

The International Law Regime of Resolving Sovereign Disputes in the South China Sea: A Case Study of Joint Development Arrangement in the Tonkin Gulf

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The paper examines the precedent value of the Tonkin Gulf case of maritime delimitation between China and Vietnam in facilitating the propagation of peaceful resolutions of sovereign disputes in the South China Sea through a perspective of United Nations Convention on the Law of Sea (UNCLOS). Despite China's rhetoric adherence on its Joint Development Arrangement (JDA) proposals to shelve the maritime disputes, the establishment of an effective and institutionalized JDA regime backed up by a multitude of bilateral treaties and agreements over the Tonkin Gulf remain the sole successful example of shelving sovereign disputes through peaceful negotiations. Under such circumstance in which the prospects of most joint development proposals are stepping forward uncertainty for China's growing assertiveness, it is requested that the Tonkin Gulf case can provide significant precedent value for other disputable areas in the South China Sea. The paper investigates the legitimation of JDA and highlights three key characteristics that the Tonkin Gulf pattern has enshrined, including the single delimitation principle and the notion of equidistance for boundary delimitation, the considerations from historical factors, the procedure of "due process". Nevertheless, it finds that it remains unlikely that these three characteristics can be effectively fulfilled in other sovereign negotiations. Finally, the status quo over the Parcel Islands is examined as a real-world problem by highlighting the three characteristics.

Keywords: the Tonkin Gulf case, Joint Development Argument, UNCLOS, institutionalism, the South China Sea

Introduction

The Tonkin Gulf is a semi-enclosed bay situated between northern Vietnam and the southern part of China. The emergence of the Economic Exclusive Zone (EEZ) in Article 57 of the 1982 United Nations Law of the Sea resulted in a sovereignty conflict in this region. It is because if according to the Article 57 of the Convention stipulating that "the EEZ shall not extend beyond 200 nautical miles from the baselines", both China and Vietnam have sovereign right over the Tokin Gulf, the bay with a width of only 176 nautical miles. Since the rapprochement of the Sino-Vietnamese relations in 1991, China and Vietnam have made unremitting efforts to settle their sovereign disputes in the Tokin Gulf Area. Two separate agreements, one on maritime delimitation and the other on fishery resources, were signed on 25 December 2000, both of which acted as the stepping stone for the peaceful settlement of sovereign disputes and paved the way for joint development

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activities (Tønnesson, 2016). In June 2004, the mutually-beneficial bilateral relationship stimulated led to the simultaneous ratification of the 2000 agreements by both the Chinese National People's Congress and the Vietnamese National Assembly. Based on the principal consensus reflected in the agreements, a myriad of joint development projects on the exploitation of natural resources have been well-implemented in the fishery and energy domains.

It is reasonable to presume that some features of the peaceful resolution in the Sino-Vietnamese Tonkin Gulf case may serve as the key facilitators in promoting the propagation of joint development arrangements (JDAs) in other sovereignty conflictual areas of the South China Sea, regarding the advantage of this approach to create an instrument for compromise and flexibility. The Paracel Islands where sovereignty rights have been overlappingly claimed by China, Vietnam, Taiwan, and Malaysia, work as the primary blasting fuse threatening regional stability. This essay therefore briefly examines the key features of the JDA in the Tonkin Gulf cases and compares the circumstance of the Tonkin Gulf to the Paracel Islands.

UNCLOS and the Conditions of South China Sea

JDA has no impact on states' sovereignty but just a mutual-accepted agreement for peaceful coexistence and cooperation while waiting for the resolution of sovereign disputes. According to Lagoni (1984), JDAs can be conceptualized as the cooperation between states in the exploration for and exploitation of certain natural resource deposits which either extend across a boundary or lie in an area of overlapping claims. For distinguishing JDA's role from some similar concepts equivalent to joint cooperation, Zou Keyuan (2006) conceptualized JDAs with the specific characteristics as the most feasible framework to pave the way for the peaceful resolution of international disputes. A sustainable JDA requires a two-step process: first, a peaceful maritime delimitation respecting the principle of "equitable solution" and second, the joint exploitation of natural resources under coordinating and effective regulation.

Because of the difficulty of reaching a final settlement of territorial disputes, the approach for temporary agreements obliged to the international law regime has become essential to ensure the maritime security and prevent the escalation of tensions resulted from unilateral jurisdictions and sole encroachment of natural resources. The pursuit of JDAs, being consistently addressed as China's unwavering diplomatic commitment in sovereign disputes, is a flexible instrument to promote regional stability and the cooperation among claimant states enshrined by the United Nations Convention on the Law of the Sea (UNCLOS). The provisions of the Convention provide the legal basis for JDA's function as a pending framework of shelving sovereign disputes and exploiting natural resource in the South China Sea (Nguyen Thi Lan, 2016). Nevertheless, due to without prescribing specific frameworks of such agreements, the effectiveness of the dispute settlement mechanism provided by the Convention remains in doubt in some spheres.

