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CHINESE SOVEREIGNTY AND JOINT DEVELOPMENT: A PRAGMATIC SOLUTION TO THE SPRATLY ISLANDS DISPUTE

I. INTRODUCTION

The South China Sea contains a collection of tiny islands known as the Spratlys, which are the subject of a sovereignty dispute between China, Vietnam, the Philippines, Malaysia, and Brunei (claimants).¹ Following World War II, the Spratlys remained largely unnoticed, except for a small Chinese garrison stationed there,² and China's and Vietnam's periodic declarations of sovereignty over the Spratlys.³ This post World War II tranquility in the Spratlys ended abruptly in the mid-1970s when oil was discovered in the South China Sea. Thereafter, the Philippines, Malaysia, and Brunei all declared sovereignty over the Spratlys in an apparent attempt to claim the South China Sea oil deposits, while most of the claimants since then have seized

1. Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 61, 62-68 (1994). Although Indonesia has made no Spratly claim, its Natuna gas field was depicted within Chinese territory on a 1992 official Chinese map of the South China Sea. *Chinese Bureaucrats Draw the Line in South China Sea*, PETROLEUM ECONOMIST, July 1995, at 16. This Comment refers to "Spratly Islands," although they are known as "Truong Sa Islands" in Vietnam, "Nansha Islands" in China, and "Kalayaan Islands" in the Philippines. Ted L. McDorman, *The South China Sea Islands Dispute in the 1990's-A New Multilateral Process and Continuing Friction*, 8 INT'L J. MARINE & COASTAL L. 263, 264 n.5 (1993). This Comment does not distinguish between the claims of the People's Republic of China (PRC) and Taiwan because both governments claim the Spratlys as Chinese territory. The "Spratly" name comes from the British whaling captain Spratly, who charted the islands in the 1880s. Teh-Kuang Chang, *China's Claim of Sovereignty Over Spratly and Parcel Islands: A Historical and Legal Perspective*, 23 CASE W. RES. J. INT'L L. 399, 400 n.8 (1991).

2. The only post World War II occupation of the Spratlys prior to the 1970s had been China's garrison on Taiping Island, which was established in 1946. Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 438 (1992).

3. Zhiguo Gao, *The South China Sea: From Conflict to Cooperation?*, 25 OCEAN DEV. & INT'L L. 345 (1994). Vietnam made its first Spratly claim at the 1951 Allied-Japan Peace Conference in San Francisco. Cordner, *supra* note 1, at 65. China (PRC) protested Vietnam's assertion, but was not represented at the conference. *Id.*

territory and granted rights in the area.⁴ The claimants' rampant unilateral activity has made the Spratly dispute one of the most visible issues in South East Asia today.⁵

The claimants will likely resolve the Spratly sovereignty dispute peacefully under some form of international agreement.⁶ The claimants have enough common interests that such an agreement should be relatively easy to craft. Because recent statements by the claimants signal a commitment to negotiate under interna-

4. In 1995, the Spratlys were occupied as follows: China occupied 8 islands (PRC 7 and Taiwan 1), Vietnam occupied 23 islands, the Philippines occupied 8 islands, and Malaysia occupied 3 islands. Bruce Blanche & Jean Blanche, *Oil and Regional Stability in the South China Sea*, JANE'S INTELLIGENCE REV., Nov. 1, 1995, at 511. The Philippines, Malaysia, and Brunei first claimed the Spratlys in 1978, 1979, and 1988, respectively. Cordner, *supra* note 1, at 66-68. On May 8, 1992, China granted a concession to the U.S. Crestone Energy Company to explore Vietnamese-claimed areas. Gao, *supra* note 3, at 349. In April 1994, Vietnam signed contracts with Mobil Oil for exploration in Chinese-claimed areas. *Spratly Islands: China Likely to Continue Claiming Territory*, STRAITS TIMES (Singapore), Mar. 25, 1995, at 34. In February 1995, the Philippines discovered prefabricated Chinese structures on Mischief Reef, an area claimed by the Philippines. Abby Tan, *Spratly Tussle Eases as China Starts to Talk*, CHRISTIAN SCI. MONITOR, Aug. 16, 1995. China states that the Mischief Reef structures are shelter for fishermen. Rene Pastor, *Manila, Beijing Agree on Spratly Code of Conduct*, Reuters World Service, Aug. 10, 1995, available in LEXIS, News Library, CURNWS File; *Facilities on Nansha Islands are for Protection of Fishermen*, Xinhua News Agency, Apr. 20, 1995, available in LEXIS, World Library, XINHUA File.

5. Gao, *supra* note 3, at 346. The Spratly issue has been raised at nearly every recent international conference concerning South East Asia, such as the 28th Association of South East Asian Nations (ASEAN) Ministerial Meeting in Bandar Seri Begawan, Brunei on July 31, 1995 (July 1995 ASEAN Meeting) and the 1995 World Conference on Women in Beijing. *Commentary: Bright Future for Sino-Asean Ties*, Xinhua News Agency, Aug. 2, 1995, available in LEXIS, World Library, XINHUA File; *NPC Chairman Meets Philippine Senator*, Xinhua News Agency, Sept. 7, 1995, available in LEXIS, World Library, XINHUA File.

6. Notwithstanding the claimants' diatribes and skirmishes, the Spratly dispute, when viewed from a larger perspective, is clearly just a dispute among friends. Trade and political relations between the claimants are strong and growing. For example, bilateral trade between China and Vietnam increased 34.1% in 1994. *Chinese, Vietnamese Foreign Ministers Hold Talks in Beijing*, Xinhua News Agency, May 17, 1995, available in LEXIS, World Library, XINHUA File. Predictions of a violent outcome to the Spratly dispute overemphasize the claimants' rhetoric. Asian countries often use heated rhetoric for domestic political purposes while carefully preserving the underlying relationships. A recent example of this phenomenon was China's military exercises near Taiwan. Although China's and Taiwan's leaders publicly denounced each other during this incident, bilateral trade was hardly affected and the parties upgraded their relationship immediately after the incident. Seth Faison, *China Proposes Effort to Improve Taiwan Relations*, SAN DIEGO UNION-TRIB., Mar. 25, 1996, at A1.

tional law,⁷ this dispute provides a perfect opportunity to establish not only a useful international law precedent, but also to help legitimize international law itself among the non-Western countries.⁸

Although some of the claimants are willing to shelve the sovereignty issue and proceed with joint development,⁹ this Comment argues that all of the claimants will benefit more by promptly settling the sovereignty dispute. This Comment explores some legal and practical considerations and concludes that the ideal solution is for the other claimants to concede sovereignty to China in exchange for an agreement to share the Spratlys' resources. Part II provides an overview of the Spratlys' value and the various claimants' positions. Part III evaluates each of the claimants' positions under the United Nations Convention on the Law of the Sea (UNCLOS)¹⁰ and suggests that China possesses the strongest

7. Historically, China insisted on a series of bilateral negotiations between China and each of the other claimants. This position was understandably disagreeable to the other claimants because of China's disproportionate bargaining power and the ambiguity of the applicable law. China's current position is more palatable to the other claimants because it calls for multilateral negotiations conducted under the United Nations Convention on the Law of the Sea. See *infra* note 10. China first announced this concession at the July 1995 ASEAN Meeting where Chinese Foreign Minister Qian Qichen declared that China was willing to resolve the Spratly "disputes through peaceful means in accordance with principles defined in recognized international law . . . including the UN Convention on the . . . Law of the Sea." *Commentary: Bright Future for Sino-Asean Ties*, *supra* note 5. The members of ASEAN are Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam. Kent E. Calder, *Asia's Empty Tank*, FOREIGN AFF., Mar.-Apr. 1996, at 55 n.1. Chinese Premier Li Peng recently reiterated China's willingness to negotiate a Spratly settlement under international law during bilateral talks with Philippine President Fidel Ramos in Tokyo on March 2, 1996. *China—Readiness to Negotiate on Spratlys Reiterated*, Periscope Daily Defense News Capsules, Mar. 5, 1996, available in LEXIS, News Library, CURNWS File.

