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# UNITED NATIONS CONVENTION FOR THE LAW OF THE SEA AND SEA DISPUTE SETTLEMENT: SPECIFIC REFERENCE TO SOUTH CHINA SEA

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## 1. Introduction

The oceans cover over 70% of the Earth's surface. Oceans are the essential basis for various purposes such as marine biodiversity like Phytoplankton produce around one third of the oxygen, we breathe, oceans are rich source of unlimited natural resources, they even provide for transportation of people and trade. Around 80% of volume of global trade is done through sea<sup>1</sup>. It was between the 15<sup>th</sup> century till the 17<sup>th</sup> century that number of supremacies tried to claim their control over the parts of the sea. In the year 1609, a book named '*Mare Liberum*' which translates to 'freedom of the seas' was written by a Dutch jurist and philosopher Hugo Grotius. This book was considered as the foundation of international legal doctrine regarding the seas and oceans. After centuries long argument between the idea of Grotius and John Selden the idea of 'freedom of seas' was finally accepted. Even though Grotius's idea was accepted, but in Asian seas and Indian ocean the general idea accepted was 'Freedom of navigation' which means that any ship flying with a flag of a nation will not be interfered by another state apart from exception under international law. In the 16<sup>th</sup> century principles of *jus gentium* was derived by Spanish theologian Francisco de Vitoria which included the ideas of freedom of the seas in a more rudimentary fashion<sup>2</sup>.

International law of the sea is that part of public international law that regulates the rights and obligations of States and other subjects of international law, regarding the use and utilization of the seas in peace time.<sup>3</sup> The seas of the world have historically played two key roles: firstly, as a means of communication, and secondly, as an immense reservoir of both living and non-

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<sup>1</sup> Review of Maritime Transport 2018, <https://unctad.org/webflyer/review-maritime-transport-2018#:~:text=Maritime%20transport%20is%20the%20backbone,are%20handled%20by%20ports%20worldwide>

<sup>2</sup> Arthur Nussbaum (1947). A concise history of the law of nations. Macmillan Co. p. 62

<sup>3</sup> Brown, E. D. (1994). The International Law of the Sea (vol. 2). Oxford University Press. Churchill, R.

living natural resources. Both of these roles have encouraged the development of legal rules.<sup>4</sup> Law of the sea is concerned with the public order at sea and much of this law is codified in the UN Convention on the Law of the Sea (UNCLOS).<sup>5</sup>

In the international jurisdiction's disputes may frequently be arisen among the neighbouring coastal States with respect to the maritime boundary, exploitation of minerals or natural resources, commission of any crime in the territorial boundary of another State, etc. These disputes are generally resolved by the international courts or tribunals following the rules of international law of the sea or following the precedents of international law. This study, however, is concerned with those rules of international law usually referred to as "the law of the sea". This research work deals with the sea law which involves the base line, inland waters, territorial sea, contiguous zone, Exclusive Economic Zone (EEZ), high sea and continental shelf with specific reference to the disputes to the South China Sea between China on one side and few of its neighbouring States on the other side.

## **2. Research Methodology**

The paper is descriptive in nature which is actually based on a short research and in preparing the same, analytical method has been used. It is entirely based on the secondary sources collected from text-books on International Law, Journals, Articles, Newspapers, Adjudicated Cases, and Websites etc. Also in this study besides the contemporary adjudicated cases on international law of the sea, the recent case between China and numerous countries in respect of South China Sea is elaborately explained so that the jurisdiction, rights and obligations of different subjects of international law can plainly be understood.

## **3. International Law of the Sea: Legal Framework**

The present law of the sea is a mixture of customary international law and treaty law, both bilateral and multilateral. The brief of major laws are follows:

### **3.1 The Four Geneva Conventions on Territorial Waters and Contiguous Zone, 1958**

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<sup>4</sup> Shaw, M. N. (1997). International Law. Cambridge: Cambridge University Press. p.390

<sup>5</sup> Churchill, R. R. (2013). Law of the Sea . <http://www.global.britannica.com>

In the first UN Conference on the law of the sea held in 1958, four multilateral conventions covering various aspects on the law of the sea were adopted:

- (i) Convention on the Territorial Sea and Contiguous Zone;
- (ii) Convention on the High Seas;
- (iii) Convention on Fishing and Conservation of Living Resources; and
- (iv) Convention on the Continental Shelf.

