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Is the Rule of Capture Countenanced in the South China Sea? The Policy and Practice of China, the Philippines and Vietnam

Melissa H Loja*

This article examines the petroleum regimes of China, the Philippines and Vietnam to ascertain whether they countenance the rule of capture in the South China Sea. It concludes that the policy and practice of Vietnam clearly and absolutely do not countenance the application of the rule of capture in regard to potential or actual transboundary petroleum deposits in the South China Sea. On the other hand, China has maintained a 1996 secrecy regulation, which authorises China National Offshore Oil Corporation (CNOOC) to undertake unilateral activities involving transboundary deposits in disputed areas of the South China Sea. At the same time, China has adopted bilateral declarations and agreements that preclude the application of the rule of capture in both delimited and undelimited areas of the South China Sea. As for Philippine policy and practice, there is ambivalence towards the potential or actual presence of transboundary deposits.

A single petroleum deposit may traverse actual or potential boundaries on the continental shelf.¹ If one state drills on its side of the boundary, that state

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1 Secretariat, International Law Commission, Memorandum on the High Seas, UN Doc A/CN.4/32, 16 July 1950, 108–109; *North Sea Continental Shelf Judgment*, ICJ Reports 1969, para 97.

can capture the fluid and fugacious deposit, to the prejudice of the other states and the detriment of peaceful relations among them.² In enclosed or semi-enclosed seas where there can be multiple overlapping claims to the continental shelf, resort to the rule of capture is likely to happen.³ One such semi-enclosed sea is the South China Sea where China, the Philippines and Vietnam are competing for the continental shelf.

In the United States, the rule of capture means that the 'owner of a tract of land acquires title to the oil or gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands'.⁴ The adjoining owners have no cause of action for injunction or recovery.⁵ Their only recourse is to produce from offset wells drilled on their own lands.⁶ In the international context, the rule of capture comes into play when a single reservoir rock containing petroleum is located across the continental shelf boundary of two or more states, any one of which can drill on its own continental shelf, perforate the reservoir rock and cause the petroleum to migrate to its side.⁷ The rule of capture also operates in an undefined continental shelf boundary, such as when a claimant state 'proceeds with the unilateral exploitation of the whole area claimed, including overlapping areas', over the objection of the other claimant states.

In the past, petroleum exploration and exploitation in the South China Sea were confined to undisputed areas close to the shores.⁸ However, since 1992, exploration by China and Vietnam has been inching towards disputed deep-water areas where a number of their exploration and licensing blocks

2 Special Rapporteur Chusei Yamada, Fourth Report on Shared Natural Resources, UN Doc A/CN.4/580, 6 March 2007, 3–4; David Pike, 'Cross-border Hydrocarbon Reserves' in Richard Schofield, *Territorial Foundations of the Gulf States* (St Martin's Press 1994), 187–188; Terence Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* (RFF Press 2010), 370–372, 394.

3 Charles Robson, 'Transboundary Petroleum Reservoir: Legal Issues and Solutions' and Rodman Bundy, 'Natural Resource Development (Oil and Gas) and Boundary Disputes' in Gerald Blake et al, *The Peaceful Management of Transboundary Resources* (Graham and Trotman/Martinus Nijhoff 1995).

4 Robert Hardwicke, 'The Rule of Capture and Its Implications as Applied to Oil and Gas' (1935) 13 Texas Law Review 393.

5 *Ibid.*

6 See *Westmoreland and Cambria Natural Gas Co v De Witt*, 18 A 724 (Pa 1889); *Kelly v Ohio Oil Co*, 39 LRA 765 (1897).

7 Yamada, n 2 above, 4.

8 Leszek Buszynski and Iskandar Sazlan, 'Maritime Claims and Energy Cooperation in the South China Sea' (2007) 29 Contemporary Southeast Asia 149–150, 157–158.

now overlap.⁹ The overlap has triggered protests and counter-protests between them.¹⁰ Thus, this article asks: is the rule of capture countenanced in the South China Sea? What does international law provide? What do the policies and practices of China, the Philippines and Vietnam indicate? If the three states are poised to practise the rule of capture, there is bleak chance for peace in the South China Sea. However, if their policies and practices do not countenance the rule of capture, this represents a minimum standard of an acceptable and expected behaviour in the South China Sea.

This article consists of four parts, including this introduction. The second part considers whether the rule of capture is countenanced under international law, specifically the United Nations Convention on the Law of the Sea (UNCLOS). There is a debate among scholars on whether international law imposes:

1. a substantive obligation to refrain from applying the rule of capture;
2. a procedural obligation to negotiate in order to reach agreement on the apportionment of the deposit; and
3. a substantive obligation to adopt a specific mode of apportionment of the deposit.

The second part of this article also provides a summary of the debate with reference only to the substantive obligation to refrain from applying the rule of capture and the procedural obligation to negotiate. The third part of this article considers how the petroleum regimes of China, the Philippines and Vietnam deal with the potential or actual presence of transboundary petroleum deposits in the South China Sea. The key elements of their petroleum regimes are:

1. laws on natural resource ownership;
2. regulations on offshore petroleum exploration and development;
3. model offshore petroleum contracts; and
4. bilateral or multilateral declarations or agreements.¹¹

9 Shicun Wu and Nong Hong, 'Energy Security of China and the Oil and Gas Exploitation in the South China Sea' in University of Virginia, Myron Nordquist, John Norton Moore and Kuncheng Fu, *Recent Developments in the Law of the Sea and China* (M Nijhoff 2006); Leszek Buszynski, 'The South China Sea: Oil, Maritime Claims, and US-China Strategic Rivalry' (2012) 35 *The Washington Quarterly* 139–156.

10 Paul Blyschak, 'Offshore Oil and Gas Projects Amid Maritime Border Disputes: Applicable Law' (2013) 6 *Journal of World Energy Law and Business* 226; Zou Keyuan, 'Joint Development in the South China Sea: A New Approach' (2006) 21 *The International Journal of Marine and Coastal Law* 87; Sanqiang Jian, 'Multinational Oil Companies and the Spratly Dispute' (1997) 6 *Journal of Contemporary China* 596–599.

11 William Onorato, 'Legislative Frameworks Used to Foster Petroleum Development' (1995) Policy Research Working Paper No 1420, Legal Department, World Bank.

The concluding part assesses the minimum consensus among the three countries on whether they have a substantive obligation to refrain from applying the rule of capture in the South China Sea and a procedural obligation to inform and negotiate.

International law and the rule of capture

Under UNCLOS, a coastal state has full territorial sovereignty over its territorial waters,¹² but it has only sovereign rights with respect to the continental shelf.¹³ Sovereign rights give the coastal state functional jurisdiction to explore and exploit the natural resources on its seabed and subsoil.¹⁴ These rights are inherent for the coastal state may exercise them without the need for prior proclamation or occupation of the continental shelf;¹⁵ they are also exclusive for if the coastal state ‘does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without [its] express consent’.¹⁶ The only limitations to these rights are an existing maritime boundary¹⁷ and the free status of the superjacent water and air space.¹⁸ However, as Hurst noted, under the Truman Proclamation on the continental shelf,¹⁹ the US expressed willingness to negotiate the delimitation of its continental shelf, but gave ‘no indication of any willingness to discuss with another State any questions of what the United States may or may not do in connection with the resources of what it proclaims to be its Continental Shelf, or with the steps it takes for the purpose of winning these resources from the sea bed and the subsoil of the Continental Shelf’.²⁰ In other words, within its boundaries a coastal state can undertake any activity to win the deposit.²¹

What about a transboundary petroleum deposit: can a coastal state apply the rule of capture and undertake any activity to win the deposit? To address

12 Article 2 of UNCLOS.

13 *Ibid* Art 77.

14 *Ibid* Arts 77.1 and 77.4.

15 *Ibid* Art 77.3.

16 *Ibid* Art 77.2.

17 *Ibid* Art 83.

18 *Ibid* Art 78.

