

# THE PHILIPPINE CLAIM OVER THE SPRATLY GROUP OF ISLANDS: AN APPLICATION OF ARTICLE 76 OF THE UNCLOS\*

Henry Rhoel R. Aguda\*\*  
Jesusa Loreto A. Arellano-Aguda\*\*\*

*"Now the earth was formless and empty, darkness was over the surface of the deep, and the Spirit of God was hovering over the waters... And God said, 'Let there be an expanse between the waters to separate water from water.' So God made the expanse and separated the water under the expanse from the water above it. And it was so."*

- Genesis 1:2-7

## I. ABSTRACT

The Spratly group of islands (hereafter referred to as Spratly) of the South China Sea is a 'tinder box'<sup>1</sup> of international conflict in the Asian region. An estimated 44 of the 51 small islands and reefs are claimed or occupied by the littoral states of Brunei, China, Cambodia, Indonesia, Malaysia, Philippines, Taiwan, Thailand, and Vietnam.<sup>2</sup> The vast natural resources contained in the area consist primarily of oil, natural gas, and seafood.<sup>3</sup> The dispute is further fuelled by the growing attempts of incursion by China in the region, which is motivated by its expanding need to meet its energy demands.<sup>4</sup> The overlapping sovereignty claims in Spratly have

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\*\* J.D., Class Valedictorian, Cum Laude, University of the Philippines (2008); B.S. Mathematics, University of the Philippines (1988); First Vice-President and Chief Information Officer, Digital Telecommunications Holdings, Inc.

\*\*\* J.D., Class Salutatorian, Cum Laude, University of the Philippines (2008); B.S. Business Administration and Accountancy, Cum Laude, University of the Philippines (2002); Legal Assistant, SyCip Salazar Hernandez & Gatmaitan.

<sup>1</sup> ICE Case Study: Spratly Island Dispute, Case No. 21 (May 1997), available at <http://www.american.edu/projects/mandala/TED/ice/spratly.htm>.

<sup>2</sup> Energy Information Administration, *Official Energy Statistics from the U.S. Government*, at [http://www.eia.doe.gov/cabs/South\\_China\\_Sea/Background.html](http://www.eia.doe.gov/cabs/South_China_Sea/Background.html). (last modified Mar. 2008).

<sup>3</sup> *Supra*, note 1.

<sup>4</sup> See H. W. French, *China's Boom Brings Fear of an Electricity Breakdown*, NEW YORK TIMES (5 July 2004)- wherein China is the second largest consumer of energy yet its per capita consumption is only 10% of the per capita consumption of USA. This situation reflects its immense need for additional energy.

resulted in several military incidents since 1974<sup>5</sup> and in several countries awarding foreign companies exploration rights in the same area of the South China Sea.<sup>6</sup> The foreboding diplomatic crisis is further emphasized by the diplomatic protest filed by the Philippines against China in 1999 when the latter established military fortifications in Mischief Reef.<sup>7</sup> In 1992, sovereignty and exploration disputes were thought to be resolved with the drafting of the ASEAN declaration, which committed members to resolve disputes peacefully and to consider joint exploration of the territory.<sup>8</sup> Military aggression and exploration endeavors conducted by China since 1992, however, have brought into question the validity of the 1992 joint declaration and raises the question of what long-term, peaceful solution could prevent the region from erupting into a continuum of military incidents over sovereignty rights to the natural resource-rich Spratly Islands.

The problem that the Philippine government faces is establishing within the international community of States its rightful claim over the islands of Spratly. While diplomatic attempts to assert Philippine sovereignty have been initiated as early as the 1970's, it is only recently upon ratification of the Philippines of the United Nations Convention on the Law of the Sea (hereinafter referred to as "UNCLOS") that an internationally recognized legal framework for resolving the competing claims has buoyed the Philippines claim to new heights.

With the force of customary law, Article 76 of UNCLOS has shifted the basis of the Philippine claim on Spratly from historical evidence to empirical scientific foundations. As the islands in Spratly are small in size and cannot support economic life of their own, and worse, many are reefs and other features that are not above water all the time, they are unlikely to be conferred continental shelf or Exclusive Economic Zone status.

The Philippine's claim is based mainly on Article 76 of the UNCLOS as it provides the framework for establishing the rights granted in Article 77 to littoral states affected by the controversy. UNCLOS compartmentalized the 'common heritage of man'<sup>9</sup> into various maritime

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<sup>5</sup> The most serious of these incidents was in 1974 when China invaded and captured the Parcel Islands from Vietnam; and again in 1988 where Chinese and Vietnamese navies clashed at Johnson Reef resulting in the sinking of several Vietnamese boats and the death of 70 sailors. (*supra* note 1.)

<sup>6</sup> ICE Case Study, *supra* note 1.

<sup>7</sup> A. Ruth and R. Jimenez, *China Fortifies Hold on Spratlys*, MANILA TIMES, (Jan. 21, 1999)

<sup>8</sup> ASEAN Declaration On The South China Sea, July 22 1992).

<sup>9</sup> The 'common heritage of man' is a concept established by Grotius's *Mare Liberum*, which is *res omnium communis* and is incapable of appropriation. This is a concept that has been attenuated by the technological progress of man enabling him to conquer what was once a vast ocean. Such is the previously unattainable realm of the sea that UNCLOS aims to set governing rules for the whole of humanity.

zones consisting of the territorial sea, contiguous zone, exclusive economic zone, and the high seas.<sup>10</sup>

Due to the highly technical nature of the provisions of UNCLOS, the paper will focus on the legal regime of the extended continental shelf and will briefly discuss the other maritime zone regimes to the extent necessary in understanding the application of Article 76 of UNCLOS. Furthermore, while most literature on the subject matter of the Spratly conflict advocates diplomatic solutions to be adopted by the littoral states, the paper will limit its discussions to the legality of the Philippines claim. While a diplomatic approach to a geopolitical conflict may ultimately be resorted to, the interests of the Philippines will be best served by making its legal position the bedrock for any diplomatic solution or future international arbitration.

While there have been several scientific research and political papers written on the Philippine claim on Spratly, there has been a dearth of research work on the legal aspect of the claim; the least of which is the availability of legal opinions on the application of Article 76 as the basis of the claim.

The paper will also discuss the other bases for the claim of the Philippines namely: discovery, proximity, and national security. The merits and weaknesses of these other bases for the Philippine claim will be discussed in order to provide a contrast with Article 76.

Finally, the paper will make recommendations in the area of legislation and executive actions required to establish the Philippine claim on Spratly based on Article 76.

## II. INTRODUCTION

It is said that the history of the sea has been dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas.<sup>11</sup> This is the balance that UNCLOS is envisioned to maintain. Having been in effect for more than two decades, the UNCLOS now encompasses the normative law

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<sup>10</sup> MERLIN MAGALLONA, INTERNATIONAL LAW ISSUES IN PERSPECTIVE 212 (1996).

<sup>11</sup> D. O'Connell, *The International Law of the Sea* 1 (1992), as cited by P. E. Steinberg, *Three Historical Systems of Ocean Governance: A Framework for Analyzing the Law of the Sea*, 12 WORLD BULL. 5-6, 1 (Sep. - Dec. 1996).

that governs maritime disputes between States. Among its ground breaking features is its compartmentalization of the various maritime zones into cohesive legal regimes. As it applies to the Spratly, the legal regime of the continental shelf embodied in Articles 76 to 84 provides the answer in resolving the contending sovereignty claims over it.

In order to facilitate the resolution of the conflicting claims, the UNCLOS has established the Commission on the Limits of the Continental Shelf (CLCS). As a pre-requisite to the granting of the claim, each coastal state must submit to the CLCS the necessary scientific information gathered according to the guidelines set by Article 76 and its annexes. The deadline for the submission has been set to May 2009. However, the Philippines is lagging behind with the other littoral claimants in finalizing, solidifying, and articulating its legal claim to the Spratly.

### III. STATEMENT OF THE PROBLEM

At least 6 countries have set up military installations in the various islands of the Spratly. The escalating tension in the region is brought about by the absence of any formal or internationally recognized adjudication of the claims. As such, claims were based on various pseudo norms and principles such as discovery, proximity, and national security.

While most of the claimants have relied on historical precedents to bolster their claims, Article 76, which covers the definition of the outer limits of the continental shelf of a coastal state, provides the Philippines with the strongest scientific and legal basis for its claim and Article 77 provides it patent rights over the Spratly. The problem before us is how to use Article 76 of the UNCLOS in winning the claim over the Spratly.

### IV. STATEMENT OF THE ISSUES

This paper will tackle the issue of whether or not the Philippines has a valid claim to the Spratly Islands based on Article 76 of the UNCLOS. In the course of the discussion, the following questions will have to be resolved:

1. What is the interpretation of the provision and annexes related to Article 76?
2. What is the procedure for the filing of the claim to the CLCS?

