# The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation

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## INTRODUCTION

The end of the Cold War created a strategic vacuum in the South China Sea. The collapse of the Soviet Union and its departure from Cam Ranh Bay; the closure of United States' naval bases in the Philippines; and Vietnam's withdrawal from Cambodia diminished superpower influence in the region. These events also prompted several East Asian littoral governments to re-calculate the strategic and national security implications of sovereignty claims made to islands in the South China Sea. In this regard, the financial turmoil that has whipsawed national economies throughout East Asia since 1998 has undercut the political stability of these same states and, in so doing, contributed to exacerbating tensions over conflicting maritime claims in the area.

In 1999 the Spratly Islands dispute reemerged as a security flashpoint in the South China Sea. This most recent flare-up over the Spratlys occurred between China and the Philippines over structures built on the aptly-named Mischief Reef, a tiny land feature known locally as Panganiban and situated within the Philippines' 200-mile exclusive economic zone as defined by contemporary ocean law.[1]

Sino–Filipino conflict over Mischief Reef dates back to February 1995, when China built and manned three octagonal structures perched on stilts atop the atoll. Following a three-year hiatus, China resumed construction at Mischief Reef in late October 1998. At least four military supply ships and some 100 workers were involved in the construction operation to lay concrete foundations there.[2] These events reignited tensions between China and the Philippines over their

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[1] "Philippines Warns of Increased Chinese Military Acts on Disputed Islands," Associated Foreign Press (AFP) ASIA, 19 January 1999. See the discussion on the Law of the Sea in the text *infra* at notes 14–18.

[2] Rigoberto Tiglao and Andrew Sherry, "Politics & Policy," *Far Eastern Economic Review* (24 December 1998): 18–20.

respective claims to the Spratly Islands.

In early 1999, the Chinese completed the construction on Mischief Reef. The five-story, fortified, cement building alongside the three octagonal structures is permanent and is viewed by the Philippines as evidence of China's intentions to establish military facilities in the region. The structure could be used for communications, anti-aircraft guns, and radar systems for monitoring aircraft and ships in the area. Further, this basing occupation of Mischief Reef is seen as part of China's forward defense and offense strategy to house equipment for guiding cruise missile systems throughout the China Sea.[3]

***. . . the Spratly Islands dispute . . . remains the most contentious, complex, and volatile of the South China Sea rivalries.***

Although China insists that the structures on Mischief Reef are intended only to provide shelter for Chinese fishermen in the area, serious suspicions exist among Asian and Western states that the completion of military structures on Mischief Reef foreshadows further Chinese military activity in the South China Sea. Recent reports in fact suggest that China might be taking secret steps to occupy the Fiery Cross atoll, another tiny islet claimed by the Philippines.[4] Consequently, the Philippine government filed a diplomatic protest against China for the 1999 intrusion onto Mischief Reef, and has welcomed the participation of the United States and the United Nations in efforts to find a solution to the Spratlys dispute.[5] China's presence on Mischief Reef is also viewed by Manila as threatening the Philippines' oil exploration activities in the Reed Bank, another part of the Spratlys. Likewise, Mischief Reef occupies a strategic location for listening and observing vessels transitting South China Sea lanes, giving China greater control over them. This confrontation between China and the Philippines in 1999 underscores the diplomatic and military sensitivities earmarking the Spratlys dispute in the South China Sea. The situation highlights the need for sensible solutions to ease tensions between several countries that claim all

[3] Annie Ruth and Raffy Jimenez, "China Fortifies Hold on Spratlys," *Manila Times*, 21 January 1999.

[4] Johnna R. Villaviay, "China Eyes Another Island in Spratlys," *Manila Times*, 22 January 1999.

[5] While politically appealing, this protest is problematic since the presence of warships is legally permissible under contemporary international law in areas of the high seas, including exclusive economic zones of coastal states. Martin P. Marfil, "Spratlys 'Intrusion':" PR to Protest China Warships," *NEWS*, 20 January 1999.

or portions of the Spratlys group. This study aims to contribute to these ends, as it assesses geopolitical and legal nuances of disputes in the South China Sea, with a view to proposing confidence-building measures (CBMs) that might contribute to the resolution or setting aside of competing claims in the region. The analysis focuses on the Spratly Islands dispute, principally because it remains the most contentious, complex, and volatile of the South China Sea rivalries, and also involves the largest number of regional claimants. Presumably, though, confidence-building measures used to ameliorate the Spratly Islands dispute might be suitably applied by those same states holding competing sovereignty claims over other island groups in the region.

## GEOPOLITICS IN THE SOUTH CHINA SEA

The South China Sea, covering an area of 800,000 square kilometers (310,000 square miles), is semi-enclosed, with ninety percent of its circumference rimmed by land. Many of Asia's most influential states are among its littoral countries: the Philippines, Malaysia, Brunei, Indonesia, Singapore, and Thailand; the Indochinese countries of Cambodia and Vietnam; and the People's Republic of China (PRC, or China) and Taiwan (the Republic of China).[6]

Freedom of navigation through the South China Sea, particularly through the choke points of the Taiwan Strait in the north and the Straits of Malacca in the south, remains essential to the region's geostrategic role in linking northeast Asia's seaborne trade with the rest of the world. Even so, the South China Sea's significance has been recently highlighted, not just for its strategically important commercial and military sea lanes, but also for furnishing living and mineral resources to the littoral states. As a consequence, over the past two decades competing claims to island territories, maritime and seabed jurisdictions, and access to fisheries have cast governments into a tangled nexus of regional jurisdictional conflicts and rivalries.

The matter of maritime boundary delimitation in the South China Sea is especially problematic, primarily because the present situation is defined in terms of a configuration of overlapping unilateral claims to sovereignty over an assortment of various semi-submerged natural formations scattered throughout the region. These hundreds of islands, islets, cays, reefs, rocks, shoals, and banks comprise four main archipelagoes in the South China Sea: the Pratas, Macclesfield Bank, Paracels, and Spratlys.

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[6] See generally *Heinemann World Atlas* (1995), 78–81; J. R. Morgan and M. J. Valencia eds., *Atlas for Marine Policy in South-East Asian Seas* (Berkeley: University of California Press, 1983), 3–4.

Eight states claim title to these South China Sea islands. Singapore and Malaysia dispute claims over Pisang Island and Pulau Batu Puteh, strategically situated in the congested waters of Malacca and Singapore Straits.[7] China, Taiwan, and Vietnam contest each other's claims to sovereignty over the Paracel Islands, a group of fifteen islets and several reefs and shoals scattered over a 200-kilometer area in the middle of the Gulf of Tonkin.[8] Taiwan also contests China's claims to Pratas Island and the Macclesfield Bank. As for the Spratlys, six states assert claims: China, Taiwan and Vietnam claim the entire archipelago, while the Philippines, Malaysia and Brunei claim sovereignty over portions of the Spratlys. Except for Brunei, all the others have established a military presence in the Spratlys.[9]

The Spratly Island group, geographically located between 4° and 11°3' North Latitude and 109°30' and 117°50' East Longitude, contains some 100-230 scattered islands, isles, shoals, banks, atolls, cays, and reefs.[10] With elevations ranging from two to six meters, the mapped islands of

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[7] See D.M. Johnston and M.J. Valencia P*acific Ocean Boundary Problems: Status and Solutions* (Boston: Martinus Nijhoff, 1991), 128–34.

[8] In January 1974, military hostilities broke out between China and the Republic of Vietnam over the Paracels, ending in a Chinese victory and that government's forceful consolidation of the entire atoll. See Marwyn S. Samuels, *Contest for the South China Sea* (New York: Methuen, 1982), 98–118; Chi-kin Lo, *China's Policy Toward Territorial Disputes: The Case of the South China Sea Islands* (London: Routledge, 1989), 5383; Steven Kuan-Tsyh Yu, "Who Owns the Paracels and Spratlys? An Evaluation of the Nature and Legal Basis of the Conflicting Territorial Claims," in R.D. Hill, Norman G. Owen, and E.V. Roberts (eds.), *Fishing in Troubled Waters: Proceedings of an Academic Conference on Territorial Claims in the South China Sea* (Centre of Asian Studies, Hong Kong, 1991), 48–74; and The-Khang Chang, "China's Claim of Sovereignty Over the Spratly and Paracel Islands: A Historical and Legal Perspective," *Case Western Reserve Journal of International Law* 23 (1991): 399.

[9] See Cheng-yi Lin, "Taiwan's South China Sea Policy," *Asian Survey* 37 (1997): 324 (Table 1); Mark J. Valencia, "China and the South China Sea Disputes," *Adelphi Paper* 298 (Oxford: International Institute for Strategic Studies, 1995), 8–25; Mark J. Valencia, *South-East Asian Seas, Oil under Troubled Waters: Hydrocarbon Potential, Jurisdictional Issues and International Relations* (Singapore: Oxford University Press, 1985), 87–89. For historical assessments of claims to the Spratlys, see Steven Kuan-tsyh Yu, "Who Owns the Paracels and Spratlys? An Analysis of the Nature and Conflicting Territorial Claims," *Chinese Yearbook of International Law and Affairs* 9 (1989-1990): 1–27 (substantiating the Chinese claims) and Chang, "China's Claim of Sovereignty," 399–420.

[10] "ICE Cases: Spratly Islands Dispute," Case No. 21 (May 1997): http://gurukul.ucc.american.edu/ted/ice/Spratly.htm; Dieter Heinzig, *Disputed Islands in the South China Sea* (Hamburg: Institute of Asian Affairs, 1976).

the Spratly archipelago, including shallow territorial waters, cover an area of approximately 180,000 square kilometers (69,500 square miles).[11]

The Spratlys are too small and barren to support permanent human settlement independently, and few have fresh water or any significant land-based resources.[12] Yet, these islands are still considered strategic, economic, and political assets for littoral states in the South China Sea, principally because they can serve as legal base points for states to project claims of exclusive jurisdiction over waters and resources in the South China Sea. It must be realized, though, that the Spratlys area holds strategic importance for all states in the region, simply because these islands straddle the sea lanes through which commercial vessels must sail en route to and from South Asian ports.

These various national efforts to stake out South China Sea claims stem largely from jurisdictional rights for coastal states over offshore seabed resources as set out in the 1982 UN Convention on the Law of the Sea (LOS Convention).[13] This instrument codifies new rights that accrue to a state having territorial sovereignty over an island or group of islands.[14] Paramount among these is the exclusive right to exploit living and nonliving resources of the water column and seabed surrounding an island or archipelago. Under the LOS Convention, the state holding valid legal title to sovereignty over an island is permitted to establish a twelve-mile territorial sea and a 200-mile exclusive economic zone (EEZ) around that island.[15] If an entire island group

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[11] J.K.T. Chao, "South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands," in Hill et al, *Fishing in Troubled Waters*, 77. The total number of the Spratly Islands, reefs, shoals, and cays is variously reported. See J.R.V. Prescott, *The Maritime Political Boundaries of the World* (London: Methuen, 1985), 218–19; Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (The Hague: Martinus Nijhoff Publishers, 1997), 225–35 (Appendix 1).

[12] See generally David Hancox and Victor Prescott, "A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands," in *Maritime Briefing* 1 (1995) (International Boundaries Research Unit, special issue); and Tao Cheng, "The Dispute Over the South China Sea Islands," *Texas International Law Journal* 10 (1975): 267.

[13] United Nations Convention on the Law of the Sea, opened for signature December 10, 1982, entered into force November 16, 1994. UN Doc. A/CONF.62/122 (1982), reprinted in United Nations, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, UN Sales No. E.83.V.5 (1983) (hereafter 1982 LOS Convention).

[14] Ibid., Articles 121 and 46–54.

[15] Article 121 provides in relevant part that ". . . the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory." Ibid., Article 121 (2).

obtains recognized sovereign independence as an archipelagic state, it has the right to draw a straight baseline between the outermost islands and will acquire exclusive rights to explore and exploit living and non-living resources within the area enclosed by that baseline.[16] Otherwise, the legal rights to exploit resources offshore non-state archipelagoes (such as the Spratlys) will flow from the rights to exploit continental shelves offshore groups of islands.[17]

Were all claimants to declare EEZs or continental shelf delimitations seaward from points fixed by islands over which they now assert sovereignty, nearly the entire ocean and seabed in the South China Sea would be subjected to various degrees of national jurisdiction. An ocean region legally comprised of high seas and international seabed would be rendered into a semi-enclosed sea.[18] In fact, this situation has already occurred in large part throughout the region. Motivated by security concerns and economic interests, littoral states began in the late 1960s to make overlapping sovereignty claims to South China Sea islands, a process that effectively has led to the *de facto* military partition of the Spratly Islands archipelago.

## NATURE AND STATUS OF SOUTH CHINA SEA CLAIMS

Though long ignored internationally, claims to sovereignty over territory in the South China Sea are based on acts of discovery, occupation, and, more recently, on certain inferred rights over continental shelf delimitation. Legal facets of the claims became more salient for governments when the prospects for petroleum exploration became real during the 1970s and the 1982 LOS Convention emerged as the standard for demarcating offshore jurisdictional limits for resource exploitation.

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[16] Ibid., Articles 46–54.

[17] Ibid., Articles 77 and 81.

[18] See Valencia, Van Dyke and Ludwig, *Sharing Resources of the South China Sea*, 254 (Plate 1). For background assessments, see Choon-Ho Park, "The South China Sea Disputes: Who Owns the Islands and the Natural Resources?" *Ocean Development and International Law* 37 (1973): 1; and Geraldo M.C. Valero, "Spratly archipelago dispute: Is the question of sovereignty still relevant?" *Marine Policy* 18 (1994): 316.

China's assertions of sovereignty in the South China Sea rest on historical claims of discovery and occupation. The Chinese case is well documented, going back to references made in Chou Ch'u-fei's *Ling-Wai- tai-ta* (Information on What Lies Beyond the Passes) during the Sung dynasty (12th century)[19] and in the records of Chinese navigators during the Qing dynasty (18th century).[20] Notable problems of authenticity and accuracy exist, however, in describing coastal points as implied references for the Spratly Islands. These problems are compounded by the fundamental question of whether proof of historical title today carries sufficient legal weight to validate acquisition of territory. Modern international law clearly recognizes that mere discovery of some territory is not sufficient to vest in the discoverer valid title of ownership to territory. Rather, discovery only creates inchoate title, which must be perfected by subsequent continuous and effective acts of occupation, generally construed to mean permanent settlement.[21] Evidence of such permanent settlement is not compelling in the case of China's claim to the Spratlys.[22]

In 1992 China passed a special territorial sea and contiguous zone act to legalize its claims to the Spratlys. Article 2 of this legislation specifically identifies both the Paracels and Spratly archipelagoes as Chinese territory.[23] To uphold this claim to title, since 1988 China has

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[19] Chou Ch'u-fei, *Ling-Wai- tai-ta* (Information on What Lies Beyond the Passes, 1178), cited in Samuels, *Contest for the South China Sea*, 15–16; and Shao Hsun-Cheng, "Chinese Islands in the South China Sea," *People's China* 13 (1956): 26.