19 Proclamation 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945.

20 Cecil Hurst, ‘The Continental Shelf’ (1948) 34 Transactions of the Grotius Society 162. See, however, the 2012 US-Mexico Transboundary Hydrocarbons Agreement, which is pending ratification by the US Senate.

21 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995), 138–139. See, also, Gilbert Gidel, ‘The Continental Shelf’ trans L F E Goldie (1954–1956) 3 UW Austl Ann L Rev 97.

this question, it is important to consider the ownership status of an offshore petroleum deposit *in situ*.²²

To recall, a coastal state has territorial sovereignty over its territorial sea but only sovereign rights or functional jurisdiction over its continental shelf. For Higgins, the difference is crucial for in the exercise of its territorial sovereignty a state can apply laws relating to the ownership of a deposit *in situ* in its territorial sea.²³ In contrast, in the exercise of sovereign rights or functional jurisdiction the state can apply only those laws that relate to activities for the exploration and exploitation of a deposit *in situ* on the continental shelf;²⁴ it cannot apply property laws reserving state ownership or allowing private ownership of the deposit.²⁵ A state that claims ‘ownership of the natural resources in the subsoil of... the continental shelf area... exceed[s] its rights in international law’.²⁶

There are some who disagree with Higgins. Redgwell noted that UNCLOS is silent on the issue of title,²⁷ and because of this silence, ‘[i]n practice, a legal fiction is employed by most States which amounts to the assimilation of the continental shelf and land territory for jurisdictional purposes’.²⁸ This implies that it is ‘up to the coastal state to exercise its sovereign rights with regard to ownership of the natural resources on its continental shelf’.²⁹

For Onorato, it is an established rule that coastal states have a ‘right of disposal’ and an ‘affirmative, vested interest in [the deposit] *in situ*’.³⁰ It follows that all the overlying coastal states have joint ownership of a transboundary

22 Daintith, n 2 above, 407. Daintith pointed out that knowing the exact property rule applicable to transboundary offshore deposits is more important than knowing whether cooperation in the exploitation of these deposits is customary international law.

23 See D W Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ (1982) 53 *British Yearbook of International Law* 6–7.

24 Higgins, n 21 above, 138.

25 *Ibid.*

26 Anita Rønne, ‘Energy Law in Denmark’ in Martha Roggenkamp et al, *Energy Law in Europe: National, EU, and International Law and Institutions* (Oxford University Press 2001), 336. Rønne referred to Denmark whose Subsoil Act and Act on the Continental Shelf provides that ‘the natural resources of the Danish continental shelf are the property of the State of Denmark’ (*ibid* 335).

27 Catherine Redgwell, ‘International Regulation of Energy Activities’ in Martha Roggenkamp et al, *Energy Law in Europe: National, EU, and International Law and Institutions* (Oxford University Press 2001), 30.

28 *Ibid.*

29 Ulf Hammer, ‘Models for State Ownership on the Norwegian Continental Shelf’ in Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden, *Property and the Law in Energy and Natural Resources* (Oxford University Press 2010), 159–160.

30 William Onorato, ‘Apportionment of an International Common Petroleum Deposit’ (1977) 26 *Int’l and Comp LQ* 328. See also William Onorato and J Jay Park, ‘World Petroleum Legislation: Frameworks that Foster Oil and Gas Development’ (2001–2002) 39 *Alta L Rev* 73–74.

deposit in situ.³¹ As joint owners, these states have a binding obligation not to impair each other's rights and interests, to refrain from the unilateral exploitation of the deposit and to agree on a mode of apportionment of the deposit.³² Even in the absence of a special agreement, these obligations are binding³³ for their source is customary international law based on the practice of states in treating a transboundary resource as joint property.³⁴

While agreeing with Onorato that coastal states can reserve ownership of a deposit in situ on the continental shelf,³⁵ Lagoni argued that this does not make the coastal states *ipso facto* joint owners of a transboundary deposit.³⁶ Rather, there is state practice not just in joint ownership but also in geological cooperation and unitisation in which states retain their sovereign rights to the deposit.³⁷ Each 'state... [has to] cooperate in order to protect its territorial integrity or sovereign rights to the minerals in place, and... to comply with international law on the inviolability of foreign territorial sovereignty and sovereign right [of others]'.³⁸ Thus, such state practice to refrain from applying the rule of capture and to negotiate is impelled by policy considerations rather than a conviction of joint ownership.³⁹ It would seem that Onorato and Lagoni differ mainly in their preferred mode of cooperation in the exploitation of the deposit. However, as stated earlier, this particular aspect of the debate is outside the scope of the present article.

Daintith also found no basis for treating a transboundary deposit as shared property.⁴⁰ In his view, in the context of their maritime boundary agreement,

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- 31 William Onorato, 'Apportionment of an International Common Petroleum Deposit' (1968) 17 Int'l and Comp LQ 87, 99–100; Onorato, n 30 above, 325. In his 1968 article, Onorato prescribed a rule *lex ferenda* of correlative rights and cooperative and non-competitive exploitation. He based the prescribed rule on state practice at the municipal level, for at that time there was no practice in the international context (*ibid* 89–93). In his 1977 article, Onorato argued that joint ownership has become customary international law based on state practice (*ibid* 325). See also J C Woodliffe, 'International Unitisation of an Offshore Gas Field' (1977) 26 Int'l and Comp LQ 353.
- 32 Onorato (1977), n 30 above, 328–329.
- 33 *Ibid* 327.
- 34 *Ibid* 330–331. See also William Onorato, 'Joint Development in the International Petroleum Sector: The Yemeni Variant' (1990) 39 Int'l and Comp LQ 654.
- 35 Rainier Lagoni, 'Oil and Gas Deposits Across National Frontiers' (1979) 73 AJIL 216. However, in a 1980 article, Onorato noted that in the North Sea context the participating states retained their sovereign rights over the deposit. See William Onorato, 'Joint Development of Seabed Hydrocarbon Resources: An Overview of Precedents in the North Sea' in Mark Valencia (ed), *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development* (Pergamon Press Ltd 1981), 1314.
- 36 *Ibid* 220–223. See also Woodliffe, n 31 above, 340.
- 37 Lagoni, *ibid* 228.
- 38 *Ibid* 235.
- 39 *Ibid*.
- 40 Daintith, n 2 above, 406–407.

states maintain exclusive sovereign rights over their respective portions of the deposit.⁴¹ However, unlike Lagoni, Daintith argued that, unless it gives its consent by way of a special agreement, a coastal state has no obligation to cooperate with the opposite or adjacent state.⁴² Among those who hold this view, one group believes that said state cannot be restrained from undertaking unilateral activities, in the sense that if that state refuses to cooperate, it would not be deemed to have violated international law.⁴³

Another group argues that unilateral activities are not permissible for said state has an obligation to notify, consult and negotiate with the objective of reaching an agreement on the mode of apportionment of the deposit.⁴⁴ However, this second group acknowledges that said state would be justified to undertake unilateral activities if the other state unreasonably refuses to negotiate or cooperate.⁴⁵ Within this second group, some argue that the obligation to negotiate arises only in the context of ‘an agreed boundary area where a known field straddles the boundary’,⁴⁶ while others say that the obligation to negotiate arises from general international law, as interpreted in

41 *Ibid.*

42 *Ibid* 406–407, 433, 435; Bundy, n 3 above, 24; Peter Cameron, ‘The Rules of Engagement: Developing Cross-border Petroleum Deposits in the North Sea and the Caribbean’ (2006) 55 *Int’l and Comp LQ* 561, 564, 570; Hazel Fox et al, *Joint Development of Offshore Oil and Gas* (British Institute of International and Comparative Law 1989), 35; Ian Brownlie, ‘Legal Status of Natural Resources in International Law (some aspects)’ (1979) 162 *Recueil des Cours* 289.

