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Factors conducive to joint development in Asia -lessons learned for the South China Sea

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Factors conducive to joint development in Asia -lessons learned for the South China Sea

Abstract

Joint development in the South China Sea has been suggested as a solution to the Spratly Islands disputes since the 1980s. China was one of the earliest proponents of 'setting aside the dispute and pursuing joint development'. The South China Sea Workshops on Managing Potential Conflicts in the South China Sea discussed joint development but ran into a number of obstacles, notably because of longstanding sensitivities over sovereignty issues and conflicting maritime claims. Consequently, the Workshops sought to focus on less contentious issues such as cooperation on marine biodiversity and the safety of navigation. Through this non-confrontational, non-binding and incremental approach, the Workshops were instrumental in building trust and confidence among the claimants and in getting them to consider co-operative measures in areas of common interest.

Keywords

era2015, china, sea, joint, factors, development, conducive, asia, lessons, learned, south

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CHAPTER 11:
FACTORS CONDUCTIVE TO JOINT DEVELOPMENT IN ASIA - LESSONS
LEARNED FOR THE SOUTH CHINA SEA

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Leonardo Bernard*

Joint development in the South China Sea has been suggested as a solution to the Spratly Islands disputes since the 1980s.¹ China was one of the earliest proponents of ‘setting aside the dispute and pursuing joint development.’ The South China Sea Workshops on Managing Potential Conflicts in the South China Sea² discussed joint development but ran into a number of obstacles, notably because of longstanding sensitivities over sovereignty issues and conflicting maritime claims. Consequently, the Workshops sought to focus on less contentious issues such as co-operation on marine biodiversity and the safety of navigation. Through this non-confrontational,

¹ When China entered into diplomatic relations with Southeast Asian countries in the 1970s and 1980s, Deng Xiaoping made this proposal for resolving disputes over the Nansha (Spratly) 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>>.

² The South China Sea Workshop (the Workshop Process) was an initiative first undertaken in 1990, fronted by Indonesia’s Hasjim Djalal, which sought to bring together ASEAN States on an informal basis to facilitate dialogue on various issues in the South China Sea and find ways to manage potential conflict in the area. The First Workshop Process was conducted in Bali in 1990 with only six ASEAN-State participants (Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand). At a second meeting in Bandung in 1991 non-ASEAN participants were also invited, including China, Laos, Taiwan and Viet Nam. The Workshop Process has continued to be held annually in Indonesia since 1990 and has had developed considerably since its early meetings.

non-binding and incremental approach, the Workshops were instrumental in building trust and confidence among the claimants and in getting them to consider cooperative measures in areas of common interest.

As alluded to in the Introduction to this book, the debate surrounding the South China Sea is evolving to the point where a meaningful discussion on implementing joint development of hydrocarbon resources is not only possible but increasingly critical.³ Indeed, there are compelling reasons why the claimants should begin discussion on how to set aside their sovereignty and maritime disputes and pursue joint development. The objective of this volume was to examine existing joint development arrangements in the region to determine whether there were any useful lessons that could be used to further discussion on joint development in the waters in the South China Sea. After all, the majority of the South China Sea littoral States have been party to one form of joint development or another, be it an ‘in principle’ agreement to jointly develop resources (such as the *2008 China-Japan Arrangement*⁴) or a comprehensive agreement setting out the framework in which the development of seabed energy resources is to take place (such as the *1979 / 1990 Malaysia-Thailand*

³ See Robert Beckman, Clive Schofield, and Ian Townsend-Gault, ‘Introduction: Why Joint Development in the South China Sea?’, at xxv.

⁴ 2008 China-Japan Principled Consensus on the East China Sea Issue, made on 18 June 2008, available online: Ministry of Foreign Affairs of the People’s Republic of China at <<http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t466632.htm>>. Map of the joint development area is published at Gao Jianjun, ‘A note on the 2008 cooperation consensus between China and Japan in the East China Sea’, (2009) 40 *Ocean Devel & Int’l L* at 292.

*Arrangement*⁵ and the *1992 Malaysia-Viet Nam Arrangement*⁶ and the *2009 Brunei – Malaysia Arrangement*⁷).

To this end, Part I of this Chapter will first highlight key economic, legal and political factors that influenced States in Asia to enter into joint development arrangements and the challenges that need to be overcome before joint development can be contemplated in the South China Sea. Part II will then set out recommendations on how the claimants can move forward on joint development.

⁵ *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) and *Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority*, 30 May 1990 [1990 Malaysia-Thailand Agreement], both reprinted in David M Ong, 'The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?', (1999) 14:2 Int'l J Mar & Coast L 207, at 61.

⁶ *Memorandum of Understanding between Malaysia and the Socialist Republic of Viet Nam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries*, 5 June 1992 (entered into force 4 June 1993), reprinted in Charney & Alexander, eds, *International Maritime Boundaries*, vol 3 (Martinus Nijhoff Publishers, 1998) at 2335.

⁷ The Exchange of Letters took place on 16 March 2009 in Bandar Seri Begawan, the capital of Brunei Darussalam. See: Ministry of Foreign Affairs of Malaysia (Wisma Putra), Press Statement (3 May 2010). Unfortunately, the text of the Letters was not publically released by either government at the time this paper was being prepared.

