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LAND RECLAMATION IN THE SOUTH CHINA SEA: POSSIBILITY OF INVOKING JUDICIAL DISPUTE SETTLEMENT MECHANISMS

LLM Paper
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TABLE OF ABBREVIATION

CBD	Convention on Biological Diversity
DOC	Declaration on the Conducts of Parties in the East Sea
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
ITLOS	International Tribunal on the Law of the Sea
UN	United Nations
UNCLOS	1982 United Nations Convention on the Law of the Sea

INTRODUCTION

Over all the time periods, territory remains an invaluable property to all states. It has a significant meaning for national security, economic development, trade exchange and expansion of national influence to every state. States therefore always find methods to enlarge their territories as much as they could do. In order to do so, wars, conflicts and other forms of violence were used as key tools by tribes and states since ancient times. For example, during his lifetime (1162-1227), Mongol leader, Genghis Khan conquered huge chunks of central Asia and China by his armies, or during Napoleonic war (1803-1815) Napoleon expanded French Empire as well as French territory over the majority of Europe. After the World War II, these methods are, however, prohibited in the relations among sovereign states because the prohibition to use force or threat to use of force is a fundamental principle of international law.[1] This nevertheless does not mean that states abandon ambitions to maximize their territories, evidenced by the long-lasting territorial disputes. Against that context land reclamation, a kind of land expansion activities emerged as an effectively alternative method for states to achieve such ambitions. Indeed, land reclamation has become the main method for states like Singapore, Monaco, Bahrain and the Netherlands to "grow up" in the terms of their territories. For instance, over the past half-century, Singapore has added onto its total area by a whopping 22 percent, by adding onto the island using earth obtained from quarries, the seabed, and rock;[2] or in the Netherlands, its surface area has increased by approximately 10 percent since the 14th century, thanks to land reclamation.[3]

The same attempt seems to be made by the states bordering the South China Sea, a semi-enclosed sea in Southeast Asia when they have constructed land reclamation works in this sea. This does not come as a surprise because the South China Sea not only possesses a high storage of natural resources but also has a strategic geographical location for the maritime commerce and national defense of the coastal states in the region. Interestingly, instead of undertaking land reclamation in the states' territories like the Netherlands and Singapore, China, Taiwan, Malaysia and Viet Nam have carried out their reclamation works

[1] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4); UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

[2] Kuschk, 'Reclaimed Land in Singapore: Nation-Building in the Most Literal Sense' *The Basement Geographer* (03 February 2011) <http://basementgeographer.com/reclaimed-land-in-singapore-nation-building-in-the-most-literal-sense/> accessed 22 February 2016.

[3] Introducing the Western Netherlands, <http://lef.uprm.edu/Historical%20investigation/pdf%20files/Holanda%208%20Reclaimed%20land.pdf> accessed 8 May 2016.

at the disputed maritime features and water in the South China Sea, over which they all claim sovereignty. As a result, the dispute is increasingly complicated and hard to define. The criticisms as well as the calls for the halt of land reclamation in the South China Sea has been given by both the states involving in and not involving in this action throughout diplomatic means of dispute settlement. However, up to now, China, state who has undertaken land reclamation at the largest scale in the South China Sea remains its activities at the seven features in the South China Sea.

Against such context, if looking at the success of resolving a dispute on the same matter between Malaysia and Singapore in 2013 with the involvement of a Tribunal established under Annex VII to United Nations Convention on the Law of the Sea (hereinafter 'UNCLOS' or the Convention), invoking judicial dispute settlement mechanisms should be recalled in order to defuse tension concerning reclamation activities in the South China Sea. Jurisdiction of any international court or tribunal available for maritime disputes however, requires consent from parties to the disputes while China made a declaration to limit the jurisdiction of compulsory dispute settlement procedures provided for in Part XV of UNCLOS. Therefore, the question **whether it is possible to invoke international judicial dispute settlement mechanisms in case of land reclamation on maritime features in South China Sea** depends on many factors. By analyzing land reclamation in light of the law of the sea, particularly UNCLOS, and considering criteria to utilizing judicial dispute settlement mechanisms in case of international disputes in the sea, the author of this thesis would identify which factors are relevant then provide the answer for the above-mentioned question.

Research sources

Various sources were used in the thesis that could be classified in three groups. The first group of sources is legal normative acts: international treaties, such as United Nations Convention on the Law of the Sea and the Charter of United Nations. The second group consists of doctrines: scientific research articles, books and monographs; and documents of international institutions. The last group of sources is practical material: institutional decisions and jurisprudence of international courts.

Research methodology

The author used various analysis methods in the thesis:

Systemic analysis method was used to analyze a variety of legal sources and draw overall conclusions, generalize or summarize.

Logic analysis method was used to draw conclusions based on rules of logic, for instance: juxtapositions, contradiction.

Linguistic analysis method was used to interpret legal source, legal terms in the light of philosophy law.

Thesis structure

This thesis, at first provides factual background on land reclamation in the South China Sea, including its location, states involving in, purposes and responses of states. Some legal issues concerning land reclamation in the South China Sea are also identified in this Chapter.

Chapter II introduces regulations provided for in UNCLOS on the issues concerning the land reclamation in the sea such as legal status of maritime features and obligations of states involving in reclamation activities. Parallel to that, the facts of land reclamation activities in the South China Sea are applied to such regulations in order to address the legal issues identified in the first Chapter.

Lastly, Chapter III based on the analysis result of Chapter II, suggests a choice of a dispute settlement mechanism in case of land reclamation in the South China Sea then propose questions which are likely to be submitted to such a mechanism. By considering criteria for jurisdiction and admissibility of the mechanism regarding question presented, the possibility of invoking international judicial dispute settlement mechanisms in case of China's land reclamation South China Sea is evaluated.

CHAPTER I. LAND RECLAMATION IN THE SOUTH CHINA SEA

Land reclamation has neither governed by international law nor discussed in international legal conferences as a separate issue of contemporary international law. That is why there is no agreed definition of land reclamation in legal sense. Instead, the definition of this term might be found in studies on environmental issues. According to OSPAR Commission in *Assessment of Environmental Impact of Land Reclamation* 'land reclamation is the gain of land from the sea, or coastal wetlands for agricultural purposes, industrial use or port expansions',[4] or according to Yasser in *Environmental impacts of dredging and land reclamation at Abu Qir Bay, Egypt* land reclamation 'comprises dredging large amounts of sea sand transported over considerable distances to create a new land for industrial or infrastructure purposes.'[5] Although these definitions do not mention directly to the involvement of human in the process of reclamation, this can be referred from using word "transported" in passive form. Furthermore, "the gain of land" or "creating a new land" has no difference in meanings and the both result to the expansion of the existing territories of states. Therefore, in brief, land reclamation could be understood as the expansion of states existing territories by man.

Based on the practice of land reclamation undertaken by states such as the Netherlands, Singapore, the United Arab Emirates, China and Malaysia, land reclamation could be classified into two types according to the location of reclamation activities. The first one is land reclamation carried out within a state's territory on which there is no territorial dispute, for example the land reclamation projects in the Netherlands and Singapore. The second type is land reclamation undertaken in states' occupied features in the sea which are subject of the disputes on title to territory or the dispute on sovereignty rights and jurisdiction. What is going on at the maritime features occupied and controlled by China, Taiwan, Malaysia and Viet Nam in the South China Sea is the best illustration for this type.

In order to avoid misunderstanding, in this thesis, when the term "land reclamation" is used, it means land reclamation in the second type. The author does not intend to recognize or imply that features on which land reclamation is constructed

[4] OSPAR Commission, *Assessment of the Environmental Impact of Land Reclamation* (Biodiversity Series 2008) 4.
[5] Yasser El Sayed Mostaf, 'Environmental impacts of dredging and land reclamation at Abu Qir Bay, Egypt' (2012) 3(1) Ain Shams Engineering Journal 1.

belong to the territory of a certain state or that state has sovereignty or sovereign rights over them by using word "land reclamation".

I. Factual background concerning land reclamation in the South China Sea

1. Location of reclamation works in the South China Sea

The South China Sea is a semi-enclosed sea in Southeast Asia, which extends from the eastern end of the Singapore Strait to the Taiwan Strait. It covers an area of around 3.5 million square kilometers with hundreds of islands, atolls, cays, shoals and other maritime formations.[6] It is bordered by Indonesia, Malaysia and Brunei in the south, by the Philippines in the east and southeast, by China and Taiwan in the north and by Viet Nam in the west. There are two main groups of islands in South China Sea, namely, the Paracel Islands which are situated about 200 miles east Viet Nam and south of China's Hainan Island,[7] and the Spratly Islands (also called 'the Spratlys') which lie between 50 and 350 miles from the Philippine island of Palawan.[8]

All of the current land reclamation projects in the South China Sea have been taken at maritime features located in the Spratlys, which geographically located between 4^{o} and 11^{o} 3' North Latitude and 109^{o} 30' and 117^{o} 50' East Longitude.[9] They caught the attention of international community and legal scholars for the first time since early February 2015 when a commander of the Philippines told reporters that China was engaging in dredging activities at Mischief Reef, about 135 nm from the Philippines' island of Palawan.[10] Surveillance photo and satellite imagery taken after that pointed out that Mischief Reef is not the only feature in the South China Sea which has been reclaiming but also ten other features, namely Cuateron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, South Johnson Reef and Subi Reef, Itu Aba, Sand Cay and West Reef.[11]

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[6] Lu Ning, *Flashpoint Spratly!* (Dolphin Trade Press 1995) 1.
[7] Duk-ki Kim, *Naval Strategy in Northeast Asia: Geo-strategic Goals, Policies, and Prospects* (Frank Cass 2000) 66.
[8] Marwyn S. Samuels, *Contest for the South China Sea* (Methuen 1982).
[9] Dieter Heinzig, *Disputed Islands in the South China Sea* (Institute of Asian Affairs 1976).
[10] Camille Diola, 'South China Sea: Photos Show Intensity of China's Massive Dredging and Reclamation Effort for Mischief Reef' (*Peace and Freedom*) < https://johnib.wordpress.com/2015/04/09/south-china-sea-photos-show-intensity-of-chinas-massive-dredging-and-reclamation-effort-for-mischief-reef/> accessed 15 April 2016.
[11] 'Island Tracker' (*Asia Maritime Transparency Initiatives*) <http://amti.csis.org/island-tracker/> accessed 8 May 2016.

Both China and Viet Nam claim sovereignty over the whole Spratly Islands, including all of eleven reclaimed features in the Spratly Islands by virtue of occupation.[12] Apart from that, the Philippines claims ten features, except Swallow Reef with the reason that they fall within its exclusive economic zone (hereinafter 'EEZ'),[13] and Malaysia claims Swallow Reef only based on the ground that Swallow Reef is within its continental shelf. In brief, land reclamation has been undertaken in disputed areas and overlapping territorial claims among China, Viet Nam, Taiwan, the Philippines and Malaysia.

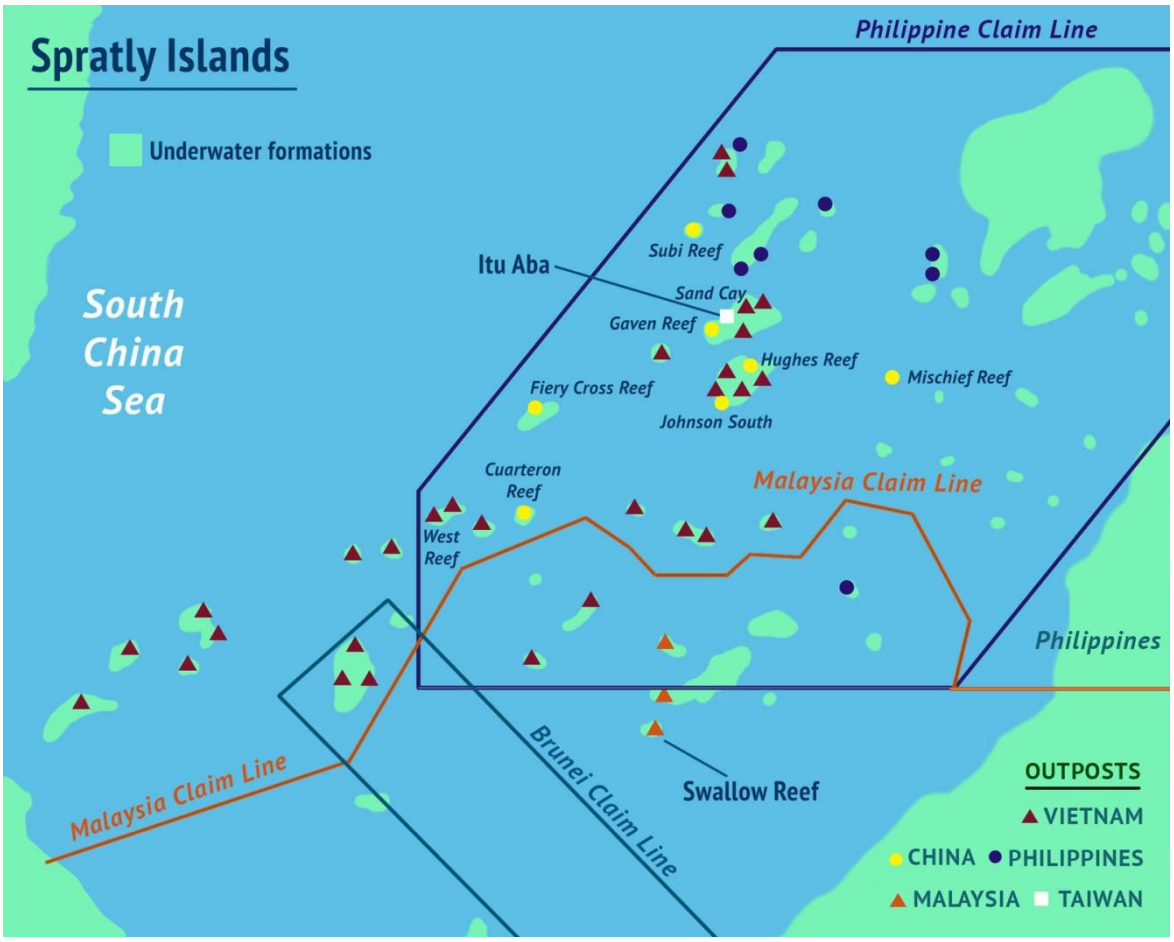

Figure 1. Reclaimed features in the Spratly Islands

Source: Digital Globe**,** CSIS Asian Maritime Transparency Initiative

a. <u>Cuarteron Reef</u>

Cuarteron Reef is a collection of coral rocks, located at the east end of the London Reefs, on the western side of the Spratly Islands. This feature is shaped like a

