Recent Development of the South China Sea Dispute and Prospects of Joint Development Regime

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PANEL 2: LEGAL CONTEXT OF JOINT DEVELOPMENT IN THE SOUTH CHINA SEA:
LEGAL FRAMEWORK, KEY ISSUES AND CASE STUDIES

Legal Framework for Joint Development in the South China Sea

Robert Beckman

Director, Centre for International Law, Singapore

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INTRODUCTION

The features in the South China Sea, especially those in the Spratly Islands, have been a source of tension and potential conflict in the region for many years. Some or all of the features in the Spratly Islands are claimed by Brunei Darussalam, China, Malaysia, the Philippines, Vietnam and Taiwan.

It is generally assumed that given the number of claimants and the sensitivity of the disputes on sovereignty over the islands, it will not be possible for the claimants to resolve the disputes through negotiation for the foreseeable future. Further, it is assumed that the claimants will not be willing to agree to refer the sovereignty disputes to an arbitral or judicial tribunal.

Since the 1980s it has been suggested that the best way to diffuse tension in the Spratly Islands is to set aside the sovereignty disputes and jointly develop the resources in and under the waters surrounding the Islands. Deng Xiaoping, the late paramount leader of China, promoted the principle of 'setting aside disputes and pursuing joint development'. This concept was first openly advanced by Deng on 11 May 1979 in relation to China's dispute with Japan over Diaoyu (Senkaku) Islands.[1] He stated that consideration may be given to joint development of the resources adjacent to Diaoyu Islands without touching upon its territorial sovereignty.[2]

When China entered into diplomatic relations with Southeast Asian countries in the 1970s and 1980s, Deng Xiaoping made the same proposal for resolving disputes over the Nansha (Spratly) Islands, stating:

> The Nansha Islands have been an integral part of China's territory since the ancient times. But disputes have occurred over the islands since the 1970s. Considering the fact that China has good relations with the countries concerned, we would like to set aside this issue now and explore later a solution acceptable to both sides. We should avoid military conflict over this and should pursue an approach of joint development.[3]

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1 'Set Aside Dispute and Pursue Joint Development', 17 November 2000, available online at the Ministry of Foreign Affairs of the People's Republic of China Website: <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm> (accessed 16 November 2012).

2 *Ibid.*

3 *Ibid.*

China and ASEAN have also taken steps which could lead to setting aside the sovereignty and maritime boundary disputes and jointly developing the resources. The 2002 Declaration on the Conduct of Parties in the South China Sea (2002 DOC) was adopted by the Foreign Ministers of ASEAN and the People's Republic of China at the 8th ASEAN Summit in Phnom Penh on 4 November 2002.[4] The 2002 DOC contains provisions on the following: (a) peaceful resolution of the territorial and jurisdictional disputes; (b) self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability; (c) confidence-building measures; and (d) cooperative activities.

In 2011 China and ASEAN agreed on Guidelines for the implementation of the 2002 DOC.[5] Despite this, little discussion has taken place on setting aside the disputes and jointly developing the resources in the disputed areas.

UNCLOS AS A LEGAL BASIS FOR JOINT DEVELOPMENT ARRANGEMENTS

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[6] establishes a legal framework to govern all uses of the oceans. UNCLOS was adopted in 1982 after nine years of negotiations. It entered into force in November 1994 and has been almost universally accepted. The States making claims to sovereignty over all or some of the islands in the South China Sea – Brunei, China, Malaysia, Philippines and Viet Nam - are all parties to UNCLOS.[7] Taiwan is not able to ratify UNCLOS because it is not recognized as a State by the United Nations, but it has taken steps to bring its domestic legislation into conformity with UNCLOS.[8]

[4] 2002 Declaration on the Conduct of Parties in the South China Sea signed at the 8th ASEAN Summit on 4 November 2002 in Phnom Penh, Cambodia by the Foreign Ministers of ASEAN and the People's Republic of China available online at the CIL Documents Database: <http://cil.nus.edu.sg/2002/2002-declaration-on-the-conduct-of-parties-in-the-south-china-sea-signed-on-4-november-2002-in-phnom-penh-cambodia-by-the-foreign-ministers/>; and <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> (accessed 16 November 2012).

