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THE SOUTH CHINA SEA IN LEGAL PERSPECTIVE

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A. Legal Perspective

1. *Customary International Law:*

- a. What are these:
 - Freedoms of the sea.
 - Cooperation between states.
 - Peaceful settlement of disputes.

2. *International Conventions or Treaties:*

- a. UNCLOS 1982
- b. Bilateral and regional agreements/arrangements
- c. UN Charter
- d. Other relevant international conventions.

Freedoms of the sea, resources use, and the use of the space, such as by shipping, have now been highly regulated particularly by UNCLOS 1982 and by other international conventions such as IMO, ICAO, UNESCO, etc.

B. What are the “disputes” in the South China Sea?

1. **Claims to the sea?** As China seems to imply? Needs for clarifications, limits, coordinates of the area claimed. Slowly, it appears that what China claims sovereignty is over the features in the 9 dotted lines, not sovereignty over the sea itself. The “U-Shape” lines appear to be “allocation” line, not territorial line.
2. **Claims to the “features”** (islands, rocks, reefs, low tide elevations, banks, atoll, etc.)?
3. **The rights to maritime zones** of the “features” (**internal waters, archipelagic waters, territorial seas, contiguous zones, Exclusive Economic Zones, Continental Shelf/margin**).

4. **The nature of the claims: Territorial sovereignty, sovereign rights, jurisdictions, interests.**
5. **“Historic claims”**, what are these and how long should it become historic?
6. **Is Chinese Taipei/Taiwan a “party” to the “dispute”?** Can an “entity” be a party to the “disputes”? Can Chinese Taipei/Taiwan be regarded as a “South China Sea entity”?
7. Is **Myanmar**, and for that matter **Thailand, Cambodia, Laos**, even **Singapore**, be regarded as parties in the South China Sea disputes because these states signed the DoC with China and they are not exactly in the South China Sea or involved in the disputed area.
8. Is ASEAN a party to the South China Sea disputes?
9. A number of UNCLOS 1982 provisions would be useful and instrumental in those issues, such as the provisions on islands and rocks (**Article 121**), on various models of baselines and the nature of the waters enclosed by the different baselines, on management of **resources**, either living or non-living, and others.

C. Who are the parties to the disputes?

1. Littoral states, and who are they?
2. Is **Indonesia** a disputant? Indonesia has no territorial claim to the features, but if the Chinese 9 dotted lines are territorial then it could overlap with Indonesia’s EEZ and Continental Shelf. China has said that it does not have problem with Indonesia.
3. **Interested non-littoral states and who are they?**
 - a. ASEAN Members
 - b. The users of the “Disputed Sea and its features”, particularly for international navigation and overflight?
 - c. Those who have global strategic security interests in the area, such as the US.

D. The legal instruments for resolving disputes:

1. UN Charter provides in **Article 33** that:

“...the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by (1) **negotiation**, (2) **inquiry**, (3) **mediation**, (4) **conciliation**, (5) **arbitration**, (6) **judicial settlement**, (7) **resort to regional agencies or arrangements**, or (8) **other peaceful means of their own choice...**”

2. **How and should these mechanisms be invoked** or applied to the South China Sea dispute, mainly because **Chinese Taipei/Taiwan is not a member of the UN or a Party to UNCLOS 1982**. Moreover, bordering **ASEAN members are not all of them involved or having claims or even bordering on the South China Sea, such as Myanmar**.
3. The “**judicial settlement**” to the South China Sea Dispute may be invoked through **ICJ, ITLOS**, or **some other regional mechanisms**. While China has judges at ICJ or ITLOS, it has no interest or inclination to invoke ICJ or ITLOS, despite the fact that some ASEAN countries have in the past invoked the ICJ to settle their disputes, although none of them have judges at ICJ or ITLOS, such as **Indonesia** and **Malaysia**, on the case of Sipadan-Ligitan, **Malaysia** and **Singapore** on Pedra Branca, **Cambodia** and **Thailand** on Preah Vihear. Now, the **Philippines** also seems willing to go to the Judicial Settlement mechanism.
4. **UNCLOS 1982** also has a mechanism for the settlement of disputes. Practically all interested parties on the South China Sea issues have ratified UNCLOS 1982 except **Chinese Taipei/Taiwan** and **Cambodia**. Other mechanism for resolving disputes would be by **invoking “third party mechanisms”**, such as **mediation**, or even **conciliation** and **arbitration**. Apparently the relevant parties have not seriously considered these mechanisms, particularly because of the insistence of China to deal with it through **bilateral relations** directly with each of the respective claimant state, despite the fact that the issues and disputes are basically more than simply “bilateral” disputes.