[12] Daniel J. Dzurek, 'The Spratly Islands Dispute: Who's on First?' (1996) 2(1) IBRU Maritime Briefing, 45.
[13] *Ibid.*

bean with a length of 3nm aligned east–west; it has an area of 8 square kilometres.[14] On the north side of the reef there are some rocks standing 1.6 metres high that do not cover.[15] Cuarteron Reef is now controlled by China as a part of Sansha, and claimed by the Philippines as a part of Kalayaan, Palawan.

b. Fiery Cross Reef

Located to the north of the London Reefs group in the Spratly Islands, Fiery Cross Reef is a steep-to reef, which has a linear shape aligned southwest-northeast direction, with the long axis of 14nm, the maximum width of 4nm, and the total area of 110 km^2.[16] There is a lagoon surrounded by fringing reefs, and several patches of coral uncovered with channels between them, which are 15 to 40 metres deep. At high-tide, the reef is only visible from the water surface by 1 metre.[17] Presently, China is controlling Fiery Cross Reef while the Philippines, Taiwan and Vietnam also have claims on its ownership.

c. Gaven Reefs

Gaven Reefs is a group of two reefs, situated on the western end of the Tizard Bank of Spratly Islands.[18] The larger northern reef, roughly diamond-shape with an area of 0.86 square kilometres dries to 1.2 metres and emerges from water by 1.9 meters at high-tide.[19] The smaller southern reef has an area of 0.67 square kilometres and dries to 1 meter.[20] Both reefs are controlled by China and claimed by Taiwan, the Philippines and Viet Nam.

d. Hughes Reef

Hughes Reef is a part of the Union Banks which is located in the northern Spratly Islands.[21] It is above water only at low-tide.[22] It is controlled by China at this moment while the Philippines claims Hughes Reef as a part of its continental shelf.[23]

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[14] David Hancox, Victor Prescott, 'A Geographic Description of the Spratly Islands and An Account of Hydrographic Surveys amongst Those Islands' (1995) 1(6) IBRU Maritime Briefing 1, 8.
[15] *Ibid* 9.
[16] *Supra* n 14, 13.
[17] *Supra* n 14, 13.
[18] Supra n 14, 8.
[19] *Supra* n 14, 8-9.
[20] *Supra* n 14, 9.
[21] *Supra* n 14, 11.
[22] Jeremy Page, Julian E. Barnes, 'China Expands Island Construction in Disputed South China Sea' (*The Wall Street Journal*, 18 February 2015) < http://www.wsj.com/articles/china-expands-island-construction-in-disputed-south-china-sea-1424290852> accessed 13 May 2016.

e. Johnson South Reef

Johnson South Reef marks the southwest extremity of the Union Banks in the Spratly Islands; it has an area of 7 square kilometres.[24] This reef is U-shaped with the entrance to a shallow lagoon from the north. The American sailing directions report that the edge of the lagoon is defined by white coral while the outer edge of the reef is composed of brown volcanic rocks.[25] Johnson South Reef stands above high water about 1.2 metres.[26] It is currently occupied and controlled by China and claimed by Viet Nam.

f. Mischief Reef

Mischief Reef lies 50 nm east of Union Banks and 129 nm from the Philippines island of Palawan. It falls within the EEZ of Philippines but is currently controlled by China. The reef is roughly circular measuring 3 nm from north to south and 4.2nm from east to west. The reef is awash and dries in patches to 0.6 metres.[27] It is occupied and controlled by China and claimed by Taiwan, the Philippines and Viet Nam.

g. Subi Reef

Situated in the northern Spratly Islands, Subi Reef is in the shape of a diamond with the long axis, aligned east–northeast, measuring 3.7 nm and the shorter axis 2.7 nm.[28] The coral reef is continuous and it surrounds a lagoon which has a maximum width of 1.9 nm.[29] It is above water only at low-tide. Like Mischief Reef, Subi Reef is the subject of sovereignty claim from Taiwan, the Philippines and Viet Nam but controlled by China.

h. Itu Aba

Itu Aba is the largest of naturally formed island in the whole of the Spratly Islands with an area of 500,000 square metres and a length of 1,400 metres.[30] It is supposed to be the only island of the Spratly Islands with fresh ground water.[31] Taiwan

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[23] Republic of the Philippines, Department of Foreign Affairs, No 13-0211, Notification and Statement of Claim (22 January 2013), 7, para 16.
[24] *Supra* n 14, 10.
[25] *Supra* n 14, 10.
[26] Supra n 14, 10.
[27] *Supra* n 14, 29.
[28] *Supra* n 14, 6.
[29] Supra n 14, 6.
[30] *Supra* n 14, 8.
[31] View of the Philippines and Taiwan on this issue is conflict. See Yann-huei Song, 'Is There Drinkable and Topsoil on Itu Alba?' (*Asia Maritime Transparency Initiative*, 25 January 2016) <http://amti.csis.org/is-there-drinkable-water-and-topsoil-on-itu-aba/> accessed 13 May 2016.

occupied this island in 1956. Now it is put under the administrative jurisdiction of Qijin District of Kaohsiung City, Taiwan.[32]

i. Swallow Reef

Swallow Reef is a small reef in the Spratly Islands, covering an area of 14 square kilometres.[33] There are some rocks which stand above water on the east and southeast section of the reef and a small rocky island standing 2 metres high on the south rim of the reef.[34] The Malaysian government opted to build an airstrip, dive resort and military installation on this reef since in 1983 after occupying it.[35] Now it is operated and managed by Malaysia despite the claim on sovereignty from China, Taiwan and Viet Nam.

j. Sand Cay

Sand Cay belongs to Tizard Bank, consisting of its natural footprint of 41,690 square meters.[36] It lies 11.5 kilometers east of the Taiwan-held island of Itu Aba and has an above water elevation of 3.5-3.8 meters at low tide.[37] It was occupied by Viet Nam in 1974 and now is controlled by this state.

k. West Reef

West Reef is an oval coral atoll, falling within the London Reefs group of the western Spratly Islands.[38] The reef has total area of about 40 square kilometres.[39] It dries at its east and west extremities and on the eastern section there is a long narrow cay which stands 0.6 metres above high water.[40] It is controlled by Viet Nam and claimed by China.

[32] Ministry of Foreign Affairs, Republic of China (Taiwan), *Statement on the South China Sea No. 001* (7 July 2015) < http://www.mofa.gov.tw/EnMobile/News_Content.aspx?s=EDEBCA08C7F51C98> accessed 10 April 2016.
[33] Layang Layang, The Malaysia Site < http://www.malaysiasite.nl/layangeng.htm> accessed 13 May 2016.
[34] *Supra* n 14, 20.
[35] *Ibid*.
[36] Sandcastles of their own: Vietnamese expansion in the Spratly Islands' (*Asian Maritime Transparency Initiative*) <http://amti.csis.org/vietnam-island-building/> accessed 10 April 2016.
[37] *Ibid*.
[38] *Supra* n 14, 14.
[39] *Supra* n 14, 14.
[40] *Supra* n 14, 14.

2. States involving in land reclamation in the South China Sea and their reclamation activities

China is the first state to be called when studying land reclamation in the South China Sea because of the massive scale of its reclamation works. In fact, China's reclamation activities in the South China Sea commenced in the 1990s. At that time, China built small constructions at several features such as at Mischief Reef in 1995 and Subi Reef in 1989 but from 2014 and especially in 2015 China has taken its reclamation activities at a massive scale on the total of seven coral features throughout the Spratly Islands, namely Cuateron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, South Johnson Reef and Subi Reef.

Apart from China, Taiwan, Malaysia and Viet Nam have also engaged in land reclamation at their occupied features in the South China Sea. Taiwan began its land reclamation at Itu Aba in April 2014 with a plan of building a $100 million port next to the airstrip on the island.[41] Malaysia engaged in significant construction and reclamation at Swallow Reef after occupying it in 1983.[42] Viet Nam is believed to undertake the reclamation work at West Reef and Sand Cay from August 2011 to February 2015.[43]

From the practice of states involving in reclamation activities in the South China Sea, these activities could be described by two main steps. The first one is the construction of solid bases by using the material extracted from sea floor or supplied from mainland. For example, China used the large cutter-suction dredgers[44] with their drills extended into the seabed to pulverise and extract coral and rock sediment then this material is transported through a floating tube and deposited onto the reef to create dry land. The next step is the erection of structures and installations such as multiple level support buildings, lighthouses, helipads and airstrips, and deployment of "equipment" such as radar and naval guns on the solid bases.

Although the land reclamation taken by China on the one hand and Taiwan, Malaysia and Viet Nam in the other hand at their occupied features are believed to follow the same process, they are incompatible in the nature. First, while Taiwan,

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[41] Anthony H. Cordesman, Steven Colley, *Chinese Strategy and Military Modernization in 2015: A Comparative Analysis* (Rowman & Littlefield, Lanham MD 2015) 36.
[42] Mira Rapp-Hooper, 'Before and after: the South China Sea transformed' (*Asian Maritime Transparency Initiative*, 18 February 2015) <http://amti.csis.org/before-and-after-the-south-china-sea-transformed/> accessed 9 April 2016.
[43] *Ibid.*
[44] Depiction available at http://www.vanoord.com/activities/cutter-suction-dredger, accessed 5 April 2016.

Malaysia and Viet Nam have expanded land mass on the island or reefs which are, at least in part, above water at high tide, China has constructed its reclamation works on fully-submerged reefs. Second, the scale of China's land reclamation at the seven features is enormous in comparison with what Malaysia, Taiwan and Viet Nam have done in Sallow Reef, Itu Aba, Sand Cay and West Reef. For example, although at this moment, China has not completed its reclamation projects yet, 5,580,000 square metres dry land has been added to the two square metres rock of Fiery Cross Reef while China has not undertaken reclamation at one feature but seven features in total.[45] By contrast, Viet Nam is estimated to have added 65,000 square metres to the existing landmass at West Reef and 21,000 square metres to the existing island at Sand Cay,[46] and to December 2015, Taiwan has reclaimed at least approximately 20,234 square metres of land to Itu Aba.[47]

3. Possible purposes of land reclamation in the South China Sea

Massive reclamation works of China at the seven features in the South China Sea recently, particularly at Mischief Reef with the construction of a 3000m airstrip make other states worried about the real purposes of such works in the disputed area. Although China resists depicting them as "maintenance and construction work" with the main purposes to serve civilian, including maritime search and rescue, navigation aid, marine research, and even weather observation,[48] what China is doing in such features seems to serve both civilian and military needs. Indeed, in the statement on 9 April 2015, Chinese spokesperson admitted this by saying that "after the construction, the islands and reefs will be able to provide all-round and comprehensive services to meet various civilian demands besides satisfying *the need of necessary military defense*."[49] Furthermore, in reality, China has constructed a 3000m airstrip in reclaimed land at Mischief Reef. Although China is not the first to build airfield at the occupied features in the Spratly Islands, none of other states' airstrips has ability to accommodate bomber like Chinese

[45] *The Republic of Philippines v. The People's Republic of China* (Pending) (2015) (Final Transcript Day 2 – Merits Hearings) PCA Case No. 2013-19 (hereinafter '**Case between the Philippines and China**') 102-103.
[46] Sandcastles of their own: Vietnamese expansion in the Spratly Islands (*Asian Maritime Transparency Initiative)* <http://amti.csis.org/vietnam-island-building/> accessed on 10 April 2016.
[47] *Supra* n 41.
[48] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 9, 2015* (9 April 2015); Ministry of Foreign Affairs of the People's Republic of China, Wang Yi on the South China Sea Issue At the ASEAN Regional Forum (6 August 2015).
[49] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 9, 2015* (9 April 2015)

one in Mischief Reef.[50] Additionally, China has built two other airstrips in Fiery Cross Reef and Subi Reef. As they are completed, they will constitute a triangle, significantly boosting China's air patrol and interdiction capabilities over the contested waters and features of the Spratly Islands.

Another possible purpose of land reclamation works in the South China Sea could be referred from sovereignty claims over the Spratly Islands. China, Taiwan and Viet Nam make their claims on the basis of occupation. According to judicial practice of international courts and arbitrations in case of territorial acquisition, to establish a valid title to territory through occupation, the intention and will to exercise sovereignty and the manifestation of State activity are necessary elements.[51] By constructing land reclamation at the features in the Spratly Islands, the claimant states act as they are exercising their sovereignty over the features with a belief that reclamation activities are the manifestation of states activity over their occupied features, representing and strengthening their effective control over such features. Regarding Malaysia, since Malaysia claims that Swallow Reef is located within its continental shelf, by carrying out land reclamation at this reef, Malaysia acts as it exercises sovereignty rights and jurisdiction in its continental shelf. In brief, the final purpose of the claimant states' reclamation activities is to assert and advance their sovereignty claims over their occupied features in the South China Sea.

Lastly, it does not come as a surprise when saying that the reason for reclaiming the features in the South China Sea stems from the value of this sea. The South China Sea has indisputably strategic significance to economic development and national security of all states bordering it, including states reclaiming the features in the Spratlys. First, it has strategically geographic location, joining the Southeast Asian states with the Western Pacific and linking the Indian Ocean to the Pacific. It functions as the throat of global sea routes. More than 50 per cent of the world's annual merchant fleet tonnage passes through this sea.[52] Second, the South China Sea is known as one of the biggest energy reserve in the world. It is estimated to contain approximately 11 billion barrels of

[50] 'Air power in the South China Sea' (*Asia Maritime Transparency Initiative)* <http://amti.csis.org/airstrips-scs/> accessed 11 April 2016.

[51] *Territorial Sovereignty and Scope of the Dispute (Eritrea versus Yemen)* (Arbitral Tribunal) (1998) 114 ILR 1, para. 239, 241; *The Minquiers and Ecrehos islands (France/United Kingdom)* (Separate Opinion of Judge Carneiro) [1953] ICJ Rep 66, 46, 63.

