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Implementing the ASEAN-China Declaration For A Decade of Coastal and Marine Environmental Protection in the South China Sea (2017-2027)

a *balikBALANGAY* extended commentary

Introduction : Laying the foundation for ocean governance in the South China Sea maritime region, defining the concern relating to the coastal and marine environment, and prescribing the ocean governance approach

On the occasion of the 20th ASEAN-China Summit on 13 November 2017, the Heads of States/Governments of ASEAN Member States and the People's Republic of China proclaimed 2017-2027 a decade of coastal and marine environmental protection in the South China Sea. The above-titled Declaration (henceforth, the Declaration) embodies a 15-paragraph mix of preambular *cum* substantive provisions. The operative part at the end of the Declaration proclaims the decade 2017-2027 **A Decade of Coastal and Marine Environmental Protection in the South China Sea**, and that the Governments of the ASEAN Member States and China are “committed to meet the **aspirations** of this Declaration”. In this extended commentary, reference to the South China Sea which is mainly concerning ocean governance as reflecting the essence and aspirations of the Declaration, would refer to the maritime area and minimized allusions to the disputed areas or the disputes.

The Declaration at the opening paragraph takes note that it coincides with the 15th anniversary of the signing of the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (ASEAN-China DOC-SCS). It also reaffirms the “regional commitments” demonstrated in 2016 on the occasion of the **19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations**, and in the **Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC**. The Declaration affirms the commitment of Governments under the ASEAN-China DOC-SCS “particularly on undertaking **cooperative activities** on marine environmental protection”, and notes further that the parties concerned may explore and undertake relevant cooperative activities in accordance with universally recognized principles of international law, including the UNCLOS 1982. It acknowledges the importance of protecting the South China Sea as a natural resource base for economic and social development for the present and future generations, and that the preservation and sustainable management of the coastal and marine environment is vital to economic well-being and enhanced quality of life of the peoples of ASEAN Member States and China.

The Declaration cites certain interrelated framework instruments relevant to the protection of the coastal and marine environment; recalling the “obligations of Governments” as contained in the following international agreements:

- The United Nations Convention on the Law of the Sea, 1982
- The United Nations Decade on Biodiversity (2011- 2020)
- The Convention on Biological Diversity (CBD), and **relevant international instruments**
- The United Nations Agenda 2030 for Sustainable Development, particularly Goal Number 14, Life Below Water, to promote conservation and sustainable use of the oceans, seas and marine resources

A general reference is made in regard to UN resolutions and **other efforts** to preserve and protect the coastal and marine environment and resources.

The Declaration also cites and makes specific reference to generally accepted scientific principles relating to the management of marine resources “to ensure its rational and sustainable development”, to wit :

- the need to promote responsible fishing practices, environmentally friendly fishing methods, and combatting illegal, unreported and unregulated (IUU) fishing, to ensure sustainable fishery resources and achieve food security
- that a precautionary and ecosystem-based approach based on the best available science in marine resources management to ensure its rational and sustainable development could be applied as appropriate
- the significance of the sustainable management and conservation of fresh water ecosystems such as lakes and rivers, wetlands, and adjacent estuaries along coastal areas in the overall health of the marine environment (of particular interest to the Philippines and other ASEAN countries is environmental management in so-called “water communities” or those located onshore or in lakes as they have significant impacts “on the overall health of the marine environment”)
- that conservation of endangered and migratory wildlife species warrants cooperation from countries within the region where such species spend any part of their life cycle

Also mentioned as a management principle is “the need to continue developing and sustaining environmentally-friendly mechanisms to mitigate the effects of climate change and transboundary marine environmental pollution and degradation”.

The foregoing scientific framework and parameters cannot be intended to be exhaustive or all-inclusive; they merely set the collective tone and convey the message in regard to ocean governance in general that highlight their special relevance to sustainable management and conservation concerns of the coastal and marine environment in the South China Sea. Moreover, the Declaration notes that the current environmental situation in the South China Sea requires **collective attention and action** to protect the marine environment and biodiversity; noting further “**that coordinated and cooperative regional efforts** are essential for the scientific conservation and management of the marine environment, biodiversity, and coastal zone of the ecosystem of the South China Sea”.

Finally, noteworthy and inviting particular attention is a political element, a benign and constructive sentiment insinuated into the context of the Declaration as a commitment and

aspirations of the Parties for the sake of the preservation and conservation of the coastal and marine environment, and this is to explore and undertake other relevant cooperative activities in accordance with universally recognized principles of international law, including the UNCLOS 1982, **“pending a comprehensive and durable settlement of territorial and jurisdictional disputes . . . without prejudice to the positions of the concerned parties to the disputes”**. The “benefits that would be gained from having the South China Sea as a sea of peace, stability and prosperity”, is duly acknowledged in the Declaration. In other words, the obligations and commitments of the ASEAN Member States and China, and their collective aspirations under the Declaration, transcends the maritime disputes in the South China Sea and leading towards a pure science norm-based management approach collectively and cooperatively to conserve, preserve and protect the coastal and marine environment. Essentially this is the ultimate expression of the collective desire and aspirations of the Parties to the Declaration.

Implementing the Declaration - a rules-based regional ocean governance framework under the UNCLOS 1982

The Declaration lays down the foundation for a collective and cooperative regional ocean governance among States bordering the South China Sea, but assumed as an ASEAN-China undertaking among all the Parties to the Declaration. The legal and scientific framework for implementing the Declaration is the UNCLOS 1982 which is attributed all prominence in regard to ocean governance, and the rights, duties and obligations among States Parties to the UNCLOS to cooperate in the implementation of the provisions therein. In the situation of the South China Sea with characteristic regional features (UNCLOS Article 197) that necessitates collective and cooperative ocean governance, and additionally burdened and complicated with intractable maritime jurisdictional issues among bordering States, the appropriate legal and scientific framework for the immediate governance concerns reflected in the Declaration i.e. coastal and marine environment protection, would be the UNCLOS at Part IX on enclosed and semi-enclosed seas. The South China Sea meets the UNCLOS definition of an enclosed/semi-enclosed sea defined at Article 123 thereof, as ***a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States***. As regards a governance regime for enclosed and semi-enclosed seas, the same UNCLOS provision also calls for cooperative undertaking, whether bilateral or collective, in all aspects of ocean governance and management for such seas.