5. There is also the modality of “**High Council**” in the **ASEAN Treaty of Amity and Cooperation** (1976) that deals with disputes between the ASEAN Member States. But this High Council has never been invoked, although Indonesia did try once (on Sipadan and Ligitan case), but did not get through.
6. “**Other peaceful means of their own choice**” as referred to in Article 33 of the UN Charter and in **various articles of UNCLOS 1982**, may also include agreement on “**joint development or joint cooperation**”. Everybody in the Workshop Process on Managing potential conflicts in the South China Sea, organized by Indonesia within the last twenty-two years, supported this mechanism which was originally suggested by China. But, after intensive discussions and studies on this issue on several working group meetings, the difficulties were on **defining the area** for such joint development, **the subjects** which would be jointly developed, the **participants** in such a joint development area, and the **modalities** or mechanisms for such programs.
7. A “**resort to regional agencies or arrangements**”. With regard to the South China Sea, it is not easy to find “regional agencies or arrangements” that can be invoked. Perhaps **ASEAN-China dialogue** or the **DoC** between ASEAN and China which is now being negotiated to become **CoC**. The problem would be **how to include Chinese Taipei/Taiwan in the process** while **Myanmar and others** in ASEAN which are not in the South China Sea disputes **are in the process**.
8. Other “**peaceful means of their own choice**”, may include the **informal track one, one and a half, or track two**, such as the South China Sea Workshops (SCSW) on Managing Potential Conflict in the South China Sea. This process, which has now been going on for the last twenty two years, include all the claimants to the disputes and the non-claimants of ASEAN countries, even now Myanmar.
9. The **South China Sea Workshop** have established three levels of studies of the South China Sea involving all the 10 ASEAN countries plus China and Chinese Taipei/Taiwan including:
 - a. A **yearly discussion in the workshop** held in Indonesia;

- b. Discussion in the various Technical **Working Groups** held in the various capitals or cities in the participating authorities;
 - c. **Study Groups/Groups of Experts** meeting on specific topics in the various locations in the area around the South China Sea.
10. **The South China Sea Workshops**, attended by all participants from the 10 ASEAN countries, and participants from China and Chinese Taipei/Taiwan, **have three objectives**, namely:
- a. **To develop cooperative programs** in which everyone can participate and learn how to cooperate rather than to confront each other;
 - b. To **encourage dialogue between the relevant parties** to solve their own problems, including maritime delimitation. Indonesia so far has concluded **17 maritime boundary agreements** with its neighbors, but unfortunately none with the Philippines despite its efforts since 1973;
 - c. To promote **confidence building process** so that every party will understand and respect the others to settle whatever disputes or potential disputes that they may have.
11. The South China Sea Workshops have originally discussed **six issues** with each participants is requested to lead the topics or other sub-topics in the discussions, such as:
- a. **Political** and **security** issues
 - b. **Territorial** and **jurisdictional** problems
 - c. **Marine scientific research**
 - d. **Marine environmental protection**
 - e. **Safety of navigation, shipping and communication**
 - f. **Mechanism** for cooperation
12. Generally the South China Sea workshop process has been **motivated by UNCLOS 1982**, particularly by **Article 122** and **123** which directed the countries around **enclosed and semi-enclosed seas**, like the South China Sea, to cooperate and coordinate their policies on the management of **marine living resources**, the conduct of **marine scientific research**, and the

- protection of **marine environment**, and at the same time, as appropriate, **inviting other interested parties or organizations** to cooperate with them.
13. **In conclusion**, devising cooperative programs on “technical and scientific” matters are relatively easier than dealing with “resources” issues, and much more difficult in dealing with territorial claims and jurisdictional issues.
14. **A number of projects or agreements have been agreed and have or are being implemented**, such as **biodiversity expedition, study on climate change and sea level rise, training program through South East Asia Networking of Education and Training**. Some implementation of the progress still wait for the “appropriate time” (such as on study of hydrography, assessment of living and non-living resources, some biodiversity expedition, joint development and many others.
15. In view of the **complex issues** of the South China Sea, I had suggested on a number of occasions a formula of 6+4+2 or 6+4+1+1 in the sense that the **6 ASEAN non-claimants** to sovereignty over islands and features in the South China Sea (**Indonesia, Singapore, Cambodia, Laos, Thailand and Myanmar**) acting as **facilitators**, should encourage and invite the four ASEAN claimants (**Philippines, Brunei, Malaysia and Vietnam**) to sit down and negotiate the matter with the two non-ASEAN claimants (**China and Chinese Taipei**). The ASEAN Chairman could take this opportunity. The reaction to this suggestion has been mixed.