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Potential for conflict in the Spratly Islands

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THESIS

POTENTIAL FOR CONFLICT IN THE SPRATLY ISLANDS

by

Chin Yoon Chin

December 2003

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13. ABSTRACT (maximum 200 words)

This thesis examines the potential for conflict in the Spratly Islands and determines whether the Declaration of Conduct of Parties in the South China Sea signed between China and ASEAN on November 4, 2002 together with ASEAN's multilateral confidence-building measures mechanisms are able to prevent or manage this dispute. China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei have laid claims on some or all of the islands. Many scholars have argued that the economic and strategic values of the Spratlys Islands underlay competing claims in the Spratlys. In response to this, ASEAN is using Track I and II diplomacies to pursue solutions and confidence-building measures to prevent the dispute from escalating into a conflict in the region. All claimants except Taiwan are signatories. Can this dispute be resolved without Taiwan's participation? This study concludes that this is a multilateral dispute that needs to be solved multilaterally by all the claimants. However, unless all the signatories adhere to the principles of the Declaration of Conduct of Parties in the South China Sea, no guarantee exist that this can prevent claimants from taking unilateral actions.

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POTENTIAL FOR CONFLICT IN THE SPRATLY ISLANDS

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Submitted in partial fulfillment of the
requirements for the degree of

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I. INTRODUCTION

A. BACKGROUND

The South China Sea, known in Chinese as Nanhai, or the South Sea, is part of the western Pacific. It is bounded on the northeast by the Taiwan Strait, on the east by Taiwan and the Philippines, on the southeast and south by Borneo, on the southern limit of the Gulf of Thailand and the east coast of the Malay Peninsula, and on the west and north by the Asian mainland.[1] In this body of water lie many groups of islands consisting atolls, shoals, cays and banks. The Pratas Islands, the Macclesfield Bank, the Paracel Islands, and the Spratlys Islands are the main groups.[2] The dispute about sovereignty over the Spratlys and the adjacent sea-space has been a sensitive and contending issue between China and five other claimants, resulting in several military clashes and near clashes over the past three decades.

The Spratly Islands are located between 4^0 and 11^0 30' latitude and 109^0 30' and 117^0 50' longitude along the wide expanse of the South China Sea and spread across the world's busiest sea lanes. This group of islands consists of more than 100 small groups of islets, coral reefs and sandbars; with some of them visible only during the low tide.[3] The waters around these islands include rich fishing grounds, phosphate deposits, and potentially natural gas and oil deposits. As of the implementation of the 1982 United Nations Law of the Sea Conference (UNCLOS), states may claim an exclusive economic

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[1] 1996 Encyclopaedia Britannica (CD Resource)

[2] Bob Catley and Makmur Kelliat, *Spratlys: The dispute in the South China Sea* (Sydney: Ashgate, 1997), p. 3. Also see map for the location of these groups of island

[3] Renato Cruz De Castro, "China's Strategic Modernization and its Implication on RP-PRC Spratly Dispute," *APAN Occasional Papers*, available at http://www.apan-info.net/ndcp/occasional_papers/HTML/Rene%20Castro%27s%20Paperwp.htm (10/3/03)

Figure 1: The South China Sea Islands

Source: Federation of American Scientists: Military Analysis Network available at

http://cat.middlebury.edu/southchinasea/maps/schina_sea_88.jpg (10/30/03)

zone (EEZ) of 200 nm. The Spratlys Islands region has turned into a region of disputes where six nations scramble to occupy the areas to reap the potential economic benefits. Three nations -- China, Taiwan, and Vietnam -- claim the entire Spratly Islands, while portions are claimed by Malaysia, Brunei and the Philippines. Currently, approximately 50 islands are occupied by China (about 450 soldiers), Malaysia (70-90), the Philippines (about 100), Taiwan (about 100) and Vietnam (about 1,500). Brunei is a claimant but does not occupy any island or reef.[4] Skirmishes between China and Vietnam occurred in 1988 over the disputed island of Fiery Cross and between China and the Philippines in 1995 over the Mischief Reef. Several others near clashes between Vietnam and the Philippines, and exchanges of harsh diplomatic notes between Malaysia and the Philippines and between China and Malaysia have occurred because of these competing claims. These nations have come close to war over the territory on several occasions in the recent years, and on August 2002 Vietnamese troops based on one islet fired warning shots at the Philippine air force reconnaissance plane.

Currently, economic activity is limited to commercial fishing and mining of phosphate. The proximity to oil and gas-producing sedimentary basins suggests the potential for oil and gas deposits, but the region is largely unexplored, without any reliable estimates of potential reserves; viable commercial exploitation has yet to be developed because the depth of water is deep in the area.

These disputes over sovereignty and maritime jurisdiction of the Spratlys remain potentially volatile and dangerous in the South China Sea today. The Association of Southeast Asian Nations (ASEAN) has been engaging China, the most powerful claimant in the disputes since the early 1990s because of its subtle expansion and consolidation in the Spratlys. Since then, a series of ASEAN-China informal consultations on the South China Sea have taken place to formulate a code of conduct. Nonetheless, on November 4, 2002 in Phnom Penh, a non-binding Declaration of Conduct of Parties in the South

[4] Figures of the troops stationed in these islands are obtained from CIA World Fact Book, available at http://www.cia.gov/cia/publications/factbook/geos/pg.html (8/28/03). See Figure 1 for the details of islands/cays/shoal/reefs that claimants have claimed updated till June 1999

Occupying Country	Feature Name (English)	Feature Geo- Location (lat/long) North East	Name in Occupying Country Language
Malaysia	Ardasier Reef	7^0 37' 113^0 56'	Terumbu Ubi
	Investigator Shoal	8^0 08' 114^0 42'	Terumbu Peninjau
	Mariveles Reef	7^0 59' 113^0 54'	Terumbu Montanani
	Swallow Reef	7^0 23' 113^0 48'	Terumbu Layang Layang
Philippines	Commodore Reef	8^0 21.5' 115^0 13.7'	Rizal Reef
	Flat Island	10^0 49.5' 115^0 50'	Patag
	Lankiam Cay	10^0 43' 114^0 32'	Panata
	Loaita Island	10^0 40' 114^0 25.5'	Dagahoy Dugao
	Nanshan Island	10^0 44' 115^0 48.5'	Lawak
	Northeast Cay	11^0 27.5' 114^0 21' 11^0 03.2' 114^0 17'	Parola
	Thitu Island		Pagasa
	West York Island	11^0 05.5' 115^0 01.5'	Likas
China	Chigua Reef	9^0 55' 114^0 29'	Dongmen Jiao
	Cuateron Reef	8^0 51.5' 112^0 50'	Huayang Jiao
	Fiery Cross Reef	9^0 33' 112^0 53'	Yongshu Jiao
	Gaven Reef	10^0 12.5' 114^0 13'	Nanxun Jiao
	Johnson Reef (S)	9^0 42.7' 114^0 16.8'	Chigua Jiao
	Mischief Reef	9^0 55' 115^0 32'	Meiji Jiao
	Subi Reef	10^0 55.5' 114^0 05'	Zhubi Jiao
Taiwan	Itu Aba Island	10^0 23' 114^0 21.4'	Tai Ping Dao
Vietnam	Allison Reef	8^0 49' 114^0 06'	Bai Toc Tan
	Amboyna Cay	7^0 53.8' 112^0 55'	Dao An Bang
	Barque Canada Reef	8^0 10' 113^0 18'	Chaw Shai/Chan Chai
	Bombay Castle (Rifleman Bank)	7^0 56' 111^0 40'	---
	Central Reef	8^0 55' 112^0 21'	Con Guia/Trong Sa Dong
	Collins Reef (Johnson Reef-N)	9^0 45' 114^0 13.7'	Bai Vung May/Co Lin
	Cornwallis South Reef	8^0 43' 114^0 11'	Da Nui Le/Nut'le
	Discovery Great Reef	10^0 55' 113^0 51'	Da Lon
	East Reef	8^0 49' 112^0 36'	Con Dong/Da Dong
	Grainger Bank	7^0 47' 110^0 28'	Bai Que Duong
	Kingston Shoal*	7^0 33' 111^0 35'	---
	Ladd Reef	8^0 37' 111^0 40'	Da Lat
	Len Dao	9^0 46' 116^0 43.8'	---
	Namyit Island	10^0 11' 114^0 22'	Nam Yit/Nam Yet
	Orleana Shoal*	70^0 42' 114^0 22'	---
	Pearson Reef	8^0 57' 113^0 40.5'	Hon Sip/Hon Sap
	Pentley Reef	10^0 24.5' 114^0 35'	Do Thi
	Pigeon Reef	8^0 51.8' 14^0 39.2'	Da Tien Nu
	Prince Consort Bank	7^0 53' 110^0 00'	Bai Phuc Nguyen
	Sand Cay	10^0 22.7' 114^0 28.7'	Da Son Ca
	Sin Cowe Island	9^0 53.2' 114^0 19.7'	Dao Sinh Ton/Gac Ma
	Sin Cowe East Island	9^0 54.8' 114^0 33.5'	Sinh Ton Dong
	South Reef	11^0 23.2' 114^0 17.9'	Da Nam
	Southwest Cay	11^0 25.8' 114^0 19.7'	Dao Song Tu Tay
	Spratly Island	8^0 38.5' 111^0 55'	Dao Truong Sa
	Vanguard Bank	7^0 31.7' 109^0 43.7'	Bai Tu Chinch
	West Reef	8^0 51' 112^0 12'	Con Tay/Da Day

Figure 2: Islands Occupied by Claimant States in the Spratly Islands

* Vietnam reportedly sent troops to occupy two additional submerged reefs in the Spratly Islands (probably Orleana Shoal and Kingston Shoal on Rifleman Bank) in September 1998, however, there had been no firm information on these actions. In comparison, Malaysia's move to construct new facilities at Investigator Shoal in June1999 was well documented.

Sources: Dan J. Dzurek, *The Spratly Islands Dispute: Who's on First?*, Maritime Briefing 2;1 (Durham, U.K: International Boundaries Research Unit [IBRU], University of Durham, 1996) Table 2: 56-57; and Rigoberto Tiglao, "Seaside Boom," *Far Eastern Economic Review* (July 8,1999):14. , and John C. Baker and David G. Wiencek, eds., *Cooperative Monitoring in the South China Sea*, (Westport, Connecticut London: Praeger 2002), p 193-194

China Sea was formally signed between ASEAN and China, rather than a code of conduct that ASEAN originally desired.[5]

B. THESIS

This thesis focuses on the Declaration of Conduct of Parties in the South China Sea. Its purpose is to assess whether the declaration, together with the current initiatives taken by ASEAN (namely, the official Track I and unofficial Track II confidence-building measures) are able to bind or prevent the disputes from escalating into flash points while preventing further skirmishes from recurring. This thesis examines whether Track I ASEAN summits, ASEAN ministerial meetings (AMM) and the ASEAN Regional Forum (ARF) and Track II informal workshop on managing potential conflicts in the South China Sea (known as the workshop) and the Council for the Security Cooperation in the Asia-Pacific (CSCAP) possess adequate confidence-building measures to manage the problems these competing claims have created.

C. AIM OF THE THESIS

This thesis will seek answers to the following questions:

(1) Why do states claim the Spratly Islands?

(2) Can claimants provide security to their claims, and what is their political will with regards to this claim?

(3) Can the Declaration of the Conduct of Parties in the South China Sea prevent the situation from escalating into a flash point?

(4) Can the Track I and II confidence-building measures mechanism prevent the escalation of the competing claims?