43 Bundy, n 3 above, citing the case of Iran and Abu Dhabi with respect to the Abu al Bukoosh – ABK field; Joseph Morris, ‘The North Sea Continental Shelf: Oil and Gas Legal Problems’ (1967–1968) 2 *International Lawyer* 207–208. Cameron noted this practice of China and Japan in the East China Sea, and by Iran and Qatar over the South Pars/North Field gas deposit (see Cameron, n 42 above, 559).

44 David Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits: Mere State Practice or Customary International Law’ (1999) 93 *AJIL* 795; Masahiro Miyoshi, ‘The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf’ (1988) 3 *International Journal of Estuarine and Coastal Law* 18. See, also, Daintith, n 2 above, 433; Brownlie, n 42 above; and Bundy, n 3 above, 39. Bundy is careful to emphasise that while there might be an emerging custom to consult and notify, there is no obligation to unitise or jointly develop a transboundary deposit.

45 Daintith, n 2 above, 433; Cameron, n 42 above; Blyschak, n 10 above. See, also, Special Unit for South-South Cooperation, United Nations Development Programme, *Effective Hydrocarbon Management: Lessons from the South* (UNDP 2009), 30.

46 Daintith, n 2 above, 433, 435; Fox, n 42 above, 35. However, Cameron noted that in the North Sea and the Caribbean Sea the new practice is to adopt a framework agreement with a standby cooperation clause, which comes into operation once a deposit is ascertained to be exploitable by any of the bordering states. See Cameron, n 42 above.

the *Aegean Sea Continental Shelf* decision⁴⁷ and *Guyana/Suriname Arbitration*,⁴⁸ as well as from customary law based on the practice of specially affected states.⁴⁹

Perhaps adding to the uncertainty over the applicable international law is the decision of the International Law Commission that it ‘should not take up the consideration of the transboundary oil and gas aspects of the topic [s]hared natural resources’.⁵⁰ The decision was made in light of objections to codification by majority of the delegations in the Sixth Committee of the General Assembly.⁵¹ Some of the delegations that objected to codification of an international law on transboundary oil and gas found no basis ‘for the Commission to try to extrapolate customary international law, common principles or best practices from the divergent and sparse State practice in this area’.⁵²

Set against such diverse views, the next part of this article turns to the offshore petroleum policies and practices of China, the Philippines and Vietnam to ascertain how they perceive their rights and obligations in regard to potential or actual transboundary deposits in the South China Sea.

Offshore petroleum regimes of China, the Philippines and Vietnam

Conflict has prevented the full survey of the South China Sea;⁵³ consequently, its potential in situ petroleum resources and recoverable reserves remain unknown.⁵⁴ There are estimates, but they vary widely, from the most optimistic estimates of 213,000 million barrels (Mb) of oil reserve and

47 *Aegean Sea Continental Shelf Case (Greece v Turkey)*: Request for the Indication of Interim Measures of Protection, ICJ Order 11 September 1976 (ICJ Reports 1976, 3).

48 *Guyana v Suriname*, Arbitral Award made 17 September 2007 (Guyana/Suriname).

49 Ong, n 44 above; Miyoshi, n 44 above; Blyschak, n 10 above; Dominic Roughton, ‘Rights (and Wrongs) of Capture: International Law and the Implications of the Guyana/Suriname Arbitration’ (2008) 26 JERL 374.

50 UN General Assembly, UN Doc A/65/10, Supplement No 10, General Assembly Official Records Sixty-fifth session, paras 377 and 384.

51 *Ibid.*

52 UN General Assembly, UN Doc A/CN.4/620, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, 26 January 2010, para 61.

53 International Energy Agency, *China’s Worldwide Quest for Energy Security* (OECD 2009), 57–59, www.oecdchina.org/OECDpdf/china2000.pdf. This is not to discount cost as a factor that discourages exploration. According to Smith, in the 1990s, ‘a well in the North Sea might cost \$7.5 million to complete, while a well drilled off the coast of China may cost \$15-20 million’. This is due to water depths, weather conditions and water currents. See Ernest Smith et al, *Materials on International Petroleum Transactions* (Rocky Mountain Mineral Law Foundation 1993), 456.

54 *Ibid.*

475,000 million barrels of oil equivalent (Mboe) of natural gas reserve⁵⁵ to the most conservative estimates issued by the US Geological Survey (2010)⁵⁶ of 1,500 to 5000 Mb of oil reserve and 22,200 to 23,800 Mboe of natural gas reserve.⁵⁷ These estimated recoverable reserves are found in nine hydrocarbon provinces,⁵⁸ which are either encompassed or traversed by the U-shaped maritime boundary line drawn by China,⁵⁹ although in the Song Hong basin, the U-shaped line is presumed to track an agreed maritime boundary between China and Vietnam.⁶⁰ For this reason it is possible for offshore petroleum deposits to traverse potential or actual boundaries in the South China Sea.⁶¹ The succeeding sections discuss whether, in regard to such transboundary deposits, China, the Philippines and Vietnam consider the rule of capture permissible.

Recognition of coexisting interests in a transboundary deposit

This section examines the petroleum regimes of the three countries to determine whether they reserve ownership of the deposits in situ on their continental shelf and, at the same time, acknowledge that other states may have coexisting interests in the same deposits. It is important also to know whether they accept an obligation to notify and negotiate prior to undertaking exploration or exploitation activities.

CHINA

China's 1947 map with a U-shaped line is often interpreted as a claim to the enclosed waters as territorial sea by historic right.⁶² However, such

55 According to the International Energy Agency, it is not confirmed whether China issued these estimates (*ibid* 59).

56 US Geological Survey, *Assessment of Undiscovered Oil and Gas Resources of Southeast Asia* (US Department of the Interior, US Geological Survey 2010).

57 Nick Owen and Clive Schofield, 'Disputed South China Sea Hydrocarbons in Perspective' (2012) 36 *Marine Policy* 815–818.

58 *Ibid* 814. The hydrocarbon provinces are Pearl River mouth basin, Song Hong basin, Phu Khanh basin, Cuu Long basin, Nam Con Song basin, South China Sea platform, Palawan Shelf basin, Baram Delta/Brunei Sabah basin and Greater Sarawak basin.

59 *Ibid* Fig 2.

60 Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the delimitation of the territorial seas, exclusive economic zones and continental shelves of the two countries in Beibu Gulf/Bac Bo Gulf (with maps), 2336 UNTS 41860. The agreement is referred to as the Gulf of Tonkin agreement.

61 See Rongxing Guo, *Cross-border Resource Management: Theory and Practice* (Elsevier 2005), 113–114.

62 See the discussion in Zou Keyuan, 'Historic Right in International Law and in China's Practice' (2001) 32 *Ocean Development and International Law* 162 and Jianming Shen, 'China's Sovereignty over the South China Sea Islands: A Historical Perspective' (2002) 1 *Chinese Journal of International Law* 129–130.

interpretation is belied by the Declaration of the Government of the People's Republic of China of China's Territorial Sea dated 4 September 1958,⁶³ which admits of the presence of high seas within the enclosed waters:

'The Government of the People's Republic of China declares:

1. The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to... the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.'⁶⁴

Therefore, in this article China's claim to the vast waters enclosed by the U-shaped line is treated under the regime of the continental shelf.⁶⁵

As stated earlier, under the regime of the continental shelf, a coastal state has only sovereign rights or functional jurisdiction over petroleum activities. Accordingly, in its Law on the Exclusive Economic Zone and Continental Shelf (1998), China acknowledges that it has 'sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources'.⁶⁶ However, in its constitution and mineral resource laws China claims state ownership of all mineral resources,⁶⁷ which are 'either near the earth's surface or underground',⁶⁸ in its 'territory... and in the sea areas under its jurisdiction'.⁶⁹ In particular, '[a]ll petroleum resources in the... continental shelf of the People's Republic of China... are owned by the People's Republic of China'.⁷⁰

None of the foregoing laws on petroleum resources defines the ownership status of a transboundary petroleum deposit *in situ* on the continental shelf

63 Limits in the Sea No 43 (1978).

64 The reference to the high seas is omitted in the Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China dated 25 February 1992.

