Introduction: why joint development in the South China Sea?

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I. WHY THE SOUTH CHINA SEA?

The South China Sea is of critical importance to its multiple bordering States and entities for a number of reasons. In particular, the broad, semi-enclosed waters of the South China Sea host a marine environment of globally significant biological diversity and productivity. Consequently, these waters support and sustain marine living resources, especially fisheries and aquaculture activities, which are fundamental to the livelihoods as well as the primary protein needs, and thus food security, of literally hundreds of millions of people within the region. The seabed underlying the South China Sea is also often portrayed as a major potential source of seabed hydrocarbon resources. Regardless of the true validity of suggestions that the seabed is ‘oil rich’, the perception that this is the case remains a powerful factor in the calculations of the interested coastal States. Moreover, the South China Sea hosts sea lanes of global significance and the geostrategic importance of the region cannot be ignored. All of these considerations are of note in the context of the other critical feature of the South China Sea – its highly disputed and contested character.

The South China Sea is host to multiple and, to a large extent, intertwined maritime and territorial disputes involving China, Viet Nam, Philippines, Malaysia, Brunei and Taiwan (the claimants). These disputes include competing claims to territorial sovereignty, especially in respect to several groups of small islands, as well as maritime jurisdictional disputes which have given rise to broad areas of overlapping maritime claims. These contentious disputes are longstanding and represent an enduring source of friction between the interested States with alarming and dangerous potential for escalation. Consequently, the South China Sea has frequently been ranked among the Asia-Pacific’s primary flashpoints for conflict.
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This threat to regional and international peace and security, serious as it is, is by no means the only negative consequence of these disputes. For example, contested sovereignty over islands and extensive areas of overlapping maritime claims has tended to compromise efforts to preserve and protect the region’s unique marine environment, thus efforts to promote sustainable management of its vital living resources have been stymied. Further, the lack of certainty regarding jurisdiction over maritime areas has largely constrained the capacity of States to undertake oil and gas exploration activities.

While the above scenario is not new, addressing it has arguably become significantly more urgent for a number of reasons. First, after a decade of relative calm, tensions in the South China Sea have escalated considerably in recent times, giving rise to genuine concerns of confrontation. Tensions have increased as a result of littoral States seeking to secure and safeguard ‘their’ maritime spaces, with a view to exercising control over the valuable marine resources within them or, at the least, preventing competing claimants from controlling or accessing them. Second, the South China Sea marine environment and the marine biodiversity and living resources that it sustains are increasingly under threat. Uncoordinated and competitive efforts to harvest the fisheries resources within areas of overlapping maritime claims, coupled with unsustainable and destructive fisheries practices, is placing substantial pressure on South China Sea stocks. This has the potential to lead to a collapse in this vital fishery, which would be a tragedy of disputed waters akin to the well recognised tragedy of the commons.1 Third, the collective energy security concerns of the South China Sea littoral States are becoming more pressing, as domestic sources of supply generally plateau or decline and demand continues to escalate. This has enhanced the desire of coastal States to access the attractively near-at-hand, if unconfirmed, seabed oil and gas resources underlying the South China Sea.

II. DEBATING THE ISSUES: A GROWING MOMENTUM

The first 12 years of the twenty-first century have seen a remarkable increase in the scope and nature of South China Sea debate, with discussion expanding both inside and beyond the region. This is not surprising, given the high public profile of the intensely contested disputes concerning

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sovereignty over islands, adjacent marine spaces, and their living and non-living resources. However, this was not always the case. During the 1980s and 1990s it was clear that some of the claimants did not welcome widespread discussion of the claims and disputes that exist in the South China Sea, and actively sought to discourage such discourse. They considered these matters to be no-one’s business but their own, in spite of the inherently international character and thus global geopolitical significance of, for instance, the critical sea routes passing through the South China Sea. Some claimants also tended and, indeed, often still try, to adopt the position that their claims were absolute and inviolate: rejecting the notion that there was anything to discuss, regardless of the inherent absurdity of such a position in the context of multiple overlapping territorial and maritime claims. Other non-claimant littorals – Indonesia, for example – seemed to regard themselves as not qualifying as ‘South China Sea States’ at all, on the basis that they do not dispute sovereignty over any of the contested islands, even if they are undoubtedly coastal States with associated maritime claims in the South China Sea. Such a position to an extent serves to distance them from the disputes.

