

The Need for a Universal Model Agreement under International Law Commission (ILC) for Development of Shared Oil and Gas Resources

(Keperluan untuk Model Perjanjian Sejagat di bawah Suruhanjaya Antarabangsa untuk Pembangunan Sumber Minyak dan Gas yang Dikongsi)

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ABSTRACT

This paper embarks on rationalizing the significance of codification of a convention for development of shared oil and gas resources under the supervision by International Law Commission (ILC). Transboundary natural resources would be discovered increasingly by development of technology that helps the States to exploit in any region and depth, and in adverse circumstances. The legal intricacies affecting such resources under international law originates from some significant factors such as complexity of oil and gas ownership, lack of international organization, association or convention to directly enforce the related rules for or against the States. Moreover, the States' practice to cooperate through agreements are operationalised through various frameworks in different regions in the world. They are inconsistencies in the structure, provisions and regime of application due to their national interests, economic systems and goals and historical and political backgrounds. This paper reviews the relevant international law sources in an analytical and explanatory method and a theoretically doctrinal way to prove the reason why codification of a comprehensive model agreement in International Law Commission (ILC) would be the most efficient way to overcome such legal intricacies and lack of relevant international law rules. The significance and necessity of a universally binding convention is justified through this paper. The predominant provisions and main principles that can be included in the model agreement as a potential annex to the convention are illustrated, along with the applicability of the codification of both convention and a model agreement in the International Law Commission (ILC).

Keywords: Shared oil and gas resources; model agreement; International Law Commission; cooperation

ABSTRAK

Artikel ini dimulakan dengan merasionalkan kepentingan mengkodifikasikan Konvensyen berkenaan pembanguna sumber minyak dan gas yang dikongsi di bawah pengawasan Suruhanjaya Undang-Undang Antarabangsa. Sumber semula jadi rentas sempadan yang wujud didapati melalui peningkatan pembangunan teknologi yang membantu negara-negara untuk mengeksploitasi di mana-mana bahagian dan kedalaman carian serta begitu juga keadaan sebaliknya. Perundangan kompleks yang menjejaskan sumber semula jadi di bawah undang-undang antarabangsa berpunca daripada faktor-faktor penting seperti kerumitan dalam pemilikan minyak dan gas, kekurangan organisasi antarabangsa, konvensyen yang secara langsung berkaitan dikenakan peraturan terhadap negara atau sebaliknya. Tambahan pula, amalan negara dalam bekerjasama melalui perjanjian dijalankan melalui pelbagai kerangka kerja di rantau yang berbeza di dunia ini. Terdapat ketidakseragaman dalam struktur, peruntukan dan rejim pemakaian disebabkan oleh kepentingan negara, sistem ekonomi serta latar belakang sejarah dan politik. Artikel ini mengkaji sumber undang-undang yang relevan dengan menggunakan kaedah analitis dan penerangan serta doktrin teoretikal untuk membuktikan bahawa kodifikasi model perjanjian komprehensif dalam Suruhanjaya Undang-Undang Antarabangsa merupakan cara yang lebih efisien untuk menangani isu berkenaan. Kepentingan dan keperluan konvensyen yang mengikat kan dijustifikasikan dalam artikel ini. Peruntukan penting dan prinsip utama yang boleh dimasukkan dalam model perjanjian sebagai tambahan potensi kepada konvensyen akan diperihalkan termasuk kebolehpakaian kodifikasi kedua-dua konvensyen dan model perjanjian dalam Suruhanjaya Undang-Undang Antarabangsa.

Kata kunci: Minyak dan sumber gas yang dikongsi bersama, perjanjian model, Suruhanjaya Undang-Undang Antarabangsa, kerjasama

INTRODUCTION

The advancement and progression of technology to explore and exploit petroleum reservoirs at depths that were not accessible to humans in the past decades have made states greedier to extend their jurisdiction to the adjoining maritime areas. Most of the earth's surface is covered by water; thus, mineral resources exist in the marine area of the earth. Petroleum is one of the significant non-renewable natural resources that is vital for governments to exploit in optimum ways and inject this wealth into the economy for the development of the country's economy and citizens' welfare. Agreements between States that have petroleum in their shared border areas are essential for their peaceful development and management.