[52] Robert D. Kaplan, The South China Sea will be the battleground of the future (*Business Insider UK*, 6 February 2016) http://uk.businessinsider.com/why-the-south-china-sea-is-so-crucial-2015-2?r=US&IR=T accessed 21 March 2016.

oil and 190 trillion cubic feet of natural gas in proved and probable reserves.[53] Third, the sea also holds one third of the entire world's marine biodiversity, thereby making it a very important area for the ecosystem.[54] Fourth, the South China Sea occupies a significant portion in world fisheries production greater than 12 per cent.[55] Five, features in the South China Sea, especially in the Paracel and Spratly Islands are considered to hold great military significance for the coastal states in the area. It could be used as naval bases and platforms for deploying military equipment such as radar, surface-to-air missiles and anti-ship cruise missile. For the said reasons, which state owns this large area of the sea would be able to extend a great influence to the whole area. That is why most of the states bordering the South China Sea provide their claims to a part or almost the sea and occupied features within the sea to take all advantages of this sea.

Furthermore, according to Article 121 of UNCLOS, maritime features can generate entitlements to different legal maritime zones depending on which status they possess, with maximum entitlement of 200 nm of EEZ and continental shelf for islands. Perhaps for this reason, the claimant states has constructed reclamation works at the features they occupied to convert them into islands with the underlying objective of maximizing the water and underlying seabed they control in the South China Sea.

4. Responses from states and international community

China is the claimant state who has constructed its reclamation works at the largest scale and the biggest number of features among four states reclaiming the features in the South China Sea. Therefore, most of the objection and concern for land reclamation in the South China Sea have been driven to China.

Among six parties to the dispute in the South China Sea, the Philippines and Viet Nam are two states who most strongly and continuously protest against China's reclamation activities. On 6 November 2014, Representative of the Ministry of Foreign Affairs of Viet Nam met with Representative of the China Embassy in Ha Noi to deliver a diplomatic note opposing illegal reclamation activities on Fiery Cross Reef and accusing that these activities 'are also in contrary to the Declaration on the Conducts of

[53] South China Sea (*US Energy Information Administration*,7 February 2013) <https://www.eia.gov/beta/international/regions-topics.cfm?RegionTopicID=SCS> accessed 21 March 2016.
[54] Talaue-McManus L, 'Transboundary diagnostic analysis for the South China Sea' *EAS/RCU Technical Report Series No 14*, Regional Coordination Unit, East Asian Seas Programme (Bangkok 2000) 107.
[55] *Ibid*.

Parties in the East Sea (hereinafter 'DOC') and the Viet Nam – China Agreement on Basic Principles Guiding the Settlement of Sea Issues. These activities break the *status quo*, complicate the situation and are not in the interest of peace and stability in the region.[56] The same position is presented by the Philippine Department of Foreign Affair on 20 June 2015.[57] Apart from that, the Philippines has written to the Tribunal in case between it and China to draw the Tribunal's attention to China's massive reclamation projects in the South China Sea.[58]

China's land reclamation also caught the attention from ASEAN countries. In the ASEAN meeting with China and the United States held in Malaysia in August 2015, this issue was marked as a serious concern raising tension and undermining peace in the context of recent development in the South China Sea.[59]

Apart from that, the G7 foreign ministers, in the statement on 15 April 2015, also raised their concern over China's "large-scale land reclamation" in the South China Sea which "change *status quo* and increase the tension" in area.[60] Moreover, at the Shangri-La Forum in Singapore in 2015, US Secretary of Defense, Australian defense minister and Japanese counterparts issued a joint statement expressing strong concern over land reclamation in the South China Sea, pressing for a halt to land reclamation by all claimants and the completion of a code of conduct between ASEAN and China regarding the South China Sea.[61]

II. Some legal issues concerning land reclamation in the South China Sea

Against the interesting factual background of land reclamation activities in the South China Sea as presented above, some legal issues of these activities should be identified in order to consider which one is suitable for seeking judgment of a court or a tribunal provided for in the law of the sea. The judgment if being issued will be basis for

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[56] Ministry of Foreign Affairs of the Social Republic of Viet Nam**,** *Remarks by Foreign Ministry Spokesperson Le Hai Binh on China's illegal reclamation activities* (06 November 2014) <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns141111165232> accessed 04 April 2016.

[57] Department of Foreign Affair of Republic of the Philippines, *DFR Release on 20 June 2015* <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/6519-on-china-s-statement-regarding-construction-in-the-reclaimed-features> accessed 04 April 2016.

[58] *Case between the Philippines and China* (Award on Jurisdiction and Admissibility) (n 45) paras 53,72.

[59] Robert Sutter, Chin-hao Huang, 'China-Southeast Asia Relations: Facing US-led Resistance in the South China Sea' (2015) 17 Comparative Connections: A Triannual E-Journal on East Asian Bilateral Relations 65, 67.

[60] Mira Rapp-Hooper, America's Security Role in The South China Sea, Statement before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, *Center for Strategic & International Studies*, July 2015.

[61] *Case between the Philippines and China* (Award on Jurisdiction and Admissibility) (n 45) 72.

the claimant states in the South China Sea to defuse tension concerning land reclamation among them.

1. Legal status of reclaimed features

Land reclamation in the South China Sea is undertaken at the features in the sea and most claimant states base on the reason of their sovereignty over such features to justify their reclamation activities. Therefore, the rooted problem in this case is who has title to territory over such reclaimed features. To be able to address such a question, it is needed to determine whether such features are capable of appropriation first,[62] or in other words, the legal status of the maritime features must be assessed at the outset[63]. It is well established in international law of territorial acquisition that low-tide elevation cannot be appropriated.[64] In other words, states cannot acquire sovereignty by appropriation over a low-tide elevation. For this reason, it is essential to identify the legal status of the features reclaimed by China, Taiwan, Malaysia and Viet Nam before considering any other legal aspects of land reclamation activities in the South China Sea.

Up to now, legal status of the eleven features reclaimed in the South China Sea has not been agreed upon among the claimant states. While China has not clarified its position regarding the status of maritime features in the South China Sea, including its seven reclaimed features within its so-called "nine dash line",[65] the Philippines submitted to the Tribunal established under Annex VII to UNCLOS that Gaven Reef, Hughes Reef, Mischief Reef and Subi Reef are low-tide elevations within the meaning of Article 13, UNCLOS.[66] During the hearings of the case, the Philippines argues that none of features in the Spratly Islands, including Itu Aba is an island within the meaning of Article 121 (1)(2), UNCLOS.[67] Viet Nam shares the same view on this matter to the Philippines.[68] On contrast, Taiwan states that Itu Aba "indisputably qualifies as an 'island' according to the specifications of Article 121"[69] and submitted its *amicus curiae* to the PCA to assert

[62] *Territorial and Maritime Dispute (Nicaragua v Colombia*) (Merits) [2012] ICJ Rep 688, para 25.
[63] *Case concerning Territorial and Maritime Dispute (Nicaragua v. Honduras)* [2007] ICJ Rep 659, para 135.
[64] *Ibid*, para 206.
[65] China officially showed its so-called nine dash line map for the first time in its Note Verbale No. CML/17/2009 (7 May 2009) to United Nations but it did not clarify the meanings of this line.
[66] *Case between the Philippines and China* (Award on Jurisdiction and Admissibility) (n 45), para 101.
[67] *Supra* n 45, 116.
[68] *Case between the Philippines and China* (n 45) (Award on Jurisdiction and Admissibility) 73, para 184.
[69] *Supra* n 45, 107.

this position.[70] Up to now, the Tribunal has not rendered its Award regarding this issue yet.

Since all states involving in reclamation activities in the South China Sea are parties to UNCLOS, which provides procedures for settling disputes concerning to the interpretation and application of UNCLOS, the issue of legal status of features reclaimed in the South China Sea might be brought to such mechanisms to ask for decision. However the question whether a court or tribunal provided for in UNCLOS has jurisdiction depends on a number of criteria set forth in Part XV of UNCLOS, which are analyzed in chapter III of this thesis, rather than a mere fact that all reclaiming states are parties to UNCLOS.

2. Title to territory of reclaimed features

The question of who has title to territory over reclaimed features is of paramount importance to consider the legitimacy of reclamation activities in the South China Sea. If the features which China, Malaysia, Taiwan or Viet Nam has reclaimed are a part of their territories, whatever these states do at them, including reclamation activities does not lead to a question about the legitimacy of such actions under international law. It is because within its territory, a state enjoys the territorial sovereignty which involves the exclusive right to display the activities of the state.[71] However in the case at hand, the matter of sovereignty over the Spratly Islands, including the reclaimed features is a prolonged dispute among six parties bordering the South China Sea. China, Taiwan and Viet Nam claim sovereignty over Spratly Islands by virtue of occupation while Malaysia and the Philippines base their territorial claims on UNCLOS's provisions.

Normally, a territorial dispute might be resolved by either an agreement among claimant states or by the judgement of a competent court. However, both solutions are highly likely to be impractical in the sovereignty dispute over the Spratlys. This comes as no surprise because China maintains its position of resolving disputes in the South China Sea through bilateral negotiation,[72] while the sovereignty dispute over the Spratly Island

[70] Chinese (Taiwan) Society of International Law, *Amicus Curiae* submission in the matter of Arbitration under Annex VII to the 1982 United Nations Convention on the Law of the sea on the issue of the feature of Taiping island (Itu Aba) pursuant to Article 121(1) and (3) of UNCLOS (23 March 2016) <http://csil.org.tw/home/wp-content/uploads/2016/03/SCSTF-Amicus-Curiae-Brief-final.pdf> accessed 13 May 2016.
[71] Judge Huber, *Island of Palmas case (Netherlands/ USA)* (1928) 2 RIAA, 839.
[72] Liu Zhenmin, Keynote Speech, (The Sub-conference on the South China Sea During the Boao Forum for Asia Annual Conference 2016, Hainan, March 2016).

involves six parties. Furthermore, the matter of sovereignty over reclaimed features in the Spratly Islands falls within China's exclusion of the application of the compulsory binding procedures for the settlement of disputes in Section 2, Part XV of UNCLOS.[73] The problem of land reclamation in the South China Sea therefore cannot be approached from the issue of title to territory over reclaimed features when considering how to force the claimant states to stop their land reclamation activities in the South China Sea by judicial dispute settlement mechanisms.

3. Legitimacy of reclamation activities in the South China Sea

In order to consider the legitimacy of reclamation activities in the South China Sea, in addition to determination of who has sovereignty over reclaimed features, it is needed to identify the obligation of states when they construct land reclamation at the sea in accordance with the law of the sea, particularly UNCLOS. The obligations depend on the location of the reclaimed features as well as the nature of such reclamation activities. In other words, the fact that the reclaimed features are located within the coastal state's territorial sea, EEZ, continental shelf or in disputed areas and reclamation works are regarded as installations, structures or artificial islands would make states bear different obligations under UNCLOS.

For example, within 12 nm from the baseline from which the territorial sea measured, or from a high-tide feature, states enjoy its full sovereignty.[74] It means that states could construct reclamation works or whatever they want to do. Beyond that, states have to consider whether their reclaimed activities fall within exclusive rights and jurisdiction they possess in EEZ and continental shelf under UNCLOS. Insofar as reclamation works is a part of construction, operation and use of artificial islands, installations and structure in EEZ or continental shelf, such reclamation could be undertaken by coastal states as long as the coastal state give due notice to the rights of other states, maintain permanent means for giving waring of their presence and ensure safety of navigation.[75]

<http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1350776.shtml> accessed 17 April 2016.

[73] China's declaration upon the ratification of UNCLOS, 7 June 1996.

[74] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (hereinafter '**UNCLOS**') art 2(1).

[75] *Ibid*, art 60(3), (7).

4. Possible legal effects of land reclamation on the status of reclaimed features in the South China Sea

In case land reclamation in the South China Sea is considered as legitimate activities under international law of the sea, the next issue should be determined is whether such reclamation activities produce any legal effect to the ownership of title on territory as well as the legal status of reclaimed features.

From the perspective of international law on territorial acquisition, land reclamation activities undertaken by some states in the South China Sea recent cannot affect the consideration of the ownership over the reclaimed features in the South China Sea. It is because such activities have undertaken after the critical date of the sovereignty disputes over the Spratlys while it is well established under the case law concerning sovereignty disputes that acts undertaken after the critical date of the disputes will not be taken into consideration.[76]

The critical date is determined by the reference to the moment at which the dispute crystallized.[77] In this case, it is hard to determine the exact moment at which sovereignty disputes over the Spratly Islands crystallized because of the different information provided by the claimant parties on their sovereignty claims and attached evidences. Nevertheless, the sovereignty disputes over the Spratly Islands among China, Taiwan, Viet Nam, the Philippines and Malaysia did happen before reclamation in the South China Sea commenced.

Indeed, the sovereignty disputes over the Spratly Islands among China, Taiwan, Viet Nam, the Philippines and Malaysia do exist because these states have conflicting interests and different legal views on the sovereignty over the Spratly Islands;[78] China and Taiwan claim the whole Spratly Islands as a part of their territory by virtue of occupation, saying that the islands were discovered by Chinese navigators and under administrator of China since the fifteenth century.[79] Meanwhile, Viet Nam maintains its position that in the early seventeenth century, the Vietnamese dynasties (Nguyen Lords

[76] *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia)* [2002] ICJ Rep 625, para 135; *Argentina/Chile Frontier case* (1966) 38 ILR, 10, paras 79, 80; *Case concerning territorial and Maritime Dispute (Nicaragua v. Honduras)* (n 63), para 117; *Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore)* [2008] ICJ Rep 12, paras 32–6.
[77] *Supra* n 63, para 124.
[78] *Mavrommatis Palestine Concessions* (Jurisdiction) [1924] PCIJ Rep Series A No 2, para 11.
[79] Leigh Powell, 'Spratly Islands Dispute (Spratly Case)' (*Trade and Environment Databases (TED) Cases Studies*, May 1994) <http://www1.american.edu/ted/spratly.htm> accessed 17 April 2016.

and Kings, and Tay Son Rulers and Kings) were the first ones to exercise state functions over these uninhabited and distant islands.[80] Over the times, it remains permanent occupation over the part of Spratlys, excluding the largest island in the Spratlys because in 1988, by using armed force, China took control such an island from Viet Nam. The Philippines and Malaysia are later claimant states in the dispute on sovereignty over the Spratly Islands. The Philippines and Malaysia made their first claims in 1975 and 1979 respectively. The Philippines claims eight features in the Spratlys, including all of the reclaimed features are located within their EEZ while Malaysia claims that three features, which it controls, are part of its continental shelf.[81]

From the perspective of the law of the sea, reclamation activities at the eleven maritime features in the South China Sea cannot change the legal status of such features under UNCLOS either. The explanation for this conclusion is given in the next Chapter.

