

PROSPECT FOR JOINT DEVELOPMENT IN THE SOUTH CHINA SEA

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I. INTRODUCTION

When the Exclusive Economic Zone (EEZ) regime was established by the Third United Nations Conference of the Law of the Sea,¹ it placed 87 per cent of the world's known offshore hydrocarbon fields under coastal State jurisdiction.² This prompted coastal States to maximize their maritime zones claims, which in turn has resulted in various overlapping claims.

In areas with multiple claimants, such as the South China Sea, it may be difficult for the parties to resolve the disputes through negotiation, especially if sovereignty disputes are also involved. Sovereignty disputes over features in the South China Sea are governed by customary international law pertaining to the acquisition of territory as articulated by international courts and tribunals. Sovereignty disputes cannot be subjected to third party dispute settlement without the consent of the disputing parties. Given the national sensitivities associated with sovereignty disputes in the South China Sea, this is unlikely to occur. Hence it is generally agreed that the most viable interim solution for managing the disputes in the South China Sea is for the claimants to set aside the sovereignty disputes and jointly develop the natural resources. Such arrangements can take the form of provisional arrangements of a practical nature, as called for in Articles 74 and 83 of 1982 United Nations Convention of the Law of the Sea (UNCLOS).³

Before serious negotiations can begin on joint development arrangements, the States concerned must agree on the area or areas in dispute which will be subject to joint development arrangements. This is difficult in the South China Sea because China has not clarified the basis of its claim to maritime space and the areas of overlapping claims are therefore uncertain. The areas in dispute are also not clear because there is no consensus on the status of the disputed insular features – whether they are islands entitled to an EEZ and continental shelf of their own, whether they are rocks entitled only to a territorial sea, or whether they are low-tide elevations entitled to no maritime zones of their own at all. It is, therefore, essential that the claimants reach a consensus on the areas of overlap between the EEZ claimed by States from their mainland coast or main archipelago and the maritime zones measured from disputed islands.

II. PROVISIONAL ARRANGEMENTS OF A PRACTICAL NATURE

Unless the fundamental and intractable disagreements on sovereignty over the islands can be resolved, it will not be possible to negotiate any boundary agreements in the South China Sea. UNCLOS makes provision for the fact that it may be extremely difficult for States to reach

¹ The conference held its first session in 1973, and worked for several months each year until a convention was finally adopted in 1982.

² United Nations, *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, online: <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm>.

³ *United Nations Convention on the Law of the Sea*, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994) [UNCLOS]. As of 19 February 2013, UNCLOS have 165 parties (including the European Union), with Timor Leste acceded to the Convention on 8 January 2013.

agreements in areas of overlapping EEZ and continental shelf claims; and it purports to provide a temporary solution to this situation in paragraph 3 of Articles 74 and 83. These interim solutions included a provisional interim median line boundary,⁴ as well as a moratorium on resource exploitation pending final delimitation and an obligation that States concerned make ‘provisional arrangements’ in the interim.⁵ It provides that if delimitation cannot be effected by agreement 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.⁶

There are two aspects to the obligation under Articles 74(3) and 83(3) of UNCLOS. First, States should make every effort to enter into provisional arrangements of a practical nature. This imposes on parties a ‘duty to negotiate in good faith’⁷ and to take ‘a conciliatory approach to negotiations in which they would be prepared to make concessions in the pursuit of a provisional arrangement’.⁸ The obligation of States to make every effort to enter into provisional arrangements of a practical nature has been succinctly summarized by scholars:

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...⁹

This view was endorsed in the 2007 arbitration between Guyana and Suriname by an Arbitral Tribunal constituted under Annex VII of UNCLOS.¹⁰ The Tribunal also stated that 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’.¹¹

⁴ For a description of the negotiating history of UNCLOS, see generally, Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Netherlands: Martinus Nijhoff Publishers, 2004), at 32–7.

⁵ Sun Pyo Kim, *ibid*, at 34.

⁶ UNCLOS, *supra* note 3, Articles 74(3) and (83(3); *Guyana/Suriname Arbitration*, UN Law of the Sea Annex VII Arb Trib, award on 17 September 2007, at para 461, online: Permanent Court of Arbitration <<http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>>; see also Ranier Lagoni, ‘Interim Measures Pending Maritime Delimitation Agreements’ (1984) 78 AJIL 345, at 358.

⁷ *Guyana/Suriname Arbitration*, *ibid*, at para 460.

⁸ *Guyana/Suriname Arbitration*, *supra* note 6, at paras 471–478.

⁹ Lagoni, *supra* note 6, at 356.

¹⁰ *Guyana/Suriname Arbitration*, *supra* note 6.

¹¹ Lagoni, *supra* note 6, at 354.

