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The UNCLOS Dispute Settlement System and the South China Sea

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Introduction

The most intractable and sensitive disputes in the South China Sea are about which State (Brunei, China, Malaysia, Philippines, Vietnam and hereinafter referred to as the "claimant States") has the strongest claim to sovereignty over features in the Spratly Islands and their corresponding sovereignty, sovereign rights and jurisdiction in waters surrounding the features in the Spratly Islands. Taiwan also claims sovereignty over the features in the South China Sea but is not recognized as a "state' under international law.

The sovereignty issue is governed by rules and principles of general international law on the acquisition and loss of territorial sovereignty and which are set out in decisions of international courts and tribunals. Such disputes cannot be referred to any form of third party dispute settlement without the consent of the claimant States.

The issue of whether the claimant States have sovereignty, sovereign rights and jurisdiction in the waters surrounding the Spratly Island features is determined by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[1] All the claimant States are parties to UNCLOS. Part XV of UNCLOS establishes a system of compulsory binding dispute settlement (CBDS) for any dispute relating to the interpretation or application of any provision of UNCLOS. Therefore, in principle, if a dispute arises between two States parties on the interpretation or application of a provision in UNCLOS, one party to the dispute can unilaterally invoke the CBDS system in Part 2 of Part XV.

However, UNCLOS has no provisions dealing with territorial sovereignty disputes. Furthermore, China has exercised its right under article 298 to "opt out" of the UNCLOS CBDS system for disputes concerning military activities as well as for disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles. Therefore, disputes on these issues cannot be taken to any form of third party dispute settlement under Part XV of UNCLOS unless China consents.

This paper will examine whether the dispute settlement system in UNCLOS may nevertheless play a role in clarifying the legal issues and bringing the parties closer to a peaceful resolution of the disputes. Firstly, it will describe the system of compulsory binding dispute settlement (CBDS) set out in Part XV of UNCLOS. Second, it will examine the optional exception to the system of CBDS. Third, it examine the prospects for a contentious case being brought under Part XV of UNCLOS notwithstanding the fact that China has exercised its right to exclude disputes on maritime boundary delimitation and on historic bays and titles. Fourth, it will examine the prospects for claimant States to seek an advisory opinion from the International Tribunal for the Law of the Sea on legal issues arising in the South China Sea. Finally, it will draw some conclusions from the above analysis.

[1] Adopted in Montego Bay, Jamaica, on 10 December 1982, entered into force on 16 November 1994, 1833 U.N.T.S. 397. As of 25 May 2011, 160 States and the European Union were parties to UNCLOS.

UNCLOS Dispute Settlement Regime: General Principles

The package deal

The dispute settlement regime in UNCLOS is the most complex system ever included in any global convention.[2] It was part of the "package deal" agreed to at the start of the nine year negotiations leading to the adoption of UNCLOS in 1982. Under the package deal, States agreed to accept the convention in its entirety, with no right to make reservations, and that as a general principle, all disputes concerning the interpretation or application of any provision in the convention would be subject to compulsory binding dispute settlement.[3] In other words, when States become parties to UNCLOS, they consent in advance to the system of compulsory binding dispute settlement in the Convention.

The choices for arbitration or adjudication

The "default" rule in UNCLOS is that if there is a dispute between two States concerning the interpretation or application of any provision in the Convention, it is subject to the system of compulsory binding dispute settlement in section 2 of Part XV. States are obligated to first exchange views to try to resolve the dispute by following the procedures set out in section 1 of Part XV.[4] However, where no settlement has been reached by recourse to section 1, the dispute may be unilaterally submitted *at the request of any party to the dispute* to the court or tribunal having jurisdiction under this section.[5]

The court or tribunal which has jurisdiction to hear a dispute depends in part on whether the parties to the dispute have exercised their right to select a procedure for resolving disputes to which they are parties.[6] Under article 287, a State is free to choose, by means of a written declaration, one or more of four procedures for the settlement of disputes concerning the interpretation or application of the Convention. States have a choice between two methods of adjudication and two methods of arbitration. The choices are: adjudication before the ICJ; adjudication before the International Tribunal for the Law of the Sea (ITLOS); arbitration under Annex VII of UNCLOS; or special arbitration under Annex VIII of UNCLOS. The choice of procedure may be made when signing, ratifying or acceding to UNCLOS, or at any time thereafter.[7]

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[2] On the UNCLOS dispute settlement system generally, see Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

[3] Tommy Koh and S Jayakumar, "Negotiating Process of the Third United Nations Conference on the Law of the Sea", in *United Nations Convention on the Law of the Sea 1982: A Commentary* (Myron H. Nordquist, ed., Martinus Nijhoff, Volume 1, 1985) pp. 29-134.