### 3.2 The UN Convention on the Law of the Sea (UNCLOS)

The United Nations Convention on the Law of the Sea (UNCLOS), is referred as the Law of the Sea Convention or the Law of the Sea treaty, is an international agreement which was a result from the 3<sup>rd</sup> United Nations Conference on the Law of the Sea. This took place from June to August in Caracas, Venezuela in 1974. The comprehensive 1982 Convention that replaced the 1958 four conventions on the law of the sea consists of 320 articles and 9 annexure was concluded in 1982. In 1994 this convention came into force. As per record of October 2012, total of 164 countries and the European Union had joined in the Convention.

The UNCLOS is intended to govern the use of oceans for fishing, shipping, exploration, navigating and mining and it is the most complete treaty in public international law that covers a range of law of the sea topics, e.g. delimitation of maritime boundaries, maritime zones, marine environment protection, marine scientific research, piracy and so on. This treaty created a universally applicable standard for the breadth of the territorial waters, established compulsory procedures for maritime dispute settlement and specified the rights and obligations for States with regard to the high seas and maritime travel.<sup>6</sup> This treaty is often seen as a ‘constitution of the oceans’: a written document, legally binding on all the signatory States.<sup>7</sup> It has, furthermore, created three new institutions to support the enforcement and arbitration of international maritime law: the International Seabed Authority (ISA), the International Tribunal for the Law of the Sea (ITLOS) and the Commission on the Limits of the Continental Shelf (CLCS).<sup>8</sup> The treaty also contains a provision that generally prevents States parties from

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<sup>6</sup>Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge Printing Press, 2015) at 22 [Tanaka]

<sup>7</sup>Ivan Shearer, “The Limits of Maritime Jurisdiction” in Clive Schofield, Seokwoo Lee & Moon-Sang Kwon, eds, *The Limits of Maritime Jurisdiction* (Leiden: MartinusNijhoff Publishers, 2014) 52 at 52 [Shearer].

<sup>8</sup>Tanaka, *supra* note 3 at 30.

having reservations on parts of the treaty, meaning that the State parties cannot opt out of certain elements of the treaty.<sup>9</sup>

According to this the national rights were limited to a specific belt of water extending from the coastline of that nation to usually 3 nautical miles (5.6 km; 3.5 mi) (three-mile limit)<sup>10</sup>. Beyond that water is considered as international waters, which is free for all nation but owned by none.

### **3.3 Salient Features: The UN Convention on the Law of the Sea, 1982**

The UNCLOS brings new concepts to the traditional laws of the sea. The salient features of the UNLCOS are as under:

- (i) The maximum width of the territorial sea is fixed at 12 nautical miles and that of the contiguous zone at 24 nautical miles;
- (ii) A “transit passage” regime for straits used for international navigation is established;
- (iii) States consisting of archipelagos, provided certain conditions are satisfied, can be considered as “archipelagic States”, the outermost islands being connected by “archipelagic baselines” so that the waters inside these lines are archipelagic waters;
- (iv) A 200 nautical mile exclusive economic zone may be established by coastal States in which such States exercise sovereign rights and jurisdiction on all resource-related activities;
- (v) Other States enjoy in the exclusive economic zone high seas freedoms of navigation, over flight, laying of cables and pipelines and other internationally lawful uses of the sea connected with these freedoms;
- (vi) The concept of the continental shelf has been confirmed with newly defined external limits;
- (vii) The International Seabed Authority being the “machinery” entrusted with the supervision and regulation of exploration and exploitation of the resources;
- (viii) A series of very detailed provisions deal with the protection of the marine environment setting out general principles and rules about competence for law-making and enforcement as well as on safeguards;

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<sup>9</sup>United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, art 309 (entered into force 16 November 1994) [UNCLOS].

<sup>10</sup> Akashi, Kinji (2 October 1998). Cornelius Van Bynkershoek: His Role in the History of International Law. MartinusNijhoff Publishers. p. 150. ISBN 978-9041105998. Retrieved 12 July 2016.