I. Economic Factors

A. *The Oil Imperative*

The global economy continues to rely on hydrocarbons and particularly oil and natural gas as key energy carriers. This is particularly the case for liquid fuels where oil remains critical. Overall, global demand for oil shows little sign of waning and instead continues to escalate despite deepening concerns over the availability of supplies to meet these requirements.

East and Southeast Asia features numerous States that are energy hungry yet simultaneously energy resource poor, especially with respect to oil. This uncomfortable equation has already led to significant dependence on imported oil within these regions.

Leaving aside the prevailing imperatives of adhering to longstanding sovereignty claims, these escalating energy security concerns go a long way to explaining why many coastal States have been enthusiastic in terms of advancing claims to maritime space and vigorously defending those claims. When set against this context, the potential existence of relatively ‘close to home’ sources of seabed energy resources underlying the disputed waters in Asia is highly attractive and serves as a potent driver in the intransigent positions maintained by States in their maritime disputes. However, the same factors can also serve as persuasive motivators to enter into maritime joint development arrangements.

Indeed, the increasingly pressing need for hydrocarbon resources has proved to be a, if not the, key incentive for States to enter into co-operative joint developments in Asia. This contention is supported by the existence within the region of multiple joint mechanisms primarily or exclusively devoted to facilitating exploration for and exploitation of seabed energy resources. For example, the *1974 Japan- South Korea Arrangement*⁸ was in large part inspired by the oil crisis of 1973 which resulted in a debilitating shortage of oil for these States and therefore led to their strong mutual desire to reduce dependence on supplies from the volatile Middle-East. Similarly, Thailand was facing declining production in its Erawan fields when it concluded the *1979 / 1990 Malaysia-Thailand Arrangement*.⁹ The suspected presence of oil and gas in the area of overlapping claims also acted as a key driver in the conclusion of the *1989 Australia-Indonesia Arrangement*.¹⁰

Fundamentally, such joint development arrangements offer interested States the tantalising opportunity to sidestep seemingly intractable disputes over ocean space and proceed with the development or management of potentially valuable marine resources, including petroleum resources, contained within areas subject to

⁸ *Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*, 30 January 1974, 1225 UNTS 114-126 (1981).

⁹ *Supra* note 5.

¹⁰ *Treaty between Australia and the Republic of Indonesia on Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991).

overlapping maritime claims. Further, as elaborated on in Chapters 5 and 6,¹¹ this can be achieved without undermining or compromising national maritime claims through the inclusion of robust without prejudice clauses in joint development arrangements.

Further, the potential economic benefits that hydrocarbon resources can bring to less developed economies, not only in terms government revenues generated but downstream economic development that may result, represents another reason why States enter into joint development arrangements. For example, a key incentive envisaged in the conclusion of the *2002 Australia-Timor Leste Arrangement*¹² was that the revenues derived from the joint development of the resources within the shared zone had the potential to radically transform Timor Leste's developing economy and reduce its dependence on aid. However, it should also be borne in mind that downstream activities can, in turn, lead to further contention, as also demonstrated in the Australia-Timor Leste context, where disputes have arisen with respect to the destination of any pipeline onshore and thus location of downstream processing infrastructure.

With regard to the South China Sea, there are clearly considerable economic incentives for claimants to enter into joint development arrangements. While the exact amount of hydrocarbon resources in the South China Sea is unknown and may not be

¹¹ See Gavin McLaren and Rebecca James, 'Negotiating Joint Development Agreements', at 195; and Richard Nowinski and Peter Cameron, 'Common Provisions in Joint Development Arrangements', at 214.

¹² *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, 20 May 2002, [2003] ATS 13 (entered into force on 2 April 2003).

as much as estimated (as will be explained below), such reserves as may exist are nonetheless highly attractive to the South China Sea States. This is primarily because the six South China Sea claimants are facing increasing demand for oil coupled with generally static or declining domestic supplies. This imbalance has resulted in the claimants depending on imported oil to a significant and increasing extent. Indeed, of the six South China Sea claimants, China, the Philippines, and Taiwan are already strong net importers of petroleum. As a result, when considered together, the South China Sea claimants already import around half of their oil needs (1,900 million barrels (Mb) of oil out of overall consumption of 3,800Mb in 2009).¹³ This scenario is likely to become more problematic for the claimants in the near future as both Malaysia and Viet Nam are also on the verge of becoming net importers as their domestic oil production plateaus and declines. Brunei stands alone as a net exporter but can be considered a small player on a global or even regional scale.

Consequently, it is projected that, with the exception of Brunei, the claimants' dependence on oil imports, which is already significant for several of them, is highly likely to increase significantly in the future. Forecasting on a 'business as usual' basis suggests that oil imports are set to climb steeply to approximately 4,500Mb by 2020, assuming that such supplies are available to import.¹⁴

¹³ EIA, International energy statistics, 2010, online:

<<http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=5&pid=53&aid=1>>.

¹⁴ EIA. International energy statistics. 2010, *ibid*; Nick Owen and Clive Schofield, 'Disputed South China Sea Hydrocarbons in Perspective', (2012) 36:3 Marine Policy 809, at 812.

Given the challenges that the South China Sea States are facing with respect to meeting their current and projected future energy, and especially oil, demands, it seems likely that accessing South China Sea seabed oil and gas reserves, should they indeed exist, will likely be viewed as a strategic priority with a view to addressing increasingly pressing energy security concerns. Indeed, given the multitude of overlapping claims and the concomitant difficulties in the exploration and exploitation of hydrocarbons, the pressing energy needs of the claimants may serve as a critical incentive for some form of co-operation on hydrocarbon resources in the South China Sea.