[20] See Samuels, *Contest for the South China Sea*, Appendix C; Chi-Kin Lo, *China's Policy Toward Territorial Disputes*, 30. Also see generally Z. Han, J. Lin, and F. Wu, eds., *Collection of Historical Materials on China's Islands in the South China Sea* (Beijing: Oriental Press, 1988) and Jianming Shen, "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands," unpublished paper prepared for 21st Annual Seminar of the Center for Oceans Law and Policy, New York, N.Y., February 7–8, 1997.

[21] *Legal Status of Eastern Greenland Case (Denmark v Norway), Permanent Court of International Justice*, Series A/B, No. 53 (1933), 3 Hudson, *World Court Reports*, 148. For discussion, see Gerhard von Glahn, *Law Among Nations*, 7th ed. (Boston: Allyn and Bacon, 1996), 296–98.

[22] See generally H Harry L Roque, Jr, "China's Claim to the Spratlys Islands Under International Law," *Journal of Energy & Natural Resources Law* 15 (1997): 189–211; Michael Bennett, "The People's Republic of China and the Use of International Law in the Spratly Islands Dispute," *Stanford Journal of International Law* 28 (1992): 425–450.

[23] The Law of the People's Republic of China on the Territorial Sea and Contiguous Zone became effective on 25 February 1992. See *People's Daily* Beijing, 26 February 1992, 4, reprinted in United Nations, *Law of the Sea Bulletin* No. 21 (August 1992), 24–27. For discussion of this law's legal ramifications, see Liyu Wang and Peter H. Pearse, "The New Legal Regime for China's Territorial Sea," *Ocean Development and International Law* 25 (1994): 431–42; and Nien-Tsu Alfred Hu, "The Two Chinese Territorial Sea Laws: Their

deployed some 260 marines in garrisons on seven of the Spratly islets.[24]

Claims by Taiwan today mirror those of the PRC and evidence suggests that both governments have made efforts to coordinate positions on Chinese claims in international discussions of the Spratly issue. The legal bases for Taiwan's claims are its longstanding historic ties to the islands.[25] Consequently, Taiwan's claims suffer from deficiencies like those of the PRC, namely, that discovery of, and intermittent contact with, scattered island formations are insufficient cause to establish legal title to sovereignty.

Taiwan was the first government to establish a physical presence on one of the Spratlys following the Japanese departure after World War II. Taiwan announced its claim to the atoll in 1947 and has occupied the largest island of the Spratlys, Itu Aba, constantly since 1956. Interestingly enough, this unchallenged exercise of control over Itu Aba for more than four decades may qualify as a display of continuous and peaceful sovereignty, a condition necessary for supporting a legal claim to the island. From the mid-1950s through the late 1980s, Taiwan maintained a force of some 500 soldiers on Itu Aba, although by 1999 the number of troops had been reduced to about 110.[26]

The legal grounds for Vietnam's claims to South China Sea islands flow from historic activities during the Nguyen dynasty (17th–19th centuries). Maps and other supporting historical evidence for Vietnam's claims were compiled and set out by the government in two white papers, *Vietnam's Sovereignty Over the Hoang Sa and Trung Sa Archipelagoes*, issued in 1979 and 1982, respectively. Vietnam's evidence for asserting claims to title is diluted by the failure to

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Implications and Comparisons," *Ocean and Coastal Management* 20 (1995): 89–96.

[24] John C. Baker, et al., "Cooperative Monitoring Using Commercial Observation Satellites: Case Study of a Transparency Regime for the South China Sea Disputes" (George Washington University Space Policy Institute: Washington, D.C., February 1999 (hereafter cited as Baker et al, "Cooperative Monitoring for South China Sea Disputes)." See also Cheng-yi Lin, "Taiwan's South China Sea Policy," *Asian Survey* 37 (1997): 324 (Table 1); and compare the reports in *Central Daily News* Taiwan, 2 December 1992, 4. While Lin suggests that there are nine occupied features, this discrepancy may be attributed to confusion from press reports about the discovery in 1992 of Chinese markers on two reefs on which no structures had been erected. Electronic mail communication from Bradford L. Thomas to John C. Baker, 5 January 1999 (on file with the author).

[25] See Peter Kien-hong Yu, "Reasons for Not Negotiating on the Spratlys: A Chinese View from Taiwan," in Hill et al., *Fishing in Troubled Waters*, 139–149.

[26] Baker et al., "Cooperative Monitoring for South China Sea Disputes;" and Lin, "Taiwan's South China Sea Policy," 324. Cf. *Central Daily News* Taiwan, 2 December 1992, 4.

specifically identify and distinguish between the Spratly and Paracel archipelagoes. Both island groups are treated generically, without one being geographically distinguished from the other, which has compounded the difficulty of assessing the lawfulness and propriety of claims. Considerable doubts also arise over the authenticity and accuracy of the historical record itself.[27] Such doubts explain why international law usually regards mere historical claims, without evident occupation and permanent settlement, as only arguably binding and susceptible to legal challenge for assuring valid claim to title over territory in the oceans.[28]

Vietnam also bases its claims to sovereignty over the Spratlys by right of cession from a French claim to the islands first made in the 1933. The French, however, made no subsequent efforts to perfect title to the Spratlys by occupation. Nor did the French act by returning after Japan's departure following World War II, or by acting after Japan formally relinquished all title and future claims to the islands at the San Francisco Conference of 1951.[29] Consequently, France possessed no lawful title to the Spratly group to which Vietnam could succeed.

In any event, Vietnam moved in 1975 to secure its claim to possession of the Spratlys when it occupied thirteen islands of the group. In September 1989 Vietnam occupied three more islets, and has since taken at least nine additional atolls. By 1999, Vietnam had stationed 600 troops on at least twenty-seven Spratly land formations.[30]

The Philippines justifies its claims to the Spratlys principally on "discovery" of certain

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[27] Valero, "Spratly archipelago dispute," 320–22.

[28] Douglas M. Johnston, *The History of Ocean-Boundary Making* (Kingston and Montreal: McGill-Queen's University Press, 1988), 5. See also Mark J. Valencia and Jon M. Van Dyke, "Vietnam's National Interests and the Law of the Sea," *Ocean Development and International Law* 25 (1994): 217–250.

[29] See Hungdah Chiu and Choon-Ho Park, "Legal Status of the Paracel and Spratly Islands," *Ocean Development and International Law* 3 (1975): 18; and Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea," *Ocean Development and International Law* 25 (1994): 65.

[30] Baker et al, "Cooperative Monitoring for South China Sea Disputes". See also Lin, "Taiwan's South China Sea Policy," *Christian Science Monitor* (July 15, 1991), 324, cited in Valero, "Spratly archipelago dispute," 316, n. 5; and *Central Daily News* Taiwan, 2 December 1992, 4. According to estimates made by Daniel Dzurek and Bradford Thomas, both highly respected experts on the Spratlys, the 27 total includes two atolls Vietnam is believed to have occupied in 1998. Electronic mail communication from Bradford L. Thomas to John C. Baker, 5 January 1999 (on file with the author).

islands by Thomas Cloma in 1947.[31] In 1956 Cloma proclaimed the creation of a new island state, "Kalayaan" (Freedomland), with himself as chairman of its Supreme Council. While no government ever recognized the lawfulness of this "state," Cloma persisted with his claim until 1974, when "ownership" was officially transferred under a "Deed of Assignment and Waiver of Rights" to the Philippine government. The first official claim by the Philippine government came in 1971, mainly in response to a Philippine fishing vessel being fired upon by Taiwanese forces stationed on Itu Aba Island. The Philippine government reacted by protesting the incident and then asserted legal title by annexing islands in the Spratly group based on Cloma's claim.[32] In 1978 the Marcos government formally annexed the archipelago to the Philippines and placed it under the administration of Palawan province.[33] Interestingly enough, the official Philippine position contends that the Kalayaan Islands group are separate and distinct from the Spratlys and Paracels. This Philippine claim is predicated on a geological assertion that the continental shelf of the so-called Kalayaan Island group is juxtaposed to the Palawan Province and extends some 300 miles westward, into the heart of the Philippines' EEZ.[34] To defend its claims, the Philippines currently has 595 marines stationed on eight islands. These bases are fortified with heavy artillery and are equipped with radar facilities, a weather station, and ammunition depots.[35]

More recently, Malaysia and Brunei have asserted claims to certain islands and reefs in the Spratlys, based principally on certain continental shelf provisions in the 1982 LOS Convention. These provisions describe in detail what legally constitutes a "continental shelf" for a state, and

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[31] Thomas Cloma, an enterprising Filipino businessman and owner of a fishing fleet and private maritime training institute, aspired to open a cannery and develop guano deposits in the Spratlys. It was principally for economic reasons, therefore, that he "discovered" and claimed the Kalayaan Islands and established several colonies on them by 1950. See Samuels, *Contest for the South China Sea*, 81–86.

[32] See Gil S. Fernandez, "The Philippines' South China Sea Island Claims," in Aileen San Pablo-Baviera, ed., *The South China Sea Disputes: Philippine Perspectives* (New Manila: Philippine–China Development Resource Center and Philippine Association for Chinese Studies, 1992), 19–24; and Wilfrido V. Villacorta, "The Philippine Territorial Claim in the South China Sea," in Hill et al., *Fishing in Troubled Waters*, 207–215.

[33] See Presidential Decree No. 1596, "Declaring Certain Areas Part of the Philippine Territory and Providing for Their Government and Administration, June 11, 1978," reprinted in San Pablo-Baviera, *South China Sea Disputes*, 55.

[34] See Fernandez, "The Philippines' South China Sea Island Claims," 20.

[35] Baker et al, "Cooperative Monitoring for South China Sea Disputes," Cf. Lin, "Taiwan's South China Sea Policy," 324; *Central Daily News* Taiwan, 2 December 1992, 4.

the sovereign rights a state may exercise for purposes of exploring and exploiting the resources of its continental shelf.[36]

Malaysia has claimed sovereignty over twelve islands in the Spratly group, but those claims appear ill-founded. Serious doubt remains about the legal propriety of Malaysia's assertions, which arises from Malaysia's basing its claims to certain islands on ocean law principles associated with prolongation of a continental shelf seaward, rather than the accepted legal means of validating claim to title over territory through permanent occupation.

The clear inference from Malaysia's claims is that a state possessing a continental shelf also possesses sovereign rights over land formations arising seaward from that shelf. That inference is misguided and flawed under contemporary international law. The 1982 LOS Convention neither stipulates nor invites such an interpretation. The Convention does set out a regime for an island, which is defined as a "naturally formed area of land, surrounded by water, which is above water at high tide."[37] The Convention also gives to a state with established sovereignty over an island the right to exploit living and non-living resources in the water column and on the seabed within that island's territorial sea, contiguous zone, and exclusive economic zone. The critical legal consideration for acquisition of sovereign title over an island formation, however, is not the geological affinity of a coastal state to island formations arising from continental shelves offshore. Rather, ownership derives from occupation, demonstrated by a continuous and effective display of sovereignty through permanent settlement. As generally construed, establishing a few military outposts may be considered vestiges of occupation. Even so, for that military presence to meet the test of "effective occupation" through permanent settlement will depend on the longevity of the presence, and whether settlers can be "permanently" attracted to inhabit the region. Such occupation has yet to be effected by Malaysia. Moreover, while Malaysia may use the continental shelf provisions in the 1982 Convention to support its claims to seabed resources, those provisions do not legally uphold assertions to sovereignty over land formations that are permanently above sea level.[38]

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[36] 1982 LOS Convention, Articles 76 and 77.

[37] Ibid., Article 121 (1).

[38] See generally R. Haller-Trout, "Limitations of International Law: The Case of Malaysia's Territorial Claims in the South China Sea," in Hill et al., *Fishing in Troubled Waters*, 216–236.

Malaysia is the most recent claimant to occupy part of the Spratlys militarily. In late 1977, Malay troops were landed on Swallow Reef. Since then, about seventy soldiers have been stationed on three of the twelve islets claimed by Malaysia.[39]

Brunei has only one claim to the Spratly group, that being to a naturally submerged formation known as Louisa Reef. Similar to Malaysia, the legal premise for substantiating Brunei's claim flows from continental shelf provisions in the 1982 LOS Convention. Unlike Malaysia's claims to island formations, however, Louisa Reef is a submarine feature and part of the seabed. Hence, it may be regarded legally as an extension of a continental shelf. The critical point here, of course, is Brunei's ability to demonstrate that Louisa Reef is indeed part of the extension of its continental shelf. Settlement here is neither necessary nor possible; the key criterion to be satisfied for ownership is whether the continental shelf can be substantiated as a natural prolongation seaward from the coastal territory of Brunei. Granting that, Brunei would enjoy the exclusive right to exploit resources of the reef. Brunei remains the only claimant without a military presence in the Spratly Islands. Even so, Louisa Reef is also claimed by Malaysia, which took possession of it in 1984.[40]

In sum, the Spratlys situation remains complicated by competing claims and the possibility of military clashes. Taiwan remains in control of Itu Aba Island; the PRC has occupied seven reefs and rocks since January 1988; Vietnam now occupies at least twenty-seven islands, reefs and cays. The Philippines controls at least eight principal islands and claims some fifty other islets, reefs, and shoals. Malaysia has troops on three atolls and asserts claims to nine other geological formations in the area. In addition, Brunei claims Louisa Reef. Consequently, the South China Sea has become a patchwork of conflicting national claims, most recently driven by geopolitical considerations over-development of potential hydrocarbon resources.[41]

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[39] Baker et al., "Cooperative Monitoring for South China Sea Disputes" Cf. Lin, "Taiwan's South China Sea Policy," 324; *Central Daily News* Taiwan, 2 December 1992, 4.

[40] See generally Khadijah Muhamed and Tunku Shamsul Bahrin, "Scramble for the South China Sea: The Malaysian Perspective," in Hill et al., *Fishing in Troubled Waters*, 237–250.

[41] See Bob Catley and Makmur Keliat, *Spratlys: The Disputes in the South China Sea* (Aldershot: Ashgate, 1997), 44–65. For the evolution of these claims, see Tao Cheng, "The Dispute Over the South China Sea Islands," *Texas International Law Journal* 10 (1975): 265; Hungdah Chiu and Choon-ho Park, "Legal Status of the Paracel and Spratly Islands," *Ocean Development and International Law* 3 (1975): 1.

***A military presence in the Spratlys, such as an island-based airstrip, could effectively be used to stop all shipping in the South China Sea if armed conflict were to break out in mainland Asia.***

Once competing states unilaterally assert territorial and maritime competence in the South China Sea, articulate enforceable limits of national jurisdiction, and then proceed to grant to multinational companies concessions or licensing projects within the areas claimed, conditions become ripe for conflict over boundaries for allocating development opportunities in resource zones. National anxieties also become aggravated, and regional tensions can escalate to the point that military options become acceptable to some governments. This pattern emerged during the past decade for states with competing claims over the Spratly archipelago.