3. What are the relevant legal and historical antecedents in understanding the Philippine claim?

4. What are the actions required from the Philippine government to support its claim?

## V. BACKGROUND

### A. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Public international law regulates the relations among the States, through treaties and customary norms.<sup>12</sup> The international law of the sea is one of the key areas of public international law and the UNCLOS is its cornerstone.<sup>13</sup>

After 14 years of negotiations to which more than 150 countries representing all regions of the world participated,<sup>14</sup> UNCLOS was finally concluded on 10 December 1982<sup>15</sup> in Montego Bay, Jamaica. It is commonly referred to as a “Constitution for the Oceans,” as it addresses every aspect of the uses and resources of the sea.<sup>16</sup> It represents one of the most complex and innovative efforts to codify international law since World War II.<sup>17</sup> UNCLOS comprises 320 articles with 9 highly complex annexes and a number of Conference Resolutions. It entered into force only in 16 November 1994, since the United States and other industrialized countries expressed objections on Part XI of the UNCLOS, relating to the deep seabed mining regime. In order to resolve that impasse, in the 1990’s, the United Nations Secretary General sponsored a series of consultations that led to the adoption of the 1994 “Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea” where State parties undertook to implement Part XI of the Convention in

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<sup>12</sup> UN Division for Oceanic Affairs and the Law of the Sea Office of Legal Affairs, Training Manual for delineation of the outer limits of the continental shelf beyond 200 nautical miles and for preparation of submissions to the Commission of the Limits of the Continental Shelf I-2 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> United Nations Convention on Law of the Sea (hereinafter “UNCLOS”), available at [http://www.eoearth.org/article/United\\_Nations\\_Convention\\_on\\_Law\\_of\\_the\\_Sea\\_\(UNCLOS\)\\_1982](http://www.eoearth.org/article/United_Nations_Convention_on_Law_of_the_Sea_(UNCLOS)_1982) (1982)

<sup>15</sup> The Philippines signed the UNCLOS on 10 December 1982 and ratified the same on 8 May 1984.

<sup>16</sup> *Supra* note 12.

<sup>17</sup> H. PAK, THE LAW OF THE SEA AND NORTHEAST ASIA: A CHALLENGE FOR COOPERATION 1 (2000).

accordance with the provisions of the agreement. The adoption of the agreement made possible the entry into force of the Convention.<sup>18</sup>

UNCLOS represents a commitment of the international community to the rule of law in the conduct of maritime affairs.<sup>19</sup> It is a response to the need expressed by many States to elaborate a new and comprehensive regime for the law of the sea as well as an effort to achieve a “just and equitable international economic order”.<sup>20</sup> Having been ratified by 152 States (as of December 1, 2006),<sup>21</sup> its universality is supposed to greatly increase order and predictability, narrow the scopes of disputes to more manageable proportions and provide the legal means to resolve them.<sup>22</sup> It is supposed to bring considerable stability to State relations with respect to ocean affairs and the law of the sea.<sup>23</sup> In short, the universality of UNCLOS should help foster a stable regime required for effective ocean governance to promote peace and security, equity, and sustainable development.<sup>24</sup>

The drafters of UNCLOS recognized that all problems concerning oceans are closely related and should be dealt with in a cohesive and holistic manner.<sup>25</sup> UNCLOS, therefore, deals with (i) limits and legal regimes of the various maritime zones (including the continental shelf); (ii) rights of navigation; (iii) peace and security; (iv) conservation and management of living and marine resources; (v) protection and preservation of the marine environment; (vi) scientific research; (vii) activities on the seabed beyond the limits of national jurisdiction; and (viii) the settlement of disputes. In addition, UNCLOS established three bodies: the Commission on the Limits of the Continental Shelf (hereinafter referred to as “CLCS”), the International Seabed Authority (hereinafter referred to as “ISA”), and the International Tribunal for the Law of the Sea (hereinafter referred to as “ITLOS”).<sup>26</sup>

UNCLOS is one of the most important and most widely ratified multilateral treaties.<sup>27</sup> As a treaty, UNCLOS has often been referred to as a “package deal” because of the circumstances in which it was negotiated, including the many different issues covered, as well as the conflicting

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<sup>18</sup> UNCLOS, *supra* note 14.

<sup>19</sup> Pak, *supra* note 17.

<sup>20</sup> UNCLOS, *supra* note 14.

<sup>21</sup> *Id.*

<sup>22</sup> Pak, *supra* note 17.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 12.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

interests cutting across traditional political and regional alignments that it sought to balance in light of the great number of States that participated.<sup>28</sup> These participating States are bound by the rights and obligations enunciated in the UNCLOS, and must be performed by them in good faith.<sup>29</sup> Article 300, Part XVI of the UNCLOS provides:

States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner, which would not constitute an abuse of right.

Moreover, UNCLOS, with the exception of Part XI, is generally considered to represent a codification of customary international law<sup>30</sup> and its progressive development.<sup>31</sup> Since the negotiations proceeded on the basis of consensus, it was much easier during the twelve years before UNCLOS entered into force for most of its provisions to become accepted as representing customary law.<sup>32</sup>

Customary international law, as described by the Statute of the International Court of Justice is "a general practice accepted as law."<sup>33</sup> The existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited, or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitates*).<sup>34</sup> Customary international law is therefore obligatory, and is binding on all States.<sup>35</sup> As most provisions of UNCLOS, specially the most important provisions, are codifications of customary international law they should be binding on all States, including the non-parties to it.

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<sup>28</sup> UNCLOS, *supra* note 14

<sup>29</sup> *Pacta sunt servanda*, Vienna Convention on the Law of Treaties, (1969) art. 26.

<sup>30</sup> International Law Governing Driftnet Fishing on the High Seas *at* <http://www.earthtrust.org/dnpaper/intlaw.html>. Examples of provisions codified as customary international laws are: conservation measures to protect the living resources of the high seas, (articles 116, 117, 118, 119, 120), to co-operate and enter into negotiations with "States whose nationals exploit identical living resources, or different living resources in the same area," (article 118); "to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors," (article 119); and to conserve and manage marine mammals in the high seas (article 120).

<sup>31</sup> UNCLOS, *supra* note 14.

<sup>32</sup> A. Aust, *Handbook of International Law* 7 (2005).

<sup>33</sup> ICJ Statute, art. 38(1)(b).

<sup>34</sup> J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, xxxii (2005).

<sup>35</sup> M. M. MAGALLONA, *FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW* 18 (2005).

## B. THE POTENTIAL OF SPRATLY

The South China Sea is defined by the International Hydrographic Bureau as the body of water stretching in a Southwest to Northeast direction, whose southern border is 3 degrees South latitude between South Sumatra and Kalimantan (Karimata Straits), and whose northern border is the Strait of Taiwan from the northern tip of Taiwan to the Fukien coast of China.<sup>36</sup> It encompasses a portion of the Pacific Ocean stretching roughly from Singapore and the Strait of Malacca in the southwest, to the Strait of Taiwan (between Taiwan and China) in the northeast. The area includes more than 200 small islands, rocks, and reefs, with the majority located in the Paracel and Spratly Island chains.<sup>37</sup> The Spratlys links the Pacific Ocean and the Indian Ocean.<sup>38</sup> Despite the fact that the archipelago is spread over 160,000 to 180,000 square kilometers of sea zone, the total landmass of the Spratly Islands total land area of 10 square kilometers only. All its islands are coral, low and small, about 5 to 6 meters above water.<sup>39</sup>

The land is not arable, does not support permanent crops, and has no meadows, pastures or forests<sup>40</sup>. Many of these islands are partially submerged islets, rocks, and reefs that are little more than shipping hazards not suitable for habitation.<sup>41</sup> The Spratly Islands have not been occupied by humans until recently. Countries with territorial claims use military means -- airstrips and armed forces -- to reinforce their claims.<sup>42</sup> The islands are important, however, for strategic and political reasons, because ownership claims to them are used to bolster claims to the surrounding sea and its resources.<sup>43</sup>

The South China Sea is rich in natural resources such as oil and natural gas. One study conducted by China estimated oil reserves in the South China Sea to be larger than Kuwait's present reserves.<sup>44</sup> Oil and natural gas reserves in the Spratly region are estimated at 17.7 billion tons; Kuwait's reserves amount to 13 billion tons.<sup>45</sup> The Spratly reserves place it

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<sup>36</sup> Spratly Islands, at <http://www.globalsecurity.org/military/world/war/spratly.html>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> ICE Case: Spratly Island Dispute, *supra* note 1

<sup>41</sup> Spratly Islands, *supra* note 36.

<sup>42</sup> R. Heinemann, *The Spratly Islands Dispute*, at <http://www.reedbooks.com.au/heinemann/hot/sprat.html> cited in ICE Case: Spratly Island Dispute, note 1, *supra*.

<sup>43</sup> Spratly Islands, *supra* note 36.

