrocarbon resources, fisheries and pollution. It is noted that the political climate developed after the delivery of the *South China Sea Arbitration* award has gradually generated momentum for cooperation in this region.³⁶ Meanwhile, the coexistence between the claimant States, roughly balanced through a strategic standoff between China and the US or any other external great powers, is not a viable means to sustain a peaceful environment for development in the Spratly Islands area. Rather, institutionalized cooperation, a more active form of coexistence which promotes shared prosperity through more organized international collaboration, is more apt for the Spratly Islands setting. Given the power differential between China and other disputant States, the purpose of institutionalized cooperation is to counterbalance the asymmetry of physical capacity through tempering the leading position of a big country like China by committing it to credible exercises of institutionalized restraints and to operate in compliance with the provision of substantive norms and cooperative institutions, which, in turn, reduces fears from weaker States about the abuse of growing resource powers by that big power. A paradigm shift from the balance of power to institutionalized cooperation is thus needed in the foreign policies that the disputant States apply respecting the Spratly Islands area.³⁷

International law provides limited guidance in regulating resource and pollution management. First, international law falls short of regulating offshore hydrocarbon activities by only touching upon a narrow range of environmental issue associated with such activities.³⁸ Second, the fisheries regulatory framework incumbent on the disputant States is characterized by and suffering from a piecemeal management approach, the lack of a general obligation to

³⁴ See chapter 4, sections 4.6.1, 4.6.2 and 4.6.4.

³⁵ See chapter 4, sections 4.6.1, 4.6.3 and 4.6.4.

³⁶ See chapter 5, section 5.3.3.

³⁷ See chapter 5, section 5.3.4.

³⁸ See chapter 5, section 5.4.

apply the precautionary approach to all aspects of fisheries, and inadequate ecosystem concerns.³⁹ Third, most instruments in relation to pollution from shipping and dumping are not ratified by or do not bind upon all the disputant States, such as BWM, AFS, CODES, IMO resolution A.868(20), London Convention and London Protocol.⁴⁰

International law, nevertheless, contains certain adaptive mechanisms that can interpret, apply or develop relevant substantive norms according to changing contexts, without reliance on the political will of individual States. One of such mechanisms is through the rules of reference as outlined in UNCLOS. The rules of reference entail a general legal duty to respect and apply specific international rules and standards adopted by competent international organizations or diplomatic conferences that come to be 'generally accepted' or 'applicable'.⁴¹ The rules of reference contained in UNCLOS include: (1) Article 208 in relation to hydrocarbon resource management, (2) Article 61(3) in relation to fisheries, and (3) Articles 21(2), 211(2) & (5) and 216 in relation to pollution.⁴² Another adaptive mechanism is through systemic integration under Article 31(3)(c) of VCLT. For example, as concluded in chapter 6, by virtue of Article 31(3)(c), the approaches or principles of precaution, ecosystem, integrated management and sustainable development as identified in CCRF and the 2030 Agenda for Sustainable Development can guide the fisheries management process, through informing the interpretation and application of other primary norms of international law with direct binding force upon the claimant States, notably those in UNCLOS, CBD and CITES.⁴³

Turning to cooperative institutions, international law obliges the disputant States to negotiate with a view to reaching cooperative arrangements, but does not prescribe the outcome of the negotiation or the substantive content of such arrangements.⁴⁴ Therefore, the selection of cooperative institutions is entirely up to the disputant States. A comparison of the analyses in chapters 5-7 suggests that cooperative arrangements for the resource and pollution management require varying degrees of institutionalization, from a simple legally binding instrument to regular intergovernmental meetings to permanent intergovernmental institutions. The more complex the regulatory problems, the more the achievement of a

³⁹ See chapter 6, section 6.3.

⁴⁰ See chapter 7, section 7.3.

⁴¹ T. Treves, *The Law of the Sea' System' of Institutions*, 2 *Max Planck Yearbook of United Nations Law* (1998), 327.

⁴² See chapter 5, sections 5.4.1.3 and 5.4.1.4; chapter 6, section 6.3.8.2; chapter 7, sections 7.3.2 and 7.3.3.

⁴³ See chapter 6, section 6.3.8.3.