B. *Location of Hydrocarbon Resources*

Where the presence of seabed energy resources is suspected within an area of overlapping maritime claims but the precise location, let alone the scale, of these suspected resources is unknown, often proves to be a double-edged sword. This scenario prevails in many areas subject to competing maritime claims, including in the South China Sea, primarily because insufficient exploration activity has taken place precisely because of conflicting claims to maritime jurisdiction.

On the one hand, suspicions over the presence of valuable seabed energy resources can provide a crucial impetus encouraging parties to either settle their disputes, for instance through maritime boundary delimitation. On the other hand, the prospect of the discovery of such new deposits, coupled with uncertainty over their location and scale, can act as a major impediment to dispute resolution. This is largely because of the fears that arise over the compromises entailed in delimiting a boundary

line and the possibility that parties may subsequently discover that the resources at stake have ended up wholly or partially on the 'wrong side of the line'. Similarly, the same concern tends to encourage States to advance maximalist claims, something that again makes compromise and thus dispute settlement, more difficult. Under these circumstances, a joint development option may well prove to be attractive as the parties are then guaranteed at least a share of any resources that may indeed be present.

For example, prior to the *1979 / 1990 Malaysia-Thailand Arrangement*, drilling in 1971 by a Malaysian contractor and drilling in 1976 by a Thai concessionaire revealed the existence of gas and helped to push parties towards joint development.¹⁵ Similarly, Malaysia and Viet Nam were also spurred into entering into the *1992 Malaysian-Viet Nam Arrangement* by the discovery of gas reserves in their overlapping claim area by a Malaysian concessionaire in 1991.¹⁶ This was protested by Viet Nam and triggered negotiations between the parties. Another example of this can be seen in the *1989 Australia-Indonesia Arrangement*. One of the major reasons why Australia was keen to consider joint development with Indonesia in the 1970s was that surveys had suggested that a geological formation called the Kelp Structure located in the north of the Timor Gap area was likely to contain exploitable hydrocarbons.¹⁷

¹⁵ Malaysia-Thailand Joint Authority, *Exploration*, online: < <http://www.mtja.org/exploration.php>>.

¹⁶ Nguyen Hong Tao, 'Joint Development in the Gulf of Thailand', (1999) *Boundary and Security Bulletin* 7(3), at 79-88.

¹⁷ Anthony Bergin, 'The Australian-Indonesia Timor Gap Maritime Boundary Agreement', (1990) *Int'l J Estuarine and Coast L* 5(4), at 383.

In the South China Sea context, although many commentators have, over the years, suggested that this region and particularly its disputed spaces are ‘oil rich’, it should be emphasised that estimates as to the seabed energy resource potential vary wildly and are generally highly speculative in nature. Significant confusion also persists in relation to oil reporting with resource estimates (that is, the volume of oil in the ground) and reserve estimates (that is, the proportion of the oil that can be recovered given oil price and technological constraints) being frequently, and erroneously, used interchangeably. This tends to lead to estimates as to the oil and gas potential of the South China Sea to be significantly inflated.

In order for oil to be present, three key geological factors are necessary – a highly porous and permeable sedimentary reservoir, organic rich source rock and a low permeability seal or capping rock. The presence of these three geological ‘play elements’ does not, however, guarantee the presence of oil. However, their absence strongly suggests that oil will not be present – a situation that exists in much of the central part of the South China Sea which comprises oceanic crust.

In fact, it has been suggested that the South China Sea is likely to be a predominantly gas rather than oil province. This has implications for the attractiveness of the resources at stake and also whether they can be readily recovered. While oil and gas are often considered together, it is important to distinguish between them. Although gas can be used as an alternative to oil, for instance as a transport fuel, in reality there are major impediments to this occurring in the near-term. This is especially the case as a consequence of the ‘lock in’ effect of

existing transportation technologies where the lead time required to change vehicle fleets across to new fuels is substantial (of the order of 15 years for cars, 25 years for buses, and 40 years for aircraft). There will be significant implications for the development of hydrocarbons if the disputed waters of the South China Sea should yield more natural gas rather than oil. Moreover, it is also worth noting the long lead times involved from discovery of hydrocarbons reserves to the extraction of 'first oil'. This, in turn has implications for the role of South China Sea hydrocarbons in the context of increasingly urgent regional and global energy security worries. That said, rapidly improving technology, coupled with rising oil prices will strengthen the business case for oil exploration and development in deeper and more challenging environments more remote from shore. Further, the price-reserve relationship will shift such that presently non-commercially attractive reserves will become increasingly viable to exploit.

It is clear that the lack of knowledge about the location, as well as the nature of resources in the South China Sea, attributable to the overlapping claims, is an obstacle to the joint development of resources by the claimants. Because the presence of hydrocarbon resources is, at least publicly, speculative.

C. *The Need for Jurisdictional Certainty and a Secure Investment Framework*

Exploration and exploitation of hydrocarbon resources in offshore areas is a capital-intensive venture which usually requires the backing of private oil companies, notably in terms of both funding and technical expertise. However, the lack of political, legal and fiscal certainty in an area claimed by two or more States is a major and often

insurmountable disincentive to such major investments. Accordingly, another reason why States in Asia have entered into joint development arrangements is to provide a secure investment framework for international oil companies and therefore to facilitate exploration and development activities.

