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Legal Framework for Joint Development in the South China Sea

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Outline of Presentation

1. Provisional Arrangements of a Practical Nature
2. Case Law on Provisional Arrangements
3. The Way Forward

Part 1

Provisional Arrangements of a Practical Nature

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Articles 74 and 83 – Delimitation of EEZ and Continental Shelf Boundaries

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and,

during this transitional period, not to jeopardize or hamper the reaching of the final agreement.

Such arrangements shall be without prejudice to the final delimitation.

When does obligation arise?

- On its face, it applies to areas of unresolved maritime boundaries between opposite or adjacent States
- Arises when there are areas of overlapping overlapping “maritime claims” in an area
- Issue: must overlapping maritime claims be in accordance with UNCLOS, that is, only claims from land territory and islands

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"Without Prejudice"

- Provisional arrangements are "without prejudice" to the final delimitation agreement
- The final agreement on delimitation does not have to take into account the provisional arrangements
- The provisional arrangements cannot be interpreted to be a renunciation of a State to its claim or as a recognition of the claim of the other parties
- The parties do not acquire any rights from the provisional arrangements

Joint Development

- An arrangement to jointly develop hydrocarbon or fisheries resources in the area of overlapping claims is a type of provisional arrangement
- An arrangement to undertake a joint seismic survey would also be an interim arrangement
- Articles 74 and 83 do not impose a legal obligation on States to enter into negotiations to establish joint development arrangements

Part 2

Case Law on Provisional Arrangements

Suriname / Guyana Arbitration 2007

- Guyana instituted proceedings in 2004
- Arbitral Tribunal constituted in accordance with Annex VII of the UNCLOS
- Permanent Court of Arbitration at the Hague served as Registry
- Award issued on 17 September 2007
- Tribunal made important statements on the obligations of States under Arts 74 & 83 of UNCLOS

Provisional Arrangements (PAs)

- Obligation in Arts 74 and 83 is designed to promote regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation
- This obligation constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area, so long as such activities do not affect the reaching of a final agreement.

Guyana / Suriname Arbitration 2007

Articles 74 and 83 impose 2 obligations:

- **1. Pending a final delimitation, States Parties are to make "every effort to enter into provisional arrangements of a practical nature."**
- **2. States Parties must, during that period, make "every effort . . . not to jeopardize or hamper the reaching of final agreement."**

Every Effort to enter into PAs

- The phrase "every effort" imposes a duty to negotiate in good faith
- Requires a "conciliatory approach" to negotiations and parties must be prepared to make concessions
- Joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by courts and tribunals as "provisional arrangements of a practical nature"

Hampering or Jeopardizing

- It precludes unilateral activities which might affect the other parties rights in a permanent manner and thereby prejudice the final agreement
- Unilateral exploitation of oil and gas reserves or unilateral drilling not permissible because would lead to a permanent physical change
- Unilateral seismic survey permissible because it would not lead to permanent physical change

Duty to make every effort

- Guyana's concession holder did seismic testing and announced plans for exploratory drilling in disputed waters
- Guyana invited Suriname for discussions, but Suriname refused
- Suriname then threatened the drilling rig
- Tribunal found both States in violation of their obligation to enter into provisional arrangements

Guyana & Duty to make every effort

Guyana violated obligation by commencing exploratory drilling without:

1. Giving Suriname official and detailed notice of its planned activities
2. Seeking Suriname's cooperation
3. Offering to share results of the exploration and offering to allow Suriname to observe
4. Offering to share financial benefits

Suriname & Duty to make every effort

- Suriname violated its obligations by not actively attempting to bring Guyana to the negotiating table
- At a minimum, Suriname should have accepted Guyana's last minute offer and negotiated in good faith
- Suriname could have insisted on cessation of the drilling as a pre-condition
- Instead of negotiating in good faith, Suriname violated its obligations by resorting to self-help and threatening the drilling rig

Hampering or Jeopardizing

- Tribunal found the unilateral seismic testing is not a violation of the duty not to hamper or jeopardize the making of a final agreement
- If Suriname believed that exploratory drilling was a violation, and if bilateral negotiations failed to resolve the issue, it should have invoked the UNCLOS dispute settlement procedures
- Suriname's threat of force against the drilling rig jeopardized the reaching of a final agreement

Part 3

The Way Forward

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CIL Report – The Way Forward

1. Increase Knowledge of Features in the Spratly Islands
2. Encourage Claimants to Clarify Claims
3. Increase Knowledge of Hydrocarbon Resources through Joint Seismic Surveys
4. Implement the 2002 ASEAN-China Declaration on Code of Conduct in the South China Sea
5. Enhance Understanding on Nature and Importance of Joint Development Arrangements

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CIL Report – The Way Forward

6. Better Management of Domestic Politics and Nationalistic Rhetoric
7. Greater Discussion on Appropriate Institutional Framework for Discussion and Negotiations
8. Oil Companies could help the States understand the commercial issues
9. More Research required on Joint Development Regimes Suitable for the South China Sea

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How define Area for Joint Development?

