Resolving the Turbulence in the South China Sea: A Pragmatic Paradigm for Joint Development

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The global economy depends on a growing and secure Asia and the waters of the South China Sea continue to show turbulence. Despite recent efforts by the ASEAN (Association of Southeast Asian Nations) to provide an effective multilateral framework for resolving these disputes, the conflict continues to escalate due in large part to the failure of the disputants to focus on a sustainable commercial solution that would encourage agreement on resource allocation rather than sovereign rights. In this article, a framework for technological advancement in the Region is developed and compared to current legal theory and models for development found in the literature.

Keywords South China Sea, Spratly Islands, ASEAN, dispute resolution, joint development

Introduction

Before the tragedy of September 11th, and the resulting two wars in the Middle East, the Asian Pacific Region was positioned to emerge as an economic world power. However, since the 1980s territorial disputes in the South China Sea have resulted in military and political conflicts that have impacted the road to economic and social prosperity in the region. These tensions were evidenced most recently by the Philippines initiation of arbitration against China under the United Nations Convention on the Law of the Sea (UNCLOS) (Akande 2013). In an effort to resolve their differences in the South China Sea, the claimants have resorted to bilateral negotiations, consultations, and informal regional discussions, but most of these efforts have proved futile. The legal scholarship has demonstrated repeatedly the difficulty of sustaining a sovereignty argument that would satisfy all the disputants under various international norms and treaties including the international law of the territorial sea and the law of Exclusive Economic Zone (EEZ). The purpose of this research is to examine possible commercial options that would encourage the parties to peacefully resolve claims based on the building of opportunity and technological advancement in the Region. This article will not declare who is right or wrong, or who has sovereign or territorial rights, but will instead focus on a framework for resolving these disputes through joint development and production sharing agreements. The goal is to generate discussion and opportunity for the development of an open, transparent, and equitable process that may serve as a model for resolving disputes for all parties in the Region. The development paradigm outlined in this article is intended for policy makers, government officials, investors and developers, academicians and students and all those engaged in the process of finding better solutions to the problems in the South China Sea (SCS). The paradigm includes the development of economic and social policies that will not only provide resources for decades to come, but will also provide sustainable solutions to the poverty and depravation of the people throughout the Southeast Asian Region.

The South China Sea Claimants

In the face of some peace-making progress, the South China Sea and its petroleum resources continue to be among the most contentious and volatile in the Region and the subject of overlapping territorial claims by eight Asian governments: China, Taiwan, Vietnam, Malaysia, Brunei, Indonesia, the Philippines and the Kingdom of Colonia St. John (the "claimants" or the “disputants”). As described in Table 1, each of the claimants has alleged rights to all or part of the territory commonly called the Spratly Islands and surrounding territories in the South China Sea. The Spratly Islands consist of hundreds of small islets, coral reefs, sandbars, and atolls covering 180,000 square kilometers and different countries refer to the islands by different names (Dubner 1995). The numerous claims overlap and result in considerable tension in Southeast Asia (Saleem 2000). Some of the claimants base their entitlements on historical evidence of discovery and occupation, while other claimants rely on legal arguments. Several incidents of armed conflict have occurred and regional security issues are a key factor and concern in the disputes. Table 1 attempts to provide an overview of the major claims as described in the literature and historical documents and some of the primary sources of these claims recognizing that a complete compilation would require volumes of data including government

reports, maps, presidential decrees, orders, case decisions, treaties, and other historical records. Moreover, this paper does not take a position on these claims as the focus is on joint development and not the resolution of sovereignty among the disputing parties.