8. Nearly all of the Asian countries' early experiences with international law have been negative. For example, several Western countries imposed treaties on China that forced China to pay reparations for wars started by Western powers, concede territory, and submit to extraterritorial application of Western law in China. See generally JOHN K. FAIRBANK, *THE GREAT CHINESE REVOLUTION 1800-1985* (1987). The successful application of international law to the Spratly dispute would demonstrate to Asian countries that modern international law may be used to their advantage.

9. For example, at the July 1995 ASEAN Meeting, Chinese Foreign Minister Qian Qichen stated that "the [Spratly] disputes should be shelved and efforts should be made for joint development." *Qian on China's Stand over Nansha Islands*, Xinhua News Agency, July 30, 1995, available in LEXIS, World Library, XINHUA File.

10. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122, reprinted in *THE LAW OF THE SEA* (1983) [hereinafter UNCLOS].

legal claim. Part IV of this Comment explains how China's growing military power, China's increasing demand for resources, and China's current amenability to compromise, all contribute to the need for an expedited resolution giving China sovereignty. Finally, Part V demonstrates that the claimants would likely adhere to a Spratly settlement agreement because such an agreement would serve important interests of the claimants.

II. BACKGROUND OF THE DISPUTE

A. *The Value of the Spratly Islands*

1. Natural Resources

The Spratly Islands consist of hundreds of coral reefs, submerged seamounts, and volcanic islets lying approximately between Vietnam, the Philippines, and Malaysia¹¹ (See Figure 1).¹²

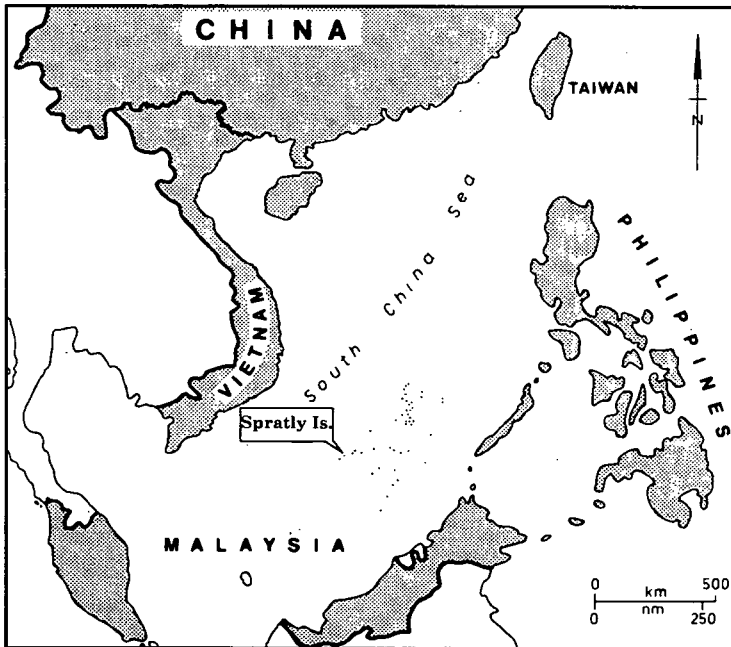


Figure 1

11. McDorman, *supra* note 1, at 267. The exact scope and location of the Spratlys have never been established. *Id.*

12. *Id.* fig. 1 at 267.

By virtue of the exclusive economic zones granted under UNCLOS, sovereignty over the Spratlys nets exclusive control over its surrounding resources.¹³ Oil and natural gas are already being extracted in areas adjacent to the Spratlys and preliminary exploration in the Spratly area itself has revealed promising signs of oil.¹⁴ The desire to secure the Spratlys' suspected oil wealth undoubtedly explains much of the claimants' enthusiasm for Spratly sovereignty.¹⁵

While large oil deposits remain speculative, fish has traditionally been a valuable natural resource in the Spratlys.¹⁶ The Spratlys are among the richest fishing grounds in the world¹⁷ that will increase in value as Asia's already large population reaches staggering proportions in the next century.¹⁸ Currently, experts value the annual yellowfin tuna harvest in the southern part of the Spratlys alone at fifty million U.S. dollars.¹⁹ The abundance of fish and the potential oil deposits virtually guarantee that sovereignty over the Spratlys will yield impressive natural resource wealth.

2. Strategic Value

In addition to economic value, control over the Spratlys may be strategically significant to the claimants.²⁰ The Spratly area straddles major international shipping lanes linking the Indian and Pacific Oceans²¹ while the sea surrounding the Spratlys is shallow and contains numerous reefs and other hazardous submarine

13. UNCLOS articles 57 and 121 allow an island sovereign to claim the resources in a 200 nautical mile radius of sea and seabed around the island. UNCLOS, *supra* note 10, arts. 57, 121.

14. Since 1950, 29 oil fields and 4 gas fields have been developed in the South China Sea. Gao, *supra* note 3, at 349. Analysts predict that ten billion barrels of "oil equivalent" (75% gas) will be recovered from South East Asia in the next decade. Blanche & Blanche, *supra* note 4.

15. Gao, *supra* note 3, at 345.

16. McDorman, *supra* note 1, at 268.

17. David Jenkins, *Philippines: Remote Islands a Flashpoint for Asia*, SYDNEY MORNING HERALD, Mar. 25, 1995, at 29.

18. Michael Richardson, *Water and Rice: Crisis Lies Ahead*, INT'L HERALD TRIB., Oct. 26, 1995, at 4.

19. McDorman, *supra* note 1, at 268.

20. *Id.* at 267-68.

21. Corder, *supra* note 1, at 61. The Spratlys are close to the sea lanes between Singapore, Hong Kong, and China; furthermore, 70% of Japan's oil supply passes through the Spratly area. Blanche & Blanche, *supra* note 4.

features.²² These conditions suggest that any country occupying the Spratlys would gain significant influence over international shipping.²³ Despite this strategic value, however, regulating shipping is probably not a leading motivation of the Spratly claimants.²⁴ Because the Spratly dispute arose suddenly in the mid-1970s, coinciding with the South China Sea oil discoveries, economic interest most likely drives the claimants' activity in the Spratlys.

B. The Claimants

1. China

China claims all of the Spratly Islands and the surrounding waters based on discovery and occupation.²⁵ China (Taiwan) has occupied Taiping Island, the largest of the Spratlys, since 1946²⁶ and has improved it with an airfield and anchorage.²⁷ China (PRC) has maintained troops on at least seven of the islands since

22. McDorman, *supra* note 1, at 267.

23. During World War II, a Japanese submarine base in the Spratlys menaced shipping throughout the South China Sea. *Id.* China's 1992 territorial sea law requires foreign warships to give prior notification and then receive China's permission to pass through most of the South China Sea. Keith Eirinberg, The Growth and Role of the Chinese Military, Prepared Statement Before the Senate Foreign Relations Committee, Subcommittee on East Asian and Pacific Affairs, Federal News Service, Oct. 12, 1995, available in LEXIS, News Library, CURNWS File. Although warships currently need no such permission to traverse international waters, China claims its 1992 sea law will not affect freedom of navigation in the South China Sea. *China's Sovereignty Over Nansha Not Affecting Sailing of Foreign Vessels*, Xinhua News Agency, May 18, 1995, available in LEXIS, World Library, XINHUA File. UNCLOS does not restrict the passage of warships in international waters. UNCLOS, *supra* note 10, arts. 17, 58.

24. Gao, *supra* note 3, at 346, 349. When the Vietnam War and Cold War caused great tension in the South China Sea during the 1950s and 1960s, the claimants essentially ignored the Spratlys. This suggests the strategic significance of the Spratlys is overstated. Also, it is difficult to imagine what the claimants may gain by harassing international shipping, considering the inevitable major power intervention.

25. Chang, *supra* note 1, at 403-13; Cordner, *supra* note 1, at 62. Since the founding of the PRC in 1949, the former National People's Party ("Kuomintang") government of China has only ruled Taiwan. The Kuomintang still considers itself the sole legitimate government of China and claims the Spratlys as Chinese territory. In fact, the Kuomintang military recently offered assistance to the PRC in defending China's Spratly claim. *Blood Thicker Than Politics*, FAR E. ECON. REV., May 5, 1988, at 26.

