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**JOINT DEVELOPMENT OF HYDROCARBON RESOURCES IN
THE SOUTH CHINA SEA**

Towards Strengthening Regional Cooperation in the Spratly Islands.

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ABSTRACT

The complexity of the South China Sea (SCS) disputes matched with the tremendous exploitation potential of hydrocarbon resources have stunted the development of economic activities in the Spratly Islands for many years. The challenge facing the international community in this regard borders on how to manage or resolve the disputes in such manner that economic growth is not impeded, and the marine environment is protected and preserved. This thesis therefore argues that Law of the Sea has set the framework for cooperation over hydrocarbon resources in the Spratly Islands. This thesis also argues that the provisions of Article 123 of UNCLOS read together with paragraph 3 of Articles 74 and 83 of UNCLOS require all coastal States to cooperate in implementing a joint development agreement when seeking to exploit in disputed maritime areas, and to refrain from unilateral actions that may jeopardize or hamper the interest of States at the final delimitation.

Keywords: South China Sea, Spratly Islands, cooperation, joint development, hydrocarbon resources, UNCLOS.

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LIST OF ABBREVIATIONS

AJIL	:	American Journal of International Law
ASEAN	:	Association of Southeast Asian Nations
ASIL	:	American Society of International Law
ATS	:	Australian Treaty Series
BIICL	:	British Institute of International and Comparative Law
CLCS	:	Commission on the Limits of the Continental Shelf
CSIS	:	Centre for Strategic and International Studies
CSIL	:	Chinese Society of International Law
CUP	:	Cambridge University Press
IBRU	:	International Boundaries Research Unit
ICGJ	:	International Court of General Jurisdiction
MoU	:	Memorandum of Understanding
nm	:	Nautical Miles
OUP	:	Oxford University Press
OPIL	:	Oxford Public International Law
para/paras	:	paragraph/paragraphs
Rep	:	Report
Res	:	Resolution
RIAA	:	Report of International Arbitral Award.
RSIS	:	Rajaratnam School of International Studies
UN	:	United Nations
UNCLOS	:	United Nations Convention on the Law of the Sea
UNCLOS II	:	Second United Nations Conference on Law of the Sea
UNCLOS III	:	Third United Nations Conference on Law of the Sea
UNGA	:	United Nations General Assembly

CHAPTER ONE: INTRODUCTION

1.1 Contextual Background.

The South China Sea (SCS) is located in Southeast Asia within an area of about 3.5 million square kilometres.¹ The Sea lies to the south of the People's Republic of China (China) and the Republic of China (Taiwan), east of the Socialist Republic of Vietnam (Vietnam), west of the Republic of the Philippines (Philippines), and the north of Malaysia, the Nation of Brunei (Brunei) and the Republic of Indonesia (Indonesia) [See Appendix 1].² It is characterised by predominantly small maritime features in form of islands, rocks, reefs, shoals etc,³ which are grouped into four categories, namely: the Paracel Islands, the Spratly Islands, Scarborough Shoal (grouped with the Macclesfield Banks), and the Pratas Islands,⁴ of which the Spratly Islands is the largest group.⁵

Asides being an important route for global trade,⁶ the SCS is abundantly rich in marine living and non-living resources.⁷ For example, it is reported to hold one-third of the world's fisheries and biologically diverse coral reef ecosystem,⁸ and also provides about 12 percent of the world's catch. However, the increasing needs of the human population have resulted in over-exploitation of these fish species.⁹ Similarly, the US Geological survey estimated the offshore

¹ Li Guoqiang, 'China Sea Oil and Gas Resources' (*China Institute of International Studies*, 11 May 2015) < http://www.ciiis.org.cn/english/2015-05/11/content_7894391.htm > accessed 16 June 2019.

² Tom Sparks, 'South China Sea Arbitration (Philippines v China), Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration [PCA]' (2016) Oxford Reports on International Law, para 3.

³ Zuo Keyuan, 'Joint Development in the South China Sea: A New Approach' (2006) 21(1) *International Journal of Marine and Coastal Law*, 83-110 at 84.

⁴ *Ibid.*, 84; Robert C Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing 2013) 48-50; Beina Xu, 'South China Sea Tensions' (*Council on Foreign Relations*, 14 May 2014) < <https://www.cfr.org/backgrounder/south-china-sea-tensions> > accessed 16 June 2019.

⁵ Xu, 'South China Sea Tensions' (n 4).

⁶ United Nations Conference on Trade and Development (UNCTAD) Secretariat, *Review of Maritime Transport 2018* (UN 2018) 1-15; see US Energy Information Agency, 'Country Analysis Briefs: South China Sea' (2013) < https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/South_China_Sea/south_china_sea.pdf > accessed 16 June 2019.

⁷ Zou Keyuan, 'The South China Sea' in Donald R Rothwell and Ors (eds), *The Oxford Handbook of the Law of the Sea* (Oxford Public International Law, 2015) 627-28. See also, Xander Vagg, 'Resources in the South China Sea' (*American Security Project*, 04 December 2012) < <https://www.americansecurityproject.org/resources-in-the-south-china-sea/> > accessed 16 June 2019.

⁸ Sparks, 'South China Sea Arbitration (Philippines v China), Award' (n 2).

⁹ Vagg, 'Resources in the South China Sea' (n 7).

oil resources of the SCS at around 28 billion barrels.¹⁰ If natural gas reserves are added, the overall potential for hydrocarbon exploitation in the region is even more promising.¹¹ The presence of these vast natural resources in the SCS has given rise to various competing claims by the surrounding coastal States.¹² Notably, all the coastal States except Indonesia have laid claims to different features in the SCS.¹³ Notwithstanding, China, Vietnam, and the Philippines have the most contentious claims being key players in the SCS.¹⁴ In 1948, China published a map titled ‘Map Showing the Location of the Various Islands in the South Sea’¹⁵ where it laid claim to a nine-dash line marked from the Chinese mainland, and reaching as far as the waters near Malaysia and Indonesia.¹⁶ Vietnam asserts sovereignty over the Paracel Islands (currently controlled by China) and the Spratly Islands; while the Philippines claim the Spratly Islands and the Scarborough Shoal [see Appendix 2].¹⁷ Interestingly, the Pratas Island is free of any conflicting interest since it is fully controlled by Taiwan under the ‘one China’ policy.¹⁸

The above-stated facts reveals: (1) the SCS is mainly disputed by China, Vietnam, and Philippines; and (2) disputes over the Spratly Islands is most complicated due to the involvement of five claimant States, the large size of the islands and potential entitlements of

¹⁰ US Energy Information Agency, ‘Country Analysis Briefs: South China Sea’ (n 6).

¹¹ Ibid.

¹² Keyuan, ‘Joint Development in the South China Sea’ (n 3).

¹³ Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea*: (n 4) 12, 48. It is pertinent to note that Taiwan is not recognised as a State by the United Nations; hence, its diplomatic interests in the SCS dispute are conveyed through China under the ‘one-China’ policy, especially since both States maintain the same claims within the nine-dash line. For the purpose of this thesis therefore, both claimants will be jointly referred to as ‘China’ [see pages 52, 327]. More details on the nature of Taiwan’s claim can be found in Cheng-yi Lin, ‘Taiwan’s South China Sea Policy’ (1997) 37(4) *Asian Survey*, 323-339 at 323.

¹⁴ Chien-pin Li, ‘The SCS Peace Initiative in a Transitional Security Environment’, (2016) 23(1) *The American Journal of Chinese Studies*, 119-134.

¹⁵ This map was published in 1948 by the Boundary Department of the Ministry of Interior, Republic of China., however, scholarly accounts indicated that the map was prepared in 1947 but published in 1948 – see Zuo Keyuan, ‘The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands’ (1999) 14(1) *International Journal of Marine and Coastal Law*, 27-56 at 27.

¹⁶ Zhiguo Gao and Bing Bing Jia. ‘The Nine-Dash Line in the South China Sea: History, Status, and Implications’ (2013) 107(1) *The American Journal of International Law*, 98–124 at 103; also Lin, ‘Taiwan’s South China Sea Policy’ (n 13); and lastly, SCMP Reporter, ‘Explained: South China Sea dispute’ (*This Week in Asia*, 16 February 2019) <<https://www.scmp.com/week-asia/article/2186449/explained-south-china-sea-dispute>> accessed 19 June 2019.

¹⁷ Li, ‘The SCS Peace Initiative in a Transitional Security Environment’ (n 14) 120; SCMP Reporter, ‘Explained: South China Sea dispute’ (n 16). Until recently, the only claimant of the Macclesfield group was China (including Taiwan). However, the Philippines have lodged a territorial claim over the entire Macclesfield group. For more details, see Keyuan, ‘The South China Sea’ (n 7) 626.

¹⁸ Keyuan ‘The South China Sea’ (n 7) 626.

the islands under Article 121 of UNCLOS¹⁹ coupled with prospects for huge hydrocarbon exploitation.²⁰ In this chapter, a brief account of the SCS dispute in the Spratly Islands between these three players (China, Vietnam and the Philippines) is laid out for better understanding of the discourse to be undertaken in other chapters of this thesis.

1.2. Territorial Claims to the Spratly Islands

The Spratly Islands refer to a cluster of small islands and coral reefs, some of which are above water level at high-tide, and located on the east-side of the SCS.²¹ These islands are proximately located to Vietnam, the Philippines, Brunei, Malaysia, and at a distance in excess of 500 nautical miles (nm) from Chinese mainland (all comprising the claimant States).²² These claimants are reported to have occupied more than 60 maritime features in the Spratly Islands.²³ A contrasting figure of 44 total features was reported by Dzurek who noted that Vietnam controls 25 features, the Philippines controls 8, China possesses 7 of them, while Taiwan only has Itu Aba (the largest feature and the only one with the natural water source).²⁴ The variations notwithstanding, it is obvious that the Spratly Islands is dominated by these claimants.

The Spratly Islands dispute can be traced to the event after World War II, when Japan was forced to forfeit all of its titles and claims to the Spratly Islands.²⁵ However, the area became contested in the mid-1970s when oil and gas resources were discovered in the deep waters around these islands.²⁶ Prior to that period, the Spratly Islands was overlooked,²⁷ and identified as “dangerous ground” for navigation on maps and nautical charts due to the presence of many submerged rocks.²⁸ As of today however, territorial claims to the Spratly Islands remain the

¹⁹ United Nations Convention on the Law of the Sea, *Basic Document 39* (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 [hereinafter UNCLOS].

²⁰ Keyuan ‘The South China Sea’ (n 7) 628.

²¹ Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea*: (n 4) 48.

²² Lian A Mito, ‘The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands’ (1998) 13(3) *American University International Law Review*, 734.

²³ Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea*: (n 4) 48.

²⁴ Daniel J Dzurek, *The Spratly Islands Disputes: Who’s on First?* (IBRU Maritime Briefing 1996) 56-57.

²⁵ Gao and Jia, ‘The Nine-Dash Line in the South China Sea.’ (n 16) 102; Peace Palace Library, ‘South China Sea Territorial Disputes’ < <https://www.peacepalacelibrary.nl/library-special/south-china-sea-territorial-disputes/> > accessed 23 June 2019.

²⁶ Charles Liu, ‘Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute’ (1996) 18 *Loyola of Los Angeles International and Comparative Law Review*, 865.

²⁷ *Ibid.*

²⁸ Clive Schofield, ‘Dangerous Ground – A Geopolitical Overview of the South China Sea’ in S Bateman and R Emmers (eds), *The South China Sea: Towards a Cooperative Management Regime* (Routledge 2009) 17; Lee G

longest unresolved dispute and as earlier recalled, the most contentious for various reasons, the common ones being – the involvement of five out of the six coastal States, strategic location of the Spratly Islands in the SCS, and its connection to international sea routes.²⁹

Following the surrender of Japan after World War II, China first published a map drawing an eleven-dash line over the SCS (including the Spratly Islands) in 1947, and later adjusted to nine-dash line in 1949.³⁰ China alleged that its nine-dash line claim stems from historic rights, and evidenced in its historic books and navigational records.³¹ Between 1970s and 1980s, other claimants had appeared in the Spratly Islands, and the disputes became much more complex.³² The 1988 clash between China and Vietnam over the Fiery Cross Reef remains a significant event in history as it marked the beginning of China's presence in the Spratly Islands.³³ After the clash, China sent its naval ships to possess more territories in the Spratly Islands such that by May 1989, it had occupied six features in addition to the Fiery Cross Reef.³⁴

Similarly in 1994, both States clashed over oil exploration in the Spratly Islands.³⁵ China had signed a contract with an American company, Crestone Energy Corporation, in 1992 to explore for oil near the Spratly Islands in an area where Vietnam's oil field was situated, to which Vietnam vehemently opposed.³⁶ Ignoring Vietnam, China proceeded with the exploration and further occupied two more islands, totalling nine islands in all.³⁷ Subsequently, in 1994 Vietnam retaliated by signing an oil drilling contract with a consortium led by Mobil Oil in an

Cordner, 'The Spratly Islands Dispute and the Law of the Sea' (1994) 25 *Ocean Development and International Law*, 61; and lastly Brian K Murphy, 'Dangerous Ground: The Spratly Islands and International Law' (1995) 1 *Ocean and Coastal Law Journal*, 188.

²⁹ Sparks, 'South China Sea Arbitration (Philippines v China), Award' (n 2) para 3.

³⁰ Gao and Jia, 'The Nine-Dash Line in the South China Sea:' (n 16) 102.

³¹ Mito, 'The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands' (n 22) 737; Clara Lindemann, 'The Situation in the South China Sea (SCS)' (Security Council Forum, 11 May 2018) 4 <https://www.google.com/search?rlz=1C1CHBF_enNO808NO808&ei=1ldXY_uEO2MrgSHsla4Cg&q=clara+lindemann%2C+the+situation+in+the+South+china+sea&oq=clara+lindemann%2C+the+situation+in+the+Sout+china+sea&gs_l=psyab.3..35i304j39i2.14232.15705..16277...0.0..0.215.975.5j3j1.....0....1..gws-wiz.80TxQCwqi2w&ved=0ahUKEwiP0_DZnpTkAhVthosKHQeYAacQ4dUDCAo&uact=5#> accessed 21 June 2019.

³² Hong Thao Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels and the Spratlys: Its Maritime Claim' (2012) 5(1) *Journal of East Asia and International Law*, 165-212 at 166.

³³ Dzurek, *The Spratly Islands Disputes: Who's on First?* (n 24) 21-22.

³⁴ Li, 'The South China Sea Peace Initiative in a Transitional Security Environment' (n 14) 120.

³⁵ Edmond D Smith, 'China's Aspirations in the Spratly Islands' (1994) 16(3) *Contemporary Southeast Asia*, 274-294 at 280-81.

³⁶ *Ibid*, 281.