At the present situation, international law is not able to oblige the States legally to cooperate in the development of shared oil and gas deposits, since there exists no binding convention or customary international law rule.¹ The principle of cooperation in shared natural resources is reflected clearly in some rules in United Nations Convention on Law of the Sea (UNCLOS) 1982 and 1958, UN general assembly resolutions, international adjudications and general principles of law, but they are not obligatory and comprehensive enough to be enforced directly by any international authority.² In other words, advisory and recommendatory tone of provisions and that fact that shared oil and gas resources subject is not specifically articulated in such international law sources. The principle of cooperation is summarized in international law, in negotiation in good faith, the peaceful settlement of disputes, clarification and identification of their claims over disputed area, determination of disputed area, consultation in good faith prior to exploitation and exercising of self-restrain

and refraining from the use of force or threat to use force against the neighbouring.³

The disparity and inconsistency of the types of the agreements practiced by the states to develop such resources would be another problem that have the role of blocking the course of formation of an obligation formed as customary international law.⁴ Types of agreement are meant to be three common model of agreements; Single-state Model, Compulsory Joint Venture System, and Joint Authority Model which are articulated in section 2.1 of this paper. In this regards, devising a comprehensive model agreement would be the most rational way in this circumstances, the only source of motivation and encouragement to bring the States to the table of negotiation.⁵ Such model agreement should be able to oblige the States to practice it in development of newly discovered natural resources, shared between two or more States in the condition that such model agreement would be an annex of an international law convention on shared natural resources. International Law Commission is an organ of the United Nations that can develop and codify a set of law or a model agreement as an obligatory law to force the States to cooperate in development of such resources.⁶ International Law Commission has two significant missions in international law; one is progressive development and the other is codification of international law (Article 1.1 of ILC Statute). Progressive development refers to the preparation of draft conventions on subjects which have not yet been regulated by international law or where the law has not yet been sufficiently developed by state practice.⁷ Codification refers to the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice precedent and doctrine (Smith 2003).

International Law Commission (ILC) commenced the consideration of shared natural resources in its long-term programme of work in 2000.⁸ The ILC at its fifty-eighth session, in 2006, adopted 19 draft articles on the law of transboundary aquifers. Aquifers refers to as an underground geological formation, or group of formations, containing water. In the next session on 2008, the commission decided to separate the subject of oil and gas from the process of codification of a draft for the law of transboundary aquifers (The Work of the International Law Commission, 8th Edition, 2012). After the adoption of the law of transboundary aquifers in 2008, the ILC decided in its sixty second session, in 2010, not to continue the subject of transboundary oil and gas in the its long-term programme of work.

Natural resources are one of the most precious and unique resource for the States to enable them to provide capitals for development of their own countries. In the future, the States would have more investment and concentration to explore and exploit such resources.⁹ This perspective to the natural resources have two main results. One is the completion, unilateral exploitation and potential dispute over such resources and the other is the potential adverse effects and pollution of the marine environment.¹⁰ Therefore, significant goals are to prevent international conflicts and threats to international peace and security and to protect maritime environment. To achieve such goals, international law should strive to formulate a law or binding rules for the development of shared natural resources specifically oil and gas resources. In this paper, the significance of codification of a convention on shared oil and gas resources is rationalized and the main principles and provisions of a model agreement as the annex to such convention is elaborated.

INTERNATIONAL LAW RELEVANT RULES

Generally interpreting, after exploring the international law sources including, the United Nation Convention on the Law of the Sea¹¹, the work of the International law commission, United Nations general assembly resolutions, international environmental law, States' practice and agreements among them, customary international law, general principles of law, international adjudications and the works of different authors and scholars, it is inferred that in international law there exists no convention or authority to directly regulate, legislate and manage oil and gas laws especially shared oil and gas resources. Extensive number of international law sources of different quality insists on the principle of cooperation in development of transboundary oil and gas fields.

In reviewing the legal system of ownership over petroleum fields, it is understood that unilateral exploitation of shared oil and gas resources in the federal countries has been restricted greatly in their domestic law. States' Conservation agencies or committee in United States to regulate oil and gas conservation law have settled problems and disputes over oil and gas resources to a great extent.¹² Private ownership in this country is legal, although it has been restricted by oil and gas conservation statutes in every oil-rich state. Oil and gas statutes in states protect their rights and interests in their contractual relationship with oil companies.

The relevant rules are UN General Assembly resolutions, the Charter of Economic Rights and Duties of States and UN Environmental Program and Interim provisional measures and arrangement in

articles in articles 74 (3) and 83 (3) of UNCLOS 1982 obliging states, in case of delimitation dispute, to “make every effort to enter into provisional arrangements of a practical nature”. This obligation is also strengthened and approved by bilateral state practice to include “mineral deposit clause” in their delimitation agreements and arranging in cooperative agreement to preserve unity of deposit and avoid competitive unilateral exploration and exploitation of shared natural resources. International Court of Justice in North Sea continental shelf cases affirmed that such similar clauses would be “potentially of a fundamentally norm-creating character”.