[5] See <http://biengioilanhtho.gov.vn/eng/TempFiles/Guidelines%20on%20the%20implementation%20of%20the%20DOC.pdf> (accessed 16 November 2012).

[6] 1833 UNTS 397, adopted in Montego Bay, Jamaica, on 10 December 1982, entered into force on 16 November 1994. As of 12 November 2012, there are 164 Parties, including the European Union.

[7] The dates of ratification of the five claimant States are: Brunei Darussalam, 5 November 1996; China, 7 June 1996, Malaysia, 14 October 1996, Philippines, 8 May 1984, and Viet Nam, 25 July 1994. UN Treaties Collection, Status of Treaties available at <http://treaties.un.org/> (accessed 16 November 2012).

[8] For the action taken by Taiwan to pass legislation claiming maritime zones as provided in UNCLOS, as well as a comparison of the positions of China and Taiwan, see Yann-Huei Song and Zou Keyuan, 'Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States', 31 *Ocean Development and International Law* (2000), 303-345, 310-312.

UNCLOS has no provisions on how to resolve sovereignty disputes over offshore features. However, it does have provisions on maritime boundary delimitation. The UNCLOS provisions on the delimitation of the exclusive economic zone (EEZ) and continental shelf boundaries assume that it will not always be possible to negotiate any boundary agreements in overlapping claim areas because of sovereignty disputes or other historical reasons.

UNCLOS provisions on maritime boundary delimitation

The UNCLOS provisions on boundary delimitation purport to provide a solution to the fact that it may be extremely difficult for States to reach agreements in areas of overlapping EEZ and continental shelf claims. This solution is found in paragraph 3 of Articles 74 and 83, which provide that if delimitation cannot be effected by agreement:

> [T]he States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

This provision is designed to 'promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation' and 'constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area.'[9]

Obligations regarding 'provisional arrangements of a practical nature'

The use of the word 'provisional' implies that the arrangements are interim measures pending the final delimitation of maritime boundaries.[10] It is commonly observed that the use of the term 'arrangements' implies that the arrangement can include both informal documents such as *Notes Verbale,* Exchange of Notes, Agreed Minutes, Memorandum of Understanding etc[11] as well as more formal agreements, such as treaties.[12] With regards to the meaning of 'practical nature', the article

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[9] *Guyana v Suriname*, Award of the Arbitral Tribunal, 17 September 2007 at 153, para 460, available at <http://www.pca-cpa.org/showpage.asp?pag_id=1147> (accessed 16 November 2012).

[10] Ranier Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *American Journal of International Law* 345 at 356.

[11] Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Netherlands: Martinus Nijhoff Publishers, 2004) at 47. Kim notes that 'some States may prefer MOUs to formal agreements for provisional arrangements because these have some advantages in several aspects: no need to publish them as these are not treaties: no need for elaborate final clauses or the formalities surrounding treaty-making: easy amendment; and no need to be submitted for an approval of the parliament.' See also Lagoni, *supra* note 10 at 358.

[12] See Kim, *ibid*.

itself does not give much guidance, but has been interpreted to mean that such arrangements 'are to provide practical solutions to actual problems regarding the use of an area and are not to touch upon either the delimitation issue itself or the territorial questions underlying this issue.'[13]

It is clear that there are two aspects to the obligation in Articles 74(3) and 83(3). First, States concerned shall make every effort to enter into provisional arrangements of a practical nature. Second, States, in good faith, shall make every effort not to jeopardize or hamper the reaching of the final delimitation agreement.

The obligation of States to make every effort to enter into provisional arrangements of a practical nature has been succinctly summarized by scholars, based on judicial precedents such as the *North Sea Continental Shelf Cases*:

> The states concerned are obliged to "enter into negotiations with a view to arriving at an agreement" to establish provisional arrangements of a practical nature and… "not merely to go through a formal process of negotiation." The negotiations are to be "meaningful, which will not be the case when either [state] insists upon its own position without contemplating any modification of it." However, the obligation to negotiate does not imply an obligation to reach agreement…[14]

This view was endorsed in the 2007 arbitration between Guyana and Suriname by an Arbitral Tribunal constituted under Annex VII of UNCLOS.[15] While it was acknowledged that the language 'every effort' leaves 'some room for interpretation by the States concerned, or by any dispute settlement body,' it imposes on the Parties 'a duty to negotiate in good faith.' This requires the parties to take 'a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement.'[16] Further, the obligation to negotiate in good faith 'is not merely a nonbinding recommendation or encouragement but a mandatory rule whose breach would represent a violation of international law.'[17]

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[13] Lagoni, *supra* note 10 at 358.

