

5. Review and re-assess projects for their cost-effectiveness and ecological sustainability.
6. Better coordination of all government officials from the national to the local levels.
7. Employ the best and most effective experts and specialists to train local personnel.

In conclusion, we should not lose sight of the whole purpose of economic development assistance. All projects should benefit the majority of our people especially primary producers – the farmers and the fisherfolk, and make sure that every sector helps in conserving the environment.

Perspectives on Joint Development in the South China Sea¹

Aileen San Pablo-Baviera

1. The Joint Development Concept in the Philippine Imagination

The idea of “joint development” of resources in the South China Sea has been an option in the consciousness of Filipino leaders at least since June 1986, when Deng Xiaoping was reported to have told Vice President Salvador P. Laurel of China’s proposed formula to “shelve sovereignty issues and go for joint development.” “We should leave aside the issue of the Nansha Islands for a while. We should not let this issue stand in the way of China’s friendship with the Philippines and with other countries,” Deng was quoted as saying (“Set aside” MOFA).

The same message was relayed in 1988 to President Corazon C. Aquino, when Deng pledged to shelve the sovereignty issue, engage in joint exploration and development, and work towards a peaceful resolution of the issue (Baviera, qtd. in Tang, Li and Acharya, eds. 173-192). “In view of the friendly relations between our two countries, we can set aside this issue for the time being

¹ Based on a paper presented at the 4th Conference on “Sealanes of Communication” organized by the National Defense University in Taipei, Taiwan on September 26, 2012.

and take the approach of pursuing joint development,” Deng is quoted to have said (“Set aside dispute” MOFA). When President Fidel V. Ramos visited Beijing in April 1993, joint development was also mentioned by the Chinese side (Buszynski 350).

No detailed proposal followed any of these occasions, however, and as the years went by, China also continued to assert “indisputable sovereignty,” casting doubt on its readiness to compromise. Thus there was no cause for the Philippines to consider the proposal of joint development seriously. Meanwhile, the Philippines continued its oil surveying and exploration activities offshore of its Palawan province which faces the South China Sea, where drilling which first started in the mid-60s had led to the first discoveries in 1976.

Under the UN Convention on the Law of the Sea (UNCLOS), joint development refers to an agreement to develop together or through some form of cooperation the resources of a designated zone which is the subject of conflicting claims. Applied to overlapping exclusive economic zones (EEZ) and continental shelves, as well as in maritime zones pertaining to territories whose sovereignty is in dispute, joint development is defined as “provisional arrangements of a practical nature” that states may enter into, and which “shall not jeopardize or hamper the reaching of a final settlement of the dispute” (UNCLOS; Article 74; Article 83; and Resolution III).

“Joint development” as a principle may also be loosely defined to include joint management and engaging in cooperative activities in a disputed area that may or may not involve the development or exploitation of resources. Coral reef conservation, cooperation for search and rescue activities, ensuring safety of navigation, and joint scientific research are but some possible initiatives which may also help build confidence and ease tensions under the framework of “shelving sovereignty.” With respect to the South China Sea which is defined under UNCLOS as a semi-enclosed

sea, surrounding states even have the obligation to cooperate for its management, as explained in Art. 123.

States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization:

- a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- c) to co-ordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area;
- d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.

The Philippines has all along shown serious interest in initiatives promoting such kinds of cooperation. A few examples of these include participation in the Indonesia-Canada workshop series, “Managing Potential Conflicts in the South China Sea,” and hosting of the UNDP/GEF regional program “Partnership for Environmental Management of the Seas of East Asia.” A Philippines-China bilateral agreement on “principles for a code of conduct,” following Beijing’s 1995 Mischief Reef occupation, set up working groups for confidence-building measures, fisheries and marine environment protection – with a provision indicating possible expansion to multilateral cooperation. A similar Philippines-Vietnam bilateral agreement was signed in 1997, and subsequently the Philippines and Vietnam undertook a series of joint marine scientific expeditions in the seas. The prospect of bilateral or multilateral functional cooperation in the South China Sea is in principle therefore not a problem for the Philippines.