<sup>44</sup> J. Kiras, *The South China Sea: Issues of a Maritime Dispute*, PEACEKEEPING & INTERNATIONAL RELATIONS, 3-4, (Jul/Aug 1995)

<sup>45</sup> N. Marsh, *The Spratly Islands Dispute*, at <http://snipe.ukc.ac.uk/international/dissert.dir/marsh.html>.

as the fourth largest reserve bed worldwide.<sup>46</sup> These resources have garnered attention throughout the Asia-Pacific region. East Asia's economic growth rates had been among the highest in the world and this economic growth will be accompanied by an increasing demand for energy. Over the next 20 years, oil consumption among developing Asian countries is expected to rise by 3.0% annually on average, with more than one-third of this increase coming from China alone. If this growth rate is maintained, oil demand for these nations will reach 33.6 million barrels per day by 2025.<sup>47</sup>

Almost all of this additional Asian oil demand, as well as Japan's oil needs, will need to be imported from the Middle East and Africa, and to pass through the strategic Strait of Malacca into the South China Sea. Countries in the Asia-Pacific region depend on seaborne trade to fuel their economic growth, and this has led to the sea's transformation into one of the world's busiest shipping lanes. In addition, the South China Sea region contains oil and gas resources strategically located near large energy-consuming countries.

Over half of the world's merchant fleet sails through the South China Sea every year. The economic potential and geopolitical importance of the South China Sea region has resulted in jockeying between the surrounding nations to claim this sea and its resources for themselves.

### C. THE HISTORY OF THE PHILIPPINE TERRITORY AND PHILIPPINE CLAIM TO THE SPRATLY

Article III of the Treaty of Paris entered into by Spain and the United States on December 10, 1898 principally defined the territorial limits of the Philippines.<sup>48</sup> The treaty sets forth in exact metes and bounds the territory of the Philippines taking into consideration the unity of land and water that inheres in the concept of an archipelago.<sup>49</sup> The subsequent Constitutions of the Philippines have adapted the historical and political boundaries of the Philippines as set in the Treaty of Paris. As shown in Figure 1.0, Spratly is not included within the political boundaries of the Philippines set forth in the Treaty of Paris.

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<sup>46</sup> Spratly Islands, *supra* note 36.

<sup>47</sup> *Supra* note 2.

<sup>48</sup> *Supra* note 10, at 202.

<sup>49</sup> *Id.*



The Figure 1.0 - Evolving Boundaries of the Philippine Territory<sup>50</sup>

During World War II, Japan occupied both the Paracels and Spratly Islands in 1939, shortly after they controlled Hainan Island. The Japanese used Itu Aba, the largest island in the Spratly, as a submarine base and a springboard for its invasion of the Philippines.<sup>51</sup> In 1947, a year after gaining independence, the Philippine Secretary of Foreign Affairs called for the territory occupied by Japan during the World War II to be awarded to

<sup>50</sup> Files from N.R. Aguda, geologist, Pacific Consultants Incorporated Philippines.

<sup>51</sup> The Philippines' Illegal Claim in the Spratly (Spratly Islands), *The Lies and the Groundless Invasion into China's Spratly Island of South China Sea*, at <http://www.spratlys.org/collection/claims/philippines>.

the Philippines.<sup>52</sup> On 7 April 1949, the Chinese Republican Legation in Manila informed the Philippine government that the Chinese were garrisoning Itu Aba in an effort to block the traffic of arms through Hainan to Communist forces. However, the Philippine government continued to express concern and discussed inducing Filipinos to settle in the Spratly islands. In the same month, the Philippines sent its navy to explore the Spratlys.<sup>53</sup> An article published in Manila Bulletin on 15 May 1950 said that the Philippine government should occupy the Spratly Islands together with the United States because it was closer to Palawan compared to China and Vietnam.<sup>54</sup> On May 17, President Quirino of the Philippines said that if the Chinese Kuomintang (Nationalist Party) troops really occupied the Spratlys, then the Philippines did not need to occupy them. However, if the islands fell into the communist enemy's hands, Philippine security is threatened. It was then said that the Spratlys should belong to the nearest country according to international law – which is the Philippines.<sup>55</sup> The Philippines did not make a claim to the islands during the 1951 Treaty of San Francisco. However, the Philippines interpreted the Japanese renunciation of the Spratly islands in the resulting treaty as to transforming the area into *res nullius* and making it open to acquisition.<sup>56</sup>

In 1956, Tomas Cloma together with his brothers and 40 crewmen explored the Spratly and claimed to have "discovered" and occupied 53 islands and reefs of the Spratly. They proclaimed "formal ownership" over them and renamed these islands and reefs the Kalayaan (Freedomland) Island Group. In October 1956 Cloma traveled to New York to plead his case before the United Nations and the Philippines had troops posted on three islands by 1968 on the premise of protecting Kalayaan citizens.<sup>57</sup>

In early July 1971, the Philippine government alleged that the Taiwanese troops on the Itu Aba Island "fired on a boat carrying a Philippine congressman".<sup>58</sup> After this the Philippine government announced on 10 July 1971 that "it had sent a diplomatic note to Taipei asking that the Chinese garrison be withdrawn from Itu Aba".<sup>59</sup> The diplomatic note states:

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<sup>52</sup> Coquia, 1990: 119, cited in D. Dzurek and C. Schofield, *The Spratly Islands Dispute: Who's on First?*, 2 IBRU Maritime Briefing, 1, 14 (1996).

<sup>53</sup> *Supra* note 51.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Drigot, 1982: 44, cited in D. Dzurek and C. Schofield, *supra* note 52.

<sup>57</sup> Spratly Islands at [http://en/ wikipedia.org/wiki/Spratly\\_Islands](http://en.wikipedia.org/wiki/Spratly_Islands).

<sup>58</sup> *Supra* note 51.

<sup>59</sup> *Id.*

(1) The Philippines has legal title to the 53 islands and reefs once occupied by Tomas Cloma because the area was *terra nullius* at the time of its occupation and was "acquired according to the modes of acquisition recognized under international law, among which are occupation and effective administration"<sup>60</sup>; (2) the presence of the Chinese forces in Itu Aba constituted a threat to the security of the Philippines; (3) Chinese occupation of some islands in Spratly group constituted a de facto trusteeship on behalf of the World War II allies which precluded the garrisoning of the islands without the allies' consent; and (4) the Spratly group is within the archipelagic territory of the Philippines.<sup>61</sup> Meanwhile, the Philippines sent its navy to occupy Thitu Island and Nanshan Island.<sup>62</sup>

In April 1972, the Philippine government incorporated the "Kalayaan" group into Palawan Province as a municipality<sup>63</sup> and was administered as a single "poblacion" (township), with Tomas Cloma as the town council Chairman.<sup>64</sup>

In February 1974, the Philippine government stated that the Philippine forces had occupied five islets in the Spratlys. It justified its occupation of the Spratly Islands as "the strategic importance of the Kalayaan area to the Philippine security".<sup>65</sup>

By 1978, the Philippines occupied two more islands; later, it further occupied Siling Jiao (Commodore Reef); in 1980, it occupied Liyue Tan (Reed Bank).<sup>66</sup> On June 11, 1978, Filipino president Marcos signed Presidential Decree 1596 which claimed the Kalayaan group. The 1978 decree omitted Spratly Island and included Amboyna Cay which was not claimed by Cloma. It also said that "some countries claimed some parts of this area but they had given up and thus the claims are not valid anymore..."<sup>67</sup> On 17 July 1978, Presidential Decree (PD) 1599 was issued, proclaiming that the Kalayaan Group was within the Philippine EEZ

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<sup>60</sup> A. J. Gregor, *In the Shadow of Giants, the Major Powers and Security of Southeast Asia* 91-92 (1989), cited in *supra* note 51.

<sup>61</sup> H. Yorac, *The Philippine Claim to the Spratly Islands Group*, 53 *Phil. L.J.* 2 (1983).

<sup>62</sup> *Supra* note 51.

<sup>63</sup> *Id.*

<sup>64</sup> Spratly Islands, *supra* note 57.

<sup>65</sup> C. Hurng Yu, *The South China Sea Islands' Sovereignty and International Conflicts*, 89 (1987), cited in note 49, *supra*.

<sup>66</sup> *Supra* note 51.

<sup>67</sup> A.S.P. Baviera ed., *The South China Sea Disputes: Philippine Perspectives* (1982), cited in *supra* note



China's assertions of sovereignty in the South China Sea rest on historical claims of discovery and occupation. The Chinese case is well documented, going back to references made in Chou Ch'u-fei's *Ling-Wai-tai-ta* during the Sung dynasty (12th century)<sup>71</sup> and in the records of Chinese navigators during the Qing dynasty (18th century).<sup>72</sup> In 1992, China passed a special territorial sea and contiguous zone act to legalize its claims to the Spratlys. Article 2 of this legislation specifically identifies both the Paracels and Spratly archipelagos as Chinese territory.<sup>73</sup> To uphold this claim to title, since 1988 China has deployed some 260 marines in garrisons on seven of the Spratly islets.<sup>74</sup>

On the other hand, Taiwan's claims, which mirror that of China's,<sup>75</sup> are based on its longstanding historic ties to the islands.<sup>76</sup> Taiwan was the first government to establish a physical presence in Spratly following the Japanese departure after World War II. Taiwan announced its claim to the atoll in 1947 and has occupied the largest island of the Spratlys, Itu Aba, constantly since 1956. From the mid-1950s through the late 1980s, Taiwan maintained a force of some 500 soldiers on Itu Aba, although by 1999 the number of troops had been reduced to about 110.<sup>77</sup>

The legal grounds for Vietnam's claims to the South China Sea islands flow from historic activities during the Nguyen dynasty (17th–19th centuries).<sup>78</sup> Maps and other supporting historical evidence for Vietnam's claims were compiled and set out by the government in two white papers, *Vietnam's Sovereignty Over the Hoang Sa and Trung Sa Archipelagoes*, issued in 1979 and 1982, respectively.<sup>79</sup> Vietnam asserts that "it has maintained effective occupation of the two archipelagos (Paracel and Spratly islands) at least since the 17th century when they were not under the sovereignty of any

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<sup>71</sup> Chou Ch'u-fei, *Ling-Wai-tai-ta* (Information on What Lies Beyond the Passes, 1178), cited in Samuels, *Contest for the South China Sea*, 15–16; and Shao Hsun-Cheng, "Chinese Islands in the South China Sea," *People's China* 13 (1956): 26. cited in C. Joyner, *The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accomodation*, at <http://www.southchinasea.org/docs/Joyner,%20Spratly%20Islands%20Dispute.pdf>.

