Principle for Joint Maritime Exploitation Under the United Nations Convention on the Law of the Sea: a Case Study of the Scramble for Areas in the South China Sea

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Abstract— South China Sea covers the areas in the main land of the Asian continent, southern seas of Taiwan, western seas of the Philippines islands, and northern seas of Borneo. It is the area of the fights for conflicting benefits in the seas north of Paracel /Xisha Islands and Spratly/Nansha Islands. The cause of such fights among various nations to reap the benefits within this area is due to estimation that there is approximately eleven billion barrels of oil and one hundred and ninety million cubic foots of natural gas underneath the land in the South China Sea .

People's Republic of China (hereinafter "China") has claimed the rights in most parts of the area and impeded such claims made by the Philippines, Vietnam, Malaysia and Brunei, while Taiwan has also claimed the rights over the South China Sea in the same way as China. Under an international agreement, there are provisions in the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) on the rights of the nations to claim for the minerals in the seas where the maritime-power nations are aware. Therefore, the consolidation of the nations entitled to jointly benefit from natural resources by establishing an organization for the sea benefits, engaged by representatives of conflicting members and representatives of neutral countries is indispensable. Such organization should be committed to creating enforceable regulations to guarantee security and prosperity in the region.

This article provides information about existing rich natural resources in the South China Sea, causing many countries have attempted to claim for the rights of exploiting them. The article also analyzes how these countries justify their rights over the said natural resources, how the international law, namely, the United Nations Convention on Law of the Sea 1982 (UNCLOS 1982) and consolidation of ASEAN play their roles in resolving this problematic issue.

Keywords: South China Sea Conflict, Dispute over Spratly/Nansha Islands , ASEAN Consolidation

I. INTRODUCTION

1.1 The United Nations Convention on Law of the Sea 1982 relating to a Case Study of the Scramble for Areas in the South China Sea

After the Third United Nations Conference on the Law of the Sea 1973 – 1982, there have been about 320 provisions and 9 annexes stipulated to control its state parties to comply with the

Convention on the Law of the Sea. Besides, the convention does not allow any member states to make any reservations.

It can be said that the Convention plays its most perfect role as an international law which can control the state parties not to perform – any activities under their sovereign power affecting rights on exploration for, and exploitation of the resources of the deep Seabed, providing they can comply with the provisions they agreed upon for ratification [1]. This can help to resolve conflicts on the scramble for natural resources in the sea, and conflicts on occupation of the air space over the territorial sea by means of expanding their national jurisdiction over 12 nautical miles in the high seas in order to have exclusive fisheries jurisdiction and govern technology which can be applied by only developed countries to carry out the mining in deep Seabed so that they can explore and consume natural resources in such area.

In fact, before the Third United Nations Conference on the Law of the Sea 1967, the notion that natural resources in such area should be common heritage of mankind was presented by Mr. Arvid Pardo who at that time was in the position of Malta's Ambassador to the UN.

The General Assembly of the UN approved his notion and prescribed it as the resolution 2340 (xxii) and set up an Ad hoc Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction or The Seabed Committee, which was later replaced by the Permanent Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction[2]. This was considered and drafted in the Third UN Conference on the Law of the Sea and was provided in Part 11 of the Law of the Sea 1982 Convention stating that Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. The part contains the greatest number of provisions provided in the Convention, and it has caused controversies in negotiation. Part 11 majorly caused developed countries, such as, the United States of America, the United Kingdom, , Germany and Japan denied to be obliged with the Convention since they do not agree with some terms and conditions provided therein, such as, transfer of technology to a developing country, and high payment of fee of running activities in the Area. However, state parties are aware of marine code which should be legislated in every state party. Furthermore, they consider that super power states in the west are leaders who can apply technology to mining in deep seabed[3].