The intractable and contentious nature of jurisdictional disputes over the Spratlys has prompted claimant states to take efforts to enforce their claims by stationing a permanent military presence in the archipelago. By 1999, nearly 1650 troops of five claimant governments had occupied at least forty-six of fifty-one land formations in the Spratly archipelago.[42] In the process, the two principal antagonists, China and Vietnam, have each increased naval patrols and established new military outposts on previously unoccupied islets in the region (See Table 1).[43]

[42] Many of these are not military bases as such, but rather raised man-made platforms constructed on and secured to barren projections of natural coral outcroppings. Such structures are highly vulnerable to sea and weather conditions, and must be continually resupplied since there is a dearth of fresh water available. See Valencia, Van Dyke, and Ludwig, *Sharing Resources of the South China Sea*, 258 (Plate 5) and *Asian Defence Journal* 15 (1992): 22, for photographs of Chinese Navy outpost structures in the Spratlys.

[43] Figures for the troops levels deployed by Spratly claimants are taken from Lin, "Taiwan's South China Sea Policy," 324. Compare these with Zhiguo Gao, "The South China Sea: From Conflict to Cooperation?," *Ocean Development and International Law* 25 (1994): 346–48.

**TABLE 1**

National Occupation of the Spratly Islands, 1999

| Claimant | Features | | Facilities | Number of Troops |
|---|---|---|---|---|
| | Claimed | Occupied | | |
| China | all | 7 | helicopter pads | 260 |
| Philippines | 60 | 8 | 1300 m runway | 595 |
| Vietnam | all | 27 | 600 m runway | 600 |
| Malaysia | 12 | 3 | 600 m runway | 70 |
| Taiwan | all | 1 | helicopter pad | 112 |
| Brunei | 0 | 0 | none | 0 |
| TOTAL | 46 islands garrisoned | | | 1637 |

Sources: Baker, et al., "Cooperative Monitoring for South China Sea Disputes;" Lin, "Taiwan's South China Sea Policy," *Asian Survey* 37:4 (1997): 324; 1996 National Defense Report, Republic of China (Taipai: Li Ming Cultural Enterprise Company, 1996), 26.

## SPECIAL GEOSTRATEGIC INTERESTS IN THE SPRATLYS

### Natural Resources

All of the claimant states assert special geostrategic interests in the South China Sea. Fishing remains an important economic activity for all littoral states, and these waters hold abundant supplies of numerous fish species. A recent study indicated that the Spratlys area in the South China Sea, covering some 390,000 square kilometers, is one of the world's richest fishing grounds, yielding up 7.5 tons of fish per square kilometer.[44] Moreover, all governments want to maintain open commercial sea lanes throughout this region to sustain their international trade. The

[44] A recent briefing paper by the Philippine Office of Strategic and Special Studies of the Armed Forces of the Philippines posits that there are 314 fish species in the Spratlys region, of which sixty-six are commercially significant stocks. At least eight percent of the world's fish catch comes from the region, since it straddles the path of yellowfin tuna migration. See "Disputed Spratlys' Rich Oil, Gas, Mineral Fish Potential," *Asia Pulse*, 13 November 1998.

Spratlys straddle the South China Sea, through which twenty-five percent of the world's cargo shipping passes enroute to Japan, Korea, China, Taiwan, Australia, New Zealand, and the Middle East. More than 200 ships traverse the South China Sea daily, and during the 1980s, some 2,700 vessels passed though the Spratlys region. To highlight the point, Japan receives seventy-five percent of its energy requirements from the Middle East though this sealane.[45] Similarly, all the claimants aspire to share in the exploitation of hydrocarbon resources if and when it occurs in the South China Sea. A 1998 report estimated that ten billion tons of oil and one trillion cubic meters (thirty-five trillion cubic feet) of natural gas are in the Spratlys, and that China has estimated hydrocarbon resources in the area of 17.1 billion barrels of oil, higher than that of Kuwait.[46]

It is China, however, that has become the key player in maritime geopolitics affecting the Spratly Islands dispute.[47] China is the largest military actor in the region, as it possesses the largest navy, air force, and land army in South Asia. Traditionally, China's national interests in the South China Sea have been geostrategic and security-related, *viz*., to prevent becoming encircled by the expanding influence of the Soviet Union (now Russia) and to protect national security from a sea-based attack. The Spratlys archipelago is seen as a strategic asset. Lying between Vietnam to the west and the Philippines to the east, the Spratlys offer a potential staging location for blocking ships traversing the South China Sea. Aircraft and helicopters based in the Spratlys could bring within range the Malacca and Sunda Straits, both vital choke-points through which shipping in the South China Sea must pass to enter the Indian Ocean. A military presence in the Spratlys, such as an island-based airstrip, could effectively be used to stop all shipping in the South China Sea if armed conflict were to break out in mainland Asia.

The geopolitical stakes for all claimant states in the Spratly Islands have been magnified by the belief that potentially significant deposits of oil, gas, and minerals exist on and under the surrounding ocean floor.[48] The possibility of extensive hydrocarbon finds in the South China Sea

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[45] Ibid., 2.

[46] Ibid., 3. While China has estimated that the South China Sea's hydrocarbon resources are so vast that the region ranks as the world's fourth largest concentrated deposit, these estimates are mostly likely exaggerated. See the discussion *infra* in the text, at notes 55–57.

[47] See Edmond D. Smith, Jr., "China's Aspirations in the Spratly Islands," *Contemporary Southeast Asia* 16 (1994): 274–294; Catley & Keliat, *Spratlys: Dispute in the South China Sea*, 65–81.

[48] At least twenty-nine oil fields and four gas field have been developed in the South China Sea over the past four decades. See "Territorial Dispute Simmers in Areas of South China Sea,"*Oil & Gas Journal* (13 July 1992): 20–21. See also Bruce Blanche and Jean Blanche, "Oil and Regional Stability in the South China Sea," *Jane's Intelligence Review* (November 1995), 511–14.

has been geologically presumed since internationally coordinated undersea seismic surveys were conducted in the late 1960s.[49] In the past two decades, China has increasingly turned toward domestic economic reform and development of trade and commerce with the outside world. Promoting an offshore petroleum industry obviously has become a major factor in China's national economic reform policy.[50] Offshore output peaked in 1997 at 12 million tons of oil and four billion cubic meters of natural gas,[51] though none of this came from exploratory efforts in the South China Sea.

China's strategy of moving offshore to develop potential oil fields has strained its relations with other littoral states in South East Asia.[52] The PRC's desire to acquire vast areas of oil-rich seabed undoubtedly has been a prominent catalyst in motivating other claimant states to carve out and assert national claims throughout the Spratlys. This rivalry has compounded regional tensions over the past decade.[53]

Expectations of developing large offshore oil deposits in the region have encouraged aggressive oil exploration efforts by China and Vietnam, sometimes in overlapping areas, but usually supported by naval patrols. For example, in 1992 the Crestone Energy Company of the United States signed an offshore contract with the China National Offshore Company that covered an area of 25,155 square kilometers in the Vanguard Bank area of the South China Sea, an area also claimed by Vietnam as its continental shelf.[54] In June 1994, when Vietnam moved an oil rig

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[49] Corazon Siddayao, *The Off-Shore Petroleum Resources of South-East Asia* (New York: Oxford University Press, 1978), 22–31.

[50] Since promulgation of a law in 1982 permitting foreign participation in offshore petroleum exploration, the China National Offshore Oil Corporation has held at least four rounds contract bidding, singed 100 contract with fifty-nine companies from sixteen countries, covering 350,000 square kilometers. "China's upstream programs advance onshore and offshore," *Oil & Gas Journal* (25 September 1995): 31.

[51] Ibid.

[52] See Adam Swartz and Matt Forney, "Oil on Troubled Waters: Vietnam's Conoco Deal Draws Fire from China," *Far Eastern Economic Review* 159 (25 April 1996): 65; "Prospect of Oil Makes Spratlys Hot Property: Storm Brews Around the Islands," *South China Morning Post* (26 July 1994), 7; "Sino/Viet Nam territorial dispute flares up again," *Oil & Gas Journal* (14 June 1993), 17; Barry Wain, "Tension Mounts as Vietnam Vies With Beijing Over Oil Exploration," *Wall Street Journal* (25 July 1994), A10.

[53] See generally Valencia, *Atlas for Marine Policy in South-East Asian States*, 83–85; Kathy Shirley, "Oil Potential Overshadows Risks," *AAPG Explorer* (December 1992), 8–9.

[54] N.D. Kristof, "China Signs U.S. Deal for Disputed Waters," *New York Times* (18 June 1992), A8; M. Vatikiotis, "China Stirs the Pot," *Far Eastern Economic Review* 155 (9 July 1992), 14–15.

into that area, China threatened to use naval force to protect Crestone's concession.[55] A serious confrontation was avoided when both governments, under pressure from ASEAN governments, pledged mutual restraint and not to escalate tensions. Even so, such threatening rhetoric has prompted concerns about contracted oil exploration activities triggering open hostilities between China and Vietnam.

More recent data have suggested, however, that the extent of hydrocarbon deposits in the South China Sea may be exaggerated. Surveys since 1995 indicate that potential oil fields around the Spratly archipelago are not as large as initially believed, and that the geological structure of these deposits will require extensive drilling operations. When linked with the great distances from China and other littoral states, the lack of sufficient geological data, deep-sea drilling difficulties, and considerable economic risks make exploitation operations in the Spratlys region appear more expensive, and thus less commercially attractive.[56] Consequently, prospecting for hydrocarbons around the Spratlys is not attracting much serious interest from major oil companies in 1999.[57]

## Maritime Strategy

The maritime strategy of the PRC navy in the South China Sea has traditionally been guided by three principal missions: (1) to guard against Russian invasion; (2) to counter nuclear attacks from sea-based sources; and (3) to protect sea lines of communication and Chinese claims to natural resources contiguous to archipelagoes in the Asia–Pacific region. As the Cold War has passed into history during the 1990s, the priority of these missions has shifted, with increasing importance now being placed on ensuring access to sea lanes and natural resources in the region.

To maintain control over the Spratlys in the South China Sea, China's navy must optimize its available assets to retain air and sea superiority out to 1,300 kilometers. In the long term, if China is to have military influence over Malaysia, Singapore, and the Philippines, the operating combat radius and sea lines of communication will have to be extended out to 2,000 kilometers.

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[55] Philip Shenon, "China Sends Warships to Vietnam Oil Site," *New York Times* (21 July 1994), A10.

[56] Andrew J. Nathan and Robert S. Ross, *The Great Wall and the Empty Fortress: China's Search for Security* (New York: W.W. Norton, 1997), 116. See also "Spratlys: Only Modest Oil and Gas Potential," *Asian Oil and Gas* (Hong Kong, September 1992): 12.

[57] Valencia, Van Dyke and Ludwig, *Sharing Resources of the South China Sea*, 9–10.

China has no aircraft carriers and only limited in-flight refueling capabilities.[58] Acquisition of an aircraft carrier (estimated to occur by the year 2010) and improvement of in-flight refueling capacity, however, could make securing this combat radius possible.[59] The PRC's plans for force projection will probably continue to concentrate on Vietnam as the most likely aggressor, while its perception of other ASEAN members will be viewed as friendly and unprovocative.[60]

The main rival to China in the region is Vietnam, although its armed forces are in "a parlous state" and its military position in the Spratlys is described as "a strategy inspired by desperation."[61] Consequently, its claims in the South China Sea provide China with the opportunity to extend its influence as a maritime power in Asia. The Chinese are developing a blue-water navy and aspire to other ocean projection capabilities, especially longer-range aircraft and submarine strength.[62] The Chinese desire to preserve economic and political interests through a strategic doctrine of active defense offshore makes it necessary for the Chinese navy to be prepared for maritime disputes. Sovereign rights, fishing rights, and the perceived potential of offshore hydrocarbon resources have driven the PRC's claims to islands in the South China Sea.

There is little doubt that Chinese claims to the Spratlys, which at their nearest point lie some 1,110 kilometers (600 nautical miles) south of the Chinese mainland, reflect strategic island grabbing. Such claims ostensibly support diplomacy that will reinforce China's naval presence

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[58] The recent purchase of seventy-two Russian-made Su-27 fighters bolsters China's aerial strength, although most of the PRC's air force is still of 1950s/1960s vintage and cannot reach the South China Sea. See William J. Dobson and M. Taylor Travel, "Red Herring Hegemon: China in the South China Sea," *Current History* 96 (September 1997): 261–62.

[59] See John Caldwell, *China's Conventional Naval Capabilities* (Washington, D.C.: Center for Strategic and International Studies, 1994); and Christopher D. Young, *People's War at Sea: Chinese Naval Power in the Twenty-first Century* (Alexandria, Va: Center for Naval Analyses, 1996).

[60] Ngok Lee "Chinese Maritime Power and Strategy in the South China Sea," in Hill et al., *Fishing in Troubled Waters*, 157.

[61] Vietnam possesses only seven frigates and forty patrol boats, many of which are non-operational because of the lack of spare parts. Its air force, "the major deterrent against the Chinese navy," is comprised of 175 MiG-21 Fishbeds, 36 MiG-23 Floggers and 65 Su-20/-22 ground attack fighter aircraft. This paucity of air and naval support renders Vietnamese outposts in the Spratlys "highly vulnerable to blockade, assault and piecemeal capture." Clive Schofield, "An Arms Race in the South China Sea?," International Boundaries Research Unit, *Boundary and Security Bulletin* 2 (July 1994): 43–44.

[62] The People's Liberation Army (Navy) reportedly contains thirty-seven frigates, 450 fast attack craft, sixty-seven minesweepers, 160 landing ships, and eighty-one patrol craft, with at least 800 other vessels in reserve. Joseph R. Morgan, "Chinese Navies," in Elisabeth Mann Borgese, Norton Ginsburg and Joseph R. Morgan eds., *Ocean Yearbook* 12 (Chicago: Chicago University Press, 1996), 279 (Table 1).

in Southeast Asian waters. Chinese warships thus have become a projection of Beijing's politics into the South China Sea.[63] Moreover, China's intentions clearly are to acquire both aircraft carrier and long-range, in-flight refueling capabilities to facilitate projection of those politics throughout the region.

## Prospects for Military Conflict

Developments affecting the Spratlys over the past decade have suggested that a regional arms buildup might exacerbate tensions in the South China Sea.[64] Not surprisingly, interstate regional relations became strained in the process. Several incidents involving bilateral intimidation contributed to an uneasy, belligerent mood among various claimants during the late 1980s and 1990s. Indeed, the Spratlys surfaced as a primary flash point for conflict, particularly where China confronted Vietnam.

The first such clash came on 8 February 1987, when Chinese and Vietnamese warships opened fire on each other in the area. On 14 March, a more serious confrontation occurred off Union Reef, as each navy lost a vessel and 120 Vietnamese sailors drowned.[65]

Even more serious was the violent clash between China and Vietnam in March 1988.[66] After a small contingent of Vietnamese opened fire on Chinese military and construction personnel

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[63] See the discussion in notes 69–78 infra. Also see generally Jun Zhan, "China Goes to the Blue Waters: The Navy, Seapower Mentality and the South China Sea," *Journal of Strategic Studies* 17 (1994): 180–208; T.M. Cheung, *Growth of Naval Power*, Pacific Papers No. 1 (Singapore: Institute of Southeast Asian Studies, 1990), 270–87; and Morgan, "Chinese Navies," 270–87. As the dominant naval power in the South China Sea, the PRC still views "local war" as the combat level most likely in the region. That is, hostilities would remain regional, and would not spill over into multilateral, global warfare. Should the need arise to enforce claims militarily in the Spratlys, that operation would be assigned to naval task forces comprised of surface combatants and patrol submarines, closely supported by land-based aircraft. The PRC today appears to have the capability of launching maritime strikes in sea-air joint operations against Vietnamese held islands and atolls, although the logistics of long-term re-supply would be formidable.