CHAPTER II. THE UNCLOS REGULATIONS CONCERNING LAND RECLAMATION AT THE SEA AND THEIR APPLICATION IN THE SOUTH CHINA SEA

I. Legal status of maritime features

Under UNCLOS, a maritime feature could be identified as an island, a rock or a low-tide elevation. Among which, only islands within the meaning of Article 121 of UNCLOS generate full maritime entitlements, including EEZ and continental shelf while other status cannot do the same thing: rocks within the meaning of Article 121(3) have no EEZ or continental shelf and low-tide elevations have no territorial sea. It should be noted that while UNCLOS provides the definitions of islands and low-tide elevations, it does not define the meanings of rocks; and even when UNCLOS defines islands, it is not always clear to determine whether a certain maritime feature qualifies as an island or not.

1. Islands and rocks

Article 121, UNCLOS provides the legal meanings for both terms "islands" and "rocks" as follow:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high-tide.

[80] Hong Thao Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims' (2012) 1 V JEAIL165, 168.
[81] *Supra* n 80.

> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Accordingly, islands and rocks share four common elements: (i) "naturally formed", (ii) an area of land", (iii) "surrounded by water" and, (iv) "above water at high-tide" because rocks are a subcategory of islands. This follows from the fact that rocks are mentioned in the third paragraph of Article 121 while the title of this article is "island". Therefore, elements of islands defined in the first paragraph of Article 121 apply equally to rocks. By addressing the question whether features can "sustain human habitation or economic life of their own" islands are distinguished from rocks. Accordingly, rocks "cannot sustain human habitation or economic life of their own".[82]

Out of the eleven features reclaimed in the South China Sea, Cuateron Reef, Fiery Cross Reef, Johnson Reef, Itu Aba, Swallow Reef, Sand Cay and West Reef are the features which are above water at high tide. The fact that all of these features are composed of coral cannot prevent them from qualify the element "area of land" since this element should not be interpreted narrowly. Indeed, in *Case concerning Territorial and Maritime Dispute between Nicaragua and Colombia* in 2012, the ICJ decided that "International law defines an island by reference to whether it is 'naturally formed' and whether it is above water at high tide, not by reference to its geological composition ... The fact that the feature is composed of coral is irrelevant."[83] These features are remote and not connected to mainland of any the coastal states, so the third requirement which means that, if an island is somehow connected to the mainland by a sandbar or even through the building of a causeway, the feature presumably will not be considered an island in the legal sense[84] also met. Therefore, the seven features fall within the meaning of Article 121, UNCLOS.

At that time, they can be classified as either islands or rocks, depending on the answer for the question whether they can sustain human habitation or economic life of

[82] UNCLOS (n 74) art 121(3).
[83] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624, para 37.
[84] Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, Cambridge University Press 2015) 65.

their own. Despite differences in the interpretation of the meaning of "sustain human habitation", at least three fundamental conditions are commonly agreed by international law experts in order for a feature to be able to sustain human habitation. They are food, fresh water and living space.[85]

Furthermore, the word "habitation" suggests that a feature to be a rock must have shelter for a group of people, not for a single person alive; and the use of word "sustain" in conjunction with "habitation" indicates that human need to make their residence on feature across a significant period of years. This understanding is consistent with the long history of construction of Article 121 and efforts to impose limitation on the maritime entitlements that small insular features generate. For example, in 1930 Hague Codification Conference, the French delegate, Gidel proposed that an island be required "in its natural conditions that it permits the residence of a stable group of organised people".[86] Lastly, the presence of officials and military personnel, serviced from the outside, in high-tide features does not establish that the features are capable of sustaining human habitation.[87]

In the South China Sea, among the seven high-tide features reclaimed, there is only Itu Aba which is highly likely to be regarded as an island within the meaning of Article 121(1)(2) because it is the only feature in the Spratly Island to be supposed to have fresh water which is a fundamental element to sustain human habitation. However, the evidences provided by Taiwan and the Philippines do not produce the same result. The Philippines in its written submissions and oral pleadings in the case with China before the Tribunal constituted under Annex VII of UNCLOS said that Itu Aba, the largest island of naturally form in the Spratly Islands is not an island but a rock[88] while Taiwan presented in its *amicus curie* submission to the Tribunal the opposite position, claiming that Itu Aba is an island, not a rock.[89] At this time, the Tribunal has not concluded whether Itu Aba is an island under UNCLOS yet however several predictions could be provided. In case Itu Alba does not qualify as an island, it will be classified as a

[85] G. Xue, 'How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks' in Myron H. Nordquist, John Norton Moore, Alfred H.A. Soons, Hak-So Kim (eds) *The Law of the Sea Convention: U.S. Accession and Globalization* (Martinus Nijhoff Publishers 2012) 356.
[86] J.M Van Dyke and R.A. Brooks, 'Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources' (1983) 12 (3-4) *Ocean Development and International Law* 265, 288.
[87] David Anderson, 'Islands and Rocks in the Modern Law of the Sea' in Myron Nordquist, Satya Nandan, Shabtai Rosenne, Michael W. Lodge (eds) *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI (Martinus Nijhoff Publishers 2003) 313.
[88] *Case between the Philippines v China* (n 45), 108.
[89] *Supra* n 70.

rock, and under any circumstances, it generates an entitlement to at least 12 nm of territorial sea.

The rest of the high-tide features reclaimed in the South China Sea, namely Cuateron Reef, Fiery Cross Reef, Johnson Reef, Swallow Reef, Sand Cay and West Reef cannot be considered islands within the meaning of Article 121, UNCLOS. In their natural conditions, they are not capable of sustaining human habitation and economic life of their own. Historical and anthropological evidences prove that they did not have human settlement on it between the first chapter of Genesis and the middle of the 20th century.[90] This is particularly compelling evidence of their non-habitability. To date, although there is the human presence at these features, it has been in form of military occupation, not civilian settlement, and conditions to maintain life there such as fresh water and food are supplied from the outside. This follows from the fact that the natural conditions of the features have not changed. They remain incapable of sustaining human habitation because they lack the fundamental conditions for human to make a residence on. Most notably, they do not have fresh water and enough shelter for a group of people. For example, at the high tide, the largest rock of Mischief Reef is barely enough space to accommodate two men. Furthermore, they itself has neither food nor vital conditions in order to make food. They do not have life-sustaining natural vegetable and soil sufficient for agricultural purposes. Regarding livestock, no animals are naturally present on these features.

When Cuateron Reef, Fiery Cross Reef, Johnson Reef, Swallow Reef, Sand Cay and West Reef are incapable of sustaining human habitation, it is hard to prove that these features meet the requirement of sustaining economic life of their own since the nature of "human habitation" and "economic life" requirements in Article 123(3) of UNCLOS is interrelated. It is difficult to conceive of sustained human habitation without economic life. Moreover, since the combination of a negative verb "cannot" with the disjunctive "or" in the third paragraph of Article 121 of UNCLOS creates a cumulative requirement, in order to avoid being classified as a rock, a feature must be able to sustain both human habitation and an economic life of its own. If a high-tide feature fails either prong, the feature cannot be identified as an island but a rock. These features therefore cannot be considered islands within the meaning of Article 121(1)(2), but rocks within the meaning of Article 121(3) which generate entitlement to territorial sea only.

[90] *Supra* n 45, 97.

2. Low-tide elevations

Article 13 of UNCLOS provides a definition of low-tide elevations that helps distinguish them from islands and rocks. Accordingly, at high tide, low-tide elevations are submerged while islands and rocks are above water. Out of that, low-tide elevations share with islands the characteristic of being "a naturally formed area of land". In brief, a feature is low-tide elevation if it: (i) naturally formed area of land, (ii) surrounded by and above water at low tide and (iii) submerged at high tide.

The Philippines in its submission to the Tribunal argues that Mischief Reef, Gaven Reef, Hughes Reef and Subi Reef qualify all of the conditions.[91] According to *Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst Those Islands*, Mischief Reef, Gaven Reef, Subi Reef and Hughes Reef are all above water at low tide but submerged at high tide.[92] They are composed of coral but this fact does not prevent them from qualify the element "area of land". Additionally, the report namely *Geographical Characteristics and Status of Certain Insular Features in the South China Sea* by Professor Clive Schofield and Professor Emeritus J.R. Victor Prescott, which provide a critical assessment of the geographical characteristics and appropriate categorisation and status of all 49 features identified by the Tribunal in the case between the Philippines and China, classified Mischief Reef, Gaven Reef, Hughes Reef and Subi Reef into the list of low-tide elevations.[93]

Out of the low-tide elevations reclaimed by China, Mischief Reef and Subi Reef are located at a distance of more than 12 nm from any other high-tide feature. Thus, if the Philippines's submission is accepted by the Tribunal, Mischief Reef and Subi Reef will be low tide elevations that fall within the scope of Article 13(2), UNCLOS. They generate no territorial sea, EEZ or continental shelf and are not capable of appropriation or occupation.

For the same condition, if the Tribunal approves the Philippines arguments, Gaven Reef and Hughes Reef will be low-tide elevations within the scope of Article 13(1), UNCLOS because they are both located within 12 nm of the high-tide features, namely Namyit and Sin Cowe respectively. They do not generate a territorial sea, EEZ or

[91] *Case between the Philippines and China* (n 45) (Final Transcript Day 2 – Merits Hearing) 27, 29, 97.
[92] *Supra* n 14, 6, 8-9, 29.
[93] *Case between the Philippines and China* (n 45) (Final Transcript Day 3 – Merits Hearing), 4-5.

continental shelf of their own, but they can serve as basepoints for the measurement of the territorial sea of nearby high-tide features.

3. Possible effects of land reclamation activities on the legal status of reclaimed features

Land reclamation activities at the eleven features in the South China Sea cannot change the legal status of such features under UNCLOS. The phrase "naturally formed" in Article 13 and 121, UNCLOS excludes human intervention during the process of the formation of a feature which qualifies as a low-tide elevation or an island. Consequently, the construction of concrete platforms and large-scale island-building in land reclamation in the South China Sea plainly does not meet this requirement. A man-made concrete platform is not "naturally formed". Therefore, a low-tide elevation cannot be inverted into a "rock" or an "island" merely because it has been subject to some degree of human manipulation. Equally, a "rock" cannot be upgraded to an "island" by human intervention.

II. State obligations on disputed areas in the sea

Disputed areas at the sea are areas over which two or more states claim sovereignty over or over which they make overlapping maritime claims.[94] In the case of the dispute in the South China Sea, the Spratly Islands, including all of the reclaimed features are disputed areas because of the both above-mentioned reasons.

1. State obligations in disputed area due to sovereignty disputes on islands

China,[95] Taiwan, the Philippines,[96] Viet Nam[97] and Malaysia[98] claim sovereignty over a part or the whole of the Spratly Islands although not all of the features in the Spratly Islands are able to be subject of appropriation. From the viewpoint of the

[94] Robert Beckman, 'Disputed Area in the South China Sea' (The 5th International Workshop, The South China Sea: Cooperation for Regional Security and Development, Hanoi, November 2013).
[95] China's Note Verbale CML/17/2009 (n 65).
[96] The Republic of Philippines, Republic Act No. 9522, An Act to Amend Certain Provisions of Republic Act No. 3046 As Amended by Republic Act 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes (10 March 2009) <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/phl_2008_act9522.pdf> accessed 10 April 2016.
[97] The Permanent Mission of the Socialist Republic of Vietnam to the United Nations, Note Verbale No. 240HC-2009 (18 August 2009) <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf> accessed 10 April 2016.
[98] Marwyn S. Samuels, *Contest for the South China Sea* (Methuen 1982) 82; *Peta menunjukkan sempadan perairan dan pelantar beau Malaysia* [Map showing the territorial waters and continental shelf of Malaysia] (Kuala Lumpur: Directorate of National Mapping Malaysia, 1979).

acquisition of sovereignty, "it has never been disputed that islands... are subject to the rules and principles of territorial acquisition" while low-tide elevations cannot be "fully assimilated with islands or other land territory."[99] It means that low-tide elevations cannot be appropriated[100] or claimed sovereignty over. As analyzed in the previous part, if four out of the eleven features reclaimed in the Spratly Islands are low-tide elevations as submitted by the Philippines to the Tribunal under Annex VII of UNCLOS in case with China, they will be excluded from the disputed area due to sovereignty disputes on islands reclaimed in the Spratly Islands. The seven features left are the disputed area.

Regrettably, UNCLOS provides no specific provision governing the rights and obligations of claimant states in disputed areas due to sovereignty claims over the same islands and the same maritime zones generated from them. However, this does not mean that the states reclaiming the features in such disputed area are released from the general obligations under international law. The general obligations including the obligation to not use force or threat to use of force[101] and obligation to resolve disputes by peaceful means[102] are bound all states and they exist independently of the location of the disputes. The claimant states in case of land reclamation in the Spratly Islands are not exception for these obligations.

2. State obligations in disputed area due to overlapping EEZ and continental shelf claims

The Spratly Islands, including ten out of the eleven features reclaimed is not only the subject of the sovereignty disputes among China, the Philippines and Viet Nam but also located in the area of overlapping claims on EEZ and continental shelf of these parties. China claims "sovereignty over the island in the South China Sea and the adjacent waters, and enjoys sovereignty rights and jurisdiction over the relevant waters as well as the seabed and subsoil" within its so-call the nine-dashed line (the pink line in the Figure 2).[103] It is not clear about China's position on the significance of this line. However, the phrase "sovereignty rights and jurisdiction over the relevant waters as well as the seabed and subsoil" is similar to words in order to describe the rights exercised by coastal states in their EEZ and continental shelf in accordance with UNCLOS. Besides,

[99] *Case concerning maritime delimitation and territorial question between Qatar and Bahrain (Qatar v. Bahrain)* (Merit) [2001] ICJ Rep 40, para 206.
[100] *Territorial and Maritime Dispute (Nicaragua v. Colombia*) (n 83) para 641.
[101] *Supra* n 1
[102] Charter of the United Nations (n 1) art 2(3).
[103] China's Note Verbale No. CML/17/2009 (n 65).

China also clearly claims that it is entitled to a 200-mile EEZ and continental shelf from the Spratly group as a whole.[104] Therefore, the nine-dashed line may indicate China's maritime boundary.