1.2 Definition prescribed in the UNCLOS 1982

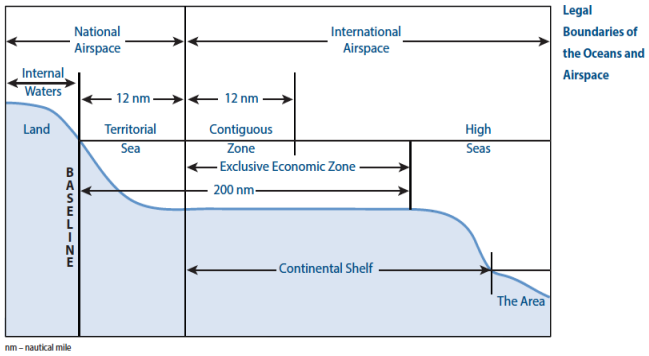
- The Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. It means that the seabed and subsoil from outer limit of the continental shelf which is rich of a great number of mineral resources being in statuses of solid, liquid, and gas, such as, manganese nodule, cobalt, copper and so on.

-Island is a naturally formed area of land, surrounded by water which is above water at high level. An island, as same as other lands, has its territorial sea, contiguous zone, exclusive economic zone, and continental shelf [4]. Except as provided in Article 121(3) stating that the

Rocks which cannot sustain human habitation or economic life of their own shall halve no exclusive economic zone or continental shelf. Therefore, definition of Area shall come into force under Article 136 of the UNCLOS 1982. According to the Article, it states that natural resources are common heritage of mankind, No State shall claim or exercise its sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof[5]. Any conflicts on seabed and subsoil shall be settled by mutual agreement of the costal states that a part of their territory is under the conflict, and the seabed and subsoil are belonged to non-costal states which have rights to exploit benefits according to the law of the sea under Article 137[6] and under the provision of benefits as provided in Article 140[7]which was in 1967 initiated by Dr. Alvid Pardo, the Malta's Ambassador to the United Nations. This principle was then developed to be the Declaration of Principles Governing the Sea-Bed and the Ocean Floor and Subsoil. It was finally prescribed in the UNCLOS 1982 [8].

1.3 Maritime Zones under UNCLOS 1982

The UNCLOS 1982 has provided the maritime zones as appears in the picture below.



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2. Conflict on asserting rights over Islands in the South China Sea

Topography and legal status of islands in the South China Sea

There are 4 groups of islands in the South China Sea, namely Spratly Islands, Paracel Islands, Pratas Islands, and Macclesfield Bank. Two groups of the islands are in conflict: Paracel; and Spratly, and there 6 conflicting states, namely China, Taiwan, Vietnam, Malaysia, the Philippines, and Brunei. At present Indonesia has become one of the conflicting states.

Spratly Islands comprise about 150 natural sites of islands, rocks, sand dunes, and so on, but there are only less than 50 natural sites that can be called islands according to the definition as prescribed in the provision of Article 121(1) which states that An Island is a naturally formed area of land, surrounded by water which is above water at high tide. Moreover, it is assumed that most of the islands are so small that they should be categorized as dirty rocks. As Article

121(3)[9] of the UNCLOS 1982 provides that Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. Spratly Islands, should not be considered as islands for they are under water at high tide. As for reefs, shoals, and sandbars, they are not above water although water is at low tide. As a result, they cannot be under the sovereignty as prescribed by international law. If the provisions of the UNCLOS 1982 are applied to this fact, China shall have no rights to possess such area in the sea.

Thus, when a state cannot claim the rights over sea territory in the areas which is above water at low tide, it shall not have right to claim its sovereignty over the conflicting areas. Is this correct?

To answer this question, a verdict of International Court of Justice set a precedent in the case of territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (2007). The case concerned about sovereignty over Pedra Branca/Pulau Batu Puteh, middle Rocks and South ledge dispute between Malaysia and Singapore (2008) [10].The judgement of International Court of Justice shows that sovereignty over islands is related to how the sovereignty is settled in accordance with the possession of islands. This means that rights of exclusive economic zone (UNCLOS III. Art. 56) and rights of continental shelf (UNCLOS III, Art.56) shall be granted as prescribed in Article 121 (2). According to Article 121 (3), the island which is not able to sustain human habitation or economic life shall have no exclusive economic zone or continental shelf. As for the conflict in the South China Sea, there were reclamation and construction on the islands that were later reclaimed that the islands are above water at high tide. This is not in line with the provision of the Law of the Sea which provides that an island is a naturally formed area of land. Hence, the reclaimed islands of China do not have the status of islands as prescribed by international law, and there shall not be exploration and exploitation on such islands.