[5] "China Signs Accord with Asian Group on Disputed Territory, Free Trade," *Washington Post*, 5 November 2002

D. SCOPE OF THE STUDY

The main focus of the thesis will concentrate on the Declaration of the Conduct of Parties in the South China Sea and whether ASEAN's multilateral institutions will be able to build confidence and resolve or manage the conflict so that it does not develop into a potential flash point in the South China Sea. This thesis examines the background of the Spratlys competing claims and the Declaration of the Conduct of Parties in the South China Sea. It further explains the events leading to China's signing of the 1976 Treaty of Amity and Cooperation in the South China Sea (TAC) in the ASEAN-China Bali Summit on October 9, 2003.

E. STRUCTURE OF THE THESIS

Chapter II examines the origin of the 1982 UNCLOS and some of the relevant International Laws governing the usage of the maritime areas, the historical background of the competing claims of the Spratlys, and the economic potential and the strategic value of the Spratlys. Chapter III investigates whether the claimants can sustain their claims using their present military capabilities, and it assesses the claimants and the political will to maintain what the nations have claimed. Chapter IV examines the genesis of the code of conduct and its principles, determines the advantages of signing the conduct, and estimates whether the claimants will be able to utilize the conduct of parties to prevent further incident from occurring. In addition, ASEAN's Track I and II confidence building mechanisms will be discussed to evaluate them in the light of multilateral theory. This chapter also discusses the roles played by the United States and Japan in these competing claims. Chapter V concludes with a judgment whether the signing of the Conduct of Parties in the South China Sea will enable these regional multilateral institutions to manage or resolve the competing disputes in the Spratlys.

II. BACKGROUND TO THE CLAIMS

A. INTRODUCTION

The instability created by the overlapping claims on the Spratly Islands is the cause for concern among Southeast Asian nations who wondered whether these claims could destabilize the regional security that the region has enjoyed thus far. China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei have each laid competing claims on the Spratly Islands on the basis of history, discovery, established laws and effective occupation. All the competing countries have occupied some of the islands with the exception of Brunei. China, Vietnam and the Philippines fought each other over their claims in the late 80s and mid 90s. The actions taken by China over this issue in the past two decades, coupled with the ongoing modernization of its naval and air assets, suggests that, China will eventually emerge as the main actor in the region. In response to this issue, bilateral agreements and codes of conduct have been signed between China and Vietnam and between China and the Philippines. These agreements and codes, however, have not stopped China and the Philippines from fighting a few months later after the signing of the code of conduct in 1995. In the November 2000 issue of *Jane's Intelligence Review*, Clive Schofield asserts that "the South China Sea disputes and the Spratlys disputes in particular, remain the principal source of tension in Southeast Asia. There is a genuine fear that ongoing incidents could escalate to actual confrontation."

This chapter discusses the origin of the 1982 United Nations Law of the Sea Conference (UNCLOS) and some of the relevant international laws governing the usage of the maritime areas. With the implementation of the 1982 UNCLOS, nations utilized it to exercise their claims, which have contributed to the conflicts in the Spratly Islands. The chapter also discusses the background of each nation's claim drawing some conclusions as to whether the claim is legitimate or in accordance with the relevant laws. The economic and strategic potential of the Spratly Islands is also discussed in order to determine why these nations claim the areas.

B. THE 1982 UNCLOS AND INTERNATIONAL LAWS

1. Origins

Prior to the mid-1960s, the law of the sea developments focused primarily on the rights of nations to act unilaterally in exploiting resources. In the absence of specific maritime laws governing the usage of the sea and the exploitation of its resources, the 1958 Continental Shelf Convention, Customary Laws and International Laws were often used for arbitration and judgments in the International Tribunals and International Court of Justice[6] for those cases pertaining to maritime issues. With the increasing importance and utilization of the sea as means of commerce and trade, a dire need arose for formulated agreements adequately covering all maritime issues. Interpretations of the laws governing the limits of territorial waters and their usage, for example, caused disputes among nations; some assumed the customary cannon ball rule, and others observed the 3 nm or 12 nm limits[7] to justify their actions.

The call for a concerted effort and common regulations governing the utilization of oceans was initiated by the Maltese ambassador to the United Nations in November 1967. In December 1970, the United Nations General Assembly decided that there was a need to formalize regulations that governed the usage of the sea and the exploitation its resources. Several resolutions were passed, and Resolution 2749 -- containing the "Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof beyond the limits of National Jurisdiction"[8] -- initiated the deliberation of the 1982 UNCLOS. This conference signaled the beginning of a new era, when for the first time attention was paid at the international level to all matters relating to the laws of the

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[6] One such example is the Fishery Jurisdiction Case between United Kingdom and Iceland 17 August 1972, available at http://www.icj.law.gla.ac.uk/idecisions/isummaries/ibiaisummary720817.htm (6/5/03)

[7] Most nations including the U.S recognized the 3 nm before the implementation of the 1982 UNCLOS. There was resistance to the 12 nm territorial limit prior to the implementation of the 1982 UNCLOS

[8] This was taken from the Agreement made in the Final Act of the Third UN Conference on the Law of the Sea available at, http://www.un.org/Depts/los/convention_agreements/texts/final_act_eng.pdf (6/3/03)

sea, while considering the problems of the ocean space and its resources. Debate started in 1973, resulting in the 1982 UNCLOS after three deliberations, which ended nine years later in Montego Bay, Jamaica on the December 10, 1982. The Convention was opened for ratification in 1982, but it did not come into force until the sixtieth nation, Madagascar, ratified it on November 16, 1994.[9]

C. THE RELEVANCE OF THE 1982 UNCLOS

The law of the sea convention provides a framework governing the rights and obligations of nations with regards to ocean space and its resources. All the claimant nations involved in the Spratlys have ratified the 1982 UNCLOS with the exception of Taiwan since Taiwan is not a member of the United Nations. Under the 1982 UNCLOS, a nation exercising territorial sovereignty over an island can declare a territorial sea extending 12 nm from the island baseline.[10] The sovereignty of the controlling nation extends to the air space above and the seabed and subsoil of the territorial sea.[11] Additionally, a sovereign nation exercising territorial sovereignty over an island can declare a 200 nm Economic Exclusive Zone (EEZ) from the island's baseline. Within the EEZ, the controlling nation has sovereign rights over the natural resources located in the water, sea bed and sub soil.[12] With these provisions in force along with other related international law, coupled with the potential wealth the sea provides and the strategic location of the Spratly Islands, claimant nations moved to exercise sovereignty over the Spratly Islands.

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[9] The 1982 UNCLOS Preamble

[10] The 1982 UNCLOS Part VIII Article 121 Regime of Islands

[11] The 1982 UNCLOS Part II Article 2 (2), Legal Status of the Territorial sea, of air space and of its bed and subsoil

[12] The 1982 UNCLOS Part V Article 55 -57, Specific legal regime of the EEZ; Rights, Jurisdiction and Duties of the Coastal State in the EEZ and Breath of the EEZ

D. CLAIMANT NATIONS

Issues of sovereignty over the Spratly Islands started when the British and French exerted their influence in the region during the 1800s. As their empires collapsed after World War I and World War II, a series of power vacuums occurred. Competing claims to the Spratly Islands began to first attract international attention towards the end of the nineteenth century as Britain, France, Japan and China competed with one another over sovereign control of the Spratly Islands. As these powers began to withdraw from the region, other regional nations joined in the competing claims.

The greatest difficulty in determining the legitimacy of each claim is identifying the common criteria and norms with which nations can make their claims. Currently, China, Taiwan and Vietnam claim the entire Spratly archipelago as their historical heritage; whereas, the Philippines, Malaysia and Brunei each claim sovereignty over part or all of the Spratly Islands on the basis of discovery and effective occupation according to international legal principles or the provisions of the 1982 UNCLOS.

E. CHINA'S CLAIM

China's claim to the entire South China Sea is historically based. The Chinese Foreign Ministry published an article entitled "Jurisprudential Evidence to Support China's Sovereignty over Nansha Islands (Chinese name for Spratlys)" in 2000.[13] It states that its claim is based on three principles: discovery, development productive activities, and exercised jurisdiction by the Chinese government. The article further states that Chinese discovered the islands as early as the Han Dynasty. This evidence was recorded in books; Records of Rarities by Yang Fu of the Eastern Han Dynasty, Records of Rarities in Southern Boundary by Wan Zhen of the Three Kingdoms Period and A History of Phnom by General Kang Tai of the East Wu State. Regarding the development of the islands, the article stated that Chinese fishermen had used the islands as their base to "develop and engage fishing, planting and other productive activities" since the Jin

[13] "Jurisprudential Evidence to Support China's Sovereignty over Nansha Islands." China Foreign Ministry Article, available at http://www.fmprc.gov.cn/eng/5773.html (6/8/03)

Dynasty.[14] The Chinese government collected taxes from these fishermen exercising jurisdiction over these islands. Maps and other historical records record the exercise of jurisdiction by the successive governments of China over the Spratly Islands and recognized these islands as Chinese territories.

China's earliest formal claim can be traced back to the signing of the Convention Respecting the Delimitation of the Frontier between China and Tonkin on June 26,1887, which concluded the Sino-French War if 1884-85.[15] Article 3 of this convention provided a delimitation line between French and Chinese territorial claims to the South China Sea. Chinese officials have cited Article 3 as giving China ownership and control of the Spratly Islands in the nineteenth century and the early 1900.[16]

China's arguments on effective occupation are based on the events in the 20th century. China claimed that the Chinese government had sovereignty over the Spratly Islands throughout the 1930s and 1940s.[17] When Spratly Islands were annexed by France in 1930 and 1933, China protested and reiterated its claim. From 1947 to 1950, after the Japanese surrendered the islands and again from 1956 until present day, Taiwan has controlled the Japanese submarine base and currently maintained an armed garrison in the island of Itu Aba, the largest island in the group. Beijing has incorporated the Spratly Islands into Guandong and Hainan provinces successively after the founding of the People's Republic of China in 1949, and it claimed that the Chinese government has maintained sovereignty over the islands since.

In its 1992 Territorial Sea Law, China claimed 12 nm territorial seas around the Spratly Islands, but it has never made any specific claims for an exclusive economic zone

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[14] Ibid

[15] Xavier Furtado. "International Law and the Dispute over the Spratly Island: Whither UNCLOS?" *Contemporary Southeast Asia*, Dec 1999, p. 389-40

[16] Ibid p. 340

[17] Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, (England: Ashgate Publishing Company 2002), p 88

or continental shelf around its claimed features.[18] China enacted its continental shelf laws and exclusive economic zone in 1998.[19]In 2000, the Chinese Foreign Ministry published an article titled "International Recognition of China's Sovereignty over the Nansha Islands**."**[20] In this article China claimed that various nations have acknowledged and recognized the Nansha Islands as Chinese territory. It further asserts that international public opinion and publications of other countries recognize the Nansha Islands as Chinese territory as well.