Table 1. - The Claimants

Claimant	Claim	Sources
Brunei	Does not claim any of the islands based on occupation, but claims part of the SCS nearest to it as part of its continental shelf and Exclusive Economic Zone (EEZ). In 1984, Brunei declared an EEZ that includes Louisa Reef and in 1988 a continental shelf claim that includes Rifleman Bank. In support of these claims, Brunei relies on a 1954 British decree fixing Brunei's maritime boundaries.	UNCLOS Articles 76 and 77; Liu 1996; Mito 1998; Joyner 1998; CIA Factbook 2012.
China	Refers to the Spratly Islands as the Nansha islands, and claims all of the islands and most of the SCS for historical reasons dating back to expeditions by the Han Dynasty in 110 AD and the Ming Dynasty from 1403-1433 AD. In 1947, China produced a map with 9 undefined dotted lines, and claimed all of the islands within those lines. A 1992 Chinese law restated its claims in the region. In 1974, China enforced its claim upon the Paracel Islands by seizing them from Vietnam. China refers to the Paracel Islands as the Xisha Islands, and includes them as part of its Hainan Island province.	Law of the PRC on the Territorial Sea and the Contiguous Zone (1992); Law on the Exclusive Economic Zone and the Continental Shelf of the PRC (1998); maps; navigational records; surveys; Chang 1991; Bennett 1991; Cordner 1994; Shen 2002; Li & Li 2003; Dutton 2011.
Kingdom of Colonia St John (Colonia)	Claims are based upon the discovery of Colonia by a Philippine explorer in 1956 and on occupation and continual peaceful governance (Cloma Claim). Colonia consists of islands and reefs of 64,976 sq. nm in the Spratlys. It contends the deed of cession in 1974 given under duress to Marcos was invalid as Cloma had no rights to the deed as all sovereignty resided in the King.	Proclamation establishing Freedomland 1956; Charter 1956; Map of Freedomland; Proclamation of Renunciation 1974; Succession Deed 1974; Deed of Cession 1974; Decree of name Change 1974; Arreglado 1982; Yorac 1983; Colmenares 1990; Bautista 2006; Duong 2007.
Indonesia	Does not claim any of the Spratly Islands. However, Chinese and Taiwanese claims in the South China Sea extend into Indonesia's EEZ and continental shelf, including Indonesia's Natuna gas field.	EIA 2013; Duong 1997; Saragosa 1995
Malaysia	Claims are based upon the continental shelf principle, and have clearly defined coordinates. Malaysia has occupied three islands that it considers to be within its continental shelf. Malaysia has tried to build up one atoll by bringing soil from the mainland and has built a structure on the atoll.	UNCLOS Art. 76; Malaysian map of 1979; Cordner 1994, p. 67); Murphy 1995; Liu 1996; Valencia 1997, p. 36; Duong 1997; Mito 1998.
Taiwan	Taiwan's claims are similar to those of China, and are based upon similar principles. Further, Taiwan has continuously occupied the Island of Itu Aba since 1956.	Law of the PRC on the Territorial Sea and the Contiguous Zone (1992); Law on the Exclusive Economic Zone and the Continental Shelf of the PRC (1998); maps; navigational records; surveys; Bennett 1991; Chang 1991; Cordner 1994, p. 62; Murphy 1995; Valencia 1997, p. 29; Chen 2002; Dutton 2011.
Philippines	The Philippines Spratly claim is based on clearly defined coordinates, under the proximity principle as well as on the explorations of a Philippine explorer in 1956 (Cloma claim) asserted also by the Kingdom of Colonia. In 1971, the Philippines officially claimed eight islands that it refers to as the Kalayaan, partly on the basis of this exploration, arguing that the islands: 1) were not part of the Spratly Islands; and 2) had not belonged to anybody and were open to being claimed. In 1972, they were designated as part of Palawan Province, Kalayaan municipality.	Philippine Constitution; Philippine National laws including Republic Act No. 3046 as amended; Republic Act No. 5446; Presidential Proclamation No. 370; Presidential Decree No. 1599. Dellapenna 1970-1971, p. 54; Bernas 1987; Marlay 1997; Bautista 2011; Mito 1998; Article 1, 1987

Vietnam	Vietnamese claims are based on history and the continental shelf principle including the entire Spratly Islands and an offshore district of the province of Khanh Hoa. The claims also cover an extensive area of the SCS, although not clearly defined. Vietnam has occupied a number of the Spratly Islands and claims the Paracel Islands, although they were seized by the Chinese in 1974.	See generally Nguyen 2012; National Committee 2011; Chiu 1975, p. 8; Valencia 1997, p. 30-32; Beller 1994, p. 305; Chang 1991; Cordner 1994, p. 65); Nguyen 2001;

Kingdom of Colonia St. John (Colonia)

