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RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA AND PROSPECTS FOR JOINT DEVELOPMENT

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Introduction

The South China Sea issue is, once again, in the forefront of international security concerns. Scholarly studies, policy/security analyses and media coverage on the issue have recently abound. The re-emergence of the South China Sea issue in the limelight following a relative tranquility as a result of the claimant countries' agreement on a declaration of the conduct of parties in the South China Sea is attributed to various recent developments in the region. But, three critical developments may be the primary drivers to change what has been so far the status quo in the South China Sea, that is, the lack of a resolution of the dispute or of any practical arrangement that could serve as interim measure pending the resolution of the dispute. This paper assesses the prospect for joint development in the South China Sea taking into consideration three recent developments in the region: (1) China's fast increasing energy needs; (2) China's rapid naval modernization; and (3) the United States' involvement in the South China Sea issue. First, it provides an overview of the dispute in the South China Sea and the mechanisms to resolve the dispute. Then it discusses joint development as an interim practical solution in the South China Sea. Afterwards, it discusses the three critical recent developments in the South China Sea and analyzes the prospects for joint development based on these developments.

Overview of the South China Sea Dispute

The South China Sea dispute refers to the conflicting territorial claims over the various geological features in the area. Estimates about the number of geological features vary ranging from 190 to as high as 650 depending on the source.¹ A group of about 87² to 190³ geological features, *e.g.* "islands", atolls, reefs, shoals, etc., called the Spratlys Group of Islands is claimed wholly by the People's Republic of China (and Taiwan) and Vietnam. The Philippines, Brunei and Malaysia claim part of the Spratlys. The Philippines claims what it referred to as the Kalayaan Islands Group (KIG) consisting of about 60⁴ to 74⁵ geological features. Another group of islands called the Paracels is contested both by China and Vietnam. An island called Scarborough Shoal is claimed both by the Philippines and China. Varying degrees of occupation⁶ over the geological features is exercised by the claimant parties, including Taiwan which occupies one island.

China has based its claim on historic title and cited evidences dating back as early as the Yuan Dynasty.⁷ In a recent Note Verbale addressed to the Secretary-General, China has referred to a nine-dash line map (also called nine dotted line or nine broke line map) produced in 1947 as

manifestation of its claim.⁸ Vietnam cites historical basis and rights of succession to France as basis of its claim.⁹ The Philippines bases its claim on five grounds: (a) by reason of proximity; (b) by being part of the continental margin; (c) by reason of history; (d) by discovery and effective occupation; and (e) by reason of abandonment.¹⁰ The Philippines has argued that the features in the South China Sea were *res nullius* or "abandoned" after World War II. Malaysia's claim is based on the concept that the islands in the South China Sea are part of its continental shelf as shown in its 1979 Malaysian Continental Shelf Boundary. Brunei claims certain islands on the ground that these are part of its 200 nautical mile continental shelf and 200 exclusive economic zone (EEZ).

Additionally, the South China Sea is also riddled with maritime disputes which pertain to overlapping 200 NM EEZ claims among littoral states, overlapping claims for extended continental shelf (ECS),¹¹ and potential overlap of maritime zones generated from the geological features in the area. The latter, however, can only be definitively determined after a geologic survey has been undertaken. This is because the maritime zones of a feature are dependent on its nature, whether it is a rock or an island under Article 121 of UNCLOS.

The conflicting territorial and maritime claims in the South China Sea make the area a regional flashpoint. In fact, several skirmishes already happened in the past, including a naval clash between Vietnam and China.¹² To minimize potential conflicts, several efforts were undertaken by concerned parties.¹³ But, the most important was the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC-SCS) which was signed between ASEAN and China in 2002.¹⁴ The DOC-SCS is a result of protracted five-year long negotiations between ASEAN and China.¹⁵ It is a non-binding agreement that enjoins claimant countries to observe the status quo by refraining from occupying geological features in the area. The agreement also recommends the claimant countries to undertake confidence-building measures (CBMs). Recently, discussions between ASEAN and China on the possible Code of Conduct (COC) in the South China Sea have commenced at a working level.¹⁶ In July 2011, almost a decade after the adoption of the DOC-SCS and amidst the growing tension in the South China Sea, the Guidelines for the Implementation of the DOC-SCS was signed by ASEAN and China. The Guidelines aims to "guide the implementation of possible joint cooperative activities, measures and projects."¹⁷

Mechanisms to Resolve the South China Sea Dispute

In general, the modes of dispute settlement, as provided under the Charter of the United Nations include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the disputants' choice.¹⁸ Inasmuch as the dispute also touches upon the legal issues on the law of the sea, the claimant States could opt for mechanisms provided for under UNCLOS. Parts XI and XV Parts

XI and XV cover the relevant provisions on dispute settlement stipulating therein the guidelines and mechanisms that States could avail.

States that are parties to a dispute have the right to choose its dispute settlement mechanism. This right is embodied in the principle of free choice of means which is laid down in Article 33, paragraph 1 of the Charter of the United Nations and reiterated in the fifth paragraph of the relevant section of the Friendly Relations Declaration and in section I, paragraphs 3 and 10, of the Manila Declaration.¹⁹

However, thus far, the claimant states have not yet resorted to these mechanisms. Negotiation has not materialized due to differing preferences of claimant states. China prefers a bilateral approach while Southeast Asian claimant states want a multilateral negotiation. Judicial settlement and international arbitration are likewise unattainable at this time because China does not want the issue elevated to a high court or an arbitral court.²⁰ The fora available in ASEAN (ASEAN-China Dialogue and ARF) provide the venue for the claimant states to discuss the issue. However, the discussions and the efforts that were initiated under ASEAN are not exactly intended to settle the dispute but merely to minimize the possibility of conflict arising from the dispute in the South China Sea. The ASEAN-China DOC-SCS and the subsequent document called Guidelines for the Implementation of the DOC are among such initiatives.

Joint Development as an Interim Measure in the South China Sea

It cannot be overly emphasized enough the need to resolve the dispute in the South China Sea, or at the minimum, maintain the peace and stability in the region. The South China Sea issue has broader regional and global implications. A conflict in the South China Sea can destabilize the region, inhibit the freedom of navigation, disrupt the world trade and commerce and possibly change the regional political and security dynamics. To address the issue, several efforts, both formal and informal, have been implemented. The initiatives range from providing a normative framework for the conduct in the South China Sea in order to prevent the emergence of potential conflict to providing platform to discuss the issue. Nonetheless, as recent developments have shown, these efforts are found wanting. And as the prospect for a judicial settlement of the issue remains dim, there is a need to assess alternative measure that can be applied in the South China Sea. Joint development seems to be the viable practical proposition for a durable alternative arrangement as the core issue of territorial sovereignty will always remain intractable.

Under the 1982 UNCLOS, States which have maritime boundary dispute could enter or agree on provisional arrangements. Article 74(3) of UNCLOS states:

“Pending agreement as provided for in cooperation 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 jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

The said provision is specific to the delimitation of the EEZ but can also be applied in the delimitation of the Continental Shelf (Article 84(3)).

UNCLOS does not elaborate on what constitutes “provisional arrangements.” However, one scholarly interpretation is that the aforesaid provision’s goal and purpose is to “further the utilization of the area to be delimited” signifying that provisional arrangements should be related to exploration and exploitation of the resources in the area.²¹ Moreover, provisional arrangements must provide practical solutions to actual problems regarding the use of an area.²² Simply put, provisional arrangements are: (1) agreements concluded between two or more of the states concerned; (2) must provide practical solutions to actual problems regarding the use of area; (3) interim measures which are preliminary or preparatory to the final agreed status of the area; and (4) without prejudice to the final delimitation.²³

The States are not obliged to enter into any provisional arrangement but must “make every effort” to negotiate in good faith.²⁴ The utility of entering into a provisional arrangement is in light of the fact that the process of determining delimitation, especially when carried out by international adjudication bodies, tends to last long particularly when the dispute involves intricate geographical circumstances and other complicating factors. On such occasion when coastal States are hampered from utilizing the resources in the area in fear of inciting the ire of other claimant States, a temporary arrangement that provides for joint utilization and development of the area is a better option than waiting for international court’s decision or triggering conflict with other claimant States. The other intended purpose of the provisional arrangement is to deter concerned States from jeopardizing the ‘reaching of the final agreement,’ which is delimitation. For this purpose, provisional arrangements could take the form of establishing moratorium on the exploration and exploitation of resources in the area. This latter objective also addresses the issue of overexploitation of resources like fisheries which is another resultant implication of a clear lack of management and enforcement framework in a yet undelineated overlapping claim.

The area of application for provisional arrangement as well the purpose or use should be strictly specified. Generally, provisional arrangements on fishing are far less complicated than provisional arrangements on the exploration and exploitation of oil and gas. This is because the latter is a risky endeavour entailing huge financial requirements that may or may not be

recovered later on. However, the increasing need for energy resources coupled with the availability of the technology for offshore oil and gas exploration resulted in making joint development as one of the prevalent provisional arrangements pending delimitation.²⁵

Joint Development

Joint development is defined as “the cooperation between States with regard to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims.”²⁶ The said definition implies two circumstances wherein joint development may be implemented. The first case is when the resources straddle between or across the boundaries of the concerned States. In this case, the maritime boundary is presumed to be delimited. Joint development becomes more attractive to concerned States to avoid the possibility of being in the losing end with regards to the exploitation of resources, especially the energy resources, whose deposit possibly extends across the delimitation line. An oil and gas field in one’s jurisdictional area, for instance, may siphon off the same resources that are under the other State’s jurisdiction.²⁷ Thus, it is economically more beneficial for concerned States to jointly exploit the resources as one unit and agree on the scheme for apportionment of costs and benefits for such an undertaking. This arrangement is also called unitization.

The second scenario is when the potential resources are located in a yet undelimited area between the claimant countries, and the concerned States, for political and economic reasons, have decided to jointly develop the resources in the area. In this case, the decision to establish joint development may be made within the context of maritime delimitation²⁸ or when maritime delimitation is still shelved or unresolved.²⁹ Joint development takes the form of a provisional arrangement when the disputed area is still undelimited, although concerned States could decide later on to make it a permanent arrangement.

Generally, joint development pertains more to the non-living, especially oil and gas, than the living resources like fisheries. The precedents for joint development for fisheries are relatively few.³⁰ It appears that there is a generally accepted practice in the international community to limit the joint development to the non-living resources and to exclude fish and marine mammals.³¹ Several factors were cited as reasons for this.³² First, the nature of the fisheries resources is different from the oil and gas resources and consequently entails a diverse set of considerations. Second, there are relevant provisions in the UNCLOS regarding the exploitation, conservation and distribution of fisheries resources. Third, there are other considerations such as historic rights and interests and fish stocks that may be governed by various international treaties.

Joint development has increasingly become a prevalent practice among States whether their boundaries are delimited or not.³³ This is attributed to four factors: (1) it has legal basis under UNCLOS which has gained wider acceptance; (2) the availability of better and improved technology facilitating better and easy access to the resources; (3) the economic incentives from oil and gas; and (4) strategic value of acquiring a diversified source of oil and gas imports.³⁴ Joint development has also become attractive option pending maritime delimitation. In Asia alone, countries such as Thailand and Malaysia, Vietnam and Malaysia, Indonesia and Australia, and Japan and South Korea, have temporarily shelved their boundary disputes and cooperate in the exploration and exploitation of oil and gas in the contested areas.³⁵ China and Japan also agreed to undertake joint development in the East China Sea, though there have been some setbacks on its implementation.

The practice of joint development is so varied, and the jurisdictional models are numerous.³⁶ In regard to geographical scope alone, the approaches range from the establishment of common zone,³⁷ a joint development zone with subzones,³⁸ and a very complex zone of cooperation divided into several areas depending on the type of arrangements.³⁹ The common practice, though, is to define the scope of the joint development area in connection with the resources.⁴⁰ In the exploration and exploitation of the resources, the arrangements vary from simple to highly complex and structured system of jurisdiction and revenue sharing.⁴¹ These arrangements are categorized into: (a) unitization; (b) joint venture; and (c) joint authority.⁴² Unitization refers to an arrangement where the natural resources are treated and exploited as a single unit.⁴³ In this situation, the states parties to the arrangement agree to authorize one state to have the overall responsibility, on behalf of both states, in the management of resource development in the zone,⁴⁴ or that a Commission composed by representatives from both States is established to oversee the development of the zone.⁴⁵ Joint venture approach retains the jurisdiction and sovereignty of each State over its area of joint zone, but provides a joint venture scheme for companies of other State.⁴⁶ The other arrangement is to establish a Joint Authority, which will assume all the rights and responsibilities in the management of the area.⁴⁷ The Joint authority will have the licensing and regulatory powers to manage the development of the joint development zone on behalf of the States.⁴⁸

Rationale for Joint Development

There are several reasons why States opt for joint development arrangements. From political and security perspectives, joint development is a way to maintain good relations with other claimant States and minimise the potential for conflict over the resources in the disputed area. From an economics perspective, joint development allows States to enjoy the benefits from having access to the resources in the disputed area without fear of being contested by other States. An elaboration of these reasons is outlined below.

Political/Security Reasons

Despite the blatant economic underpinnings of joint development, it must be emphasized that the choice to undertake it is primarily a political decision. A claimant country's acquiescence to a joint development arrangement implies a tacit recognition of the other claimant country's valid claim over the resources in the area, notwithstanding the *no prejudice* clause that are usually maintained by claimant countries and reflected in the joint development agreements.⁴⁹ Indeed, a joint development arrangement among States presupposes the existence of valid contending claims over the area under international law. This is why the choice of the joint development area is a crucial consideration for a State's decision, and later on, for the continued success of the arrangement itself.⁵⁰

Joint development arrangements are a pragmatic tool that States could use to avoid conflict with other contending States. Territorial and maritime disputes are oftentimes characterized by military clashes, which if left unresolved, will continue to persist and may even lead to worse or heightened situations. Beyond economics, the concern of security also becomes a motivating factor for joint development.

Economic Reasons

Conflict over resources is predicted to be the source of war in the twenty-first century.⁵¹ Strategically valuable and highly scarce, energy resources and water are the primary reserves around which conflicts are predicted to be waged. Just in recent years, aside from the heightening tension in the South China Sea which is primarily attributed to more assertive actions by claimant countries allegedly driven by the need to explore and exploit the oil and gas in the area, there is also a dread of war between Britain and Argentina over the Falklands Islands which has oil prospects that are estimated to be around 8.3 billion barrels of oil.⁵²

Joint development, as adverted earlier, is established essentially to promote further utilization of the area pending delimitation. Not surprisingly, if the disputed area has no potential valuable resources, the concerned States would not be compelled to pursue joint development instead of other applicable provisional arrangement. On the aspect of oil and gas resources, some States have recognized the relative economic gains that may be derived from treating the energy resources underneath the disputed or overlapped area as one unit or a single deposit which the States can jointly explore and develop.