65 See James Fry and Melissa Loja, 'The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes', (2014) 27 *Leiden Journal of International Law* 750.

66 Article 4 of the Law on the Exclusive Economic Zone and Continental Shelf (1998).

67 Article 9 of the Constitution of the People's Republic of China (1982), as amended; Art 3 of the Mineral Resources Law of the People's Republic of China (1986), as amended.

68 Article 3 of the Mineral Resources Law; Art 3 of the Rules for the Implementation of the Mineral Resources Law of the People's Republic of China (1994), as amended in 2007.

69 Article 4 of the Mineral Resources Law of the People's Republic of China (1986), as amended in 1994.

70 Article 2 of the Regulations of the People's Republic of China on Sino-Foreign Cooperative Exploitation of Offshore Petroleum Resources (1982), as amended in 2001 and 2011; hereinafter referred to as Offshore Regulations.

of China and a neighbouring state.⁷¹ However, it is important to point out that under a 1996 rule on state secrets,⁷² China categorised as top secret information regarding the ‘[d]iscovery of resources at areas or sea areas in dispute between [China] and neighboring countries and the assessment and decisions thereon during the exploration and exploitation of oil resources by [China]’.⁷³ As top secret, such information ‘[concerns] the security and interest of the State... and [is] only accessible by a certain group of people during a certain period of time as determined according to legal procedures’.⁷⁴ The regulation was promulgated by the State Secrecy Bureau, China National Petroleum Corporation (CNPC), China Petrochemical Corporation (Sinopec) and CNOOC.⁷⁵ The regulation implies that, in regard to a potential or actual transboundary offshore deposit in a disputed area, China perceives no obligation to notify or consult with a competing state unless a legal procedure has been agreed upon. The recent deployment of the Haiyang Shiyou 981 rig in waters off the Paracel Islands is a case in point for these waters are not subject to any agreement with Vietnam, unlike the waters in the Gulf of Tonkin, which have been partially delimited.⁷⁶

The foregoing 1996 secrecy regulation is still valid even today.⁷⁷ However, in 2000 China entered into a maritime boundary agreement with Vietnam affecting the Gulf of Tonkin. Under Article VII, China agreed with Vietnam that:

‘If any single petroleum or natural gas structure or field, or other mineral deposit of whatever character, extends across the delimitation line defined in Article II of this Agreement, the two Contracting Parties shall, through friendly consultations, reach agreement as to the manner in which the structure, field or deposit will be most effectively exploited as well as on the equitable sharing of the benefits arising from such exploitation.’⁷⁸

71 There are provisions relating to concession blocks that extend to another administrative unit within the territory of China (see Art 49 of the Mineral Resources Law as amended). However, these provisions do not deal with mineral deposits that straddle boundaries.

72 Provisions on the Scope of State Secrets in the Petroleum and Petrochemical Industries and their Confidentiality Levels, promulgated by the State Secrecy Bureau, China National Petroleum Corporation, China Petrochemical Corporation and China National Offshore Oil Corporation, 6 April 1996.

73 *Ibid* Art 3, s 1, para 8.

74 *Ibid* Art 2.

75 *Ibid*.

76 UN Doc No A/68/887, Annex to the letter dated 22 May 2014 from the Chargé d’affaires ai [sic] of the Permanent Mission of China to the UN addressed to the Secretary-General.

77 Last accessed from Westlaw China, 28 April 2014 at 10:57.

78 See n 60.

Article VII is an acknowledgment by the parties that they have a coexisting interest in a petroleum deposit that straddles their boundary, and an obligation to consult in order to reach agreement on the effective exploitation of the deposit and its equitable apportionment.⁷⁹ The 1996 secrecy regulation is clearly incompatible with Article VII of the Gulf of Tonkin agreement.

Article VII is similar in tenor to the ‘unity of deposit’ clause in the 1965 maritime boundary agreement between the United Kingdom and Norway.⁸⁰ This ‘unity of deposit’ clause has been incorporated into almost every maritime boundary agreement⁸¹ concluded after 1965, so much so that it now represents an authoritative international petroleum practice.⁸² In 2006, pursuant to the terms of Article VII of the Gulf of Tonkin agreement, CNOOC, as the state corporation mandated to conduct the upstream offshore petroleum business of China,⁸³ and Vietnam Oil and Gas Group or PetroVietnam, as the national petroleum corporation of Vietnam,⁸⁴ entered into an Agreement on Joint Exploration in the Gulf of Tonkin.⁸⁵ The agreement has since been amended to intensify ‘exploration of the oil and gas composition that cuts cross the delimitation line’⁸⁶ in the Gulf of Tonkin. The agreement has also been reinforced by the adoption of basic

79 *Ibid.*

80 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 delimitation of the continental shelf between the two countries, 10 March 1965, 551 UNTS 213. Article IV reads:

‘If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.’

81 Douglas Johnston, *The Theory and History of Ocean Boundary-making* (McGill-Queen’s University Press 1988), 217; Cameron, n 42 above, 577, 579.

82 Department of Ocean Affairs and Law of the Sea, *United Nations Handbook on the Delimitation of Maritime Boundaries* (United Nations Publications 2000) 38, 80–83.

83 Article 6 of the 1982 Offshore Regulations, n 70 above.

84 Prime Minister of Government Decision No 198/2006/QĐ-TTg Approving the Scheme on the Formation of the Vietnam National Oil and Gas Group, 29 August 2006.

85 Socialist Republic of Vietnam Ministry of Foreign Affairs, ‘Vietnam-China Joint Statement, dated 24 June 2013’, www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns130624152141/newsitem_print_preview. The text of the agreement itself is not in the public domain.

86 *Ibid.*

principles guiding the settlement of maritime issues,⁸⁷ one principle being that, pending further maritime delimitation of the Gulf of Tonkin, China and Vietnam shall ‘actively [discuss] co-operation for mutual development on these waters’.⁸⁸ These bilateral agreements and declarations are a clear signal by the two states of their views on the status of a transboundary deposit across their defined boundary. CNOOC’s 1996 secrecy regulation ought not to apply in this boundary.

Finally, in 2004, CNOOC signed with the Philippine National Oil Company (PNOC)⁸⁹ ‘An Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea’,⁹⁰ and in 2005, with both PNOC and PetroVietnam, a ‘Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea’⁹¹ (JMSU). Based on their official statement,⁹² the three national oil companies will ‘jointly collect 2D and 3D seismic data and process the existing 2D seismic data in the agreement area of over 140,000 square kilometers in the South China Sea’,⁹³ without undermining ‘the basic positions held by their respective Governments on the South China Sea issue’.⁹⁴ The JMSU fell through, for reasons to be discussed under the section on the Philippines.⁹⁵ Nonetheless, it is emphasised that unlike the 2006 joint exploration agreement between CNOOC and PVN, which pertains to a delimited area of the Gulf of Tonkin, the 2005 JMSU pertained to an area of the South China Sea, which had not been delimited. Nonetheless, the terms of the JMSU precluded the application of CNOOC’s 1996 secrecy regulation to that disputed area.

It can be summed up that China claims state ownership of surface and underground petroleum resources on the continental shelf.⁹⁶ With respect to transboundary petroleum deposits in the disputed area in the South

87 An official text of the basic principles can be found in the press release of the Ministry of Foreign Affairs of Vietnam: ‘VN-China basic principles on settlement of sea issues’ (VNA – 12 October 2011) <http://en.vietnamplus.vn/Home/VNChina-basic-principles-on-settlement-of-sea-issues/201110/21524.vnplus>.

88 Paragraph 5 of the Agreement on Basic Principles.

89 The authority of PNOC to sign the agreement is based on Presidential Decree 334, 9 November 1973.

90 The official text of the agreement is not in the public domain.

91 *Ibid.*

92 A copy is posted on the PRC foreign ministry website, available at www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t187333.htm.

93 *Ibid.*

94 *Ibid.*

95 See, generally, Foreign Ministry Spokesperson Hua Chunying’s Remarks on the Philippines’ Statement on the South China Sea, Ministry of Foreign Affairs of the People’s Republic of China, available at www.fmccprc.gov.hk/eng/xwdt/wjbt/t1059343.htm.