UNCLOS not only reaffirms the fundamental principle that sovereign disputes should be resolved by peaceful means of the own choices of the parties but also promulgates the rights and obligations of the coastal and non-coastal states (Zou, 2008). The legal source of JDA can be directly traced to Articles 74(3) and 83(3). The Articles provided that,

Pending agreement reached between countries on the delimitation of EEZs and continental shelf, as 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 to jeopardize or hamper the reaching of the final agreement. Such

arrangements shall be without prejudice to the final delimitation.¹

Besides, as the South China Sea meets the geographical criteria of “semi-enclosed sea”, the littoral states are encouraged to cooperate directly or through an appropriate regional organization under the obligation of Article 123. As the sub-clauses of Article 123 provided that, states bordering an enclosed or semi-enclosed sea shall cooperate with each other in the following aspects:

a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea; b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.²

It is certain that a consentaneous interpretation and implementation of the provisions of UNCLOS could sustainably militate against unilateral exploration activities of the claimant states that escalate the possibility of conflicts and contribute to the progress of multilateral cooperation. Nevertheless, as Beckman and Bernard (2016) concerned, the ambiguous wording of Articles 74(3) and 83(3) mandates too much discretions for the littoral states to self-determine the type of provisional arrangements they implement, which consequently results that the provisional arrangement does not constitute an explicit or implicit acknowledgement of the legitimacy of the claim of any other party.

The notion of equidistance rule, which was traditionally perceived as the most common method in the delimitation of the territorial sea, remains in Article 15. It sets forth that

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.³

It is reasonable for the Convention to remain reserved in providing a general and fixed clarification of equitable principle as each case of delimitation is *unicum*. The variance of geographical features as well as other specific circumstances attribute to the reservation clause manifested in the second paragraph of Article 15, in which it remarks, “The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith”⁴. The cautious approach, though understandable, leads to the failure of UNCLOS to provide any precise guidance or criteria for equidistance delimitation.

In cases where states are unable to resolve the sovereign conflicts, joint development agreements are instrumental in constructing mutual trust and confidence for mutual economic benefits of claimant states in areas of common interest. According to Zou Keyuan (1999), the existing joint development patterns remain great referential significance to framing a similar effective JDA regime in the South China Sea. The first natural resource management regime contained joint development provision is the delimitation agreement between the United Kingdom and Norway in 1965 regarding cooperative development of straddling petroleum reservoirs in the North Sea (Bastida, Adaeze Ifesi-Okoye, & Ross, 2007). The 1965 UK-Norway delimitation treaty drew the

¹ UNCLOS, Article 74(3); UNCLOS, Article 83(3).

² UNCLOS, Article 123.

³ UNCLOS, Article 15 para 1.

⁴ UNCLOS, Article 15 para 2.

boundary line under the principle of equidistance and stipulated that the two countries are obliged to exploit and develop the petroleum reservoirs contained in the North Sea coordinately and resolve ownership disputes through peaceful means. Another notable example for successful JDA enshrined the norm of “equity and fairness” was the 1974 Japan-South Korea Agreement of the continental shelf in the East China Sea, in which expenses and profits incurred in the exploration and exploitation phases were shared proportionally between two countries (Bastida et al., 2007).

Key Characteristics of the Tonkin JDA Model

Two countries had undergone a tough negotiation process before finally achieving the principal consensus on the maritime delimitation of the Tonkin Gulf in 2000. As Tønnesson calculated, China and Vietnam held seven rounds of negotiations at the governmental level, three unofficial meetings between the heads of the governmental delegations, 18 rounds of negotiations in mixed working groups, nine unofficial meetings between legal and technical experts and 10 rounds of meetings by groups of experts (Zou, 1999). As two countries were allied with each other in the Convention regime in support of the relevant provisions that expand the rights of coastal states in EEZ, UNCLOS automatically became the shared legal basis for the process of negotiation (Nguyen Thi Lan, 2016). The Tonkin Gulf example provided a creative solution of establishing a sustainable and enriched cooperative scheme while steering by the sensitive topic of sovereignty. In the 2000 Sino-Vietnamese Fishery Agreement, both parties clearly declared that the bilateral cooperation should not affect the sovereignty of the two countries over their respective territorial seas and other sovereign rights enjoyed by two countries respectively in their own EEZs (Zou, 2002). This section highlights three typically important factors of the Tonkin JDA model through an international law perspective which potentially can be the reference for other disputing areas in the South China Sea.

