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**Session 1. Dispute Resolution Mechanisms
“Resolution of Disputes in the South China Sea”**

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Outline of Presentation

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3. UNCLOS Provisions subject to compulsory binding dispute settlement regime in Part XV
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Part 1

Territorial Sovereignty Disputes in the South China Sea

Territorial Sovereignty Disputes

- Issue of who has the better claim to sovereignty over the islands is governed by customary international law
- The sovereignty disputes cannot be referred to a court or tribunal unless the parties agree
- Examples of island disputes being referred to the ICJ are those between Indonesia & Malaysia (Sipidan & Ligitan) and between Malaysia & Singapore (Palau Batu Puteh/Pedra Branca)
- Given the number of claimants and complexity of the disputes, it is not likely that the claimant States will agree to resolve the sovereignty disputes through adjudication or arbitration

Principle on Peaceful Settlement

- Article 2 of the UN Charter provides that “All Members shall settle their disputes by peaceful means”
- Article 33 of the UN Charter lists the means for resolving disputes peacefully - negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice

Use of Force & Sovereignty Disputes

- **UN Charter Art 2(4) prohibits the use force**
- **UN General Assembly Resolution 2625 Declaration of Friendly Relations (1970) provides that :**
 - No territorial acquisition resulting from the threat or use of force shall be recognized as legal**
- **1976 Treaty of Amity and Cooperation in Southeast Asia provides that the High Contracting Parties shall be guided by fundamental principles including :**
 - d. Settlement of differences or disputes by peaceful means;**
 - e. Renunciation of the threat or use of force;**

2002 DoC & Sovereignty Disputes

- The Declaration on the Conduct of Parties in the South China Sea provides that :
 - 4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by **peaceful means**, **without resorting to the threat or use of force**, through friendly consultations and negotiations by **sovereign states** directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

CoC and Sovereignty Disputes

- The 2002 DoC provided that:
 - 10. The Parties concerned reaffirm that the adoption of a **code of conduct** in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.
- In my view, it is unlikely that the CoC will contain any provision requiring States to any form of third party dispute settlement for the territorial sovereignty disputes

Part 2

Dispute Settlement Regime in UNCLOS Part XV

UNCLOS Part 15

- General principle is that any dispute between parties over the interpretation or application of a provision of the Convention is subject to the system of compulsory binding dispute settlement in Section 2
- By becoming a party to UNCLOS, State Parties are giving their consent to referring disputes to adjudication or arbitration
- Certain categories of disputes are excluded under Article 297, and States can opt out of other categories under Article 298

Section 2, Article 286

SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

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 298. Optional Exceptions

States parties have option to formally declare that they do not accept Section 2 for following categories of disputes:

- the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles
- Disputes concerning military activities
- Disputes concerning law enforcement activities relating to rights and jurisdiction of coastal States over resources in EEZ

Choice of Procedure - Article 287

A State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

1. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) established in accordance with Annex VI;
2. INTERNATIONAL COURT OF JUSTICE (ICJ);
3. ARBITRAL TRIBUNAL constituted in accordance with Annex VII;
4. SPECIAL ARBITRAL TRIBUNAL constituted in accordance with Annex VIII

“Default Procedure”

Article 287 (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.

- Since none of the claimants to sovereignty over islands in the South China Sea have selected a procedure, the default procedure (Arbitration under Annex VII) would apply, unless they otherwise agree

Disputes on Maritime Delimitation

- If other claimant States cannot agree on their maritime boundaries in the SCS, one of the parties could unilaterally invoke the dispute settlement procedures in UNCLOS
- For example, Malaysia could bring the Philippines to dispute settlement over their adjacent EEZ boundary in the SCS
- Exception: If one of parties to dispute has “opted out” under article 298 (eg. China)

Applicable Law [Article 293]

- Article 293 provides that a court or tribunal having jurisdiction under this section shall apply
 - this Convention and
 - other rules of international law not incompatible with this Convention.