[4] Article 283, UNCLOS, supra note 1.

[5] Article 286, UNCLOS, supra note 1.

[6] Article 288, UNCLOS, supra note 1.

[7] Article 287, UNCLOS, supra note 1.

If two States Parties to a dispute have elected the same procedure, the dispute will be referred to that procedure. If the States Parties to the dispute have not elected the same procedure, or if one of them has not made a choice of procedure, the dispute will go to arbitration under Annex VII, unless the parties otherwise agree.[8] For example, in 2010, Bangladesh invoked the dispute settlement system in UNCLOS against both India and Myanmar concerning the UNCLOS provisions on maritime boundary delimitation.[9] None of the three States concerned had made a choice of procedure under Article 287. Therefore, the dispute between Bangladesh and India as well as the dispute between Bangladesh and Myanmar would go to arbitration under Annex VII. However, Bangladesh and Myanmar subsequently agreed to take their dispute to ITLOS rather than to arbitration.[10] Consequently, Bangladesh will be going to arbitration in its dispute with India and to ITLOS in its dispute with Myanmar.

None of the States which claim sovereignty over features in the South China Sea have made an election under article 287.[11] Therefore, if the compulsory binding dispute settlement system in section 2 of Part XV were invoked in a dispute between two claimant States relating to the South China Sea, the dispute in question would go to arbitration under Annex VII of UNCLOS[12].

Applicable law and finality of decisions

The court or tribunal has jurisdiction because the dispute concerns the interpretation or application of a provision in UNCLOS. However, in resolving the dispute, the court or tribunal is not restricted to applying the provisions of UNCLOS. Article 293 of UNCLOS provides that a court or tribunal having jurisdiction shall apply the Convention as well as other rules of international law not incompatible with the Convention.

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8 Article 287, paragraph 5, UNCLOS, supra note 1.

9 On October 8, 2009, the People's Republic of Bangladesh instituted arbitral proceedings concerning the delimitation of the maritime boundary between Bangladesh and the Republic of India pursuant to Article 287 and Annex VII, Article 1 of UNCLOS. The Permanent Court of Arbitration acts as Registry in this arbitration. http://www.pca-cpa.org/showpage.asp?pag_id=1376.

10 *Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Case No. 16, International Tribunal for the Law of the Sea (ITLOS). The dispute had initially been submitted to an arbitral tribunal to be constituted under Annex VII UNCLOS through a notification dated 8 October 2009, made by the People's Republic of Bangladesh to the Union of Myanmar. However, on 14 December 2009, proceedings were instituted before ITLOS after both States submitted declarations to ITLOS accepting its jurisdiction to hear the case. See ITLOS Press Release 140 of 16 November 2009, available online at http://www.itlos.org.

11 The up-to date official texts of declarations and statements which contain the choice of procedure under article 287 of the UNCLOS are available online on the web page of the UN Treaties Collection under Status of Treaties. See http://treaties.un.org/Pages/ParticipationStatus.aspx**.**

12 Article 287 (5) UNCLOS, supra note 1.

Whether the dispute goes to one of the two methods of adjudication or to one of the two methods of arbitration, the decision rendered by a court or tribunal having jurisdiction is final, and must be complied with by all the parties to the dispute.[13]

Request for Provisional Measures

A State party to a dispute which is referred to dispute settlement under section 2 may also request provisions measures to either (1) preserve the respective rights of the parties; or (2) prevent serious harm to the marine environment.[14] The only prerequisite is that ITLOS must first determine that prima facie the arbitral tribunal to be constituted would have jurisdiction to hear the case.

Such provisional measures are legally binding.[15] Even if a dispute is being referred to an arbitration tribunal, a State party may request provisional measures from ITLOS pending the establishment of the arbitral tribunal.[16]

Optional Exceptions under Article 298

Section 3 of Part XV also gives States the right to "opt out" of the compulsory binding dispute settlement system in section 2 for certain categories of disputes. Article 298 provides that States parties have the option to formally declare to the UN Secretary-General that they do not accept Section 2 for certain categories of disputes, including the following:

- the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles;
- disputes concerning military activities and disputes concerning law enforcement activities relating to enforcement of rights and jurisdiction of coastal States over resources in the EEZ;
- disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

Several States in Asia, including Australia, China and Korea, have exercised their right to exclude these categories of disputes from the system of compulsory binding dispute settlement in section 2 of Part XV.[17] Significantly, on 25 August 2006, China submitted a declaration under article 298 providing that:

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[13] Article 296, UNCLOS, *supra* note 1.

