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# DANGEROUS GROUND: THE SPRATLY ISLANDS AND INTERNATIONAL LAW

Brian K. Murphy\*

## I. INTRODUCTION

The Spratly Islands lie in the South China Sea, occupying a 150,000 square mile area between Malaysia and Brunei to the south, Vietnam to the west, the Philippines to the east, the People's Republic of China to the northeast, and Taiwan far to the north. The chain consists of numerous islands, islets, reefs and coral atolls.<sup>1</sup> Those pieces of dry land that can be classified legally as islands<sup>2</sup> are tiny, nothing more than guano and scrub-covered coral atolls that have risen marginally above sea level. The largest island in the chain, Itu Aba,<sup>3</sup> is only 0.4 square kilometers in area.<sup>4</sup> The Spratlys have been variously described by journalists as "a group of tiny islands,"<sup>5</sup> "a motley collection of atolls [and] coral reefs,"<sup>6</sup> and "flyspecks of land in the South China Sea."<sup>7</sup> The

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1. Estimates of the number of features (including dry-land islands, semi-submerged reefs, submerged reefs, and atolls) making up the Spratlys vary widely, if not wildly, from 60 to more than 500.

2. Article 121 (1) of the 1982 United Nations Convention on the Law of the Sea defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide." See *infra* note 13, at 1291.

3. Taiwan, which occupies this island, calls it Taiping Island. Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Island Dispute*, 28 STAN. J. INT'L L. 425, 429-430 (1992).

4. *Id.*

5. Julian Brutus, *Prospects of Oil Make Spratlys Hot Property: Storm Brews Around the Islands*, SOUTH CHINA MORNING POST, July 26, 1994, at 7.

6. Robert Thomson, *Lure of the Spratlys' Empty Atolls*, FIN. TIMES, Mar. 23, 1988, at 3.

7. Ben Tierney, *Bullets May Eventually Fly over Some Flyspecks of Land in the South China Sea*, OTTAWA CITIZEN, Aug. 16, 1992, at B5.

island group also has been given several proper names: the Nansha Islands (China), the Truong Sa archipelago (Vietnam), Kalayaan or "Freedomland" (the Philippines) and, of course, the Spratlys.<sup>8</sup>

Until the second half of this century, the Spratlys were almost entirely ignored by the world community. The only resources the islands offered were small guano and phosphate deposits, seashells, turtle meat, and fish. These resources were enough to attract only occasional exploitation by adventurous fisherman and phosphate miners. The tiny size, remoteness, and vulnerability of the islands to tropical storms made them unattractive to permanent settlement, and the island group was perhaps best known by mariners, who were careful to avoid the countless reefs and shoals in the region marked as "dangerous ground" on their charts.<sup>9</sup>

The area remained largely unnoticed by the world until the early 1970's, when an Asian oil boom—and record-high world oil prices—stimulated an increase in oil exploration in the South China Sea. Major oil fields were discovered off the coasts of Malaysia and Brunei, just to the south of the Spratlys. In 1973, Russian seismologists explored and found signs of oil fields off the coast of North Vietnam, to the west of the Spratlys.<sup>10</sup> That same year, the Philippines embarked on an ambitious campaign of oil exploration off the island of Palawan, which lies immediately to the east of the Spratlys. With major oil strikes virtually surrounding the Spratlys, it was no wonder that the attention of a number of Southeast Asian nations ultimately turned to these tiny islands.<sup>11</sup> Today, it is acknowledged by the international oil industry that the Spratlys may lie atop an "elephant" of petroleum, with potential to yield in excess of a billion barrels of oil and untold quantities of natural gas.<sup>12</sup> On this basis alone, these forgotten islands have become the most sought-after property in Asia.

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8. Choon-Ho Park, *Maritime Claims in the China Seas: Current State Practices*, 18 SAN DIEGO L. REV. 445, 453 (1981).

9. Clayton Jones, *Law of the Sea Runs Aground Amid 26 Tiny Coral Isles*, CHRISTIAN SCIENCE MONITOR, June 10, 1983, at B6.

10. Hungdah Chiu & Choon-Ho Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. & INT'L L.J. 1, 4 (1975).

11. *Id.*

12. Wilson da Silva, *Western Companies Seek Oil Finds to Rival Middle East*, Reuter Business Report, Aug. 26, 1992, available in LEXIS, News Library, REUBUS File.

The recently ratified 1982 United Nations Law of the Sea Convention (*hereinafter* LOS)<sup>13</sup> codifies the "bundle of rights" that accrue to a state which has territorial sovereignty over an island or a group of islands. Most important among these rights is the exclusive right to exploit the resources of the sea bed surrounding an island or archipelago. The state holding territorial sovereignty over an island is allowed, under the LOS, to establish a 12-mile territorial sea and a 200 mile Exclusive Economic Zone (EEZ) around the island.<sup>14</sup> If the state has territorial sovereignty over an entire archipelago, it has the right to draw a straight baseline between the outermost islands and will have exclusive rights to exploit the resources of the sea bed within the area enclosed by that baseline.<sup>15</sup> To the claimants vying for the Spratlys, the implications of territorial sovereignty over the islands under the LOS are all too clear.

In addition to its potential resources, the Spratlys archipelago occupies a strategic location. Lying between the coast of Vietnam on the west and the Philippines to the east, the Spratlys occupy a potential blocking position for ships transiting the South China Sea. Aircraft based in the Spratlys would be within range of the Malacca and Sunda Straits, bottlenecks through which shipping in the South China Sea must pass in order to enter the Indian Ocean. A military presence, such as an airfield located in the Spratlys, could effectively halt all shipping in the South China Sea in the event of a conflict. This is a fact of no small consequence to nations in the region, who are currently restructuring military relationships in the wake of the end of the Cold War.

Today, six Asian nations—the Philippines, Malaysia, Brunei, Vietnam, Taiwan and the People's Republic of China—vigorously assert claims of sovereignty over all or parts of the Spratlys.<sup>16</sup> Based on these assertions, journalists are using new and more ominous phrases to describe the Spratlys: "the eye of a political typhoon" and "a potential Falklands."<sup>17</sup>

With so much at stake, the claimants to the Spratlys have pursued the sovereignty issue in various ways. All except Brunei have taken steps to physically occupy numbers of islands, including landing garrison

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13. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, 21 I.L.M. 1261 (1982) [*hereinafter* LOS].

14. LOS, *supra* note 13, arts. 3-4, 46, 47, 57; at 1272, 1278, 1280.

15. LOS, *supra* note 13, arts. 47, 56-57; at 1278, 1280.

16. Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEV. & INT'L L.J. 61, 62 (1994).