However, Liselotte Odgaard argues that "China did not exercise jurisdiction, military or otherwise over the Spratlys before 1988."[21] Because of the difficulty of providing evidence of "effective occupation in ancient times, the fact that the concept of effective occupation did not exist in the Confucian legal system negates the existence of effective occupation prior to 1988."[22] Lian A. Mito states that China's argument is "weak and the historical evidence fails to provide conclusive proof of routine occupation and at most supports only a claim of inchoate title."[23] Christopher C. Joyner argues that "the fundamental question of whether proof of historical title today carries sufficient legal weight to validate acquisition of territory."[24] He further argues that "modern international law clearly recognizes that mere discovery of some territory is not sufficient to vest the discoverer['s] valid title of ownership to territory." However, Lee Lai To implies that China has adequate historical records, maps and cultural relics to support its historical

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[18] Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig. *Sharing the resources of the South China Sea.* (Honolulu: University of Hawaii Press 1997), p 24

[19] "A code of Conduct for the South China Sea." *Jane's Intelligence Review*, 27 October 2000. available at http://www.janes.com/regional_news/asia_pacific/news/jir/jir001027_1_n.shtml (5/22/03)

[20] **"**International Recognition of China's Sovereignty over the Nansha Islands**."** China Foreign Ministry Article, available at http://www.fmprc.gov.cn/eng/5766.html (6/8/03)

[21] Ibid Liselotte Odgaard (2002 p. 92)

[22] Roque Jr., R. Harry L. "China Claim to the Spratly Island Under International Law." *Journal of Energy and National Resources Law*, (August 1997), 15:3 p 189-211, quoted in Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, (England: Ashgate Publishing Company 2002), p 92

[23] Lian A. Mito. "The Timor Gap Treaty as a Model for Joint Development in the Spratly." *American University International Law Review*, Rev. 727, Spring 1998

[24] Christopher C. Joyner. "The Spratly Islands: What Role for Normalizing Relations between China and Taiwan?" *New England law Review*, Rev. 819, Spring 1998

claims to these islands.[25] Andrew Forbes, a British scholar who has done extensive research into Chinese expeditions and the history of the South China Sea did not find any evidence of the Chinese explorers mentioning the Spratlys; he only found mention of the Paracels Islands.[26] Forbes points out that no one paid much attention to the Spratlys until World War II, when control over the sea lanes between East and Southeast Asia became strategically important when the Japanese used the islands as a staging point for it military.[27]

Analyzing the facts thus far in the case of China, there appears to be gaps in its occupation of the Spratlys during different historical periods when China was engaged in various internal and civil wars. I would argue that China effectively occupied the Spratlys only after the 1974 and 1988 clashes with Vietnam where it wrested control of the islands from the Vietnamese. In a more recent case, in 1995 China forced the Philippines out of the Mischief Reefs after a brief clash. The legitimacy of China's occupation in the Spratly Islands is questionable and is challengeable since I have carried out extensive patrol in this area in the late 1970s and early 1980s while serving aboard ship. These islands not only provide shelter for the Chinese fishermen but also for other fishermen of the region.[28] The islands have also acted as an area where fishermen recuperate after spending days at sea. Therefore China's argument of effective control may not be acceptable and its claim based on history also appears to be weak due to inconclusive collection of historical arguments in its claim. Besides this, five other nations are claiming the areas, which also weakens China's claim for these five nations do not agree with China's assertion of sovereignty.

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[25] Lee Lai To. *China and the South China Sea Dialogue,* (Westport, Connecticut London: Praeger 1999), p 9

[26] Paracel Islands is another group of islands situated approximately 100 nm North West of the Spratly group which is claimed by China, Taiwan and Vietnam

[27] The Japanese have used the Island of Itu Aba as their staging areas during the WW II and it has assisted the Japanese in their campaign in Southeast Asia

[28] I have carried out extensive patrols in the area since the late 1970s in the Spratlys area. It is common to see Filipinos, Taiwanese, Vietnamese and Malaysian fishermen taking shelter in these islands especially when the hit by rough weather for some of their fishing vessels are only about 30-40 feet

F. TAIWAN'S CLAIM

Taiwan calls itself as Republic of China and has historically claimed to be the legitimate government of all of China. Taiwan's claim to the Spratly Islands is argued in the same manner as China's claim is based on historical discovery and the utilization of the islands.[29] In addition, Taiwan claims that after the Japanese invaded Hainan Island, the Paracel Islands, and the Spratly Islands in 1939, the Japanese placed the Spratly Islands under Taiwan's jurisdiction.[30] In 1948, Taiwanese troops were withdrawn to fight the Communist forces in the mainland and were redeployed to Itu Aba in 1956 and have remained there ever since.

Taiwan has gone further than China on the issue of maritime boundary declaration. In 1979, Taiwan declared a 12 nm of territorial sea and a 200 nm EEZ. In 1990, the Executive Yuan approved Itu Aba to be placed under the temporary jurisdiction of the municipal government of Kaoshiung, Taiwan's southern most city.[31] In October 1992, Taiwan's Ministry of National Defense declared a 4,000 meter prohibited sea zone and a 6,000 meter restricted air zone to enforce effective control over Itu Aba.[32] The Taiwanese parliament passed the bill on the country's territorial waters and adjacent areas in January 1998; it was declared that seagoing vessels would be subjected to observations and inspection.[33] The Taiwanese draft law on maritime issues touches upon the historic waters concept. The draft Territorial Sea and Contiguous Zone Law mentions that the "Taiwanese's historical waters and its area shall be promulgated by the Executive Yuan", but the draft of the "Economic Exclusive Zone and Continental Shelf does not contain specific reference to the Spratlys."[34]

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[29] Ibid Mark J. Valencia el at (1997, p 29)

[30] Ibid Lian A. Mito. (Spring 1998)

[31] Lin Cheng-yi, "Taiwan's South China Sea Policy." *Asian Survey*, Vol. 37. No. 4. April 1997 available at http://www.ic.ucsc.edu/~poli163/Lin.html 6/3/03

[32] Ibid

[33] Ibid

[34] Ibid

Taiwan's claims to the Spratlys mirror those of the PRC, Christopher C. Joyner[35] and Lin Cheng-yi[36] agreed that the Taiwanese government based its claim on longstanding historic ties to the islands although it only has control over Pratas (Tungsha) and Itu Aba (Taiping) Islands. Mark Valencia noted that to strengthen its effective control, Taiwan has planned to build a 6,500-foot runway, an air terminal, a lighthouse and a fishing port on Itu Aba.[37] Lian A. Mito argues that Taiwan's claim is based upon the same historical evidence as China's and thus suffers from the same weaknesses, attributable to unconvincing and intermittent proof.[38] He further states that Taiwan may, however, have a strong claim to Itu Aba Island, which it has continuously occupied since 1956.[39] Xavier Furtado states that "Taiwan has been exercising effective administration and control over some of the islands in the Spratly Islands ever since 1956 and not since 1948."[40]

Most Chinese scholars claimed that Taiwan has met the requirement found in the Isle of Palmas arbitration[41] for it has been effectively exercising sovereignty over Itu Aba Island since 1956. In my opinion, Taiwan historical claim suffers the same weaknesses as China, whereas, it has provided proof of effective occupation over Itu Aba and has maintained military presence on the island since the Japanese evacuated the island after

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35 Ibid Christopher C. Joyner (Spring 1998)

36 Ibid Lin, Cheng-yi. (1997)

37 Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig. *Sharing the Resources of the South China Sea*. (The Hague: University of Hawaii Press 1997), p 29, IBRU Boundary and Security Bulletin, Oct 1993 at 47, *Taiwan Eyes Spratly for Airport, Tourism*, Honolulu Star Bulletin, Jan 24, at A8

38 Ibid Lian A. Mito (Spring 1998)

39 Ibid

40 Ibid Xavier Furtado (1999 p 390)

41 The *Palmas Island* case concerned an inhabited island, but the analysis given by Max Huber, the arbitrator to this dispute between the United States and the Netherlands, reinforces the principle that less is required to acquire ownership of uninhabited places. The United States based its claim on Spain's earlier "discovery" and the island's "contiguity" or proximity to the main Philippine islands (which were then a colony of the United States). The Netherlands (which then controlled Indonesia) invoked its contact with the region and its agreements with native princes. The arbitrator favored the Dutch, based on their peaceful and continuous display of authority over Palmas. Spain's "discovery" did not confer title because it was not accompanied by any subsequent occupation or attempts to exercise sovereignty. Quoted from Jon M. Van Dyke article "Legal status of islands – with reference to article 121(3) Of the UN Convention on the Law of the Sea" available at http://www.hawaii.edu/law/faculty/publications/KoreanPaper-Islands12999.htm (6/13/03)

World War II. [42] Taiwan has not forcefully evicted other nations from any of its claimed island to exercise effective occupation. The legal status of Taiwan places Taiwan in an awkward position; because of this status, it is difficult for Taiwan to be effectively involved in resolving the competing claims with the other nations multilaterally. Furthermore, Taiwan is not a signatory to the 1982 UNCLOS, which questions whether all its legislations pertaining territorial limits, EEZ and restricted air and sea zone are legally binding or are subjected to closer scrutiny. Taiwan, in my opinion, has exercised effective occupation over Itu Aba over the last forty odd years, so it could argue its case if being arbitrated.

G. VIETNAM'S CLAIM

Vietnam claims the entire Spratly archipelago while occupying at least 25 islands, reefs, and cays. Similar to that of China and Taiwan, Vietnam based its claim on historical heritage to the area. Vietnam argues that Vietnamese Emperors had effectively administered the Spratly archipelago since the 1800s. Vietnam has produced historical maps from that period showing the Spratlys to be under control of Vietnam. [43] In addition, its government records describe the islands and its expeditions to retrieve treasures from sunken ships. [44] In 1884, the French established protectorate over Vietnam and began to assert claim over the Paracel and Spratly Islands. From 1933-1939, France had physical control over nine of the Spratly Islands and published a formal notice of annexation in its own official Journal on July 26, 1933. [45]

Vietnam asserted it claims at an international level, including meetings of the World Meteorological Organization, the 1951 Peace Conference in San Francisco, and as

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[42] Hsiao Shi-Ching. "The Nansha (Spratly) Disputes." *Chinese Culture* XXXV:1, 1994 , p 41-85 quoted in Liselotte Odgaard, *Maritime Security between China and Southeast Asia*, (England: Ashgate Publishing Company 2002), p 88

[43] Ibid Xavier Furtado (1999 p 392)

[44] Ibid

[45] Ibid Mark J. Valencia el at (1997 p 30)

part of the Geneva agreements for the return of Vietnam by France.[46] Even after the Chinese invasion of the Paracels in 1974, Vietnam did not relinquish its claims to either island group and chose to maintain 22 features in the Spratlys to support its claims of effective occupation with troops. The main garrison is situated on Sin Cowe Island and is fortified with heavy artillery and anti-aircraft guns. Spratly Island also has a small airstrip.[47] All these fortifications enhance Vietnam claim of effective occupation.