26. Chinese troops first occupied Taiping Island in 1946. Bennett, *supra* note 2, at 437. The Kuomintang abandoned Taiping Island in 1950 in fear of imminent Communist Chinese invasion. *Id.* at 438. The PRC never invaded and the Kuomintang reoccupied Taiping Island in 1956 in response to the Philippine "discovery" of the Spratlys. *Id.*

27. McDorman, *supra* note 1, at 269.

1988 and has erected structures on some of them,²⁸ including a naval airfield on Fiery Cross Reef.²⁹

According to Chinese records, China discovered the Spratlys in the second century B.C.³⁰ and began occupying and administering them as early as 111 B.C.³¹ For example, Admiral Yang Pu led 100,000 sailors to the islands of the South China Sea during China's Han dynasty (206 B.C. to A.D. 24).³² Later, during the medieval period in Europe, the South China Sea was the principal Chinese trade route to the West.³³ The famous Ming dynasty (A.D. 1368 to 1644) navigator Cheng Ho prepared detailed records of his many voyages through the Spratly area in the 1400s.³⁴ Recently excavated remains of Chinese Spratly settlements date to the Tang (A.D. 618 to 907) and Song (A.D. 960 to 1272) dynasties.³⁵

More recent events further strengthen China's sovereignty claim over the Spratlys. China declared its sovereignty over the Spratlys in 1933 and 1934 in response to France's 1933 partial occupation of the Spratlys.³⁶ Japan seized the Spratlys in 1939 and later relinquished sovereignty over the Spratlys to China in the 1952 China-Japan peace treaty.³⁷ These modern acts manifesting sovereignty, as well as ancient records and artifacts, provide substantial support for China's discovery and occupation claim.

2. Vietnam

Like China, Vietnam claims the entire Spratly group based on discovery and occupation.³⁸ Currently, Vietnam occupies twenty-three of the Spratly Islands.³⁹

Although failing to identify any basis for its claim, Vietnam states that its Spratly ownership can be traced back to A.D.

28. *Id.*

29. Cordner, *supra* note 1, at 64.

30. Chang, *supra* note 1, at 403.

31. *Id.*

32. *Id.*

33. Cordner, *supra* note 1, at 62.

34. Chang, *supra* note 1, at 404.

35. *Id.*

36. Cordner, *supra* note 1, at 64.

37. *Id.*

38. *Id.* at 65.

39. Blanche & Blanche, *supra* note 4.

1650.⁴⁰ In addition, Vietnam maintains that it succeeded France's 1933 Spratly claim despite France's insistence that it never ceded the Spratlys to Vietnam.⁴¹ Vietnam made its first modern declaration of sovereignty over the Spratlys at the 1951 San Francisco Peace Conference.⁴² Later in 1956, South Vietnam strongly protested the Philippine explorer Tomas Cloma's alleged discovery of the Spratlys.⁴³ On September 14, 1958, North Vietnamese Premier Pham Van Dong solemnly stated that Vietnam recognizes and supports the Chinese Spratly claim.⁴⁴ In 1975, however, Vietnam reneged on its 1958 commitment to China and asserted its own Spratly claim.⁴⁵ Though Vietnam does appear to possess some documentation of early Spratly contact, the modern Vietnamese government's inconsistent positions regarding Spratly sovereignty weaken its current Spratly claim.

3. The Philippines

The Philippines claimed most of the Spratly area in 1978 based on Philippine explorer Tomas Cloma's alleged 1947 discovery of the Spratlys.⁴⁶ This claim is based on the astonishing premise that the Spratlys were unoccupied and unclaimed at the time of Cloma's discovery and that a private individual may establish sovereignty over territory.⁴⁷ Currently, the Philippines maintains troops on eight of the islands.⁴⁸ The Philippine Spratly claim is invalid under international law because the Philippine government derived it from persons acting in an individual capacity.⁴⁹

4. Malaysia

Malaysia claimed the southern portion of the Spratlys in 1979

40. Cordner, *supra* note 1, at 65.

41. *Id.* at 66.

42. *Id.* at 65.

43. *Id.*

44. Chang, *supra* note 1, at 417.

45. Cordner, *supra* note 1, at 66.

46. Cloma, a Philippine lawyer, allegedly discovered the Spratlys in 1947. *Id.* Cloma publicized his discovery in 1956 and named it Kalayaan ("Freedomland"). *Id.* In May 1956, Cloma proclaimed himself "Chairman of the Supreme Council of the Kalayaan State." *Id.* The Philippine government, through President Ferdinand Marcos, annexed the Spratlys in 1978 under Cloma's 1974 cession of the Spratlys to the Philippines. *Id.* at 66-67.

47. *Id.* at 66.

48. *Id.* at 67.

49. *Id.*

based on the Spratlys' geographic proximity to Malaysia.⁵⁰ Currently, Malaysia occupies eight of the islands.⁵¹ Malaysia's Spratly claim rests primarily on a misinterpretation of UNCLOS. Under UNCLOS, a coastal state like Malaysia may control the resources of its continental shelf but may not establish sovereignty over any islands on the shelf.⁵² Malaysia, however, relies on UNCLOS' continental shelf provision to claim the Spratly Islands.⁵³ In addition, customary international law disallows the use of coastal state status to gain new territorial rights.⁵⁴ Because Malaysia's current claim rests on improper applications of both customary international law and UNCLOS, Malaysia's claim is of dubious legality.

5. Brunei

Like Malaysia, Brunei claims the southern portion of the Spratlys based on their geographic proximity.⁵⁵ But unlike the other claimants, Brunei does not currently occupy any of the islands.⁵⁶ Brunei's claim suffers from similar legal deficiencies as Malaysia's claim.

III. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

On November 16, 1994, UNCLOS entered into force, ushering in a promising new era in international maritime law.⁵⁷ UNCLOS is the first comprehensive maritime legal regime governing the exploitation and navigation of the world's oceans that most countries played a role in drafting.⁵⁸ The Third United Nations Conference on the Law of the Sea promulgated UNCLOS in December 1982 and most countries since then have signed it.⁵⁹

50. *Id.*

51. Gao, *supra* note 3, at 348.

52. UNCLOS, *supra* note 10, arts. 76-77.

53. Cordner, *supra* note 1, at 67.

54. Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 729 (1995); *Palmas*, *infra* note 69, at 910.

55. Cordner, *supra* note 1, at 68.

56. McDorman, *supra* note 1, at 264.

57. Charney, *supra* note 54, at 725.

58. Bernardo Zuleta, *Introduction to THE LAW OF THE SEA*, *supra* note 10, at xix, xix.

59. Charney, *supra* note 54, at 727 nn.10-11. Though all of the Spratly claimants signed UNCLOS, only the governments of China, the Philippines, and Vietnam have ratified it. *China, NPC Adopts Sea Law*, FAR E. ECON. REV., May 30, 1996, at 13, 13; Mark J. Valencia et al., *The Solution for the Spratly Islands Ought to Look Like This*, INT'L

UNCLOS is especially relevant to the Spratly dispute because it serves as the authoritative international law basis for an island sovereign or a coastal state to control its surrounding resources.

UNCLOS provides two avenues through which the Spratly claimants may potentially acquire the Spratlys' resources. One way is to establish sovereignty over the actual islands.⁶⁰ Alternatively, the claimants may control the Spratlys' resources by virtue of their status as coastal states.⁶¹

Generally, UNCLOS requires mandatory third party adjudication where the parties fail to agree.⁶² UNCLOS, however, excepts boundary disputes from the mandatory third party adjudication requirement.⁶³ This exception is convenient because the Spratly claimants prefer an agreement without third party involvement and such agreements have greater legitimacy in China.⁶⁴

HERALD TRIB., Oct. 10, 1995, Opinion Section. Because all of the interested parties negotiated and signed UNCLOS, UNCLOS is the customary international law applicable in the Spratly dispute notwithstanding Malaysia's and Brunei's failure to ratify it. See Ted L. McDorman, *The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure*, 17 LOY. L.A. INT'L & COMP. L.J. 477, 485 (1995).

60. UNCLOS article 121 grants the owner of an island an exclusive economic zone (EEZ). UNCLOS, *supra* note 10, art. 121. UNCLOS provides that, in the EEZ, the state has sovereign rights for the purpose of exploiting the natural resources. *Id.* art. 56.

61. *Id.* art. 76.

62. UNCLOS articles 281 and 286 require compulsory third party adjudication if the parties fail to agree. *Id.* arts. 281, 286.