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.¹² International courts and tribunals have found that 'any activity which represents an irreparable prejudice to the final delimitation agreement'¹³ is a breach of this obligation and that 'a distinction is to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration'.¹⁴

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.¹⁵ Provisional arrangements can include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas,¹⁶ joint development or cooperation on fisheries,¹⁷ joint development of hydrocarbon resources,¹⁸ agreements on environmental cooperation¹⁹ and agreements on allocation of criminal and civil jurisdiction.²⁰ The term 'arrangements' implies that the arrangement can include both informal documents such as Notes Verbales, Exchange of Notes, Agreed Minutes, or Memorandum of Understanding (MoU); as well as more formal agreements, such as treaties.²¹ With regards to the meaning of 'practical nature', the article itself does not give much guidance, but has been interpreted to mean that such arrangements 'are to provide

¹² *Guyana/Suriname Arbitration*, *supra* note 6, at para 470.

¹³ Lagoni, *supra* note 6, at 366.

¹⁴ *Guyana/Suriname Arbitration*, *supra* note 6, at para 467.

¹⁵ Natalie Klein, 'Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes' (2006) 21 Int'l J Mar & Coast L 423, at 444; see also Sun Pyo Kim, *supra* note 4, at 94.

¹⁶ *Maritime Delimitation Treaty between Jamaica and the Republic of Colombia*, 12 November 1993, Article 3, online: UN <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/JAM-COL1993MD.PDF>>.

¹⁷ *Agreement on Fisheries between the Republic of Korea and the People's Republic of China*, 3 August 2000 (entered into force 30 June 2001), reprinted in Sun Pyo Kim, *supra* note 4, at 347.

¹⁸ *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources in the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, 21 February 1979 (entered into force 24 October 1979), reprinted in David M Ong, 'Thailand/Malaysia: The Joint Development Agreement 1990' (1990) 6:1 Int'l J Mar & Coast L 57, at 61.

¹⁹ *Agreement between the Government of Jamaica and the Government of the Republic of Cuba on the Delimitation of the Maritime Boundary Between the Two States*, 18 February 1994, Article 5, reprinted in 34 *Law of the Sea Bulletin*, Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, at 64.

²⁰ *Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority*, 30 May 1990.

²¹ Sun Pyo Kim, *supra* note 4, 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 Ranier Lagoni, *supra* note 6.

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'.²²

A. Joint Development Arrangements as a 'Provisional Arrangement of a Practical Nature'

The concept of joint development of hydrocarbon resources appears to have emerged in the 1950s.²³ However, despite considerable state practice since then, there is no common or uniform definition of joint development of hydrocarbon resources.²⁴ It is usually used as a 'generic term'²⁵ and extends from *unitization* of a single resource straddling an international boundary to joint development of a shared resource where boundary delimitation is shelved because it is not feasible or possible to reach an agreed boundary at the time.

There is no doubt that joint development arrangements are a type of 'provisional arrangement of a practical nature' and that their legal basis stems from Articles 74(3) and 83(3) of UNCLOS. International courts and tribunals have also endorsed joint development agreements as an alternative to maritime delimitation.²⁶ In his dissenting opinion in the 1982 continental shelf delimitation case between *Tunisia and Libya*, Judge *ad hoc* Evensen proposed a system of joint exploration of petroleum resources based on his view that joint development represented an alternative equitable solution to the maritime boundary dispute which was eventually adopted by the parties.²⁷ In the *Eritrea/Yemen Arbitration*, the arbitral tribunal stated that the parties should give every consideration to the shared or joint or unitized exploitation of any such resources.²⁸

There has been considerable doctrinal debate on whether there exists an obligation to enter into joint development arrangements.²⁹ However, while joint development arrangements are a useful mechanism, it appears clear that States do not have a specific duty to enter into joint development arrangements in areas of overlapping claims. First, there is no international convention which specifies this obligation. Articles 74(3) and 83(3) provide merely an obligation to negotiate in good faith. Article 123 provides that States bordering an enclosed or semi-enclosed sea should co-operate with each other, but it imposes no 'specific and legally

²² Lagoni, *supra* note 6, at 358.

²³ 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 54.

²⁴ Thomas Mensah, 'Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation' in Ranier Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (The Netherlands: Martinus Nijhoff Publishers, 2006) 143–53, at 146. For example, Mensah states that 'some scholars seek to distinguish between, on the one hand, 'unitization of shared resources' which they describe as an arrangement under which 'a single resource straddling an international boundary is developed subsequent to agreement without reference to such boundary' and on the other, joint development properly so called which they define as 'a regime under which the entire boundary dispute is set aside, thus creating an ambient development of political cooperation from the outset'.

²⁵ Fox et al, *supra* note 23, at 43.

²⁶ *Guyana/Suriname Arbitration*, *supra* note 6, at para 463; *North Sea Continental Shelf Sea Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 ICJ 4, at para 99.

²⁷ Ong, *supra* note 18, at 787.

