ENFORCING EXPLORATION AND PRODUCTION CONTRACTS IN THE SOUTH CHINA SEA: INVESTOR-STATE DISPUTE SETTLEMENT AS A *SUI GENERIS* SOLUTION

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I. INTRODUCTION

The East Asia region is characterized by densely populated "energy-hungry littoral States" situated around a geographically crowded semi-enclosed sea.[1] The South China Sea is home to eight States whose coastlines immediately border the waters of this sea, the Peoples Republic of China (PRC), the Republic of China (RPC), Vietnam, the Philippines, Malaysia, Indonesia, Singapore, and Brunei Darussalam. These eight States cast their esurient eyes on the potentially rich oil and gas fields that lay off their coasts, creating one of the world's "most vexing territorial disputes."[2] Due to the synergistic relationship between energy and warfare, this region has the potential of becoming a flashpoint for global conflict in the coming decades.

This comment identifies energy security as a source of conflict in the East Asia region and offers a solution to encourage the equitable and cooperative extraction of subterranean fugacious minerals in the South China Sea. This proposed solution is important to upstream firms and their legal counsel. For instance, issues such as maritime boundary delimitation, joint development agreements, international offshore unitization agreements, and the legal regime of offshore oil rigs in international waters combine with each other to create a legal conundrum not commonly experienced elsewhere in the world. These issues invite an obvious question of whether the United Nations Convention on the Law of the Sea (UNCLOS) is alone sufficient to govern State behavior in the unending quest for energy dominance in the region.

This comment begins by outlining energy's influence on geopolitics and describing UNCLOS' role in managing competing States' interests in disputed waters. This comment then provides a brief review of pertinent international case law on resource extraction in disputed maritime zones and explains why joint development zones (JDZs) are not a viable solution for the South China Sea region. Lastly, this comment proposes a regional multilateral investment treaty similar in scope to the Energy Charter Treaty, as a solution to the currently intractable situation in East Asia. This

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[1] Min Gyo Koo, *Island Disputes and Maritime Regime Building in East Asia*, The Political Economy of the Asia Pacific 1 (Vinod K. Aggarwal ed., 2010).

[2] *Id.*

proposed treaty will incorporate the principles of fair and equitable treatment (FET), *pacta sunt servanda*,[3] and binding arbitration to protect and encourage Asia-Pacific foreign direct investment generally, and offshore hydrocarbon production investment specifically.

II. THE GEOPOLITICAL INFLUENCE OF ENERGY

The South China Sea is a semi-enclosed sea situated in the western Pacific Ocean. The various State actors surrounding the South China Sea have navigated and exploited the waters of this sea since “time immemorial.”[4] Historically, “ocean politics” in this region were relatively simple and focused on the “use of the sea for trade, warfare (including piracy), and limited fishing.”[5] However, since the spudding of the first oil well and ushering in of the Age of Oil,[6] the region’s “ocean politics” have evolved considerably.[7] Thus, in order to understand fully the various territorial disputes within the South China Sea, one must first understand the geopolitical influence of energy on this region.

The geopolitics associated with energy security are a driving force of conflict in international relations. Both real and perceived threats to energy access encourage States to resort to *Realpolitik*[8] as opposed to pursuing policy based on normative ideology.[9] This is especially true when oil and gas markets tighten following a shortage of supply or an unforeseen increase in demand. Regional conflicts or the threat thereof further increase the volatility of oil prices, with prices rising precipitously as supply shrinks in response to decreased exploration and production activity in geopolitically unstable regions.

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3 Latin for “agreements must be kept.”

4 Kriangsak Kittichaisaree, The Law of the Sea and Maritime Boundary Delimitation in South-East Asia 3 (1st. ed. 1982).

5 *Id*.

6 I define the beginning of the Age of Oil as August 28, 1859, the date George Bissel and Edwin Drake first used a drilling rig to produce oil at Oil Creek in Titusville, Pennsylvania.

7 *Supra* note 5, at 3.

8 *Realpolitik*, Random House Dictionary of the English Language (2d ed. 1997) (political realism or practical politics).

9 Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik - What Good Does Law Do in the South China Sea Territorial Conflicts?*, 30 FDMILJ 1098, 1145 (2007).

In particular, hydrocarbon resource extraction in disputed maritime zones is profoundly influential because such activity signals control of that territory to other States.[10] This may explain why "energy exploration and production [in the South China Sea] has remained close to the shores of controlling regional bodies and away from disputed areas for the past 40 years."[11] This theory also helps explain the PRC's behavior during the Hai Yang Shi You 981 standoff, *infra*, as the PRC deployed a $1 billion mobile offshore drilling unit (MODU) to gain "de facto control" of the disputed maritime zone off the coast of Vietnam.[12] Viewed this way, deploying an oil rig that fails to produce any hydrocarbons "could be rationalized as a territorial acquisition cost."[13]

During the 1970s the world experienced a global energy shortage. Many scholars, such as M.K. Hubbert, believed that the world had reached peak oil, or the point where no increase in production would be possible.[14] The 1970s was also when States in Southeast Asia began claiming "islands and various zones" in the South China Sea.[15] Thus, the geopolitics of energy security provides a cogent theory for explaining contemporary State behavior in the Asia-Pacific region. This argument is strengthened by the data compiled in the International Energy Agency's (IEA) 2018 World Energy Outlook. Consistent with previous reports, the IEA noted a continued growth in energy demand in Asia.[16] In particular, the PRC is projected to remain "a key source of demand growth to 2040."[17] Globally, energy demand is expected to "grow by more than 25%" by 2040, "requiring more than $2 trillion a year in investment in new energy supply."[18] In order to satisfy this increase in energy

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[10] *South China Sea Oil and Natural Gas*, Global Security (November 25, 2016) https://www.globalsecurity.org/military/world/war/spratly-oil.htm.

[11] *Hydrocarbon Exploration and Politics in the South China Sea*, Stratfor (July 25, 2012, 10:00 A.M. G.M.T.) https://worldview.stratfor.com/article/hydrocarbon-exploration-and-politics-south-china-sea.

[12] *Id.*

[13] *Id.*

[14] Ugo Bardi., *Peak Oil: The Four Stages of a New Idea*, 34 Energy Pol'y 323, 323 (2008) (discussing Hubbert's Peak Theory).

[15] Council on Foreign Relations, Territorial Disputes in the South China Sea, https://www.cfr.org/interactives/global-conflict-tracker?goal=0_aa18ea5b4e-ff3d9e77cf-#!/conflict/territorial-disputes-in-the-south-china-sea (last visited January 9, 2019).

[16] International Energy Agency, World Energy Outlook 2018, Overview, 1.

[17] *Id.*

[18] *Id.*

demand, “approvals of conventional oil projects need to double from their current levels.”[19]

The South China Sea region has the potential to satisfy some of the IEAs projected growth in conventional energy demand. According to a U.S. Geological Survey (USGS) assessment in 2010, seismic surveys suggest that undiscovered oil and gas fields within several geographic zones of the South China Sea region contain a mean total of 21,632 million barrels of oil, a mean total of 298,761 billion cubic feet of natural gas, and a mean total of 9,009 million barrels of natural gas liquids.[20] Similarly, an Energy Information Agency report from 2013 estimates “the South China Sea contains approximately 11 billion barrels of oil and 190 trillion cubic feet of natural gas in proved and probable reserves.”[21] While these may be conservative estimates of economically extractable reserves, it is impossible to gain a more accurate assessment of the region without further exploration and production “progress into deeper waters of the South China Sea.”[22]

The contentious interstate relations of the East Asian littoral region are exacerbated by the semi-enclosed nature of the South China Sea. According to Article 122 of UNCLOS, a semi-enclosed sea is,

> a gulf, basin or sea surrounded by two or more States and connected to another sea or ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.[23]

The South China Sea is a particularly crowded semi-enclosed sea due to the number of States within its immediate vicinity and the physical dimensions of the sea itself. This overcrowding coupled with the rich resources in the area has resulted in several States

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[19] *Id.*

[20] U.S. Geological Survey, Assessment of Undiscovered Oil and Gas Reserves of Southeast Asia, 2010. https://pubs.usgs.gov/fs/2010/3015/pdf/FS10-3015.pdf (last visited December 18, 2018).