63. UNCLOS article 289 exempts boundary disputes from mandatory third party adjudication. *Id.* arts. 289.

64. China would prefer settlement among the parties over third party adjudication for several reasons. First, traditional Chinese philosophy frowns upon judicial determinations. R.H. van Gulik, *Preface to KUEI WAN-JUNG, T'ANG YIN PI SHIH [PARALLEL CASES FROM UNDER THE PEAR-TREE]* at vii, vii (R.H. van Gulik trans., 1956). The Chinese government has always regarded official adjudication as something to be avoided. CHINESE CIVILIZATION AND SOCIETY 126 (Patricia B. Ebrey ed., 1981). This view stems partly from the Chinese government's stand throughout history of discouraging its citizens from seeking legal redress because disputes were viewed as a failure of the moral leadership of the state. *Id.*; Gulik, *supra*, at vii. Moreover, agreement among the parties is currently the preferred method of dispute resolution in the PRC, where according to recent official statistics, party agreement has solved 90% of all civil cases. Paul C. Yuan, *China's Jurisdiction Over its Offshore Petroleum Resources*, 12 OCEAN DEV. & INT'L L. 191, 203 (1983) [hereinafter *China's Jurisdiction*]. Finally, China's nineteenth and early twentieth century experiences with international law, such as the Unequal Treaties and the Opium War, continue to affect its policy decisions today, explaining China's discomfort with terms imposed upon it by a foreign tribunal. Bennett, *supra* note 2, at 443; Paul C. Yuan, *The United Nations Convention on the Law of the Sea from a Chinese Perspective*, 19 TEXAS INT'L L.J. 415, 424 (1984) [hereinafter Yuan, *UNCLOS from a Chinese Perspective*]. See generally FAIRBANK, *supra* note 8.

A. Control Based on Island Sovereignty

The most revolutionary and far-reaching provision of UNCLOS is article 121, which gives an island sovereign the exclusive right to exploit the resources in a 200 nautical mile exclusive economic zone (EEZ) around the island.⁶⁵ Article 121 paragraph 3, however, limits the granting of EEZs to islands capable of sustaining human habitation or economic life.⁶⁶ Although it is unclear whether the Spratlys can sustain either, most commentators agree that the terms "sustain human habitation" and "economic life" should be interpreted generously as applied to the Spratlys.⁶⁷

1. Cases Decided Under International Adjudication

UNCLOS requires a country to establish sovereignty over an island prior to claiming an EEZ around it. Rather than provide a codified rule, UNCLOS states that sovereignty disputes shall be resolved under pre-existing international law.⁶⁸ Insofar as UNC-

65. UNCLOS article 121 provides that "the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention." UNCLOS, *supra* note 10, art. 121. Article 2 provides "[t]he sovereignty of a . . . [s]tate extends . . . to . . . the territorial sea," which article 3 defines as "not exceeding 12 nautical miles." *Id.* arts. 2-3. Article 33 defines the contiguous zone as not exceeding 24 miles from the territorial sea. *Id.* art. 33. Article 57 provides the EEZ "shall not extend beyond 200 nautical miles from . . . the territorial sea." *Id.* art. 57. Article 76 defines the continental shelf as "extend[ing] beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin." *Id.* art. 76.

66. UNCLOS article 121 paragraph 3 provides "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." *Id.* art. 121, para. 3. A "rock," therefore, is only entitled to a default 12 nautical mile territorial sea.

67. UNCLOS fails to define the terms "rocks," "sustain human habitation," or "[sustain] economic life." Some commentators have suggested that the language "sustain human habitation" should be interpreted to include islands that import supplies. Jon M. Van Dyke & Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources*, 12 OCEAN DEV. & INT'L L. 265, 284 (1983). Similarly, "economic life of their own" should be interpreted to mean use of the island to exploit its surrounding resources. Charney, *supra* note 54, at 734. The larger of the Spratlys' islands, such as Taiping Island, would not be considered "rocks" because they contain airfields and anchorages. McDorman, *supra* note 1, at 269.

68. UNCLOS articles 74 and 83 provide that the EEZ and the continental shelf shall be "effected . . . [under] international law, as referred to in Article 38 of the Statute of the International Court of Justice." UNCLOS, *supra* note 10, arts. 74, 83. Article 38 of the Statute of the International Court of Justice states that disputes shall be decided in accordance with international law, which is defined as follows:

a. international conventions, whether general or particular, establishing rules

LOS incorporates only existing international law, UNCLOS offers limited guidance in determining island sovereignty. This makes an examination of the twentieth century international cases establishing island sovereignty necessary to determine sovereignty issues.

International law provides two general rules for establishing island sovereignty. First, discovery, occupation, and administration establish sovereignty over inhabited islands.⁶⁹ Second, discovery alone can establish sovereignty over uninhabited islands.⁷⁰ These fact intensive rules were developed in the *Palmas* and *Clipperton* cases discussed below.

a. *The Palmas Case*

The 1928 *Palmas* case, decided by the Permanent Court of Arbitration at The Hague,⁷¹ involved a sovereignty dispute between the United States and the Netherlands over an island off the Philippine coast.⁷² The *Palmas* court held that the first country to discover an island establishes only inchoate title which, unless subsequently perfected by actual utilization, will be defeated by another country's display of continuous occupation.⁷³ The *Palmas* court further ruled that proximity to an island is not a basis for establishing sovereignty over it.⁷⁴

The United States argued for sovereignty over Palmas based on two theories. First, the United States claimed that it succeeded Spain's title by discovery under the 1898 Treaty of Paris.⁷⁵ Second, the United States claimed Palmas based on its proximity

expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 [hereinafter ICJ STATUTE].

69. Cordner, *supra* note 1, at 69. The *Palmas* case established the general rule for perfecting sovereignty over an inhabited island. The Island of Palmas (U.S. v. Neth.) (Perm. Ct. Arb. 1928), *reprinted in* 22 AM. J. INT'L L. 867 (1928) [hereinafter *Palmas*].

70. The *Clipperton* case established the general rule for perfecting sovereignty over an uninhabited island. Clipperton Island (Fr. v. Mex.) (Victor Emmanuel III 1931), *reprinted in* 26 AM. J. INT'L L. 390 (1932) [hereinafter *Clipperton*].

71. *Palmas*, *supra* note 69, at 870.

72. *Id.* at 884.

73. Inchoate title cannot prevail over the continuous and peaceful display of another state's authority. *Id.*

74. "Contiguity . . . has no foundation in international law." *Id.* at 910.

75. *Id.* at 907. Spain ceded the Philippines to the United States under the 1898 Treaty of Paris.

to the Philippines.⁷⁶ The *Palmas* court, however, rejected both of these arguments⁷⁷ and awarded Palmas to the Netherlands based on the Netherlands' "peaceful and continuous display of state authority over the island."⁷⁸ The *Palmas* court reasoned that although the Netherlands did not discover Palmas, it maintained continuous settlements on it while Spain never utilized the island.⁷⁹ The *Palmas* rule appears limited to inhabited islands.⁸⁰

The *Palmas* court's dismissal of the U.S. proximity argument undermines Malaysia's and Brunei's Spratly claims because these claims rest primarily on geographic proximity.⁸¹ The *Palmas* court's rule on discovery and occupation applies only to China's and Vietnam's Spratly claims because they are the only claimants who rely on historic discovery and occupation.⁸²

According to China's records, China discovered the Spratlys 2100 years ago during its Han dynasty,⁸³ and China's Guandong province was effectively administering the Spratlys by the Ming dynasty (A.D. 1368 to 1644).⁸⁴ Archaeological evidence of ancient Chinese occupation, such as remains of dwellings and tombs, as well as artifacts like coins and porcelain, provide tangible support for China's records.⁸⁵ The *Palmas* court stated that "[i]t

76. *Id.*

77. The *Palmas* court rejected the U.S. Spanish succession argument because Spain could not transfer more rights than it itself possessed. *Id.* at 879. Spain's inchoate title over Palmas was unperfected because Spain never occupied Palmas; thus, Spain had no valid title that could have been transferred to the United States. *Id.* at 879-80. The *Palmas* court rejected the proximity argument with the following rule: "Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results." *Id.* at 893. "Contiguity . . . has no foundation in international law." *Id.* at 910.

