CIL South China Sea Seminar Series

THE SOUTH CHINA SEA DISPUTES: Prospects for Adjudication or Arbitration

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Robert C Beckman
Director, Centre for International Law (CIL)
National University of Singapore
Organization of Presentation

1. 1982 UNCLOS and “islands” in Spratlys
2. Claims of Vietnam, Philippines & China prior to 2009
3. Claims of Vietnam, Philippines & China as of 2011
4. UNCLOS Dispute Settlement Regime
5. Current Disputes between Vietnam & China and between the Philippines & China
6. Conclusions
Part I

1982 UN Convention on the Law of the Sea (UNCLOS)
1982 UNCLOS

- Negotiated for 9 years from 1973
- Adopted in on 10 December 1982
- Entered into Force in on 16 November 1994
- As of 13 June 2011, 162 parties
- All 5 claimants to islands in the South China are parties – China, Vietnam, Philippines, Malaysia and Brunei
Significance of UNCLOS

- States Parties have agreed that the right to explore and exploit the natural resources in and under the oceans will be determined by the maritime zones in UNCLOS.
- States Parties have given up any "historic rights" or traditional rights to resources unless such rights are recognized in UNCLOS.
- States Parties cannot use their national laws as an excuse not to comply with their treaty obligations.
Maritime Zones

- **Territorial Sea** of 12 nm - Sovereignty
- **Exclusive Economic Zone (EEZ)** of 200 nm – “sovereign right” to explore and exploit the natural resources in the water and of the seabed and subsoil
- **Continental Shelf** – sovereign right to explore & exploit natural resources of seabed & subsoil out to edge of continental margin, which can extend to 350 nm or beyond
Article 121. Regime of Islands

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

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.
Okinotorishima
Okinotorishima
Japan’s Okinotorishima policy and its implication

• Japan introduced a hydrographic observation radar station in 2005
• Japanese Fishery Agency started the breeding of coral in 2006.
• Japan Coast Guard constructed a lighthouse and started its operation in March 2007
• Tokyo Metropolitan government conducts several projects to create fishing grounds around Okinotorishima.
• The Tokyo government placed an official titanium address plaque in Okinotorishima.
Islands in Spratlys

- **Itu Aba Island, Namyit Island** & Sand Cay on Tizard Bank
- **Thitu Island** on Thitu Reefs
- **Loaita Island** & Lankiam Cay on Loaita Bank
- **Northwest Cay** & **Southwest Cay** on North Danger Reef
- **Sin Cowe Island** & Sin Cowe East Island on Union Reefs
- Flat Island
- Nanshan Island
- **Spratly Island**
Spratly Island (Vietnam)
Southwest Cay (Vietnam)
Sin Cowe (Vietnam)
Thitu Island (Philippines)
Northeast Cay (Philippines)
Loaita Island (Philippines)
Flat Island (Philippines)
Lankiam Cay (Philippines)
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Article 13. Low-tide Elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.

2. Where a low-tide elevation is wholly situated more than 12 nm from the mainland or an island, it has no territorial sea of its own.
Article 6. Reefs

- In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef.
Swallow Reef (Malaysia)
Pulau Layang Layang
Mischief Reef (China)
Mischief Reef (China)
Article 60. Artificial Islands in EEZ

1. In the EEZ, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) artificial islands;

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.
Article 60. Artificial Islands in EEZ

- 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands.
- 5. The breadth of the safety zones shall not exceed a distance of 500 metres.
- 8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the EEZ or the continental shelf.
Sustain Human Habitation?
Island or Artificial island?
Fiery Cross Reef?
Islands or Rocks?
Part 2

Claims of Vietnam, Philippines and China prior to 2009
Viet Nam’s Claim Prior to 2009

1. In statements, Viet Nam claimed sovereignty over the Spratlys and the Paracels.

2. Viet Nam claimed a 200 nm EEZ but no map was issued indicating the outer limit of its EEZ.

3. The straight baselines claimed by Viet Nam were challenged by the US and other States as inconsistent with UNCLOS.

4. It was not clear what maritime zones Viet Nam claimed from the islands in the South China Sea.
Philippines Claim prior to 2009

1. Archipelagic baselines were not consistent with UNCLOS

2. Maintained that its territorial sea boundaries were established by the 1898 Spanish-American Treaty, even though the US challenged the position of the Philippines

3. Philippines claims the Kalayaan Island Group (KIG) based on the Governments succession to the claim of a private citizen in 1956