Joint development provides a conducive environment for economic activities, which is a boon for concerned States because it attracts potential investors to develop the area. In the absence of dispute settlement, a commercial undertaking in a disputed area, no matter how appealing the financial benefits may be, is a big financial and investment risk considering that any operation on the ground has the possibility of encountering threats from the forces of other contending

claimant States.⁵³

Legal Reasons

Not only is joint development a practical interim measure on maritime delimitation but it is also one way of complying with legal obligation to cooperate in respect of shared common natural resources. The United Nations General Assembly Resolution 3281 Charter of Economic Rights and Duties of States (A/RES/29/3281) dated 12 December 1974 highlights the need for cooperation among countries in the exploitation of shared natural resources.⁵⁴ Another UN General Assembly Resolution exhorts cooperation for the “conservation and harmonious exploitation” of common resources.⁵⁵

Moreover, joint development is consistent with the relevant emerging rules of customary international law which are as follows:⁵⁶

- Unilateral exploitation of the petroleum deposit in disputed area is prohibited;
- The concerned States should agree on the method of exploitation and the underlying legal basis for apportionment of the deposit; and
- The concerned States should negotiate in good faith to arrive at an agreement or at least provisional arrangement.

Other Reasons

Aside from the loss of time and opportunity that a dispute settlement process may cause to the disputing States, there is also a possibility of an adverse ruling from international court. The decisions on maritime boundary disputes, as one writer notes, lack coherent and logical pattern⁵⁷ which makes a reasonable forecasting of results unlikely. The concerned States are therefore taking a huge risk when disputes are elevated to judicial settlement/arbitration. This is especially true when the basis for claims have questionable merits under international law. In this regard, claimant States are better off with a joint development agreement that allows them to enjoy the benefits from the resources than risking the same rights in an international legal procedure.⁵⁸

Joint Development in the South China Sea

The South China Sea is not only a maritime delimitation case, but a conflict of territorial sovereignty as well. Whereas in the former the main concern is an unresolved maritime jurisdiction, in the latter the issue is the ownership of several geologic features which may or may not generate an expansive maritime jurisdiction over which exploration and exploitation of resources can be undertaken. Thus, joint development, if even implemented in the South China Sea would certainly be an arrangement unlike others.

While joint development is essentially directed at unresolved maritime delimitation, its

usefulness to the South China Sea case, specifically to the Spratly Islands, which is more of a territorial sovereignty issue, cannot be denied. It is a fact that the conflict of territorial claims over the geological features exists not because of the intrinsic value of the features, which scholars note to be of minimal,⁵⁹ but due to the strategic value of having the concomitant sovereignty and sovereign rights over the maritime areas that are generated from the geologic features. In particular, claimant countries are principally concerned about the exploration and exploitation of energy resources underneath the continental shelf of the South China Sea.

The possibility of a joint development in the South China Sea was contemplated as early as the 1980s. Keyuan (2006) notes that two workshops were organized at that time to discuss the issue, though most discussions were focused on geology, geophysics and potential hydrocarbon resources in the South China Sea while limited discussions were centered on the legal aspect of joint development.⁶⁰ Whether or not joint development is possible in the South China Sea was explored by Miyoshi (1997) who concludes that the possibility is contingent upon whether multilateralism is feasible in the region given that China prefers bilateralism in territorial dispute settlement.⁶¹ He further notes that there is no precedent yet for a multilateral joint development arrangement which can be used as useful reference.⁶² Though, he makes reference to the Convention on the Regulation of Antarctic Mineral Resource Activities of 1988 as a precedent for a multilateral arrangement of prospective joint development in an area of overlapping claims.⁶³

Contributing to the discussions on the possibility of joint development in the South China Sea, Baviera and Batongbacal (1999) have identified certain conditions that may engender joint development in the South China Sea. These are as follows: (1) a clear and explicit agreement among claimants to put sovereignty claims aside in the meantime; (2) a regional code of conduct that will create a more positive political climate and help build trust and confidence among the claimants and help contain disagreements and conflicts; (3) identification of the common interests of the claimant states to facilitate harmonization of interests and prioritization of the pursuit of said interest, with minimizing the security concerns as the foremost priority; and (4) considerable experience in successful joint management of non-resource related activities.⁶⁴

The issue of joint development has also been discussed by Chinese scholars and government officials. Keyuan (2006) mentions two conferences, one in 1991 and in 2002, which discussed extensively on joint development in the South China Sea. Both conferences viewed joint development as a pragmatic provisional measure of solving the disputes peacefully⁶⁵ which can lead to effective and rational use of South China Sea resources, and can serve as a stabilizing factor in the region.⁶⁶ This positive view about joint development is not surprising given that the same policy was advanced by Deng Xiaoping. The concept of “setting aside

dispute and pursuing joint development" was proposed by Deng Xiaoping when China commenced its diplomatic relations with the Southeast Asian countries during the 1970s and 1980s, stating that:

“The Nansha Islands have been an integral part of China's territory since the ancient times. But disputes have occurred over the islands since the 1970s. Considering the fact that China has good relations with the countries concerned, we would like to set aside this issue now and explore later a solution acceptable to both sides. We should avoid military conflict over this and should pursue an approach of joint development.”⁶⁷

The concept of joint development as envisioned by China contains the following elements: “(1) the sovereignty of the territories concerned belongs to China; (2) when conditions are not ripe to bring about a thorough solution to territorial dispute, discussion on the issue of sovereignty may be postponed so that the dispute is set aside. To set aside dispute does not mean giving up sovereignty. It is just to leave the dispute aside for the time being; (3) the territories under dispute may be developed in a joint way; and (4) the purpose of joint development is to enhance mutual understanding through cooperation and create conditions for the eventual resolution of territorial ownership.”⁶⁸

A challenge to a joint development in the South China Sea is the difficulty in designing an arrangement that would be acceptable to all claimant parties. With various interests, expectations and claims, arriving at an arrangement that would be considered “fair” among the concerned parties is an arduous process. Attempting to address this issue, Mark Valencia, Jon Van Dyke and Noel Ludwig (1997) propose specific models for joint development arrangement in their book “Sharing the Resources of the South China Sea. The book outlines certain principles, elements and schemes for establishing a multilateral cooperative regime in the area.⁶⁹ One suggested regime is a Spratly Management Authority that will govern a specific area (defined in the book according to some technical considerations), with the associated cost and benefits allocated among claimant States based on certain criteria.⁷⁰ Another proposal is the establishment of 12 joint development companies covering each area where overlapping claims occur, and governed under a Spratly Coordinating Agency. The shares, cost, votes and benefits for each company will be shared equally and 5% of the profits to be allocated to the Agency.⁷¹ The third proposal is the creation of a Spratly Management Authority to manage hydrocarbon development and fisheries within that area enclosed by lines joining the outermost drying reefs.⁷² Smith (1997) opines that a creative approach is required for joint development in the South China Sea. Smith underscores the need for claimant States to refrain from pursuing further claims in the area as the most important step in the joint development process. Afterwards, the claimant States could then proceed to identify hypothetical equidistant lines

between the disputed islands and the littoral States. Beyond the zone created by the equidistant lines, the claimant States could seek bilateral boundaries agreement and within the zones created by the equidistant lines, they could establish various “joint zones.” Within these “joint zones,” the claimant States could agree to designate joint development, limited joint development and non-development zones.⁷³ Non-development could be applied in zones where competing claims are very complex or it could take the form of marine sanctuaries in respect of living resources.⁷⁴ Still, others have referred to specific existing joint development agreement as potential model for South China Sea. (Further discussion on this is on later section.)

While the practical benefits from establishing a joint development arrangement in the South China Sea has been widely acknowledged, an attempt was not pursued by claimant countries until 2005 when China, Vietnam and the Philippines agreed to undertake a joint marine seismic undertaking (JMSU) in a defined area in the South China Sea. The agreement was signed by representatives from national oil companies of China National Offshore Oil Corporation (CNOOC), Vietnam Oil and Gas Corporation (PETROVIETNAM), and the Philippine National Oil Company (PNOC) and was hailed as “diplomatic breakthrough for peace and security in the region.”⁷⁵ The agreement allowed the three oil companies to conduct a joint research of petroleum resource potential in a defined area in the South China Sea. The area is defined in the agreement through specific geographical coordinates. However, an allegation that the JMSU survey area was prejudicial to the Philippine sovereign rights resulted in a public condemnation of the agreement which prompted the Philippine Government not to renew the agreement after it lapsed in 2008, thereby halting the activity from moving on to the next logical stage of joint exploitation of resources. Despite the repeated insistence of China to continue the agreement, the undertaking has since then stopped.

The JMSU agreement was supposed to be the first step to a joint development arrangement, despite constant proclamations of the Philippine government to the contrary to avert any legalistic recriminations.⁷⁶ The idea of jointly undertaking a seismic survey purposely to determine the resource potential of the area is, on the face of it, undoubtedly the very first step of an oil exploration process. Flawed as it was, one lesson learned from JMSU is that claimant States are willing to cooperate on joint activities, albeit a thorough study is essential for it to continue and succeed.

State Practice on Joint Development: Some Proposed Models for South China Sea

As adduced earlier, there is a variety of joint development arrangements. This is logical considering that the circumstances underlying each agreement are unique and different. In the case of the South China Sea, there is no existing agreement that can be considered as outright appropriate model. But some features of the existing joint development agreements may be considered for South China Sea:

Timor Gap Treaty⁷⁷

The Timor Gap Treaty is not only recommended as a potential model for the South China Sea,⁷⁸ but also for the Western Gulf between the United States and Mexico.⁷⁹

The Treaty was signed originally between Australia and Indonesia on 11 December 1989 to establish a provisional zone of cooperation for joint development in Timor Gap. Timor Gap refers to an area of the Timor Sea which straddles between East Timor and northern Australia.⁸⁰ Prior to its independence, East Timor was considered by Indonesia and acknowledged legally by Australia as one of Indonesia's provinces.⁸¹ The unresolved maritime boundary is a result of conflicting position on the boundary of continental shelf. From Australia's perspective, the Timor Trough represented the northern boundary of Australia's physical continental shelf, and should be the maritime boundary.⁸² Indonesia, on the other hand, was of the view that the boundary line should be the median line or equidistant line between the two coastal States.⁸³ When the two coastal States failed to reach an agreement, they decided to pursue joint development instead. After East Timor gained its independence from Indonesia in 1999, the Timor Gap Treaty was renegotiated. The structure of the joint development basically remains the same but the apportionment of royalties changed from an equal share (50%-50%) between Indonesia and Australia to an uneven share in favor of East Timor (90%-10%).⁸⁴

The Joint Development Area

The Treaty covers approximately 60,000 square kilometres, comprising of three areas A, B, C.⁸⁵ The boundaries of the zone of cooperation reflect the two countries' potential maximum extent of their respective claims: the boundary in the northernmost is indicative of the maximum extent of the claim for continental shelf by Australia; the boundary in the southernmost indicates the possible maximum extent of the claim for EEZ by Indonesia; and the boundaries in the east and the west reflect equidistance lines.⁸⁶ Area C is the area closest to East Timor and is separated from Area A by a boundary line of 1500 meter isobaths.⁸⁷ Area B is the area closest to Australia and is delineated from Area A by a median line between the two countries.⁸⁸ Area A lies between Areas B and C and has an area of about 30,000 square kilometers.⁸⁹

Area A is subject to joint control by the two countries.⁹⁰ Area B is under the control of Australia but the latter should notify and share 10% of gross resource rent tax collected petroleum production to East Timor.⁹¹ Area C is under East Timor's control and East Timor must also notify and share with Australia 10% of tax collected from petroleum production in the area.⁹²

The Salient Features of the Treaty

The Treaty established a Ministerial Council which is composed of equal number of Ministers from two countries and has the “overall responsibility for all matters relating to the exploration for and exploitation of the petroleum resources in Area A.”⁹³ It is also in-charge with other functions relating to the exploration for and exploitation of petroleum resources that may be entrusted by the two countries.⁹⁴ The Council gives direction to the Joint Authority, a juridical entity comprising of equal numbers of Executive Directors from two countries appointed by the Ministerial Council, established to manage petroleum exploration and exploitation activities in Area A. The Council and the Joint Authority both make decisions by consensus.⁹⁵

The Joint Authority has the operational responsibility of the petroleum exploration and activities in Area A. Its functions include, among others, dividing Area A into contract areas, issuance of prospecting approvals, commissioning of environmental investigations, entering into production sharing contracts and supervising the contractors’ activities.⁹⁶

A Petroleum Mining Code is provided as Annex B of the Treaty and outlines the obligations and rights of the Joint Authority and petroleum contractors. It also outlines the administrative arrangements covering the petroleum operations.⁹⁷ A Model Production Sharing Contract is also provided to form the basis for all contracts between the Joint Authority and contractors. The Contract sets out commercial terms and the respective rights and obligations of the Joint Authority and the contractor which include work commitments, recovery of investments, production sharing and handling of production, among others.⁹⁸

In addition to petroleum activities, the two countries are also obliged to cooperate on the following activities in Area A: (1) coordination on surveillance activities,⁹⁹ security measures for responding to security-related incidents,¹⁰⁰ and search and rescue;¹⁰¹ (2) provision of services such as air traffic services,¹⁰² marine environment protection,¹⁰³ unitization of petroleum accumulation extending the boundary of Area A,¹⁰⁴ and construction of facilities for Area A;¹⁰⁵ and (3) conduct of hydrographic and seismic surveys¹⁰⁶ and marine scientific research.¹⁰⁷

Malaysia, Thailand and Vietnam Arrangement in the Gulf of Thailand

A quite interesting proposal, albeit not fully expounded, is the accumulation of bilateral arrangements which eventually and gradually will evolve into a multilateral arrangement.¹⁰⁸ The proposal is based on the case of Malaysia, Thailand and Vietnam in the Gulf of Thailand. In 1999, the three countries agreed in principle to undertake joint development in the tripartite overlapping area – area where Vietnam’s 200 EEZ and CS overlap with the Thai-Malaysian JDA of 1979.¹⁰⁹ It is not clear when is the joint development arrangement will operationalize

as the parties concerned are still under the discussions on the technical aspects of the arrangement.¹¹⁰ However, if this trilateral undertaking materializes, it will be the first multilateral arrangement on joint development.