[14] Article 290, paragraph 1, supra note 1.

[15] Article 290, paragraph 6, supra note 1.

[16] Article 290, paragraph 5, supra note 1.

[17] The up-to date official texts of declarations and statements which contain optional exceptions to the applicability of Part XV, Section 2, under article 298 of UNCLOS are available online on the web page of the UN Treaties Collection under Status of Treaties. See http://treaties.un.org/Pages/ParticipationStatus.aspx.

> The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.

It should be noted that the exclusion of certain categories of disputes from the jurisdiction of court or tribunal under article 298 declarations are not 'self-judging.' A party to a dispute cannot determine whether the exclusions do or do not apply in a given case. Article 288(4) makes it clear that in the event of dispute on whether a court or tribunal has jurisdiction, the matter shall be settled by a decision of that court or tribunal.

The following sections will examine the nature of the disputes excluded under Article 298 Declarations.

Disputes related to military activities and certain law enforcement activities

China's declaration under article 298 excludes disputes relating to military activities. Therefore, any dispute on whether a State has a right under Article 58 of UNCLOS to conduct military activities such as military surveys or military exercises in the EEZ of China would be excluded from the compulsory binding dispute settlement system in UNCLOS. Any dispute concerning military activities by China in the maritime zones of another State would also be excluded.

China's declaration also excludes disputes relating to law enforcement activities in relation to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2) or (3). This in effect excludes only a narrow category of law enforcement activities, that is, those relating to the enforcement of fisheries activities and marine scientific research activities, which activities are already excluded from the compulsory binding dispute settlement system under Articles 297(2) and (3). Disputes relating to other types of law enforcement activities, such as disputes concerning interference with seismic surveys or disputes concerning the arrest of foreign fishing vessels in areas of overlapping claims would not be excluded by the declaration.

Disputes related to matters covered by the Security Council

China's declaration also excludes disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this UNCLOS. The purpose of this exception is to avoid a conflict between a dispute settlement procedure initiated under Part XV of UNCLOS and action that the United Nations Security Council might be taking in the exercise of its responsibility to maintain international peace and security under Chapter VII of the United Nations Charter. For example, if armed conflict were to break out between claimant States over the disputed islands in the South China Sea, the matter may be referred to the Security Council. In such a case, one of the parties to the dispute may not be able to invoke the dispute settlement procedures in UNCLOS on the issue of whether the use of military force by a claimant State was a violation of UNCLOS.

Disputes on maritime boundary delimitations

An article 298 declaration also excludes "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations". Therefore, another claimant such as Vietnam could not invoke the CBDS system against China with regard to the delimitation of the EEZ or continental shelf boundary.

However, although disputes on the interpretation or application of articles 74 and 83 relating to "sea boundary delimitations" can be excluded under the article 298 declaration, there may nevertheless be issues with respect to the interpretation or application of articles 74 and 83 which are **not covered by** the exclusion. Not all the paragraphs in articles 74 and 83 deal with "sea boundary delimitations. For example, under paragraph 3 of Articles 74 and 83 of UNCLOS, State Parties have an obligation to "make every effort to enter into provisional arrangements of a practical nature" and "not to engage in activities which would jeopardize or hamper the reaching of the final agreement on the maritime boundaries." If a State refuses to enter into discussions regarding provisional arrangements of a practical nature, there would be a dispute on whether it has breached its obligation under articles 74 and 83 to make every effort to enter into provisional arrangements of a practical nature. Also, if a claimant State authorized drilling in an area in dispute, an issue would arise as to whether it has breached its obligation not to engage in activities which would jeopardize or hamper the reaching of the final agreement on the maritime boundaries. Therefore, a court or arbitral tribunal could interpret article 298 strictly and rule that it only excludes disputes relating to the boundary delimitations, not disputes on the obligations of states pending agreement on the delimitation of boundaries.

Disputes on historic bays and titles, historic waters and historic rights

Article 298 provides that disputes on "historic bays and titles" may be excluded. Part II of UNCLOS on the territorial sea contains one provision referring to historic bays and one provision referring to historic title. Article 10 sets out rules for enclosing bays with straight baselines, but provides in paragraph 6 that its provisions do not apply to "so-called 'historic' bays." Article 15 on the delimitation of territorial sea provides that the normal rule for delimiting territorial sea boundaries does not apply where it is necessary by reason of "historic title" or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with the normal rule. The fact that the terms "historic bays and titles" appear in Part II of UNCLOS on territorial seas suggest that the terms are used to refer to maritime space that is similar to internal waters or territorial sea.

