

**Legal Issues regarding the China's Placement of the Oil
Rig Haiyang Shiyou 981 in Viet Nam's EEZ and CS
Saturday 26 July 2014, Ho Chi Minh City, Viet Nam**

**The Dispute Settlement Procedures
UNCLOS – Implications for the Dispute
between Viet Nam & China**

Robert Beckman

**Director, Centre for International Law (CIL)
National University of Singapore**

CIL
Centre for International Law
www.cil.nus.edu.sg



Section 1

UNCLOS Dispute Settlement Procedures & Philippines v. China

Compulsory Procedures entailing Binding Decisions

- General rule under UNCLOS – **any dispute** on the interpretation or application of any provision in the Convention is subject to compulsory procedures entailing binding decisions
- If a dispute arises, the Parties must first exchange views and attempt to resolve the dispute by negotiation.
- If the dispute cannot be settled by negotiation, either party may unilaterally invoke the dispute settlement procedures in Section 2 of Part XV and bring the other to a court or tribunal
- The “default procedure” – Arbitration under Annex VII

Disputes on Territorial Sovereignty

- UNCLOS has no provisions on how to determine which State has the better claim to sovereignty over disputed land territory or disputed islands
- Therefore, the dispute settlement provisions in UNCLOS cannot be used to decide disputes on who has the better claim over the islands in the Paracels or the Spratlys

Article 298. Optional Exceptions

- China has formally declared under Article 298 that it does not accept the compulsory procedures entailing binding decisions for certain categories of disputes, including:
 1. the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations,
 2. or those involving historic bays or titles
 3. or those involving military activities
- Not possible for ASEAN claimants to bring China to a Court or Tribunal on the delimitation of maritime boundaries

Philippines v China Case

- On 23 Jan 2013 Philippines brought action under Part XV of UNCLOS to take China to arbitration under Annex VII
- Argued that there are disputes on the interpretation or application of the provisions of UNCLOS other than those on boundary delimitation, such as:
 - Interference with Philippines' exercise of its sovereign rights in its Exclusive Economic Zone (Art 56)
 - Illegal occupation of Low-Tide Elevations
 - Claiming more than 12 nm maritime zones from islands which cannot sustain human habitation or economic life of their own [121(3)]

What Philippines Does NOT Seek

1. Does NOT seek a determination of which Party enjoys **sovereignty over the islands** claimed by them
2. Does NOT request any **delimitation of maritime boundaries**
3. Philippines is conscious of China's Declaration under Article 298 and has avoided raising any subjects or making any claims that China excluded from arbitral jurisdiction
4. Claims do not fall within China's Declaration under Article 298:
 1. Do not concern boundary delimitation
 2. Do not involve historic bays or titles or military activities or law enforcement activities

Relief Sought by Philippines

1. Declare that China's rights to **maritime areas** are those established by UNCLOS
2. Declare that China's maritime claims based on its **9-dash line** are contrary to UNCLOS and invalid
3. Declare China's occupation of **four submerged features** is unlawful
4. Declare that **Scarborough Shoal** and **three other reefs** it occupies are "**rocks**" within 121(3) entitled only to a 12 m territorial sea

Relief Sought by Philippines

5. Declare that Philippines is entitled maritime zones measured from its archipelagic baselines
6. Declare that China has unlawfully claimed and unlawfully exploited living and non-living resources in the Philippines' EEZ and on the Philippines' continental shelf
7. Declare that China as unlawfully interfered with navigation rights and other rights of the Philippines in areas within and beyond its 200 nm EEZ

Procedure of Tribunal

- China has refused to participate
- Four of 5 arbitrators appointed by President of ITLOS
- Rules of Procedure issued
- Philippines filed Memorial by 30 March deadline – 4000 pages
- China given deadline of 15 Dec to submit Counter-Memorial
- Could be decision sometime in 2015
- Tribunal must find that it has jurisdiction and that Philippines case is well-founded in fact and law