The tripartite arrangement is based on two bilateral joint development arrangements concluded between Malaysia and Thailand in 1979, and Malaysia and Vietnam in 1992.¹¹¹ As Keyuan notes, a tripartite arrangement has gradually evolved based on these agreements.¹¹²

Malaysia and Thailand's dispute arose from a disagreement on the effect of a Thai islet called Ko Losin, 1.5 meters high above the sea and reputed to have no economic life of its own, in the delimitation. Thailand insisted to use the islet as a valid basepoint for delimitation while Malaysia argued that it should have no effect on the delimitation.¹¹³ The overlapping area as a result of each country's respective equidistant line, approximately 7250 square kilometers, was agreed to be jointly developed by the two upon signing a Memorandum of Understanding (MoU) on 21 February 1979.¹¹⁴

The overall administration of joint development area is vested upon the Malaysia-Thailand Joint Authority (MTJA). MTJA is a legal body established under the laws of the two countries in 1991 "to assume all rights and responsibilities on behalf of the two Governments to explore and exploit the non-living natural resources, particularly petroleum,"¹¹⁵ in the Joint Development Area (JDA). A fiscal regime for exploration and exploitation activities was formulated, including the production sharing scheme.¹¹⁶ The costs, expenses, liabilities and benefits from the activities are equally shared between the two parties.¹¹⁷

Aside from petroleum activities, the following are established in the JDA: (1) the rights of "fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution and other similar matters,"¹¹⁸ including the relevant enforcement authority, which are conferred or exercised by each party's national authority; (2) a combined and coordinated security arrangement;¹¹⁹ and (3) each party's criminal jurisdiction area in JDA.¹²⁰ For this purpose the JDA was divided into two parts: 930 square miles for Malaysia; and 1,100 square miles for Thailand.¹²¹

Malaysia and Vietnam have overlapping area of 2500 square kilometers. Vietnam's claim for continental shelf ends at the median line between Malaysia and Vietnam. Malaysia, on the other hand, designates the outer limit of its claim the median line between the Malaysian island of Redang and Vietnam's cape of Ca Mau.¹²²

On 5 June 1992, the two countries agreed to undertake joint development in their overlapping area of claims, which they termed as "Defined Area." The area has a length of 100 miles and a

width of 10 miles.¹²³

The exploration and exploitation activities are undertaken through a commercial arrangement entered into between the national oil corporations of the two countries, Malaysia's Petronas and Vietnam's PetroVietnam, and approved by the two Governments.¹²⁴ The commercial arrangement was agreed by the two national petroleum companies on 25 August 1993.¹²⁵ It provides for the creation of a Coordination Committee which provides "policy guidelines for the management of petroleum operations in the Defined Area."¹²⁶ The Committee has eight members nominated equally by the two national oil corporations with equal voting rights.¹²⁷

Convention on the Regulation of Antarctic Mineral Resource Activities of 1988

The Convention is touted as a precedent for a multilateral arrangement of joint development in an area where there are overlapping claims.¹²⁸ However, it is primarily intended for the conservation and protection of the environment and not for the utilization of resources. This is evidenced from the objectives set out in the Convention which is to provide the principles, rules and the institutions a means to: (1) assess the possible impact on the environment of Antarctic mineral resource activities; (2) determine the acceptability of the mineral resource activities in the area, govern the conduct of the activities; (3) to govern the conduct of such activities in the area; and (4) to ensure that all such activities are undertaken in conformity with the Convention.¹²⁹ More importantly, the ultimate objective of the Convention is to "ensure that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord."¹³⁰

Joint Development in the South China Sea: Assessment of Merits

Joint development in the South China Sea has been proposed as a solution to the disputes as early as the 1980s. China was even one of the earliest proponents; its policy was enunciated by Deng Xiaoping as "set aside dispute and pursue joint development."

The practical benefits of a joint development are irrefutable. From political, security, legal and economic standpoints, there is no debate that joint development is an extremely practical temporary solution for maritime delimitation. Specific to the South China Sea case, there are compelling reasons that should induce a joint development arrangement in the region. First, it is highly improbable that the territorial and maritime dispute will be resolved in the near future. The core issue of sovereignty seems to be intractable and appears to remain so in the incoming years. The various mechanisms available for solving the dispute have not been availed of by the claimant States. The Philippines has recently been sending signals to have the issue raised for judicial settlement; its prospect though depends on the cooperation of the other claimant States, which if based on China's stance is not forthcoming. Secondly, most of claimant States have need for energy resources that are presumed to be present in the area. In the midst of

rising oil price and increasing energy demand, it would be outright impractical to refrain from exploring and exploiting the energy resources in the area. Attempts for unilateral activities from claimant States have faced strong objections from other claimant States, which make environment of South China Sea unstable for economic activities. Thirdly and corollary to the above, the economic incentives from utilizing the resources in the area have prompted some claimant States to undertake unilateral actions amidst protests. This leads to heightened tension in the area as each claimant State tries to protect its interests.¹³¹ Viewed within those contexts, joint development seems to be a logical appropriate temporary measure that can be applied in the South China Sea. It does not only promotes the utilization of much needed resources but it also serves as a tool to reduce or avert conflicts arising from each claimant State's unilateral activities in the area.

Beyond the recognition that joint development is beneficial for the South China Sea case, the next hurdle is how to facilitate its implementation in the South China Sea. The foregoing discussions have outlined some conditions which scholars have identified as engendering joint development. Two important factors are the existence of a regional code of conduct and acquired experience in joint management of non-resource related activities. A reasonable assessment would reveal that it is highly unlikely to achieve the said conditions in the immediate future. Past evidence show that any undertaking or agreement in the South China Sea takes a long time to realize. The Guidelines for the DOC-SCS, for instance, took almost a decade of negotiations before an agreement was reached. The Guidelines pertain to the implementation of the confidence-building measures in the South China Sea, which if, agreed upon earlier, would have provided the claimant States with the experience on undertaking joint activities in the area.

A set of practical program of actions to enable joint development in the South China Sea was formulated in the Conference on Joint Development and the South China Sea held on 16–17 June 2011 and organized by the Centre for International Law of the National University of Singapore. Among the recommended actions include: (a) increase of knowledge about the features in the Spratly Islands so as to facilitate legal analysis to determine whether or not the features should be entitled to a full suite of maritime zones in accordance with Article 121 of UNCLOS; (b) the need for China to clarify its claim to enable the determination of the potential areas for joint development; (c) increase of knowledge on the hydrocarbon resources in the area so as to identify areas suitable for joint development; (d) the implementation of the DOC-SCS especially the CBMs so as to foster the good will and trust necessary for discussions on joint development; (e) the improvement of understanding on nature and importance of joint development arrangements especially among government officials from claimant States who have the wrong perception that joint development compromises sovereignty. This may be done through seminars, conferences and workshops, among others; (f) better management of

domestic politics and nationalistic rhetoric of claimant States so as not to stoke the nationalistic sentiments of the public and to prevent misinformation about joint development: (g) greater discussion on appropriate institutional framework for discussion and negotiations; (h) utilizing oil companies to facilitate joint development. Oil companies have the potential to exert influence on States to enter into a JDA in order to secure their investment; and (i) the need to conduct more research on joint development regimes suitable for the South China Sea.¹³²

The foregoing is a comprehensive list of activities that aim to address the political, legal and other relevant considerations for establishing joint development in the South China Sea. However, some of the activities can be done simultaneously and not necessary prior to joint development. For instance, joint seismic survey can be an activity after a joint development agreement has been reached. Admittedly though, *items (a) and (b)* are extremely important considerations in the joint development. Although between the two, there is a more urgent need to seek China's clarity than to determine the nature of the geologic features in the South China Sea. There are international jurisprudence that would guide how offshore small islands should be treated in maritime delimitation opposite continental islands. The claimant States could certainly work out a compromise on that basis, a flexibility that is lacking with regards to vague nine-dashed line claim by China.

Among the joint development arrangement models that have been discussed above, the Timor Gap Treaty model seems to be a good option. The hope that a series of bilateral efforts would eventually lead to a multilateral arrangement is possible only if there is a clear and defined area that are under dispute between and among the concerned States. Any bilateral arrangement entered into between two claimant countries that possibly impact on China's nine-dashed line claim would be in vain as China would surely object against it. The Antarctic Convention, on the other hand, entails a far more complicated structure and focuses too much on the environment aspect to be an appropriate model for South China Sea. Although some environmental considerations can also be incorporated in an envisaged joint development arrangement. This redounds to the point that the South China Sea is a very unique situation requiring a different and creative arrangement. The proposals from Valencia et al, notwithstanding the criticisms of the "fairness" of the proposed schemes,¹³³ could be a takeoff point for discussions.

In sum, the point of whether or not joint development should be implemented in the South China Sea is no longer a question. Save for a definitive solution which is unattainable at this time or in the coming years, joint development could be a panacea for the current situation of heightening tension in the South China Sea. The recent developments have prompted, once again, the establishment of a joint development in the area. How these recent development influence engendering joint development is discussed in the succeeding sections.

Recent Developments in the South China Sea and Prospects for Joint Development: An Analysis

Three significant developments in the recent years that have great implications on the South China Sea issue have been noted. These developments include China's energy security, China's increasing sea power, and the U.S. involvement in the South China Sea issue. The succeeding sections examine these issues and analyze the prospects for joint development taking into account the said developments.

China's Energy Security

Discussions on South China Sea issue have always been framed against the context of its potential energy resources. This connection is not without basis. Various sources have indicated the presence of energy resources in the area. According to the surveys conducted by China's Nanhai Oceanography Research Institute between 1948 and 1988, about 25 billion cubic meters of gas reserves, 105 billion barrels of oil reserves and 370 thousand tons of phosphorus may be found in the continental shelves in the Spratlys.¹³⁴ Recent Chinese studies estimate the energy resources in the South China Sea between 105 billion barrels to 213 billion barrels.¹³⁵ Another Chinese data, albeit incomplete, indicates that the sedimentary basins in the Spratly area alone contain 34.97 billion tons of petroleum reserves, including 1182 billion tons of oil and 8000 billion cubic meters of gas.¹³⁶ Notwithstanding the inconsistencies of the estimates, what is clear is that the South China Sea has energy resources that coastal states could explore and exploit. Indeed, this is what exactly the coastal states have been undertaking for the past years. The oil explorations were generally conducted in the coastal states' respective maritime zones outside the Spratlys area.

The energy factor in the South China Sea dispute has never been more highlighted than in the past two years. There have been exchanges of protests about oil exploration activities in the area. China's protests against other claimant states' oil explorations have never been as persistent. Not only does China make diplomatic protests but also employs harassment tactics in the maritime area.¹³⁷

China's assertive and aggressive stance in the South China Sea has been tied to its energy security. China's rapid economic growth has resulted in the intensification of its energy needs. The International Monetary Fund (IMF) estimates that between 2000 and 2009, China's average growth rate of real gross domestic product (GDP) was 10%. This rapid economic development and industrialization has resulted in China's emergence as the world's second largest economy as well as the world's second largest energy consumer in 2010.¹³⁸ Specific to oil consumption, China was the second largest oil consumer behind the United States.¹³⁹ China's oil consumption exceedingly overwhelms its production. (Figure 8.1.1) In 2009, China became the second largest net oil importer.¹⁴⁰

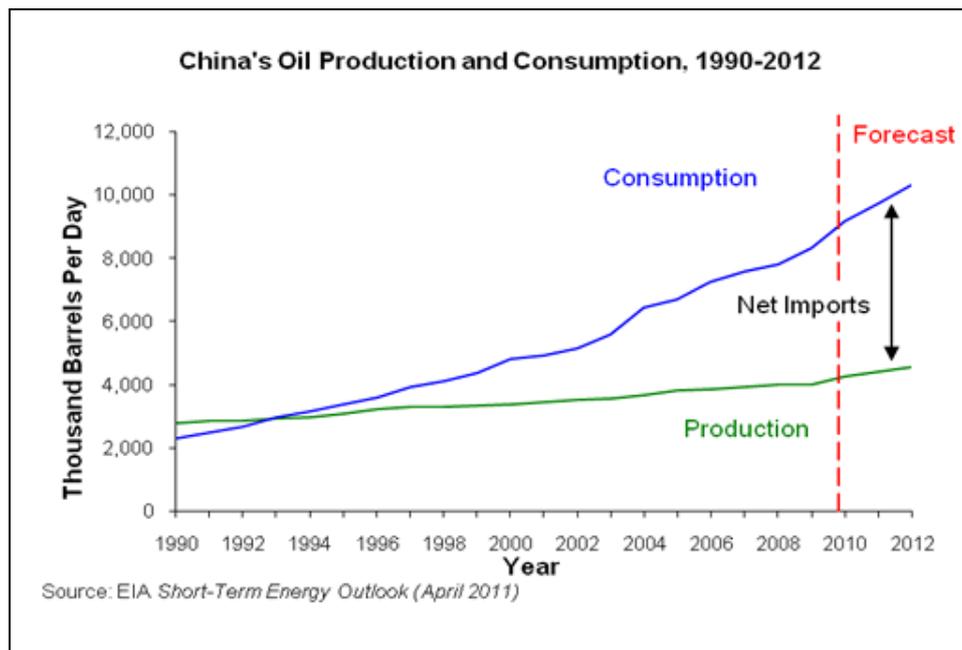


Figure 8.1.1. China's consumption vs production

Source: China Energy Analysis, U.S. Energy Information Administration

Obviously, energy security prominently figures as China's foremost national interest. Energy, after all, is the driver of economic activities and securing sufficient supply is essential if China wants to sustain its economic development. Clearly, the quest for energy security has geopolitical implications. For the past years, energy security has fundamentally shaped China's foreign and security policy. On this aspect, the United States has noted that China's energy demands pose economic, environmental, and geostrategic challenges to the United States.¹⁴¹ In particular, the United States is concerned about China's dependence on oil imports and its impact on China's relations with other countries, notably those in Asia, the Middle East and Central Asia.¹⁴² The United States fears that in its quest for oil and other energy resources, China would undermine any regard for critical global security issues such as the fight against terrorism. China is accused that in its uncritical quest for energy security, it undertakes actions and policies that violate the international norms such as the sale of arms to countries like Iraq and Iran and the provision of weapons of mass destruction (WMD) technologies to North Korea, Syria, Libya and Sudan.¹⁴³ China has denied all allegations.¹⁴⁴ Other related allegations have linked China's use of veto power in the UN Security Council to secure its oil imports such as in the case of UN resolution on sanctions against Sudan¹⁴⁵ and forging energy deal with Iran supposedly with a commitment to veto a UN resolution against Iran's nuclear energy program.¹⁴⁶ As of yet, China has not exercised its right to veto any resolutions against Iran. However, it has continued its trade relations with Iran despite economic sanctions imposed by the United States.¹⁴⁷ China has been criticized for exploiting the "morality gap" by its blatant disregard for international norms in its pursuit of energy security.¹⁴⁸

On the face of it, China's pursuit of energy security has certainly affected its policy on the South China Sea. However, it can be argued as well that the recent actions of China may be primarily driven by its nationalistic desire to assert its sovereignty over the area considering that it now has the economic, political and improved military capabilities to do so. Although a counter-argument to the above supposition is that China's nationalistic desire emanates from the realization of the benefits from the energy resources in the area amidst the country's massive energy needs. Whether or not the energy factor is the primary motive or influence in China's recent South China Sea policy cannot be fully determined considering that energy resource is but one factor in the South China Sea dispute. There is, however, a way to ascertain if China's energy security influences its South China Sea policy and vice versa. This aspect necessitates a look at the policy pronouncements and the pattern of Chinese behavior in the South China Sea vis-à-vis the developments related to energy.