For example, prior to in the *1974 Japan-South Korea Arrangement*,¹⁸ both States had awarded unilateral oil exploration and exploitation contracts to Western oil interests in the overlapping claim area. However, after China strongly objected to the continental shelf claims of Japan and Korea on the basis that it had sovereign rights in the area, all exploration activities in the East China Sea by US oil companies ceased, on the advice of the US. The *1974 Japan-South Korea Arrangement* encouraged foreign investors to return to the East China Sea, to participate in the Arrangement.

Similarly, prior to the establishment of the *2009 Malaysia-Brunei Arrangement*,¹⁹ foreign oil companies had on several occasions been forced to leave the overlapping claim area by both Malaysian and Bruneian patrol forces and some foreign companies ceased operations in the area. Under the 2009 arrangement, while it was agreed that the disputed seabed in question belonged to Brunei,²⁰ the Malaysian national oil company Petronas was awarded concessions in the area. This

¹⁸ *Supra* note 8.

¹⁹ *Supra* note 7.

²⁰ Goh De No, 'Brunei may soon start drilling in Blocks J and K' *The Brunei Times* (23 April 2010), online: The Brunei Times <<http://www.bt.com.bn/business-national/2010/04/23/brunei-may-soon-start-drilling-blocks-j-and-k>>.

accommodation will undoubtedly give oil companies a certain level of certainty needed.

With respect to the South China Sea, the multitude of overlapping claims in the South China Sea means that the claimants will face considerable difficulties in exploiting any hydrocarbon resources that may exist in large areas of the South China Sea. This is particularly the case if the exploration and exploitation is undertaken in areas near the disputed features of the Spratly Islands, as evidenced by incidents relating to survey activities in the vicinity of Reed Bank in mid-2011. Consequently, exploration efforts in and around the Spratly Islands have been severely limited and, accordingly, information regarding the hydrocarbons prospectivity of the underlying seabed remains meagre. Indeed, even seismic exploration by Viet Nam-licensed vessels far away from the disputed features and within Viet Nam's 200 nm EEZ has been subject to strong protests by China. This highlights the difficulties that oil companies face in even undertaking survey activities in the South China Sea, let alone embarking on large-scale exploitation and development of any discoveries made, including the sustained investment that this would inevitably entail.

D. *Marked Asymmetries in Capacity*

There is sometimes an incentive either for two States to pool their expertise as well as their sovereign rights for the purposes of cooperative joint development or, alternatively, for less developed States to enter into a joint development arrangement with another State which has more developed petroleum expertise, legislation and infrastructure. Arguably, an important factor underpinning the conclusion of some of

the co-operative arrangements in Asia was the need of one of the States concerned for assistance in developing hydrocarbon resources, ranging from technical or financial matters, to infrastructure, petroleum laws or human resources.

For example, in the *1992 Malaysia-Viet Nam Arrangement*,²¹ Viet Nam's national oil company, at that early stage in its development, lacked the necessary technical expertise as well as petroleum legislation to undertake exploration and exploitation of hydrocarbon resources. Viet Nam was consequently agreeable to Malaysia's national oil company Petronas taking the lead role in the exploration and exploitation and giving Viet Nam's national oil company PetroViet Nam a share of the revenue. Similarly, the differences in the regulatory and management capacities of Australia and East Timor were also a factor in the genesis of the *2002 Australia-East Timor Arrangement*.²²

The co-operation and exchange of knowledge facilitated by co-operative arrangements also encourages the development of petroleum expertise and infrastructure and other related industries for less developed States which can be used in other areas. For example, one of the indirect benefits of the *1979 / 1990 Malaysia-Thailand Arrangement* was the consequent development of the exploration and production national industries which also encouraged foreign investment and technology.

²¹ *Supra* note 6.

²² *Supra* note 12.

II. Legal Factors

A. *Defined Maritime Claims made in Good Faith*

Joint development arrangements are squarely based on and consistent with international law. As mentioned in Chapter 4,²³ Articles 74(3) and 83(3) of UNCLOS dealing with the delimitation of the exclusive economic zone and continental shelf respectively provide a sound legal rationale for such arrangements by providing that:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Joint development zones are usually either located in addition to a boundary line or in areas of overlapping claims and in some instances constitute the whole overlapping claim area. It is axiomatic that clearly defined areas of overlapping claims significantly contribute to the conclusion of joint development arrangements. Further, not only must they be clearly defined, they must have some basis in international law. Indeed, it is worth noting that when making claims to maritime

²³ See Chapter 3: The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims by Tara Davenport, at 133.

space under UNCLOS, States are constrained by the obligation to make such claims in ‘good faith’ under both customary international law²⁴ and UNCLOS.²⁵ A ‘good faith’ claim is one that is ‘permissible under international law in the sense that they have a prima facie basis in law’²⁶ or is one that has a valid basis in the present corpus of international law.²⁷ The importance of such factors to the conclusion of joint development arrangements is illustrated by some of the joint development arrangements concluded in Asia.