After examining 1982 Convention on the Law of the Sea, it is inferred that coastal states have sovereign rights in continental shelf and exclusive economic zone (EEZ). Consequently, all mineral and natural resource of the seabed and sub-seabed that are located in these areas, the exclusive economic zone and continental shelf is recognized; but these rules are effective as long as there is no interference of sovereignty claim between the countries [UN General Assembly Resolution (UNGAR), 1803/XVH of December 14, 1962]. In case of such claims, the delimited agreement should be referred to. In the absence of maritime delimitation agreement, the member States of the 1982 Convention should practice practical actions in the basis of interim measures in such a way that do not endanger the final agreement [Articles 74, Paragraph 3, UNCLOS 1982]. Besides these arrangements of the Convention that can be the basis of cooperative and correlative development of shared oil and gas resources, the principle of cooperation for exploitation of such deposits is repeated emphatically in several international adjudications as well. The interim measures can be recognized

throughout international law, especially various provisions of UNCLOS 1982, United Nations General Assembly Resolution Resolutions (UNGAR), States practices and general principles of international law relevant to shared oil and gas resources and interim measures: 1) to exchange information and prior consultation [UN GA Resolution 3281 (XXIX)], 2) to avoid exploratory actions leading to permanent changes in the environment, 3) to agree upon temporary measures in the light of understanding and cooperation, 4) to avoid any action that would impair the process of reaching a final agreement, 5) to respect the rights and interests of any coastal states, 6) not to cause considerable damage, 7) to agree on optimum use of such resources, 8) appropriate compensation for any exploitation from a shared reservoir without any prior notice to the other party, 9) to determine the area around the boundary line not to be exploited for a specific period.

Protective perimeters (interim measures) which are recognised as significant provisions in States’ agreement are enumerated in brief as follows:

When one party discovers an oil and gas reservoir that is approved by geological geophysical data to be extended into the other party’s continental shelf, the first party must notify the latter party accordingly by such technical data [Article 2(1), Netherlands & Germany Delimitation Agreement 1971]. Appropriate compensation is thought up in delimitation agreements in the event that one party extract from a transboundary reservoir without any prior notice to the other party [Article 4(2) of France and Spain Delimitation Agreement 1974, Article 2(2) Netherlands & Germany Delimitation Agreement 1971].

STATES PRACTICE

Respecting the State practice in the subject of shared oil and gas deposits, a large number of coastal states whether having opposite or adjacent continental shelves have adopted and applied cooperation for managing correlatively shared oil and gas deposits.¹³ Such cooperation appears in the context of joint development agreement and international unitisation agreement such as; Saudi Arabia-Bahrain Agreement (1958), Qatar – Abu Dhabi Agreement (1969), Japan – South Korea Agreement of 30 January (1974), France – Spain Agreement of (1974), Argentina – United Kingdom Joint Declaration (1995), Malaysia – Thailand Joint Development Agreement (1979 and 1990), Nigeria-Sao Tome Joint Development Agreement (2001) and various other agreements of the same category. Regardless the increasing numbers of such cooperation, their geographical diversity disprove any attempt to reject their repeated occurrence as merely coincidental.¹⁴ The differences in the structures of joint development agreements originates from their policies, the specific plans they design for cooperation and specificities of each case. Such verities, disparity and pragmatic nature of these agreements specify the inconsistency in the States practices in development of shared oil and gas resources; therefore, such States practices are in primitive course to be developed as customary international law and formation of customary international law is very difficult or impossible for the joint development agreement.

Joint development agreements of shared oil and gas resources are executed in various models by the states involved.¹⁴ The three recognized models are as follows;

1. Single State Model: The simplest choice in operational stage requiring the lowest amount of struggles and challenges of development for the interested states in which one state undertakes the development management of the reserve situated in a disputed zone on behalf of the other state. Examples are the Saudi Arabia and Bahrain Agreement 1958 (UN Doc. ST/LEG/SER.B/16, UN Sales, No. E/F.74.V2 (1974), Australia and Indonesia (1989) and Norway and England Agreement (2005).

New tendency towards such model was enhancement to the growth of good-neighborly relations, economical consideration. As an example of recent agreement to avoid such risk of state autonomy, is the Norway and England agreement 2005, in which both countries that have 35 years of experience in cooperation of petroleum exploitation, agreed that in case of existence of a shared field or reservoir between them the state in which most extent of the reserve is located, would develop the field unilaterally and the agreed revenue will be shared afterwards.¹⁵ Compulsory Joint Venture System Model is an agreement in which states and any other relevant oil company from each state or those granted a concession are agreed to establish a joint venture for development of every aspect of the project in the area.¹⁶ Examples of such model are Japan and South Korea Agreement (1974) and the agreement between France and Spain (1974) in the Bay of Biscay that was adopted a day before Japan and South Korea Agreement. The agreed zone is divided between France and Spain with separate jurisdiction and sovereign rights. The concessionaries of either interested state applying to develop the zone are urged to enter into joint venture with the nominee of the other party on an equal bases. Financial

affairs and costs is in proportion to their shares (1988).¹⁷

1. Joint Authority Model is the third and the most efficient and complex option requiring highest level of cooperation in an institute, managing board, administrative council or commission consisted of the influential authorities in each position equally from the interested states. International joint authority under joint development agreement has gained legal personality and adequate decision-making powers to manage development zone. Comparing to the above-mentioned models that jeopardize the reduction of national autonomy, it is the best method of wide ranging cooperation and prevent any possible intervention to sovereign rights of either states.¹⁸