<sup>72</sup> Samuels, *supra*. Appendix C; Chi-Kin Lo, *China's Policy Toward Territorial Disputes*, 30, cited in C. Joyner, *supra* note 71.

<sup>73</sup> The Law of the People's Republic of China on the Territorial Sea and Contiguous Zone became effective on 25 February 1992. See *People's Daily Beijing*, 26 February 1992, 4, reprinted in *UN Law of the Sea Bulletin* No. 21, pp. 24–27 (August 1992).

<sup>74</sup> J. C. Baker, *et al.*, *Cooperative Monitoring Using Commercial Observation Satellites: Case Study of a Transparency Regime for the South China Sea Disputes* (1999), cited in C. Joyner, *supra* note 70.

<sup>75</sup> C. Joyner, *supra* note 71.

<sup>76</sup> P. Kien-hong Yu, "Reasons for Not Negotiating on the Spratlys: A Chinese View from Taiwan," cited in C. Joyner, *Id.*

<sup>77</sup> J.C. Baker, *supra* note 74.

<sup>78</sup> C. Joyner, *supra* note 71.

<sup>79</sup> *Id.*

country and the Vietnamese State has exercised effectively, continuously and peacefully its sovereignty over the two archipelagos until the time when they were invaded by the Chinese armed forces.”<sup>80</sup>

Vietnam also bases its claims to sovereignty over the Spratlys by right of cession from a French claim to the islands first made in 1933. In any event, Vietnam moved in 1975 to secure its claim to possession of the Spratlys when it occupied thirteen islands of the group. In September 1989, Vietnam occupied three more islets, and has since taken at least nine additional atolls. By 1999, Vietnam had stationed 600 troops on at least twenty-seven Spratly land formations.<sup>81</sup>

Malaysia has claimed sovereignty over twelve islands in the Spratly group, basing its claims to certain islands on ocean law principles associated with prolongation of a continental shelf seaward based on UNCLOS. Malaysia is the most recent claimant to occupy part of the Spratlys militarily. In late 1977, Malay troops landed on Swallow Reef. Since then, about seventy soldiers have been stationed on three of the twelve islets claimed by Malaysia.<sup>82</sup>

Brunei has only one claim to the Spratly group – the naturally submerged formation known as Louisa Reef. The legal premise for substantiating Brunei’s claim flows from continental shelf provisions in the UNCLOS. Brunei remains the only claimant without a military presence in the Spratly Islands. Even so, Louisa Reef is also claimed by Malaysia, which took possession of it in 1984.<sup>83</sup>

Indonesia is not a claimant to any of the islands or rocks in the Spratlys. However, the Chinese and Taiwanese claims, depending on their nature and interpretation, could also intrude upon the Indonesian EEZ and continental shelf as defined under UNCLOS and as demarcated in the Indonesian-Malaysian Agreement of 1969.<sup>84</sup>

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<sup>80</sup> Vietnam, 1988:4, cited in D. Dzurek and C. Schofield, *supra* note 52 at 8.

<sup>81</sup> J.C. Baker, *supra* note 74.

<sup>82</sup> *Id.*

<sup>83</sup> K. Muhamed and T. Shamsul Bahrin, “Scramble for the South China Sea: The Malaysian Perspective,” in Hill et al., *Fishing in Troubled Waters*, 237–250, cited in C. Joyner, *supra* note 71.

<sup>84</sup> H. Djalal and I. Townsend-Gault, *Preventive Diplomacy: Managing Potential Conflicts in the South China Sea*, at <http://www.faculty.law.ubc.ca/ses> cited in C. Joyner, *supra* note 71.

In sum, the Spratlys situation remains complicated by competing claims and military clashes. In March 2005, a memorandum of understanding was signed by China, the Philippines, and Vietnam to resolve the energy exploration issues among the three countries in the South China Sea. The country agreed to do seismic surveys in the area which includes the Spratly Islands, without giving up their respective territorial claims. The Philippine National Oil Company, China National Offshore Oil Corporation, and PetroVietnam agreed to design seismic oil exploration for a three-year program covering a 55,000 square mile area. The three companies are sharing the \$15 Million project cost. The Chinese seismic vessel *Nanhai* is gathering the data. The seismic data is sent to Vietnam for processing. Then the data is analyzed by experts in the Philippines.<sup>85</sup>

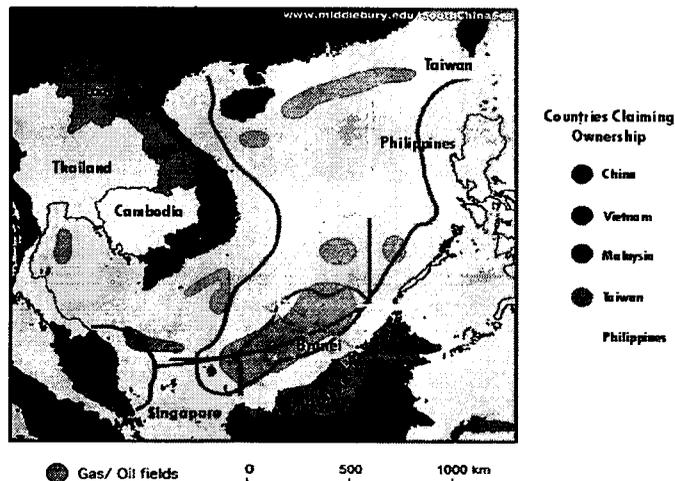


Figure 3.0 Conflicting Oil Claims Over Spratly

## VI. ARTICLE 76 AS BASIS FOR THE PHILIPPINE CLAIM ON SPRATLY

As man's technology enabled him to exploit the historically inaccessible seabed and subsoil lying beyond the territorial sea, so did the interests of States to appropriate for themselves these areas rich with minerals and other resources. The need to regulate this once invisible realm of humanity can be traced back to the "continental shelf" doctrine proclaimed by U.S. President Harry Truman in 1945, where he pronounced the US government's claim of sovereignty to the natural resources and sea

<sup>85</sup> South China Sea, available at [http://www.eia.doc.gov/emeu/cabs/South\\_China\\_Sea/Background.html](http://www.eia.doc.gov/emeu/cabs/South_China_Sea/Background.html).

bed of the continental shelf beneath the high sea but contiguous to the coast of the United States.<sup>86</sup>

Truman's proclamation started the flow of customary international law on the continental shelf that was officially recognized by the international community in the 1958 Convention on the continental shelf and in the 1969 North Sea Continental Shelf Cases<sup>87</sup> as well as the 1978 Aegean Sea Continental Shelf Cases<sup>88</sup> all decided by the International Court of Justice (ICJ). In fact, the ICJ had the occasion to assert the customary nature of the doctrines governing the continental shelf. The ICJ stated:

For to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court, e.g.: 'generally ... adopted in the practice of States' (Fisheries, Judgment, I.C.J. Reports 1951, p. 128). Not all States have, as I indicated earlier in a different context, an opportunity or possibility of applying a given rule. The evidence should be sought in the behavior of a great number of States, possibly the majority of States, in any case the great majority of the interested States.<sup>89</sup>

Hence, Articles 76 to 84 of UNCLOS embodied the customary international law pertinent to the determination of the validity of States claims over its continental shelf. The pertinent provisions of UNCLOS now prevail over the 1958 Convention on the Continental Shelf.<sup>90</sup>

### A. THE LEGAL REGIMES OF UNCLOS

One of the unique features of UNCLOS is the introduction of several legal regimes corresponding to each maritime zone that determine the jurisdictional and sovereignty rights of a coastal state. These legal regimes are (i) internal waters (article 8); (ii) territorial sea (articles 2-32); (iii) contiguous zone (articles 33 and 303); (iv) exclusive economic zone (EEZ)

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<sup>86</sup> *Supra*, note 12.

<sup>87</sup> 'The rights of the coastal state in respect to the area of the continental shelf that constitutes the natural prolongation of its land territory into and under the sea exist *ipso facto and ab initio*, by virtue of its sovereignty over the land, and as an extension of it in exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural rights. In short there is here an inherent right.' [North Sea Continental Shelf Case (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands), ICJ (1969) par.3.]

<sup>88</sup> 'In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State' (Aegean Sea Continental Shelf Case, ICJ, (1978) par. 86).