For example, in the *1979 / 1990 Malaysia-Thailand Arrangement*,²⁸ both Thailand and Malaysia had made their claims clear. Thailand made a unilateral continental shelf claim in the Gulf of Thailand in the 1970s, and Malaysia issued a map showing its territorial sea and continental shelf boundaries in 1979. Arguably, both claims have some basis in international law. The overlapping maritime area which eventually became subject to joint development in the *1979 / 1990 Malaysia-Thailand Arrangement* was caused by Thailand’s use of one of its offshore features, Ko Losin, 39 nm offshore and 1.5 m above water at high tide as a basepoint to measure its continental shelf boundary at the expense of Malaysia. While Thailand’s claim that Ko Losin (a tiny rock) was entitled to full effect may now be considered

²⁴ For an overview of the concept of ‘good faith’ in international law, see Markus Kotzer, ‘Good Faith (Bona Fides)’ in Max Planck Encyclopedia of Public International Law, Volume IV at 508 – 516.

²⁵ Article 300, UNCLOS.

²⁶ Xinjun Zhang, ‘Why the 2008 Sino-Japanese Consensus on the East China Sea has stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation,’ *Ocean Development and International Law* 42 (2011): 53 – 65, 58.

²⁷ See *North Sea Continental Shelf Case* [1969] ICJ Rep 51, Separate Opinion of Judge Jessup at 80.

²⁸ *Supra* note 5.

legally questionable, it should be borne in mind that this was pre-UNCLOS. Although negotiations were going on at the time, the exact effect of islands in generating maritime zones or their effect in maritime delimitation was not clear.

Similarly, in the *1974 Japan-South Korea Arrangement*,²⁹ both Japan and Korea had also clearly expressed their claims and the overlapping area was defined. In 1969, Japan and South Korea had made claims to the continental shelf in the East China Sea by unilaterally establishing offshore concession blocks and a boundary. Their claims also had some basis in international law. Japan's unilateral claims indicated that they were delimiting their continental shelf by applying the median line between Korea and Japan, but using the islets of Danjo Gunto and Tori Shima as basepoints in determining the median line. In contrast, Korea argued that the islets could not be used as basepoints and the presence of the Okinawa Trough between Korea and Japan constituted special circumstances under which the median line-delimitation principle could not be applied as it interrupted the natural prolongation principle. At the time and even now, maritime delimitation principles were fluid. In 1969, at the time the claims were made, the natural prolongation principles had been identified in the *North Sea Continental Shelf Cases*³⁰ and it was only in 1985, in the *Libya / Malta Case* the ICJ cast severe doubt on the relevance of the natural prolongation principle in delimitations between opposite States when the distance between them is less than 400 nm.³¹

²⁹ *Supra* note 8.

³⁰ *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands)* (1969) ICJ Rep 3.

³¹ *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (1985) ICJ Rep. 13.

Likewise, it appears to be more difficult to negotiate joint development if the claim to an overlapping area lacks adequate legal grounds. For example, in the *2001 Cambodia-Thailand Arrangement*,³² the overlapping area was divided into two Areas, an area north of the boundary in which negotiations on maritime delimitation would continue, and an area south of the boundary in which negotiations on joint development would continue. It was impossible for Thailand to have accepted joint development in the north of the overlapping area, as it would risk legitimizing Cambodia's highly dubious claim in that area based on a 1907 Franco-Siamese Land Boundary – a claim that apparently cuts across a Thai island.

The lesson to be learned is that having clearly defined overlapping areas makes it easier to enter into co-operative arrangements on resources as States are aware of what the other State is claiming and know the extent of the area in dispute. That the limits of such overlapping areas have at least some basis in international law also serves to constrain extreme claims. Unfortunately, this does not exist in the South China Sea. At present, there is a significant lack of clarity on the basis, nature and extent of the maritime claims in the South China Sea.

For example, it is not clear what maritime zones, if any, are being claimed from the Spratly Islands features. The ASEAN claimants, at least for now, appear to be treating the Spratly Islands features as either 'rocks' only entitled to a 12 nm

³² *Memorandum of Understanding between Cambodia and Thailand on the Area of Their Overlapping Maritime Claims*, 18 June 2001, online: Ministry of Foreign Affairs of the Kingdom of Thailand, <<http://www.mfa.go.th/web/2630.php>>.

territorial sea, or as low-tide elevations not entitled to any maritime zone of their own.³³

China's claim from the Spratly Islands is ambiguous. This is largely due to its use of its infamous 'nine-dashed line' map and its seemingly deliberate refusal to clarify the meaning and/or effect of the map. Some scholars have suggested various interpretations of the nine-dash line, including that it is a 'historic waters' claim or a claim to some form of 'historic rights' to the resources within the nine-dashed line, both of which would be inconsistent with international law and UNCLOS. A more acceptable explanation, at least under international law, would be that the nine-dashed line is used to denote China's claim to sovereignty to the features within the nine-dashed line.

Indeed, China's official statements appear to reflect this last interpretation. In an official statement to the UN in 2009,³⁴ China indicated that it is only claiming sovereignty over the islands and their adjacent waters, which presumably means the 12 nm territorial sea adjacent to the islands, and sovereign rights and jurisdiction in

³³ However, Article 13 of UNCLOS allows States to use low-tide elevations as basepoints if they are situated within the territorial sea of the mainland or an island.

