PROSPECT FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES IN THE SOUTH CHINA SEA

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In areas with multiple claimants, such as the South China Sea, it may be difficult for the claimants to resolve disputes through negotiation, especially if disputes over sovereignty over territory are also involved. The law that applies to sovereignty disputes is customary international law pertaining to the acquisition of territory as articulated by international courts and tribunals. Sovereignty disputes can only be subjected to third party dispute settlement through the consent of the disputing parties. Given the national sensitivities associated with sovereignty disputes in the South China Sea, it is unlikely that the disputes will be resolved in the near future through third party dispute settlement. It is generally agreed that the most viable interim solution 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).[1]

I. Joint Development as a Provisional Arrangement of a Practical Nature

UNCLOS makes provision for the fact that it may be extremely difficult for States to reach agreements on maritime delimitation 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.[2] Articles 74(3) and 83(3) 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.[3]

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1 *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.

2 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.

3 UNCLOS, 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.

There are two aspects to the obligation contained in Articles 74(3) and 83(3). 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'[4] and to take 'a conciliatory approach to negotiations in which they would be prepared to make concessions in the pursuit of a provisional arrangement'.[5] 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'; but the obligation to negotiate does not imply an obligation to reach agreement.[6] This view was endorsed in the 2007 arbitration between Guyana and Suriname by an Arbitral Tribunal constituted under Annex VII of UNCLOS.[7] 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'.[8]

The second part of the obligation provides that during this transitional period States should not 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 process of boundary dispute resolution.[9] International courts and tribunals have found that 'any activity which represents an irreparable prejudice to the final delimitation agreement'[10] 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'.[11]

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.[12] With regards to the meaning of 'practical nature', the articles themselves do not give much guidance, but have 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]

Although the concept of joint development of hydrocarbon resources appears to have emerged in the 1950s,[14] there is no common or uniform definition of joint development of hydrocarbon resources,[15] despite considerable State practice since then. The term 'joint

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[4] *Guyana/Suriname Arbitration*, *ibid*, at para 460.

[5] *Guyana/Suriname Arbitration*, *supra* note 3, at paras 471-478.

[6] Lagoni, *supra* note 3, at 356.

[7] *Guyana/Suriname Arbitration*, *supra* note 3.

[8] Lagoni, *supra* note 3, at 354.

[9] *Guyana/Suriname Arbitration*, *supra* note 3, at para 470.

[10] Lagoni, *supra* note 3, at 366.

[11] *Guyana/Suriname Arbitration*, *supra* note 3, at para 467.

[12] 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 2, at 94.

[13] Lagoni, *supra* note 3, at 358.

[14] 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.

[15] 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

development' is usually used as a 'generic term'[16] 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.[17]

There has been considerable doctrinal debate on whether there exists an obligation to enter into joint development arrangements.[18] 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) of UNCLOS merely provide 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 enforceable' obligation on these States.[19] Furthermore, the call for co-operation in the does not include the joint development of hydrocarbon resources.[20]

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, the practices adopted do not appear to be constant or uniform. Nor does this practice appear to occur as a result of the fact that States believe they are under a legal obligation to enter into such agreements.[21]

However, although the status of joint development as a solution for maritime boundary disputes has not reached the level of customary international law, this does not necessarily indicate that a legal void exists in relation to this issue.[22] There is a strong argument to be made

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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'.

[16] Fox et al, *supra* note 14, at 43.

[17] In his dissenting opinion in the 1982 case between *Tunisia and Libya*, Judge *ad hoc* Evensen proposed a system of joint exploration of petroleum resources since it represented an alternative equitable solution to the maritime boundary dispute which was eventually adopted by the parties, see Ong, *supra* note **Error! Bookmark not defined.**, at 787; In the *Eritrea/Yemen Arbitration*, the tribunal stated that the parties should give every consideration to the shared or joint or unitized exploitation of any such resources, see *The Government of the State of Eritrea v The Government of the Republic of Yemen* (1999), 119 ILR at 417, 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; see also *Guyana/Suriname Arbitration*, *supra* note 3, 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.

[18] 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.

[19] Ong, *supra* note **Error! Bookmark not defined.**, at 781.

[20] Ong, *supra* note **Error! Bookmark not defined.**, at 782.

[21] 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.

[22] 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.

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.[23] Indeed, cooperating to manage and exploit shared marine resources may be a preferable solution in settling overlapping maritime claims than waiting for an agreement designed to divide the maritime space from painstakingly long negotiation process.[24]

II. Political Will of the Claimants

Two conditions are necessary before there can be serious discussions on joint development arrangements. First, joint development arrangements tend to be concluded in periods where good relations existed amongst the relevant parties. Second, the parties must have the political will to make decisions which may be met with opposition within their countries. Therefore, steps must first be taken to build confidence and trust among the claimants, to reinforce the underlying rationale for joint development and to articulate the advantages of pursuing this option to as wide an audience as possible.