[64] See Schofield, "Chinese Navies," 39–48; and Clive Schofield and William G. Stormont, "An Arms Race in the South China Sea?," in Elisabeth Mann Borgese, Norton Ginsburg and Joseph R. Morgan eds., *Ocean Yearbook* 12 (Chicago: Chicago University Press, 1996), 286–305.

[65] Peter Forrest and Eric Morris, "Maritime Constabulary and Exclusive Economic Zones in the South China Sea: Some Strategic Considerations," in Hill et al., *Fishing in Troubled Waters*, 302–319, 311.

[66] Chang Pao-Min, "A New Scramble for the South Sea Islands," *Contemporary Southeast Asia* 12 (June 1990): 20–39.

working on Fiery Cross Reef (Chigua atoll), the Chinese dispatched warships to the area, further hostilities erupted, and three Vietnamese vessels were sunk, with the loss of seventy-four lives.[67] China emerged as the clear victor from this episode. Not only did the Fiery Cross Reef confrontation reaffirm the PRC's determination to assert sovereignty over the Spratlys, it also demonstrated the superiority of Chinese naval power over that of Vietnam.[68] The incident touched off a naval buildup between China and Vietnam in the islands, as well as a series of competing occupations of more islets by troops from both states.[69]

The growing naval presence and construction by China and Vietnam of military installations on newly occupied islets unsettled other claimants as well. In April 1988, forty-nine Filipino fishermen were arrested by Malaysian authorities in the Permatang area of the Spratlys on charges of poaching in Malaysian continental shelf waters.[70]

Events during the 1980s made armed conflict in the South China Sea seem more likely. Difficulties of demarcating ocean boundaries, uncertain bilateral negotiations, and obstacles impeding multilateral discussions all suggested that a negotiated settlement for the Spratly dispute was at most a distant aspiration, not a near-term expectation. Occupying vast areas of the archipelago became critical for concerned governments to assert anything approaching legitimate claims of sovereignty. It is precisely for these reasons that China, Vietnam, Malaysia, and the Philippines were tempted during the 1980s to consolidate territorial gains in the Spratly archipelago, and they even sought to expand their respective areas of control throughout the South China Sea. Such attempts exacerbated tensions and generated armed clashes between China and Vietnam.

Events during the 1990s generated greater concern over Chinese intentions in the South China Sea. In 1992 China began installing sovereignty markers on various shoals and islets in Spratlys, but a strong "Declaration on the South China Sea" by ASEAN curbed Beijing's

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[67] S*traits Times* (26 March 1988), 3.

[68] Justus M. van der Kroef, "Territorial Claims in the South China Sea: A Strategic Irrelevance?," in Hill et al., *Fishing in Troubled Waters*, 21–35; and Shee Poon Kim, "The March 1988 Skirmish over the Spratly Islands and Its Implications for Sino–Vietnamese Relations," in *Spratly Times*, 177–191.

[69] Schofield and Stormont, "An Arms Race in the South China Sea?," 303.

[70] Lee Yong Leng, "The Malaysian-Philippine Maritime Dispute," *Contemporary Southeast Asia* 11 (1989): 17.

assertiveness and prompted the PRC to temper its South China Sea activities in 1993 and 1994.

China resumed its expansionist policies in February 1995 when troops from the PRC occupied Mischief Reef, a shoal in the Spratlys located well inside the 200-mile EEZ claimed by the Philippines.[71] They constructed three fisherman's structures on the half-submerged atoll. The Mischief Reef incident so alarmed the ASEAN states that they took a united stand critical of China's occupation of territory within the Philippines' EEZ. In reaction to this unified protest by ASEAN, China and Philippines agreed in 1995 to a code of conduct to avoid new provocations and potentially destablizing actions. That code aimed to reduce chances of military conflict over Spratlys by fostering the reduction of forces in the region and lessening of chances of accidental military confrontation over the Spratlys.[72] China also pledged to abide by the 1992 ASEAN statement, which had called for mutual restraint in South China Sea activities. It was the 1995 crisis over Mischief Reef, however, that provoked real regional concern and suspicion over China's long-term intentions and geostrategic objectives in the Spratly and revived fears that the South China Sea could become a tinderbox in the region.[73]

In October 1998 construction was resumed on Mischief Reef, as the three octagonal structures were expanded and solidified. China's decision to go forward with this maritime construction project reveals how the balance of power has tipped in its favor since the onset of the East Asian financial crisis in 1998, which has sapped the strength, attention, and unity of ASEAN members.[74] The intrusive return to Mischief Reef during 1998–99 revived regional anxieties about the threat posed by China to the region. By sending warships unannounced to the region and undertaking construction operations on Mischief Reef, the PRC openly breached the code of conduct signed in 1995 with the Philippines. Building hardened structures, complete with military communication facilities and guarded by Chinese naval vessels and antiaircraft artillery, is hardly

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[71] Daniel J. Dzurek, "China Occupies Mischief Reef in Latest Spratly Gambit," *Boundary and Security Bulletin* 3 (April 1995): 65–71; Cameron W. Barr, "Uneasy Silence Hangs Over China's Grab," *Christian Scientist Monitor* (17 March 1995).

[72] "Manila, Beijing agree on Spratlys Code of Conduct," *Reuters*, 10 August 1995.

[73] The Philippines reacted by diplomatically protesting China's "invasion of their EEZ" and sending a symbolic force of ten aircraft and three patrol boats to the island of Palawan. Abby Tam, "Manila Tries Diplomacy In Confronting China," *Christian Science Monitor* (22 February 1995); Scott Snyder, "The South China Sea Dispute: Prosects for Preventive Diplomacy: A Special Report of the United States Institute of Peace," (Washington, D.C.: USIP, August 1996), 15.

[74] Rigoberto Tiglao and Andrew Sherry, "Politics & Policy," *Far Eastern Economic Review*, (24 December 1998): 18–20.

conducive to promoting peaceful relations between states who claim the same dot of land in the ocean. Such developments strain prospects for instituting CBMs and cloud prospects for maintaining stable regional security. Similarly, serious questions must be asked about the sincerity of Chinese diplomacy given Mischief Reef II, especially in light of these events and the commitment made by Jiang Zemin to employ peaceful means to resolve the countries' dispute over the Spratlys at the 6th Leaders Summit of the Asia–Pacific Economic Cooperation (APEC) forum in Kuala Lumpur in November 1998.

Disturbing, too, is that ASEAN now appears vulnerable to regional pressures. Tensions from the region's financial crisis have strained economic relations among members and left these states with few funds to spend on an arms race. Although four of six claimant states in the Spratlys are ASEAN members (viz., the Philippines, Malaysia, Vietnam, and Brunei), none is eager to jeopardize bilateral relations with China given the latter's economic growth and potential marketplace. The point here is plain: ASEAN's failure to take a stand against the recent Chinese intrusions into the South China Sea warrants serious concern. The message sent to China in the wake of non-action by ASEAN is that further expansion will not be seriously protested, much less challenged.[75] That the PRC has warmed its relationship with the United States may also contribute to making its policies more audacious in the South China Sea.

The Philippine government views China's strategy on Mischief Reef as one of "talk and take." As a result, the 1998–99 Chinese incursion into the Spratlys generated diplomatic repercussions for the Philippines. For one, in early 1999 Manila moved to strengthen ties and improve its security alliance with the United States while pursuing talks with the Chinese.[76] Secondly, to this end, the Estrada government now advocates ratification of the stalled visiting Forces Agreement with the United States, which would permit resumption of joint military exercises between the two allies.[77] The ulterior motive here, of course, is to make the United States a backstop ally who would dissuade further Chinese encroachments into portions of the South China Sea claimed by the Philippines. A third repercussion is suggested by President

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[75] Ralph Cossa, "Inside View: Mischief Reef Flashpoint," *Defense News* (11 January 1999), 13. For treatment of China's historical attitude toward ASEAN, see Catley & Keliat, *Spratlys: Dispute in the South China Sea*, 92–110.

[76] "Philippines Warns of Increased Chinese Military Acts on Disputed Islands," *AFP ASIA*, 19 January 1999.

[77] "Estrada: VFA Needed to Stop Sino Buildup in Spratlys," *Philippine Daily Inquirer Interactive NEWS*, 1 February 1999, http://www.inquirer.net/issues/feb99/feb01/news/news_10.htm.

Estrada's announcement in February 1999, that the new constitutional convention will undertake to redefine the borders of the country to ensure that claimed portions of the Spratly Islands will be included within the Philippines' official national territory on the new map.[78] Finally, suggestions have been made by Filipino diplomats to bring the Mischief Reef dispute between China and Philippines to the International Tribunal on the Law of the Sea for adjudication.[79]

In February 1999, the Mischief Reef II confrontation between China and the Philippines eased. China agreed to conduct bilateral talks with Philippines over the structures built on Mischief Reef. Moreover, China and the Philippines reportedly reached agreement to shelve the dispute and focus on joint use of the area, ostensibly including common exploration and development opportunities.[80] The appointment of a panel of legal experts from China and the Philippines to discuss fisheries, search and rescue operations, navigation, environmental protection, and disaster relief points to an encouraging trend.

For the time being, then, there is good reason to believe that large-scale military conflict over the Spratlys is unlikely. For one, these islands are scattered over an immense area, nearly 200,000 square kilometers (about the size of Minnesota). For another, the Spratlys are more than 300 kilometers (185 miles) from the Philippine and Vietnamese coasts, and more than 1000 kilometers (600 miles) from mainland China. This distance presents serious difficulties for any claimant government to patrol more than a small area of the Spratly archipelago at any one time, especially given their relatively weak capabilities for projecting armed forces. Moreover, no claimant state, including China, possesses sufficient logistical support capabilities to ensure effective occupation and maintain extended control over these islands, which underscores the importance of relative naval size. Even so, these conditions presumably should permit greater opportunities for confidence-building measures to be considered as alternative strategies.

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[78] Martin P. Marfil, "Charter Change: Next RP map to include Spratly islands–Estrada," *Philippine Daily Inquirer Interactive, NEWS*, 27 January 1999.

[79] Richard B. Langit, "Erap wants US Role in Spratlys Row," *Manila Times Internet Edition*, 15 January 1999. In contrast, Beijing rejects the proposal of international dispute settlement and does not want US involvement. Discussions or negotiations should only be conducted among claimants, and should not include outside states or international organizations. China opposes internationalizing the Spratlys issue, calling instead for bilateral solutions to bilateral problems.

[80] See Martin P. Marfil, "Charter Change: Next RP map."

Despite the PRC's rumblings in the South China Sea, the Cold War's passing has brought a general sense of rapprochement to East Asia. This new climate should render political costs of a large-scale military conflict in the Spratlys unacceptable to claimant governments. Once the current financial disturbances abate, the economic expansion of ASEAN countries will resume, and the need for maintaining open shipping lanes through the South China Sea will become all the more commercially vital. These prospects should dissuade blatant attempts by any state to dominate the region militarily. That the claimants' economies are becoming more interdependent with other states in Southeast Asia, including other Spratly claimants, might amplify that reluctance.[81]

## SOVEREIGNTY AS AN OBSTACLE TO DISPUTE RESOLUTION

Regional efforts to resolve sovereignty disputes in the South China Sea have not been successful. China traditionally has opposed multilateral talks on the Spratlys, principally because its sovereignty over the islands is held as non-negotiable, although joint ventures for exploiting natural resources in the area can be negotiated on a bilateral basis. China's no-multilateral negotiation strategy is also driven by strategic bargaining preferences. That is, China sees its interests couched in bilateral terms in the South China Sea since that strategy makes it easier to isolate the disputants and deal with them one-on-one. This erodes the ability of ASEAN to organize around an issue and allows China the freedom to negotiate individually with governments in the region.[82]

Anxiety surrounding the sovereignty issue and conflicting claims to the Spratlys is obviously aggravated by uncertainty over how many islands, cays, reefs, and atolls are actually present. Smaller formations are difficult to identify, since many remain submerged at high tide. For a government to allege claims is relatively easy; to substantiate the presence and exact location of varied land formations in the South China Sea is more difficult, and this, too, complicates the sovereignty situation.

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[81] This era of rapprochement throughout the South Asia region makes China's avowed maritime strategy and its 1995 confrontation with the Philippines over Mischief Reef appear all the more confusing.

[82] For example, in the Mischief Reef episode, ASEAN did put pressure on China and advocate the adoption of "codes of conduct." In the end, though, China was able to negotiate bilaterally with the Philippines to secure its objectives, and paid only lip service affected to the "rules of conduct." I am indebted to Professor Victor Cha of Georgetown University for bringing this to my attention.

One can appreciate a no-negotiation strategy from the Chinese vantage point. In Beijing's view, a plethora of historic records and artifacts exist to support Chinese claims to the Spratlys. That the South China Sea bears the proper name of China is in itself indicative of the paramount historical influence of that state in the region, and fosters the image of the region being a "Chinese lake." In sum, no negotiations mean no compromise on Chinese sovereignty over the Spratly archipelago. The status quo serves Chinese national interests by allowing their historical claims to persist, without fear of having to give up part or all of what the government perceives as historically and thus, rightfully theirs. Moreover, in a future multilateral conference on the Spratlys, if each government were allocated one vote at the negotiating table, China could be outvoted on important issues by a coalition of other claimants.[83]

Sovereignty connotes both legal and political dimensions. For China and Vietnam especially, notions of political sovereignty are very sensitive concerns. Any challenge to China's claim to the Spratlys is considered to be a challenge to China's domestic sovereignty. Any concession is seen as appeasement, with adverse implications both for domestic politics and foreign relations. This point is reinforced by the realization that nationalism and sovereignty remain the strongest political cement holding the "ideologically bankrupt" Chinese Communist Party together in the post-Cold War era. In the past, the Chinese political leadership could point to foreign intervention, the Soviet threat and irredentism to bolster its nationalist legitimacy. Today, such appeals to nationalism by the leadership hold less political sway for challenges to

***Sovereignty connotes both legal and political dimensions. Any concession is seen as appeasement, with adverse implications both for domestic politics and foreign relations.***

[83] See Peter Kien-Hong Yu, "Reasons for not Negotiating and for Negotiating on the Spratlys: A Chinese View from Taiwan," in Hill et al., *Fishing in Troubled Waters*, 139–49.

Chinese claims in the South China Sea.[84] The importance of the region is viewed more in terms of geopolitical attributes, particularly its fisheries resources, hydrocarbon potential, and commercial sea lanes. Thus, Sino–Vietnamese contention over the Spratlys turns less on ideology and more on access to resources, both for food and development. In China's view, then, control over the Spratlys can not be handed over to any adversary, especially to its principal antagonist, Vietnam.