³⁴ CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 7 May 2009, online: United Nations <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf

the relevant waters. In an official statement in April 2011,³⁵ China also stated that the Spratly Islands are entitled to an EEZ and continental shelf. Further, in February 2012, a Chinese MFA spokesperson also stated that its claim in the South China Sea is to the features within the nine-dashed line and the EEZ that it would generate.³⁶ If this is China's position, it would mean that all the claimants are following the legal framework in UNCLOS as the basis for claims to explore and exploit the natural resources in the South China Sea. However, this interpretation has not been officially confirmed by China and China's maritime enforcement actions appear to run contrary to it.³⁷ For example, the national oil company of China, China National Offshore Oil Corporation (CNOOC) published in June 2012 a concession map showing nine blocks off the coast of Viet Nam which were stated to be 'under the national jurisdiction of China'.³⁸ The only way in which China could justify this would be on the basis of the 'nine-dashed line'.

³⁵ CLCS, *Communication received from China with regard to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam*, 14 April 2011, online: United Nations <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf>.

³⁶ Chinese foreign ministry, '2012年2月29日记者会记行例行举言人洪磊发日外交部' ['Foreign ministry spokesperson Hong Lei's regular press conference on 29 February 2012'].

³⁷ On 26 May 2011, a Chinese maritime surveillance vessel cut the exploration cables of Petro Viet Nam seismic vessel while it was conducting seismic survey approximately 116 nm of the coast of Viet Nam, which mean that China's action can only be based on the 'nine-dashed line', see Viet Nam Ministry of Foreign Affairs, Press Release, 'Press Conference on Chinese maritime surveillance vessel's cutting exploration cable of Petro Viet Nam Seismic Vessel' (29 May 2011), online: Viet Nam MFA <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110530220030>.

³⁸ CNOOC 'Notification of part of open blocks in waters under jurisdiction of the People's Republic of China available for foreign cooperation in the year of 2012', 23 June 2012, online: CNOOC.

It is therefore very clear that the claims in the South China Sea have not been defined or justified to the degree of certainty necessary before joint development arrangements can take place.

B. Sovereignty Disputes over Offshore Features

Sovereignty disputes over offshore features were only an issue in two of the co-operative arrangements in Asia, namely the *1982 Cambodia-Viet Nam Arrangement*³⁹ and the *2008 China-Japan Arrangement*.⁴⁰ Notably, both of these are ‘in principle’ agreements for joint development.

Prior to the conclusion of the *1982 Cambodia-Viet Nam Arrangement*, the continental shelf claims of both Cambodia and Viet Nam in the 1970s were based on full sovereignty over Phu Quoc Island / Koh Tral, Koh Ses Island and Koh Thmei Islands and the seaward Islands of Puolo Wai / Koh Wai and the Tho Chu / Panjang Archipelago. The effect of the *1982 Cambodia-Viet Nam Arrangement* (which includes an agreement to jointly develop resources) was that Cambodia effectively gave up its claim over Phu Quoc Island although it arguably simply endorsed a situation that had been prevalent since the French colonial era.

³⁹ *Agreement on the Historic Waters of Viet Nam and Kampuchea*, 7 July 1982, reprinted in Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Singapore: Oxford University Press, 1987) at 180.

⁴⁰ *Supra* note 4.

In the *2008 China-Japan Arrangement*, China and Japan agreed in principle to jointly develop an area well to the north of the disputed islands which effectively sidestepped the sovereignty dispute over the Senkaku / Diao Yu Dao Islands. China had earlier proposed joint development in the area surrounding Senkaku / Diao Yu Dao Islands, but this was rejected by Japan.

The *2009 Malaysia – Brunei Arrangement*⁴¹ did not involve sovereignty disputes over offshore features, however, Malaysia agreed to give up its claims (and hence its sovereign rights) over blocks of hydrocarbon resources (known as Blocks L and M) off Borneo which were also claimed by Brunei Darussalam. This appeared to be in exchange for Malaysia's, and particularly its national oil company, Petronas involvement in the development of these blocks. In addition, the sovereignty dispute over Limbang was purported to be resolved in favour of Brunei in the Arrangement. This is an exceptional case in State practice on joint development in Asia. Instead of preserving its claims in the joint development zone, Malaysia gave them up in exchange for being allowed to participate in the joint development of resources in the overlapping claim.

In the South China Sea of course, the sovereignty disputes over the Spratly features dominate the discourse and are not only bilateral, but can involve as many as six (6) parties. This is a major obstacle to joint development. Not only does this make defining the area of overlapping claims difficult, it enhances the possibility that any joint development arrangement will be perceived by national electorates as a 'surrender of sovereignty' over the features. In this regard, it is worth noting that

⁴¹ *Supra* note 7.

States do not have to give up or surrender sovereignty over offshore features or their sovereign rights over adjacent waters when entering into joint development arrangements. As noted above and as explored in further detail in Chapter 5,⁴² these claims can be preserved and protected by ‘without prejudice’ clauses in the joint development arrangement itself.

C. *Claims of Third Party States*

Two of the joint development arrangements in Asia, namely *the 1974 Japan-South Korea Arrangement*⁴³ and the *1979 / 1990 Malaysia-Thailand Arrangement*⁴⁴ are subject to competing claims of Third Party States whose interests were not included or reflected in the arrangement. This has several implications. First, it demonstrates that it is considerably easier to conclude joint development arrangements with two parties than with three. Second, while the existence of claims of Third Party States in the joint development area did not significantly hinder the conclusion of that arrangements, such claims may impact the operation / implementation of the arrangement later on.

For example, China claims part of the joint development zone of the *1974 Japan- South Korea Arrangement*⁴⁵ and China protested both at the conclusion of the arrangement in 1974 as well as when exploratory work began. However, the existence

⁴² See Gavin McLaren and Rebecca James, *supra* note 11.