³⁷ *Ibid*; Keyuan, 'Joint Development in the South China Sea:' (n 3) 88.

area overlapping with China's Crestone contract.³⁸ This invasion escalated the tension between both countries. Even though both countries have negotiated agreements after the 1988 and 1994 incidents, no agreement has been reached till date on the Spratly Islands because China insisted on bilateral negotiation as opposed to multilateral talks suggested by Vietnam.³⁹

On the other side was the tension between China and the Philippines. Their controversy over the Spratly Islands intensified in 1995 with the Mischief Reef conflict.⁴⁰ In 1978, the Philippines claimed sovereignty over the entire Kalayaan Island Group [Spratly Islands] with the exception of the Spratly Island itself on the basis that the islands were *terra nullius* and according to the principle of *la terre domine la mer* which meant 'the land dominates the sea' and UNCLOS, it had the legitimate claim to the Kalayaan Group.⁴¹ Consequently, when it was discovered in 1995 that China had developed structures on Mischief Reef for the Chinese fishermen, the Philippines took military actions against Chinese fishing vessels at Scarborough Shoal.⁴² This was recorded as the first military standoffs between China and Philippines.⁴³

The series of conflicts influenced the decision of China and the ASEAN member States to negotiate a Code of Conduct for the SCS,⁴⁴ and eventually the Declaration on the Conduct of Parties in the South China Sea (DOC) was signed on 4 November 2002 wherein the parties agreed *inter alia* 'to resolve their territorial and jurisdictional disputes by peaceful means'.⁴⁵ Unfortunately, the good relations between the claimant States deteriorated in 2009 when the SCS coastal States made their submissions for continental shelves beyond 200nm to the United Nations Commission on the Limits of the Continental Shelf (CLCS) in accordance with Article

³⁸ Smith, 'China's Aspirations in the Spratly Islands' (n 35) 281.

³⁹ Ibid, 275. One of the landmark agreements negotiated in this period was the 2000 Agreement on Gulf of Tonkin – see Gao and Jia, 'The Nine-Dash Line in the South China Sea:' (n 16) 106.

⁴⁰ Daojiong Zha and Mark J Valencia, 'Mischief Reef: Geopolitics and implications' (2001) 31(1) Journal of Contemporary Asia, 86.

⁴¹ CLCS, 'The Philippines Note Verbale No. 000228' (April 5, 2011) <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf> accessed 12 July 2019. See also Dang Thang Nguyen and Hong Thao Nguyen, 'China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes Between the Philippines and China' (2012) 43 Ocean Development and International Law, 47; finally see Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels and the Spratlys:' (n 32) 201.

⁴² Li, 'The South China Sea Peace Initiative in a Transitional Security Environment' (n 14) 120-21.

⁴³ Ibid, 121.

⁴⁴ Christopher Linebaugh, 'Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea' (2014) 52(2) Columbia Journal of Transnational Law, 542-568 at 543-44.

⁴⁵ ASEAN-China Declaration on the Conduct of Parties in the South China Sea (signed during the 8th ASEAN Summit, 04 November 2002), (2003) 2 Chinese Journal of International Law 418 [hereinafter 'the Declaration'] para 4.

76 of UNCLOS.⁴⁶ This tension grew worse and eventually resulted in the Philippines initiating an arbitration against China on 22 January 2013 at the Permanent Court of Arbitration pursuant to Articles 286 and 287 of UNCLOS and in accordance with Article 1 of Annex VII of UNCLOS.⁴⁷ In the Statement of Claim, the Philippines asked the tribunal to resolve four issues:

- a) Dispute concerning the source of maritime rights and entitlements in the South China Sea. In this respect, the Philippines sought a declaration that the claims within the nine-dash line were inconsistent with UNCLOS;⁴⁸
- b) Dispute concerning the entitlements of Scarborough Shoal and certain maritime features in the Spratly Islands to generate maritime zones under UNCLOS;⁴⁹
- c) Disputes concerning the lawfulness of China's actions in the SCS;⁵⁰ and lastly,

⁴⁶ China and the Philippines protested to Vietnam's submission and the joint submissions by Vietnam and Malaysia – for Malaysia-Vietnam submission, see *Joint Submission to the Commission on the Limits of the Continental Shelf, in Respect of the Southern Part of the South China Sea* (6 May 2009) at <http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf> accessed 21 July 2019; for Vietnam's partial submission, see *Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea: Partial Submission in Respect of Vietnam's Extended Continental Shelf: North Area (VNM-N)* (April 2009) at <http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf> accessed 21 July 2019. China's response to these submissions raised further submission from Malaysia, Vietnam, Indonesia and the Philippines (who at this time had gained the support of the U.S on the matter). For China's responses – see *Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009* (7 May 2009); and *Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009* (7 May 2009); for the submissions by other States – see *Note Verbale from the Permanent Mission of the Socialist Republic of VietNam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009* (8 May 2009); *Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228* (5 April 2011); *Note Verbale from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09* (20 May 2009); *Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10* (8 July 2010). For more detailed analysis on these submissions, see HT Nguyen and Ramses Amer, 'Coastal States in the South China Sea and Submissions on the Outer Limits of the Continental Shelf' (2011) 42 *Ocean Development and International Law* 245-263.

⁴⁷ *South China Sea Arbitration between The Republic of Philippines v The People's Republic of China*, PCA Case No 2013-19, Award on Merits (12th July 2016), (2016) ICGJ 495 [hereinafter *Philippines v China*] para 28. The 1982 United Nations Convention on Law of the Sea (UNCLOS) is widely recognised as the 'constitution for the ocean'. As of 2012, UNCLOS had gained 168 signatories which include all the coastal States of the South China Sea (SCS) excluding Taiwan whom is not eligible to become a member – see Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea*: (n 4) 47, 52. Generally, see Li, 'The SCS Peace Initiative in a Transitional Security Environment' (n 14) 121; Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels and the Spratlys:' (n 32) 201.

⁴⁸ *Philippines v China* (n 47) para 7.

⁴⁹ *Ibid*, para 8.

⁵⁰ *Ibid*, para 9.

- d) To find that China has aggravated and extended the disputes between the Parties by restricting access to a detachment of Philippines Marines stationed at Second Thomas Shoal.⁵¹

China rejected these claims and notified the tribunals of its unwillingness to participate in the proceedings or to be bound by any Award issued, through *Note Verbales* and public statements.⁵² On 19 February 2013, China sent a *Note Verbale* to the Ministry of Foreign Affairs of the Philippines,⁵³ stating that the subject-matter of the disputes could not be decided independent of the territorial sovereignty issue which falls outside the scope of UNCLOS.⁵⁴ Moreover, both countries had agreed to settle their disputes through negotiations and friendly consultations citing the Declaration of 2002 and other agreements between the States;⁵⁵ and lastly that even if UNCLOS could support the claims of the Philippines, the SCS dispute involves overlapping claims which calls for delimitation, and historic rights both of which China had excluded from compulsory settlement in its 2006 declarations in accordance with Article 298(1) of UNCLOS.⁵⁶ These positions were reiterated in the position paper of 7 December 2014 as the grounds for non-participation.⁵⁷ The tribunal interpreted this paper as an objection to jurisdiction, and thus conducted a separate hearing on the issue of jurisdiction and admissibility.⁵⁸ In October 2015, the tribunal gave a ruling recognising its jurisdiction over the matters submitted by the Philippines and assuring China of its intentions not to decide issues that may affect delimitation or sovereignty over islands.⁵⁹ The tribunal observed that the instruments relied upon by China were either not legally-binding or not construed to exclude

⁵¹ Ibid, para 10.

⁵² Ibid, paras 11, 29.

⁵³ See, *Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (13) PG-039, 19 February 2013.*

⁵⁴ *Philippines v China* (n 47) paras 29.

⁵⁵ Ibid.

⁵⁶ Ibid, paras 13, 37. China lodged its Declaration under Article 298 of UNCLOS on the 25th August 2006, and the content reads: 'The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.' – The updated official record of declarations and statements of State parties to Part XV of UNCLOS are available on the web page of the UN Treaties Collection under Status of Treaties < <http://treaties.un.org/Pages/ParticipationStatus.aspx>>.

⁵⁷ *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014)* [hereinafter 'China's Position Paper'] <www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 28 June 2019. Also see *Philippines v China* (n 47) para 37.

⁵⁸ *Philippines v China* (n 47) paras 14-15.

⁵⁹ Ibid, paras 5-6, 60-61, 119-142, 161-163. *South China Sea Arbitration (Philippines v China)*, PCA Case No 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015 at <<https://pcacases.com/web/sendAttach/2579>> [hereinafter 'Award on Jurisdiction'] para 255.

the jurisdiction of the tribunal;⁶⁰ consequently, China's non-participation would not bar the proceedings and it was bound by any Award issued at the Merits stage.⁶¹

This proceeding was eventually brought to an end in 2016 with an Award in favour of the Philippines (the 'Award') stating *inter alia* that none of the features in the Spratly Islands were entitled to an EEZ and continental shelf under Article 121 of UNCLOS.⁶² In response to this Award, China released a public statement notifying the Philippines of its refusal to recognise the Award as binding on it, and restating that it was opened to negotiation and friendly consultations.⁶³

The Award raised controversies among the international community and academics questioning the legality of the Award and its implications on the SCS dispute.⁶⁴ Two views emerged from this Award; while some were in support of the Award, others disagreed with the reasons adopted by the tribunal in reaching its decision.⁶⁵ In my view, the tribunal lacked jurisdiction to hear the matter most especially because the obligation to settle disputes by peaceful means and the obligation to exchange views, which are pre-conditions for invoking compulsory procedures for dispute settlements were not complied with by the Philippines.

In arriving at the Award on Jurisdiction, the tribunal qualified the Declaration (DOC) as a political agreement without any legal effect,⁶⁶ however on the basis of Article 52 of the UN

⁶⁰ Ibid, para 159. As an example, the Declaration was qualified as a mere political agreement by the tribunal on the grounds that it 'was not intended to be legally binding with respect to dispute resolution, does not provide a mechanism for binding settlement, and does not exclude other means of settlement (...)'.
⁶¹ Ibid, paras 143-144, 165-168.

⁶² Ibid, paras 382-384, 625-626. The high-tide features referred to in this Award were: Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North). On the contrary, Hughes Reef, Gaven Reef (South), Subi Reef, McKennan Reef, Mischief Reef and Second Thomas Shoal were all found to be low-tide elevations, Hughes reef, and Subi reef. In addition to these high-tide features which were deemed incapable of generating entitlements under Article 121 of UNCLOS, Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay were also included in the list.

⁶³ 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines' (The South China Sea Issue, 12 July 2016) <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm> accessed 25 June 2019.

⁶⁴ Ian Storey, 'Assessing Responses to the Arbitral Tribunal's Ruling on the South China Sea' (2016) 43 ISEAS Perspective, 2-3.

⁶⁵ See Douglas Guilfoyle, 'The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?' (2018) 8 (1) Asian Journal of International Law 51-63; and Robert Beckman, 'UNCLOS Part XV and the South China Sea' in S. Jayakumar and Ors (eds), *South China Sea Disputes and Law of the Sea* (Edward Elgar Publishing 2014), who have both projected different views on the Award.

⁶⁶ *Philippines v China* (n 47) para 159.

Charter, this declaration better qualifies as a regional arrangement among the ASEAN States and China to settle their ‘territorial and jurisdictional disputes...through friendly consultations and negotiations’ and thus, compatible with Articles 2(3) and 33(1) of the UN Charter and Article 279 of UNCLOS.⁶⁷ The UN recognises the legality of any such regional arrangements and activities for dealing with matters relating to the maintenance of international peace and security provided it is not inconsistent with the purposes and principles of the UN as stated in the UN Charter.⁶⁸ It is noteworthy that the preamble of the DOC is consistent with the above provisions.⁶⁹ Furthermore, Article 280 of UNCLOS notes that: ‘Nothing in this part [Part XV] impairs the rights of any States to agree at any time to settle a dispute between them concerning the interpretation or application of this convention by any peaceful means of their own choice.’

Alternatively, it can be argued that both countries have an obligation to expeditiously exchange views regarding settlement by negotiation and/or conciliation.⁷⁰ According to Beckman, Article 283 of UNCLOS proposes settlement by negotiation but where this fails the parties are required to further explore conciliation under Annex V, section 1 or any other conciliation procedure.⁷¹ It is only where no settlement have been reached after recourse to these procedures in section 1, Part XV that parties may submit their dispute to compulsory procedures in section 2, Part XV of UNCLOS.⁷² From the above, it appears that the obligation to exchange views was not satisfied by the parties as required under Articles 283 and 284 of UNCLOS, thereby questioning how the tribunal arrived at the decision that views were satisfactorily exchanged in the series of diplomatic communications between the Philippines and China.⁷³

These provisions when construed together shows that recourse to Part XV was not mature and the tribunal should have rightly pointed out in its Award on Jurisdiction that the tribunal lacked the jurisdiction to hear the merits of the arbitration. As a consequence, any award issued will

⁶⁷ Charter of the United Nation (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi [hereinafter the ‘UN Charter’]. The UN Charter is the most universal agreement, ratified by 193 member States. Articles 2(3) and 33(1) when put together, recognises the right of members to settle their dispute through peaceful means of their choice and particularly by negotiations. This was confirmed in Article 279 of UNCLOS as an obligation binding the State Parties.

⁶⁸ UN Charter, Article 52.

⁶⁹ DOC, preamble and Article 4.

⁷⁰ UNCLOS, Articles 283-284.

⁷¹ Beckman, ‘UNCLOS Part XV and the South China Sea’ (n 65).

⁷² Ibid; UNCLOS, Articles 286 and 284(3).

⁷³ *Philippines v China* (n 47) para 160.

not be final and binding on China and the Philippines.⁷⁴ In any case, the Award aggravated the tension in the SCS, with all parties maintaining their conflicting claims over the Spratly Islands.⁷⁵ To improve the situation however, diplomats and scholars have suggested a need to look towards achieving cooperation in the use of resources located in these contested areas.⁷⁶ To this end, this research will consider what the obligation to cooperate in the development of non-living resources entails; and whether cooperation over hydrocarbon resources can be achieved in the Spratly Islands?

1.2 Aims and Significance of the Research

In recent history, the SCS has been subject of dispute due to the rich resources of its waters, and the unilateral initiatives or actions of the claimant States, for example, the activities of China within the acclaimed nine-dash lines, have further aggravated the ongoing dispute.⁷⁷ All effort to calm this tension particularly between the Philippines and China have failed since the latter is refusing to recognise the Award as binding.⁷⁸ As an alternative approach to delimitation and pending the settlement of the lingering sovereignty dispute, political leaders and diplomats are considering cooperation by means of joint development in order to manage the common issues in the SCS.⁷⁹ Against this background, the current research examines, in light of the Award, if there are overlapping claims in the SCS. It also seeks to examine whether coastal States bordering the SCS have a duty to cooperate in the use of shared offshore hydrocarbon

⁷⁴ UNCLOS, Article 296.

⁷⁵ Storey, 'Assessing Responses to the Arbitral Tribunal's Ruling on the South China Sea' (n 64).

⁷⁶ David Whiting 'The Spratly Island Dispute and the Law of the Sea' (1998) 13 *International Journal of Marine and Coastal Law* 897, 914. wherein he stated that joint development might be the fastest way of reducing tension in the SCS). Although, Southeast Asian nations (including Vietnam and Philippines) have traditionally rejected bilateral solution with China – see Linebaugh, 'Joint Development in a semi-enclosed sea:' (n 44) 545. Despite this, one year after the landmark ruling against China's territorial claims, Philippine President Rodrigo Duterte agreed to solve the dispute with China through bilateral talks. Similarly, Vietnam, the most outspoken critic of China, has softened its stance, and in April 2018, the government said it was willing to hold talks with China to resolve disputes in the area "in accordance with international law". See South China Morning Post, 'Explained: South China Sea dispute' <<https://www.msn.com/en-sg/news/world/explained-south-china-sea-dispute/ar-BBTGkfr?li=BBr8Cnr>> accessed 25 June 2019.

