

ASEAN & BIMSTEC ISA Workshop, Myanmar

# Contents and achievements of the 1982 United Nations Convention on the Law of the Sea and its significance for South and South East Asia

September 9, 2019

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# Contents

- Brief introduction on the UNCLOS
- 3 significances of the UNCLOS for the South and South East Asia
  - Dispute settlement
  - Land-locked states
  - Constitution(-alism)

# Contents of 1982 UNCLOS

- 1958 Conventions (UNCLOS I)
  - Convention on the Territorial Sea and Contiguous Zone
  - Convention on the Continental Shelf
  - Convention on the High Seas
  - Convention on Fishing and Conservation of the Living Resources of the High Seas
- 1982 Convention (UNCLOS III)
  - 17 Parts, 320 Articles, 9 Annexes
  - 1994 Agreement relating to the implementation of Part XI of the UNCLOS
  - 1995 Fish stocks Agreement

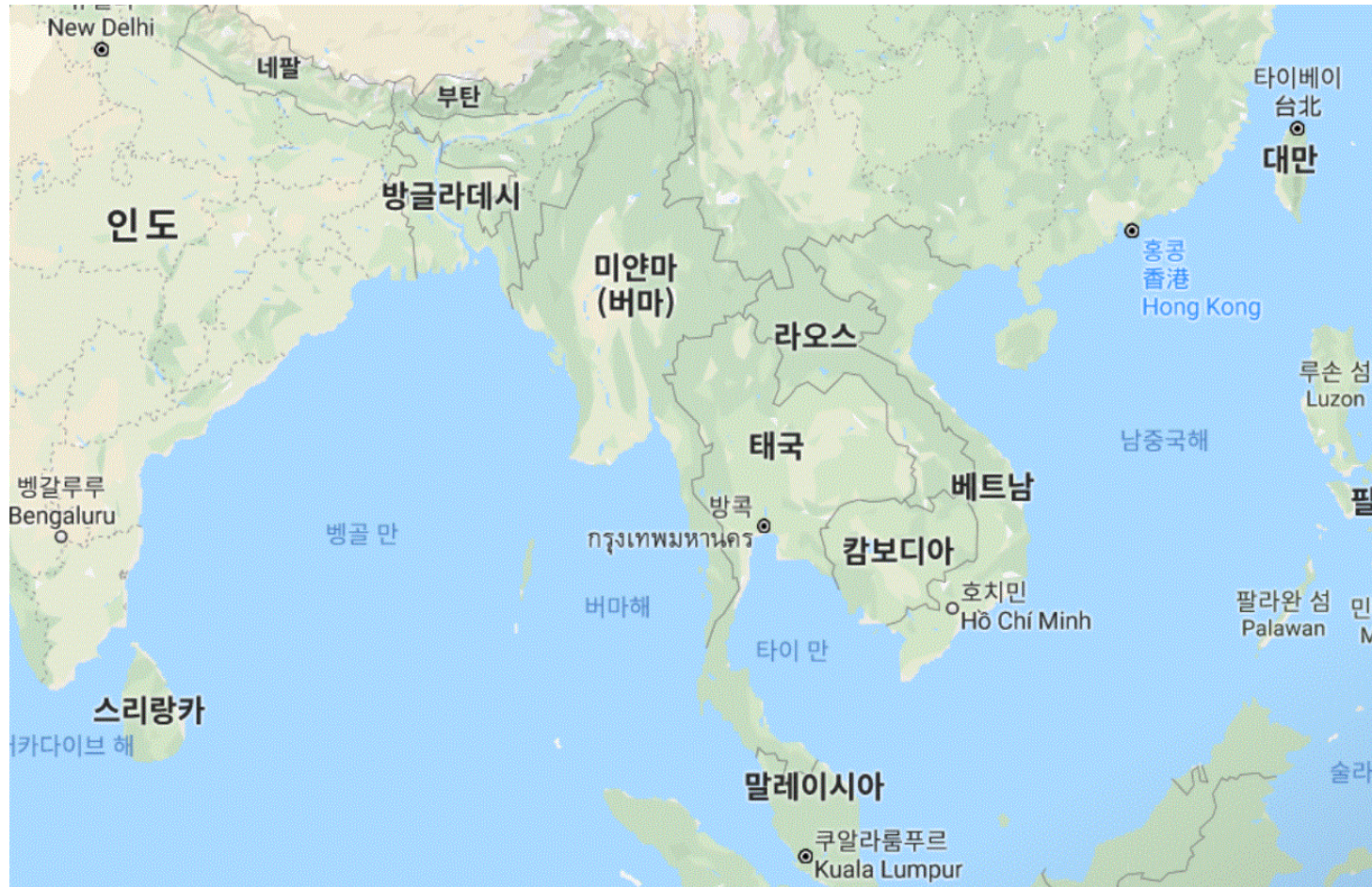
# Key Achievements

- Extension of coastal states' jurisdiction
  - 12 nm TS
  - 200nm EEZ
  - CS beyond 200 nm
- The Area: Common heritage of mankind
  - "The Area and its resources are the **common heritage of mankind**." (Art.136)
- Compulsory dispute settlement mechanism
- New institutions
  - ISA, ITLOS, CLCS
- Land locked states : right of access to and from the sea and freedom of transit

## UNCLOS non-parties among 193 UN members

No	State	Land-locked State	No	State	Land-locked State
1	Afghanistan	O	16	Lybia	X
2	Andorra	O	17	Liechtenstein	O
3	Bhutan	O	18	Peru	X
4	Burundi	O	19	Rwanda	O
5	Cambodia	X	20	San Marino	O
6	Central Africa	O	21	Syria	X
7	Columbia	X	22	Tajikistan	O
8	North Korea	X	23	South Sudan	O
9	El Salvador	X	24	Turkey	X
10	Eritrea	X	25	Turkmenistan	X
11	Ethiopia	O	26	United Arab Emirates	X
12	Iran	X	27	USA	X
13	Israel	X	28	Uzbekistan	O
14	Kazakhstan	X	29	Venezuela	X
15	Kvrazstan	O			

# ASEAN and BIMSTEC member states



## Significance for the S.&SE Asia 1: Dispute settlement

- Part 15 of UNCLOS
- It can be invoked **unilaterally** by any party to the convention without the consent of the respondent party.
- **Unusual/unique in public international law** in that **comprehensive and compulsory** dispute settlement system, with only limited exceptions

# Compulsory procedures

- Article 286. Application of procedures under this section
  - Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.
- Article 287. Choice of procedure
  - 1. A state shall be free to choose one or more of the following means for the settlement of disputes...
    - (a) ITLOS (Annex VI)
    - (b) ICJ
    - (c) an arbitral tribunal (Annex VII)
    - (d) a special arbitral tribunal (Annex VIII)
  - 5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree



# Article 290. Provisional measures

- 1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.
- 5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

## Article 292. Prompt release of vessels and crews

- 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
- 2. The application for release may be made only by or on behalf of the flag State of the vessel.

## Article 297. Limitations on applicability of section 2

- 2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to **marine scientific research** shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
  - (i) the exercise by the coastal State of a right or discretion in accordance with [article 246](#); or
  - (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
- 3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to **fisheries** shall be settled in accordance with section 2, [except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise](#), including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

## Article 298. Optional exceptions to applicability of section 2

- 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
  - (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles,
  - (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;
  - (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, ...

## Significance for the S.&SE Asia 2: Land-locked states

- Part X. Right of access of land-locked states to and from the sea and freedom of transit (Arts.124-132)
- "land-locked State": a State which has no sea-coast
- "transit State": a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes
- "traffic in transit": transit of persons, baggage, goods and means of transport across the territory of one or more transit States
- "means of transport": (i) railway rolling stock, sea, lake and river craft and road vehicles; (ii) where local conditions so require, porters and pack animals.
- Air?