Consider the prospects for regional negotiations on the Spratlys situation. Given the multi-party character of the dispute, one might presume that only a multilateral conference could produce a meaningful and enforceable agreement. Yet, the objective needs for a diplomatic settlement and public expressions by parties to address the dispute diplomatically do not perforce render the dispute amenable to peaceful resolution. Obstacles persist and impede even convening a forum to launch formal negotiations among the disputants.

A critical first step must be realized. Holding multilateral discussions presumes acceptance of the status quo as the basis for negotiations. Clearly, this premise lacks appeal to all claimant governments. While the Philippines and Malaysia might entertain such multilateral discussions quite readily, neither China, nor Vietnam, nor Taiwan could do so without putting at risk their longstanding comprehensive claims to the archipelago. Taiwan, controlling only one island, could hardly expect to gain much from such a multilateral negotiation. For China, any decision to engage in multilateral talks would immediately undermine its longtime assertions over claims to the entire archipelago. China would prefer to engage in bilateral discussions with the Philippines or Malaysia, but would balk at jeopardizing any geostrategic advantage it holds over Vietnam by negotiating with Hanoi.

An especially delicate issue for the PRC is the place of Taiwan in any conference of multilateral discussions. Even if both governments were to agree in principle to participate, their respective positions must be reconciled on the format of such discussions. Both the PRC and the ROC claim all of the Spratlys as their sovereign territory. Both governments make the same claim to the Spratlys, in the name of "China," based on similar historical evidence. Were they to enter into formal negotiations as two separate and contending parties, that would constitute *de facto* recognition of two Chinas, which neither government will accept. Moreover, two separate Chinas would tend to cancel out claims by both governments to the Spratlys, and could produce squabbles

[84] This point was suggested by Professor Cha to the author in his "Comments to the Author," dated 7 February 1997, 2.

over the recognition of credentials. Yet, neither is the time ripe to put together a single, combined Chinese negotiating delegation and crystallize a common position on the Spratlys. Recent events highlighted by the PRC conducting combat naval maneuvers in the Taiwanese Strait in 1996 seriously aggravated political relations and dimmed trust between Beijing and Taipei. For its part, the PRC has endorsed diplomatic negotiation in principle, but has preferred limited bilateral approaches in fact.[85]

Vietnam's push for negotiations over the disputed islands appears targeted mainly at China. Vietnam also prefers the bilateral approach to a multilateral, regional forum. Vietnam originally claimed sovereignty over all archipelagoes in the South China Sea, but lost the Paracels to China in 1974. Hanoi appears ready to hold on to the Spratlys, and may believe that the PRC must eventually concede part of its claim for the sake of maintaining regional stability. Vietnam controls the largest number of islets and has established the most pervasive military presence in the Spratlys. Even so, the hazardous condition of its military forces, equipment, and weapons suggest it military effectiveness in defending that control to be suspect at best.

Participation by both Vietnam and China in negotiations is essential for obtaining diplomatic solutions for the Spratlys. These governments have the longest historical claims to the islands, and they have exercised the strongest resolve to use military force to uphold these claims. It seems reasonable, then, that China and Vietnam must first undertake negotiations between themselves to temper matters of principle before proceeding to negotiations with other claimants.

Absent a compromise, such a precondition for PRC–Vietnamese negotiations poses a fundamental dilemma for each government. Both China and Vietnam must insist on the other leaving the archipelago completely in order to substantiate its own comprehensive claim to all the islands. Yet, such a strategy risks producing only diplomatic deadlock. It would be overly presumptuous and politically unrealistic for both to agree to partition the South China Sea into respective spheres of influence, since that strategy would obviously encroach on claims by three

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[85] The recent financial crisis throughout Asia in 1998 has given Taiwan the opportunity to break out of its isolation by greatly expanding commercial links throughout Southeast Asia via an investment strategy known as the "Go South" policy. By purchasing corporate and banking assets at sale prices, Taiwanese businesses are integrating their investments Asia-wide, and in the process enhancing Taiwan's economic influence and political leverage against Beijing. See Keith B. Richburg, "Exploiting Asia's Crisis: Taiwan Buys Up Bargains And Widens Its Influence," *Washington Post* (2 January 1998), A23. For an assessment of how the Spratly Islands dispute might be used to further normalization of relations between the PRC and Taiwan, see Christopher C. Joyner, "The Spratly Islands Dispute: What Role for Normalizing Relations between China and Taiwan?," *New England Law Review* 32 (1998): 819–52.

other governments in the region. But, alternatively, were China and Vietnam unable to reach compromise, that development would undercut their respective negotiating positions vis-a-vis the Philippines and Malaysia, and could be interpreted as verifying the legitimacy of the latters' claims.

For Vietnam and China, the Spratlys dispute seems cast as a zero-sum game. Both claim sovereignty over all the Spratly archipelago, and if one claim is upheld, the other must be denied. Consequently, compromise or partial concession by either party would depreciate the legitimacy of their historical claims and thus enhance claims by Malaysia and the Philippines.

Even if all parties can agree to negotiate based on the status quo, the fundamental and intractable problem remains of how to apportion the contested islands and adjacent sea areas among the claimant states to the satisfaction of all. Serious difficulties no doubt complicate apportionment of the central area of the archipelago, where power configurations implicit in the present patterns of island occupation have established certain spheres of influence that must require significant trade-offs. It is this same area, moreover, where Vietnam, the Philippines, and Taiwan have also constructed military fortifications and airstrips, and they will have problems surrendering these islands to each other, much less to China.[86]

***China is being compelled to expand its industrial base to support greater demands for more goods and services from its burgeoning population growth. . . . and has demonstrated its willingness to use military force, if necessary, to protect and support such operations.***

For the foreseeable future, China will remain predominant in the Spratlys archipelago and throughout the South China Sea. Technology has given the Chinese government motives for its policies in the region (namely, potential oil exploitation and expanded maritime rights) and the means to execute those policies (namely, on-site naval installations and enhanced military capabilities). Whether through naval force or diplomacy, pressures for China to maintain claim to the Spratlys will come from increasing resource demands generated by its 1.4 billion plus people. China is being compelled to expand its industrial base to support greater demands for more goods and services from its burgeoning population growth. To fuel this industrial expansion,

[86] Chang Pao-Min, "A New Scramble for the South Sea Islands," 20–39, 34–35.

new energy sources are required, which in turn will require more extensive efforts to explore and exploit offshore petroleum reserves. The Spratlys emerge as a key consideration here, and China has demonstrated its willingness to use military force, if necessary, to protect and support such operations.

In sum, territorial conflicts in the Spratlys are complicated and intertwined with multiple considerations having both domestic and foreign policy implications. Nationalistic claims are not given up easily. Sovereignty is perceived by each claimant as exclusive and sacred. For lasting solutions to be found, these governments must be willing to temper nationalism and distrust, and accept trade-offs and compromises that lead to mutual benefits and cooperation.

## APPROACHES TO DISPUTE RESOLUTION

### Joint Resource Development

Creation of a joint authority dedicated to common development of resources within the Spratlys area may be the most appealing and logical solution for a territorial dispute as convoluted as this one. Establishing a "Spratly Resource Development Authority" would be consistent with statements by the Chinese government which aver that while sovereignty over the Spratly Islands is non-negotiable, joint ventures to exploit the natural resources of the South China Sea may be discussed.[87] The pivotal question remains, though, of how to put this principle into multilateral regional practice.

Essential for establishing a cooperative joint development regime in the South China Sea is agreement by the parties to set aside, without prejudice, their claims to the Spratlys and jointly form a "Spratly Resource Development Authority" for managing resource exploitation, including fisheries, the environment, and safety of navigation. In this respect, defusing the Spratly Islands dispute would not require resolution of the protracted sovereignty question. Rather, a kind of multilateral "Authority" analogous to that for mining the deep seabed in the 1982 LOS Convention might be established.[88]

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[87] As early as September 1992, Chinese foreign minister Qian Qichen indicated that China is prepared to negotiate joint development of South China Sea resources. "Chinese Drilling Ship Leaves Disputed Waters," *Japan Economic Newswire* (4 November 1992).

[88] Mark J. Valencia, "A Spratly Solution," *Far Eastern Economic Review* (31 March 1994): 1.

Joint resource development, while not a legal obligation under the 1982 LOS Convention, does furnish a reasonable solution to outstanding sovereignty disputes. Furthermore, multinational oil companies may be less likely to invest in hydrocarbon development in disputed areas, particularly if the dispute is serious enough to threaten the security of their investments.

***Security concerns can act as incentives or impediments to successful negotiations leading to a joint development arrangement among the Spratly claimants.***

A Spratly Authority could well serve all the claimants' interests. Costs involved in unilateral exploration are enormous; military bases on the islands impede extraction of resources in the area; and so long as the dispute persists, the region will remain threatened with instability. A cooperative regime such as a joint resource development authority would offer a relatively quick solution and palatable compromise. Such an authority could freeze all claims for the indefinite future, ensure demilitarization of the zone, facilitate resource exploitation, and provide acceptable mechanisms for dispute resolution.[89]

### *Factors Affecting Joint Development*

Fundamental to joint resource development are the character of basic relations and the genuine willingness of claimant governments to cooperate. Generally good relations open the door for cooperation. Malaysia, the Philippines, and Vietnam have tenuous, albeit not hostile relations with each other and are able to discuss the Spratly issue. China is interested in cultivating better relations with ASEAN governments, but its relations with Vietnam, a recent addition to ASEAN, remain less than good. This situation complicates their cooperation in disputes involving the Paracels and Spratly Islands, as well as China's overall relations with ASEAN. It is not inconceivable, though, that China's domestic needs for hydrocarbon energy resources could override antagonistic political considerations, and thereby open the door for a joint development arrangement. If substantial hydrocarbon discoveries were made in the South China Sea, joint development would permit greater opportunities for reducing tensions in the region. Still another significant ingredient is political pragmatism. Patience and genuine commitment are required for integrating legal, financial, economic, and customs arrangements between governments and successful implementation of any agreement.

[89] See Mark J. Valencia and Masahiro, "Southeast Asian States: Joint Development of Hydrocarbons in Overlapping Claim Areas?," *Ocean Development and International Law* 16 (1986): 211–54.

Security concerns can act as incentives or impediments to successful negotiations leading to a joint development arrangement among the Spratly claimants. Prior to 1990, these concerns would have been aggravated by Cold War considerations and East–West competition. Today, security concerns by disputant governments in the South China Sea focus mainly on the bilateral rivalry between China and Vietnam.

For the Spratlys, oil is but one security factor in the dispute. The Spratlys are considered by various disputants as strategic bases for sea-lane defense, interdiction, surveillance, and potential launching sites for land attacks. Russia has been a traditional ally and supporter of Vietnam on this issue, and a rival to China in the region. The state that controls the Spratlys could also control major sea lines of communication throughout the South China Sea. Here, too, Russia's retrenchment since 1990 from global naval ambitions (on account of internal economic disruptions) has correspondingly fostered Chinese incentives to assert a more expansionist strategy in the South China Sea. The Philippines, which no longer has a mutual defense pact with the United States that commits American military action to defend governments within the treaty area (including the South China Sea), feels threatened. The United States also has salient national security interests in maintaining unimpeded transit rights—on the surface, in the air and under the sea—throughout the South China Sea, especially to protect Japan in the event of hostilities.

Hydrocarbon resources around the Spratlys have emerged as a signal element in the Chinese effort to consolidate a position of regional primacy. Whereas prior to 1996 China might have sought to use oil development rights to win the support of the ASEAN states, especially in countering Hanoi's claims to the region, the admission of Vietnam into ASEAN has dimmed prospects for that strategy. Similarly, the Philippines views its efforts to consolidate and strengthen its military presence in the Spratlys as a means to preclude Vietnam (and implicitly Russia) from encroaching into the area.

Important, too, is the degree of knowledge about resource deposits in the disputed area. Since little is now known about the hydrocarbon potential, it may be easier to apportion the disputed area than if substantial proven deposits had already been discovered. In the latter case, each side would realize that it must give something away, and that could dissuade each from serious negotiations. Thus, governments are more likely to opt for a joint resource development agreement when each is unwilling to give up a larger share, the extent of the resource deposits are unknown, and neither side knows how much it could lose.

The strongest reasons motivating a government to undertake a joint management arrangement, however, are the perceived sense of urgency or obligation to protect its interests in potential oil or gas deposits, combined with a desire to maintain or solidify good relations with another state(s). The duration of the agreement is important, as well as the reasons and procedures for its termination.

Joint development is neither permanent nor optimal for resolving boundaries and international jurisdictional disputes over rights to resources. But in some cases it may be the only alternative to no action at all—and thus no resource development—or to confrontation and conflict. Joint development will look increasingly attractive as more oil is needed, or new deposits discovered, by disputant governments and successful precedents for cooperative arrangements occur.

## APPROACHES TO NEGOTIATING AN AGREEMENT

During this century, a number of resource development arrangements have been successfully negotiated that serve as models for managing resource development in the South China Sea. Like the Spratlys, each arrangement deals with issues of disputed sovereignty, maritime jurisdiction, geostrategic considerations, and access to natural resources. In that regard, much can be learned from the ways and means that these agreements treat the sovereignty conundrum, as well as the scope and direction of rights, duties, and obligations assigned to the respective parties. Each agreement accordingly may be viewed as furnishing lessons for negotiating an arrangement that resolves—or at least mitigates—the disputed sovereignty situation in the South China Sea.

### The Australia–Indonesia Timor Gap Agreement

The Timor Gap Treaty is notable for its "zone of cooperation" approach, which should appeal to Spratly Island claimants. Various zones could be set out according to various jurisdictional claims, but with the view that special sovereign prerogatives could not be attached to any zones. For further information on the Timor Gap Agreement, see Appendix A.

The two-tier management structure in the Timor Gap Treaty requires close cooperation between the parties, especially for reaching consensus on decisions at each level. It also demands a high level of integration and interdependent procedures; disagreements could jeopardize the entire

treaty relationship. Respective to the Spratlys' situation, consensus decision-making could prove problematic, since there could be as many as six parties participating in the arrangement. Yet, decisions reached through consensus would be taken as binding and unequivocal.

Finally, the clean slate approach adopted by the Timor Gap Treaty—that is, not to recognize previously claimed rights (which had been used to issue licensing agreements by respective governments to their nationals)—should also hold considerable appeal for Spratly Island claimants. No claimant state would be put at a diplomatic or political disadvantage, and all governments would gain economic access or tax revenues by participating in the agreement. A critical point here is that all this must be carried out in an exclusively peaceful manner.

## The Spitzbergen (Svalbard Treaty) Arrangement

Svalbard, a cluster of glaciated islands in the Arctic Ocean lying 645 kilometers (400 miles) north of Norway, consists of the Spitzbergen group and several smaller islands. The discovery of extensive mineral and coal deposits in the late 19th century prompted several states, among them Norway, Sweden, Denmark, the Soviet Union, the United Kingdom and the United States, to stake claims in Svalbard. To remedy this conflictive assortment of national claims, in 1920 the Treaty Relating to Spitzbergen (Svalbard Treaty) was negotiated.[90]

A major innovation of the Svalbard Treaty that might be applied to the Spratlys is its approach toward conflicting sovereignty claims by granting permanent *terra nullius* economic rights to participating parties.[91] Nevertheless, it does not seem likely that all Spratly claimants would be willing to grant to any other single Spratly claimant state recognized sovereignty over the entire archipelago. The more likely scenario suggests that a management authority might be established that grants to each party equal access rights to the area. For further discussion on the Spitzbergen Arrangement, see Appendix B.