⁴⁴ UNCLOS, Articles 74(3), 83(3) and 123.

cooperative arrangement becomes dependent on the working of the cooperative institution.⁴⁵

First, compared with the management of fisheries and pollution that have the status of commons, hydrocarbon resources management has received relatively less available guidance under international law.⁴⁶ The inertia to develop unified international standards is probably because offshore hydrocarbon activities in a specific location are often perceived as commercial activities in the hands of a limited number of countries, and their management is often 'precisely determined by agreement among the parties concerned in the light of special circumstances'.⁴⁷ Thus, the disputant States are recommended to adopt a cooperative institution with a high degree of institutionalization, namely a joint authority with the formalized decision-making process and administrative functions.⁴⁸

Second, the disputant States are recommended to establish a joint commission to adopt fisheries management measures including the setting of the TAC, and exercise the flag State enforcement jurisdiction to implement such measures against their vessels that fish within the Spratly Islands area.⁴⁹

Third, as to pollution management, hosting regular ministerial meetings or establishing an intergovernmental commission to unify the content of their national anti-pollution legislation respecting the Spratly Islands area would suffice to remedy the problem of concurrent prescriptive jurisdiction.⁵⁰ To remedy the problem of concurrent enforcement jurisdiction, the disputant States are recommended to enter into a legally binding agreement that specifies the allocation of enforcement jurisdiction among the States concerned.⁵¹

8.5 OUTLOOK FOR THE FUTURE MANAGEMENT OF THE SPRATLY ISLANDS AREA

The author would like to make some comments on the future management of the Spratly Islands area prior to delimitation on the basis of this research. The author has identified three points that may provide the most prominent guidance for the future management of this region.

⁴⁵ See chapter 5, section 5.3.4.

⁴⁶ See chapter 5, section 5.4; chapter 6, section 6.3; chapter 7, section 7.3.

⁴⁷ Third United Nations Conference on the Law of the Sea, Official Records, Vol. II (1973-1982), 275-276, para.32.

⁴⁸ See chapter 5, section 5.5.2.

⁴⁹ See chapter 6, section 6.4.4.

⁵⁰ See chapter 7, sections 7.4.1 and 7.4.3.

⁵¹ See chapter 7, sections 7.4.2 and 7.4.3.

First, cooperation is and will continue to be the key element to the management of the Spratly Islands area, although it will be the consequence of political and economic drives rather than a legal one. As mentioned in the introductory chapter, this thesis seeks to provide legal solutions to the problems arising from the absence of maritime boundaries in the Spratly Islands area. For this purpose, it has delved into a broad historical trajectory of international law, from the customary rule of discovery of *terra nullius* relating to territorial acquisition developed in the 15th century, to the law of the sea conventions relating to the allocation of maritime entitlements adopted in the 20th century, and further to the 2030 Agenda for Sustainable Development in the 21st century. The main findings as concluded in sections 8.1-8.4 reveal that international law does, on the one hand, provide useful guidance in addressing the underlying territorial dispute, identifying the disputed marine areas, regulating unilateral conduct, and promoting cooperation in resource and pollution management respecting the Spratly Islands area, but on the other hand, has its limitations. In the author's view, the most significant limitation is that international law cannot and does not provide for the compulsory settlement of the complex territorial and maritime disputes respecting the Spratly Islands area, and that it does not mandate the outcome, modalities, scope or locations in respect of cooperation but leaves it to be agreed upon by the parties concerned prior to actual implementation. Thus, the peaceful coexistence of the disputant States and sustainable development of the region remain reliant on whether the disputant States are willing to make concessions in good faith and facilitate collaboration. It is beyond doubt that proactive cooperation in broader areas and at a greater depth between or among the disputant States will benefit the development of the region from a long-term perspective. In light of this, the recommendations proposed in this thesis advocate a blueprint of joint cooperation that can be undertaken at a relatively low level of efforts or changes by making use of international instruments or cooperative institutions that are available under current international law as much as possible. The fact that cooperation will be the consequence of political and economic drives rather than a legal one would not diminish its role, as its outcomes - cooperative institutions established on the basis of legally binding agreements - would offer the indispensable legal assurance as required by the disputant States and other stakeholders concerned.