Official statements made in 1956 by North Vietnamese Second Foreign Minister Ung Van Khiew and by its Prime Minister Pham Van Dong in 1959 acknowledged Chinese authority over the Spratly,[48] which weakens Vietnam's argument based on history. In 1967, South Vietnam issued a proclamation affirming that the subsoil and seabed of the continental shelf adjacent to Vietnamese territorial waters, together with all the natural resources contained therein and thereon, came under the exclusive jurisdiction and direct control[49] of the Vietnamese government. In 1970, a by-law regulating the exploration for and exploitation of hydrocarbon resources was enacted and, in 1972, a 50 nm fishing zone was declared.[50] In 1977, after the fall of South Vietnam, a unified Vietnam issued a statement on maritime jurisdiction confirming the 12 nm limits of territorial sea, a 12 nm contiguous zone was established 'to see to its security and interest' and a 200 nm EEZ was also established.[51]

Liselotte Odgaard states that Vietnam bases its claim to territory in the Spratlys on four arguments, discovery, effective occupations, recognition and proximity[52]. No strong evidence exists to support the discovery claim. Whereas as for the effective occupation it is based on the French history of occupation when the French occupied the Spratlys in 1933 when the islands were maintained as part of the French administration of

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[46] Ibid

[47] Ibid p. 31

[48] Ibid

[49] Ibid Liselotte Odgaard (2002 p 95)

[50] Ibid

[51] Ibid

[52] Ibid p 94

the colonial state of Vietnam. The Japanese forced France to give up the islands in 1939 when Japan began their conquest in Southeast Asia. Vietnam was represented at the San Francisco Peace Conference; it used this occasion to claim sovereignty to the Spratlys. The Vietnamese point out that no one protested against its claim to sovereignty; therefore, it assumes a universal recognition of its sovereignty over these islands.[53] In order to substantiate the claim of effective occupation, ten features were incorporated into the administrative system of South Vietnam by assigning them to the Phuoc Tuy province in 1956; however, military presence was not established.[54] Vietnam, nonetheless, may have a legitimate 350 nm continental shelf claim to the western part of the Spratly area, since its continental shelf appears to be a shallow and natural prolongation of the land territory.[55]

Omar Saleem states that Vietnam's claim is based on two theories. First, Vietnam claims that it has exercised historical dominion and control over the Spratly Islands, dating back to 1650 to 1653.[56] Notwithstanding the fact that the government of North Vietnam had concurred with Chinese claims of sovereignty over the Islands in the 1950s, the reunited Vietnam reasserted its claim to the entire archipelago. Vietnam argues that its right to the Spratly Islands vested at the San Francisco Allied-Japanese Peace Conference in 1951 when Japan relinquished all right to the islands and Vietnam asserted its claim.[57]

Second, Vietnam claims a right to the Spratly Islands because the Islands are within its continental shelf.[58] Whereas, Lian A. Mito mentions that Vietnam's claim to the Spratly Islands is weak for four main reasons. First, Vietnam's historical claim, like

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[53] Ibid p 95

[54] Ibid

[55] Ibid p 97

[56] Omar Saleem. "The Spratly Islands Dispute: China Defines the New Millennium." *American University Law Review.* No. 527. 2000

[57] Ibid

[58] Ibid

China's, suffers from evidentiary weaknesses;[59] second, Vietnam did not succeed France's 1933 claim; third, there are significant lapses in Vietnamese control over the Spratlys;[60] and fourth, statements made by North Vietnamese government officials in 1956 and 1959 support China's claim to the Spratlys. Mito further reiterated that despite these weaknesses, however, Vietnam has maintained garrisons on twenty-two Spratly features since 1973. Lee G. Cordner[61] agrees with Mito that Vietnam did not succeed France and that a period lapsed when Vietnam did not have effective control over the islands.

In summary, I would argue that Vietnam's historical claim is not strong and its weaknesses similar to that of China's. The argument that the islands were inherited from the French too can be challenged for during that period China was occupying some of the islands. Furthermore, during its civil war years; evidence of effective occupation is absent and its open support for China's claim further weakens its claim to the area. However, Vietnam's claim that the islands are within its continental shelf may support its claims. In addition Vietnam has effectively occupied the 22 islands since 1973, which cannot be disputed because it has been there since then.

H. THE PHILIPPINES'S CLAIM

The Philippines claims part of the Spratly Islands. Its formal interest in the Spratly Islands can be traced to the time when the Republic was born. The earlier period of history of the Filipino people dated back to the Spanish or American colonial period indicates that there was knowledge of existence of the Spratlys then. Filipino contacts with Vietnam and Cambodia in the 1800s are also known to have occurred against the backdrop of the Spanish and French Colonial conquests, when Filipinos were conscripted

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59 Ibid Lian A. Mito (Spring 1998)

60 Ibid

61 Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea." *25 Ocean Development. & International Law. 61*. 1994. p. 66

into the Spanish navy to Vietnam in order to assist the French in suppressing the natives.[62]

After the defeat of the Japanese in World War II, the newly independent government of the Philippines expressed interest and concern over the status of the islands west of Pahlawan, which had been under the Japanese occupation during the war. In September 1946, the Secretary of Foreign Affairs and Vice President Elipidio Quirino wrote to General Douglas MacArthur demanding the "New Southern Islands" or Shinnan Gunto as they were then known, be given to the Philippines.[63] From 1947 to 1950, a Filipino mariner, Captain Filemon Cloma led a group of fishing vessels venturing further west of Pahlawan and discovered a vast fishing frontier, which Filemon's brother Tomas Cloma later claimed as Freedomland.[64]

In May 1956, Tomas Cloma led an expedition to survey the islands, which they had by then occupying for several months. Later that year Cloma issued a "notice to the whole world" announcing a claim that he and his associates were making as citizens of the Philippines, over "the islands, sand cays, sand bars, coral reefs, and fishing grounds with a total area of approximately 64,976 square nautical miles."[65] Cloma asserted that he had discovered territory that was not "res nullius" or without owner,[66] which Japan had renounced in the San Francisco Peace Conference in 1951. This drew protests from China, Taiwan and Vietnam. However, the Secretary of Foreign Affairs was quoted to have said that he saw no reason why Freedomland should not be a part of the territory of the Philippines "by virtue of proximity or occupation."[67]

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62 Aileen San Pablo-Baviera, "The Kalayaan Islands (Spratly) in the Philippine Foreign Policy." *Panorama.* 2/1999 available at http://www.kas-asia.org/Publication.html#pano12002 6/4/03

63 Ibid

64 Ibid

65 Ibid

66 Ibid

67 Ibid

In the late 1960s, the Philippines began to set up military outposts to provide security to its fishermen who had been harassed by the Taiwanese that resided in Itu Aba. Since then the Philippines has occupied seven islands. In 1971, President Marcos organized a composite contingent of Filipino Army, Navy, constabulary and security personnel to be stationed in the area of the Spratlys.[68] That same year at the 72nd Meeting of the United Nations Seabed Committee, Undersecretary of Foreign Affairs Jose Ingles issued a statement asserting the Philippines government's effective occupation and control of the island group. Later on June 11, 1978, Presidential Decree No. 1596 mandated that the islands, cays, shoals and reefs be integrated into the Philippine administrative structures as the 12th municipality of Pahlawan province and renamed the area "Kalayaan Island Group."[69] Another Presidential Decree 1599 was issued the same day proclaiming a 200 nm EEZ for the Philippines.[70]

Omar Saleem states that the Philippine's claim to the Spratly Islands is based on economic need, proximity, and abandonment of rights by all other nations that led to Philippine discovery of the Islands in 1947.[71] He further elaborates that following the war with Spain in 1898, the United States and Spain signed a treaty that among other things defined the "Philippine Islands" and transferred them to the United States. The treaty, however, neglected to include the Spratly Islands in this land transfer. Lian A. Mito argues that the Philippines claims are based upon the theory that the islands were "terra nullius" (without an owner) when a Filipino Tomas Cloma discovered them in 1947.[72] Mito further clarifies that the Philippines also contends that the Spratly Islands were terra nullius following the 1951 San Francisco Peace Treaty, therefore, invalidating all previous claims of ownership and justifying its occupation. Lastly, the Philippines claim that the Spratly Islands lie within its archipelagic territory and are "vital to the country's

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[68] Ibid

[69] Ibid

[70] Ibid

[71] Ibid Omar Saleem. (2000)

[72] Ibid Lian A. Mito (Spring 1998)

security and economic survival."[73] In 1978, the Philippines formally claimed the Spratly Islands by presidential decree.

Analyzing the facts thus far, the Philippines arguably possesses the weakest claims to the Spratly Islands as agreed to by many scholars. The argument that the islands were unclaimed and unoccupied when Cloma "discovered" them in 1947 is unconvincing and highly unlikely for countries like China, Taiwan and Vietnam had already stationed its troops in the area prior to Cloma's discovery. In addition, Cloma's discovery did not give rise to a claim of ownership on the part of the Philippine government since Cloma was acting as an individual without the sanction of the Philippine government then. Moreover, it is unlikely that Cloma's brief occupation of the Spratly Islands satisfies the Palmas Island standard of a continuous display of authority or an effective occupation. Lastly, the Spratly Islands are not located within the Philippines' archipelagic territory since the Pahlawan Trough separates the islands from the Philippine archipelago. Even though the Philippines suffers these weaknesses, its occupation on the seven features since 1978 may strengthen its claim under the Palmas Island standard.

I. MALAYSIA'S CLAIM

Malaysia's claim dates back to 1979 when that government published an official map encompassing the southern most of the Spratly Islands as part of the country's continental shelf and EEZ.[74] Twelve features in the southern portion of the Spratly Islands, which Malaysia claimed, are located on its continental shelf. Currently Malaysia is occupying four of the islands and has built an air strip and a diving resort in the Swallow Reef which Malaysia renamed as Pulau Layang Laying. In a speech delivered by the Foreign Minister of Malaysia on September 2, 1999 regarding Malaysia's latest claim to the Investigator Reefs, he reiterated that Malaysia's claims are in accordance

[73] Ibid.

[74] The official map called the "Peta Baru" shows the Malaysian EEZ. With this announcement the navy was given the task to patrol the claimed area

with the established laws and regulations of the 1982 UNCLOS and it is used for scientific research purposes.[75]

Mark J, Valencia states that Malaysia asserts two legal bases for its claims: continental shelf extension and discovery/occupation.[76] Malaysia's continental shelf claim arises out of the Geneva Convention of 1958 pertaining to Territorial Waters and Continental Shelf boundaries which Malaysia signed in 1960. He states that Malaysia claims are difficult to justify under a continental shelf theory because neither the 1982 UNCLOS nor Malaysia's own Continental Shelf Act of 1966 indicate that the continental shelf pertains to land or rocks,[77] and Article 76(1) of the 1982 UNCLOS refers to "the seabed and subsoil of the submarine areas that extend…[from a] natural prolongation of its land to the outer edge of the continental shelf margin."[78] As for the claim of occupation, Valencia notes that Malaysia's claim is on uncertain footing because its occupation and exploitation are relatively recent and have been vigorously contested by other nations.

Mito states that Malaysia's claim lacks strength for several reasons. First, Malaysia's interpretation of the 1982 UNCLOS is incorrect. While the 1982 UNCLOS does allow a coastal state to control the resources of its continental shelf, none of the provisions grant sovereign rights to a coastal state over islands located on its continental shelf.[79] Second, Malaysia's 1979 claim of discovery and occupation is fairly recent, as compared to China, Taiwan, and Vietnam's claims, and further more it is challenged by several countries in the region. Lastly, other countries control several of the features claimed by Malaysia. However, he believes that Malaysia's claim to the four features it

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[75] Malaysia's Minister of Foreign Affairs Speech delivered at University Malaya Sabah Campus, September 2, 1999

[76] Ibid Mark J. Valencia el at (1997 p 36)

[77] Ibid p 37

[78] Ibid p 37

[79] Ibid Lian A. Mito (Spring 1998)

has occupied since the 1980s may possess more legal strength under the Palmas standard.[80]

Liselotte Odgaard contends that Malaysia's continental shelf claim may be acceptable under the international law as the claim extends 200 nm from the coast of Sabah and Sarawak whereas she agrees that the argument of effective occupation is uncertain because Malaysia's occupation and exploitation is recent and contested and it only controls some of the features for which it lays claim.[81]

Having discussed the facts in Malaysia's claim, the islands and features that Malaysia claimed falls within the 200 nm of the continental shelf as stipulated in Article 76 of the 1982 UNCLOS, thus making the claim an acceptable argument. The question of effective occupation, even though it is relatively new, it can be argued that it further strengthens when a resort and diving center opened its door to the public in the late 1980s. A marine research center was established at the same time. Malaysia has maintained a continuous patrol using its air and maritime assets in the area to exercise its claims and has continuously maintained its troops in the islands since 1979 to support this argument.