The oil factor in the South China Sea is, undeniably, one of the impetuses for claiming the area. The Philippine claim over the KIG, for instance, was linked to the prospect of oil in the area.¹⁴⁹ The oil factor became more appealing after the oil shock in the early 1970s. Post-oil crisis, the scramble for claim over the features in the South China Sea was manifested by the Philippines' formal claim in 1978 and Malaysia's claim in 1979. With respect to China, it has been noted that its distribution of map in 1993 indicating its claim to the entire South China Sea, including the area near Indonesia's Natuna Island where gas deposits were being developed, was coincident with China's imbalance of its oil demand and domestic production.¹⁵⁰ The latter situation may also have contributed to China's provision of oil concession to Crestone Energy Corporation in the southwestern part of the South China Sea in 1992 and China's occupation of Mischief Reef in 1995. Additionally, China's disclosure of the results of the Nanhai Oceanographic Research Institute about the oil in the Spratlys which was timed after it had occupied features in the area gave rise to the conjecture that its occupation was motivated to a certain extent by the energy resources in the area.¹⁵¹ On the policy side, in the absence of any official statements that clearly indicates South China Sea as a factor in China's energy security or vice versa, there have been certain policies where such may be inferred. Deng Xiaoping's "setting aside dispute and pursuing joint development" policy that was promoted in the 1970s and 1980s is indicative of China's willingness to prioritize resource development, particularly oil and gas, in the South China Sea. This was proven true when China entered into a joint pre-exploration activity with the Philippines and Vietnam in 2005.¹⁵² A government paper entitled China's Energy Conditions and Policies does not mention the South China Sea at all. The paper, however, indicates China's plan to expedite the development of oil and gas on major oil and gas basins and to "actively explore new areas" on "land and major sea areas."¹⁵³

The foregoing implies that China's South China Sea policy has, to certain extent, been

influenced by its energy security. As to how significant is China’s access and presence in the South China Sea to China’s energy security is difficult to determine; though, an indication could be discerned by re-examining the energy aspect of the South China Sea vis-à-vis China’s energy security goals.

The South China Sea has two fundamental roles in the context of China’s energy security. First, it can provide energy resources. Second, it serves as important waterways for the transport of China’s oil imports from the Middle East and Africa. With regards to the energy resources, it bears repeating that there are conflicting estimates of the oil and gas reserves in the area. Moreover, it is unclear where these energy resources are exactly located in the South China Sea. For instance, estimates of the energy potential of the Spratlys area are overly optimistic according to a popular international oil company which claims that the area is not a priority for the company’s oil exploration.¹⁵⁴ The table below shows these different approximations.

Table 8.1.2. Estimates of Energy Resources in the South China Sea		
Energy Resources	Data from China	Data from other sources
Oil	105 to 213 billion barrels	1-2 billion barrels [U.S. Geological Survey (USGS)]
Natural gas	900 trillion cubic feet (tcf)	24 tcf (non-Chinese report; not indicated)

Source: <http://www.globalsecurity.org/military/world/war/spratly-oil.htm>

Putting aside the issue of the accuracy of the estimates, it must be remembered that these are not all recoverable reserves. The rule-of-thumb on this aspect holds that around 10% of the potential resources can be economically recovered.¹⁵⁵ Hypothetically, this translates to 1.9 million barrels/day (bpd) of oil based on Chinese estimates or 180,000 - 370,000 bpd based on USGS’ estimates, taking the same order of magnitude as current production levels in Brunei or Vietnam.¹⁵⁶ Natural gas, on the other hand, would be 1.8 Tcf annually or 0.5 Tcf annually based on Chinese and non-Chinese estimates, respectively, and in the same order of magnitude as current production levels in Thailand.¹⁵⁷ Nonetheless, the resultant figures still remain substantial for exploration. The exploration, however, may be affected by the depth of water in the Spratlys area.¹⁵⁸

China’s oil consumption is estimated at 9.2 million bpd in 2010. Its net oil import was 4.8 million bpd, second only to the United States in 2009.¹⁵⁹ China’s oil demand in December 2011 was 9.71 million bpd and increased 5% in January 2012.¹⁶⁰ The natural gas reserves of China are at 107 tcf as of January 2011. In 2009, China’s consumption of natural gas exceeds

its production at 3.08 tcf and 2.93 tcf, respectively.¹⁶¹

As can be gleaned from the figures above, regardless of whose estimates are used as basis, the potential oil and gas reserves in the South China Sea would significantly quench China's thirst for energy. Although, at this point it must be emphasized that the above calculations are qualified taking into account the following assumptions: (1) that China alone would explore the energy resources in the area; and (2) that the base estimates are not affected by the current oil explorations being undertaken in the area.¹⁶² Discounting these assumptions, the potential energy reserves and their probable contribution to China's energy requirements are admittedly less considerable though still not paltry. To put it in context, a million bpd production from an oil exploration in the South China Sea would offset China's annual dependence on Iraq from which China imported 977,190 bpd of oil comprising 3.5% of China's total oil import in 2010.¹⁶³

An important aspect to China's energy security is its need to protect the sea lines of communication (SLOC) through which oil tanker vessels containing China's oil imports from the Middle East and other countries traverse. The South China Sea, along with the Strait of Malacca and Singapore, are very important for China's oil transportation. 90% of China's oil imports are transported by sea¹⁶⁴ and more than 4/5 of which pass through the Strait of Malacca and Singapore¹⁶⁵ presumably continuing onto the South China Sea to reach China's ports. The dependence on seaborne transportation poses a challenge to China to safeguard the SLOCs from piracy and armed robbery at sea in order to ensure the safe and secured passage of the oil tanker vessels. Piracy in the Strait of Malacca and Singapore as well as in the South China Sea has always been a major concern. The prevalence of the piracy incidents in the region resulted in the forging of Regional Cooperation Agreement on Anti-Piracy and Armed Robbery against Ships in Asia (ReCAAP). While cooperative maritime surveillance has been instituted particularly in the Strait of Malacca, piracy incidence has not yet been totally eradicated. In fact, there have been instances where piracy incidents increase in certain years. In 2010, for instance, 17 piracy incidents occurred in the South China Sea, which was a 55% increase from 2009 and the highest reported incidents since 2006.¹⁶⁶ Bulk carriers, container ships and large tankers of product, oil, LNG and chemical were reportedly targeted.¹⁶⁷

Aside from SLOC security, another challenge posed by China's dependence on seaborne transportation is the safe delivery of its oil imports.¹⁶⁸ China recognizes that its oil imports are vulnerable to possible blockade by a rival country, specifically the United States with which China has several conflicts of interests. China is expectedly concerned about the potential interdiction of its oil tanker vessels along the Strait of Malacca and Singapore in the event of China's conflict with Taiwan. The apprehension is certainly warranted considering that 80% of China's oil imports passes through the said Strait.¹⁶⁹ Interdiction of oil ships is not feared only

to happen in the Strait of Malacca and Singapore; the United States has naval presence in almost every important SLOC.

To summarize, China's rising demand for energy has largely influenced its foreign policy and, evidently, its South China Sea policy. The recent assertiveness of China in the South China Sea is in line with its interest to secure energy resources for itself, which can be obtained in two ways: (1) getting access to the resources in the area; and (2) establishing control or significant presence in the area to secure SLOC and ensure the safe passage of its oil imports.

China's Naval Modernization

It has been held that the most fundamental context of the dispute over the islands and waters of the South China Sea is China's seapower.¹⁷⁰ Indeed, China's threat in the South China Sea has been more ominous in the recent years due to its increasing military capability. China has always enjoyed a relative strength on military capability as compared with other claimant states. However, U.S. military observes that China's recent military developments were "pretty dramatic."¹⁷¹

According to the United States, China's People's Liberation Army (PLA) is undergoing massive modernization in three areas. First, China has now the "most active land-based ballistic and cruise missile programme in the world."¹⁷² Second, China has greatly improved its submarine fleet. Third, China has a sophisticated reconnaissance and sensor equipment that can even be used in cyber-warfare.¹⁷³ Further modernization is expected. Just last year, President Hu Jintao has ordered its navy to speed up its development and "make extended preparations for warfare."¹⁷⁴

China's naval strategy is impelled by three factors: (1) to secure its sovereignty over Taiwan and deter the United States from providing military support in case of conflict; (2) to protect the SLOCs through which its energy supplies pass by; and (3) to deploy a sea-based second-strike nuclear capability in the Western Pacific to deter the United States from striking against China in the event of conflict.¹⁷⁵ Control over the South China Sea is necessary for China's pursuit of energy security. More importantly, China's control over the area is a necessary component of its naval defense strategic concept called "first island chain of defense" which maintains that the control over the maritime space stretching from Japan, Taiwan through the Philippines is necessary to secure China. A "second island chain of defense" stretches from Japan to Guam in the Pacific.¹⁷⁶

The Involvement of the United States

Whoever prepared the early wartime studies of the United States which came to the conclusion that the islands in the South China Sea “are of no vital interest, strategically or economically, to any single country or territory” would have been astounded by the extent to which such deduction has been repeatedly proven erroneous by the subsequent developments in the area.¹⁷⁷ The United States was of the belief that the islands would only be a security concern if left under Japan.¹⁷⁸ Shortsighted as it was, this thinking was the probable reason why the San Francisco Peace Treaty was silent on the proper disposition of the geological features in the South China Sea.¹⁷⁹ In retrospect, this lack of definitive settlement of ownership of the features became a source of conflict among China (and Taiwan) and the newly independent Southeast Asian claimant countries. It is therefore reasonable to state that the South China Sea dispute is among the numerous prevailing regional concerns that arose from the San Francisco Treaty.¹⁸⁰

It was during the Cold War period when the strategic significance of the South China Sea was considered by the United States. The South China Sea became a part of the U.S. forward defense strategy in a bid to deter Soviet Union and contain China’s influence.¹⁸¹ The U.S. forces were deployed in the region and the U.S. presence was reinforced when Soviet established its naval base in Cam Ranh Bay. When Cold War ended, the United States withdrew from the South China Sea.

For the most part, the United States was indifferent about the territorial disputes in the South China Sea. It was, however, compelled to state its position when prompted in the face of the Mischief Reef incident in 1995. On 10 May 1995, the United States issued a statement indicating five main concerns of U.S. policy on the South China Sea: (1) “the United States strongly opposes the use of force;” (b) “the United States has an abiding interest in the maintenance of peace and stability in the South China Sea;” (c) “maintaining freedom of navigation is of fundamental interest;” (d) the United States takes no position on the legal merits of the territorial dispute; and (e) the United States “views with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with international law, including UNCLOS.”¹⁸² A related issue that the United States addressed was its commitment to the Philippines under its 1951 Mutual Defense Treaty. According to the U.S., the treaty could not be invoked in the event of conflict between the Philippines and China in the South China Sea; the KIG was not part of the Philippine territory when the treaty was forged.

After its expression of official position in 1995, the South China Sea issue did not figure in the U.S. security concerns. Between 1995 and 1998, the South China Sea issue was not even mentioned in the reports of the Department of Defence.¹⁸³ The United States apparently did not believe that China has expansionist ambition in the South China Sea¹⁸⁴ and considered the Chinese forces in the Spratlys not a “major security threat.”¹⁸⁵ The United States, however,

continued to closely monitor the issue.

For their part, the Southeast Asian countries have started to become more concerned with the China threat in the South China Sea. The Mischief Reef incident in 1995 prompted some countries to forge closer relations with the United States for military protection. The Philippines, for instance, after ending the agreement for U.S. military bases in 1992 revived its military ties with the United States through a Visiting Forces Agreement (VFA) which was ratified in 1999. Allegedly, the United States agreed to extend its defence perimeter to include the South China Sea so as to have the VFA signed.¹⁸⁶ One of the objectives of the agreement was the improvement of the capabilities of the Philippine armed forces.¹⁸⁷ Indonesia, Malaysia, Brunei, Thailand and Singapore have also military engagements with the United States. Singapore has allowed for the permanent stationing of the U.S. logistics West Pacific command. Indonesia, Malaysia, Brunei and Thailand have granted U.S. ships and aircraft transit, refuelling and visiting rights.¹⁸⁸ Therefore, while the United States was not actively involved in the South China Sea issue, its presence in Southeast Asia has remained the foremost balancing strategy used by the Southeast Asian countries against China.

In 1999, the United States started to show active concern about the South China Sea issue.¹⁸⁹ This policy shift happened after Chinese fortifications in the Mischief Reef were discovered by the Philippines in late 1998. In the wake of the incident, members of the U.S. Congress called for an active policy in the South China Sea.¹⁹⁰ Subsequently in July 1999 at the 6th ASEAN Regional Forum (ARF), Secretary of State Madeleine K. Albright expressed that the United States was increasingly concerned about the rising tensions in the South China Sea. She stated that the United States “cannot simply sit on the sideline and watch” further encouraging the ARF to take concrete steps to promote stability in the South China Sea.¹⁹¹ The United States then supposedly proposed establishment of an inter-sessional group (ISG) on the South China Sea during an ARF senior officials meeting, but such proposal did not get the support of ASEAN.¹⁹² The concern was reiterated in its meeting with ASEAN in 2000. The United States “noted that the South China Sea remained an area of potential conflict” and urged all parties to take steps that would bring about stability in the area.¹⁹³ Parallel to these pronouncements, the United States conducted joint (bilateral or multilateral) military exercises with some Southeast Asian countries. An example was the search and rescue (SAR) exercise among navies of the United States, the Philippines and Thailand in the South China Sea near the disputed Scarborough Shoal in March 2001.¹⁹⁴ Moreover, the United States conducted its own military exercises in the South China Sea. In August 2001, the U.S. Navy held a two-carrier (USS *Carl Vinson* and USS *Constellation*) passing exercise in the South China Sea. In addition to the two carriers, the exercise include 13 vessels, among of which are three submarines, around 150 aircraft and personnel numbering more than 15,000.¹⁹⁵ The United States claimed that the exercises were intended to help maintain peace and stability in the Asia Pacific region and

ensure the right of the freedom of navigation in the South China Sea.¹⁹⁶ However, the show of force could be in response to the Chinese and U.S. aircraft collision in international airspace about 70 miles off China's Hainan Island that happened in April 2001.¹⁹⁷ The collision was a result of the two countries' conflicting views on the freedom of navigation and overflight in the EEZ. From the perspective of the United States, the freedom of navigation and overflight in the 200 EEZ, beyond the 12 NM territorial sea, is permissible under international law. China, on the other hand, believes otherwise. Further discussion on this is in later section.