The Declaration, however, is an ASEAN-China undertaking in the South China Sea and the governance approach is already explicitly determined therein to be collective and not bilateral. Under UNCLOS Article 123, the parties directly concerned in an UNCLOS Part IX arrangement in the South China Sea would be China, Vietnam, Laos, Philippines, Malaysia, Brunei, and Indonesia as bordering States. The aforementioned ASEAN member countries and China would form the principal participating States in an UNCLOS Part IX arrangement implementing the Declaration. However, in the context of the Declaration in relation to UNCLOS Part IX, the rest of the ASEAN member States would necessarily be direct participants in its implementation, in two categories subsumed together : (1) as signatory to the Declaration as ASEAN Member States, and (2) as “other interested States” under UNCLOS Article 123 that do not border the South China Sea,

wherein the “invitation” from the aforesaid principal participating States to the rest of the ASEAN member countries is necessarily impliedly contained and accepted in the Declaration itself. In other words, in the context of the Declaration implementing UNCLOS Part IX, the distinction between States bordering the South China Sea and the rest of the ASEAN Member States has been erased, and that all ASEAN member countries are collectively participants with China as Parties to the Declaration. Moreover, the duties and obligations between the ASEAN Member States and China, as shall be seen later, would necessarily extend throughout an expanded maritime area as interconnected enclosed and semi-enclosed seas under UNCLOS Part IX, that would encompass all the seas of the ASEAN maritime region beyond the intended South China Sea ambit of the Declaration.

As above indicated but stated another way for emphasis, implementing the Declaration on coastal and marine environmental protection in the South China Sea is an all-inclusive undertaking among ASEAN Member States and China by virtue of the terms of the Declaration, and not only among ASEAN countries bordering the South China Sea and China. The undertaking among ASEAN Member States in regard to coastal and marine environmental protection in the South China Sea under the Declaration is differentiated from that in the ASEAN-China DOC-SCS, and for that matter under the ASEAN-China Code of Conduct being formulated, which binds directly only the ASEAN claimant countries and China. Restated for emphasis, the obligations and commitments under the Declaration is an active collective and cooperative engagement among ASEAN Member States whether claimant or non-claimant States in the South China Sea maritime jurisdictional disputes. Whereas non-claimant countries in the ASEAN-China DOC-SCS (and the proposed Code of Conduct) are simply passive participants and not even guarantors of its faithful compliance; and a factor in the seeming indifference and perceived failure of the ASEAN to reach consensus on the South China Sea agenda.

Implementing the Declaration – Defining the scope of collective cooperation in ocean governance

Carrying further the regional ocean governance scenario pursuant to the Declaration in relation to UNCLOS Part IX, the activities outlined in the Declaration would be implemented collectively and cooperatively as prescribed in the Declaration and not bilaterally as otherwise allowed under the UNCLOS Part IX, as aforesaid. Additionally, since the Declaration mentions the UNCLOS as the principal instrument to implement the Declaration, and UNCLOS Part IX being the relevant governance regime for the South China Sea as enclosed/semi-enclosed sea, the appropriate modality or vehicle for a collective and cooperative maritime and ocean governance scheme would necessarily be through **an appropriate regional organization** (UNCLOS Article 123) to be established through an implementing agreement among UNCLOS Part IX stakeholders, as follows:

- the States bordering the South China Sea, namely China, Vietnam, Laos, Philippines, Malaysia, Indonesia and Brunei

- the rest of the ASEAN Member States as Parties to the Declaration that binds them collectively
- relevant international organizations (and non-governmental organizations, NGOs) upon invitation of the principal stakeholders under the Declaration i.e. ASEAN-China

Finally, faithful to the rationale and aspirations expressed in the Declaration in regard to coastal and marine environmental protection, the connectivity of the ocean and the geomorphological and large marine ecosystem (LME) setting of the South China Sea as enclosed/semi-enclosed sea, and the rationale for such seas being accorded a *sui-generis* governance regime under the UNCLOS, it cannot be too early to start adapting a mindset that would project holistic and comprehensive governance to the entirety of the seas of the ASEAN. The seas of the ASEAN shares characteristic regional features and are interconnected enclosed/semi-enclosed seas, that encompass interconnected archipelagic waters within. A natural expansion of the coastal and marine environmental protection envelope under the Declaration towards the wider maritime region would be a nature-inspired and compelled regional undertaking under UNCLOS Part IX.

Implementing the Declaration - Target activities relating to coastal and marine environmental protection in the South China Sea for the decade 2017-2027

As already stated above, the Declaration highlights certain ocean governance activities for the decade 2017-2027, herein reiterated as follows :

- to promote responsible fishing practices, environmentally friendly fishing methods, and combatting illegal, unreported and unregulated (IUU) fishing
- the scientific conservation and management of marine resources and environment, biodiversity, and coastal zone of the ecosystem of the South China Sea
- the sustainable management and conservation of fresh water eco-systems such as lakes and rivers, wetlands, and adjacent estuaries along coastal areas in the overall health of the marine environment
- to continue developing and sustaining environmentally-friendly mechanisms to mitigate the effects of climate change and transboundary marine environmental pollution and degradation

It is clear, however, that while the Declaration makes special mention of specific activities above, it cannot be intended as a neat exclusionary enumeration. The Declaration encourages that “the parties concerned may explore and undertake relevant cooperative activities in accordance with universally recognized principles of international law, including the UNCLOS 1982” and not confining themselves solely to coastal and marine environmental protection with specified activities subject of the Declaration. Indeed, the framework instruments cited in the Declaration that would serve as guidance documents towards crafting a regional ocean governance regime in the South China Sea provides a wide scope of protective and conservation measures that includes a general reference to “UN resolutions and **other efforts to preserve and protect the coastal and marine environment and resources**”. And certain **other efforts** can include

“developing and sustaining environmentally friendly mechanisms to mitigate the effects of . . . **transboundary marine environmental pollution and degradation**”.