[14] Lagoni, *ibid* at 356.

[15] See note 9.

[16] *Guyana v Suriname*, *supra* note 9, at 153, para 461.

[17] Lagoni, *supra* note 10 at 354.

However, it is clear that States are under no obligation to enter into any provisional arrangement but must only 'make every effort' to negotiate in good faith. Articles 74(3) and 83(3) also leave States with significant discretion as to the type of provisional measures which should be taken.[18]

The obligation to negotiate in good faith appears to include an obligation to consult with each other if they intend to carry out unilateral activities in the disputed area and to continue to negotiate even after such unilateral activities take place. In the *Guyana v Suriname* Arbitration, it was found that the Parties had breached their obligation to negotiate provisional arrangements of a practical nature pending maritime delimitation of their territorial sea, EEZ and continental shelf boundary. This stemmed from an incident in 2000 where an oil rig and drill ship engaged in seismic testing under a Guyanese concession was ordered to leave the disputed area by two Surinamese vessels. It was found that Guyana had violated its obligation under Article 83(3) as it should have, in a spirit of co-operation, informed Suriname of its exploratory plans, given Suriname official and detailed notice of the planned activities, offered to share the results of the exploration, given Suriname an opportunity to observe the activities, and offered to share all the financial benefits received from the exploratory activities.[19] Similarly, the Tribunal found that when Suriname became aware of Guyana's exploratory efforts in disputed waters, 'instead of attempting to engage it in a dialogue which may have led to a satisfactory solution for both Parties, Suriname resorted to self-help in threatening the oil rig and drill ship in violation of [UNCLOS].'[20]

The second part of the obligation provides that during this transitional period States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. It is said that a court or tribunal's interpretation of this obligation must reflect the delicate balance between preventing unilateral activities that affect the other party's rights in a permanent manner but at the same time, not stifling the parties' ability to pursue economic development in a disputed area during a time-consuming boundary dispute.[21]

International courts and tribunals have found that 'any activity which represents an irreparable prejudice to the final delimitation agreement'[22] is a breach of this obligation and that 'a distinction is therefore to be made between activities of the kind that lead to a permanent physical change, such as

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[18] Natalie Klein, 'Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes' (2006) 21 (4) *International Journal of Marine and Coastal Law* 423 at 466.

[19] *Guyana v Suriname*, *supra* note 9 at para 477.

[20] *Guyana v Suriname*, *ibid* at para 476.

[21] *Guyana v Suriname*, *ibid* at para 470.

[22] Lagoni, *supra* note 10 at 366.

exploitation of oil and gas reserves, and those that do not, such as seismic exploration.'[23] For example, in the *Guyana v Suriname* Arbitration it was found that allowing exploratory drilling in disputed waters was a breach of the obligation to make every effort not to hamper or jeopardize the reaching of a final agreement as this could result in a physical change to the marine environment and engender a 'perceived change to the status quo.'[24] This was in contrast to seismic testing, which did not cause a physical change to the marine environment.

Notably, it was also found that Suriname's actions in using the threat of force in getting the Guyana-licensed vessel to leave was not only a breach of its obligation not to jeopardize the final agreement, but also a breach of its obligation not to use force under UNCLOS, the UN Charter and general international law.[25]

Provisional arrangements are 'without prejudice' to the final delimitation of boundaries

The key aspect of provisional arrangements of a practical nature is that they are 'without prejudice' to the final delimitation. The effect of such a feature is that:[26]

- Nothing in the arrangement can be interpreted as a unilateral renunciation of the claim of either party or as mutual recognition of either party's claim;
- The arrangement itself does not create any legal basis for either party to claim title over the area and its resources;
- The States concerned cannot claim any acquired rights from the interim arrangement;
- Final delimitation does not have to take into account either any such preceding arrangement or any activities undertaken pursuant to such arrangement.

