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Confidence Building in the Asia Pacific: The Security Architecture of the 21st Century

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To break the stalemate of the South China Sea dispute in the 1990s, the late Chinese leader Deng Xiaoping initiated a proposal to "shelve disputes and go for joint development". The aim is also to access oil and gas resources in the SCS in the interests of both China and other claimant states. Though long been proposed as an interim practical measure to reduce tensions and build confidence in the South China Sea, joint development faces many difficulties such as lack of political will and mutual trust, unilateral exploration, finding a location acceptable to the parties, and profit sharing. I will start with the legal regime for joint development of seabed resources in overlapping claim sea areas sets out by UNCLOS and international law, then review state practice in the South China Sea. I'll conclude by identifying the challenges to joint development projects and suggesting the possible ways forward.

1. The South China Sea

The South China Sea is a semi-enclosed sea, strategically situated as part of major Sea Lines of Communication (SLOCs) connecting the pacific and the Indian Ocean. It is dotted with numerous island features which fall into four island groups, namely the Nansha (Spratly) Islands in the far south, Xisha (Paracel) Islands in the northwest, Dongsha (Pratas) Islands in northeast, and Zhongsha Islands (Macclesfield Bank and Scarborough Shoal) to the southeast of Xisha (Paracel) Islands and south of Dongsha (Pratas) Islands. It is also endowed with rich fishery resources and estimated to have rich hydrocarbon reserves[1]. Under the regime of Exclusive Economic Zone (EEZ) and continental shelf of the United Nations Convention on the Law of the Sea (UNCLOS),

[1] Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective*, (Oxford: Chandos Publishing, 2013), 5-8.

the individual features in the South China Sea, if qualified as islands, could generate EEZs and continental shelf of their own.

With a number of bordering countries, it is not surprising that the dispute among them in the South China Sea come into being of its own accord. Driven by socio-economic and strategic interests, as well as the dynamics between regional and extra-regional powers, the dispute has become one of the most complicated and intractable knot. Yet, it would be easier to understand it if one categorize the knot into three different layers. In the core, it is the territorial dispute among China (both Chinese mainland and Taiwan), the Philippines, Vietnam, Malaysia and Brunei. And the crux is the Nansha (Spratly) Islands. Of the five countries, both China and Vietnam claim the entire Nansha (Spratly) Islands, while China has occupied eight features (including Taiping Island controlled by Taiwan) and Vietnam 29 features[2]. The Philippines claims sovereignty features that were previously claimed by its citizen, the Cloma Brothers, in 1956, and has occupied eight[3]. Malaysia claims sovereignty over 12 features, and has occupied five[4]. Brunei claims sovereignty over 2 features, but has occupied none[5]. Most of the claimants, including the Philippines, also use national legislation to consolidate their sovereign claims over those island features[6].

Natural resources in the South China Sea are abundant, including marine living resources and mineral reserves. Some Chinese scientists estimate that there are at least 5 sedimentary basins in the northern part of the South China Sea with an area of 420000 square kilometres. In the Spratly area there are 8 sedimentary basins with an area of 410000 square kilometres and 260000 square kilometres are within China's U-shaped line. An incomplete figure from China shows that these 8 sedimentary basins contain 34.97 billion tons of petroleum reserves, including the discovered 1.192 billion tons of oil and 8000 billion cubic metres of gas. Thus he South China Sea is sometimes called a second "Persian Gulf"[7].

To break the stalemate of the SCS dispute and to access new oil and gas in the interest of both China and other claimant states, the late Chinese leader Deng Xiaoping started the Chinese movement in this direction in the early 1990s and

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2 Wu Shicun, *The Origin and Development of the Nansha Disputes (南沙争端的由来与发展)*, (Beijing: Ocean Press, 2009), 107.

3 Christopher C. Joyner, *The Spratly Islands dispute in the South China Sea: problems, policies, and prospects for diplomatic accommodation. Investigating Confidence-Building Measures in the Asia-Pacific Region*, [Report No. 28] (Washington: Stimson Center, 1999), 61-62, accessed 8 September 2014 <http://www.stimson.org/images/uploads/research-pdfs/cbmapspratly.pdf>.

4 Wu Shicun (2009), 152.

5 Ted L. McDorman, "The South China Sea islands dispute in the 1990s – a multilateral process and continuing friction" (1993), *International Journal of Marine and Coastal Law*, 8, 264.

6 Wu Shicun (2013), 153.

7 Zou Keyuan, 2006

initiated the proposal to shelve the disputes and go for joint development. This proposal ran largely along the lines of code of conduct agreements such as the 1992 Manila Declaration and United Nations Convention on the Law of the Sea Article 123, which calls for cooperation between claimant states. The term 'shelving the disputes' (gezhi zhengyi) is interpreted to apply to the disputes over maritime jurisdiction rather than those concerning territorial sovereignty[8].