[21] Energy Information Agency, South China Sea, https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=South China Sea (last visited December 18, 2018).

[22] *Hydrocarbon Exploration and Politics in the South China Sea*, Stratfor (July 25, 2012, 10:00 A.M. G.M.T.) https://worldview.stratfor.com/article/hydrocarbon-exploration-and-politics-south-china-sea.

[23] U.N. Convention on the Law of the Sea art. 122, Dec. 10, 1982, 1833 U.N.T.S. 397 (*Hereinafter* UNCLOS).

possessing overlapping territorial claims in the South China Sea. Specifically, the PRC, the RPC, Brunei Darussalam, Indonesia, the Philippines, and Vietnam all have competing claims in the region.[24]

Article 123 of UNCLOS, which should be read *in pari materia* with Article 122[25] prescribes that, "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention."[26] While it is true that some States within the South China Sea region have amicably resolved their disputes through diplomacy and arbitration according to the rules established under UNCLOS, many States have continued to resort to *Realpolitik.* For instance, the PRC insists that "foreign militaries are not able to conduct intelligence-gathering activities, such as reconnaissance flights, in its exclusive economic zone (EEZ)."[27] This view directly contradicts "centuries of state practice" and UNCLOS Articles 58, 86, and 87.[28] Elsewhere, in the Timor Sea, Timor-Leste and Australia are embroiled in a dispute over illegal Australian intelligence operations in connection with the now defunct Timor Gap Treaty.[29] More importantly, there is an ongoing cold-war between Vietnam and the PRC over the extraction of resources off the coast of Vietnam.[30]

III. TURBULENT WATERS OFF THE COAST OF VIETNAM

By all customary international norms, the waters in the Nam Con Son Basin due south of Ho Chi Minh City lie within Vietnam's 200

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[24] Council of Foreign Relations, Territorial Disputes in the South China Sea, https://www.cfr.org/interactives/global-conflict-tracker?goal=0_aa18ea5b4e-ff3d9e77cf-#!/conflict/territorial-disputes-in-the-south-china-sea (last visited January 9, 2019).

[25] UNCLOS, *supra* note 23.

[26] UNCLOS, *supra* note 23, art. 123, at 443.

[27] Territorial Disputes in the South China Sea, *supra* note 24.

[28] The Fletcher Sch. of Law and Diplomacy, Law of the Sea: A Policy Primer, 37 (John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen Murray, Jack Whiteacre eds., 2017).

[29] ABC News, East Timor Tears Up Oil and Gas Treaty with Australia After Hague Dispute, https://www.abc.net.au/news/2017-01-09/east-timor-tears-up-oil-and-gas-treaty-with-australia/8170476 (last visited January 14, 2019).

[30] MAREX, Vietnam Halts South Sea E&P After Chinese Threats, https://www.maritime-executive.com/article/vietnam-halts-s-china-sea-ep-after-threat-from-china (last visited January 24, 2019).

nautical mile exclusive economic zone.[31] However, the PRC claims roughly all the waters within 100 miles of the coast of Vietnam,[32] beginning off the coast of Quảng Ninh province east of Hainan Island and extending south to the coast of Cambodia.[33] In 2017, Vietnam granted an exploration and production lease near the Vanguard Bank located in the Nam Con Son Basin to Spanish upstream firm Repsol.[34] The Vanguard Bank oil and gas field is co-owned by "PetroVietnam, UAE-based Mubadala Development and lease operator Repsol."[35] After acquiring the lease, Repsol subcontracted with Odfjell Drilling, a Norwegian firm specializing in technically challenging deepwater drilling operations.[36]

Repsol and Odfjell spudded the first well in the Vanguard Bank in June 2017 onboard the "ultradeepwater drillship DEEPSEA METRO 1."[37] Unconfirmed reports suggest that Repsol and Odfjell struck a major gas reserve shortly after the spud date.[38] Before the end of the first month of operations, the PRC ordered Vietnam to halt all operations in the Vanguard Bank area and "threated to attack Vietnamese installations in the Spratly Islands" if Vietnam did not comply.[39] Vietnam complied and annulled Repsol's drilling lease in Block 136/03.[40] At the time of the lease annulment, Repsol's total investment in the operation was $27 million.[41]

Three years prior to the Repsol incident, the inverse happened in what became known internationally as the Hai Yang Shi You 981 (HYSY 981) standoff. Launched in 2012, HYSY 981 is a $1 billion semi-submersible MODU christened by China National Offshore Oil Corporation (CNOOC) as a "strategic weapon."[42] In late spring

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31 UNCLOS, *supra* note 23, art. 55.

32 *See* Figure 1 in Appendix.

33 *Id.*

34 MAREX, *supra* note 30.

35 *Id.*

36 Odfjell Drilling, About, https://www.odfjelldrilling.com/About/ (last visited January 24, 2019).

37 MAREX, *supra* note 30.

38 *Id.*

39 *Id.*

40 *Id.*

41 Reuters, Repsol Says Drilling Suspended on Vietnam Oil Block Disputed by China, https://www.reuters.com/article/us-southchinasea-vietnam-idUSKBN1AI27D (last visited, January 24, 2019).

42 Asia Maritime Transparency Initiative, Counter-Coercion Series: China-Vietnam Oil Rig Standoff, https://amti.csis.org/counter-co-oil-rig-standoff/ (last visited, January 24, 2019).

2014, CNOOC deployed HYSY 981 and three support vessels into waters claimed by Vietnam to be within its EEZ. "One diplomat told reporters that this prospect has 'been one of [Hanoi's] worst fears' since the rig's maiden voyage, even if 'the timing caught us by surprise."[43] On May 2, CNOOC's fleet anchored "17 miles south" of Triton Island in the Paracel Island chain, occupied by the PRC but also claimed by Vietnam and the RPC.[44] Vietnam immediately opposed the deployment of PRC's oil rig "declaring that the rig [was] located on its continental shelf."[45] In response, Beijing deployed an additional 77 "ships, including seven military vessels, along with aircraft to support the rig."[46] The situation quickly escalated, with Hanoi deploying 29 of its own vessels, "to disrupt the rig's placement and operations."[47] On May 7, the PRC assaulted Vietnamese ships with "high powered water cannons" and rammed "several vessels."[48] According to an officer of the Vietnamese Coast Guard, no one was killed during the incident, but six Vietnamese seamen were injured after a "Chinese marine vessel crashed into a Vietnamese ship."[49]

Beijing placed HYSY 981 in a strategically vital disputed area. HYSY 981 was positioned "near the edge of two hydrocarbon blocks already created by Hanoi, though not yet offered for exploitation to foreign oil and gas companies."[50] More specifically, CNOOC anchored HYSY 981 at 15°29'58" north latitude and 111°12'06" east longitude near the Ca Voi Xanh, or Blue Whale field under development by ExxonMobil in Block 118.[51] In 2011 and 2012, ExxonMobil "discovered substantial oil and gas reserves near Blocks 118 and 119," and in 2013 ExxonMobil and PetroVietnam "announced plans to build a $20 billion power plant to be

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[43] *Id.*

[44] *Id.*

[45] Ernest Z. bower & Gregory B. Poling,-China-Vietnam Tensions High over Drilling Rig in Disputed Waters, Center For Strategic & International Studies (May 7, 2014), https://www.csis.org/analysis/china-vietnam-tensions-high-over-drilling-rig-disputed-waters. (last visited January 24, 2019).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] VTC News, China Mobilized 80 Ships and Planes Around the Rig Illegally, Tearing Vietnamese Sea Police Ships, https://vtc.vn/trung-quoc-huy-dong-80-tau-may-bay-quanh-gian-khoan-trai-phep-dam-rach-tau-canh-sat-bien-vn-d155648.html (last visited January 24, 2019).