78. *Id.* at 908.

79. *Id.* at 894-95.

80. *Id.* at 894.

81. Cordner, *supra* note 1, at 67-68.

82. *Id.* at 62, 65. Although the Philippines also relies on discovery and occupation to claim the Spratlys, the Philippines rests its Spratly claim on succeeding an individual's (Tomas Cloma) alleged title over the Spratlys. *Id.* at 66-67. Deriving sovereignty from an individual not acting as a agent of a sovereign state was not addressed in either *Palmas* or *Clipperton* probably because of the theory's obvious invalidity. *Id.* at 67. Because the Philippines rests its claim on unrecognized legal principles, this Comment will not analyze the Philippines' discovery claim under the either the *Palmas* or *Clipperton* rule.

83. Chang, *supra* note 1, at 409.

84. *Id.* at 404-05.

85. *Id.* at 410; Cordner, *supra* note 1, at 62. Song dynasty (A.D. 960 to 1272) porcelain and Tang dynasty (A.D. 618 to 907) coins were found in the Spratlys in 1995. *More Chinese Relics Found in Nansha Islands*, Xinhua News Agency, June 13, 1995, available in

is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control."⁸⁶ China's records track the *Palmas* formulation quite accurately.

In contrast to China's ancient records, the oldest Vietnamese record of contact with the Spratlys dates only to the 1600s.⁸⁷ Not only do China's records of utilization predate Vietnam's, China's records also reflect continuity of Chinese occupation, which perfects China's title by discovery under the *Palmas* rule. China's perfected title would be unaffected by subsequent Vietnamese contact with the Spratlys.

b. *The Clipperton Case*

Although the *Palmas* rule required actual occupation, the 1931 *Clipperton* case⁸⁸ held that discovery and declaration of sovereignty may alone suffice to claim an uninhabited island.⁸⁹ *Clipperton* was a sovereignty dispute between France and Mexico over an uninhabited guano mount in the Pacific Ocean.⁹⁰ Like the United States in *Palmas*, Mexico's sovereignty claim rested on succeeding Spain's title by discovery.⁹¹ The *Clipperton* court accepted the theory that an uninhabited island could be claimed by discovery alone.⁹² The court, however, rejected Mexico's claim because it found Mexico's evidence of Spanish discovery unconvincing.⁹³ Instead, the court accepted France's discovery claim, even though a mere newspaper advertisement in 1858 supported it,⁹⁴ and awarded the island to France despite Mexico's later sovereignty declaration in 1897.⁹⁵ Because the Spratlys are arguably uninhab-

LEXIS, World Library, XINHUA File.

86. *Palmas*, *supra* note 69, at 908.

87. Cordner, *supra* note 1, at 65.

88. *Clipperton*, *supra* note 70.

89. The *Clipperton* court held that taking possession of an island generally requires a series of acts to occupy the island and to exercise exclusive authority over the island. *Id.* at 393. For completely uninhabited islands, however, sovereignty is established the first moment the occupying state makes its appearance. *Id.* at 394.

90. *Id.* at 392.

91. *Id.*

92. *Id.* at 394.

93. *Id.* at 392-93.

94. France placed an advertisement in the December 8, 1858 edition of the Honolulu newspaper, *The Polynesian*, proclaiming its sovereignty over Clipperton Island. *Id.* at 391.

95. *Id.* at 392.

ited,⁹⁶ the *Clipperton* rule for uninhabited islands could apply in the Spratly dispute.

China's documented two thousand year old discovery of the Spratlys predates Vietnam's earliest record of Spratly contact by over a millennium.⁹⁷ In addition, China's and Vietnam's first modern declarations of Spratly sovereignty occurred in 1933 and 1951 respectively.⁹⁸ China's combination of discovery and earlier modern sovereignty declaration perfects China's Spratly claim under *Clipperton's* first-to-discover rule.

c. Summary of the Cases

Palmas and *Clipperton* created an international law distinction between inhabited and uninhabited islands that is unimportant as applied to the Spratly dispute. The relative strengths of the Spratly claimants' positions are identical under either classification of the Spratlys. Regardless of whether the Spratlys are deemed inhabited or uninhabited, China clearly possesses the strongest sovereignty claim.

2. Relevant Anglo-American Legal Theories

UNCLOS requires application of pre-existing international law to settle sovereignty disputes.⁹⁹ Under UNCLOS, the sources of international law include treaties and cases decided by international tribunals, as well as "the general principles of law recognized by civilized nations."¹⁰⁰ Because of the widespread acceptance of Anglo-American law, the Spratly dispute should be analyzed under some Anglo-American legal principles that may prove relevant in a future Spratly settlement. This section focuses on three such principles—notice, estoppel, and bargaining power—in order to illustrate some potential issues.

a. Notice

A fundamental concept of Anglo-American law is that one may not establish title to property with knowledge that the

96. Van Dyke & Brooks, *supra* note 67, at 268.

97. Chang, *supra* note 1, at 409; Cordner, *supra* note 1, at 65.

98. In 1933 and 1934, China protested France's July 25, 1933 claim of sovereignty over part of the Spratlys. Cordner, *supra* note 1, at 64. Vietnam first asserted sovereignty over the Spratlys at the San Francisco Peace Conference in 1951. *Id.* at 65.

99. UNCLOS, *supra* note 10, arts. 74, 83.

100. ICJ STATUTE, *supra* note 68, art. 38.

property already belongs to another. Three of the Spratly claimants, the Philippines, Malaysia, and Brunei, failed to assert any Spratly claims until the late 1970s or 1980s.¹⁰¹ Because China and Vietnam have periodically declared sovereignty over the Spratlys since the early 1950s,¹⁰² the Philippines, Malaysia, and Brunei had ample notice that the Spratlys already belonged to others. The *Clipperton* court found that France's newspaper advertisement gave sufficient notice to defeat Mexico's subsequent sovereignty declaration.¹⁰³ The public announcements by China and Vietnam at international forums are certainly more obvious than a mere newspaper advertisement. Therefore, the Philippines', Malaysia's, and Brunei's knowledge should preclude them from asserting a valid Spratly claim.

b. Estoppel

Another principle of Anglo-American law is the equitable doctrine of estoppel. Estoppel prohibits a party from retracting a representation if the other party has detrimentally relied on it.¹⁰⁴ In 1958, North Vietnamese Premier Pham Van Dong solemnly recognized China's Spratly claim.¹⁰⁵ After the fall of Saigon in 1975, however, the Vietnamese government reversed its long-standing position and asserted its own Spratly claim.¹⁰⁶ China may argue that it had committed resources to develop the Spratlys in reliance on Vietnam's 1958 representation that China's Spratly claim was valid. Therefore, Vietnam should be estopped from denying the validity of China's Spratly claim. Even if China is unable to show that it detrimentally relied on Vietnam's 1958 representation, Vietnam's prior representation certainly diminishes its current historic claim over the Spratlys.

c. Bargaining Power

Contemporary Anglo-American law looks unfavorably at imbalanced agreements where the parties negotiated under unequal bargaining positions. Many countries, including China, have

101. Cordner, *supra* note 1, at 66-68.

102. *Id.* at 67.

103. *Clipperton*, *supra* note 70, at 391.

104. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

105. Cordner, *supra* note 1, at 66.

106. *Id.*

declared such agreements invalid due to the parties' unequal bargaining strength.¹⁰⁷ Because China has agreed to multilateral negotiations in the Spratly dispute,¹⁰⁸ even a facially imbalanced agreement may not be attacked on grounds of unequal bargaining power because the combined bargaining strength of the other claimants is an adequate balance to China's power.

3. Summary of the Island Sovereignty Analysis

Under UNCLOS article 121, sovereignty must first be determined before the Spratlys' resources may be secured. Cases such as *Palmas* and *Clipperton* have established sovereignty rules based on discovery, occupation, and administration. Some commentators suggest that none of the Spratly claimants have thus far presented sufficient indicia of discovery, occupation, or administration that would meet contemporary legal standards.¹⁰⁹

Even if none of the Spratly claimants' evidence is comprehensive enough to satisfy all of the commentators, China's evidence is certainly the strongest compared to the other claimants' evidence. As a result, China should prevail under a relative standard for determining island sovereignty. International law is unclear on whether this standard is relative or absolute.¹¹⁰ If all of the claimants are unable to meet an arbitrary absolute standard, however, the absolute standard suggests the illogical result that none of the claimants are entitled to sovereignty. Therefore, the relative standard appears correct.

