South China Sea and ASEAN-China Relations: Joint Development in the South China Sea?[1]

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Abstract

The idea of joint development to address the issue of overlapping maritime claims in the South China Sea has long been mooted by China. However, there has been no concrete take-up on the idea by ASEAN claimant States. This article attempts to shed some light on how China and the ASEAN claimant States view the notion of joint development, and highlights some possible reasons why the idea of joint development in the South China Sea between China and any of the ASEAN claimant States cannot take-off. The question of preferred basepoints is also discussed, considering that the issue on basepoints is inseparable from territorial sovereignty. Are there then no options or different modalities for these States to consider to enable resources in the South China Sea to be explored for mutual gains?

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[1] By Dr Rizal Abdul Kadir; this topic is a modified topic of a more general theme – South China Sea and ASEAN-China relations: Opportunities & Challenges - presented by the author in Bangkok in March 2016 at a forum organized by the Human Development Forum Foundation – www.hdff.org ; this article, as the present title now shows, explores further the point of joint development briefly touched upon during the presentation. The contents of this article are the own views of the author, drawn from information in the public domain, and does not represent the views or position of ASEAN or any State.

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Analysis

Maritime issues in the South China Sea trigger sovereignty and jurisdictional concerns for relevant ASEAN States; voiced by ASEAN apparently since 1992 through a Declaration on the South China Sea.[2] Thus for example, the Award on the Merits in the arbitration instituted by Philippines against China bears on ASEAN-China relations; because as a bloc, ASEAN is legitimately interested with the overall regional peace and security in the South China Sea. This purpose of ASEAN ostensibly mirrors the spirit of the dual-track approach advanced by China.[3] The dual-track approach developed by China,[4] however, has underpinnings of joint development;[5] an initiative yet to gain traction with ASEAN particularly the relevant ASEAN claimant States. This narrative explores why difficulties exist in the joint development initiative mooted by China, highlights attendant issues, and concludes by reflecting how ASEAN-China relations may pursue mutual gains over interests in the South China Sea.

The maritime rights and interests of ASEAN coastal States place a wedge in ASEAN-China Relations; because China contends that "… only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention."[6]

Complexities within territorial sovereignty claims by China in the South China Sea under contemporary international law are beyond present remit. Of immediate interest however, China seemingly favours setting aside or shelving disputes and seeking joint development – a philosophy attributable to the late Deng Xiaoping, with his 12 character guideline for dealing with territorial disputes such as Spratly/Paracel; which President Xi Jinping appeared to approve in his 2013 speech at the 18th Party Congress.[7]

Although 'joint development' seeks mutually beneficial outcomes, the initiative from China for the South China Sea currently however remains merely a suggestion. Perhaps, difficulties exist within the meaning of 'setting aside' or 'shelving disputes', as expressed by China; for, States may be unwilling to 'set aside or shelve' disputes through joint development because joint development of any defined maritime area, ordinarily, presupposes or recognises the existence of overlapping maritime claims, or equality of Sovereign claims. An example of this may be seen in the preamble to the 1979 Malaysia/Thailand MoU concerning their joint development

[2] 'apparently' – because original text unretrievable from ASEAN website at the time this article was finalised. However, an unofficial text is available via https://cil.nus.edu.sg/rp/pdf/1992%20ASEAN%20Declaration%20on%20the%20South%20China%20Sea-pdf.pdf (accessed 15 May 2017).
[3] The 'dual-track' approach apparently was an idea by Brunei - See Wang Yi: "Dual-Track Approach" Is the Most Practical and Feasible Way to Resolve the South China Sea Issue ('*Wang-Yi*') - http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1358167.shtml (accessed 15 May 2017).
[4] See Wang-Yi above n3 - "… in line with the dual-track approach, parties directly concerned can find solutions acceptable to them through friendly consultations. Pending a settlement, they could also discuss and shelve disputes for joint exploration and effectively manage and control disparities."
[5] See also MOFA PRC, "Set aside dispute and pursue joint development" ('*China Initiative*') via http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml (accessed 15 May 2017).
[6] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines ('*Position Paper*') via http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml, (accessed 15 May 2017) para.10.
[7] See commentary by Fravel, M. T. (15 August 2013) Xi Jinping's Overlooked Revelation on China's Maritime Disputes. The Diplomat via http://thediplomat.com/2013/08/xi-jinpings-overlooked-revelation-on-chinas-maritime-disputes/ (accessed 15 May 2017).

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arrangement.[8] Similarly, the 1978 joint development arrangement between Japan and South Korea preserved the Sovereign rights of both States in spite of the creation of a Joint Development Zone in the area of overlapping maritime claims.[9] The UK-Norway unitisation agreement over the Frigg Field Reservoir in the North Sea,[10] in the context of preserving the unity of a petroleum deposit, illustrates how States can work together and later still adjust their positions to sustain their interests.[11]

The suggestion by China to 'shelve disputes' and pursue joint development in the South China Sea is inseparable from claims by China to "… indisputable sovereignty over the South China Sea *Islands* and the adjacent waters (italics added);"[12] and is premised, although open to question, on the position of China that "… the sovereignty of the territories concerned belongs to China".[13] While Brunei, Malaysia, Philippines, and Vietnam each claim various maritime features in the South China Sea, more pertinently, these States, as coastal States, are also entitled – de jure – to maritime space in the area; especially, a Continental Shelf and an Exclusive Economic Zone. The aforementioned position of China, thus, appears tantamount to denying legitimacy of sovereign claims there, assuming, arguendo, that the aforementioned ASEAN States might consider whether China has sovereign rights in the South China Sea. The issue of sovereignty and relevant sovereign rights are thus integral, pivotal perhaps, to any discussion ASEAN-China may have on the nature and scope of any potential 'joint development' in the South China Sea be it on oil and gas interests, environmental protection, meteorology, fisheries or anything else the relevant States may envisage.