[50] *Id.*

[51] Bower, *supra* note 45.

fueled by the oil and gas from those blocks."[52] Thus, the PRC's forward deployment of HYSY 981 was a strategic attempt to disrupt Vietnam and ExxonMobil's lucrative development project in the region.

The area in which the semi-submersible was placed was roughly "120 nautical miles east of Vietnam's Ly Son Island and 180 nautical miles south of China's Hainan Island – the two nearest features that indisputably generate a continental shelf."[53] Hanoi claimed that under UNCLOS, the hydrocarbon block lies on Vietnam's continental shelf, thus granting Vietnam "exclusive rights to all mineral and hydrocarbon resources" in the immediate area.[54] Beijing asseverated that HYSY 981 was positioned "completely within the waters of China's Paracel Islands."[55] In staking their claims, both countries appealed to provisions contained within UNCLOS, referred to by many as the constitution for the sea.[56]

IV. GENERAL PRINCIPLES OF MARITIME BOUNDARY DELIMITATION UNDER UNCLOS

The origins of UNCLOS can be traced at least as far back as 1945, when President Harry Truman "unilaterally extended United States jurisdiction over all natural resources on" the American continental shelf.[57] Several countries swiftly followed suit with their own declarations of ownership of continental shelf resources.[58] Many other States, such as Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries began to deviate from the "traditional three mile limit" and claim twelve nautical mile territorial seas for themselves.[59] The complexities involved with freedom of the seas continued to evolve in the 1960s and 1970s as advances in mineral extraction technology allowed

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52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 United Nations, The United Nations Convention on the Law of the Sea (A Historical Perspective) http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective (last visited January 25, 2019).
57 *Id.*
58 *Id.* (Argentina in 1946, "Chile and Peru in 1947, and Ecuador in 1950.").
59 *Id.*

countries to drill for oil, gas, and other resources farther offshore.[60] The Cold War also had an influence on the development of UNCLOS, as super-Power rivalry threatened to disrupt the tranquility of the sea.[61]

In late 1967, Arvid Pardo, Malta's UN Ambassador, gave a speech to the UN General Assembly in which he recognized the need for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction."[62] This speech laid the groundwork for what was to become the Third United Nations Conference on the Law of the Sea. "The Conference was convened in New York in 1973," with the goal of writing a "comprehensive treaty for the oceans."[63] After nine years of deliberation between more than 160 sovereign States the UN finally adopted the "constitution for the seas" – UNCLOS – in 1982.[64]

UNCLOS establishes many rules and procedures for the delimitation of maritime boundaries. Globally, over half of all maritime boundaries are disputed or undefined.[65] At least half of these non-delimited boundaries "involve overlapping claims by more than two States."[66] The four most commonly delimited maritime zones under UNCLOS "are the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf."[67] According to UNCLOS, the "seaward limits" for these different zones are measured from the baseline of the riparian State.[68] The limits for each respective maritime zone are "12 nautical miles for the territorial sea, 24 nautical miles for the contiguous zone and 200 nautical miles for the exclusive economic zone."[69]

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[60] *Id.*

[61] *Id.*

[62] UNCLOS, Introductory Note, http://legal.un.org/avl/ha/uncls/uncls.html (last visited, January 25, 2019).

[63] United Nations, The United Nations Convention on the Law of the Sea (A Historical Perspective) http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective (last visited January 25, 2019).

[64] *Id.*

[65] Jorge Antonio Quindimil Lopez, *Maritime Delimitation*, Oxford Bibliographies (May 12, 2017) http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0119.xml

[66] United Nations, Handbook on the Delimitation of Maritime Boundaries 45 (2000).

[67] *Id.* at 3.

[68] *Id.*

[69] *Id.*

In order to facilitate the establishment of boundary lines, there must first be an agreement on the baselines from which to conduct the boundary survey. There are at least two different ways to establish the baselines for delimitation, the normal baseline approach and the archipelagic approach. Article 5 of UNCLOS defines normal baselines as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."[70] Under the archipelagic baseline approach,

> an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.[71]

Once proper baselines are established, boundary lines are determined using the principles of equidistance. Article 12 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and Article 15 of UNCLOS, define this line as "the line every point of which is equidistant from the coastlines from which the breadth of the territorial sea of each two States is measured."[72]

There are several variations to the rules pertaining to equidistance. The first variation is known as strict equidistance, whereby the boundary line is demarcated by taking "into account all coastal base points permitted under international law."[73] Strict equidistance often results in a complicated and impractical "line made of a multiplicity of turning points and short straight-line segments."[74] For this reason, strict equidistance is rarely used.[75] A more commonly used equidistance method is known as simplified equidistance. Under simplified equidistance the boundary line is demarcated "by simply reducing the number of base points or turning

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70 *Id*. at 4.

71 United Nations, *supra* note 66, at 105.

72 *Id*. at 47.

73 *Id*. at 48.

74 *Id.*

75 The continental shelf delimitation agreement between Spain and Italy in 1974 is an exception.

points (once the line is drawn) to be taken into consideration."[76] A third variation of the equidistance method is "adjusted or modified equidistance."[77] Under modified equidistance, "relevant geographical features" are ignored or modified based on equity or other considerations.[78] In practice, this means that under the modified approach, "low-tide elevations, rocks and islands" and other geographical features are accorded "no effect or partial effect."[79] Which delimitation method to use depends on the geopolitical nature of the particular boundary dispute in question.

V. PERTINENT INTERNATIONAL CASE LAW IN MARITIME BOUNDARY DELIMITATION

Guyana v. Suriname is one of a few cases to proceed to the Permanent Court of Arbitration that involved a dispute over the location of an oil rig in a disputed maritime zone. The maritime boundary disputes between all of the three Guianas – Guyana, Suriname, and French Guiana – are inextricably interlinked with "three longstanding land boundary disputes."[80] Venezuela and Guyana are embroiled in a dispute over large tracts of land "west of the Essequibo River."[81] This affects the maritime boundary dispute because over "130 nautical miles of coastline are disputed."[82] Guyana and Suriname also disagree over land and maritime boundaries, disputing ownership of the New River Triangle which lies "between two tributaries of their international boundary river."[83] Finally, French Guiana and Suriname are engaged in their own dispute over riparian territory in the "upper tributaries of their boundary river."[84]

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[76] United Nations, Handbook on the Delimitation of Maritime Boundaries 49 (2000).

[77] *Id*. at 50.

[78] *Id*.

[79] *Id*.

[80] Peggy A. Hoyle, Guyana.org, The Guyana-Suriname Maritime Boundary Dispute and its Regional Context, http://www.guyana.org/guysur/THE_GUYANA-SURINAME_MARITIME_BOUNDARY_DISPUTE (last visited January 25, 2019).