Second, the future management of the Spratly Islands area cannot escape one of the most dramatic challenges to international law in the 21st century, namely climate change.⁵² It needs to be noted that climate change, interacting with many other pre-existing environmental stressors, such as the potential environmental impact in relation to offshore hydrocarbon activities, overharvest of fishery

⁵² J. Gupta, International Law and Climate Change: The Challenges Facing Developing Countries, 16(1) *Yearbook of International Environmental Law* (2006), 119.

resources and pollution as mentioned in chapters 5-7, may lead to the loss of marine biodiversity and the increasing vulnerability and impoverishment of artisanal fishers, which are heavily dependent on the marine resources concerned.⁵³ The framework of the UN Framework Convention on Climate Change (UNFCCC) is the primary international, intergovernmental forum for negotiating the global response to climate change.⁵⁴ Important instruments under the UNFCCC framework are UNFCCC itself,⁵⁵ the Kyoto Protocol and its Doha Amendment,⁵⁶ and the Paris Agreement.⁵⁷ Despite the fact that all the disputant States have ratified all these instruments, the legal guidance provided by the UNFCCC framework is limited, mainly because all these States are developing countries.⁵⁸ Firstly,

⁵³ X. Ma, *Governing Marine Protected Areas in a Changing Climate: Private Stakeholders' Perspectives*, 9 *Arctic Review on Law and Politics* (2018), 335-356.

⁵⁴ Beyond the UNFCCC framework, IMO MARPOL Annex VI and are two important instruments in relation to climate action. All the disputant States except Brunei are parties to MARPOL Annex VI. Thus, at least, these State parties are obliged to ensure the compliance of vessels under their flags with the energy efficiency regulations as outlined in MARPOL Annex VI when navigating within the Spratly Islands area. Moreover, the 2030 Agenda for Sustainable Development, albeit without binding force, gives the disputant States measurable implementing guidance on: response to climate-related hazards and natural disasters (Target 13.1), integration of climate action into national programmes (Target 13.2), education and awareness-raising (Target 13.3), financing commitment (Target 13.A), capacity-building of special stakeholders (Target 13.B), and ocean acidification (Target 14.3). See MARPOL Annex VI: Prevention of Air Pollution from Ships, adopted 26 September 1997, entered into force 19 May 2005. Resolution MEPC.203(62): Amendments to MARPOL Annex VI (15 July 2011). MARPOL Annex VI, List of Parties (as of 25 November 2019), 173-174, available at <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf>>. UN Doc.: A/RES/70/1, Transforming Our World: the 2030 Agenda for Sustainable Development (25 September 2015). For specific indicators in relation to the SDG 13 targets and Target 14.3 of SDG 14, see UN Doc.: A/RES/71/313, Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development (10 July 2017), Annex: Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, 17-18.

⁵⁵ United Nations Framework Convention on Climate Change, adopted 9 May 1992, entered into force 21 March 1994, 1771 *UNTS* 107.

⁵⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted 11 December 1997, entered into force 16 February 2005, 2303 *UNTS* 162. Doha Amendment to the Kyoto Protocol, adopted 8 December 2012. The Doha Amendment will enter into force when 144 parties, or three-quarters of parties to the Kyoto Protocol, have submitted their instruments of acceptance to the depositary. As of 3 August 2019, the Doha Amendment has 130 parties.

⁵⁷ Paris Agreement, adopted 12 December 2015, entered into force 4 November 2016.

⁵⁸ See UNFCCC, List of Parties (as of 1 December 2019), available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en>; Kyoto Protocol, List of Parties (as of 1 December 2019), available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en>; Doha Amendment to the Kyoto Protocol, List of Parties (as of 1 December 2019), available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&clang=_en>; Paris Agreement, List of Parties (as of 1 December 2019), available at <

UNFCCC sets out broad principles and basic institutions without specific obligations.⁵⁹ Secondly, the compulsory emission targets under the Kyoto Protocol and its Doha Amendment apply to developed country parties only.⁶⁰ Thirdly, although the Paris Agreement obliges all parties, including developing countries, to prepare and communicate nationally determined contributions (NDCs) and national adaptation plans (NAPs),⁶¹ as of September 2019, only China, Malaysia and Vietnam have submitted their first NDCs, and none of the disputant States has as yet submitted their NAPs.⁶² The planned mitigation and adaptation measures contained in the NDCs submitted by China, Malaysia and Vietnam mainly relate to the mainland territory of the countries concerned, and none of them has referred to marine areas, not to mention the Spratly Islands area.⁶³ Therefore, the disputant States will need to take extra climate-related initiatives in the resource and pollution management process in the Spratly Islands area.

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en >.

⁵⁹ UNFCCC, Articles 3 (Principles), 7 (Conference of the Parties), 8 (Secretariat), 9 (Subsidiary Body for Scientific and Technological Advice), 10 (Subsidiary Body for Implementation). UNFCCC, Climate: Get the Big Picture, available at <
<https://unfccc.int/resource/bigpicture/>>.

⁶⁰ Kyoto Protocol, Article 3 and Annex B. Doha Amendment to the Kyoto Protocol, Article 1.