<sup>89</sup> North Sea Continental Shelf case, *supra* note 87 at 229.

<sup>90</sup> *Id.*

(articles 55-75); and (v) continental shelf (articles 76- 84).<sup>91</sup> Beyond the maritime zones are the (i) high seas (articles 86-120) and (ii) international seabed area (articles 133-191).<sup>92</sup> These zones are shown in Figure 4.0.

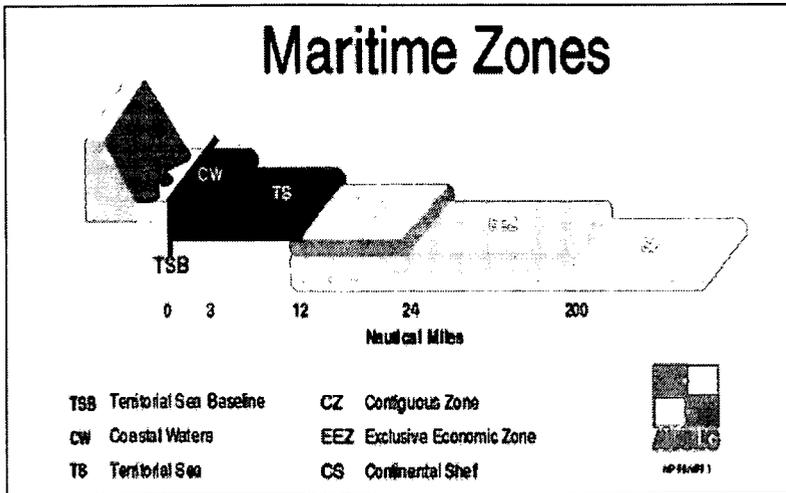


Figure 4.0

### The Maritime Regimes of UNCLOS<sup>93</sup>

#### B. DEFINING THE BASELINE

The baseline is a line drawn by joining a set of points called basepoints which represent areas exposed during low-low tide conditions. It is a prescribed line where all maritime zones will be measured seaward of the coastal state. UNCLOS defines three principal types of baselines from which the coastal state can use to define its coastal limits to its maximum advantage, whether using only one type or combination of the following: Normal baseline (Article 5), Straight baselines (Article 7) and Archipelagic baseline (Article 47). After defining the baseline, other maritime zones can now be defined as follows: territorial sea (12nautical miles or “nm”) (Article 3), contiguous zone (24nm) (Article 33), exclusive economic zone (200nm) (Article 57), mandatory continental shelf (200nm) (Article 76), and the extended continental shelf (beyond 200nm) (Article 76).

<sup>91</sup> *Supra*, note 12 at 1-3.

<sup>92</sup> *Id.*

<sup>93</sup> Available at <http://www.gmat.unsw.edu.au/currentstudents/ug/projects/baltyn/marzon1.jpg>

### C. THE CONTINENTAL SHELF REGIME

Article 76(1) of UNCLOS defines the continental shelf of a coastal state as comprised of the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin<sup>94</sup> or a distance of 200 nautical miles from the archipelagic base lines<sup>95</sup>. All maritime zones are defined by breadth criteria<sup>96</sup> as shown in Figure 4.0. The continental shelf regime is defined and contained in Part VI (Articles 76 to 84) and Annex II of UNCLOS and it prevails over the 1958 Convention on the Continental Shelf.<sup>97</sup>

The concept of Philippine sovereignty over its continental shelf existed and is incorporated as early as the 1935 Philippine Constitution, amplified in the 1973 Philippine Constitution, and perpetuated in the 1987 Philippine Constitution.<sup>98</sup> The terms sub-soil, seabed, and other submarine areas over which the Philippines have sovereignty refers to its continental shelf and is a strong indication of the Philippine government's intention to protect its interest,<sup>99</sup> which would naturally include Spratly by virtue of its geology.

### D. RIGHTS CONFERRED BY UNCLOS TO COASTAL STATES

There is a difference between claims based on sovereignty and claims based on Article 77. The first would confer to successful claimants' sovereignty over the resources as well as on the air, water, and subsoil of the area claimed. It gives full jurisdiction and control over the area. On the other hand, Article 77 confers only rights as provided by the UNCLOS, which are as follows:

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<sup>94</sup> Art. 75, par. 1 defines the continental margin, which comprises the submerged prolongation of the land mass of the coastal State and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

<sup>95</sup> Art. 47 sets the criteria for the establishment of the archipelagic baseline which requires that (i) such baselines include the main islands of the archipelago, and (ii) within which such baselines that ratio of the area of the water to the land, including atolls, be between 1 to 1 and 9 to 1.

<sup>96</sup> *Supra* note 12 at I-4.

<sup>97</sup> *Supra* note 12 at I-3.

<sup>98</sup> 1987 Philippine Constitution, Art. III- National Territory - The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

<sup>99</sup> H. Yorac, *The Philippine Claim to the Spratly Islands Group*, 53 Phil. L. J. 2, (1983).

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.<sup>100</sup>

The rights above stated will accrue to the features directly connected and contained in the continental shelf. The sovereign rights for the purpose of exploring and exploiting the natural resources of its continental shelf granted above is now considered customary international law.<sup>101</sup>

#### E. THE DETERMINATION OF THE EXTENDED CONTINENTAL SHELF

As discussed above, Article 76 deals with the operational aspects of the delineation of the continental shelf's outer limits beyond the 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.<sup>102</sup> The continental shelf of a coastal State contains the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.<sup>103</sup> After determining the delineation of the Philippine's continental shelf, the outer limits of the extended continental shelf must be ascertained. UNCLOS

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<sup>100</sup> UNCLOS, Art. 77.

<sup>101</sup> M. M. Magallona, *supra* note 35 at 436.

<sup>102</sup> *Supra* note 12 at I-25.

<sup>103</sup> UNCLOS, Art. 76 (1).

provided for the means to approximate the outer limits of the extended shelf by using the following formula:

(a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.<sup>104</sup>

The concept of the extended continental shelf was brought about by the differences in topologies of various continental shelves. Figure 5.0 below shows the difference between the mandatory continental shelf and the extended continental shelf.

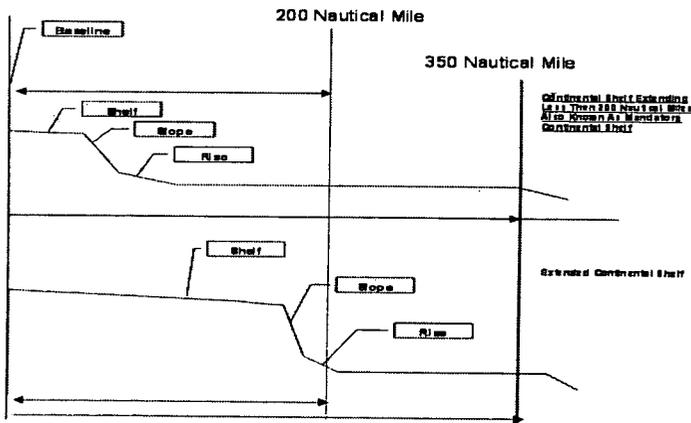


Figure 5.0 Types of Continental Shelves

<sup>104</sup> *Id.*, at Art. 76 (4).

The outer limits of the extended shelf established above are subject to the following conditions:

The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.<sup>105</sup>

The outer limits of the extended shelf are further limited by:

Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>106</sup>

In sum, to locate the extended continental shelf, one must first determine the archipelagic baseline.<sup>107</sup> The territorial sea begins from the baseline up to 12 nautical miles seaward.<sup>108</sup> The contiguous zone, however, is between 12 and 24 nautical miles from the baseline.<sup>109</sup> Then the EEZ is determined by measuring 200 nautical miles from the baseline.<sup>110</sup> The mandatory continental shelf lies below the EEZ consisting of the seabed and its subsoil.<sup>111</sup> The extended continental shelf is then measured using Article 76(4, 5) but only up to 350 nautical miles from the baseline as stated in Article 76(6). Essentially, the extended continental shelf may be found between the EEZ and 350 nautical miles from the baseline of the coastal state as shown in Figure 6.0 (see following page).

#### F. APPLICATION TO THE PHILIPPINE CLAIM ON SPRATLY

Spratly is outside the 200 nautical mile EEZ of the Philippines but is within the 350 nautical mile limit set by Article 76 (6). As such, the Philippine claim on Spratly may easily be established through determining the outer limits of its extended continental shelf.

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<sup>105</sup> *Id.*, Art. 76 (5).

<sup>106</sup> *Id.*, Art. 76 (6).

<sup>107</sup> *Id.*, Art. 47.

<sup>108</sup> *Id.*, Art. 3.

<sup>109</sup> *Id.*, Art. 33.

<sup>110</sup> *Id.*, Art. 48,57.

<sup>111</sup> *Id.*, Art. 76 (1).

The claim of the Philippines is sufficiently supported by the necessary geological and topological surveys done through remote sensing imagery and sea based survey. The bathymetric map in Figure 8.0, *infra* shows exactly where the Spratly is and how it straddles the continental shelf of the Philippines as depicted by the light blue color on the map.