- (ix) Detailed provisions concerning marine scientific research, based on the principle of consent of the coastal State, consent which should be the norm for pure research and discretionary for resource-oriented research;
- (x) The ocean bottom beyond national jurisdiction is proclaimed to be the “Common Heritage of the Mankind”.<sup>11</sup>

### 3.4. Bilateral/Multilateral Treaties or Customary International Law

Besides the above mentioned two vital international instruments, the customary international law and other bilateral or multilateral agreements are also the outstanding source of international law of the sea. These as with all customary rules, bind States in the ordinary manner.<sup>12</sup>

### 3.5. UNCLOS: Various Jurisdictions of the Maritime Zones

Under UNCLOS, there are following seven maritime areas over which the States can exercise their jurisdiction:

- (i) **Base Line** : The coastal curve, from which the maritime area of a State is measured, is called baseline or low water line.<sup>13</sup> Baseline can be of two types: a) normal baseline and b) straight baseline. Normal baseline is the low-water mark line along the coast. straight baseline departs from the physical coastline due to certain distinctive features of coasts of a State. The globally recognized principle as to the delimitation of straight baseline is accepted in 1951 from the judgment of the famous *Anglo-Norwegian Fisheries Jurisdiction Case (1951)* (England vs. Norway; ICJ).
- (ii) **Internal waters**: It includes areas such as port, rivers, inlets and the other marine spaces of the landward of the low- water line where the port state has the jurisdiction of domestic regulation. The coastal State has its sovereign control and authority over its inland waters. There are few renowned case in this regard e.g., the *Fijens Case or Wildenhus Case (1887)* (Belgium vs.USA)<sup>14</sup> and *Reex V. Anderson(1868)*<sup>15</sup>.

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<sup>11</sup> Khan, F. R. (2006). International Law of the Sea: Bangladesh Perspective. The Daily Star .

<sup>12</sup> Dixon, M. (2005). Textbook on International Law. New York, NY: Oxford University Press. P.198

<sup>13</sup> Rahman, M. (2003). International Law in a Changing World. Dhaka: PololProkashoni

<sup>14</sup> *Fijens Case or Wildenhus Case (Belgium vs. USA, 1887)* 120 U.S. 1 (1887).

<sup>15</sup> *Rex vs. Anderson (1868)*. 11 Cox Crim Cases 198 (Court of Criminal Appeal, England).

- (iii) **Territorial waters:** The coastal state has freedom to make laws and use resources. The foreign containers are given right to pass through territorial water subject to some restrictions. It extends up to 12 nautical (22 kilometres; 14 miles) from the baseline. In the area of territorial sea, the coastal state shall have its exclusive jurisdiction. But the other states shall enjoy an exceptional right named as “right of innocent passage”. Article 17 of the 1982 Convention deals with the right of innocent passage of states and provides that, subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. Article 27 deals with the provisions regarding the criminal jurisdiction on board a foreign ship and provides in its sub-article (1) that, the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed onboard the ship during its passage save only in the cases provided in Article 27 (2). Article 28 deals with the civil jurisdiction of the coastal state in relation to foreign ships.
- (iv) **Contiguous Zone:** This is intermediary zone between the territorial sea and the high sea. It extends up to 24 nautical miles from its baselines. The state can enforce its laws only in case of customs, taxation, immigration, and pollution. The coastal State has the right of both preventing and punishing for the infringement of immigration, sanitary and customary laws within the territory and territorial sea. This zone onwards on airspace jurisdiction is given to the State. The most important case with respect of jurisdiction of State in Contiguous Zone is the *Re Martinez Case (1959)*<sup>16</sup>.
- (v) **Exclusive Economic Zone (EEZ):** This zone extends to 200 nautical miles from its baselines. This zone was presented to decrease the growing heated clashes over fishing rights. Inside this zone coastal state has the right over exploring, exploiting and conserving the natural resources. The case example is the *Fisheries Jurisdiction Case*<sup>17</sup>. In this case, the core issue before the Court was, whether Iceland was entitled to the unilateral extension of its economic zone 50 nautical miles beyond its territorial

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<sup>16</sup> Re Martinez Case (1959). (52 Cal.2d 808) [Crim. No. 6343. In Bank. Oct. 30, 1959].

<sup>17</sup> Fisheries Jurisdiction Case (USA and Germany vs. Iceland; ICJ, 1974).

water? The court by 10 to 4 votes held that Iceland was not entitled to declare unilaterally an exclusive fisheries zone of 50 nautical miles beyond its territorial water.