96 Article 3 of the Mineral Resources Law.

China Sea, the 1996 secrecy regulation promulgated by CNOOC indicates that China does not perceive an obligation towards other claimant states to refrain from unilateral exploration and exploitation or to notify and consult for the purpose of reaching an agreement on a mode of cooperation. However, China entered into bilateral agreements that override the 1996 secrecy regulation in the sense that, in both delimited and undelimited areas of the South China Seas, China acknowledged that other states may have a coexisting interest in a potential or actual transboundary deposit, and committed to cooperate in the survey or exploration of these areas.

VIETNAM

Under its Constitution, Vietnam claims title to all mineral resources 'lying underground or coming from... the continental shelf'.⁹⁷ This claim to title is reiterated in its Petroleum Law, which considers '[a]ll petroleum existing in the subsoil of... [the] exclusive economic zone and continental shelf of the Socialist Republic of Vietnam... [as] property of the Vietnamese people under the sole management of the State of Vietnam'.⁹⁸

However, the implementing rules⁹⁹ of the Petroleum Law provide that the Vietnamese Government, which exercises state management over all petroleum activities, shall decide on 'issues related to cooperation in oil and gas activities in areas where overlappings with foreign countries occur'.¹⁰⁰ This provision of the implementing rules was later incorporated as Article 38 of the amended Petroleum Law of 2008.¹⁰¹ The amended Petroleum Law delegated to the Ministry of Industry and Trade 'the prime responsibility for submitting to the Prime Minister for approval... foreign cooperation schemes for oil and gas activities in overlapping areas with foreign countries'¹⁰² and 'to carry out international cooperation on oil and gas'.¹⁰³ Such cooperation may take

97 Article 17 of the Constitution of the Socialist Republic of Vietnam. This Constitution was unanimously approved by the 8th National Assembly of the Socialist Republic of Vietnam at its 11th session, 15 April 1992.

98 Article I of the Petroleum Law, effective 1 September 1993, as amended in 2000.

99 Decree No 84-CP Detailing the Implementation of the Petroleum Law, 17 December 1996. See also Art 64 of Decree No 48/2000/ND-CP Detailing the Implementation of the Petroleum Law, 12 September 2000.

100 Decree No 84-CP, *ibid* Art 58.

101 Law Amending and Supplementing a Number of Articles of the Petroleum Law, 3 June 2008.

102 *Ibid* Art 38(2).

103 *Ibid*. The Petroleum Law of 1993 and the Law on Amendment and Supplementation to a number of Articles of the Petroleum Law on 2000 did not contain any provision dealing with contract areas that overlap with those of a foreign country.

the form of a petroleum joint venture enterprise 'established under... a Treaty entered into by and between the Government of Vietnam and a foreign government'.¹⁰⁴

Moreover, it has been shown in the previous section that, under Article VII of its Gulf of Tonkin agreement and the 2011 agreement on basic principles with China, Vietnam accepts the idea that its title may coexist with the title of China in a single mineral deposit lying across their boundary. Vietnam is also a party to a memorandum of understanding with Malaysia on joint exploration and exploitation of a defined area of their continental shelf in the Gulf of Thailand.¹⁰⁵ Vietnam agreed with Malaysia that '[w]here a petroleum field is located partly in the Defined Area and partly outside that area in the continental shelf of Malaysia or the Socialist Republic of Vietnam, as the case may be, both parties shall arrive at mutually acceptable terms for the exploration and exploitation of petroleum therein'.¹⁰⁶ The same provision can be found in the 1997 maritime boundary agreement of Vietnam with Thailand in another part of the Gulf of Thailand.¹⁰⁷

Finally, PetroVietnam is party to the JMSU as well as the 2006 Agreement on Joint Exploration in the Gulf of Tonkin,¹⁰⁸ both of which recognise the coexisting interests of states in a transboundary petroleum deposit in the South China Sea.

In sum, like China, Vietnam claims state ownership of the underlying mineral resources of its continental shelf in the South China Sea. At the same time, in its petroleum laws and regulations, Vietnam unilaterally accepts that other states may have coexisting interests in a potential or actual transboundary petroleum deposit. Additionally, its bilateral agreements and undertakings in the South China Sea reflect the same policy and practice. Vietnam leaves to negotiation only those details on the mode and extent of cooperation.

104 Article 3(10) of the Petroleum Law.

105 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries was signed on 5 June 1992 and entered into force on 4 June 1993. Copy available at Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, Vol 6 (Oxford University Press 2012), 463.

106 *Ibid* II (2).

107 Article IV of the Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand, effective 9 August 1997, as reported in 39 *Law of the Sea Bulletin* 23.

108 The agreement took effect on 30 June 2007, after the respective governments approved the agreement signed by their nominees CNOOC and PetroVietnam (see Vietnam Ministry of Foreign Affairs, 'Gov't gives nod to Tokin Gulf oil deal with China' *Foreign Affairs News*, 1 November 2007).

PHILIPPINES

Under its 1949 Petroleum Law and 1973 and 1987 Constitutions, the Philippines claims sovereign rights to its continental shelf,¹⁰⁹ and full title to the underlying mineral resources.¹¹⁰ These claims apply to areas in the South China Sea, specifically the Kalayaan Group of Islands (a major portion of the Spratly Islands)¹¹¹ and Bajo de Masinloc (Scarborough Shoal).¹¹² Unlike Vietnam, the Philippines has no law or regulation dealing with the potential or actual presence of petroleum deposits that straddle an agreed or disputed boundary on the continental shelf. Consequently, Philippine practice in bilateral agreements relating to transboundary deposits is not consistent. In 2005, PNOG signed a JMSU with an explicit caveat that ‘the basic positions held by their respective governments on the South China Sea issue’ will not be compromised.¹¹³ PNOG was authorised to sign the JMSU under a Non-Exclusive Geophysical Permit purportedly issued by the Department of Energy.¹¹⁴

In 2008, Philippine legislators questioned PNOG for entering into a JMSU without submitting the agreement to congressional approval, which, in the minds of these legislators, is a mandatory requirement, for the agreement was deemed no ordinary commercial contract, as its terms affected Philippine claims to sovereignty.¹¹⁵ Moreover, the JMSU was perceived by the media as

109 Article I of the 1973 Constitution; Art I of the 1987 Constitution. Under the 1935 Philippine Constitution, all natural resources found within Philippine territory belong to the state (Art XII, s 1). However, as defined under Art I, the Philippine territory included only the main land territory and the islands ceded by Spain to the US. The concepts of the EEZ and continental shelf were not yet recognised.

110 Article XIII, s 1 of the 1935 Constitution; Art XIV, s 8 of the 1973 Constitution; Art XII, s 2 of the 1987 Constitution; Art 3 of the Petroleum Act of 1949; s 10 of the Oil Exploration and Development Act of 1972, as amended by Presidential Decree 1857 (1983).

111 Presidential Decree 1596, 11 June 1978.

112 Republic Act 9522, 28 July 2008. As early as 1916, the US colonial government declared Masinloc part of Philippine territory (see Book I, Chapter 2, Art II, Act 2657, 21 December 1916; Book I, Art II, s 38, Act 2711, 10 March 1917 of the American colonial government).

113 The agreement was announced by the Ministry of Foreign Affairs of the People’s Republic of China at www.fmprc.gov.cn/eng/wjzj/zwjg/zwbdt/187333.htm. The official text is not in the public domain. Consequently, the exact nature of the exploration or survey to be conducted cannot be ascertained.

114 As cited in Congressional Record, Plenary Proceedings of the 14th Congress, First Regular Session, House of Representatives, Vol 4, No 66, 10 March 2008, at 194. The text of the permit is not in the public domain. It is not clear whether CNOOC or PetroVietnam also were named in the permit.

