Introduction

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The South China Sea has long been a source of tension and potential conflict in the Asia-Pacific region. The underlying source of the tension is the territorial sovereignty disputes over the Spratly Islands (claimed partially or wholly by Brunei Darussalam, China, Taiwan, Malaysia, the Philippines and Viet Nam), the Paracel Islands (claimed by China, Taiwan and Viet Nam), and Scarborough Shoal (claimed by China, Taiwan and the Philippines).

The territorial sovereignty disputes are governed by the principles and rules of general international law on the acquisition and loss of territory, not by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹ For most of the claimants, the legal disputes about territorial sovereignty are complicated by different historical narratives and by sensitive issues of nationalism and domestic politics. This makes negotiating a resolution of the sovereignty disputes very difficult.

Given the intractability of the sovereignty disputes, many scholars and officials do not speak of ‘resolving’ the disputes in the South China Sea. Rather, they speak about ‘managing potential conflicts’ in the South China Sea. The interim solution that is most often proposed is ‘setting aside the disputes’ and pursuing joint development and other cooperative arrangements. To explore and promote this idea, in 2013 the NUS Centre for International Law (CIL)² published a book discussing the legal framework for the joint development of hydrocarbon resources in the South China Sea.³

¹ United Nations Convention on the Law of the Sea, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994) [UNCLOS]. As at 15 January 2014, UNCLOS has 166 parties (including the European Union), with Niger being the latest to accede to the Convention on 7 August 2013.

² National University of Singapore, Centre for International Law, online: www.cil.nus.edu.sg.

³ See Robert Beckman, *et al*, eds, *Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing, 2013).

Little progress has been made on setting aside the sovereignty disputes and pursuing joint development. This lack of progress is due in part to the fact that some of the maritime claims in the South China Sea may not be consistent with the provisions of UNCLOS.

This book will not examine the sovereignty issues, or the legal status of various offshore features. Nor will it examine the merits and demerits of the specific competing claims. Rather, the purpose of the book is to provide a detailed analysis by recognized experts of the issues of international law raised by the disputes over maritime claims in the South China Sea. Its objective is to provide a comprehensive overview of the legal issues pertinent to the disputes over maritime claims and a means of mapping the interplay and overlap between them.

The chapters in this book are derived from papers originally presented at the 2013 CIL *Roundtable on the South China Sea, International Law and UNCLOS* conducted in Singapore, 27–28 June 2013. The Roundtable was a high-level discourse between legal experts on the law of the sea, including former judges of the International Tribunal for the Law of the Sea (ITLOS), legal advisors for States during the negotiation and drafting of UNCLOS, and outstanding scholars of both law and geography, many of whom have served as counsel or experts before international courts and arbitral tribunals.

In convening the Roundtable, CIL sought to maintain the neutrality of the members, electing not to invite experts from any of the claimants to serve as members of the Roundtable; experts who have been appointed as arbitrators in the proceedings initiated by the Philippines against China; or experts who are members of the legal team representing the Philippines. However, a few days prior to the Roundtable commencing, one of our Roundtable members, Professor Bernard H Oxman, notified CIL that he had been invited to join the legal team of the Philippines. Professor Oxman, however, gave his assurance that he would refrain from advocating the views of its client. On this basis, we were happy to welcome him as one of the members of the Roundtable and as a contributor to this book.

Writing a book on the law relevant to the legal disputes in the South China Sea without discussing the legal case recently brought in connection with that dispute is a challenge. We have consciously sought not to discuss the merits of the claim brought by the Philippines against China in relation to the South China Sea dispute. The dispute, however, raised several issues concerning the interpretation and application of the provisions of UNCLOS. This book will provide the background necessary to understanding those issues, without examining the merits of the claims in that case.

In the first chapter, Professor Bernard H Oxman of the University of Miami discusses the characteristics of offshore features that are legally capable of being subject to claims of sovereignty by States. Professor Oxman explains that although sovereignty over land territory may be acquired by the State that first establishes effective control, the same system does not apply to the sea or the seabed, and that the presence of low-tide elevations or artificial islands, installations, and structures does not change this. The coastal State may, however, exercise sovereignty or sovereign rights over the sea and the seabed that extends seaward from the coast, within the limits permitted by the rules set forth in UNCLOS for various zones of coastal State jurisdiction. No State may claim or exercise sovereignty or sovereign rights with respect to the seabed and subsoil beyond the limits of national jurisdiction.