17. Jones, *supra* note 9.

troops, erecting stone "sovereignty markers," and building lighthouses and weather stations. This is the practical approach to acquiring sovereignty, applying the simple theory that "possession is nine-tenths of the law."<sup>18</sup> The effort to occupy the islands is also an element of a legal approach to establishing sovereignty, as will be explained in detail in Section III of this article. Some of the claimants have backed their occupations with naval patrols, in an attempt to consolidate their own holdings and to prevent others from expanding occupation to remaining islands.<sup>19</sup> One nation, Malaysia, has even taken the unique step of establishing a small resort on a disputed island.<sup>20</sup> While taking these practical measures, all of the claimant nations have been careful to craft legal claims to the Spratlys, both to justify their current occupation of the islands and to prepare for any negotiation or arbitration proceedings that may be necessary to settle the dispute.

The prospect of negotiating a settlement is being treated gingerly by the disputants, as the militarily more powerful nations—China and Vietnam—each carefully avoid the subject of multilateral negotiations on the issue of sovereignty, while trying to entice and cajole weaker disputants into bilateral talks on the issue.

This article will review and analyze the various legal arguments advanced by the six states currently claiming territorial sovereignty in the Spratlys. This will begin in Part II with a review of the history of the dispute, and will be followed by a discussion of the primary legal theories under which the disparate claimants might assert claim to territorial sovereignty over remote islands in Part III. Part IV will then explore the alternative methods—legal and practical—that these states may use in order to finally settle the dispute over the islands. In Part V, some conclusions will be drawn concerning the merits of these methods.

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18. Julian Brutus, *Experts Say China's Claim is Flawed and Vietnam has more Valid Claim to Resources in Spratlys Area*, SOUTH CHINA MORNING POST, May 13, 1994, at 6, available in LEXIS, News Library, SCHINA File.

19. Phillip Melchior, *Vietnam Calls for Spratlys Talks as Tension Builds Up*, REUTERS LIBR. REP., May 31, 1988, available in LEXIS, News Library, REUWLD File.

20. Charles P. Wallace, *Who Wants the Spratlys? Just About Everyone*, L.A. TIMES, July 16, 1991 at 8, available in LEXIS, News Library, ARCNEWS File.

## II. HISTORICAL BACKGROUND OF THE SPRATLYS DISPUTE

Four out of the six claimants to the Spratlys base their legal arguments for sovereignty upon some historical connection with the archipelago, with contacts either dating back to antiquity or of more recent origin. Although Vietnam, the People's Republic of China (PRC), and the Republic of China (Taiwan) all claim historic ties to the Spratlys reaching back hundreds of years, the history of the Spratly Islands as a disputed land mass begins in the nineteenth century and comes into sharpest focus during the twentieth century. During this period, European and Asian nations began to realize the potential strategic value of these islands—and began to quarrel over them.

One of the earliest treaties used by a nation to assert a claim over the Spratlys is the Convention Respecting the Delimitation of the Frontier Between China and Tonkin (Vietnam), signed by China and France in 1887.<sup>21</sup> Under this treaty, France and China agreed to a French protectorate over what today is Vietnam. In addition, the treaty established a French claim to areas in the South China Sea lying *west* of a line 105° 43' *east* of Paris. The Spratlys lie *east* of this line, and therefore beyond the French claim. Today, China uses this treaty as part of its argument for Chinese sovereignty over the Spratlys.<sup>22</sup> It is interesting to note, however, that while China may base part of its claim to the Spratlys on this 1887 treaty, China waited more than a century (until 1988) to actually occupy any of the islands.

The actual dispute over ownership of the Spratlys began 46 years after the signing of the treaty, when France announced it had occupied a number of islands in the South China Sea, including a number of the Spratlys. China was quick to react to the occupation and lodged diplomatic protests in both 1933 and 1934. These protests were based on China's claim to "historic ties" to the islands and on the provisions of the 1887 treaty.<sup>23</sup> However, the Chinese government carried the dispute no further, as it was at this time becoming embroiled in a much larger and catastrophic dispute with Japan, the Asian beginnings of what would become the Second World War.

With the war came Japanese invasions of areas throughout the region, and the Spratlys were not immune. The French presence

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21. Chiu & Park, *supra* note 10, at 11.

22. *Id.*

23. Cordner, *supra* note 16, at 64.

disappeared under Japanese military invasion in 1939. The Japanese renamed the Spratlys the "Shinnan Gunto" archipelago. Japan used one of the hidden resources of the Spratlys, their strategic location, to great advantage during the war. Japanese soldiers occupied the islands, and naval bases were established from which Japan's navy could assist in invasions and effectively block Allied shipping.<sup>24</sup> This was the most significant occupation of the islands since their discovery, but like previous occupations of the Spratlys, it was not to last.

The Japanese withdrew from the Spratlys at the conclusion of the war in 1945. The islands were then unoccupied until 1946, when the Republic of China (still under the Guomintang government of Chiang Kai-shek) sent a small naval contingent and a garrison force to occupy an island known as Itu Aba. The Guomintang government put this island under administrative jurisdiction of Kuangtung Province, a part of mainland China. These actions took place against the backdrop of the Chinese Civil War, which the Guomintang ultimately lost. In mid-1950, forces of the new People's Republic of China (PRC) took Hainan Island. The Guomintang government concluded that it was only a matter of time before the PRC swept them out of the Spratlys, and made the decision to abandon Itu Aba. The predicted invasion never occurred, and by 1951 all of the Spratlys were unoccupied.<sup>25</sup>

The San Francisco Allied-Japanese Peace Conference of 1951 was convened to sort out many of the territorial issues that remained in Southeast Asia in the wake of World War II. In particular, it was a way for the Allies to compel Japan to formally relinquish territorial claims it had staked throughout the Pacific before and during the war. Among these claims was a claim to the Spratlys. As a result of agreement at the San Francisco Conference, Japan formally renounced its claim to the Spratlys.<sup>26</sup>

Of the other nations that might have used this opportunity to make ownership claims in the Spratlys, it is surprising that France, a participant in the Conference, did not reassert its claim at this time.<sup>27</sup> Vietnam, on the other hand, asserted a territorial claim based on

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24. Teresa Poole, *Spratly Islands under Shadow of Expansionism*, THE INDEPENDENT, Feb. 13, 1992, at 14.

25. Cordner, *supra* note 16, at 64.

26. Treaty of Peace with Japan, Sept. 8, 1951, art. 2(f), 3 U.S.T. 3169, 136 U.N.T.S. 45.

27. Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, *supra* note 3, at 432.