Unlike China, Viet Nam has not clarified the entirety of its continental shelf yet. In its Submission to the Commission on the Limits of the Continental Shelf concerning the out limits of its continental shelf beyond 200 nm, Viet Nam clarified that continental shelf that is the subject of the Submission is not a subject of any overlap and dispute.[105] This submitted continental shelf does not include the Spratlys. This could be interpreted that Viet Nam has not submitted the whole of its continental shelf in the Submission to the Commission on the Limits of the Continental Shelf (hereinafter 'CLCS') yet, but submitted the part which does not overlap or conflict with any other states' maritime zones. Meanwhile, in the map of proposed petroleum concession blocks that Ha Noi drew up in the 1970s,[106] the area of the EEZ and continental shelf that Viet Nam can draw encompasses the Spratlys (the area limited by the yellow line in the Figure 2). Although Viet Nam considers that features of the Spratly Islands mentioned in case between the Philippines and China cannot generates EEZ or continental shelf of their own,[107] the maritime zones which China claims still overlaps with the territorial water generated by the islands in the Spratly Islands over which Viet Nam claims title to territory.

In contrast to China and Viet Nam, the Philippines has pointed out the definite geographical coordinates showing the features in Kalayaan Island Group (hereinafter 'KIG') (a part of the Spratly Islands) over which it claims sovereignty.[108] It also claims that the continental shelf of the KIG (area bordered by the brown line in Figure 2) is a natural prolongation of its island of Palawan.[109]

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[104] The Permanent Mission of the People's Republic of China to the United Nations, Note Verbal No. CML/8/2011 (14 April 2011) <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf> accessed 20 April 2016.

[105] Socialist Republic of Viet Nam, Submission to the Commission on the Limits of the Continental Shelf, Partial Submission in respect of Viet Nam's Extended Continental Shelf: North Area (VNM-N), CLCS/ 64 (7 May 2009), 3.

[106] Mark J. Valencia, Jon M. Van Dyke, Noel A. Ludwig, *Sharing the Resources of the South China Sea* (University of Hawaii Press 1999) 11-12.

[107] *Case between the Philippines and China* (n 45) (Award on Jurisdiction and Admissibility) 73, para 184.

[108] The Republic of Philippines, Presidential Decree No. 1596 Declaring Certain Area Part of the Philippine Territory and Providing For Their Government and Administration.

[109] Mark Valencia, Jon M. Van Dyke, Noel A. Ludwig, *Sharing the Resources of the South China Sea* (Kluwer Law International, 1997) 35.

Apart from that, Swallow Reef is located in the disputed area due to overlapping claims on the EEZ and continental shelf of China and Malaysia. In 1979, Malaysia published a map called *Peta Baru Menunjukkan Sempadan Perairan dan Penlantar Benua Malaysia* which defines the limits of its continental shelf (the blue line in Figure 2). Swallow Reef is one of five features in the Spratly Islands located within that limits.[110] In brief, all the features reclaimed in the Spratly Island are situated in the area of overlapping claims on the EEZ and continental shelf either among China, Viet Nam and Philippines or between China and Malaysia.

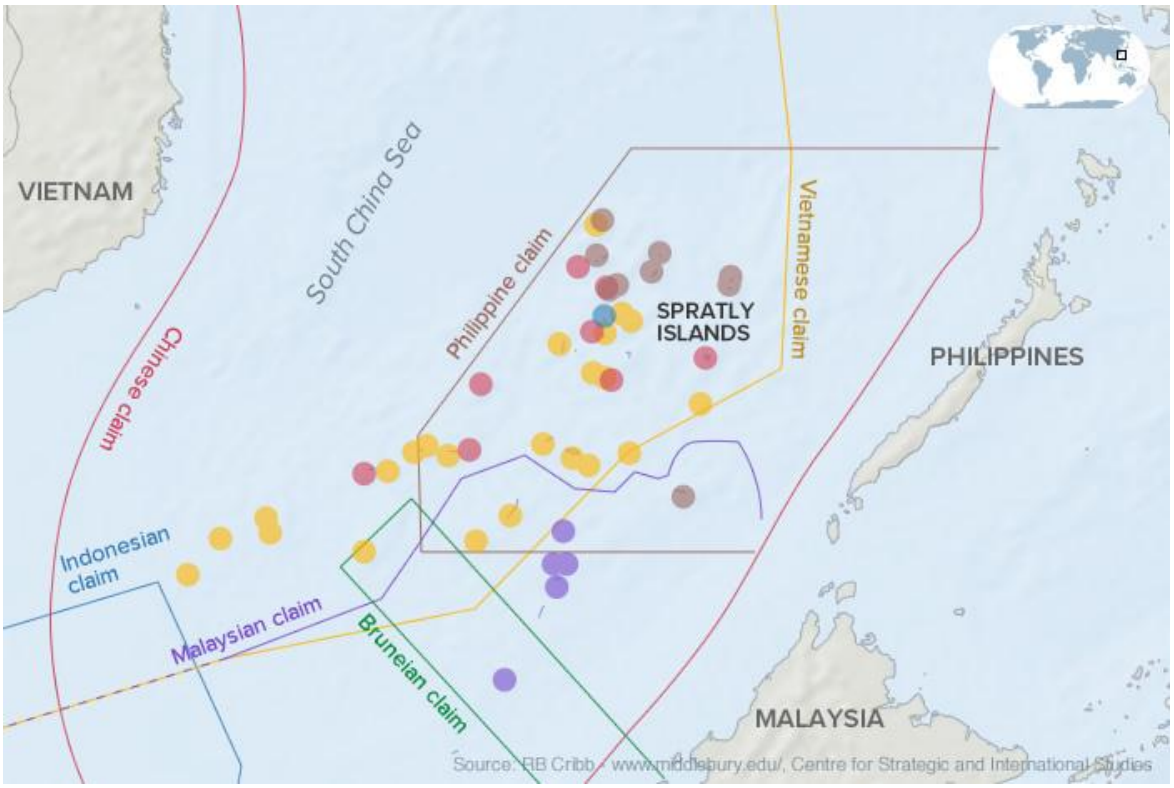

Figure 2. Overlapping claims on the EEZ and continental shelf in the South China Sea

Source: Digital Globe**,** CSIS Asian Maritime Transparency Initiative

Article 74(3) and 83(3) of UNCLOS impose two obligations upon the coastal states in un-delimited maritime zones owing to the overlapping claims on EEZ or continental shelf, namely obligation to cooperation and obligation to exercise self-restraint before reaching an agreement on delimitation of the EEZ or continental shelf. These two obligations also apply to China, Viet Nam and Malaysia because they have

[110] Mark J Valencia, *Malaysia and the Law of the Sea* (Malaysia: Institute of Strategic and International Studies 1991) 66.

undertaken reclamation activities at the features in the overlapping EEZ and continental shelf.

In the context of Article 74(3) and 83(3), aim of the first obligation is to facilitate provisional arrangements among interested parties. It requires states to 'enter into negotiations with a view to arriving at an agreement and not merely go through a formal process of negotiation'[111] and in good faith,[112] or in order words, to employ "every effort to enter into provisional arrangements of a practical nature".[113] Therefore, unilateral activities without consulting or informing relevant parties would be considered as a breach of the first obligation. In case of land reclamation in the South China Sea, China fails to fulfill the first obligation since China maintains the position that it is unnecessary to inform any other states of what it has done at the features over which it has sovereignty.

Concerning the second obligation, in order to fulfil it, states refrain from acts that 'jeopardise or hamper the reaching of the final agreement.'[114] State practice indicated that acts that jeopardise or hamper the reaching of the final agreement comprises activities that may alter *status quo* of disputed areas, endanger to result of negotiation or natural resources, particular unrenewable natural resources in disputed areas.[115] To be more specific, they include actions that cause 'physical damage to the seabed or subsoil',[116] or 'permanent physical change to marine environment'[117] and activities such as the establishment of installation or structures in disputed areas or deployment of military forces to threat against structures or installations falling out of the scope of national jurisdiction as well as actions irreparably prejudice the maritime environment and living and non-living resources.[118]

What China has taken in the area of the reclaimed features seems to be inconformity with this obligation. In order to have materials for fill in and enlarge the surface of the features, China has utilized heavy equipment to break apart coral and rocks in the sea floor. These actions do not happen in one feature but in the seven features at a

[111] *North Sea Continental Shelf (Germany v Denmark)* [1969] ICJ Rep 3, para 85(a).
[112] *Guyana/Suriname Arbitration* (2007) 8 PCA Award Series 1, para 461.
[113] UNCLOS (n 74) art 74(3), 83(3).
[114] UNCLOS (n 74) art 74(3)
[115] S. Jayakumar, Tommy Koh, Robert Beckman, *The South China Sea Disputes and Law of the Sea* (Edward Elgar Publishing 2014) 218.
[116] *Guyana/Suriname Arbitration* (n 112) para 467.
[117] *Aegean Continental Shelf (Greece v. Turkey)* (Interim Protection, Order) (1976) ICJ Rep 3, para 30.
[118] *Supra* n 115, 218 -220.

large scale. Consequently, the seabed and the coral which constitute the characteristic of the maritime environment of the South China Sea are destroyed. Furthermore, living and non-living resources around these reclaimed features are also affected adversely because the coral reefs are home to thousands of species.[119]

III. Protection and preservation of the maritime environment

The South China Sea is identified as a large marine ecosystem in the world with the enormous diversity of marine fishes and reef-building coral species, notably found in the Spratly Islands.[120] Furthermore, it is reported to be safe harbor for some of the last viable population of highly threatened species.[121] In order to constitute such diversity, coral reefs play a crucial role. Indeed, coral reefs functioning as important spawning, nursery, breeding and feeding areas for fish stocks and other marine species while assisting in monitoring changes in the state of the maritime environment and climate change.[122] The protection and preservation of the maritime environment of the South China Sea therefore, is of paramount importance, particularly in the context that massive land reclamation has been taken in the coral reefs of the Spratly Islands and harmfully affected to the existence of these coral reefs.

1. Obligation to protect and preserve the maritime environment

As any state party to UNCLOS, China, Malaysia and Viet Nam have a duty to protect and preserve the maritime environment. This obligation is enshrined in Article 192, an article regarded as the chapeau of Part XII, UNCLOS. It covers areas within national jurisdiction and beyond national jurisdiction. Therefore, it does not matter where these states have taken reclamation works in the sea, within or beyond its national jurisdiction, this obligation still applies. Furthermore, this obligation does exist independently on deciding which party has sovereignty over the reclaimed features in the Spratly Islands. Article 194 provides more details for implementing the obligation to protect and preserve the maritime environment. Accordingly, states shall take all

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[119] Reaka-Kudla ML, 'The Global Biodiversity of Coral Reefs: A Comparison with Rain Forests' in Reaka-Kudla ML and others (eds), *Biodiversity II: Understanding and protecting our biological resources* (Joseph Henry Press 1996) 83–108.

[120] Wilkinson, C. and others *South China Sea, GIWA Regional assessment 54* (University of Kalmar 2005) 18-19.

[121] Mora C, Caldwell IR, Birkeland C, McManus JW, 'Dredging in the Spratly Islands: Gaining Land but Losing Reefs' (2016) 14(3) PLoS Biol <http://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.1002422> accessed 9 May 2016.

[122] F. Moberg and C. Folke, 'Ecological goods and services of coral reef ecosystems' (1999) 29(2) Ecological Economics 215.

necessary measures to prevent, reduce and control pollution of the maritime environment from any source.[123]

This obligation is also confirmed by International Tribunal on the Law of the Sea (hereinafter 'ITLOS') in *Case concerning land reclamation by Singapore in and around the straits of Johor* between Malaysia and Singapore.[124] Malaysia alleged that Singapore's reclamation works would adversely affect the maritime environment and coastal areas as well as Malaysia persons and entities around strait of Johor. In it Order dated 8 October 2003, ITLOS stated that Singapore was not allowed to conduct its land reclamation in ways that might cause serious harm to the maritime environment,[125] or in other words, Singapore was obliged to protect and preserve the maritime environment. Apart from that, the recent award in the *Chagos* arbitration also highlighted this obligation and explained that Article 194 covers the conservation and preservation of marine ecosystems, including coral reefs.[126]

The South China Sea is home to one of the largest and most productive coral reef ecosystem in the world.[127] Dredging and filling activities in land reclamation by countries in the South China Sea lead to considerable losses of, and perhaps irreversible damages to, unique coral reef ecosystem here.[128] Little wonder, in order to have materials for constructing solid bases above the features in the Spratlys, China has used large cutter-suction dredgers to drill into the sea floor. When the teeth of drills rotate, the coral and rock in the seabed are broken apart and extracted. Consequently, reefs are ecologically degraded and denuded of their structural complexity and the seafloor is disturbed.[129] It means that the coral under the seven features as well as the whole coral system of the Spratly Islands are destroyed. Even where the reef itself is not directly destroyed, the sedimentation caused by the large-scale works and the disturbance of the seabed may eventually smother the coral, depriving it of sunlight and the ability to feed and grow. As a result, coral reef cannot exist in the area above which land reclamation

[123] UNCLOS (n 74) art 194(1).
[124] *Case concerning land reclamation by Singapore in and around the strait of Johor (Malaysia v. Singapore)* (Provisional Measure) (Order) (2003) ITLOS Case No 12, 27, para 106.
[125] *Ibid*, 28.
[126] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom),* UNCLOS Annex VII Tribunal, Award (2015) para 538.
[127] Kent E. Carpenter. PhD., Eastern South China Sea Environmental Disturbances and Irresponsible Fishing Practices and their Effects on Coral Reefs and Fisheries (2014), 3-9.
[128] *Supra* n 121.
[129] *Ibid.*

has been undertaken. This means that China has failed to fulfil its obligation to protect and preserve the maritime environment under Article 192 and Article 194 of UNCLOS.

Other states reclaiming the features in the South China Sea are also bound to this obligation however because the information on the methods they apply to create land above the reefs is not available, it is hard to conclude whether they break the obligation or not.

2. Obligation to cooperation for the protection and preservation of the maritime environment

In regard to the cooperation for the protection and preservation of the maritime environment, UNCLOS provides two articles. While Article 123 applies to a specific group of states, namely states bordering an enclosed or semi-enclosed sea and it is not a mandatory obligation, Article 197 requires all states to the Convention to cooperate both globally and regionally for the protection and preservation of the maritime environment. The cooperation in accordance with this Article 197 is not only a mandatory obligation of UNCLOS but also a fundamental principle in the prevention of pollution of the marine environment under general international law.[130] This obligation is fulfilled by formulating and elaborating international rules, standards and recommended practices and procedures consistent with the Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.[131] Since the South China Sea is a semi-enclosed sea, Article 123 and Article 197 both apply.