⁷⁷ Li, 'The South China Sea Peace Initiative in a Transitional Security Environment' (n 14) 119.

⁷⁸ Ibid, 121-23; Chinese Society of International Law (CSIL), *South China Sea Arbitration Awards: A Critical Study* (OUP 2018).

⁷⁹ Julius C Trajano, 'Resource Sharing and Joint Development in the South China Sea: Exploring Avenues of Cooperation', NTS Insight, No. IN19-01 (Singapore: RSIS Centre for Non-Traditional Security Studies (NTS Centre)).

resources? In the event that such obligation exists, this thesis will consider whether the concept of joint development is applicable to the Spratly Islands.

1.3 Research Questions

There are two questions to be answered in this research, they are as follows:

- a. Are States claiming the Spratly Islands required under international law, to cooperate towards the exploration and exploitation of hydrocarbon resources?
- b. How can cooperation be achieved in the Spratly Islands?

1.4 Methodological Approach

This thesis adopts a doctrinal legal research method (also known as the ‘black letter law’) in analysing the scope of cooperation in the joint development of hydrocarbon resources under international law. This approach is referred to as doctrinal because it primarily focuses on statutes, case law and other legal sources relevant in addressing the research questions.⁸⁰ In discussing the research questions, the main sources to be applied are treaties and conventions such as provisions from Articles 2, 33 and 52 of the UN Charter on cooperation and peaceful settlement of disputes; Articles 122 and 123 of UNCLOS on semi-enclosed seas, Paragraph 3 of Articles 74 and 83 of UNCLOS on provisional arrangements for overlapping areas; and Articles 26 and 31-32 of the Vienna Convention on the Law of Treaties (VCLT)⁸¹; Articles 1-2, and 6 of the Convention on the Continental Shelf.⁸² Alongside, the general principles of law on cooperation (i.e., the principle of good neighbourliness), provisional arrangement (i.e., principle of good faith) and mutual restraint (i.e., principle not to cause harm) will be applied. Supporting these body of laws, are State practices reflected in UN resolutions, travaux préparatoires and agreements, for example, DOC. Other subsidiary sources relevant for the purpose of this research include: court decisions and Awards such as *Philippines v China*,⁸³

⁸⁰ Statute for the International Court of Justice (ICJ), (Signed 26-06-1945, EIF 24-10-1945) [hereinafter ‘ICJ Statute’], Article 38(1).

⁸¹ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [hereinafter VCLT].

⁸² 1958 Geneva Convention on the Continental Shelf, *Basic Document 12* (opened for signature 29 April 1958, entered into force 10 June 1964) 499 UNTS 311

⁸³ *Philippines v China* (n 47).

North Sea Continental Shelf Cases,⁸⁴ *MOX Plant Case I and II*,⁸⁵ *Guyana v Suriname Arbitration*,⁸⁶ to mention a few; authored and edited books; chapter-in-books and journals; articles (hardcopy and online Articles). Illustrations are used throughout this research.

1.5 Structure of the Thesis

This thesis consists of four chapters. Chapter one commences with a detailed description of the South China Sea, gives a brief history of conflict in the Spratly Islands between China, Vietnam and the Philippines. It further presents the aims and objectives of this research, outlines the research questions, and identifies the methodology approach for dealing with the research questions and achieving the stated aims.

Chapter Two examines the nature and scope of the obligation to cooperate under international law in semi-enclosed seas, especially regarding the use of natural resources. In this regard, it offers an interpretation of the definition provided in Article 122 of UNCLOS on enclosed or semi-enclosed sea and considers if an obligation to cooperate over hydrocarbon resources arises from Articles 123, 73(3) and 83(3) of UNCLOS when construed together. This chapter concludes by citing some existing cooperation over natural resources in the SCS, as a way of determining States practice in this regard. Chapter Two is integral to appreciating the discourse on JDA in chapter 3 of this thesis.

Chapter Three which is the main body of the thesis, discusses the concept of joint development, and the likelihood of cooperation over hydrocarbon exploitation in the Spratly Islands through a JDA. Additionally, some implemented JDA models on hydrocarbon exploration and exploitation in contested maritime areas will be summarily discussed to give practical examples on the issue.

The last chapter summarises the findings of the thesis and gives a concluding remark.

⁸⁴ *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* (Judgment) [1969] ICJ Report 22 [hereinafter, *North Sea Continental Shelf Cases*],

⁸⁵ *MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, ITLOS Case No 10, (2001) ICGJ 343 [hereinafter *MOX Plant case I*]; *MOX Plant Case (Ireland v United Kingdom)*, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures (Order No 3), (2003) ICGJ 366; (2003) 126 ILR 310 [hereinafter *MOX Plant Case II*].

⁸⁶ *Guyana v Suriname Arbitration*, PCA Case No. 2004-04, (2007) 139 ILR 566.

CHAPTER TWO: COOPERATION OVER HYDROCARBON RESOURCES IN THE SPRATLY ISLANDS.

2.1 Sovereign Rights and Jurisdiction

The SCS dispute over the Spratly Islands is undoubtedly one of sovereignty and sovereign rights over its surrounding waters.⁸⁷ Whereas Law of the Sea cannot deal with sovereignty disputes because UNCLOS assumes the existence of sovereignty, it deals extensively with the legal order of the seas and ocean, setting out rights and obligations to govern the interaction of States in their uses of natural resources located around the Spratly Islands.⁸⁸ Of the myriads of rights and obligations enjoyed under customary international law and UNCLOS, coastal States are granted exclusive sovereign rights and jurisdiction over the natural resources located in their economic exclusive zone (EEZ) and outer continental shelf area; in addition, these sovereign rights under Article 76 are inherent in the State.⁸⁹ The ‘exclusive’ and ‘inherent’ nature of the sovereign rights over the continental shelf prevents this maritime area from being lost to another State in the absence of an express agreement to the contrary, and also restricts unauthorized activities from occurring within the area.⁹⁰ This is reaffirmed in Article 81 of UNCLOS, wherein coastal States are granted exclusive rights to authorize and regulate drilling on their continental shelf for all purposes.

⁸⁷ Robert Beckman, ‘The United Nations Convention on the Law of the Sea and the Maritime Disputes in the South China Sea and the Maritime (2013) 107 AJIL 142; Robert C Beckman, ‘International law, UNCLOS and the South China Sea’ in Robert C Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing 2013) 48-50.

⁸⁸ Ibid; Nong Hong, *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea* (Routledge, 2012). 54-55.

⁸⁹ Convention on the Continental Shelf, Article 2; and UNCLOS, Articles 56 and 77. According to Article 56(3), the rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI [dealing with continental shelf]. What this implies is that, continental shelf provisions governing natural resources applies to the natural resources on the seabed of the EEZ. In this regard, Article 77(1) and (2) provides that the coastal State exercises exclusive sovereign rights for the purpose of exploring and exploiting its natural resources. Also see *North Sea Continental Shelf Cases* (n 84) 22, para 19 where the ICJ held that customary international law recognises the sovereign rights of a State by virtue of its sovereignty over the adjacent land territory. The right of coastal States to exploit their adjacent continental shelf originated from the Truman Declaration of 1945 which asserted that the natural resources of the seabed and subsoil of the continental shelf contiguous to the coasts of the United States belonged to the United States and were subject to its jurisdiction and control. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 28 September 1945 (1945) 10 Federal Regulation 12,303 [hereinafter Truman Declaration].

⁹⁰ UNCLOS, Articles 76(1) and 77(2) and (3). For the purpose of this thesis, ‘Natural Resources’ is described as consisting of the mineral and non-living resources of the sea-bed and subsoil’ such as natural gas and oil (collectively known as hydrocarbons) – see Article 77(4).

The extension of maritime jurisdiction over offshore resources to a limit of 200 nm and beyond (where their outer limit exceeds 200nm) has made many continental shelves rich in hydrocarbon resources. It is the potential or actual value of these resources that have influenced States to assert their sovereignty, and consequently, resulted in overlapping claims by opposite and adjacent coastal States.⁹¹ The situation is aptly described by Professor Miyoshi as follows, ‘in as much as a State has sovereign rights over its continental shelf under customary law...the other State also has [equally] its sovereign rights over its share...even if it does not explore the continental shelf or exploit its natural resources.’⁹² The issue arising in this regard is the uncertainty regarding the obligation in such instances of overlap.⁹³ Therefore, this chapter seeks to examine whether international law requires cooperation of SCS coastal States in the use of common hydrocarbon resources found in disputed areas.

2.2. Scope of Cooperation over Hydrocarbon Resources in Semi-Enclosed Seas

2.2.1 Cooperation over Hydrocarbon Resources under General International Law prior to UNCLOS

The obligation to cooperate is a well-founded rule in international law,⁹⁴ however, there is no specific rule of customary international law or convention imposing a duty to cooperate in relation to hydrocarbon resources.⁹⁵ Nonetheless, the existence of this obligation can be proven

⁹¹ Chidinma B Okafor, ‘Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?’ (2006) 21(4) *The International Journal of Marine and Coastal Law*, 489-522 at 489 ; Tara Davenport and Ors, ‘Conference on Joint Development and the South China Sea’ (Centre for International Law, National University of Singapore, 16-17 June 2011) 5.

⁹² Masahiro Miyoshi, ‘The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf’ (1988) 3(1) *International Journal of Estuarine and Coastal Law*, 1-18.

⁹³ Tara Davenport, ‘The Exploration and Exploitation of Hydrocarbon Resources in Areas Of Overlapping Claims’ in Robert C Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing 2013) 99.

⁹⁴ The obligation to cooperate is established upon the principle of ‘good neighbourliness’ enunciated in Articles 2(2) and 74 of the UN Charter – see P Sands and Ors, *Principle of International Environmental Law* (CUP 2018) 203-04; and widely supported by State practice – see Declaration on Principle of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), (adopted 24 October 1970) UN Doc A/8028 [hereinafter, 1970 Friendly Relation Declaration] Recital 17 (d) and (g) [adopted without a vote].

⁹⁵ David Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?’ (1999) 93(4) *AJIL* 771-804 at 780.

by examining various sources of international law such as the UNCLOS, UN General Assembly (UNGA) resolutions, international case law, examples of State practice and legal literature.⁹⁶

2.2.2 Cooperation over Hydrocarbon Resources under Law of the Sea (UNCLOS)

Cooperation is generally required in Article 123 of UNCLOS from States bordering enclosed or semi-enclosed sea, in the exercise of their rights and performance of their duties.⁹⁷ However, this provision does not explicitly provide that the obligation extends to natural resources or state the extent to which the provision can be stretched to accommodate the exploitation of hydrocarbon in common areas subject to overlapping claim.⁹⁸ Before delving further into discussions on the nature and scope of this obligation under the convention, it is first important to determine the status of the SCS [Spratly Islands] by examining the criteria for enclosed or semi-enclosed seas in Article 122 of UNCLOS.

2.2.2.1 South China Sea as a Semi-Enclosed Sea

The definition of an enclosed or semi-enclosed sea is set out in Article 122 of UNCLOS. This article consist of two main requirements for categorising any body of water as an enclosed or semi-enclosed sea: (1) surrounded by two or more States and connected to another sea or the ocean by a narrow outlet definition (narrow outlet requirement); and (2) consisting entirely or primarily of the territorial seas and EEZs of two or more coastal States (territorial seas/EEZs requirement).⁹⁹

⁹⁶ Rainer Lagoni, 'Oil and Gas Deposits across National Frontiers' (2002) 73 AJIL 215; David M Ong, 'The New Timor Sea Agreement 2001: Is Joint Development of Common Offshore Oil and Gas Deposit Mandated under International Law?' (2002) 17 International Journal of Marine and Coastal Law 79-122; Davenport, 'The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims', (n 93) 107. According to the *pact sunt servanda* rule, '[e]very treaty in force is binding upon the parties to it and must be performed in good faith' – VCLT (n) art 26. see also UN Charter, art 2(2).

⁹⁷ UNCLOS, Article 123.

⁹⁸ Linebaugh, 'Joint Development in a Semi-Enclosed Sea: (n 44) 546; Ong, 'Joint Development of Common Offshore Oil and Gas Deposits:' (n 95) 781-82; Seokwoo Lee and Jeong Woo Kim, 'UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-enclosed Sea Cooperation' in Zou Keyuan (ed), *Maritime Cooperation in Semi-enclosed Seas: Asian and European Experiences* (Brill Nijhoff 2019) 11-29 at 19-21; finally, Hua Zhang, 'Duty to Cooperate in Semi-enclosed Seas: Exploring the way forward for the South China Sea' in *Maritime Cooperation in Semi-enclosed Seas: Asian and European Experiences* (Brill Nijhoff 2019) 30-70.

⁹⁹ Art 122 of UNCLOS provides: 'For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and Exclusive Economic Zones (EEZs) of two or more coastal States'

The application of the interpretation rule which starts with interpreting the ordinary meaning of Article 122 of UNCLOS in the light of its context and object and purpose¹⁰⁰ reveal the following:

- First, that the use of the conjunctive word ‘or’ indicates that the requirements are not coterminous. This interpretation is supported by Linebaugh when he noted that any body of water that falls into either category qualifies as enclosed or semi-enclosed sea.¹⁰¹
- Second, that a narrow outlet requirement provides that the surrounding States must be connected to a sea, which also should be connected to another sea or ocean by a narrow outlet. It however fails to state, whether such enclosed or semi-enclosed space is expected to have a single narrow outlet, at least or at the most?¹⁰² The SCS is surrounded by 6 (six) coastal States — China, Vietnam, Philippines, Brunei, Malaysia and Indonesia [See Figure 1]. Additionally, several straits connect the SCS to other seas and ocean.¹⁰³ For instance, the Taiwan Strait on the North connects the SCS to the East China Sea (both seas together form the ‘China Sea’);¹⁰⁴ the Luzon Strait also connects the SCS to the Philippine Sea on the East;¹⁰⁵ finally, the Strait of Malacca connects the SCS to the Indian Ocean.¹⁰⁶

Assuming that the narrow outlet requirement was applied only to an enclosed sea, it will be plausible to argue that the requirement is strictly a single narrow outlet; however, the recognition of a semi-enclosed sea in the same manner as an enclosed sea, only embraces the explanation that a narrow outlet is the threshold, as such, nothing precludes the SCS with multiple narrow outlets from claiming the status of a semi-enclosed sea according to Art 122 of UNCLOS.¹⁰⁷ Notably, Linebaugh takes a

¹⁰⁰ VCLT, art 31.

¹⁰¹ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 552.

¹⁰² Ibid, 549.

¹⁰³ Ibid, 549.

¹⁰⁴ The Editors of Encyclopaedia Britannica, ‘Taiwan Strait’ (Encyclopædia Britannica Inc 1998) <<https://www.britannica.com/EBchecked/topic/580987/Taiwan-Strait>> accessed 23 July 2019.