The above-defined target activities, however, can be an initial or “starter package” for the South China Sea under the Declaration and woven together for constructing a regionwide ASEAN-China Integrated Coastal Zone Management (ICZM) programme addressing and straddling the economic, socio-cultural, and security pillars of AEC 2015 vital to food security and the “economic well-being and enhanced quality of life of the peoples of ASEAN Member States and China” (in the words of the Declaration). At the same time, the Parties can explore and undertake relevant cooperative activities pursuant to the UNCLOS and universally recognized principles of international law and thus rendering **open-ended** the collective and cooperative ocean governance activities beyond those specifically mentioned in the Declaration. In effect, there are no limits or constraints to collective and cooperative ocean governance activities under the Declaration from the very outset, to serve whatever may be deemed to be the collective aspirations of the Parties to the Declaration.

Implementing the Declaration - China’s design and unilateral commitment to ocean governance, a **Silk Road Spirit** in a **Blue Partnership** for a **Blue Economy**; and its direct relevance to the Declaration

On 20 June 2017, or five months preceding the Declaration, China promulgated its **Vision for Cooperation under the Belt and Road Initiative** (the Vision). It is an updated version proceeding from the **2015 Visions and Actions on Jointly Building the Silk Road Economic Belt and the 21st Century Maritime Silk Road**. The Vision, together with the ASEAN Vision 2025, are “acknowledged” in the **Joint Statement between ASEAN and China on Further Deepening the Cooperation on Infrastructure Connectivity** issued on 13 November 2017 (also on the occasion of the 31st ASEAN-China Summit and simultaneously with the Declaration) as **strategic guiding documents**.

As an **economic development** belt, the Vision spells out in greater detail China’s overall proposition “to synchronize development plans and promoting joint actions amongst countries along the Maritime Silk Road”. On this aspect alone, the Vision ought to elicit the highest level of interest and attention from the ASEAN as a regional organization; the ASEAN must attribute due importance to the Vision. Firstly, this is because it is an economic development proposition that would involve and benefit all individual member countries of the ASEAN as among countries along the 21st Century Maritime Silk Road. Moreover, it goes without saying that the maritime silk road would facilitate outward economic and trade interaction between the ASEAN and other economic groupings or other countries along the maritime route. Finally, the maritime silk road under the Belt and Road Initiative of China must be accorded greater prominence in the ASEAN-China Dialogue agenda inasmuch as it has strong impacts and direct relevance on the three pillars of AEC 2015 as related to the ASEAN Vision 2025.

Secondly and equally important, the ASEAN is a maritime region striving for a maritime connectivity under the AEC 2015 that necessarily spills over to China (or from China to ASEAN, as

a two-way perspective). The Vision is about a **Blue Partnership** “together to build platforms for maritime cooperation . . . as an effective way for promoting ocean cooperation . . . to promote policy coordination, deepen common understanding, enhance mutual **political** trust, build bilateral and multilateral cooperative mechanisms . . . to jointly participate in ocean governance”. It entails an “all-dimensional, multi-tiered and broad-scoped partnership” in a “new era of increased focus and dependence upon maritime cooperation and development”. Further, all the foregoing efforts “in order to provide the institutional framework for ocean cooperation” . . . to “jointly protecting and sustainably utilizing marine resources to achieve harmony between man and the ocean for common development and enhancement of marine welfare”. In short, the Vision accords parallel importance to economic development and a sustainable coastal and marine environmental protection and management, in a synergized approach along the Maritime Silk Road and the wider maritime region it serves. The practical link between the Declaration and the Vision is clearly established under both instruments. All together, the Declaration, the ASEAN-China DOC-SCS, and the Vision, touches on the ocean as the source of life, sustainable livelihood and shared development; and nurtured to enhance quality of life.

An **ASEAN-China partnership for ocean governance** under the Declaration and Vision; for an Asian Century in a new world economic and political order

Underlining the Blue Partnership is what China calls **The Silk Road Spirit**, which is about “peace and cooperation, openness and inclusiveness, mutual learning and mutual benefit”, expounded in detail in the 10-page **VISION** document. Significantly, there is a political strand in the foregoing geo-economic line, nonetheless a truism especially relevant to the South China Sea embroiled in maritime jurisdictional disputes, that “**enhancing maritime cooperation also enables various countries to jointly tackle challenges and crises, thus promoting regional peace and security**”. Indeed, transborder maritime issues and concerns are endemic to the wider maritime region traversed by the maritime silk road many of which are related to resources exploitation that are not necessarily connected to jurisdictional issues. In certain instances they even antedate the UNCLOS and thus with historical roots. Many if not most are low-intensity resources competition that can be managed or resolved through a reestablished ancient Asian culture of consultations or negotiations appropriately applicable to the present-day context of a collective ocean governance cooperation. Among its principles, the Vision seeks “mutual political trusts” and to “promote harmonious co-existence”; to build a culture of harmony and cooperation. Furthermore, pursuing development cooperation along the preceding lines will be further enhanced by “strengthening cooperation through existing multilateral mechanisms” (such as APEC, etc.) and “boost cooperation with multilateral organizations” (such as IMO, FAO, IHO, IOC/UNESCO and the International Ocean Institute, etc.). This is significant in that peaceful dispute resolution and management in a resort to consultations and negotiations would in all likelihood involve delving into technical and scientific parameters consistent with UNCLOS Article 123 that would involve relevant international organizations (and NGO’s) as stakeholders. It will establish and strengthen synergies between sustainable development and sustainable ocean governance. The relative political influence of States with competing self- interests must not be a factor in maritime dispute settlement.

The above is a general exposition of the direction and approach of the Vision, which is the **assurance** of China's commitment to the Declaration and even enhancing it. In a significant way, the Vision contains elements that reinforce and enhance the Declaration, the full and effective implementation of the ASEAN-China DOC-SCS, and most importantly, the UNCLOS particularly at Part IX thereof on enclosed and semi-enclosed seas. It is a detailed translation into a seamless and comprehensive regional ocean governance architecture that can be assembled together and consolidate elements contained in the Declaration and the ASEAN-China DOC-SCS under the umbrella of UNCLOS Part IX, in support of AEC 2015, ASEAN Vision 2025 and the Belt and Road Initiative. This direction can be the signal contribution towards a rules-based "progressive development" of an ASEAN-China partnership in the South China Sea, and beyond.