The terrorist attack in September 11, 2001 has fundamentally changed the strategic security interests of the United States. This change was also manifested in its presence in the South China Sea. In the global war against terrorism, the United States has strengthened its military ties with the Philippines, Thailand and Singapore. It also improved its relations with Malaysia and Vietnam.¹⁹⁸ These enhanced security relations reinforced the United States presence in the South China Sea albeit the security concern shifted to terrorism rather than the potential conflict from territorial disputes. On the other hand, the September 11 terrorist attack also improved the U.S. bilateral relations with China which was notably marred by the April 2001 aircraft collision and the Taiwan arm sales issue.¹⁹⁹

The U.S. focus on terrorism sidelined the South China Sea issue. However, negotiations between ASEAN and China to forge a code of conduct in the area still continued. In 2002, the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC-SCS) was signed. The adoption of the DOC-SCS resulted in the relative stability in the South China Sea although there were intermittent skirmishes between claimant countries. The DOC-SCS certainly has served its purpose of preventing another Mischief Reef incident. However, as normative guidelines without provisions for sanctions or penalties, the DOC has failed to curtail any claimant country's unilateral activities that "complicate or escalate disputes" in the area. Moreover, the implementation of the envisaged practical CBMs has stalled because ASEAN and China could not agree on the Guidelines for the Implementation of the DOC until recently.

In 2010, the United States manifested, for the first time, that it will be actively involved in the South China Sea issue. The significance of the South China Sea as a concern was clearly conveyed Secretary of State Hillary Rodham Clinton presented the U.S. position before the Foreign Ministers of the countries attending the 17th ASEAN Regional Forum, including Chinese Foreign Minister Yang Jiechi. State Secretary Clinton stated that:

“... The United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea. We share these

interests not only with ASEAN members or ASEAN Regional Forum participants, but with other maritime nations and the broader international community.

The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion. We oppose the use or threat of force by any claimant. While the United States does not take sides on the competing territorial disputes over land features in the South China Sea, we believe claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN convention on the law of the sea. Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features..."²⁰⁰

The foregoing was essentially a reiteration of the U.S. position enunciated in 1995, though with additional elaborations on the basis by which claims in the South China Sea should be pursued. The U.S. position has clearly emphasized that maritime claims should be based on "legitimate claims to land." This stress on the legitimacy of the maritime claims is obviously a message against the nine-dashed line claim by China. The latter expectedly reacted to the statement claiming the statement was an attack to China. China accused the United States of "creating an illusion that the situation of the South China Sea is alarming."²⁰¹

Prior to the ARF meeting, the United States had already indicated its growing concern about the South China Sea issue. In his address to the International Institute for Strategic Studies (IISS) Shangri-la Dialogue in June 2010, U.S. Secretary of Defense Robert Gates remarked that the South China Sea is "not only vital to those directly bordering it, but to all nations with economic and security interests in Asia." In his speech, U.S. Defense Secretary Gates expressed the policy of the United States, to wit:

"Our policy is clear: it is essential that stability, freedom of navigation, and free and unhindered economic development be maintained. We do not take sides on any competing sovereignty claims, but we do oppose the use of force and actions that hinder freedom of navigation. We object to any effort to intimidate U.S. corporations or those of any nation engaged in legitimate economic activity. All parties must work together to resolve differences through peaceful, multilateral efforts consistent with customary international law. The 2002 Declaration of Conduct was an important step in this direction, and we hope that concrete implementation of this agreement will continue."²⁰²

The U.S. position was reiterated by U.S. Secretary of Defense Leon Panetta in his meeting with ASEAN Defense Ministers in October 2010.²⁰³ In November 2011, during the East Asian Summit, U.S. President Barack Obama expressed that the United States has a “powerful stake” in the resolution of the South China Sea “as a resident Pacific power, as a maritime nation, as a trading nation and as a guarantor of security in the Asia-Pacific region.”²⁰⁴

The repeated assertions by the United States of its position on the South China Sea may have been prompted by a series of events unfolding in the region: (1) the alleged harassment by the Chinese vessel and aircraft of the USNS Impeccable which was conducting surveillance 75 miles off the island of Hainan;²⁰⁵ (2) China’s official declaration of its nine-dashed line claim in the South China Sea which the United States considers as a threat to the freedom of navigation and overflight;²⁰⁶ (3) China’s alleged reference, for the first time, to the South China Sea as China’s “core interest” of sovereignty on par with Taiwan and Tibet;²⁰⁷ and (4) the speedy naval expansion of China and its changing naval strategy from coastal defense to far sea defense which poses as challenge to U.S. Navy’s area of supremacy.²⁰⁸

At this point, it is worth examining the strategic interests of the United States in the South China Sea.

U.S. Strategic Interests in the South China Sea

The United States has repeatedly insisted its stance that the freedom of navigation and overflight in the South China Sea must be maintained at all times. The U.S. concept of freedom of navigation does not merely refer to the passage of vessels or to the security of the sea line of communication (SLOC) in the area. The United States believes that the concept of the freedom of navigation includes the right to conduct military activities within the EEZs of the coastal States in the South China Sea. The Chinese and U.S. aircraft collision in 2001 and the USNS Impeccable incident in 2009 have clearly demonstrated what the United States believed as the rights permissible under the freedom of navigation and overflight. From the U.S. perspective, the military surveys are an exercise of the freedom of navigation and “other internationally lawful uses of the sea” that are allowed under UNCLOS and customary international law.²⁰⁹ This stand contradicts China’s position which holds that while the freedom of navigation is allowed in the EEZ under UNCLOS, the conduct of marine scientific research (MSR) under which the U.S. vessel activities off the coast of China can be categorized, must have the consent of a coastal state. Moreover, the surveillance activities of the USNS Impeccable of undersea threats, including submarines, off the coast of China are collection of data necessary for a battlefield and thus constitute a threat of force and a non-peaceful use of the ocean, issues that are inconsistent with the UN Charter and UNCLOS, respectively.²¹⁰ With regards to the aircraft collision, the United States maintains that the freedom of overflight in the EEZ is allowed under international law and reconnaissance flights are parts of “comprehensive

national security strategy that helps maintain peace and stability in our world.”²¹¹ China, however, views that reconnaissance flights are an abuse of freedom of overflight and a “grave threat” to China’s national security. China, therefore, has the right to intercept the aircraft to protect its own security interest.²¹²

Putting aside the irony that the two countries, the United States which has not yet ratified UNCLOS and China which has a fickle practice of abiding by UNCLOS, have strongly invoked UNCLOS as basis for their respective actions, the different views on navigational rights in the EEZ clearly constitutes another dispute in the South China Sea which, like the territorial and maritime disputes, should be addressed soon. Otherwise the incidents like the Impeccable and the aircraft collision will continue to beleaguer the bilateral relations of the two countries. On this aspect, an arrangement akin to the 1972 Incidents at Sea agreement (INCSEA) between the United States and the Soviet Union has been suggested as a practical confidence building measure (CBM).²¹³

However, beyond the opposing views on international law, the main issue of the naval scuffles between the United States and China in the South China Sea is the mutual distrust between the two countries arising from the growing China’s military prowess.²¹⁴ The United States is particularly concerned about the elements of China’s military modernization which the United States views as designed to challenge the U.S. freedom of action in the region.²¹⁵

Indeed, the United States feels compelled to be wary of and continuously monitor the naval expansion of China. The United States recognizes the risks that accompany the rise of China’s military capabilities and the threats that it poses to U.S. strategic interests. (See 8.1.2 above). Not only will the United States lose its strategic control over the Western Pacific but it would also result in undermining U.S. alliances with Japan and South Korea, unraveling the U.S. strategy in Asia Pacific and relegating the U.S. role to a position of less influence and power in the region.²¹⁶ In this regard, the United States interest in preventing China from its expansive claim over the entire South China Sea is not merely about freedom of navigation but more importantly about protecting its geopolitical role and geostrategic interests in the region. The United States, according to President Barack Obama, is a Pacific power and will remain in the region to play a larger and long-term role in shaping its future.²¹⁷ In line with this, the U.S. military planned to expand its role in the Asia-Pacific region, notwithstanding budget cuts.²¹⁸ Accordingly, in the past two years, the United States has strengthened its military relations not only with Southeast Asian countries but also with Japan and Australia. The United States and Japan have recently forged a new agreement on the joint use of military bases throughout the Pacific region and the lifting of restrictions on arms exports.²¹⁹ It also finalised agreement with Australia that allows the U.S. military unrestricted access to bases in Australia thereby

providing the United States with a foothold between the Indian and Pacific Oceans.²²⁰ The United States also plans to station several combat ships in Singapore and increase deployments to the Philippines and Thailand.²²¹ The U.S. presence in Singapore is very strategic considering that the Strait of Malacca and Singapore are part of a vital sealane connecting East Asia to the Middle East and Africa. Expectedly, these military moves of the United States encountered protest from China and raised concern that the United States wants to “encircle” China.²²²

In sum, the South China Sea issue is no longer about territorial and maritime disputes. From all indications, it has become a microcosm of China-U.S. great power rivalry. There are pros and cons to this new dimension of the South China Sea issue. On one hand, the U.S. presence may compel cooperation among the claimant states. On the other hand, it could worsen and further complicate the situation in the South China Sea such that the issue of territorial disputes will be subordinated to the power play between China and the United States. Whichever direction the South China Sea issue leads into would largely depend on China. If China chooses a hardline position and becomes more assertive and belligerent in the South China Sea, then the United States in its role as a “guarantor of security,” would be compelled to respond accordingly. According to the International Crisis Group (ICG), it is indeed likely that China could take a hardline position in the South China Sea if it does not address its internal problems, particularly the issue of having different institutional actors on the South China Sea issue. The proliferation of these various agencies, which oftentimes do not consider the broader policy implications of their actions in the South China Sea, imperils China’s diplomatic efforts to resolve the issue.²²³ A realist assessment of the situation, however, would discourage China from pursuing such approach. China, through its increasing assertive actions in the recent years, has provided the United States with the opportunity to play an expanded significant role in the region and further enhanced its security ties with countries in the Asia Pacific. With all these allied countries “encircling” China, it would be downright senseless for China to provoke a conflict in the South China Sea. The disincentives far outweigh any potential benefits, perceived or otherwise, that China may gain from such actions. Though it is worth noting that notwithstanding repeated U.S. assertion of its position on the South China Sea in 2010, China has moved from being assertive in 2010 to being aggressive in 2011.²²⁴ One possible reason identified for the change was that China may have been testing the resolve of the United States.²²⁵ What this means is that a logical forecasting of China’s stance in the South China Sea is difficult to discern. The potential for a military conflict remains probable.

Analyzing the Prospects for Joint Development in the South China Sea

The discussions above have shown that China’s pursuit of energy security has been an inducing factor in its assertive policy in the South China Sea in the recent years. Two related factors spurred China to take such approach: (1) China wants to benefit from the oil resources in the South China Sea; and (2) China wants to establish control in the South China Sea for the

safe delivery of its oil imports. China's assertiveness may also have been impelled by China's resentment against the other claimant states' continued explorations in the area while it had yet to do so.²²⁶ On this aspect, China has been particularly strong in its protest against the Philippine oil exploration in the Reed Bank, 92 NM off the Palawan Island. Reed Bank is not in the Spratly Islands Group but is located within the nine-dashed line claim by China.

China's assertive stance, which later on became aggressive, was likewise influenced by its growing capability. With its improved and modernized military capability, China is now confident to project its seapower. There is a symbiotic relationship between energy security and improved naval capability. Energy security prompts China to modernize so as to secure its maritime oil imports, on one hand. On the other hand, modern navy induces China to undertake activities in pursuit of its energy security goals. But, China's naval modernization is not only intended for its energy security quest. China's navy is clearly embarking on a massive modernization beyond what would be required in securing the safe delivery of its energy imports. Indeed, China's capability, as noted by the United States, is designed to challenge the U.S. supremacy in the maritime domain. Though reports have stated that China's seapower is still very much far off the U.S. capability, what matters is that China is becoming a military force to reckon with.

China's enhanced military capability has increased the "China threat" syndrome felt by its neighbouring countries. The Southeast Asian countries are particularly wary because of their geographic proximity to China. China is, literally and figuratively, a giant among the dwarves; a giant that is now more powerful. Two potential flashpoints associated with China are of particular concern to the Southeast Asian countries: (1) the Taiwan Strait; and (2) the South China Sea. The Southeast Asian countries are apprehensive about a potential conflict between the United States and China, especially when the latter becomes more assertive over the Taiwan issue.²²⁷

The apprehension of China's military capability is more pronounced in the context of the South China Sea dispute resulting in most claimant countries' rush for their respective militarization. As noted earlier, both Malaysia and Vietnam have also resorted to increasing their capabilities. Vietnam contracted Russia to deliver six Kilo-class diesel submarines worth a total of \$3.2 billion.²²⁸ On the other hand, Malaysia acquired two Scorpene-class submarines.²²⁹ Lacking the budget to modernize its capability, the Philippines has been looking at the United States for operational support. More recently, the United States has promised to provide aid to the Philippines as well as assisted in the discussions with South Korea, Japan and Australia to provide defense equipment to the Philippines.²³⁰ The United States is also helping the Philippines to reform and improve its Armed Forces (AFP).²³¹

Indeed, the involvement of the United States has been the most surprising development in the South China Sea issue in the recent years. While not entirely unexpected considering that Southeast Asian countries have been trying to engage the United States as a balancing power against China, the visible presence and active involvement of the United States in the South China Sea issue has certainly added another dimension to the issue. Power rivalry seems to permeate the tensed atmosphere in the region. It seems that the South China Sea provides an avenue for the two competing countries for power play. The involvement of the United States bolstered other powerful countries like Japan and Australia to get involved as well. Japan, in particular, has a high stake on the issue not only because of its maritime trade but more importantly because it has a similar contentious issue with China. Additionally, the visible U.S. support has empowered the claimant states not to give in to China's blatant threat through seapower posturing and intimidation through its economic power.²³² Certainly, the involvement of the United States resulted in what China called "encirclement." On this aspect, China has itself to blame. Its assertiveness in the South China Sea has certainly validated the China threat among Southeast Asian countries.

Given the above as the backdrop, the central question of this paper now warrants a response: Is the prospect for joint development in the South China Sea possible at this time?

The preceding analysis has come to the conclusion that China's hardline policy has failed to subjugate the Southeast Asian claimant states. The possibility of joint development in the South China Sea in this context will be examined as a possible alternative. An elaboration of this proposition is provided below.