The Single Delimitation Principle and the Notion of Equidistance for Boundary Delimitation

The Tonkin Gulf agreements follow the single delimitation principle in dividing maritime zones beyond territorial sea, which literally means that the areas of EEZ and continental shelf were separated by one single line drawn from seaward to coast. The single delimitation principle reflects the spirit of “simplicity, certainty, and convenience” and is effective in avoiding jurisdiction conflicts in which two countries enjoy rights of jurisdiction in the same area (Sharma, 1987). Nevertheless, it should be noted that the norm of single delimitation is not binding to the Convention; however, there is also without any customary law prohibits the utilization of single delimitation principle in maritime boundary delimitation. Therefore, the prevalence of single delimitation principle is fully a result of states’ choices for their conveniences (Dundua, 2006).

In the Tonkin Gulf case, both parties adopt the “adjusting the equidistant line for equity” in modifying the line based on the length of the relevant coasts to ensure equity. According to Nguyen Hong (2005), the ratio of the relevant coastlines of Vietnam and China is 1.1:1, while the sea areas of Vietnam and China in the agreements are 1.135:1. The proportional test showed that Vietnam obtained 53.23 percent of the Tokin Gulf while China obtained 46.77 percent (Nguyen Hong, 2005). Parts of line, however, are nearer to the Vietnamese side, thus making China occupy a larger area than it could yield under the strict equidistance method. It was reported that *Bach Long Vi* islands were given just 3 nm EEZ beyond its 12 nm territorial sea while *Con Co* islands have been given a 50 percent effect, despite both of which are permanently populated and larger features eligible to be labeled as fully valued islands (Nguyen Hong & Amer, 2007). The reason for the

incomplete effect of these Vietnamese small islands is that small islands carry less weight in the semi-enclosed sea as the length of their relevant coasts must count against the length of opposite coasts. This criterion has been supported by the *International Court of Justice (ICJ)* in the *Nicaragua versus Colombia* case (Tønnesson, 2016). Thus, it is convinced that the delimitation in the Tonkin Gulf enshrines the values of equidistance and fairness.

Considerations From Historical Factor

One perplexing problem tormented the negotiation process is the status of the Sino-French Agreement of 1887. The historical factor is certainly important in the maritime delimitation procedure. The Vietnamese government based its claims on the 1887 treaty that the part of Tokin Gulf belonging to Vietnam constituted historic waters and should be subjected to the Vietnamese domestic jurisdiction in its 1982 Statement on the Territorial Sea Baseline of Vietnam (Zou, 2013). Therefore, in the negotiations for delimitation, Vietnam reiterated its proposal to delineate the boundary line based on the line using in the 1887 treaty for its advantage. The China opposed to the Vietnamese claims of the historical status of the water. It argued that France, Vietnam's then-protector, who had only taken administrative control over the Gulf, had not declared the historical status of the water and Vietnam did not maintain a historic continuity of exercising its authority over the Gulf that fulfills the condition of historical water in international law (Zou, 1999).

It is widely agreed by the international law scholars that it unlikely that a gulf or a bay claimed by more than one country can be categorized as a historical water (Nguyen Hong & Amer, 2007; Zou, 1999). For instance, Zou Keyuan (1999) went against Vietnam's viewpoint that, as he noted, the most troubling deficiency of the Vietnamese claim lies on the fact that China, the only country adjacent to the Gulf has refused to recognize the historical status of the line setting up by the 1887 treaty. However, a well-regulated JDA regime in the Tonkin Gulf underpinned by the relevant provision UNCLOS was impossible to be created and sustainably developed if Vietnam refused to abandon its claims on its historical water based on the 1887 treaty. Eventually, the Vietnamese government recognized the negative consequence of bringing up the historical issues on the negotiation table repeatedly. It had significantly accelerated the creation of declining the delimitation boundary in accordance with the spirit of equidistance that showed in the 2000 agreements.

“The Double-Step Process”

The framing process of JDA regime in Tonkin Gulf is a typical example of a double-step solution of managing sovereign conflicts, in which delimitation and fishery cooperation had been largely independent. The implementation of fishery cooperation was delayed than the formal delimitation that enforced in 2000 in order to minimize the economic and environmental dislocation of states (Nguyen Hong & Amer, 2007). The fishery cooperation in the Tonkin Gulf was adopted by the necessary measures and activities, including the establishment of the Common Fishery Zone (CFZ); coordinately determination of annual allowable catch and the number of operating vessels; and the setting up of the Transitory Fishery Zone (TFZ).⁵ According to the 2000 agreement on fishery cooperation, two countries were committed to undertake fisheries cooperation in a coordinating framework based on mutual respect for sovereignty rights and jurisdiction.