J. BRUNEI'S CLAIM

Brunei currently claims two reefs, the Louisa Reef and Rifleman Bank, both located in the southern portion of the Spratly Islands, based on the belief that these features are located on an extension of its continental shelf.[82] Brunei published a map in 1988 extending its continental shelf to an area of 350 nm.[83] The boundaries which Brunei claim can be traced back to a 1954 decree by Britain declaring the boundaries of

[80] Ibid

[81] Ibid Liselotte Odgaard (2002 p 103)

[82] Ibid Mark J. Valencia el at (1997 p 38)

[83] Ibid

its Borneo possessions to include "the area of the continental shelf … to the territorial waters."[84] Brunei claimed a 200 nm fishing zone in 1982 and a 200 nm EEZ in 1984.[85]

Valencia and others argue that Brunei claims are weak for Louisa Reef has only two rocks that are above water at high tide and these features would certainly be classified as "rocks" under the 1982 UNCLOS; therefore, they would not have the capacity to generate an exclusive economic zone or continental shelf under Article 121(3) of the 1982 UNCLOS.[86] He further reiterated that its claim to an extended continental shelf does not appear to be consistent with the requirements of the Law of the 1982 UNCLOS because the East Pahlawan Trough interrupts the "natural prolongation" of the continental shelf 60 to 100 nm off Brunei. Furthermore, Brunei has not attempted to apprehend or evict foreign fishing boats or vessels from the area it claims.[87]

Mito states that Brunei relies on Articles 76 and 77 of the 1982 UNCLOS [88] and a 1954 British decree establishing Brunei's maritime boundaries and unlike the other countries, Brunei does not currently occupy any of the Spratly features.[89] Liselotte Odgaard reiterated that a 350 nm continental shelf claim is not likely to be sustainable under the international law because of natural prolongation of the continental shelf is broken by the East Pahlawan Trough 60 to 200 miles off the coast.[90]

The facts presented thus far do not favor Brunei in its claim on the two reefs. These reefs can only be visible during low tide and cannot support life on its own. Therefore these reefs do not generate a territorial sea or EEZ as stipulated in the 1982 UNCLOS. The argument on prolongation of continental shelf also suffers setback since

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[84] Ibid

[85] Ibid

[86] Ibid

[87] Ibid

[88] Article 76-Definition of Continental Shelf and Article 77-Rights of Coastal States over the Continental Shelf

[89] Ibid Lian A. Mito (Spring 1998)

[90] Ibid Liselotte Odgaard (2002 p 103)

the fault line is not continuous and it cannot be supported by Articles 76 or 77 of the 1982 UNCLOS. Brunei has not attempted to exert its influence in the area by either stationing its personnel in the reefs or evicting foreign fishermen frequenting the waters of the claimed area.

K. SUMMARY

China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei argue their claims based on historical evidence, discovery, effective occupation and proximity of the islands within the continental shelf complying with the established regulations and laws of the 1982 UNCLOS and international laws. China's, Taiwan's and Vietnam's historical evidence are inconsistent with unexplained gaps of conclusive proof that cannot be substantiated. Furthermore whether historical title today carries sufficient legal leverage to validate acquisition of territory is a question that requires further in depth investigation. Today's modern international law clearly recognizes that mere discovery of some territory is not sufficient to entitle the discoverer valid title of ownership to territory. As for effective occupation argument, all the nations involved in these competing claims, with the exception of Brunei, have exercised some form of effective occupation of the islands/reefs that they have occupied ranging from four decades to eight years. Does this duration qualify nation effective occupation? I am convinced that it needs other reasons and arguments to support and determine the effectiveness on a case by case basis.

Since the implementation of the 1982 UNCLOS, countries utilized various articles stipulated in the 1982 UNCLOS to justify their claims. Examining carefully each article is essential in determining whether the claim is legitimately sound. Article 76 of the Continental Shelf Law for example, has criteria that need to be met before a nation can claim that it has a continental shelf. Whereas, Articles 55-75 of the 200 nm Exclusive Economic Zone Laws allow a nation to generate an EEZ as long as the nation has a coastline. Article 121, "definition of rocks that cannot sustain life and economic activities" is use to counter argue by opposing claimants in some instances. The EEZ

extends the sovereignty of the coastal state regarding the exploitation, conservation and management of hydrocarbon resources, fish resources and mineral resources to 200 nm. The consequences of these claims overlap in the Spratlys thus creating contentions between and among states.

These competing claims are not only based upon different reasons but also upon different objectives and interests of these states. Why would countries stake these claims and be willing to fight each other? I would argue that the main reason is to claim sovereignty and with this, nations can claim an EEZ that is stipulated in the 1982 UNCLOS. With an EEZ, exploitation of the rich resources can be carried out. With the consumption of energy rising in the fast developing countries of Southeast and East Asia and with the available resources on land fast diminishing, countries are venturing further out to the sea to explore the possibilities of finding resources.

Mark Valencia argues that with the 1982 UNCLOS implementation, maritime jurisdiction extension created an unstable geopolitical environment. States pursued their maritime and economic interests without much concern for their neighbors[91]. However, Stein Tonnesson argues that EEZ should not be seen as a right to sovereignty but as a right to exploit resources on and under the sea bed (continental shelf) and in the water (EEZ)[92]. Political scholars like Liselotte Odgaard and Lee Lai To[93] agree with this statement for each of them believe that claimant countries that stake their claims utilizing the 1982 UNCLOS argues that the 1982 UNCLOS gave legitimacy to their claims. However, my reasoning is that these claims can be contested because claimant nations justify and interpreted the established laws on these claims to their advantages. Even though the 1982 UNCLOS stipulates all the conditions and rules to give nations legitimacy to their claims, sovereignty is not absolute when more than one nations

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[91] Mark J. Valencia, "Asia, the Law of the Sea and International Relations", *International Affairs*, April 1997, p 268

[92] Stein Tonnesson, "Vietnam's Objective in the South China Sea: National or Regional Security?", *Contemporary Southeast Asia* Vol. 22 Issue 1, Apr 2000 p 199-220

[93] Ibid Lee Lai To, (1999 p 11)

claiming the same area. In addition until all the nations involved are able to resolve these overlapping claims, each must exercise constraints to avoid the situation escalating into a conflict. The laws further expound that when contentions exists, avenues where these contentions can be arbitrated by an appointed Tribunal or the International Court of Justices are required, provided the contending parties agree to utilize these mechanisms. The difficulty in getting an agreement is obvious and the likelihood of a settlement may not be that easy because it involves six countries of varied political backgrounds and national interests. Therefore, what are the courses of actions available then? When the likelihood of settlement is not forthcoming, there are avenues available where confidence-building measures that can enhance and prevent further clashes from recurring ought to be taken. The signing of the Declaration of Conduct of Parties between ASEAN and China in November 2002 is a positive step taken to prevent escalation in the Spratly region.

L. ECONOMIC POTENTIAL OF SPRATLYS

1. Oil and Natural Gas

Oil and natural gas deposits have been found in most of the littoral states of the South China Sea. Currently China, Vietnam, the Philippines, Malaysia and Brunei have extracted oil and gas in their coastal waters and they believe that the Spratlys region is rich in these natural resources. With Southeast and East Asia's economic growth rates among the highest in the world the increasing demand for energy to sustain this economic growth will be an unending requirement.

There are claims stating that South China Sea oil and gas potential is as big as "the Second Persian Gulf."[94] If this claim is true, nations in contention will not be willing to forgo what they have claimed so far but they may increase their stake whenever an opportunity arises. However, according to Scott Snyder a study conducted in 1995 by

[94] EIA D.O.E Country Analysis Brief, "*South China Sea Region*," September 2003 available at http://www.eia.doe.gov/emeu/cabs/schina.html 10/7/03 (10/7/03)

Russia's Research Institute of Geology of Foreign Countries, which estimated that "the equivalent of 6 billion barrels of oil might be located in the Spratly Islands area, of which 70 percent would be natural gas which [is] far below the amount speculated." [95] Craig Snyder states that in 1987, the South China Sea Institute of Oceanology conducted a geophysical survey in Spratlys and confirmed strong evidence of oil. And in the 1989 follow-up survey through the South China Sea, "the Chinese estimated that the Spratlys held deposits of 25 billion cubic feet of natural gas, 370,000 tons of phosphorous and 105 billion barrels of oil." [96] Todd C. Kelly states that in 1994, Vietnamese estimated that the Spratly region has oil reserve equivalent 225 billion barrels of oil.[97] However in an Energy Information Administration report in March 2002[98], it states that natural gas might be the most abundant hydrocarbon resource in the South China Sea. The U.S. Geological Survey indicates that about 60 to 70 percent of the region hydrocarbon resources are gas.

David Rosenberg states that "over the next 20 years, oil consumption among developing East Asian countries is expected to rise by 4% annually on average, with about half of this increase coming from China. If this growth rate is maintained, oil demand for these nations will reach 25 million barrels per day and this demand will be more than double the current consumption levels by 2020."[99] He further went on to argue that industrial output and energy consumption has grown faster in the countries around the South China Sea than anywhere in around the world because of the region's rapid economic growth and increasing population.

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[95] Scott Snyder, "The South China Sea Dispute Prospects for Preventive Diplomacy", *U.S. Institute of Peace Special Reports*, 1997 available at http://www.usip.org/pubs/specialreports/early/synder/South_China_Sea.html (4/27/03)

[96] Craig Snyder, *"The Implications of Hydrocarbon Development in the South China Sea"*, Center for International and Strategic Studies, Joint Centre for Asia Pacific Studies, available at http://faculty.law.ubc.ca/scs/hdy.htm (4/7/03)

[97] Todd C. Kelly. "Vietnamese Claims to the Truong Sa Archipelago [Ed Spratly Islands]" *A Journal of Southeast Asian Sudies*. Vol.3 Fall 1999. available at http://www.hawaii.edu/cseas/pubs/explore/v3/todd.html (4/7/03)

[98] "South China Sea Report", *Energy Information Administration*, March 2002, available at http://www.eia.doe.gov/emeu/cabs/schina2.html (4/27/03)

[99] David Rosenberg, "The South China Sea", *Asian Studies Virtual Library*, available at http://www.middlebury.edu/SouthChinaSea/why.html (4/18/03)

Lee Lai To revealed that a senior Chinese official predicted that China's oil imports would hit 100 million tons a year by 2010, up from 16 million tons in 1993, unless China made some massive oil finds.[100] The official further admitted that "for a considerable time China's oil import had been unable to provide sufficiently for the nation's economic growth and that the situation could hardly change for the better if no new big oil fields were tapped."[101] Lee Jae-Hyung states that recent estimates of China's oil imports are expected to rise from 1.4 million barrels of oil per day (bbl/d) in 2000 to three million bbl/d by 2010.[102]

To fulfill such ambitious production goals, China has placed considerable importance on utilizing the resources of the South China Sea, especially potential oil and gas reserves, thus linking those resources to national economic development.[103] Oil is a strategic resource of which China has been a net importer since 1993. The increase in China's territorial claims in the South and East China Seas and the importance of the sea lines of communication that connect to the oilfields of the Persian Gulf is vital to China's economic growth. Besides China, other claimant nations also heavily depend on oil and gas as a revenue earner or as economic drivers. Therefore, to capture these resources will enhance a nation is productivity and decrease dependence of import for country like China. Oil revenue for Malaysia, Brunei, Vietnam and the Philippines will improve their economic growth in the long term.