The undertakings and commitments towards a regional ocean governance contained in the aforesaid strategic guidance documents can be consolidated into a coherent component "annex" to UNCLOS Part IX. It can also be taken as a conscious and purposeful modern-day adaptation of the notion of collective security in regard to an appropriate role of a *de facto* or informal regional organization (i.e. ASEAN-China) in resolving maritime disputes in a maritime region; a regional maritime security concern appropriate for regional action (adapting phraseology from Chapter VIII of the Charter of the United Nations). This regional undertaking would be a more constructive alternative wisely attuned to a regional (Asian) culture and values, than the contrived and discredited recourse to a unilateral compulsory arbitration under the UNCLOS. It would also lend substance and credence to the 1976 ASEAN Treaty of Amity and Cooperation in Southeast Asia (ASEAN-TAC) subscribed to by China, and to promote adherence towards dispute resolution or conflict management elements contained therein.

There is a clear and desirable connection between the Declaration, the ASEAN-China DOC-SCS, and China's vision for a blue cooperation under the Belt and Road Initiative. The aforesaid documents impact on the South China Sea, and dwells on cooperation among the same Parties to the said separate documents in regard to ocean governance cooperation transcending any political hindrances to pursuing practical cooperation activities. The Declaration reflects multilateral engagement compatible with, and in furtherance of, the ASEAN-China DOC-SCS. The Vision for the Belt and Road Initiative on the other hand is a unilateral China undertaking for a wider and comprehensive ocean governance cooperation in support of a shared economic development and prosperity among countries along the maritime silk road. The undertakings and commitments in the aforementioned documents and the ASEAN Vision 2025 as strategic guidance documents, would be melded together for a comprehensive seamless program planning and implementation under UNCLOS Part IX.

Finally, it bears reminding at this point, what has earlier been said, that whereas the agreed initial ocean governance cooperation called for in the Declaration appears more limited than the broad scope of China's vision for cooperation under the Belt and Road Initiative, the Declaration as the primary framework instrument for pursuing ASEAN-China maritime cooperation, has a built-in provision for expansion of practical cooperation activities that can be added incrementally to the scope of cooperation for the decade 2017-2027. And this expanded envelope of activities under the Declaration could be in as many aspects of China's vision commitment under the all-embracing Vision for a Blue Partnership under the Belt and Road

Initiative. A number of existing ASEAN-China maritime cooperation arrangements, and an extensive set of separate bilateral arrangements between China and ASEAN member countries are already contained in China's vision document and therein catalogued. These bilateral arrangements which involves all ASEAN member countries except the Philippines (somehow) can be incorporated as building blocks under the Declaration, implementing UNCLOS Part IX. And good organizational models would be the EU Integrated Maritime Policy (IMP) and Arctic Council.

Maritime jurisdictional issues as perceived hindrance to ocean governance cooperation in the South China Sea

Awareness of a brewing and escalating conflict situation in the South China Sea became palpable since the mid-nineteen nineties with the so-called "Mischief Reef incident" involving China in the Spratly archipelago. The "incident" was seen as the overt and proximate cause that raised tensions in the South China Sea and generally regarded as signaling China's "assertiveness" in regard to the maritime disputes situation. It is also said that China's assertive moves in the Spratly archipelago to reconsolidate on what it considers its rightful entitlements in national territory, was further fueled by a vacuum created with the departure in 1991 of American presence in the South China Sea through their military bases in the Philippines. This was in the wake of a catastrophic volcanic eruption that destroyed physical facilities in the military bases; a natural event almost coincidental with the termination of the Military Bases Agreement (MBA) between the Philippines and the United States of America.

The Mischief Reef "incident", it may be worth noting, was not about an aggressive display of force but the setting up of a flimsy "fisherman's shelter" that when discovered, was announced by China to be made available in due time to fishermen of any nationality facing a distress situation in the South China Sea. Nevertheless, China's move in this regard was generally taken as establishing an occupation or at least a "presence" in the so-called disputed area. It is significant, however, that if it were indeed so, the excuse then relates to an ocean governance concern for fishermen and a proffered shared solution; and thus planting the seeds of an idea for collective cooperation?

The underlying cause of the conflict situation, however, was the unsatisfactory and controversial disposition, bordering on complete neglect or total indifference, at the United Nations Conference on International Organization (San Francisco, 1945) in regard to islands and other marine geological features in the South China Sea. The post-colonial and post-World War II sovereignty issues in the South China Sea thereafter remained festering and percolating. In the regional geopolitical equation, the change of government in China from the Kuomintang to the Peoples' Republic also raised regional apprehensions that translated into the so-called "Domino Theory" and triggering the frenzied free-for-all territorial grab. It should also be remembered that it was the Kuomintang Government era that first emphasized application of the 'nine-dashed line'; and Taiwan is still in possession of Itu Aba, the largest island formation in the Spratly archipelago. In other words, the present involvement of the People's Republic merely arises from governmental succession, a perspective with some significance in the context of the dispute situation as concerns China.

At the same time, awareness was also growing among countries surrounding the South China Sea that the latent conflict situation in the Spratly archipelago could hamper normal State-to-State interactions. These early apprehensions were nevertheless accompanied by a sense that the escalating conflict situation might yet be deflected, and political tensions eased, through cooperative ocean governance activities among regional States, in particular among the so-called “claimant countries”, a point that has not been lost on the Declaration and Vision. At that earlier time, China had offered a “soft” formula for peacefully resolving the conflict situation which is about “shelving” sovereignty issues among claimant countries and engaging in joint cooperation/joint development of marine resources; leaving the sovereignty issues for future generations who may have the wisdom to work out the solution.

Constructing regional ocean governance cooperation in the South China Sea in the midst of maritime jurisdictional conflicts – tentative steps/early attempts

In regard to “soft” approaches to the conflict situation, a window for a “rules-based” collective cooperation opened through the United Nations Convention on the Law of the Sea (UNCLOS) that had then recently come into force. Certain regional initiatives were undertaken addressing ocean governance matters, otherwise now referred to as non-traditional maritime security concerns, such as the **Joint Oceanographic Marine Scientific Research Expedition in the South China Sea (JOMSRE-SCS)** between Vietnam and Philippines, and a Track 2 process that was the **Informal Workshop on Managing Potential Conflicts in the South China Sea (MPC-SCS)** sponsored by Indonesia. A marine scientific research exercise open to participation among scientists from regional countries and Taiwan (see later) was conducted under the auspices of the Informal Workshop MPC-SCS. A similar marine scientific research activity is the **Exercise Luzon Sea** which was a unilateral undertaking by the Philippines open to participating scientists from other States and international organizations by invitation. It cannot be argued with certainty that these new approaches had any direct impact towards a peaceful resolution of the conflict situation, but they raised awareness about an alternative mode other than the use of coercive means or recourse to assertive moves, and promoted the idea of management of the conflict situation through a collective and cooperative ocean governance approach.