2.1 Claim for rights over South China Sea

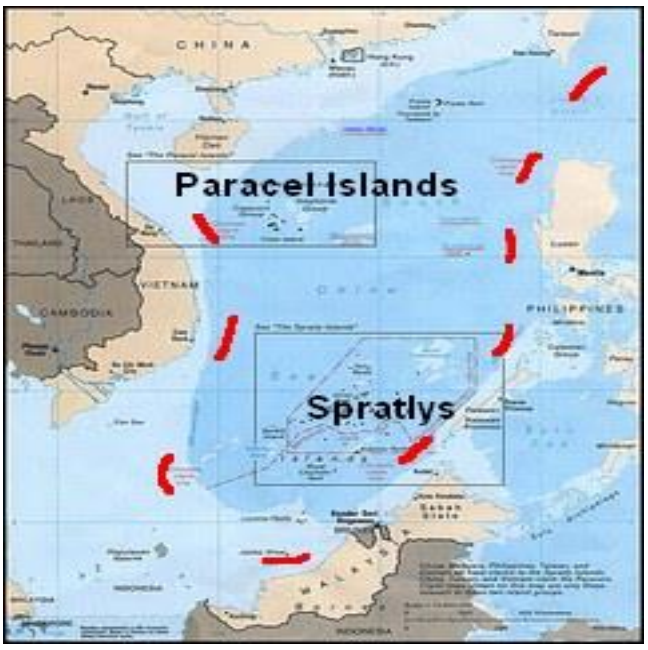
Every state claims on its supreme right over South China Sea, and the Republic of China claims its rights over marine territory and islands in such area in history. As for the Philippines, Malaysia, and Brunei, they claim to have rights on exclusive economic zone for 200 nautical miles and islands in the zone, while Vietnam claims to have rights on islands, and marine territory [11].

2.2 Disputed Areas in the South China Sea as China Claim-Nine Dash Line

The claim of China is based on the U-shape of the Nine Dash Line shown on the map of China in 1936. The U-shape of the Nine Dash covers marine territory in the history about 90 percent of the area in the South China Sea which covers 3.5millionsquare kilometers. In the past there was U-shape of the Eleven Dash Line, but China removed two of the Dashes which covered the

Gulf of Tokin in 1953. Later, China in 2013 added one Dash so that Taiwan is covered by the U-shape.

Map of the South China Sea as China Claim-Nine Dash Line



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The conflict is that if China claimed its rights on marine territory covered by the Nine Dash which belonged to it in history, the territory would be internal area of China where it could control fishing which would be allowed to do or not depending on the state. Such China's argument can be compared with the case that islands state of Indonesia claimed after the UNCLOS III,1982) came into force. Thailand, thus, could not claim its historical right on fishing in the marine territory of the islands state if fishing takes place in such area, and fees must be paid to Indonesia. Otherwise, one who conducted the fishing without permission shall be arrested with the offence of violation of sovereignty power to exploit natural resources in the sea.

It is evident that the claims made by costal state on the rights in history result in the claims on the rights over the sea since the ancient time beyond any laws of the sea in such period of time allowed to do so. Obviously, if any coastal state , has continuously claimed such rights until the rights are accepted by states and approved by the Law of the Sea. The rights therefore convey different meaning i.e., historical right, traditional right, and established right.

China's claim for historical right over the South China Sea has been opposed as it is against the interests of other states. Interestingly, claim for historical rights may be continuously made or abolished depending on power of all the parties concerned since there has not been certain principle in this regard. Each state may have the same or different opinion with others on its rights to exploit natural resources in the sea territory.

Take the case of Australia. The country did not accept historical right claimed by Japan to explore pearl in continental shelf of Arafura Sea. However, Australia presented it positive manner in the Law of the Sea Conference in Geneva in 1958 to accept historical rights to do fishery activities in contiguous zone since there are no other states' vessels doing fishing in the areas near the shore of Australia [12].