Another issue is whether disputes relating to "historic waters" would fall within the exclusion in article 298 of disputes relating to "historic bays or titles." With the exception of the provision in article 15, the law on historic waters is governed by the principles and rules of general international law. As indicated in the preamble to UNCLOS, matters not regulated by UNCLOS continue to be governed by the rules and principles of general international law. It is not clear whether the exclusion in article 298 of disputes relating to "historic bays or titles" would also include disputes on claims to "historic waters" but it is reasonable to conclude that it would.

There is no generally agreed definition of “”historic waters”, but it is generally agreed that it is wider in scope that “historic bays”.[18] A working definition of historic waters that has been proposed by a Professor Clive Symmons is as follows:

> Waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.[19]

The International Court of Justice has stated that the term “historic waters” was generally understood to mean “waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title”.[20]

In his recent review of the subject, Professor Symmons has stated that certain requirements are necessary to support claims to historic title to “historic waters”. First, with respect to the exercise of authority, there must be a formal, clear and consistent claim to sovereignty over the waters. Second, the claim must have been adequately publicized with clear notification of the claim to other States, such as by a formal declaration. Third, there must have been continuity of the claim over time and the effective exercise of jurisdiction by the claiming State. Finally, there must have been knowledge of, and acquiescence to the claim by other States. [21]

Although some scholars from Taiwan and China have claimed that China that the waters inside China’s nine-dashed lines on its 1947 map are China’s historic waters, this argument is not convincing. Simply stated, it is not possible to argue that the requirements set out by Prof Symmons have been met. The publication of a map is not clear notification of a claim to historic waters without a formal declaration. Also, given that the meaning of the nine-dashed line map is still being debated in 2011 inside and outside China, it would be extremely difficult for China to maintain that there has been clear notification of the claim to other States.

The term “historic rights” is also found in the literature and in international cases. Symmons argues that the term “historic rights” is broader than that of “historic waters”. He states that the term “historic rights” implies, in its widest sense, a State claiming to exercise certain jurisdictional rights, most particularly fishing rights, in what usually are high seas. He states that historic rights must satisfy the same, or at least similar requirements as historic waters, such as continuous and long usage with the acquiescence of relevant other States. However, he argues that historic rights are different from historic

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[18] Juridical Regime of Historic Waters, 1962 Yearbook of the International Law Commission, vol II, at pp. 2-3, UN Doc A/CN.4/143

[19] Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijoff, 2008) at 1. This definition is originally from L.J. Bouchez, *The Regime of Bays in International Law* (Syhott, Leyden, 1964) at 281.

[20] *Fisheries Case* (United Kingdom v Norway), [1951] ICJ Reports 116, at 174. This definition was recently cited by the ICJ in the *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) (Judgment) [1992] ICJ Reports 351 at 588-589.

[21] Symmons, *supra* note 19, at 113-115.

waters in several important ways. The most important difference he gives is that historic rights do not amount to claims of sovereignty or jurisdiction over a certain maritime space, but only a claim to exercise rights and jurisdiction over fisheries in areas of the high seas or areas within the EEZ of other States. [22]

Claims to historic fishing rights have been considered in several modern international cases, including the 1982 *Tunisia/Libya Continental Shelf Case*[23], the 2001 *Qatar/Bahrain Case*[24] and the 1999 *Eritrea/Yemen Arbitration*[25]. The issue which arose in these cases was whether the claim to historic rights to fisheries resources should have an influence on maritime boundary delimitation between the two States. Symmons concludes after examining these cases that the relevance of claimed historic rights to maritime delimitation of the EEZ and continental shelf remains unclear. However, he also states that coastal States sometimes agree to give access to fisheries in their EEZ to fishermen who have historically fished in waters that are now its EEZ.[26]

The doctrine of historic rights to fishing resources developed when the waters beyond the limits of a 3 nautical mile territorial sea were subject to the principle of freedom of fishing. In the 1974 *Fisheries Jurisdiction case* the ICJ ruled that Iceland, a coastal State with a special dependence on fishing, had “preferential rights” to the fisheries resources outside its territorial sea, but that the United Kingdom had “established rights” because its fishermen had historically fished in the same area.[27] However, these principles were rejected in the negotiations leading to UNCLOS in favour of a 200 nautical mile EEZ regime in which coastal States have the sovereign right to explore and exploit the living resources. The EEZ regime in UNCLOS does not recognize historic fishing rights or established fishing rights of other States in the EEZ. Rather, it provides that in giving access to other States in its EEZ to any “surplus” of its allowable catch, the coastal State shall take into account all relevant factors, including “the need to minimize economic dislocation in States whose nationals have habitually fished in the Zone or who have made substantial efforts in research and identification of stocks”.[28] Coastal States have wide discretion in granting access to any surplus of living resources in their EEZ, and their discretionary decisions are

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[22] Symmons, *supra* note 19, at 4-6.