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

Conflict surrounding the border battle between Suriname and Guyana date back to 1978 "when Surinamese trawlers were arrested by Guyanese gunboats."[85] Attempts were made to ease the tensions between the two countries in 1991, when both States signed a memorandum of understanding (MOU) in which Guyana and Suriname mutually "agreed to allow" exploration and production activity in the disputed maritime zone.[86] The Surinamese Parliament never ratified the MOU however.[87] The conflict erupted again in the summer of 2001 when Surinamese Navy vessels seized and forced the removal of an oil rig operated by Canadian exploration and production firm CGX "under a Guyanese concession in what Guyana claims is its EEZ."[88]

Much of the dispute in 2001 focused on ownership of the Corentyne River, long considered by Guyana to be a "border river."[89] In a *note verbale*[90] issued to Guyana immediately "prior to the eviction of the CGX oil rig," Suriname expressed its concern "that the CGX rig was operating in Surinamese waters."[91] Guyana replied in its own *note verbale* stating that CGX's rig was well within Guyanese waters.[92] Following Suriname's forced eviction of the Guyanese concessionaire's oil rig, Guyana instituted proceedings at the Permanent Court of Arbitration and the International Tribunal for the Law of the Sea in 2004.[93]

Ultimately the Tribunal "found both Parties to be in breach of their obligations under Articles 74(3) and 83(3) of UNCLOS, to make provisional arrangements of a practical nature pending delimitation."[94] The Permanent Court of Arbitration also ruled that

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85 Peggy A. Hoyle, *The Guyana-Suriname Maritime Boundary Dispute and its Regional Context*, IBRU Boundary and Security Bulletin, Summer 2001, at 99.

86 *Id*.

87 *Id*.

88 *Id*. at 100.

89 Guyana.org, The Guyana-Suriname Maritime Boundary Dispute and its Regional Context, http://www.guyana.org/guysur/THE_GUYANA-SURINAME_MARITIME_BOUNDARY_DISPUTE (last visited January 25, 2019).

90 *Note Verbale*, Merriam-Webster, https://www.merriam-webster.com/dictionary/note%20verbale (a diplomatic note that is more formal than an aide-mémoire and less formal than a note, is drafted in the third person, and is never signed).

91 Hoyle, *supra*, at 100.

92 *Id*. at 100.

93 Guyana v. Suriname, PCA, https://pca-cpa.org/en/cases/9/.
/ (last visited February 25, 2019).

94 *Id*.

both Parties should commence the process of delimiting the disputed maritime zone "by positing a provisional equidistance line."[95] The Tribunal "found that there were no relevant circumstances requiring adjustment to [this] provisional equidistance line."[96] Lastly, the Tribunal held that the use of Surinamese naval vessels to seize Guyana's oil rig "constituted a threat of use of force, contrary to international law, but denied Guyana's request for monetary compensation."[97]

Applying the Court's position in *Guyana v. Suriname* to the South China Sea, the Tribunal would likely order the PRC and Vietnam to propose "a provisional equidistance line," possibly beginning off the coast of Hainan Island in the Gulf of Tonkin.[98] Furthermore, the Court would likely not award Vietnam monetary damages for the PRCs arbitrary actions in the Vanguard Bank without the existence of a regional multilateral investment treaty or an international investment agreement with a *pacta sunt servanda* clause controlling such a scenario.

VI. ARE JOINT DEVELOPMENT AGREEMENTS THE ANSWER?

For decades, joint development agreements (JDAs) have been considered "a rule of customary international law."[99] JDAs and the joint development zones (JDZs) they create have become an increasingly popular tool to "reap the benefits of resources located within a disputed area, particularly oil and gas."[100] Despite the widespread acceptance of the JDA concept in international law, UNCLOS does not provide a formal framework for structuring JDAs and the JDZs they establish.[101] Instead, Articles 59, 74, and

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95 *Id.*

96 *Id.*

97 *Id.*

98 *Supra*, note 94.

99 David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?*, 93 Am. J. Int'l L 771, 802 (1999).

100 Oil & Gas Journal, How to Negotiate and Structure a Joint Development Agreement, https://www.ogj.com/articles/print/volume-101/issue-34/exploration-development/how-to-negotiate-and-structure-a-joint-development-agreement.html (last visited, January 10, 2019).

101 Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik - What Good Does Law Do in the South China Sea Territorial Conflicts?*, 30 FDMILJ 1098, 1145 (2007).

83 prescribe only the rules for JDA negotiation under UNCLOS.[102] Article 59 States that conflicts "regarding the attribution of rights and jurisdiction" shall be resolved equitably, "taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."[103] Article 74 dictates that delimitation negotiations should be conducted "in a spirit of understanding and cooperation" and that States "shall make every effort to enter into provisional arrangements of a practical nature."[104] Article 83 outlines the procedure that partner States "shall resort to" in the event an agreement cannot "be reached in a reasonable time."[105] In spite of UNCLOS' aspirations for coadjuvancy, there are many problems associated with JDAs generally, and as they apply to the South China Sea specifically.

Theoretically, under the Joint Authority Model, JDAs should be governed by neutral administrative bodies.[106] In reality, stronger States often impose terms that subjugate or unequally allocate mineral revenues to the detriment of the weaker State.[107] This tendency to resort to *Realpolitik* is especially prevalent in regions characterized by a unipolar or bipolar distribution of power. On a strictly regional level the South China Sea can arguably be described as unipolar. This is because the PRC is the only State in the region with a blue-water navy and the capability to project power anywhere in the region. This unequal distribution of power puts all other States in the region in a weak bargaining position. For these reasons, JDA negotiations in the South China Sea involving the PRC as a partner State often devolve into intractable zero-sum situations. As one scholar remarked, negotiating the economic terms of a JDZ may go on endlessly, while nationalistic fervor may escalate.[108] Additionally, JDAs and JDZs may "uproot" or

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Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik - What Good Does Law Do in the South China Sea Territorial Conflicts?*, 30 FDMILJ 1098, 1144 (2007).

[102] *Id.*

[103] U.N. General Assembly, *Convention on the Law of the Sea*, art. 59 (10 Dec. 1982), https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[104] *Id.* at Article 74, UNCLOS.

[105] *Id.* at Article 83, UNCLOS.

[106] Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik - What Good Does Law Do in the South China Sea Territorial Conflicts?*, 30 FDMILJ 1098, 1144 (2007).

[107] *Id* at 1147.

[108] *Id* at 1145.

rescind previously established contracts between a host government and its concessionaires, and thereby upset whatever tenuous balance of power existed prior to their ratification.[109]

Some JDAs have proven to be particularly successful in subjugating sovereignty claims and fostering cooperative resource extraction, while others have proven to be unsuccessful. For instance, in 1958 the governments of Bahrain and Saudi Arabia mutually agreed to overcome competing claims of ownership of the Fasht Abu-Sa'fah oilfield in the Persian Gulf.[110] The Bahrain-Saudi Arabia JDA of 1958 delimited the continental shelf boundary between the two States by employing a "variation of the equidistance principle."[111] Thus, rather than using the normal baseline approach, whereby "a median line [is] based on the configuration of the coastline," the boundary line in the Bahrain-Saudi Arabia Agreement is delimited by lines drawn from "predetermined landmarks on both Bahraini and Saudi Arabian territory."[112] An important feature of this JDA is the cooperative nature in which the extracted resources are shared between the two States. Under the JDA, Saudi Arabia has control of the development of the Fasht Abu-Sa'fah oilfield, but the "revenues received from the exploitation of the petroleum [are] evenly divided between the two countries."[113] In spite of its success, the Bahrain-Saudi Arabia Agreement may prove to be an exception to the norm, as most JDAs are more contentious and less cooperative.