2. Fish Resources

Beside oil and gas, fishing remains an important economic activity for nationals from China, Taiwan, Vietnam and the Philippines as these waters hold abundant supplies

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100 Ibid Lee Lai To, (1999 p 11)

101 Ibid

102 Lee Jae-Hyung. "China's expanding maritime Ambitions in the Western Pacific and Indian Ocean." *Contemporary Southeast Asia*, Vol. 24. Issue. 3, December 2002, p 554

103 Chris Rahman. "Defending Taiwan, and why it Matters?" *Naval War College Review*. 2001., Michael Leifer, "Chinese Economic Reform and Security Policy: The South China Sea Connection," *Survival*, Summer 1995; and Mark J. Valencia, "China and the South China Sea Disputes." *Adelphi Paper* 298, Oxford Univ. Press, London, 1995

of numerous fish species. This is the main source of food security in the region. With the proclamation of the EEZ, fishery disputes often erupted among claimant nations. Daojiong Zha argues that fishing is another major industry for countries like China, Vietnam and the Philippines.[104] Scott Snyder, Brad Glosserman and Ralph A. Cossa[105] state that the sea provided "25 per cent of the protein needs for 500 million people; 80 per cent of Philippine diet alone. Over 5 tons of fish are harvested from the South China Sea each year; this constitutes 10 percent of the global fisheries catch and is also the world's fifth top shrimp producer." whereas, in a report by the Philippines Office of Strategic and Special Studies of Armed Forces of the Philippines posits that there are 314 fish species in the Spratlys region, of which 66 are commercially significant stocks. At least 8 percent of the world's fish catch comes from the region for it straddles the path of yellow fin tuna migration. Tom Noess reported that fisheries in Southeast Asia accounted for some 23 percent of the total catch in Asia and 10 percent if the total world's catch in 1992.[106] Liselotte Odgaard aptly put it that "following increasing demand for fish as a source of animal protein and export income, fishing activities in territorial seas and claimed EEZ will increased."[107]

The areas within the Spratlys regions are known to be rich fishing grounds. Fishing is a major industry for the claimant nations. Besides being a revenue earner, it provides jobs while being a relatively cheap source of protein for its population. Therefore claimant nations scramble to occupy the islands in the area and promulgate an EEZ to exploit and capture this resource.

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[104] Daojiong Zha, "Writing Security in the South China Sea", *Columbia International Affairs Online 3/00* available at http://www.cianet.org/isa/zha01/index.html 4/9/03

[105] Scott Snyder, Brad Glosserman and Ralph A.Cossa, "Confidence Building Measures in the South China Sea, Issues and Insight No.2-01", *Pacific Forum*, August 2001

[106] Tom Noess. "Environmental Cooperation around the South China Sea; The Experience of the South China Sea Workshops and the United Nations Environment Programme's Strategic Action Programme." *The Pacific Review*, Vol.14 No. 4 2001 p 556

[107] Liselotte Odgaard, "Deterrence and Cooperation in the South China Sea", *Contemporary Southeast Asia*, Vol.23, No.2, August 2001, p 297

3. Minerals

Beside oil, gas and fish resources, the Spratly Islands are also rich in guano and phosphate[108] which the Chinese have been harvesting over the years. The German Chambers of Commerce March 2002 report states that the South China Sea is rich in tin, manganese, copper, cobalt and nickel. In the same report it states that the Chinese estimates that there are 370,000 tons of phosphorous in the Spratly regions.[109]

The mineral potential of the Spratlys has not been exploited thus far due to the depth of the water in the region which requires high technology to mine these resources. Its economic potential cannot be ruled out without further exploration. Guano and phosphate have been extracted in the region over the years by the Chinese and will encourage the claimants to protect their claims.

Among the three economic potentials that have been discussed, oil and gas are the most promising potentials that generate higher returns currently. I would argue that the disputed islands in the South China Sea assumed importance only after it was disclosed that potential sites of substantial offshore oil deposits existed. This initiated a scramble to occupy the Spratly region in the 1980s and early 1990s. Even though the quantity being reported varies greatly, the possibility of finding oil and natural gas in the Spratly regions cannot be ruled out because in the adjacent areas, oil and natural gas have been extracted by Malaysia, Vietnam, China, Brunei and the Philippines. Two likely factors that prevent most foreign oil companies from taking the financial risk of carrying out the exploration necessary to determine whether the potential yields in the area are commercially viable are; one, the depth of waters varies greatly and two, the areas are subject to competing claims. Furthermore foreign oil companies are not willing to be caught in the intricate web of contention and to take risk in the extraction of these potentials when security risks

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[108] Ibid Lee Lai To (1999 p 10)

[109] German Chambers of Commerce Report downloaded available at http://www.ahk.org.hk/Archive/02_03_cover.pdf (4/9/03). Craig Snyder in his writing also reported that the Sprtalys region is rich in tin, manganese, copper, cobalt, nickel and other materials. http://faculty.law.ubc.ca/scs/hyd.htm (4/7/03)

are high. Besides oil and gas potential, the seas in the region are rich in fish resources. Therefore can claimant nations provide security to ensure safety of their fishermen and oil exploration companies? The answer to this vital question will be discussed in Chapter III of this thesis.

M. SPRATLY'S STRATEGIC VALUE

The Spratlys region's strategic value is hard to estimate. Many views stating different arguments and some argue that the uncharted waters in the areas are hazards to navigation and do not commensurate the strategic value it command. In rebutting this notion, the Japanese used Itu Aba during World War II, as their staging area for many successful campaigns in Southeast Asia.

1. Sea Lines of Communications (SLOCs)

Ji Gouxing argues that the Spratly Islands straddle the critical SLOC linking Northeast Asia and the Western Pacific to the Indian Ocean and the Middle East. He further states that "About 15 percent of the volume of world trade transits the Southeast Asian (SLOC)."[110] Lee Lai To reiterated that the Spratlys straddle the major sea lanes between Indian Ocean and Pacific Ocean and are adjacent to the Straits of Malacca. Control of the Spratlys would enable a state to monitor the movements of shipping in the area.[111] Constance See, CDI research intern states that the SLOCs are crucial to the economic and security interests of ASEAN and the United States. She further reiterates, besides ASEAN, Japan, Taiwan South Korea and China are all important trading partners of the United States where the shipping routes are often describe as the arteries of the regional economy. International Herald Tribune reported that 41,000 ships transited the South China Sea in 1999. This figure is estimated to rise with the economic situation improving in the region.

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[110] Ji Guoxing, "SLOC Security in the Asia Pacific", *Occasional Paper Series*, Asia-Pacific Center for Security Studies, Honolulu, Hawaii, February 2000, p 3-5

[111] Ibid Lee Lai To (1999 p 10)

The South China Sea SLOCs form the economic lifeline of the nations in the region. Any disruption in the sea traffic flow will evidently disrupt the economies of the nations in the region. With the volume of shipping and trade passing through the SLOCs of the South China Sea, it is vital that the sea lanes remain open. The scramble to control the islands in the Spratlys should, therefore, be regarded as an effort to protect the claimant nation's economic interests.

2. Forward Defense or Forward Base

Liselotte Odgaard argues that nations can utilize the islands as bases in forward defense structure and, at the same time, exert influences on the sea lanes to the west of Spratlys if nations are able to possess the islands that provide the vital links. [112] In another article, she argues that the "South China Sea constitute the first line of defense for the littoral states of Southeast Asia". [113] Whereas Stein Tonnesson argues that the South China Sea is a semi-enclosed and has a double role. [114] First, the sea forms a "sea-bridge" between surrounding states. Second, it is an international thoroughfare with crucial shipping routes from the Indian Ocean to the Pacific. Omar Saleem notes that Japan used the Spratlys as a military outpost for both invasions and blockade during World War II. [115] B. Rahman reiterated that in the Chinese perception, control over the South China Sea would constitute effective forward defense against intrusion that had historically come from the Southeast. [116]

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[112] Liselotte Odgaard, "*The Spratly Dispute and southeast Asian Security: Towards a Pluralist Regional Order?*", Border Under Stress M.A. Pratt and J.A. Brown (eds) Kluwar Law International, 2000, p 423

[113] Liselotte Odgaard, "Deterrence and Cooperation in the South China Sea*", Contemporary Southeast Asia* Vol.23, No.2 August 2001, 292-306

[114] Ibid Stein Tonnesson, (Apr 2000 p 199-220)

[115] Ibid Omar Saleem (2000)

[116] B. Rahman. "Chinese Territorial Assertions: The Case of the Mischief Reef." *SAPRA India.* Institute for Topical Studies 14 January 1999. available at http://www.subcontinent.com/sapra/world/w_1999_01_21.html. (4/27/03)

3. Surveillance Area

In 1982, China's third Navy Commander, Admiral Liu Huaqing put forward a, "offshore defense" strategy.[117] This strategy was finally endorsed by China's historic resolution called "Strategic Changes in the Guiding Thoughts on National Defense," which was adopted by the enlarged meeting of the Central Military Commission in June 1985.[118] The South China Sea region is identified as one of the offshore defense areas and the control of these areas where surveillance and identification of all incoming air and surface threats can be conducted. The collision between a United States Navy surveillance plane and a Chinese fighter jet in April 01, 2001 demonstrates that the South China Sea area is used by nations to conduct surveillance and gathering information. According to Mark J. Valencia this incident is only a tip of an iceberg of mounting tension in the South China Sea.[119]

4. Additional Area to Support Population Growth

Beside the oil factor and China's energy needs to fuel its fast developing economy, some Chinese analysts feel that it is necessary to regain some of the maritime area in the South China Sea, because of China's population increase, limited resources, and diminishing *lebensraum* in the future. Maritime territories were considered to be a valuable asset for China's sustained economic development and population growth.[120]

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[117] Swaran Singh. "Continuity and Change in China's Maritime Strategy." *Strategic Analysis*, Vol. XXIII No. 9. December 1999. available at http://www.ciaonet.org/olj/sa/sa_99sis01.html (5/2/03)

[118] Ibid

[119] Mark J.Valencia. "Tension in the South China Sea." *Far Eastern Economic Review*, April 19, 2001 available at http://www.feer.com./articles/2001/0104_19/p031fcol.html (6/2/03)

[120] Ibid Lee Lai To (1999 p 12), John W. Garver, "China's Push through the South China Sea: The Interaction of Bureaucratic and National Interests," *The China Quarterly*, December 1992, pp 1018-1020

5. Meteorological and Marine Scientific Research Stations

The openness of the area is an ideal area to carry out meteorological and marine research which claimant nations like China, Vietnam and Malaysia argue their claims. China further strengthened its stronghold in the Spratlys when a UNESCO conference in March 1987 requested Beijing to establish two meteorological stations in the Spratlys with a comprehensive global oceanic survey.[121] Malaysia in May 1999 claimed two reefs and established a marine scientific research center to carry out scientific research in marine science in these two outcrops.[122]

Reviewing the facts presented, the strategic importance of the Spratly regions is difficult to ignore. The critical sea lanes linking Northeast Asia and the western Pacific to the Indian Ocean and the Middle East transverse the Spratlys regions. The SLOC is the main artery for the countries in the region and almost 80 percent of their maritime trade passes through the area. Of importance is the SLOC remaining open and not being subjected to any disruption. If Spratly claimants threaten to inhibit freedom of navigation along adjacent international SLOCs, such actions will inevitably draw outside power like the United States into the conflict. All claimants, including China, have taken great pains in assuring the world that their claims and actions in the Spratlys will remain consistent with international freedom of navigation protocols as stipulated in the 1982 UNCLOS.

Beside that the military value of these islands are equally difficult to quantify and estimate. The potential of China and other claimants using the islands as a staging area for its naval activities and intelligence gathering cannot be ruled out. Many nations used the strategy of forward defense in shaping their defense strategy. The proximity of the Spratlys to the South China Sea SLOC adds an important strategic element to the dispute. Therefore I can safely conclude that the Spratly region does have strategic values and can serve as an igniter of conflict.