[23] *Case Concerning the Continental Shelf* (Tunisia/ Libyan Arab Jamahiriya) (Merits) 1982 ICJ Reports 18.

[24] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain) (Merits), 2001 ICJ Reports 40

[25] Eritrea / Republic of Yemen, *Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)* December 17, 1999. Decision is available on the home page of the Permanent Court of Arbitration. See http://www. Pca-cpa.org

[26] Symmons, *supra* note 19, at 46-47.

[27] *Fisheries Jurisdiction Case* (Merits) (UK v Iceland) ICJ Report 3 at 29.

[28] Article 62, paragraph 3, UNCLOS, *supra* note 1. Under article 61 of UNCLOS coastal States must determine the “allowable catch” of the living resources in their EEZ. Under article 62 they must determine their “capacity to harvest” the living resources in their EEZ. When the coastal State does not have the capacity to harvest the entire allowable catch, it must give other States access to any “surplus” of the allowable catch.

generally not subject to the CBDS system in Part XV of UNCLOS.[29] Therefore, it can be argued that when States become Parties to UNCLOS, they have in effect abandoned any historic rights to fish in the EEZ of other States.

Officials and scholars from China have often referred to "historic rights" of China inside the nine-dashed line. If a dispute arises with respect to China's historic rights in waters that are now the EEZ of other States, such a dispute would be subject to the CBDS system in section 2 of Part XV. It would not be excluded by China's declaration under article 298, as claims to historic rights are very different than claims to historic bays or titles or claims to historic waters.

Compulsory Conciliation under Annex 5

Even if a State makes a declaration under article 298 to exclude disputes relating to maritime boundary delimitation and historic bays and titles from the CBDS in section 2 of Part XV, such disputes may nevertheless be subject to the compulsory conciliation procedures in Annex 5 of UNCLOS. Article 298 provides that:

> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
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> (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
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> (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

Therefore, if a dispute arises after 16 November 1994 (the date of entry into force of UNCLOS) on the delimitation of the maritime boundary between China and another State Party to UNCLOS, and it does not concern the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory, it could be referred to compulsory conciliation under Annex V.

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[29] Article 29, paragraph 3, of UNCLOS provides that "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States . . .".

However, if the delimitation of the maritime boundaries is in an area which would also require the concurrent consideration of an unsettled dispute concerning sovereignty over off-shore islands, the dispute would not be subject to the compulsory conciliation. The only recourse would be to resolve the issues by bilateral negotiations or by other procedures agreed to by the parties.

The procedures for compulsory conciliation are set out in Annex 5 of UNCLOS. A conciliation commission would be established, and it would study the problem and issue a report. The report is not legally binding on the parties, but the parties would be under a legal obligation to negotiate in good faith on the basis of the conciliation report. This requirement forces parties to abandon their traditional position and negotiate in good faith to try to reach an agreement on the basis of the conciliation report. Although the parties are not required to reach an agreement, they are legally obligated to negotiate in good faith to try to reach agreement.

If they are unable to reach agreement after negotiations on the basis of the report, it is not entirely clear what happens. Article 298 provides that

> if these negotiations do not result in an agreement, the parties *shall, by mutual consent*, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree. [emphasis added]

Opinions differ on what the meaning of the phrase "*shall, by mutual consent*, submit the case to either arbitration or adjudication as provided in section 2." The language appears to be intentionally vague. It could be argued that if the parties cannot reach agreement based on the non-binding conciliation report, they must then agree to refer the dispute to one of the four methods of CBDS in section 2 – adjudication before the ICJ, adjudication before ITLOS, arbitration under Annex VII, or special arbitration under Annex VIII. However, some writers opine that the phrase "by mutual consent" means that no State party can be forced to refer the case to arbitration or adjudication without their express consent.[30] Given this ambiguity, a dispute could arise between China and the Philippines on the interpretation or application of this language in article 298. In such case, that dispute would be subject to the CBDS system in section 2 of UNCLOS.

