Chapter – III
China, Malaysia, Philippines, Taiwan, and Vietnam have claims to one or more of the Spratly Islands.
(I)

Geography and History of Claims in the South China Sea

The South China Sea is a semi-enclosed sea that is one of the most important strategic basins in the world. The sea extends from approximately 3° south latitude to 23° north latitude and is surrounded by China, Vietnam, Malaysia, Singapore, Brunei, the Philippines and Taiwan. The South China Sea, with a surface area of 1,148,500 square miles, is the world's largest sea. The width of the Sea, from Vietnam across the expanse of the Spratly's, to Balabac Island in the Philippines, is approximately 600 miles (see Map 4). Since 1969, several studies have suggested that the seabed may also be rich in hydrocarbon resources.

Much of the South China Sea lies on a shallow continental shelf, punctuated by numerous cays, shoals, reefs, islets and sandbars that lie just below or are just above the waters' surface. Although portions of the sea are on a deep abyssal plain (which extends to a depth of more than 5000 metres at the Palawan Trough, off the coast of the Philippines), almost half of the Sea has a depth of less than 200 metres.

The South Eastern portion of the Sea includes the Spratlys, a widely dispersed group of features, which are at their closest, more than 600 nautical miles [nautical miles/mile have been used interchangeably in the chapter. Whenever measurements on the sea are mentioned as mile/miles, they are to be taken as

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6 The Blue Dragon Area and the block licensed by China to Crestone Corporation, is also variously known as Vanguard Bank area, or, by the Chinese as, Warian Bei-21, sometimes also as WAB-21.


8 For discussions of the economic resource importance of the South China Sea generally, see, for example, Joseph R. Morgan and Mark J. Valencia, Atlas for Marine Policy in South East Asian Seas, (Singapore: ISEAS, 1983); Choon-ho Park, "The South China Sea Disputes: Who owns the Islands and the Natural Resources?," Maritime Studies, (London), Issue 27, 1978 especially p. 47: ("Over 70 per cent of Japan's oil comes from the Middle East and other sources for which the South China Sea is the main shipping route. A break in the shuttle chain...would prove fatal (loss of Japan's 'lifeblood' ").

9 Jon M. Van Dyke and Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea," Ocean, (London), vol. 10, no. 4, 1993, p. 56. The deep plain of the South China Sea (alternatively called the 'China Basin' or the 'South China Basin') can be considered as either (1) the 'deep ocean floor' lying between the continental shelves of Vietnam, China, the Philippines and Malaysia, or (2) merely a part of the entire Asian continental shelf (the Sunda shelf) which itself rests on the greater Pacific Ocean basin.
nautical miles] from the Chinese mainland, while only 200 miles from Vietnam. Marine charts appropriately label the Spratly’s ‘Dangerous Ground’ or ‘Dangerous Group’ because of the multitude of barely submerged rocks that are hazardous to ships. Many of them rise sharply from the South China Basin and frequently drop off abruptly to depths of 1000 meters and sometimes to depths of 3000 meters. Authorities vary in their estimation of the number of islets and other formations that make up the Spratlys. Van Dyke and Bennett count “33 islands, cays and rocks that are permanently above sea level” in the Spratly’s. Symons describes the Spratly group as “a widely spread string of some 200 coral reefs, atolls, sand cays and banks” (see Map 5). Professor Prescott identified 26 islets and seven ‘known rocks’, but several of the locations named by Prescott may not in fact be high-tide elevations as is discussed in detail below. In 1992 the US Central Intelligence Agency (CIA) identified 191 individually named formations in the Spratlys, without specifying which are permanently above water. With the aid of consultant cartographers (Professor Joseph Wiedel of the University of Maryland and, independently, Maryland Cartographic Inc.), Brice Clagett identified a total of 26 high-tide elevations in the Spratlys. Michael Bennett and Dieter Hanzig each found only twenty.

Informed commentators characterise the Spratlys as incapable of sustaining human habitation or economic life of their own. This aspect is of legal significance. The legal advisor for the Department of Foreign Affairs of the Philippines, for example, explains that the “disputed Spratly Islands are mostly coral reefs which allow only sparse growth of mangroves, shrubs and stunted trees.

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10 Ibid., p. 58.
13 CIA Map, The Spratly and Paracel Islands, Reference no 801947 (R 001177) 4-92. This map is available at http://www.cia.gov/maps/spratly.htm.
This area can hardly support human habitation.\textsuperscript{16} Van Dyke and Bennett, speaking of the Spratly’s and Paracels together, declare that “almost all have been uninhabited and cannot sustain an economic life of their own.”\textsuperscript{17} The largest of the Spratlys, Itu Aba Island (now occupied by Taiwan) is less than 0.4 square miles in size. A Chinese scholar has concluded that the islets are apparently too small to permit permanent settlement. The islet after which the group is named, Spratly, covers a mere 0.15 square miles.\textsuperscript{18} The total area of all the Spratly’s which are above water at mean high tide, taken together, are less than 5 square kilometers.\textsuperscript{19} Daniel Dzurek, Crestone’s consultant, has called the islets ‘tiny’ and of virtually no economic value.\textsuperscript{20}

The following section examines in detail the international legal clauses applicable to the dispute. The South China Sea disputes involve competing claims and the legal imperatives arising therein principally are between the PRC, Vietnam and to some extent the Philippines. The researcher has to a large extent relied on sources dealing with the international law of the sea as written by J.R.V. Prescott, John Van Dyke, Dale Bennett, Scott Snyder, Brice M Clagett and Mark Valencia.

**Summary of the Claims (See Appendix VIII)**

The question of who owns the more than 400 rocks, reefs and islands (known as the Spratly) that are scattered within an 800,000 square kilometers area within the South China Sea, was largely ignored until the 1970s. It must be noted here that the Paracel islands and Macclesfield Bank are also part of the vast South China Sea region that also includes other island chains and submerged reefs (see

\textsuperscript{16} Jorge R. Coquia, “Maritime Boundary Problems in the South China Sea,” *University of British Columbia Law Review* (Vancouver), vol. 21, no. 1, March 1990, p. 120.

\textsuperscript{17} Van Dyke and Bennett, n.9 p. 54 - 'Most of the islets are nothing more than coral outcroppings or reefs unable to support human habitation.' Only Yangzing Island (Paracel group-Woody Island) sustains a stable population of any size.


Plate 1  The Spratly features, their occupants as of 1996, and jurisdictional claims. China has placed markers on features with open triangles, but does not occupy them.
At that time, the area became a possible target for exploitation by multinational oil companies.\textsuperscript{21} In addition, the likelihood of conflict has increased as international maritime laws have slowly been codified and institutionalised since World War II. Motivated by the desire to extend control over sea based resources, neighbouring states in the areas have increasingly come into verbal conflict and even sporadic military confrontations over sovereign rights, jurisdiction, and arms control efforts in the South China Sea.

During the 1980s and 1990s, most of the disputing states had found themselves in a race to bolster their claims to sovereignty, by gaining occupation of the islands that can support a physical presence or by establishing markers on the islands where physical occupation is not feasible. In some cases, claimants have even built structures on features that are completely submerged at high tide (see Map 7), maintaining a physical presence on these island specks under mind numbing physical conditions (see Map 7). Currently, Vietnam occupies more than twenty islets or rocks, China occupies eight, Taiwan one, the Philippines eight, and Malaysia, three to six.\textsuperscript{22} Maritime claims have been made by six states: China, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia. The maritime-boundary claims asserted by the Philippines, Malaysia and Indonesia are well known and appear to have remained stable.\textsuperscript{23}

Although China has apparently never published the co-ordinates of its claims to the South China Sea, a 1984 bathymetric chart published by the South China Sea Institute, Beijing, which is at a scale of 1:3,000,000 shows nine broken lines that set out what China apparently today regards as indicating its claim. While the broken lines, standing alone, are susceptible to a variety of interpretations, if they are intended to assert a maritime boundary they indicate that China claims the entire South China Sea with the exception of a narrow belt


\textsuperscript{22} “China Takes to the Sea,” n. 2, pp. 41-42.

(varying between 12 and 80 miles in breadth) which it concedes to other states around the sea (see Map 8). The alleged ‘boundary’ appears roughly to track the 200 meter isobath, although with frequent deviations from it. Lines connecting the broken lines on the Chinese charts have been published frequently in the literature and are generally understood today to demarcate the maritime area claimed by China, although that understanding is of very recent origin.24

**Origin of the Claims**

The Chinese and Vietnamese claims to sovereignty in the South China Sea could be inferred to be based on historical claims of discovery and occupation. The Chinese case is better documented, but the extent of the Chinese claims remain ambiguous and contradictory. The Japanese occupied the Spratly Islands during the Second World War and used the island of Itu Aba (Taiping Dao) as cover for surveillance and as a supply depot, but the Japanese claim lapsed with their defeat in World War II.25 Taiwan’s claims to Chinese ownership of the South China Sea are similar to those of the PRC, and there has been some evidence of coordination of positions on the Chinese claims in the Indonesian workshops on the South China Sea. The Philippine claim is based on the ‘discovery’ of the unclaimed islands of “Kalayaan” (Freedom land) by an explorer Thomas Kloma, and the U.S.-Philippines security commitment has been consistently interpreted by the United States as excluding Kalayaan.26 The Malaysian claim as also Brunei’s claim is based on a straight line projection of its EEZ as stipulated by the UN Convention on the Law of the Sea.27

**Conflict Over Spratly Islands:**

The race for occupation of the Spratly Islands has increased the likelihood of conflict, if one is to go by the three cases of military intimidation in the period between the mid 1980s to the mid 1990s (setting aside China’s use of military

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25 Scott Snyder, n. 21, p. 12


27 See, Scott Snyder, n. 21.
Adapted from Marvyn Samuels, *Contest for the South China Sea*
force against Vietnamese troops to enforce its claims to the Paracels in 1974), the first of which led to military conflict (see Appendix IX). This confrontation occurred between the Chinese and Vietnamese over the occupation at Fiery Cross Reef (Yung Shu Jiao) in 1988, at which time the PRC sank three Vietnamese vessels, killing seventy-two people, mostly Vietnamese sailors. In 1992, the announcement of an oil exploration concession to the U.S. Crestone company by the PRC, combined with the occupation of Dalac Reef and subsequent deployment of three Romeo class conventional submarines to patrol the area, aroused alarms along the ASEAN states, which had in 1992 called for the non-use of force in resolving the Spratly Islands dispute in the Manila Declaration of the South China Sea. This development is discussed at length later on in the chapter. The third incident began with the discovery that the Chinese had occupied Mischief Reef (Meijijiao/Panganiban), a circular reef well within the Exclusive Economic Zone (EEZ) of the Philippines (following the Philippines announcement of a desktop oil exploration concession in the "Mischief Reef" area), and involved encounters between military vessels from the Philippines and the PRC in March and April 1995. It was the aptly named Mischief Reef confrontation that has catalysed the most recent wave of interest and concern over the Spratly Islands issue. That concern was reinforced by the PRC's military pressures against Taiwan.