Happily, it seems that we have moved a long way from the prevailing doubt and hesitation that marked such discussions as there were during the latter part of the last century. Threats of boycotts if ‘sensitive issues’ appeared on agendas resulted in much self-censorship on the part of internationally respected regional think-tanks and the like. These days have passed. In 2011 and 2012, there were South China Sea-related scholarly or research meetings in Manila, China, Taiwan, Indonesia, Malaysia and Singapore. These meetings have, unsurprisingly, featured strong regional participation, yet have also included a notably international flavour. Despite the desire of some claimants to exclude external actors from ‘their’ region, together with an abiding desire among some claimants to regard their own claims as ‘indisputable’ and beyond question or discussion, it seems that the debate on South China Sea has become thoroughly internationalised.

The tone of many contributions to these gatherings, not to mention many publications on the South China Sea, has become increasingly demanding, in particular, on the issue of jurisdictional clarity. That is, clarity as to the precise nature, extent and justification for claims to sovereignty and maritime jurisdiction. There is much support for the view that ambiguous and unclear claims are antithetical to dispute resolution. Other salient issues raised include: concerns over what we truly know (as opposed to what we hope or speculate) about the living and non-living resources of the South China Sea; as well as the nature of the obligations owed by the littoral States concomitant with their rights at international
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law. Altogether, then, a healthy and vigorous set of debates searching for true principle and ascertainable fact is increasingly emerging, in contrast to persistent reiteration of nationalistic positions. That said, it should be acknowledged that intransigent positions are still maintained (and defended at such meetings) in addition to the welcome new perspectives. Some of these positions can increasingly be viewed as untenable by some of the claimants and by the international community.

The rhetoric of South China Sea commentaries has certainly changed since the 1990s, when assessment of issues and priorities lacked accuracy and factual analysis. The former notion that the ‘oil-rich Spratlys’ were the ‘key’ to the South China Sea, a rote-repeated nostrum, has to a large extent been dethroned. The present volume contains chapters which help to make it clear why this is. Not only is the ‘oil-rich’ notion far from established, but we are now putting together a better picture of how a principled approach to the resolution of maritime jurisdictional issues (if not the extremely vexed question of sovereignty over disputed islands) might proceed. Moreover, part of this process involves placing the islands and geographic features of the South China Sea in their true context, as irritants to maritime delimitation as opposed to being central to this process. Attention is also being focussed on renewable resource issues.

One of the consequences of the invigorated debate has been to question the notion of South China Sea ‘exceptionalism’; the idea that the South China Sea is a unique area which is set apart from the rules that are applicable for the rest of the world’s oceans. It remains a mystery why the rules of maritime jurisdiction accepted the world over, and codified and developed in the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), should not apply, or at least should not be applied as they are elsewhere. A similar claim has been attempted by some with respect to jurisdictional issues in the Arctic Ocean, again without adequate or convincing explanation as to why this might be.

III. AN INCREASINGLY COMPELLING RATIONALE FOR JOINT DEVELOPMENT

This volume is set against the backdrop described above and the rationale for action that it entails. We are by no means the first to suggest the application of provisional arrangements of a practical nature, or maritime joint development, for the South China Sea. Such proposals, however, have tended to founder on the complexities inherent in the South China Sea disputes, especially under the corrosive influence of contested sovereignty over South China Sea islands. Yet this dynamic is changing, and avenues
towards maritime co-operation, including joint development, are hopefully emerging. Arguably, the political will to proceed with co-operative arrangements and joint development is likely to increase, not only because of the increasingly urgent need to somehow address issues of management of the South China Sea’s marine environment, but also because no final resolution to the disputes is discernible on the horizon.