France's prior interests. This claim, which was not contested by any of the participants,<sup>28</sup> was the beginning of Vietnam's active involvement in the dispute. Neither the PRC nor Taiwan participated in this Conference.

The Spratlys remained unoccupied for another period of five years, until Taiwan returned in 1956 to reoccupy Itu Aba. Taiwan has been occupying this island ever since, and regularly sends naval patrols through the area to assert its sovereignty.<sup>29</sup> Taiwan's occupation of Itu Aba is the longest continuous occupation of any of the Spratlys since the dispute over the islands began.

Also in 1956, in one of the more novel approaches to claiming the Spratlys, a Filipino lawyer and businessman, Tomas Cloma, claimed a number of islands in the chain (by right of his discovering them in 1947) and attempted to create a new state, "Kalayaan" or "Freedomland" on the islands.<sup>30</sup> His establishment of settlements on these islands raised diplomatic eyebrows and stimulated official protests. In the end, the settlers thought better of living on these remote islands and the settlements disappeared. Nevertheless, the Philippines bases its claim to these islands on the original Cloma claim.

One of the nations protesting the Cloma claim was Vietnam, which based its own claim to the Spratlys upon succession to the pre-war French claims. As noted above, Vietnam made its own official claim of sovereignty over the islands, uncontested and virtually unnoticed, at the San Francisco Conference of 1951.<sup>31</sup> In 1956, in response to the Cloma claim, the Republic of Vietnam (South Vietnam) reiterated its claim of sovereignty over the Spratlys and placed the chain under provincial administration.<sup>32</sup> Notably, the North Vietnamese government contested the Republic's claim, supporting instead China's claims to sovereignty over the islands.<sup>33</sup> In any case, the Vietnamese made no move to occupy any of the islands for another 15 years.

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28. The PRC protested any prospective claim to the Spratlys *in advance* of the Conference.

29. Richard D. Fisher, Jr., *Brewing Conflict in the South China Sea*, HERITAGE FOUND. REP., Oct. 25, 1984, at 3.

30. Mark Fineman, *Filipinos Guard Isles; Nations Vie for Specks in the South China Sea*, L.A. TIMES, Mar. 16, 1987, at 1.

31. Chiu & Park, *supra* note 10, at 14.

32. *Id.* at 9.

33. Cordner, *supra* note 16, at 66.



In 1958, the People's Republic of China issued a declaration on China's territorial sea, under which the government proclaimed a 12 nautical mile territorial sea and explicitly stated that this limit applied to the Nansha (Spratly) Islands.<sup>34</sup> Despite this sweeping claim of sovereignty, the PRC made no move to physically occupy any part of the Spratlys for the next 30 years.

With the 1960's came the Vietnam War, and the issue of the remote Spratlys virtually disappeared. Various claims to the Spratlys remained latent and no country moved to occupy more of the islands until 1968, when the Philippines occupied three islands.<sup>35</sup> This went almost entirely unnoticed against the worldwide tumult of 1968.

In 1973, with the Vietnam War approaching its end, South Vietnam reasserted its claim to the Spratlys, and occupied five of the islands thereafter.<sup>36</sup> This action prompted a strong protest and warning from the People's Republic of China, but the latter country, despite its rhetoric, took no action to eject the Vietnamese.<sup>37</sup> South Vietnam occupied these islands until 1975, when the Hanoi government took control of Vietnam.

In 1974, Tomas Cloma formally relinquished his claim to the Kalayaan Island group to the Philippine government of Ferdinand Marcos. President Marcos in turn decreed in 1978 that this island group (a subset of the Spratlys archipelago) was annexed to Palawan Province. The Philippines eventually occupied eight islands in the Spratlys, all but one of which was within the Kalayaan Group.<sup>38</sup>

In 1978, Malaysia entered the fray by asserting a claim to three of the southernmost Spratlys. In 1979, Malaysia issued a map of its continental shelf, showing these islands as part of Malaysian territory. In 1983, Malaysia established a military garrison on Layang Layang Island (Swallow Island) to more clearly establish its claims, and followed up with occupation of two other islands in 1986.<sup>39</sup>

The whole complexion of the Spratlys issue began to change radically in the late 1980's. The Cold War, which once had exerted a stabilizing influence in the region, collapsed. The Soviet Union,

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34. *Document on China's Claim to Xisha and Nansha Islands*, BBC Summary of World Broadcasts, Feb. 1, 1980, available in LEXIS, News Library, ARCNWS File.

35. Cordner, *supra* note 16, at 73.

36. *Id.* at 66.

37. *Id.* at 66.

38. *Id.* at 66-67.

39. Paul Lewis & Chris Donville, *Asian Tensions Rise Over Oil Rights*, DEF. NEWS, Mar. 23, 1992, at 1.

undergoing vast political changes, withdrew its military presence from Cam Ranh Bay in Vietnam. The United States, with some prompting by the Philippine Senate—and the eruption of Mount Pinotubo—executed a withdrawal from its major military presence at Clark Air Force Base and Subic Bay Naval Base. The nearly simultaneous withdrawal of the two largest Cold War powers left a political and military power vacuum in the region. After U.S. and Soviet withdrawal from the region, by far the strongest remaining power in Asia was the People's Republic of China.

China began to exercise this power in the Spratlys in 1988. During that year, both China and Vietnam began campaigns to occupy the remaining vacant islands of the Spratlys and the nearby Paracel Islands. Early in the year, the PRC landed small contingents of troops on five of the islands and on one large reef. Vietnam responded quickly by sending its own troops to occupy 15 more of the islands. Finally, in March, a Chinese naval patrol encountered and attacked three Vietnamese supply ships on a resupply mission to the Spratlys. A number of these freighters were sunk and several Vietnamese sailors were killed in the encounter.<sup>40</sup>

This clash focused the attention of the international community on the ongoing Spratlys dispute, but no action was taken to resolve the controversy. After 1988, the PRC and Vietnam avoided further armed conflicts, while both nations greatly stepped up their activities in the area. In what could be fairly characterized as "the battle of the lighthouses," both countries endeavored to stake out claims to various islets by landing troops, taking photographs of them, laying down marker stones<sup>41</sup> and plaques, and erecting lighthouses. Each new occupation was accompanied by public relations fanfare, reiterated claims of sovereignty over the entire Spratlys chain, and counterclaims by the other side.

The tension over the Spratlys has been exacerbated in the 1990's by a number of developments. The first is legislation passed by the PRC which asserts ownership by China not of just the Spratly Islands, but the entire South China Sea.<sup>42</sup> The second is a general military buildup by

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40. David Holley, *China, Hanoi Count Losses in Isles Clash*, L.A. TIMES, Mar. 17, 1988, at 6.