What seems clear is that if there is a dispute on how to delimit the maritime boundary between the EEZ measured from the coast of a claimant State and the territorial sea or EEZ claimed from a disputed island, such a dispute would not be subject to the compulsory conciliation procedure. This is because the maritime boundary could not be determined without addressing the issue of which State has the better claim to sovereignty over the disputed island. Article 298 expressly provides that

[30] For a history of the negotiations leading to this clause, see *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist, ed. Martinus Nijhoff), Vol. V (Shabtai Rosenne & Louis B. Sohn, eds., 1988) pages 109-134. They conclude in paragraph 298.31 that "the agreement to resort to one of the procedures in section 2 can come into effect only be mutual consent. Their view is that if no agreement can be reached to refer it to one of the procedures for adjudication or arbitration, the only obligation that remains is the general obligation set out in article 283(1) to proceed expeditiously to an exchange of views regarding settlement of the dispute by further negotiations or other peaceful means. See also, Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge Univ Press, 2005), pp. 260-1.

any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission

Prospects for a Contentious Case under Part XV

Notwithstanding China's declaration under 298 excluding certain categories of disputes, there is a possibility that legal disputes could arise between claimant States to the Spratly Islands concerning the interpretation or application of provisions of UNCLOS which would be subject to the CBDS in UNCLOS.

Disputes on provisions not excluded by article 298

The CBDS in UNCLOS would apply to disputes between claimant States concerning the interpretation or application of the provisions of UNCLOS which are not within the exclusion in article 298. They include:

1. A dispute on whether a feature meets the definition of an island under Article 121(1) because it is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. A dispute on whether an island is a rock which cannot sustain human habitation or economic life of its own within article 121(3) and is therefore not entitled to an EEZ or continental shelf of its own
3. A dispute on whether a feature is a low-tide elevation within article 13
4. A dispute on whether the use of straight baselines by a State is consistent with article 7
5. A dispute on the interpretation or application of article 6 on reefs
6. A dispute on whether a State has "historic rights" under customary international law to fish in the waters claimed by another State as its EEZ
7. A dispute on whether a State, in a disputed area or area of overlapping claims, has breached its obligations under Article 74 to 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.
8. A dispute on whether a State has interfered with the sovereign right of another State to explore and exploit the natural resources in its EEZ pursuant to article 56
9. A dispute on whether a State has lawfully arrested the fishing vessel of another State in its EEZ under article 73
10. A dispute on whether a State has complied with the provisions for prompt release of vessels and crew under article 298

Disputes concerning areas in dispute and areas not in dispute

One of the consequences of the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf and the Notes Verbale which followed is that it has become clear that the Southeast Asian claimants do not accept that China has rights to any resources in and under the waters within the nine dashed lines based on a claim of historic waters or historic rights. They are likely to argue that the nine dashed line map has no legal significance under UNCLOS or international law except to indicate that China has a historic claim to sovereignty over the islands inside the nine dashed line. They are also likely to argue that any claims to sovereign rights over the resources must be based on maritime zones measured from land territory or islands, and that any claims to rights and jurisdiction in the waters surrounding the features in the South China Sea is governed by the provisions of UNCLOS discussed above (as opposed to any concept of historic rights or historic waters)

China could assert that its nationals have a right to fish in the 12 nm territorial sea adjacent to any feature inside the nine dashed line which meets the definition of island. China could also assert that its fishing vessels have the right to fish in an EEZ claimed from the islands over which it claims sovereignty, notwithstanding the fact that such islands may be occupied by other claimants. China could further assert that it has historic rights under general international law to fish in the waters inside the nine-dashed line. China might conceivably also assert that it has historic rights to exploit the resources of the seabed in areas inside the nine-dashed line.

If some of these assumptions are correct, there is a distinct possibility that a legal dispute could arise between China and a Southeast Asian claimant State which would be subject to the compulsory binding dispute settlement system in section 2 of Part XV of UNCLOS. Consider the following scenarios.