Essentially, parties are preserving their claims either to sovereignty over disputed territory or to sovereign rights over the waters surrounding such territory, and at the same time, shelving the sovereignty disputes and the final boundary delimitation.[27]

It is debatable whether it is necessary to have an express 'without prejudice clause' in a provisional arrangement because there is a general 'without prejudice clause' in the final sentence of Articles 74(3) and 83(3). Arguably, 'simply referring to the provisions of Articles 74(3) and 83(3) in

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[23] *Guyana v Suriname*, *supra* note 9 at para 467.

[24] *Guyana v Suriname*, *ibid* at para 480.

[25] *Guyana v Suriname*, *ibid* at para 445.

[26] As succinctly summarized by Dr Gao Zhiguo in Gao Zhiguo, 'Legal Aspects of Joint Development in International Law', in M. Kusuma-Atmadja, TA Mensah, BH Oxman (eds), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda* 21 (Honolulu, Law of the Sea Institute, 1997), 625 at 639.

[27] Hazel Fox et al, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*, (Great Britain: British Institute of International and Comparative Law, 1989) at 378.

an arrangement would be sufficient for preserving the positions of each party on final delimitation, if the parties to the arrangement are also parties to the LOS Convention.'[28] However, it is of course preferable in terms of legal certainty to have an express 'without prejudice clause'. The 'without prejudice' clause in the 1959 Antarctic Treaty is a good example of a 'without prejudice' clause:

> 1. Nothing contained in the present Treaty shall be interpreted as:
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> a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
>
> b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
>
> c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.
>
> 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

The area to which provisional arrangements apply

Articles 74(3) and 83(4) do not specify the area to which the provisional arrangements apply, although some suggestions and proposals raised during the negotiations of UNCLOS contained references to specific geographical lines or areas.[29] Ranier Lagoni opines that the obligation to negotiate provisional arrangements has a geographical connotation:

> In accordance with the above-mentioned object and purpose of paragraph 3, the obligation applies only to those areas about which the governments hold opposing views. These views must be expressed formally, for example by declarations, or may be implied, for example through protests filed against the acts of other states or foreign nationals, by acts of the national legislator, or by the granting of licenses and concessions.[30]

Types of provisional arrangements

As discussed above, Articles 74(3) and 83(3) do not mandate the type of provisional arrangements States can enter into, but leave it to the discretion of the States concerned. State practice shows that provisional arrangements can include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas, joint development or cooperation on

[28] Kim, *supra* note 11 at 53.

[29] Lagoni, *supra* note 10 at 356.

[30] Lagoni, *ibid.*

fisheries, joint development of hydrocarbon resources, agreements on environmental cooperation, and agreements on allocation of criminal and civil jurisdiction. The next section will explore one type of provisional arrangement, namely, the joint development of hydrocarbon resources.

PROVISIONAL ARRANGEMENTS INVOLVING JOINT DEVELOPMENT IN THE SPRATLY ISLANDS

Arguably, the claimant States have an obligation under Articles 74(3) and 83(4) of UNCLOS to make every effort to negotiate, in good faith, provisional arrangements of a practical nature. The claimant States also have an obligation not to undertake unilateral activities which would irreparably damage resources or the interests of other claimants. Such obligations would apply even though negotiations on maritime delimitation have not begun and even though the overlapping claim area has not been defined due to the lack of clarity in both the sovereignty and maritime zone claims of the claimant States.[31]

One type of provisional arrangement which could be agreed upon in the South China Sea is the joint development of hydrocarbon resources and fisheries resources.

Rationale for joint development in the South China Sea

There are good reasons why the claimants should make an effort to enter into joint development arrangements in the South China Sea. First, there is unlikely to be a resolution of the sovereignty disputes and maritime delimitation disputes in the immediate or near future.