VII. THE TIMOR GAP TREATY, A CASE STUDY

The now defunct Timor Gap Treaty, a product of the Timor Sea dispute shares many similarities with the conflict in the South China Sea, albeit on a much smaller scale. This territorial skirmish thus serves as a useful case study demonstrating the complexities involved with JDA negotiation in a semi-enclosed sea. The Timor Gap Treaty was Australia and East Timor's first at-

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[109] *Id.*

[110] Department of State, International Boundary Study, Limits in the Seas: Continental Shelf Boundary Study – Bahrain- Saudi Arabia, Series A, No. 12 https://2009-2017.state.gov/documents/organization/62003.pdf (last visited, January 10, 2019).

[111] *Id.*

[112] *Id.*

[113] *Id.*

tempt to resolve a discord over the Greater Sunrise oil and gas field.[114] Located in the Timor Sea, this hydrocarbon field has proven economically extractable reserves valued at nearly $40 billion.[115] Like the South China Sea dispute, the Timor Sea conflict "is actually a multifaceted set of interlocked contests."[116] The three main sources of contention in the Timor Sea dispute are "the creation of permanent maritime boundaries . . . the appropriate split of upstream revenue from the contested Greater Sunrise field . . . and finally, the question of how the field should be developed."[117] The Timor Gap Treaty was East Timor and Australia's first attempt at cooperatively resolving these issues.

The Timor Gap Treaty was saddled with problems almost from the start when Portugal instituted proceedings against Australia in connection with the treaty signed in 1991.[118] Prior to Indonesian annexation in 1975, East Timor was a principality of Portugal, a once vital colonial outpost during the age of the spice trade.[119] Following annexation, Indonesia subsequently adopted the Portuguese position in the resulting maritime boundary delimitation dispute between Australia and East Timor.[120] East Timor held that "the boundary line between Australia and [East Timor] was the median distance between Australia and [East Timor]."[121] Australia maintained "that the boundary line [was] delimited by the Timor Trench, a deep seabed depression closer to [East Timor] and which Australia [asserted] [was] the edge of [its] continental shelf."[122]

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[114] This treaty is known officially as the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia.

[115] Henry Belot & Emily Stewart, *East Timor Tears Up Oil and Gas Treaty with Australia After Hague Dispute,* ABC News (Jan. 9, 2017 AM), https://www.abc.net.au/news/2017-01-09/east-timor-tears-up-oil-and-gas-treaty-with-australia/8170476.

[116] Rebecca Strating, *The Timor Sea disputes: Resolved or Ongoing?*, Austl. Ins. Of Int'l Aff. (Mar. 9, 2018), http://www.internationalaffairs.org.au/australianoutlook/the-timor-sea-disputes-resolved-or-ongoing/.

[117] *Id*.

[118] ICJ, *East Timor (Portugal v. Australia)* https://www.icj-cij.org/en/case/84 (last visited, January 15, 2019).

[119] Parliament of Austl., *Greater Sunrise Unitisation Agreement Implementation Bill 2004 (Bills Digest No. 108 2003-04)* https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0304/04bd108 (last visited January 18, 2019).

[120] *Supra*, note 119.

[121] *Id*.

[122] *Id*

In spite of Indonesia's annexation of East Timor, Portugal never conceded its claim that it was the "Administering Power of East Timor."[123] Thus, in 1991 Portugal instituted proceedings against Australia for abrogating Portuguese authority in signing the Timor Gap Treaty in that same year.[124] The International Court of Justice ultimately decided that "it could not consider Portugal's claims on the merits."[125] Having survived inquiry by the International Court of Justice, the Timor Gap Treaty was annulled anyway following East Timor's independence from Indonesia in 1998, and was replaced with the Timor Sea Treaty on May 20, 2002.[126]

The Timor Sea Treaty was Australia and (now) Timor-Leste's second attempt at establishing a JDZ known as the Joint Petroleum Development Area (JPDA) in the Greater Sunrise oil and gas field.[127] The Timor Sea Treaty was structured under the Joint Authority Model, meaning that "exploration, development and exploitation of the petroleum resources of the JPDA" was jointly managed between Australia and Timor-Leste.[128] Based on this model, a Designated Authority was established to form exploration and production contracts with "limited liability corporations specifically established for the sole purpose of the contract."[129] This treaty allocated ninety percent of petroleum produced in the JPDA to Timor-Leste, and only ten percent to Australia.[130] This apportionment was not as much of a windfall to Timor-Leste as it seemed because the JPDA covered only a small portion of the Greater Sunrise field. Thus, Australia was able to impose its own favorable terms at the expense of Timor-Leste.

The Sunrise International Unitization Agreement (Sunrise IUA) was a companion treaty to the Timor Sea Treaty between Austral-

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[123] ICJ, *supra* note 118.

[124] *Id.*

[125] *Id.*

[126] *Timor Sea Treaty Between the Government of East Timor and the Government of Australia*, signed 20 May 2002, [2003] ATS 13 http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html (last visited, Jan. 15, 2019).

[127] The State formerly known as East Timor prefers to be known as Timor-Leste.

[128] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, [2003] ATS 13, Article 3 http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html (last visited, January 15, 2019).

[129] *Id.*

[130] *Id.* Article 4.

ia and Timor-Leste.[131] The Timor Sea Treaty contained a provision in Annex E under Article 9(b) that outlined the provisions for unitizing the "Sunrise and Troubadour deposits (collectively known as 'Greater Sunrise')."[132] Specifically, under the Sunrise IUA, 79.9% of production revenue was allocated to Australia, and the remaining 20.1% was attributed to the JPDA, of which Timor-Leste was granted title to 90% of the petroleum resources located therein.[133] Thus, Timor-Leste [was] apportioned 90% of the "20.1% allocation from the Greater Sunrise field that goes to the JPDA."[134] The development of the Greater Sunrise gas field was expected to yield Australia $8.5 billion in revenue over the life of the project, and was expected to last over thirty years.[135] In reality, the treaty lasted less than a decade and was formally dissolved in the aftermath of the Australian-East Timor spying scandal.[136]

The Timor Sea dispute represents a decades long struggle to secure a permanent solution to the intricate disagreement between Australia and Timor-Leste. Interstate conflicts such as the Timor Sea dispute and the South China Sea dispute, characterized as having a "territorial component" are difficult to resolve given the tendency for disputing States to establish competing claims fueled by "territorial nationalism."[137] Thus, bilateral JDA negotiation between two States with unequal economic, military, and political power will not resolve the endemic structural problems involved with unequal regional power dynamics. One international organization exists that could offer a balanced solution beneficial to all State actors in the East Asian region.

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[131] Parliament of Austl., Greater Sunrise Unitisation Agreement Implementation Bill 2004 (Bills Digest No. 108 2003-04) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0304/04bd108 (last visited January 18, 2019).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] Washington Post, A Spying Scandal Exposes Australia's Immoral Behavior Toward East Timor https://www.washingtonpost.com/news/global-opinions/wp/2018/08/10/a-spying-scandal-exposes-australias-immoral-behavior-toward-east-timor/?utm_term=.9d075b7adcb1 (last visited January 15, 2019).

[137] Koo, *supra* note 2, at 1.