The preceding analysis on establishing island sovereignty may prove irrelevant to the Spratly dispute because Spratly sovereignty does not automatically yield an EEZ. Whether the Spratlys are entitled to an EEZ turns on the interpretation of article 121 paragraph 3's limitation that UNCLOS only confers control of maritime resources to owners of islands capable of sustaining human habitation or economic life.¹¹¹ Because experts disagree on the definition of sustaining human habitation and economic life,¹¹² the country that eventually gains Spratly sovereignty may not receive exclusive control over their surrounding resources. If

107. Yuan, *UNCLOS from a Chinese Perspective*, *supra* note 64, at 424.

108. *Commentary: Bright Future for Sino-Asean Ties*, *supra* note 5.

109. Cordner, *supra* note 1, at 69.

110. Charney, *supra* note 54, at 728.

111. UNCLOS, *supra* note 10, art. 121.

112. Charney, *supra* note 54, at 734.

this happens, the claimants may still acquire the Spratlys' resources under UNCLOS based on their status as coastal states.

B. Control Based on Coastal State Status

In addition to islands, UNCLOS also grants a 200 nautical mile EEZ to coastal states.¹¹³ For non-living resources, UNCLOS extends the coastal state's control beyond the 200 nautical mile EEZ limit to the edge of its continental shelf, provided the shelf is a natural prolongation of the coastal state's land territory.¹¹⁴ The advantage of using coastal state status to acquire resource rights is that it avoids the difficulties of establishing sovereignty over islands. Nonetheless, acquiring resource rights using coastal state status may be problematic as well.

The difficulty of the coastal state analysis as applied to the Spratly dispute is the geological situation of the South China Sea. Because the claimants exist opposite and adjacent to each other, their potential EEZs and continental shelf boundaries overlap. Fortunately, a geological analysis is not determinative in delimiting borders where, as in the Spratly situation, the states have opposite or adjacent coasts.¹¹⁵

In a Spratly-type situation, the contemporary trend seems to rely more on factors such as coastal geography, equidistance, and access to currently exploited resources to set maritime boundaries.¹¹⁶ A modern court would probably measure the claimants' coastlines, develop median lines through the South China Sea, and then apply equitable considerations in order to arrive at boundaries for the claimants.¹¹⁷ Under these principles, and disregarding the presence of the Spratlys themselves, China, Vietnam, and the Philippines would probably gain equal shares of the Spratly area,¹¹⁸ Malaysia would receive a smaller share, and Brunei

113. UNCLOS article 56 grants an EEZ to a coastal state, and article 57 limits the EEZ to 200 nautical miles. UNCLOS, *supra* note 10, arts. 56-57.

114. *Id.* arts. 56, 76.

115. The last paragraph of article 76 provides: "The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts." *Id.* art. 76.

116. Charney, *supra* note 54, at 740.

117. Valencia et al., *supra* note 59. Like the issue of island sovereignty, UNCLOS article 83 requires the continental shelf to be delimited on the basis of existing international law. UNCLOS, *supra* note 10, art. 83.

118. Valencia et al., *supra* note 59.

would get a narrow corridor.¹¹⁹

Claiming the Spratlys' resources based on the claimants' proximity has a certain allure because each of the claimants would probably receive a share. This solution, however, is applicable only if the Spratlys are deemed to be mere "rocks" under UNCLOS.¹²⁰ If the Spratlys are determined to be islands under UNCLOS, the Spratlys themselves would generate EEZs that may not be diminished by the presence of coastal states.¹²¹ Because the Spratlys probably are islands under UNCLOS¹²² and China has the strongest sovereignty claim, China would likely receive the largest share, even under the coastal state analysis.

IV. AN EXPEDITED JOINT DEVELOPMENT AGREEMENT WITH CHINESE SOVEREIGNTY

Recent statements by top Chinese officials reflect the position that China is willing to ignore the sovereignty issue temporarily in order to proceed with joint development.¹²³ Despite this attractive offer, all of the Spratly claimants have more to gain by a prompt settlement of the sovereignty dispute. To the extent that *Palmas* and *Clipperton* remain good law, China possesses the strongest Spratly sovereignty claim. China's claim will not weaken with the passage of time so there is little reason for the other claimants to delay a sovereignty determination. The legal consideration that China possesses the strongest sovereignty claim combined with practical considerations, such as China's growing military power, China's increasing demand for resources, and China's current amenability to compromise in exchange for sovereignty, all indicate that the Spratly dispute should be resolved under an expedited joint development agreement giving China sovereignty. Existing Asian joint development projects, as well as UNCLOS provisions, may provide useful guidance in shaping a workable Spratly joint development agreement.

Notwithstanding China's offer to shelve the sovereignty issue, the claimants should resolve the sovereignty dispute promptly. If

119. *Id.*

120. UNCLOS article 121 defines a "rock" as a feature not able to sustain human habitation or economic life. UNCLOS, *supra* note 10, art. 121.

121. Charney, *supra* note 54, at 729.

122. See *supra* text accompanying note 67.

123. *Qian on China's Stand over Nansha Islands*, *supra* note 9.

the claimants delay, they may forfeit their opportunity to settle under acceptable terms. Currently, China probably harbors neither the desire nor the ability to take the Spratlys by force. This situation, however, could change in the next century. China's impressive economic growth in the last decade will likely continue into the foreseeable future.¹²⁴ Undoubtedly, this economic growth will also fuel China's military modernization, which can only erode the other claimants' bargaining positions.

Coinciding with increased Chinese military power in the next century will be increased Chinese demand for resources. China already bears one-fifth of the world's population whose future growth will further strain China's limited food capacity. Also, China's rapidly modernizing economy poses ever increasing demands for energy to satisfy its citizens' appetites for automobiles, appliances, and other necessities of modern life. The Spratlys, with their proven fish stocks and potential oil reserves, will become an increasingly inviting target for a resurgent and resource-starved China, especially if potential oil reserves are confirmed. The prospect of a hungry yet powerful twenty-first century China should further urge the claimants not to delay a resolution to the Spratly dispute.

Moreover, the longer the sovereignty dispute remains outstanding, the more opportunities for hostile incidents among the claimants to occur.¹²⁵ Such incidents may lead to serious conflicts if, for example, a major power intervenes to safeguard international shipping lanes. This constant danger of violent conflict in the South China Sea requires a swift resolution of the Spratly dispute.

An additional factor adding urgency to resolving the Spratly dispute is China's current political situation. A pressing concern among China's leaders is the impending leadership transition within

124. China's economy has grown at an average of nine percent per year since 1979. *Chinese Bureaucrats Draw the Line in South China Sea*, *supra* note 1.

125. On March 14, 1988, Vietnamese and Chinese ships clashed in the Spratly area, leaving two Vietnamese ships destroyed. *The World*, L.A. TIMES, Mar. 31, 1988, at 2. Both countries accused the other of precipitating the incident. *Id.* In May 1995, Philippine soldiers destroyed some Chinese territory markers in the Spratlys. Abby Tan, *Manila's Plan to Build Lighthouses in Spratlys May Make China See Red*, CHRISTIAN SCI. MONITOR, July 5, 1995; *U.S. Voices Concern at Rising Tension in Spratlys*, Reuters, June 15, 1995, available in LEXIS, News Library, CURNWS File. In an even bolder move, the Philippine government captured 62 Chinese fishermen in the Spratlys and detained 58 of them for 8 months and 4 of them for 10 months. *Detained Chinese Fishermen Back Home*, Xinhua News Agency, Jan. 29, 1996, available in LEXIS, World Library, XINHUA File.

China.¹²⁶ Securing Spratly sovereignty for China would be a monumental prize for any aspiring Chinese paramount leader. Current Chinese officials should be willing to make concessions to the other claimants for the opportunity to take credit for reclaiming high-profile disputed territory. In addition, recent statements by top Chinese officials imply that China is willing to compromise in exchange for recognition of China's Spratly sovereignty.¹²⁷ These factors place the other claimants in an excellent negotiating position with China that may be unavailable later.

