

10th South China Sea International Conference
Cooperation for Regional Peace and Development
Sheraton Grand Da Nang Resort, 8-9 November 2018



SESSION 8.
EMERGING DISRUPTERS TO MARITIME ORDER
IN THE SOUTH CHINA SEA

NON-COMPLIANCE AND INTEGRITY OF
THE MARITIME LEGAL ORDER

Robert Beckman

Head, Ocean Law and Policy Programme,
Centre for International Law, NUS
Associate Professor, Faculty of Law, NUS

OUTLINE OF PRESENTATION

- 1. UNCLOS as a Legal Order for the Oceans**
- 2. UNCLOS Cases and Non-Compliance**
- 3. SCS Case and UNCLOS Maritime Legal Order**

Part 1

UNCLOS as a Legal Order for the Oceans

Current Status of UNCLOS

- Near universal acceptance – 168 Parties including EU
- All coastal States in East & Southeast Asia except Cambodia and DPR Korea
- USA is not a party but it regards most of the provisions of UNCLOS as binding under customary international law
- Most provisions in UNCLOS are regarded as the “best evidence“ of customary international

Preamble to 1982 UNCLOS

- **RECOGNIZING** the desirability of establishing through this Convention, with due regard for the sovereignty of all States, **a legal order for the seas and oceans** which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment

Key Elements of “Package Deal”

- **No Reservations** allowed
- **Compulsory Binding Dispute Settlement Regime**
 - Any dispute between two parties that cannot be resolved by negotiation is subject to compulsory binding procedures in Section 2 of Part XV at the **request of either party** to the dispute
 - Exceptions and exclusions are very limited
 - States “consent” to the compulsory binding dispute system when they become a party to UNCLOS – no additional consent required when a case is instituted

UNCLOS Compulsory Dispute Settlement Regime

Jurisdiction: 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 (Article 288).

Non-participation: The absence of party shall not constitute a bar to the proceedings (Article 12 Annex V, Article 28 Annex VI, Article 9 Annex VII).

Final and binding nature: Any decision rendered by a court or tribunal having jurisdiction shall be final and shall be complied with by all parties to the dispute (Article 296).

Integrity of UNCLOS Legal Order

- International courts and tribunals have no effective means of enforcing their decisions and awards
- Integrity of UNCLOS is based on the assumption that all parties understand that it is in their long-term national interests to comply with the provisions of UNCLOS and with decisions of courts and tribunals interpreting UNCLOS
- If States are permitted to pick and choose which provisions to follow, and if they refuse to participate in the dispute settlement procedures they accepted when they ratified UNCLOS, the legal order established in UNCLOS will be threatened

Part 2

UNCLOS Cases and Non-Compliance

51 Cases on Law of the Sea instituted between 1994 and 2017

- **25 cases** were instituted before the **ITLOS** from 1997 to 2017 on the basis of UNCLOS DSM.
- **14 cases** were instituted before an **ad-hoc tribunal (Annex VII)** under UNCLOS
- **1 case** was instituted before a **compulsory conciliation commission** under UNCLOS article 298 and Annex V
- **5 cases** were instituted before the **ICJ** on the basis of jurisdiction under “optional clause declaration” provided in Article 36(2) of the Statute of the ICJ
- **6 cases** were instituted before the **ICJ** under the Pact of Bogotá by Latin American States

Compliance in LOS Cases

- An overwhelming majority of the decisions have been respected and complied with.
- Only 3 cases of non-compliance or partial compliance:
 1. Territorial and Maritime Boundary Case (Nicaragua v Colombia, ICJ)
 2. Arctic Sunrise (Netherlands v Russian Federation, UNCLOS Annex VII),
 3. South China Sea (Philippines v China, UNCLOS Annex VII)

Nicaragua v Columbia Case

- Nicaragua instituted proceedings against Columbia before ICJ under 1947 Pact of Bogota on territorial and maritime boundaries
- ICJ rendered its judgment on 19 November 2012 and delimited the maritime boundary between Nicaraguan coast and Columbian islands
- Columbia rejected the ICJ decision and gave notice to withdraw from the Pact of Bogota, to be effective in one year, 27 November 2013
- In November 2013, just before Columbia's withdrawal from Pact of Bogota would become effective, Nicaragua submitted two additional applications to the ICJ
- Proceedings in latest two proceedings are still pending

Arctic Sunrise Case (Netherlands v Russian Federation)

- **Netherlands instituted proceedings in 2013 and requested provisional measures from ITLOS pending establishment of an Annex VII Tribunal**
 - Russia did not participate in the proceedings but sent Note Verbale to ITLOS stating its position that ITLOS had no jurisdiction because as excluded by its Declaration under Article 298
 - ITLOS found prima facie case of jurisdiction and issued order for release of vessel and crew upon posting of bond or security
 - Russia in effect complied with the ITLOS decision in part by releasing the crew members and the vessel after the Netherlands made payment ordered by ITLOS.