VIII. ASEAN'S ROLE IN REGIONAL NEGOTIATION AND DISPUTE SETTLEMENT

The United Nations noted that "one way to deal with overlapping claims in maritime zones may be through regional solutions, especially in the case of enclosed or semi-enclosed seas."[138] One such regional solution is the Association of Southeast Asian Nations (ASEAN). ASEAN was established in 1967 in Bangkok, Thailand with member States Indonesia, Malaysia, Singapore, the Philippines, and Thailand.[139] Later signatories to the association were Brunei Darussalam, Vietnam, Lao People's Democratic Republic, Myanmar, and Cambodia.[140] Further negotiations began in 1997 with the goal of eventually incorporating the PRC, Japan, and the Republic of Korea into the authority of ASEAN. These negotiations were known as the ASEAN Plus Three Cooperation.[141] The declared goal of ASEAN Plus Three is to "strengthen and deepen East Asia cooperation at various levels and in various areas, particularly in economic and social, political and other fields."[142] Thus, ASEAN Plus Three is perhaps the best suited vehicle through which regional multilateral treaty negotiation should be conducted. A treaty incorporating the principles of Investor-State dispute settlement offers the possibility of succeeding where JDAs and JDZs have failed.

IX. INVESTOR-STATE DISPUTE SETTLEMENT AS A *SUI GENERIS* SOLUTION FOR THE SOUTH CHINA SEA REGION

Rather than resort to the potentially intractable process of negotiating multiple centrally managed JDAs and JDZs, Investor-State dispute settlement offers a decentralized and equitable solution to the South China Sea dispute. Investor-State dispute settlement is commonly used globally as a mechanism for encouraging and pro-

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138 United Nations, *supra* note 64, at 46.

139 ASEAN, About ASEAN, https://asean.org/asean/about-asean/ (last visited February 23, 2019).

140 *Id.*

141 ASEAN, Secretariat Information Paper 1 (2018) https://asean.org/wp-content/uploads/2016/01/Overview-of-APT-Cooperation-Jul-2018.pdf. (last visited February 23, 2019).

142 *Id.*

tecting foreign direct investment. To date, "more than twenty-eight hundred bilateral investment treaties (BITs), involving 179 countries, have been signed."[143] BITs and other international investment agreements serve to encourage and enforce foreign investment contracts.[144] Under BITs, preferential trade agreements and other such agreements, "investors from one state party can seek financial compensation from another state party to the agreement for failure to comply with the treaty obligations through binding arbitration."[145] Additionally, BITs commonly contain arbitration clauses in which local remedies are eschewed in favor of international tribunals.[146] This "is a concession many States are willing to make to attract foreign investment."[147] Thus, rather than stifle exploration and production of disputed oil and gas fields around the South China Sea by time consuming JDA negotiation between individual States, a regional multilateral investment treaty consisting of the member States of ASEAN Plus Three could encourage a more timely and even-handed answer to the necessary development of the hydrocarbon resources in this region.

The formation of a multilateral investment treaty is crucial because the existence of such a treaty is necessary in order to bring an Investor-State dispute settlement claim. One of the most important principles of law to be contained within this investment treaty is the fair and equitable treatment (FET) standard. The Draft United Nations Code of Conduct on Transnational Corporations contained the first major reference to FET in a multilateral context.[148] In this draft, the United Nations noted that "transnational corporations should receive [fair and] equitable and [nondiscriminatory] treatment."[149] FET has since become a customary international standard advocated by both developed and developing

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143 Julien Chaisse, *The Shifting Tectonics of International Investment Law - Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 Geo. Wash. Int'l L' Rev. 563, 566 (2015).

144 *Id*. at 599.

145 *Id*. at 608.

146 Jean Ho, State Responsibility for Breaches of Investment Contracts 63 (Larissa van den Herik et al. eds., 1st ed. 2018).

147 *Id*.

148 OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", *OECD Working Papers on International Investment*, 2004/03, at 6, OECD Publishing. http://dx.doi.org/10.1787/675702255435.

149 UNCTC, *The United Nations Code of Conduct on Transnational Corporations*, Current Studies, Series A (New York, 1986) UN Doc. ST/CTC/SER. A/4, Annex 1.

countries.[150] Today, international investment agreements commonly include FET clauses that contain "prohibitions against arbitrary and discriminatory acts and/or a 'nonimpairment' obligation."[151] In *Waste Management v. Mexico*, the tribunal defined conduct violative of FET as follows:

> Grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.[152]

Thus, it is likely that the arbitrary behavior of the PRC in the Paracel Island chain and near disputed Vietnamese lease blocks in the Vanguard Bank would violate the FET standard if the PRC and Vietnam were member States of an East Asian international investment agreement.[153]

FET standards are expressed in East Asian international investment agreements (IIA) but they are rarely defined.[154] Thus, "defining FET within the context of Asia-Pacific IIAs may prove challenging given their own varying formulations."[155] These differences in the expression of FET in East Asia may lead to confusion in their application and inconsistent interpretative outcomes.[156] In promotion of a consensus understanding of FET, the proposed multilateral investment treaty should concisely define FET, which would provide an exact legal standard as opposed to the more

150 OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", *OECD Working Papers on International Investment*, 2004/03, at 20, OECD Publishing. http://dx.doi.org/10.1787/675702255435.

151 Chaisse, *supra* note 144 at 599.

152 *Id*. at 602.

153 *See* MAREX, *supra* note 29; Reuters, *China Oil Rig to Keep Drilling in Waters Disputed with Vietnam,* https://www.reuters.com/article/us-southchinasea-china-vietnam-idUSKCN0QU0UG20150825 (last visited January 21, 2019).

154 Chaisse, *supra* note 142 at 601.

155 *Id*.

156 *Id*. at 599.

commonly encountered *ex aequo et bono*[157] standard. A draft of the now defunct Trans-Pacific Partnership offers a good definition of FET for use in the South China Sea. The draft states:

> The obligations of paragraph 1 to provide: 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in according with the principle of due process embodied in the principal legal systems of the world.[158]

Another important provision to be contained within this proposed multilateral investment treaty is an arbitration clause under which the member States agree to submit all disputes to a mutually agreed upon place of arbitration. One such treaty that contains many of the principles this treaty should have is the Energy Charter Treaty.

a. The Energy Charter Treaty

The Energy Charter Treaty was adopted in 1994 with the goal of promoting "energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over resources."[159] The Treaty focuses on protecting foreign direct investment through "most-favored nation treatment," "nondiscriminatory conditions for trade in energy materials," "resolution of disputes between participating States," and "the promotion of energy efficiency, and attempts to minimize the environmental impact of energy production and use."[160] The Energy Charter Treaty is relevant for the purposes of multilateral investment treaty negotiation in the South China Sea because this Treaty directly focuses on fostering the coop-

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157 Latin for "what is just and fair."

158 Chaisse, *supra* note 144 at 600.

159 Energy Charter Secretariat, The Energy Charter Treaty, https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (last visited February 26, 2019).

160 *Id*.

erative "prospecting, production and use" of hydrocarbons among signatories.[161]
Article 12 and 13 of the Energy Charter Treaty are two provisions that should be included in an East Asian multilateral investment treaty. Article 12(1) is a damages clause whereby an,

> Investor of any Contracting Party [who] suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party. . . restitution, indemnification, compensation, or other settlement, treatment which is the most favourable [*sic*] of that which that Contracting Party accords to any other Investor.[162]

The Article goes on to say that if any,

> Contracting Party. . . suffers a loss in the Area of another Contracting Party resulting from . . . [the] destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the situation, shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.[163]

The proposed multilateral investment treaty should include a provision like Article 12 of the Energy Charter Treaty. The only necessary changes to the Energy Charter Treaty's damages clause would be the insertion of the word "Disputed," and the replacement of the word "Party" with the word "State." Thus, the draft clause in the proposed treaty would be as follows: *if any* *Contract-*

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161 Energy Charter Secretariat, The International Energy Charter Consolidated Energy Charter Treaty 35, https://energycharter.org/fileadmin/DocumentsMedia/Legal/Energy_Charter_Treaty-Positive_Annex_W.pdf (last visited February 26, 2019).