A brief description of the foregoing initiatives relating to collective and cooperative regional ocean governance in the South China Sea, follows :

- **The JOMSRE-SCS Phase I (Philippines-Vietnam)** - In 1994, Philippines and Vietnam agreed for both countries to cooperate in marine scientific research and environmental conservation and protection in the South China Sea to increase knowledge on the natural processes of the marine environment and resources. The joint exercise, originally called the **Philippines-Vietnam Joint Oceanographic Marine Scientific Research Expedition in the South China Sea (JOMSRE-SCS)** was first conceived to be a confidence-building activity between the two countries upon the mutual recognition of Governments in the wake of the Vietnam war. In 2003, it was agreed to institutionalize the bilateral JOMSRE-SCS under **UNCLOS Part IX on Enclosed and Semi-enclosed Seas**, having achieved the initial goal of confidence building. An institutionalized JOMSRE-SCS would further enhance confidence and trust between the two countries, and advance and sustain the scientific aspect of the joint

project. The JOMSRE-SCS conducted four research cruises wherein participation was expanded to include scientists from other interested States, particularly the ASEAN riparian States to the South China Sea. It was also agreed among participating scientists that the bilateral Philippines-Vietnam JOMSRE-SCS I-IV now designated as **JOMSRE-SCS Phase I**, that the southern part of the Spratly archipelago have been adequately researched and sufficient scientific data gathered, and that JOMSRE-SCS Phase I would then be concluded.

The results, conclusions, and recommendations of the four JOMSRE-SCS Phase I expeditions are found in 23 papers published in 2008 as the **Proceedings of the Conference on the Results of the Philippines-Vietnam Joint Oceanographic and Marine Scientific Research Expedition in the South China Sea (JOMSRE-SCS I-IV)**. Seven of these papers were co-authored by Philippines and Vietnam scientists, a reflection of close collaboration between the two groups of scientists. The papers deal with seven topics, namely : the nature and status of marine biodiversity in the Spratlys, plankton, water circulation, marine geology, chemical oceanography, toxic chemicals in marine species, and implications of the overall findings on management of the marine resources.

An important finding from the research expeditions was the probability of fish larval connectivity via ocean currents and their gyres between the Spratlys and western Philippines and between the Spratlys and the coast of Vietnam. One recommendation to address the observed depletion of marine biodiversity (especially fish) was for the countries surrounding the Spratly archipelago, in particular Philippines, Vietnam and China, to jointly establish marine protected areas to rebuild, maintain and sustain the biomasses of fish and other resources inasmuch as such marine sanctuaries would be beneficial to all countries surrounding the South China Sea, and beyond. What may be a politically-nuanced statement in the form of a joke among scientists, was about a needed transmutation of the South China Sea into a Marine Protected Area, rather than an area protected by the Marines – demilitarization! The unsaid but serious message may be politically **sensitive**, but the thousands of military and civilian elements present in built – up marine geological features in the South China Sea have been found to be creating serious environmental and resource depletion concerns.

JOMSRE-SCS Phase I was formally concluded with a Symposium held at Ha Long Bay in Vietnam among participating scientists to discuss the overall results of the joint exercise. Among the significant recommendations contained in the **Proceedings** along with the establishment of marine protected areas, was for the creation of a **Transborder Marine Peace Park** in the South China Sea (TBMPP-SCS) jointly with other interested States, regional or extra-regional. The participating scientists also agreed to proceed to a **JOMSRE-SCS Phase II** intended to be the next higher and enhanced level of maritime cooperation in the South China Sea together with China. (The TBMPP-SCS has not yet found implementation, but would be good project implementing the Declaration.)

- **The JOMSRE-SCS Phase II (China-Philippines-Vietnam)** - As above indicated, the participating JOMSRE-SCS scientists agreed that JOMSRE-SCS Phase I had sufficiently covered the southern part of the Spratly archipelago. It was further agreed that JOMSRE-SCS Phase II

should seek the participation of China (thus also labeled the Tripartite JOMSRE-SCS). The participation of China was necessary and inevitable as the scientists were aiming for a northward expansion of the research project as the next maritime area of scientific interest. (For example, the scientists were keen to investigate information about upwelling and downwelling phenomena in the sea area in the general vicinity of Hainan Island and the Philippine Sea.) The Governments of the Philippines and Vietnam accepted the preceding recommendation of the JOMSRE-SCS scientists and consultations with China were promptly undertaken. China readily agreed to the joint Philippines/Vietnam proposal and technical preparations commenced immediately involving scientists from the three countries primarily involved, i.e. China, Philippines and Vietnam. It was agreed to hold three preparatory meetings alternately in Manila, Guangzhou and Nha Trang.

Preparations were largely completed at the Manila and Guangzhou meetings, and the Nha Trang meeting was to be a wrap-up session. At the third and final preparatory meeting in Nha Trang, however, it was decided to hold an extra meeting in China to review the research cruise track. The JOMSRE-SCS Phase II cruise track was set among participating scientists and finalized in the two (2) preparatory meetings in Manila and Guangzhou. At the final wrap-up session in Nha Trang, however, the Philippines Track I head of delegation raised late objections and other “issues” which had political color, and insisted on a review. The additional meeting, which China offered to host, did not occur. The last minute agreement for an extra meeting was overtaken by events – the annual “window” of favorable weather conditions (monsoonal transition) for a marine scientific research cruise in the target area, had closed. The matter has not been thereafter further pursued, overtaken by a change of government Administration in the Philippines which decided to take a different attitude and dispute resolution tack in regard to the maritime disputes situation. JOMSRE-SCS Phase II has been placed in a ‘political back burner’, but it can be quickly resumed and incorporated into the ocean governance programme under the Declaration.