More important, this obligation is confirmed by ITLOS to apply in case of land reclamation in the sea. In the *Case concerning land reclamation by Singapore in and around the straits of Johor* Singapore was under duty to cooperate with Malaysia to conduct study determining the effects of Singapore's land reclamation works and proposing measures to deal with any adverse effects of such land reclamation, to exchange information on and assess risks of Singapore's land reclamation work. [132] It was also required to make consultation and provide information to Malaysia at an early stage. The same obligation should be imposed upon the states involving in land reclamation in the South China Sea. Despite this, there is little evidence concerning the

[130] *The MOX Plant case (Ireland v United Kingdom)* (Provisional Measures) (Order) (2001) ITLOS Case No 10, para 82.
[131] UNCLOS (n 74) art 197.
[132] *Case concerning land reclamation by Singapore in and around the strait of Johor (Malaysia v. Singapore)* (n 124) 27, para 106.

cooperation of states bordering the South China Sea on matters of environmental protection in this sea in reality. Some cooperative activities could be recalled such as the 2002 DOC, the Philippines-Viet Nam Joint Research in the South China Sea 1996-2007 and UNEP Regional Seas Programme. However, none of which is designed to concentrate on protection of the marine environment or provide practical activities or initiatives for the cooperation in protection of the marine environment of the South China Sea. Instead, they only insert a declaration to undertake cooperative activities for marine environment purposes and the question of how and at which degree of this cooperation is implemented depends on good will of the participating states. Furthermore, there is no agreement is designated as a cooperation in order to contain adverse effects due to land reclamation at the features in the Spratly Islands. Neither are consultation and information about land reclamation activities in such features given in advance. Therefore, states, which have undertaken reclamation activities in the South China Sea, fail to comply with the obligation to cooperation for the protection and preservation of the South China Sea.

3. Obligation to conducting an environment impact assessment

Environmental impact assessment is defined as 'a national procedure for evaluating the likely impact of a proposed activity on the environment'[133] (hereinafter 'EIA'). In case of land reclamation, states cannot release themselves from obligation to undertake an EIA, regardless of where reclamation undertaken, in land or in the sea. This obligation was stressed in both customary international law[134] and treaty law.[135] It is applied to activities under the jurisdiction of a certain state which may cause substantial pollution or significant harmful changes to the environment. Therefore, it does exist irrespective of whether such activities taken, within or beyond national territory.

[133] Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991) 30 ILM 800, art 1(vi).
[134] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep 14, para 204; *Responsibilities and Obligation of States Sponsoring Persons and Entities with respect to Activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber) (2011) ITLOS Case No 17, para 145.
[135] UNCLOS (n 74), art 206; Protocol concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (1999 Aruba Protocol) (adopted 6 October 1999 and entered into force13 August 2010) art VII (2); Protocol to Kuwait Regional Convention for the Protection of the Environment against Environment from Land-Based Sources (adopted 21 February 1990, entered into force 2 January 1993) art VIII(1); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) (entered into force 17 January 2000), art 7(1), Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (adopted 22 September 1992), art 6(a).

Although "it is for each state to determine in its domestic legislation…the specific content of the EIA required in each case",[136] some treaties expand the scope of this obligation to the extent of not only evaluating potential impact of planned activities but also proposing protection measures, evaluating their effectiveness and identifying priority for protective action.[137] In case of UNCLOS, in addition to obligation to assess the potential effects of planned activities on the marine environment, Article 206 imposes upon states a follow-up obligation which requires states to publish the result of such assessment in a manner to make it available to all states.[138]

In the South China Sea, among states reclaiming the maritime features in the Spratly Islands, China's reclamation activities surely harm to the ecosystem and biodiversity of the South China Sea because using large rotating drills in the seabed has destructed coral reef complexity and sedimentation of the sea floor in and around such features, resulting in the significant harmful changes of the South China Sea's environment. Therefore, according to Article 205 and 206, UNCLOS, China is obliged to conduct assessment of potential effects of its reclamation activities and publish the result of the assessment. Up to now, there is simply no evidence that China has carried out such an EIA. Thus, it fails to act pursuant to Article 206, UNCLOS.

CHAPTER III. POSSIBILITY OF INVOKING DISPUTE SETTLEMENT MECHANISMS IN CASE OF LAND RECLAMATION IN SOUTH CHINA SEA UNDER UNCLOS

The fundamental principle to resolve international disputes is peaceful dispute settlement. In order to implement this principle, states to the dispute may choose different means of dispute settlement provided for in Article 33(1) of the Charter of United Nation (hereinafter 'UN'), in which although it is hard to invoke a judicial mean, this mean has legally binding effect on states to the dispute and therefore, it can resolve the dispute completely. The major obstacle to invoke this mean of dispute settlement is consent among states to dispute to submit their dispute to a same competent authority. In other words, 'it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to

[136] *Pulp Mills on the River Uruguay* (n 134) para. 205.
[137] OSPAR Convention (n 135) art 6(a); Tanaka (n 84) 285.
[138] UNCLOS (n 74), art 206, 205; OSPAR Convention (n 135) art 6(a).

arbitration, or to any other kind of pacific settlement.'[139] This means that regarding disputes on the South China Sea in general as well as disputes resulting from land reclamation at the maritime features in the South China Sea, international judicial dispute settlement mechanisms can be invoked only when states to the dispute, namely China, the Philippines, Viet Nam, Malaysia and Brunei reach a consent to submit their disputes to a certain dispute settlement authority.

The expression of this consent might be confirmed through: (i) a special agreement, (ii) a clause in a treaty, or (iii) a unilateral declaration.[140] All of five states to the dispute do not conclude any agreement or provide any unilateral declaration on an agreed dispute settlement mechanism in regard to the disputes of the South China Sea, including disputes resulting from land reclamation. Regarding clauses of treaties, ASEAN member states, including Viet Nam, the Philippines, Malaysia and Brunei concluded the *ASEAN protocol on enhanced disputes settlement mechanism in 2004* in which a common dispute settlement mechanism is provided. The subject of this mechanism is however not maritime disputes but economic disputes.[141] China and ASEAN member states also agreed on a common dispute settlement mechanism. It is arbitral tribunals established by Senior Economic Officials Meeting with the purpose of resolving disputes arising out of the *Agreement on Dispute Settlement mechanism of the framework agreement on comprehensive economic co-operation between China and ASEAN*. Other agreements among disputant states do exist but they do not provide any choice of judicial dispute settlement mechanism. For instance, *Tripartite Agreement for Joint Marine Seismic Understanding on Certain Areas in the South China Sea among China, the Philippines and Viet Nam* in 2005 indicates that disputes on implementation and interpretation of the agreement are dealt with by consultation,[142] or *Agreement between China and Viet Nam on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves of the two Countries in the Bac Bo Gulf* also states that disputes relating to implementation and interpretation the agreement shall be

[139] *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Rep Series B No 5, para 33.
[140] Frequently Asked Questions, *International Court of Justice*, <http://www.icj-cij.org/information/index.php?p1=7&p2=2> accessed 23 April 2016.
[141] ASEAN Protocol on Enhanced Disputes Settlement Mechanism (adopted 29 November 2004), Preamble.
[142] Tripartite Agreement for Joint Marine Seismic Understanding on Certain Areas in the South China Sea, (14 March 2005) art 10.

settled through friendly consultations and negotiations.[143] In brief, there is no clause of treaties among claimant states separately introducing a mechanism for resolving disputes in the South China Sea.

Nevertheless, UNCLOS, to which Viet Nam, China, Malaysia, the Philippines and Brunei are parties, provides compulsory procedures for settlement of disputes concerning the implementation and interpretation of UNCLOS. However this does not means that such procedures are able to apply to all types of the South China Sea's disputes. It is because member states to the Convention are allowed to make declarations of excluding the application of compulsory binding procedures for dispute settlement under the Convention.[144] Since China made such a declaration, using the procedures for settlement of disputes in the South China Sea with China becomes more difficult depending on different elements as analysed as follows.

I. Dispute settlement mechanisms under UNCLOS and the choice of dispute settlement mechanism in case of land reclamation in the South China Sea

1. Dispute settlement mechanisms under UNCLOS

Part XV of UNCLOS is designated to introduce procedures for settling disputes concerning the interpretation and application of the Convention. This part is composed of three sections. Section 1 sets out general provisions, including those aimed at reaching agreement on settlement disputes through negotiations and other peaceful means. Section 2 provides compulsory procedures entailing binding decisions, which apply where no settlement has been reached by recourse to Section 1 but are subject to Section 3, which lays out number of specific limitations and exceptions to jurisdiction.[145] The compulsory procedures of Section 2 includes: (i) ITLOS, (ii) International Court of Justice, (iii) an arbitral tribunal constituted in accordance with Annex VII to UNCLOS, and (iv) a special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS.[146] States to the disputes are free to choose one of the four above-mentioned mechanisms. However before doing so, member states to UNCLOS are required to fulfil an obligation to exchange views pursuant to Article 286, Section 1.[147] This is a newly fundamental

[143] Agreement between China and Viet Nam on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves of the two Countries in the Bac Bo Gulf (adopted 25 December 2000, entered into force 30 June 2004), art. X.
[144] UNCLOS (n 74), art 310, 298(1).
[145] UNCLOS (n 74), art. 286.
[146] UNCLOS (n 74), art. 287(1).
[147] UNCLOS (n 74), art. 286(1).

principle on dispute settlement in UNCLOS. Others are well-established principles such as principle of peaceful dispute settlement and principle of free choice of means of dispute settlement which are recalled in Article 270 and 280 respectively.

1.1. International Court of Justice

The International Court of Justice (hereinafter 'ICJ'), one of the most important organs of the UN, was set up in 1945 and started to operate from April, 1946. It functions in accordance with the provisions of the ICJ's Statute which is a part of the UN's Charter and the Regulation of Procedures enacted by the Court. ICJ has 15 judges elected by the UN's General Assembly and UN's Security Council among persons of high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence in international law.[148] Normally, all of 15 judges deal with the disputes but a chamber of five judges can be constituted for the speedy dispatch of business.[149]

ICJ has competence in resolving the disputes and providing advisory opinion on legal questions.[150] While the judgment of the Court is final and binding on parties to the disputes, advisory opinion of the Court is non-binding. Only states are able to bring their disputes to ICJ. This is stated clearly in Article 34, paragraph 1 of ICJ's Statute. On the contrary, in regard to the request for an advisory opinion, states are not the subject of this procedure but the UN's bodies authorized by or in accordance with the UN's Charter.[151] They are the General Assembly and Security Council of the UN.[152] Apart from that, specific organs of the UN are also able to request advisory opinion from ICJ provided: (i) the request receive the permission from General Assembly and (ii) legal questions are within the activities of such organ. If a state desires to ask for advisory opinion from the ICJ, it is necessary to ask indirectly through an authorized organ of the UN. For instance, Serbia asked ICJ for advisory opinion on the legality of the 2008 Kosovo's unilateral declaration on independence in accordance with international law through the General Assembly.[153]

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[148] Statue of International Court of Justice (adopted 24 October 1945) 188 UNTS 137, art 2.
[149] *Ibid*, art 29.
[150] *Supra* n 148, art 34, 65.
[151] *Supra* n 148, art 65(1).
[152] *Supra* n 148, art 65; UN Charter (n 1), art 96(1).
[153] Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo's Independence, Press Release (*United Nations*, 8 October 2008) < http://www.un.org/press/en/2008/ga10764.doc.htm> accessed 13 May 2016.

1.2. International Tribunal on the Law of the Sea

ITLOS is an international judicial mechanism designated to settle disputes on the law of the sea in UNCLOS. It is composed of 21 members taking nine-year term of office,[154] elected at the meeting of State Parties by secret ballot from the list of nominated person by State Parties.[155] Normally, a disputes submitted to the Court is heard and determined by 11 judges, however a chamber of five elected members can be constituted for the speedy dispatch of business in accordance with a summary procedure.[156]

The competence of ITLOS encompasses: (i) hear and determine the disputes, (ii) issue advisory opinion and (iii) decide provisional measures. Regarding the competence in hearing and determining the disputes, in addition to member states, non-state entities described in Part XI or which submitted an agreement on invoking ITLOS agreed by all member states are also able to invoke the Tribunal to resolve their disputes concerning the law of the sea. It is noteworthy that the meanings of term "member states" used in UNCLOS cannot be interpreted narrowly. It includes not only states but also international organizations and territories which enjoy full internal self-government.[157] Thus, in comparison to the ICJ, entities which can invoke ITLOS are expanded, including non-state entities. Generally, ITLOS has jurisdiction to decide on all disputes concerning the interpretation and application of the Convention. This jurisdiction is however limited by Article 297 which lists out limitation in regard to disputes on fishing and marine scientific research and by Article 298 which lays out exception of application of Section 2, Part XV.

Concerning the competence in providing advisory opinion, the request for such advisory opinion opens to whatever body authorized by or in accordance with the agreement to make the request to the Tribunal.[158] The word "body" here can refer to both organizations and states which are authorized by treaties related to the purposes of the Convention to do so.