⁶¹ Paris Agreement, Articles 4(2), 7(2), (7) and (10). Also see UN Doc.: FCCC/CP/2018/10/Add.1, Decision 1/CP.24: Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement; UN Doc.: FCCC/PA/CMA/2018/3/Add.1, Decision 3/CMA.1: Matters relating to the implementation of the Paris Agreement. For guidelines on the formulation and public registry of NDCs, see UN Doc.: FCCC/PA/CMA/2018/3/Add.1, Decision 4/CMA.1: Further guidance in relation to the mitigation section of decision 1/CP.21; Decision 5/CMA.1: Modalities and procedures for the operation and use of a public registry referred to in Article 4, paragraph 12, of the Paris Agreement. For guidelines on the formulation and public registry of NAPs, see UN Doc.: FCCC/PA/CMA/2018/3/Add.1, Decision 9/CMA.1: Further guidance in relation to the adaptation communication, including, inter alia, as a component of nationally determined contributions, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement; Decision 10/CMA.1: Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement.

⁶² For the registry of NDCs, see NDC Registry, available at <
<https://www4.unfccc.int/sites/ndcstaging/Pages/All.aspx> >. For the registry of NAPs, see NAP Central, available at <
https://www4.unfccc.int/sites/NAPC/News/Pages/national_adaptation_plans.aspx>.

⁶³ China's First NDC (20 June 2015), available at <
<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/China%20First/China%27s%20First%20NDC%20Submission.pdf> >. Malaysia's First NDC (16 November 2016), available at <
<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Malaysia%20First/INDC%20Malaysia%20Final%2027%20November%202015%20Revised%20Final%20UNFCCC.pdf>>. Vietnam's First NDC (3 November 2016), available at <
<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Viet%20Nam%20First/VIETNAM%27S%20INDC.pdf>>.

Third, the establishment of marine protected areas (MPAs) in the Spratly Islands area will be a 'two birds, one stone' solution. The International Union for Conservation of Nature (IUCN) has defined an MPA as a protected area located in marine and coastal areas with a 'clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.⁶⁴ On the one hand, MPAs can be a 'natural solution' to the climate change problem in the Spratly Islands area,⁶⁵ by mitigating and promoting adaptation to climate change.⁶⁶ On the other hand, MPAs can serve as an overall institution to integrate resource and pollution management in the Spratly Islands area in the context of climate change. The varying cooperative institutions proposed for resource and pollution management in chapters 5-7 do not amount to the endorsement of a piecemeal approach to the management of the Spratly Islands area. Rather, it is recommended to incorporate such cooperative institutions into an overall institution, where MPAs can play a critical role.

The legal basis of the establishment of an MPA as a management solution can be found in Article 194(5) of UNCLOS, which stipulates that the measures taken by States shall comprise 'those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.⁶⁷ Moreover, under Aichi Biodiversity Target 11 and SDG Target 14.5, the coastal States have committed to conserve at least 10% of the coastal and marine areas as protected areas.⁶⁸ As of

⁶⁴ Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (Gland: IUCN, 2008), 8.

⁶⁵ See e.g., J.W. McManus, *The Spratly Islands: A Marine Park?* 23(3) *AMBIO: A Journal of the Human Environment* (1994), 185-186; J.W. McManus et al., *Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan*, 41 *ODIL* (2010), 275-276; H.D. Vu, *Towards a Regional Regime for the Establishment of a Network of Marine Protected Areas in the South China Sea*, in R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, 2015), 412.

⁶⁶ MPAs can mitigate the adverse impacts of climate change by avoiding or reducing GHG emissions caused by the destruction or degradation of ecosystems and by sequestering GHG emissions from the atmosphere. MPAs can also help biological systems better adapt to the changing climate by reducing stressors that amplify climate impacts and by sustaining ecosystem processes and functions to promote resilience. See C.M. Roberts et al., *Marine Reserves Can Mitigate and Promote Adaptation to Climate Change*, 114(24) *Proceedings of the National Academy of Sciences* (2017), 6167; John E. Gross et al., *Adapting to Climate Change* (Gland: IUCN, 2016), 5-6.

⁶⁷ UNCLOS, Article 194(5).

⁶⁸ UN Doc.: UNEP/CBD/COP/10/27, Decision X/2, Annex: Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets (20 January 2011), 119. UN Doc.: A/RES/70/1, *Transforming Our World: the 2030 Agenda for Sustainable Development* (25 September 2015), 24.