- **Exercise Anambas** – In March 2002, scientists from the South China Sea region, including participants from China and Taiwan conducted a major biodiversity expedition in territorial waters off the Anambas and Natuna Islands of Indonesia. The expedition was under the auspices of the **Informal Workshop on Managing Potential Conflicts in the South China Sea** mentioned earlier, and conducted entirely within the territorial jurisdictions of Indonesia. It was seen as the first of others intended to foster closer collaboration between regional scientists and managers. The two-week expedition obtained over 3000 specimens representing a large diversity of plant and animal species. Many were new records for the area, and some were also new to science. (Information sourced from a summary report of the events leading up to the expedition as well as data on the various collection sites that is available at https://www.researchgate.net/publication/311971468_Expedition_Anambas_An_Overview_of_the_Scientific_Marine_Exploration_of_the_Anambas_and_Natuna_Archipelago_11-22_March_2002.)

- **Exercise Luzon Sea Phase I (Southern Palawan)** - The **Exercise Luzon Sea** (ELS) is a marine scientific research project conducted along the western coast of the island of Palawan and entirely within the maritime territorial jurisdictions of the Philippines. In this aspect, it is a take from Exercise Anambas, albeit a purely national project. It was purposely intended and designed to complement JOMSRE-SCS as the western coastal/territorial sea (and exclusive economic zone) connection from the Philippines towards the South China Sea high seas theatre of JOMSRE-SCS. Southern Palawan was chosen for the first phase (ELS 1) to parallel the western flank of the JOMSRE-SCS cruise tracks, and thus close the coastal and territorial sea gap towards the high seas. The subsequent series in **Exercise Luzon Sea** research cruise tracks (Phase II and II-a; and Phase III and IV) were planned to proceed northwards to cover the entire western coastline and territorial sea of the Philippines, anticipating the parallel research cruise tracks under JOMSRE-SCS Phase II. This was for planning purposes, the intent has always been to eventually meld Exercise Luzon Sea and JOMSRE-SCS.

ELS I was held on 16-28 March 2004 with the same composition of scientists from Philippines and Vietnam, but including scientists from Malaysia, Thailand and Laos (scientists from China withdrew at the last minute, during the send-off ceremony for the expedition, instigated by an ASEAN non-claimant State for reasons that was not openly disclosed). International organizations **Conservation International** (CI) and **World Wildlife Fund** (WWF) were also invited and sent representatives. The results of ELS 1 were published the following year (2005), and consisted of ten (10) papers dealing with oceanography, marine resources (mangroves, seagrasses, microalgae, benthos in soft-bottom areas, corals, fish, fisheries, marine turtles and marine mammals) and coastal and marine resources management (CRM).

A significant information gathered from the abovementioned published results on ELS I that relates to ocean processes in the South China Sea, is in regard to data that . . . “ would help oceanographers, marine biologists and marine resource managers understand the oceanographic processes that link bodies of marine waters. The ELS I expedition investigated the marine connectivity between the South China Sea and the Sulu Sea, the coastal sea areas north of Palawan Island, the Mindoro Strait, the strait separating Mindoro and Palawan (and associated islands), that serves as a passageway of water from the South China Sea to the Sulu Sea. Information gathered shows that it is through this channel that marine propagules, plankton nutrients (as well as pollutants) from the South China Sea enter the Sulu Sea. The other channel through which water from the South China Sea flows to the Sulu Sea is the Balabac Strait, where the direction of surface water flow was found to be southward and southeastward. In North Balabac where there are strong tidal currents, turbulence develops which can act against water stratification, promoting a mixing of water masses. The vertical profiles of temperature in the South China Sea from Mindoro to the southern tip of Palawan indicates a good vertical mixing of water, thus favoring high primary productivity.” This is information that in the same manner is planned to be extrapolated and investigated along the entire length of the Luzon Sea to establish connectivity of the country’s archipelagic waters and its western territorial sea and coastal areas, to the South China Sea.

The results of Exercise Luzon Sea suggests that joint cooperation in ocean governance especially in the situation of the South China Sea as an enclosed/semi-enclosed sea would be more beneficial to science and overall collective and cooperative management if conducted seamlessly un mindful of jurisdictional boundaries. It is a logical and necessary sequel to JOMSRE-SCS which excluded territorial waters from its coverage. In a practical way, the results of ELS I is a validation of UNCLOS Part IX in regard to the special circumstances of enclosed and semi-enclosed seas; that ocean governance in that regard must be seamless on account of the connectivity of the waters therein and the necessity for a collaborative and collective scheme among countries bordering such seas.

The above account is merely to share a glimpse of the characteristics of the South China Sea and surrounding bodies of water that points to the appropriate governance modality as gathered from practical cooperation activities. They are sample activities that need to be catalogued and assembled towards implementing the Declaration; the said activities above can serve as among building blocks for regional ocean governance for the South China Sea, and beyond.

Another collective threat situation to the coastal and marine environment of the South China Sea necessitating cooperative solutions

The coastal and marine environment of the South China Sea also faces another collective threat situation not conceived in the Declaration but about which early provisions must already be factored into the overall regional coastal and marine environment protection scheme. This relates to pollution that can be generated from exploration and exploitation of seabed energy resources. The foregoing threat situation arises in the South China Sea under two situations, in both instances graphically illustrated in the extent of damage to the coastal and marine environment and resources in the 2010 BP oil spill in the Gulf of Mexico. These involves seabed energy exploration and exploitation in the following situations in the South China Sea:

- where the seabed energy resources are located within uncontested national maritime jurisdictions
- where the seabed energy resources are sited in areas subject of contested maritime jurisdictional claims

In both such instances above, the threat situation to coastal and marine environment is a collective interest to ASEAN-China, and therefore some early awareness and steps should already be included into the overall scheme under the Declaration.

A practical undertaking that relates to the second situation above is a joint cooperation and joint development project in the South China Sea involving marine and seabed resources; **the Joint Marine Seismic Undertaking (JMSU)**. It is a purely commercial venture between China National Offshore Oil Corporation, Vietnam Oil and Gas Corporation and Philippine National Oil Company to explore for seabed energy resources in a defined area in the South China Sea. The agreement is the first to be conceptualized and planned as a joint cooperation/development

venture in disputed waters in the South China Sea, initiated by the Philippines. The joint cooperation part i.e. survey and research on seabed energy resources, was successfully completed with promising results. Under the terms of the agreement, joint cooperation would progress to joint development (exploitation) if commercially warranted. The original JMSU agreement was first entered into between the Philippines and China on 1 September 2004. Later, on account of strong objections from Vietnam, another stakeholder claimant State in the disputed area covered in the China-Philippines agreement, a three-party agreement that includes the Vietnamese company was signed on 14 March 2005.