Arctic Sunrise Case (Netherlands v Russian Federation)

- **Case then proceeded to Arbitration under Annex VII**
 - Russia did not participate - Tribunal appointed by ITLOS President
 - On Jurisdiction, the Tribunal found it had jurisdiction – dispute not excluded by Russia’s Article 298 declaration
 - On Merits, Tribunal found that Russia had breached UNCLOS by manner in which it boarded and seized the Arctic Sunrise and by failing to comply with ITLOS order prescribing provisional measures
 - On Merits, Tribunal ordered to pay compensation of more the 5 million Euros
 - Russia has not complied with order to pay compensation

Judges Wolfrum & Kelly in Arctic Sunrise on Non-Appearance

- The non-appearing party not only weakens its own position concerning the legal dispute but also hampers the other party in its pursuit of its rights and interests in the legal discourse of the proceedings in question.
- But, more importantly, it hinders the work of the international court or tribunal in question.
- Article 28 of the Statute should not be understood as attributing a right to parties to a dispute not to appear, it rather reflects the reality that some States may, in spite of their commitment to co-operate with the international court or tribunal in question, take this course of action.

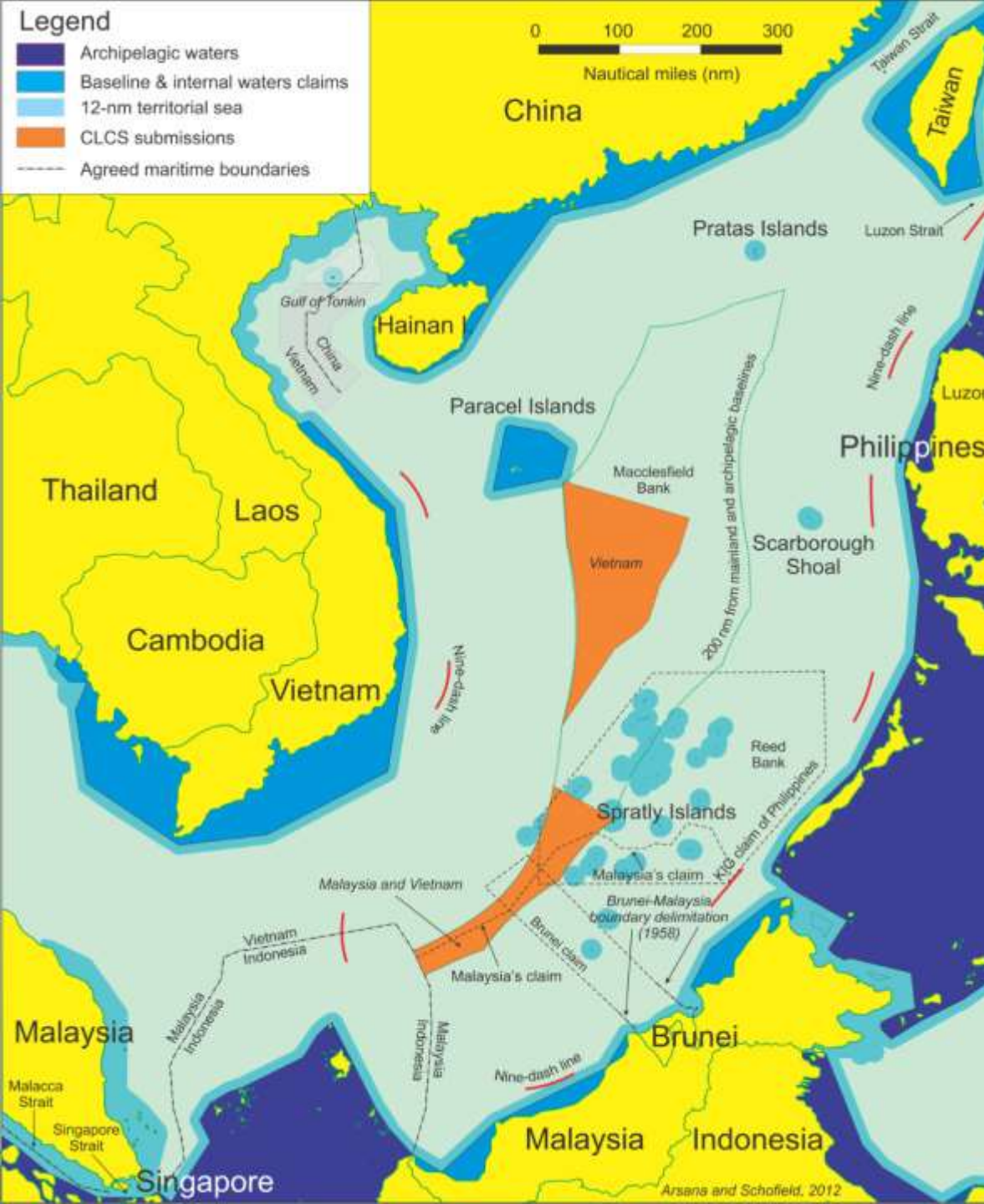
Other cases involving Russia

- Russia has been a party to three other judicial proceedings:
 - Volga case (applicant),
 - Hoshinmaru (respondent)
 - Tomimaru (respondent)
- Russia participated in all three proceedings.
- There is no problem on compliance in these three cases.

Part 3

SCS Case and UNCLOS Maritime Legal Order

- Maritime Zones in South China Sea



China's Position in the South China Sea Case

- **Non-Participation and Non-Appearance**
 - It refused to appoint an arbitrator and to participate in the selection of the remaining three arbitrators
 - It refused to formally challenge jurisdiction
 - It refused to submit a counter-memorial or to comment formally on the Philippines Submission
 - It failed to participate in the hearings on Jurisdiction and Merits
- **Non-Recognition and Non-Compliance**
 - it stated that it would not recognize or comply with any decision of the Tribunal if it finds jurisdiction and issues an Award on the Merits