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[90] Treaty relating to Spitzbergen (Svalbard), with annex. Done Feb. 9, 1920, entered into force August 14, 1925. 43 Stat. 1892, TS 686, 2 Bevans 269, 2 LNTS 7. For a full account of the negotiation of the Svalbard Treaty, see Willy Ostreng, *Okonomi og Politisk Suverenitet, Interessespillet om Svalbards Politiske Status* (Oslo: Universitetsforlaget, 1974).

[91] *Terra nullius*, literally translated as "no man's land" or "vacant land," under international law is an unattributed territory that is hitherto unclaimed or unsettled. A *terra nullius* territory may be added to a state's national territory if that state can perfect valid title through effective occupation, when demonstrated through permanent settlement.

Provisions of the Svalbard Treaty, moreover, leave unanswered certain questions pertaining to jurisdiction offshore—questions that have direct bearing on the resolution of the Spratly Islands dispute. Particularly important here is the geographical application of exploitation principles to the exclusive economic zone and continental shelf jurisdictions generated by the archipelago. Does the Svalbard Treaty extend to marine areas beyond the territorial sea? Can Norway assert rights to establish an EEZ and continental shelf regime around the archipelago? Are mining provisions providing equitable access to other states limited to land areas? Or do they by inference extend offshore into the continental shelf region as well? To what extent might establishment of EEZ and continental shelf regimes create conflicts and thus undermine the peaceful utilization purpose of the agreement? The resolution of these legal quandaries poses legal challenges for the Svalbard regime that eventually must be addressed.[92] Similarly, such legal uncertainties must be overcome if an acceptable joint resource development authority is to be devised for the South China Sea area.

## The Antarctic Treaty

Beginning in 1908, portions of Antarctica have been claimed by seven states—the United Kingdom, Australia, France, New Zealand, Norway, Chile, and Argentina. During the 1950s, after the great success of the International Geophysical Year, participating governments became convinced of the desirability of preserving the international cooperation in Antarctic affairs. The resultant diplomatic efforts produced the 1959 Antarctic Treaty.[93] For further information on the Antarctic Treaty, see Appendix C.

With respect to the Spratlys situation, several important principles flow from provisions in the Antarctic Treaty. Still in force today, the Antarctic Treaty was principally designed to promote scientific cooperation in the region. The Treaty expressly stipulates legal obligations banning military activities and nuclear weapons in the area, as well as guarantees for freedom of scientific research and cooperation and the obligation to settle disputes peacefully. An especially significant aspect is the system of unannounced, on-site inspection by any party of another party's

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[92] One is tempted to ask, then, why has this agreement worked so well for so long? The answer is grounded in political realism. The treaty well serves the national interests of the parties, and these legal quandaries have not yet risen to the level of problematic issues that must be resolved by those governments. See generally the discussion in Robin Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (New York: Routledge, 1992), 32–53.

[93] The Antarctic Treaty, signed December 1959, entered into force June 1961.

Antarctic vessels or research stations to verify that Treaty obligations are being met.[94] A similar type of inspection system might be especially useful for building confidence among regional states in negotiation for a Spratly development regime.

The Antarctic Treaty also provides for a special decision-making group, which has become known as the Antarctic Treaty Consultative Parties (ATCPs).[95] Included in this group are those signatory states that have acquired policy-making authority under the Treaty.[96] This group and its legal activities are self-creating, self-implementing, and self-administering. More than 225 special policies, called "recommendations," have been adopted through consensus in Consultative Party Meetings.

Like the Spratlys, the Antarctic Treaty had to address delicate political complications created by ambiguous sovereignty claims held by states with mutually antagonistic interests in the region. Indeed, the claims of Argentina, Chile, and the United Kingdom entirely overlapped on the continent, and questions concerning who had sovereignty where, based on what legitimate legal grounds, constantly threatened to disrupt international cooperation in the south polar area. Antarctic Treaty negotiators had to finesse the sovereignty situation between these claimant states, as well as all other parties to the Treaty, amid steadfast refusal to recognize the lawful validity of any claims to Antarctica.

Particularly of interest for governments negotiating a Spratly Islands Resource Development Authority is the manner in which Article IV sets aside the status of sovereignty on the continent throughout the duration of the Treaty relationship. In legal effect, then, sovereignty considerations are shelved as factors that might complicate or undermine successful operation of the agreement. Yet, such a provision would not resolve the sovereignty problem in the South China Sea, nor would it shed much legal light on how to arrive at a solution. Agreeing to disagree on the status of sovereignty simply delays the time when the question of sovereignty disputes over the Spratlys will have to be addressed, a situation that ultimately might not prove satisfactory to all parties. Nevertheless, for the duration of an agreement, the issue of sovereignty would not

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[94] Ibid. Article I. For discussion, see Christopher C. Joyner, "Non-Militarization of the Antarctic: The Interplay of Law and Politics," *Naval War College Review* 42 (1989): 83–104; Antarctic Treaty, Articles III, V, VII, and XI.

[95] Ibid., Article IX.

[96] Ibid., Article IX, para 2.

encroach upon cooperation in developing resources in the South China Sea. The agreement would provide the framework for cooperation among the parties, and it would ostensibly permit all participant governments equal access with equal rights in managing resources in the region. Through such an arrangement for shared management, habits of cooperation and trust might be formed, leading to closer, more collaborative relationships among states interested in the South China Sea.

## The Balance Sheet

The Timor Gap Agreement, Spitzbergen Arrangement, and Antarctic Treaty provide salient lessons for negotiating the Spratlys situation. Each case involved contentious claims of sovereignty to the same territory; each case involved access to and exploitation rights of potential mineral resources; each case involved a package deal approach wherein no crippling reservations were permitted that might undercut or dilute the legitimacy of the agreement or the participation of any party to it; each case did not resolve the sovereignty conundrum, but instead put it aside so that cooperation though the agreement might be allowed to work; in each case a special mechanism was created to make policies for the arrangement and to deal with disputes that might arise between parties; each case included efforts to enhance transparency of the governments' policies affecting activities in the region; and each case was successfully negotiated by the political willingness of all claimants (and involved non-claimants) to compromise on what had been highly intransigent, nationalistic positions.

These cases demonstrate that international agreements can be forged, and resource development arrangements can be produced—if the parties are willing to make them happen. But should any state, especially a key player, assume the bargaining position that it will give away nothing and only take everything, then no agreement will be possible. The geopolitical status quo will persist, or possibly deteriorate. Thus, in each of these successfully-negotiated resource arrangements, all governments were treated as co-equals, and all compromised to some extent, so that an agreement could be obtained that better served their national interests, especially by creating a climate of cooperative co-existence and shared expectations with the other parties. The key to the negotiating process was mutual trust and confidence in the end game as a workable outcome for all parties. No lasting agreement will be possible absent the political will to compromise positions so that the sovereignty, resource and sharing concerns of all parties can be accommodated.

## CBMs AS PREVENTIVE DIPLOMACY

The ingredient most obviously missing, but necessary for resolving the South China Sea imbroglio, is sustained confidence and transparency between the governments of Southeast Asia and China. Confidence and trust among fellow governments are critical for progress in successful negotiations. How to nurture and advance CBMs among claimant states remains critical for launching negotiations aimed at establishing a joint resource development authority for the South China Sea.

***The Spratly Island disputants must become involved in constructive negotiations aimed at solutions for satisfying their different interests through peaceful means.***

Asian states do not formulate their foreign policies for the Spratly Islands in a vacuum. Other governments' actions exert important influence on their actions. The resolution of the Cambodia situation in 1991 has allowed Southeast Asian states to focus their attention on the South China Sea as a potential arena for regional conflict. Considerably overlapping jurisdictional claims, persistent military occupation of islands, aggravated military spending by concerned governments, and the leasing of disputed areas to international petroleum companies have all combined to aggravate tensions among states in the region. The issue of sovereignty disputes in the South China Sea thus surfaced in the early 1990s as a serious regional concern.

This awareness of regional tensions also highlighted the necessity of maintaining a maritime order in the South China Sea predicated on accepted rules of international law—rules that can be used fairly to accommodate the disparate national interests at stake. Toward this end, the Spratly Island disputants must become involved in constructive negotiations aimed at solutions for satisfying their different interests through peaceful means. This has already begun to happen, prompted by ASEAN's unified negative reaction to the Mischief Reef incident in February 1995 between China and the Philippines. By late 1995 China had agreed in principle to set up bilateral "codes of conduct" in the Spratly Islands with the Philippines and with Vietnam that pledge to resolve the disputes peacefully.[97]

[97] Snyder, "The South China Sea Dispute," 8.

Presuming that large-scale military conflict is not in the national interests of governments involved in the South China Sea, the preeminent question becomes how to defuse tensions between the Spratly claimant states. How can a situation be cultivated to produce political conditions that permit negotiation of this complex, multilateral dispute? What ingredients or factors are necessary among claimant governments for generating the psychological impetus and political framework needed to negotiate issues affecting the status of the Spratly Islands?

An important first step is the pursuit of CBMs. Through CBMs, functional cooperation and direct communication could be fostered among the claimants as a means to preclude territorial disagreements from escalating into military confrontation. Measures for building confidence can lead to a better climate for negotiations and more positive results.

International negotiations between governments involve people with emotions, deeply held values, and perceptions. People can be unpredictable. Confidence-building aims at making the political climate more conducive to certainty. Confidence-building engenders working relationships where the trust, understanding, and respect built up over time can make subsequent negotiations easier, more efficient, and more constructive.

CBMs also make negotiators feel good about themselves and, often, more concerned about what others think of them as well. Hence, CBMs can contribute to raising sensitivities about other negotiators' national interests, and constraints on their negotiating positions affecting particular issues. Similarly, all negotiators must obtain an agreement that satisfies their national interests, but at the same time, they also must preserve a relationship of mutual trust with the other side. Otherwise, the negotiated solution is worthless.

Building confidence depends on nurturing mutual trust and understanding. For genuine confidence to be secured, governments must understand the motives and rationales behind the policies of other states in the region, and this can only come about through increased transparency of national policies and capabilities. Governments must also appreciate that competing self interests and violations of agreed measures can extract political costs by compromising the mutual trust in which CBMs are grounded. Transparency thus becomes key to confidence-building. In the case of the South China Sea, several measures can contribute to transparency and thus build confidence among the concerned governments.

For one, Spratly claimant governments might consider giving official and informal

assurances to restrain the use of military force in the region. Official pronouncements made by governments in the press or to international gatherings provide a public, written record of policy declarations, which makes it more difficult for that government to vacillate, or renege on those commitments.

Second, government officials might strive to recognize and respect national sensitivities arising from military deployments in the region. While some Spratly claimants might prefer not to recognize the legitimacy of other governments' claims in the region, they must respect the sensitivities arising from those claims. This is especially important (and will be most difficult) for China and Vietnam, the two most intransigent antagonists among the disputants.

A third constructive measure involves the need for governments to cease further occupation and annexation of territory in the Spratlys. Seizing and occupying more islets does little to promote a government's strategic position in the region. These features are insignificant as strategic outposts and hold little value for their natural resources. Moreover, new occupations reinforce suspicion and distrust over that government's disingenuousness toward future diplomatic negotiations. It seems prudent that claimant governments should accept the status quo as the starting ground for negotiation.

Fourth, governments claiming South China Sea territories might reign in efforts to expand military activities in the region. Military activities connote shows of force, not genuine sincerity to resolve contentious legal issues peacefully and diplomatically. It seems reasonable and prudent that no maritime military maneuvers be conducted without prior notification of other governments. Along this same line, governments might take friendly measures (e.g., direct communication and consultation with other concerned governments) when military exercises are being contemplated in the disputed region. Parties might agree not to station additional forces on the Spratlys and to provide notice when they are rotating troops already stationed on the islands. Similarly, arrangements might be made to notify governments about naval patrols in the region.

Fifth, it would be helpful to devise and coordinate a common set of operating procedures for navies and air forces of concerned governments in the disputed region. Such a "standardized manual of operations" would lessen tensions by reducing the likelihood for accidents and minimizing situations that could spark military conflict in the region. Negotiation of such a handbook, moreover, will require serious intergovernmental collaboration among national military representatives, which can foster greater appreciation for the national interests, sensitivities, and

priorities of their armed forces counterparts in the region. In addition, greater cooperation might also be made on the issue of naval piracy in the region.

Finally, efforts might be made to devise means and mechanisms that improve contacts and communication between mainland governments and their local military commanders on islands occupied in the South China Sea. Again, clearer state-to-state hotlines of communication could reduce possibilities of misunderstandings and misperceptions of other governments' policy intentions.[98] The establishment of hotlines between naval chiefs might also be useful.

## The Indonesian Initiative

Opportunities do exist today for functional cooperation among states involved in South China Sea disputes. Mutual restraint and reasonable expectations in foreign policy initiatives are essential preconditions for making such undertakings effective. Yet, efforts at functional cooperation require time. Consensus must evolve gradually, in stages, to permit operation of a joint management program. Conflict resolution is not an end point. Rather, conflict resolution is a process that unfolds along a continuum, and that requires specific decisions to be made to assure progress. Conflict management is critical in this process; minor frictions or incidents must be controlled such that they do not erupt into major disagreements or serious disruptions in the confidence-building process.

The process of confidence-building among governments involved in the South China Sea situation has already begun. A regional dialogue on disputes, hosted informally through a series of workshops by Indonesia, has been annually convened since 1990 through its Department of Foreign Affairs. Although Indonesia is a South China Sea littoral state, it is usually viewed as a neutral party in the region, as it makes no claims to the Spratlys.[99] Its motive for undertaking this initiative appears straightforward: if regional tensions can be reduced and greater peace and order brought to the South China Sea, then Indonesia will share in the resultant growth in economic and

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[98] Portions of these suggestions are drawn from B.A. Hamzah, "The Spratlys: What Can Be Done to Enhance Confidence?" in Hill et al., *Fishing in Troubled Waters*, 320–347, 335–6.

[99] Within the past few years, the PRC has made insinuations about claiming sea areas in Indonesia's EEZ around Natuna, which has pulled Indonesia directly into controversy with the PRC. This development, as seen by some observers, especially in Malaysia, may have compromised Indonesia's alleged neutrality in the region. The author is grateful to an anonymous reviewer for noting this point.

commercial opportunities.