- (vi) **High Seas:** These seas are open for all. However, this freedom has some conditions as provided under UNCLOS. There are four freedoms as has been mentioned in this Convention: (i) freedom of navigation, (ii) freedom of fishing, (iii) freedom to lay submarine cables and pipelines, and (iv) freedom to fly over the high seas. It is further provided that, the high seas shall be reserved for peaceful purposes.
- (vii) **Continental Shelf:** It is that part of the continental border which is between the shelf break and shoreline or, where there is no clear slope between the shoreline and the point where the depth of the superjacent water is around between 100 to 200 meters. In the *Tunisia-Libya Continental Shelf Case (1982) (ICJ)*<sup>18</sup>, a dispute arose between Tunisia and Libya in respect of delimitation of the respective area of continental shelf appertaining to each on the basis of the geology, physiographic and bathymetry. By a majority of ten to four votes the Court held that the delimitation method to be applied according to the principle of equity taking into account of all the relevant circumstances

#### **4. Dispute Settlement under UNCLOS- South China Sea Dispute and Role of UNCLOS in Dispute Settlement**

Part XV of the UNCLOS provides the provisions related to settlement of disputes, which imposes an obligation that all the member states should their disputes in a peaceful manner. However, the choice is given to the parties to choose the matter of dispute and to choose the forum to settle the dispute. There are four alternative forums under the convention which are:

- (i) the International Tribunal for the Law of the Sea (ITLOS or the Tribunal);
- (ii) the International Court of Justice;
- (iii) an arbitral tribunal constituted in accordance with Annex VII to UNCLOS;
- (iv) a special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS<sup>19</sup>.

The proceedings provided for in Part XV of UNCLOS are divided into three parts.

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<sup>18</sup> Tunisia-Libya Continental Shelf Case (ICJ, 1982) 1982 I.C.J. 18.

<sup>19</sup> Sheehan, Anne --- "Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes" [2005] UQLawJl 7; (2005) 24(1) University of Queensland Law Journal 165

- (i) Section 1 stipulates general provisions on cardinal principles regarding the procedures.
- (ii) Section 2 sets out the compulsory dispute settlement procedures.
- (iii) Section 3 lays down limitations and exceptions to applicability of the compulsory procedure.

Disputes can never be avoided in international relations. Among number of disputes that most difficult ones are disputes related to territory. It is required by the international laws to resolve these disputes peacefully and by following the principles of justice and international law so that international peace, security, and justice will not be breached<sup>20</sup>. One such dispute is the South China Sea (SCS) dispute. This dispute is based on two parts:

- (i) overlapping jurisdictional claims
- (ii) territorial dispute over groups of mid-ocean islands<sup>21</sup>

#### **4.1. Introduction to the dispute<sup>22</sup>**

On 22 January 2013, pursuant to Article 287 and Annex VII of UNCLOS, the Philippines initiated an arbitral procedure against China in order to settle a dispute concerning historic rights, maritime entitlement and unlawful acts in the South China Sea. The Philippines asked the tribunal to make three things containing inter-states matters clear:

- (i) It argued that the Parties right and obligations should be based on the Convention. Since “historic rights”, which is the main reason for China to support its legitimacy of so-called “nine-dash line”, were not in conformity with the Convention, China’s claims are null and void.
- (ii) It sought adequate characterization of geographical features in the area.
- (iii) It alleged that the enforcement of its sovereign rights and freedom pursuant to UNCLOS were offended by interference from China.

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<sup>20</sup> Article 1 and 2 of the Charter of the United Nations

<sup>21</sup> Settlement of disputes under the 1982 United Nations Convention on the Law of the Sea The case of the South China Sea dispute, Dong Manh Nguyen, UN-Nippon Foundation Fellowship on the Law of the Sea New York, December 2005.

<sup>22</sup> 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]

China never appeared in the Tribunal throughout the process. Instead, China articulated its non-acceptance of and non-participation in the arbitration by a "*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*".

However, Article 9 of Annex VII to the Convention has a provision regarding "Default of appearance", which lays down that "absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings". China remained a party to the Arbitration and shall be bound by the decision of the Tribunal under Article 11 of Annex VII.