It is on the matter of joint resource development where

obstacles to cooperation abound. However appealing the idea of joint development might be as a practical approach to the management of intractable disputes in resource-rich areas, the complexity of the disputes in the South China Sea makes it nearly as difficult to pursue joint development as to resolve sovereignty and boundary issues.

In the case of the Philippines, the area of dispute with China, Vietnam, and to a lesser extent Malaysia includes that part of the Spratlys that it calls the Kalayaan Island Group. These islands are farther from the coasts of China and Vietnam but are close to the Philippines, partially lying within the Philippine 200 nautical mile EEZ drawn from the baselines of the main archipelago. Therefore, from the Philippine vantage point, any potential joint development area to be identified in the Spratlys is likely to be proximate to the main islands of the Philippines, a major factor contributing to its wariness. Adding to the confusion is China's so-called "nine-dash line" claim, which encompasses 80-90 percent of the entire South China Sea.

China submitted a map of its "nine-dash line" claim, without coordinates or explanation of legal basis to the Commission on the Limits of the Continental Shelf in 2009, as part of its objection to a joint submission by Malaysia and Vietnam of their own continental shelf limits. The "nine-dash line," on the premise that it represents a territorial claim by China, has been roundly criticized as being in violation of UNCLOS.

Assuming that the Philippines is interested in pursuing joint development, even identifying the proper areas for joint development would require agreement with prospective partners on the legal status of specific features and on the maritime zones that they can generate. This agreement on the legal character of specific features and their adjacent waters is what the ZoPFF/C proposal announced in 2011 by the Philippine Department of Foreign Affairs, appears to push for.

Absent such agreements and pending the final resolution of the sovereignty questions, the Philippines would benefit if, at the minimum, its right to exercise its sovereign rights and responsibilities over its EEZ and the continental shelf will be recognized by other coastal states.

However, efforts to exercise sovereign rights have led to tensions with other countries over foreign fishing and over Philippine oil exploration activities. An escalation of tensions occurred in March of 2011 when Chinese vessels conducted harrassing maneuvers against the Philippine oil exploration vessel *MV Veritas Voyager* in the area of Reed Bank off Palawan, and again in early April 2012 when Philippine naval authorities tried to apprehend Chinese fishermen found harvesting corals and giant clams in Scarborough Shoal. In the latter case, China resisted by sending its maritime authorities, leading to a standoff between official vessels of the two sides that lasted some months, and to the present situation of China enjoying de facto control of Scarborough Shoal.

In recent years, the territorial disputes have manifested most seriously as contests over fisheries and hydrocarbon resources, and this raises the question: will joint development of these resources be a solution? The question with respect to the Spratlys/Kalayaan Islands is: "Is the Philippines interested in joint development?"

2. Is the Philippines Interested in Joint Development?

Aside from avoiding the possibility of armed conflict, one primary motivation for states to consider the approach of joint development is to ensure access to valuable resources – fisheries (which as a renewable resource may not be as sensitive), but particularly oil and gas. These resources are located not in the

middle of the ocean but likely on the territorial sea, seabed and continental shelf of the nearest coastal state. For the most part, it has been observed that even though coastal states may be willing to undertake joint development in disputed areas, the territorial sea and the continental shelf would be considered off limits (Snyder 145). However, successful (i.e. profitable) commercial development of these resources will rely in some measure on access to nearby infrastructure (pipelines, refineries) as well as nearby markets. Thus, the cooperation of the nearest coastal state is of importance.

The Philippines lacks the capital and technology to undertake offshore oil development on its own, so in its other areas on the main archipelago it has been actively seeking partnerships with local and foreign companies, including state-owned CNOOC of China. In the disputed areas of the Spratlys, tensions are thus seen to have high opportunity costs in terms of scaring off potential investors and leaving badly needed energy resources untapped. However, agreement to jointly develop resources with other claimant states (especially bigger and more powerful ones) is deterred by fear of even greater costs and risks that may arise from failed cooperation—such as the inequitable division of economic benefit, de facto surrender of sovereignty and territorial integrity, and ensuing threats to security. In other words, a strong legacy of distrust and sense of vulnerability constitute obstacles to Philippine participation in joint development arrangements.