Binding Force of Decisions

Article 296 provides that:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Part 3

**UNCLOS Provisions subject to
compulsory binding dispute
settlement regime in Part XV**

Article 121. Regime of Islands

- 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
- 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
- 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Article 13. Low-tide Elevations

- 1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.
- Where a low-tide elevation is situated wholly or partly within 12 nm from the mainland or an island, it may be used as the baseline for measuring the breadth of the territorial sea.
- 2. Where a low-tide elevation is wholly situated more than 12 nm from the mainland or an island, it has no territorial sea of its own.

Article 60. Artificial Islands in EEZ

- 1. In the EEZ, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
 - (a) artificial islands, installations and structures
- 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

Article 60. Artificial Islands in EEZ

- 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands
- 5. The breadth of the safety zones shall not exceed a distance of 500 metres
- 8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the EEZ or the continental shelf.

Article 56. Rights & Jurisdiction of Coastal State in the EEZ

In the exclusive economic zone, the coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil

Part 4

Possible Disputes on status of features and rights to resources in maritime zones

Disputes over Status of Features

1. Whether a particular feature is a “low-tide elevation” under Article 13 or an “island” as defined in Art 121(1)
2. Whether a particular feature is an “artificial island” under Article 60 or an “island” as defined in Art121(1)
3. Whether a particular “island” is only entitled to a 12 nm territorial sea because it is a “rock” which “cannot sustain human habitation or economic life of its own” as set out in Article 121(3)

Dispute on rights to resources

- ASEAN States have claimed EEZ out to 200 nm from the baselines along their coast or archipelago
- China has objected to unilateral activities of ASEAN States in these areas
- Dispute could arise on whether China has a right to explore and exploit resources in the EEZ of other States
- Such disputes could raise questions on interpretation and application of article 121 - whether certain islands are entitled to an EEZ of their own or whether they are only entitled to a 12 nm territorial sea

Part 5

Prospect of ITLOS Advisory Opinion

UNCLOS & Advisory Opinions

- **Advisory jurisdiction of ITLOS is based on article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.**
- **The Rules of the Tribunal give it the authority to give advisory opinions in certain circumstances.**

Article 138 of Rules of Tribunal

Article 138 of the Rules of the Tribunal provides:

- 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion.

Request by ASEAN Claimants?

- Two or more ASEAN claimants could enter into an agreement on cooperation in the South China Sea
- The agreement could establish a body and authorize that body to request an advisory opinion from ITLOS on legal issues as to how UNCLOS applies in the South China Sea
- For example, the body could request an advisory opinion how to interpret and apply Article 121(3)

Part 6

Conclusions

Conclusions

- The dispute settlement regime in UNCLOS cannot be used to resolve the disputes concerning the merits of sovereignty claims to the islands in the South China Sea
- China has exercised its right to opt out of the system of dispute settlement for disputes concerning the interpretation or application of the UNCLOS provision on maritime boundary delimitation

Conclusions

- There may be evolving disputes between China and the ASEAN Claimant States on whether particular features are islands, rocks or low-tide elevations, and what zones they are entitled to
- May also be evolving dispute on legality under UNCLOS of China's actions to interfere with activities in the EEZ of ASEAN claimants
- Such disputes could be subject to the compulsory binding dispute settlement regime established in Part XV of UNCLOS

Conclusions

- Only viable solution in long run is “Setting Aside Disputes and Joint Development”
- However, ASEAN claimants are likely to maintain that Joint Development should be limited to areas in Dispute, that is the islands and the maritime zones around them
- It will be difficult to agree on the areas in dispute unless China clarifies its claim and brings it into conformity with UNCLOS

Conclusions

- **ASEAN Claimants could request an Advisory Opinion from ITLOS on legal issues relating to the South China Sea if they comply with the requirements in Article 138 of the Tribunal**
- **Referral to arbitration or adjudication can be an effective way of clarifying areas in dispute**

Thanks for your Attention !

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