On analysing and studying state practice and varieties of bilateral agreements among them, it should be noted that the practice of so-called specially affected States enhances considerably to the determination of any rule of customary international law.¹⁹ For instance, the judgment in the North Sea Continental Shelf cases, underlies the role of the practice of the specially affected States. Regarding the principle of cooperation in general in the form of unitization and joint development agreement and considering to customary international law, it can also be inferred that first requirement and factors of customary international law formation as state practice has been settled and achieved to a great extent. An ongoing process of customary international law formation includes following element as an integral parts:

1. The degree of consistency and uniformity of the state practice;
2. The generality and length of the state practice;
3. The interests of specially affected States.

Two necessary elements for formation of customary international law are the consistent states practice as a widespread or universal act and the belief that such practice is required, prohibited or allowed as law (*opinio juris*). Both elements are not satisfactorily achieved for considering and practicing of joint development agreement as a customary international law.

Considering the international adjudications, the separate opinion of Judge Jessup in the North Sea Continental Shelf cases is mentioned as an evidence, where he notes that the principle of international cooperation is well established under customary international law [North Sea Continental Shelf Cases, ICJ Judgment, ICJ Report 1969]. Although by reviewing the agreement for development of shared oil and gas deposits, joint development agreement along with joint authority is the most optimal efficient and advanced agreement.

It has not reached to a degree that embodies it as a remedy for resolving sovereign disputes, since efficient arrangements of joint development agreement require very high degree of cooperation in all aspects of bilateral international relations and this degree of cooperation cannot be recognized everywhere equivalently in the same level and quality. These agreement reached for development of transboundary oil and gas resources, none of them was accomplishment less than 5 years. Kashani (2010) said that the process of drafting, signing and ratification and entering into force took more than 5 years. Consequently, devising a model agreement or a convention to oblige the states to cooperate and detour unilateral exploitation is the best remedy and shortcut to overcome such legal complexity in international law.

INTERNATIONAL LAW COMMISSION ATTEMPT FOR CODIFICATION OF AN AGREEMENT FOR SHARED NATURAL RESOURCES

A group of United Nations (UN) experts and International Law Commission (ILC) recognized that a need has arisen for establishment of rules governing the development of shared natural resources and this was the beginning of a difficult and challenging process for International Law Commission (ILC) whether they can get any success or solution for this crucial issue.

The attempt to adopt norms and regulations in United Nations for shared natural resources is not novel. It goes back to the 1970s when several relevant UN General Assembly resolutions were adopted without resulting in any brilliant legal solution [UNGA Resolution 3129 (1973), UNGA Resolution 3281, (1974)]. Schwebel (1980) said that the ILC commenced its work on the law of non-navigational uses of international watercourses since international watercourse is a sort of shared natural resources passing through the boundaries and they had been potential to cause international conflicts and disputes. The work on the Convention on the Law of Non-Navigational Uses of International Watercourses was accomplished after 24 years strive and it was adopted by United Nations on 21 May 1994 and convention was opened for the States accession on 1997 (General Assembly Resolution 51/229). This convention entered into force after being ratified by 35 states, based on article 36 of the Convention.

It can be inferred that the core of this convention is made up of broad substantial and procedural rules such as obligation not to cause significant harm and management of the resource equitably and rationally, general obligation to cooperate (Article 8), exchange of information (Article 9) and prior

notification of planned measures (Article 12). During the establishment of such convention, the commission was going to include the international transboundary aquifers (A body of permeable rock that can contain or transmit groundwater) in this convention as well. Eventually they recognized that the international aquifers are complicated issue and reaching the agreement would be very difficult in case of inclusion of this issue in the Convention on the Law of Non-Navigational Uses of International Watercourses (1997). The ILC commenced investigation on the subject of shared natural resources on 2002 after the inclusion of the issue on the long term programme of work. The challenging question for the ILC remained whether the Commission should consider the topics of Shared Natural Resources (international aquifer and oil and gas) in one document or it had to prepare a separate document for both topics.²⁰ While the first Special Rapporteur Rosenstock supported the separation of the topics, the second Special Rapporteur Yamada expressed his firm belief on the separation of these two topics.²¹ Yamada included in his work program the finalization of the topic of international aquifer on 2004, accomplishment of shared oil and gas resources on 2005 and achieving to a comprehensive conclusion in both topics on 2006. He argued that despite the similarities on the application, transboundary nature, legal norms and the location of their occurrence, there are fundamental differences between the topics. Finally, the 6th commission approved the agenda as shared natural resources and Mr. Yamada announced by a report to the General Assembly on August 2007 that the drafts of confined groundwater have been sent to the states for comments and observation on it and the work of the ILC would no longer resume till the