Indicative of the sharp distrust in the Philippines particularly of the biggest player China, typical sentiments about “joint development” of the South China include the following:

China's position on joint development is “What is mine is mine. What is yours, we can jointly develop.”

They talk about joint development now, but when economic payoffs begin, China will grab everything.

China says ‘shelve sovereignty disputes’ but their actions and

statements indicate they will use ‘joint development’ to trick others into recognizing their sovereignty.

The lack of faith in China's sincerity was not because of any innate hostility or unfriendliness toward China. As mentioned earlier, China is a welcome partner in other energy projects, aside from being an active trade partner. The Philippines and China moreover enjoy close people to people ties. The suspicion is in large part a function of structural power asymmetry and possibly collective memory of how disadvantaged the Philippines has historically been in its relations with big powers. Such distrust was, no doubt, reinforced by China's 1995 Mischief Reef occupation, which some informed observers in the Philippines saw as a move to get closer to the Philippines' Reed Bank where much of the suspected offshore oil and gas deposits closest to the Spratlys are believed to be located. The rapid advances in China's military and maritime enforcement capabilities amid its growing assertiveness and nationalism also contribute to this anxiety.

Since the original formulations by Deng of “shelve sovereignty disputes, pursue joint development” were enunciated, China is perceived to have become more insistent that other claimant states have to recognize Chinese sovereignty in the South China Sea as a precondition to joint development. The 2000 statement by the Chinese Ministry of Foreign Affairs quoted below, while preaching joint development, is full of contradictions as it asserts Chinese sovereignty yet accepts that there are disputes and that ownership questions will need to be resolved. This ambiguity, in the context of China's rapid rise, development, and high energy demand, makes it extremely difficult for other countries to agree to any joint development formula on offer from China:

The concept of “setting aside dispute and pursuing joint development” has the following four 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.

4. The purpose of joint development is to enhance mutual understanding through cooperation and create conditions for the eventual resolution of territorial ownership ("Set aside dispute" MOFA).

Nonetheless, despite distrust and suspicion, and the ambiguity of China's idea of joint development, the Philippines did seem ready to take that leap of faith during the Gloria Arroyo administration (2001-2010), when Manila came as close as one could under the circumstances to agreeing with China to turn the Spratlys area into an oil and gas joint development zone. The Philippines chose to cooperate with China (and subsequently, Vietnam) in the so-called Joint Marine Seismic Undertaking (JMSU).

3. The JMSU and Philippine Pragmatism

The JMSU accord was originally a bilateral agreement signed in 2004 between the state-owned Philippine National Oil Company (PNOC) and the China National Offshore Oil Company (CNOOC). It provided for the parties to engage in joint research of petroleum resource potential of a certain area of the South China Sea. Petro Vietnam came on board only in March 2005, turning the bilateral into a tripartite agreement.

In a joint statement, the three state-owned oil companies declared that the signing of the tripartite agreement "would not undermine the basic positions held by their respective governments on the South China Sea" (referring to the claims of sovereignty), but would help turn the disputed area into an area

of "peace, stability, cooperation and development in accordance with the UNCLOS and the 2002 DOC." During the signing ceremony in Manila, Philippine President Arroyo also called the agreement "a breakthrough for our energy independence program...." Chinese ambassador to Manila Wu Hongbo called the agreement "a good example for the countries concerned to resolve the South China Sea issue in a peaceful way," while Vietnamese ambassador Dinh Tich said, "We have to look for the best thing for the region, for our interest. We have to do it collectively" (*People's Daily* March 15, 2005).

In the Philippines, critics of the agreement expressed concern that positive oil and gas findings will immediately heighten security tensions among the claimants, given the yet unsettled sovereignty question. On the other hand, supporters of the project argued that the stable security environment at the time and the inclination of countries to pursue regional cooperation presented a window of opportunity that must be seized: i.e., it is better to deal with China now than with an even more powerful irredentist China later; and far better for the parties to explore and exploit the oil together than forego all chances of doing so by insisting on settling the sovereignty issues first.