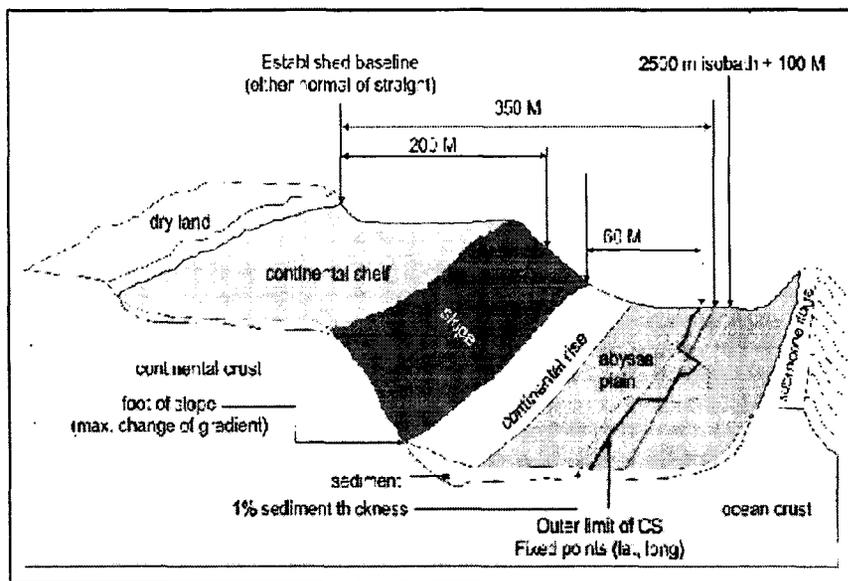


Figure 6.0 The Extended Continental Shelf<sup>112</sup>

The Spratly is undisputedly within the extended continental shelf of the Philippines located between its established EEZ and 350 nautical miles from EEZ.<sup>113</sup> Based on the voluminous scientific studies in the South China Sea incorporating bathymetric, paleontologic, and geophysical information, the geology of the “Dangerous Grounds” or Spratly is the same with Palawan microcontinental block.<sup>114</sup>

Figure 7.0 *infra*, shows the evolution of the continental shelf of the South China Sea and how the shelf was formed. At “d3” is where the

<sup>112</sup> Available at <http://discoveryindonesia.com/images/fig1.jpg>.

<sup>113</sup> Based on interviews with Engr. Nancy Aguda, Geologist, and Engr. Jenny Barreto, Geophysicist, of Pacific Consultants Incorporated Philippines

<sup>114</sup> L. Zamoras and A. Matsuoka, *Malampaya Sound Group: A Jurassic-Early Cretaceous Accretionary Complex in Busuanga Island, North Palawan Block (Philippines)*, 107 *Journal of the Geological Society of Japan*, 5, 316-336 (2001).

current geological formation of Spratly can be found on top of the Philippine continental shelf.

Several well data (Figure 8.0) indicate that Spratly (KIG) is underlain by similar lithologic formations, therefore, it can be argued that Spratly is the submerged natural extension of the Palawan landmass.<sup>115</sup>

### **G. PROCEDURE FOR FILING THE PHILIPPINE CLAIM WITH UNCLOS**

The Philippines must submit to the Secretary General of the United Nations the charts and other relevant information, including geodetic data, permanently describing the outer limits of its continental shelf.<sup>116</sup> The Philippines is also required to provide to the Commission on the Limits of the Continental Shelf (CLCS) all information on the limits of the continental shelf beyond the 200 nautical miles from the baseline from which the breadth of the territorial sea is measured and the CLS will make recommendations to the coastal States on matters related to the establishment of the outer limits of the continental shelf.<sup>117</sup> Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, it shall submit particulars of such limits to the Commission on the Limits of the Continental Shelf (CLCS) along with supporting scientific and technical data as soon as possible.<sup>118</sup> The preliminary procedure is shown in Figure 9.0.

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<sup>115</sup> Based on consultation with Engr. Jenny Barreto, Geophysicist.

<sup>116</sup> UNCLOS, Article 76 (9),

<sup>117</sup> UNCLOS, Art. 76 (8).

<sup>118</sup> CLCS/40, Rule 45 - Submission by a Coastal State, 2 July 2004.

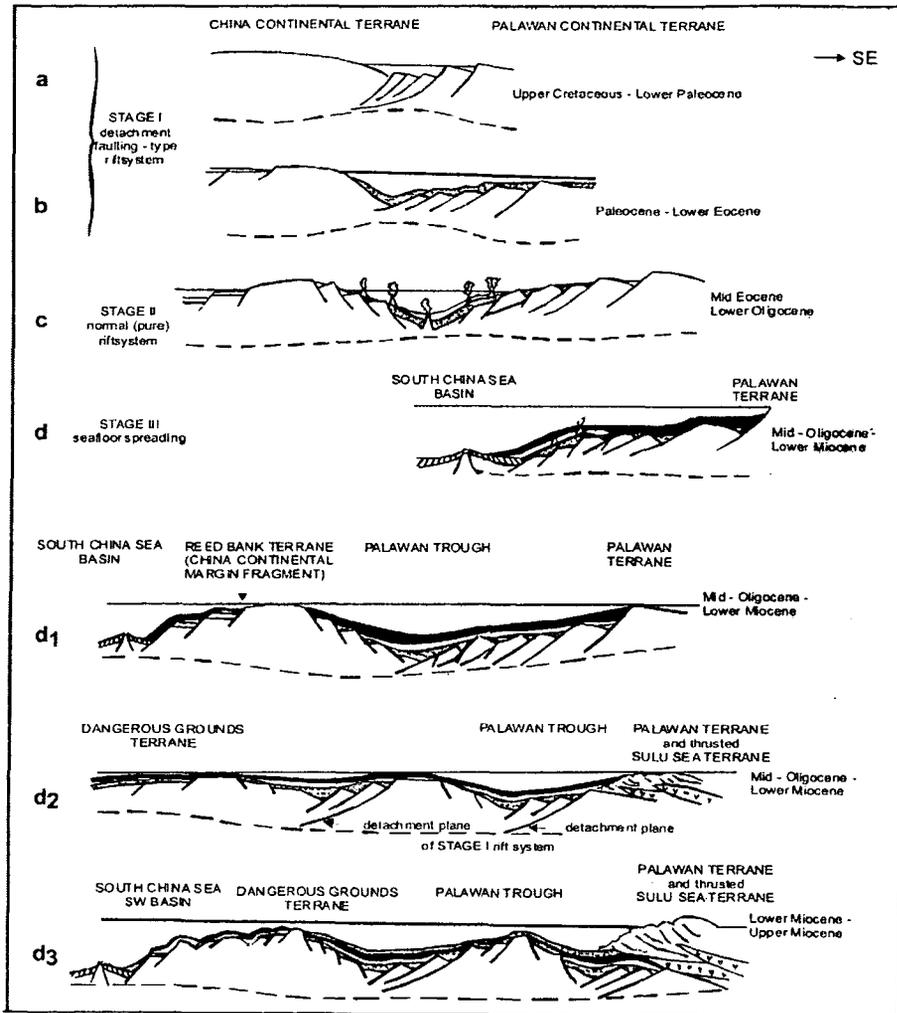


Figure 7.0

Schematic geologic cross sections across the South China Sea with evolutionary stages off North Palawan (stage a-d) and off South Palawan (d1-d3)<sup>119</sup>

<sup>119</sup> H.U. Schlüter, K. Hinz, and M. Block, *Tectono-Stratigraphic Terranes and Detachment Faulting of the South China Sea and Sulu Sea*, Marine Geology, v. 130, 39-78 (1996).



Source of bathymap:  
[www.ngdc.noaa.gov/mgg/gebco/](http://www.ngdc.noaa.gov/mgg/gebco/)  
 Relevant laws not georeferenced

Figure 8.0

Bathymetric Map Showing the Extended Continental Shelf<sup>120</sup>

<sup>120</sup> The bathymetric map above shows seafloor depth with respect to mean sea level; available at <http://www.ngdc.noaa.gov/mgg/gebco/>.

To establishing its outer limits, the Philippines must submit information on its outer limits to the CLCS established under Annex II of the UNCLOS for its recommendation. The original deadline for submission, which provided 10 years to each coastal State, commenced on 13 May 1999.<sup>121</sup> The final limits of the shelf established by a coastal State on the basis of the recommendation of the CLS shall be final and binding.<sup>122</sup> State parties to the UNCLOS created the CLCS to further aide the littoral states in agreeing to the outer limits of their continental shelf. CLCS aims to provide scientific and technical advice in the preparation of all geodetic, bathymetric, geophysical, and other methodologies required by Article 76.<sup>123</sup> More importantly, CLCS is tasked to assess the validity of such information used by the coastal state in substantiating its claim over the extended continental shelf.<sup>124</sup> The CLCS consists of 21 members, who are experts in the field of geology, geophysics, and hydrography, elected by States Parties to the UNCLOS from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities. The submitting State shall also include in their submission the names of any Commission members who have provided it with scientific and technical advice.<sup>125</sup> To date, the CLCS has already received submissions from the Russian Federation, Brazil, Australia, Ireland and New Zealand. CLCS has already made recommendations on the submission by Russian Federation.<sup>126</sup>

The initial procedure requires the Philippines to comply with the required submission in Annex II before 9 May 2009. Failure of a coastal state to submit the necessary information to CLCS on or before the deadline will have adverse legal repercussions on its claim. Furthermore, submissions related to disputes between coastal states shall be governed by Annex I of CLCS/40.<sup>127</sup>

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<sup>121</sup> International Symposium on Scientific and Technical Aspects on the Establishment of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles, at <http://www.mofa.go.jp/policy/maritime/symposium/shelf0603.pdf>. (updated as of February 2006)

<sup>122</sup> UNCLOS, Art. 76 (8).