collection of the state's reply, its review and potential modification and final report on 2008 [Official Reports of General Assembly 62nd session, supplement no. 10 (A/62/10), paras 161-166]. It was decided to discuss oil and gas topic in the second part and after finalization of the first part which is international aquifer [Official Reports of General Assembly 62nd session, supplement no. 10 (A/62/10), paras 177]. Some delegates of Greece, Indonesia, Mexico, Poland and Portugal proposed that once the Commission had accomplished its codification on groundwaters, the oil and gas as the other topic of shared natural resources should become the main concern of the Commission [A/CN.4/580, (17 July 2007), para. 5]. The commission presented 2 ways based on the states' comments and interpretation of the Working Group responsible for the topics and the proposal of the special rapporteur [A/CN.4/580, (17 July 2007), para. 5]. One is to issue the document in the form of a General Assembly resolution and the draft articles to be annexed to its resolution and recommending that States concerned make appropriate bilateral and regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles, the other is to develop the draft to form a convention to be approved and opened to be ratified by states [Yearbook of International Law Commission, 2008, paras. 37 and 49].

The approved draft of the Commission, titled "Shared Natural Resources, the Law of Transboundary Aquifer" has one introduction, 4 parts and 19 articles [Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10)]. Article 5 is the most fundamental and can be considered as the focal point of the law of transboundary aquifer. The gist of discussion on shared

natural resources is that the interested states would be able to benefit their own share from it. This article restricts unilateral exploitation from international aquifer in a soft language. In such an event the exploitation of the resources by the other partner should be done by prior and regular informing and data exchange and attempt to establish bilateral cooperation. Article 5, concerns equitable and reasonable utilization of aquifers. The question is that such rules as reasonable equitable utilization for international underground water cannot be applied for the oil and gas resources characterized as fluid and migratory substances.

It can be concluded based on the Commission efforts and works on the topic of shared natural resources and the viewpoints of the involved groups that for the time being we cannot expect these articles to be an effective draft and binding rules. They believed that the 19 articles of the law are not capable of being a document as effective as a convention. No instrument for dispute settlement is advised and in the final articles no procedures for approval, ratification and entering into force is considered.²² Despite these defects in the documents and the differences between oil and gas topic and transboundary aquifer law, there are some aspects and general principles that can be relevant to oil and gas such as sovereignty, equitable and reasonable utilization of the resources, the obligation not to cause significant harm, general obligation to cooperate.²³

On the 57th session the Special Rapporteur proposed to address transboundary groundwaters, oil and natural gas, taking a step-by-step approach, beginning with groundwaters and after this the other relevant topics such as oil and natural gas [Fifty-seventh Session of the General Assembly, Supplement No. 10

(A/57/10), paras. 518-519]. As mentioned in previous paragraphs, at its sixtieth session, in 2008, the Commission adopted, on the second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers, with the recommendation that the General Assembly, *inter alia*, consider the elaboration of a convention on the basis of the draft articles [See General Assembly resolution 63/124]. At the fifty-ninth session, in 2007, the Working Group on Shared Natural Resources, chaired by Enrique Candioti, discussed the issue of oil and gas resources on the basis of the fourth report [A/CN.4/580] submitted by the Special Rapporteur, Mr. Chusei Yamada. In addition to determining that the law of transboundary aquifers should be addressed separately from issues concerning oil and gas resources, the Commission decided to request the Secretariat to circulate to Governments a questionnaire on the subject prepared by the Working Group [Fifty-ninth Session, Supplement No. 10 (A/59/10), paras. 161-183].

At the sixty-first session, in 2009, the Working Group discussed the feasibility of any future work by the Commission on the issue of oil and gas resources on the basis of a working paper on oil and gas, which had been prepared by Mr. Yamada before he resigned from the Commission. The Working Group decided to have the 2007 questionnaire recirculated and to entrust the further sessions with the responsibility of preparing a study in which the feasibility of any future work by the Commission on oil and gas would be determined through the analysis of written replies from Governments and their comments and observations in the Sixth Committee of the General Assembly, as well as other relevant elements [Sixty-fourth Session of the General Assembly,

Supplement No. 10 (A/64/10), paras. 187-193].