One of the lesser known, but significant claimants in the South China Sea (SCS) is the Kingdom of Colonia St. John (Colonia), commonly known as the "Cloma Claim." Since the majority of scholarly work omits discussion of this claim, and because it has a direct impact on the resolution of all claims, particularly the claim of the Philippines, it is important to highlight it here. Colonia, formerly known as the "Free Territory of Freedomland," consists of more than 100 islands and reefs in the SCS approximately 65,000 nm in a general trapezoidal shape. According to historical documents, Tomas Cloma, a Philippine citizen of considerable prominence and director of the Philippine Maritime Institute discovered and mapped the islands from 1947, and proclaimed the establishment of the government of Freedomland in 1956 (Arreglado 1982; Yorac 1983; Colmenares 1990; Bautista 2006; Duong 2007; Proclamation of Freedomland 1956). Colonia is unique among the SCS claimants in that it represents a government established de facto in nature in order to promote the general welfare and the ideals of liberty, justice and peace in the great society of nations for the benefit of all mankind (Colonia Constitution 1974). Moreover, under its Constitution it renounces war completely and adopts international neutrality as its policy together with the accepted principles of international law as the law of the country. In April 1974 Cloma asked the Supreme Council to issue a proclamation changing the name of the country from Freedomland to Colonia and to elevate its status from a principality to the Kingdom of Colonia (Proclamation 1974). That having been done, Cloma resigned as head of State due to his advanced age in favour of Prince John de Mariveles (Succession 1974). According to Colonia's historic documents, in November 1974 Cloma was arrested under a trumped-up charge and was forced to sign a Deed of Cession to Philippine President Marcos. Colonia's historic records reflect that the Deed of Cession has never been recognized in international law and Colonia alleges that it has been continuously and peacefully occupied and governed as a Kingdom in accordance with its Constitution (Deed of Cession 1974; Succession Deed 1974).Though not a member of the United Nations (UN), Colonia remains a viable actor in the SCS under international law. United Nations membership is not a prerequisite for sovereignty under customary international law and the Charter recognizes the obligation of its UN members to protect the rights of non-member states, particularly to protect them from aggression by other states (Bederman 2010). Colonia's sovereignty has been recognized through its trade and contractual commitments with other nations including Malaysia and the Philippines, through the maintenance of Consulates in various regions of the world, and through its continuous and peaceful governance for the benefit of mankind.

Overlapping Claims

Scholars and commentators have offered options and recommendations for addressing the SCS claims, both bilaterally and multilaterally, with various opinions why some claims are legally stronger than others (Guoxing 1995; Duong 2007). Because many of the claims are overlapping, one approach offered is to create separate joint development zones for each area of overlapping claims instead of creating a single zone (Valencia et al. 1997; Mito 1998). For instance, one zone might consist of Brunei's claim which overlaps in five different areas with the claims of China, Malaysia, Vietnam and the Philippines, while another zone might consist of the overlapping claims of the Philippines, Colonia, China and Taiwan. This approach would take into consideration the full extent of each country's claim regardless of its strengths or weaknesses (Valencia et al. 1997). This assumes of course that the parties would agree to such a process and be able to negotiate these zones without resort to an international tribunal that could take years to render a decision. The first rule of international law involving opposite or adjacent States' maritime delimitation is that the States involved should negotiate in good faith to reach a result (Bederman 2010). A more pragmatic approach would be for each of the claimants to consider bilateral negotiations and set aside legal issues for a more practical commercial resolution. If the estimates by the U.S. Energy Information Agency (EIA 2013) and other seismic research is correct, that trillions of dollars of oil, gas and carbon deposits reside in the SCS, a commercial development agreement would be a more efficient and equitable approach as all claims of sovereignty would be frozen for the duration of the agreement, or until a more permanent solution could be established.

What are the Spratly Islands and Why are they so Valuable?

The Spratly Archipelago is a group of approximately 100 plus islands, reefs and shoals spread over approximately 7000 square miles in the southern part of the SCS (Chandler 1993). There are no indigenous inhabitants, but there are scattered garrisons occupied by military personnel of several claimant states (CIA 2012). The crux of the Spratly Islands dispute centers on the potential wealth and strategic military value of the Islands. The Spratly Islands are located in the SCS, 900 miles south of the Chinese island of Hainan,

230 miles east of Vietnam, 120 miles west of the Philippine island of Palawan, and 150 miles northwest of the Malaysian state of Sabah (Cordner 1994). They connect the Indian and Pacific Oceans and thereby establish a major sea-route and strategic military position linking Asia, Africa, and Europe. An estimated eighty percent of Japan's and seventy percent of Taiwan's oil and raw material imports pass through the South China Sea, while twenty-five percent of the world's oil production passes through the area en route from the Middle East to Japan and the United States. Control of the Spratly Islands could serve as a means to impact oil transports both in Southeast Asia and the remainder of the industrialized world because ownership and control of the Spratly Islands provides sovereign rights over the adjacent waters and seabed. Many analysts consider the South China Sea area, which encompasses the Spratly Islands, to have vast riches of oil and natural gas (EIA 2013; BP 2012; USGS 2010). Estimates of oil and natural gas vary widely, from U.S. estimates of up to 28 billion barrels of oil and 190 trillion cubic feet of natural gas in proved and probable reserves to Chinese estimates in November 2012 of 125 billion barrels of oil and 500 trillion cubic feet of natural gas (EIA 2013). Yet no country knows for sure what really lies beneath the seabed despite intermittent testing by national oil companies over the years. In addition, many analysts believe it is one of the most lucrative fishing areas in the world with an annual value estimated in the mid-1990s at three billion U.S. dollars. China's military strength has had a fundamental impact on the dialogue and proposals initiated to resolve the Spratly Islands dispute. Any agreement concerning the Spratly Islands that does not satisfy China's interests would fail at its inception and possibly result in military conflict involving one or more of the claimants and the United States. The belt, along with China's military growth, are perceived challenges to United States' interests in Asia because they have a potential impact upon existing sea-lanes, oil reserves, the Senkaku Islands, the Korean Peninsula, Taiwan, and the Spratly Islands. The Spratlys also lie in important shipping channels and thus have tremendous strategic value. Some have argued that the strategic value exceeds the value of the natural resources in the area, thus giving the ownership of rights to these islands significant political advantage (Beller 1994).