International Laws Related to the Dispute:

Issues pertaining to the territorial control of sea waters have long been the subject of international law. Although there are some generally accepted rules of maritime shipping and the extension of a states' territorial limits, the emphasis in recent years on potential undeveloped sea resources has generated a number of interstate conflicts around the globe. Undersea oil exploration has been particularly contentious. The former Soviet Union in 1960 extended its territorial waters by 12 miles. Other countries claim a 200 mile off-shore territorial zone. To resolve disputes and regulate issues, the United Nations drafted the Law of the Sea.


For a detailed treatment see Ang Cheng Guan, "The South China Sea Dispute Revisited" Australian Journal of International Affairs (Canberra), vol. 54, no. 2, July 2000 pp. 201-15.
Convention (UNCLOS) in 1982. The UNCLOS is aimed at establishing coastal boundaries, erecting an International Seabed Authority to regulate seabed exploitation of resources and distribute revenue from regulated exploration. Till 1990, only 42 of the required 60 ratifications to make the convention were completed. It was only on 16 November 1994, following its ratification by 60 states that the UNCLOS come into force. Although there are a number of international legal principles and conventions that are relevant to disputed territories, we have taken up only those that have an immediate relevance to our purpose.

The Applicable Principles of International Law:

Maritime Delimitation

The law pertaining to ownership of seabed and subsoil resources of maritime areas beyond traditional territorial waters, has emerged almost entirely since 1945. Although all sources agree that the preferred way to resolve maritime disputes is by negotiations and agreement among the concerned parties, there are two principal sources of law that are pertinent to those cases where a negotiated treaty has not been achieved: 1) a multilateral treaty, the UN Law of the Sea Convention of 1982 (LOS - Lome convention), and 2) decision of international courts. Scholarly writings on occasion provide some elucidation on the large body

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21 See, for example Prosper Wei!, The Law of Maritime Delimitation - Reflections Occasional Paper 16, (Institute of Maritime Studies: London,1989), p.7. The rising interest in development of the law is largely attributable to the increasing exploitability, and hence increase in value, of the continental shelf, resulting in recognition of exclusive rights to the resources of the shelf and thus in the need to delimit boundaries. Despite the rapidly developing law, most of the maritime boundaries of the world remain unsettled.

of state practice that is sometimes consulted. An earlier multilateral convention, the Convention on the Continental Shelf of 1958, is regarded as largely superseded, as a source of customary international law, by the LOS convention, although it may have continuing vitality as between parties to it. Neither China nor Vietnam is a party to the 1958 convention. The Republic of China (Taiwan) is a party.

Although the sources of law have not always been in agreement since 1945, certain legal principles have become generally accepted with reference to situations where the maritime areas of two or more states potentially overlap and where a delimitation must therefore be made. These principles have been applied in a sufficient number and variety of court decisions to make it possible to predict how a court would approach a new delimitation, and in most of cases to predict with a fair degree of confidence either the approximate boundary that a court would select or, at the least, two or more alternative lines among which a court would choose. In general, the applicable principles of international law governing exclusive jurisdiction over seabed and subsoil resources are codified in the LOS convention. These provisions were drafted and negotiated through a lengthy process in which virtually every state in the world (including China, Vietnam, Malaysia, Indonesia and the Philippines) participated. The provisions relevant to the present inquiry were adopted by consensus, without significant indications of dissent. International courts have accepted the basic provisions of the convention as declaratory of, or incorporated into customary international law. Conversely, these provisions were influenced by, and are entirely consistent with, the two court

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34 The United States, the United Kingdom and other major maritime states which declined to sign the convention, did so because of their disagreement with the deep-sea mining regime. They expressed no disagreement with the continental-shelf and related provisions, and indeed actively participated in shaping those provisions. See, for example, “United States Ocean Policy,” Statement by President Reagan at Newport, Hampton High, Maine on 10 March 1983; Satya N. Nandan and Shabtai Rosenne (eds.) *II United Nations Convention on the Law of the Sea 1982: A Commentary*, as cited in Van Dyke and Bennet, n. 9, pp. 848 to 851.

35 Case concerning the continental shelf (Libyan Arab Jamahariya v. Malta), 1985 ICJ Cases 13, (The Hague), p. 29 (Libya/Malta); Arbitration Tribunal for the Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau (1985), no. 25 ILM 252 P. 289 - 299.
decisions that preceded the adoption of the convention.\textsuperscript{36} With entry into force of the convention last year and with the concurrent decision of several major industrial and maritime powers to adhere to the convention, there is every prospect that the provisions of the convention will gain ever-increasing acceptance as authoritative customary law that is binding on non-parties.\textsuperscript{37} The most important provision of the convention for present purposes are Article 13, Low-tide elevations; Article 56, Exclusive Economic Zone; Article 76, Definition of the continental shelf; Article 77, Rights of the coastal state over the continental shift; Article 83, Delimitation of the continental shelf between states with opposite or adjacent coasts; Article 121, Regime of islands; and Articles 112 and 123, Enclosed or semi-enclosed seas.\textsuperscript{38}

While Article 83(i) of the Convention, which sets forth the principles for delimitation of maritime boundaries between potentially overlapping continental shelves, is expressed in strikingly vague and general terms,\textsuperscript{39} substantial content for those terms is in considerable measure supplied by the extensive body of case law -- more than a dozen judicial and arbitral decisions to date -- in maritime boundary disputes, of which the first was the North Sea Continental Shelf cases in 1969\textsuperscript{40} and the most recent is the Jan Mayen case in 1993.\textsuperscript{41} These decisions are entirely consistent with the principles set forth in Article 83(i) of the Convention, and the decisions both before and after the adoption of the Convention are authoritative applications of the same principles as are codified in Article 83(i).

\textsuperscript{36} North Sea Continental Shelf cases (FRG/Denmark ; FRG/Netherlands), 1969 KJ 3 (North Sea Continental Shelf cases). Delimitation of the continental shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic) International Law Review (New York), vol. 56, no. 6 (decision of 30 June 1977) 1979-Anglo/French case.


\textsuperscript{38} In addition to these Articles, Article 3 authorises 12 mile territorial seas and Articles 55 to 75 provide for a 200-mile exclusive economic zone (EEZ) in which exclusive rights may be exercised over surface and water-column resources as well as those of the seabed and subsoil. A boundary between overlapping EEZ's is not necessarily the same as that between continental shelves. See for example, Guinea Bissau v. Senegal, Arbitral Award of 31 July 1989, Arbitral Award of 31\textsuperscript{st} July 1989, Arbitration Tribunal for the Determination of the Maritime Boundary (Barberus, President; Bedjaaoou and Gros, Arbitrators), 83 ILR (1990).

\textsuperscript{39} Article 83(1) provides merely that delimitation is to be made 'on the basis of international law... in order to achieve an equitable solution.'

\textsuperscript{40} North Sea Continental Shelf cases, ICJ Rulings no. 3, 1969.

\textsuperscript{41} Jan Mayen, ICJ Ruling no. 38, 1993.
If one reads the convention and the decided case law as each clarifying, complementing and supplementing the other, the following general rules emerge as among those that one can predict with confidence will be followed by courts in future maritime-boundary cases, even if one or both parties to the dispute are non-parties to the convention.

**Natural Prolongation**

The basic rationale for the doctrine that coastal states are entitled to exclusive rights in the seabed and subsoil of maritime areas adjacent to their coasts, is that such seabed and subsoil constitute the ‘natural prolongation’ of the land into the sea.\(^{42}\) The submarine land mass that comprises this ‘natural prolongation’ is broadly described as ‘the continental shelf’ or the ‘continental margin’. Some terminological confusion exists, however, because the term ‘continental shelf’ is also used in a much more restricted sense, to mean the portion of the greater shelf that is immediately adjacent to the coast, that is relatively shallow and that descends gradually until reaching the continental slope. Article 76 of the LOS convention contributes to this modest confusion by using the term in both its more and its less restricted senses.

In what is widely regarded as the ‘typical’ scenario and which is subsumed into the definition of ‘continental shelf’ in Article 76 of the LOS convention, a coastline is abutted by an area covered by shallow water which deepens very gradually (the ‘continental shelf’ in the narrow sense) beyond which is an area characterised by a much sharper deepening (the ‘continental slope’). Beyond the slope is an area which again deepens more gradually (‘the continental rise) and which is characterized by the presence for a relatively thick layer of sedimentary rock, in contrast to the deep ocean floor which lies beyond the rise.\(^{43}\) All these

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\(^{42}\) President Harry S. Truman is generally cited as the author of the notion that a coastal state is entitled to the submarine landmass that is the natural prolongation of its territory. See for example, United Nations Office of Legal Affairs. *The Law of the Sea: Definition of the Continental Shelf* (New York: United Nations, 1993), at p.1. In its most primitive form, this position assumes that there is an ocean ‘floor’ on which the continents rest. Some of the difficulty in applying the exact terms of the LOS convention derives, in part, from the fact that it attempts to blend the ‘primitive’ conception of a continental shelf with more sophisticated geology and plate tectonics.