⁴³ *Supra* note 8.

⁴⁴ *Supra* note 5.

⁴⁵ *Supra* note 8.

of such claims by China did not appear to deter investment and exploration in the joint development zone once the arrangement was concluded. While recent years have seen China's protests dwindle, if significant discoveries were made in the joint development zone, China would in all likelihood protest. This, in turn, will have consequences for the certainty that the joint development arrangement was supposed to have created for investors and oil companies.

Another example is the *1979 / 1990 Malaysia-Thailand Arrangement*.⁴⁶ The seaward part of the Malaysia-Thailand Joint Development Zone is also subject to a claim by Viet Nam and covers approximately 256 nm. However, Article 2 of the Thai-Viet Nameese maritime boundary treaty of 7 August 1997 provides that its parties:

[S]hall...shall enter into negotiation with the Government of Malaysia in order to settle the tripartite overlapping continental shelf claim area of the Kingdom of Thailand, the Socialist Republic of Viet Nam and Malaysia, which lies within the Thai-Malaysian Joint Development Area.

This appeared to raise the prospects for the conclusion of a trilateral joint development arrangement relating to that portion of the Thai-Malaysia JDA also subject to a claim by Viet Nam. Indeed, in 1999, Viet Nam, Thailand and Malaysia reportedly agreed in principle on joint development for this relatively small area subject to the overlapping claims of three States although there have been no reports

⁴⁶ *Supra* note 5.

of progress on the implementation of this agreement. The potential claim of Viet Nam in the 'Tripartite Overlapping Claim Area' in the Malaysia-Thailand Joint Development Zone has meant that no exploration or exploitation has taken place there.

Accordingly, for overlapping claim areas which are claimed by more than two parties, the preferable option would be to involve the Third Party State in the joint development arrangement despite the difficulties in doing so. This would avoid a 'persistent challenge' to the arrangement by the Third Party State and will help enhance the legal and political certainty of the arrangement.

III. Political Factors

A. *Good Relations between States*

Overlapping maritime claims can serve as a major source of tension in relations between neighbouring States which can spill-over into other areas in bilateral relations. Co-operative arrangements not only remove or reduce the tension, they also have the potential to create and / or cement good relations between the States concerned and even act as confidence-building measures in their own right. Such arrangements have the added advantage that they are an overtly cooperative rather than confrontational mechanism for addressing an inter-State dispute. In essence, there is no 'winner' or 'loser' in the establishment of a co-operative arrangement, in a manner arguably dissimilar to, for example, the way in which the delimitation of a maritime boundary is often portrayed, for all that most successful boundary

delimitations feature a healthy degree of compromise in order to be achieved. Accordingly, the need to maintain and promote good relations represents an important underlying rationale for entering into co-operative or joint development arrangements.

A good example of this is the *1992 Malaysia-Viet Nam Arrangement*.⁴⁷ Viet Nam was more amenable to the idea of joint development because it was in the process of joining ASEAN, and cooperation with Malaysia, a key ASEAN State and a major regional oil player, was useful to it. Further, the arrangement also fostered a better relationship between the two States and facilitated cooperation in other areas, as demonstrated by the 2009 Joint Submission by Malaysia and Viet Nam to the CLCS.

Similarly, both the *1974 Japan-South Korea Arrangement*⁴⁸ and the *2008 China-Japan Arrangement*⁴⁹ were preceded by increasing tension, nationalistic rhetoric and military clashes at sea. However, despite the absence of significant oil and gas discoveries in the *1974 Japan-South Korea Arrangement*,⁵⁰ and the absence of implementation of the *2008 China-Japan Arrangement*,⁵¹ they both significantly diffused the tension between the Parties at the time.

Apart from the need for good relations and the importance of removing an irritant in bilateral relations, it is also important to note that most joint development

⁴⁷ *Supra* note 6.

⁴⁸ *Supra* note 8.

⁴⁹ *Supra* note 4.

⁵⁰ *Supra* note 8.

⁵¹ *Supra* note 4.

arrangements in Asia were concluded in a period when there were good bilateral relations between the States concerned. For example, the *2000 China-Viet Nam Arrangement* in the Gulf of Tonkin occurred following progressive improvements in bilateral ties after the two countries normalised diplomatic relations in 1991.⁵² Similarly, the improvement in general bilateral ties between China and Japan from 2006 prompted by changes in Japanese leadership helped to move negotiations forward towards the *2008 China-Japan Arrangement*.⁵³

Conversely, joint development arrangements have proved more difficult to conclude when relations are turbulent. For example, the *1979 / 1990 Malaysia-Thailand Arrangement* took eleven years to move from an agreement in principle to a formal treaty.⁵⁴ This long delay in operationalising the agreement was in large part caused by a downturn in bilateral relations as a result of factors entirely unrelated to the development of seabed hydrocarbons and in particular fisheries issues. Similarly, the *2001 Cambodia- Thailand Arrangement*⁵⁵ which envisaged the joint development in the southern part of the two countries extensive overlapping claims area has not

⁵² *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf [Gulf of Tonkin] between the People's Republic of China and the Socialist Republic of Viet Nam*, 25 December 2000, (entered into force 30 June 2004), reprinted in David A Colson & Robert W Smith, eds, *supra* note 39, at 3755-3758; *Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on Fishery Cooperation in the Beibu Bay [Gulf of Tonkin]*, 25 December 2000, (entered into effect 30 June 2004), reprinted in Zou Keyuan, 'Gulf of Tonkin' (2002) 17 Int'l J Mar & Coast L at 143-148.