The Legal Framework of the Law of the Sea

The Sea maintains much power in the world. It covers three-fifths of the earth's surface, it is the major means of transport for trade and commerce and the ability to "project" force over ocean areas remains one of the central tenets of military doctrine for the United States and all great powers (Bederman 2010). Consequently, there is much at stake in dividing up the Sea. The Law of the Sea Treaty is an agreement drawn up by the United Nations and ratified by 165 states (162 UN member states) and the European Union that governs the oceans (UNCLOS 1994). The treaty has been described as a "constitution of the oceans" and was negotiated in the 1970s and early 1980s. Its official title is the United Nations Convention on the Law of the Sea (UNCLOS). The UNCLOS came into force in 1994. Although the United States now recognizes the UNCLOS as a codification of customary international law, significantly, the Treaty has never been ratified by Congress although Presidents Bill Clinton, George W. Bush and Barack Obama have encouraged the U.S. Senate to accede. According to some scholars, this reluctance is largely due to the congressional concerns that UNCLOS would lessen the private sector's chance for profitability with respect to deep seabed mining together with the United States' overall concern for its maritime regulation on account of national security interests (Duong 2007). Despite its recognition as the governing law of the ocean, there are two primary concerns as it applies to the disputes at hand. First, even though UNCLOS is recognized as the contemporary authority on international maritime law, such a maritime right does not establish a State's territorial sovereignty over any island in the SCS. In other words, only after sovereignty over land or an island has been established can a State apply UNCLOS to resolve sea-use rights; creating a serious concern as to its application to the Spratly Island disputes (Duong 1997). Second, like many international agreements, UNCLOS lacks an enforcement mechanism, and because of this, there is no guarantee that China will comply with the "compulsory" procedures outlined in the Convention (Whiting 1998). Even if the Association of Southeast Asian Nations (ASEAN) submit the dispute for arbitration as a group, it is not clear that China will comply with an arbitrated settlement. A recent example of this is the Philippines request for arbitration against China under Annex VII of the Convention. Proceeding with arbitration may prove difficult for the Philippines if China successfully argues that it never accepted compulsory dispute settlement procedures under Article 287 of the Convention, particularly with respect to disputes involving sea boundary delimitations or historic titles. Nonetheless, under Article 287 the parties could still be compelled to go to a conciliation procedure, the outcome of which would not be binding on either party. Thus, once again leaving unresolved the differences concerning sovereignty and maritime boundaries.

Alternative Dispute Resolution for the South China Sea

Though many mechanisms for dispute resolution have been mandated in international treaties, national legislation, and bilateral and multilateral investment agreements, the most effective mechanisms historically have been those designed by the parties to the dispute. Many disputes remain unresolved, because there is no immediate political or economic incentive for countries to pursue a remedy. Joint development agreements on the other hand have been effective in resolving disputes because they are not mandated by law, but require voluntary participation by the

parties. Some examples include, the Indonesia-Australia "Timor Gap" Treaty of 1988, the Japan-South Korea Agreement of 1974 involving the East China Sea, and the Malaysia-Thailand Treaty on the Establishment of the Joint Authority of 1990. Outside the Asian Pacific Region there have also been many successes such as the 1976 agreement between the United Kingdom and Norway regarding cross-boundary petroleum operations and the Persian Gulf Agreement of 1965 between Saudi Arabia and Kuwait. Alternative approaches to the main problems of the SCS disputes have been offered in government reports, decrees, and scholarly research. A few examples that indicate the breadth of possible resolution for the Spratly disputes are highlighted below.

Dispute Resolution through friendly negotiation

In 1976, in order to tackle potential disputes, the members of the ASEAN worked out the Treaty of Amity and Cooperation ("TAC") which under Article 13 provides: "If case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations." Article 17 of the TAC further provides: "The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations (TAC 1976)."

