

**Prospects for Joint Development in the
South China Sea:
One (Procedural) Step at a Time?**

By

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I. Parameters of the South China Sea Disputes and Sources of Bilateral/Regional Tension

A. Territorial Sovereignty over Island/Rocks

B. Sovereign Rights & Jurisdiction over Natural Resources:

- **Inherent (continental shelf) sovereign rights over hydrocarbon & other mineral resources;**
- **Claimed (EEZ) sovereign rights over fisheries;**
- **Claimed (EEZ) jurisdiction over marine environment;**

C. Freedom of Navigation/Innocent Passage of All Ships

II. Taxonomy of Approaches adopted by States, Institutions and Commentators Towards the South China Sea Disputes

- A. Strategic/Security Approaches**
- B. Institutional/Regime-building Approaches**
- C. Scientific/Ecological Approaches**
- D. International Law Approaches**

International Law Approaches:

Focus on Substantive Solutions:

- 1) Bilateral/ Regional Joint Development Arrangements – Antarctic Treaty system;**
- 2) Variants such as Indonesian ‘Doughnut Hole’ proposal & Philippine proposal for a Zone of Peace, Freedom, Friendship & Co-operation.**

However, these are not binding under international law ...

On the other hand, procedural obligations for transboundary/ shared natural resources or common interest areas, such as the sea bed beyond national jurisdiction, and by analogy, the South China Sea region, are arguably binding under international law...

III. Recent International Case Law Authorities for Procedural Obligations over Transboundary or Shared Natural Resources/ Environmental Issues

- **A. Malaysia/Singapore Land Reclamation case;**
- **B. Guyana/Suriname Maritime Boundary Delimitation case;**
- **C. Argentina/Uruguay Pulp Mills case;**
- **D. Advisory Opinion of Seabed Disputes Chamber on (Deep) Seabed Activities**

A. Malaysia/Singapore Land Reclamation case

- The ITLOS Order unanimously held, *inter alia*, that Malaysia and Singapore shall first cooperate and enter into consultations to establish promptly a group of independent experts with a mandate to conduct a study to determine the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation; exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works;
- More substantively, the Tribunal also directed Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment.

B. Guyana/Suriname Maritime Boundary Delimitation case

- the Tribunal placed a specific obligation upon Guyana to inform Suriname *directly* of Guyanese plans to allow its concessionaire company, CGX, to undertake exploratory drilling;
- the Tribunal then specified the precise steps that Guyana could have taken that would have been consistent with her obligations under the Convention and thus sufficient to discharge her duty to make every effort to reach a provisional agreement. These steps ‘include (1) giving Suriname official and detailed notice of the planned activities, (2) seeking (the) co-operation of Suriname in undertaking the(se) activities, (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities.’

C. Argentina/Uruguay Pulp Mills case

- The Court first noted that the obligation to notify is an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.
- The Court further held that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource – a common river boundary.

D. Advisory Opinion of ITLOS Seabed Disputes Chamber on (Deep) Seabed Activities

Referring to the ICJ decision in the *Pulp Mills* case, the Chamber held that:

The Court's reasoning in a transboundary context may also apply to ***activities with an impact on the environment in an area beyond the limits of national jurisdiction***; and the Court's references to ***“shared resources” may also apply to resources that are the common heritage of mankind.***

IV. Application of International Procedural Obligations to the South China Sea?

- **Duty to inform and consult other interested States over *all* planned activities that may have implications for their sovereign rights and exercise of jurisdiction in the disputed region, whether these are marine-based research and/or exploration activities, or building activities on any insular formations.**
- **Duty to conduct an EIA for such activities, including addressing the possible impacts on freedom of navigation and ecological/environmental concerns.**

Recommendation:

Inclusion of specific procedural requirements for information-sharing and consultation, and EIA for proposed building and exploration activities in South China Sea within the proposed Code of Conduct (COC)