¹⁰⁵ The Editors of Encyclopaedia Britannica, ‘Luzon Strait’ (Encyclopædia Britannica Inc 1998) <<https://www.britannica.com/place/Luzon-Strait>> accessed 23 July 2019.

¹⁰⁶ The Editors of Encyclopaedia Britannica, ‘Strait of Malacca’ (Encyclopædia Britannica Inc 1998) <<https://www.britannica.com/place/Strait-of-Malacca>> accessed 23 July 2019.

¹⁰⁷ MH Nordquist and Ors (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol III, Brill NV 1995). See also, Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 549.

difference stance on the subject. In his words ‘a sea must have only one outlet in order to meet the narrow outlet definition,’ since the SCS it has more than one narrow outlet it does not meet this requirement.¹⁰⁸

- Third, according to the territorial seas/EEZs requirement the SCS can also be considered as enclosed or semi-enclosed sea if it consists entirely or primarily of the territorial seas and EEZs of two or more coastal States. There are several maps and reports showing that over half of the SCS is made up of the EEZs of coastal States without including any of the disputed islands.¹⁰⁹ On the basis of this criterion, it is *prima facie* clear that the SCS is a semi-enclosed sea under Art 122 of UNCLOS [see Appendix 2].

Notwithstanding the clarity of this analysis, it is necessary to clear all doubt regarding the application of Article 122 of UNCLOS to the SCS.¹¹⁰ Therefore, the preparatory work of the Second Committee of the UNCLOS will now be considered to determine the circumstances leading to its conclusion.¹¹¹ At the second session of UNCLOS II, the Second Committee cited SCS as an example of a semi-enclosed sea.¹¹² Similarly, Iran in its Draft Articles differentiated between an enclosed and a semi-enclosed sea but all effort to have this differentiation influence a separate body of rules for both seas was abandoned at the third session.¹¹³ The Chairman of the Committee in fact, coined a definition identical to what we now have as Article 122 of UNCLOS which categorized both seas under Part IX of UNCLOS.¹¹⁴ Notably, there were other proposals to revise the narrow outlet criteria and some others to make both requirements apply simultaneously, but none of these proposals were accepted.¹¹⁵ According to Linebaugh, ‘[B]ased on the text and drafting history of Article 122, it is clear that the SCS is an enclosed

¹⁰⁸ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n) 553

¹⁰⁹ Ronald O’Rourke, ‘*Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*’ (Congressional Research Service (CRS), 2013) [hereinafter CRS Report for Congress]. See also, One Planet Nation Online, ‘Political Maps of the South China Sea’ < <https://www.nationsonline.org/oneplanet/map/South-China-Sea-political-map.htm> > accessed 22 July 2019 .

¹¹⁰ VCLT, art 32.

¹¹¹ Third United Nations Conference on the Law of the Sea, 1973-82, Volume II, Summary Records of the Second Committee, Second Session: 43rd Meeting A/CONF.62/C.2/SR.43 [hereinafter ‘Summary Records of the Second Committee of UNCLOS II’]; see also Nordquist and Ors (eds), UNCLOS III Commentary (n 107).

¹¹² Summary Records of the Second Committee of UNCLOS II, (n 111) para 32. Other seas cited as belonging to this category include: Red Sea, Black Sea, the Baltic Sea, the Mediterranean Sea, the Persian Gulf and the East China Sea.

¹¹³ Ibid, paras 31-32

¹¹⁴ Nordquist and Ors (eds), UNCLOS III Commentary (n 107) 348-49.

¹¹⁵ Ibid, 349-50; Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 552.

or semi-enclosed sea as defined by the Article’, as such the legal duty to cooperate in Article 123 becomes applicable.¹¹⁶

2.2.2..2 Obligation to Cooperate in the Development of Hydrocarbon Resources

Significantly, Article 123 of UNCLOS embodies the obligation to cooperate in a semi-enclosed sea. It specifically provides that States located within this region *should* cooperate in the exercise of their rights and in the performance of their duties under the convention [UNCLOS]. To this end, they *shall endeavour* directly or through an appropriate regional organization to coordinate their activities with respect to marine living resources, protection and preservation of the marine environment, marine scientific research policies, and cooperate with other interested States or international organizations in furtherance of the provisions of this article [Article 123].¹¹⁷ The above provision was formulated to address the special situation of enclosed or semi-enclosed States who were likely to be so connected that ‘the activities undertaken by one State may directly affect the rights and duties of other States bordering that sea’.¹¹⁸ In any case, Article 123 is flawed with ambiguity from efforts by the second conference to reach a compromise among the States.¹¹⁹ A compromise which is reflected in the language used, that is, ‘should’ and ‘shall endeavour’, was later adopted in place of ‘shall’ to impose a less strict obligation to cooperate.¹²⁰ Based on this history, some commentators have argued that a legal duty exist only in respect of activities in subsections (a)-(d),¹²¹ while others have held the view that the obligation on these States extend to all rights and duties under the convention.¹²²

The question on obligation to cooperate in Article 123 was the core issue for determination in the *MOX Plant case II*,¹²³ however, the tribunal did not clearly articulate the scope of this obligation, before the proceeding was terminated in 2008, leaving the questions unresolved.¹²⁴

¹¹⁶ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 553.

¹¹⁷ UNCLOS, Article 123 (a)-(d).

¹¹⁸ Nordquist and Ors (eds), UNCLOS III Commentary (n 107) 365.

¹¹⁹ Zhang, ‘Duty to Cooperate in Semi-enclosed Seas:’ (n 98) 31-32.

¹²⁰ Nordquist and Ors (eds), UNCLOS III Commentary (n 107) 359-362.

¹²¹ Mitja Grbec, *Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Sea: A Mediterranean and Adriatic Perspective* (Routledge 2014) 36-46; Zhang, ‘Duty to Cooperate in Semi-enclosed Seas:’ (n 98) 32.

¹²² Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 554.

¹²³ *MOX Plant Case II* (n 85).

¹²⁴ Zhang, ‘Duty to Cooperate in Semi-enclosed Seas:’ (n 98) 32.

On this note, two key questions are to be addressed in this part: (1) whether Article 123 mandates cooperation in an enclosed or semi-enclosed sea or merely recommend it; (2) if a legal duty arises from this provision, does it extend to the exploitation of hydrocarbon resources?. The general rule of treaty interpretation will be employed in developing answers to these questions. Accordingly, consideration must be given to the ordinary meaning of the text (i.e., Article 123), the context, and object and purpose according to the principle of good faith.¹²⁵

As illustrated above, the vagueness of the language employed in Article 123 is faulted for the controversies in interpretation, hence, nothing meaningful can be deduced from the ordinary meaning of the text.¹²⁶ For example, in the first sentence the word ‘should’ is used to introduce cooperation which suggests that an act is recommendable. In the second sentence however, the language is changed to ‘shall’ which is a binding character.¹²⁷ Therefore, interpreting the ordinary meaning of this Article may result in three different views: i) States are encouraged, but not obligated to cooperate; ii) States have a legal duty to cooperate in respect of activities listed in subsection (a)-(d); and lastly iii) States have an obligation to cooperate in the exercise of all rights and performance of *all* duties under the convention, Article 123 (a)-(d) being the common examples.

i) States are encouraged, but not obligated to cooperate: This interpretation is faulted on the basis that if no legal duty was intended, a mandatory word like ‘shall’ will not be used in the second sentence. It is argued that the addition of ‘endeavour’ after ‘shall’ does not invalidate the mandatory nature of the phrase.¹²⁸ According to Linebaugh, it was included to notify parties that the obligation to cooperate is one of conduct that requires States to act in good faith rather than seeking to win at all cost.¹²⁹

¹²⁵ VCLT, Article 31.

¹²⁶ Zhang, ‘Duty to Cooperate in Semi-enclosed Seas:’ (n 98) 34.

¹²⁷ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 555.

¹²⁸ Ibid.

¹²⁹ Ibid. This view is supported by the dictum of the ICJ in *North Sea Continental Shelf* cases (n 84) para 85. The Court noted that ‘parties are under an obligation to conduct themselves in a manner that ensures that negotiations are meaning, which will not be the case when either of them insist upon its own position without contemplating any modification of it’. Additionally, in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ GL No 92, (1997) ICJ Reports 88 [hereinafter *Gabčíkovo-Nagymaros* case], the ICJ stated that the principle of good faith required Hungary and Slovakia to apply their 1977 Treaty in a reasonable manner that will not undermine the purpose of the Treaty.

ii) *States have a legal duty to cooperate in respect of activities listed in subsection (a)-(d):* This interpretation argues that the first sentence merely introduces the phrase ‘cooperation’ as a basis for the obligation formed in the operative part of the text.¹³⁰ This argumentation sufficiently explains the use of the word ‘shall’ in the second sentence. However, this legal duty is limited to the activities listed in Article 123 and would therefore not apply to non-living resources.¹³¹ This interpretation appeared very logical at first, but when analysed alongside other rights and duties established under the framework of UNCLOS, the essence of Article 123 becomes pointless since other provision requires cooperation on the activities already listed.¹³² The implication of applying this interpretation is that no new legal duty would have been imposed (which cast doubt on the correctness of this interpretation), and possibly suggest that the lists are general.¹³³ Adopting this view contradicts the principle of effectiveness (a practical aspect principle of good faith) which states that the terms of a treaty must not be interpreted in a manner that renders the treaty redundant or reduce the practical effects.¹³⁴

iii) *States have an obligation to cooperate in the exercise of all rights and performance of all duties under the convention:* A cursory look at the wordings of Article 123, nothing suggests a legally-binding duty or non-exclusive list of activities. However, the object and purpose of UNCLOS stated in the preamble reveals the consensus of State parties to coordinate their activities in order to achieve peace and security, cooperation and friendly relations among user States, to promote equitable and efficient utilization of offshore resources, and ensure the protection and preservation of the marine environment.¹³⁵ This supports the argument that there is a general requirement to cooperate in respect of all offshore resources, including hydrocarbon.

¹³⁰ Lee and Kim, ‘UNCLOS and the Obligation to Cooperate:’ (n 98) 20

¹³¹ Ibid. According to Lee and Kim, only the activities contained in subsections (a) – (d) of Art 123 are qualified by the obligation to cooperate within this text. Also see Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 555.

¹³² Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 556-557. For instance, with respect to Article 123(a), the provisions of Articles 61(2), 63, 117 and 118 all require cooperation in the utilization, conservation and management of living resources; while for Article 123(b), the equivalent is contained in Article 197; regarding marine scientific research in Article 123(c), Part VIII of UNCLOS and Article 242 has the same purpose. Finally, all these additional provisions require cooperation with international organizations either at regional or sub-regional level, which is not any different from Article 123(d).

¹³³ Ibid.

¹³⁴ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 422.

¹³⁵ UNCLOS, preamble paras 1-7.

To clear all doubt arising from the interpretation of this Article, the travaux préparatoires will be examined for supplementary meaning.¹³⁶ Debates on enclosed or semi-enclosed seas was first raised during UNCLOS II,¹³⁷ many of the delegates at the second session argued that the unique features of the enclosed or semi-enclosed seas, such as the size and the possibility of overlapping EEZs, warranted special rules in order to prevent and control problems likely to result from navigation, pollution and exploitation of resources.¹³⁸ In this regard, draft articles from this session were compiled and reproduced in Articles 133-135 of the Informal Single Negotiating Text (ISNT).¹³⁹ In the fourth session of UNCLOS II however, the Chairman substituted ‘shall’ for ‘should’ in Articles 134, while Article 135 of ISNT was entirely taken out.¹⁴⁰ In his words, ‘I have responded to the expressions of dissatisfaction with the provisions by making *less mandatory* the coordination of activities in such seas’.¹⁴¹ In the remaining sessions of the conference, attempts were made to restore the mandatory word as well as Article 135, but all was to no avail. Instead the wording of Article 134 was adopted as Article 123 at UNCLOS III.¹⁴² From this draft history, it is obvious that the delegates could not agree on whether an obligation should arise from the then, Article 134. This prompted the chairman to make changes that will be acceptable to all, which is now reflected in Article 123 of UNCLOS.¹⁴³

From the wordings of the Chairman, it can be correctly stated that the substitution of phrases was not to take out the obligation to cooperate which had already attained the status of customary International law at the time, but to enforce a less strict obligation on states bordering enclosed or semi-enclosed seas in respect of activities recognised under the Convention. On the other hand, it is argued that Article 135 was removed to create a synergy between the rights and duties under Part IX of UNCLOS and other relevant provisions of UNCLOS,¹⁴⁴ in such a

¹³⁶ VCLT, Article 32.

¹³⁷ See Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 557.

¹³⁸ See, Official Records, Second United Nations Conference on the Law of the Sea (Committee of the Whole – Verbatim Records of the General Debate), UN Doc. A/CONF.19/9, (Geneva, 17 March-26 April 1960) at 409-15. Also see, Summary Records of the Second Committee of UNCLOS II (n 111) para 35.

¹³⁹ ‘Summary Records of the Second Committee of UNCLOS II’ (n 111); Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 558.

¹⁴⁰ Article 135 of the ISNT stated that ‘The provisions of this part shall not affect the rights and duties of coastal or other States under other provisions of the present Convention, and shall be applied in a manner consistent with those provisions’ – see Nordquist and Ors (eds), UNCLOS III Commentary (n 107) 360.

¹⁴¹ Ibid, 362.

¹⁴² Ibid, 363-65.

¹⁴³ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 559

¹⁴⁴ Ibid, 559-60.

manner that cooperation is achieved over more activities by way of reference. Both arguments are consistent with the principle of equity underlying the Preamble of UNCLOS¹⁴⁵ and align with the debate in the Second Committee which was more focused on ‘achieving cooperation’ in difficult situations.¹⁴⁶ Consequently, the third view presents the most plausible interpretation of Article 123, as applying to the exercise of *all* rights and performance of *all* duties under UNCLOS sought to be undertaken by coastal States within an enclosed or semi-enclosed sea.¹⁴⁷ Linebaugh’s endorsed this view in his statement ‘this interpretation would give all border States a seat at the negotiating table and would prevent China from negotiating in bad faith...’¹⁴⁸ Similarly, Ong notes that ‘the principle of cooperation in Article 123 has been traced back to the UN Charter and the 1970 Declaration on Principles of International Law.’

Moreover, the obligation to cooperate in the protection and preservation of the marine environment can be used as a premise for finding a cooperation rule over natural resources.¹⁴⁹ As Onorato rightly observed, hydrocarbon resources are likely to lay as a single structure in the seabed or subsoil of two or more States.¹⁵⁰ To this end, Article 3 of the 1974 Charter of Economic Rights and Duties of States provides that: ‘In the exploitation of natural resources shared by two or more countries, each State must cooperate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.’¹⁵¹ The Governing Council of the United Nations Environmental Programme (UNEP) recognizing the importance of cooperation from an environmental perspective further invited the General Assembly to draft principles guiding

¹⁴⁵ Ibid, 561.

¹⁴⁶ This is corroborated by the fact that navigation emerged as an issue of great concern in the Second Committee, yet it was not included among the list of activities in Article 123 of UNCLOS. From that time however, there have been several instances of cooperation among that SCS States, and with other user States over the use of international straits in accordance with the provisions of UNCLOS. The same holds true for the utilization of natural resources. For more details, see Nien-Tsu Alfred Hu and Ted L McDorman (eds), *Maritime Issues in the South China Sea: Troubled Waters or A Sea of Opportunity* (Routledge 2013) .