Dispute Resolution through Arbitration

Since the turn of the century, there have been a few cases that have demonstrated what courts base their decisions on in cases involving territorial disputes over islands. One of the most highly precedential cases dealing with island territorial disputes involved the Island of Palmas (Palmas 1928), a dispute between the Netherlands and the United States. The arbitrator ruled in favor of the Dutch on the grounds that although Spain had discovered the islands, they had not taken sufficient steps to protect against their use by the Dutch. Since the Dutch used the islands on a regular basis, the Court held that their title was superior to that of Spain and by extension, the United States who claimed cession from Spain after the Spanish-American War. Another important case, relevant to the disputes at hand is the Clipperton Island case (Clipperton 1932). The Clipperton case like the Spratly Islands dispute involved sovereignty issues between France and Mexico over an uninhabited atoll off the coast of Mexico. France asserted that a French Lieutenant claimed the island on behalf of the French government in 1858, while Mexico claimed ownership through cession from Spain. The International Court of Justice held that France's discovery and declaration of sovereignty in a Honolulu journal and evidence of possession and acquiescence by other states are of decisive importance in determining sovereignty issues.

Dispute Resolution through Hybrid Institutions

An emerging area in international development is the concept of alternative dispute resolution through the development of hybrid institutions to resolve important public interest concerns, such as poverty, labor, health and environmental issues (Odumosu 2006-2007). These dispute resolution processes are unique because they are developed by the stakeholders to the project and enforced pursuant to the commitments of the parties. As reflected in empirical studies, dispute resolution mechanisms that are 1) developed incrementally through an inclusive political process; 2) accountable and transparent; 3) sensitive to local context; and 4) require inputs from and are responsive to a broad cross-section of society, have far greater chances of success than those imported from western cultures and forced upon local communities (Adler et al. 2009; Greiman 2011). These institutions have been used to promote the general welfare of the citizens of the developing world - an important consideration in the development of the South China Sea.

Dispute Resolution through Joint Development

In the past two decades scholars have offered up various models to resolve the Spratly Disputes including adjudication under international law, bilateral investment treaties, national legislation, and arbitration. A few of the most appealing models recommend a dispute resolution mechanism based on trust, transparency and joint development. These models include: (1) a 40 year joint development agreement modeled after the Timor Gap Treaty resolving a 17 year dispute between Indonesia and Australia over seabed boundary delimitations (Mito 1998); (2) the resolution of the Spratly disputes through joint development that would yield significant collateral benefits to the claimants beyond the direct economic value of the Spratlys' resources to enhance their collective modernization drive (Liu 1996); (3) resolution of the sovereignty issues directly by the parties involved through peaceful means (Nguyen 2012); (4) development of the idea of a Spratly joint management authority based on fairness and efficiency (Cui 2003); and (5) use of a joint maritime regime to protect the environment and resources of the Aegean Sea from third states (Acer 2006). These models all represent the importance of shared responsibility and joint authority which could be implemented through joint development agreements, various bilateral or multilateral treaties or through memorandums of understanding executed by each country. For example, in the Timor Gap Agreement, the Treaty provides for the creation of a Ministerial Council and a Joint Authority to oversee the various rights and responsibilities involved in petroleum exploration and exploitation within designated areas. The Council is composed of an equal number of Ministers appointed from each country, and all decisions are made by consensus. The Joint Authority is responsible for the management of the petroleum exploration activities and consists of an equal

number of Executive Directors from each country, appointed by the Ministerial Council. In addition to resolving a protracted territorial dispute, the Treaty has served to strengthen previously strained relations between Australia and Indonesia. Commentators have referred to the Timor Gap Treaty as a "triumph of compromise," and an "imaginative approach to breaking the deadlock in boundary negotiations" (Mito 1998). Despite recent incidents and mounting tension in the Spratly Islands, the claimants should begin the process of establishing a joint development agreement on a bilateral or multilateral basis that would foster a sense of cooperation and provide a model for the SCS. Given the recently expressed willingness to peacefully resolve disputes and explore joint development such an agreement would likely be well received.

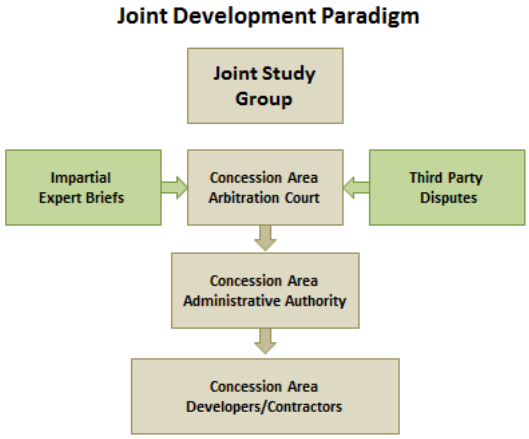
Dispute Resolution through Conflict Management