4. Philippines drew a polygon shaped line around the islands in the Kalayaan Island Group (KIG)
China’s Claim Prior to 2009

1. The PRC Government has continually asserted sovereignty over all of the islands in the South China Sea since 1949

2. China claims an EEZ of 200 nm from its mainland coast, but it did not officially claim an EEZ from the islands in the South China Sea

3. China has drawn straight baselines around the Paracel Islands, but has issued no map claiming maritime zones from those baselines

4. China has issued no map claiming any maritime zones from the islands it claims in the SCS
China’s Claim Prior to 2009

1. In 1947, the Republic of China (KMT) government published an official map of the archipelago of the South China Sea using 11 interrupted lines to indicate the boundary of the island and other features over which China exercises sovereignty.

2. Two of these lines in the Tonkin Gulf area were later deleted – now known as the “nine dashed lines”.

3. PRC Government never officially endorsed the dotted-line map in the international arena prior to 2009.
Map 2: Official Chinese map of the South China Sea with the nine-dotted line


www.nus.edu.sg
China’s Map & Freedom of Navigation

- MOFA Statement in May 1995:
  
  . . while safeguarding its sovereignty over the Nansha Islands (the Spratly Islands) and its marine rights and interests, China will fulfill its duty of guaranteeing freedom of navigation for foreign ships and air routes through and over the South China Sea according to international law.
Map 3.
Source www.middlebury.edu
Part 3

Claims of Vietnam, Philippines and China as of 2011
Submissions to CLCS

- To claim an extended continental shelf beyond 200nm, States have to submit technical information to the Commission of the Limits of the Continental Shelf.
- Deadline for submissions to the CLCS was set at May 2009.
- In order to meet deadline, Malaysia, Vietnam and Philippines took steps which clarified their claims in the South China Sea and brought them into conformity with UNCLOS.
Submissions to CLCS

- Philippines amended in Archipelagic baselines law to bring its claim into conformity with UNCLOS and made its 200nm EEZ boundary clear
- Malaysia and Vietnam made Joint Submission to CLCS which clarified their 200 nm EEZ boundary
- Vietnam made submission which further clarified its EEZ boundary
- China’s response provoked series of communications called Notes Verbale which further clarified claims
China has indisputable **sovereignty** over the **islands** in the South China Sea and the **adjacent waters**, and enjoys **sovereign rights and jurisdiction** over the **relevant waters** as well as the seabed and subsoil thereof (see attached map).
Since 1930s, the Chinese Government has given publicity several times to the geographical scope of China’s Nansha Islands and the names of its components. China’s Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of [UNCLOS and China’s laws on Territorial Sea, EEZ and Continental Shelf] China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.
Part 4

Dispute Settlement Regime in UNCLOS Part XV
Sovereignty Disputes in South China Sea

- Issue of who has the better claim to sovereignty over the islands is governed by customary international law.
- UNCLOS has no provisions on territorial sovereignty.
- The sovereignty disputes cannot be referred to a court or tribunal unless the parties agree.
- Given the number of claimants and complexity of the disputes, it is not likely that the claimant States will agree to resolve the sovereignty disputes through adjudication or arbitration.
General principle is that any dispute between parties over the interpretation or application of a provision of the Convention is subject to the system of compulsory binding dispute settlement in Section 2.

By becoming a party to UNCLOS, State Parties are giving their consent to referring disputes to adjudication or arbitration.
SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

Article 286. Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.
Article 298. Optional Exceptions

States parties have option to formally declare that they do not accept Section 2 for following categories of disputes:

a) the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles

b) Disputes concerning military activities and disputes concerning law enforcement activities relating to rights and jurisdiction of coastal States over resources in EEZ

c) Disputes over which UN Security Council is exercising functions under the UN Charter
Choice of Procedure under Article 287

A State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

1. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) established in accordance with Annex VI;

2. INTERNATIONAL COURT OF JUSTICE (ICJ);

3. ARBITRAL TRIBUNAL constituted in accordance with Annex VII;

4. SPECIAL ARBITRAL TRIBUNAL constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.
Article 287 (5):

If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to ARBITRATION in accordance with Annex VII, unless the parties otherwise agree.

