Freedom of Navigation and the Chinese Straight Baselines in the South China Sea

Kuen-chen FU, SJD
State “One Thousand Elites Program” Expert
Dean, SCS Institute, Xiamen University
KoGuan Chair Professor of Law, Shanghai Jiao Tong University

Seoul, KOREA
2013-5-2
Is navigational freedom a real issue in the SCS?

• The reality is clear. Though complicated, No.
• FON needed by everyone.
• Theoretically speaking, innocent passage might be suspended in the future by China within the internal waters encircled by the straight baselines of the Paracel Islands.
Chinese Straight baselines of the Paracel Islands and their impacts on the right of navigation and over flight

- The 1992 PRC Law of Territorial Sea and Contiguous Zone provides that the SCS islands, including the Paracel Islands, the Prata Islands, the Macclasfield Banks and the Spratly Islands are Chinese territories (Art. 2)
• The 1992 PRC Law of Territorial Sea and Contiguous Zone also has provided that the demarcation of the PRC territorial sea baselines applies [only] the “straight baselines method.” (Art. 3)

• This law needs some amendment – example of Chinese Taiwan.
Paracel Islands – Xisha Islands
UNCOS Art. 8(2): Straight baselines

- Foreign vessels’ right of innocent passage within internal water encircled by newly demarcated straight baselines → Yes
- For foreign aircrafts overflight → No
- The right of innocent passage itself → subject to suspension
How to resolve the issue - if it is an issue?

• Suggestion 1: To amend the UNCLOS and to allow non-archipelagic States to demarcate their own archipelagic water baselines.
• Suggestion 2: China may unilateral designate sea lanes and allow foreign vessels and aircrafts to sail through or to fly over the internal waters of her Paracel Islands.
• A graceful turning around of China in the SCS.
• Both for the benefits of China herself and other members of the international community.

• Allow me to elaborate on this topic.
Non-archipelagic States’ archipelagic waters?
Straight baselines proclaimed by PRC around the Paracel Islands:

- Innocent passage (UNCLOS Art. 8: 2)
- No free over flight
- No Transit passage – unless it is regarded as a SUIN.
- No sea lanes passage – unless it is an archipelagic water
If China may claim straight “archipelagic baselines,” instead of “ordinary straight baselines” in the SCS

→ Better transportation environment

• Innocent passage → Yes
• Free over flight → Yes
• Sea lanes passage → Yes
Is it possible to amend the UNCLOS 40 years after the debates (1974 ~ 2014) ?

• In 1974, various countries expressed their confronting opinions in the 36th and the 37th meeting of the Second Committee, the Second Session of the UNCLOS III:
Indonesia:

- Described the concept of an archipelagic State as essential to the national unity, political stability, economic, social and cultural cohesiveness and territorial integrity.
Without the concept of an archipelagic State, most of Indonesia’s waters would have become pockets of so-called “high seas”, open to activities which might endanger the country’s unity, security and territorial integrity.
Most countries, including China, sympathized with the difficulties faced by the archipelagic States, with the demand of a strict definition of the “archipelagic State”, and asked for a satisfactory regime of navigation and over flight through the archipelagic waters.
• Australia,
• Japan, and some other States, supported 5:1 (water:land) ratio; 48 nm length of baselines
• UK,
• the Netherlands,
• USSR,
• Malaysia and Thailand: emphasized that equity demanded that due account be taken of the rights and interests of neighboring States affected by the archipelagic claims
Some argued that non-archipelagic State’s archipelagic waters should be given equal status:
India:

- India had over 1280 islands and islets, of which approximately half constituted the archipelago of the Andaman and Nicobar islands and that of Lakshwadeep. The principle (of archipelagic waters) should apply to these archipelago.
It acknowledged the right of a coastal State having archipelagos which formed integral part of its territory to apply the principles applicable to the archipelagic States, on the clear understanding that such principles would apply to those archipelagos only. Furthermore, such outlying archipelagos could not be joined with the mainland of the coastal State by straight baselines.
As people could imagine, Burma strongly opposed India, for any extension of that concept (of archipelagic waters) to oceanic archipelagos or other groups or chains of islands belonging to a continental State.
Portugal:

- The arguments in favour of the establishment of a special regime for archipelagic States were also valid for archipelagos forming part of the territory of a coastal State, particularly with regard to the security and economic interests of such States. Plication of a different regime for the latter would mean that the archipelagic part of the territory of mixed States would be regarded as second class territory.
Argentina:

- Three categories—(1) archipelagic States; (2) States which possessed archipelagos far from their coats; (3) States which possessed a fringe of islands in close proximity to their coast. It agreed with the delegations of Ecuador, Spain and India to the effect that the provisions relating to archipelagic States should apply *mutatis mutandis* to distant archipelagos which belonged to a continental State.
Argentina also insisted:

- It should be made clear that the coastal State could not draw baselines connecting the coasts of its continental territory with those of its distant archipelago.
77 Club v. Major sea powers

- Exchange of interests
- Are the non-archipelagic States’ archipelagos better controlled, if they are within their “internal waters”?  
- Unresolved issue of the non-archipelagic States’ archipelagic waters.
- Out-lying/distant islands: How far is far enough? -- Answer: out of the reasonable coastal straight baselines.
Compare the two policies:

• If China unilaterally allows, other than innocent passage, the sea lanes passage through her SCS archipelagos → “face” derogated, harsh domestic critics.

• If China may claim its SCS archipelagic waters according to the “amended” UNCLOS → “face” maintained, freedom of navigation and over-flight better preserved, and a positive precedent made for other similar non-archipelagic States’ archipelagos.
China would also gain something of real interests:

- A graceful turning around leading to easier bilateral negotiations in the SCS region.
- Using drying reefs to demarcate its baselines.
- Longer baselines, larger (archipelagic) water areas.
- Applying the same principle and sail through (over fly) other non-archipelagic States’ archipelagic waters in the world.
A three-leveled SCS concept:

- It is also true for some other states in the SCS community.
- Yet, at no level, the freedom of navigation has been hindered.
谢谢各位！
Kamchan Hamida！
kuenchen_fu@163.com