As the waters of the South China Sea have grown more turbulent, efforts by ASEAN and China to calm them have proved disappointing and the only existing conflict management mechanism is the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC) described by one Southeast Asian Scholar as "a non-binding, essentially toothless agreement which has yet to be operationalized" (Storey 2013b). In September 2012, China's Vice Minister of Foreign Affairs, Minister Fu Ying stated, "What's the point of a CoC when the DoC is not faithfully observed?" This sent a strong but important message that until basic rules are perceived to be observed by all parties further negotiations will be difficult. To be able to build a code of conduct (CoC), clear agreement must be acknowledged by all parties concerning the process and environment in which negotiations will proceed. A code of conduct can only be developed if there is trust that all parties will behave fairly under the established rules. All views must be considered and equally included before any agreement can be reached among the disputing claimants. Critical requirements for a code of conduct for the South China Sea must contain specific provisions prohibiting the countries from claiming new territory, granting oil exploration outside the concession agreement, and expanding military forces in the disputed region. Until all parties are confident that their concerns matter there will be no movement on a code of conduct.

A Pragmatic Paradigm for Joint Development

There are many possibilities for the structuring of a joint development agreement including public private partnerships, joint ventures, lease arrangements, highly leveraged financial structures, and privately financed equity ownership with government oversight. However, the Spratly Island disputes are unique in that they involve at least eight claimants with long held positions on their rights to the vast resources and the benefits of sovereignty in the SCS. To resolve these disputes one must look beyond traditional dispute resolution mechanisms to create an environment free of pressures from international courts and influence from the developed world. Thus, a pragmatic paradigm outside of the international arena must be developed to assist these claimants in resolving the rights to these resources in a peaceful manner. Figure1, diagrams an approach to joint development that would allow the parties to begin the process of resource development and allocation, while not limiting rights they may claim to sovereignty in the future. The approach would consist of the following steps:

Figure 1. Joint Development Paradigm



Establishment of a Joint Study Group

As a prelude to a cooperative environment in the South China Sea, an essential first step is the establishment of a joint study group (JSG) to develop the framework and to establish guidelines for promotion of dialogue and identification of specific projects in the region. The guidelines would ensure that all parties are treated fairly based on respective interests and aimed at a peaceful resolution of the overlapping claims in the region. The guidelines would include building a code of conduct for dispute resolution, granting exploration concessions, and developing measures to prohibit future territorial claims until existing claims are resolved. Though a multilateral approach would be more efficient, bilateral agreements could be effective in building confidence and encouraging claimants to participate in developing a framework and guidelines. The joint study group would consist of representatives from each claimant to develop a joint study agreement (JSA). The Study Group could also consist of experts or government representatives in the technical fields essential to determining the key matters for decision. The Study Group would review such matters as the methodology for determination of the Spratly Island Concession Area (SICA), the allocation of the interests of the participants in the development, the contributions of the claimants to the cost of the study and the options to acquire an interest in the JSA. Once the Agreement is awarded a determination would be made by the Group as to the right to gather and evaluate data relating to the petroleum potential of the

concession area. Upon completion of the JSA, the Study Group would develop the legal and procedural framework of the Arbitration Court, the Concession Area Administrative Authority and the Joint development Concession Area as shown in Figure 1.

Allocation of interests The most difficult tasks of the Joint Study Group will be the determination of the Spratly Island Concession Area (SICA) and the allocation of the assets from the SICA. This will be a negotiated process among the parties to develop a "Concession Agreement" with the strategy of involving all potential claimants at the outset, particularly with reference to overlapping claimants. The parties to the "Concession Agreement" would contribute the territory for exploration, and private sponsors and governments willing to commit public funds would contribute the development finance. The SICA would be unrestricted and open to exploitation by all claimants, under license and royalty with disputes regarding development rights to be adjudicated by the Concession Area Arbitration Court (CAAC).

Concession Area Arbitration Court (CAAC)

A Concession Area Arbitration Court would be established to resolve claims that arise from the concession agreement as well as third party disputes that may arise during the course of the concession. For example, assuming a bilateral agreement, each claimant will select their own arbitrator, while the third arbitrator would be selected by the arbitrators or the claimants. Rules of arbitration would be agreed upon by the claimants such as sharing of costs, choice of law, rights of appeal, confidentiality and other essential provisions. Alternatively, the parties could choose arbitration procedures established by prominent arbitral organizations such as the London Court of Arbitration, the International Court of Arbitration (ICC), or the International Center for Investment Disputes (ICSID), a member of The World Bank Group. The arbitrators would have the option to receive briefs from impartial experts approved by the arbitration court as well as briefs from third party claimants as defined in the CAAC procedures.