Some foreign scholars rightly observe the Philippine approach to the disputes as being pragmatic, notwithstanding the often bold nationalist rhetoric. Granados' (267-294) description of Philippine policy as "creative problem solving" certainly appears to accurately describe the general approach, judging from initiatives that have been taken by the Philippines throughout the years – to name a few, the 1992 Manila Declaration on the South China Sea, the bilateral codes of conduct with China and Vietnam in the wake of Mischief Reef occupation, proposals in ASEAN to establish a regional code of conduct with China, the JMSU with China and Vietnam, joint marine scientific expeditions with Vietnam, and the 2011 proposal to institute

a Zone of Peace, Freedom, Friendship, and Cooperation in the South China Sea.²

Manila does not shy away from being at the forefront of new initiatives and has succeeded in keeping the territorial disputes on the agenda of ASEAN-China and East Asian regional cooperation. Through these initiatives, successive Philippine governments have demonstrated that they believed the disputes can be deescalated and practical areas of cooperation might be pursued even without a final resolution of the sovereignty issues.

Craig Snyder (154) similarly points to Philippine willingness to enter into joint development agreements particularly with respect to hydrocarbon resources, which to him appeared to outweigh the Philippine desire to win a boundary dispute or any mere assertion of sovereignty.

The JMSU could have been the first step. It involved an agreement between the three oil companies to jointly conduct pre-exploration activities in disputed areas of the Spratlys. The agreement proceeded based on its three-year program that involved data-gathering, data-processing, and data-analysis being led by CNOOC, Petro Vietnam, and PNOC, respectively. Before its third year was up, and before talks on an extension could begin, it became controversial in the Philippines when it came to public knowledge that the area of coverage included parts of the Philippine territory which had not earlier been acknowledged by the Philippines as disputed area, including Reed Bank.

Reed Bank is thus far the area of primary hydrocarbon interest

² Ulises Granados calls the Philippines a "pragmatist" in its South China Sea policy, pointing to how the country would base its claims not on objective norms supported by international law but instead as "contingent acts of creative problem-solving, which nonetheless have been self-legitimized since the 1960s and 1970s through state practice, interpretation of domestic law, and contemporary rules of International Maritime Law" (270).

near the Spratlys; it is a submerged feature of the country which together with the island of Mindoro and the northern part of Palawan island in southwestern Philippines, constitute a continental fragment known in geology circles as the North Palawan block. The rocks of these areas indicate a geologic origin and history contrasting with that of the rest of the Philippine Archipelago (Holloway 1355-1383).

There are various estimates of hydrocarbon potential in the Western Palawan and Reed Bank area. One estimate describes its oil and gas deposits as far exceeding the Malampaya fields which currently supply up to 55 percent of electricity in Luzon. Another unofficial estimate, translated into impact on Philippine energy independence, says that if fully recoverable, it could be sufficient to cover the total fuel demand of the country for the next 20 years.³

As a precursor to joint development, the seismic research cooperation under JMSU would have to be scrutinized in terms of its potential to contribute to successful management of the disputes, while granting the parties equitable access to the resources. Among the criteria for joint development are that 1) the agreement has to be negotiated in good faith, 2) the agreement is of a provisional nature, 3) the joint development agreement will not jeopardize or hamper the reaching of a final agreement, and 4) the agreement shall be without prejudice to the final delimitation.

At the outset, there were signs that the JMSU would run into trouble with respect to these criteria. On the Philippine side was a constitutional prohibition against allowing foreigners to explore and exploit natural resources in the country's territory. Manila was aware of this and the Arroyo government in fact tried

³ Conversation with a former Philippine Department of Energy undersecretary on July 2012.

to protect itself against suit by arguing that the seismic surveys were pre-exploration activities and therefore not covered by the constitutional ban, and that the parties to the agreement were oil companies rather than the governments per se. Since positive oil and gas finds could have logically led to joint development, which would not have been allowed under the Philippine constitution, did the Arroyo government act in good faith by agreeing to it? True enough, critics challenged the agreement before the Philippine Supreme Court, but it was simply allowed to lapse without extension after getting embroiled in anti-Arroyo politics in the Philippines.