On this basis, the political will that is crucial to pursue discussions on joint development may be more readily engendered. Past examples of joint development arrangements were ultimately concluded because the States had the political will to pursue this option. This political will needs to be sufficient to withstand domestic politics and changes in government. Of course, political will is an ambiguous concept and can be attributed to a number of factors, such as the presence of resources, and the existence of good relations between the claimants. However, it also highlights the importance of ensuring that joint development arrangements are drafted to withstand political changes. Exploration for and development of oil and gas resources commonly have a timetable measured in decades. Joint agreements for this purpose therefore have to provide for continuity and stability far beyond the likely tenure of the governments that enter into the particular joint arrangement. A robust joint regime and relationship is required if resource development is to be achieved over the long term.

Public perception of a joint development arrangement plays a significant role in facilitating both the conclusion of such mechanisms and their successful implementation. In many of the arrangements under discussion, media portrayal and subsequent public reaction were significant factors contributing to the success of negotiations and/or implementation of the arrangement. Unfortunately the reverse is also true and negative public perceptions of a potential joint development arrangement can have adverse implications for their conclusion and implementation.

The South China Sea disputes have become potent symbols of nationalism for the nationals of the claimant States. Accordingly, these nationals often perceive their governments to be weak if they fail to aggressively assert claims over the South China Sea. For example, while the international community perceives China to be aggressively advancing its claims in the South China Sea, the Chinese people, particularly the netizens, often criticize their government for not adequately asserting its position.[25]

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[23] Ong, *ibid*.

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

[25] International Crisis Group, 'Stirring up the South China Sea (I)', Asia Report No 223 (23 April 2012), at 26–27, online: International Crisis Group, http://www.crisisgroup.org/en/regions/asia/north-east-asia/china.aspx.

There is a natural tendency for governments to take actions and make decisions based on prevailing domestic politics or sentiments. This is a dangerous course to follow, as not only does it further inflame national sentiments and emotions, but it makes it more difficult for the claimants to make reasonable compromises in international negotiations without being accused of surrendering the State's 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 should make a serious effort to manage domestic politics and tone down nationalist rhetoric associated with the claims to the South China Sea. First, governments and the media should refrain from stoking national sentiments when incidents occur which are perceived as a threat to national sovereignty. Second, the governments should avoid taking extreme positions from which it is difficult to back down. 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.

III. Joint Development Arrangements Adopted "Without Prejudice"

There is a general lack of understanding on the nature of joint development arrangements. Many officials from claimant States do not appear to understand that they can enter into joint development arrangements without compromising their sovereignty or maritime boundary claims and without acknowledging or accepting the legitimacy of the claims of the other parties.

The key advantage of joint development is that it enables parties to utilize the resources while at the same time preserving their sovereignty or maritime claims. However, some officials or groups associated with the claimants are under the misconception that joint development arrangements will either compromise their sovereignty claims or be perceived as recognizing the legitimacy of the claims of the other claimants. Similarly, there is also a lack of understanding on, or perhaps a refusal to acknowledge, the importance of co-operation with regard to shared interests and/or shared resources.

One of the ways in which such understanding can be enhanced is to organise seminars, workshops and other such meetings where such issues can be discussed and concerns raised. Such events can be organised by think tanks and research institutes on a 'Track Two' basis so as to encourage free and frank discussion. Given the role of the media in fanning the flames of nationalism, some of the sessions should include members of the media, provided of course, that the media does not sensationalize the issues under discussion.

IV. Defining Areas for Joint Development

A critical prelude to engaging in serious discussions on joint development arrangements is agreement on the specific geographic areas which might be subject to such arrangements. For many joint development arrangements, the area of joint development reflects the area of overlapping EEZ or continental shelf claims. However, this issue is much more complicated in the South China Sea. At present, there is no clearly defined overlapping claim area which could be the joint development zone in a joint development arrangement and there is no agreement between the claimants as to what areas are in dispute.

A. Encourage Claimants to Clarify Claims in accordance with UNCLOS

One of the major factors conducive to joint development is the fact that the States involved had, in good faith, made defined maritime claims that had some legal basis under international law. At present, there is a significant lack of clarity on the basis, nature and extent of the maritime claims in the South China Sea. It is therefore desirable that all claimants in the South China Sea disputes should clarify what it is that they are claiming and provide a legal basis for their claims.

First, the claimants who are claiming a 200 nm EEZ from their mainland coast (or from their main archipelago in the case of the Philippines) should, if they have not already done so, give official notice of the outer limit of their EEZ by publishing charts or lists of geographic coordinates, as required by UNCLOS. In addition, if they have measured their 12 nm territorial sea and 200 nm EEZ from straight baselines along their coast, they should, if they have not already done so, give official notice of such baselines by publishing charts or lists of geographic coordinates, as required by UNCLOS.[26]

Second, the claimants should identify the names and locations of islands over which they claim sovereignty. This is important because States can only claim sovereignty over off-shore features which meet the definition of an island, as islands are land territory that generates an entitlement to a territorial sea and other maritime zones pursuant to UNCLOS. An island is defined as 'a naturally formed area of land, surrounded by water, which is above water at high tide'. Most of the geographic features in the South China Sea are reefs, shoals, cays or low-tide elevations which are not above water at high tide. One academic study concluded that less than 25 per cent of the approximately 170 geographic features in the Spratly Islands meet the definition of an island.[27]

