The South China Sea dispute

This article discusses the South China Sea dispute from the perspective of international law. First, it introduces some basic information about international law in this field. In the second part, the Spratly islands dispute is used as a concrete example to show how international law deals with this kind of dispute. Finally, it analyzes the arbitration case between the Philippines and China.

Relevant international law

It is natural to imagine that if a state intends to claim rights over the land, it needs to take possession of it. Things are different with the sea. For centuries people thought that it was impossible and unnecessary to occupy the sea. Therefore the principal rule governing the sea until recent years was the freedom of the sea. Every state was free to use the sea in any way. However, with the development of technology and the increasing demand for resources, it became possible and necessary to limit and regulate the use of the sea. Since the Second World War, regulations have been developed for the use of the sea.

Under the current laws, the sea is divided into several maritime zones. These zones include territorial sea (TS), contiguous zone (CZ), exclusive economic zone (EEZ), and continental shelf (CS). According to the United Nations Convention on the Law of the Sea (UNCLOS), if a state has territorial sovereignty over an island or a mainland, it can claim a TS of no more than 12 nautical miles (nm), an EEZ of no more than 200nm, and normally a CS of no more than 200nm.

UNCLOS is a treaty. Treaties, international customary laws and general principles of law are three formal sources of international law. Treaties are agreements between or among states. Customary law is state practice that has been accepted as law. General principles of law are principles that have been recognized by civilized nations. There is no hierarchy between these three sources. There are also two substantial sources, judicial decisions and teachings of jurists, that can bind states in the form of the above-mentioned three formal sources. The sources of international law are important because they provide a basic framework to analyze the legal issues that can be solved through recourse to international law. Usually, states base their claims on different sources, and the settlement of disputes relies on the determination of which source can provide a better territorial title over the disputed area.

An example of legal analysis: the Spratlys

The underlying sources of tension in the South China Sea are disputes within the following three areas: the Spratly Islands area (claimed partially or wholly by China, Taiwan,
Malaysia, Vietnam, the Philippines and Brunei), the Paracel Islands area (claimed by China, Taiwan and Vietnam), and the Scarborough Shoal area (claimed by China, Taiwan and the Philippines). There are two main issues: island sovereignty and maritime entitlements. Among these three areas, the Spratlys area is the most complicated one since it involves more parties. This article uses the Spratlys dispute as a concrete example to show how international law deals with this kind of dispute.

China claims territorial sovereignty over all the Spratly islands, and claims an EEZ and CS from these islands. China may also claim some titles or rights from the U-shaped line. Vietnam claims all the islands in this area, as well as an EEZ and CS from its mainland. The Philippines claims the islands within the Kalayaan Island Group, and an EEZ and CS from its archipelagic baselines. Malaysia claims a dozen tiny geographical features in the southeastern portion of the Spratlys, and also an EEZ and CS from its mainland. Brunei does not claim any islands, but a marine area around Louisa Reef.

Based on the claims by each state, the overlapping claims between the states can be identified. Respecting island sovereignty, all states, except Brunei, claim part or all of the islands in this area. Regarding maritime entitlements, based on UNCLOS, states like Vietnam, Malaysia and the Philippines claim an EEZ and CS either from the mainland or archipelago, while China claims an EEZ and CS from the islands. Meanwhile, based on customary law, China may also claim historic rights from the U-shaped line.

According to the foregoing analysis, the legal issues in this dispute can be summarized as follows: firstly, which state has better claims? Secondly, before the final settlement, what kinds of provisional arrangements can be made in order to keep the peace in this area? Regarding the first issue, various factors need to be taken into consideration. The first factor is that states may rely on different sources, including treaty, custom and general principles of law. If these sources lead to different conclusions, the prevailing source shall be determined. Furthermore, these sources may come into effect at different time periods. Therefore, the intertemporal principle needs to be considered in order to decide whether the previous law or the posterior law should be applied to facts that may have taken place in the past. The third factor is related to the Eurocentric international law issue. Modern international law originated and developed in the Western
world. However, the states involved in the Spratly Islands dispute are Asian. Therefore, before their awareness of European international law, other legal orders governing the areas in dispute may have existed. Finally, states may assert conflicting state practices. Hence, the question of how to identify and analyze such conflicting state practices needs to be addressed. These are the main legal issues we should pay attention to when we try to use international law to deal with this kind of dispute.

The arbitration case between the Philippines and China

In January 2013, the Philippines initiated arbitration against China. In February of the same year, China refused to attend this case. In July 2015, the tribunal held a hearing on Jurisdiction and Admissibility. In October 2015, the tribunal rendered an Award on Jurisdiction and Admissibility (First Award). In November 2015, the tribunal held a merit hearing. In July 2016, the tribunal rendered its Final Award.

In the First Award, the tribunal held that it has affirmative jurisdiction over 3 claims and conditional jurisdiction over 4 claims, and that the decisions on the remaining 8 claims are subject to the decisions on the merits. The tribunal admits that the existence of overlapping entitlements can possibly affect the outcome of this case since it can result in a sea boundary delimitation issue. According to UNCLOS, China expressed a reservation about exceptions to the tribunal’s jurisdiction. Pursuant to this reservation, disputes regarding sea boundary delimitation are exempted from the jurisdiction of the tribunal. This can also explain why the legal status of Itu Aba, the biggest feature in this area, is so important. According to UNCLOS, if Itu Aba is proved to be an island rather than a rock, it can generate a 200-nm EEZ. This potential 200-nm EEZ significantly overlaps with the Philippines’ claimed EEZ. Therefore, in this arbitration case, the tribunal would lack jurisdiction on some claims asserted by the Philippines. The decision of the legal status of Itu Aba would have a major influence on the outcome of this case. Actually it is a priority issue to be addressed in the tribunal’s final award.

However, in the Final Award, the tribunal concluded that all of the high-tide features in the Spratly Islands, including Itu Aba, constitute rocks under Article 121(3) of UNCLOS, and thus none of them can generate an EEZ or a continental shelf. Hence, there is no entitlement to an EEZ or continental shelf generated by any feature claimed by China that would overlap the entitlements of the Philippines. The tribunal has jurisdiction to consider all the claims by the Philippines except claims No. 14(a), (b) and (c) since they are related to military activities, and military activities are exempted from the jurisdiction of arbitration according to Article 298(1)(b) of UNCLoS.

It is worth noting that the tribunal in this case is established under UNCLoS, and therefore it cannot touch the issue of territorial sovereignty over the islands. Also, due to China’s reservation, the tribunal cannot deal with the issue of sea boundary delimitation. Therefore, the main legal issues of South China Sea dispute remain unsettled and need to be addressed through the good faith and cooperation by disputants in the future.

Concluding remarks

This article provided a legal analysis framework for the South China Sea dispute. From the aforesaid analysis, it can be concluded that the settlement of disputes through international law shall go as follows. The claims by each state shall be first identified, then the overlapping claims are analyzed, and the legal issues that can be solved through international law are figured out. It is worth noting that the reasons for disputes can be diverse. However, international law can address only those belonging to legal issues. Other issues need to be approached through cooperation or other means. What we need to bear in mind is that the function of international law is to make peace and keep peace. It is not intended to escalate the conflicts. The parties shall be aware of this and address this dispute in a peaceful way.

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2. ‘Art. 38 of the Statute of the International Court of Justice’.