China had contended that the Tribunal does not have jurisdiction and its ground was composed of three reasons touched upon in China's position Paper as follows:

- (i) The territorial sovereignty over several maritime features is the subject matter. Therefore, the case falls without the scope of the Convention and is not related to the interpretation or application of UNCLOS.
- (ii) Both States Parties to the dispute have already agreed upon settlement of relevant disputes.
- (iii) Even if the case were subject to the procedure of the Convention, the subject matter would still be linked with maritime delimitation.

In its Procedural Order No. 4 of 21 April 2015, paragraph 1.1.1, the Tribunal stated that the communications by China including the Position Paper and the Letter to the Netherlands "effectively constitute a plea concerning this Arbitral Tribunal's jurisdiction" and "will be treated as such for the purposes of this arbitration". Thus, it decided to "rule on any plea concerning its jurisdiction as a preliminary question" apart from its merits.

#### **4.2. History of South China Sea Territorial Dispute**

At the height of the Second World War, the Imperial Japanese Army and Navy used some islands for strategic purposes and insisted that they were unclaimed, ignoring historical evidence that France had occupied a certain number of those islands until the Japanese fell into its hands with colonial possessions. Since the war ended, Imperial Japan was forced to give up all the territories they had occupied before the war by the Treaty of San Francisco in 1951. During the 1951 Treaty talks, the People's Republic of China made different demands on the islands.

### **4.3. Formation of Nine-Dash Line by China**

The nine-dash mark is partly identified as China's claims in the South China Sea. Initially an eleven-dashed line, in 1947 this line was suggested in its claim to the South China Sea for the first time by the Kuomintang government of the Republic of China. The line was adopted in 1949 and updated in 9 dashes / dots, as sponsored by the Chinese Communist Party, when the mainland of China was overtaken and the People's Republic of China was established. The statement of 1958 represented China's claims on the islands of the South China Sea, based on a chart of nine lines. Any officials of the PRC and the PRC military consider the legacy of this 9-dash line to be historical evidence for their claims to the South China Sea.

South Vietnam's south of the 17th Parallel, which included the islands of Paracels and Spratlys, was governed by the Geneva agreements of 1954, which terminated the First Indochina War. Two years later, the Government of North Vietnam declared that the PR was the rightful island claimant when the island was under occupation by South Vietnam. The countries involved in the South Sea dispute are China, Vietnam, Malaysia, Indonesia, Philippines, Brunei and Taiwan.

### **4.4. The Tribunal's Decision**

The Tribunal held that "There is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea" and the diplomatic communications between the Parties also underpinned the existence of a dispute over sovereignty. The Tribunal did not regard sovereignty issues as a main ground of the dispute. The tribunal thought about the lawful action taken by the Chinese in the South China Sea. After finding that certain areas are within the limits of the exclusive economic zone of Philippines, the tribunal ruled that China had profaned the sovereign rights of the Philippines in its EEZ by:

- (i) Unduly intervening in Philippine petroleum exploration and fishing.
- (ii) Building artificial islands.
- (iii) Failure in the prevention of Chinese fishermen from fishing in the zone.

The tribunal further considered that China severely damaged the marine environment by massive scale land reclamation and construction of large-scale artificial islands at seven features in Spratly islands.<sup>23</sup>

The ruling of the tribunal was all against China and additionally the big victory for the Philippines. This is the “heavy blow” for China.<sup>24</sup> On the basis of UNCLOS clauses on EEZ, the Philippines claimed parts of the islands. According to geological research, the Spratly islands in the South China Sea are part of Philippine territory and jurisdiction under UNCLOS on EEZ. As a result, the arbitral tribunal ruled in favour of the Philippines.

The Tribunal viewed that China's argument about the nine-dash line is exaggerated. As a result, the claim's historical component became crucial. Though Chinese mariners used the islands at the time, the award claimed that there is no proof that Chinese mariners had exclusive access to the sea at the time. Thus, the contention made by China was rejected.

Even though the litigation over the SCS ended in 2016, territorial disputes remain. The Chinese government, for example, has indicated repeatedly that it does not accept the PCA's authority to rule on these issues because it finds the SCS issues to be "usually related" to matters of sovereignty. In a wider legal context, China's decision to disregard the ruling may be troubling for the international dispute settlement system's legitimacy. If non-compliance with international rulings becomes more common in similar situations, some States may lose faith in mandatory dispute-resolution mechanisms as a means of resolving international conflicts. In light of these issues with non-compliance, with the enforceability of the award and with the continued military build-up in the SCS, a long-term solution could necessitate a change not only in authority, but also in the political mindset of the governments concerned.