In the second chapter, Professor Clive Schofield of the Australian National Centre for Ocean Resources and Security examines the various territorial sea baselines that define the land/sea interface in the South China Sea. He underlines the importance of ascertaining the location of this 'boundary' to claims to maritime zones and to the delimitation of maritime boundaries. Such 'territorial sea baselines', as they are often termed (although they are relevant to the definition of all maritime zones), are also crucial to the construction of equidistance lines, which often play a significant role in the delimitation of maritime boundaries. UNCLOS provides for several distinct types of baselines and these provisions are reviewed in Professor Schofield's chapter, with particular reference to their practical application in the South China Sea. The chapter also examines the use of straight baselines and archipelagic baselines systems by the claimants as well as the rules on baselines for various types of insular features (islands/rocks, reefs, low-tide elevations).

Professor Clive R Symmons of Trinity College provides an exhaustive analysis of the definition of 'islands' in the law of the sea in Chapter 3. Article 121(1) of UNCLOS defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide'. Professor Symmons examines the definition of an island in light of State practice and international jurisprudence, with particular attention being given to the 'grey areas' in the definition, as well as to the maritime zones which islands can generate. The chapter also examines the problematic language contained in paragraph 3 of Article 121, which relates to what may be termed 'under-privileged islands', namely 'rocks which cannot sustain human habitation or economic life of their own' that are not entitled to an exclusive economic zone (EEZ) and continental shelf of their own. Article 121 as a whole is then applied to the disputed insular formations in the South China Sea.

In Chapter 4, Professor Tullio Treves of the University of Milan and former ITLOS judge discusses the issues that arise with respect to the delimitation of maritime boundaries in the South China Sea. The International Court of Justice (ICJ) has stated that UNCLOS Articles 74 and 83 on the delimitation of the EEZ and continental shelf represent customary international law. The content of the customary rule, however, is not clear. International courts and tribunals have adopted and developed a methodology that pursues the objective of an equitable result; but the methodology does not always ensure predictability. Certain key issues relating to the delimitation of maritime boundaries necessitate a case-by-case assessment, taking into account factors such as the determination of the relevant coasts in drawing a provisional equidistance line and consideration of relevant circumstances for adjusting this provisional line. A clear example is the treatment of islands in delimitation cases. ITLOS remarked in 2012 that there is no general rule as to the effect of islands on maritime delimitation and that it depends on the circumstances of the case.⁴ State practice confirms this assessment. Professor Treves also discusses Article 121 of UNCLOS, including the sub-provision on ‘rocks which cannot sustain human habitation or economic life of their own’, which the ICJ has determined reflects customary law.⁵

In Chapter 5, Professor Ted L McDorman of the University of Victoria analyzes historic claims to waters and their intersection with the provisions in UNCLOS on rights and jurisdiction over resources. He identifies two types of historic claims to waters – historic waters and historic rights. Historic waters involve a State claiming exclusive rights and jurisdiction for all purposes over the waters towards the international community as a whole. Claims to historic rights are narrower than historic waters as they are not exclusive, do not involve zonal claims of sovereignty or jurisdiction and usually attach only to a specific resource or activity. Both types of claims are governed by general international law, but when they involve fisheries or resources of the continental shelf, UNCLOS also becomes engaged. Professor McDorman also examines the ‘nine-dash line’, indicated on Chinese maps of the South China Sea, in light of the rules of international law governing rights to resources in maritime spaces,

⁴ *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, [2012] ITLOS Reports 4, at para 147.

⁵ Whether the same can be said with regard to the application to specific features of this provision in the recent *Nicaragua v Colombia* judgment of the ICJ may be debated. See *Territorial and Maritime Dispute (Nicaragua v Colombia)*, [2012] ICJ Reports 50.

notwithstanding the fact that there is significant uncertainty as to what China is asserting with respect to the waters enclosed by the nine-dash line.