This bleak prognosis has been repeatedly confirmed by commentators. Indeed, there are few objective studies of the sovereignty and associated maritime jurisdictional claims in the South China Sea which do not include the words ‘intractable’, or ‘insoluble’, or one of their synonyms. Writings which marry discussion of the issues with the future of non-renewable resource exploration and production from this semi-enclosed sea are apt to conclude that the realistic prospects for an orderly (that is, conflict-free) assessment of its productive capacity are not encouraging – unless the claimants follow the example of other regions and enter into one or more co-operative arrangements based on a shelving of the jurisdictional disputes which have divided them for decades.

Perceptive writers will go on to say that, on the face of it, this idea has found a measure of acceptance in the region. None of the claimants have expressed opposition to joint development in one form or another, and most have actually endorsed it and, indeed, participated in such co-operative endeavours, including on the periphery of the South China Sea on a bilateral basis. Which raises the question: why are the governments concerned still talking about prospects for co-operation, as opposed to proceeding with its implementation? Part of the answer lies in the challenges arising from differentiating between a concept which some see primarily as a convenient way around a jurisdictional or delimitation impasse to the development of a co-operative structure which will form a solid basis for the investment of billions of dollars and a sturdy regime governing exploration and production operations. Establishing such a basis is, after all, the principal function of domestic oil and gas laws. The petroleum industry (and those to whom it will turn to raise the necessary funds) demand security, stability, and knowing ‘the rules of the game’. Governments and entities exercising the functions of government are expected to respect these requirements, while of course being mindful of their duties to act in the public interest. In the context of a contentious arena such as the South China Sea, these expectations will be of a high order. So how should regional governments respond? These are some of the issues to be explored in these pages, together with a host of related matters, some of which have attracted less attention than they deserve.
IV. A TOOLBOX FOR JOINT DEVELOPMENT

This book is not concerned with issues of sovereignty over disputed islands and other insular features. As noted, it proceeds on the basis that this issue is much less significant than previously thought. Instead, it seeks to advance some recommendations on how the claimants can give effect to obligations they have accepted under UNCLOS, by instituting provisional measures of a practical nature. In a sense, therefore, this volume provides a ‘toolbox’ of options to address the management and governance of areas of overlapping maritime claims.

This book explores forms of co-operation usually described as ‘joint offshore resource development’. The predominant emphasis in this context is on mechanisms designed to deal with the joint development of oil and gas resources. As some chapters herein demonstrate very clearly, joint development arrangements can be the means whereby jurisdictional issues are shelved, and resources accessed to the mutual benefit of the parties concerned. Further, there is a broader advantage in that an irritant in interstate relations, one which can lead to a destabilising situation, can be avoided or resolved. For countries that prefer an ‘all-or-nothing’ solution (usually with a particular emphasis on ‘all’), the ideas canvassed in these pages will have little attraction. In the South China Sea context, however, such approaches can be considered as implausible: opposition to such a one-sided outcome has been expressed with increasing vehemence by States concerned to secure what they consider to be their equitable share through delimitation or, alternatively, States open to the idea of maritime co-operation. It is understood that any one interstate issue must be seen against the background of bilateral, sub-regional and regional relationships as a whole, not to mention the functional demands necessitating close maritime co-operation, particularly in semi-enclosed seas such as the South China Sea. It will be clear that State practice, when supported by the requisite degree of political will, offers solutions, or at least a way forward, in sharp contrast to the present jurisdictional status quo, or deadlock, which does not.

Notwithstanding these points, the focus of this volume on joint development of non-renewable resources may appear to defer to what could be regarded as ‘old’ thinking. In reply, we suggest that the resource debate should be broadened and approached with greater realism and pragmatism without devaluing or abandoning any one sector. The chapters that follow are intended to bring greater objectivity, precision and pragmatism to what may be the only viable approach to the promotion of optimum oil and gas activities in the South China Sea.
V. ORGANIZATION OF THE BOOK