Ironically, as a non-member of UNCLOS, and a non-related party to the South China Sea disputes, the US continuously justifies its intercessions into the dispute as a ‘protector’ of UNCLOS. To show its commitment to freedom of navigation, the US continuously conducts ‘operational assertions’ in other countries’ waters, including Chinese, Malaysian and

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<sup>23</sup> Permanent Court of Arbitration (PCA). 2016. The South China Sea arbitration (The Republic of the Philippines V. the People’s Republic of China), Press Release, The Hague. <https://pca-cpa.org/wpcontent/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>.

<sup>24</sup> Bonnie, Glaser S. 2016. Shaping China’s response to the PCA ruling, The Interpreter. <http://www.lowyinterpreter.org/post/2016/07/18/Shaping-Chinas-Response-to-the-Tribunal-Ruling.aspx>.

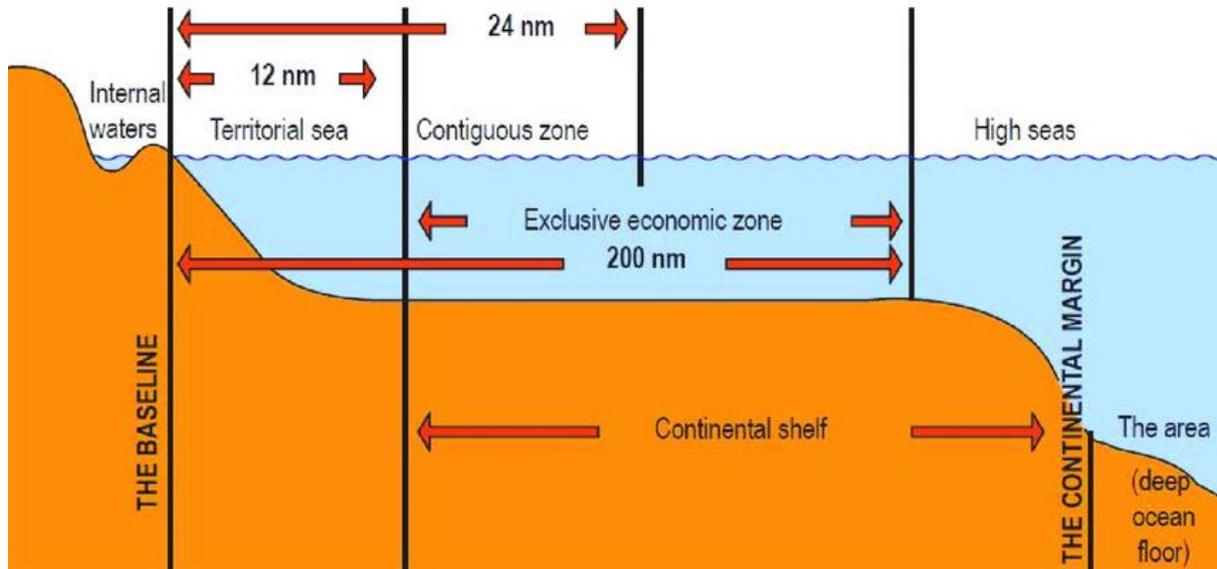
Vietnamese waters. The US has opposed any claim by China to maritime rights based on the nine-dashed-line on Chinese maps, and to possible historic claims by Vietnam. In May 2015, American military officials took a CNN crew on a US Navy reconnaissance flight of the South China Sea and released the footage. This was a well-designed action to provoke China and test its willingness to assert its claim in the South China Sea.

## **5. Conclusion**

UNCLOS is a great achievement by the international community regarding how to govern a massive maritime domain in the 20th century. But it is also a law characterised by many ambiguities, different interpretations and reservations. Unfortunately, it has also generated or exacerbated conflict by raising the stakes and failing to resolve a number of key legal issues since it came into effect.<sup>42</sup> It is also evident that it is not an appropriate regime to resolve intractable territorial disputes. Its credibility and viability are at stake right now because certain countries, like the US and The Philippines, unilaterally interpret and abuse its provisions.<sup>43</sup> Since the South China Sea issue is becoming a ‘lawfare’ issue rather than a legal issue or historic rights issue, abusing UNCLOS as an excuse to carry on provocative and confrontational military actions in the South China Sea is highly likely to cause miscalculation and incidents. How to strike the right balance between the historic rights of nations and general international law—and how to strike a balance between the abiding rule of law and respecting other international governance approaches to building a just, equal and fair world—will be a defining factor in either maintaining or undermining the peace in this region in the years ahead.