¹⁴⁷ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 560.

¹⁴⁸ Linebaugh, ‘Joint Development in a Semi-Enclosed Sea:’ (n 44) 561

¹⁴⁹ UNCLOS, Article 123(b).

¹⁵⁰ William Onorato, *Apportionment of an International Common Petroleum Deposit* (1968) 17 *International and Comparative Law Quarterly* 85.

¹⁵¹ Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX) in UN Doc. A/9030 (adopted 12 December 1974) 50.

the conduct of States in the utilization of natural resources shared among them;¹⁵² accordingly, this was incorporated into the General Assembly Resolution 34/186.¹⁵³

The UNEP Guidelines call upon States to cooperate in the equitable utilization of shared natural resources protection of the environment from the adverse effect of that utilization. It further provides for exchange of information, notification of plans and consultation between interested States.¹⁵⁴ The General Assembly implored the States to apply these principles ‘as guidelines and recommendations in the formulation of bilateral and multilateral convention regarding natural resources shared by two or more States on the basis of the principle of good faith and in the spirit of good neighbourliness, and in such a way as to enhance and not adversely affect development and the interest of all countries.’¹⁵⁵

Although, these resolutions are not binding rules in international law, the ICJ noted in *Legality of the Threat or Use of Nuclear Weapons*,¹⁵⁶ that UNGA resolutions can be used to establish the existence of a rule or the emergence of an *opinio juris*, in order to reflect general practice accepted as law.¹⁵⁷ Interestingly, these principles on good faith, equity, good relations and cooperation are all recognised in the preamble of UNCLOS.

2.2.2.3 Obligation to Cooperate over Resources in Disputed Maritime Areas

Additionally, the drafters of UNCLOS recognised that claim to maritime areas would possibly overlap, and such overlap might not be easily resolved because of the time-consuming process of reaching a delimitation agreement.¹⁵⁸ Bearing this in mind and recognizing that interested States may be unwilling to suspend economic activities in the disputed areas pending

¹⁵² Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, UNEP Doc. GC Dec No. 6/14, in UN Doc. A/33/25 (adopted by consensus on 19 May 1978) at 154.

¹⁵³ Co-operation in the field of environment concerning natural resources shared by two or more States, UNGA Res. 34/186, in UN Doc. A/34/46 (adopted by consensus on 18 December 1979) at 128. This resolution was reached with the desire of promoting ‘effective cooperation among States for the development of international law regarding the conservation and harmonious utilization of natural resources shared by two or more States.’

¹⁵⁴ Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits’ (n 95) 781

¹⁵⁵ Ibid.

¹⁵⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226.

¹⁵⁷ David Harris, *Cases and Materials on International Law* (Thomson Reuters, 7th edn, 2010) 54.

¹⁵⁸ Rainer Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (1984) 78(2) *The American Journal of International Law*, 345–368; Robert Beckman and Leonardo Bernard, ‘Framework for the Joint Development of Hydrocarbon Resources’ (Paper presented at the Centre for International Law, National University of Singapore 2013) 5-6.

delimitation, UNCLOS purports to provide an interim solution in Articles 74(3) and 83(3) for the EEZ and continental shelf respectively.¹⁵⁹ These identical provisions contain some obligations which are in two folds: a) States are required to ‘make every effort’ to *enter into provisional arrangements* of practical nature; and b) States shall ‘make every effort’ *not to jeopardize or hamper* the reaching of a final delimitation agreement.¹⁶⁰ Understanding these obligations is crucial to determining their application to hydrocarbon exploitation in disputed areas.

2.2.2.3.1 obligation to seek provisional arrangement

The first half of Articles 74(3) and 83(3) commences in this manner, ‘Pending agreement as provided for in paragraph 1 [i.e., Articles 74(1) and 83 (1)], the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature (...). Such arrangements shall be without prejudice to the final delimitation’. Lagoni basing his explanation on the *North Sea Continental Shelf Cases*,¹⁶¹ succinctly summarized this obligation in the following words:

The States concerned are obliged ‘to enter into negotiations with a view to arriving at an agreement’ to establish provisional arrangements of a practical nature and... ‘not merely to go through a formal process of negotiation.’ The negotiation are to be ‘meaningful, which will not be the case when either [State] insists upon its own position without contemplating any modification of it.’ However, the obligation to negotiate does not imply an obligation to reach agreement...¹⁶²

This view was endorsed in the 2007 arbitration between *Guyana and Suriname*.¹⁶³ In this case, Guyana issued an oil exploration concession to CGX Resources, a Canadian oil company in 1998, in an area that was subject to overlapping claims. Suriname demanded that Guyana suspend all exploration activities in the overlapping area. Responding to this action, in 2000 Suriname dispersed two naval vessels to halt the drilling causing CGX Resources to withdraw

¹⁵⁹ Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits:’ (n 95) 773-774; Beckman and Ors, *Beyond Territorial Disputes in the South China Sea*: (n 4) 100.

¹⁶⁰ MH Nordquist and Ors (eds), *United Nations Commentary LOS 1982: A Commentary* (Vol II, Martinus Nijhoff 1985) 815, 984 [hereinafter, UNCLOS Commentary II].

¹⁶¹ *North Sea Continental Shelf Cases* (n 84) para 85.

¹⁶² Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (n 158) 356

¹⁶³ *Guyana v Suriname Arbitration* (n 86) 287 at para 459.

immediately from the area. In the arbitration therefore, both parties argued that the conduct of the other amounted to a breach of Articles 74(3) and 83(3). On the one hand, Suriname claimed that Guyana had failed to ‘make every effort’ by continuously demanding a license for CGX Resources to carry on exploration activities in the area.¹⁶⁴ Guyana claimed on the other hand that Suriname breached the obligation to negotiate provisional arrangements.¹⁶⁵ The tribunal found that the language ‘every effort’ imposes on the parties [Guyana/Suriname] ‘a duty to negotiate in good faith’ and requires them to take ‘a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuant of a provisional arrangement...’.¹⁶⁶ Noting further, the tribunal stated that this obligation constitutes explicit acceptance of the need to avoid suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement.¹⁶⁷ Suriname and Guyana were both found to have violated their obligation to negotiate a provisional arrangement in good faith.

The standard of good faith in the context of negotiations on continental shelf boundary is agreements is met by application of the so-called equitable principles that such agreements should ordinarily reflect.¹⁶⁸ According to Lagoni, the obligation to negotiate in good faith ‘is not merely a non-binding recommendation or encouragement, but a mandatory rule whose breach would represent a violation of international law.’¹⁶⁹ Notwithstanding, this obligation does not imply an obligation to agree upon any provisional measure rather, that negotiations should be governed by good faith, understanding and cooperation at all times.¹⁷⁰

While the phrase ‘provisional’ implies that such arrangements are interim and ceases to exist once a final delimitation agreement is made,¹⁷¹ ‘arrangements’ shows that the agreement could be formal such as treaties or informal such as Memorandum of Understanding(MoU), Note

¹⁶⁴ Ibid, para 471, 473-76.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid, para 461.

¹⁶⁷ Ibid para 460

¹⁶⁸ *North Sea Continental Shelf Cases* (n 84) para 101(D); Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits:’ (n 95) 784

¹⁶⁹ Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (n 158) 354.

¹⁷⁰ BIICL, *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas* (BIICL 2016) 13 at para 47; Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea*: (n 4) 104

¹⁷¹ Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (n 158) 356.

verbales and much more.¹⁷² Indeed, Anderson and Logchem have noted that these variety of arrangements include a simple arrangement of prior notification and consultation, a cooperative arrangement or joint regime, a partial or total moratorium on certain types of activities.¹⁷³ In practice however, the two main forms of provisional arrangements used – provisional boundary line,¹⁷⁴ or joint development.¹⁷⁵ The phrase ‘of a practical nature’ was interpreted by Lagoni to means such arrangements capable of providing practical solution to actual problems confronting the parties without infringing upon the delimitation issue or territorial dispute as the case may be.¹⁷⁶ And finally, ‘without prejudice to final delimitation’ means that the nothing in the arrangement can be construed as acknowledging the legitimacy of any party’s claim, or as a renunciation of States’ claim to sovereignty over territory or sovereign rights in the surrounding waters’.¹⁷⁷ These points confirms the procedural obligation of States to engage in meaningful negotiations and make every possible effort to reach an agreement on the provisional exploitation of economic resources in the disputed areas, refusal to do so amounts to a breach of UNCLOS in Article 300.¹⁷⁸

2.2.2.3.2 obligation not to jeopardize or hamper

This obligation is contained in the second half of Articles 74(3) and 83(3) as ‘[P]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort (...), during this transitional period, not to jeopardize or hamper the reaching of the final agreement.’

The relevant questions here are: what does it mean to jeopardize or hamper? and what conducts would likely jeopardize or hamper the reaching of a final delimitation agreement?.¹⁷⁹ UNCLOS

¹⁷² Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijhoff 2004) 94.

¹⁷³ David Anderson and Youri van Logchem, ‘Rights and Obligations in Areas of Overlapping Maritime Claims’ in S. Jayakumar, T Koh and R Beckman (eds), *The South China Sea Disputes and the Law of the Sea* (Edward Elgar 2014) 198; Natalie Klein, ‘Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes (2006) 21 *International Journal of Marine and Coastal Law*, 423 at 444.

¹⁷⁴ A good example is the Agreement between Ireland and United Kingdom in 2001 – see BIICL, ‘Obligation of States in Undelimited Maritime Areas’ (n 170) 14 at para 51

¹⁷⁵ A good example is the 2001 Agreement between Nigeria and Sao Tome e Principe for the exploration and exploitation of petroleum and othere resources – see BIICL, ‘Obligation of States in Undelimited Maritime Areas’ (n 170) 15 at para 52. This form of provisional arrangement is elaborated upon in chapter 3 of this thesis.

¹⁷⁶ Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (n 158) 358.

¹⁷⁷ Beckman and Bernard, ‘Framework for the Joint Development of Hydrocarbon Resources’ (n 158) 10.

¹⁷⁸ Miyoshi, ‘The Basic Concept of Joint Development of Hydrocarbon Resources’ (n 92) 12.

¹⁷⁹ BIICL, ‘Obligation of States in Undelimited Maritime Areas’ (n 170) 22 at para 74.

does not define the terms or suggest what conducts are included in the obligation not to jeopardize or hamper.¹⁸⁰ During the Third Conference, there were two main views by two groups – one group was concerned about unilateral actions in disputed areas, while the other was more focused on the likely implications of limiting activities in disputed areas which they argued would impair the development of coastal States.¹⁸¹ It is obvious that both groups shared the view that under certain circumstances, the conduct of activities need to be limited in disputed maritime areas and that mutual restraint should be exercised by parties to the dispute.¹⁸² However, the intention was never to completely prevent any activity from taking place in such undelimited areas, this is proved by the lack of support for a general moratorium on all activities, during the negotiation.¹⁸³

In the BIICL Report, it is noted that this obligation require States whose maritime zones overlap and have not yet been delimited, to make every effort to refrain from conducts likely to endanger the prospects of reaching agreement on a maritime boundary or impede the progress of negotiations to that end.¹⁸⁴ However, that does not necessarily preclude all activities from occurring in the disputed area.¹⁸⁵ In determining these activities, it is said that a court or tribunal’s interpretation must ‘reflect the delicate balance between preventing unilateral actions that may permanently alter the status quo but, at the same time, not stifling the parties ability to pursue economic development in a disputed area’.¹⁸⁶ In *Guyana v Suriname Arbitration*, the tribunal drawing heavily from the decision of the court in *Aegean Sea Continental Shelf Case*,¹⁸⁷ found that allowing exploratory drilling in disputed waters was a breach of the obligation to make every effort not to hamper or jeopardize the reaching of a final agreement given that the result could permanently change the physical condition of the marine environment.¹⁸⁸ In a similar manner, Suriname’s actions in using the threat of force in getting the Guyana licensed

¹⁸⁰ Ibid.

¹⁸¹ Nordquist (ed), UNCLOS Commentary II (n 160) 800-815, 952-984.

¹⁸² Youri van Logchem, ‘The Scope of Unilateralism in Disputed Maritime Areas’ in C Schofield, S Lee and M Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014) 179-81 at 179.

¹⁸³ Ibid, 180-81.

¹⁸⁴ Ibid, 22-23 at para 77-78

¹⁸⁵ Ibid, 22-23 at para 77-78.

¹⁸⁶ *Guyana v Suriname Arbitration* (n 86) para 470

¹⁸⁷ *Aegean Sea Continental Shelf (Greece v Turkey)*, Interim Protection, order of 11 September 1976, (1976) ICJ Rep 3 [hereinafter *Aegean Sea Continental Shelf Case*].

¹⁸⁸ *Guyana v Suriname Arbitration* (n 86) para 480; Youri van Logchem. ‘The Rights and Obligations of States in Disputed Maritime Areas: What Lessons can be Learned from the Maritime Boundary Dispute between Ghana and Cote d’Ivoire (2019) 52 Vanderbilt Journal of Transnational Law. 140-141.

vessel to leave was interpreted as a breach of its obligation not to jeopardize the final agreement.¹⁸⁹ According to the tribunal, Suriname ‘had a number of peaceful options to address Guyana’s authorization of exploratory drilling’ such as the entry into discussions with Guyana concerning provisional arrangements and recourse to the compulsory dispute settlement procedures in Part XV of UNCLOS.¹⁹⁰

2.3. Cooperation Efforts among States in the SCS.

The first and most significant cooperation effort witnessed in the history of SCS was the Declaration (DOC) on the Conduct of Parties in the South China Sea signed on 4 November 2002 between China and the ASEAN member States¹⁹¹ The ASEAN States are Philippines, Vietnam, Indonesia, Brunei, Singapore, Cambodia, Laos, Malaysia, Myanmar and Thailand.¹⁹² This Declaration sought to promote peace, stability, economic growth, and security within the region.¹⁹³ It equally regulated some selected activities¹⁹⁴ and create avenues for direct and friendly negotiations between the State parties.¹⁹⁵ Although, the Declaration (DOC) is a non-binding instrument, it nonetheless reflect the consensus of parties to act in good faith and pursue cooperation in their activities.¹⁹⁶

Interestingly in 2011, ASEAN together with China agreed to establish Guidelines for Cooperation in the South China Sea,¹⁹⁷ to regulate the activities of States in the South China Sea, but this was stalled by the *Philippines v China* arbitration.¹⁹⁸ The Minister of Foreign

¹⁸⁹ Ibid para 445.

¹⁹⁰ Ibid, para 483-484.

¹⁹¹ The Declaration (n 45).

¹⁹² ASEAN, ‘ASEAN Member States’ < <https://asean.org/asean/asean-member-states/> > accessed 02 August 2019

¹⁹³ Preamble to the Declaration.

¹⁹⁴ The Declaration, para 7.

¹⁹⁵ Ibid, paras 4-8.