Second, there are considerable economic incentives for claimants to enter in joint development arrangements. Admittedly, the exact amount of hydrocarbon resources in the South China Sea is unknown and may not be as much as estimated in some accounts. However, the cost of oil is rising and coupled with shortage in supply, the claimants will want to and may need to exploit every resource possible. The claimants will face considerable difficulties in exploiting any oil in areas which are subject to competing claims, particularly if the exploration and exploitation is done in areas near the disputed features.

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[31] As mentioned above, Ranier Lagoni observed that the obligations in Article 74(3) and 83(3) may arise in 'exceptional situations if no definite claim can be asserted because the principles of delimitation are at issue, or if the delimitation is contingent on the resolution of a dispute over sovereignty of an island. See Lagoni, *supra* note 10 at 357.

Third, joint development arrangements in the South China Sea have the potential to reduce tension and facilitate cooperation between claimants. The disputes relating to the Spratly Islands have been a major irritant which spills over to other aspects of bilateral and multilateral relations.

Identifying the area subject to joint development arrangements

One practical obstacle to any joint development arrangements being negotiated in the South China Sea is that there will have be agreement on the geographic area or areas which will be subject to joint development and in which claimants will participate in the joint development arrangements.

The Philippines and Vietnam have maintained that certain areas of their EEZs are not in dispute because they are close to the coast of their mainland territory or main archipelago and far from any of the disputed islands. Their position is that joint development arrangements must be limited to those maritime areas which are in dispute.

It will be difficult to agree on the areas in dispute and subject to joint development in the Spratly Islands unless agreement can be reached on the status of the geographic features and the maritime zones to which such features are entitled. There is no agreement on which features in the Spratly Islands are ‘islands’ entitled to maritime zones of their own because they are naturally formed areas of land above water at high tide as set out in Article 121(1) of UNCLOS. Scholars have estimated that less than one-third of the features in the Spratly Islands are naturally formed areas of land above water at high tide. Furthermore, many of the features which do meet the definition of island in Article 121(1) are very tiny and might be classified as ‘rocks’ which cannot sustain human habitation or economic life of their own as provided in Article 121(3) of UNCLOS. If so, such features would not be entitled to an EEZ or continental shelf of their own, but only a 12 nm territorial sea.

Uncertainty as to the status of the features and the maritime zones they generate could be a serious obstacle to the claimants reaching agreement on the areas in dispute which are subject to joint development. The Philippines maintains that Reed Bank is not an area in dispute because it is a submerged bank which is part of its continental shelf and which is outside the maritime zone that can be measured from any disputed island. Its position seems to be that the disputed features near Reed Bank either do not meet the definition of an island in Article 121 or, if they are islands, they are rocks within Article 121(3) which are not entitled to an EEZ or continental shelf of their own. Therefore, its position is that the Reed Bank area is not an area in dispute and is not be subject to joint development.

Currently, the only areas which are clearly 'in dispute' in the Spratly Island are the features which are islands because they are naturally formed areas of land above water at high tide, and the 12 nm territorial sea adjacent to such islands.

One approach to reaching agreement on the area in dispute in the Spratly Islands is to determine the status of every geographic feature and the maritime zones to which they are entitled. However, this is likely to be exceedingly difficult to negotiate because the claimants are likely to take positions on the features that favour their national interest. One possible way this could be done is for the claimants to agree to have a neutral third party conduct a study on the status of the various features. However, it would still be difficult to reach agreement because of the ambiguity of the definition of a rock in Article 121(3).

A more fruitful way to reach agreement on the area for joint development arrangements might be for the claimants concerned to enter into serious negotiations to try to reach agreement on the area for joint development. Discussions could begin by focussing on the area where most of the larger islands are located, which is in the northern part of the Kalayaan Island Group (KIG) claimed by the Philippines. All of these islands are claimed by China, the Philippines, Vietnam and Taiwan, and all of the larger features in this area are occupied by one of those claimants. Therefore, the islands and the 12 nm territorial waters adjacent to them are areas in dispute. In addition, some of these islands are arguably large enough to be entitled to an EEZ of their own, at least in principle. Therefore, the claimants concerned may be able to agree that the maritime zones measured from these disputed islands will overlap with the EEZ claims and extended continental shelf claims of the ASEAN claimants. This area of overlap could be the agreed area in dispute. Vietnam and the Philippines may be amendable to such an approach as it would exclude areas close to their mainland coasts. Such an approach would also be advantageous to China as it could be done without any reference to the nine-dashed line map.