\(^{43}\) The rationale for including the continental rise in the area in which exclusive rights exist is that the sedimentary rock characteristics of that area has been washed down, over
areas in the aggregate area called ‘the continental margin,’ and are also called the ‘continental shelf’ in the broad sense. While the dual use of the term ‘shelf’ permits occasional confusion, the basic conceptual structure is adequately clear. As used in the convention, ‘shelf’ in the broad sense is legal rather than a geomorphological term: it designates the entire area, beyond territorial waters, to which a state is recognised as having exclusive rights to exploitation of seabed and subsoil resources. 44 In many parts of the world however, reality is much more complicated than the ‘typical’ scenario. Many offshore areas present irregular characteristics, such as troughs, rifts, submerged hills or mountains, reefs, islands or island chains, and other features that make it possible to discuss at length about where the ‘natural prolongation’ of a particular mainland territory ends. 45

The 200 - Mile Minimum

By the time of UNCLOS III, (the extended negotiations which resulted in the completion and signature of the LOS convention in 1982), many states feared that the ‘natural prolongation’ doctrine would work to their disadvantage because they had relatively narrow continental shelves (in the narrow sense) or because of the problems mentioned immediately above. Responding to these concerns, the Convention modified the ‘natural prolongation’ principle by providing, in Article 76(i), that every state has exclusive rights in a ‘continental shelf’ to a minimum of 200 nautical miles offshore, regardless to the bathymetry or geology of the seabed and subsoil in question. Thus, within 200 miles, legal entitlement became

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44 See generally, UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Definition of the Continental Shelf: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, 1993. In this chapter, the term ‘continental shelf’ is used in the broad (or legal) sense as including the entire shelf, slope and rise to which a coastal state may exercise exclusive seabed and subsoil rights in accordance with the convention and customary international law.

automatic; 'natural prolongation' was no longer necessary. In the Libya/Malta case, the ICJ accepted this rule as part of customary international law. The court further concluded that, in cases where the continental shelves of two or more states, allegedly overlap and require a delimitation, the new 200-mile rule means that, within that limit, considerations of bathymetry and geology are irrelevant to the delimitation, which is to be made on the basis of entirely different considerations.

Entitlement Beyond 200 Miles

The convention does not repeal the 'natural prolongation' doctrine, nor does it restrict exclusive seabed-and-subsoil rights to 200 miles. Article 76 permits exclusive rights out as far as 350 nautical miles (or 100 miles beyond the 2,500-metre isobath) if the natural prolongation of the land extends that far, and contains specific and detailed provisions which provide two alternative methods for determining the outer limit to which exclusive rights may lawfully be claimed. These provisions, unlike the regime within 200 miles, require consideration of the bathymetric and geological characteristics of the area in question. In particular, both of the alternative methods require identification of the foot of the continental slope, which is defined as 'the point of maximum change in the gradient at its base.'

The case law has not yet addressed the question of how far beyond 200 miles a state may extend its exclusive rights. It remains to be seen whether the courts will hold, if and when the issue arises, that the precise and detailed provisions of Article 76(4) to (7) have become incorporated into customary international law so as to be binding on states that are not parties to the convention.

On the one hand, such incorporation would be unusual; customary international law normally consists of general principles, not precise rules, including units of measurement, which are more characteristic of texts, such as

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46 Libya/Malta, 1985 ICJ at pp. 33-35.
47 UNCLOS Article 76(4) to (7).
48 Ibid.
49 UNCLOS Article 76(4) (b), n. 47.
treaties, that are binding only on the parties. On the other hand, the LOS convention is perhaps unique with respect to the breadth of national participation in its drafting and the degree of consensus that it has achieved. The courts have quickly recognized that some of the units of measurements in the convention -- the 12-miles territorial sea and the 200-mile EEZ and minimum ‘shelf’ entitlement -- are incorporated into customary international law. Moreover, the provisions of Article 76 (4) to (7), and the high degree of consensus behind them, unquestionably demonstrate that there is no consensus whatever on a rule that would prohibit states from asserting exclusive rights on to the limits expressly permitted by those provisions. Since customary international law permits what it does not prohibit, any claim that a state making such assertion is acting unlawfully would be entirely without foundation.

For these reasons, it seems probable that the courts (when and if the issue arises) will hold that the provisions of Article 76(4) to (7) have become incorporated into customary international law. In any event, even if the courts should hold that the precise rules, including units of measurements, of those provisions have not achieved the status of a binding law, it can be predicted with confidence that they will hold, in application of the ‘natural prolongation’ doctrine that state may extend its exclusive rights beyond 200 miles when the bathymetric and/or geological characteristics of the area make that appropriate. The precise rules of Article 77(4) to (7) will at least be regarded as highly probative guidelines, even if not binding in and of themselves. A state will be held entitled to extend its exclusive rights to the foot of the continental slope (assuming that point can be identified in a particular area) and for some distance beyond that, to include the continental rise as well. Finally, a court would obviously not find its claims in accordance with the precise rules of Articles 76 that had violated any rule for customary international law that precludes it from doing so.

Criteria for Delimitation

The convention and the courts are in entire agreement that the goal of a maritime-boundary delimitation, whether accomplished by agreement or by

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50 ‘Libya/Malta, 1985 ICJ at p. 35; Guinea/Guinea-Bissau No. 25 ILM at pp. 298-300; Guinea-Bissau vs Senegal, also n. 38.'
adjudication, is 'to achieve an equitable solution'.\footnote{LOS Convention, Article 83(1). For articulations of the same principle in the case law, see, for example, Jan Mayen 1993 ICJ at p. 59; Guinea/Guinea-Bissau, 25 ILM at p. 289; Anglo/French Case, 54 ILR at p.100; Case concerning the continental shelf (Tunisia v Libyan Arab Jamahiriya), 1982 ICJ p. 18 and 49; Gulf of Maine, 1984, ICJ at p. 343-4, and Libya/Malta, 1985, ICJ at pp. 29-30.} In determining whether particular proposed boundaries meet that test, the most important requirement as developed in the case law is that there should be a reasonable degree of proportionality between the lengths of the relevant coasts of the state parties (measured by general-directional lines) and the quantity of maritime space assigned to those states.\footnote{For example North Sea continental shelf cases, 1969 ,ICJ at p. 54; Libya/Malta, 1985 ICJ at pp. 51-53; Tunisia/Libya, 1982 ICJ at p. 91; Court of Arbitration for the Delimitation of Maritime Area as between Canada and France: Decision in case concerning Delimitation of Maritime Areas (St.Pierre & Miquelon), 31 ILM at pp. 1175-76 (1992) - Canada/France.}

**Historic Title**

In certain very exceptional situations, international law may recognize a 'historic' title to a bay, as internal waters or the exclusive rights of a coastal state to exploit or to regulate a particular seabed or subsoil resource, located in a well-defined and limited area, on the basis of longstanding occupation and appropriation of the resource by that state with the acquiescence of the international community.\footnote{Ibid., p. 27.}

**Effective Occupation of Islands**

The rule of effective occupation calls for a brief discussion because of the disagreement between China and Vietnam concerning sovereignty over the Spratlys and Parcels. The law of the sea, as embodied in the 1958 conventions, the LOS convention, and the opinion of international tribunals, provides no guidance for resolving disputes regarding sovereignty over land areas, including islands. Another body of law deals with those issues. The standard rule regarding occupation, which is set forth and applied in several international decisions, is that discovery of territory provides no more than an inchoate title, "Possession and
administration are the two essential facts that constitute an effective occupation.\(^{54}\)

Discovery must be followed reasonably promptly by effective occupation and by state administration; visits or use by individuals not accompanied by the exercise of governmental authority is insufficient. To quote Professor Brownlie:

"Much of the material to be considered under the heading 'effective occupation' has a relevance far beyond the acquisition of terra nullius. Its elements involve simply proof of possession by states, of manifestations of sovereignty legally more potent than those of the other claimant or claimants, or, in brief, proof of the better right. The intensity of state activity required will obviously be less in the case of terra nullius than in the case where a competing claimant takes an interest in territory."\(^{55}\)

If an international tribunal held that both China and Vietnam had failed to meet this test in earlier times with respect to the Spratlys and Paracels, the result could be a holding that the islets were terra nullius, as recently as 1973.\(^{56}\) If that position prevailed, them each Spratly and Paracel (that is, each high-tide elevation) would be held to belong to the state which first established effective occupation of it in the twentieth century and had met the international-law standard described above, for the acquisition of sovereignty over the Spratlys (or any of them), then any use of force in recent times by another state to displace that sovereignty would be held unlawful and ineffective. Article 2(4) of the United Nations Charter and other developments since the Kellogg-Briand Pact of 1928\(^{57}\) make it clear that an act of conquest or subjugation cannot be a source of sovereignty or displace a previous sovereign.\(^{58}\)

Within the framework of claims and counter-claims regarding the sovereignty of the Spratly and Paracel Islands, is the dispute China and Vietnam

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\(^{54}\) Robert Jennings (ed.), *Oppenheimer's International Law*, 1992 (9th ed.), at p. 866. See The Island of Palmas Case (United States v. Netherlands), 2 RIAA 829 award of April 1928. The Island was awarded to Netherlands which had demonstrated continuous occupation from 1700 to 1906; Clipperton Island, Z RIAA 1165-judgement of 28 January 1931 – dispute between Mexico and France, where it was decided that the actual, and not the nominal, taking of possession is a necessary condition of occupation.


\(^{56}\) Ian Brownlie, ibid., p. 144.

\(^{57}\) General Treaty for the Renunciation of War (Kellogg-Briand Pact), 27 August 1928.

have regarding the Vanguard Bank area and the Blue Dragon area, which have been licensed by China to Crestone Energy Corporation and by Vietnam to the Mobil Oil Company and others, respectively. To understand the dynamics that have, and are, shaping the dispute, it becomes necessary to examine the background of sovereignty and maritime-boundary disputes between China and Vietnam.