The Indonesian initiative, also labeled the South China Sea Informal Working Group, aims to encourage confidence among South China Sea states through "Track Two Diplomacy" in order to ease tensions arising from sovereignty and jurisdictional disputes over the Spratly and Paracel Islands. The notion here is that persons from different states who may be parties to an international dispute will meet informally and discuss aspects and issues of the matter, in order to create an atmosphere of open free discussion, without the restrictions imposed by having to maintain official government positions. The hope is to foster regional cooperation such that the South China Sea might be made legally compatible with a semi-enclosed sea, as provided for in the 1982 LOS Convention.[100]

***The process of confidence-building among governments concerned with the South China Sea situation has already begun.***

The University of British Columbia in Vancouver, Canada, administrates the project, with its counterpart in Indonesia being the Centre for Southeast Asian Studies. Issue-areas for potential cooperation between South China Sea littoral governments are identified, and now include marine scientific research, marine environmental protection, safety and sea communications, fisheries assessment and development, defense and security issues, territorial and jurisdictional issues (other than claims to islands and ocean space), and creation of institutions for cooperation.[101]

Workshop participants attend in their own private capacity and are drawn from governments (particularly the foreign affairs ministries), diplomatic corps and military services, academia and research organizations. Technical working groups have additionally convened to discuss issues affecting cooperation in marine scientific research, resource assessment and means of development, marine environmental protection, and navigational safety. Issues raised at these meeting are then re-circulated back to the annual workshop plenary meeting and adoption. The process is geared toward informal diplomacy, with the expectation that completed agreements on

[100] Ian Townsend-Gault, "Brokering Cooperation in the South China Sea," in Lorne K. Kriwoken, Marcus Haward, David VanderZwaag, and Bruce Davis, *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (Kluwer Law International 1996), 313, 316–17. For background treatment of the Indonesian initiative, see Catley & Keliat, *Spratlys: Dispute in the South China Sea*, 139–171.

[101] Townsend-Gault, "Brokering Cooperation," 318.

an issue can be returned to normal inter-governmental diplomatic channels for eventual negotiation.

The Indonesian initiative operates though an informal process, which offers participants the advantage of greater freedom to discuss ideas and an atmosphere of greater community. In so doing, the tendency has evolved to promote opportunities for consensus by avoiding adversarial situations, that is, the workshops eschew issues on which consensus obviously can not be reached. For example, there is no discussion of sovereignty over the Spratlys, or conflicting claims to jurisdiction over ocean space, or continental shelf drilling rights. Since no agreement within the workshop could be forthcoming, such sensitive issues are not even brought up. To do so would accomplish nothing constructive, and could seriously risk disrupting the entire cooperative process.

The initial Indonesian workshop gathered in Bali, in January 1990, and concluded that such informal discussion sessions were worthwhile.[102] A second meeting in Bandung in July 1991 improved on that first exchange, where attendees expanded to include China, Taiwan, Vietnam, and Laos.[103] All participants agreed on a statement affirming that any territorial dispute in the South China Sea should be resolved by "peaceful means through dialogue and negotiation," and that "the parties involved in such disputes are urged to exercise self-restraint in order not to complicate the situation."[104] A third workshop convened in Yogyakarta in July 1992, and participants agreed in principle that "joint development" should be used as a peaceful means for resolving the dispute among states in the South China Sea.[105] Also at the 1992 workshop, two technical working groups were created, one on marine scientific research and the other on resource assessment and ways of development.[106] A fourth workshop met in August 1993 in Surabaya,

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[102] See William G. Stormont, "Report: managing potential conflicts in the South China Sea," *Marine Policy* 18 (1994): 353–56.

[103] Ibid., 353–54.

[104] Professor Doctor Hasjim Djalal, "South China Sea Island Disputes," in Myron H. Nordquist and John Norton Moore, eds., *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation* (Kluwer Law International Publications, 1998), 109–134; Appendix 1: Workshop Statement, Bandung, 18 July 1991, reprinted in T. L. McDorman, "The South China Sea Islands Dispute in the 1990s—A New Multilateral Process and Continuing Friction," *International Journal of Marine and Coastal Law* 8 (1993): 263–285.

[105] Appendix 2: Workshop Statement, Yogyakarta, 2 July 1992, in ibid., 283–285.

[106] Stormont, "Report," 354.

Indonesia.[107] On that occasion, Indonesian proposals for initiating

negotiations for a joint development program were rebuffed by China, and the idea was shelved. More CBMs are needed before any formal negotiations can be initiated.

In 1994, a fifth workshop convened in Bukittinggi, Indonesia, and addressed the issue of the "non-expansion of existing military presence." While the principle enjoyed support by most, a few (including China) opposed it as beyond the proper purview of the workshop. Similarly, in the sixth workshop that convened in Balikpapan in 1995, the possible "exchange of military commanders" was introduced, but opposition by some parties led to dropping discussion of that subject as well. Some agreement was reached, however, on the need to secure greater transparency of the activities in the disputed area.[108]

In retrospect, the 1993 workshop in Surabaya marked a watershed in that participants actually reflected on what the workshop process had accomplished thus far and where it was headed. The aim to produce CBMs had actually evolved into producing a confidence-building process. This can be seen in the parties' decision to create technical working groups to discuss ocean law and maritime navigation in the South China Sea and agreement on the priority for continued diplomatic cooperation, notwithstanding the sovereignty issue. The formation of a Special Technical Working Group (TWG) on Resources Assessment and Ways of Development represents the early effort to deal with the joint development issue. The TWG has asked Vietnam to coordinate activities concerning "non-living non-hydrocarbon resources," Indonesia to coordinate activities on the study of "non-living hydrocarbon resources," and Thailand to coordinate activities concerning the study of "living resources," namely fisheries, in the South China Sea. These discussions are intended to produced greater agreement on the zone that is to be developed; the nature of the issues on which cooperation is necessary (i.e., on fisheries, oil and gas, environmental protection, marine scientific research, and marine parks); the mechanism or authority for joint development; and who shall participate in such joint development or joint cooperation activities.[109] These issues surfaced more directly at the first meeting of the Technical Working Group on Legal Matters, which met in Phuket, Thailand in early July 1995. It was there that participants agreed that the 1982 LOS Convention furnished

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[107] Ibid., 354–55.

[108] Hasjim Djalal, "South China Sea Island Disputes," 123.

[109] Ibid., 124–26.

a suitable means for fostering cooperation among South China Sea littoral states, particularly in terms of the framework regime it creates for semi-enclosed seas.[110]

The seventh workshop met in Batam, Indonesia, in December 1996. A working outline for cooperation on many fronts during 1997 was put forward, which included meetings by: the Groups of Experts on Training and Education of Mariners and Seafarers (in Singapore); the Group of Experts on Hydrography, Data and Mapping (hosted by Malaysia); the Group of Experts on Marine Environmental Protection (hosted by Cambodia); the Second Technical Working Group Meeting on Legal Matters (in Thailand); the Second Technical Working Group Meeting on Marine Environmental Protection (hosted by China); and convening of the Eighth Workshop on Managing Potential Conflict in the South China Sea in late 1997.[111] During 1998, a number of subsequent Workshop committee meetings contributed to the regional dialogue on the South China Sea situation. The Study Group on Zones of Co-operation met in Vietnam in June; the Technical Working Group on Hydrographic Data and Information Exchange, the Working Group on Safety of Navigation, Shipping and Communication, and the Technical Working Group on Legal Matters convened in October; and the Sixth Meeting of the Technical Working Group on Marine Scientific Research, the second meeting of the Group of Experts on Marine Environmental Protection, and the first meeting of the Group of Experts on Non-living, Non-hydrocarbon Mineral Resources all met in November, 1998.

Notwithstanding Indonesia's shaky financial and political situation, in early December 1998 a ninth workshop was convened in Jakarta to set the agenda for 1999. The premise of the meeting was that economic recovery of the ASEAN region depended on political stability, and that this track-two diplomacy could contribute to that end by continuing to promote cooperation on South China Sea issues through the workshop's projects. New developments from the 1998 workshop included agreements to convene special meetings by the Committee for the Co-

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[110] The 1982 LOS Convention provides that States bordering on enclosed or semi-enclosed seas should cooperate with each other and "endeavour, directly or through an appropriate regional organization": (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to co-ordinate their scientific research policies and undertake where appropriate joint programs of scientific in the area; (d) to invite, as appropriate, other interested states or international organizations to co-operate with them in furtherance of the provisions of this article. 1982 LOS Convention, Article 123.

[111] Hasjim Djalal, "South China Sea Island Disputes," 132–33.

ordination of Offshore Prospecting to compile data on non-hydrocarbon mineral resources in the South China Sea and by the Study Group on Zones of Co-operation to examine the prospects for joint cooperation and development. In addition, the Legal Matters Group would be charged with discussing the possible content of various codes of conduct that might be applied to activities in the region.[112]

Given this raft of regional cooperative activities generated by the Indonesian workshops, a strategy of confidence-building is in progress, and is producing tangible results—at least in terms of the number of ancillary discussions being convened among the participants. It is slow, ponderous, and piecemeal. While achieving few visible solid results, the workshop sessions and their spin-off committee discussions have provided opportunities for participants to air their views, thus compelling claimant governments to recognize differences of opinion, rather than merely ignoring them. The point here is that the workshops involve a process aimed toward regional cooperation, not a quick fix for demilitarization of and joint resource development in the South China Sea.

The attitude of China toward the workshop process is critical. Thus far, China has supported the workshop process, although the government apparently feels that the process is going too far, too fast. For China, prolonged patience is a diplomatic virtue when it comes to formulating arrangements in the South China Sea. The Chinese have also supported efforts to promote cooperation on select issues, albeit observers are not yet able to determine with certainty whether China is willing to participate in implementing any of the agreed upon collaborative projects.[113] Likewise, China acknowledges the need to develop confidence-building among states in the region, but seems to regard the workshop process as an end in itself. China is thus unwilling to discuss other CBMs, which it feels lie beyond the capacity of the workshop. Perhaps most significant, China has intimated a willingness in principle to put aside territorial claims in favor of joint development. Still not clear, however, is the location and meaning of the "zone" that China is willing to jointly explore or bilaterally develop. "Joint development" to China apparently means just that: bilateral development undertaken jointly with another claimant in an area of the

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[112] Statement of the Ninth Workshop on Managing Potential Conflicts in the South China Sea, Jakarta, December 1–3, 1998, paragraphs 10 and 11.

[113] Ibid., 128. Attitudes such as this have prompted some analysts to conclude that the Indonesian workshop mediation thus far has been a "failure." See Catley & Keliat, *Spratlys: Dispute in the South China Sea*, 165–168.

South China Sea claimed by the other state.[114]

Personalities are critical for the success of the Indonesian workshops, and a central role is being played by Indonesia's Ambassador Hasjim Djalal. He enjoys international respect not only for being co-chair of the meetings, but for his stature as a diplomat of international standing, an expert on law of the sea and the recently elected President of the International Seabed Authority. That the participants trust and respect Ambassador Djalal contributes to confidence-building.

The Indonesian workshops represent the most serious regional effort thus far for promoting peace and cooperation in the South China Sea. These meetings serve as informal, private fora for confidence-building among nationals from states involved in Spratly Islands jurisdictional disputes. They have been purposefully designed to bring together representatives from concerned states in the region to discuss non-polemical issues affecting environment, navigation, pollution control, marine research, and possible means of cooperation.

The few practical results thus far do not diminish the political significance of these gatherings. The major contribution of the Indonesian workshops is that they have moved away from political confrontation, military conflict, and diplomatic inertia toward a process of dialogue and cooperation on the long road to dispute settlement. In that manner, these workshops have also fostered more salient appreciation of joint development as a potentially useful regional approach towards eventual resolution of the Spratly Islands dispute.

## PROSPECTS FOR A NEGOTIATED SOLUTION

Several recent developments suggest that prospects still live for beginning negotiations on the Spratlys situation. Again, the role of the PRC is pivotal. First, China's strategic situation today is more favorable than at any time since World War II. Strategic and security factors are important considerations in China's policy toward the South China Sea, especially with regard to Vietnam's relations with Russia. A critical geostrategic objective of China policies in the South China Sea is to ensure that no security threat to its southern flanks comes from the United States,

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[114] Ibid., 128. In its bilateral overtures, China at times has demanded recognition of its sovereignty over the South China Sea in return for accepting a model of joint development. That position, of course, is a non-starter with other claimant states. See "Cautious Progress on Disputes Affecting China Seas Exploration," *Offshore* (October 1998).

Russia, or Japan. The withdrawal of the United States from Vietnam in 1975 and from the Philippines in 1992, coupled with the collapse of the Soviet Union in 1990, diminishes China's security concerns considerably.

Second, the use of force by the PRC in the South China Sea runs counterproductive to enhancing long-term Chinese political, economic, and commercial interests in the region. While China clearly stands as the military power with which to be to be reckoned in the region, since 1990 its government has consistently disavowed intentions of using force to resolve territorial disputes.[115] Indeed, China has a vested interest in cooperative engagement with ASEAN states to allay persistent suspicion and mistrust of its long-term intentions created by the Mischief Reef incident. At the same time, the ASEAN states must pursue means of further integration among its membership, while engaging constructively with other governments in the region. China can not help but play a major role in ASEAN's regional integration strategy. To use military force over the Spratlys would seriously undercut China's long-term prospects for fostering closer, more dependable economic relations with its Asian neighbors. That would be a high regional price to pay for what would mostly be symbolic political gains at home.

Also, China's contemporary policy actually displays considerable flexibility. As noted earlier, China's foreign policy tends to be less initiative and more reactive toward other states' policies. If adversaries assert hard-line, uncompromising attitudes toward Beijing, then China can be expected to react with a similarly strong response. Conversely, if adversaries adopt more amiable postures, then China's behavior has demonstrated more amity in kind.

In like fashion, China's policy toward the Spratlys in particular and the South China Sea in general appears a function of that government's relationships with her Southeast Asian neighbors. When tensions rise between China other Asian states, especially Vietnam, then rivalry over the Spratlys may well also increase. But when overall relations improve, tensions over the Spratlys tend to abate. The key to unlocking a diplomatic solution is thus for governments to stress common ground and interests, to highlight areas of cooperation, and to minimize differences and conflicts among neighbors.

China, however, has developed an unfortunate habit of undertaking unilateral decisions that upset ASEAN states, on the eve of scheduled dialogues with them. The Mischief Reef incident

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[115] See Smith, "China's Aspirations," 284.

with the Philippines in early 1995 is one example. More recently, just prior to the ASEAN–China Dialogue in Bukittinggi in June 1996, China announced on 15 May its partial baselines for measuring its territorial sea offshore the mainland and the Paracel Islands, stipulating that it would "announce the remaining baselines of the territorial sea of the PRC at another time."[116] The critical question left hanging was what is meant by the "remaining baselines." If these "baselines" include extension of the Chinese territorial sea to the Spratly Islands, then the regional situation will become more precarious—legally, economically, and politically. If China draws baselines out to and around the Spratlys, it would arrogate to itself a large part of the South China Sea as its internal waters, and would in fact violate Article 89 of the 1982 LOS Convention, which asserts that "no state may validly purport to subject any part of the high seas to its sovereignty." Moreover, should China opt instead to draw straight baselines around the Spratlys, that act would violate specific provisions in the Convention pertaining to islands offshore and specific geographical situations for which straight baselines along a coast are permitted.[118] The 1982 LOS Convention does not permit coastal states to draw straight baselines around small, scattered islands that they claim in the ocean. That right is reserved only for archipelagic states, a status for which neither mainland China nor the Spratly Islands qualify.[119]

These concerns aside, relations among the Spratly claimants at present are relatively good. Governments have moved toward patterns of accommodation and normalization during the 1990s. China, at least rhetorically, has indicated its willingness to cooperate with Southeast Asian states on joint development in the Spratlys.[120] Recent events suggest that while no negotiation means no compromise on Chinese sovereignty over the archipelago, resources might be exploited by other claimants if the PRC does nothing to protect those resources. Diplomatic pressures by a united ASEAN could work to dissuade China from taking a military response, largely because such

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[116] Hasjim Djalal, "South China Sea Island Disputes," 129.