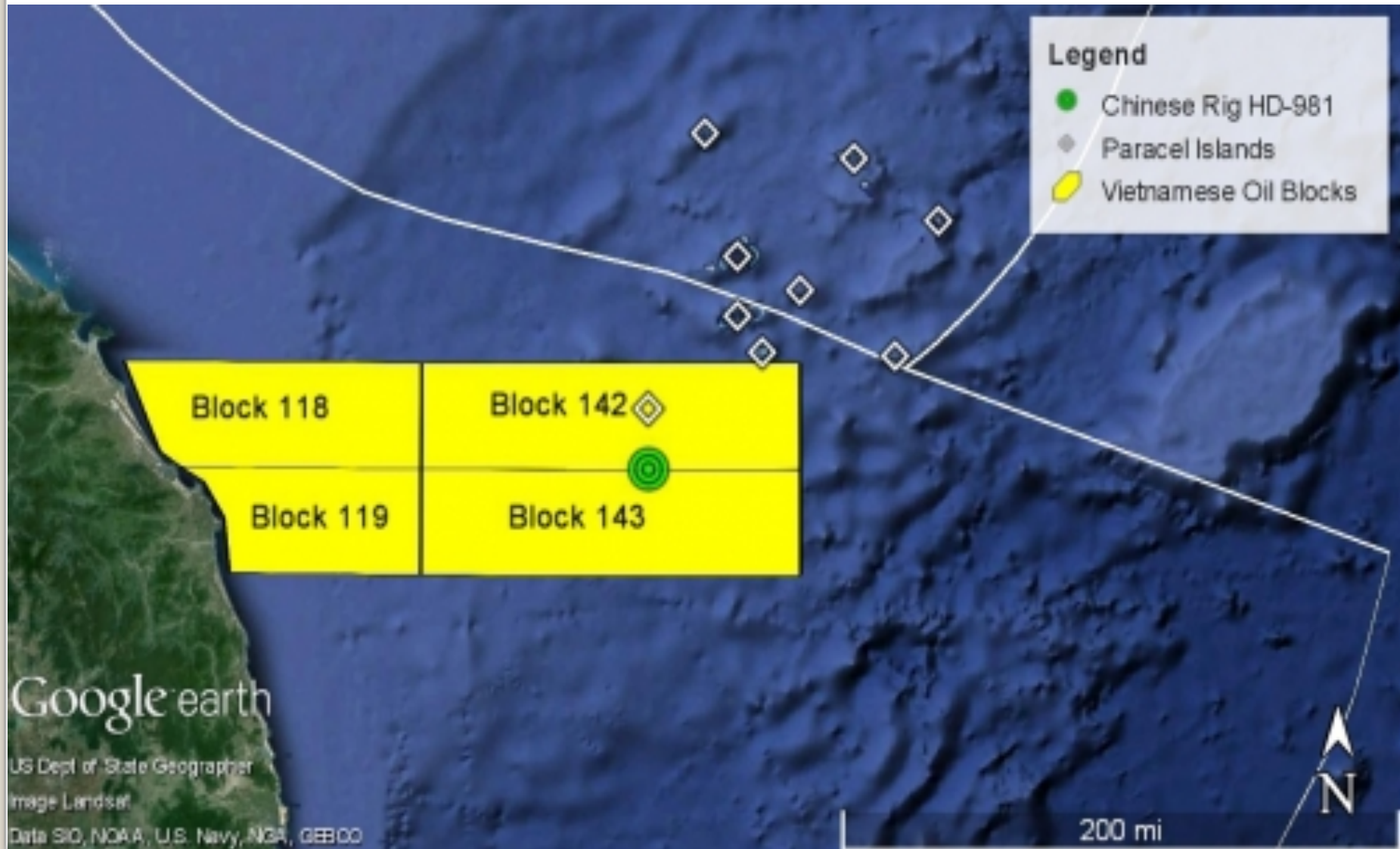
Section 2

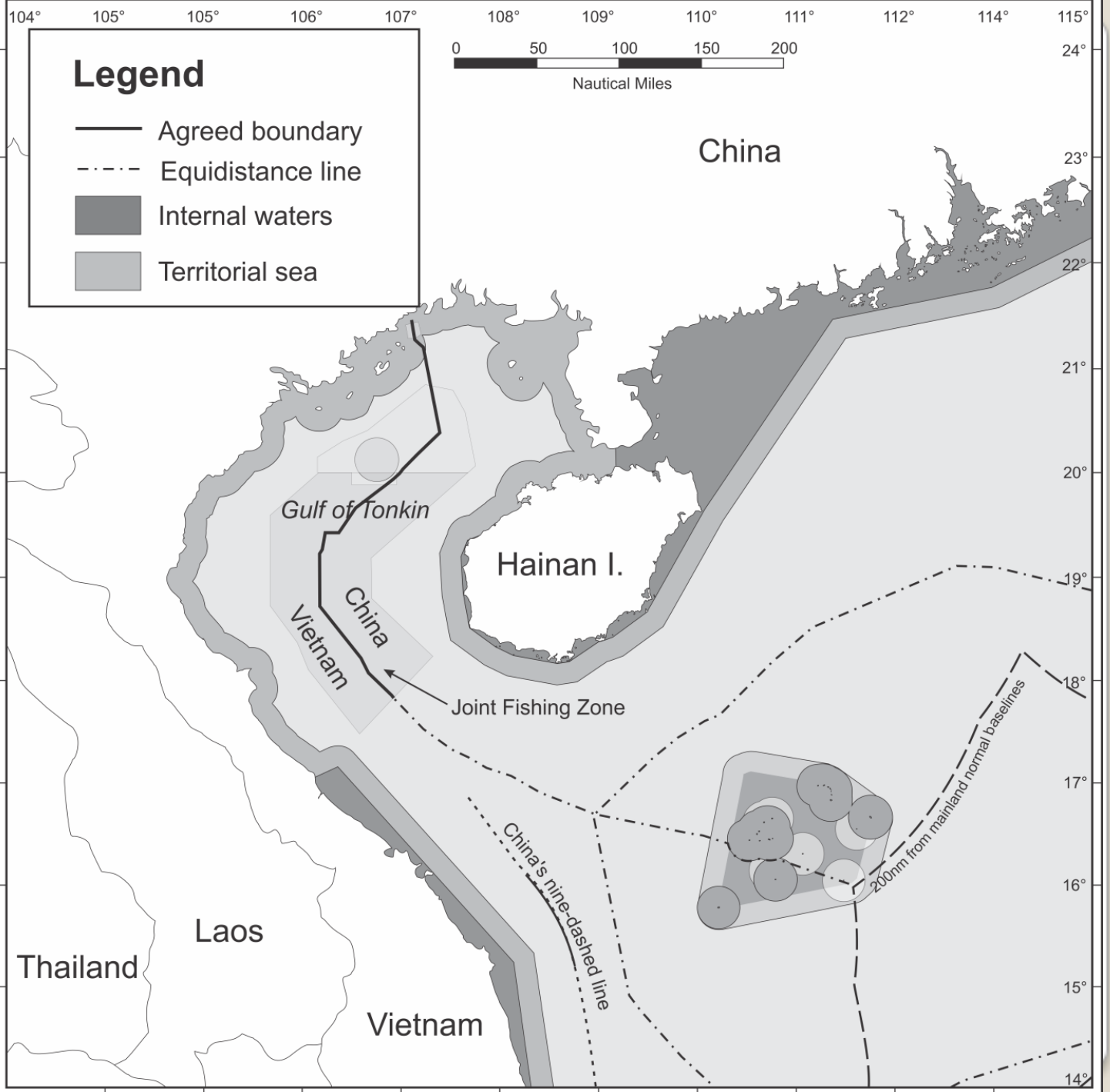
UNCLOS Dispute Settlement & Dispute between Viet Nam & China