At the sixty-first session, in 2010, as the last session held for the topic of shared natural resources, the commission reviewed the 39 replies and observation of governments signifying that the viewpoints from majority of Member States concerning the issue of oil and gas were greatly negative [Sixty-first Session of the General Assembly, Supplement No. 10 (A/64/10)]. A majority believed that the question was not only fundamentally bilateral in nature, but also highly technical, involving various regional situations. That is to say the specific and complex issues related to shared oil and gas reserves had been adequately addressed for a number of years through bilateral cooperation and mutually agreed arrangements, and thus did not seem to be giving rise to insoluble problems in practice. It was particularly important to distinguish the physical or geological characteristics of oil and gas from the legal evaluation of those resources, and also to note that, as far as oil and natural gas were concerned, each case had its own specific and distinct features and would need to be addressed separately.²⁴

Doubts were thus expressed as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. It was feared that an attempt at generalization might inadvertently lead to additional complexity and confusion in an area that had been adequately addressed through bilateral efforts to manage it. Given that oil and gas reserves were often located in continental shelves, maritime boundary delimitation, which, in political terms, was a very delicate and sensitive issue for the States concerned, was a prerequisite for the consideration of this topic, unless the parties had mutually agreed, as in a limited number of cases, to

bypass the problem of delimitation [Sixty-Second Session of the General Assembly, Supplement No. 10 (A/CN.4/621), paras. 16].

A few States expressed their view on State practice concerning oil and gas that should be reviewed precisely because of the specificities of each case having its specific circumstance or the commission after reviewing states practice and other interpretations elaborate a model agreement on the topic. The delicate and profound nature of specific relevant cases could well be expected to hinder any attempt at adequately broad and useful analysis of the issues involved.

Eventually, Shinya Murase, the author of the paper [A/CN.4/621] recommends that the Working Group decided, at the sixty-second session of the Commission, in 2010, that the topic of oil and gas will not be pursued any further. It may be recalled once again, since such a decision is not without precedent in the practice of the Commission [Sixty-Second Session, Supplement No. 10 (A/CN.4/621), paras. 17].

What is inferred in the work of ILC is that they have not got any success in providing law for the topic shared oil and gas resources. The mere procedure to be followed is focusing on states practice and regional arrangements in the form of joint development and unitization agreement to draw the common aspects along with procedures that plays the role of a guidelines for states to practice their interest in a shared petroleum deposit.²⁵

CODIFICATION OF A MODEL AGREEMENT AS RULES OF INTERNATIONAL LAW BY THE ILC

In the last four decades, international law commission (ILC) commenced its work on Non-Navigational Uses of International

Watercourses which was succeeded in codification and adoption of a set of the convention on the law for this subject. In 2000, the ILC included the work on shared natural resource in its long-term programme of work and succeeded in second law codified and adopted for the law of transboundary aquifers (2008). At the time of drafting, the Convention on the Law of Non-Navigational Uses of International Watercourses (1997), the ILC work group concluded not to include confined groundwaters (transboundary aquifer) which are unrelated to surface waters from the topic, but nonetheless the working group concluded to continue the subject of transboundary aquifers in a separate study [The Work of The International Law Commission, 2012]. The same decision happened before the drafting of the law of transboundary aquifers, the ILC referred to the questionnaires sent to the States and reported that majority of the States recognised that the law of transboundary aquifers should be coped within separate document from oil and gas. The reasons for this decision originates from the fact that these subjects are significantly different technically, commercially, economically, environmentally and socially [the ILC Fifth Report on Shared Natural Resources, A/CN.4/591].

The ILC in the law of transboundary aquifers recognised the sovereignty of each State over a part of any aquifer system situated within its territory. In this law, it is emphasized that the States should implement such resources in compliance with the principle of equitable and reasonable exploitation and utilisation. It also obliges the States to establish joint arrangements and mechanisms of cooperation based on sovereign equality, territorial integrity, sustainable development, mutual benefit and

good faith [the ILC Fifth Report on Shared Natural Resources, A/CN.4/591].

The analogous rules could not be used for shared oil and gas deposits because they are non-renewable resources and exploration and exploitation of such resources are greatly different from the other resources based on economic worth. Eventually the ILC concluded not to continue the codification of a set of law or a model agreement for cooperative development of shared oil and gas resources for the reasons that some of such resources located in the disputed area and also each case and circumstances of shared oil and gas resources is specific and this specificities would rise a complexity to applicably synthesize a model agreement [Sixty-Second Session, Supplement No. 10 (A/CN.4/621)]. The problem arises to choose a joint development system when the States have different national legal and economic system, oil and gas law or Petroleum law and also different oil and gas development regime adopted or practiced by them. Adjustment of such differences to select an appropriate regime is complicated and the existing approach might not be interesting for some states and would not be able to gain a universal acceptance.