As discussed above, China's miscalculation in the South China Sea has isolated itself from its neighbouring countries and has provided the United States with the opportunity to balance its regional power. China's military conflict with any claimant state in the South China Sea like the Philippines would no longer be a bilateral or localized conflict. With the vocal U.S. promotion of itself as a guarantor of security in the region and its visible support to the Philippines, there is no doubt about the U.S. involvement in the event of a military conflict. Japan and Australia are likely to get involved as well. China knows that while its defense capability has improved significantly, it is not yet at par with the U.S. capability. In addition, the United States has strategic naval presence in SLOCs which would make the country capable of interdicting China's oil tanker vessels or trade vessels. China, therefore, faces a huge risk that far outweighs any potential benefits it could get from possible oil exploration in the South China Sea.

In this regard, China may cooperate with the claimant countries to undertake joint development in the area. This move again is rooted on rational decisions. First, a joint development would

still provide China with access to the energy reserves in the area. Second, forging cooperation with claimant countries is a step towards repairing damage to their relations. Establishing good relations with the Southeast Asian countries may moderate U.S. presence in the region, which is in the interest of China.

Given China's long-term desire for regional dominance, a long-term cooperation with the Southeast Asian claimant states in the South China Sea is very unlikely. Thus, even if China agrees to a joint development, there is no guarantee that it will commit itself for long. China could potentially apply the same tack that it did with Japan in the East China Sea, *i.e.* sign a joint development agreement but not implement it. Or, China could commit to a joint development agreement in the short term while subtly preparing for possible takeover of the entire South China Sea in the long-term.

The interconnectedness of the economies of the claimant states is a big disincentive to initiate or enter into a war. The involvement into the South China Sea issue of the United States, with which China has very substantial trade, also suggests that a war is not beneficial to China. However, the challenge of energy security must still be met by China. Joint development provides an opportunity and China may just have to take it.

Shared norms and ideas are essential for successful long-term cooperation. In the case of the South China Sea, joint development can be engendered when claimant states are convinced that it is a better option. In face of possible domestic opposition, China could frame joint development as a pragmatic alternative to the status quo and a much easier way to obtain access to the resources. When China shares the view that UNCLOS and other relevant international law should be the norm in the South China Sea, cooperation is possible. Although, based on China's actions, its consistency in observing international law hinges on whether the law serves China's interest. For instance in regard to UNCLOS, China has been invoking the good faith principle in its protest against Japan's use of Oki-No-Tori Shima while at the same time failing to observe the same principle since it continues to assert its claim for historic waters over the entire South China Sea – a claim that is not recognized by UNCLOS, except for historic bays.

While the prospect for joint development is certainly present amidst the recent developments in the region, the analysis is centered on China. A look at the other end of the spectrum is therefore necessary to have a cohesive grasp of the issue. In this regard, the receptiveness of the other claimant states to a possible joint development must be examined.

The other two most visible claimant states in the South China Sea are Vietnam and the Philippines. These two countries have been the focus of China's assertive actions, intimidation

and pressure in the recent years. On the part of Vietnam, some of China's assertive actions include cutting of survey ships' cable²³³ and convincing India to cease from oil exploration in Vietnam's claimed 200 NM continental shelf.²³⁴ The Philippines has also experienced what it termed as harassment by Chinese vessels of survey vessels' operating in the Reed Bank. The most recent incident was the two month standoff near the Scarborough Shoal. China has sent 20 vessels in the area, clearly showcasing its relative strength to the Philippine capability.²³⁵ The weak defense capability of Vietnam and the Philippines prompted the two to obtain defense equipment and to "internationalize" the issue, particularly courting the United States to get involved in the issue. Vietnam has taken advantage of its turn as Chairman in the ASEAN in 2010 by including the South China Sea agenda in various ASEAN fora. In an obvious bid to balance China, Vietnam has forged oil exploration deals with Russia and India. For its part, the Philippines has been promoting the issue in several fora in its desire to rally the international community to be involved. It has strengthened its military ties with the United States, started the reform of its armed forces, and proposed a new template for an interim solution and cooperation called the Zone of Peace, Friendship, Freedom and Cooperation (ZoPFFC).²³⁶ The latter is being discussed in the ASEAN forum. Both the Philippines and Vietnam have conducted military exercises in the South China Sea with the United States on separate occasions. Vietnam has also conducted several live fire drills in the South China Sea.

Both Vietnam and the Philippines recognize the probability of military conflict in the South China Sea. Both also recognize the huge implications of such a scenario. Both are also, from all indications, amenable to a pacific settlement of the issue. The Philippines, for one, wants the issue settled by ITLOS. Thus, given an option for joint development, there is no doubt about the two countries' as well as Brunei and Malaysia's openness to negotiating such an arrangement. However, their agreement would hinge on China's sincere effort to negotiate in good faith. A crucial element to this initiative is China's clarification of its nine-dashed line claim. China must clarify its claim to explicitly limit its claims to the geological features inside the line, if any kind of joint development is to be negotiated.

The Impact of China's Internal Politics

Admittedly, the foregoing analysis is focused on the assumption that China's external concerns outweigh its domestic or internal politics in its foreign policymaking, especially concerning territorial disputes. Certainly, internal politics influence China's policy on its territorial disputes. Indeed, one study finds that China's pattern of cooperation and delay in its territorial disputes can be explained best by regime insecurity. Chinese leaders compromised when there were internal threats to regime security.²³⁷ In this context, China threat in the South China Sea is likely to be caused by regime insecurity rather than the increasing military capabilities of China.²³⁸ The role of internal politics is also highlighted by the International Crisis Group (ICG). ICG predicts a regional war unless China addresses its internal problems, particularly

the issue of having different institutional actors on the South China Sea issue. The proliferation of these various agencies, which oftentimes do not consider the broader policy implications of their actions in the South China Sea, imperils China's diplomatic efforts to resolve the issue.²³⁹

Conclusions

The foregoing discussions have shown that joint development is possible in the South China Sea because China, a claimant state which largely influences the situation in the South China Sea, will adopt it in order to (1) have access to the energy resources in the area in line with its quest for energy security; and (2) discourage the increasing presence and role of the United States in the region. Additionally, China's economic interdependence with the Southeast Asian countries, the United States and possibly Japan is an inhibiting factor to any aggression in the area. Though, China could use its economic superiority as diplomatic tool to pressure the Southeast Asian claimant countries, the possible domestic backlash of acceding to China as well as the involvement of the United States would bolster the claimant states to stand up to China. Thus, while economic ties between China and Southeast Asian claimant countries can discourage war, it could not necessarily prevent it. The equation changes when the United States and other powerful states enter the picture; China would exercise caution in this case.

The modernization of China's military capability impacts only to the extent that China has increased its presence in the South China Sea and has undertaken assertive actions in the past two years. But, while China's military capability is relatively stronger than other claimant states, it has not yet reached a point of being at par with the U.S. capability. China's military power does not and would not serve as an effective intimidating factor to other claimant states, notably Vietnam and the Philippines, to force their acquiescence with China, especially now that the United States has gotten involved in the issue.

The U.S. involvement has certainly raised the stake in the South China Sea issue; the area has now become a playground for two rival countries as they try to reaffirm their perceived roles in the geopolitical landscape of the region. Japan and Australia would side with the United States in the event of a conflict between the two. The three have stake in maintaining the freedom of navigation in the area, not to mention that any expansionist activity of China is a threat to their respective strategic interests.

The involvement of the United States and other external actors was a result of China's recent assertive actions in the South China Sea. The Southeast Asian claimant states, especially Vietnam and the Philippines, have rallied the international community to be involved in the issue. As the target of repeated intimidations in the South China Sea, the two countries have cultivated stronger relationships with the United States and other states to balance China. Along with Malaysia, the two countries have also improved their defense capabilities.

If China resorts to a more assertive or aggressive actions in the face of the U.S. involvement and repeated statement of being a guarantor of peace in the region, then the U.S. participation in the event of military conflict is inevitable. The United States has already prepared for any possibility; it has strengthened military ties with Vietnam, reinforced its military ties and presence in the Philippines, acquired unrestricted access to naval bases of Australia, further strengthened its defense agreement with Japan, and plans to station permanent naval presence in the Strait of Malacca and Singapore. A permanent presence in the Strait of Malacca and Singapore is very strategic considering that the strait is where almost 80% of China's oil imports pass through. In case of military conflict or war, the United States could easily cut off the oil supply of China from that area. The political, security and economic costs associated with a war involving the United States and other powerful states would be far bigger than the benefits that China could get from the energy resources in the South China Sea, unless China's actual intended ultimate objective is to have full sovereignty over the area. Of course, the expansionist underpinning of China's recent assertive actions is what motivates the United States and other powerful states to get involved.

In summary, the current situation does not bode well for China to become more assertive. What it needs is a policy that, as earlier stated, would provide it with access to the resources, repair the damage of its relationship with the Southeast Asian claimant countries, and consequently, to immediately put a stop to the increasing presence and role of the United States in the region. Joint development is a policy that it could adopt in the South China Sea. For their part, the Southeast Asian claimant countries would be amenable to a joint development arrangement in the South China Sea. An unstable environment in the South China Sea, after all, is not in any country's interest. Furthermore, a good relationship with China is also necessary considering the magnitude of their economic relations. However, the Southeast Asian claimant states would not easily agree to a joint development arrangement that covers the entire area of the South China Sea. A shared idea as to what is the disputed area is a crucial factor that the Southeast Asian claimant states will foremost consider.

Finally, an aggressive policy or a delaying strategy should not be discounted. China's internal politics could possibly outweigh any external concerns that China may consider in its formulation of its South China Sea policy.

ENDNOTES

¹ See Leszek Buszynski, "Rising Tensions in the South China Sea: Prospects for a Resolution of the Issue," *Security Challenges* 6, no. 2 (Winter 2010): 85.

² See Digital Gazetteer of the Spratly Islands, accessed June 1, 2011, <http://community.middlebury.edu/~scs/macand/gazetteer.htm>

³ See Ralph A Cossa, "Security Implications of Conflict in the South China Sea: Exploring Potential Triggers of Conflict," *A Pacific Forum CSIS Special Report*, Honolulu, Hawaii, March 1998; The Spratly Islands, according to the Central Intelligence Agency Factbook, is comprised of "more than 100 small islands or reefs." See <https://www.cia.gov/library/publications/the-world-factbook/geos/pg.html>

⁴ See Christopher C. Joyner, "The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation," *Investigating Confidence Building Measures on the Asia Pacific Region*, Report No. 28, ed. Ranjeet Singh (Washington DC: Henry L. Stimson Centre, 1999), 66.

⁵ See Digital Gazetteer Digital Gazetteer of the Spratly Islands.

⁶ Leszek Buszynski claims that the term occupation is ambiguous as it could mean a permanent presence or just a token presence in the area. See Buszynski, 2010, 85.

⁷ Chiu and Park, 1978 as cited in Haydee B. Yorac, "The Philippine claim to the Spratly Islands Group," *Philippine Law Journal* 58 (1983): 48-49.

⁸ See Note No. CML/17/2009 of 7 May 2009 from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations referring to the Joint Submission of Malaysia and the Socialist Republic of Vietnam to the Commission on the Limits of the Continental Shelf. At http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

⁹ See Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *The Hoang Sa and Truong Sa Archipelagoes Vietnamese territories* (Hanoi, 1981).

¹⁰ See R.A. Arizala, "Claim to Kalayaan: Its Legal Aspects and Options," *The Lawyers Review*, (31 October 2004): 2-9; See also Presidential Decree No. 1596 "Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration [1978],

<http://www.chanrobles.com/presidentialdecrees/presidentialdecreeno1596.html>

¹¹ Under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), a coastal state which has a continental margin that extends beyond the 200 NM continental shelf, can claim the outer limits of its continental shelf up to 350 nautical mile from its baselines or 100 nautical miles from the 2500 meter isobaths. This claim for the extended continental shelf (ECS) must be supported by technical data and must be submitted to the UN Commission on the Limits of Continental Shelf (CLCS) for its determination. For details on ECS, see http://www.un.org/Depts/los/clcs_new/clcs_home.htm

¹² For instance, in 1988, Chinese naval vessels clashed with Vietnamese naval vessel near Johnson Reef in South China Sea. Also in 1995, the Chinese occupation of Mischief Reef in the Philippine claim zone led to a diplomatic tension between the two countries and prompted the Philippines to rally the "internationalization" of the South China Sea territorial dispute. See, Leszek Buszynski and I. Sazlan, "Maritime Claims and Energy Cooperation in the South China Sea," *Contemporary Southeast Asia* 29/1 (2007): 143-171 ; See also "Military Clashes in the South China Sea," <http://www.globalsecurity.org/military/world/war/spratly-clash.htm> (accessed May 30, 2011).

¹³ These efforts range from informal (track two) to formal (track one) initiatives. See Yann-huei Song, "Codes of conduct in the South China Sea and Taiwan's stand," *Marine Policy* 24, (2000): 449-459.

¹⁴ See Declaration on the Conduct of Parties in the South China Sea (DOC-SCS), <http://www.aseansec.org/13163.htm> (accessed May 30, 2011).

¹⁵ See Chien-peng (C.P.) Chung, "Southeast Asia-China Relations: Dialectics of 'Hedging' and 'Counter-Hedging'," *Southeast Asian Affairs*, (2004): 39.

¹⁶ See http://www.chinadaily.com.cn/china/2010-09/30/content_11371512.htm.

¹⁷ See Abdul Khalik and Desy Nurhayati, "South China Sea guidelines agreed," *Jakarta Post*, 21 July 2011, accessed 10 May 2012, <http://www.thejakartapost.com/news/2011/07/21/south-china-sea-guidelines-agreed.html>; Copy of the Guidelines for the Implementation of the DOC accessed at <http://www.aseansec.org/documents/20185-DOC.pdf>.

¹⁸ See Article 33(1), Chapter VI: Pacific settlement of disputes, Charter of the United Nations,

<http://www.un.org/en/documents/charter/chapter6.shtml>.

¹⁹ United Nations, *Handbook on the Peaceful Settlement of Disputes between States* (New York: United Nations, Office of Legal Affairs, 1992): 7.

²⁰ See Wang, “Bridge over troubled waters.”; The Philippines recently offered to China to elevate the territorial dispute over the Scarborough Shoal, an island in the northern part of the South China Sea. The offer was rejected by China, see “DFA suggests settlement of Scarborough dispute through ITLOS,” 17 April 2012, accessed 24 April 2012,

<http://www.ptv.ph/index.php/news-menu/nation-sub-menu/3731-dfa-suggests-settlement-of-scarborough-dispute-through-itlos->; “China rejects Manila’s move to take sea dispute to ITLOS,” April 19, 2012, accessed 24 April 2012, http://zeenews.india.com/news/world/china-rejects-manila-s-move-to-take-sea-dispute-to-itlos_770642.html.