Another aspect of China's impending leadership transition is that it probably precludes any settlement involving China relinquishing sovereignty. As previously mentioned, the coastal state theory of border delimitation can possibly lead to partitioning the Spratlys among the claimants.¹²⁸ Spratly sovereignty, however, probably cannot be divided because the Chinese government is simply not in a position to relinquish any sovereignty. Because China is now in a sensitive transition period as its aging leaders step down, no element of the Chinese government can afford to lose domestic legitimacy by relinquishing territory to foreign powers.¹²⁹ Even after the leadership transition, a new Chinese government in the process of consolidating power would also be unable to sacrifice domestic legitimacy by relinquishing sovereignty.

Unlike China, the other claimants probably face less obstacles in relinquishing sovereignty over the Spratlys. Because most of the other claimants showed no interest in the Spratlys until the discovery of South China Sea oil, it is reasonable to assume that these claimants' primary interest in the Spratlys is economic. This

126. Rone Tempest, *Next Step, China's Power Game, Who Will Succeed Leader Deng Xiaoping? Top Players Are Jockeying for Position*, L.A. TIMES, May 16, 1995, World Report.

127. See Qian on China's Stand over Nansha Islands, *supra* note 9.

128. UNCLOS, *supra* note 10, art. 77.

129. China has no established mechanism for transferring power from one generation to another. Tempest, *supra* note 126. The advanced age of most of China's current leaders, including Deng Xiaoping, herald an imminent succession struggle. *Id.* It is important for aspiring successors to secure military and popular support. *Id.* Any Chinese official who relinquishes Spratly sovereignty will lose domestic credibility, especially because the National People's Congress declared that the Spratlys were Chinese territory in China's 1992 territorial sea law. Liyu Wang & Peter H. Pearse, *The New Legal Regime for China's Territorial Sea*, 25 OCEAN DEV. & INT'L L. 431, 435. Also, Chinese Foreign Minister Qian Qichen stated that "China, from time immemorial, [had] the indisputable sovereignty of the Nansha islands." Qian on China's Stand over Nansha Islands, *supra* note 9. It would be difficult for Chinese leaders to retreat from such forceful declarations.

makes a joint development agreement giving China sovereignty an ideal solution because it would provide all of the claimants significant economic benefits, deny nominal sovereignty only to those claimants with little interest in sovereignty, and grant sovereignty to China, which has a strong interest in sovereignty.

Many existing cases of joint resource development in disputed areas may serve as a model for a Spratly settlement. In 1979, for example, Thailand and Malaysia established a joint oil development area in the disputed Gulf of Thailand.¹³⁰ Australia and Indonesia established a joint development project in the disputed Timor Gap in 1988.¹³¹ Malaysia and Thailand both have joint development agreements with Vietnam.¹³² In these cases, the disputants shelved the sovereignty issue and proceeded with joint development.¹³³ Nevertheless, these cases are useful examples of South East Asian countries sharing resources in disputed areas.

The joint development and distribution of maritime resources is a major underlying theme of UNCLOS.¹³⁴ UNCLOS states that the resources of the seas are the common heritage of mankind.¹³⁵ Because the EEZs and the continental shelves granted under UNCLOS are so vast, UNCLOS necessarily contemplates that countries possessing EEZs and continental shelves will share their bounty. In fact, UNCLOS even requires resource sharing in certain circumstances,¹³⁶ indicating a possible role for UNCLOS as the legal basis supporting a Spratly joint development agreement.

In sum, an expedited joint development agreement providing for Chinese sovereignty is the most practical solution to the Spratly dispute. It would allow the other claimants to take advantage of China's current weakness and impending leadership transition to bargain for valuable concessions China would have little reason to relinquish in the future. Also, China would benefit because it could avoid a potentially unfavorable adjudication of the sovereignty claim. In addition, examples of successful joint development in

130. McDorman, *supra* note 1, at 273.

131. *Id.*

132. Blanche & Blanche, *supra* note 4.

133. McDorman, *supra* note 1, at 273.

134. UNCLOS, *supra* note 10, pmb1.

135. *Id.*

136. UNCLOS article 82 provides: "[t]he coastal state shall make payments . . . [for] the exploration of non living resources . . . beyond 200 nautical miles." *Id.* art. 82.

Asia already exist and UNCLOS provides a means of enforcing a joint development agreement.

V. RELIABILITY OF A SPRATLY SETTLEMENT AGREEMENT

Any international agreement, even one labeled "binding," is by nature voluntary. This makes an international agreement's reliability dependent on the parties' belief that it is in their interests to adhere to it. A Spratly agreement would serve important interests of all the claimants, and as a result, the likelihood of compliance is high. Attaching additional agreements between the claimants beyond the Spratly joint resource development may even further strengthen a Spratly agreement. This section proposes some possible terms for a Spratly joint development agreement and analyzes the advantages to the claimants of compliance with this agreement.

A. *The Claimants' Interest in Adhering to a Spratly Agreement*

The claimants other than China would have a strong interest in adhering to a Spratly agreement because it could assist their modernization efforts. A Spratly agreement would facilitate the foreign investment and technology transfer needed to efficiently exploit the Spratlys' resources. Such an agreement would also result in a closer relationship with China that could only benefit these claimants.

1. Need for Foreign Technology and Investment

All of the claimants are developing countries that could use the Spratlys' natural resources to modernize.¹³⁷ But because they are developing countries, none have the requisite capital or technology necessary to exploit these resources.¹³⁸ As a result, efficient exploitation of the Spratlys depends on attracting foreign investment and technology transfer. Potential foreign investors are unlikely to commit billions of dollars in joint ventures unless they are convinced of the host country's rights to the resources.¹³⁹

137. None of the developing countries of East Asia have any significant amount of native petroleum. V.H. Krulak, *Spratly Islands Have An Oily Allure*, SAN DIEGO UNION-TRIB., Feb. 25, 1995, at B8. Thus, they must buy oil on the open market, which makes the potential oil deposit under the Spratlys especially attractive because of its proximity. *Id.*

138. Bennett, *supra* note 2, at 433.

139. *Id.* Competing claims of sovereignty over the Spratly Islands threaten oil and gas development in the area. Blanche & Blanche, *supra* note 4. "The continuing discord and

Because none of the claimants have sufficient military strength to offer a unilateral guaranty to foreign investors,¹⁴⁰ the claimants would be unable to maximize the Spratlys' economic bounty while the issue of sovereignty remains contested.

2. Benefits of a Closer Relationship with China

Insofar as the issue of sovereignty is crucial to China, if the other claimants concede sovereignty, China would almost certainly reciprocate with valuable benefits for these claimants. Such benefits could include greater access to the Chinese market, greater access to advanced technology, and improved bargaining strength with respect to the major powers.

a. Increased Access to the China Market

China's economy is currently the fastest growing major economy in the world.¹⁴¹ With a population of over one billion whose spending power is climbing at a breathtaking rate, improved relations with China would be especially useful to the Spratly claimants because many of them are major producers of consumer goods that are highly sought after in China.¹⁴² If the claimants gained trade concessions from China as part of a Spratly settlement, the claimants would certainly have a strong economic interest in abiding by the agreement.

b. Access to Technology Using Chinese Trade Clout

A consequence of China's immense economy is its great bargaining power over foreign vendors. Western companies and governments are properly reluctant to transfer technology that may potentially erode their competitive advantage.¹⁴³ The Chinese

the threat of conflict now dominating the region are discouraging investors." Valencia et al., *supra* note 59.

140. All the Spratly claimants have modest military capabilities. Gao, *supra* note 3, at 348. The recently publicized increase in regional arms buying activity consisted merely of a few countries purchasing one or two squadrons of fighter aircraft or a few patrol boats. *Id.*

141. Craig S. Smith, *China's Growth Rate Slowed to 9.8% for 9 Months, Lowest Level Since 1991*, WALL ST. J., Oct. 20, 1995, at A6.

142. Sid Astbury, *Malaysia Surviving Growing Pains-So Far an 8-Year Economic Miracle Generated a Consumer Boom. Now, the Government Walks Tightrope to Keep Hot Economy from Overheating*, S.F. EXAMINER, Sept. 24, 1995, at B5.