Background of Sovereignty and Maritime-Boundary Disputes between China and Vietnam

Both China and Vietnam claim long historic sovereignty over the Spratly’s and Paracels. China asserts that the Spratly have been a part of its territory since as early as the Three Kingdom Period (AD 220-265). The Chinese government insists that the islets were visited and commercially, developed during the next thousand years. Further, Chinese archaeologists claim to have found ancient artifacts on the Paracels, including pottery, utensils, knives, cooking pots and the ruins of living quarters, that provide evidence of long-standing Chinese occupation. Ironically, the Chinese claims to have possessed the Spratly’s for nearly two millennia, may be due to the implicit reliance on the expansive claims made by Ming and Qing dynasties that had invaded and controlled what is modern day Vietnam (then known as Annam). Vietnam, like China, claims long-standing possession of the Spratlys based on its own collection of historical documents and maps. The two states have engaged in a debate over the meaning and significance of ancient maps and texts that form the basis of each party’s claims. The Chinese position is articulated by the Ministry of Foreign Affairs of China, while the Vietnamese position is articulated by the Ministry of Foreign Affairs of Vietnam.

The modern debate over the Spratlys and Paracels begins with the French occupation of Indo-China in the 19th century and the British government’s claimed annexation of Spratly Islands. The French and the British exchanged diplomatic

59  R. Haller Trost, n. 23, p. 88.
60  See, Chinese Foreign Ministry, n. 24.
61  Choon-ho-Park, n. 8, p. 34.
notes over rights to the islets in the late 19th century. France both claimed and exercised control over the Spratlys during the 1930s, apparently without any protest by China, which had not asserted any claim of its own. During World War II, the Japanese occupied several of the Spratlys, using them as military outposts. Japan renounced its claim to the islets in 1945. Although there were disagreements over the relative merits of the parties' claims, the issue was not at the forefront of any state's concern.

Prior to the late 1960s, none of the states bordering the South China Sea had made any claim to the continental shelf. When China issued its Declaration on China's Territorial sea on 4 September 1958, despite the fact that a convention on the continental shelf had just been signed in Geneva, it made no mention of the shelf or of any claims to the shelf.

From 1969 to 1985

In 1969 a major change occurred. In that year, the United Nations Economic Commission for Asia and the Far East reported that 'a high probability exists that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world... From that time on, states in the region began taking an increasing interest, not only in making claims to the continental shelf, but in staking claims to the numerous islets, rocks, low-tide elevations and submerged reefs that dot the seascape of the South China Sea.

In September 1973, the South Vietnamese Government moved to occupy five Spratly locations and declared that 11 such locations would be administered

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by Phuoc Tuy Province. On 11 January 1974, shortly after the South Vietnamese government announced its intention to explore for oil off the Paracels, some of which it then occupied, the Chinese government issued a proclamation asserting its sovereignty over that area. On 20 January 1974, after the South Vietnamese government had rejected China's claim to the Paracels, China sent MiG fighters, warships and several hundred troops to oust the few Vietnamese defenders of the islands. Several soldiers died or were taken prisoner (including one US adviser). Neither the United States nor the Soviet Union took a position on the dispute. A few days later, on 30 January 1974, South Vietnam landed 120 soldiers on several uninhabited Spratlys. Following the collapse of the Saigon regime in 1975, Hanoi took possession of the Spratly garrisons and asserted claims to both the Spratlys and the Paracels. In 1979, China invited foreign oil companies to enter into geophysical-survey agreements for the continental shelf with the China National Oil and Gas Exploration Development Corporation. By 1984, more than 31 companies had signed more than 20 contracts with China; all of them were in waters fairly close to Chinese coasts, and none was in the South China Sea south of 16° north latitude.

From 1985 to 1991

During the 1980s, it became more evident that the states surrounding the South China Sea had become increasingly assertive in staking claims to the Spratlys and had posted rival garrisons and scientific observatories on the islets. In 1985, Professor Prescott counted 13 of the Spratlys as then being occupied; Vietnam occupied five (including the feature called Spratly Island), the Philippines occupied seven and Taiwan occupied one (see Map 7).

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70 See, Jeanette Greenfield, n. 64, pp. 168-174.
71 J.R.V. Prescott, n.12, pp. 218-222.
Perhaps, the most significant Chinese move in the Spratly’s came during the spring of 1988. On 14 March 1988, Chinese gunboats attacked a Vietnamese convoy, with the reported loss of more than 70 Vietnamese soldiers and three transport ships. The Chinese then seized several of the submerged reefs or low-tide elevations, converting Fiery Cross Reef into an artificial island complete with an airfield. Interestingly, the People’s Republic of China has pledged to defend Taiwan’s occupation of its sole Spratly isle, Itu Aba, if Taiwan’s occupation were to be challenged by Vietnam. By 1992, only seven years after Professor Prescott counted 13 occupied Spratly locations, the CIA identified 42 locations in the Spratly and Vanguard Bank areas as being occupied. China occupied six; Vietnam 24 (including Vanguard Bank Shoals, Prince Consort Bank and Grainger Bank, which are submerged reefs within the area licensed by China to Crestone; the Philippines, eight; Malaysia, three; and Taiwan still occupying only Itu Aba. The increasing interest in occupying these submerged reefs, low-tide elevation and tiny islets, is, of course, not due to any intrinsic value of the damp rocks, scrub bush and guano that lie just above sea-level on some of them, but to the resources that may lie within the surrounding seabed.

1992 to 1995: The Vanguard Bank and Blue Dragon Areas

Relations between Vietnam and China noticeably improved in the last 1980s and through the first years of the 1990s, culminating in the Bandung talks in July 1991 and the re-establishment of diplomatic relations in November 1991. Events during the last four years, however, which largely pertain to oil licenses, have once again created tension. Although China has made some offers to develop the South China Sea jointly, it nevertheless promulgated a new law on 25

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72 See, Van Dyke and Bennett, n. 9; also, citing Agence France Presse on 10 June 1988.
73 See, Cordner, n. 66, p. 64.
74 Van Dyke and Bennett, citing Agence France Presse (Paris), 16 December 1988.
76 On 7 July 1994, a Chinese Foreign Ministry Spokesman is reported to have indicated that “China is willing to shelve its dispute with Vietnam over the Spratly in favour of joint development, but still claims undisputed sovereignty over the entire area.” Indochina Digest, 8 July 1994, p.4. It does not appear that China has ever specified what area it contemplates might be subjected to joint development or what arrangements for such development it might agree to. It has been suggested, moreover, that China’s joint development offer apparently is conditional upon recognition of Chinese sovereignty. See Mark Valencia’s Adelphi Paper 298, for this extract.
February 1992 - the Law of the Territorial Sea and the Contiguous Zone - which effectively supplants the 1958 Declaration (to which it does not refer). This 1992 law repeated China’s claim to a 12-nautical-mile territorial sea (Article 3) and added a 12-nautical-mile contiguous zone (Article 4). But, like the 1958 Declaration, it made no reference to the continental shelf, or to any ‘historic waters’ as the basis of its claims to the South China Sea. There have been reports, however, of an international Chinese document that has been obtained and translated by the United States, wherein Chinese officials declare China’s need for sheng cun keng jian - ‘survival space’ - in the South China Sea. The document is said to declare that the South China Sea holds petroleum reserves worth one trillion dollars.

Vanguard Bank

On 8 May 1992, the Chinese government signed an oil exploration contract with a small American company named Crestone Energy Corporation. The terms of the contract apparently permit Crestone to explore a 10,000-square-mile block in the Vanguard Area (which the Chinese have labelled Warian Bei-21). An American embassy official attended the signing ceremony between the Chinese and Crestone. The block is approximately 160 miles from the Vietnam coast and over 600 miles from Hainan Island, the closest undisputed Chinese territory. The Chinese government simultaneously announced that its navy would be used to protect the block (see Appendix X).

The Crestone contract caused several governments in the region to become concerned about the extreme Chinese territorial claims. In July 1992, President Ramos of the Philippines told an ASEAN meeting that “we cannot postpone the urgent necessity to seriously seek a solution... lest the unsettled situation lead to

78 Ibid., p. 16.
79 In a letter to the Foreign Minister of Vietnam dated 19 August 1992 (unpublished), US Acting Secretary of State, Lawrence Eagleburger declared that “the United States Government had no knowledge of or involvement in the negotiations between Creston, a private corporation, and the Chinese Government and takes no position on the contract... we hope that Vietnam will treat this as a legal matter with regard to Crestone.”
80 See, “Treacherous Shoals,” n. 77.
perilous developments,” and the ASEAN foreign ministers adopted a declaration calling for peaceful resolution of the conflict.81

Blue Dragon

In late December 1993, Mobil and several other oil companies, including PetroVietnam, agreed to undertake a joint venture to explore the Blue Dragon block, which lies a short distance to the west of the Vanguard Bank area.82 This agreement was the culmination of two years' work wherein Vietnam sought Western partners to conduct oil exploration work off its coast. (A contract between PetroVietnam and the Norwegian-based Nopec had been signed in 1992, which had prompted a protest from Crestone).83 On 19 April 1994, after the lifting of the US trade embargo, Mobil formalised its December 1993 agreement with PetroVietnam to explore Blue Dragon.

Blue Dragon is approximately 160 miles from Spratly Island, the nearest Spratly high-tide elevation, well beyond the 24-miles territorial sea and contiguous zone announced by the 1992 Chinese law - and 688 miles from the nearest undisputed Chinese territory.84 Nevertheless, China has claimed that the Blue Dragon sea area belongs to the adjacent waters of the Nansha (Spratly) Islands.85 Some press reports in 1994, suggested that China had obtained equipment for the purposes of drilling in the Blue Dragon field. Despite the tensions, Vietnam issued more than 27 petroleum production-sharing contracts between 1988 and 1994.86


82 In 1973, four US oil companies had signed contracts with the government of South Vietnam to begin exploration on the Vietnamese continental shelf near what is now Blue Dragon. Mobil, one of those companies, had found oil in the nearby Tiger block shortly before it was forced to leave following the collapse of the South Vietnamese government in 1975.


85 Blue Dragon is only 90 miles from Vietnam's Undisputed Catwick Islands, so that even on the assumption that China owns Spratly Islands (which Vietnam occupies), an equidistance line between Spratly and Catwick would leave Blue Dragon well on the Vietnamese side. However, no such line can be justified as Maritime boundary.