²¹ Rainer Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” *The American Journal of International Law* 78, 2 (1984): 354.

²² Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” 358.

²³ Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” 358-359.

²⁴ Citing the International Court of Justice’s statements on the North Sea Continental Shelf Cases, Lagoni opines that the States are obliged to negotiate about such interim measures but such obligation does not imply an obligation to reach an agreement. See Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” 354-356.

²⁵ Gao Zhiguo states that it is not an overstatement that joint development is so far the most widely used form of interim measure, see Gao Zhiguo, “Legal Aspects of Joint Development in International Law,” in *Sustainable development and preservation of the oceans: The Challenges of UNCLOS and Agenda 21*, eds. Mochtar Kusuma-Atmadja, Thomas A. Mensah, and Bernard H. Oxman (The Law of the Sea Institute, Hawaii, 1997); See Johnston, D.M. and Mark Valencia, *Pacific Ocean Boundary Problems: Status and Solutions*, Publication on Ocean development. (Netherlands: Martinus Nijhoff Pub., 1991); See also Lagoni, “Interim Measures Pending Maritime Delimitation Agreements,” 360-362; see generally Valencia, et al, “Sharing the resources of the South China Sea,”; H. Fox, P. McDade, D.R. Reid, A. Strati and P. Huey (eds), *Joint development of offshore oil and gas : A model agreement for states for joint development with explanatory commentary* (London: British Institute of International and Comparative Law, 1989).

²⁶ There are numerous definitions of joint development. But, this paper adopts Lagoni’s definition since, from the author’s view, it encompasses the broad meaning of joint development. See Lagoni, 1989 as cited in Francisco Orrego Vicuña, “Regional cooperation in nonliving resources: Joint management zones,” in *Ocean governance: sustainable development of the Seas*, ed. P.B. Payoyo (United Nations University Press, 1994).

²⁷ For example when China conducted oil drilling near the Japan-proclaimed median boundary line between China and Japan, the latter officially protested the oil drilling for fear that it will siphon off gas from Japan’s side. See Mark J. Valencia, “The East China Sea Dispute: Prognosis and Ways Forward,” *Pacific Forum CSIS PacNet 47A* (Honolulu, Hawaii, 15 September 2006), <https://csis.org/files/media/csis/pubs/pac0647a.pdf>.

²⁸ As in the case of the joint development arrangements between Bahrain-Saudi Arabia Agreement Concerning the Delimitation of the Continental Shelf of 22 February 1958, the France-Spain Convention on the Delimitation of the Continental Shelves in the Bay of Biscay of 29 January 1974, among others. See Keyuan, “Joint Development in the South China Sea,” 92. For a copy of the agreement between Bahrain and Saudi Arabia, see <http://www.state.gov/documents/organization/62003.pdf>. For a copy of the Spain-France Agreement, see <http://www.state.gov/documents/organization/59579.pdf>.

²⁹ Keyuan, “Joint Development in the South China Sea,” 92.

³⁰ Some of these arrangements include the Iran/Sharjah Agreement, Japan/Korea Agreement, Malaysia/Thailand Agreement. See Fox et. al, 1989.

³¹ Fox et. al, 1989.

³² Fox et. al, 1989.

³³ According to Peter D. Cameron, citing Barrows (2005) *Joint Development Zones of the World* Supplement 9, there are now at least 24 joint development agreements in force worldwide. See Peter D. Cameron, “The rules of engagement: developing cross-border petroleum deposits in the North Sea and the Caribbean,” *International Comparative Law Quarterly* 55 (July 2006):559-586, doi: 10.1093/iclq/lei105.

³⁴ Cameron, “The rules of engagement,” 560.

³⁵ Mark J. Valencia, “Asia, the Law of the Sea and International Relations,”

International Affairs (Royal Institute of International Affairs 1944-) 73, no. 2 Asia and the Pacific (Apr. 1997):263-282.

³⁶ For a comprehensive review of joint development agreements, see H. Fox, P. McDade, D.R. Reid, A. Strati and P. Huey (eds), *Joint development of offshore oil and gas: A model agreement for states for joint development with explanatory commentary* (London: British Institute of International and Comparative Law, 1989); See also Francisco Orrego Vicuña, “Regional cooperation in nonliving resources: Joint management zones,” in *Ocean governance: sustainable development of the Seas*, ed. P.B. Payoyo (United Nations University Press, 1994).

³⁷ Examples are Iran-Sharjah and Saudi Arabia and Sudan. *See* Vicuna, “Regional cooperation in nonliving resources.”

³⁸ The Ems-Dollard 1960 Treaty between Germany and Netherlands where a joint development zone in Ems Estuary is divided by a provisional line into two subzones for each country. *See* Vicuna, “Regional cooperation in nonliving resources.”

³⁹ Australia and Indonesia have zone of cooperation divided into three areas depending on the type of arrangement/activity. *See* Vicuna, “Regional cooperation in nonliving resources.”

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ J.C. Woodliffe, "International unitization of an offshore gas field," *International and Comparative Law Quarterly* 26, (1977): 338, cited in Vicuna, “Regional cooperation in nonliving resources.”

⁴⁴ David Lerer and Kendall Freeman, “How to Negotiate and Structure a Joint Development Agreement,” *Oil and Gas Journal* 101, 34 (Sept 08, 2003): 38.

⁴⁵ This is the case of UK and Norway’s agreement in the exploitation of the Frigg Field Reservoir which extends across the boundary line of the continental shelves of the two countries. *See* Agreement relating to the exploitation of the Frigg Field Reservoir and the transmission of gas therefrom to the United Kingdom (with annexes), signed at London on 10 May 1976, copy accessed at http://www.kulturminne-frigg.no/stream_file.asp?iEntityId=1530.

⁴⁶ Vicuna, “Regional cooperation in nonliving resources.”

⁴⁷ Vicuna, “Regional cooperation in nonliving resources.”

⁴⁸ An example of this is the arrangement between Malaysia and Thailand. In 1979, the two signed a Memorandum of Understanding to establish a Joint Authority to be known as “Malaysia-Thailand Joint Authority.” *See* copy of the agreement at

<http://cil.nus.edu.sg/rp/il/pdf/1979%20MOU%20between%20Malaysia%20and%20Thailand-pdf.pdf>.

⁴⁹ One definition of joint development is that it is “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 seabed and subsoil of the continental shelf to which both or either of the participating States are entitled in *international law*.” British Institute of International and Comparative Law, *Joint Development of Offshore Oil and Gas: A Model*

Agreement for States for Joint Development with Explanatory Commentary (London, British Institute of International and Comparative Law, 1989) cited in Keyuan, “Joint Development in the South China Sea,” 89.

⁵⁰ For instance, the tripartite Joint Marine Seismic Undertaking (JMSU) Agreement between China, Vietnam and the Philippines which lapsed in 2008 did not continue after it encountered severe criticisms from the Philippine public. A case was filed against the Philippine Government officials for allegedly selling out the country’s territory. Mark Valencia, a noted scholar on South China Sea, commented that the JMSU area “includes parts of its [Philippines] legal continental shelf that China and Vietnam don’t even claim. *See* Barry Wain, “Manila’s Bungle in the South China Sea,” *Far Eastern Economic Review* (January/February 2008):45-48; *See also* “SC asked to void JMSU pact,” *The Philippine Star*, 22 May 2008,

<http://www.philstar.com/youngstar/ysarticle.aspx?articleId=63603&publicationSubCategoryId=63>

⁵¹ *See generally* Klare, *Resource Wars: The New Landscape of Global Conflict*.

⁵² Brian Swint, “Oil Grab in Falkland Islands Seen Tripling U.K. Reserves: Energy,” *Bloomberg*, 20 January 2012, accessed 4 May 2012,

<http://www.bloomberg.com/news/2012-01-19/britain-s-oil-grab-in-falkland-islands-seen-tripling-u-k-reserves-energy.html>.

⁵³ The issue of China and Vietnam’s conflict over certain unilateral oil explorations in the South China Sea is an example. China awarded a contract for oil exploration to a US company Creston in 1992 which Vietnam protested on the basis that it has sovereign rights over the continental shelf. A series of unilateral oil explorations were attempted by both sides with both sides protesting each other’s actions and even led to the use of force to stop the operations on the ground. *See* Keyuan, “Joint Development in the South China Sea,” 88. Another example is the reported harassment by Chinese marine surveillance vessels during the operation of an oil firm authorized by the Philippines in the Recto Bank (Reed Bank) area on 2 March 2011. *See* Philippine Secretary of Foreign Affairs Albert F. del Rosario, “Philippine Policy Response and Action,” (Speech delivered during the Forum on The Spratly Islands Issue: Perspective and Policy Responses, Ateneo de Manila University, 5 August 2011), accessed at

<http://www.philippine-embassy.org/il/all-news/137-qphilippine-policy-response-and-actionq-by-hon-albert-f-del-rosario-secretary-of-foreign-affairs>

⁵⁴ Article 3 of the Resolution states, “In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.”

See United Nations General Assembly Resolution 3281 Charter of Economic Rights and Duties of States (A/RES/29/3281) dated 12 December 1974, copy accessed at <http://www.un-documents.net/a29r3281.htm>; See also Ibrahim F.I. Shihata and William T. Onorato, "Joint Development of International Petroleum Resources in Undefined and Disputed Areas," *ICSID Review* 11, 2(1996): 302.

⁵⁵ Article 1 of the Resolution states, "...it is necessary to ensure effective co-operation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States in the context of the normal relations existing between them..." See United Nations General Assembly Resolution 3129 on Co-operation in the field of the Environment concerning Natural Resources Shared by Two or More States, 13 December 1973, copy accessed at http://www.cawater-info.net/bk/water_law/pdf/newyork_1973_e.pdf. See also Shihata and Onorato, "Joint Development of International Petroleum Resources in Undefined and Disputed Areas," 302.

⁵⁶ Shihata and Onorato, Joint Development of International Petroleum Resources in Undefined and Disputed Areas," 301; See also Zhiguo, "Legal Aspects of Joint Development in International Law," 636.

⁵⁷ The decisions of ICJ on various cases provide the impression that a clear "determinative black-letter rule of law" is unlikely. See Charney, "Progress in International Maritime Boundary Delimitation Law," 233.

⁵⁸ An example cited is the case of *Nigeria v Cameroon*. The decision left Nigeria bereft of the whole of the disputed oil rich Bakassi Peninsula. The ICJ decided that the sovereignty over the Peninsula lies with Cameroon. See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Merits, Judgment, I.C.J. Rep. 2002 (III) (Oct. 10), 117, copy accessed at <http://www.icj-cij.org/docket/files/94/7453.pdf>.

⁵⁹ See Clive Schofield and Bruce Elleman's summary presentations in *The South China Sea: Towards a cooperative management regime* (Conference Report, 16 - 17 May 2007, Maritime Security Programme, S. Rajaratnam School of International Studies, Nanyang Technological University, Singapore, 3-4.

⁶⁰ Keyuan, "Joint Development in the South China Sea," 95.

⁶¹ Masahiro Miyoshi, "Is Joint Development Possible in the South China Sea?," in *Sustainable development and preservation of the oceans: The Challenges of UNCLOS and Agenda 21*, eds Mochtar Kusuma-Atmadja, Thomas A. Mensah, and Bernard H. Oxman (The Law of the Sea Institute, Hawaii, 1997):618.

⁶² Ibid.

⁶³ Miyoshi, "Is Joint Development Possible in the South China Sea?," 619.

⁶⁴ See Aileen Baviera and Jay Batongbacal, "When Will Conditions Be Ripe? Prospects for Joint Development in the South China Sea," *Chronicle* 4, nos. 1-2 (January-December 1999).

⁶⁵ Keyuan cites that the term "shelving the disputes" is understood as shelving the disputes over maritime jurisdiction rather than over territorial sovereignty. See Keyuan, "Joint Development in the South China Sea," 98.

⁶⁶ Ibid.

⁶⁷ See Ministry of Foreign Affairs, People's Republic of China, "Set aside dispute and pursue joint development," 17 November 2000, accessed 2 May 2012, <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm>.

⁶⁸ Ibid.

⁶⁹ Valencia, et al, *Sharing the Resources of the South China Sea*, 199-223.

⁷⁰ Valencia, et al, *Sharing the Resources of the South China Sea*, 210-217

⁷¹ Valencia, et al, *Sharing the Resources of the South China Sea*, 217-218

⁷² Valencia, et al, *Sharing the Resources of the South China Sea*, 218-219.

⁷³ Robert W. Smith, "Joint Development Zones: A Review of Past Practice and Thoughts on the Future," in *Sustainable development and preservation of the oceans: The Challenges of UNCLOS and Agenda 21*, eds. Mochtar Kusuma-Atmadja, Thomas A. Mensah, and Bernard H. Oxman (The law of the Sea Institute, Hawaii, 1997):645-662. At 660-661.

⁷⁴ Ibid.

⁷⁵ Gil C. Cabacungan Jr. and Abigail Ho, "RP, China, Vietnam sign joint accord on Spratlys for pre-exploration activities only," *Philippine Daily Inquirer*, 15 March, 2005.

⁷⁶ For instance, the Philippine Department of Foreign Affairs (DFA) consistently claimed that the JMSU is limited only to scientific/seismic surveys or a joint evaluation of marine resources in the disputed territory. While it may be so, it does sidestep the issue that there is an intention for further exploration and exploitation after a positive outcome of the survey. It may not be explicitly stated in the JMSU agreement but the fact that China kept on insisting to move to the next step of JMSU proves that a joint development was envisaged when JMSU was agreed upon.

⁷⁷ Australia-Indonesia: Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, [hereinafter Timor Gap Treaty], copy accessed from <http://www.austlii.edu.au/au/other/dfat/treaties/1991/9.html>.

⁷⁸ Lian A. Mito, "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands," *American University International Law Review* 13, no. 3 (1998): 727-764.