A more cautious approach might be to first attempt to negotiate joint development arrangements in the areas where there are only two claimants. It might be possible for China and the Philippines to agree on a joint development area surrounding Scarborough Shoal. It might also be possible for China and Vietnam to agree on a joint development area in the Gulf of Tonkin, especially since they have been able to negotiate part of the maritime boundary in this area.[32]

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[32] 2000 Agreement between the Vietnam and China on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves of the Two Countries in the Beibu Gulf / Bac Bo Gulf . Article VII 'If any single petroleum or natural gas structure or field, or other mineral deposit of whatever character, extends

RECOMMENDATIONS FOR MOVING FORWARD ON JOINT DEVELOPMENT

On 16-17 June 2011 the Centre for International Law (CIL) at the National University of Singapore organized a Conference on Joint Development and the South China Sea. The Conference brought together international legal experts on joint development, representatives from the oil and gas industry and government officials from the region to examine the law and policy issues relating to the joint development of oil and gas resources in areas of overlapping claims in the South China Sea.

The Report of the Conference makes several recommendations for moving toward joint development in the South China Sea.[33] Although these recommendations are focused on the Spratly Islands, many of them would be equally applicable to the other areas in dispute in the South China Sea. These recommendations will be summarized below.

1. Encourage Claimants to Clarify Claims in Conformity with UNCLOS

At present, there is a significant lack of clarity on the basis, nature and extent of the maritime claims surrounding the Spratly features. It is not clear what maritime zones, if any, are being claimed from the Spratly features by the various claimants. The ASEAN claimants, at least for now, appear to be treating the Spratly features as either 'rocks' only entitled to a 12 nm territorial sea or low-tide elevations not entitled to any maritime zone, but they have not expressly stated this.

China's claim from the Spratlys remains ambiguous. While it has recently confirmed that it believes the Spratly Islands are entitled to a territorial sea, EEZ and continental shelf, its 9-dashed line map surrounding the Spratly Islands and covering a large part of the waters of the South China continues to raise suspicions that China is claiming 'historic rights' to explore and exploit the natural resources inside the 9-dashed line.

Clarification of the claims would help the claimants move towards joint development in two ways. First, it would be a step toward clarifying the areas which could be subject to joint development. Until agreement can be reached on which marine spaces in the South China Sea are in

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across the delimitation line defined in Article II of this Agreement, the two Contracting Parties shall, through friendly consultations, reach agreement as to the manner in which the structure, field or deposit will be most effectively exploited as well as on the equitable sharing of the benefits arising from such exploitation' available at <http://biengioilanhtho.gov.vn/eng/TempFiles/Bac%20Bo%20Gulf%20Agreement.pdf> (accessed 16 November 2012).

[33] The Conference Report for the CIL Conference on Joint Development and the South China Sea is available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/Report-of-CIL-Conference-on-Joint-Development-and-the-South-China-Sea-2011-04.08.2011.pdf> (accessed 22 November 2012).

dispute and subject to joint development, and which marine areas are not in dispute and not subject to joint development, it will be impossible to begin discussions on joint development.

Second, a clarification of the claims would foster an atmosphere of trust and confidence which is necessary for joint development. Once the 9-dashed line is clarified and the prospect of claims based on historic rights is put to rest, the necessary trust and confidence to pursue joint development will be present.

2. Increase Knowledge of Features in the Spratly Islands

The number and nature of the features in the Spratlys remain shrouded in mystery. While there are accounts of physical descriptions of some of the features made by geographers and academics they are not up to date and also are not consistent with each other. The lack of definitive information on the number and nature of the features contributes to the uncertainty and lack of clarity of the claims made by the claimants. It also makes it difficult to identify disputed areas in which joint development can take place. Therefore, there should be further research on the features in the Spratly Islands.