<sup>123</sup> K. Hinz, *The Law of the Sea System: Some major features of high relevance for marine scientific researchers and explorations*, AAPG Hedberg Conference, Hannover, Germany.

<sup>124</sup> *Id.*

<sup>125</sup> Rule 45 (b), CLCS/40.

<sup>126</sup> *Id.*

<sup>127</sup> Rule 46, CLCS/40.

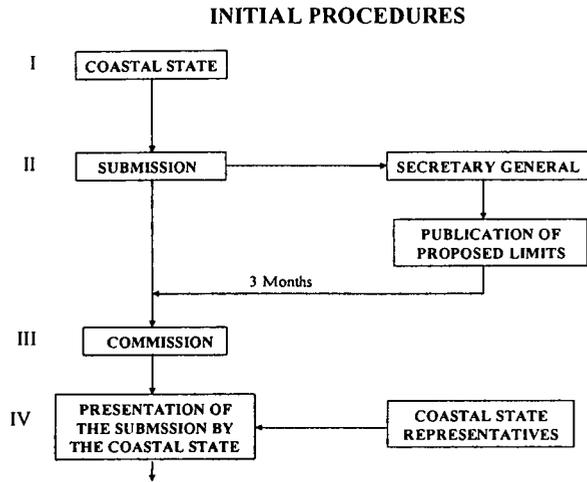


Figure 9.0

Initial Procedures of the CLCS<sup>128</sup>

In light of the extensive scientific and legal work required for the submission, the Philippines is at risk of running out of time. While the National Mapping and Resources Information Authority (NAMRIA) has completed most of the geological information, the Philippine government has yet to establish a cohesive legal strategy for winning its claim.

The establishment of a legal team and strategy will be more critical after the actual submission. It is at this stage where the deliberations on the validity of the claim in the CLCS are conducted. As shown in Figure 10.0, the Commission will conduct deliberations and evaluations over the submission of each coastal state and will conduct consultations among the claimants prior to rendering its recommendation to the Secretary-General. A favourable recommendation from the CLSCS is critical since the outer limits of the continental shelf established by a coastal State on the basis of the

<sup>128</sup> H. Brekke, member of the CLCS, *The Modus Operandi of CLCS at* <http://www.continentalshelf.org>.

recommendation of the Commission shall be final and binding, as provided by Article 76 (8).<sup>129</sup> Unfortunately, the provision of Article 76 (8) maybe construed as not granting the CLCS judicial authority to decide on the merits of the claims. As worded, it seems that the recommended outer limits of the continental shelf will only be binding if the coastal states adapt and recognize such limits. It can be deduced that any recommendation made by CLCS on the outer limits that is met with resistance from any of the coastal states through diplomatic protest or inaction to accept such recommendation will render it ineffective.

Nonetheless, even if the binding nature of the recommendation of the CLCS is in question, the weight of its authority will be influential in any subsequent arbitration between claiming states. Furthermore, the acceptance of the CLCS of the outer limits of the continental shelf of the Philippines is a prerequisite to making it final and binding.<sup>130</sup> In other words, the submission of the Philippines to the CLCS is a necessary but disputable condition to finalizing its claim.

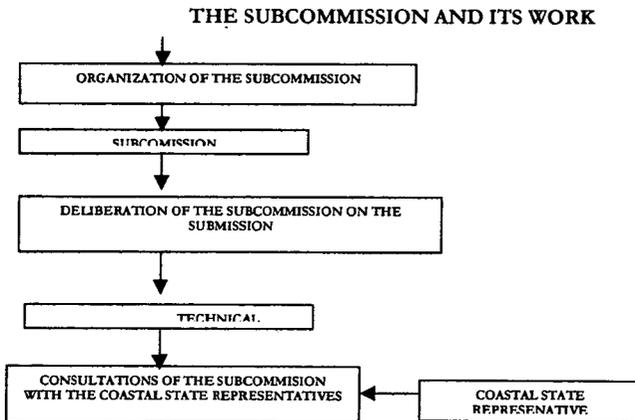


Figure 10.0

Deliberation Procedure in the CLCS<sup>131</sup>

<sup>129</sup> CLCS/40, Rule 53.

<sup>130</sup> Questions and answers: The Continental Shelf, at [http://www.regjeringen.no/nb/dep/ud/dok/lover\\_regler/retningslinjer/2006/Questions-and-answers-The-continental-Shelf.html?id=436938](http://www.regjeringen.no/nb/dep/ud/dok/lover_regler/retningslinjer/2006/Questions-and-answers-The-continental-Shelf.html?id=436938).

<sup>131</sup> H. Brekke, *supra* note 128.

## VII. OTHER BASES FOR THE PHILIPPINE CLAIM ON SPRATLY

The basis for the Philippine claim on Spratly evolved from historical evidence and geopolitical considerations to the exact sciences of geology and geophysics. The indisputable proof of the location of Spratly and the exacting method advocated by UNCLOS in its determination should make the claim an open and shot case. To highlight the significance of Article 76 to the cause of the Philippines, the other bases for the claim will be discussed below.

### A. DISCOVERY

As discussed earlier, in 1956, Thomas Cloma “discovered” and claimed the Kalayaan Islands Group (KIG, also known as Spratly) and established several colonies on them. While no government ever recognized the lawfulness of this “state,” Cloma persisted with his claim until 1974, when “ownership” was officially transferred under a “Deed of Assignment and Waiver of Rights” to the Philippine government. In 1978 the Philippine government officially claimed the KIG through Section 1 of P.D. 1596<sup>132</sup> where the metes and bounds of the KIG were explicitly highlighted, which placed the KIG under the province of Palawan. Cloma’s ‘discovery’ of KIG and its subsequent acquisition of the Philippines are the foundation of the Philippine claim on Spratly premised on discovery.

Unfortunately, while discovery is the oldest mode of acquiring title to territory, it does not per se confer legal title unless the requisites of possession and administration are present.<sup>133</sup> Modern international law clearly recognizes that mere discovery of some territory is not sufficient to vest in the discoverer valid title of ownership to territory. Rather, discovery only creates inchoate title, which must be perfected by subsequent continuous and effective acts of occupation, generally construed to mean permanent settlement.<sup>134</sup> The use of discovery as basis for the claim is further weakened by the fundamental question of whether proof of historical title today carries sufficient legal weight to validate acquisition of territory.

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<sup>132</sup> “Declaring Certain Areas of the Philippine Territory and Providing for their Government and Administration.”

<sup>133</sup> J. R. Coquia and M. Defensor Santiago, *International Law* 259-260 (1998); I. A. Cruz, *International Law*, 110 (2003).

<sup>134</sup> H. Roque, Jr., “China’s Claim to the Spratlys Islands Under International Law,” *Journal of Energy & Natural Resources Law* (1997): 189–211, cited in Joyner, *supra* note 71.

## B. PROXIMITY AND NATIONAL SECURITY

In many instances, the Philippines have cited proximity and national security as bases for claiming Spratly. On 15 May 1950, the government stated that it should occupy the Spratly Islands together with the United States because it was closer to Palawan compared to China and Vietnam. On May 17, President Quirino said that if the Chinese Kuomintang troops really occupied the Spratly, then the Philippines did not need to occupy them. However, if the islands fell into the communist's hands, the Philippine's security is threatened. Spratly should then belong to the nearest country according to international law, which is the Philippines. In February 1974, the Philippine government stated that its forces already occupied five islets of the Spratly. It justified its occupation as "the strategic importance of the Kalayaan area to the Philippine security."<sup>135</sup>

There is no international law providing that geographical proximity and the national security theory may be used to justify the Philippine claim to the Spratly group of islands.<sup>136</sup> Furthermore, using proximity as basis for the claim will be far from prudent given that many isolated islands in the Sulu Sea are much closer to Borneo than to the Philippines. An argument based on proximity will have adverse effects on other territorial disputes.

National security, on the other hand, is an untenable legal basis for the Philippine claim to the Spratly islands as this essentially requires military action. At present, the Philippines is in no position to back up any military posturing against the other claimants.

## VIII. STUMBLING BLOCKS

Article 76 and Annex II of the UNCLOS clearly define the legal and scientific framework for coastal States to establish their claims over their continental shelves, either mandatory or extended. CLCS/40 and its pertinent annexes have provided the clear procedure for a coastal state to make a valid submission. The Philippines rights will be adequately resolved with empirical scientific proof of its claim over the underlying extended continental shelf that contains the Spratly. Unfortunately, while the law and the science are clear, the overall legal strategy of the Philippine government is yet to be crafted. As the deadline for the submission to the CLCS nears,

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<sup>135</sup> *Supra* note 51.