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- ⁷⁹ John Holmes, “End of Moratorium: The Timor Gap Treaty as a Model for the Complete Resolution of the Western Gap in the Gulf of Mexico,” *Vanderbilt Journal of Transnational Law* 35, (2002):925-952.
- ⁸⁰ See Summary information of “Timor Gap Treaty between Australia and the Republic of Indonesia on the Zone of cooperation in an area between the Indonesian Province of East Timor and Northern Australia,” accessed 3 May 2011, <http://www.atns.net.au/agreement.asp?EntityID=710>.
- ⁸¹ Ibid.
- ⁸² Holmes, “End of Moratorium,” 945.
- ⁸³ Ibid.
- ⁸⁴ Ibid, 946.
- ⁸⁵ Mito, "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands," 753.
- ⁸⁶ Mito, "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands," 753-754.
- ⁸⁷ Ibid.
- ⁸⁸ Ibid.
- ⁸⁹ See D. Zahar, “Australia-Indonesia Joint Authority for the Timor Gap Zone of Cooperation,” in *Sustainable development and preservation of the oceans: The Challenges of UNCLOS and Agenda 21*, eds. Mochtar Kusuma-Atmadja, Thomas A. Mensah, and Bernard H. Oxman (The Law of the Sea Institute, Hawaii, 1997), 598; See also “Summary Information on Timor Gap Treaty between Australia and the Republic of Indonesia on the Zone of cooperation in an area between the Indonesian Province of East Timor and Northern Australia,” copy accessed at <http://www.atns.net.au/agreement.asp?EntityID=710>; See also Mito, "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands," 754.
- ⁹⁰ Article 2(2a), Timor Gap Treaty.
- ⁹¹ Articles 2(2b) and 4(1b), Timor Gap Treaty.
- ⁹² Articles 2(2c) and 4(2b), Timor Gap Treaty.
- ⁹³ Article 6(1), Timor Gap Treaty.
- ⁹⁴ Article 6(1), Timor Gap Treaty.
- ⁹⁵ Articles 5(5) and 7(4), Timor Gap Treaty.
- ⁹⁶ Article 8, Timor Gap Treaty
- ⁹⁷ Annex B, Timor Gap Treaty.
- ⁹⁸ Annex C, Timor Gap Treaty.
- ⁹⁹ Article 12, Timor Gap Treaty
- ¹⁰⁰ Article 13, Timor Gap Treaty
- ¹⁰¹ Article 14, Timor Gap Treaty
- ¹⁰² Article 15, Timor Gap Treaty
- ¹⁰³ Article 18, Timor Gap Treaty
- ¹⁰⁴ Article 20, Timor Gap Treaty
- ¹⁰⁵ Article 21, Timor Gap Treaty
- ¹⁰⁶ Article 16, Timor Gap Treaty
- ¹⁰⁷ Article 17, Timor Gap Treaty
- ¹⁰⁸ Keyuan, “Joint Development in the South China Sea,” 95.
- ¹⁰⁹ Nguyen Hong Thao, “Joint Development in the Gulf of Thailand,” *IBRU Boundary and Security Bulletin Autumn* (1999): 86.
- ¹¹⁰ Ibid.
- ¹¹¹ Keyuan, “Joint Development in the South China Sea,” 94-95.
- ¹¹² Keyuan, “Joint Development in the South China Sea,” 95.
- ¹¹³ Thao, “Joint Development in the Gulf of Thailand,” 81.
- ¹¹⁴ Ibid.
- ¹¹⁵ “About the Malaysia-Thailand Joint Authority (MTJA),” <http://www.mtja.org/aboutus.php>.
- ¹¹⁶ See MTJA, “Fiscal regime for JDA,” <http://www.mtja.org/fiscalregime.php>.
- ¹¹⁷ Thao, “Joint Development in the Gulf of Thailand,” 83.
- ¹¹⁸ Article 4(1), 1979 Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the establishment of the joint authority for the exploitation of the resources of the sea bed in a defined area of the continental shelf of the two countries in the Gulf of Thailand, adopted in Chiang Mai, Thailand on 21 February 1979.[hereinafter 1979 Malaysia-Thailand MOU].
- ¹¹⁹ Article 4(2), 1979 Malaysia-Thailand MOU
- ¹²⁰ Article 5, 1979 Malaysia-Thailand MOU.
- ¹²¹ Thao, “Joint Development in the Gulf of Thailand,” 83.
- ¹²² Thao, “Joint Development in the Gulf of Thailand,” 81
- ¹²³ Thao, “Joint Development in the Gulf of Thailand,” 82.

¹²⁴ Article 3, 1992 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the exploration and exploitation of petroleum in a defined area of the continental shelf involving the two countries, Adopted in Kuala Lumpur, Malaysia, 5 June 1992.

¹²⁵ Thao, "Joint Development in the Gulf of Thailand," 82.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Miyoshi, "Is Joint Development Possible in the South China Sea?," 619.

¹²⁹ Article 2, Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988 [hereinafter Antarctic Mineral Resource Convention]

¹³⁰ Ibid.

¹³¹ Several incidents have been reported alleging one claimant State's violation of the other claimant State's sovereignty, and vice versa. For instance, Vietnam accused that the Chinese fishing boats intentionally cut the cables of a Vietnamese vessel conducting oil and gas exploration in the South China Sea. China denied the accusation and countered that Vietnam illegally chased Chinese fishermen. See "China, Vietnam Trade Blame in Recent South China Sea Incident," 10 June 2011, copy accessed at <http://www.2point6billion.com/news/2011/06/10/china-vietnam-trade-blame-in-recent-south-china-sea-incident-9453.html>.

¹³² See Tara Davenport, et al, *Conference Report: Conference on Joint Development and the South China Sea*, 16–17 June 2011, Grand Copthorne Hotel, Singapore (Centre for International Law, National University of Singapore), 35-42.

¹³³ See Cui Wei, "Multilateral management as a fair solution to the Spratly disputes," *Vanderbilt Journal of Transnational Law* 799 (May 2003).

¹³⁴ Xinhua News Agency, 22 December 1988, cited in Catley and Keliat, *Spratlys*, 46.

¹³⁵ "South China Sea Oil and Gas.," There are different estimates on energy potential of the South China Sea. For discussion on this, see Chapter 1, Potential Energy Reserves of this paper;

¹³⁶ Zou Keyuan, "Cooperative development of oil and gas resources in the South China Sea," 80.

¹³⁷ Philippine Secretary of Foreign Affairs del Rosario stated that Forum Energy Philippines Corporation's (FEPC) seismic survey vessels were "harassed by Chinese marine surveillance vessels" during their operations in the Recto Bank (Reed Bank) area on 2 March 2011. Del Rosario also stated that cited at least seven (7) aggressive intrusions by China from February to August 2011. See del Rosario, "Philippine Policy Response and Action." Vietnam accused China of deliberately cutting the survey ship's cables in the South China Sea, see "Vietnam accuses China in seas dispute," BBC News, 30 May 2011, <http://www.bbc.co.uk/news/world-asia-pacific-13592508>.

¹³⁸ "Global statistical yearbook 2011," Enerdata, <http://yearbook.enerdata.net/>

¹³⁹ "China Energy data, Statistics and Analysis," Energy Information Administration, last updated May 2011, <http://www.eia.gov/cabs/china/Full.html>, accessed 20 March 2012.

¹⁴⁰ Ibid.

¹⁴¹ China's Energy Needs and Strategies: Hearing Before the U.S.-China Economic and Security Review Commission, One Hundred Eighth Congress First Session, October 30, 2003, available at <http://www.uscc.gov>.

¹⁴² Ibid, 2.

¹⁴³ Luft, "Fueling the dragon: China's race into the oil market."

¹⁴⁴ China denies making arm sale to Sudan and Libya or selling WMD to North Korea, see "China denies report of arms sales to Sudan," Xinhua, 15 March 2008,

http://www.chinadaily.com.cn/china/2008-03/15/content_6538395.htm; Hao Zhou, "China denies selling launcher to N.Korea," *Global Times*, 19 April 2012,

<http://www.globaltimes.cn/NEWS/tabid/99/ID/705780/China-denies-selling-launcher-to-nkorea.aspx>; "China

denies report, says it did not sell weapons to Libya," *CNN*, 05 September 2011,

http://articles.cnn.com/2011-09-05/world/libya.war_1_moammar-gadhafi-musa-ibrahim-chinese-companies?_s=P

M:WORLD
¹⁴⁵ The United Nations Security Council passed resolution 1564 in September 2004 which threatens Sudan with sanctions if it continues to help the militia groups in Darfur. Allegedly, Beijing made a statement that China would veto any such type of sanctions. See Luft, "Fueling the dragon."

¹⁴⁶ Ibid.

¹⁴⁷ "So Much for Sanctions: China, Iran Iron Out Oil Agreement," *Wall Street Journal*, February 17, 2012, <http://blogs.wsj.com/chinarealtime/2012/02/17/so-much-for-sanctions-china-iran-iron-out-oil-agreement>.

¹⁴⁸ John Keefer Douglas, Matthew B. Nelson and Kevin L. Schwartz, "Rising in the Gulf:

How China's Energy Demands Are Transforming the Middle East," *Al Naklah: The Fletcher School Journal for issues related to Southwest Asia and Islamic Civilization* (Tufts University Spring 2007): 1.

- ¹⁴⁹ Seismic surveys in the Palawan area or 100 miles off the eastern edge of the Spratlys confirmed the likelihood of the presence of oil in early 1970s. The Philippines formally announced its claim over the KIG a few years after. See Samuels, *Contest for the South China Sea*, 92.
- ¹⁵⁰ Catley and Keliat, *Spratlys*, 50; Valencia, *Sharing the Resources of the South China Sea*, 27.
- ¹⁵¹ Catley and Keliat, *Spratlys*, 50-51.
- ¹⁵² For discussions on JMSU, please see Chapter 6, Joint Marine Seismic Undertaking and certain section in Chapter 7 of this paper.
- ¹⁵³ Information Office of the State Council, People's Republic of China, *China's Energy Conditions and Policies*, <http://en.ndrc.gov.cn/policyrelease/P020071227502260511798.pdf>, 22-23
- ¹⁵⁴ Schofield, "Dangerous Ground," 17.
- ¹⁵⁵ "South China Sea Oil and Gas."
- ¹⁵⁶ Ibid.
- ¹⁵⁷ Ibid.
- ¹⁵⁸ Schofield, "Dangerous Ground," 16.
- ¹⁵⁹ "China Energy data, Statistics and Analysis."
- ¹⁶⁰ Judy Hua and Chen Aizhu, "China Jan oil demand up 5 pct on yr, off Dec peak," *Reuters*, 9 March 2012, <http://www.reuters.com/article/2012/03/09/china-oil-demand-idUSL4E8E924I20120309>
- ¹⁶¹ "China Energy data, Statistics and Analysis."
- ¹⁶² This pertains to the estimates that are unclear about the exact location of the potential reserves.
- ¹⁶³ Daniel Workman, "China's Top Suppliers of Imported Crude Oil by Country in 2010," International Trade@suite 101.com, <http://daniel-workman.suite101.com/chinas-top-suppliers-of-imported-crude-oil-by-country-in-2010-a355760>.
- ¹⁶⁴ Erica Downs, *China* (The Brookings Foreign Policy Studies, Energy Security Series, The Brookings Institution, December 2006): 31, <http://www.brookings.edu/~media/research/files/reports/2006/12/china/12china.pdf>.
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- ¹⁶⁶ Joshua Ho, "Piracy In The South China Sea: Lessons From Gulf Of Aden – Analysis," *Eurasiareview*, 28 March 2011, <http://www.eurasiareview.com/28032011-piracy-in-the-south-china-sea-lessons-from-gulf-of-aden-analysis/>
- ¹⁶⁷ Ibid.
- ¹⁶⁸ Downs, *China*, 14.
- ¹⁶⁹ Ibid.
- ¹⁷⁰ Samuels, *Contest for the South China Sea*, 6.
- ¹⁷¹ Edward Wong, "Chinese Military Seeks to Extend Its Naval Power," *The New York Times*, 23 April 2010, <http://www.nytimes.com/2010/04/24/world/asia/24navy.html?pagewanted=all>.
- ¹⁷² "Friend or foe?: A Special Report on China's place in the world," *The Economist*, 24 December 2010.
- ¹⁷³ Ibid.
- ¹⁷⁴ "Hu Jintao tells China navy: Prepare for warfare," BBC News, 07 December 2011, <http://www.bbc.co.uk/news/world-asia-china-16063607>.
- ¹⁷⁵ Leszek Buszynski, "The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry," *The Washington Quarterly* 35, no. 2 (Spring 2012):145.
- ¹⁷⁶ Ibid, 146-147.
- ¹⁷⁷ A wartime study document T-324 "Spratly and Other Islands (Shinnan Gunto)" prepared by the US State Department on 25 May 1943 for examination by the Territorial Subcommittee considered several alternatives for the disposition of the islands: retention by Japan; transfer of islands to China; France (or Indochina); the Philippines; and an international organization which will have control and administration. The latter was proposed on the basis that the "islands are of no vital interest to any single country or territory." Another document, CA-301 "Spratly and Other Islands (Shinnan Gunto)" prepared by the Inter-divisional Area Committee on the Far East concluded that "under Japan the islands are a menace to other states, but with Japan eliminated they will be of no vital interest, strategically or economically to any single country or territory." See Hara, "The Spratlys and the Paracels," 146-147.
- ¹⁷⁸ Ibid.
- ¹⁷⁹ The San Francisco Treaty merely states: "...(f) Japan renounces all right, title, and claim to the Spratly Islands and to the Paracels Islands." See Treaty of Peace with Japan, 8 September 1951, copy accessed at <http://www.taiwandocuments.org/sanfrancisco01.htm>.
- ¹⁸⁰ For a discussion of other regional problems that originated from the San Francisco Treaty, see Kimie Hara, *Cold war frontiers in the Asia-Pacific: divided territories in the San Francisco system* (London : Routledge, 2007).

¹⁸¹ Catley and Keliat, *Spratlys*, 113-114.

¹⁸² “US Policy on Spratly and the South China Sea,” Statement by Christine Shelly, acting Spokesman, Department of State, May 10, 1995, http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html.

¹⁸³ Ang Cheng Guan, “The South China Sea Dispute Re-visited,” (Institute of Defence and Strategic Studies, Singapore, August 1999), 15.

¹⁸⁴ *Ibid.*

¹⁸⁵ “US Rejects Talk of Massive Spratlys Build-up,” *The Straits Times*, 12 April 1999, cited in Ang Cheng Guan, “The South China Sea Dispute Revisited,” 16.

¹⁸⁶ Michael Yahuda, *The International Politics of Asia Pacific* (London and New York: Routledge Curzon, 2003), p. 298, cited in Renato de Castro, “The US-Philippine Alliance against an Emerging China Challenge,” *Contemporary Southeast Asia* 31, no.3 (2009):409.

¹⁸⁷ de Castro, “The US-Philippine Alliance against an Emerging China Challenge,” 405.

¹⁸⁸ Liselotte Odgaard, *Maritime security between China and Southeast Asia: conflict and cooperation in the making of regional order* (Ashgate, Aldershot : 2002), 143-144.

¹⁸⁹ The U.S. policy on South China Sea was noted by commentators to have switched from the policy of “active neutrality” to “active concern,” see Yann-huei Song, “The Overall Situation in the South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks,” *Ocean Development and International Law* 34 (2003): 237.

¹⁹⁰ Odgaard, *Maritime security between China and Southeast Asia*, 133.

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