41. The Chinese were even reported to have loaded barges with stone markers and dumped them into the sea atop shallow water reefs in an effort to claim sovereignty over these features.

42. Xinhua News Agency, *Law of the People's Republic of China in Its Territorial Waters and their Contiguous Areas*, Feb. 28, 1992, from BBC Summary of World Broadcasts, available in LEXIS, News Library, ARCNWS File.

the PRC in the South China Sea, including the establishment of a major military airfield in the also-disputed Paracel Islands, which lie just to the north of the Spratlys. From this base, the PRC will now be able to project air power over the Spratlys (before building the base, the Spratlys were out of range for Chinese warplanes based on Hainan Island, 900 miles distant). The third development is perhaps the most significant, because it involves oil.

In June of 1992, the China National Offshore Oil Corporation (CNOOC) signed an agreement with the Crestone Energy Corporation of Denver, Colorado, by which CNOOC granted Crestone oil exploration rights over an area encompassing 9500 square miles and abutting the Spratlys. In signing the agreement, the Chinese publicly pledged to Crestone that it would defend American exploration crews with its "full military might." Crestone publicly estimated that the oil reserves lying under the concession were in excess of one billion barrels.<sup>43</sup> While much of the area encompassed by the concession lies in or near the Spratlys, its western extremities lie within 84 miles of the coast of Vietnam, well within Vietnam's recognized 200 mile territorial limits.<sup>44</sup> The Crestone Oil deal aggravated an already tense atmosphere surrounding the dispute.<sup>45</sup>

With its strategic location and its potential oil wealth measurable in billions of barrels, it is not surprising that several nations have overlapping claims to the Spratlys chain. The recent military build up in the area by the PRC, Vietnam, and other nations makes it equally unsurprising that the Spratlys are considered one of Asia's potential flash points. With all of these nations claiming the Spratlys, and some demonstrating intent to defend their claims militarily, the question remains: which nations have the strongest legal claims to the Spratlys and how might these competing nations finally resolve their disputes over the islands?

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43. *U.S. Firm Granted Oil Exploration Rights off Spratlys*, STRAITS TIMES, June 20, 1992, at 3.

44. A.F.P., *Vietnam Again Claims Violation of International Law by China—Crestone*, PLATT'S OILGRAM NEWS, June 23, 1992, at 2.

45. The U.S. government went out of its way to warn Crestone that should trouble develop between Vietnam and China over this concession, the company could *not* expect American help.

### III. POSSIBLE LEGAL FOUNDATIONS FOR CLAIMS TO THE SPRATLYS

All six countries currently asserting claims to all or portions of the Spratlys base their claims of territorial sovereignty on legal arguments. As will be examined later, these legal arguments vary widely, and each country advances its own geographic or historical evidence to prove its claim. Before considering each of these claims, it is instructive to first address the question: under what legal theories might a nation acquire territorial sovereignty over remote islands under existing international law?

#### *A. Continuous and Peaceful Display of Sovereignty*

In *United States v. The Netherlands*<sup>46</sup> (the Island of Palmas case), the Permanent Court of Arbitration established legal standards by which a nation might claim territorial sovereignty over an island. In this case, the issue was "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory."<sup>47</sup> Both nations had claimed sovereignty over this isolated island (located, incidentally, not far from the Spratlys) and supported their claims with differing legal arguments. The United States claimed title based upon discovery by Spain and subsequent cession of the island to the United States under the Treaty of Paris of 1898. The Netherlands based its claim of title upon colonization of the island by the Dutch East India Company as early as 1677, and on an uninterrupted and peaceful exercise of the rights of sovereignty over the island since that time.

The Permanent Court concluded that discovery alone was insufficient to establish territorial sovereignty over an island. Discovery gives the nation inchoate title to the territory, but in order to claim sovereignty, this inchoate title "must be completed within a reasonable period by the effective occupation of the region claimed to [have been] discovered."<sup>48</sup> Absent this completion, "an inchoate title could not prevail over the continuous and peaceful display of authority by another state."<sup>49</sup>

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46. Island of Palmas Case (*United States v. The Netherlands*), 2 U.N. Rep. Int'l Arb. Awards 829 (1928).

47. *Id.* at 832.

48. *Id.* at 846.

49. *Id.*

Under the *Island of Palmas* decision, the nation claiming sovereignty must prove a "continuous and peaceful display of state authority [peaceful in relation to other states]." <sup>50</sup> Notably, the Court stressed that the display of sovereignty must not be purely negative and exclusionary in nature, that is, to the exclusion of the activities of other states within the territory.<sup>51</sup> The claiming nation cannot simply stake out a territory and guard it as its own. Within the territory claimed, it must respect the rights of other states.

The Court in the *Palmas Case* stated that the "display of territorial sovereignty" must be "continuous," but recognized that in the case of small, isolated islands the manifestations of territorial sovereignty may reflect that isolation. There is no absolute requirement that the claiming state exercise sovereignty "in fact at every moment on every point of a territory."<sup>52</sup> In the case of a far-flung island group or archipelago, this type of control would be virtually impossible to maintain. Problematically for the Spratlys disputants, the Court in the *Palmas Case* did not provide specific guidance on how long a period of occupation would constitute continuous display of sovereignty. Nevertheless, the *Island of Palmas* decision is regarded as one of the most comprehensive judicial statements on what is required in order for a state to claim sovereignty over an island. In the Spratlys dispute, Vietnam, Taiwan, and the PRC all base their primary legal claims to sovereignty upon "continuous exercise of sovereignty" over the islands—the *Palmas* standard.

### *B. Cession from a Predecessor State*

It is a well settled principle of international law that a state which has sovereignty over a particular area may cede sovereignty to another state.<sup>53</sup> Provided that the successor state can prove that the predecessor state actually had sovereignty, and that the predecessor ceded the territory to the successor, the latter will have an indisputable claim by right of cession. Vietnam bases its argument for sovereignty over the Spratlys in part upon a claim that Vietnam is the successor to previous French claims.

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50. *Id.* at 868.

51. *Id.* at 839.

52. *Id.* at 840.

53. Cession, 1 Hackworth DIGEST § 61, at 421.

*C. Extension of Continental Shelf—Under 1982  
Law of the Sea Convention*

Malaysia and Brunei both base their claims to certain islands and reefs in the Spratlys upon provisions of the Law of the Sea Convention (LOS) of 1982. Basing claims of territorial sovereignty to land areas upon provisions of the Law of the Sea Convention is legally questionable, however. The LOS concerns itself primarily with the rights of states to make use of the sea. It is concerned with such rights as freedom of navigation, use and conservation of marine resources, and resolution of disputes over usage of the sea and its resources.

