

**COOPERATION UNDER UNCLOS WITH REGARD TO PART IX, PART XII  
AND PART XIII OF UNCLOS: THE SOUTH CHINA SEA FOCUS**

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**A. Legal Perspective of The SCS Issues**

**1. Customary International Law:**

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 being claimed and the “disputes” in the South China Sea?**

1. **Claims to the sea?** Needs for clarifications, limits, coordinates of the area claimed. Slowly, it appears that what China claims is “sovereignty” over the features in the 9 dotted lines and their rights to the “adjacent waters”, based on “history” not sovereignty over the sea itself? Thus, the 9 separate “U-Shape” lines appear to be “allocation” line, not “territorial” line.
2. What are being **claimed by others?**
  - a. **Philippines** claims Kalayaan Islands Group (KIG) on the basis of ‘history’, ‘discovery’, ‘contiguity’, ‘proximity’, and also on UNCLOS.
  - b. **Malaysia** claims on the basis of EEZ and prolongation of the Continental Shelf as stipulated in UNCLOS.

- c. **Brunei** claims on the basis of EEZ and Continental Shelf based on UNCLOS.
  - d. **Vietnam** claims on the basis of “history” as well as on UNCLOS provisions on EEZ and Continental Shelf.
  - e. **Chinese-Taipei** claims on the basis of “history” (like China) and “effective occupation” on certain islands.
3. **Claims to the “features”** (islands, rocks, reefs, low tide elevations, banks, atoll, etc.) on the basis of UNCLOS (Article 47, 56, 57, 76, 121 and others).
  4. **The rights to maritime zones** of the “features” (**internal waters, archipelagic waters, territorial seas, contiguous zones, Exclusive Economic Zones, Continental Shelf/continental margin**).
  5. **The nature of the claims: Territorial sovereignty, sovereign rights, jurisdictions, interests.**
  6. **“Historic claims”**, what are these and how long should it become historic?
  7. 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, on navigation and overflight over the EEZ and High Seas, and the various provisions on archipelagic waters, territorial seas, Contiguous Zones, Exclusive Economic Zone, Continental Shelf, High Sea and International Seabed Area, on enclosed and semi-enclosed sea (Article 122 and 123), and the obligation to cooperate on the protection of environment (Article 192) and on marine scientific research (Article 242).

### **C. Who are the parties to the disputes?**

1. **Littoral states**, and who are they? (are Thailand, Cambodia, Laos, Myanmar, Singapore) are the littoral states of the SCS?
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 informally that it does not have problem with Indonesia).

3. **Interested non-littoral states** and **who are they?**

- a. Certain 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, Japan, Australia, South Korea, and perhaps also India and Russia.

4. **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”?

5. 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.

6. **Is ASEAN a party to the South China Sea disputes?**

**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, Thailand, Cambodia and Laos**.

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-three 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 members and China which is now being negotiated to become a more legally binding Code of Conduct (**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 three 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 Informal 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 how 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 more than **17 maritime boundary agreements** with its neighbors (the last

one was with the Philippines on the EEZ boundaries in the Celebes Sea and in other areas between the two countries), and continue to negotiate the remaining maritime boundaries with all its neighbors.

- 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 participating authorities 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** of Part IX, 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. It should also be noted that Part XII of UNCLOS 1982 on Protection and Preservation of the Marine Environment also stipulates **obligation of states “to protect and preserve the marine environment”** (Article 192), despite their “sovereign rights to exploit their natural resources” (Article 193). In addition, Article 197 also stipulates that “states shall **cooperate on a global and, as appropriate, on a regional basis, to protect and preserve the marine environment**”.

14. Equally, it should also be remembered that Part XIII of UNCLOS 1982 on marine scientific research also stipulates that “**states and competent international organizations shall, in accordance with the principle of respect for sovereignty and jurisdiction and on the basis of mutual benefit, promote international cooperation in marine scientific research for peaceful purposes**” (Article 242 (1) of UNCLOS 1982).

## E. The Way Forward

1. In conclusion, **devising cooperative programs** on “technical, scientific and environment” matters are relatively easier than dealing with “resources” issues, and much more difficult in dealing with “territorial claims and jurisdictional issues”.
2. **A number of projects or agreements have been agreed and have or are being implemented** by the informal Workshop Process, 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 the study on hydrography, assessment of living and non-living resources, some other biodiversity expedition, joint development and many others).
3. 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**), albeit informally. The ASEAN Chairman could take this initiative. The model of “Jakarta Informal Meeting” (**JIM**), inviting the relevant parties during the Cambodian Conflict in the 1980s to “informal cocktail parties” in Bogor and Jakarta, could be used as an example. The reaction to

this suggestion has been mixed, but I have not heard objection from the disputants.

4. In the meantime, ASEAN as a group could and should continue to induce China to agree and to **accelerate the formulation and agreement on the Code of Conduct (CoC) for the SCS** on the basis of the already agreed Declaration of Conduct (DoC) of 2002 and its “guidelines” and others. In fact, Indonesia has already drafted certain “Zero Draft” for the CoC.
5. It would also be helpful if the **relevant ASEAN Countries could settle their own maritime boundaries** with their neighbors, particularly between Malaysia and the Philippines, as already indicated by Malaysia and Brunei Darussalam.
6. The **relevant parties in the SCS should clarify as precisely as possible the nature of their claims as well as the legal basis for those claims**. It would be a monumental development if the concerned parties would also agree to **seek solution through third party mechanism**, either through arbitration or judicial adjudication, or even through other regional mechanism.
7. In the meantime, the Indonesian initiated **informal Workshop Process** on Managing Potential Conflicts in the SCS that has lasted for more than 23 years **should continue** as already agreed by all the relevant authorities of the SCS. In this context, it is essential to promote cooperative programs, including on the possibility of **joint development**, on **joint marine scientific research**, and on **marine environmental protection**, to encourage dialogues between the parties that are involved in territorial and jurisdictional disputes, and to develop confidence building process and measures through diplomacy rather than military.
8. It is very essential to **maintain and promote peace, stability and development in the area of the SCS**, and that the rule of law should be developed, established, and respected by all, and that the military engagement and other hostile act should be avoided as effectively as possible, perhaps by **developing some rules of engagement** between the law enforcement as well as the military authorities in the SCS area.



9. The **non-SCS Countries** should be helpful and should be very careful in dealing with the SCS issues and disputes so that they will not be perceived as complicating the situation, thus potentially could produce more tensions in the area.
10. At the same time, **bigger countries** in the region should be mindful of the views of their smaller neighbors. The bigger countries should be careful so that they are not perceived to be dominating or bullying their smaller neighbors.