2. Joint Development in International law

The joint development concept in international law first appeared in the 1970s. Many legal scholars give their explanation on the term, but each with some limitations. The British Institute of International and Comparative Law defines joint development as "an agreement between two States to develop so as to share jointly in agreed proportions by inter-State cooperation and national measures the offshore oil and gas in a designated zone of the sea-bed and subsoil of the continental shelf to which both or either of the participating States are entitled in international law"[9].

After nine years of negotiation, the United Nations Convention on the Law of the Sea (LOSC) was concluded in 1982, including 320 Articles and 9. It entered into force on 16 November 1994 and so far 166 states have ratified the treaty10. The LOCS is often cited as the "constitution of the oceans"11, with a plenty of innovative concepts such as archipelagic status, exclusive economic zone (EEZ), and the deep seabed; it injected new responsibility to existing institutions like the IMO and it created numbers of new institutions – the Commission on the Limits of the Continental Shelf (CLCS), the International Seabed Authority (ISA), and the International Tribunal for the Law of the Sea (ITLOS). It is arguable whether the LOSC is an enduring normative framework for regulating the ocean space, yet it is widely aware that it needs to be adapted to emerging requirements.

The identical articles 74 and 83 on maritime boundary delimitation purports to provide a temporary solution in paragraph 3: '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 the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements

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8 Wu Shicun, Certain reflections on joint development in the Nansha (Spratly) Islands, Proceedings of the SCS workshop (@002)

9 British Institute of International and Comparative Law, p45

10 Access Sep 15th 2014:
http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea

11 The Law of the Sea, Progress and Prospects, Edited by David Freestone, Richard Barnes and David Ong, Oxford University Press, 2006

shall be without prejudice to the final delimitation.'[12]

- 'Provisional arrangements'
- 'a practical nature'
- 'without prejudice to the final delimitation'

State practice: Joint zones in lieu of delimitation

- Kuwait-Saudi Arabia in the Persian Gulf (1965)
- Japan-South Korea in the Sea of Japan (1974)
- Sudan-Saudi Arabia in the Red Sea (1974)
- Australia-Indonesia in the Timor Sea (Timor Gap) (1989)
- Malaysia-Thailand in the Gulf of Thailand (1990)
- Malaysia-Vietnam in the Gulf of Thailand (1993)
- Sao Tome-Nigeria in the Gulf of Guinea (2001)
- Australia-Timor Leste in the Timor Sea (2002 and 2007)

State practice in the South China Sea: joint development projects

- Malaysia-Thailand (1990)
- Malaysia-Vietnam (1992)
- Malaysia-Philippines-Vietnam
- China-Vietnam (2000)
- China-Vietnam-Phillipines (2005)

3. China's oil and gas exploration and exploitation in the South China Sea

China claims 12 nm territorial sea, 12 nm contiguous zone beyond the territorial sea, and a 200 nm exclusive economic zone, each measured from the coastal baseline. On 25 February 1992, China declared the Law on the Territorial Sea and Contiguous Zone. The Exclusive Economic Zone and continental shelf were declared in 1996, accompanying the ratification of the UNCLOS[13]. Then on 26 June 1998, the Law of the PRC on the Exclusive Economic Zone was enacted. The law requires prior approval of marine scientific research, fishing activities and exploration and exploitation of natural resource.

China and Vietnam concluded a maritime boundary agreement in the Beibu Bay (Gulf of Tonkin) in December 2000 and simultaneously created three joint fishing zones. A common Fishery Zone of approximately 30000 km2 was defined which straddles the maritime delimitation line and extends 30.5 nm on either side of it.

China, the Philippines, and Vietnam concluded a Joint Marine Seismic Understanding (JMSU) in March 2005. State-owned oil companies to conduct a

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[12] UNCLOS, Articles 74(3) and 83(3);

[13] The 1996 declaration states that "In accordance with provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over exclusive economic zone of 200 nautical miles and continental shelf."

joint seismic study in the South China Sea. JMSU was an initial joint seismic survey. It lapsed in 2008 and was not renewed due to domestic political reasons of the Phillipines.

4. Challenges and possible way forward
    - No rules in international law specifies the duty for States to enter into joint development.
    - Claimant States in the South China Sea do not have enough trust and desire to enter into joint development.
    - Domestic politics in some country blocks the way.
    - No consensus on cooperation model or authority, mainly due to lack of political will.
    - High costs of exploration and exploitation makes oil and gas companies reluctant to step into the disputed waters.
    - States fears that the JD project will have an effect on the final settlement of maritime delimitation and jeopardize their maritime claims.
    - Bilateral fisheries agreements could be served as examples. Managing and conserving fisheries resources jointly maybe easier than developing hydrocarbon resources.
    - Joint seismic surveys as the first step to investigate the oil and gas potentials.
    - Possible sea areas for JD between China and Vietnam, China and the Phillipines, China and Malaysia and Brunei.