Third, if the claimant States believe that any of the islands they claim are entitled to an EEZ and continental shelf of their own, they should identify such islands and give notice of the EEZ claim from them by publishing official charts or lists of geographic coordinates of the limits of such claims, as required by UNCLOS. This is important because most of the islands in the South China Sea are tiny, uninhabitable rocks. Under UNCLOS, 'rocks which cannot sustain human habitation or economic life of their own' are not entitled to an EEZ or continental shelf.[28]

Notwithstanding this clarification, issues would remain on the status of the various features under UNCLOS and on how many of the features, if any, would be entitled to an EEZ and continental shelf of their own. Nevertheless, such a clarification would be a major step toward reaching a consensus among the claimants on which areas in the South China Sea are in dispute and potentially subject to joint development arrangements, and which areas are not in dispute. Even if such a process would necessarily highlight differences and disputes among the claimants, nevertheless, it would enhance clarity and arguably contribute to the creation of an atmosphere of trust.

Apart from clarification on the features in the South China Sea, China should also clarify what exactly the nine-dashed line means, that is, whether it is a claim to historical waters or historical rights or simply a line indicating the islands over which China has a sovereignty claim. At the current time, the exercise by China of rights and jurisdiction within the nine-dashed line, in areas far away from any of the features over which it claims sovereignty, puts China on a legal collision course with the ASEAN claimants as they believe that such a claim is not consistent

[26] UNCLOS, Art 16.

[27] For further details on the geographical description of the features in the Spratly Islands, see David Hancox and Victor Prescott, 'A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst those Islands', (1995) 1:6 *IBRU Maritime Briefings* 1.

[28] UNCLOS, Art 121(3).

with UNCLOS or general international law. This also makes it much more difficult to reach any consensus on the 'areas in dispute' which would be the subject of joint development arrangements, as the practical result would be that most of the South China Sea would be an area in dispute. It is highly likely that the clarification of the claims made in the South China Sea will, at the very least, increase the trust and confidence between claimants and provide a solid foundation for negotiations on joint development arrangements to proceed.

B. Areas for Joint Development versus 'Areas in Dispute'

While clarifying the claims will significantly contribute to determining areas in dispute, this may not occur for a long time. The question is whether the claimants would be able to negotiate 'areas for joint development' without identifying the areas in dispute.

If the status quo remains and the claimants, particularly China, do not clarify their claims such that it is not possible to identify an 'area in dispute', it may nonetheless still be possible for the claimants to reach agreement on the areas for joint development. Indeed, it is theoretically possible for the claimants to agree on areas for joint development without addressing the merits of the claims of China or of the other claimants. After all, the late Deng Xiaoping of China proposed that the claimants set aside the disputes and jointly develop the resources.[29] Therefore, it would be possible for the claimants to agree on areas for joint development which represented a compromise between China and the other claimants, without either side having to back down from their claims.

However, there may be challenges to face in identifying areas for joint development without definitively determining 'areas in dispute'. Some of the claimants may well be resistant to such an approach. For example, the position of the Philippines has been that joint development or joint co-operation must be limited to the 'areas in dispute'.[30] The Philippines' position seems to be that claims to maritime space can only be made by making claims to maritime zones from land territory or islands as set out in UNCLOS, and they challenge the legitimacy of any claim by China based on historic rights or sovereign rights within the nine-dashed line. Therefore, the Philippines' position is that much of its EEZ is not within an area in dispute and would not be an area for joint development. Their position seems to be that the only maritime areas in dispute within their EEZ would be the 12 nm territorial sea adjacent to the disputed islands that lie within their EEZ. However, despite these obstacles, identifying areas for joint development rather than trying to get agreement on or identify 'areas in dispute' (which may be implausible) may be a convenient way to remove an otherwise potentially intractable impasse in negotiations of a joint development arrangement.

V. CONCLUSION

[29] This concept was first openly advanced by Deng Xioaping on 11 May 1979 in relation to China's dispute with Japan over Senkaku / Diao Yu Dao Islands; see '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.

[30] 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.

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, supported by 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 discussed above, a critical issue is *where* joint development should take place. The presence of 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, for there to be actual knowledge about offshore hydrocarbon resources in areas of overlapping claims, since the lack of agreed boundaries makes it difficult to even conduct seismic work to explore and confirm the existence of 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.[31]

It is also important to remember that entering into a joint development arrangement is the second best option to having a defined maritime boundary, significantly less attractive than 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.[32] Joint development arrangements as provisional arrangements of a practical nature are 'without prejudice to the final delimitation'.[33] The use of the word 'provisional' implies that the arrangements are interim measures pending the final delimitation of maritime boundaries.[34] 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.[35]

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[31] 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).

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

[33] UNCLOS, Articles 74(3) and (83(3); *Guyana/Suriname Arbitration*, *supra* note 3; see also Lagoni, *supra* note 3, at 358.

[34] Lagoni, *supra* note 3, at 356.

[35] 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); 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.