The Articles of the LOS invoked by Malaysia and Brunei in making their territorial claims are Articles 76 and 77. Article 76 describes in detail what constitutes the "continental shelf" of a state.<sup>54</sup> Article 77 then goes on to outline the sovereign rights of a state for the purpose of exploring and exploiting the resources of its continental shelf.<sup>55</sup> It is crucial to note here that the definition of the continental shelf is expressed entirely in terms of submarine terrain, and the resources that are referred to as exploitable are submarine resources. Article 77(4), which deals with rights to resources on the continental shelf describes only "mineral and other non-living resources of the sea-bed."<sup>56</sup> Nowhere in either of these Articles is there reference to how sovereign rights over islands themselves is to be determined.

The LOS goes to some length to define exactly what constitutes an island. Part VIII, Article 121(1) (the Regime of Islands) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."<sup>57</sup> The LOS sets out these objective criteria because a state that has established sovereignty over an island has the exclusive right, under Article 121(2), to exploit the resources of the territorial sea, a contiguous zone and an exclusive economic zone (EEZ) around an island "in accordance with the provisions of this Convention applicable to other land territory."<sup>58</sup>

In summary, the LOS concerns itself with defining the rights of a state to exploit marine resources surrounding its land territory, but such

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54. LOS, *supra* note 13, art. 76, at 1285.

55. LOS, *supra* note 13, art. 77, at 1285.

56. LOS, *supra* note 13, art. 77(4), at 1285.

57. LOS, *supra* note 13, art. 121(1), at 1291.

58. LOS, *supra* note 13, art. 121(2), at 1291.

rights are predicated upon the state's territorial sovereignty over the land mass, including islands. The LOS is a treaty about sovereignty over the sea, not over land.<sup>59</sup> It is left to the claimant state to prove first that it has territorial sovereignty over the land before it can claim sovereignty over the surrounding sea. Given that the LOS provides no mechanism for determining sovereignty over land, the claimant state must rely on other legal standards to support such a determination.

#### IV. EVALUATION OF RESPECTIVE CLAIMS TO TERRITORIAL SOVEREIGNTY UNDER INTERNATIONAL LAW

##### A. *The People's Republic of China*

The People's Republic of China claims territorial sovereignty over the entire Spratlys chain. The PRC puts forward several legal bases for this claim. Primarily, the PRC anchors its claim on its assertion of longstanding historical contact with the islands. The PRC claims that China both discovered and began to occupy the islands as early as 200 B.C.<sup>60</sup>

There is little doubt that the Chinese were the first to discover the Spratlys. Chinese historians claim that records exist of Chinese activities in the Spratlys as early 206 B.C. during the Han Dynasty, primarily the voyages of fishermen.<sup>61</sup> China was an active trading and seafaring nation long before Europe exited the Middle Ages, and records show Chinese mapping expeditions through the South China Sea that took place 200 years before Columbus sailed for America. Chinese scholars placed the Spratlys on their maps of the region beginning in the early eighteenth century.<sup>62</sup>

Although these records support the claim that China first discovered the Spratlys, this would only serve to support a claim of inchoate title. In order to perfect a claim of territorial sovereignty, according to the *Island of Palmas* case, the state holding inchoate title must also maintain a peaceful and continuous display of authority<sup>63</sup> over the territory.

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59. Tommy Koh & Robert Beckman, *Law of the Sea Convention: Implications for Singapore*, STRAITS TIMES, Nov. 12, 1994, at 34.

60. *Document on China's Claim to Xisha and Nansha Islands*, *supra* note 34.

61. *Id.*

62. *Id.*

63. *Island of Palmas Case*, *supra* note 46, at 846.

While the PRC asserts that the Chinese have maintained a continuous presence in the chain since the fourteenth century, the records supporting this claim are sparse and unconvincing. Mostly, the ancient records show that groups of Chinese fishermen from Hainan Island camped intermittently on some of the Spratlys. There is no credible record of continuous occupation of the islands by the Chinese. While the PRC still claims that the Spratly islands have been "effectively occupied" by Chinese fishermen "since time immemorial," the claim to territorial sovereignty is undermined by a 1928 Chinese government report that delineated the borders of China. The borders included the Paracel (or *Xisha*) Islands, but stopped short of including the Spratlys, which lie immediately to the south.<sup>64</sup>

In addition to its claim of ancient historic contacts with the Spratlys, the PRC invokes the comparatively modern 1887 bilateral treaty with France, the Convention Respecting the Delimitation of the Frontier Between China and Tonkin, in which France "ceded" territory lying east of a line 105° 43' east of Paris, to China.<sup>65</sup> When France took the initiative to occupy the Spratlys in 1933, China protested that this was in violation of the 1887 Convention. France ignored the protests and annexed the Spratlys to French Indochina.<sup>66</sup>

The San Francisco Allied-Japanese Peace Conference of 1951 seems to have clouded the issues surrounding claims to the Spratlys. The peace treaty drafted by the United States and Great Britain for signature by the Japanese contained a provision (Article 2(f)), which stated: "Japan renounces all right, title, claim to the Spratly Islands and the Paracel Islands."<sup>67</sup> There was nothing in the treaty that suggested which country would succeed to Japan's title. Vietnam, which had a delegate at the Conference, stepped in quickly to lay claim to title. Neither Taiwan nor the PRC had been invited to the Conference, so neither was able to register a protest on the spot. However, PRC Foreign Minister Chou En Lai, anticipating a disposition of the Spratlys issue at the Conference, had issued a categorical statement of the PRC's position:

Whether or not the U.S.-British Draft Treaty contains provisions on this subject and no matter how these provisions are worded,

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64. Cordner, *supra* note 16, at 62.

65. *Id.* at 64.

66. *Id.* at 64-65.

67. Treaty of Peace with Japan, *supra* note 26.



the inviolable sovereignty of the People's Republic of China over Nanwei Island (the Spratly Islands) and Xisha Island (the Paracel Islands) will not in any way be affected.<sup>68</sup>

It is clear from this statement that the PRC still claimed sovereignty over the Spratlys. Yet the roots of the PRC's claim were still based primarily upon discovery and intermittent occupation of some of the islands by nomadic Chinese fishermen. The PRC made no move to occupy any of the Spratly islands from its 1951 statement until 1988. Any PRC administration of the Spratlys during the intervening decades was limited to the periodic visits of enterprising Hainan fishermen.