Scenario 1. A fishing vessel flying a Chinese flag fishes in waters surrounding features in the Spratly Islands which are claimed by a Southeast Asian State as its EEZ. The relevant area is more than 12 nm from any large island claimed by China. The Southeast Asian State arrests the Chinese fishing vessel for illegally fishing in its EEZ in waters which it asserts are “not in dispute”. China protests the arrest and claims that its fishing vessel had a right to fish in this area under UNCLOS and general international law. A dispute will have arisen between the two parties on the interpretation of UNCLOS. The Southeast Asian claimant can unilaterally invoke the dispute settlement system in section 2 of Part XV. The Southeast Asian claimant can argue that the Chinese fishing vessel had no right to fish in an area of its EEZ that is more than 12 nm from any island claimed by China. China would have to assert that the arrest took place in a disputed area either because that area is also within its EEZ measured from an island it claims, or because it has “historic rights” to fish in the area. If China argued that the area in question is within the EEZ of an island which is not a rock under article 121(3), the tribunal would have to interpret and apply the ambiguous language in article 121 (3) to a particular island in the South China Sea. In particular, it may have to determine whether the relevant island is capable of sustaining human habitation or economic life of its own, and hence entitled to an EEZ and or continental shelf of its own. If China argues that the dispute is excluded by its declaration under article 298, the Southeast Asian country could argue that the legal issues that arise from the facts can be resolved without the tribunal having to decide who has sovereignty over the island and without delimiting the maritime boundary. If

the tribunal determines that it has jurisdiction, it could examine the issue of historic rights under general international law, as it has the right under article 293 to apply other rules of international law not incompatible with UNCLOS.

Scenario 2. A Southeast Asian claimant issues licenses to a company to conduct a seismic survey in an area off its coast which is within its EEZ and more than 12 nm from any disputed island. A Government vessel from China intercepts the survey ship and directs it to stop its activities. The Southeast Asian State protests, alleging that China is interfering with its sovereign right to explore and exploit the natural resources in its EEZ in an area that is not in dispute. China responds by stating that it has rights and jurisdiction in the area. The Southeast Asian State can invoke the CBDS system in section 2 of Part XV. It can argue that this dispute is about the interpretation and application of relevant provisions of UNCLOS, and is not a dispute on boundary delimitation or on historic bays or titles. As in scenario 1, it can argue that the issue of whether China has a right to interfere with the survey can be resolved without the tribunal having to decide who has sovereignty over the disputed islands and without delimiting the maritime boundary. China could challenge the jurisdiction of the tribunal, and argue that this dispute would require the tribunal to make decisions which could ultimately affect the maritime boundary. The tribunal would decide whether it has jurisdiction to decide the case.

Scenario 3. A Southeast Asian claimant State issues a license to a company to begin exploratory drilling in an oil concession block in an area of the South China Sea which overlaps with a concession block of China in which China has previously issued a license to explore to another company. China protests, claiming that such action in an area of overlapping claims is in breach of the obligations in Articles 74 and 83 not to take unilateral action which would jeopardize or hamper a final agreement on the maritime boundary. When its protest is ignored, China invokes the CBDS mechanism in section 2 of Part XV, and requests ITLOS to grant provisional measures and order the Southeast Asian claimant to cease such unilateral activities. The Southeast Asian claimant challenges the jurisdiction of ITLOS and the arbitral tribunal on the ground that such a dispute is excluded from jurisdiction because of China's declaration under Article 298.

Numerous other scenarios could be articulated. The point is that there are situations where disputes could arise which would be subject to the CBDS in section 2 of Part XV. In such cases, it would be the tribunal which would decide whether it has jurisdiction, and whether the disputes are excluded by China's declaration under article 298. If the tribunal did decide some of the legal issues raised in the above scenarios, it would be a peaceful resolution of some of the difficult legal issues which could assist that claimant States in clarifying their legal positions. This could be a useful step in defining the areas in dispute which would be subject to joint development arrangements.

Prospects for an ITLOS Advisory Opinion

There is no provision in UNCLOS or in the Statute of ITLOS which permits States Parties or institutions created by UNCLOS to request an advisory opinion from ITLOS on legal questions. However, the Rules of the Tribunal, adopted in 1996 by the Tribunal pursuant to Article 16 of its Statute, give the Tribunal the authority to give advisory opinions in certain circumstances. The Tribunal's advisory

jurisdiction is based on article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Article 138 of the Rules of the Tribunal reads as follows:

> 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion.
>
> 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
>
> 3. The Tribunal shall apply mutatis mutandis articles 130 to 137.

There is no express authority in either UNCLOS or the ITLOS Statute for this provision. Furthermore, there is no precedent for it in the rules of the International Court of Justice.[31] The status and legal basis of Article 138 (1) has been the subject of analysis by government officials and judges of the tribunal.[32] Although some concern has been raised on whether the Tribunal exceeded its powers in providing for advisory jurisdiction in Article 138 (1) of the Rules of the Tribunal, commentators have concluded that there has largely been a positive reaction to the rule empowering ITLOS to give advisory opinions in certain circumstances.[33]

If a body were to request an advisory opinion pursuant to article 138 (1), it would be difficult for any State to challenge the authority of the Tribunal to give an Advisory Opinion. In any case, even if such a challenge could be made, article 288 (4) of UNCLOS provides in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal. Therefore, it would be up to the Tribunal itself to determine whether it has the authority it has vested in itself under its Rules.