3. Modern theory related to claims for rights over the sea

Initiation of modern theory related to historical-waters

In the era before the World War II, there were no claims for exclusive economic zone, and continental shelf. The U.S. was the first state claiming on continental shelf after the World War II. China still did not claim on other marine territory. As for historical marine territory, China followed western states who have claimed on their historical marine territory since the ancient time. The Anti-China states created new theory stating that historical marine territory can be claimed if it connects with shores, while China's claim for the historical marine territory was the claim for the sea which is far away from the shore. This reflects that China applied general provisions so as to create a modern theory. Indeed, provisions in the Law of the Sea allow the rights to claim for marine territory based on the shore, but do not allow the rights to claim for historical marine territory. Records show that the European states claimed their historical rights when they wanted to claim for marine territory which the laws do not allow to do so, or in the case they claim beyond the rights provided by the laws.

3.1 Result of China's claim for historical rights

In the past, China did not explicitly announce details of its claim over the South China Sea. But when the country has more marine power, it expands power to control the South China Sea.

This reflects that China claims on historical marine territory based on the Nine Dash and claims on ownership of islands located in the territory according to ownership doctrine so as to reserve its rights to exploit benefits from natural resources in the sea and on land surrounded by the sea and on the land under the sea. Interestingly, China does not want to exercise sovereignty over such area because it never claims on sovereignty over the historical marine territory in the South China Sea as claimed in the historical marine territory. As a result, other states can have sovereignty and possess such territory since China does not announce its sailing and routes of aircraft over the territory so as to not disturb routes of other states. Rights of sailing ships and flying are historical rights of China which can be approved based on facts and the rights are consistent -with the provision as prescribed in the part of freedom of sailing ships and flying as provided in the Law of the Sea. However, whether the rights shall be approved or not depends on agreement from states in the international community which shall be proceed respectively.

3.2 Legal status of islands in the South China Sea after the Second World War .

In the period of time when the World War II almost ended, there were documents indicating rights over Paracel and Spratly island, the details of which are as follows:

a) Cairo declaration of the leaders of the U.S., China and England on 1 December 1943 declaring that islands in the Pacific Ocean possessed by Japan were returned to China;

b) Paus Adam declaration, a leader of the U.S., China, and England on 26 July 1945, Article 8 providing that Japan shall have sovereignty over Honshu, Hokkaido, Kyushu, Shikoku island and small islands.

c) China – Japan Peace Treaty signed in Taipei on 28 April 1952, Article 2 stating that Japan shall give up its rights to possess Paracel and Spratly islands[13].

As the aforementioned evidence, it is indicated that Japan gave up all of its rights to possess Paracel and Spratly islands as recorded in the Treaty. The islands shall be returned to China in accordance with the Cairo Declaration. However, the islands were not returned to China due to political issue. In 1950, China was governed by communism and it was fighting with the U.S. in Korea. China was enemy of the U.S.: thus, the islands were not returned to it.

The U.S. considered that if the islands had been returned to Taiwan who was a representative of China in the United Nations, Taiwan might have been colonized by China. It meant that the islands were returned to its enemy. This was concerned by the United Nations. The U.S. did not act according to what its leader had announced in Cairo. Rather, it left this issue to the states around China to fight for the islands[14].

3.3 Claims of Vietnam, the Philippines, Malaysia, and Brunei

When the new law of the sea allows coastal states to claim –on their rights of exclusive economic zone, and continental shelf, the area of the Nine Dash, as a result, overlapped the exclusive economic zone and/or the continental shelves of Vietnam, the Philippines, Malaysia, Brunei, and Indonesia. However, Indonesia whose Natuna Island was overlapped by the Nine Dash negotiated with China peacefully . It did not protest like the other four countries[15]. The Philippines, Malaysia and Brunei in the past did not express their intention for years as they were concerned that they claimed for less benefits in comparison with their rival states. These states -claimed on their rights as much as allowed by the-United Nations Convention on the Law of the Sea. This can be claimed based on exclusive economic zone at 200 nautical miles and/or continental shelves depending on geographical characteristic. Besides, they and China claim on sovereignty over islands of Spratly Islands.