Ruling of Tribunal on Status & Entitlement of Features

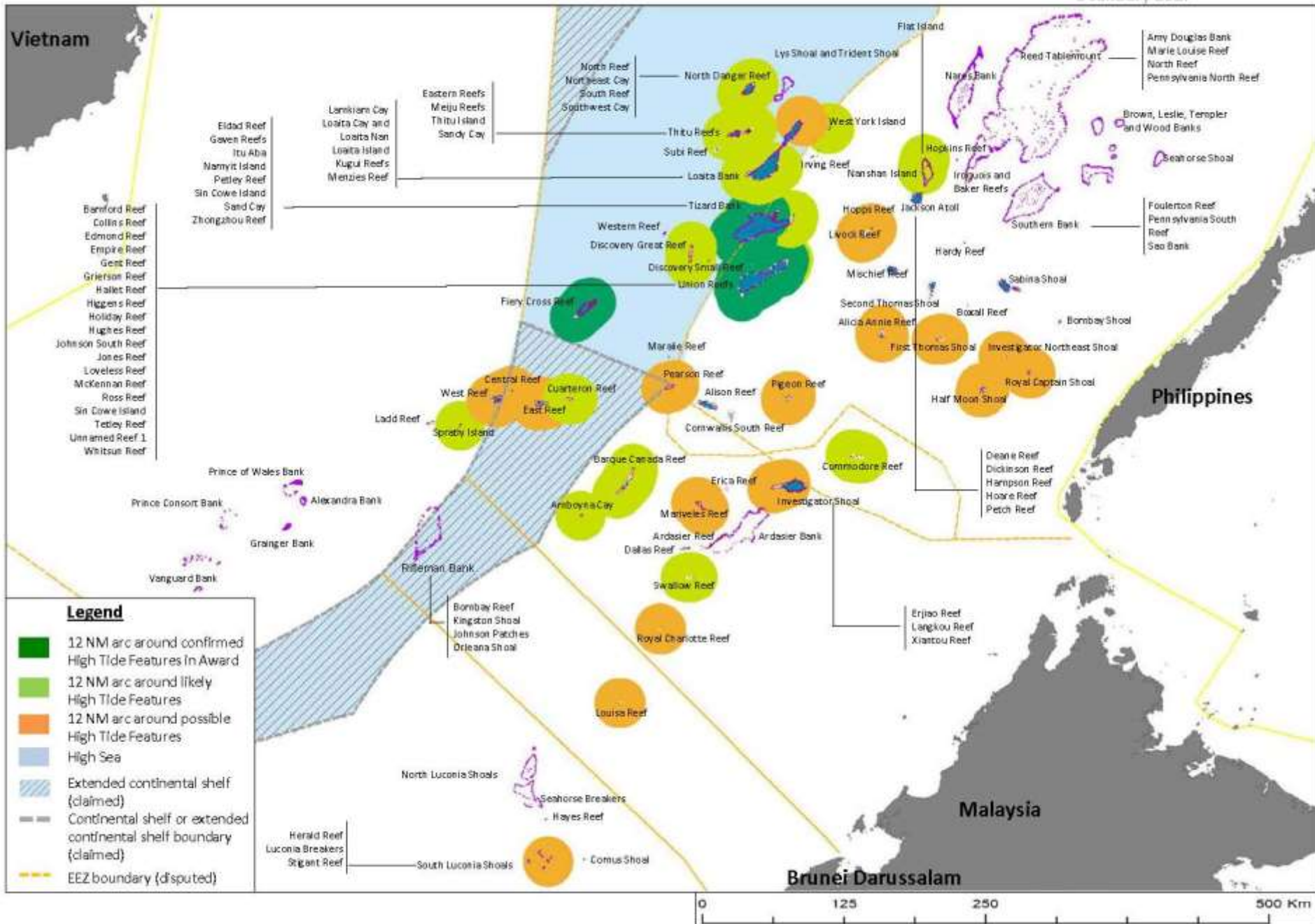
- None of the high-tide features (islands) in the Spratly Islands generate entitlements to an EEZ or continental shelf because they are “rocks” within Article 121(3)
- Mischief Reef is a low-tide elevation that is not capable of appropriation and does not generate entitlements to maritime zones
- Not permissible under UNCLOS to draw straight baselines around mid-ocean archipelago

Ruling of Arbitral Tribunal on China's Claim to “historic rights”

- **China's claims to historic rights within the 'nine-dash line'** are **contrary to UNCLOS** and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;
- To the extent China had **historic rights** to resources in the waters of the South China Sea, **such rights were extinguished by the entry into force of UNCLOS** to the extent they were incompatible with the system of maritime zones in UNCLOS

Spratlys' Geographic Features – Maritime Zones based on the 12 July 2016 Arbitral Award

Youna Lyons
Centre for International Law
9 January 2017



China's Statements in 2016 after the Arbitral Award

- China has territorial sovereignty and maritime interests in the South China Sea, including;
 - **sovereignty over the South China Sea Islands** consisting of the Spratly Islands, the Paracel Islands, Pratas Island and Macclesfield Bank
 - **maritime zones from the islands**, including internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf.
- “In addition, China has **historic rights** in the SCS.”