[118] See 1982 LOS Convention, Articles 3, 5 and 6, which set out the criteria for establishing coastal baselines. Strait baselines may be permitted in the case where the coastline is deeply indented (Article 7:1), or where a delta produces "highly unstable natural conditions" (Article 7:2), or there is a river flowing into the sea (Article 9), or where the distance between the low water marks at the natural entrance of a bay exceeds 24 nautical miles (Article 10:5).

[119] 1982 LOS Convention, Articles 46–54. See the text *supra* at notes 13–18.

[120] In 1993, Premier Li Peng asserted that: "On the issue of Spratly Islands whose sovereignty belong to China, our country puts forward the proposal of 'shelving disputes in favor of joint development,' and is willing to work toward the long-term stability, mutual benefit and co-operation in the South China Sea region." "Annual Work of the Chinese Government by Premier Li Peng, to the First Plenary Session of the Eighth National People's Congress" (13 March 1993), reprinted in *People's Daily* (2 April 1993), 3.

hostilities would unravel increasingly cooperative commercial relations in the region.

The ultimate goals in the South China Sea should be strategic stability, national security, and reduced force levels in the region for all states. There is a need for more non-military mechanisms to keep the peace. Multilateral fora, such as the APEC Conference, are important for promoting transparency and mutual exchange of information on regional activities. Through such agreed upon rules, tensions, and conflict among the claimant states can be more easily contained.[121]

## CONCLUSION

The essence of the Spratly dispute lies in questions of territorial sovereignty, not law-of-the-sea issues. The 1982 LOS Convention prescribes new legal rights and duties for Asian littoral states and other users of ocean space. In the South China Sea, the extension of 12 nautical mile territorial seas and 200 nautical mile exclusive economic zones has exacerbated conflicting claimed jurisdictions over non-living resources in overlapping continental shelf zones.[122] Moreover, various political antagonisms and disputed sovereignty claims over the Spratly Islands have seriously complicated establishment of agreed-upon baselines for territorial waters.

The complexities of overlapping claims and the dispute's long history make determination of national sovereignty in the Spratlys extremely difficult. Obviously, if the issue of sovereignty can be resolved, then the maritime jurisdictional principles codified in the 1982 LOS Convention can be applied to the Spratlys. Such application would cede undersea resource rights to portions of the South China Sea to recognized legal owners. Yet, no claimant government is able to establish sufficiently substantial legal grounds to validate its claim. This situation, paradoxically, makes resorting to binding arbitration or adjudication by claimant states, especially China, less likely since none is willing to risk an unfavorable outcome. Uncertainty through ambiguity over disputed territorial claims is deemed preferable to certainty through clarity with less or no claimed territory at all. Put bluntly, the alluring prospects perceived for oil resources, when combined with only a dimmed possibility for resolving the Spratlys dispute in the foreseeable future, places all

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[121] See Peter Polomka, "Strategic Stability and the South China Sea: Beyond Geopolitics," in Hill et al., *Fishing in Troubled Waters*, 36–47. For a variety of other proposals see Valencia, Van Dyke, and Ludwig, *Sharing Resources of the South China Sea*, 199–225.

[122] See Forrest and Morris, "Maritime Constabulary and Exclusive Economic Zones," 302–319.

the claimants in a political stalemate. The possibility that claimants might resort to force to defend their claims complicates an already protracted problem.

The Spratlys dispute is sharpened by strategic and geopolitical considerations. China requires increasingly more energy resources to meet the growing needs of its rapid industrialization process, and its massive population exacerbates its energy problem. China desperately needs to find more sources of hydrocarbon resources. The anticipated potential for oil and gas deposits beneath the seabeds offshore the Spratly archipelago, therefore, holds considerable attraction for the Chinese government.

ASEAN states are especially concerned because China historically has shown willingness to use military force to settle disputes within what it regards as its sphere of influence. China's build-up of naval forces is seen as expanding this sphere in the South China Sea through enhancing force projection. Moving to a blue-water naval capability is viewed by some as spawning a naval arms race among Asian states. Taken on tandem, China's vast size, growing population, rapidly expanding economy, and improved air and naval force projection capabilities make it increasingly formidable as a regional power.

Certain actions by Spratly claimants could spark conflict in area. Triggers include creeping occupation, such as that demonstrated by China during 1998–99 on Mischief Reef. Triggers for bilateral conflict abound: A claimant government's seizure of another state's fishing boats or commercial ships within disputed boundaries; confrontations between patrolling vessels of different navies; military resistance by Philippines to Chinese activities on Mischief Reef, or a future attempt by China attempt to repair structures, or build new ones elsewhere—all these are realistic events that could spark violent confrontation in the South China Sea. The ever-present possibility of accidents or miscalculations, compounded by persistent acts of occupation by China or over-reaction by some other claimant, make for serious violence waiting to happen.

A Spratly Resource Development Authority might alleviate pressures of conflicting sovereignty claims in the South China Sea. Such a cooperative arrangement could pool financial wherewithal of claimants into a joint effort to develop the area's resources within a politically stable, demilitarized environment. Previous agreements negotiated for resource management elsewhere provide fundamental principles, structures, and procedures for negotiating a treaty framework for cooperation in the South China Sea.

Whether such a scheme can be made acceptable to the Spratly claimants is still uncertain. All the claimants remain locked in a classic prisoner's dilemma. Unilateral control of the archipelago would yield the most benefits to that state. If each claimant, however, attempts to enforce unilateral control of the area, military confrontation will occur. The resultant loss in life, financial, and military resources—as well as in international trust and commercial confidence—would exact extravagant political costs on each antagonist, without any assurance of a favorable outcome. Indeed, for most claimants military conflict would be a lose-lose situation. Mutual cooperation, while yielding fewer benefits than unilateral control and exploitation of South China Sea natural resources, would protect more surely against the high costs of persistent or exacerbated conflict.

Confidence, trust, and transparency among the disputants remain wanting in the South China Sea situation. The Indonesian workshops can provide an interim solution, but they are only that. Such "talk shops" allow for airing views, concerns and issues, but they provide few incentives for immediate or long-term solutions. While the informal nature of the discussions has attracted key participants such as China and Vietnam, the effectiveness of their outcome depends on formalization of real solutions.

In short, the facts are these: No disputant in the region possesses in 1998 the ability to fight a sustained war over these islands. Further, few of the islands are sufficiently large to build airstrips. At the same time, the resource potential in the region remains unrealized. Thus, one might surmise that CBMs have not yet emerged because these issues have yet to become real or pressing, but once they do, more proactive efforts will be made toward resource development. The critical point is that the time for building trust, transparency, and cooperation is now. In the event that pre-existing institutional arrangements are not available, were Crestone to make a giant oil strike or China to acquire aircraft carrier capabilities in the South China Sea, beggar-thy-neighbor, self-help policies could well prevail over regional efforts at peaceful accommodation.[123]

The critical realization for producing an acceptable diplomatic solution for the Spratlys is evident. Conflicting claims are driven by politics. Irrespective of the talents and personalities of negotiators around a table, if national government leaders lack the political will to produce a solution, such an outcome can not happen. If leaders are not willing to compromise at all on sovereignty issues for the sake of a long-term agreement, then no agreement is likely to be made.

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[123] I am indebted to Professor Victor Cha of Georgetown University for pointing out the possibility of this scenario.

Governments must genuinely want to resolve the dispute—to negotiate an agreement that brings acceptable benefits to each party, albeit not at the expense of any vital interests to another.

Conflict over the Spratlys can be resolved only if policy makers have the political will and genuine determination to do so. Most states in the region confront common problems, among them political succession, economic development, and rising expectations from their people. In this regard, the Spratlys situation should be turned into an issue of regional unity, rather than division, with the creation of a joint development authority for exploiting resources under the seabed. That ambition has been successfully obtained for other contentious multinational sovereignty disputes elsewhere, and it is not beyond the realm of possibility to conceive such a management agency evolving for the South China Sea as well. The critical challenge is for governments in the region to make it happen.

## APPENDIX A

The Timor Gap area lies south of the former Portuguese territory of East Timor, which was annexed by Indonesia in 1975. Australia recognized East Timor as part of Indonesia in 1978, ostensibly to facilitate resolution of the Timor Gap problem. The area is of considerable interest to petroleum geologists, as the seabed contains geological features with substantial hydrocarbon potential.

Negotiations between Australia and Indonesia were complicated by disparate views on principles of international law governing the concept of the continental shelf and the natural prolongation of the land mass.[124] The critical issue hinged on how to delimit the continental shelf between the two states, that is, what mutually agreeable legal means might be used to accommodate the claims of both states based on the shelf's natural prolongation.

In searching for viable solutions, negotiating teams explored the possibility of a provisional joint development regime to oversee final delimitation of the seabed. Detailed discussions then went forward in 1985 at the ministerial level, culminating in an agreement in September 1988. The Timor Gap Agreement, which established a three-area "Zone of Cooperation," entered into force in February 1991.[125]

The Zone of Cooperation in the disputed seabed boundary area between East Timor and Australia covers 60,000 square kilometers (23,000 square miles). In Zone B, the area closest to Australia, Australia pays to Indonesia ten percent of the Gross Resource Rent Tax collected from petroleum production.[126] Similarly, Indonesia makes analogous payments to Australia from the Contractor's Tax collected in Area C, the portion of the Zone nearest to Indonesia.

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[124] Australia contended that under customary law, two continental shelves existed, and the law should be applied accordingly under Article 76 of the 1982 LOS Convention. Indonesia contended that there was one shared continental shelf between the two states, and therefore a median line should be acceptable. This position, moreover, allegedly was supported by the concept of a 200 nautical mile EEZ with seabed rights.

[125] 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, reprinted in (1990) 29 International Legal Materials 457–529. For a prescient proposal, see Ernst Willheim, "Australia-Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the East Timor Gap," *Natural Resources Journal* 29 (1989): 821–842.

[126] Timor Gap Agreement, Articles 2 (2b) and 4 (1b).

Zone Area A, the central and largest portion of the Zone possessing the greatest potential for hydrocarbons, is made subject to a joint development regime.

Responsibility for managing Zone Area A is delegated to a Ministerial Council. Comprised of an equal number of representatives from both states, the Council meets annually and operates by consensus. A Joint Authority, accountable to the Council, manages petroleum exploration and exploitation activities and is responsible for environmental management as delegated by the Treaty's provisions and the regulations issued by the Ministerial Council.

The agreement also specifically provides for cooperation in Area A in matters of search and rescue, air traffic services, and protection of the marine environment.[127] The parties are required to negotiate agreement on the exploitation of petroleum accumulations that overlap boundaries of Area A.[128] This Zone of Cooperation will be in force for forty years, and may be renewed for successive terms of twenty years if no permanent agreement is reached on continental shelf delimitation. The incentive is thus depreciated for producing a permanent settlement, particularly if it could lead to collapse of the interim agreement that now works satisfactorily for both parties.

[127] Ibid., Aricles 14–17.

[128] Ibid., Article 20.

## APPENDIX B

The Svalbard Treaty creates a regime of equity treatment in the exploitation of resources of Svalbard for all parties, which currently number forty. The agreement is designed to provide an international arrangement over the Svalbard archipelago by giving to Norway sovereignty over Svalbard, while maintaining existing access of other states to the islands for purposes of carrying out mining, hunting and other economic activities.[129]

While the Svalbard Treaty contains few provisions and leaves much unsaid about the explicit nature of the regime governing the region, three essential purposes are clearly articulated in the treaty. First, it places the Svalbard archipelago under the sovereignty of a single state, Norway, so that the island would be subject to proper legal regulation.[130] Yet, it is important to realize the package-deal nature of this arrangement: Norway did not grant rights to other states and Norway was given sovereignty over Svalbard on condition that other states retained their previous extensive *terra nullius* economic rights. Nor does the Treaty give any indication that Norwegian sovereignty is of an inferior quality compared to the sovereignty of other states over their territory. A second purpose of the Svalbard Treaty is to ensure preservation of rights that other states had to exploitation of the archipelago's economic resources under the prior legal status of *terra nullius*. This is accomplished by ensuring equal access to economic activities and by requirement that all taxes collected be used on Svalbard.[131] Lastly, the Treaty aims to secure peaceful development on the islands. If the first and second purposes can be attained, then the third can be more easily secured.

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[129] Articles 2 and 3 provide that nationals of all parties to the Treaty "enjoy equally the rights of fishing and hunting and may engage in all maritime, industrial, mining and commercial operation on a footing of absolute equality." As regards mining, Norway is obliged to provide mining regulations, which require the approval by other states parties under Article 8. The Norwegian authorities' power to tax those who are enjoying rights under Articles 2 and 3 also restricted, so as not to exceed "what is required for the object in view." Furthermore, the duty for any mineral exports is not to exceed one percent of the value of the minerals exported (Article 8). Finally, the archipelago is effectively demilitarized. Article 9 obligates Norway "not to create or to allow the establishment of any naval base" on Svalbard, nor to permit construction of "any fortifications in the said territories, which may never be used for warlike purposes."

[130] Norway was chosen as that state because of its interests on Svalbard, Svalbard's geographical adjacency to the Norwegian mainland, and the need to reach a conclusive solution. Commission du Spitsberg, *Recueil des actes de la Conference*, part VII, Conference de la paix 1919–1920 (Paris 1924), 90.

[131] Svalbard Treaty, Article 8(2).

## APPENDIX C

Key to reaching a desirable outcome was successful negotiation of Article IV in the Antarctic Treaty. This provision is now recognized as the "flexi-glue" that holds the treaty together, as it makes possible a political context in which claimants and non-claimants are able to cooperate in Antarctic affairs. At the same time, Article IV permits governments to continue to disagree vehemently on where, when, how, and whether sovereignty has been properly acquired by states on or offshore the continent, without jeopardizing the treaty's ability to function.[132]

Article IV in effect stabilizes the sovereignty conundrum within the treaty regime. The first paragraph of Article IV permits all parties to the treaty to dodge the issue of sovereignty. Each party's legal position towards the claims issue is thus preserved. Each party can participate within the framework of the treaty with other parties who espouse adverse legal positions. During the treaty's operation thus far, this pivotal facet of Article IV has proved to be functional, pragmatic and demonstrably effective.

Article IV also plainly asserts that no new claim, or enlargement of an existent claim, can be asserted while the treaty remains in force. Moreover, no acts or activities that occur while the Treaty is in force can constitute a basis for any state "asserting, supporting, or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica."[133]

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[133] In full, Article IV provides: 1. Nothing contained in the present Treaty shall be interpreted as: (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica. 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial in Antarctica shall be asserted while the present Treaty is in force. Antarctic Treaty, Article IV.

[133] Ibid., Article IV, para 2.