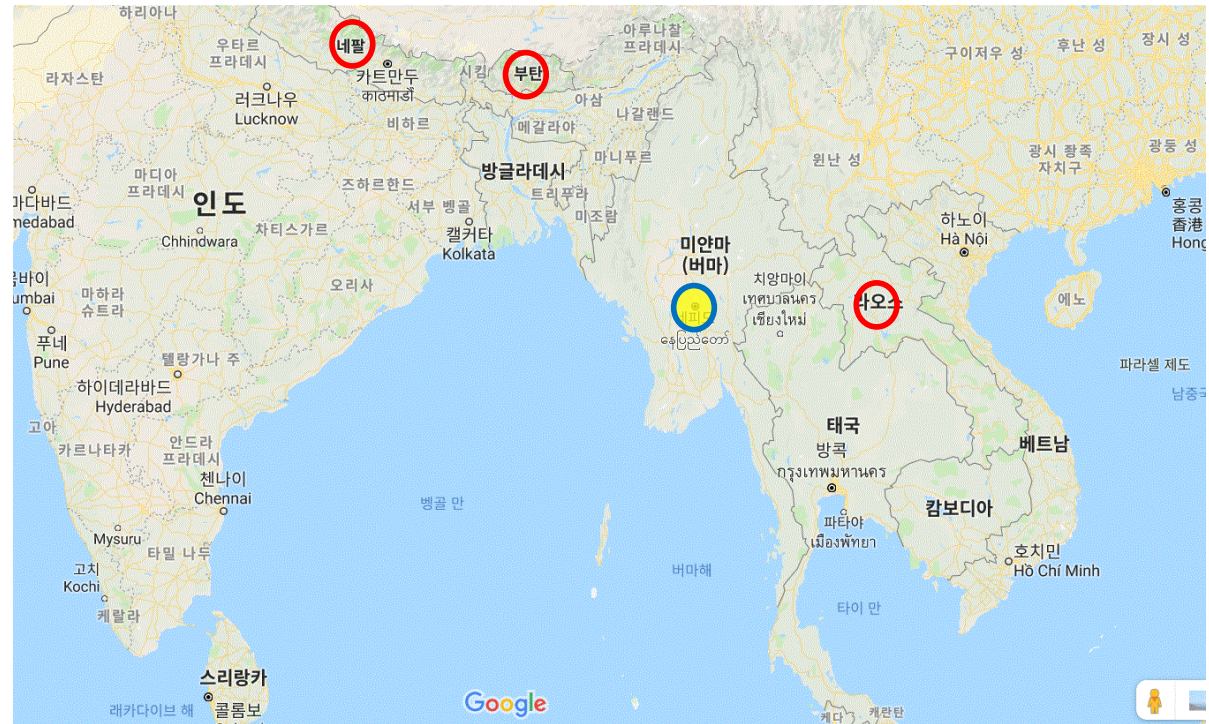
# Land-locked states and transit states among ASEAN and BIMSTEC members

- **ASEAN members:**

Indonesia, Thailand, Singapore, Malaysia, Philippines, Vietnam, Myanmar, Brunei, Laos, Cambodia

- **BIMSTEC members:**

Bangladesh, India, Myanmar, Sri Lanka, Thailand, Nepal, Bhutan



## Article 125. Right of access to and from the sea and freedom of transit

- 1. **Land-locked States** shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.
- 2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.
- 3. **Transit States**, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

\* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile, 2018)*

## Article 127. Customs duties, taxes and other charges

- 1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.
- 2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit State.

## Article 128. Free zones and other customs facilities

- For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.