There are also accounts that in the course of the JMSU, China started pressing the Philippine government to invalidate GSEC 101, a geophysical and seismic exploration contract within the JMSU area that had been granted by the Philippine government to other parties in 2002, or long before the JMSU agreement. One might speculate that China was trying to shore up its sovereignty by ensuring that any activity in the area would have its full knowledge and sanction. This Chinese demand was unacceptable to the Philippines, and Manila subsequently continued to issue other contracts, demonstrating that the JMSU was not seen to be an exclusive cooperation zone with the Chinese and Vietnamese.

GSEC-101 was eventually converted to Service Contract 72, and pre-drilling activities of one of its vessels, the *MV Veritas Voyager*, were targets of harassment maneuvers by two Chinese patrol vessels in March 2011. It was this incident that led once more to an unfortunate spiraling of conflict between Manila and Beijing. In May of that year, the Philippines reported the discovery of steel posts and construction materials supposedly unloaded by Chinese vessels on Iroquois Reef (Amy Douglas Bank) just at the southern tip of Reed Bank. Manila filed a diplomatic protest over the incident.

4. The ZoPFF/C as a Correction of JMSU

In the Philippines' view, it may be argued that Reed Bank is not an area in dispute. It is a submerged bank (neither island, rock or low-tide elevation) and part of its continental shelf. Moreover, Reed Bank does not lie in any maritime zone that may be claimed from any of the disputed islands (taking into consideration the Philippine position that none of the disputed features near Reed Bank are islands per the definition in Article 121 and they are not therefore entitled to any EEZ or continental shelf of their own.) Reed Bank therefore is not subject to any need or obligation for joint development.

This does not mean, however, that the Philippines no longer looks to joint development as an approach to managing the territorial and maritime jurisdiction disputes in the rest of the South China Sea. Under the current government of Benigno S. Aquino III, Manila's proposal is for the parties to first sit down and determine the disputed from non-disputed areas, and then discuss joint development only for what are clearly disputed areas.

The Philippines Department of Foreign Affairs produced a paper calling for the region to transform the disputed areas of the South China Sea into a Zone of Peace, Freedom, Friendship, and Cooperation. It proposed that the disputed parts of the Spratlys and Paracels be enclaved and then turned into a Joint Cooperation Area (JCA), in which claimant states can engage in various forms of cooperation such as marine science research, search and rescue, oil spill preparedness and conservation. Philippine attempts to obtain ASEAN endorsement of this new proposal failed, however, as other members expressed preference to continuing the discussions among ASEAN and with China on a regional code of conduct.

The ZoPFF/C proposal traces its guidance from President Aquino's statement that "What is ours is ours, and with what is disputed, we can work towards joint cooperation."

Realistically, the prospects of establishing this joint cooperation area are not so simple. As the main proponent and author of the ZoPFF/C proposal, Henry Bensurto, indicated:

In the final analysis, delimitation and segregation are by no means easy. They require political will and courage on the part of all the claimant states. Territorial and sovereign issues are always at the core of a country's national interest. They are the hardest and most difficult issues to compromise on. At the end of the day, the generation of political will among the concerned states is really the task and challenge facing diplomats in the region.

Indeed, such political will appeared to be lacking in the region, and the ZoPFF/C proposal fell by the wayside as ASEAN failed to endorse it, preferring to remain focused on the agenda of negotiating a Code of Conduct with China. What ZoPFF/C tells us however is that the Philippines remains interested in joint development, but only in clearly disputed areas. This was evidently an attempt to correct the fatal error in the JMSU, where the Philippines had inadvertently agreed to subject even some undisputed areas to joint cooperation.

The security environment in the region has unfortunately also grown much more complex compared to 2005 when the trilateral JMSU was agreed upon, with unilateral actions taken by various claimants leading to rising tension. Aside from China's more active presence and apparent readiness to challenge other countries at sea using its various paramilitary maritime organs, CNOOC launched its US\$1 billion Haiyang Shiyou 981 drilling rig which is intended for the deep-sea drilling in the South China Sea; whether it shall serve as threat or enticement to joint development for the technologically-challenged rival claimants is not quite clear.