Third party claims The rapid rise of private investment arbitration in the international legal order has been accompanied by mounting public concern over the system's legitimacy and accountability (Levine 2012). The involvement of a State in the investment context can lead to arbitral decisions that affect a significantly broader range of actors than the two parties to the agreement, as recognized by tribunals such as the ICC and ICSID. These broad range of actors are commonly known as "third party participants" or "third party claims." In the SCS disputes, the concern over "third party claims" is well founded. For example, the proposed Concession Area Arbitration Court for the Spratly claimants might want to define "third party claims" in the following way: (1) Claimants to the territory being exploited who are not a party to the Concession Area Agreement. For instance, if China and Malaysia are parties to the "Concession Agreement," and Brunei as a non-party has a claim they would like to assert concerning their interests in the concession area, Brunei would be permitted to file a claim with the Arbitration Court. If the Arbitration Court rejected Brunei's claim it could still be asserted in the appropriate court of law. (2) The second type of third party claimant might be those who want to provide important information involving protection of the welfare such as environmental concerns, human rights, health and safety and labor laws (Tienhaara 2007). These types of claims are commonly asserted by non-governmental organizations, local communities or other parties in interest. Regardless of how claims are classified, the arbitration process should be structured to encourage transparency and measures to promote the broadest possible participation necessary to avoid confrontations under international law in international courts or arbitral organizations. The parties would be well advised to provide an open and collaborative environment that may enhance development opportunities and prevent further disputes, particularly when the outcome of a dispute appears to affect third parties that have rights directly connected to the land on which the exploration is located (Glamis 2005). However, in establishing a third party process, a crucial issue arises regarding the need for arbitration tribunals to recognize that certain third parties may have more significant legal interests in the outcome of the dispute, and as such, may merit broader participation rights (Levine 2012). Furthermore, clear rules should be developed for third party participation that is consistently applied such as the presence of a significant interest in the merits of the dispute.

Concession Area Administrative Authority (CAAA)

The CAAA would be made up of representatives appointed by the Arbitration Court to oversee the exploitation activities and to ensure accountability through enforcement of the obligations of the developers and contractors set forth in the Concession Area Agreement and related contracts. Since they would serve as an oversight authority for the development they should be representative of the expertise needed for the particular development project and would be accountable to the Concession Agreement's sponsoring organization.

Concession Area Developers/Contractors

Developers and contractors would be selected through an open procurement process established in the Joint Development Concession Agreement that would encourage transparency and a fair and a competitive process in compliance with international standards recognized by the World Bank, the OECD and other respected inter-governmental organizations.

Incentives to Resolve Claims through Joint development

Since China has indicated its preference to negotiate bilaterally, a joint development agreement will not succeed without China's cooperation. To ensure settlement of claims through a peaceful, voluntary, negotiated process, incentives must exist that will encourage the claimants with diverse interests and multiple overlapping claims to come to the table. To better understand the motivation of the various parties to settle these disputes through a joint development agreement, a few examples are offered here.

Collective interest in maintaining peace and stability In November 2002, China signed a Declaration of Conduct (DoC) in the South China Sea with the ASEAN confirming the principle of friendly negotiations contained in the 1992 Declaration. The DoC is often praised as the first step toward a peaceful settlement (Dosch 2011). Then, in 2003, China acceded to the Treaty of Amity and Cooperation (TAC), with the members of ASEAN which is an impressive testament to the determination of its "good neighbor" policy and inclination to peace. In April 2011, China's President Hu Jintao called on other Asian nations to forge better cooperation regarding security matters involving territorial claims over the Spratly Islands to avoid disagreement. Taiwan's Foreign Ministry spokesperson, James Chang, supported this statement by saying that all countries involved should "first shelve their disputes and then seek to solve the issue peacefully." In September 2012, China's President Xi Jinping, when he was the leader-in-waiting, expressed his support for a peaceful solution stating: "The more progress China makes in development and the closer its links with the region and the world, the more important it is for the country to have a stable regional environment and a peaceful international environment" (Beijing 2012). The ASEAN members have an incentive to continue the progress towards a peaceful resolution of claims due to the vast resources in the SCS that would bring prosperity to the country and its citizens.

Demand for energy and source of hydrocarbons Asia's robust economic growth has boosted the demand for energy in the region.The U.S. Energy Information Administration (EIA) projects total liquid fuels consumption in Asian countries outside the OECD to rise at an annual growth rate of 2.6 percent, growing from around 20 percent of world consumption in 2008 to over 30 percent of world consumption by 2035. Similarly, non-OECD Asia natural gas consumption grows by 3.9 percent annually, from 10 percent of world gas consumption in 2008 to 19 percent by 2035. EIA expects China to account for 43 percent of that growth (EIA 2013). The SCS offers the potential for significant natural gas discoveries, creating an incentive to secure larger parts of the area for domestic production.