115 Senate Resolution No 319: Joint marine seismic agreement/Spratly Islands, 14th Congress, 5 March 2008; Congressional Record, Plenary Proceedings of the 14th Congress, First Regular Session, House of Representatives, Vol 4, No 66, 10 March 2008 at 194.

a blunder, for the survey area covered portions of the Philippine territory, which were not being claimed by China or Vietnam.¹¹⁶ It was feared that the JMSU covered concession areas that the Philippines had earlier awarded to NorAsia and Forum Energy, respectively.¹¹⁷ In the wake of the controversy, PNOC let the JMSU expire in 2008.¹¹⁸

At the time of expiration, the JMSU had generated regional 2D seismic data, which the parties were left to interpret individually.¹¹⁹ Reacting to the Philippine decision not to extend the agreement, China declared 'it is regrettable that over recent years, the Philippines has changed its attitude and approach in handling the issue, gone back on its consensus with China'.¹²⁰ The statement seems to imply that China considers the Philippine withdrawal from the JMSU a breach of the procedural requirement outlined in *Guyana v Suriname*.

In lieu of the JMSU, the Philippines proposed a Zone of Peace, Freedom, Friendship and Cooperation or ZoPFFC.¹²¹ In his 2011 State of the Nation Address, Philippine President Benigno Aquino described ZoPFFC as a mode of cooperation to be carried out by 'segregating first the disputed relevant features of the Spratlys from the undisputed waters of the West Philippine Sea in accordance with the UNCLOS... [a]fter which, claimant countries would then be enabled to engage in joint cooperation including joint development or establishment of a Marine Peace Park in the disputed relevant features of the Spratlys'.¹²² Evidently, ZoPFFC does not contemplate a situation where petroleum deposit crosses contested or uncontested boundaries where an important function of a seismic survey jointly undertaken by the disputing

116 Mark Valencia, 'In response to Robert Beckman', RSIS Commentaries 53/2007. See also Barry Wain, 'Manila's Bungle in the South China Sea (Jan/Feb 2008) Far Eastern Economic Review 48.

117 Donnabelle Gatdula, 'Government Urged to Resolve Reed Bank Claims to Avoid International Row' *Philippine Star* (7 August 2007) www.philstar.com/business/11046/government-urged-resolve-reed-bank-claims-avoid-international-row+&cd=2&hl=en&ct=clnk&gl=hk.

118 Philippine Information Agency Press Release 2008/03/09 Joint Statement of former Energy Secretary Vince Perez and former PNOC President Eduardo V Manalac. See Aileen Baviera, 'The Influence of Domestic Politics on Philippine Foreign Policy: The Case of Philippines-China Relations Since 2004'. RSIS Working Paper No 241 (2012), 2, 12–18.

119 *Ibid.*

120 Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Statement on the South China Sea, Ministry of Foreign Affairs of the People's Republic of China, www.fmco.gov.hk/eng/xwdt/wjbt/t1059343.htm.

121 See www.pcoo.gov.ph/asean2011/backgrounder.htm.

122 Paragraph 5.4 of the 2011 State of the Nation Address Technical Report, Official Gazette of the Republic of the Philippines, www.gov.ph/2011/07/25/the-2011-state-of-the-nation-address-technical-report.

states would be to detect the presence of a viable resource that is either lying across disputed areas¹²³ or straddling a disputed area and an undisputed area.¹²⁴

The foregoing discussion indicates that, in its present state, the Philippine petroleum regime does not take into account the potential or actual existence of transboundary petroleum deposits in the South China Sea. Consequently, Philippine practice in bilateral negotiations and agreements, specifically its ZoPFFC proposal, is ambivalent to the idea that other states may have coexisting interests in a deposit that traverses a disputed or settled boundary in the South China Sea.

To summarise this section, China, the Philippines and Vietnam assert title to the mineral resources on their claimed continental shelf in the South China Sea. Under its 1996 secrecy regulation, China does not perceive an obligation to notify or cooperate with a neighbouring state in regard to a transboundary deposit in a disputed area of the South China Sea. However, through negotiated declarations and agreement affecting both delimited and undelimited areas in the South China Sea, China acknowledges the coexisting interest of other states in a potential or actual transboundary deposit and an obligation to cooperate. Vietnam unilaterally and bilaterally acknowledges the coexisting interest of other states in a transboundary deposit and an obligation to cooperate. The Philippine petroleum regime does not provide the legal infrastructure for recognition of or negotiation on the coexisting interests of other states in a transboundary petroleum deposit. There are past and ongoing attempts to negotiate on the issue, but these are currently labelled 'constitutionally impermissible'.¹²⁵ These attempts are discussed in the next section.

The next section reviews the mechanisms that may enable China, the Philippines and Vietnam to cooperate in regard to a transboundary deposit. The focus is on the role of the national or state petroleum corporation within the mechanisms provided by their model contracts. The discussion will look more closely into the Philippine experience, although there will be preliminary discussions on the mechanisms available in China and Vietnam.¹²⁶

123 Ralf Emmers, *Resource Management and Contested Territories in East Asia* (Palgrave-McMillan 2013), 63.

124 See Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen: Report and recommendations to the Governments of Iceland and Norway (1981) 20 ILM 830.

125 Antonio Carpio, 'The Rule of Law in the West Philippine Sea' (speech delivered before the Philippine Bar Association, 29 August 2013), www.imoa.ph/speech-the-rule-of-law-in-the-west-philippine-sea-dispute.

126 The official model contracts of the Philippines and Vietnam are available. Despite best efforts by the University of Hong Kong Library, official copies of the model contracts of China could not be obtained. There are excerpts of the CNOOC model contracts in Smith, n 53 above, 444–458, citing Barrows Company Inc; and Jacqueline Weaver and David Asmus, 'Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts' (2006) 28 *Houston Journal of International Law* 123–124, citing Barrows Company Inc. This article has referred to these excerpts.

Mechanisms for dealing with transboundary petroleum deposits

PHILIPPINES

The Philippine State exercises its sovereign rights to explore and exploit the continental shelf by undertaking offshore exploration and development directly¹²⁷ or indirectly,¹²⁸ through service contracts¹²⁹ awarded either to the PNOC or to a local or foreign oil company.¹³⁰

When it was created in 1973, PNOC was vested with the plenary power to 'undertake, by itself or otherwise, exploration, exploitation and development of all energy resources of the country, including surveys and activities related thereto',¹³¹ and 'to undertake all other forms of petroleum or oil operations and other energy resources exploitations'.¹³² For this purpose, PNOC could 'enter into contracts, with or without public bidding, with any person or entity, domestic or foreign, and with governments for the undertaking of the varied aspects of oil or petroleum operation, and energy resources exploitation'.¹³³ By virtue of its power to contract directly, PNOC was able to conclude crude oil supply contracts with foreign governments such as China and Kuwait.¹³⁴ PNOC retained this power even after the creation of the Ministry of Energy in 1977 under Presidential Decree No 1206.¹³⁵ However, in 1992, Republic Act (RA) No 7638 placed PNOC under the supervision of the Department of Energy (DOE),¹³⁶ which controlled all government activities relative to

127 Section 4, Presidential Decree (PD) 87, 31 December 1972.

128 Article 94 of the Petroleum Act authorised the Secretary of Natural Resources (formerly Secretary of Agriculture and Natural Resources) to enter into offshore service contracts. PD 87 (1972) and PD 782 (1975) transferred the authority to contract to the Petroleum Board. Contracting was conducted through bidding or negotiation (s 5, PD 87).

129 Section 6 of PD 87 provides that 'in service contract, service and technology are furnished by the service contractor for which it shall be entitled to the stipulated service fee while financing is provided by the Government to which all petroleum produced shall belong'. If the government is unable to provide financing, s 7 provides that the contract 'shall furnish services, technology and financing' but it may recover the service fee and the operating expenses from the proceeds of sale of the petroleum produced. Under s 8(e), the contractor bears all exploration risks.

130 PD 334, as amended by PD 927, PD 1516, EO 171.

131 Section 5(a) of PD 334, as amended.

132 *Ibid* s 5(d).