143. Jeff Cole et al., *Orient Express: Boeing Flies into Flap over Technology Shift in Dealings with China*, WALL ST. J., Oct. 13, 1995, at A1.

market is so vast, however, that many Western companies have willingly divulged technology to China as the price for admission to the Chinese market.¹⁴⁴ As part of a Spratly settlement, the other claimants may negotiate for participation in Chinese joint ventures with foreign companies. Such participation would give the other claimants an important incentive to adhere to the Spratly settlement because it could provide access to advanced technology that these claimants would otherwise have difficulty obtaining.¹⁴⁵

c. Greater Bargaining Strength Over Major Powers

All of the Spratly claimants other than China are small developing countries existing in a world dominated by large industrial powers. It is often difficult for countries such as these Spratly claimants to prevail on their positions in international negotiations. As part of a Spratly settlement, the other claimants may obtain pledges of Chinese support for their positions on various international issues, which will certainly enhance their bargaining power on the world stage.

B. China's Interest in Adhering to a Spratly Agreement

An obvious concern of granting China sovereignty in a resource sharing agreement is that China may simply abrogate the agreement upon gaining sovereignty. This scenario is unlikely, however, because China has strong interests in preserving its credibility in South East Asia. Equally important is that China currently lacks the military capability to unilaterally expropriate the Spratlys' resources. These practical considerations indicate that

144. One example is General Motors' recent agreement to build an automobile design institute in China in exchange for increased access to the Chinese automobile market. *General Motors Planning Research Center in China*, WALL ST. J., Sept. 29, 1995. Some analysts speculate that China awarded this contract to General Motors over Ford because General Motors was more willing to share technology. David Lawder, *Ford May Move to Back of Pack for Dominance in China*, SAN DIEGO UNION-TRIB., Oct. 25, 1995, at C2.

145. To illustrate, China and South Korea formed a partnership to develop a commercial airliner as a joint venture with Western aerospace companies. Jeff Cole, *Boeing Faces European Competition in Effort to Build Small Plane for Asia*, WALL ST. J., May 8, 1995, at B2. The Western companies agreed to transfer technology because they hoped to tap into China's immense aircraft market. Stanley Holmes, *How Boeing Woos Beijing*, SEATTLE TIMES, May 26, 1996, at A1. Although the China-South Korea partnership was eventually abandoned, it illustrates how a small country may access advanced technology using China's trade clout. Craig S. Smith, *China, South Korea Decide to Abandon Aircraft Alliance*, WALL ST. J., June 19, 1996, at A14.

China would likely adhere to a Spratly agreement.¹⁴⁶

1. Benefits of a Closer Relationship with the Other Claimants

China stands to gain significant goodwill in South East Asia by adhering to a Spratly settlement agreement. An obvious result of this goodwill is that China could maintain or increase its access to the fast-developing South East Asian markets. Also, the future global economy will likely see increased regional cooperation in the form of trading blocks. This trend is already manifesting itself in coalitions like the European Union and treaties like the North American Free Trade Agreement. China's adherence to a Spratly agreement would enhance the regional goodwill necessary to form an East Asian trading block.

In addition to economic advantage, goodwill with the claimants could also enhance China's strategic influence in the region. With the withdrawal of most of the U.S. and Russian military forces from South East Asia, China now has an opportunity to increase its influence over the policy direction of the region.¹⁴⁷ A peaceful Spratly settlement would enhance China's reputation as a good neighbor and would help China fill the strategic vacuum left by the United States and Russia.¹⁴⁸

Good relations with the other claimants could also assist China in refuting charges of human rights violations. One Malaysian commentator stated, "ASEAN expected China to develop a more friendly approach towards them . . . for . . . resisting efforts to

146. Some commentators view agreements with China skeptically because of China's alleged human rights violations, China's alleged proliferation of weapons technology, and China's inability to control intellectual property right infringement. None of these situations, however, should cast doubt on the reliability of a Spratly settlement. Foreign countries imposed on China the universal human rights notions and the list of countries barred from receiving weapons technology. Nigel Holloway et al., *Going Ballistic*, FAR E. ECON. REV., June 27, 1996, at 14; Ian Johnson, *Chinese Military Subverts Policies; Army Defies U.S., Pressures Taiwan*, BALTIMORE SUN, Feb. 15, 1996, at 1A. On the other hand, China would take an active part in developing any Spratly settlement and thus would more likely adhere to its terms. China's difficulty in enforcing its intellectual property law is mainly due to local governments' disregard for the central government's authority. *U.S. Trade Sanctions—Chinese Comments*, Newsbites News Network, Feb. 6, 1995, available in WESTLAW, 1995 WL 2205550. A Spratly settlement, however, would avoid this problem because the central government would administer the agreement directly.

147. During the 1990s, Russia withdrew its forces from Cam Ranh Bay, Vietnam, and the United States dramatically reduced its forces in the Philippines. McDorman, *supra* note 1, at 270.

148. *Id.*

condemn Beijing for its human rights policies.”¹⁴⁹ Thus, goodwill in South East Asia could help China undermine the charge that it violates “universal” human rights notions.

2. China's Limited Military Capability

China would likely abide by a Spratly agreement rather than expropriate the Spratlys' resources because China currently lacks the military capability to hold the Spratlys.¹⁵⁰ The other claimants may not even need to directly confront the potential Chinese forces occupying the Spratlys in order to prevent China from realizing the Spratlys resources. Indeed, by simply mining the potential oil drilling sites, the other claimants can effectively neutralize all oil development. To guard against this possibility, China would have to maintain a continuous presence in the region to enforce its claim. Because the Spratlys are far from any Chinese bases and China's navy has limited blue-water capability,¹⁵¹ such an ongoing military operation is beyond China's current logistical capability.¹⁵² There is also the additional consideration of whether the potential resource wealth of the Spratlys is sufficient to justify the enormous cost of building, maintaining, and deploying a blue-water navy.¹⁵³

3. China's Need for Foreign Technology

Because of insufficient technology and capital, China, like the other claimants, must rely on foreign companies to exploit the Spratlys' suspected oil wealth.¹⁵⁴ As noted previously, the issue

149. B.A. Hamzah, *Cloud of Gloom over the Spratlys*, NEW STRAITS TIMES (Malaysia), Jan. 11, 1996, at 9.

150. *Maritime Risks and Threats in the Western Pacific*, JANE'S INTELLIGENCE REV., Aug. 1, 1995, at 3.

151. Blue-water capability is a country's ability to project its military forces to distant theaters of operation. This is usually accomplished by operating large numbers of ocean going warships, supply ships, and transport ships. China has only recently begun to acquire these types of vessels. Gao, *supra* note 3, at 348.

152. “[T]he PRC is years away from having the capability to overrun the Spratlys and then militarily hold them.” Eirinberg, *supra* note 23. The Chinese navy today is largely a coastal defense force with no aircraft carriers. Bennett, *supra* note 2, at 428.

153. “Any significant extension . . . of their [Spratly claimants] navies . . . in the area [Spratlys] . . . require[s] . . . more . . . financial investment . . . than seems . . . sensible.” *Maritime Risks and Threats in the Western Pacific*, *supra* note 150.

154. Bennett, *supra* note 2, at 433. China's fast-developing industries will require significantly more energy sources. Blanche & Blanche, *supra* note 4. In the last decade, China changed from an exporter of oil to a net importer and its dependence on imported

of sovereignty must be resolved before foreign oil companies will likely commit to long-term investment.¹⁵⁵ While the Spratly dispute remains outstanding, the political risk would either deter foreign companies from investing in the Spratlys or would cause them to exact a high premium for the risk. Either scenario would burden Chinese economic interests in the Spratlys.

VI. CONCLUSION

The most appropriate solution to the Spratly dispute is an expedited joint development agreement giving China sovereignty. This solution is practical because international law favors China's sovereignty claim, a joint development agreement will promote regional interests, and China's current domestic situation offers the other claimants substantial bargaining power.

The resolution of the Spratly dispute through Chinese sovereignty and joint development may yield significant collateral benefits to the claimants beyond the direct economic value of the Spratlys' resources. The direct benefit of resolving the dispute would be the efficient exploitation of the Spratlys' resource wealth. The more significant collateral benefit is the synergy the claimants would create that would enhance their collective modernization drive.

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oil will likely deepen. Calder, *supra* note 7.

155. Blanche & Blanche, *supra* note 4.

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