The first phase of the tripartite JMSU was a joint cooperation activity to conduct research on petroleum resource potential which was completed and confirmed the presence of commercially exploitable energy deposits. The JMSU, as aforesaid, was a commercial undertaking among private companies with official endorsement and support from their respective governments. The joint cooperation part of the arrangement, i.e. resources survey (seismic), carried on smoothly although the Philippines part was dogged domestically with anticipated allegations of unconstitutionality if the venture were to proceed to the exploitation phase. The joint cooperation part having been successfully completed with promising results, steps were then taken to proceed with joint development or exploitation. The exploitation phase, however, was aborted as the Philippines government was compelled to suspend participation not because of Constitutional objections, but it was sidelined on account of public suspicions of corruption on the Philippines side.

The JMSU is herein mentioned as another aspect of cooperative initiatives between interested parties in the two instances earlier mentioned, that is subject to circumstances and characteristics related to the South China Sea as an enclosed and semi-enclosed sea. As noted, a collective and cooperative ocean governance in the South China Sea is compelled by nature and the shared characteristic regional features of the South China Sea. On the other hand, another aspect that strongly promotes joint cooperation/development has to do with the exploitation of seabed resources including energy, on account of jurisdictional disputes or straddling seabed energy resources. The point here is that in the South China Sea, a culture of cooperation among bordering States is dictated by nature, economics, or politics. Any of these instances could engender threats to the coastal and marine environment. While any such joint cooperation/joint development practical cooperation activities in the South China Sea must be encouraged for the sake of regional maritime peace and good order, the other facet in regard to coastal and marine environmental protection must not be overlooked as an ASEAN-China concern under the Declaration. [The JMSU may have been inspired from a joint cooperation undertaking between China National Offshore Oil Corporation (CNOOC) and Taiwan's Chinese Petroleum Corporation (CPC) with official sanction from both parties, to explore for energy resources in the Chaosan block located in the northern part of the South China Sea. This development is significant on account of the Parties involved, and conveys a message pointing to joint cooperation/

development modality that would overcome political issues. (See “Landmark Taiwan-China oil exploration pact inked,” Manila Bulletin, 17 May 2002, B-18.)]

Implementing the Declaration : Back to the Future on a clean slate

A “second wind” opportunity constructing an UNCLOS-based regional collective and cooperative ocean governance regime for the South China Sea can start with a clean slate devoid of extraneous geopolitical/strategic notions introduced into the conflict situation by extra-regional Powers. There are two factors as recently and successively happening events and both involving the United States of America, the leading world maritime Power and non-Party to the UNCLOS, that clears the table and can facilitate a restart. These are :

➤ In regard to an artificial and politicized non-issue of a supposedly strategic concern i.e. Freedom of Navigation, injected late into the regional conflict scenario by extraneous Powers. At the recent APEC Summit in Danang and the ASEAN and Related Summits in Manila, President Donald Trump emphatically qualified the time-honored principle of Freedom of Navigation as applicable to trading ships and not just to State and military vessels. The principle had never been violated in the South China Sea in any way and at any time during the running dispute situation; it is *fake news*, to use contemporary language. The new Trump freedom of navigation doctrine, however, presents a timely opportunity for regional States to revisit the principle and define it in terms appropriate and suited to the South China Sea maritime region – that ocean governance trumps freedom of navigation. Ocean governance is a *jus cogens* that is the very rationale of the UNCLOS that qualifies the exercise of the right of freedom of navigation, for the protection of coastal and marine environment. (Compelling readings: (1) Statement of Rudiger Wolfrum as President of the International Tribunal for the Law of the Sea (ITLOS) entitled “**Freedom of Navigation : New Challenges**” (https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/freedom_navigation_080108_eng.pdf) and (2) “**The Truth About US Freedom of Navigation Patrols in the South China Sea**” by Shannon Tiezzi (<http://thediplomat.com/2015/09/the-truth-about-us-freedom-of-navigation-patrols-in-the-south-china-sea/>).) Clear guidelines under the Declaration in regard to the exercise of freedom of navigation, aside from being a protective mechanism in the interest of coastal and marine environment, can be a defining factor in implementing the 1971 ASEAN Declaration on the Zone of Peace, Freedom, and Neutrality .

➤ In regard to the ruling of the Permanent Court of Arbitration at The Hague (The Hague PCA) handed down a year and a half ago. President Trump had “set aside” the ruling wherein the Philippines won an “overwhelming” victory and which former U.S. Secretary of State Madeleine Albright characterized as already a “permanent part of international law”. At the APEC Summit in Danang and later during the ASEAN and Related Summits in Manila, President Trump offered to personally arbitrate on the conflicting maritime claims in the South China Sea, and thus effectively setting aside the PCA ruling. There can be no other interpretation or explanation for the Trump statement, for otherwise how is it possible for the President of the

United States of America to arbitrate on an issue that has already been settled by a rules-based compulsory arbitration and actively encouraged and supported all the way by the Government of the United States of America? And knowing that arbitration is a “non-starter” with China? It is a complete about turn and repudiation of The Hague PCA ruling. Significantly, a year and a half after The Hague PCA ruling, nothing has changed on the *status quo* on the ground nor in clarifying the situation; whether on the facts or the law. The Hague PCA ruling is all “water under the bridge” and thus an occasion for a fresh start for the region towards a collective and cooperative ocean governance transcending the maritime jurisdictional disputes situation. And innocent passage carries on freely and unabated.

While it may not be necessary for ASEAN-China to make clarificatory points on the above issues, it is nevertheless necessary to make a clear, directly or ASEAN-China position relevant to implementing the Declaration to remove any cloud or controversy; to clear the air, so to say.