August 2019, only 7.7% of the global ocean has been protected.⁶⁹ Whereas most MPAs are 'national' in the sense of being subject to the exclusive jurisdiction of a coastal State, a few MPAs are 'international' in the sense that they have been or will be established in areas beyond national jurisdiction based on agreements of multiple States concerned. International MPAs are of more relevance to the Spratly Islands setting. At present, established international MPAs include:⁷⁰ (1) a network of MPAs in the North-East Atlantic set up by the Commission under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission),⁷¹ (2) a system of MPAs (including the South Orkney Islands Southern Shelf MPA and the Ross Sea region MPA) in the Antarctic Ocean established by Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),⁷² and (3) the Pelagos Sanctuary for Mediterranean Marine Mammals in the north-western Mediterranean Sea established jointly by Italy, France and Monaco, which was later included in the 'Specially Protected Areas of Mediterranean Importance' designated under the 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean.⁷³ Apart from these established MPAs, a relevant ongoing initiative is the negotiation on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Convention).⁷⁴

Three recommendations can be proposed for the institutional framework of MPAs within the Spratly Islands area, drawing on previous experience. Firstly, the author suggests that the Spratly

⁶⁹ For the source of data, see UNEP-WCMC and IUCN, Protected Planet: The World Database on Protected Areas (WDPA), August 2019 version, available at < <https://liverreport.protectedplanet.net/chapter-2> >.

⁷⁰ See A.G. Oude Elferink, Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC, 33(3) *IJML* (2018), 455-460; W. Duan, A Case Study on the Third Party Effects of Marine Protected Areas Established by the Commission for the Conservation of Antarctic Marine Living Resources, 2018(1) *China Oceans Law Review* (2018), 90-91; E.M. De Santo, Implementation Challenges of Area-based Management Tools (ABMTs) for Biodiversity beyond National Jurisdiction (BBNJ), 97 *Marine Policy* (2018), 36.

⁷¹ OSPAR MPA Database, available at < http://mpa.ospar.org/home_ospar >. OSPAR, MPAs in Areas beyond National Jurisdiction, available at < <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction> >.

⁷² CCAMLR, MPAs, available at < <https://www.ccamlr.org/en/science/marine-protected-areas-mpas> >.

⁷³ See Pelagos Sanctuary, available at < <https://www.sanctuaire-pelagos.org/en/66-anglais/uncategorised/254-presentation-of-the-pelagos-sanctuary> >. Also see Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted 10 June 1995, entered into force 12 December 1999, 2102 UNTS 181, Article 8.

⁷⁴ UN Doc.: A/CONF.232/2019/6, Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (17 May 2019).

Islands area must not be designated as a giant MPA.⁷⁵ Rather, areas requiring protection via the establishment of MPAs within this region must be identified on the basis of the best available science and the precautionary and ecosystem approaches.⁷⁶ Secondly, the disputant States constituting a conference of parties should make decisions by consensus on the establishment of MPAs and related conservation and management measures to be adopted within those MPAs.⁷⁷ Thirdly, the disputant States may jointly establish a scientific and technical body to be responsible for: developing and revising the criteria for identifying areas requiring protection, assessing MPA proposals and making recommendations to the conference of parties, monitoring and periodically reviewing MPA-related measures, and other matters authorized by the conference of parties.⁷⁸

The above institutional framework of MPAs can serve as a basis to integrate the cooperative institutions for resource and pollution management as specified in chapters 5-7. An analogy can be made to the Arctic Council, which is mandated to establish subordinate working groups and to oversee and coordinate the work of such working groups.⁷⁹ To that effect, the cooperative institutions for resource and pollution management can be incorporated into the intended institutional framework of MPAs as separate working groups, subordinate to the disputant States constituting a conference of parties.⁸⁰ (see Figure 8-1) The conference of parties oversees and coordinates the work of such working groups and can also decide to establish additional working groups when necessary. A secretariat can be set up to help the conference of parties coordinate the work of subordinate working groups.⁸¹ A scientific and technical body established by the conference of parties could be responsible for matters authorized by the conference of parties.

⁷⁵ For example, as of September 2019, the OSPAR Commission has designated seven MPAs in ABNJ in the North-East Atlantic. See OSPAR, MPAs in Areas beyond National Jurisdiction, available at < <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction> >. For the identification and designation of sites by the OSPAR Commission, also see P. Drankier, *Marine Protected Areas beyond National Jurisdiction*, 27 *IJMCL* (2012), 314-316.