In Chapter 6, Professor Alex Oude Elferink of the Netherlands Institute for the Law of the Sea assesses whether the claimants have a right to claim a continental shelf beyond 200 nautical miles (nm)⁶ in the South China Sea. Three of the States bordering the South China Sea – Brunei Darussalam, Malaysia and Viet Nam – have indicated that they believe they are entitled to a continental shelf beyond 200 nm and have either made or intend making a submission to the Commission on the Limits of the Continental Shelf (CLCS) in relation to the outer limits of their continental shelf. China and the Philippines have reserved their right to make a submission to the CLCS in the South China Sea. This chapter examines developments in continental shelf claims beyond 200 nm and their potential impact on the disputes concerning maritime claims in the South China Sea. Professor Oude Elferink examines the legal issues that arise when there is an overlap between an extended continental shelf claim of a State bordering the South China Sea and an EEZ claim from the disputed offshore islands. Interestingly, China has left open the option that it may base its maritime claims in part on an entitlement to a continental shelf beyond 200 nm extending from Hainan Island.

In Chapter 7, former ITLOS judge David Anderson and Youri van Logchem of the Netherlands Institute for the Law of the Sea analyze the rights and obligations of States in areas of overlapping maritime claims. More than 200 overlapping maritime claims remain unresolved today. As regards the territorial sea, Article 15 of UNCLOS is designed to prevent overlapping claims by providing that neither State is entitled to claim across the median line, unless there is an agreement or a special circumstance, for example a historic title. Overlapping EEZ and continental shelf claims between adjacent or opposite States are subject to the provisions in paragraph 3 of Articles 74 and 83. This paragraph provides that until they reach a final agreement establishing a maritime boundary, the two States have an obligation to make every effort to enter into provisional arrangements of a practical nature, coupled with a prohibition on unilateral action that might jeopardise or hamper the reaching of the final agreement, all without prejudice to the final delimitation. The authors also examine the difficult legal issues that arise when two States assert sovereignty over the

⁶ Technically the correct abbreviation for a nautical mile is ‘M’, while ‘nm’ denotes nanometres. However, ‘nm’ is widely used by many authorities (for example the UN Office of Ocean Affairs and the Law of the Sea) and appears to cause less confusion than ‘M’, which is often assumed to be an abbreviation for metres.

same island and assert maritime claims from that island. UNCLOS has no provisions governing this situation so it is governed by the rules and principles of general international law.

Finally, in Chapter 8, Professor Robert Beckman of the Centre for International Law expounds on the complex regime for the settlement of disputes contained in Part XV of UNCLOS. Professor Beckman first provides an overview of the dispute settlement regime in Part XV, including what is meant by a 'legal dispute', how Part XV was part of the 'package deal' during the negotiations leading to UNCLOS, and the general principles governing disputes between States Parties on the interpretation or application of the provisions in UNCLOS. He explains that the general principle in section 2 of Part XV is that any dispute between two States Parties on the interpretation or application of a provision of UNCLOS which cannot be resolved by negotiation may unilaterally be referred by either party to the dispute to an international court or arbitral tribunal for a binding decision. States give their consent in advance to these compulsory procedures when they become a party to UNCLOS. Professor Beckman also examines the exceptions to the compulsory procedures in section 2 in the context of the types of legal disputes which could arise in the South China Sea, including the right of States to make declarations excluding certain categories of disputes from the compulsory procedures in section 2. The chapter then examines the types of disputes in the South China Sea that would be subject to the compulsory procedures in section 2, notwithstanding the exceptions and exclusions. Finally, he examines whether it might be possible for some of the legal issues in the South China Sea to be referred to ITLOS for an Advisory Opinion.

In organising the 2013 Roundtable, CIL believed that we could make a useful contribution to the exceedingly complex maritime disputes in the South China Sea by providing a forum where leading experts and scholars on law of the sea could examine and discuss the issues of law arising from the disputes. We realised that such discussion could be a sensitive matter. The sensitivity became more complicated when the Philippines instituted the arbitration proceeding after we had announced the programme for the Roundtable. We decided to proceed with the Roundtable, however, with all the care and controls and caveats that we had reasonably set. The intention was to have a serious discussion between leading world experts and scholars on the issues of international law that underpin the disputes in the South China Sea, in a manner that does not put anybody in the dock or question or embarrass any of the claimants as to the merits or wisdom of their claims. This has not been an easy exercise, but thanks to the co-operation of the contributors, we hope that we have achieved our objective.

We hope this book, and the discussion and debate it generates, will mark a step forward on the long road toward either resolving the disputes or managing potential conflicts arising from them. It may also assist States in clarifying their maritime claims and set the stage for negotiations to try to reach agreement on the area of overlapping claims where joint development arrangements and other co-operative measures could be undertaken. This, in turn, would assist in promoting peace and good order on the seas; clearly a benefit for all.