3. Increase Knowledge of Hydrocarbon Resources through Joint Seismic Surveys

While the Spratlys are often referred to as 'oil rich', estimates of hydrocarbon resources differ widely and there is an absence of reliable publicly available data regarding hydrocarbon reserves. Actual knowledge of hydrocarbon resources will enable the claimants to know where the hydrocarbons are and hence, assist in identifying areas that could be suitable for joint development.

Joint seismic surveys between some or all the claimants conducted on a 'without prejudice' basis in areas which are clearly in dispute would be a tremendous step towards joint development. The Parties to the joint seismic survey should be the claimants that have bona fide claims made in good faith to the area in which the survey will be taking place. It should also involve all claimants which have claims in that area so as to avoid protests and persistent challenges. The agreement for the joint seismic survey should have robust 'without prejudice' clauses to allay concerns of States and their national populations.

4. Implement the 2002 ASEAN-China Declaration on Code of Conduct in the South China Sea

The 2002 ASEAN-China Declaration on the Code of Conduct in the South China Sea (DOC) was an important milestone as it set down a series of conflict avoidance mechanisms, such as mutual

restraint and co-operative activities designed to build confidence between parties. The co-operative activities which the Parties are encouraged to undertake are marine environmental protection, marine scientific research, safety of navigation and communication at sea; search and rescue operations and combating transnational crime. These are arguably less controversial than joint development of hydrocarbon resources and hence, may be easier to reach agreement on. Small incremental steps such as these will help foster the good will and trust necessary for discussions on joint development.

5. *Enhance Understanding on Nature and Importance of Joint Development Arrangements*

There appears to be a lack of understanding in some countries on the nature of joint development arrangements, particularly that joint development can be done without compromising the sovereignty claims of the claimants. Seminars, workshops and meetings can be organized by think tanks and research institutes on a Track 2 basis so as to enhance understanding of joint development arrangements. Given the role of the media in fanning the flames of nationalism, some of the sessions should include members of the media.

6. *Better Management of Domestic Politics and Nationalistic Rhetoric*

The Spratly Islands have become potent symbols of nationalism for the populations of the claimants. Accordingly, the public often perceives its government as weak if it fails to aggressively assert its claims over the Spratlys. This makes it difficult for the claimants to make reasonable compromises in negotiations without being accused of surrendering its sovereignty. This is a major obstacle to any joint development agreement in the South China Sea (and any peaceful settlement of the disputes for that matter).

Accordingly, the governments of the claimants and the media have a significant role to play in managing domestic politics and nationalist rhetoric associated with the Spratlys. First, governments and the media can refrain from stoking national sentiments when incidents occur which are perceived as a threat to national sovereignty. Second, the governments can avoid taking extreme positions which are difficult to back down from. Third, the governments can educate the public on the benefits and importance of joint development and the fact that it does not involve a surrender of sovereignty. Last, the governments should be as transparent as possible or at the very least, give the appearance of transparency, in any negotiations relating to joint development.

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7. *Greater Discussion on Appropriate Institutional Framework for Discussion and Negotiations*

There is a lack of agreement on the appropriate institutional framework for discussion and negotiations on joint development. There appears to be a lack of agreement between claimants on the forum where such issues should be discussed and on who should be included in the discussions. The confusion on the proper forum is exacerbated by China's insistence that sovereignty disputes and competing claims be discussed bilaterally between individual claimants and by the actions of some ASEAN claimants to organize conferences and workshops which appear to be intended to internationalize the issues. There also seems to be some confusion on the role of ASEAN in the Spratly disputes.

ASEAN can provide a forum for discussion between the claimants without it becoming a dispute between the ASEAN claimants and China. In fact, there is little likelihood that ASEAN will have a common position since the non-claimant members view the issues differently than the claimants. Once the claims of all of the claimants States have been clarified, all of the claimants should be able to agree that there are areas in the EEZs of the ASEAN claimant States which are not in dispute and which are not subject to joint development. While it may be difficult to reach a formal agreement clarifying the areas not in dispute, such a consensus can be achieved by State practice. For example, if the Philippines licences a company to do a seismic survey in an area of its EEZ and none of the other claimants protest when the survey is done, they will have impliedly agreed that the area in question is solely within the EEZ of the Philippines.