133 *Ibid* s 5(e).

134 Soo Lee (ed), *Relations between West Asia and Southeast Asia* (Institute of Southeast Asian Studies 1978), 130.

135 Under PD 1206, PNOC became an attached agency of the DOE (s 10). The power of PNOC to regulate other oil companies was transferred to the DOE (s 12(e)). PD 1573 (1978) amended PD 1206 by transferring to the DOE the power of PNOC to regulate oil and petroleum operations (s 4(c)).

136 Section 13 of RA 7638.

energy projects.¹³⁷ PNOC no longer had the power to directly contract with foreign governments.¹³⁸ The awarding of contracts is conducted through the Philippine Energy Contracting Round (PECR) system,¹³⁹ in which even PNOC must bid,¹⁴⁰ and if PNOC is awarded a service contract, it must, like any other winning contractor, conduct its operations according to the DOE-prescribed model contract.¹⁴¹

Notwithstanding the restriction on its authority, PNOC signed a JMSU with CNOOC and PetroVietnam.¹⁴² The negotiations leading to the JMSU took place in the context of rising oil prices in 2004.¹⁴³ The JMSU was seen as a necessary component of the Philippine's 'five-point energy independence agenda, to find and develop new indigenous petroleum reserves'.¹⁴⁴ However, as earlier discussed, the JMSU was scuttled when the authority of PNOC to enter into the agreement, as well as the constitutionality of the survey area, were challenged.¹⁴⁵ A senior member of the Philippine Supreme Court warned that any joint development effort with CNOOC in the disputed areas of the South China Sea 'will negate the maritime entitlements of the Philippines under UNCLOS',¹⁴⁶ a move that is 'constitutionally impermissible'.¹⁴⁷ He referred to the constitutional provision that international joint ventures in petroleum, even at the exploration stage, must have 60 per cent participation of Filipino citizens, unless the President himself enters into agreements 'for large-scale exploration, development, and utilization of minerals, petroleum'.¹⁴⁸ It would seem that, based on the government's interpretation of this provision, the mechanisms for cooperation in regard to transboundary offshore petroleum are limited to either treaty or executive agreement, both of which are negotiated and concluded at the state level.

137 *Ibid* s 5(d).

138 *Ibid* s 4.

139 Department Circular No DC2003-05-005.

140 *Ibid*.

141 Section 1(4)(a)1 of Department Circular No DC2009-04-0004 and s 4(3)(a) of Department Circular No DC2011-12-0010.

142 Official announcement available at www.fmprc.gov.cn/eng/wjlb/zwjg/zwbdt/187333.htm.

143 Philippine Information Agency Press Release 2008/03/09 Joint Statement of former Energy Secretary Vince Perez and former PNOC President Eduardo V Manalac.

144 *Ibid*.

145 It is not clear whether Philippine President Arroyo merely witnessed the signing of the JMSU, but did not sign the document itself or any other document ratifying the act of PNOC.

146 Justice Antonio Carpio, 'The rule of law in the West Philippine Sea' (speech delivered before the Philippine Bar Association, 29 August 2013).

147 *Ibid*. The Foreign Affairs Secretary echoed this view (see SFA Statement on the UNCLOS Arbitral Proceedings against China, Q and A No 24, 22 January 2013, available at www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos/216-sfa-statement-on-the-unclos-arbitral-proceedings-against-china).

148 Article XII, s 2 of the 1987 Constitution.

The Philippine model contract recognises the concept of unitisation. The contractor can negotiate for unitisation in the event that an oil or gas field is found to extend beyond a contract area or when a non-commercial field can be made commercial by linking it to other fields,¹⁴⁹ provided the overall development plan is approved by the DOE.¹⁵⁰ However, as presently worded, the model contracts contemplate unitisation of a purely national scope.

To recapitulate, in its present state, the Philippine petroleum regime does not have the legal infrastructure to deal with the actual or potential presence of a transboundary petroleum deposit in the South China Sea.

VIETNAM

Compared to the Philippines, Vietnam has more extensive state practice in joint exploration/development and unitisation. To recall, in its own laws, Vietnam unilaterally subscribes to the idea of coexisting interests in transboundary resources.¹⁵¹ In its 1992 memorandum of understanding with Malaysia, Vietnam committed to the joint exploration of a defined area where their claims overlap, and to cooperate if a petroleum field straddles the defined area and the continental shelf of either party.¹⁵² Vietnam made similar commitments to Thailand, in their 1997 maritime boundary agreement,¹⁵³ and to China, in their 2004 Gulf of Tonkin agreement.¹⁵⁴

Prior to their 1992 memorandum of understanding, Vietnam and Malaysia had awarded overlapping blocks in the Gulf of Thailand.¹⁵⁵ In Vietnam's Block 46 Cai Nuoc, Petrofina had surveyed strong prospects, but it was the discoveries by Hamilton Oil Co in the adjoining Block PM-3 of Malaysia that encouraged the parties to come to an understanding.¹⁵⁶ Operators of PM-3 had found that the structure in Malaysia's Block PM-3 actually crosses into Vietnam's Block 46.¹⁵⁷

149 Paragraph 9(5) of the 2003 PERC Model Contract; para 9(05) and 9(06) of the 2006 PERC Model Contract; para 9(05) and 9(06) of the 2011 PERC Model Contract.

150 Paragraph 2(46) of the 2001 PERC Model Contract; para 9(04) of the 2005 PERC Model Contract; para 2(50) of the 2011 PERC Model Contract.

151 Decree No 48/2000/ND-CP of 12 September 2000 Detailing the Implementation of the Petroleum Law; Law Amending and Supplementing a Number of Articles of the Petroleum Law, 3 June 2008.

152 Article 2(2) of the Malaysia–Vietnam Memorandum of Understanding.

153 Article 4 of the Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam.

154 Article VII of the Agreement Between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Sea, Exclusive Economic Zones and Continental Shelves of the Two Countries in Beibu Gulf/Bac Bo Gulf.

155 'Viet Nam Moves to Settle Offshore Territorial Disputes' (1992) 90(13) *Oil and Gas Journal* 80 (3 October 1992).

156 *Ibid.*

157 Clive Schofield, *Maritime Boundary Delimitation in the Gulf of Thailand*, PhD Thesis (University of Durham 1999), 284.

From mutual understanding with countries in dealing with a transboundary petroleum deposit, Vietnam progressed to actual joint exploration and international unitisation, and it kept apace by adopting mechanisms for cooperation. These mechanisms, as enumerated in its 2012 Law of the Sea, included not only international treaties¹⁵⁸ but also ‘contracts signed in accordance with the provisions of Vietnamese legislation or with the permission of the Vietnamese Government’.¹⁵⁹

As earlier discussed, Vietnam has employed state-to-state negotiations to forge cooperation with Malaysia, Thailand and China in the South China Sea.¹⁶⁰ However, the more dynamic mechanisms currently available to it are petroleum contracts involving PetroVietnam as ‘a state company having the function of signing and supervising the performance of petroleum contracts with foreign countries’.¹⁶¹ Its 2013 model contract deserves mention for under paragraph 18.2.2 international unitisation can be negotiated at the level of the operating company:

‘18.2.2 If any proven accumulation of Petroleum extends beyond the Contract Area into another adjacent contract area managed by another country, then the CONTRACTOR and the contractors concerned in such adjacent areas must negotiate in order to reach agreement on unitized development in order to jointly appraise, develop and produce such accumulation of Petroleum by a method generally agreed within the Petroleum Industry, and in accordance with same the costs and revenue arising shall be shared at an equitable ratio. Such agreement on unitized development must be approved by the Government of Vietnam and by the Government of the country concerned. The unitized areas shall be regulated by corresponding contracts and by a unitization contract.’¹⁶²

The forgoing provision on international unitisation is a significant shift in policy for in the 2005 model contract – which Vietnam had previously applied – the provisions on unitisation did not contemplate the possibility of cross-border cooperation,¹⁶³ much less cooperation initiated by an operator. Moreover, the language of the 2013 model contract makes negotiation towards transboundary cooperation obligatory and spontaneous on the part of Vietnam. Such mechanism is a clear departure from the outcome in *RSM*