⁷⁶ See UN Doc.: A/CONF.232/2019/6, Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (17 May 2019), Article 16(1).

⁷⁷ *Id.*, Article 19(1) and (2).

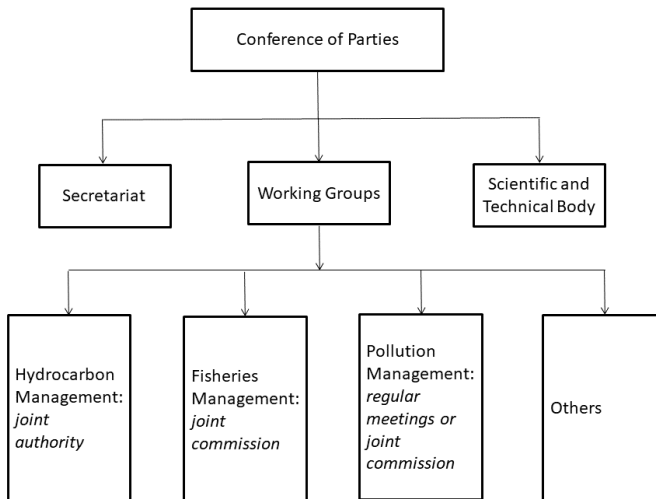
⁷⁸ *Id.*, Articles 16(3), 18(6), 21(2) and (3) [Alt.1].

⁷⁹ Declaration on the Establishment of the Arctic Council, adopted 19 September 1996, Article 1.

⁸⁰ Z. Gao, Review and Prospect of the Security Cooperation Mechanisms in the South China Sea (in Chinese), 1 *Boundary and Ocean Studies* (2016), 8.

⁸¹ *Id.*, 9.

Figure 8-1: An overall institution integrating resource and pollution management in the Spratly Islands area



8.6 REFLECTIONS ON FUNCTIONS AND LIMITATIONS OF INTERNATIONAL LAW

Lastly, the author would like to reflect on the functions and limitations of international law in the management of the Spratly Islands area prior to delimitation.

First, the functions of international law in managing the Spratly Islands area can be achieved through the interaction between its substantive and procedural elements. The substantive element denotes norms including both principles and rules with binding force and other non-binding normative expectations of conduct, according to which marine natural resources and pollution should be managed. The procedural element refers to institutions and mechanisms for maintaining order, resolving disputes and considering, applying or otherwise revisiting substantive norms.⁸² Such institutions and mechanisms can take diverse forms with varying degrees of institutionalization, from a simple legally binding instrument to regular intergovernmental meetings to permanent intergovernmental institutions. The substance-procedure duality is hardly a novelty in international law.⁸³ More than 60 years ago, Hans Kelsen already recognized this duality 'in deriving the law's validity from a dynamic and a static principle – the former relating to the processes whereby law establishes competences, the latter relating to the ascertainment of existing law' content'.⁸⁴ In the 2010 *Pulp Mills* Judgment, the ICJ also confirmed the complementary relationship between substantive norms and cooperative institutions in achieving the objective of realizing common interests through cooperation.⁸⁵

The substance-procedure duality is playing an increasingly important role in the management of the Spratly Islands area, owing to the recent changes in the structure of the international relations between the disputant States. As the author has pointed out in chapter 5, the power differential between China and the other disputant States prompted the latter to draw on external powers, particularly the US, to balance against China between 2009 and 2016.⁸⁶ The balance of power, by its nature, remains within the paradigm described by Wolfgang Friedmann as diplomacy of 'coexistence', which refers to 'the conduct of international relations

⁸² S. Huntington, *Political Order in Changing Societies* (Yale University Press. 1973), 8-9.

⁸³ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP. 2007), 20.

⁸⁴ *Id.*, 20, fn.9. See H. Kelsen, *Principles of International Law* (Rinehart. 1952), 409-411.

⁸⁵ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010 (ICJ), paras.75, 77.

⁸⁶ For discussions on the balance-of-power theory, see e.g., W.H. Riker, *The Theory of Political Coalitions* (Yale University Press. 1962), 161; O. Niou et al., *The Balance of Power: Stability in International Systems* (CUP. 1989), 21; M. Sheehan, *The Balance of Power: History & Theory* (Routledge. 1996).

on the basis of national power'.⁸⁷ However, with the decline of confidence in the US defense shield and economic alliance since the inauguration of President Donald Trump in the US in 2017, the tide of domestic politics of the claimant ASEAN States has now turned in favor of cooperation with China for joint development of hydrocarbon resources in the Spratly Islands area.⁸⁸ This change calls for a paradigm shift from the balance of power to institutionalized cooperation, which promotes shared prosperity through more organized international collaboration.⁸⁹ Thus, the law of cooperation, which seeks to pursue the realization of common interests shared by sovereign States through cooperation,⁹⁰ will play a cardinal role in the Spratly Islands setting.