William Onorato argued on his work (1968) that there is ample reason for an international technical convention establishing uniform exploitation procedures reflecting accepted standards of good oil field practice which should apply where several countries are found to be tapping the same oil deposit. Onorato continued that an international codification such proved practices and procedures would be a useful first step towards providing a basis for even greater co-operation. An alternative step, however, would be to reach an international accord providing for unitized operations between countries.²⁶

The joint authority model is considered as the most comprehensive system of joint development as a supranational joint entities equipped with legal personalities and autonomy to undertake the role of the States parties [See three models of the States practice in section 2 of this paper]. The following justifications support the reason why the joint administrative commission (JAC) or joint authority is thought up as one of the vital aspects in the existing model agreement:

1. This Administrative body is an independent international commission.
2. It is supranational joint entities that can be relied on as an impartial third party.
3. The organisational functions can be adjusted to the requirements of any specific circumstances affecting that particular shared deposit.
4. It is granted legal personality and autonomy.
5. It do not tackle sovereign rights of the States owing to be consisted of adequate legal administrative authorities as the members from each States parties.
6. This commission of wide-ranging power and decision-making mandates supervise over all aspects of the joint development zone.
7. In the occasion of potential changes of circumstances and necessity of amendment, it would be the best tool and resort to overcome them and proceed the development plan.

The ILC by its working group which is competent enough to work on complexity of shared oil and gas resources would study precisely the main principles and provisions of such model agreement that are inferred from weaknesses and strengths of petroleum

agreements and the agreement between the States for development of shared oil and gas fields. To overcome the specificities of each case occurring in different marine or onshore locations, the ILC should codify a provision that the States have to establish their administrative commission as the decision-making body of the joint development agreement, prior to the final agreement. This decision-making board of experts from the interested States would be able to overcome any intricacy and specificities that might occur in their continental shelf, Exclusive Economic Zone (EEZ) or equidistance boundary and especially determination of the Joint Development Zone (JDZ). In this regards, after overcoming and resolving this crucial step, the codification of other provisions of the agreement would be applicable easier.

The ILC also in its codification of a convention should categorize all steps the states must observe accordingly. Pre-negotiation and negotiation period, establishment of Joint Authority or Joint Commission, determination of the joint development zone and finally formal execution of the main agreement signed between two or more states. The interested States in the first stage (pre-negotiation and negotiation period) would be obliged to observe the following rules that are originated from international law sources. These rules get obligatory and binding when they are codified in a convention that have entered into force. These rules are as follows:

1. To exchange information and prior consultation [UN GA Resolution 3281 (XXIX). Article 4(5-6) of the United States of America and Mexico Delimitation agreement 2000 affirms this obligation].
2. To avoid exploratory actions leading to permanent changes in the

environment

3. To agree upon temporary measures in the light of understanding and cooperation
4. To avoid any action that would impair the process of reaching a final agreement
5. To respect the rights and interests of any coastal states
6. Not to cause considerable damage
7. To agree on optimum use of such resources
8. Appropriate compensation for any exploitation from a shared reservoir without any prior notice to the other party [Article 4(2) of France and Spain Delimitation Agreement 1974, Article 2(2) Netherlands & Germany Delimitation Agreement 1971. Determination of the area around boundary line is also reflected in Iran and Qatar and Iran and Saudi Arabia Delimitation Agreement].
9. To determine the area around the boundary line not to be exploited for a specific period [Article 4 of the United States of America and Mexico Delimitation agreement 2000].

The ILC in the context of the potential convention should enumerate and formulate a set of provisions as the next step for the establishment of the joint commission. In this regard, the States transfer the duty of negotiation and coming to an agreement to their established joint commission. It is given legal personality by the states and it is a board of influential figures from each States to find practical solution for the States parties and as the most optimal mechanism to resolve any dispute regarding continental shelf, delimitation or determination of Joint Development Zone (JDZ). Such transnational commission regardless to bestowing legal personality, and adequate and reasonable autonomy to undertake its required functions,

is granted with exploration and exploitation rights, legal and contractual management and settlement of dispute, preparation of enforcement instrument and applicable law, protection of health, safety and environment, collection and apportionment of revenues and taxes, and financial management and all other competences bestowed under the decision of the States Parties. More extended powers or less autonomy of joint entities depend on the States decision and the complexity, the stretch of the JDZ and amount of resources in the JDZ and the area. The more the area is complex and the resources is huge, the more comprehensive and detailed joint administrative commission (JAC) shall be. The joint commission should consist of subsidiary committee in the following crucial matters of the joint development agreement; Petroleum Development Committee, Economic and Financial Committee, Legal Committee, Health Safety Security and Environment Committee, Administration, Human Resource and Logistic Committee.

The International Law Commission would regard the following circumstances to codify appropriate rules and provisions for each status of the determination of the Joint Development Zone (JDZ):

1. JDZ might overlap the sovereign area of a third party
2. JDZ and potential overlapping area within the zone or out of the zone
3. JDZ in delimited boundaries
4. Pre-existing Concessions and Rights in the JDZ
5. Division of the Zone into Separate Blocks
6. The Resources in Joint Development Zone.