Regarding the last competence, ITLOS may prescribe provision measures upon the request of a party to the dispute if a dispute has been duly submitted to it and if it

[154] UNCLOS (n 74), Annex VI, art 2& 5(1).
[155] UNCLOS (n 74), Annex VI, art 4.
[156] UNCLOS (n 74), Annex VI, art 15.
[157] UNCLOS, (n 74) art 305.
[158] ITLOS, Rules of the Tribunal, ITLOS/8, 17 March 2009, art 138(2).

considers that *prima facie* it has jurisdiction under Part XV or Part XI, section 5, of the Convention in order to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.[159] Besides, ITLOS may also prescribe provisional measures in case of pending the constitution of an arbitral tribunal to which a dispute is being submitted if within two weeks from the date of a request for provisional measure, parties to the disputes do not agree to submit the request to another court or tribunal, and the Tribunal considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires. Provisional measure may be modified or revoked as soon as the circumstance justifying them have changed or ceased to exist.[160]

1.3. Arbitral Tribunal established pursuant to UNCLOS

Arbitral tribunals constituted in accordance with UNCLOS includes: (i) an arbitral tribunal constituted in accordance with Annex VII to UNCLOS, and (ii) a special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS. Both tribunals are established after disputes arising and automatically dissolved after the disputes settled.

a. Arbitral tribunal established under Annex VII, UNCLOS

Arbitral tribunal constituted in accordance with Annex VII to UNCLOS is composed of five members elected from the list of arbitrators of UNCLOS drawn up by the UN's Secretary-General on the nomination of state parties to UNCLOS. Each of parties to the dispute appoints a member from that list; three other members are appointed by the agreement between the parties, out of which, the President of the Tribunal is chosen by the parties. If the parties fail to appoint three arbitrators or the President of the Tribunal, they can request the President of ITLOS to make necessary appointments. If the President of ITLOS fails to do so, the appointment shall be made by the next senior member of ITLOS who is available and is not a national of one of the parties.[161]

The arbitral tribunal constituted in accordance with Annex VII to UNCLOS has competence in disputes arising out of the interpretation and application of UNCLOS if: (i) the parties to the dispute declare that they accept the Tribunal as a mean of dispute

[159] UNCLOS (n 74), art 290(1);
[160] UNCLOS (n 74), art 290(2).
[161] UNCLOS (n 74), Annex VII, art 3.

settlement, (ii) agreement on settlement of the dispute by the Tribunal in form of a arbitration agreement or arbitral clause, (iii) the parties to dispute do not agree on the same procedure for dispute settlement.

b. Special arbitral tribunal established under Annex VIII, UNCLOS

The special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS is also composed of five members elected from the list of experts in fields, namely fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and by dumping. Each party to the dispute appoints two members and the president of the special Tribunal are appointed through the agreement of the parties to the dispute from the list of experts.[162] Unlike ITLOS or an arbitral tribunal constituted in accordance with Annex VII, the special Tribunal does not have competence to settle dispute. Instead, it has competence to carry out an inquiry and provide fact finding for the disputes concerning the interpretation and application of UNCLOS within the aforementioned fields upon the request of any parties to the disputes. Apart from that, the special Tribunal may formulate recommendations which constitute the basis for a review by the parties of the question giving rise to the dispute if all the parties to the dispute so request.[163]

2. The choice of dispute settlement mechanism in case of land reclamation in the South China Sea

All states to the disputes in the South China Sea are parties to UNCLOS. The Philippines ratified it on 8 May 1984, China on 7 June 1886, Viet Nam on 25 July 1994, Malaysia on 14 October 1996 and Brunei on 5 November 1996. According, they are bound to the dispute settlement procedures provided for in Part XV of the Convention in respect of any disputes among them concerning the interpretation and application of the Convention. Although Article 287 of UNCLOS allows parties to freely choose a procedure for the settlement of their disputes, all of five states to the disputes in the South China Sea do not record any agreement as regards this matter among them. As a result, pursuant to paragraph 5 of Article 287, the disputes on the South China Sea, including the disputes concerning land reclamation may be only submitted to an arbitral tribunal constituted in accordance with Annex VII of UNCLOS.

[162] UNCLOS (n 74), Annex VIII, art 3.
[163] UNCLOS (n 74), Annex VIII, art 5.

II. Possible questions submitted to the Tribunal

1. Criteria to choose questions

It is stated in paragraph four of Article 287, UNCLOS that the dispute settlement procedures provided for in the first paragraph of the same article "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part". Therefore, the jurisdiction of the Tribunal established by Annex VII of UNCLOS depends on a finding that the parties actually have a dispute and that the dispute concerns the interpretation or application of UNCLOS. Based on this, in order to identify which matters are possible to be accepted by the Tribunal in case of land reclamation in the South China Sea, it is need to address two questions: Whether there is a dispute between the claimant states concerning such matters and, second, whether such a dispute concerns the interpretation or application of the Convention.

The concept of a dispute is well-established in international law. Accordingly, a "dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[164] A mere assertion by one party that a dispute exists is "not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves non-existence of the dispute."[165] Instead, it requires that there be "positive opposition" between the parties, in that the claims of one party are affirmatively opposed and rejected by the other.[166] Such positive opposition will normally be apparent from the diplomatic correspondence of the parties as views are exchanged and claims are made and rejected.[167]

2. Application such criteria in case of land reclamation in the South China Sea

Regarding land reclamation activities in the South China Sea, there are three groups of matters which are likely to fulfill the two said conditions. The first group is to request the Tribunal to determine the legal status of the eleven maritime features which have been reclaimed by the coastal states in the South China Sea and their maritime

[164] *Mavrommatis Palestine Concessions* (n 78) 11.
[165] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase, Advisory Opinion) [1950] ICJ Rep 65, 74.
[166] *South West Africa (Ethiopia v. South Africa: Liberia v. South Africa)* (Preliminary Objection) [1962] ICJ Rep 319, 328.
[167] *Case between the Philippines and China* (n 45) (Award on Jurisdiction and Admissibility), para 159.

entitlements under UNCLOS. In this instance, China, Viet Nam, the Philippines, Brunei or Malaysia appear to have only rarely exchanged views concerning the status of specific individual features. China has set out its view on the status of features in the Spratly Islands as a group, stating that "China's Nansha Islands [are] fully entitled to territorial sea, exclusive economic zone and continental shelf".[168] On the contrary, the Philippines and Brunei share the views that the features in the Spratly Islands are entitled to at most a 12 nm territorial sea. For example, Brunei informs that its future submission to CLCS will be based on the continuous natural prolongation of the adjacent shelf - not from the Spratly Island but from the territory of Brunei,[169] or in the hearings of 25 November 2015 in the case with China, the Philippines presented its position that none of the features that comprise the Spratly group is entitled to an EEZ or continental shelf.[170] Viet Nam and Malaysia have not provided their positions on this matter. However, it seems that both counties join the view of the Philippines and Brunei.[171] In light of these evidences, the claimant states have a conflict of legal view with respect to the status of and the maritime entitlement by the features in Spratly Islands, including the reclaimed features. Therefore, there is a dispute over this matter among the claimant state. Furthermore, in order to determine the status and maritime entitlement of the features, the Tribunal needs to interpret and apply Article 13 and Article 121 of UNCLOS. Thus, the second condition is also qualified by the first group of questions.

The second group of questions concerns the obligation of the coastal states in the disputed areas in the South China Sea due to the overlapping EEZ and continental shelf claims, namely obligation to cooperation to reach provisional arrangement of a practical nature and obligation to exercise self-restraint. China maintains its position that it has sovereignty over the Spratly Islands as the whole, therefore its reclamation activities at several features of the Spratly Islands are lawful, reasonable and justified action.[172] It means that China does not recognize that the Spratlys is located in the overlapping

[168] China's Note Verbale No. CML/8/2011 (n 104).
[169] Brunei Darussalam's Preliminary Submission concerning the Outer Limits of its Continental Shelf (12 May 2009), <http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf > accessed 29 April 2016.
[170] *Case between the Philippines and China* (n 45), 96.
[171] *Supra* n 80, 200.
[172] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs* (16 June 2015) <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1273370.shtml> accessed 29 April 2016.

claims over EEZ and continental shelf among the bordering states the South China Sea. Consequently, it does not believe that it has the obligations in such an area. It seems that the Philippines, Viet Nam, Malaysia and Brunei share the same view with China in this matter. All of which claim sovereignty a part or the whole Spratly Islands instead admit that the Spratly Islands is situated in the overlapping EEZ and continental shelf among them. Therefore, regarding the second group of question, based on the available information it is hard to find that the dispute exists among the claimant states.

The third group of questions concerns the obligations under UNCLOS in the matter of protection and preservation of the marine environment in the South China Sea. Out of five claimant states, there are at least China and the Philippines having opposing views regarding this matter. China states that its construction activities in the Spratly Islands did not cause or will not cause damage to the marine ecological system and environment in the South China Sea[173] while the Philippines alleged that China's land creation and construction activities on Mischief Reef has threatened and significantly harm to the marine environment, and more specifically to the complex ecosystem of coral reefs, biodiversity, and the living resources of the South China Sea.[174] Therefore, there is a dispute regarding this matter between China and Philippines. Besides, China's land creation and construction activities could involve violation of obligation under Article 192, 194, 197 and 206 of the Convention as presented in the previous Chapter. Hence, the third group of questions is possible to be submitted to the Tribunal.

III. Jurisdiction and admissibility of the Tribunal

In order for the Tribunal constituted in accordance with Annex VII of UNCLOS to have jurisdiction to determine the matters concerning land reclamation activities in the South China Sea, it is need to address three questions. The first one is whether there are any circumstances as described in Section 1, Part XV of the Convention under which the agreement of states on a peaceful mechanism of their own choice would preclude recourse to the compulsory procedures in Part XV, Section 2. The second question that is whether the disputes fall within automatic limitation or optional exception as presented in Section 3 of Part XV, UNCLOS to the jurisdiction of the court or tribunal. The third question is whether obligation to exchange views is fulfilled. If the answers for the first two questions are negative, and for the last question is positive, the disputes concerning

[173] *Ibid.*
[174] *Case between the Philippines and China* (n 45) (Final Transcript Day 3 – Merits Hearing), 10, 17, 18.

land reclamation could be resolved by the Tribunal established under Annex VII to UNCLOS.

1. Preconditions to the Tribunal's jurisdiction

1.1.Article 281, UNCLOS: no settlement has been reached by the Parties

Article 281 indicates that if there is no agreement between parties to the disputes to seek settlement of the dispute by a peaceful mean of their own choice or if there is such agreement but no settlement has been reached by recourse to the agreed mean, the agreement does not exclude any further procedure and any agreed time limits have expired, the procedures provided for in Part XV, Section 2, including the Tribunal established under Annex VII apply. Accordingly, if there is no agreement among China, Viet Nam, the Philippines, Malaysia and Brunei to choose a peaceful mean in order to resolve disputes among them, Article 281 poses no obstacle to the jurisdiction of the Tribunal.

Indeed, there is no such agreement existing in the relation of the claimant states to the South China Sea. The DOC, the documents designated to regulate the conduct of parties in the South China Sea, although requires state parties to resolve their disputes by friendly consultations and negotiations, was not intended as a legally binding agreement.[175] Neither do other bilateral statements[176] or agreements[177] concerning the South China Sea's issues between these states render legally binding effect on settling disputes by "other peaceful means" within the meaning of the first paragraph of Article 281. Apart from that, although Treaty of Amity and Co-operation in Southeast Asia (hereinafter 'Treaty of Amity') and Convention on Biological Diversity (hereinafter 'CBD'), to which China, Viet Nam, the Philippines, Malaysia and Brunei are state parties, are binding agreements providing provisions on settlement of disputes, they cannot preclude the Tribunal's jurisdiction over the possible questions suggested in the previous part either. Regarding the Treaty of Amity, it provides a wide range of options

[175] *Case between the Philippines and China* (n 45) (Award on Jurisdiction and Admissibility), para. 219.
[176] Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995), *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures*, 2 (23 March 1999), *Joint Statement: Framework of Bilateral Cooperation in the Twenty-First Century* (16 May 2000), *Joint Statement: 3rd Philippines-China Experts' Group Meeting on Confidence-Building Measures* (4 April 2001), *Joint Press Statement on the State Visit of H.E. President Gloria Macapagal-Arroyo to the People's Republic of China* (3 September 2004), *Joint Statement* (1 September 2011).
[177] Agreement on basic principles guiding the settlement of sea-related issues between China and Viet Nam (11 October 2011)

for resolving disputes between its parties such as negotiation, mediation, conciliation and good office[178] however it neither constitutes a binding agreement to settle disputes nor prescribes a particular form of dispute settlement. Concerning the CBD, while Article 281 is premised upon the existence of a "dispute concerning the interpretation or application of this Convention", the CBD's dispute settlement procedures apply exclusively to disputes concerning the interpretation or application of the CBD. Even if there may be some overlap in the subject matter of Part XII of UNCLOS and the subject matter of the CBD, a dispute under UNCLOS does not become a dispute under the CBD merely because of that overlap. Therefore it is sufficient to dispose of the issue of the DOC, CBD, the Treaty of Amity and the bilateral agreements between the claimant states in the South China Sea's disputes for the purpose of Article 281.

1.2. Article 282, UNCLOS: obligation under general, regional or bilateral agreement

Article 282 would only displace the dispute resolution provisions in Section 2 of Part XV if four requirements are met. These are: (a) that the parties must have agreed through a "general, regional or bilateral agreement or otherwise" that, (b) at the request of any party to the dispute, (c) the dispute shall be submitted to a procedure "that entails a binding decision," and (d) that the parties have not otherwise agreed to retain access to the Part XV, Section 2 procedures.

Among the claimant states to the South China Sea, there is no such a general, regional or bilateral agreement existing. For the same reason presented in connection with Article 281, the DOC and other bilateral agreements do not constitute a bar to the Tribunal's jurisdiction. Neither do the Treaty of Amity and the CBD constitute such a bar. Article 16 of the Treaty of Amity indicates that dispute resolution mechanisms described in Article 13, 14 and 15 of the same treaty "not apply unless all the parties to the dispute agree to their application to that disputes". It means that this treaty fails to fulfil the requirement of Article 282 which requires the dispute submitted to a procedure "at the request of any party to the dispute". Furthermore, mechanisms enumerated in Articles 13, 14, 15 of the Treaty of Amity, namely negotiations, good office, mediation, inquiry or conciliation are diplomatic means of dispute settlement and therefore, they do not entail a "binding decision". Regarding the CBD, its Article 27, paragraph 3

[178] Treaty of Amity and Co-operation in Southeast Asia (adopted 24 February 1976) art 13-15.

introduces dispute settlement mechanism entailing binding decision such as arbitration and the ICJ. However, in order to invoke these mechanisms the CBD requires states parties to lodge a written declaration with the Depositary saying that they accept such mechanisms. None of the five claimant states in the South China Sea has deposited such a declaration. The dispute settlement provisions in the CBD therefore cannot preclude the Tribunal's jurisdiction over the questions concerning the protection and preservation of the marine environment by virtue of Article 282.

1.3. Article 283, UNCLOS: obligation to exchange of views and negotiate

Prior to the commencement of arbitral proceedings in accordance with Annex VII of UNCLOS, member states to the Convention has obligation to exchange views pursuant to Article 283. The Award of the tribunal in *Chagos Marine Protected Area* indicates that Article 283 applies once a dispute has arisen between parties and views exchanged concern the means to settle the dispute,[179] not the subject matter of the disputes.[180]

As a matter of fact, land reclamation in the South China Sea have not been commenced in recent but in the 1990s. At that time, China built small constructions at several features such as at Mischief Reef in 1995 and Subi Reef in 1989. Other states in the region have also undertaken their constructions at several features in the Spratly Islands in 1990s and faced the objections from other states. Therefore, views on means of settlement disputes in the South China Sea exchanged among the five claimant states in the South China Sea from and after 1995 are taken into account. As stated by the Tribunal in *Case between the Philippines and China*, 'the DOC itself, along with discussions on the creation of a further Code of Conduct, represents an exchange of views on the means of settling the Parties' dispute.'[181] Additionally, between the Philippines and China, a numerous exchanges of views regarding possible means of settling disputes have been taken in in 1995, 1998 and 2012.[182] The obligation in Article

[179] *Chagos Marine Protected Area (Mauritius v. United Kingdom)* (n 126) paras. 382-83.
[180] *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)* (Provisional Measure) (Merits) (2015) ITLOS Case No 22, para 151.
[181] *Case between the Philippines and China* (n 45), para 335.
[182] Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 March 1995); Republic of the Philippines, Department of Foreign Affairs, *Record of Courtesy Call on Chinese Vice Premier and Foreign Minister Qian Qichen* (21 March 1995); *Summary of Proceedings: Philippine-China Bilateral Consultations* (20-22 March 1995); Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures* (23 March 1995); Department of Foreign Affairs of the Republic of the Philippines,

283 was therefore, implemented at least between the Philippines and China by virtue of the DOC and their bilateral consultations. If case concerning land reclamation in the South China Sea is brought by two states other than China and the Philippines, this obligation need to be put under consideration more thoroughly through bilateral exchanges of views between them before come to a conclusion on this obligation.