¹⁹⁶ Statement of the Ministry of Foreign Affairs Concerning the Declaration on the Conduct of Parties in the South China Sea Signed by the Association of Southeast Asian Nations (ASEAN) and the People's Republic of China (PRC) in Cambodia on 4 November 2002, < www.mofa.gov.tw/webapp/ct.asp?xItem=2357&ctNode=1902&mp=6 > accessed 02 August 2019.

Even though Taiwan is not a party to the Declaration, it acknowledges the goals and objectives by embracing cooperation with all other member States.

¹⁹⁷ Guidelines for the Implementation of the DOC adopted 20 July 2011, by Senior Officials of the People's Republic of China and the ASEAN States, para 6 < www.asean.org/documents/20185-DOC.pdf > accessed 01 August 2019.

¹⁹⁸ Shih-Ming Kao, Nathaniel Sifford Pearre and Jeremy Firestone, ‘Regional Cooperation in the South China Sea: Analysis of Existing Practices and Prospects’ (2012) 43(3) *Ocean Development and International Law*, 283-295.

Affairs of China noted that this code will be ‘an important milestone document on the cooperation among China and ASEAN countries (...) and we are looking forward to future cooperation.’¹⁹⁹ Indeed the multilateral agreement between ASEAN and China encouraged the signing of many other agreements, mostly bilateral.²⁰⁰ Some of the notable examples on the utilization of natural resources are:

- 2004 Joint Marine Seismic Undertaking between China and Philippine.²⁰¹
- 2005 Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreed Area in the South China Sea signed by China, the Philippines and Vietnam shows cooperation among the States in their search for oil within an agreed area. However, this was shut down by the Philippines in 2008.²⁰²
- In 2010, China and Brunei explored joint development and cooperation in the offshore fields over oil and gas exploitation. It was not until October 2013, that both parties signed the Memorandum of Understanding on Maritime Cooperation with the hope of establishing a joint venture in oil field services.²⁰³

In 2011, China and Thailand signed a Memorandum of Understanding on Marine Cooperation between the State Oceanic Administration of China and the Ministry of Natural Resources and Environment of Thailand.²⁰⁴ Subsequently, in 2012 both sides signed the Arrangement between the State Oceanic Administration of China and the Ministry of Natural Resources and Environment of Thailand on establishing a Sino-Thai Joint Laboratory for Climate and Marine Ecosystem.²⁰⁵

The adoption of such a code was originally stated in the Declaration on the Conduct of Parties in the South China Sea – see The Declaration, para 11.

¹⁹⁹ Nusa Dua, ‘ASEAN, Beijing Agree on Cooperation Guidelines in South China Sea’, (2011) < www.interaksyon.com/article/8905/asean-beijing-agree-on-cooperation-guidelines-in-south-china-sea > accessed 02 August 2019

²⁰⁰ The Declaration, para 8.

²⁰¹ Marichu A Villanueva, ‘RP, China Approve Joint Oil Exploration in Spratlys’ (2004) < <https://www.philstar.com/headlines/2004/09/02/263251/rp-china-approve-joint-oil-exploration-spratlys> > accessed 02 August 2019.

²⁰² Chien-pin Li, ‘The South China Sea Peace Initiative in a Transitional Security Environment’ () 121.

²⁰³ Hai Min and Zhang Aizhu, ‘Cooperation in the South China Sea Under International Law’ (CIIS, 19 March 2014) < http://www.ciis.org.cn/english/2014-03/19/content_6756309.htm > accessed 02 August 2019

²⁰⁴ Ibid.

²⁰⁵ Ibid.

In 2018, Philippines and China signed a Memorandum of Understanding on Cooperation in Oil and Gas Development.²⁰⁶ This memorandum fails to recognise the *Philippines v China* award and is based on the pre-condition that ‘the joint oil and gas exploration shall not affect the respective position on sovereignty and maritime rights and interests of the two parties.’²⁰⁷

²⁰⁶ Trajano, ‘Resource Sharing and Joint Development in the South China Sea:’ (n 79); Li Qingqing, ‘China-Philippines ties a Model for Cooperation’ (Global Times, 2019) < <http://www.globaltimes.cn/content/1158910.shtml> > accessed 02 August 2019.

²⁰⁷ Framework Agreement on Joint Maritime Oil and Gas Exploration between China and the Philippines < <https://media.philstar.com/images/the-philippine-star/headlines/20181120/China-Draft-Joint-Exploration-2018-November.pdf> > accessed 02 August 2019; also Jay Batongbacal, ‘The Philippines-China Mou on Cooperation in Oil and Gas Development’ (2018) < <https://amti.csis.org/philippines-china-mou-cooperation-oil-gas-development/> > accessed 02 August 2018

CHAPTER THREE: JOINT DEVELOPMENT OF HYDROCARBON RESOURCES IN THE SPRATLY ISLANDS

3.1 The Concept of Joint Development Agreement (JDA)

There is a general acceptance that JDA is a common form of ‘provisional arrangement of a practical nature’ stemming from Articles 74(3) and 83(3) of UNCLOS.²⁰⁸ Although there is no uniform definition or practice of joint development,²⁰⁹ this interim arrangement have been widely practiced by the international community and endorsed by international courts and tribunals as an alternative to delimitation since the 1950s.²¹⁰ Some notable examples are, first, the *North Sea Continental Shelf Cases*, wherein the ICJ held that joint exploration agreements were ‘particularly appropriate when it is a question of preserving the unity of the deposit in areas of overlapping claims;’²¹¹ secondly, Judge *ad hoc* Evensen dissenting opinion in the *case concerning delimitation between Tunisia and Libya*,²¹² where he opined that joint development represented an alternative equitable solution to the maritime boundary dispute; in that case, the joint exploitation regime proposed by Judge Evensen was eventually implemented by the parties.²¹³ Finally, the tribunal in the recent case of *Guyana v Suriname Arbitration* stated that the obligation of entering into a provisional arrangement was designed ‘to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation’²¹⁴ while negotiating in good faith to achieve these objectives.²¹⁵

²⁰⁸ According to Lagoni, and Yusuf, both scholars separately noted that ‘the principal object and purpose of Articles 74(3) and 83(3), is to further the provisional utilisation of the area to be delimited, by offering practical solution which allows development to proceed even where there is a boundary dispute between the parties which may take long to finalise’ – see Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (n 158) 354; Yusuf M Yusuf, ‘Is Joint Development a Panacea for Maritime Boundary Dispute and for the Exploitation of Offshore Transboundary Petroleum Deposits?’ (2009) 4 International Energy Law Review (IELR), 130 – 137 at 134-35.

²⁰⁹ Miyoshi, ‘The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf’ (n 92) 5.

²¹⁰ Hazel Fox and Ors, *Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary* (BIICL 1989) 54; Thomas Mensah, ‘Joint Development Zones as an alternative Dispute Settlement Approach in Maritime Boundary Delimitation’ in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff 2006) 143-153 at 146.

²¹¹ *North Sea Continental Shelf Cases* (n 84) para 99.

²¹² *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Dissenting Opinion of Judge Evensen (1982) ICJ Rep 18 at 320-23 (hereinafter, *case concerning delimitation between Tunisia v Libya*)

²¹³ Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits:’ (n 95) 787.

²¹⁴ *Guyana v Suriname Arbitration* (n 86) para 460.

²¹⁵ Eddy L Wifa, Mark Amakoromo and Ibiateli Johnson-Ogbo, ‘The Role of a Joint Development Agreement (JDA) in Resolving the Conflicts and Uncertainties over Maritime Boundary Delimitation: A Missed Opportunity

In the same manner, several scholars have analysed the legal framework, operations and importance of JDA in resolving maritime boundary disputes. According to the BIICL Research team, JDA is defined as ‘an agreement between two States to develop, so as to share jointly in agreed proportions by interstate cooperation and national measures, the offshore oil and gas in a designated zone of the seabed and subsoil of the continental shelf to which either or both of the participating States are entitled in international law.’²¹⁶ Miyoshi also defines joint development as an ‘inter-governmental arrangement of a provisional nature, designed for functional purposes of joint exploration for and/or exploitation of hydrocarbon resources of the seabed beyond the territorial sea.’²¹⁷ Gao defined JDA as ‘the common exercise of sovereign rights and jurisdiction based on an international agreement between governments or two or more concerned States for the purpose of exploitation and apportionment of a potential natural resource in an overlapping area of territorial dispute pending final delimitation.’²¹⁸ While, Shitata and Onorato were of the view that a JDA is ‘a procedure under which boundary disputes are set aside, without prejudice to the validity of the conflicting claims, and the interested States agree instead to jointly explore and exploit and to share any hydrocarbon resources found in the area subject to overlapping claims.’²¹⁹

Although the above analyses present different perspectives on the scope of JDA, certain characteristics are common to them all. These are: JDA is an intergovernmental arrangement, that is, negotiations is restricted to sovereign States only.²²⁰ This agreement is intended as a provisional arrangement effective only in the absence of a final delimitation agreement.²²¹ In other words, the negotiation of a JDA does not suggest that parties have forfeited their claims or that their maritime boundary disputes has been settled. It is designed for the joint exploration

in the Bakassi Case’ in Edwin Egede and Mark Osa Igiehon (eds), *The Bakassi Dispute and the International Court of Justice: Continuing Challenges* (Routledge 2018) 157.

²¹⁶ Fox and Ors, *Joint Development of Offshore Oil and Gas*: (n 210) 45.

²¹⁷ Masahiro Miyoshi, *The Joint Development of Offshore Oil Gas and in Relation to Maritime Boundary Delimitation* (IBRU, Maritime Briefing No 5, 1999) 3.

²¹⁸ Z. Gao, ‘The Legal Concept and Aspects of Joint Development in International Law’ (1998) 13 *Oxford YearBook* 112.

²¹⁹ Ibrahim F Shihata and William T Onorato, ‘Joint Development of International Petroleum Resources in Undefined Disputed Areas’ in Gerald Blake and Ors (eds), *Boundaries and Energy: Problems and Prospects* (Kluwer Law International, 1998) 433

²²⁰ Gao, ‘The Legal Concept and Aspects of Joint Development in International Law’ (n 218).

²²¹ David Ong, ‘The New Timor Sea Arrangement 2001: Is Joint Development of Common Offshore Oil and Gas Deposits Mandated under International Law?’ (2002) 17(1) *International Journal of Marine and Coastal Law* 105; Beckman, *Beyond Territorial Disputes in the South China Sea*: (n) 109-110.

and/or exploitation of offshore resources in overlapping areas, and the proceeds are to be shared jointly as agreed by the parties.²²²

The question often asked is whether there is an obligation to negotiate a joint development where an overlap exist?²²³ While many of the academic writers agree on the functionality of joint development, they have contrasting views on whether a joint development arrangement is binding on States or otherwise.²²⁴ On the one hand, Onorato, Ong and Gao argue that joint development is mandatory under international law for States seeking to exploit hydrocarbon deposits located in undelimited areas or overlapping claim areas, and is steadily crystallising into rule of customary international law.²²⁵ Lagoni support this position only to the extent that this obligation binds States which have ratified or acceded to the UNCLOS because the obligation of joint development has its basis in conventional law.²²⁶ On the other hand, Townsend-Gault, Thao and Miyoshi have opposed this position on the ground that nothing suggests a binding obligation on the States to make such arrangement. Miyoshi notes that while he supports the view that joint development of common deposit is desirable, and exploitation of natural resources is impossible without cooperation for joint development, he totally disagrees with the argument that positive cooperation for joint development is an established rule of customary international law.

To determine the correctness of these arguments, it is necessary to attempt an interpretation of Articles 74(3) and 83(3) in accordance with the rules in Articles 31-32 of the VCLT. The first rule in Article 31 of VCLT is to interpret the language of the texts by its ordinary meaning. The phrase 'shall' which is a binding character implies that the conducts required of parties in a disputed area is mandatory rather than exhortatory. To clarify the interpretation derived above, and possibly understand its scope of application, Article 32 of VCLT allows reference to the draft history of the treaty [UNCLOS]. At the second session of the Third Conference on the Law of the Sea, delegates proposed the need for interim solutions pending final delimitation,

²²² BIICL, *Obligation of States in Undelimited Maritime Areas* (n 170).

²²³ Ong, 'Joint Development of Common Offshore Oil and Gas Deposits:' (n 95) 796; Anderson and van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' (n 173) 208.

²²⁴ Okafor, 'Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?' (n 91) 506-507.

²²⁵ WT Onorato, 'A Case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone' (1985) 10 Energy 539; Ong, 'The New Timor Sea Arrangement 2001:' (n 221) 105; Gao, 'The Legal Concept and Aspects of Joint Development in International Law' (n 218) 124

²²⁶ Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (n 158) 367.

however, the chairman soon realised that finding an acceptable solution was dependent on addressing issues affecting delimitation and dispute settlement.²²⁷ Thus in 1974, the conference welcomed the first proposal on the subject from the Netherlands. The proposal argued that in the event that an agreement cannot be reached, the maritime area should be divided by a provisional equidistance line.²²⁸ Ireland's proposal further suggested a moratorium on exploration and exploitation activities in areas subject to overlapping continental shelf claims, unless the coastal States gave their consent.²²⁹

The failure to reach consensus led to the establishment of an informal consultative group on delimitation, in 1975.²³⁰ The informal group produced an informal Single Negotiation Text (ISNT) which stated that pending agreement, an equidistance or median line will divide the overlapping area.²³¹ The refusal of most delegates to acknowledge this text combined with the possibility that compulsory third-party settlement procedure for delimitation disputes might be abandoned, forced the chairman to opt for a provisional arrangement in place of an equidistance line.²³² At the sixth session of UNCLOS III (1977), Spain reintroduced the language of restraint and included that the use of an equidistance line as an interim solution should be made mandatory only if the States concerned could not 'agree on alternative interim measures of mutual restraint.'²³³

It appeared that the debate had produced two groups with conflicting views on what should be the interim solution. One group in favour of a moratorium against all economic activities in the disputed area, while the other group supported the provisional arrangement pending delimitation.²³⁴ Accordingly, the Chairman established Working Group 7 to enquire into the

²²⁷ Report of the Chairman on the Work of Negotiating Group 7, NG7/26 (1979) reproduced by Renate Platzoder, *Third United Nations Conference on the Law of the Sea: Documents, VOL IX* (Oceana Publications 1989) 432 [hereinafter 'UNCLOS Document']; Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (n 172) 32-37.

²²⁸ Netherlands: Draft Article on Delimitation between States with Opposite or Adjacent Coast, A/CONF.62/C.2/L.14, UNCLOS III *Official Records Vol. III* (1974) 190.

²²⁹ Ireland: Draft Article on Delimitation of Areas of Continental Shelf between Neighbouring States, A/CONF.62/C.2/L.43, UNLCOS III *Official Records Vol. III* (1974), 221.

²³⁰ Statement on the work of the Second Committee, A/CONF.62/C.2/L.89/Rev.1, UNCLOS III *Official Records Vol. IV* (1975), 195-196 at paras 5, 17.

²³¹ Informal Single Negotiating Text (ISNT) Part II, A/CONF.62/WP.8/Part II, UNCLOS III *Official Records Vol. IV* (1975) 162-163. See, Articles 61(3) and 70(3) of ISNT.

²³² Revised Single Negotiating Text Part II, A/CONF.62/WP.8/Rev.1/Part II (ISNT 1976) UNCLOS III *Official Records Vol. IV*, 164-165. See, Articles 62(3) and 71(3).

