

Resolution of Conflicts within Ocean Geopolitics

[a “practicing lawyer’s perspective” -- on cooperation and on sovereignty]

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Introduction - 1

Summary of approaches for peaceful resolution of an International Dispute

Private International Law – State Courts and Commercial Arbitration

[According to the Parties' prior mutual voluntary choice]

Public International Law – International Courts (e.g., ICJ, UNCLOS Tribunal)

[According to the ratified Treaty terms accepted by States]

Mixed (Private/Public) -- Investment Arbitration

[According to a State's ratified Bilateral Investment Treaties (BIT's)]

Other Alternative Dispute Resolution approaches

[Mediation – Conciliation – Dispute Panels – etc.]

Introduction - 2

Another approach to resolve an International Ocean Dispute



Figure 1: Map showing the "Location of the Various Islands in the South Sea," 1945
Boundary Department of the Ministry of Interior, Republic of China

Use of force -- Aggressive Tactics

(Example: China/Philippines – since 2009)

← **The Chinese Nine-Dash Line** – first announced in 1935 as “traditional Chinese territory” but revised for N. Vietnam
(map from the PCA Arbitration Award of 12 July 2016)

Risks of Military Actions

(e.g., Chinese militarized fishing fleet)

Potential for Declaration(s) of War

Introduction – 3

Private International Law

-- Cross-Border Disputes involving private persons/companies

Substantial body of law since 16th Century (with many scholarly efforts)

Historically based on the concept of “international comity”

- Rules for establishing the applicable national substantive law
(*lex loci contractus/ lex loci solutionis/ etc*)

- Identifying a competent State Court or Arbitral Tribunal

- Effective enforcement of the resulting Judgment or Award

Possibility that no competent tribunal will be found = *no resolution*

Introduction - 4

Public International Law -- Disputes between/among “sovereign” States

Separate bodies of law based on Multinational and Bilateral Treaties

- Convention-based claims- UNCLOS example (ITLOS or PCA Arbitration)

- BIT Investment Arbitrations- ICSID Convention (Arbitration Tribunals)

Problematic enforcement of the resulting decision (Judgment or Award)

State frustration with loss of sovereignty – rethinking ICSID rules/approach

Territorial Disputes & Access to Resources disputes

- Antarctica Treaty examples

Generally Successful Dispute Resolution

Private Maritime Disputes

Dispute of private entity asserting claims against private or public entities
with an agreed applicable State law or agreed choice of law approach
Disputes in Shipping /Trading /Chartering /Vessel ownership-financing

Designation of agreed Association-based Dispute Resolution

Maritime disputes (LMAA designation)
Commodities (GAFTA designation)

Arbitration Awards generally enforceable - 1958 New York Convention

Often Unsuccessful Dispute Resolution - 1

Bilateral Investment Treaties -- Investor/Host State Disputes

Investment Arbitration Tribunal, established in accordance with the applicable BIT

- Tribunal members appointed by the investor and the host State
- Choice of law issues – effect of Host State internal law / other laws?

Some examples:

- Foreign private investment defeated by new local environmental regulation
- Foreign private investment expropriated by the local state
- Foreign investors denied *national or most favored nation (MFN) treatment*
- Foreign investor denied “*fair and equitable treatment*”
or “*full protection and security*”

Reforms -- addressing concerns with host State’s loss of sovereignty

Often Unsuccessful Dispute Resolution - 2

Convention Arbitration – example **UNCLOS** -- Dispute Resolution (Arts 279 to 299)

- Parties may stipulate **ITLOS** or one of three Arbitral Tribunals

- Example Cases:

UK v. Mauritius (2019)

UK refused to accept Tribunal ruling on Diego Garcia independence

UK/US set up a military base on the island – not resolved today

NL v. Russian Federation (ITLOS 2013)

Greenpeace vessel taken over by Russian Coast Guard

Russia refused to participate in the ITLOS case – not resolved

“Star Case” -- Unsuccessful Dispute Resolution

The Philippines’s dispute with China in the South China Sea



Revisit the South China Sea map *(from the PCA Arbitration Award of 12 July 2016)*

- UNCLOS EEZ's for Vietnam/Indonesia/Malaysia/Philippines (in blue)
- important conflicting claims over substantial areas of the sea and islands
- China's use of aggressive tactics to enforce its traditional sea territory

-- The South China Sea – important facts:

- heavily trafficked (\$3.4 trillion/year in ship-borne commerce)
- resources: 11 billion barrels oil; 190 trillion feet³ natural gas
- Philippines accepts it does not have the military or economic power to oppose the Chinese aggression / seeks UNCLOS resolution of the dispute which is causing the country serious harm
- China and Philippines are signatories ratifying UNCLOS

“Star Case” -- Unsuccessful Dispute Resolution

Philippines’ claims asserted at the Permanent Court of Arbitration

UNCLOS – Part XV – Rules for peaceful resolution of disputes between State Parties to the Convention

Art 282(1) – a signature State may choose ITLOS (Hamburg); ICJ (The Hague); Ad Hoc Arbitration (Annex VII) or “a special Arbitration Tribunal” for some disputes (Annex VIII)

If the Parties to the dispute have not agreed, PCA Arbitration under Art VII is the default method.

The Philippines’ claims were submitted in January 2013 to the Permanent Court of Arbitration

Case raised issues of interpretation of the scope and meaning of UNCLOS provisions as to the Exclusive Economic Zone provisions and freedom of navigation provisions

China adopted a position of **non-acceptance and non-participation** in the proceedings.

The ruling of the Permanent Court of Arbitration (12 July 2016 – 479 pgs)

The PCA Tribunal overwhelmingly accepted the Philippines' claims:

1. China's assertion of historical rights within its Nine-Dash Line have no basis in international law;
2. None of China's claimed land features or that Spratly Island generate a 200nm EEZ is valid in law;
3. China interfered with Philippines sovereignty in its EEZ by
 - a. stopping Philippines exploration activities,
 - b. Prohibiting Philippines fishing vessels from operating;
 - c. Failing to prevent Chinese fishing vessels from operating
 - d. Conducting land reclamation in Philippines sovereign territory
4. China violated its marine environmental protection obligations as a signatory of UNCLOS by causing extreme harm to the coral reef environment with its land reclamation program and by harvesting endangered species.

The Chinese Responses to the Philippines' Request for PCA Arbitration

1. **A subdued Government Statement (12 July 2016)**
reaffirming its sovereignty and maritime rights in the South China Sea and desire to “resolve the disputes peacefully” without mention of the Philippine’s claim in UNCLOS Arbitration
2. **A hardline Ministry of Foreign Affairs Statement (12 July 2016)**
Declaring the PCA Arbitration Award is “null and void and has no binding force”
3. **Chinese state-affiliate press – several articles condemning the PCA ruling**
 - a. Xinhua – “President Xi rejects any or action based on the PCA Award” (12 July 2016)
 - b. China Daily – “Inherently unjust and biased piece of paper” (12 July 2016)
4. **Increased the PLA (Chinese Coast Guard/Maritime Militia) presence in Disputed Areas**
5. **Engaged in new Commercial Exploration and land reclamation in the Disputed Areas**
6. **Imposed sanction on the Philippines**
7. **Established an Air Defense Identification Zone (ADIZ) in the South China Sea**
8. **Succeeded to prevent other South China Sea claimants from supporting the Philippines**
China did not withdraw from UNCLOS

Conclusions

UNCLOS Treaty Dispute Resolution is Ideal, but remains “optional” for the States involved.

The stated goals of **“peaceful resolution of disputes”** – including ocean-related disputes – has not gained the desired worldwide acceptance – local “sovereign rights” can and do win (not just in the South China Sea, but in many other UNCLOS Tribunal decisions).

We need to find both the political will and the legal means to obtain success in effective dispute resolution – a task which has been on society’s shoulders for centuries.

Currently being handled better in Private International Law disputes
than in Public International Law disputes.

This is a political task – but can be aided by contributions of concerned academics.

The ICES Scientific Community is invited to consider the situation and to raise ideas for discussion in its published papers and ICES Workshops

International Centre for Earth Simulation

The Symbiosis of Science, Society and Nature

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THANK YOU – COMMENTS WELCOME

Resolution of Conflicts and Ocean Geopolitics

Can ICES's members, with their vast scientific, computer, technical and A.I. knowledge, as well as their valued creativity and curiosity, assist the World Community to identify better and more effective means for assuring the peaceful resolution of Ocean-related conflicts involving issues of sovereignty and of national interests, in addition to the pending treaty obligations?

I propose we consider that for our further discussion.



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