- China will not agree if only areas are 12 nm arcs around largest islands
- Other claimants will not agree if all areas within 9-dash line
- Can begin discussions by drawing EEZ from the largest islands in the Spratlys and the Paracels
  1. Give islands full effect in direction of open sea
  2. Draw equidistance line between largest islands and mainland coasts
  3. Negotiate to adjust the equidistance line to give less effect to the islands

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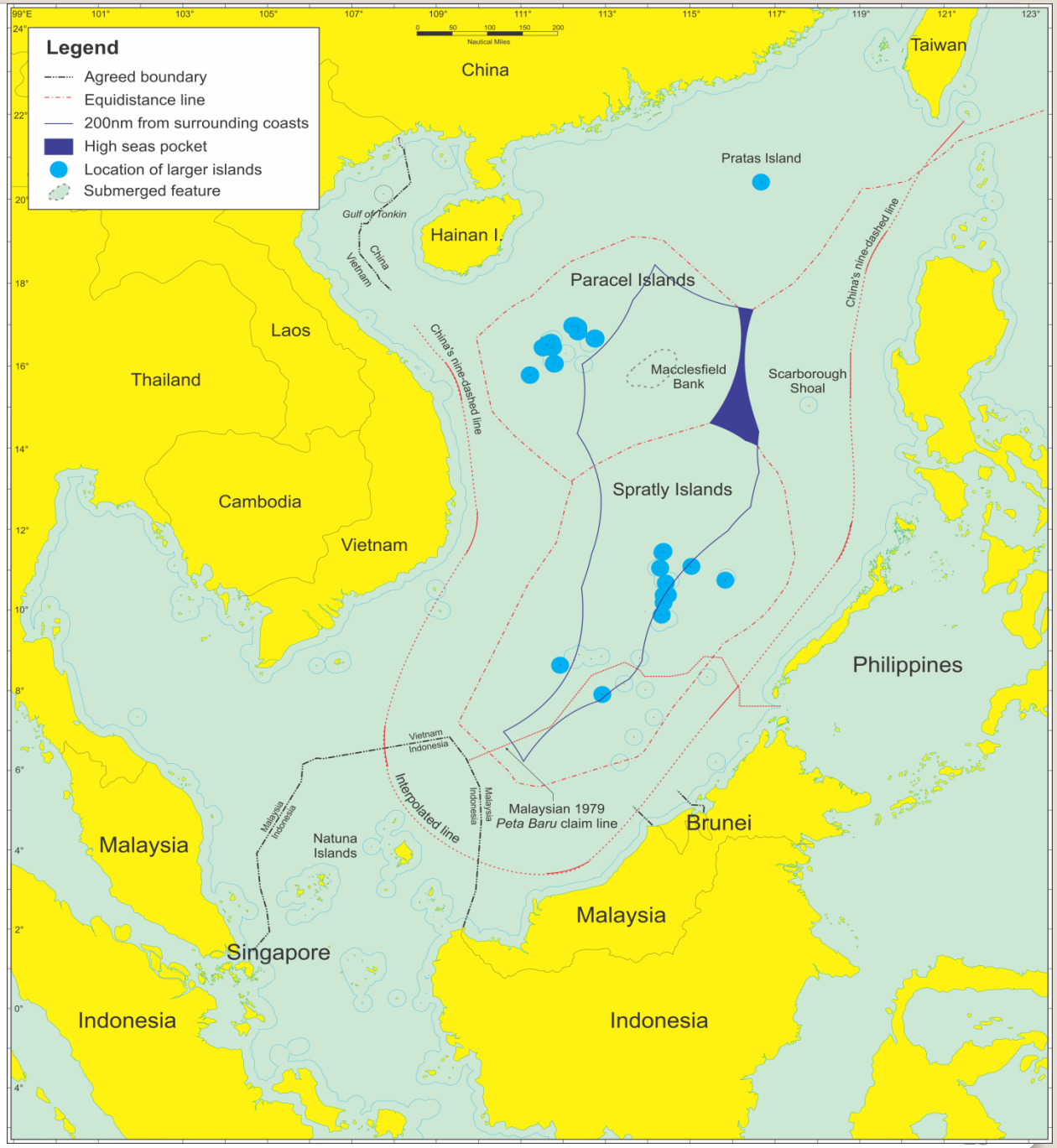

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Way Forward on Areas in Dispute?

In area of "High Seas"

1. **Track 1.5 discussions to define areas**
2. **Talks must be "without prejudice"**
3. **Include outside experts as "resource persons"**
4. **Examine legal arrangements that have to be addressed such as parties, jurisdiction, taxes, revenue sharing, etc**

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Thanks for Your Attention

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