Dispute governed by UNCLOS

- Area where China has moved its oil rig is an “area of overlapping maritime claims”
- Is within EEZ claimed by Viet Nam from its mainland and within EEZ claimed by China from islands over which both China and Viet Nam claim sovereignty
- Until the maritime boundary in this area is resolved, both States are under an obligation to exercise restraint and not to take any unilateral actions which would irreparably prejudice a final agreement on the maritime boundary in this area

Chinese Oil Rig HD-981





Legend

- Agreed boundary
- · - · - Equidistance line
- Internal waters
- Territorial sea

0 50 100 150 200
Nautical Miles

Option 1 for Viet Nam

- Bring a separate case against China under section 2 of Part XV
- Must allege that tribunal has jurisdiction because a dispute on the interpretation or application of the provisions of UNCLOS
- If unilateral drilling, could request ITLOS to order Provisional Measures under Article 290 of UNCLOS in order to preserve Viet Nam's rights to the hydrocarbon resources in this area
- Pending the formation of an Arbitral Tribunal under Annex VII, the request for Provisional Measures can be heard by International Tribunal for the Law of the Sea

Option 1 for Viet Nam

- The duty to exercise restraint in areas of overlapping EEZ claims is set out in article 74(3) of UNCLOS
- China has made a declaration under Article 298 excluding disputes on the interpretation or application of Article 74 of UNCLOS on the delimitation of maritime boundaries
- However, scholars have argued that a 298 Declaration does not exclude disputes on whether one State has failed to exercise restraint

Option 1 for Viet Nam

- The Tribunal in the 2007 Guyana v Suriname case under Annex XV of UNCLOS ruled that unilateral drilling is an area of overlapping claims is a breach of international law
- Unilateral drilling permanently changes the situation with regard to mineral resources
- Therefore, drilling is a unilateral action that will jeopardize or hamper the reaching of a final agreement on maritime boundaries

Option 2 for Viet Nam

- Make for formal request to Intervene in the Annex VII arbitration case between the Philippines and China
- Viet Nam can argue that there is also a dispute between China and Viet Nam regarding the legality under UNCLOS of China's actions in the EEZ of Viet Nam in the South China Sea
- Viet Nam can argue that it also claims sovereignty over the islands in the Spratlys and the Tribunal should consider its position on whether the disputed islands are entitled to an EEZ or CS of their own
- Request the Arbitral Tribunal in that case to order Provisional Measures under Article 290 to cease unilateral drilling in the area of overlapping maritime claims

Option 2 for Viet Nam

- There are no provisions in the Rules of Procedures of the Arbitral Tribunal in the Philippines v China case allowing for “intervention” by a third party
- On the other hand, there are also no provisions which prohibit a third State from intervening in the case
- Viet Nam can claim it is ‘real party of interest’ in the case because it also claims sovereignty over the islands in dispute in that case (except for Scarborough Shoal)
- In addition, Viet Nam occupies several islands and low-tide elevations that are within the EEZ claimed by the Philippines

Option 2 for Viet Nam

- If the Tribunal refuses to allow Viet Nam to intervene in the pending case, Viet Nam could then bring a separate case under Annex VII
- If China refuses to participate in the second case, Viet Nam could ask the President of the ICJ to appoint the same panel of judges so as to avoid any chance of conflicting decisions on the same legal issues

Conclusions

- It is not certain if the Tribunal will hold that it has jurisdiction to consider some or all of the issues in the PvC case
- Viet Nam may be able to invoke the Dispute Settlement provisions in UNCLOS to bring China to a Tribunal to challenge the legality of China's unilateral drilling in the area of overlapping claims
- Viet Nam may also be able to intervene in the arbitration between the Philippines and China since that case has serious implications for Viet Nam's rights in the waters surrounding the Spratly Islands

Conclusions

- The decision on whether to go to an international court or tribunal should be made by officials in the Vietnamese Government after they obtain expert advice from international lawyers
- The Vietnamese Government will also have to carefully consider the impact of its decision on its economic, political and security relations with China

Thanks for your Attention !

Robert Beckman

Director, Centre for International Law

Email: cildir@nus.edu.sg