At this time of increasing tensions, the window of opportunity to pursue joint development as a provisional solution appears to have closed. In May 2011 the Philippine Secretary of Energy announced that there were no plans of reviving the JMSU (*PDI*, May 22, 2011). In February 2012, Foreign Secretary Albert del Rosario was quoted as having said that joint development of areas in the West Philippine Sea (South China Sea) that "are clearly ours is not a viable solution" to our problem with China, whereas the Philippines is "open to considering joint development in the disputed areas" (Remo "Gov't").

President Aquino said as much in a speech in May 2012 where he stated that he was willing to share the bounty of the seas but stressed that he will not cede any portion of the Philippine archipelago to a foreign power like China. He still blames the JMSU of the previous Arroyo administration as a misguided move that resulted in the current problems with China (Calica "Aquino"). In that speech, he also said that parties to the dispute "should work towards easing the problems and the concerns of our respective peoples in the here and now and not in some future date where, you know, it is not a fair solution."

"If it's clear that we have a 200-mile exclusive economic zone, designated by the United Nations Convention of the Law of the Seas, and both of us are parties to it, is it too much to ask that our rights are respected by our neighbors in the same token that we respect their rights?" he asked (Bordadora "Philippines").

China has, however, been trying to persuade the Philippines to revisit the possibilities for joint development. In June 2012, Chinese state media published praise of former Philippine Speaker of the House of Representatives Jose de Venecia who had been the brains behind JMSU during the Arroyo government. De Venecia was quoted to have remarked: "All countries around the South China Sea urgently need hydrocarbon resources and it is rational to put aside disputes and seek for joint exploration,

exploitation and a fair distribution of benefits.” In reply, a *People’s Daily* (June 14, 2012) opinion piece read: “Jose Claveria de Venecia has always paid high attention to the regional peace and development.”

In May this year, at the height of Philippines-China standoff over Scarborough Shoal, Manuel Pangilinan, top executive of Forum Energy which was undertaking the exploration work on the Reed Bank, went to China upon the invitation of CNOOC. Pangilinan had reportedly been eyeing CNOOC as a possible partner in oil ventures. The visit was inconclusive, but it highlighted the fact that commercial interest from private stakeholders continued to remain high, but also that commercial undertakings and agreements would not be allowed to supersede the sovereignty and security concerns in this highly sensitive matter (*ABS-CBNNews Online*).

Following that unsuccessful exploratory visit, the Philippine Department of Energy announced that it would open three exploration blocks for bidding in July 2012. As anticipated, China reacted through the Foreign Ministry spokesman who said that: “Without permission from the Chinese government, oil exploration activities by any country or any company in waters under China’s jurisdiction are illegal” (Yan “Manila’s oil”).

5. Concluding Observations

This paper looks only at possible oil and gas joint development arrangements. In the case of fisheries, which is sometimes the more proximate source of tensions and draws much sympathy from the publics of all the countries involved, there is also a need to examine ways of easing and then preventing conflict pending the final settlement of the sovereignty question. The more recent tensions that led to a standoff with China occurred in Bajo de

Masinloc (Scarborough Shoal), an area with no known oil and gas deposits, but with rich fishery grounds.

The JMSU experience taught the Philippines that cooperation is possible and can be beneficial up to a certain extent, but that ultimately the domestic public will hold government to account for and explain its decisions, especially if these are seen to be against the national interest.

The good news is that joint development, or in the case of fisheries at least some form of cooperation in resource management, remains an option. The Philippines in the past has demonstrated a pattern of pragmatism and seeking innovative and cooperative approaches, particularly ones based on clear norms and principles such as equality and rule of law. If joint development cannot be pursued in the Reed Bank, it may be possible to do so in the more clearly disputed areas of the Spratlys. In the Reed Bank, the Philippines continues to invite foreign investors and partners to exploit the resources under Philippine laws, including those coming from China.

The bad news is that the current atmosphere is certainly not conducive to any talk of joint development, with very low levels of trust and mutual confidence among the parties concerned. This will take some time to repair. In the meantime, all sides must try to exercise restraint and find new windows for cooperation if they wish to establish a proper climate for reconsideration of the joint development concept.

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