²³³ Informal document produced by Spain (1977) reproduced in Platzoder, 'UNCLOS Document Vol. IV' (n 227) 467.

²³⁴ Anderson and van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' (n 173).

matter.²³⁵ Morocco, who was neither belonging to any of the groups submitted a proposal advancing that claimant States having legitimate claims in the area(s) of overlap must refrain from ‘any measure which would prejudice a final solution’ and were to make every efforts to seek agreement if they wished to pursue any activities in the area concerned.²³⁶ In addition, Papua New Guinea suggested a ban on all economic activities within the area of dispute except States agreed to the contrary.²³⁷ Furthermore, India, Iraq and Morocco submitted a draft article in April 1979 noting that ‘during the period before the conclusion of a bilateral agreement, when a dispute is not pending before a forum of dispute settlement, claimants shall in a spirit of cooperation make every effort to enter into provisional arrangements.’²³⁸ Mexico and Peru included in their proposal that the provisional arrangement could be in existence only for a limited period.²³⁹ The Chairman, convinced that the key elements for attaining compromise were included in the proposals of India and Iraq and Morocco and that of Mexico and Peru, convened a private group at the eighth session to produce a final draft which read as follows:

Pending agreement as provided for in paragraph 1, the States concerned, in the spirit of understanding and cooperation, shall make every effort with a view to entering into provisional arrangements. Accordingly, during this transitional period, they shall refrain from aggravating the situation or hampering in any way the reaching of the final agreement. Such agreements shall be without prejudice to the final delimitation.²⁴⁰

The Negotiating Group 7 (NG7) Chairman fully endorsed this proposal and included it in his summary report.²⁴¹ Except for minor changes to the body of the text, most of the important elements were replicated in the draft convention,²⁴² and Articles 74(3) and 83(3) of UNCLOS.

²³⁵ M Nordquist and Choon-Ho Park (eds), *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea* (The Law of the Sea Institute 1983) 211-212.

²³⁶ Draft Article of Morocco, A/CONF.62/L.26, UNCLOS III *Official Records Vol. IX* (1978); Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (n 172) 35.

²³⁷ Papua New Guinea: Draft Article Replacing Articles 298 and 299, A/CONF.62/L.29, UNCLOS III *Official Records Vol. IX* (1978).

²³⁸ Informal Documents: India, Iraq and Morocco, NG7/32 (1979), Article 83(3) reproduced in Platzoder, ‘UNCLOS Document Vol. IX’ (n 227) 453.

²³⁹ Informal Document: Draft Articles of Mexico and Peru, NG7/36/Rev.1 (1979), Article 83 reproduced in Platzoder, ‘UNCLOS Document Vol. IX’ (n 227) 456.

²⁴⁰ Report of the Chairman on the Work of Negotiating Group 7, NG7/39 (1979) reproduced in Platzoder, ‘UNCLOS Document Vol. IX’ (n 227) 461.

²⁴¹ Anderson and van Logchem, ‘Rights and Obligations in Areas of Overlapping Maritime Claims’ (n 173) 205.

²⁴² Draft Convention on the Law of the Sea, A/CONF.62/L.78, UNCLOS III *Official Records Vol. XV* (1981).

What seems clear from reviewing the draft history is that an obligation to seek interim arrangement was intended for States, however the obligation takes effect only when States have shown interest in exploring or exploiting the hydrocarbon resources in a disputed maritime area.²⁴³ In this sense, they are bound by the obligation to negotiate in good faith and the obligation of mutual restraint in accordance with customary and conventional law.²⁴⁴ Notably, there is no legal consequences for withdrawing from such arrangement before a final agreement is reached, provided no activity of irreparable damage is unilaterally conducted in the area.²⁴⁵ Where such unilateral act is conducted, it is deemed as an exercise of bad faith, and an abuse of sovereign rights granted under UNCLOS.²⁴⁶ Thus, other affected States may be entitled to seek redress under the dispute settlement procedure of UNCLOS provided such procedure have not been excluded from Part XV.²⁴⁷ The tribunal in *Guyana v Suriname Arbitration*, explicitly stated that the obligations arising from Articles 73(3) and 83(3) fulfil the objectives of the convention, that is, the peaceful settlement of disputes and the effective utilization of natural resources.²⁴⁸

Overall, joint development has proved to be an effective means of ensuring cooperation in the exploration and exploitation of shared hydrocarbon resources.²⁴⁹ It has also been used to strengthen relations or reduce tension among claimant States, and possibly lead to the negotiation of a final delimitation agreement. Shitata and Onorato captures the importance of joint development in the following words: ‘The harder case, of course, is where no (...)’

²⁴³ Ong, ‘The New Timor Sea Arrangement 2001:’ (n 221) 105; Gao, ‘The Legal Concept and Aspects of Joint Development in International Law’ (n 218) 124; Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (n 158) 354.

²⁴⁴ UN Charter, Article 2; UNCLOS, Articles 74(3) and 83(3). In these provisions, UNCLOS merely requires States to engage in negotiations towards an interim solution in accordance with the principles of cooperation and good faith without implying that states should reach and implement an agreement. See I Townsend-Gault and WG Stormont, ‘Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?’ in GH Blake and Ors (eds), *The Peaceful Management of Transboundary Resources* (Martinus Nijhoff 1995) 58; Peter D Cameron, ‘The Rules of Engagement: Developing Cross-Border Petroleum Deposits in the North Sea and the Caribbean’ (2006) 55 *International and Comparative Law Quarterly*, 565–567. Also see I Townsend-Gault, ‘Petroleum Development Offshore: Legal and Contractual Issues,’ in N Beredjick and T. Wälde (eds), *Petroleum Investment Policies in Developing Countries* (Graham and Trotman 1988) 145; Lagoni, ‘Oil and Gas Deposits Across National Frontiers’ (n 96) 243.

²⁴⁵ UNCLOS, Articles 74(3) and 83(3),

²⁴⁶ UNCLOS, Article 300 and PART XV.

²⁴⁷ Fox and Ors, *Joint Development of Offshore Oil and Gas*: (n 210) 35.

²⁴⁸ *Guyana v Suriname Arbitration* (n 86) para 464; Anderson and van Logchem, ‘Rights and Obligations in Areas of Overlapping Maritime Claims’ (n 173) 208.

²⁴⁹ Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits:’ (n 95) 787; *Case concerning the delimitation between Tunisia v Libya* (n 212).

boundary delineation agreement has been reached. Joint development is, in fact, a procedure under which boundary disputes are set aside, without prejudice to the validity of the conflicting claims, and the interested States agree, instead, to jointly explore and exploit and to share any hydrocarbons found in the area subject to overlapping claims.²⁵⁰ Referring to the benefits of joint development, Anderson noted that ‘... a joint area may well be better than seeing a dispute remain unresolved and possibly grow more serious. The governments may prefer a compromise to a defeat in litigation. An effective treaty providing for joint development may allow the industry to work and produce benefit for many years in an area which would otherwise have remained blighted by dispute over jurisdiction. “Half a loaf is better than no bread”, as the saying goes.’²⁵¹ Due to the complex nature of petroleum deposits and the difficulty in reaching a consensus on joint exploitation, only limited JDAs on hydrocarbon exploitation exist. Nonetheless, this chapter will discuss some prominent examples in order to show the use of provisional arrangement in Articles 74(3) and 83(3) as a tool for cooperation in disputed areas.

3.2 Successful JDA Models on Hydrocarbon Exploration and Exploitation

3.2.1 Nigeria – Sao Tome and Principe Joint Development Agreement.

Nigeria and Sao Tome and Principe are located in the Gulf of Guinea in West Africa along with Cameroon, Gabon and Equatorial Guinea. This region is one of the world’s richest oil-producing areas, attracting large foreign investment.²⁵² Due to this fact, delimitation amongst the Gulf of Guinea countries, who share a narrow sea got even more complex resulting in overlapping claims.²⁵³ Eventually in 1995, Cameroon submitted the *case concerning Land and Maritime Boundary between Cameroon and Nigeria* before the ICJ, which was resolved in favour of Cameroon.²⁵⁴ It is suggested that the likely outcome of the proceedings influenced the Nigerian Government to take joint development negotiations with Sao Tome and Principe

²⁵⁰ Shihata and Onorato, ‘Joint Development of International Petroleum Resources in Undefined and Disputed Areas’ (n 219) 433.

²⁵¹ DH Anderson, ‘Strategies for Dispute Resolution: Negotiating Joint Agreements’, in Gerald Blake and Ors (eds), *Boundaries and Energy: Problems and Prospects* (Kluwer Law International 1998) 475.

²⁵² Huang Wen-bo, ‘Analysis of the Nigeria–Sao Tome and Principe Joint Development Agreement and Suggestions for China’ (2015) 4(3) *International Journal for Energy and Power Engineering* 123–128 at 124.

²⁵³ *Ibid.*

²⁵⁴ *Ibid*; Wifa, Amakoromo and Johnson-Ogbo, ‘The Role of a Joint Development Agreement (JDA) in Resolving the Conflicts and Uncertainties over Maritime Boundary Delimitation:’ (n 215) .

more seriously.²⁵⁵ By 2001, a Treaty on joint development was signed containing a preamble, 53 Articles, an MoU and an appendix.²⁵⁶ The preamble emphasizes that member should fully commit to maintaining and strengthening mutual respect, friendship and cooperation between their countries.²⁵⁷ Furthermore, Article 3(1) of the Treaty states that ‘[W]ithin the Zone, there shall be joint control by the States Parties of the exploration for and exploitation of resources, aimed at achieving optimum commercial utilization. The States Parties shall share, in the proportions Nigeria 60 percent, Sao Tome and Principe 40 percent, all benefits and obligations arising from development activities carried out in the Zone in accordance with this Treaty.’²⁵⁸

The joint development structure is jointly managed by the Joint Ministerial Council and the Joint Authority.²⁵⁹ The Council oversees all matters relating to exploration and exploitation of the resources within the joint development zone (JDZ), and such other task assigned by the State parties;²⁶⁰ while the Authority is granted legal personality in international law and under the law of each States member, to make contracts, acquire and dispose of all properties and institute or be a party to legal proceedings where necessary.²⁶¹ No petroleum activities can be undertaken in the JDZ without the consent and involvement of the Authority. However, the Council has the powers to override the decision of the Authority in accordance with the rules of procedures laid down by the Council.²⁶² Finally, the Treaty contained dispute settlement mechanism which provides that disputes will be subject to binding commercial arbitration, unless otherwise agreed by parties.²⁶³ The Treaty shall remain in force for forty-five years, and will be reviewed by the parties after thirty years from the date it entered into force except parties agree to the contrary [in which case it will continue for forty-five years], or may be terminated by parties before the expiration of this period.²⁶⁴ After the initial forty-five years, parties may

²⁵⁵ Ibid.

²⁵⁶ Treaty Between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and Other Resources, in Respect of Areas of the Exclusive Economic Zone of the Two States, (opened for signature 21 February 2001, entered into force 16 January 2003) [hereinafter ‘2001 Treaty’] <www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/STP-NGA2001.PDF> accessed 13 August 2019.

²⁵⁷ 2001 Treaty, Preamble at para 2.

²⁵⁸ Ibid, Article 3(1).

²⁵⁹ Ibid, Articles 6 and 9.

²⁶⁰ Ibid, Article 8.

²⁶¹ Ibid, Article 9.

²⁶² Ibid, Articles 47 – 49

²⁶³ Ibid, Article 51(1)

²⁶⁴ Ibid.

also agree for the Treaty to remain in force.²⁶⁵ It is pertinent to mention that in 2006 the Treaty established the Gulf of Guinea Commission which has the responsibility of providing a stable environment for joint development activities to thrive between Nigeria-Sao Tome and Principe in order to improve their terms of cooperation in the region.²⁶⁶

The Nigeria and Sao Tome and Principe situation is very different from that of the Spratly Islands because the latter concerns sovereignty disputes over the maritime features and the maritime zones to be generated under Art 121 of UNCLOS, while in the Nigeria and Sao Tome and Principe scenario there was no dispute and the boundaries for joint development are clearly marked.²⁶⁷ Nevertheless, Nigeria is a large country just like China while Sao Tome and Principe is an archipelago just like the Philippines.²⁶⁸ Also, the subject-matter in both cases involves the exploitation of hydrocarbon resources in overlap areas. Rather than result to armed conflict, Nigeria-Sao Tome and Principe negotiated a Treaty in 2001 establishing a joint development zone. The essence of the JDZ was to strengthen mutual respect and the good relations between Nigeria and Sao Tome and Principe; enhance cooperation and economic development in the region; allow parties engage in lawful exploration and exploitation within the areas marked in the Treaty.²⁶⁹ However, both countries have an understanding that nothing in the treaty could prejudice the eventual delimitation of their maritime zones by agreement as provided for in Articles 74(3) of UNCLOS.²⁷⁰

3.2.2 Australia – Timor-Leste Joint Development Agreements.

Australia and Timor-Leste (formerly known as ‘East Timor’) both share the Timor sea, a semi-enclosed sea within the definition of Articles 122 and 123 of UNCLOS.²⁷¹ It was only recently that the parties concluded a new treaty establishing their maritime boundaries in the Timor

²⁶⁵ Ibid, Article 51(2)

²⁶⁶ Wen-bo, ‘Analysis of the Nigeria–Sao Tome and Principe Joint Development Agreement and Suggestions for China’ (n 252).

²⁶⁷ Mito, ‘The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands’ (n 22).

²⁶⁸ Ibid.

²⁶⁹ 2001 Treaty, Preamble.

²⁷⁰ Ibid.

²⁷¹ More details on the geographical scope of Timor Sea can be found in Timor Gap Map, ‘Agreements, Treaties and Negotiated Settlement Projects’ < <http://www.atns.net.au/objects/Timor.JPG> > accessed 18 August 2019.

Sea.²⁷² Prior to this time, Indonesia ruled Timor-Leste, and had negotiated the Timor Gap Treaty²⁷³ with the Australian Government in December 1989, to enhance cooperation and attract investors to execute exploration or exploitation contracts.²⁷⁴ The need for cooperation stemmed from the fact that a gap was created in the Timor Sea after Indonesia and Australia had established their seabed boundaries, which was later reported in 1974 to have significant hydrocarbon resources.²⁷⁵ Indonesia relying on UNCLOS claimed a median line or equidistance method as appropriate for boundary delimitation since Timor and Australia were separated by a single continuous continental shelf; on the other hand, Australia argued that delimitation should be based on the principle of natural prolongation of land territory.²⁷⁶ When it was realised that both countries are unwilling to compromise on their respective positions, Australia suggested a joint development zone (JDZ), which was established by the Timor Gap Treaty.²⁷⁷

The Timor Gap Treaty aimed at establishing a cooperation zone allowing for parties to share the potential hydrocarbon resources in three areas marked A, B, and C of the Timor Sea, without establishing a definite maritime boundary.²⁷⁸ Area A was located in the central part of the zone and represented the overlapping claims area, hence parties agreed to a 50/50 sharing basis. For Areas B and C, it was agreed that Australia should solely exploit Area B while Indonesia took Area C; however, each State was entitled to a small percentage of the exploitation proceeds.²⁷⁹ The treaty established a Ministerial Council and a Joint Authority to oversee the various rights and responsibilities involved in petroleum exploration and exploitation within Area A.²⁸⁰ The treaty is to remain in force for at least forty years or until a permanent boundary is agreed

²⁷² Treaty between Australia and The Democratic Republic Of Timor-Leste establishing their Maritime Boundaries in the Timor Sea (opened for signature 6 March 2018) [hereinafter 'Boundary Treaty'] <<https://dfat.gov.au/geo/timor-leste/Documents/treaty-maritime-arrangements-australia-timor-leste.pdf>> accessed on 18 August 2019 .