The ILC in the formulation of the convention would consider the above circumstances and regulate through comprehensive provisions in the part of the determination of the joint

development zone in a potential convention. Thus, the ILC should consider and include most of the significant circumstances and statuses arising from the specific location of the shared oil and gas resources straddling the States boundary and regulate and formulate the relevant rules for determination of the JDZ. In the other section and parts of the convention, the ILC working group is proposed to consider the other crucial matters as the skeleton of the convention and model agreement, summarized as follows:

1. Joint Development Zone: it determines the area to be jointly developed under the agreement is another column of the agreement.
2. Joint Administrative Commission (JAC): this regulatory body is the supranational organization which is established under the joint development agreement to manage all activities and aspects of the agreement pertaining to the JDZ.
3. Joint Development Regime: it defines what mechanism as a whole leading all aspects and principles of the agreement and is reflected in the JDZ Plan.
4. Exploration and Exploitation in JDZ: the system under which the JDZ is going to be explored and exploited covers operations pertaining to all petroleum activities. This is also reflected in the JDZ Plan.
5. Revenue Sharing: It is the most fundamental aspect of the agreement as the main goal of the States for joint sharing of petroleum production the JDZ as a whole.
6. Financial Arrangements and Fiscal Policies: the initial and general accord regarding financial and fiscal regime would be regulated in the joint development t agreement and in operational and practical phases of the

development plan, it would be supervise and necessarily revised by the joint administrative commission (JAC). Cost obligations and taxation system are the columns of financial aspects the joint development agreement model which is going to be broadened in details.

7. Surveillance of Petroleum Exploitation: It includes all standards and strategies concerning conservative regulation of petroleum activities such as conservation law, correlative rights, production regulation, wells spacing regulations, maximum efficient rate, Production and marketing regulation, pooling and unitization law.
8. Governing Law: it designates the specific legal framework for the joint development including criminal jurisdiction, jurisdiction and enforcement, petroleum law codification under the joint development agreement and other legal aspect of the agreement. The main sources of law ruling the agreement are; the Agreement itself, Petroleum Codes and development contract.
9. Settlement of Dispute: this provision determines the ways and options of the processing inter-state dispute or disputes between private parties.
10. Health, Safety and Security Rules and Protection of Marine Environment: It includes standards and rules adopted from the States Parties legal system and international law rules and standards drafted and prepared by the relevant committee in the joint administrative commission (JAC).
11. Final Clauses: Entry into Force, Duration of the Development, Amendment, confidentiality, rights of the third Party and so on.

The ILC in codification of the convention on the law of shared oil and gas resources would include the above-mentioned the fundamental provisions of the joint development agreement between the States. These principles become a base for the convention framework. The ILC would attached a Model Agreements as an annex to the convention as a comprehensive rules to oblige the States.

CONCLUSION

The attempt of the ILC to formulate a set of law or a model agreement for development of shared oil and gas resources was in vain. In fact, the work group made a hasty decision where it could have continued the process by implementation of a committee consists of members and experts from the successful States in application of the joint development agreement and scholars and authors of this subject and also call for cooperation of the other organisations such as United Nations Institute for Training and Research (UNITAR) or International Development Law Organization (IDLO) or the Organization of Petroleum Exporting Countries (OPEC) and the Gas Exporting Countries Forum (GECF). The subject of shared oil and gas resources requires vast and great attempt as much as famous and complicated conventions took years and decades to be finalized and adopted formally. Moreover, such convention would be feasible and applicable, through implementation of a competent committee in the subject of the joint development of shared oil and gas resources and long-term programme of work and study,

Practicability and feasibility of this framework has priority over ideality of it. Workable approach is a preference in this potential convention and model agreement by

the ILC. In accomplishment of this approach, the ILC committee or work group can implement the existing and old joint development agreements, international unitization agreements and also petroleum act of some developed countries and their oil and gas laws and management strategy and all petroleum industry practices as reference and inspiration. It does not mean such a convention or model would be derived merely from any particular joint development agreement or states practice. The ILC is experienced in synthesizing and codifying ample of conventions and sets of law and by using such competencies, it would be able to formulate a comprehensive convention to cover all complicated aspects of transboundary oil and gas resources as enumerated and clarified in the last section of this paper which would be a step forward for energy efficiency and energy conservation, environmental protection and development of international law and the world peace and security that can be achieved by development of international law and relevant organisation such as International law commission (ILC) and even United Nations Institute for Training and Research (UNITAR) or International Development Law Organization (IDLO).

NOTES

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- ⁸ *Yearbook of International Law Commission*. 2008,. p. 37 and 49.
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