In early 1988 the PRC took its first affirmative steps to occupy the Spratlys, sending soldiers to occupy five of the islands. Not long after the PRC arrived, its naval forces attacked and sank several Vietnamese ships resupplying Vietnamese occupation forces in the area. Today, the PRC occupies islands scattered throughout the Spratlys and continues to base its claims of inviolable sovereignty upon historic contacts with the islands.

Measured against the *Island of Palmas* standards, the Chinese claim is not legally strong. First, discovery alone does not give the PRC title to the Spratlys. There must be continuous and peaceful exercise of sovereignty. Occasional, brief visits by Chinese fisherman could hardly be considered to be the requisite exercise of sovereignty. Finally, it is open to question whether China's relatively recent occupation of the Spratlys would qualify as a continuous and *peaceful* exercise of sovereignty. China's occupation of the Spratlys has been undertaken by Chinese soldiers, and its exercise of sovereignty has been to the accompaniment of Chinese naval gunfire. This is precisely the type of negative exercise of sovereignty that the *Palmas* court excluded from legitimacy.

### B. Vietnam

Vietnam claims sovereignty over the entire Spratly archipelago and advances two primary arguments to support its claim. First, the Vietnamese government claims sovereignty on the basis of historical exercise of control over the archipelago, a claim similar to that of the

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68. Chiu & Park, *supra* note 10, at 14.

PRC. Alternatively, Vietnam claims sovereignty by right of cession from the French claim of sovereignty over the islands in the 1930s.

Like the PRC, Vietnam claims that it has "maintained actual possession of, and continuously exercised its sovereignty over ... the Truong Sa archipelago."<sup>69</sup> In a statement issued by the central government paper 'Nhan Dan' in 1988, the government presented a chronology of Vietnamese control over the islands dating to the seventeenth century. In the statement, the government indicates that "[u]p to the eighteenth century" the Lords of Nguyen had established a team "in charge for the exploitation and administration, as state power, of the Hoang Sa and Truong Sa archipelagoes."<sup>70</sup> The statement then lists a number of actions that Vietnam took during the next 200 years to establish sovereignty over the *Hoang Sa* archipelago—the Paracels, which lie to the north of, and entirely separate from, the Spratlys.

The Vietnamese government presents no evidence to show that the "team" set up by the Nguyens in the seventeenth century ever left mainland Vietnam to administer and exploit the Spratlys. The statement does not mention any further Vietnamese contact with the Spratlys until 1930, when a French ship, the *La Malicieuse*, under orders from the French Governor-General of Indochina, sailed to the Spratlys and planted the French flag and some stone markers on a number of islands.<sup>71</sup> This invokes the second Vietnamese argument, that of sovereignty through succession to the French claim.

The 1930 visit of *La Malicieuse* to the Spratlys was brief. Having planted their flags and stone markers, the French departed the area, leaving the Spratlys unoccupied for three years. The French returned in 1933, announced occupation of a number of the Spratlys, and assigned ownership of them to Ba Ria Province (French Indochina) under Decree Number 4762-CP of December 21, 1933.<sup>72</sup> France claimed the islands, believing that they were *terra nullius* (land belonging to no one) before 1930.<sup>73</sup> Japan and China both disputed this claim and protested French presence on the islands. Whether or not the islands were *terra nullius* before French occupation was rendered moot by subsequent French

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69. *Vietnam Details Claim to Paracel and Spratly Islands*, BBC Summary of World Broadcasts, Mar. 1, 1988, available in LEXIS, News Library, ARCNWS File.

70. *Id.*

71. *Id.*

72. *Id.*

73. Chiu & Park, *supra* note 10, at 18.

inaction on the Spratlys sovereignty question following the Second World War.

Japan conquered and occupied the Spratlys during the war and used some of them as military bases. Immediately after the war, Japan left the islands and the Spratlys were again unoccupied. France did not return to reoccupy their lost territory or to reestablish a claim. On the contrary, France, represented at the San Francisco Conference of 1951, stood by while Japan officially relinquished title and all future claims to the Spratlys. France did nothing at the Conference to reassert its own claim to the Spratlys and France never again returned to the islands. Vietnam quickly asserted its own claim at the Conference, basing such claim upon succession to the French title to the islands.<sup>74</sup> This theory is problematic, because by not reasserting its own claim after the war, or at the Conference, France *had no title* to which Vietnam could succeed.

Vietnam's failure to occupy the Spratlys after 1951 also weakens its claim to succeeding the French. After stating at the San Francisco Convention that the Spratlys "have always belonged [to] Vietnam,"<sup>75</sup> the Vietnamese government took no action to assert control over the islands for five more years. This assertion of control in 1956 consisted of a series of decrees, issued in response to the Cloma claim, by which the Republic of Vietnam (South Vietnam) assigned the Spratlys to administration under Phuoc Tuy Province.<sup>76</sup> Despite this series of official decrees, the South Vietnamese government made no effort to occupy or otherwise exercise sovereignty over the islands for almost two decades.

The Vietnamese claim dating to the 1950's suffers from yet another flaw. At the time of the South Vietnamese claim, there were two governments in Vietnam, the RVN government in South Vietnam and the communist government in North Vietnam. At the time that South Vietnam was asserting that the Spratlys had "always belonged to Vietnam," the North Vietnamese government was supporting China's claim to the islands. With the unification of Vietnam in 1975, the RVN government ceased to exist, and the Hanoi government, the same government that for decades backed the PRC claim to the Spratlys, became the government of all Vietnam.<sup>77</sup> Upon taking control of

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74. Cordner, *supra* note 16, at 65.

75. *Vietnam Cites Historical 'International Legal' Recognition of SRV Sovereignty over Paracels and Spratlys*, BBC Summary of World Broadcasts, Apr. 4, 1988.

76. Cordner, *supra* note 16, at 66.

77. *Id.*

Vietnam, the communist government abruptly made an about-face on its previous support for China's claim. Today's Hanoi government unabashedly declares that the Spratlys "have always belonged to Vietnam," but these declarations have a hollow ring in light of the Hanoi government's past support for the PRC claim.

Vietnamese soldiers have been present on five islands in the Spratlys since 1973, when South Vietnamese forces took the initiative to sail out and occupy them. The Hanoi government took control of these five islands after the war and in 1988 landed soldiers on fifteen more islands.