Land border treaties, oil exploration and surveys In 1999, Vietnam signed a land border treaty with China and in 2000 another treaty on the demarcation of the Gulf of Tonkin which came into effect in 2004. These treaties have narrowed the scope of territorial disputes at least between these two countries relating to the Paracel and Spratly archipelagos. In March 2005, the State-owned oil companies of China, Vietnam and the Philippines signed an agreement with regard to the conducting of oil pre-exploration surveys and marine seismic activities in the Spratly Islands. Moreover, China through its National Offshore Oil Corporation (CNOOC), China Petroleum & Chemical Corporation (Sinope) and China National Petroleum Corporation (CNPC) is responsible for developing the SCS's resources (EIA 2013). CNOOC has the most experience with offshore oil production and has invested the most into sea. According to its 2011 annual report, CNOOC produced an average of 193,000 barrels per day in the SCS for that year (CNOOC 2011). These initiatives are indicative of the political will of the States concerned to develop the disputed area jointly. Partnerships should continue to be developed in the SCS to expand testing and exploration in accordance with a detailed code of conduct and oil exploration agreement.

Privatization of the development process Another important impetus for joint development is China's clear intentions not to internationalize dispute resolution in the SCS. For example, in July 2012 at the 19th ARF Foreign Ministers' Meeting held in Phnom Penh, Chinese foreign Minister, Yang Jiechi, declared that "China hopes that all parties will do more to enhance mutual trust, promote cooperation, and create necessary conditions for the formulation of the CoC" (Ministry of Foreign Affairs, the PRC 2012). Further, in a strong response to Secretary of State Clinton's 2010 statement to reporters that "the United States, like every other nation, has a national interest in freedom of navigation and open access to Asia's maritime commons and respect for international law in the South China Sea" (Clinton 2010), Yang Jiechi said that the South China Sea should not be internationalized, and the Draft Code of Conduct (DoC) must not be viewed as between China on one side and ASEAN on the other (Ministry of Foreign Affairs of the PRC 2010). Any effort to internationalize the disputes such as the recent filing of arbitration by the Philippines provides additional reasons for China to delay further talks on the CoC with ASEAN (Storey 2013a). Any international agreement, even one labeled "binding," is by nature voluntary as international law lacks the ability to penalize parties for failure to comply with the agreements (Bederman 2010). This makes an international agreement's reliability dependent on the parties' belief that it is in their best interests. A Joint development Agreement would serve important interests of all the claimants, and as a result, the likelihood of compliance is high (Liu 1996).

Building confidence and exploiting socio economic opportunity The purpose of signing joint development agreements is to guarantee the disputing parties' right to benefit from the natural resources in the disputed area. The

successful arrangement of economic interests around the Spratly Islands would help China and as well the other claimants to build up their confidence in avoiding conflicts. Claimants like Colonia whose underlying vision embedded in its Constitution is to utilize its resources for the benefit of mankind would play an important role in moving forward charitable giving to alleviate poverty in the Southeast Asia Region.

Advancement of technology and attraction of investment All of the claimants are developing countries that could use the Spratlys' natural resources to advance their technology and attract investment. None of these countries currently have the capital or technology necessary to exploit these resources. A joint development agreement could assist in building their economies and the rule of law. A joint agreement would facilitate the foreign investment and technology transfer needed to efficiently exploit the Spratlys' resources. Such an agreement would also result in a closer relationship with China that could only benefit these claimants.

Developing strong bilateral relations Beijing has significantly strengthened its position in the region by developing a tightening network of bilateral relations with individual ASEAN members. The current strategy of maintaining peace and order in the SCS is based on bilateral negotiations initiated and facilitated largely by China (Dosch 2011). Under international law a forced, involuntary process under the UNCLOS would foster an environment of adversity and hostility. On the other hand, voluntary bilateral agreements would allow the parties to choose the law of the contract and the ability to create their own dispute resolution process free from interference by international tribunals and the uncertainties of international law.

Enhancing goodwill and building a trade block Cooperation with the smaller claimants would enhance China's potential for building a trading block similar to the EU and NAFTA. Such a block would enable all countries to participate and to enter into a treaty that would provide numerous benefits to growth and expansion through free trade and reduced trade barriers, and agreed upon trade policies that would enhance both social and economic growth in the region.

Conclusion

The most appropriate solution to the Spratly disputes and the South China Sea are negotiated agreements for joint development. Agreement between the claimants will not only reap the benefits of natural resource exploitation but can lead to better preservation of the environment, fairer distribution of the resources and better use of the water spaces by the impacted communities. Moreover, the resolution of the Spratly disputes will promote greater economic and military security in Southeast Asia. The options presented in this paper would focus on resource allocation, rather than decades of fruitless litigation over sovereignty. Until the disputing parties in the South China Sea agree to mutually beneficial joint development arrangements, the waters in the South China Sea will remain turbulent.

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