Lawfare Surrounding the South China Sea: The Role of UNCLOS

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October 19, 2017, University of Oxford

@ Conference of New Approaches to the South China Sea Conflicts
What causes the SCS dispute?

- Legacy from the WWII (SF Peace Treaty)
- Geopolitics
- Marine resources
- Law of the Sea
Role of UNCLOS

• Is UNCLOS successful in preventing or managing conflicts pertaining to marine resources?

• Is UNCLOS playing a positive role in addressing the SCS dispute?

Mare Liberum vs. Mare Clausum
The South China Sea Issues

Resources Management

Historic Concepts

Islands Regime

Other Maritime Regimes

Freedom of Navigation

Part XV of UNCLOS (Third-party compulsory settlement mechanism)

Marine Environment

Other Maritime Regimes

Institute for China-America Studies
Approach

- **Explore** the Dispute Settlement Mechanism of UNCLOS
- **Apply** the different models in the context of the essence of the South China Sea disputes
- **Suggest** a model of maritime dispute management with the ultimate goal of achieving peace and stability in the SCS
Maritime Dispute Settlement Mechanism under UNCLOS

- **Obligation to settlement disputes by peaceful means**
- **Compulsory settlement mechanism**
- **Limitation and exception of compulsory settlement**

<table>
<thead>
<tr>
<th>State</th>
<th>Choice of procedure</th>
<th>Optional exceptions to applicability of Part XV, Section 2, of the Convention (Declarations under article 298)</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>No choice under article 287 made (on 25 August 2006)</td>
<td>Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;¹</td>
</tr>
<tr>
<td>Philippines</td>
<td>No choice under article 287 made</td>
<td>N/A</td>
</tr>
<tr>
<td>Indonesia</td>
<td>No choice under article 287 made</td>
<td>N/A</td>
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<tr>
<td>Viet Nam</td>
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<tr>
<td>Malaysia</td>
<td>No choice under article 287 made</td>
<td>N/A</td>
</tr>
<tr>
<td>Topic</td>
<td>Subject to the compulsory settlement procedures:</td>
<td>Not subject to the compulsory settlement procedures:</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
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<td>----------------------------------------------------</td>
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</tbody>
</table>
| Exercise by a coastal state of its sovereign rights or jurisdiction provided in the LOS Convention | - Disputes with regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or other internationally lawful uses of the sea specified in Article 58 and Article 297, Para 1 (a) and (b).  
- Disputes relating to the alleged contravention by a coastal state of specified international rules and standards for the protection or preservation of the marine environment (Article 297, Para 1 (c)), | All other disputes |
| Marine scientific research:                                           | All other disputes                                                                                                                                                  |                                                    |
| Fisheries                                                            | All other disputes                                                                                                                                                  | Disputes relating the sovereignty rights with respect to the living resources in the exclusive economic zone or their exercise (Article 297, Para 3 (a)). |
| Sea boundary delimitation or historic bays or titles                 | A state may declare not to accept the compulsory procedures (Article 298, Para. 1 (a)).                                                                            |                                                    |
| Military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction | A state may declare not to accept the compulsory procedures (Article 298, Para. 1 (b)).                                                                            |                                                    |
| In respect of which the United Nations Security Council exercises the functions assigned to it by the United Nations Charter | A state may declare not to accept the compulsory procedure (Article 298, Para. 1 (c)).                                                                          |                                                    |
State Practice of Maritime Dispute management

Negotiation

Regional approaches

Joint development

Jurisprudence

Dispute Management

- Malaysia/Indonesia
- Malaysia/Singapore
- The Philippines/China

- Indonesia Informal Workshop
- China-ASEAN Maritime Cooperation Fund
- DoC and CoC

- China/Vietnam
- The Philippines/Indonesia
- Vietnam/Thailand
- Vietnam/Indonesia
- Malaysia/Indonesia
- Malaysia/Thailand
- Malaysia/Indonesia/Thailand
- Malaysia/Brunei

- China/Brunei
- Vietnam/Malaysia
- Malaysia/Thailand
- China/Philippines/Vietnam
State Practices of IL in the SCS

- Attitude Towards International Law
- Participation in UNCLOS Process
- Maritime Legislation Review
- State Practice of Dispute settlement
Implication of the South China Sea Arbitration Case

- Legal Implication
- Political and Security
- Policy Option
The Way Forward

• Accept the fact that SCS is always a region with both competition and cooperation

• Among Claimant States: how to balance history and modern claim, joint development regime under 74 and 83, regional cooperation under 123

• Between Claimant States And User States: FoN; MoU on avoiding incidents at sea or air; ASEAN wisdom to solve the problem

• An Identical Legal Culture? CoC?
A Practical Model of Maritime Dispute Management

- Environmental Security As A Driving Force Of Cooperation In The SCS
- Fisheries Cooperation As A Start Of SCS Disputes Resolution
- UNCLOS As A Framework For Ocean Governance In The SCS
- Transformation Of Ways Of Thinking As A Foundation To Lead Policy And Research Direction
Thank you