- “The above positions are consistent with relevant international law and practice.”

Has China in practice partially complied with the Arbitral Award?

1. China has reportedly allowed Philippine and Vietnamese fishing boats to fish in the territorial sea surrounding Scarborough Shoal
2. China has reportedly refrained from sending its law enforcement vessels to protect Chinese fishing vessels in the EEZ of Indonesia
3. China has reportedly refrained from attempting to unilaterally explore and exploit hydrocarbon resources inside the nine dash line in the EEZ of the ASEAN States bordering the South China Sea
 - However, China has reportedly threatened to use force if Vietnam or the Philippines take unilateral action to explore and exploit hydrocarbon resources in their EEZ inside the nine dash line

The Future?

1. USA, UK, France and Australia are exercising rights and freedoms to maintain the legal order established by UNCLOS
 - Can China come to an understanding with them on how UNCLOS applies to these activities?
2. China continues to officially assert rights in the EEZ of other States that are inconsistent with the Arbitral Award
 - Will the coastal State acquiesce and allow China to exploit their resources?
 - Will China decline in practice to assert the rights it claims in the EEZ of other States?
 - If China challenges rights of coastal States to exploit their resources, will any State institute proceedings under UNCLOS?

Thanks
for your Attention

Robert Beckman
cilbeckman@nus.edu.sg