8. *Involve the Oil Companies in the Discussions*

Oil companies (both state-owned and privately owned) have a significant role to play in facilitating joint development in the South China Sea. They are the contractors who will ultimately be carrying out exploration and exploitation and will be required to provide considerable capital input. They have the potential to exert influence on States to enter into a joint development arrangement in order to ensure political and legal certainty for their investment.

A more indirect way for oil companies to facilitate joint development is through education and dialogue with the claimants on the benefits of joint development and on technical matters related to joint development (such as licensing regimes, petroleum laws, safety of installations etc). This would not only enhance understanding on joint development but would also improve the lines of communication between the claimants and oil companies.

9. Do Research on Joint Development Regimes Suitable for the South China Sea

While examining common provisions in existing joint development arrangements in Asia was useful in setting out the issues and considerations that need to be addressed in any joint development arrangement, it also demonstrated that each situation is unique and the terms of any joint development agreement will depend on the needs and circumstances of the States at the time. Accordingly, it would greatly move joint development forward if more research was done on joint development regimes that would be suitable specifically for the South China Sea.

If the claimants were to actually see *how* and/or *on what terms* joint development can be done in real terms (as opposed to the abstract way joint development has been discussed to date), it would significantly increase the chances of them coming to an agreement on joint development. While the joint development regime put forward would not bind the claimants in any manner, it would provide an excellent starting-point for negotiations.

CONCLUSIONS

The sovereignty disputes in the Spratly Islands are intractable and are unlikely to be resolved in the foreseeable future. Another extremely difficult problem is the status of the features in the Spratly Islands and the maritime zones those features can generate. Given these obstacles it is unlikely that the States concerned will be able to reach agreement on the maritime boundaries in the Spratly Islands.

Nevertheless, the claimant States have obligations under UNCLOS to make every effort to enter into provisional arrangements of a practical nature pending final agreement on the boundaries. Furthermore, until the sovereignty and boundary issues are finally resolved, the claimants have an obligation not to take any measures in the areas of overlapping claims that would jeopardize or hamper the reaching of a final agreement on the boundaries. The provisional arrangements of a practical nature include the cooperative measures called for in the 2002 China-ASEAN Declaration of Conduct. More importantly, they include the measure called for by the late Deng Xiaoping of ‘setting aside disputes and pursuing joint development.’

It is in the interests of all of the claimants to begin discussion on provisional arrangements of a practical nature concerning joint development of the resources in the Spratly Islands. Such arrangements would be without prejudice to the sovereignty claims or the final determination of the

maritime boundaries. They would be in the common economic interests of the claimants and would further mutual trust and confidence in the region.

One major obstacle to agreement of provisional arrangements concerning joint development in the Spratly Islands is the lack of consensus on the precise geographic areas which would be subject to joint development. This problem is exacerbated by the fact that the claimants have fundamental differences over the appropriate forum for addressing these issues. China argues for bilateral negotiations and the ASEAN claimants argue for negotiations between China and ASEAN.

There may be a 'middle way' of going forward to define the areas in dispute. As stated earlier, the area which seems to be the most obvious candidate for joint development is centred in the KIG group where the largest islands (with the exception of Taiwan-occupied Itu Aba) are claimed and occupied by China, the Philippines and Vietnam. If those three claimants could begin serious discussions on defining the areas in dispute, it would be a major step forward. If the focus of the negotiations was to reach a consensus on the area of overlapping claims surrounding the larger islands, and define it as the area in dispute which is subject to joint development by the three States (and possibly Taiwan), it would go a long way toward finding an amicable solution. An advantage to such an approach is that it would enable the parties to completely avoid discussing the nine-dashed line map or China's right to undertake activities in certain areas in the EEZ of the other two claimants.

Another approach would be to first attempt to negotiate joint development arrangements in the areas where there are only two claimants. It might be possible for China and the Philippines to agree on a joint development area surrounding Scarborough Shoal. It might also be possible for China and Vietnam to agree on a joint development area in the Gulf of Tonkin, especially since they have been able to negotiate part of the maritime boundary in this area.

If the claimant States are able to generate the necessary political will to take the steps required to move toward joint development, it will be a major step in managing potential conflicts in the region.

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