162 *Id*. at 59.

163 *Id*.

ing State. . . suffers a loss in the Disputed Area of another Contracting State. This slight change is necessary because it would then protect all regional foreign direct investment from arbitrary or unnecessary damage or loss due to action by another Contracting State in a disputed maritime zone in the South China Sea.

Article 13 of the Energy Charter Treaty is also an important clause to consider including in the proposed multilateral investment treaty. Article 13 prescribes the provisions controlling the expropriation of "Investments of Investors of a Contracting Party in the Area of any other Contracting Party."[164] The Article prevents the nationalization of any investments made by a Contracting Party in the territory of another Contracting Party "except where such Expropriation is: "(a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation."[165] The inclusion of an anti-expropriation provision such as this one into the proposed multilateral investment treaty will prevent or reduce the occurrence of arbitrary State expropriation of foreign offshore hydrocarbon investments in both the sovereign and disputed territory's of Contracting States. Another important provision to include in this treaty is an arbitration clause.

b. The Arbitration Clause

An arbitration clause, as opposed to a Calvo clause[166] would eliminate the risk of submitting disputes to potentially impartial courts in East Asia. While Calvo clauses are common in international investment agreements, especially ones involving concession contracts, the risk of inconsistent jurisprudential outcomes by submitting disputes to the various courts of the Contracting States of the proposed multilateral investment treaty dictates the need for an impartial jurisdiction that will hear all claims from concessionaires and Contracting States. One potential place of arbitration is

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[164] *Id*. at 160.

[165] *Id*.

[166] A Calvo clause essentially states that foreigners who hold property in a specific State, who have claims against the governments of that State "should apply to the courts within such nations for redress instead of seeking diplomatic protection." *See* Britannica, Calvo Doctrine, https://www.britannica.com/topic/Calvo-Doctrine.

the International Centre for Settlement of Investment Disputes (ICSID).

"ICSID [also known as the Centre] is a sister organization of the World Bank group that shares in that institution's goal of promoting economic development through greater flows of international investment."[167] Since its inception in 1966, ICSID has "been particularly relevant to the energy, oil and gas and mineral sectors."[168] The Centre has jurisdiction over

> (1) any legal dispute (2) arising directly out of an investment, (3) between a Contracting State (or any constituent subdivision or agency of a Contracting State that has been designated to the Centre by that State) and (4) a national of another Contracting State, (5) which the parties to the dispute consent in writing to submit to the Centre.[169]

Despite ICSIDs experience in resolving investment disputes involving mineral extraction contracts, its usefulness in an East Asian multilateral investment treaty may be limited given its geographical distance from the region. Furthermore, because ICSID is headquartered in Washington, D.C., many States in East Asia may be reluctant to submit to arbitration in such a jurisdiction. A more realistic potential place of arbitration is the Hong Kong International Arbitration Center (HKIAC).

HKIAC was founded in 1985 and is a non-profit corporation established under Hong Kong law.[170] Although it settles mostly private disputes between individual parties, it is a strong candidate for a place of arbitration in an East Asian multilateral investment agreement due to its financial self-sufficiency and independence

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[167] Abby Cohen Smutny, Rocky Mountain Mineral Law Special Institute, *Arbitration Before the International Centre for Settlement of Investment Disputes*, 1 (2002) https://1.next.westlaw.com/Document/Idb836de083f211dca51ecfdfa1ed2cd3/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default).

[168] *Id*. at 3.

[169] *Id*.

[170] HKIAC, At a Glance, http://www.hkiac.org/about-us (last visited, January 4, 2019).

from any type of influence or control.[171] Furthermore, according to the 2015 International Arbitration Survey by White & Case, LLP and Queen Mary University of London, HKIAC is the third most preferred arbitral institution globally, the other two being the London Court of International Arbitration, and the International Chamber of Commerce.[172]

A final option for a potential place of arbitration is the China International Economic and Trade Arbitration Commission Arbitration Center (CIETAC). CIETAC was established in 1956, and "is China's oldest and most experienced arbitration institution."[173] CIETAC is headquartered in Beijing, thus presenting a potential issue with impartiality. However, the tribunal's location may be a necessary concession in order to convince the PRC to join a regional investment treaty. According to Article 3(1) of CEITACs rules, the tribunal "accepts cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on an agreement of the parties."[174]

Having discussed various potential places of arbitration, what would the proposed multilateral investment treaty's arbitration clause look like? What language should the arbitration proceedings be conducted under? The International Centre for Dispute Resolution (ICDR) offers several draft arbitration clauses that may be useful. Perhaps the most logical clause format to include within the proposed treaty is the Negotiation-Arbitration Clause.[175] This "step-clause" would first require disputing Parties to "seek resolution of the dispute by negotiation and/or mediation before resorting to arbitration."[176] In order to prevent one Contracting State from hopelessly bogging down the arbitration process, the arbitration clause should include a provision limiting the amount of time allowed for negotiation, after which mandatory arbitration proceedings must commence.

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171 *Id.*

172 White & Case, LLP, Queen Mary University London, International Arbitration Survey 17 (2015).

173 CIETAC, Introduction, http://www.cietachk.org/portal/mainPage.do?pagePath=\en_US\aboutUs (last visited February 25, 2019).

174 CIETAC, Arbitration Rules 2 (2015).

175 ICDR, Guide to Drafting International Dispute Resolution Clauses 3 https://www.adr.org/sites/default/files/document_repository/ICDR%20Guide%20to%20Drafting%20International%20Dispute%20Resolution%20Clauses%20-%20English.pdf (last visited February 25, 2019).

176 *Id.*

Whatever States are members of this proposed treaty, the arbitral language should be the regional *lingua mercatoria*.[177] In the case of the East Asia region, the *lingua mercatoria* is likely Mandarin and English. Thus, using ICDRs draft clause[178]as a template, the proposed treaty's arbitration clause would be as follows:

> *In the event of any controversy or claim arising out of or relating to this agreement, or a breach thereof, the Contracting States hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of 30 days, then upon notice by any Contracting State to the other(s), any unresolved controversy or claim shall be settled by arbitration administered by either ICSID, or HKIAC, or CIETAC in accordance with the provisions of its Rules.*

As mentioned above, the proposed investment treaty should include a choice of language clause, a proposed one is as follows: *"The language(s) of the arbitration shall be Mandarin and English*."

c. The Umbrella Clause

A multilateral investment treaty in a contentious region such as the South China Sea must contain an "umbrella clause," "*pacta sunt servanda,*" or some similar formulation to protect foreign investment inflows.[179] Umbrella clauses have a long history in BITs and other investment agreements. For example, the 1959 BIT between Germany and Pakistan contained the following umbrella

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[177] Latin for "merchant language," the phrase simply denotes the most commonly used commercial language of the specific regional market contemplated.

[178] *Id*.

[179] Katia Yananca-Small, OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, 3 (2006).

clause: "*Each party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party*."[180] Including a provision like the one above in the proposed treaty would add another layer of protection to regional foreign direct investment generally, and encourage further international exploration and production activity in the South China Sea specifically.