<sup>136</sup> *Id.*

the Philippine claim has yet to overcome some critical issues less it forfeits its right to the Spratly.

#### A. LACK OF GOVERNMENT SUPPORT FOR THE CLAIM

As of the writing of this paper, no State claimants to the Spratly have formally submitted their claim to the CLCS.<sup>137</sup> Nonetheless, the government must prioritize the immediate completion of the information required by the CLCS. In spite of the rapidly approaching deadline for the submission to the CLCS and the extensive legal and scientific research needed, the Office of the President only released E.O. 612 on 27 March 2007, which reorganized the DFA-MOAC<sup>138</sup> into the CMOA<sup>139</sup> under the Office of the President. The CMOA is tasked to complete the Submission for the CLCS. Almost eight years had passed from the 13 May 1999 agreement to submit the necessary information to the CLCS. This highlights the government's lack of focus and priority in substantiating the Philippines's claim to its extended continental shelf.

The multi-agency commission consists of NAMRIA, the Department of Foreign Affairs, and the Department of Justice. NAMRIA has almost completed the technical work and is ready to turnover all its scientific information to the DFA and DOJ for their reference. The DFA must work quickly on the diplomatic front and engage the other claimants in bilateral and multilateral talks.

The DOJ, on the other hand, must prepare the brewing international confrontation in the ITLOS. Due to the vast importance of the Spratlys to all the claimants owing to its unique geography and natural resources, it is unlikely that all claims by the other States will be abandoned in favor of the Philippines. Hence, it is more probable that the DOJ will seek an international arbitral award in order to secure whatever rights may accrue to the Philippines based on Article 77. Other Parties may be able to bring disputes to be solved under binding dispute settlement mechanisms, such as the International Tribunal for the Law of the Sea (ITLOS) in Hamburg.<sup>140</sup> The Philippines is still unprepared for any international confrontation in ITLOS or ICJ.

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<sup>137</sup> Scan of the CLSC websites shows no submissions yet by the claimants of Spratly.

<sup>138</sup> Maritime and Ocean Affairs Center.

<sup>139</sup> Commission on Maritime and Ocean Affairs.

<sup>140</sup> The World Conservation Union, *The Status of Natural Resources on the High-Seas*, 80 (IUCN).

## B. THE RISK OF BREACH OF UNCLOS

A careful scan of the provisions of the UNCLOS and its annexes do not contain any provision that will penalize a coastal state to lose its claim over its continental shelf for failure to submit to the CLCS. Nonetheless, the failure to do so will result in the breach of the Philippines of its fundamental international obligation to adhere to the rules of the UNCLOS.<sup>141</sup> Such a breach<sup>142</sup> of international obligation will be detrimental to any future arbitration involving the Philippine claim over Spratly.

## C. EXCEPTION TO COMPULSORY PROCEDURES OF UNCLOS

UNCLOS provides for compulsory procedures for resolving inter-State conflicts. This mechanism is provided in Section 2 of Part XV of the UNCLOS which provides that where no settlement has been reached through peaceful means, any dispute concerning the interpretation or application of the UNCLOS shall be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction as provided in the same section. Unfortunately Section 3 of Part XV also provides for limitations and exceptions to the applicability of the compulsory procedures in Section 2. Specifically, Article 298(1) provides that a party state may declare in writing that it does not accept any one or more of the compulsory procedures and binding settlements over disputes concerning interpretation or application of Article 83<sup>143</sup> relating to sea boundary delimitations including issues on delimitations of continental shelves between opposite or adjacent states. This will essentially leave the resolution of the conflict in Spratly to diplomatic avenues of bilateral or multilateral negotiations and

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<sup>141</sup> The Tenth Meeting of State Parties to the Convention agreed to defer the final date for presenting a Submission to 13 May 2009 for states that had ratified the UNCLOS prior to 13 May 1999. (Commission on Limits of Continental Shelf concludes 13 sessions, UN Press Release, May 24, 2004, at <http://www.un.org/News/Press/docs/2004/sea1793.doc.htm>).

<sup>142</sup> Article 60(3(b)), Vienna Convention on the Law of Treaties (1969) defines such action as a material breach by an act that defeats the accomplishment of the object or purpose of a treaty.

<sup>143</sup> Delimitation of the continental shelf between States with opposite or adjacent coasts

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

agreements between the State claimants. These provisions may effectively cut the legal remedy of the Philippines and transpose it to the realm of pure diplomacy.

#### D. CHINA'S TALK AND TAKE STRATEGY

In the course of this research, it was discovered that there is an overwhelming effort on the part of the Chinese government to generate international support for its claim on Spratly. This is evident in the many websites featuring the South China Sea conflict and China's alleged rightful claim on Spratly. Furthermore, while China continues to aggressively take the diplomatic route, it continues to fortify its military installation in the Mischief Reef. China is iron-willed in maintaining its highly questionable 'nine-dash line' that has re-drawn China's territorial boarder to substantially include almost all of the South China Sea including the Spratly.<sup>144</sup> This is inconsistent with the 12 nautical mile territorial sea limitation of UNCLOS.<sup>145</sup>

It is very likely that China will submit its claim to CLCS but knowing fully that its claim stands on shaky ground with Article 76, it will simultaneously embark on military adventurism in the area of Spratly. It will be to China's advantage to bully each of the claimants to negotiate with it on bilateral talks rather than in multilateral discussions so as to assert its dominance. It is latently obvious that China will resort to military aggression if diplomacy fails.

#### IX. CONCLUSION AND RECOMMENDATIONS

The provisions of Article 76 are clear and the scientific data gathered through remote sensing and other geo-mapping applications indicate that the Spratly is within the Philippines' extended continental shelf. The technical work required by Article 76 has been substantially completed by NAMRIA. What remains is the legal and diplomatic work by the Department of Justice and Department of Foreign Affairs on their respective domains.

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<sup>144</sup> C. W. Pumphrey, ed., *The Rise of China in Asia: Security Implications*, 235 (1982).

<sup>145</sup> *Id.*

### **A. GOVERNMENT LEGAL STRATEGY MUST BE CRAFTED**

The scientific process required by CLCS is as complex as the legal preparation that the government must embark on. Not only will the legal team be required to be trained in the technology and methodologies of UNCLOS, they will also be tasked to map out the permutations of legal strategies.

To highlight the complex legal scenarios facing the Philippine legal team, the procedure for the claims will vary depending on the success of each of the claimant's submission. The ideal scenario, for example, is for the Philippines to submit on time while the other claimants default in their submission to the CLCS. If the CLCS agrees with the Philippine submission and no diplomatic protest is filed by the other claimants, the established outer limits of the extended continental shelf will be final and binding. This will give the Philippines undeniable rights over Spratly. On the other extreme, if the Philippines defaults in its submission and the other claimants are successful, then the Philippines must resort to filing a diplomatic protest to prevent any agreed limits to become final and binding. Should the other claimants proceed to arbitration, the Philippines may then invoke Article 298(1) to prevent further arbitration proceedings. In between these two extreme scenarios are the permutations of the success or default of the other claimants. Note that there are differences in the specific islands claimed by the claimants as well as differences in their legal positions.

### **B. LEGISLATIVE ACTION**

In order to reinforce the Philippine position with UNCLOS, all the relevant laws pertaining to our maritime boundaries must be amended to exactly conform to the standards and prescriptions of UNCLOS, particularly PD 1596 and RA 3046 as amended by RA 5446.

### **X. SUMMARY**

At the centre of the tapestry of conflict in the South China Sea is the Spratly group of islands. In order to unravel the conflict, the international community, together with the affected coastal states, has ratified and adopted UNCLOS. Article 76 of UNCLOS, pertaining to the delimitation of the continental shelf, has provided the means to untangle the conflict.

Article 76 of UNCLOS and its related annexes provided both the forensic bases and the procedural rules for determining the empirical evidence in establishing the Philippine claim over Spratly. Unfortunately, it also sets a deadline for the submission of the claims of the coastal states to the CLCS, which is on 13 May 2009. If the Philippine government fails to submit its claim to the CLCS, it will most likely result in the possible forfeiture of the Philippines's right over the Spratly. As the deadline rapidly approaches, the Philippine government must immediately put together its legal and diplomatic strategy to complement the incontrovertible geological, geophysical, geographical, and hydrographical research that places the Spratly as part of the extended continental shelf of the Philippine archipelago.

The legal work needed involves both legislative and executive actions in amending needed legislation that will further align our laws with UNCLOS. More legal research must be encouraged in the area of international arbitration and territorial rights claims based on treaty or convention rules. Extensive legal study on Article 76 and its application must be further encouraged.

Finally, the Philippine government must promptly prioritize the completion of its submission to the CLCS before the stated deadline. It must immediately designate the legal team that will prepare for the possible arbitration process with the ITLOS.

In fine, winning the claim on Spratly is not a mere acquisition of a handful of islands endowed with vast oil and hydrocarbon deposits. Securing the Spratly will preserve the Philippines territorial sovereignty and keep intact its dignity in the international community. To lose the claim would simply be tantamount to a capitulation to the chaos of the sea.