The double-step process significantly contributed to the improvement of the Tonkin Gulf JDA regime. As the principal strategic position of the Gulf for both countries' fishery industries, a precautionary and

⁵ See Agreement on Fishery Cooperation in the Beibu (Tonkin) Gulf between the Government of the People's Republic of China and the Government of the Socialist Republic of Vietnam. Part I; Part II; Part III.

comprehensive approach in framing fishery cooperation scheme becomes necessary for a sustainable JDA regime. The deliberate separate of fishery management, being perceived as the core issue over the Gulf by two countries, had largely impelled the negotiation process for delimitation and raised the efficiency of the afterward expanding JDA projects based on the foundation of delimitation. The parallel but independent procedures also constituted an interesting complimentary relationship between two areas in which delimitation acted as a stepping stone for promoting fishery cooperation while a mutual-desired fishery cooperation provided the immediate needs for two countries to impel the negotiation for delimitation.

The establishment of the JDA regime in the Tonkin Gulf reflects the determination of two countries to resolve the sovereign dispute under the framework of UNCLOS. The enforcement of the agreements in 2004 that clearly defined maritime boundaries in the Gulf and established norms governing fisheries exploitation has comprehensively enhanced the mutual trust and comprehensive relationship between China and Vietnam. Together with the land border Treaty of 1999, the founding of maritime cooperative scheme induced significant spillover effect impelling the creation of JDA in other domains. As an exemplification, in line with the delimitation and fishery cooperation, the Vietnam National Oil and Gas Group (PVN) and the China National Offshore Oil Cooperation (CNOOC) signed up an oil-and-gas exploitation agreement on joint offshore exploration in the Tonkin Gulf in 2006 (Vietnam Net, 2013).

The Tonkin Gulf Case and the Prospect of JDAs in the Paracel Islands

In general, the choice for arbitration is the alternative of JDA in resolving sovereign disputes. Article 286 of the Convention stipulated that where no settlement has been reached by the procedure of exchanging views to resolve the dispute set out in Section 1 of Part XV, the dispute may be unilaterally submitted at the request of any party to the dispute to the court or tribunal having jurisdiction.⁶ The right of unilateral submitting is subject to the compulsory binding dispute settlement system manifested in the Convention's Section 2 of Part XV. As UNCLOS is a customary law where states have no rights to make reservations when becoming parties to this regime, states consent in advance to the compulsory binding dispute settlement system (Beckman & Bernard, 2016). Any decision rendered by a court or tribunal having jurisdiction granted by the Convention shall be final and shall be complied with by all the parties to the dispute (Beckman, 2008).

Nevertheless, in the context of the South China Sea, negotiating for cooperative JDA is the only feasible and most viable solution for resolving the sovereignty dispute. China has exercised the right to "opt out" of the compulsory binding dispute settlement system granted by Article 298 on August 25, 2006. Article 298(a) provides that states parties have the option to formally declare to the UN Secretary-General that they do not accept the compulsory binding dispute settlement under Section 2 for disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations.⁷ The declaration effectively excludes the jurisdiction of international law court or tribunal relating to China with respect to sea boundary delimitation and makes JDA negotiating the only feasible solution of peaceful resolution. The sole expectation of the declaration's effectiveness is that claimant state might be able to refer certain disputes to the system of compulsory binding dispute if China's unilateral action violating UNCLOS and applicable principles of international law. Furthermore, the decision made by the court or tribunal solely based on international law will support the sovereignty claims of one single state and thus eliminate the possibility of flexible and compromise

⁶ UNCLOS, Article 286.

⁷ UNCLOS, Article 298(1).

solutions (Beckman, 2008). Regarding the complicated geopolitical interplay of Southeast Asia, it is unlikely that the claimant states will be willing to resolve the disputes solely by the ruling of international law, which could trap the situation into a zero-sum game.