Of the roughly 2500 BITs "currently in existence approximately 40 percent contain an umbrella clause."[181] Thus, umbrella clauses, respect clauses, or other formulations of the *pacta sunt servanda* principle have attained the status of customary international law. Such clauses are important because "if a host State breaches an umbrella clause in an investment treaty, its international responsibility will be engaged for violating a treaty obligation."[182] Umbrella clauses are transformative in nature in that they allow international investment contracts to "be removed from the influence of national law and relocated within the protective ambit of international law."[183] Thus, a breach of an umbrella clause in an international investment agreement by the host State "enables sanction of the State by international law and is a strong deterrent to contractual interference."[184]

The Energy Charter Treaty provides an example of an umbrella clause used in an energy-focused multilateral investment treaty and is as follows: *"Each contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."*[185] Including a clause similar to this one in the proposed investment treaty would discourage State breaches of contract, since such a breach would be transformed into a sanctionable, international law violation.

X. CONCLUSION

This comment has shown that it is possible for States in the South China Sea with disputed maritime claims to reach an agreement whereby territorial claims are subjugated in favor of

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180 *Id*. at 4.
181 *Id*. at 5.
182 Ho, *supra* note 147 at 196.
183 *Id*. at 180.
184 *Id*.
185 Yannanca-Small, *supra* note 154 at 5.

the cooperative extraction of subterranean fugacious minerals through a competitive bidding process by concessionaires of each State. This would be attainable through the formation of a multilateral investment treaty specifically tailored to protect regional foreign direct investment by holding all Contracting States accountable for breaches of the investment contracts of any other Contracting State. Thus, rather than have eight States negotiate eight separate joint development agreements over the relatively limited suspected hydrocarbon deposits in the South China Sea, one regional multilateral investment treaty like the Energy Charter Treaty could prescribe all the guiding provisions and rules for such activities. Clearly, one could expect to have disputes related to breaches of this treaty. However, with the inclusion of umbrella clauses, arbitration clauses and damages clauses, such breaches could be minimized or discouraged.

Given the current geopolitical situation in East Asia, it is prudent to closely study the myriad maritime issues posed by the South China Sea. The issues dealt with in this comment, namely, maritime boundary delimitation, joint development agreements and joint development zones, international unitization agreements, and the overarching issue of exploring for and producing fugacious minerals in disputed maritime zones are pertinent to practitioners of maritime law today. As the quest for oil and natural gas continues, countries and companies alike will have to become increasingly creative in reaching ever more remote mineral zones. Thus, the study of how to best facilitate the extraction of these minerals, particularly those located in a disputed maritime zone between the continental shelf or EEZ of two or more States will become ever more relevant.

XI. LIST OF ABBREVIATIONS

ASEAN – Association of Southeast Asian Nations
BIT – Bilateral Investment Treaty
CGX – CGX Energy Incorporated
CIETAC – China International Economic and Trade Arbitration Commission
CMATS – Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea
CNOOC – China National Offshore Oil Company
EEZ – Exclusive Economic Zone
FET – Fair and Equitable Treatment
HKIAC – Honk Kong International Arbitration Center
HYSY 981 – Hai Yang Shiyou 981
ICSID – International Center for Settlement of Investment Disputes
IEA – International Energy Agency
IIA – International Investment Agreement
ITLOS – International Tribunal for the Law of the Sea
Sunrise IUA – International Unitization Agreement
JDA – Joint Development Agreement
JDZ – Joint Development Zone
JPDA – Joint Petroleum Development Area
MODU– Mobile Offshore Drilling Unit
MOU – Memorandum of Understanding
PRC – Peoples Republic of China
UNCLOS – United Nations Convention on the Law of the Sea
USGS – United States Geological Survey

XII. APPENDIX

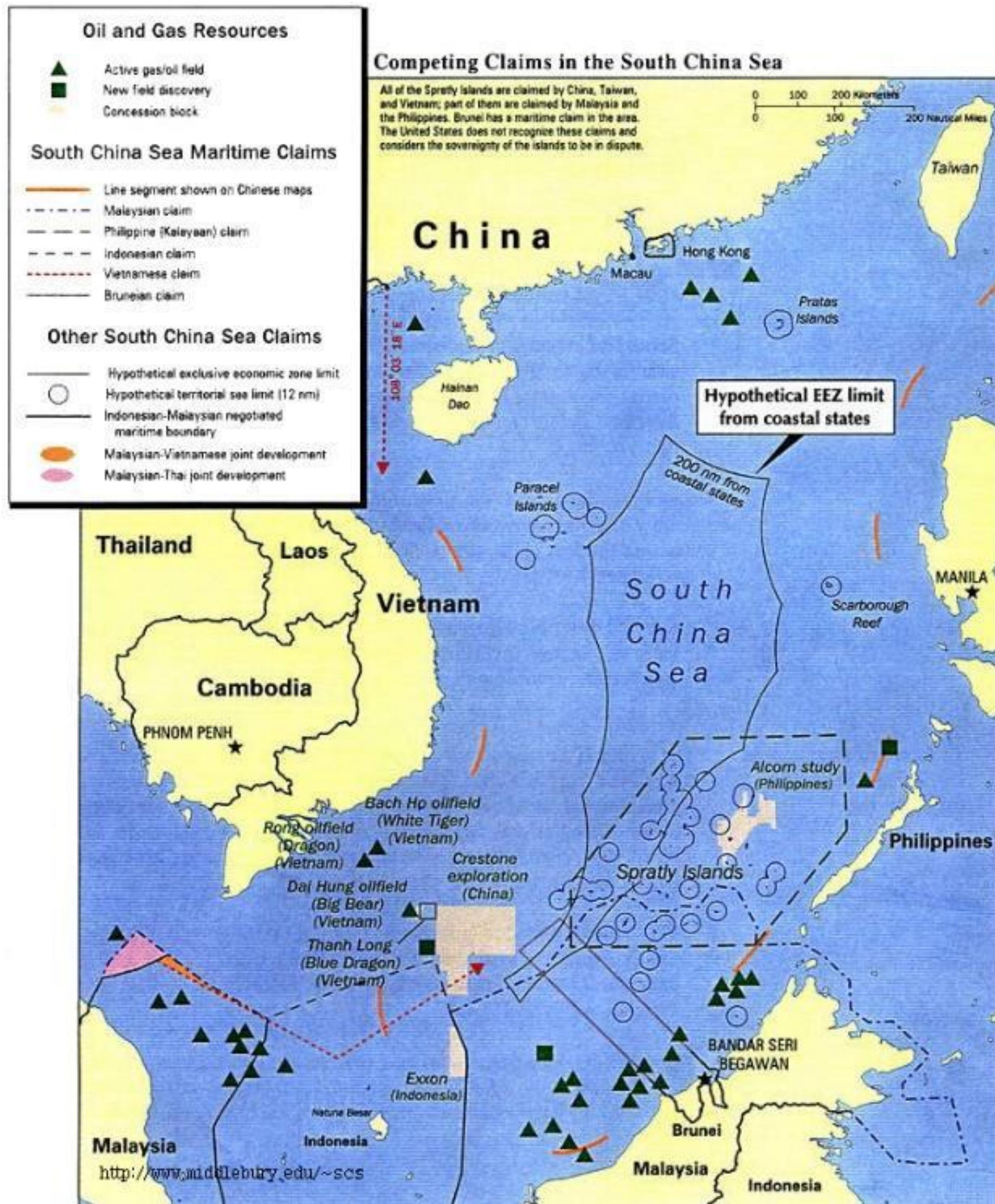

Figure 1