It is emphasized that when extraneous or extra-regional Powers are herein mentioned, it is in regard to activities related to geopolitical positioning and not to their presence for commerce and trading. Their presence in the region is important and helps create economic vitality as evidenced by vessels flying the flags of all nations carrying more than fifty percent of world trade through the South China Sea. Foreign presence is welcome but involvement is needed in regard to ocean governance particularly for coastal and marine environmental protection. Shipping is considered a human activity that is an ever present threat to the coastal and marine environment. The Torrey Canyon, Exxon Valdez, Prestige II (and the Gulf of Mexico) incidents are among the more destructive examples that are magnified no end in the very tight and sensitive coastal quarters of the South China Sea and the larger maritime region that are interconnected enclosed and semi-enclosed seas. The basic proposition is that, as ocean governance cooperation increases in the South China Sea, maritime disputes especially those that generate political tension would expectedly decrease, facilitating trade and development and regional economic and political integration.

Extra-regional countries, especially those with interests in trade and shipping, are stakeholders in regional ocean governance in the South China Sea as “other interested States” under UNCLOS Part IX. These “other interested States” must pursue and strengthen ocean governance cooperation with regional countries, for their own interests. This is especially true for those with dialogue relations with the ASEAN such as ASEAN-Japan, ASEAN-ROK, ASEAN-India, ASEAN-Australia, ASEAN-New Zealand, ASEAN-EU, ASEAN-US and ASEAN-Canada. The ASEAN Dialogue Partners must separately and respectively highlight the ocean governance agenda in their Dialogue relations as a two-way proposition of mutual benefit to facilitate trade and commerce. Leading maritime countries if they may, can give a focused priority on transfer of knowledge and technology under the UNCLOS **Final Act at Annex VI - Resolution on Development of National Marine Science, Technology and Ocean Service Infrastructure**, which can be incorporated into the suggested ASEAN-China Plan of Action. The UNCLOS at Parts XII and XIII provides for general obligations among States Parties in regard to assistance and cooperation

in capacity building and marine scientific research and environmental protection, which can be tapped in furtherance of cooperation under the Declaration.

Conclusion : An ASEAN-China Action Plan - implementing the **Declaration** and **Vision**

As can be seen, there is a clear early inclination and direction among countries bordering the South China Sea to undertake joint and cooperative activities related to ocean governance. And this despite the disputes situation prevailing in the maritime region, or probably because of it. In other words, countries bordering the South China Sea, especially the so-called claimant countries, have impliedly accepted “shelving sovereignty issues” and pursuing joint cooperation/development, the Deng Xiao Ping formula. After a six-year blip, an opportunity for a restart on collective regional ocean governance cooperation may be presenting itself at this time; going back to the future and starting on a clean slate through the Declaration and a modernized fleshed-out version of the Deng Xiao Ping formula i.e. the ocean governance **Vision** of China in connection with its Belt and Road Initiative.

The combined legal and scientific framework for a formalized collective and cooperative regional undertaking are already provided for in the UNCLOS 1982, the ASEAN-China Declaration on Coastal and Marine Environmental Protection and the ASEAN-China Declaration on Conduct of Parties in the South China Sea; and a development compass provided under ASEAN Vision 2025 and China’s Vision on the Belt and Road Initiative. These framework documents under ASEAN-China need coherence towards constructing an ASEAN-China **Plan of Action** that is strong on commitment in regard to collective and collaborative ocean governance cooperation. This action plan could well overtake the elusive “binding and enforceable” Code of Conduct, altogether making it superfluous and unnecessary. And needless to say, it can culminate in a durable seamless and comprehensive regional ocean governance regime establishing maritime connectivity essential to economic/political integration supportive of AEC 2015. China’s Vision for the Belt and Road Initiative which have been accorded favorable reception from ASEAN member countries, and shown above to be premised on practical cooperation activities that in some aspects have already been demonstrated among certain regional countries more than a decade earlier, may yet be the motivation to galvanize a collective regional political will towards the ocean governance proposition.

In regard to coastal and marine environmental protection, a “starter package” would be as indicated in the Declaration, a prioritized program to address IUU fishing and fisheries conservation, Integrated Coastal Zone Management (ICZM), and transborder marine pollution; a development cluster that straddles the three pillars of AEC 2015 and further defined in many parts under ASEAN Vision 2025. A jump-off activity can take up from the JOMSRE-SCS Phase II and Exercise Luzon Sea left off and as a combined activity on marine scientific research and biodiversity conservation. Catching up with the times through the adoption of a comprehensive and seamless ocean governance system appropriate for the South China Sea maritime region, and beyond, through which passes more than half of the world’s commercial vessel traffic, the “starter package” must already assign prudent attention and concern to Vulnerable Marine

Ecosystems (VMEs) and areas where activities that may have Significant Adverse Impacts (SAIs) are avoided and considered in charting trade sea lanes to mitigate such impacts, alongside the development of mechanisms for further management of renewable marine resources. In essence, an enhanced regional equivalent of the IMO's Associated Protective Measures for ships.

As suggested above, constructing a regional ocean governance regime for the South China Sea, and beyond, would start with the Declaration. A first step towards initiating the implementation of the Declaration would be to develop an **ASEAN-China Plan of Action** under the ASEAN-China Dialogue that issued the Declaration. A draft Plan of Action may be formulated by an ASEAN-China Permanent Working Group (PWG) proceeding from work done through an informal workshop composed of ASEAN-China scientists and experts from invited "other interested States" and "relevant international organizations" (and relevant non-governmental organizations) that can later serve as a "spectrum of resources" for the actual drafting, development and negotiations, in a shadow format patterned after UNCLOS Article 123. The informal drafting process for an Action Plan can be ready with a negotiating draft in time for presentation to the next ASEAN-China Dialogue Forum or in a special meeting of the Dialogue Forum for that specific purpose, whichever may come earlier in time. This might seem a tall order but time is already of the essence. The beginning year of the decade 2017-2027 is already past, and that leaves just nine years to go.

The lead shepherd for this informal workshop ought to be assigned to the Philippines which takes over as country coordinator for the ASEAN-China Dialogue in August 2018, and having had the experience with JOMSRE-SCS and Exercise Luzon Sea. Moreover, the decade 2017-2027 ends with the next Philippines hosting of the ASEAN and other Related Summits, ASEAN 60, which should occasion a review conference of the ASEAN-China decade on coastal and marine environment protection, for purposes of progressively moving forward.

In the South China Sea, on all counts and by all accounts, it is ocean governance, the very essence of the Declaration and the aspirations among the Parties, that should remain the central focus for future cooperation.

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08 December 2017