The common position of the PRC and Taiwan regarding the Spratly’s

At this stage, it would be useful to take a look at the similar approach adopted to the Spratly Islands dispute by China and Taiwan. Both parties see this as an internal conflict and not a conflict over maritime borders. Taiwan is, according to Beijing, a part of China and there were no maritime conflicts between China and Taiwan. It is interesting to note that China and Taiwan have cooperated with each other regarding the South China Sea disputes, where their claims are identical, and both claim the South China Sea as being Chinese waters, not PRC or Taiwanese waters.

Scholars in China have repeatedly proposed that China and Taiwan cooperate in South China Sea through contacts between forces occupying the area, joint missions, logistics support and even joint military exercises. The first sign that China and Taiwan might adopt a common policy on these issues surfaced during the March 1988 clash in the South China Sea between China and Vietnam, when Taiwan’s Defence Minister stated that Taiwan would help China defend the Spratly islands group from a third party if asked to do so. At the 1991 round of the Indonesia-sponsored talks, it became apparent that China and Taiwan had the same sweeping claim to most of the South China Sea – and the same historical rationale. Although the claim is based on grounds of ancient exploration and empire, their modern version stems from 1947. This claim is often accompanied by a map showing a U-shaped historic claim line (see Map 8) that encompasses much of the continental shelves and even the subsequently-discovered and producing oil and gas fields of ASEAN nations. Taiwan has stated that multilateral cooperation should be pursued through the entire South China Sea and not just the Spratly’s or the multiple claim area. In June 1994, a joint mainland – Taiwan academic conference on the South China sea was held in Taipei. At the conference, Zhang Jinyou, political counsellor to the Administrative Yuan (Taiwan’s

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administrative bureaucracy), urged the governments of Taiwan and China to map jointly the waters and exercise jurisdiction accordingly. 89

This burgeoning 'united front,' it could be analysed, has implications for the politics of China-Taiwan reunification. Although Beijing and Taipei continue to vie for sole diplomatic recognition, the trend in cross-Taiwan straits politics since 1987 (excepting a few incidents) has been towards accommodation rather than confrontation. Also, by forging a united front with China on the South China Sea issue, both the PRC and Taiwan can ensure that the disputed area will not fall into non-Chinese hands.

China's Position on the Spratly Islands: An Interpretation

As the war in Vietnam was coming to a close, the Spratly islands dispute was once again revived when Chinese and South Vietnamese troops clashed in South China sea. Following the clash between the PRC and Vietnam in 1974 over the Paracels, the statement issued by the Chinese side was:

"The Army and the people on the Xisha Islands (Paracel) succeeded in defending China's sovereignty and the territorial integrity by repulsing the attacks by the puppet troops of South Vietnam who had violated China's territorial waters and airspace, occupied Chinese islets and killed and wounded Chinese fishermen." 90

In 1976, after the cessation of hostilities in Vietnam, and with China going through a crisis of leadership (with the demise of Mao Zedong and Zhou Enlai in quick succession) there emerged in Chinese foreign policy a period of flux. It was at this juncture that Foreign Minister Huang Hua had made the assertion with regard to the Spratly's that:

"When the time comes, we (China) will retrieve those islands. There will be no need then to negotiate at all". 91

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89 This conference was the first of its kind where participants from the Mainland were coordinating a common position to be adopted with, regarding the Spratly Islands dispute with the Taiwanese.


The role of the Naval wing of the PLA, the People’s Liberation Army-Navy (PLAN), also comes under scrutiny since within the PRC’s foreign policy decision making structure, it has an important role. To cite an instance, following the Fiery Cross skirmish in 1988, the *Jiefangjun Bao (Liberation Army Daily)* carried an editorial which said that:

“In order to make sure that the descendants of the Chinese nation can survive, develop, prosper and flourish in the world of the future, we should vigorously develop and use the oceans. To protect and defend the rights and interests of the reefs and islands within Chinese waters is a sacred mission… [T]he Spratly Islands not only occupy an important strategic position, but every reef and island is connected to a large area of territorial water and an exclusive economic zone that is priceless… **92** (sic)

As discussed in the last chapter, with the emergence of Deng Xiaoping and the administering of the policy of reform, there was a change in the PRC’s approach. As part of China’s economic diplomacy it was during a visit to Singapore in 1990 that Li Peng, then China’s Premier, declared that the South China Sea conflict should be “frozen” and the exploitation of the natural resources should be managed by joint ventures until a peaceful solution is reached. **93** This formulation was seen as a fresh impetus in gradually guiding the issue towards a resolution. With a view to accommodate and not antagonise the PRC, the Manila declaration of ASEAN involved the parties agreeing to solve the conflict with peaceful means and by cooperation in the development and exploration of the area. **94**

It is to be inferred that there is strong reluctance on the part of China to internationalise the issue due to the fact that an evolving multilateral conflict management would lessen China’s advantageous position in any bilateral negotiation with the other regional actors, who are much weaker. During the Bandung Workshop in July 1991, China explained that it did not support any conflict management process in the region by regional or external actors, i.e.,

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93 Eric Hyer, n. 91, p. 48. A joint venture is, for Li Peng, tantamount to cooperation between two parties with an agreed purpose.
China wanted all conflict to be resolved bilaterally between the involved countries.\textsuperscript{95} China has pointed out that it supports a peaceful solution, even if on a bilateral basis. According to Mark Valencia, China had developed a “Three No’s” strategy: “No” to internationalisation of the conflict; “No” to multilateral negotiations, and “No” to specification of China’s territorial demands.\textsuperscript{96} This is another instance of the ambiguities in China’s approach to multilateralism.

The dispute essentially remains between the Chinese and the member nations of the ASEAN (see Map 9). Recognising the potential of a flare-up in the region over the Spratly’s, the Manila Declaration called for a peaceful resolution to the dispute, as also the foreswearing of use of arms.\textsuperscript{97}

However, prior to the Manila declaration on 25 February 1992, the standing committee of the National People’s Congress adopted \textit{The Law on the Territorial Sea and Contiguous Zone of the People’s Republic of China} (Territorial Sea Law), which attracted a lot of attention for the sheer range of China’s claimed territories offshore. For instance, Article 2 of the Territorial Sea Law States

\begin{quote}
“The Territorial land of the People’s Republic of China includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoou (Senkaku) Islands, the Penghu (Pescadores) Islands, and Dongsha (Pratas) Islands, the Xisha (Paracel) Islands, the Nansha (Spratly) Islands and other islands that belong to the People’s Republic of China.”\textsuperscript{98}
\end{quote}

Following the adoption of the Territorial Sea Law and the Mischief Reef incidents, the confidence among the ASEAN states towards China lessened significantly, with the result that, China’s laudable proposal for joint development of the region came into serious doubt by the other participants.\textsuperscript{99} It is also to be inferred, that an apprehension shared by most ASEAN members is that, cooperation, according to Chinese demands, can only be initiated after the other actors have recognised

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{95} Nayan Chanda, “Fear of the Dragon,” \textit{FEER}, July 22, 1995, p. 28.
\item \textsuperscript{97} See http://www.aseansec.org/maniladecUhtm./ for a complete text of the declaration.
\item \textsuperscript{98} As cited in Lt. Com. Max Herriman, “China’s Territorial Sea Law and International Law of the Sea,” \textit{Maritime Studies} (Red Hill: Australia), vol. 92, no. 5, p. 35.
\item \textsuperscript{99} Niklas Swanström, \textit{Conflict Management and Negotiations, in the South China Sea: The ASEAN Way?}, Ph.D. candidate, Department of Peace and Conflict Research, Uppsala University, Departmental Paper, p. 7.
\end{itemize}
\end{footnotes}
China's "unquestionable" sovereignty over the area. Of interest is the interpretation put forward by some analysts who say that China had a relatively weak political interest in the Spratly's before 1983, but began to make its presence felt afterwards to fill up the power vacuum that the US and the Soviet Union had left behind.

As a confidence building measure on 15th May 1996, the Standing Committee of the NPC ratified the United Nations Convention on the Law of the Sea (1982-Lome). Closely following this, China declared its EEZ of 200nm in May 1996 and while promising to adhere to the LOS Convention, stated: "but only according to their interpretation." This in effect meant that the Chinese were not going to accept any international convention that they interpret as impinging on their sovereignty.

With a view to engaging the ASEAN and not precipitate the issue, the PRC officially announced its policy of "joint development." Currently the basic stance and policy of the Chinese government in solving the South China Sea issues echoes Deng's formulation of the mid-80s and is formulated thus:

"The Chinese Government has always stood for negotiated settlement of international disputes, through peaceful means... [T]his position applies to the Nansha Islands... [T]he Chinese Government has also put forward the proposition of "shelving disputes and going in for joint development." China is ready to shelve the disputes for the time being and conduct cooperation with the countries concerned pending settlement of the disputes."

In mid-1999, the ASEAN established a special committee to formulate a code of conduct to be observed by all claimants to the Spratly Islands. Proposals under consideration were a ban on the building of new structures, which had been the cause of escalating tensions in 1998, and a declaration rejecting the use of force to resolve disputes. The draft code of conduct was approved in November 1999. China, however insisted that it would adopt the proposed code only as a set of

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100 Mark Valencia, n. 96, p. 12.
guidelines and not as a legally binding document. While resolving not to strengthen its presence on the islands, China, in March 2000, participated in discussions with ASEAN officials concerning the document.

Following the trajectory of the shifts in the Chinese position regarding the Spratly islands dispute, the next section will examine in detail the various approaches, official and non-official that have emerged with a view to defuse the crisis.

Approaches to Resolving the Dispute

The complexity and ambiguity of the conflicting claims in the South China sea, are factors that have frustrated previous attempts to arrive at a lasting solution. But the fact that not all positions are set in stone, may allow flexibility in future negotiations. A wide variety of approaches have been presented for consideration, if the parties can develop the political will to resolve the dispute through negations.

In view of the widely varied estimates of the Spratly's oil and gas reserves, it is conceivable that some of the claimants are intentionally delaying a political solution, as they wait for more conclusive information regarding the area's economic potential.