- Since none of the claimants to sovereignty over islands in the South China Sea have selected a procedure, the default procedure (Arbitration under Annex VII) would apply, unless they otherwise agree.
Disputes on Maritime Delimitation

- If other claimant States cannot agree on their maritime boundaries in the SCS, one of the parties could unilaterally invoke the dispute settlement procedures in UNCLOS.
- For example, Malaysia could bring the Philippines to dispute settlement over their adjacent EEZ boundary in the SCS.
- Exception: If one of parties to dispute has “opted out” under article 298 (eg. China)
Applicable Law [Article 293]

1. Article 293 provides that a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

2. This means that in resolving a dispute between Malaysia and the Philippines on their maritime boundary, the court or tribunal could consider the claim of the Philippines to sovereignty over the Malaysian State of Sabah.
Article 296 provides that:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.
Provision subject to CBDS

- Article 121(1) on island
- Article 121(3) on rocks
- Article 13 on low-tide elevations
- Article 60 on artificial islands
- Article 6 on reefs
- Article 7 on straight baselines
Part 5
Recent Disputes in the South China Sea
On 26 May 2011 three Chinese vessels interfered with PetroVietnam ship conducting a seismic survey inside lot 148, 120 nautical miles off the coast of Phu Yen province.

A Chinese marine surveillance vessel cut the exploration cables of the Vietnamese seismic vessel.

Chinese MOFA: What relevant Chinese departments did was completely normal marine law-enforcement and surveillance activities in China's jurisdictional sea area.
26 May Incident in Block 148
7 June Incident in Block 136
7 June Incident in Block 136
Spratly Island (Vietnam)
China’s Unilateral Fishing Ban

- Haikou City of Hainan Province, China published on its website on May 11 "the Announcement on the management plan for the fishing holiday season in the South China Sea Region in 2011" effective 12 p.m May 16 through 12 p.m August 1
- Fishing Ban applies north of 12 degrees latitude
- Vietnam protested that violation of Vietnamese sovereignty over Paracel Islands and inconsistent with 2002 ASEAN-China Declaration
Woody Island - Paracels
Duncan Island (Paracels)
Chinese Intrusion in Philippines

- June 2: DFA of Philippines protest increasing presence and activities of Chinese vessels including naval assets in the West Philippine Sea (South China Sea).
- Reported to China Marine Surveillance Vessel and other People’s Liberation Army Navy ships.
- Actions hamper the normal and legitimate fishing activities of the Filipino fishermen in the area and undermine the peace and stability of the region.
- This protest follows a series of protests already filed by the DFA since the Reed Bank incident in March.
June 2011 Incident with Philippines
Iroquois Reef & Amy Douglas Bank
June 2011 Incident with Philippines
Iroquois Reef & Amy Douglas Bank
Nanshan Island (Philippines)
Flat Island (Philippines)
1. The delimitation of the [EEZ & CS] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, in order to achieve an equitable solution.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, 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.
3. The Parties reaffirm their respect for and commitment to the **freedom of navigation in and overflight** above the South China Sea as provided for by the universally recognized principles of international law, including 1982 UNCLOS.
4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including 1982 UNCLOS
5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.
Part 6

Conclusions
Conclusions

1. The dispute settlement regime in UNCLOS cannot be used to resolve the disputes on territorial sovereignty claims to the islands.

2. Disputes on maritime boundary delimitation between China and ASEAN claimants are not subject to the UNCLOS dispute settlement regime because China has exercised its right to “opt out” of the regime for disputes concerning the interpretation or application of the UNCLOS provisions on maritime boundary delimitation.
Conclusions

3. Current disputes concerning interference in activities within the EEZ of Vietnam or the Philippines may be subject to the system of CBDS

4. Disputes would be whether China has any legal basis under UNCLOS for asserting sovereign rights and jurisdiction in the areas in question

5. Disputes on interpretation and application of the provisions on islands, rocks, low-tide elevations and baselines could also be subject to UNCLOS regime on dispute settlement
Conclusions

6. Only viable solution in long run is to accept China’s proposal for “Setting Aside Disputes and Joint Development”

7. ASEAN claimants likely to maintain that serious negotiations on Joint Development can begin only after there is agreement on Overlapping Claim Areas

8. It will be difficult to agree on the Overlapping Claim Areas unless China clarifies its claim and brings it into conformity with UNCLOS by making claims to maritime zones from the islands
Thanks for Your Attention

Prof Robert Beckman
Director, Centre for International Law (CIL)
National University of Singapore
Email: CILDIR@NUS.EDU.SG
Website: WWW.CIL.NUS.EDU.SG