⁵³ *Supra* note 4.

⁵⁴ *Supra* note 5.

⁵⁵ *Supra* note 32.

been implemented because of the thorny bilateral relationship between the two countries. In 2009, the Thai Government reportedly intended to unilaterally revoke the MOU,⁵⁶ although this does not appear to have formally occurred.

The counterpoint is that joint development should not be perceived as some kind of panacea or magical antidote to inherently acrimonious relations. As Stormont and Townsend-Gault have observed joint development should not be suggested lightly as:⁵⁷

The conclusion of any joint development arrangement, in the absence of the appropriate level of consent between the parties, is merely redrafting the problem and possibly complicating it further.

B. *Effective Management of Public Perception of Joint Development Arrangements*

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 was a significant factor contributing to the success of

⁵⁶ This was due in part to sporadic clashes along their land border in the vicinity of the Preah Vihear Temple as well as Cambodia's appointment of ousted Thai Prime Minister Thaksin Shinawatra as an economic adviser.

⁵⁷ WG Stormont and Ian Townsend-Gault, 'Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?', in Blake, *Peaceful Management*, at 52.

negotiations and / or implementation of the arrangement. Unfortunately the reverse is also true and negative public perceptions of a potential joint development arrangement in the making can have adverse implications for their conclusion and ultimate implementation.

Similarly, after the *2008 China-Japan Arrangement*,⁵⁸ while both parties agreed to establish a joint development zone, there was also a provision which allowed Japan to participate in the development of the Chunxiao Gas fields which lay on the Chinese side of the theoretical equidistance line. After the Arrangement was concluded, differing interpretations arose relating to the Chunxiao Gas field. Japan claimed that China and Japan were carrying out joint development of the Chunxiao Gas field whereas China argued that all they had allowed was capital participation of the Chinese and that Japan had acknowledged China's sovereign rights over Chunxiao. This is one of the reasons why talks on the conclusion of a comprehensive joint development arrangement between China and Japan have been held up.⁵⁹

The *2009 Malaysia-Brunei Arrangement*⁶⁰ also met with controversy as the media (and certain former leaders of Malaysia) portrayed the arrangement as the

⁵⁸ *Supra* note 4.

⁵⁹ Reuters, 'Japan says China's oil production at the disputed Chunxiao gas field is regrettable' *Energy-pedia News* (10 March 2011), online: Energy-pedia.com <<http://www.energy-pedia.com/news/china/japan-says-chinas-oil-production-at-the-disputed-chunxiao-gas-field-is-regrettable>>.

⁶⁰ 'Pak Lah refutes claims it was a deal with Brunei in 'exchange' for Limbang', *The Star Online* (1 May 2012), online: The Star Online <<http://thestar.com.my/news/story.asp?file=/2010/5/1/nation/6173470&sec=nation>>.

Malaysian Government being weak in having given up its sovereign rights to the overlapping area.⁶¹ Despite of this, leaders of both countries claimed that the existing cooperation between their national petroleum authorities had been proceeding well and expressed satisfaction with the signing of a Memorandum of Understanding between Brunei National Petroleum Company (PetroleumBRUNEI) and Petroliam Nasional Berhad on Cooperation in the Oil and Gas sector.⁶² In the latest statement issued, leaders of both countries urged both sides to carry out the proposed collaboration between the national petroleum authorities of the two countries with regard to Brunei Darussalam's Blocks N and Q, and in downstream industries, as soon as possible.⁶³

There are a few important lessons to learn from this. First, it is important that the joint development arrangement is perceived as fair and equal for both Parties. The provisions in the arrangement itself will play an important part in determining whether the arrangement is perceived as fair and equal. Provisions such as equal representation on Joint Authorities, equal sharing of revenue, without prejudice

⁶¹ *Supra* note 7.

⁶² Ministry of Foreign Affairs and Trade of Brunei Darussalam, News Release, 'Joint Statement on the 15th Annual Leaders' Consultation between Brunei Darussalam and Malaysia (12 September 2011), online: MOFAT <<http://www.mofat.gov.bn/index.php/press-release/item/235-joint-statement-on-the-15th-annual-leaders-consultation-between-brunei-darussalam-and-malaysia>>.

⁶³ Ministry of Foreign Affairs and Trade of Brunei Darussalam, News Release, 'Joint Statement on the 16th Annual Leaders' Consultation between Malaysia and Brunei Darussalam (4 September 2012), online: MOFAT <<http://www.mofat.gov.bn/index.php/news/news-highlights/item/571-joint-statement-on-the-16th-annual-leaders-consultation-between-malaysia-and-brunei-darussalam-putrajaya-malaysia-4-september-2012>>.

clauses and so forth, will play a considerable role in demonstrating that a joint development arrangement is a 'win-win' situation for the parties concerned.

Second, States need to manage the expectations of their public. This includes refraining from stoking national sentiments when incidents occur which are perceived as a threat to national sovereignty and not taking unreasonable or extreme positions which are difficult to back down from. It also includes educating the public through the media and other avenues on the benefits of joint development and the fact that it does not involve a surrender of sovereignty.

C. *Political Will of Parties*

The co-operative arrangements in Asia were ultimately concluded because the States had the political will to make it happen. 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, as well as the need and existence of good relations.

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.