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

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Cover Page



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Summary

Moving towards Coexistence and Cooperation: The Spratly Islands and International Law

The water that swallows up the boat can be the same that bears it. On the one hand, the modern development of the law of the sea in the twentieth century, by enabling coastal States to claim a vast area of the seas to be under their jurisdiction, has significantly increasing overlapping claims and generating or exacerbating maritime disputes between States, with the Spratly Islands disputes being a notable example. On the other hand, international law is expected to play critical roles in reducing inter-State conflicts, promoting peaceful coexistence, and further facilitating cooperation among the disputant States in the Spratly Islands area. Thus, this thesis seeks to investigate the extent to which international law provides a normative framework for the management of the Spratly Islands area in the absence of agreed maritime delimitation, with the aim of maintaining peaceful coexistence of the disputant States and promoting international cooperation in this region. In addition to the introductory and concluding chapters, this thesis consists of two parts: Part I (Coexistence) and Part II (Cooperation). Part I, comprising chapters 2-4, seeks to set out a predictable territorial order and a permissible scope for unilateral behaviors to ensure peaceful coexistence of the disputant States in the region. Part II, including chapters 5-7, outlines international legal frameworks for inter-State cooperation in resource and pollution management concerning the Spratly Islands area.

A legally predictable territorial order and a set of restraints upon unilateral behaviors within a clearly defined spatial area are essential to maintaining the peaceful coexistence of the disputant States in this region. Chapter 2 addresses the underlying territorial dispute in this region by evaluating whether the legal arguments (i.e. historic title, *effectivités*, treaty title, cession, and discovery of *terra nullius*) advanced by the disputant States are substantiated under international law. One needs to bear in mind that modern international law rejects the applicability of *terra nullius* for attaining a stable territorial order across the globe and tends to attribute a certain territory to one country whenever possible, despite that picking the best argument out of a mediocre bunch has little chance to enjoy unanimous support. After analysis, it is concluded that China's territorial claim based on historic title, among all the claims, is the most plausible one, albeit not necessarily an impeccable one, when evaluated against the law of territory. Meanwhile, the little possibility of resolving this territorial dispute by either judicial or

diplomatic methods in the foreseeable future requires further consideration of alternative solutions such as the exercise of self-restraint on unilateral activities (chapter 4) and cooperative arrangements (chapters 5-7). Chapter 3 deals with the spatial extent of disputed marine areas in the studied region where the disputant States shall exercise self-restraint according to legal parameters to be set out in chapter 4. Two competing approaches are considered, one approach requiring consideration of all claims advanced by the disputant States, and another excluding unreasonable claims that are implausible under international law (e.g. claims based on the U-shape line invalidated by the *South China Sea Arbitration* award). The former approach undoubtedly leads to a larger spatial extent of a disputed marine area than the latter one. This thesis argues in favor of a larger disputed marine area, as constraints are imposed on unilateral State conduct in broader areas prior to delimitation. Chapter 4 sets out the legal parameters to determine what sort of unilateral conduct should be prohibited and what should be permitted in the Spratly Islands area preceding delimitation. First, it is concluded that extracting oil or gas reserves (i.e. exploitation and exploratory drilling) is prohibited, while seismic surveys, to the extent of not causing irreversible harm to marine life, are generally permissible provided that the information related to marine natural resources collected through seismic surveys is communicated and made available to other disputant States. Second, the disputant States and their nationals shall not engage in direct exploitation of depleted, threatened or endangered species or any activities that may indirectly destroy the habitats of such species. Whereas harmful fishing practices (e.g. degrading habitats of important species and destroying the structure of seabed and subsoils by using explosives) are prohibited, non-harmful fishing activities are generally permissible to the extent of not exceeding the current annual catch within the Spratly Islands area, unless scientific evidence suggests otherwise. Meanwhile, traditional or artisanal fishing practices, if any, remain permissible across the whole Spratly Islands area. Third, most law enforcement measures that have occurred in this region are taken unilaterally by coast guard administrations of the disputant States, are thus less likely to trigger the application of Article 2(4) and not generally prohibited.

Proactive cooperative arrangements on resource and pollution management can derive benefits of prosperous development of the region. Chapters 5-7 concludes that international law provides a limited normative framework in regulating resource and pollution management regarding the Spratly Islands area. First, international law falls short of regulating offshore hydrocarbon activities by only touching upon a narrow range of environmental issue associated with such activities. 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 apply the precautionary approach to all aspects of fisheries, and inadequate ecosystem concerns. Third, most instruments in relation to pollution from shipping and dumping are not ratified by or do not bind upon all the disputant States. Despite such limitations, international law 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 (i.e. Article 208 on hydrocarbon resource management, Article 61(3) on fisheries management, and Articles 21(2), 211(2) & (5) and 216 on pollution management), which entail a general legal duty to respect and apply relevant international rules and standards external to UNCLOS. Another adaptive mechanism is through systemic integration under Article 31(3)(c) of VCLT, whereby certain non-binding norms (e.g. soft-law principles established in international environmental law) can have the chance of informing the interpretation and application of other primary norms of international law with direct binding force upon the claimant States, notably those in UNCLOS. 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. 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 cooperative arrangement becomes dependent on the working of the cooperative institution. Compared with the management of fishery resources and pollution that have the status of commons, hydrocarbon resources management has received relatively less available guidance under international law, as a result of inertia to develop unified international standards for offshore hydrocarbon activities, and thus requires a cooperative institution with a high degree of institutionalization.

In the concluding chapter, this thesis reflects 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

(binding or non-binding normative expectations of conduct) and procedural elements (institutions and mechanisms for considering, applying or otherwise revisiting substantive norms). 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, given that the tide of domestic politics of the claimant States has now turned in favor of cooperation with China for joint development in the region. Second, 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 that relies on spatial connections in determining the scope of a sovereign State's regulatory power. However, in the Spratly Islands setting, the 'territoriality' model of jurisdiction 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 amounts to 'motionless demarcations frozen in time and space'. On the one hand, 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. On the other hand, in terms of breaking the constraints on 'time', the author agrees with other scholars that 'it seems more prudent to approach the period before and after delimitation in terms of degrees rather than absolutes' and suggests that certain rules and principles that apply to undisputed marine areas can, arguably, apply with equal force to disputed marine areas.

In brief, 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. 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.