Mechanism for Sustaining Dialogue

1. South China Sea Informal Meetings: 104

These annual hosted workshops on Managing Potential Conflicts in the South China sea were initiated in Bali by the Indonesian government in 1990. The meetings have been attended by government officials in their private capacities and technical experts on aspects of maritime cooperation, security, and resource development in the South China sea. Representatives from both, the PRC and Taiwan, have participated since 1991.

An important feature of the Indonesia-hosted workshops has been the establishment of technical working groups on resources assessment; marine

scientific issues; safety of navigation; shipping and communication; and legal matters. The significance of the technical working groups lies in their attempts to establish practical areas of cooperation and contact among disputes, even while the sovereignty issues remain unresolved.\textsuperscript{105} Confidence-building measures (CBMs) have also been a part of the agenda for the workshops with much success in generating ideas but little consensus on how CBMs might be implemented in practice.\textsuperscript{106}

While the Indonesia-hosted meetings have provided useful contacts and a bottom-up approach towards creating a basis for cooperation, some critics doubt that these meetings can provide the basis for political negotiations to resolve the dispute. This type of incremental approach has supported the status quo, but thus far has not found a way to generate the political momentum\textsuperscript{107} necessary to achieve a negotiated settlement. In addition, the meetings have failed to forestall confrontations or the escalation of bilateral tension between some claimants, such as the Mischief Reef incident of March 1995. From mid-1994, the Chinese started occupying Mischief Reef, by constructing temporary structures. The Mischief Reef incidents is significant because this was the first time that China had occupied a reef that was claimed by an ASEAN country, in this case it being the Philippines. Previous disputes had always been with Vietnam. According to one source, the construction on Mischief Reef, which apparently took place between June and December 1994, was only discovered by the Philippines in February 1995.\textsuperscript{108} Further, the operation as apparently undertaken by elements in the People’s Liberation Army-Navy (PLAN) without the sanction of the top leadership, Chinese officials had apparently told the Philippines Government that this was the case.\textsuperscript{109}

\textsuperscript{105} See, Renato Cruz De Castro, n. 28, p. 122


\textsuperscript{107} Spratly Islands – A documentation \url{http://www.asean.org}.

\textsuperscript{108} See Ian James Storey, “Creeping Assertiveness: China, the Philippines and the South China Sea Dispute,” \textit{Contemporary Southeast Asia}, vol. 21, no.1, pp. 95-118.

\textsuperscript{109} Ian James Storey, ibid., p.104.
Creation of an Eminent Persons Group

It has been suggested that to create the political breakthrough necessary to lay the groundwork for substantive official negotiations, an Eminent Persons Group might be formed to complement the Indonesian Workshops. A group of senior representatives from ASEAN non-claimants (that is, Singapore, Indonesia and Thailand) might be called upon to play a mediating role among the disputants.\textsuperscript{110} China might have reservations about this formulation, since it essentially would juxtapose Beijing against the ASEAN bloc. In another formulation of this approach, the group could be made up of high-level participants from among the disputants – with potential assistance from highly respected representatives of the international community playing private roles, as a means to create the necessary political momentum.

Third-Party Mediation

Another possibility along the lines of an Eminent Persons Group is mediation by a third party. The ICJ administers decisions in cases where the parties are willing to submit to a judicial decision, but it is difficult to predict how the ICJ might rule in such a complex cases, and China is not likely to accept ICJ jurisdiction in the South China Sea because such a process would “internationalize”\textsuperscript{111} the dispute and run counter to its preferred strategy of dealing with each of the other claimants bilaterally.

Professor Ji Guoxing from the Shanghai Institute of International Studies has proposed that an ad hoc tribunal or non-official third party could play a role without “institutionalizing” the negotiating process or “internationalizing” the dispute, two critical Chinese concerns.\textsuperscript{112} Third-party mediation has played a role


in resolving other maritime disputes, such as the Iceland Continental Shelf Agreement, and in setting a dispute between Argentina and Chile in the Beagle Channel. As with the creation of an Eminent Persons Group, mediation by a third party would be a way of catalyzing political negotiations at the highest levels.\textsuperscript{113} Perhaps a useful model for conducting such negotiations would be to consider "proximity" talks hosted by a non-official third party – similar to the role provided by the United States during the Dayton negotiations on Bosnia. (In this case, the United States might provide communication and the technical means for verifying complex boundary negotiations).

\textbf{Creation of Joint Resource Development Authority}

The idea of setting aside claims to sovereignty in favour of joint resource development has been articulated on several occasions by Chinese representatives.\textsuperscript{114} However, the Chinese concept of "joint resources development" appears to be defined as bilateral cooperation in disputes and areas, while ASEAN claimants appear to prefer multilateral joint development schemes. It is felt that a series of bilateral development agreements would in effect expand the Chinese claim to resources in contested areas that would most likely not be open to Chinese participation following a final settlement. Evaluating the proposal of joint development, it is observed that the competing parties had initially welcomed the proposal as a means to resolving the complex issue. However with the clashes on the Mischief reef in 1995, the very objective of the proposal got diluted. The member states of the ASEAN began to doubt the sincerity of the PRC in resolving the dispute amicably. The hardening of posture on the part of the PLA also alarmed the littoral states of the region to air their misgivings.

As a concept, 'joint development' would have sought the harnessing of resources under the seabed within a multilateral framework. The advancements in technology had made it possible not only to extract hydrocarbon resources from a

\textsuperscript{113} Ibid., p. 7.

great depth, but also to initiate deep sea mining of minerals. The rich fishing grounds were also an attractive proposition for the countries around the South China Sea.

**Multilateral Talks between ASEAN and the PRC**

The entry of Vietnam into ASEAN in the summer of 1995 and the solidarity of the ASEAN members in support of the Philippine position regarding Mischief Reef has made a coordinated ASEAN approach to the South China dispute more likely.115

Another proposal that caught the attention was that of Professors David Denoon and Steven Brams of New York University. They had proposed that a new mathematical technique called "fair division,"116 be used to help facilitate the negotiations over sovereignty. They suggested two-stage negotiations: first between ASEAN and China and then among ASEAN members. In "fair division," each side is given an agreed upon number of points to allocate over various assets in a way that gives each side the same percentage of its preferences. As an example, Denoon and Brams suggest that the South China sea could be divided into five zones, and the PRC and ASEAN might each get some of the islands and some of the deep water hydrocarbon development areas. The advantages of this technique is that it would be fair and resolve sovereignty definitively, thus making it easier to get businesses to invest in the follow-on development needed.117

**Resolving Bilateral Issues First, Then Pursuing Multilateral Negotiations**

There has traditionally been a reluctance among the smaller claimants in the Spratly Islands to pursue bilateral negotiations with larger states for fear that a larger state would diplomatically overpower its smaller neighbours, resulting in unsatisfactory precedents for other bilateral negotiations. China, on the other hand, has resisted calls for multilateral discussions of the Spratly Islands issues in an official setting, insisting on bilateral negotiations involving the PRC, while condemning bilaterals involving other claimants.

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116 For these and other details see Brice M. Clagett, n. 14.
117 Ibid.
However, the fallout from the discovery of a Chinese presence on Mischief Reef has led to progress in raising the Spratly Islands issue in both the bilateral and multilateral forums especially amongst the ASEAN members states, who resolved to formulate a common strategy to deal with such exigencies in future. At a meeting in Brunei in August 1995, a common position was adopted through the negotiation of bilateral “principles for a peaceful settlement” with Vietnam and the Philippines. Given the enhanced cohesiveness among ASEAN claimants, following the Mischief Reef incident (and since Vietnam entered ASEAN in the summer of 1995), perhaps the time has come to initiate bilateral negotiations to resolve disputes in areas of the South China Sea where there are not multiple claimants. If successive bilateral negotiations were to succeed in areas where there are only two claimants, such agreements would eliminate significant portion of the overall area under dispute. In addition, the conclusion of agreements in areas where there are only two claimants, might create sufficient momentum towards a multilateral solution to the area where multiple claims overlap. There is therefore a need to study carefully the significance of the areas where bilateral claims overlap, the resource potential of these areas, and the strategic implications of proceeding with bilateral talks.

One concern expressed in connection with this approach is that, bilateral solutions might serve as a precedent for subsequent negotiations that would recognize expansive claims of the most powerful parties to the dispute. If a strong coordinating mechanism were developed among the ASEAN claimants, it might be possible to “backstop” a bilateral negotiating process with multilateral consultations in the same way that a coordinated position was developed among

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118 As cited in Mark J. Valencia, n. 96, p. 298.
This commentary analyses the scenario that should the ASEAN member states evolve a bilateral mechanism with each other following a future Chinese attempt to occupy a few more isles. By entering into bilateral agreements with the sanction of the ASEAN, an effective counter pose could be presented to the Chinese, says the commentary.
South Korea, Japan, and the United States during nuclear negotiations with the Democratic People's Republic of Korea. The consultative infrastructure within ASEAN states is already in place, and a coordinated ASEAN position would provide smaller Southeast Asian states with sufficient leverage to protect the interests of ASEAN members in negotiations with China. Such an approach is consistent with ASEAN's efforts to pursue the "integration" of China into the region.

Developing the Political Will to Sustain Peaceful Settlement

The Mischief Reef incident marked a new phase in the South China Sea dispute. The incident forced the South China's Sea dispute onto the formal agenda of the ASEAN Regional Forum held in Brunei in August 1995. At that meeting, the PRC foreign minister, Qian Qichen, responded by declaring that the PRC would pursue a solution to the dispute, consistent with the UNCLOS, declaring that the PRC's claim did not contradict the right of safe passage or freedom of navigation through international waterways in the South China Sea. The PRC has also acquiesced to bilateral talks with the Philippines and Vietnam to establish a "code of conduct" in the South China sea, in effect building on ASEAN's Manila Declaration of 1992.