The successful pattern of the Tonkin Gulf case met the aspirations of settling disputes left by history and enlightening shared future could possibly serve as the precedent for resolving sovereignty conflicts under the international law framework in the Paracel Islands. Nevertheless, different geographical features and geopolitical interplay contribute to a more complicated circumstance for applying the Tonkin Gulf model in the South China Sea. In contrast with China's insistence on the equidistant principle which can ensure equity and fairness, the main hurdle for the maritime delimitation in the Paracel Islands is China's claims on the "Nine-dash line", a line the People's Republic of China (PRC) inherited from the former Kuomintang government includes all the Paracel Islands into the Chinese sovereignty claims. Since 2006, China and Vietnam have initiated the prolongation talks about a prolongation of the Tonkin Gulf delimitation line pointing directly at the Paracel Islands. Nevertheless, China's intransigence on its "nine-dash line" makes the prolongation talks between China and Vietnam about the delimitation over the Paracel Islands impossible to be expedited since Vietnam absolutely cannot accept a boundary line bending so much toward its own coastlines. It requires China to accept a line further distance from the Vietnamese coast to ensure equity in the delimitation process. However, it is nearly impossible for Beijing to make such concession since the compromise will result in a clarification of the meaning of "Nine-dash line", which Beijing is reluctant to see. The compromise solution, if happens, will have a similar effect of clarifying that China's "Nine-dash line" is not a claim to "historical rights" or "historical water", but instead an indication that China holds the sovereign claims over all the maritime features and water within it (Tønnesson, 2016). The later indication would threaten the legitimacy of China's claims over the South China Sea as a monolithic because it appears like a conflation of the meanings of sovereignty and jurisdiction, as is required in international law (Tsirbas, 2016).

Another daunting challenge for resolving disputes through negotiations are legal uncertainties relating to the status of the geographic features in the Paracel Islands. In contrast with the Vietnamese *Bach Long Vi* islands and *Con Co* islands in the Tonkin Gulf case, both of which occupy a clear legal status of "islands", there remains ambiguity in classifying whether some small and uninhabited geographical features in the Paracel Islands are islands entitled to generating EEZ and continental shelf. It is interesting that although all claimant states have purported that the geographical features they occupied or claimed are "islands" entitled to a 200 nautical mile EEZ and continental shelf, many geographical features in the Paracel Islands could be more accurately determined as rocks, low-tide elevations, reefs, or shoals carrying a modest weight (Beckman, 2008). According to Part II of UNCLOS, the classification of the legal status of the geographical features is subject to the binding compulsory dispute settlement mechanism provided in Part XV of the Convention. It will lead to a consequence that JDA negotiations are hard to precede. Besides, the method of referring the dispute to arbitration is concerning in practice. The decision of the court or tribunal can technically be legally binding only to two of the claimant states; however, the Paracel Islands case is a multi-lateral sovereign conflict where more than two parties have involved.

As the Tonkin Gulf agreement manifested, a successful initiation and sustainable development of JDA regime requires a sophisticated "double-step" framing process, in which maritime delimitation acting as the stepping stone for the establishment of more specialized regulatory regimes. Therefore, the JDA approach is unlikely to work functionally in the Paracel Islands if China and Vietnam, as well as other claimant states,

cannot reach a mutual-acceptable agreement in delineating the maritime boundary. Notwithstanding this shadowed future, the lesson the parties in the Paracel Islands dispute, as well as other places where JDA proceeds in the South China Sea, can learn from the practice of fisheries management in the Tonkin Gulf is the operational mechanism of the Sino-Vietnamese Joint Fishery Committee (JCF), a governmental representative of Beijing and Hanoi in the fishery cooperation regime. The JCF takes responsible for laying down regulations in accordance with the domestic laws of each party on the preservation and management of fishery resources and determines the annually catch and the number of operating fishing vessels based on the need to respect sustainable development (Zou, 2002). The lesson is that a great functional JDA regime must enshrine the values of equity, mutual benefit and necessary concerns for environmental issues.

Conclusion

To sum up, the achievement of JDA approach in the Tonkin Gulf remarks a milestone of settling down sovereign dispute through cooperative negotiations under the framework of UNCLOS. It is acknowledged that the Tonkin Gulf provides some valuable reference for elsewhere in the South China Sea. However, in terms of the more complicated geopolitical interplay and geographical difference, resolving sovereign disputes over the Paracel Islands through the methods adopting in the Tonkin Gulf turns to be very difficult. Indeed, international law regime plays a marginal role in managing sovereign disputes of the South China Sea. Instead, as the real regional leader enjoying unparalleled economic power and naval capability, China occupies incomparable bargaining chips determining the direction of JDA development, in which it participates. Nevertheless, it is observed that China's attitude toward JDA, which is perceived as a grand strategy in dealing with sovereign disputes, hinges around its relative share of bargaining power within certain dispute. It, to some extent, explains why the process of JDA is so fluctuating in the Paracel Islands as well as the South China Sea in general.

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