²⁸ *The Government of the State of Eritrea v The Government of the Republic of Yemen* (1999), 119 ILR at 417, (1999), Award Of the Arbitral Tribunal in The Second Stage of the Proceedings (Maritime Delimitation), online: PCA-CPA <http://www.pca-cpa.org/showpage.asp?pag_id=1160>.

²⁹ For a summary of the two opposing schools of thought, see Chidinma Bernadine Okafor, 'Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?' (2006) 21(4) Int'l J. Mar. & Coast. L. at 506–9.

enforceable' obligation on these States.³⁰ Also, the call for co-operation in the does not include the joint development of hydrocarbon resources.³¹

Second, there is no customary international law obligation to enter into joint development agreements. While there is arguably widespread State practice on joint development in many areas of the world, it does not appear to be constant or uniform. Nor does it appear to be a result of the fact that States believe they are under a legal obligation to enter into such agreements.³²

The lack of customary status of joint development as solution to maritime boundary disputes under international law, however, does not necessarily indicate a legal void in this issue.³³ There is a strong argument to be made that States have a general obligation to cooperate in the exploitation of shared natural resources, even if the normative content of this rule is yet to be determined.³⁴ Indeed, cooperation to manage and exploit shared marine resources may be a better solution in settling overlapping maritime claims rather than waiting for an agreement designed to divide the maritime space from painstakingly long negotiation process.³⁵

B. Setting Aside the Disputes and Jointly Developing the Resources

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'.³⁶ 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. He stated that:

The Nansha Islands have been an integral part of China's territory since the ancient times. But disputes have occurred over the islands in 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.³⁷

China and ASEAN have also taken steps which could have led 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

³⁰ Ong, *supra* note 18, at 781.

³¹ Ong, *supra* note 18, at 782.

³² Ian Townsend-Gault and William Stormont, 'Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?' in Gerald Blake, *et al* (eds), *The Peaceful Management of Transboundary Resources* (Great Britain: Graham & Trotman Ltd and Kluwer Publishers Group, 1995), at 53.

³³ David M Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?' (1999) 93(4) AJIL 771, at 792.

³⁴ David M Ong, *ibid.*

³⁵ Douglas M Johnston, *The Theory and History of Ocean Boundary Making* (McGill Queens University Printing, 1988), at 227-29.

³⁶ 'Set Aside Dispute and Pursue Joint Development', 17 November 2000, online: Ministry of Foreign Affairs of the People's Republic of China <<http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm>>.

³⁷ Ministry of Foreign Affairs of the People's Republic of China, *supra* note 36.

Ministers of ASEAN and the People's Republic of China at the 8th ASEAN Summit in Phnom Penh on 4 November 2002.³⁸ The 2002 DOC contains provisions on the following: (1) peaceful resolution of the territorial and jurisdictional disputes; (2) self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability; (3) confidence-building measures; and (4) cooperative activities.³⁹ In 2011, China and ASEAN agreed on Guidelines for the implementation of the 2002 DOC.⁴⁰ Despite of this, little discussion has taken place on setting aside the disputes and jointly developing the resources in the disputed areas.⁴¹

C. Defining Areas for Joint Development

One practical obstacle to any joint development arrangements being negotiated in the South China Sea is that there will have to be an agreement on the geographic area or areas which will be subject to joint arrangements. The Philippines and Viet Nam have maintained that joint development arrangements must be limited to those maritime areas which are in dispute.⁴² It will be difficult to agree on the areas subject to joint development in the South China Sea unless agreement can be reached on the status of the geographic features and the maritime zones to which such features are entitled. Uncertainty as to the status of the features and the maritime zones they generate is a serious obstacle to the claimants reaching agreement on the areas subject to joint development.

Currently, the only areas which are clearly 'in dispute' in the South China Sea are the features which are islands because they are naturally formed areas of land above water at high tide, and the territorial sea adjacent to such islands. One approach to reaching any agreement on the areas in dispute in the Spratly Islands would be to determine the status of every geographic

³⁸ 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, online: 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/>>.

³⁹ 2002 Declaration on the Conduct of Parties in the South China Sea, *ibid.*

⁴⁰ 2011 Guidelines for the Implementation of the 2002 Declaration on the Conduct of Parties in the South China Sea, online: <<http://biengioilanhtho.gov.vn/eng/TempFiles/Guidelines%20on%20the%20implementation%20of%20the%20DOC.pdf>>.

⁴¹ Indonesia has produced a 'Zero Draft' of a COC with provisions for confidence-building, conflict prevention and conflict management based on the 2002 DOC and the 'elements' of a COC agreed by ASEAN in July 2012, see: Mark J Valencia, *Navigating Differences: What the 'Zero Draft' Code of Conduct for the South China Sea Says (and Doesn't Say)*, (Global Asia, March 2013), online: <http://www.globalasia.org/V8N1_Spring_2013/Navigating_Differences_What_the_Zero_Draft_Code_of_Conduct_for_the_South_China_Sea_Says_and_Doesn_t_Say.html>.