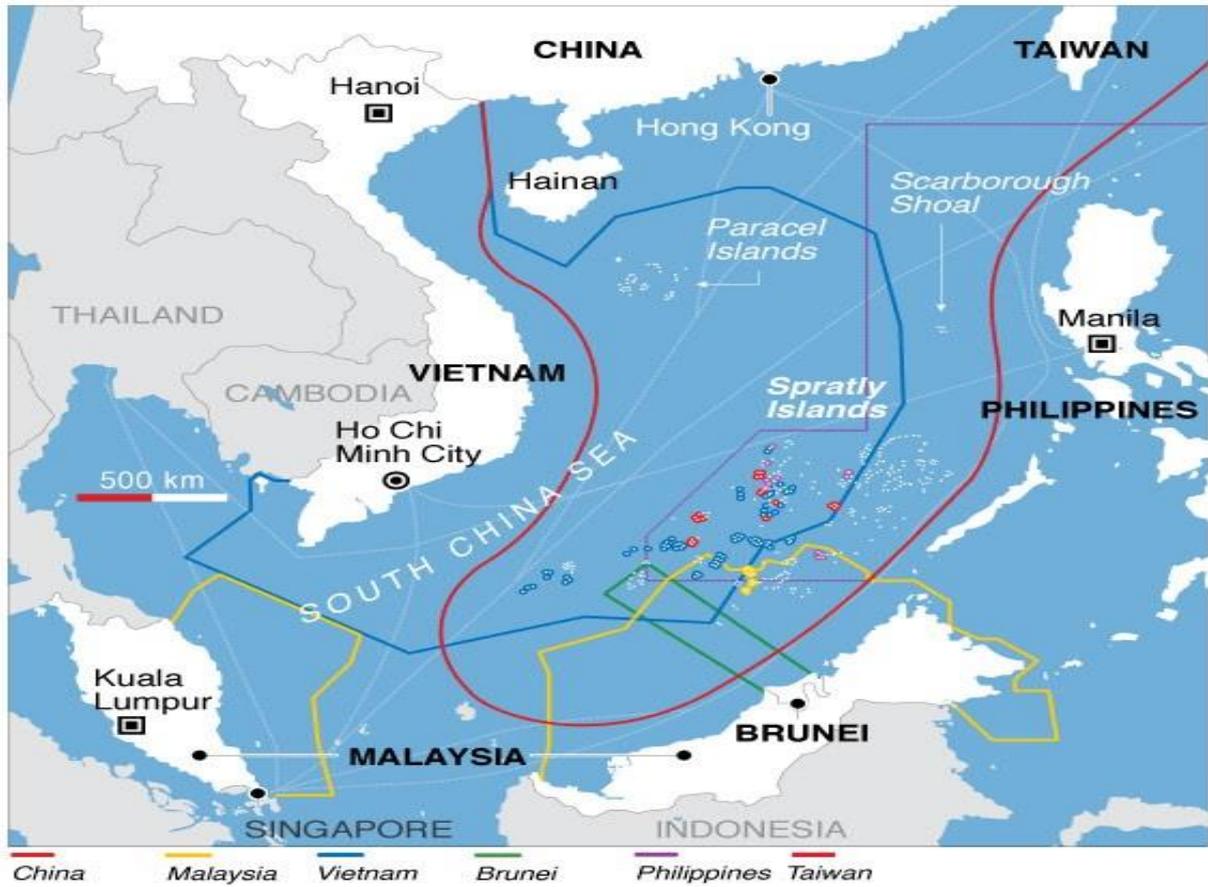
### Appendix A

The diagrammatic explanation of the maritime zones



## Appendix B

### Territorial claims in South China Sea



Source : *UNCLOS Under Pressure: Law of the Jungle or Law of the Sea?* | *Clingendael Spectator*