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[121] Ibid Lee Lai To. (1999, p 14), *Wen Wei Po* (Hong Kong), April 10, 1988.

[122] Malaysia Foreign Minister Speech delivered September 2, 1999 at University Malaya Campus in Sabah

N. CONCLUSION

Competing claims Spratly Islands started in the 1970s when nations justified their claims utilizing historical evidences, discovery, effective occupations and established laws and regulations stipulated in the 1982 UNCLOS and international laws. Clashes broke out between Vietnam and China and the Philippines and China. Exchanges of harsh diplomatic notes between Malaysia and the Philippines and between China and Malaysia have also occurred as a result of these disputes. What are the main reasons for all these claims? Is it because of its economic potential, oil, gas or strategic value, or the control of the SLOC? These are the fundamental questions that need to be asked and answered.

Examining the legal aspects of the claims, no claimant nations have presented sufficiently strong or unchallengeable evidence in arguing their claims. Each has their own flaws and most of all each and every nation opposes each other's claim thus weakens the claim and making the situation even more complex and difficult. Taiwan, Vietnam, the Philippines and Malaysia may possess some strength in their argument pertaining to effective occupation. In my opinion, the underlying reason why nations claim these islands is because of the economic value that comes with the ownership of these islands. The 1982 UNCLOS allows nations to claim an exclusive economic zone of 200 nm where a nation has the rights to exploit the resource. Despite contradicting assessments and findings of untapped resources the region harbor, the potentials the regions possess cannot be ruled out.

The adjacent exploration activities by China, Vietnam, the Philippines, Brunei and Malaysia are a clear indication that these potentials could be present for it may share the same continental shelf trough. With the demand of energy needs growing, countries continue to explore and drill for these resources further out to the sea to meet these demanding needs to fuel it fast growing economies. Oil and gas exploration, especially when major finds or progresses to active exploitation, is the most likely catalyst for conflict today. It is important to note that even if no major oil deposits are confirmed, the

mere act of exploration could trigger conflict since such activity could be viewed as a direct challenge to another claimant's sovereignty.

More than half of the world's annual maritime trade that passes through the Straits of Malacca and continues on through the SLOCs of the South China Sea. This artery joining the Indian Ocean and Pacific Ocean is vital to the economic well being of the Southeast and East Asian nations. Merely preventing its usage may trigger conflict among these nations. Therefore keeping the SLOC open is important.

The claimants view the Spratly regions as a strategic location where their forward defense elements can be placed, for example for the gathering of intelligence activities and for forward bases of their naval units and aircraft to replenish in time of conflict. Besides that, early warning and identification of incoming threats can be further enhanced if sophisticated equipment is installed in these islands. The presence of military personnel in the claimed areas indicates that some form of surveillance or monitoring is being carried out in the region. The chances of giving up these claims are slim given each nation has constructed permanent infrastructures, has placed medium range armament and has stationed armed troops to protect and deter other claimants from claiming it.

The complexity of the claims, couple with the economic potentials and strategic potentials these islands possess, it is difficult to find a compromise. The recently concluded declaration of Conduct of Parties in Phnom Penn November 2002 is seen as a great step when China formally acknowledged to a multilateral approach in resolving this competing claims. Chapter IV will explore the declaration of Conduct of Parties and ASEAN's confidence building mechanisms and with the aim to come up with some viable solutions to the existing problem.

III. MILITARY CAPABILITIES AND POLITICAL WILL OF CLAIMANTS

A. INTRODUCTION

Chapter II outlined the historical background of the Spratly's claims of each of the countries involved. At this point, predicting the next course of actions that each claimant will take is an uncertainty. However, it is safe to predict that none of the claimants will forego what they have claimed thus far. Malaysia's latest claim to the Investigator Shoal and the Erica Reef in June 1999 and Vietnam's expansion and construction of structures on the Tennent Reef, the South Cornwallis Reef and the Alison Reef in October 1999, indicates only that the claimants will apply a strategy of "talk and take."[123] When opportunities arise, claimants will continue to stake their claims and expand their structures while, at the same time, negotiating a solution. The harassing of fishermen among claimant nations against one another continues despite the signing of the declaration of conduct of parties in November 2002. Claimants also continue to prospect for oil and gas in waters adjacent to the disputed areas. In July 2003, Malaysia announced its third discovery of oil off the Sabah coast, located in the vicinity of the disputed areas. [124] What does this scenario represent? What actions should claimant nations take to keep the region calm and prevent the other from taking provocating actions?

This chapter addresses why claimant nations are not able to collaborate and compromise in the Spratlys claims. It will investigate the extend to which the claimants can sustain their claims with the present military capabilities. The trends claimants tend to take will be examined to determine whether the leadership has the political will to

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[123] M. Taylor Fravel, *China in the South China Sea: Facts in Search of a Theory*, paper presented at the Annual Conference of the International Studies Association Chicago, Illinois, February 20-24, 2001.The "talk and take" strategy is a strategy where the parties concerned are negotiating to settle a dispute, in this case the Spratlys disputes. At the time of negotiation one party did not observe the agreed principle and acted contrary to what was agreed upon earlier, such as building structures in the disputed area during the process of negotiation by Malaysia

[124] "Murphy makes third oil discovery off Sabah" *Malaysian Star Newspaper*, September 12, 2003. This paper reports that a US-based Murphy Oil Corp discovered oil offshore Sabah field in 4,380 feet of water

sustain what the nations have claimed so far. The chapter concludes that even though nations may not have the necessary military assets and capabilities to maintain continuous surveillance or presence, the majority of the claimants are not willing to forego what they have claimed. Therefore they may use military force to defend their interests if and when the need arises.

B. DIFFICULTY IN COMPROMISING

The background of each country's claims in Chapter II explains each nation uses various interpretations and justifications in arguing its claims. Chapter II has also shown that each claim has weaknesses and strengths. Nevertheless, the claimants have not been willing to compromise despite various efforts to resolve the issue bilaterally and multilaterally over the past decade. China and the Philippines or Vietnam and the Philippines have signed a bilateral code of conduct in August 1995 and November 1995 respectively. This has not stopped China from expanding the structures built on the disputed Mischief Reef in the Spratlys, the Philippines from firing at or arresting Chinese fishing boats operating close to the disputed Scarborough Shoal, and Vietnam from firing shots at the Philippines Air Force reconnaissance aircraft that flew over the disputed Tennent Reef a few months after signing the code of conduct. [125] Why these incidents happened could be deduced from four assumptions. First, each nation has its own interests and if and when the interests are not met, no agreement is conclusive. Many scholars argue that the economic and strategic value is the main interest of the claimant nations while others argue that the issue of sovereignty is the main interest. According to Shee Poon Kim, China's occupation of the Mischief Reef was "not merely a dispute over sovereignty with the Philippines, but rather a manifestation of China's larger concern for its political and strategic interests."[126] He further states that, "China's growing assertiveness in the South China Sea is merely a return to a familiar area which has been perceived as its natural sphere of interest and influence." Depending which nation one

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[125] Yann-huei Song, "South China Sea Code of Conduct and Taiwan," *PacNet Newsletter #40* October 06, 2000, available at http://www.csis.org/pacfor/pac0040.html (9/29/ 03)

[126] Shee Poon Kim, "The South China Sea in China's Strategic Thinking," *Contemporary Southeast Asia*, Volume 19, Number 4, March 1998, p 371

examines, all these considerations are important and all the different nations have their own interpretations and priorities. As long as the claimant interests are not met, finding a compromise is difficult and is not forthcoming.

Second, among the six claimant states three different political systems of governance exist. China and Vietnam are communist states. Taiwan, Malaysia and the Philippines are democratic states and Brunei is a monarchy. China, the Philippines and Vietnam have used force in asserting their claims and the other three claimants are using diplomatic means to try to defuse tensions. Why do only China, Vietnam and the Philippines use force and why not the others? According to Liselotte Odgaard, China will continue "its tradition of using force, when its territorial rights [are] encroached upon."[127] And Andrew Scobell states that "China is willing to pursue its claims militarily."[128] He goes on to argue that China and Vietnam were "the main belligerents in the 1970s and 1980s." China has ongoing border disputes with Japan, India, Russia, Taiwan and Vietnam. It shelled the Taiwanese island of Quemoy in 1954, 1955 and 1958. It went to war with India in 1962, with Russia in 1969 and with Vietnam in 1974 and again in 1979. Both China and Vietnam had bitter experiences in the past and they do not hesitate to militarily settle disputes. Therefore, using the military now is not something uncommon.

The Philippines, being relatively weak militarily, needs to instigate a scene that draws the media attention in order to seek out support internally and externally, especially from its ASEAN neighbors and the United States. According to Daojiong Zha and Mark J. Valencia, "the Philippines tried to win sympathy from the regional powers for its case."[129] They further state that "the Philippines tried to internationalize the dispute through the media…and [raise] international awareness of China's behavior." Lee

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[127] Ibid Liselotte Odgaard (2002 p119)

[128] Andrew Scobell, "Slow Intensity Conflict in the South China Sea," Essay Presented at the 2nd Conference of FPRI's Asia Program on "Flashpoints in East Asia" held May 12, 2000

[129] Daojiong Zha and Mark J. Valencia, "Mischief Reef: Geopolitics and Implications," *Journal of Contemporary Asia*, Vol. 31 No.1, 2001 p 90

Lai To states that "not only does Manila want to internationalize the issue, it would also like to bring the United States into the Spratly dispute."[130]

According to Liselotte Odgaard, Malaysia and Brunei "practice the use of non-use of force developed in Southeast Asia during the Cold War."[131] I would argue that Malaysia and Brunei would like to resolve any dispute the "ASEAN way," that is through dialogue and consultation. Taiwan, on the other hand, would rather devote its effort to develop its economy and engage diplomatically to resolve the dispute. This will also help Taipei to project itself economically and gain acceptance internationally, which it badly requires right now.

Third, the leadership styles of these nations vary greatly. According to Sheldon W. Simon, the PRC leadership sees "China as a rising power and a natural leader in Asia and China is willing to pursue through force any of its territorial ambitions in the South China Sea."[132] According to some Chinese scholars, the current leadership will continue to assert its claims on the Spratlys because Beijing considers the South China Sea as part of China's territory.[133] On the contrary Cheng Li argues that "greater changes seems inevitable … more diversified, more committed, and less dogmatic generations of leaders aggressively rise to power in China."[134] A belief is that both Beijing and Hanoi leaders would defend their claims and would not hesitate to use military force to assert their interests; whereas, the other nation leaders are believed to only use the military as the last option after diplomatic efforts failed. This is a common practice of democratic states seeking consensus first. Besides that, not all the nations claim the same area. China,

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[130] Lee Lai To, "China, the USA and the South China Conflicts," *Security Dialogue.* Vol. 34 (1), March 2003, p 31.

[131] Ibid Liselotte Odgaard (2002 p 119).

[132] Sheldon W. Simon, "Southeast Asia," *Strategic Asia 2001-02*, The National Bureau of Asian Research Publication, 2000, p272 available at http://strategicasia.nbr.org/report/pdf/ShowReportPDF.aspx?ID=7&f=1 (9/29/03)

[133] This was confirm during the discussion with some Chinese scholars from the Shanghai Institute for International Studies who visited the Naval Postgraduate School on Sept 4, 2003

[134] Cheng Li, "China's Road Ahead: Will the new Generation of Leaders make a Difference?" *The Brown Journal of World Affairs*, Spring 2002 Vol. IX, Issue 1

Taiwan and Vietnam claim the entire of the Spratlys and Malaysia, the Philippines and Brunei only claim part of it.