⁴² Albert F Del Rosario, 'Philippine Policy Response and Action' (Forum on 'The Spratly Islands Issue: Perspective and Policy Responses', delivered at the Department of Political Science, Ateneo De Manila University, 5 August 2011) online: Philippines Department of Foreign Affairs <<http://dfa.gov.ph/main/index.php/newsroom/dfa-releases/3531--philippine-policy-response-and-action-by-the-hon-albert-f-del-rosario-secretary-of-foreign-affairs>>; Viet Nam Ministry of Foreign Affairs, Spokesperson's Statement, 'Press Conference on Chinese maritime surveillance vessel's cutting exploration cable of Petro Viet Nam Seismic Vessel' (29 May 2011) online: <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110530220030/view#1W4QVp9GHQ4R>.

feature and the maritime zones to which it is entitled.⁴³ Nevertheless, reaching an agreement on which of the islands are rocks entitled only to a territorial sea is likely to be exceedingly difficult because the claimants are likely to take positions on the features which favour their national interest. One possible way this could be done, other than waiting for the ruling of the arbitral tribunal on the definition of a rock in Article 121(3), is for the claimants to agree to have a neutral third party do a study on the status of the various features, or to set aside the dispute completely and agree to jointly develop the resources.

III. CONCLUSION

Overall, joint development arrangements potentially offer a highly attractive option to circumvent disputes and proceed with development activities in broad maritime areas subject to competing claims. Joint development does not address the underlying territorial and maritime jurisdictional disputes, nonetheless it offers several advantages. In particular, entering into a joint development arrangement as a ‘provisional arrangement of a practical nature’ is an accepted legal option, warranted under UNCLOS and recognized by international courts and tribunals as an equitable solution to overlapping maritime claims. Such joint mechanisms also enable utilization of resources in disputed areas and at the same time, are without prejudice to existing claims.

While there are various issues which need to be overcome before discussions on joint development can take place, as explained above, a critical issue is *where* joint development should take place. The potential for offshore hydrocarbon resources in an area of overlapping claims may make negotiating maritime boundary difficult, and an agreement to exploit the area jointly may be the better and sensible solution. It is very rare, however, to have an actual knowledge about offshore hydrocarbon resources in these overlapping claims areas, since the lack of agreed boundaries makes it difficult to conduct even seismic work to explore and confirm the existence of these hydrocarbon resources. However, once an area has been agreed upon, it is likely that the other contentious issues that need to be negotiated in a joint development agreement will be much easier to agree upon. Thus, understanding and recognising the overlapping claims is the important first step in considering joint development.⁴⁴

It is also important to remember that entering into a joint development arrangement is the second best option to having a defined maritime boundary, well below the preferred option of retaining the *exclusive* right to exploit the resources. Thus, it is natural that all parties to the joint development arrangement wish to maintain their respective legal positions.⁴⁵ Joint development arrangements as provisional arrangements of a practical nature are ‘without prejudice to the final delimitation’.⁴⁶ The use of the word ‘provisional’ implies that the arrangements are interim

⁴³ See Robert Beckman, *et al*, *Conference Report*, Conference on Joint Development and the South China Sea Organized by the Centre for International Law, 16 – 17 June 2011, online: <<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>>.

⁴⁴ Gavin Maclaren and Rebecca James, ‘Negotiating Joint Development Agreements’, in Beckman, *et al*, eds, *Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing, 2013).

⁴⁵ David Anderson, *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff Publishers, 2008), at 495.

⁴⁶ UNCLOS, *supra* note 3, Articles 74(3) and (83(3); *Guyana/Suriname Arbitration*, *supra* note 6; see also Ranier Lagoni, *supra* note 6, at 358.

measures pending the final delimitation of maritime boundaries.⁴⁷ This means that nothing in the arrangement can be deemed as a renunciation of the claim of any party to sovereignty over the features or sovereign rights in the surrounding waters. Also, the provisional arrangement does not constitute an explicit or implicit acknowledgement of the legitimacy of the claim of any other party.⁴⁸

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⁴⁷ Lagoni, *supra* note 6, at 356.

⁴⁸ See for example *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989 [1991] ATS 9, Article 2(3), (entered into force 9 February 1991); generally, see also Gao Zhiguo, 'Legal Aspects of Joint Development in International Law,' in M Kusuma-Atmadja, TA Mensah and BH Oxman (eds), *Sustainable Development and the Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21, Proceedings of the Law of the Sea Institute's Twenty-Ninth Annual Conference, Denpasar, Bali, Indonesia, 19–22 June 1995* (Honolulu, Hawaii: The Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, Honolulu, 1997), at 639.