Nevertheless, in the absence of a resolution of the dispute, the next phase could be much more volatile. Rather than seizing additional unoccupied features, claimants desiring to strengthen their claims might seek to play power games by taking physical occupation of features currently occupied by other claimants. The current outposts in the South China Sea already pose a significant obstacle to resolving the dispute because a unilateral withdrawal from these features might

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123 The basic Stance and Policy of the Chinese Government in Solving the South China Sea Issue, n. 103.

represent a loss of face that would be much more difficult to negotiate.\textsuperscript{125} Competition for resources through oil exploration or fisheries disputes may constitute additional sources of conflict. Major oil companies may continue to be reluctant to invest money or other resources in the area of overlapping territorial claims.

These potentially destabilising factors serve only to emphasize that none of the mechanisms for achieving a lasting solution of disputes in the South China Sea can be put in place, if all the parties do not have the political will to come to the negotiating table and seek a peaceful settlement.\textsuperscript{126} The Mischief Reef incident crystallized regional concerns about the dangers of a military confrontation in the South China Sea and heightened ASEAN’s suspicions regarding China’s long-term intentions and tactics.\textsuperscript{127} It also gave a clearer picture of the potential costs of a militarily imposed solution. But a comparison of the advantages of cooperation and the costs of confrontation is not necessarily sufficient to overcome the emotional response that is precipitated when core issues such as sovereignty are involved. Moreover, the immediate crisis in the relations between the Philippines and the PRC has ebbed with the passage of time. Attention has shifted to the escalation of tensions between China and Taiwan, dissipating the momentum necessary to shape a “negotiated settlement in the Spratly Islands.”\textsuperscript{128} A failure to come to grips with the core issues, increases the likelihood that another crisis will be necessary before the parties will find the political will to come to the negotiating table.

Some analysts have suggested that there is no near-term evidence that parties are ready to come to a negotiated settlement, given domestic political transitions in the PRC and the need to focus on the more urgent tensions in cross-strait relations. According to this analysis, the best hope under current


\textsuperscript{127} See, Ralph A. Cossa, n. 125, p. 7.

\textsuperscript{128} Statement by the Chinese Delegation in Exercise of the Right of Reply on the question of the south China Sea, 24 November 1998.
circumstances is that any simmering potential disputes will stay beneath the surface and that the claimant states will be able to avoid aggressive actions or new crisis that might cause renewed confrontation.\textsuperscript{129}

Others argue that now is the time to pursue a political settlement. This analysis suggests that rising nationalism and the political transition from authoritarianism to democratic rule will make it even more difficult to muster political support for painful compromises on sensitive issues such as sovereignty. In addition, the discovery of new resource potential,\textsuperscript{130} negative long-term trends in the military balance in the area of the Spratly Islands, or tension among claimants over unrelated side issues might emerge, setting the stage for a far more intense conflict than the current one. Regardless of whether the dispute will be easier or harder to resolve in the future, it is in the interest of all parties to seek to create the political will necessary to reduce the likelihood of conflict in the South China Sea.

Seeking Solutions

The quasi-diplomatic conference on the South China Sea in October 1994 at Bukittingi, Indonesia, was the fifth in a series of unofficial meetings – funded by the Canadian International Development Agency and hosted by Indonesia – designed to explore the sensitive issues of conflicting claims in the South China Sea.\textsuperscript{131} Participants in the multinational invitation – only workshops – neither purely formal nor informal – were primarily foreign ministry officials, along with a


\textsuperscript{130} “South China Sea Region” United States Energy Information Administration \texttt{http://www.eia.doe.gov/emeu/cabs/schina.html}

\textsuperscript{131} Since 1990, a series of workshops on Managing Potential Conflicts in the South China sea have been held in Indonesia under the auspices of the Research and Development Agency within its Department of Foreign Affairs. These non-governmental gatherings, attended by government officials, have been convened to explore ways to enhance cooperation among South China Sea nations to manage the region’s natural resources. The meetings include: the First Workshop of Managing Maritime Conflicts in the South China Sea (Bali, January 1990); the Second Workshop (Bandung, June 1991); the Third Workshop (Jog Jakarta, July 1992); the Fourth Work Shop (Surabaya, August 1993); and the Fifth Workshop was scheduled for October 1994). The Sixth Workshop was scheduled for October 1995. A series of technical working-group meetings have also been organised; including: Marine Scientific Research (Manila, May 1993, and Singapore, 1994) Resource Assessment (Jakarta, July 1993); Protection of the Marine Environment (China, May 1995); and Legal Issues (Phuket, July 1995).
few academics from the then six ASEAN States, and Vietnam, China, Taiwan and Laos.

Government and academic participants in the workshops, influence the process in different ways. Proposals for confidence-building measures, an exchange of views and carefully worded statements released at the end of each workshop, reflect the government influence on the process. Academics provide the intellectual atmosphere and creative suggestions for tension-reducing mechanism and multilateral resource development regimes. The workshop process may make its most significant contribution in this realm.132

Non-government workshops are a novel approach to international dispute management. The informality of the workshop process is both a strength and a weakness; issues can be discussed frankly and solutions debated freely but governments can disregard the results and pursue policies that contradict workshops recommendations.133

Despite their closed, informal and non-governmental status, statements were released at the end of each workshop. One key product of the workshops was the July 1991 Bandung statement. Participants were to recommend to their respective governments that:

- force should not be used to settle territorial and jurisdictional disputes;
- where conflicting claims exist, states should consider the possibility of undertaking cooperation for mutual benefit including joint development; and
- self-restraint should be exercised in order not to complicate the situation of conflicting claims.134

Until Bukittingi, these principles were reaffirmed in all meetings. The Spratly issue also found its way onto the agenda of the ARF; which includes non-

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132 Liselotte Odgaard, as cited in n. 110, p. 296.
134 See, Kriangsak Kittichaisaree, n. 124, pp. 131-148.
claimants and outside powers. The then Thai Prime Minister, Chuan Leekpai stated in July 1994 that the situation in the Spratlys was urgent and that ASEAN should use preventative diplomacy to avert armed confrontation.\footnote{Sonya Hepeinstall, “Thailand: Thai PM Says ASEAN Must Act over Spratly’s Dispute,” 
{\textit{Reuters}, 22 July 1994; Lindsay Murdock, “Beijing Snubs Summit Plan – War Fears Mount in Row Over South China Sea Resources Carve-up,” \textit{International Herald Tribune} (Hong Kong) 27 July 1994.}} China, re-emphasized that it would only negotiate a resolution to the dispute bilaterally.\footnote{Indonesia Digest (Jakarta), 29 July 1994, p. 2.} To further accommodate China, it was agreed that the ARF would only serve as a consultative forum and that direct solutions would be addressed by \textit{ad hoc} processes, like the Indonesian initiative on the South China Sea.

The goal of the Indonesia process is to establish cooperation on broad South China Sea initiatives in order to build enough confidence to undertake multilateral cooperation in the Spratlys.\footnote{President Suharto, “Solution to Spratlys dispute must be ‘multilateral’ ” \textit{SWB FE 3491 and B/5 24 March 1996.}} It is also hoped that the slowly evolving web of activities will constrain aggressive behaviour by claimants and thus reduce the potential for conflict. As a concrete step towards South China Sea cooperation, the participants have established technical working groups on marine scientific research, environmental protection, resource assessment and means of developments and, more significantly, legal matters.\footnote{Edgardo D. Gomez, “Marine Scientific Research in the South China Sea and Environmental Security,” \textit{Ocean Development and International Law}, vol. 32, no. 2, 2001, pp. 205-211.}

In the run-up to the October 1994 Bukittingi talks, a few observers like Ralph Cossa and Nayan Chanda had expressed considerable pessimism, believing that the talks had reached a plateau because of China’s reluctance to move ahead. During the talks, Taiwan and China blocked agreement on the non-expansion of the military presence in the South China Sea; and they demanded that such confidence building measures and the now traditional item on ‘Spratly and Parcel issues’ be dropped from the agenda.\footnote{{\textit{Jakarta Post}, 29 July 1994, p.1; \textit{Jakarta Post}, 26 October 1994, p. 1; “Achievement at South China Sea Meeting Lauded,” \textit{FBIS-EAS-94-210}, 31 October 1994, p.75; \textit{FBIS-EAS-209}, 28 October 1994, p. 1.}
For better or worse, the claimants position and strategies have become clearer, and they are at odds. Malaysia is unenthusiastic about multilateral joint development, especially in the area it claims. Vietnam firmly opposed any joint development scheme that would include portions of its claimed continental shelf, although it supports multilateral negotiations and joint development of the Spratly area proper.\textsuperscript{140} The Philippines is therefore the only claimant that supports multilateral joint development for the entire area it claims. It has been suggested that although China and Taiwan profess to support joint development, they wish to negotiate bilaterally so that they can dominate the arrangements.\textsuperscript{141} It would appear that, Taiwan and China want to hold up the process and Malaysia seems to support this strategy. Vietnam and the Philippines, then, are the only claimants that support the process wholeheartedly, and Vietnam's support may stem more from a desire to isolate and embarrass China than from enthusiasm for multilateralism.\textsuperscript{142} Perhaps, linked to this entire issue are the differing ideologies and sense of nationalism that is identified with the dispute. While China, claims the islands as part of its historical legacy, and links the extent of the waters of the South China sea with the question of sovereignty, other countries view its occupation as simply a transgression and violation of the accepted principles of international law. This is where the question emerges, as to how serious are the participants of the Workshop process in solving the dispute and not just restating their oft repeated positions.