Unlike the law of existence which mainly consists of prohibitive rules to restrain States from conducting activities that could aggravate the dispute and finally lead to armed conflicts,⁹¹ the law of cooperation relies not only on substantive norms but also on institutions. The relationship between 'cooperation' and 'institution' can be best described using M.C.W. Pinto's words that '[c]o-operation would seem to reach its most developed expression in the establishment by the parties of institutions through which regular contact could be maintained, co-operative action can be monitored and supervised and, perhaps, new co-operative initiatives proposed, adopted and implemented'.⁹² This observation applies to the Spratly Islands setting. Given the power differential between China and other disputant States, institutionalized cooperation can counterbalance the asymmetry of physical capacity through tempering the leading position of a big country like China by committing it to credible exercises of institutionalized restraints and to operate in compliance with the provision of substantive norms and cooperative institutions, which, in turn, reduces fears from weaker States about the abuse of growing resource powers by that big power.

Second, as concluded in chapters 2-7, the role of international law in managing the Spratly Islands area is subject to limitations, which, in the author's view, result from the classic 'territoriality' model of jurisdiction. The essence of the successful management of the Spratly Islands area preceding delimitation is to allocate jurisdictional rights and duties respecting the disputed islands and waters in a way that

⁸⁷ W. Friedmann, *The Changing Structure of International Law* (Columbia University Press. 1964), 14.

⁸⁸ See chapter 5, section 5.3.3.

⁸⁹ See chapter 5, section 5.3.4.

⁹⁰ W. Friedmann, *The Changing Structure of International Law* (Columbia University Press. 1964), 58-59.

⁹¹ *Id.*, 89.

⁹² M.C.W. Pinto, The Duty of Co-operation and the United Nations Convention on the Law of the Sea, in A. Bos & H. Sibbesz (eds.), *Realism in Law-making: Essays on International Law in Honour of Willem Riphagen* (Martinus Nijhoff Publishers. 1986), 154.

is acceptable to all the disputant States. Both the law of territory and the law of the sea, two main bodies of international law discussed in this thesis, are primarily constructed on the basis of the territoriality principle, which is the ‘most basic principle of jurisdiction in international law’ and characterized by exclusiveness in the sense that for a particular territory, only one State can hold a territorial title.⁹³ Under the territoriality principle, the factual links between particular conduct and a given spatial location, or between the effects of that conduct and a given spatial location, determine a sovereign State’s jurisdiction or authority over the conduct.⁹⁴ The territoriality principle captures the triangular relationship of three elements: spatial location (land or sea), sovereignty, and jurisdiction.⁹⁵ Sovereignty is defined by reference to a particular spatial extent. Jurisdiction is ‘an aspect of sovereignty’, coextensive with and limited by sovereignty.⁹⁶

The ‘territoriality’ model of jurisdiction is self-evident in the law of territory in the sense that a sovereign independent State ‘should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits’.⁹⁷ The territoriality principle has also shaped the law of the sea in two significant ways. On the one hand, the sea is closely tied to the land according to the legal principle of ‘*la terre domine la mer*’, whereby a State can only claim maritime entitlements over specific marine areas when it enjoys territorial sovereignty over certain land territories.⁹⁸ On the other hand, the modern international law of the sea uses the zone-based approach as a predominant tool to manage the oceans, according to which the jurisdictional rights and obligations of a sovereign State over a specific marine area are determined based on the distance of that area from its coast.⁹⁹ As commented by Frederick A. Mann, the territoriality principle ‘seems to establish a satisfactory regime for the whole world’ by dividing

⁹³ C. Ryngaert, *Jurisdiction in International Law* (OUP 2nd ed. 2015), 49.

⁹⁴ H.L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 *American Journal of Comparative Law* (2009), 632. Also see G. Kegel and I. Seidl-Hohenveldern, On the Territoriality Principle in Public International Law, 5(2) *Hastings International and Comparative Law Review* (1982), 249.

⁹⁵ H.L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 *American Journal of Comparative Law* (2009), 632.

⁹⁶ F.A. Mann, *The Doctrine of Jurisdiction in International Law* (Brill | Nijhoff. 1964) (Collected Courses of the Hague Academy of International Law, Volume 111), 30, quoted in: *id.* 632.