²⁷³ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (opened for signature 11 December 1989, entered into force 9 February 1991) [1991] ATS 9 [hereinafter 'Timor Gap Treaty'].

²⁷⁴ Stuart Kaye, 'The Timor Gap Treaty: Creative Solutions and International Conflict' (1994) 16 *Sydney Law Review* 72-90.

²⁷⁵ Mito, 'The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands' (n 22) 751

²⁷⁶ Ana E Bastida and Ors, 'Cross-Border Unitization and Joint Development Agreements: An International Law Perspective' (2007) 29 *Houston Journal of International Law* 355, 389.

²⁷⁷ Timor Gap Treaty (n 257); Mito, 'The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands' (n 22) 752.

²⁷⁸ Timor Gap Treaty, Article 2.

²⁷⁹ Ibid, Annex A and B..

²⁸⁰ Ibid, Articles 5 – 11, 12 – 21.

upon.²⁸¹ Before the expiration of this Treaty, Indonesia was forced to surrender control of Timor-Leste to the United Nations.²⁸²

This event led to the signing of a Memorandum of Understanding in 2001, and subsequently the negotiation of a new Timor Treaty in May 2002 between Timor-Leste and Australia.²⁸³ The Timor Sea Treaty renamed Area A, the Joint Petroleum Development Area (JPDA);²⁸⁴ established a Joint Commission and a Designated Authority to deal with the rights of parties in the area including the grant of licences and contracts;²⁸⁵ and made some changes to the allocation of revenues giving Timor-Leste 90 percent while Australia took 10 percent.²⁸⁶ In addition, parties inserted a ‘without prejudice clause’ and a provision on unitization of any other new cross-border petroleum reservoirs.²⁸⁷ The implication of the unitization provision was to ensure States negotiated the treatment of any identified transboundary deposit.²⁸⁸ As a result, both countries negotiated the Agreement relating to the Unitization of the Sunrise and the Troubadour Fields (Unitization Agreement).²⁸⁹

Subsequently, Australia proposed the revision of certain arrangements in the Timor Sea Treaty, and on 12 January 2006, the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) was signed.²⁹⁰ The CMATS Treaty extended the duration of the Timor Sea Treaty and the Unitization Agreement to fifty years or five years after the exploitation of the unitization areas.²⁹¹ It also provides that the parties shall not claim a permanent maritime boundary while

²⁸¹ *Ibid*, Article 33.

²⁸² Francisco P Coutinho and Francisco Briosa e Gala, ‘David and Goliath Revisited: A Tale about the Timor-Leste/Australia Timor Seas Agreements’ (2014) 10 *Texas Journal of Oil, Gas and Energy Law*, 437.

²⁸³ Timor Sea Treaty between the Government of East Timor and the Government of Australia (opened for signature 20 May 2002, entered into force 2 April 2003) 2258 UNTS 3 [hereinafter Timor Sea Treaty].

²⁸⁴ Timor Sea Treaty, Article 3.

²⁸⁵ *Ibid*, Article 6.

²⁸⁶ *Ibid*, Article 4.

²⁸⁷ *Ibid*, Article 9 and Annex E.

²⁸⁸ Coutinho and Briosa e Gala, ‘David and Goliath Revisited:’ (n 282) 447

²⁸⁹ Agreement relating to the Unitization of the Sunrise and the Troubadour Fields, Australia – Timor-Leste (opened for signature 6 March 2003, entered into force 23 February 2007) 2483 UNTS 317 [hereinafter Unitization Agreement].

²⁹⁰ Treaty on Certain Maritime Arrangements in the Timor Sea, Australia-Timor-Leste (opened for signature 12 January 2006, entered into force 23 February 2007, Date of Termination, 10 April 2017) [2007] ATS 12 [hereinafter CMATS Treaty]. On 10 January 2017, the Democratic Republic of Timor-Leste formally notified the Commonwealth of Australia of its desire to terminate the 2006 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea. In accordance with the terms of the 2006 Treaty, it ceased to be in force on 10 April 2017. In 2018, following the first-ever conciliation under UNCLOS, Australia and Timor-Leste signed the Treaty Between the Democratic Republic of Timor-Leste and Australia Establishing their Maritime Boundaries in the Timor Sea.

²⁹¹ CMATS Treaty, Article 12

the Treaty is in force.²⁹² The CMATS Treaty notes further that if within six years no plan is developed for the area, then any of the party is entitled to terminate the Treaty.²⁹³ By the end of the sixth year, no development was approved in the area but rather than terminate the Treaty, Timor-Leste sought to invalidate the CMATS Treaty before a competent tribunal.²⁹⁴ If the Treaty is found to be invalid, all its provision will have no effect and parties will be free to establish their maritime boundaries according to conventional law.²⁹⁵ Accordingly, in March 2018 the Agreement on permanent boundary for the Timor Sea was signed.²⁹⁶ Article 9 of the Boundary Treaty provides that the previous agreements between the parties will cease to exist upon the entry into force of the Boundary Treaty.

Indeed, implementing a JDZ for Timor Sea was instrumental to sustaining peace and good relations in the region despite the contradicting claim of parties. The existent cooperation regimes ensured that resources were used in an efficient and equitable manner, and the claim of the parties, particularly those of Timor-Leste was preserved at the same time.²⁹⁷ The successes of these JDAs makes it recommendable for the Spratly Islands notwithstanding that the circumstances in the SCS differs from the Timor Sea.

²⁹² CMATS, Article 4.

²⁹³ CMATS, Article 12(2)

²⁹⁴ Donald K. Anton, 'The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents' (2014) 18 ASIL INSIGHTS 6.

²⁹⁵ Coutinho and Briosas e Gala, 'David and Goliath Revisited:' (n 282) 450-451.

²⁹⁶ Boundary Treaty (n 272).

²⁹⁷ Ibid; UNCLOS, preamble and Articles 74(3) and 83(3).

CHAPTER FOUR: CONCLUSION

4.1 Summary Notes and Findings.

In the preceding chapters of this thesis, the existence of overlapping claims in the Spratly Islands, the scope of cooperation over offshore hydrocarbon resources in the SCS, and how this cooperation is achievable through joint development arrangements have been extensively discussed.

Chapter one shows that the claims to sovereignty in the Spratly Islands amongst China, Vietnam and the Philippines have been closely followed by maritime boundary claims to one or more of the features located within this vicinity. The speculative perception of the coastal States in respect of hydrocarbon resources influenced the unilateral actions of claimants and the several armed conflicts that took place in the Spratly Islands. Likewise, the uncertainty about the legal status of the features have made cooperation within the ambit of law of the sea almost impossible. Even though the Philippines obtained an Award in 2016 the effect of which would have cleared so many questions revolving the status of these maritime features, it is argued that the Award is non-binding on China and the overlapping claims to the Spratly Islands continue to exist.

In an attempt to find an alternative solution to the Spratly Islands disputes, chapter two examined the scope of cooperation in the use of hydrocarbon resources by SCS coastal States which in this case is restricted to China, Vietnam and the Philippines. The rationale is that, if these three countries who are key players in the SCS can work out their differences and coordinate their activities, the smaller States such as Malaysia and Brunei will have no problem adopting the same approach. This chapter therefore, argued that there is an obligation to cooperate over natural resources [including hydrocarbons] under general international law by considering the decisions in *Mox Plant Case II*,²⁹⁸ *North Sea Continental Shelf Case*,²⁹⁹ *Legality of the Threat or Use of Nuclear Weapons*,³⁰⁰ and *Guyana v Suriname Arbitration*;³⁰¹ as well as Article 3 of the 1974 Charter of Economic Rights and Duties of States, Guidelines

²⁹⁸ *MOX Plant Case II* (n 85).

²⁹⁹ *North Sea Continental Shelf Cases* (n 84).

³⁰⁰ *Legality of the Threat or Use of Nuclear Weapons* (n 156).

³⁰¹ *Guyana v Suriname Arbitration* (n 86).

adopted in the Draft Principles of UNEP; and Articles 123, 74(3) and 83(3) of UNCLOS. It concluded that the obligation in Article 123 of UNCLOS extended to offshore hydrocarbon resources and UNCLOS required the parties in undelimited or overlapping claim areas to cooperate in seeking practical provisional arrangements and to make every effort to restrain from conducts that may jeopardize or hamper a final boundary agreement.³⁰²

In achieving this cooperation obligation, chapter three presents JDA as the most promising provisional arrangement for China, Vietnam and the Philippines, and discussed the Nigeria – Sao Tome and Principe JDA in the Gulf of Guinea, and the Australia – Timor-Leste JDA in the Timor Sea as classical examples of successful JDAs on hydrocarbon exploitation. These examples showed the application and adaptability of JDA to different disputes in various regions of the world. The bias for JDA emanates from the fact that States can make compromises or take political risks in the spirit of cooperation, and these risks does not in any way prejudice their claims at the final delimitation.³⁰³ Moreover, implementing a JDA is an act of good faith, while continuing unilateral activities without regard for the sovereign rights of other claimant States is interpreted in UNCLOS as a show of bad faith and an abuse of sovereign rights under international law.³⁰⁴

4.2 Concluding Remark

This thesis concludes on the note that cooperation through a JDA is [in principle] an obligation imposed on China, Vietnam and the Philippines where they seek to explore and/or exploit for resources in the Spratly Islands. It is only in this instance that the obligation arises, and it ends upon the conclusion of a boundary agreement except parties agrees to the contrary. Although, many scholars have argued that the complexity of the SCS claims and the nature of hydrocarbon resources makes the negotiation of a JDA impossible,³⁰⁵ this thesis argues that a JDA for hydrocarbon exploitation is achievable in the Spratly Islands notwithstanding. It emphasizes that cooperation is the focus and UNCLOS require State parties to make every effort practicable

³⁰² UNCLOS, Articles 74(3) and 83(3).

³⁰³ Anderson and van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' (n 173) 215.

³⁰⁴ UNCLOS, Article 300.

³⁰⁵ Gaven MacLaren and Rebecca James adopted this view in their work titled 'Negotiating Joint Development Agreements' in R Beckman and Ors (eds), *Beyond Territorial Disputes in the South China Sea*: () 150-151; See Chapter 2 and 3 of this thesis for more discussions on the views of scholars regarding the issue of JDA and SCS.

to realise this; noting further that the ASEAN Declaration serves as a platform for cooperation. Indeed, the recent actions and negotiations of the SCS diplomats, especially those of China and Philippines in concluding a Memorandum of Understanding in 2018 stating the willingness of the parties to jointly explore and exploit oil and gas in disputed maritime areas³⁰⁶ is evidence that cooperation can be achieved through joint development.

³⁰⁶ Framework Agreement on Joint Maritime Oil and Gas Exploration between China and the Philippines < <https://media.philstar.com/images/the-philippine-star/headlines/20181120/China-Draft-Joint-Exploration-2018-November.pdf> > accessed 02 August 2019

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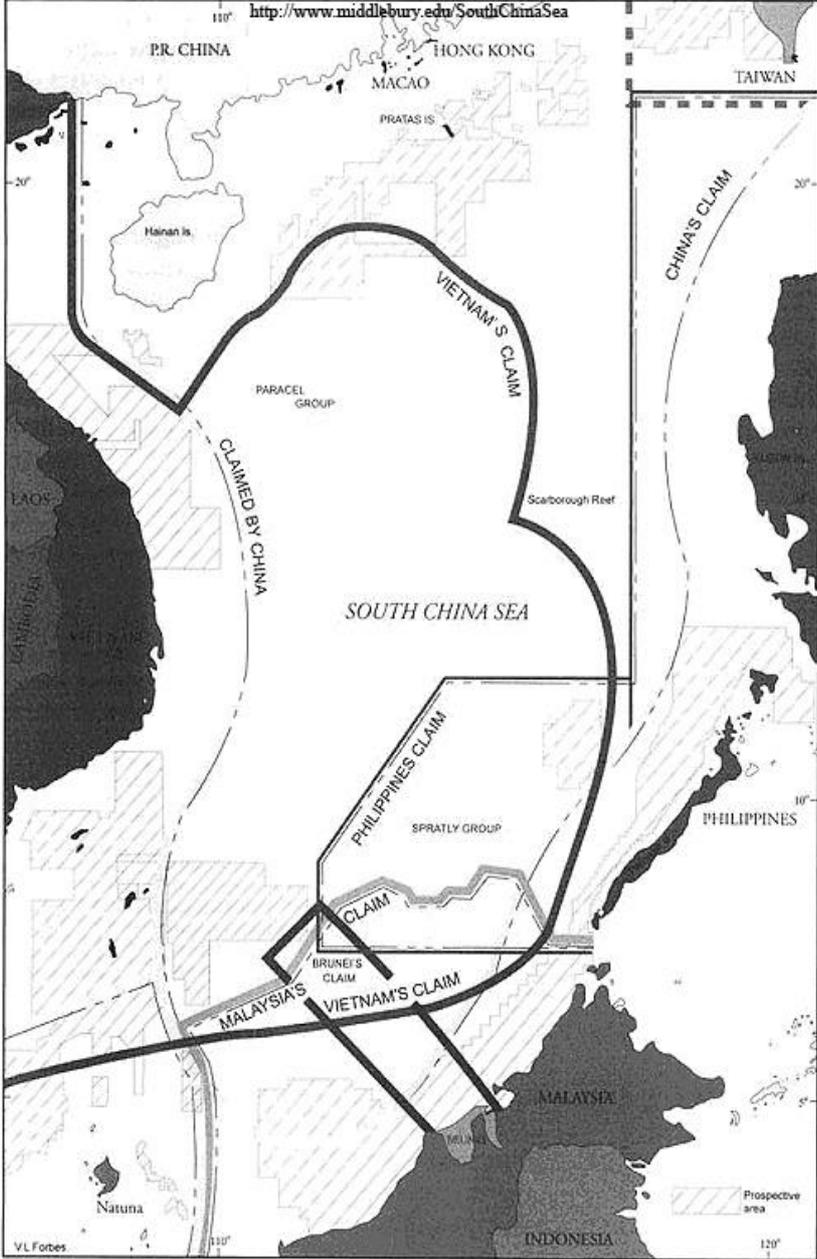
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SOURCE: Vivian Louis Forbes, *Conflict and Cooperation in Managing Maritime Space in Semi-enclosed Seas* (Singapore: Singapore University Press, 2001), p. 136. (Reproduced with the kind permission of Dr Vivian Louis Forbes)
Source: Buszynski, Leszek, and Iskandar Szalun. *Maritime Claims and Energy Cooperation in the South China Sea*. *Contemporary Southeast*, map 3