The book consists of four Parts. Part I, ‘Understanding the South China Sea Disputes’ provides insights on certain aspects of the South China Sea disputes. Professor Clive Schofield offers a detailed examination of the geographical and geopolitical factors that drive the South China Sea disputes. He explains the unique coastal geography of the South China Sea, including the fact that it is a semi-enclosed sea encompassing approximately three million square kilometres of maritime space. This facet of the South China Sea, coupled with the fact that multiple states surround it, means that maritime entitlements tend to converge and overlap with one another. An additional and significantly complicating factor is the presence of a numerous islands, islets, rocks, reefs and shoals in the region, many of which are subject to multiple competing claims to sovereignty. Professor Schofield also sheds light on the geopolitical factors that play an instrumental role in shaping the actions and reactions of the claimants.

In Chapter 2, Professor Robert Beckman discusses the way in which international law and particularly the law of the sea, has shaped the South China Sea disputes. He explains why the sovereignty disputes are unlikely to be resolved in the near future, either through negotiation or through submission to a third party dispute settlement body. He then examines in detail the nature of the maritime claims made by the various claimants in the South China Sea and suggests that maritime delimitation either by negotiation or third party dispute settlement mechanisms is also unlikely to occur in the near future. Professor Beckman argues that while international law may not ultimately determine the final outcome of the dispute, any discussion on possible solutions to the dispute will be futile unless the claimants understand the legal issues relating to the dispute. Further, he maintains that any resolution of the South China Sea disputes must be in accordance and consistent with international law.

Part II on ‘Joint Development: Principles, Pre-requisites and Provisions’ explores various aspects of the concept of the ‘joint development’ of resources. First, Tara Davenport discusses the international law governing the exploration and exploitation of hydrocarbon resources in areas of overlapping claims. She explains that the legal basis for joint development can be found in the obligations in Articles 74(3) and 83(3) of UNCLOS, which provide for States Parties to negotiate provisional arrangements of a practical nature pending maritime delimitation. She argues that while international law has increasingly recognized certain obligations of co-operation in overlapping claim areas, particularly in relation to resources, international law does not impose a specific duty to adopt joint development arrangements in these overlapping claim areas. However,
she concludes that joint development arrangements have been recognised under international law as an extremely valuable mechanism to facilitate the management of resources and should be seriously considered by States involved in maritime disputes.

In Chapter 4, Professor Ian Townsend-Gault examines joint development as a part of a wider functional approach to oceans governance and resource management in his chapter on ‘Rationales for Zones of Co-operation’. He elaborates on the functional, political and ecological rationales for zones of co-operation such as joint development zones, and provides a compelling argument as to why joint development zones should be established in areas of overlapping claims.

In Chapters 5 and 6, experienced legal practitioners examine the practical aspects of joint development agreements. Gavin MacLaren and Rebecca James offer insights into the key issues commonly faced by States when negotiating joint development agreements and suggest some ways to overcome these issues. Further, Professors Richard Nowinski and Peter Cameron provide a meticulous overview of common provisions in joint development arrangements.

Having examined the concept of joint development in Part II, Part III gives an overview of State practice on joint development arrangements, with a particular focus on Asia. Professor David Ong examines existing joint development arrangements in Southeast Asia, while Vasco Becker-Weinberg looks at the joint development arrangements in the Gulf of Tonkin and Northeast Asia. Professor Stuart Kaye then discusses the comprehensive joint development arrangements in the Timor Sea, followed by Ben Milligan who explores the arrangements made with regards to resources in the Torres Strait. Each of the authors in Part III offers critical analysis of the factors which led to the conclusion of the relevant joint development arrangement, key provisions in the arrangement, and whether and to what extent the relevant joint development arrangement can be considered a success.

Finally, Part IV provides an in-depth examination of the possibilities and prospects for joint development of hydrocarbon resources in the South China Sea. In this Part, the editors highlight the various factors that contributed to the successful conclusion and implementation of joint development arrangements in Asia and examine whether such factors exist in the South China Sea. Recognising that there are political, legal and practical considerations that must be overcome before joint development can even take place, the final chapter sets out critical steps or actions that need to be taken before joint development arrangements can be implemented in a serious and meaningful manner.