⁹⁷ This statement is made by Lord Macmillan, quoted in: *id.* 632.

⁹⁸ See North Sea Continental Shelf (Federal Republic of Germany / Denmark), Judgment of 20 February 1969 (ICJ), para.96. Also see C. van Bijnkershoek, *De Dominio Maris Dissertatio* (OUP 2nd ed. 1744) (translated by R. Van Deman Magoffin), 43.

⁹⁹ Y. Tanaka, *The International Law of the Sea* (CUP 2nd ed. 2015), 4. Y. Tanaka, Zonal and Integrated Management Approaches to Ocean Governance: Reflections on a Dual Approach in International Law of the Sea, 19 *IJML* (2004), 484.

the world into 'compartments within each of which a sovereign State has jurisdiction'.¹⁰⁰

However, in the Spratly Islands setting, the classical 'territoriality' model of jurisdiction, which relies on spatial connections in determining the scope of a sovereign State's regulatory power, has been called into question. The limitations of the law of territory and the law of the sea in untangling the overlapping jurisdictions alleged by the disputant States are largely due to the uncertainty and indeterminacy of the spatial extent of the sovereignty resulting from the underlying territorial and maritime disputes in this region. Such limitations require us to think outside the box and to break the constraints posed by the strict application of the classical 'territoriality' model of jurisdiction, which Paul S. Berman has criticized for amounting to 'motionless demarcations frozen in time and space'.¹⁰¹ Rather, as suggested by David Ong, where a maritime boundary has been delimited or where it is absent are two different phases on the 'time-space continuum'.¹⁰² Accordingly, two alternative approaches have been proposed in the preceding chapters. Firstly, in terms of breaking the constraints on 'space', the disputant States are recommended to move away from the use of jurisdictional zones as the frame of reference when managing the resources and pollution in Spratly Islands area but to regard this region as an integrated whole for the purpose of management.¹⁰³ Secondly, in terms of breaking the constraints on 'time', built on Ong's 'time-space continuum', Youri Van Logchem argued that 'it seems more prudent to approach the period before and after delimitation in terms of degrees rather than absolutes', since these two phases fall on the same continuum after all.¹⁰⁴ Agreeing with Ong and Van Logchem, this thesis suggests that certain rules and principles that apply to undisputed marine areas can, arguably, apply with equal force to disputed marine areas.¹⁰⁵

¹⁰⁰ F.A. Mann, *The Doctrine of Jurisdiction in International Law* (Brill | Nijhoff. 1964) (Collected Courses of the Hague Academy of International Law, Volume 111), 30, quoted in: H.L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 *American Journal of Comparative Law* (2009), 632.

¹⁰¹ P.S. Berman, The Globalization of Jurisdiction, 151(2) *University of Pennsylvania Law Review* (2002), 322.

¹⁰² D. Ong, Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?, 93(4) *AJIL* (1999), 783.

¹⁰³ See e.g., chapter 4, section 4.2.4.1 (regulating unilateral State conduct); chapter 6, section 6.3.8.4 (promoting cooperation in fisheries management); chapter 7, section 7.5.3 (promoting cooperation in pollution management).

¹⁰⁴ Y. van Logchem, *Disputed Maritime Areas: The Rights and Obligations of States under International Law* (PhD Dissertation, Utrecht University, defended on 8 January 2019), 317.

¹⁰⁵ See e.g., chapter 4, section 4.3 (general principles), section 4.6.2 (principle of prohibition of threat or use of force), section 4.6.3 (principles applicable to law enforcement measures in general); chapter 5, section 5.4.1 (Articles 194, 204, 205, 206 and 208 of UNCLOS); chapter 6, section 6.3 (substantive norms on fisheries management); chapter 7, section 7.4 (substantive norms on pollution management),

In short, this thesis seeks to provide a balanced perspective on the functions and limitations of international law in the management of the Spratly Islands area prior to delimitation. Criticizing the limitations of international law without appreciating its functions would amount to throwing out the baby with the bathwater. The implementation of the remedies to limitations, indeed, is reliant on the functions of international law through the adoption or revision of substantive norms via certain cooperative institutions to be established based on the agreement of the disputant States. The dynamics of international law functioning through the substance-procedure duality will continue to play an important role in the management of the Spratly Islands area.

section 7.5.1 (juridical allocation of prescriptive jurisdiction), section 7.5.2 (juridical allocation of enforcement jurisdiction).