Vietnam's legal claim to the Spratlys suffers flaws that are similar to those of the PRC claim. The claims of historic contact with the islands are insufficient alone to establish territorial sovereignty, especially when other countries like China and Taiwan can advance equally credible claims of such contact. The Vietnamese occupation of the islands has been essentially military in character, which brings into question whether such exercise of sovereignty could be considered peaceful in nature. Finally, the claim that Vietnam has sovereignty over the Spratlys by way of succession to French sovereignty is undercut by France's failure to reoccupy the islands after World War II, its failure to reassert a claim at the San Francisco Conference in 1951, and by North Vietnam's support of China's claim to sovereignty prior to unification of Vietnam in 1975.

### *C. The Republic of China (Taiwan)*

Taiwan's claims to the Spratlys are essentially the same as those of the PRC, and are based upon long standing historical contact with the islands. Consequently, Taiwan's argument suffers from the same weaknesses as that of the PRC, namely, that discovery of and intermittent contact with the islands are insufficient to establish claim to territorial sovereignty. However, Taiwan has physically occupied and exercised sovereignty over some parts of the Spratlys far longer than any of the other more recent claimants, including the PRC.

Taiwan was the first state to establish a physical presence in the Spratlys following the Japanese departure at end of the Second World War. Taiwanese forces landed and occupied Itu Aba, the largest island in the Spratlys in 1946. In 1947, Taiwan announced a territorial claim to the Spratlys. In 1950, when communist Chinese forces took Hainan Island, Taiwan withdrew from Itu Aba. Itu Aba remained unoccupied for 5 years after this, and Taiwan returned to occupy Itu Aba again in

1956. Since then, Taiwan has maintained a constant presence on Itu Aba.

While Taiwan's claim to the entire Spratlys archipelago may not be supportable for the reasons already stated, Taiwan has occupied Itu Aba continuously and (relatively) peacefully for almost 40 years. This may qualify, under the *Palmas* standards, as peaceful and continuous exercise of sovereignty sufficient to give Taiwan a legally supportable claim to Itu Aba.

#### *D. The Philippines*

The Philippines' claim to the Spratlys is based upon the "discovery" of a number of the Spratlys by Thomas Cloma in 1947. In 1956, Cloma proclaimed a new state, "Kelayaan" or "Freedomland," and named himself chairman of the Supreme Council of Kelayaan State.<sup>78</sup> The Philippine government was bewildered by this development and neither supported nor denied Cloma's claim. South Vietnam and China were quick to dispute the Cloma claim.

"Kelayaan State" was limited to a brief occupation of a few islands and the establishment of settlements. The settlers eventually abandoned Kelayaan and retreated to Palawan, the nearest large island in the Philippines. Nevertheless, Cloma continued to claim these islands until the late 1970s.

The Philippine government's first official claim to the Spratlys was purely reactive in nature. In 1971, a Philippine fishing vessel ventured too close to Itu Aba Island, and was fired upon by forces of Taiwan, which had occupied the island continuously since 1956.<sup>79</sup> In response, the Philippine government protested and, among other things, claimed legal title to the Spratlys based upon the Cloma "discovery." In 1974 Cloma officially transferred ownership of the Kelayaan group to the Philippine government. In 1978 the Marcos government formally annexed the group to the Philippines and placed it under administration of nearby Palawan province.<sup>80</sup> Since then, the Philippines has occupied eight of the islands.

The Philippines' claim, disputed from its beginnings, is perhaps the weakest claim made by any of the disparate claimants to the Spratlys.

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78. *Id.* See also Fineman, *supra* note 30, at 1.

79. Cordner, *supra* note 16, at 66.

80. *Id.* at 67.

At the outset, Thomas Cloma's claim to have "discovered" the islands in 1947 is not credible. The Spratlys, including the islands claimed by Cloma, had been subject to numerous mapping expeditions long before that year, and had doubtless been "discovered" many times. Secondly, the settlements established by Cloma remained for only about 90 days before they were abandoned. Despite the fact that the *Palmas* case never defined the term "continuous," it is unlikely that 90 days—followed by abandonment—would fit the definition.

Nevertheless, the Philippines has occupied three islands since as early as 1968 and has occupied five additional islands between 1980 and 1989. While the Philippines may not be able to claim the entire Spratlys archipelago, it is still within reason that islands occupied peacefully by the Philippines for a decade or more could be found to belong to the country under the *Palmas* standard.

### *E. Malaysia*

Malaysia claims only three islands in the Spratlys chain. The Malaysian claim was established in 1979, and differs significantly from the Chinese, Vietnamese and Philippines claims in that it relies upon Article 76 of the 1982 Law of the Sea Convention. The islands claimed by Malaysia all lie on a prolongation of Malaysia's continental shelf.<sup>81</sup>

Malaysia's claim to sovereignty over land, based upon the prolongation of the continental shelf of Malaysia is founded upon a misinterpretation of provisions of the Law of the Sea Convention of 1982. While Malaysia may base claims to seabed resources upon Articles 76 and 77 of the LOS, these provisions do not legally support a claim to land areas that are permanently above sea level.<sup>82</sup>

Notwithstanding its misinterpretation of the LOS, the Malaysian claim to the three islands it occupies may prevail under international law, but based upon an entirely different legal standard. In 1983, Malaysia established a garrison on Layang Layang island, the largest of the three islands it now claims. In 1986, Malaysia occupied two additional, smaller islands. The islands claimed by Malaysia have never been occupied by any of the other states claiming the Spratlys, and the occupation by Malaysia has been peaceful and continuous since 1983.

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81. *Id.* at 70.

82. LOS, *supra* note 13, arts. 76-77, at 1285.

Thus, a claim of sovereignty over these islands might be supportable under the standards of the *Palmas* case.

### *F. Brunei*

Brunei's only claim in the Spratlys is to Louisa Reef, which Brunei claims lies upon an extension of its continental shelf. The reef is also claimed by Malaysia, and the countries have been engaging in negotiations since 1984 to resolve the two claims.

Like Malaysia's claim, Brunei's is based upon Articles 76 and 77 of the 1982 Law of the Sea Convention. However, Brunei's claim does not suffer from the same misinterpretation of the LOS as the Malaysian claim. Louisa Reef is a submarine feature, rather than an island. It has no permanent dry land and is not habitable. It is essentially part of the seabed. Thus, like any other part of the shallow seabed lying upon an extension of a state's continental shelf, Brunei may exercise an exclusive right to exploit the resources of the reef. Brunei must only prove that the reef lies on an extension of its continental shelf.

## V. ALTERNATIVES FOR RESOLVING THE SPRATLY DISPUTE

Article 2(3) of the Charter of the United Nations provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."<sup>83</sup> Article 33(1) of the Charter states that:

[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>84</sup>

The foregoing Articles contain well-meaning suggestions as to what type of disputes should be settled and what means should be used to settle them. Both provisions are broadly worded, however, and are subject to varying interpretations, depending on the points of view—and political motivations—of the disputants. While all six of the disputants

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83. U.N. CHARTER art. 2(3).