Under article 138 (1), the Tribunal can give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion. Three requirements must be met.

First, there must be an agreement between States that is related to the purposes of the UNCLOS. This could be a multilateral agreement, a regional agreement or even a bilateral agreement, so long as the agreement is related to the purposes of the Convention.

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[31] P. Chandrasekhara Rao & Ph. Gautier, eds., *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, 2006) at 393.

[32] See Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited" 39 Ocean Development & International Law (2008), 360-371; Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea" 9 Chinese JIL (2010), 565-587.

[33] Ki-Jun You, *ibid*, at 364.

Second, the agreement must specifically provide for the submission of a request for an advisory opinion from the Tribunal. The international agreement should state who can request an advisory opinion and set out the procedure for making such request. The agreement could provide that the States Parties to the agreement can make the request when there is a consensus to do so. The agreement could also establish a body and authorize that body to request an advisory opinion if it believes an opinion would assist it in carrying out its functions and objectives.

Third, the advisory opinion must be on a legal question. This presumably would be a legal question relating to the Convention. The Tribunal is likely to follow the jurisprudence of the International Court of Justice in determining whether there is a legal question.[34]

Would it be possible for some or all of the claimant States in the South China Sea to request an advisory opinion on legal issues relating to the interpretation and application of UNCLOS? It could be possible if two or more claimant States entered into an agreement relating to the purposes of the Convention, such as an agreement to cooperate to prevent pollution of the marine environment in the South China Sea from ocean dumping. That agreement could establish a body to institute rules and standards to prevent pollution of the marine environment in the South China Sea from ocean dumping. It could also authorize that body to request an advisory opinion from ITLOS on legal questions relating to their functions and purposes. For example, the body created under the international agreement could request an advisory opinion on whether there are any international rules and standards on the decommissioning and abandonment of offshore platforms which are legally binding on States Parties to UNCLOS who are not parties to the 1972 London Convention or its 1996 Protocol.[35]

It may also be possible for claimant States to enter into an international agreement which would enable them to request an advisory opinion on more controversial legal issues such as how to interpret article 121 (3) on rocks which cannot sustain human habitation or economic life of their own. The claimant States could enter into an international agreement to cooperate to clarify the status of the features in the Spratly Islands. The agreement could establish a technical body to review the features to determine which are completely submerged at low tide, which are low tide elevations, which meet the definition of islands in article 121 (1), and which may be rocks as defined in article 121 (3). The treaty could then authorize the technical body to request an advisory opinion from ITLOS on legal questions relating to their functions and responsibilities.

One question which could arise is whether States not parties to the agreement would have the right to present arguments to the Tribunal on a legal question if they believe that they have an interest in the issue. A more difficult question would be whether a claimant State which is not a party to the agreement could intervene to argue that the Tribunal should not give an advisory opinion on a particular

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[34] On this issue, see Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, ICJ Reports 1996, 226, para. 13.

[35] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, 1046 UNTS 120; ATS 1985 No 16; 1996 Protocol to the 1972 Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 2006 ATS 11.

legal question because the opinion might irreparably prejudice their rights in an ongoing territorial sovereignty dispute.

Conclusions

From the above discussion, the following conclusions can be drawn:

1. The dispute settlement regime in UNCLOS cannot be used to resolve the disputes concerning the merits of sovereignty claims to the islands in the South China Sea;
2. Certain legal disputes which could arise in the South China Sea are not subject to CBDS because China has exercised its right under article 298 to opt out of the system of dispute settlement for certain categories of disputes;
3. Disputes concerning China's objections to activities within the EEZ of Southeast Asian claimants may be subject to the system of CBDS in section 2 of Part XV;
4. Such disputes are primarily about the interpretation and application of article 121 and the rights and jurisdiction of China within the 9-dashed line;
5. If the Tribunal were to decide that the disputes fall within Article 298 because they involve the first stages of delimitation, the disputes may be subject to compulsory conciliation;
6. Two or more Claimant States could request an Advisory Opinion from ITLOS on legal issues relating to the South China Sea if they comply with the requirements in Article 138 of the Tribunal;
7. An arbitral decision or advisory opinion could clarify some of the intentionally vague provisions of UNCLOS such as Art 121(3);
8. An arbitral decision or advisory opinion could clarify the "areas in dispute" that can be subject to "joint development" arrangements.