More specifically, ascertaining or delineating an area for joint development is a technical and fundamental step for any such arrangement. Whatever the area for any potential joint development, the process invariably attracts the use of preferred basepoints.[14] Basepoints may only be preferred by a State when they have territorial sovereignty over the feature. Thus, territorial sovereignty is at the heart of the selection of preferred basepoints. Herein lies deeper issues for ASEAN-China relations vis-à-vis the initiative by China to shelve disputes and pursue joint development; because, territorial sovereignty to certain maritime features in the South China Sea remain claimed by multiple States.

It may thus be useful to pause – and reflect on some lessons from delimitation, in that even where territorial sovereignty over preferred basepoints is not in issue, there is no guarantee that the features will be used – by a Court of law – in a delimitation process. Still, while jurisprudence is clear that the criterion governing the choice of basepoints is the physical geography of the relevant coasts,[15] States themselves, in negotiating an equitable

[8] Park, Choon-ho. (1993). Report No.5-13(2),Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Establishment of a 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 - which appears as an annex to the Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, signed 24 October 1979 (entered into force 15 July 1982). International Maritime Boundaries. J. I. Charney and L. M. Alexander. The Hague,Boston,London, Martinus Nijhoff. **I:** 1099-1123, 1107 et seq.
[9] Agreement between Japan and The Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the two Countries, signed 30 January 1974, 1225 UNTS 113 Registration No. I-19978 (entered into force 22 June 1978).
[10] See eg Woodliffe, J. C. (1977). "International Unitisation of an Offshore Gas Field." ICLQ **26**: 338-353.
[11] See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the amendment of the Agreement of 10 May 1976 relating to the exploitation of the Frigg Field Reservoir and the transmission of gas therefrom to the United Kingdom, done 25 August 1998, in force 30 June 2000, 2210 UNTS 94.
[12] Position paper, above n6, para.4.
[13] See 'Set aside dispute and pursue joint development', above n5.
[14] Especially where principles of equidistance may be employed.
[15] *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*) [2009] ICJ Rep 1, para.137.

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delimitation,[16] and therefore in negotiating an area for joint development too, are free to apply equitable principles to decide whether to include or exclude a particular basepoint.

The use and choice of basepoints, whether for delimitation or towards ascertaining an area for joint development, has national interest underpinnings, particularly in the South China Sea. As a general rule, where used as a basepoint the feature personifies the landmass of the coastal State as a whole, or perhaps more significantly as *Bowett* further points out, the maritime feature may determine the shape of the landmass in a given location.[17] The significance of a preferred basepoint may be more pronounced where a maritime feature is duly recognised as an island, potentially generating entitlement to a maritime area whether on its own or in conjunction with a larger landmass.[18]

Whether any of the features in the South China Sea claimed by the relevant States qualify as an island under international law, for use as a basepoint or otherwise, may be open to question[19]; but the text in article 121 of UNCLOS is instructive: "an island is a *naturally formed* area of land, … " (italics added). Considering the value of a maritime feature itself, generally, may be debateable, this begs the question on the purpose of the claims to maritime features in the South China Sea. It may thus be useful to note that, whether for delimitation or in establishing an area for joint development, the disputed features themselves may have no influence, especially if the features do not form an integral part of the coast.[20] Even where the territorial sovereignty of basepoints are not in issue, jurisprudence is clear that physical geography of relevant coasts play a significant role in the choice of basepoints.[21]

Concluding, the idea of joint development, howsoever defined, in the South China Sea presents opportunities in as much as it attracts a plethora of challenges for ASEAN-China relations. Matters concerning sovereignty and sovereign rights cannot be sidestepped, instead typically exists, in joint development; for, contemporary international law entitles coastal States to maritime rights. Whether China has sovereign rights through 'indisputable sovereignty' in the South China Sea attracts more complex issues than the question of joint development between ASEAN claimant States inter se, as contemporary law of the sea readily sets out maritime rights of the ASEAN claimant States on the basis of their existing indisputable sovereignty in the area – without even having to ascertain sovereignty over the contested features in the South China Sea. Still, modalities exist to elevate ASEAN-China relations on interests in the South China Sea without employing 'joint-development': the Brunei-Malaysia commercial arrangement in the South China Sea is one example and a way forward for ASEAN claimant states and China.

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Remarks: Opinions expressed in this contribution are those of the author.

[16] Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) [1993] ICJ Rep 38, para.57.
[17] Bowett, D. (1993). Islands, Rocks,R eefs, and Low-Tide Elevations in Maritime Boundary Delimitations. International Maritime Boundaries. J. I. Charney and L. M. Alexander, Martinus Nijhoff. **I:** 131-151, ('*Bowett*') 148 *et seq*.
[18] See Bowett above n17, pp132-147, esp 144-7.
[19] *Cf* The South China Sea Arbitration, Award of 12 July 2016, para.1203 [B](7), available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf (accessible as of 15 May 2017), where the Tribunal decided that "… none of the high-tide features *in the Spratly Islands*, in their natural condition, are capable of sustaining human habitation or economic life of their own …" [italics added].
[20] See also Bowett, above n17 151 *et seq* – the features may qualify as basepoints '…*where* they can be regarded as forming an integral part of the coast' [italics added].
[21] See eg *Romania* v *Ukraine*, above n15.

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