2. Limitation and exceptions to the Tribunal's jurisdiction

Although procedures for dispute settlement provided for in Section 2 are mandatory, the jurisdiction of such procedures might be limited by automatic limitation and optional exception set out in Section 3. Accordingly, disputes excluded automatically from the compulsory procedures encompass: (i) dispute concerning the interpretation and application UNCLOS with regard to marine scientific research in accordance with Article 246 and 253, and (ii) disputes concerning coastal states' sovereignty rights and jurisdiction with regard to living resources in EEZ in accordance with Article 61-72.[183] Furthermore, according to Section 3, Article 298, disputes on which states declared in written form that they do not accept one or more procedures of dispute settlement provided for in Section 2 are also excluded. These disputes pertain to: (a) the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, (b) military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3, (c) which the Security Council of the UN is exercising the functions assigned to it by the Charter of the UN, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.[184]

Transcript of Proceedings: RP-PRC Bilateral Talks (9 August 1995); Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995); Government of the Republic of the Philippines, Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks (10 August 1995) 3; Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Press Communiqué: Philippines-China Foreign Ministry Consultations* (29-31 July 1998) para 4; *Record of Discussion: 17th Philippines-China Foreign Ministry Consultations*, paras 134-41 (14 January 2012).

[183] UNCLOS (n 74) art 297.

[184] UNCLOS (n 74) art 298.

Out of the five claimant states in the South China Sea, only China provided its declaration excluding all three types of disputes described in Article 298 from the jurisdiction of the four compulsory procedures enumerated in Section 2, Part XV. Therefore, if case concerning land reclamation in the South China Sea is lodged by one of the four claimant states to against China, it is crucial to consider whether the possible questions suggested in the previous part fall within optional exceptions in Article 298. If not, Article 298 does not apply to consider the jurisdiction of the Tribunal under Annex VII, UNCLOS.

Assuming that the Philippine, Viet Nam, Malaysia or Brunei bring the case concerning China's land reclamation in the South China Sea before the Tribunal under Annex VII, UNCLOS. The determination of the legal status of the eleven features reclaimed in the South China Sea is obviously irrelevant to any matters of Article 297 and 298. The status of a feature as an island, a rock or a low-tide elevation relates to the entitlement to maritime zones generated by that features, not to the delimitation of such entitlement in the event that they overlap. This was confirmed by the Tribunal in case between the Philippines and China in its Award of Jurisdiction and Admissibility.[185] The same conclusion may be drawn for the examination of on land creation and construction activities in the South China Sea in the context of the obligation to protect and preserve the marine environment. States to the Convention bear this obligation in both the territorial sea and EEZ. The Tribunal's jurisdiction is thus not dependent on a prior determination of the status of any maritime feature or prior delimitation of any overlapping entitlement among states. Furthermore, states which have reclaimed features in the South China Sea themselves make clear that their constructions at such features are for civilian use, not military purposes. However, whether in nature such activities are military activities or law enforcement activities as mentioned in Article 298 (a) and (b) needs more consideration. If the answer for such a question is negative, the Tribunal will have jurisdiction regarding this land reclamation activities in the South China Sea. If yes, the Tribunal cannot determine the case concerning this matter.

IV. Other possible means in case of the disputes concerning land reclamation

In addition to the competence to hear and determine the disputes, the compulsory procedures provided in Section 2, Part XV of UNCLOS have competence to issue

[185] *Case between the Philippines and China* (n 45) (Award on Jurisdiction and Admissibility) para 404.

advisory opinions and prescribe provisional measures. Advisory opinions have non-binding effects on states to the disputes therefore in case concerning land reclamation in the South China Sea they do not help much to force states involving in land reclamation to halt their activities. Conversely, the provisional measures are bound to states to the disputes. They are however temporary in nature, they can be modified or revoked after being prescribed therefore they do not resolve the dispute completely. Despite that, they help provide basis for parties to the dispute to negotiate and to settle their disputes in the future.

Case concerning land reclamation in and around Johor between Malaysia and Singapore is the best illustration for this.[186] This is the first case to be brought to an international judicial mechanism in order to settle a dispute on land reclamation. Land reclamation has been carrying out by Singapore since its early colonial days without any objection from neighboring countries until the year of 2002 when Singapore constructed reclamation works in Pulau Tekong and Tuas View Extension. This type of Singapore activities faced complaints from Malaysia. Malaysia then initiated arbitral proceedings as provided for in Annex VII to UNCLOS and applied for provisional measure from ITLOS in accordance with Article 290, paragraph 5 of UNCLOS simultaneously in order to resolve the dispute with Singapore. Regrettably, the issue of land reclamation was not analyzed by the Arbitral Tribunal because both parties signed a Settlement Agreement and jointly requested the Arbitral Tribunal to terminate the case at hand and to deliver a final Award in the terms set out in the said Settlement Agreement.[187] Nevertheless, the states' obligations in the case of the construction of land reclamation works were pointed out by ITLOS in it Order dated 8 October 2003 to reply the Malaysia's Request for the prescription of provisional measure. Notably, these obligations were after that agreed voluntarily by both sides in their Settlement Agreement. Additionally, a lump sum of 374,400 RM was agreed to pay for Malaysia's fisherman as compensation for losses as a result of the reclamation works. This means that besides obligations imposed under international law of the sea, states constructing reclamation works have duty to compensate for losses caused by their reclamation activities.

In case of land reclamation in the South China Sea, the same request for provisional measures may be also submitted by any affected states in the South China

[186] *Supra* n 124.
[187] *Case concerning land reclamation by Singapore in and around the strait of Johor (Malaysia v. Singapore)* (n 124) 140, para 24.

Sea to ITLOS in order to request states, which are reclaiming the features in the South China Sea, to stop doing so on the pre-condition that ITLOS considers that *prima facie* the tribunal which is to be constituted to settle dispute between the affected state with the state reclaiming the features would have the jurisdiction. Based on the analysis in the previous parts, this consideration might occur. Furthermore, the adverse effects of reclamation activities on the marine environment of the South China Sea and the biodiversity of this sea may be sufficient for the requirement that "the urgency of the situation so requires" in order for ITLOS prescribe provisional measure in accordance with Article 290 of UNCLOS.

CONCLUSION

Land reclamation activities themselves have no problem under international law if such activities carried on within a state's territory. Land reclamation in the South China Sea, however does not fall within this type of activities, instead, it has been undertaken at the maritime features in the Spratly Islands over which states bordering the South China Sea claim sovereignty. Interestingly, such claims are made in the context that not all types of features in the sea are capable of being the subject of sovereignty claims and the claimant states have not provided their clear positions regarding the status of the features they claim in the South China Sea yet. If a feature is classified as a low-tide elevation within the meaning of Article 13, UNCLOS, it cannot become the subject of a sovereignty dispute. Out of the eleven features reclaimed in the South China Sea, at least four features are believed to be low-tide elevations, namely Gaven Reef, Mischief Reef, Second Thomas Shoal and Subi Reef. All of them are controlled and now reclaimed by China.

In addition to China, Viet Nam, Malaysia and Taiwan have also engaged in land reclamation activities, however, the majority of attention has drawn to China. It is because first China has created land and constructed buildings and other facilities at the seven features at the enormous scale which has transformed such features completely, from small and submerged reefs into large and full-fledged ones. Second, unlike Viet Nam, Malaysia and Taiwan, China has taken reclamation activities even at the submerged features such as Gaven Reef, Mischief Reef, Second Thomas Shoal and Subi Reef. Third, during the process of creating materials for adding them into the features, China has utilized large and powerful drills into the seabed, resulting to the destroy of the system of the coral reefs in the South China Sea, harmful effects on the marine environment and biodiversity of the sea.

Although UNCLOS is regarded as a constitution in the field of international law of the sea, it does not provide any specific provision to regulate reclamation activities at the sea. Nevertheless, this does not mean that states which have reclaimed the features in the South China Sea are released from their obligations under the Convention. Since reclamation activities in the South China Sea have been taken place in the Spratly Islands, over which states' claims on the EEZ and continental shelf overlap, and indeed such maritime zones might overlap, the states involving in land reclamation in the South China Sea bear obligations to cooperation to reach an provisional arrangement of practical nature and self-restraint pursuant to Article 73(3) and 84(3), UNCLOS before reaching an

agreement on delimitation of the EEZ or continental shelf. Furthermore, they are obliged to protect the marine environment of the South China Sea, to cooperate to do so and to conduct an EIA in accordance with Part XII of the Convention.

In case the states involving in land reclamation in the South China Sea do not comply with the above-mentioned obligations under UNCLOS, judicial dispute settlement mechanisms might be recalled to prevent them from continuously engaging the similar action. Among four compulsory procedures for settling disputes provided for in Article 298 (1), Section 1, Part XV of the Convention, the Tribunal constituted in accordance with Annex VII is the only one that is able to resolve the disputes concerning land reclamation in the South China Sea.

In order for this Tribunal has jurisdiction to hear and determine the case, several conditions need to be fulfilled. First, the matters which are submitted to the tribunal have to be the matters over which the parties have disputes and such disputes concern the interpretation and application of the Convention. Second, there is no agreement between the parties on agreed means of dispute settlement of their own choice as described in Article 281 and 282, Section 2 of UNCLOS. Third, the parties fulfill the obligation to exchange views regarding procedures to settling the dispute between them. Eventually, the matters which are possible to submit the Tribunal fall out of the scope of the automatic limitations and optional exceptions enumerated in Section 3 of the Convention.

In light of the analysis in the three chapters, if the dispute is brought by China or the Philippine against each other, the Tribunal is likely to have jurisdiction over the matters pertaining to the legal status of the reclaimed features and their entitlements as well as the matter concerning the protection and preservation of the marine environment. If the case is lodged by the left of the claimant states in the South China Sea, the possibility that Tribunal has jurisdiction over such matters is harder to evaluate because the information concerning the positions of these states as well as their views exchanged among them and with China on the matters are not available to access to the full extent.

In conclusion, in case of land reclamation in the South China Sea, it is possible to invoke a judicial mechanism for settle disputes provided for in the Convention in order to defuse the tension among the claimant states. Provisional measures should be also put under consideration in order to prevent the marine environment and biodiversity of the South China Sea from being destroyed by the harmful actions of states bordering it.

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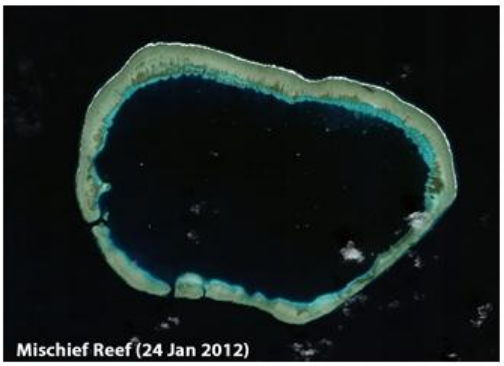
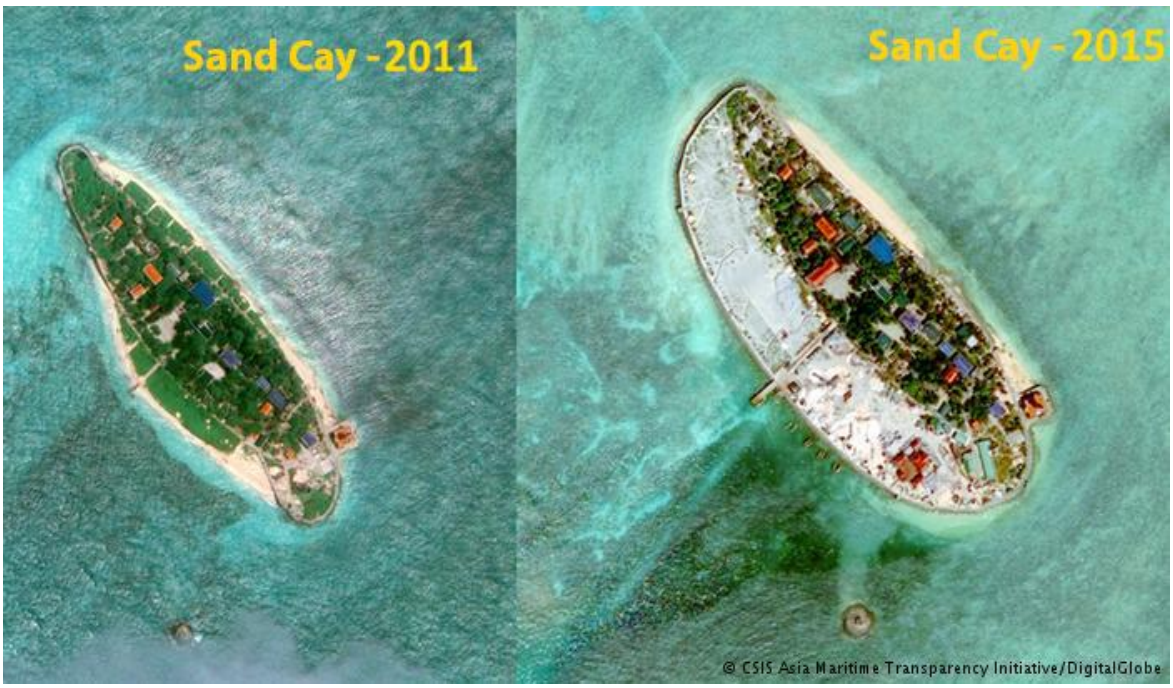
ANNEX

Land reclamation in several features in the South China Sea





Source: Digital Globe**,** CSIS Asian Maritime Transparency Initiative