As for Vietnam, it claims on possession of Paracel Islands, and rights of exclusive economic zone and continental shelves for it also claims on rights of fishing and concession of oil drilling.

3.4 Claim of Taiwan

Claim of Taiwan shall be considered together with China's since Taiwan is a part of China. Taiwan has claimed in accordance with U-shape of the Nine Dash since China was ruled by

the National Commission before Communism–, and even after the National Commission moved to Taiwan, the claim still remained.

When the the National Commission ruled the mainland China, it claimed only on the rights of islands in the area of U-shape of the Nine Dash and territorial sea of the islands. (At that time, coastal states were not given rights by the law of the sea to claim on rights of exclusive economic zone) As for China, it claimed marine territory in the area of U-shape of the Nine Dash as historical marine territory more seriously than Taiwan. If the claim of Taiwan was successful, China would gain benefits since when China and Taiwan are united, all the rights obtained by Taiwan would belong to China.

3.5 Competition of construction in the South China Sea

In 2012, China built Sansha on Yongxing Island or Woody Island in Paracel Islands. Sansha covers 13 square kilometers. It is a home to 2 kilometer runway for aircrafts, a pier for huge ships of 5,000 tons, post office, parking spaces for helicopter, shelters for small warplanes , underground shelters for stocking oil, and bullets, banks, hospitals, schools, and there are 1,000 people living there [16].

China uses this island as its army headquarter and contact center in the South China Sea. Such city building caused Yongxing Island to become an island on which people are living, and in turn, entitled to claim on rights in the sea against its conflicting states. China filled the sea, constructed buildings, piers, and runways.

In 1994, China constructed concrete building on Mischief Reef consisting of many floors, piers, space for helicopter parking, and radar station. This island is 209 kilometers away from Palawan of the Philippines in exclusive economic zone[17].

China filled the sea and constructed runway about 3,110 meters on Fiery Cross Reef located on Spratly Islands. Moreover, it dug sand and built piers. This island can be used as airport for army aircrafts and can be used as huge piers for army ships and ships carrying oil. Besides, China dug sand to fill rocks sand areas so that it can form new islands in Spratly Islands (Johnson South Reef, Cuarteron Reef, amd

Gaven Reef),[18] .

Mr. Albert del Rosario, Foreign Affairs Minister of the Philippines stated that China is controlling areas in the South China Sea. China fill 7 rocks with soil in Spratly Island [19].

According to award of the Permanent Court of Arbitration, it is clear that claim for rights in the South China Sea is contrast to the provisions of the United Nations Convention on the Law of the Sea 1982 [20] (Permanent Court of Arbitration, Hague, (2016).which China has ratified. The Convention determines marine territory of states to be far away from coast for 12 nautical miles, and provides the states with rights to control economic activities in the sea for 200

nautical miles away from their coast. China has denied the award. China states that the Court does not have jurisdiction on the conflict in the South China Sea [21].

Conclusion

Conflicting countries for the benefits in the South China Sea consist of all ASEAN member countries of one part, and China, a super power country, of the other part. As far as economic development is concerned, China has advantage over the ASEAN member countries, especially where the law of the sea does not have any provision covering the land occupation by means of using relatively advanced technologies to develop buildings on the artificial islands effectively for the purpose of territory expansion in the Area. In this circumstance, the chances of other states which also claim for the benefits in the sea are very slim.

This article suggests the conflicting countries get together and create international agreement to regulate on the benefits in the Area, in which the states entitled to claim for benefits should be all the states in ASEAN, both coastal and

non-coastal states. This is because the natural resources in such area are considered as the common heritage of mankind. The said international agreement should introduce the Framework under the Permanent Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. Such Permanent Committee should jointly work with a working group appointed from the representatives of the ASEAN member countries. This will reflect the neutrality for allocating benefits proportionally among all states concerned rather than allowing the sea-power countries to monopolize the benefits from the sea solely. In this regard, China should agree with such principle to reinforce the balance of power in the South China Sea where the United States has been playing increasing roles in this region.

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