The positive results of the workshop process are an agreement on cooperative research on biodiversity; the identification of national focal points for the existing Technical working Groups (TWGs) on marine scientific research and environmental protection; and, authorization for the coordinator to seek external


\textsuperscript{142} Michel Chossudovsky, \textit{Towards Capitalist Restoration? Chinese Socialism after Mao} (Macmillan, Hong Kong, 1986), p. 247. Chossudovsky makes his argument while analysing the manner in which American oil firms have got the contracts of the two important disputants in the conflict - Vietnam and China. Also see Stein Tonneson, n. 140, pp. 199-220.
support to implement the biodiversity proposal.\textsuperscript{143} Talks have also identified a number of possibilities for regional cooperation in the hope that these efforts can eventually build an epistemic community that supports the notion of regional cooperation in ocean management.\textsuperscript{144}

**Finding Solutions**

Despite all hope of improvement, the most likely scenario for the foreseeable future of the South China sea disputes is the *status quo*. In this scenario, talks continue, but remain informal and focused on technical issues. The working groups on marine scientific research, environmental protection and safety of navigation deflect discussions of the core issues of conflicting sovereignty claims. China, fearing that its flexibility will be restricted, refuses to allow the talks to be formalised or even to discuss its specific claims and their rationale, let alone joint oil exploration.\textsuperscript{145}

The significance of this area, both in economic, as well as in potential conflict terms, has prompted many researchers to investigate the likely prospects. In the context of the PRC’s policy options. Among the better known studies is that by Samuel Wu and Bruce de Mesquita, who have applied the formal model approach.\textsuperscript{146} The likelihood of the use of military force by the PRC is analysed in the backdrop of the ongoing market reforms. In their view, the reformers’ success in gathering support and therefore implementing their agenda domestically, is the most probable scenario in the immediate future. Given that, “policies that emphasise a stable international environment are expected to prevail in the near future.” Therefore, China is “unlikely to engage in any significant use of force” to achieve its objectives “over the next few years.”\textsuperscript{147} That this study was done shortly before the 1995 Mischief Reef Incident does not detract from the essential thrust of the argument. China’s attempts, in the aftermath of the incident, along

\textsuperscript{143} Edgardo D. Gomez, n. 138, pp. 205-211.  
\textsuperscript{144} Tobias Ingo Nischalke, n.106, pp. 89-112.  
\textsuperscript{147} Ibid., pp. 398-9.
with the efforts of the other parties involved, to sort out the matter, would appear to bear this out. Very few would be contest that the PRC's overriding concern in Southeast Asia is stability, which would translate into the peaceful environment that is the pre-requisite for the success of their modernisation plans. In this framework, local wars or limited military actions are not entirely excluded, which would demonstrate a certain capability and enhance or strengthen positions vis-à-vis the contested territories (wherein, as we saw earlier, actual occupation becomes a major factor: under international law physical occupation and resultant status quo usually are predisposed towards the nations that has 'effective occupation').

From a strategic perceptive, a status quo approach could, through an unexpected political or military event - be transformed into the least likely, scenario, i.e., open conflict. A deterioration of, for example, China's relations with Vietnam or Taiwan could foreshadow more armed conflict in the Spratlys. Or, unilateral actions by one of the claimants - the seizure of an occupied island from another's forces; unilateral drilling in the area; the capture or killing of fishermen, or large, aggressive naval manoeuvre - could trigger a series of increasingly frequent and violent incidents. The build-up of naval and air-force weaponry in the region, originally designed mainly to enhance the capability of regional status to protect their resources in EEZ's, could be become a arms race, involving the acquisition of submarines, military aircraft carriers, bombers and fighters capable of posing a real threat. Since "intensifying and spreading violence could endanger the freedom of navigation along the strategic sea-lanes in the South China Sea, the interests of Japan and the United States could be affected." Indeed, control of this area by a potential adversary or its allies has implications for the national security interests of Japan, the United States and even Russia. On the other hand, a common stance by Vietnam and ASEAN, tacitly supported by the United States vis-à-vis China, could confirm China's fear of being surrounded by hostile nations.\(^\text{148}\)

Besides, as nationalism increasingly on occasions influences positions on the Spratly Islands disputes, there is a sense of urgency to make progress, to pre-empt the outbreak of hostilities due to various unforeseen factors. These possibilities, together with the worst case scenario of open conflict, could even

\(^{148}\text{See Ji Guoxing, n. 112.}\)
have implications for longer-term geostrategic alliances in the region. Nevertheless, elements conducive to a peaceful settlement do exist.

- It is unlikely that in the next five to ten years any claimant-state, including China, will have the military capability to occupy the major islets and dominate the region’s sea and air space.
- Both China and Vietnam are striving for economic development, to attract foreign investment and to achieve integration into the world economy. Any hostilities would jeopardize foreign investment and increase the risk to an aggressor of facing a trade embargo.
- Since China wants to cooperate with ASEAN, as a trade and investment partner, it is not likely to disrupt the status quo in the Spratly’s.

**Multilateral Arrangements**

Any multilateral arrangement must take account of the following regional political realities:

- conflicting sovereignty claims to features and the need to demilitarize these features;
- conflicting claims to maritime space;
- conflicting definitions of the area to be subject to a resource-management agreement;
- claimants primary interest in the hydrocarbon potential of the area;
- the need to establish a stable administrative decision-making structure that is perceived as fair and equitable;
- China’s insistence on separate negotiations and arrangements with each party;
- the need to allocate some power and benefits to the smaller powers;
- the need to acknowledge and accommodate the interests of non-claimant South China Sea states; e.g., Indonesia
- and the need to acknowledge and accommodate the interests of extra-regional maritime powers.

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Managed Sharing of a Regional Commons?

A multilateral cooperative regime could be ad hoc single purpose or formal and comprehensive, including a managed sharing of a regional commons. Single-purpose regimes that have been suggested include creating a marine park; establishing a South China Sea institute for marine resource management; conducting a joint survey and assessment of the mineral and hydrocarbon potential of the region; and cooperatively implementing maritime safety and surveillance measures, perhaps excluding the immediate vicinity of the islands so as not to prejudice sovereignty claims.\(^{150}\)

These are valuable proposals, and the adoption of one or more would be a step towards protecting the region’s resources and building confidence through cooperation. However, none of them address the major disputes, nor do any permit the orderly cooperative development of the resources of the south China Sea. It seems necessary, therefore, to propose the bolder step of treating the disputed areas as a regional commons to be governed by a regional multilateral resources authority.\(^{151}\)

An alternative arrangement, that of allocating 200nm(nautical miles) to claimant states, on the basis of equidistance, while agreeing that the area beyond 200nm(nautical miles) is “high seas” would be unacceptable to many, as then the high seas area would fall under the International Sea-Bed Authority – with its resources open to exploitation by other countries too.

A regional common heritage area would only allow resources access for nations in the region, or to the original claimants. This choice may be supported by Article 123 of UNCLOS, which encouraged cooperative management of semi-enclosed sea.\(^{152}\) The concept of a regional common heritage would be useful in arguing against involving outside powers and in encouraging managed sharing. This solution could include a multilateral organization to administer use of the area. If a multilateral solution becomes feasible, a series of joint development

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150 See, Mark J. Valencia, n. 96, p. 117.
151 Sec, Brice M. Clagett, n. 14, pp. 21-24
152 The semi-enclosed sea description is not a determinant in controlling the entire resources by any of the parties.
arrangements coordinated by a central authority might satisfy most of the central concerns of claimant states. A series of 12 joint-development companies (JDCs) could be established, in name at least, based on the areas of overlapping claims. The 12 JDCs would be coordinated by a loose Spratly coordinating Agency (SCA) that would facilitate, coordinate and harmonize the operations of multiple joint-development arrangements for resource exploitation within the core area. China and Taiwan would be a member of all JDCs and Vietnam would be a member of all but the three that would cover areas it appears not to claim.

Shares, benefits, costs and voice (vote) in the operation of each JDC could be shared equally after allocating 5% of the profits to the operation of the SCA. Another 5% of the profits could be possibly allotted to non-claimant South China Sea states. The SCA would have a China or Taiwan representative as its head, as they are involved in every JDC. Although a JDC would exist on paper for each of the 12 Areas, it would only become operational when and if it was agreed by a simple majority of the claimants to that area. This approach would go a considerable way towards satisfying China's demand that the issues be resolved between it and each of the claimants, while giving the claimants an opportunity to influence decisions in areas they claim in common with others conclusion.

Referring to the South China Sea workshop process, it is very obvious that although the participants have agreed to avoid unilateral actions that would destabilize the situation, this is precisely what many claimants are doing. Indeed, the dialectics in the south China seas appears to be that of unilateral actions and bilateral negotiations synchronously with the workshop process and may undermine any confidence it has generated. The workshop process has failed to make progress regarding the setting of the contentious claims and lacks a formal and institutional presence, handicapped as it is without a secretariat. The claimants are also to blame for failing to evolve a mechanism of transparency especially with regard to military expansion.

A status quo approach – 'do nothing' – is unstable and may lead to conflict. Due to various factors if the relations between two or more claimants were to deteriorate, irreconcilable differences will be exposed leading to the perceived recurrence of past incidents. If status quo were really the operative norm, acquisitions of military equipment would be frozen, leading to a relaxation in the build-up of military facilities and air strips. In China's case the status quo is the most favourable option as it adopts a step-by-step approach towards a dominant position, from which it would be difficult to retreat.

Some observers believes that the Chinese occupation of Mischief Reef was part of this inexorable advance, designed to test both ASEAN and US reactions. 155

On the other hand if Beijing were to lend support to a modified multilateral solution, it could allay ASEAN and US concerns about Chinese intentions, thus blocking the involvement of outside powers and halting the growth of common Vietnamese and ASEAN opposition to Chinese claims. Again, China's interest and presence in the heart of maritime Southeast Asia would be legitimised. For Vietnam, a multilateral solution would be an opportunity to improve relations with China and ASEAN, and to demonstrate its sincerity in wanting to avoid a conflict. Joint development offers Brunei; the Philippines and Malaysia a way of sharing in any future resource discoveries in the core area while avoiding a costly defence-built up and a military position they could not possibly defend. Japan and the US would welcome a negotiated solution because the safety of strategic sea-lanes running though the South China sea would be assured.

Further, China is unlikely to enter into a cooperative arrangement whose benefits accrue equally to the other parties. For its cooperation, China will expect to receive rewards. 156 Thus, if Beijing is to participate in a joint development effort, other claimants will have to make it sufficiently attractive to China. Moreover, China prefers a loose form of joint development, so extracting a long-term commitment from it will necessitate establishing high exit costs to make it more difficult for China to withdraw. 157 This could involve tying a Spratly's

156 Daojiong Zha, n. 125, pp. 33-51.
solution to agreements in other sectors in which ASEAN has more leverage, such as economic investment and trade.