84. U.N. CHARTER art. 33.

in the Spratlys issue may generally agree that the issue should be settled by negotiation, there is little or no agreement on who should be parties to the negotiations. There is even less agreement about what to do if negotiations do not settle the dispute.

For a number of reasons, the Spratlys dispute defies easy resolution. These reasons range from the legal, to the political, to the cultural. First, there is the problem of the multilateral nature of the dispute. Today, six nations assert claims of territorial sovereignty in the Spratlys. Some of the disputants (the PRC, Taiwan, and Vietnam) claim the entire archipelago, while others (Malaysia and the Philippines) claim islands or individual subgroups of islands. One claimant, Brunei, claims a semi-submerged reef. Some of the disputants (the PRC and Taiwan) have nearly identical legal arguments for sovereignty, based upon historical claims. A number of the disputants (particularly Taiwan and Vietnam) have occupied a few of the islands long enough to claim territorial sovereignty under the *Island of Palmas* standard, but do not have strong enough legal arguments to support their claims to the entire archipelago.

Secondly, the bargaining power of the disputants varies widely. This bargaining power derives, essentially, from military power and a perceived willingness to apply it. While the PRC may not have the best legal argument for sovereignty over the Spratlys, it has by far the strongest military power of any of the claimants, and has already demonstrated a willingness to use this power to back its agenda in the region. In addition, the PRC has political and economic power that eclipses its opponents. The Chinese national economy is booming, and industrialized nations are flocking to China with visions of opening one of the world's greatest untapped markets. This economic power translates into political power. Western powers, focused on friendly relations with such a large trading partner, would be unlikely to intervene in any way if the PRC simply pushed all of its opponents out of the Spratlys by force. The PRC government is keenly aware of its own bargaining power and has adopted a unique (and coldly logical) strategy to pursue the Spratlys issue.

Since its short, one-sided naval battle with Vietnam in 1988, the PRC has repeatedly called for a peaceful, negotiated settlement of the dispute. On a superficial level, these continuous calls for peaceful negotiations make China appear to have entirely legal, and benign intentions. At the same time, the PRC has consistently rejected, or otherwise ignored, suggestions that multilateral negotiations be held on



the Spratlys sovereignty issue. Rather, the government has pursued a divide and conquer strategy, calling for bilateral negotiations between the PRC and other individual disputants. The underlying premise of these negotiations would be a willingness on the part of the PRC to share the resources of the Spratlys with any state that is willing to recognize overall Chinese sovereignty. To this end, the PRC has made separate overtures to the Philippines, Malaysia, and Vietnam to engage in bilateral talks. Each of these states has so far declined to participate in meaningful bilateral negotiations with the PRC.<sup>85</sup>

Another obstacle to settling the sovereignty issue is cultural in nature. Simply put, it is a problem of "saving face." Vietnam, the PRC, and Taiwan have all repeatedly made categorical claims of sovereignty over the Spratlys. Vietnam and the PRC have been particularly inflexible and vociferous about their claims. They have, essentially, painted themselves into a corner. To compromise on these claims now would entail a humiliating and unacceptable loss of face. While the world might see some agreement in the future on joint development in the Spratlys, it is highly unlikely that there will be an agreement reached on the core issue of territorial sovereignty.

On a political and practical level, no solution to the Spratlys dispute will be made permanent without the active participation of the PRC. The near-superpower status of the PRC, coupled with its strong national interest in the potential resources of the archipelago, ensures that any solution that does not meet with Chinese approval will fail.

Progress on the Spratlys dispute will depend upon the willingness of the various claimants to set aside the issue of sovereignty and explore creative ways in which they might cooperate to share the potential wealth of the Spratlys. China has recently taken a leading role in inviting joint development, and it would be in the best interests of all involved in the dispute to consider the invitation. As time goes on, opportunities for a peaceful settlement of the dispute will diminish. Discovery of a major oil field in the Spratlys by Vietnam or the Philippines (both of which are

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85. The Foreign Ministers of Vietnam and China recently released a joint communiqué announcing that the two countries were committed to resolve the Spratlys dispute peacefully and would establish a committee to study maritime disputes between the two countries, including the Spratlys issue. China suggested at this meeting that the two countries embark on joint development of resources in the Spratlys even before sovereignty issues are resolved. Vietnam demurred. Hiroaki Hayashida, *China and Vietnam Agree to Settle Territorial Row*, The Daily Yomiuri, Nov. 23, 1994, available in LEXIS, World Library, ALLWLD File.

actively exploring) will almost certainly prove an irresistible temptation for China to settle the sovereignty issue by force of arms. Certainly, Vietnam and the Philippines have no allies willing to fight a war with China—and China requires no allies in order to win.

## VI. CONCLUSION

The Spratlys dispute represents a very real threat to peace in Southeast Asia, and an immense challenge—a Gordian knot—for international legal scholars. A few conclusions can be drawn from analysis of the problem, however.

First, the conventional dispute settlement mechanisms of submission to an arbitral panel, judicial solution, or submission to a regional agency are inadequate to address an unconventional dispute as complicated as the Spratlys. In this dispute there are too many variables. Some states claim part and some claim all of the Spratlys. Some of the claimants have peacefully occupied islands or groups of islands for varying lengths of time. One of the most powerful disputants claimed the islands on legally doubtful grounds and has occupied a large number of the islands by force of arms. Some have advanced identical legal arguments based upon the same sets of facts. It seems highly unlikely that a judicial or arbitral body could place these variables in an order that would yield a solution.

Second, the potentially high stakes in this dispute make it unlikely that any of the claimants (except those who are virtually powerless otherwise) will seek to submit it to an independent judicial or arbitral body. All of the disputants would rather pit their negotiating skills against one another than surrender the decision making in this dispute to an outside panel. Given the purely intra-Asian nature of the dispute it is highly unlikely that the parties would find comfort in submitting the dispute to a court or arbitral panel consisting of Americans, Europeans or other non-Asians.

Finally, the disputants seem today to be working toward the best means available for resolving any major dispute: negotiation and compromise. After all the stridency, posturing, threatening, and jockeying for position, the Asian states involved in the Spratlys dispute appear to be leaning in the direction of a negotiated solution of the dispute, based upon China's recent proposal that the sovereignty issue be laid aside and that resources in the Spratlys be shared by those who enter into a negotiated agreement. It would be wise for the nations involved to accept China's overtures, and to enter into serious negotiations on a

resource-sharing arrangement soon, before a major oil strike changes China's mind.