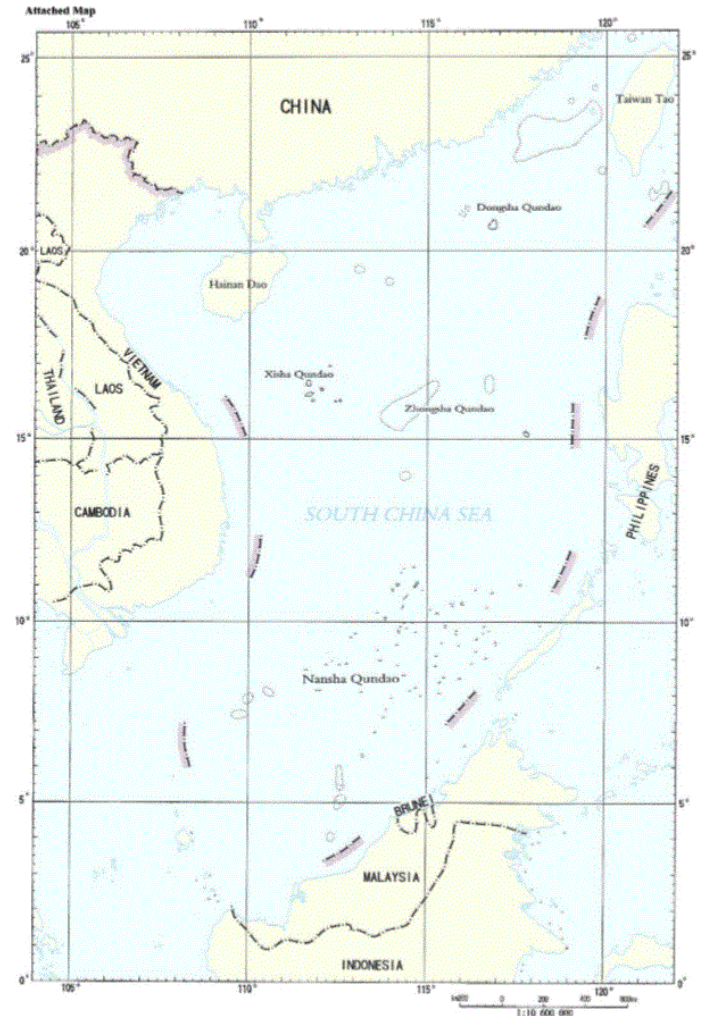


## Significance for the S.&SE Asia 3: Constitution(-alism) of the LOS

- 1982 UNCLOS: "Constitution" of the law of the sea
  - 168 state parties
  - Art.34 of the 1969 VCLT: "A treaty does not create either obligations or rights for a third State without its consent."
  - Customary international law (large part)
- South China Sea Arbitration (Philippines v. China)
  - *A battle b/t David and Goliath?*
  - On 22 January 2013, the Philippines initiated arbitration proceedings against China.
  - The Philippines sought the arbitral tribunal to declare, among others, that **the Parties' respective rights and obligations** in regard to the waters, seabed and maritime features of the South China Sea **are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid;**

## 9 dash line: China's position

- "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community." (para.182)



## 9 dash line: China's position

- “China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. **China's sovereignty and relevant rights** in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China's domestic laws on many occasions, **and protected under international law including the United Nations Convention on the Law of the Sea (UNCLOS)**”



THE WALL STREET JOURNAL.

## 9 dash line: Award in July 2016

- (para.246) Insofar as China's relevant rights comprise a claim to historic rights to living and non-living resources within the 'nine-dash line', partially in areas that would otherwise comprise the exclusive economic zone or continental shelf of the Philippines, the Tribunal cannot agree with this position. The Convention does not include any express provisions preserving or protecting historic rights that are at variance with the Convention. On the contrary, the Convention supersedes earlier rights and agreements to the extent of any incompatibility. ... China's claim to historic rights is not compatible with these provisions.

## 9 dash line: Award in July 2016

- (para.278) With respect to Submission No. 2, for the reasons set out above, **the Tribunal concludes that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.**

# Constitution of the law of the sea

- Art. 2(1) UN Charter, "The Organization is based on the principle of the [sovereign equality of all its Members](#)."
- There is no game like *David v. Goliath* under the UNCLOS.
- The UNCLOS provides a rule for the fair game between states and maintains an international legal order in the ocean.
- States' claims should be based on the UNCLOS.

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