158 Adopted by the 13 National Assembly of the Socialist Republic of Viet Nam at the 3rd Session on 21 June 2012.

159 Article 16, s 3 and Art 17, s 5.

160 See s 2(2)(2).

161 Article 2 of Decision No: 198/2006/QĐ-TTg, 29 August 2006.

162 Adopted under Decree No 33/2013/ND-CP dated 22 April 2013.

163 Paragraphs 18(2)(1) and 18(2)(2) of the 2005 Model Petroleum Production Sharing Contract attached to Decree No 139-2005-ND-CP, 11 November 2005.

v Grenada wherein operators were declared without authority, personality and cause to involve themselves in a maritime dispute between two states.¹⁶⁴

The 2013 model contract is remarkable in its flexibility and liberality, especially when set in the context of a volatile South China Sea. For one, Vietnam authorises its operator to negotiate with the adjoining or opposite operator the terms of a unitisation agreement, subject only to the approval of the management committee. Technically, the Government of Vietnam will involve itself only at the stage of approval of the terms of the agreement, although it may be argued that the equal participation of PetroVietnam in the management committee¹⁶⁵ would mean that the government shall be informed and consulted every step of the way. More than that, the right of the contractor and management committee to negotiate and adopt an international unitisation agreement is enforceable by arbitration under paragraph 15.1.2. Undoubtedly, this international unitisation provision in the 2013 model contract provides Vietnam with the necessary and efficient mechanism to deal with a potential or actual transboundary deposit in the South China Sea.

CHINA

China's model contracts do not contain an international unitisation clause akin to that of Vietnam's 2013 model contract. The unitisation clause in China's 1992 and 2008 CNOOC model contracts are similar in tenor to that of the Philippines and limited in its contemplation to unitisation agreements of a purely national scope. The CNOOC model petroleum contract provides that if 'an offshore oil or gas field straddles a boundary, CNOOC shall arrange for the Contractor and the neighboring parties involved to work out a unitized Overall Development Program for such field and to negotiate the provisions

164 *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14.

165 The 2013 Model Petroleum Production Sharing Contract provides:
'3(1) Within thirty (30) Days from the Effective Date, the Parties shall set up a Management Committee under this Contract. The Management Committee shall be responsible for assisting PETROVIETNAM and the CONTRACTOR to supervise and monitor all operations in the Contract Area pursuant to approved Work Programs and Budgets and in accordance with this Contract. The Management Committee shall have the following rights and obligations:
- To approve and confirm implementation of annual Work Programs and Budgets and any amendments thereto'...

thereof'.¹⁶⁶ The first unitisation agreement entered into by CNOOC was with Texaco China BV involving two fields in Bohai Bay.¹⁶⁷

CNOOC is vested with authority to engage in cooperation across defined or undefined boundaries. Since 1982, CNOOC, as a state corporation with a legal personality,¹⁶⁸ has had the overall responsibility 'for Sino-foreign exploitation of offshore petroleum resources of the People's Republic of China... the exclusive right to prospect for, develop, produce and market petroleum within the zones of cooperation with foreign enterprises'.¹⁶⁹ It may establish regional corporations and specialised corporations to carry out tasks delegated to it by the head office.¹⁷⁰ However, as to whether CNOOC would venture into a cooperative arrangement across an international boundary, it would all depend on the outcome of bilateral political negotiations by the Chinese Government with its neighbours, such as with Vietnam in the Gulf of Tonkin. Such cooperation could also depend on corporate negotiation with another national oil corporation or contractor, such as PNOOC or Forum Energy, but this mode of negotiation would all depend on the extent of authority of the latter corporations. It is notable that, in the wake of efforts by Forum Energy to involve CNOOC in Service Contract No 72 in the disputed Reed Bank, the Ambassador of China to the Philippines urged the Philippine Government to authorise the private sector to engage in a mode of cooperation with CNOOC.¹⁷¹ Despite the fact that the Philippine Government responded by filing with ITLOS a notification and statement of claims against China,¹⁷² the Ambassador of China has reiterated the call for joint exploration involving the private sector.¹⁷³ It would appear that China

166 Article 11(7) of the Model Contract for Fourth Offshore Bidding Round 1992. Under Art 11(8), recourse to unitisation is likewise called for if a 'petroleum-bearing trap without commercial value within the Contract Area can be most economically developed as a commercial Oil Field and/or Gas Field by linking it up with facilities located outside the Contract Area'. These provisions are as cited in Weaver, n 126 above.

167 See CNOOC press release, 'CNOOC and ChevronTexaco Step Forward to Develop the Large BZ25-1/25-1S Field in Bohai Bay', 14 October 2002.

168 Article 1982 of the Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises.

169 Article 6 of the Regulations of the People's Republic of China on Sino-Foreign Cooperative Exploitation of Offshore Petroleum Resources, Decree No 607 of the State Council, 1 November 2011.

170 *Ibid.*

171 Carlos Sumayao, 'China, Philippines seek private sector deals', Asia Pacific Defense Forum, 29 January 2013, http://apdforum.com/en_GB/article/rmiap/articles/online/features/2013/01/29/philippines-china-oil.

172 Notification and Statement of Claim dated 22 January 2013. China rejected the claim (see Statement of the Department of Foreign Affairs On China's response to the Philippines' Arbitration case before UNCLOS, 19 February 2013).

173 Speech by Ambassador Ma Keqing at the Manila Rotary Club, 29 September 2013.

has demonstrated a preference for the private sector or semi-private sector mechanism of cooperation in the South China Sea.

To sum up this section, in Vietnam there are legal mechanisms that easily facilitate cross-border unitisation and joint exploration or development. No such legal mechanisms can be found in the petroleum regime of China and the Philippines. However, CNOOC itself has the authority and flexibility to forge cross-border cooperation following bilateral or corporate negotiations. China has called upon the Philippines to give similar authority to PNOOC or to the private sector, but the Philippines has not acted in this direction.

Conclusion

The potential or actual presence of transboundary petroleum deposits across defined and undefined boundaries makes for a volatile situation in the South China Sea. The principle of sovereign rights under international law aggravates, rather than regulates, the situation, for if pursued to its logical end, the principle countenances the rule of capture in the international context.

This article posed the question whether China, the Philippines and Vietnam apply or are poised to apply the rule of capture in the South China Sea. It analysed the natural resource and petroleum regimes and bilateral agreements and undertakings of the three countries, for in these instruments the three countries formally define their rights and obligations in regard to a transboundary petroleum deposit in the South China Sea. Based on these instruments, China and Vietnam acknowledge the potential or actual presence of a transboundary petroleum deposit across their defined or undefined boundaries. Vietnam unilaterally and bilaterally expresses this acknowledgment in law, regulation, contract and agreement. China expresses this acknowledgment in bilateral agreements and undertakings. However, China has a subsisting secrecy regulation, which authorises CNOOC to withhold information relating to transboundary deposits in disputed areas in the South China Sea that are not governed by any bilateral agreement or declaration. Meanwhile, the Philippines has not defined its policy on the potential or actual presence of transboundary petroleum deposits or on the status of these deposits.

Furthermore, Vietnam installed in its petroleum law and model contract mechanisms by which cooperation in regard to a transboundary petroleum deposit is easily facilitated. China has no similar legal mechanism, but it equipped CNOOC with a level of corporate autonomy to forge such cooperation. The Philippines has no similar mechanism for it has clipped the authority of PNOOC.

It might be concluded that, in relation to potential or actual transboundary petroleum deposits in the South China Sea, Vietnam clearly and absolutely does not countenance the application of the rule of capture. China has maintained its 1996 secrecy regulation in regard to discoveries and activities involving transboundary deposits; however, it has also adopted bilateral declarations and agreements that preclude the application of the rule of capture. The Philippines has yet to make up its mind.