Finally, politically China does not recognize Taiwan as a sovereign state and it claims Taiwan as one of its provinces, which Taiwan refuses to acknowledge. Taiwan lost its position in the UN and its legitimacy internationally when China replaced it in 1971. Since then it has repeatedly been trying into gain entrance to the UN. Its most recent bid in September 2003[135] was rejected. The "one-China" policy that all other claimant nations adopted creates problems because Taiwan cannot officially participate diplomatically in forums as a sovereign state relating to this claim. In March 2000, China's Vice-Premier Qian Qichen, in charge of Beijing's Taiwan policy, stated in his talk at a conference of directors of the Office of Taiwan Affairs that "the Chinese government will never compromise on the "one-China" principle."[136] Stein Tonnesson said that "no states [will] recognize both regimes simultaneously."[137] This has compounded the complexity of the dispute. Unless all the competing claimants are able to participate, the dispute is not likely to be resolved and remains a potential flash point for conflict in the region. Despite many attempts by various countries and organizations to broker a solution to the conflict, no positive results have occurred. This makes collaboration and consensus building to resolve the disputes among the claimants difficult. Can the nations sustain and secure their claims and is their political will strong enough? The answer to these two questions will be investigated later in this chapter.

In sum, the interests of claimant states, their differences in leadership and their political systems of governance, while Beijing's "one-China" policy has increased the complexity of the competing claims in the Spratlys. This diversity poses the greatest challenge in finding a compromise that meets each and all claimants' interests, needs and

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135 "Taiwan U.N. bid fails, again" *CNN World News*, September 18, 2003 available at http://cnn.worldnes.printthis.clickablity.com/pt/cpt?action=cpt&expire=09%2F2 (9/18/ 03)

136 Muthiah Alagappa Ed, *Taiwan's Presidential Politics Democratization and Cross-Strait Relations in the Twenty-first Century*, (Armonk, New York, London: M.E. Sharpe 2001), p 198

137 Stein Tonnesson, "*Two Scenarios of Conflict Management,"* paper presented at Workshop on South China Sea conflict in Oslo, 24-26 April,1999

aspirations. The legal status of Taiwan has to be addressed because Taipei is one of the claimants. Unless Taipei and Beijing are willing to accept some form of compromise and collaborate with each other, the dispute in the Spratlys will remain unsolved for many years to come.

C. MILITARY CAPABILITIES

The distances of each claimant nation from the Spratlys figures into assessing whether they have adequate resources to provide security to the area and maintain their claims. Besides distance, the capabilities of providing logistic support, protection and early warning will play an important role. China and Taiwan are situated approximately 1000 nm and 1200 nm respectively and are the furthest claimants in these disputes. Vietnam is approximately 250 nm away. Malaysia and Brunei are 130 nm from the area and the Philippines is about 100nm to its nearest coast.

Eric Hyer argues that "China's naval modernization and expansion [are] motivated by interests to control the South China Sea"[138] and he concludes that "Beijing is adopting a more assertive approach to the South China Sea disputes." Ji Gouxing states that "China's naval buildup is for offshore defense of China's maritime rights and interests in its maritime jurisdictional zones, which includes the Spratlys."[139] Additionally according to Kristen Nordhaug, Taiwan does not have the capabilities to patrol shipping routes in the South China Sea.

The Spratlys are also outside the reach of its air force.[140] Allen Shephard states that development in regional military capabilities in Southeast Asia is partly due to an

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138 Eric Hyer, "The South China Disputes: Implications of China's Earlier Territorial Settlements", *Pacific Affairs*, Vol.68 (Spring 1995), 34-54

139 Ji Guoxing, "SLOC Security in the Asia Pacific", *Asia-Pacific Center for Security Studies*, *Occasional Paper Series*, Honolulu, Hawaii, February 2000, p 3-5

140 Kristen Nordhaug. "Explaining Taiwan's Policies in the South China Sea." *The Pacific Review.* Vol.14. No. 4. 2001. p 499

increase of "the ability to defend their maritime interests."[141] He further states that China, Taiwan, Malaysia, Brunei and the Philippines are all upgrading their naval assets to strengthen their capabilities in the Spratlys regions. According to Sheldon W. Simon, the Philippines lacks the capability to project power in the South China Sea to defend its claims of the Spratly Islands and it has less than five airworthy F-5s and a navy of World War II vintage ships. Malaysia's purchase of FA-18s and Russian MIG-29s[142] along with its replacement of patrol crafts to 27 offshore patrol vessels will enhance its capabilities and provide the security needed to maintain its claims in the Spratlys. [143] In a report published in the *Oil and Gas Journal* on October 25, 1999, China's military upgrading, particularly its navy and air force, will have an impact in its claims in the Spratlys. *Jane's Intelligence Digest* dated November 24, 2000 reported that Vietnam is upgrading its 150 MIG 21 fighters and purchased another 12 modern SU-27 fighters for its air force. It further reported that Russian built Tarantul missile corvettes equipped with Zvezda SS-N-25 surface-to-surface missiles and 2 Sang O Boats purchased from North Korea[144] were added to its naval inventory. This will enhance Vietnam's capability further.

In sum, comparing the statistics published in *Jane's Fighting Ships 2003* (Figure 3) and *Jane's Fighting Aircraft 2003* (Figure 4), the order of battle for the naval and air units of claimant states to defend their claims effectively is limited to China. China's naval and air force assets and capabilities far outnumber those of the other claimants. With a vast inventory of available assets, China is capable of enforcing its claims even though these assets are old. Its current upgrading will further enhance its capability and dictate the security environment in the disputed areas of Spratlys. Regardless those countries like Taiwan, Vietnam, the Philippines, and Malaysia do not have adequate assets, they will continue their naval patrols and fly their maritime patrol/reconnaissance

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[141] Allen Shephard. "Maritime Tension in the South China Sea and the Neighborhood: Some Solutions." *Studies in Conflict and Terrorism*, Vol.17, 1993, p. 186

[142] Marvin C.Ott. "Southeast Asian Security: A Regional Perspective." *Symposium*. March 7-8 2000 available at http://www.ndu.edu./inss/press/ASIAN.html (6/8/03)

[143] Ibid Sheldon W. Simon (2000 p. 278)

[144] Vietnam and Regional Security, *Jane's Intelligence Digest*, dated 24 November 2000, available at http://www.janes.com/security/international_security/news/jid/jid001124_1_n.shtml (4/28/03)

Ship Type /Strength	China	Vietnam	Taiwan	Malaysia	Philippines	Brunei
Strength	220,000	36,000	46,500	15,400	20,900	747
Ballistic Missile Submarine	2					
Nuclear Submarine	5					
Attack Submarine	63	2	4	2*		
Destroyer	18		11			
Frigate	32	6	21	3	1	
Corvette				6	13	3
Fast Attack Craft Missile	87	8	50	8		3
Fast Attack Craft Gun				6		

* Not yet in service

Figure 3: Summary of Naval Capabilities of Claimant Nations
Source: Compiled from data obtained Jane's Fighting Ship 2003 available at http://www2.janes.com/ (6/14/03)

aircraft in the disputed area, demonstrating their resilience and consistency in their effort to protect their claimed islands and reefs. [145] Malaysia's recent commissioning of its first

[145] There have been reports of the Philippines naval ships arresting Chinese fishing vessels, and this have been an ongoing affair. Chinese navy ships too have been reported harassing fishing vessels in the region. Whereas Malaysian navy ships have been actively patrolling the areas and numerous arrest were made over the years. Since 1999, there has not been any report of close encounters between naval units in the area with the exception of maritime patrol aircraft reported being shot at near the Vietnamese claimed islands.

patrol vessel on September 25, 2003, which will be operational next year, will enhance Malaysia's naval capability further.[146]

Aircraft Type /Strength	China	Vietnam	Taiwan	Malaysia	Philippines	Brunei
Strength	420,000	30,000	45,000	8,000	17,000	1,100
Fighter	Su-27, J-5, J-6, J-7, J-8, Q-5, J-10	Su-27, MiG-23, MiG-21	IDF (Ching-kuo), Mirage 2000-5, F-16A/B, F-5	MiG-29N/U F-5E F-18D Hawk Mk 208	F-5A/B	
Bomber	H-5, H-6					
AEW	A-501					
RECCE	HZ-5, JZ-6					
ELINT	Tu-154					
Transport	An-26, An-30, Y-11, Il-14, Il-18, Il-78, Y-8, Y-7	An-26, Mi-6	C-130H	C-130H/H-30 Caribou CN-235M-220	C-130B/H, L-100-20, UH-1D/H, 205A-1	
Close Air Support		MiG-21, Su-22	IDF, F-16A/B, F-5	Hawk 200	OV-10A	
Attack Helicopter		Mi-24				

Figure 4: Summary of Air Capabilities of Claimant Nations
Source: Compiled from data obtained Jane's Fighting Air Craft 2003 downloaded from http://www2.janes.com/ (6/14/03)

Brunei is the only claimant that has not built any structure in its claimed reef, and it has the least assets among all the claimants. Despite their limited resources, the claimant countries will ensure that their continued presences are felt and that their troops

146 "Navy to Take Delivery of Five More Patrol Vessels," *Bernama*, September 25, 2003 available at http://www.bernama.com/bernama/V3/news.php?id=18980 (10/3/03)

in the claimed islands and reefs are fully re-supplied when required. The chances of these forces encountering each other at sea or in the air are highly probable. Thus the potential for misjudgment is always present unless a provision is made to prevent it.

D. POLITICAL WILL OF CLAIMANTS

The political will of claimants is important in determining whether these states are able to sustain their claims, and what actions they will take if their claims are threatened. Regarding political will, Lee Lai To states that China is following a policy of "cautious opportunism" and taking [a] gradualist approach, and China has been successful in "consolidating its control and establishing a foothold in the Spratlys."[147] He further states, "nationalist fervor based on history and domestic political priorities" will continue to enhance the political will to claim the area. According to Todd C. Kelly, Vietnam will continue to strengthen its military presence; it is not willing to simply surrender what is considered historic territory. [148] Yann-huei Song states that the Philippine government's recent action of encouraging civilians to reside in the disputed island of Pag-Asa (Hope) and its (likely deployment of) paramilitary troops to the disputed areas reinforces its political will to maintain its claims. [149] Malaysia has been maintaining an effective occupation in its claimed islands and reefs since Malaysia first claimed the area in the early 1980s. Scott Snyder argues, "it is possible to find a political 'win-win' settlement for military conflict would threaten the interests of all parties in the dispute, since the political costs of military escalation would be higher than any single party is currently willing to bear." [150] A March 17, 2003 article of *Strategic Forum* states that the recent leadership changes in China will not affect Beijing's political will of China in handling the competing claim issue of the Spratly Islands.

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[147] Ibid Lee Lai To (2003, p 36)

[148] Todd C. Kelly, "Vietnamese Claims to the Truong Sa Archipelago [Ed. Spratly Islands]", *Journal for Southeast Asian Studies* Vol. 3, Fall 1999, p 13 available at http://www.hawaii.edu/cseas/pubs/explore/v3/todd.html (4/7/03)

[149] Yann-huei Song, "The Signing of the Declaration on Conduct of Parties in the South China Sea and Its Potential Impacts on Taiwan's Rights and Interests", *Peace Forum Essay*, available at http://www.dsis.org.tw/peaceforum/papers/2002-11/4PS0211001e.pdf (4/9/03)

[150] Ibid Scott Snyder (USIP Special Report 1997)

In summary, the political will demonstrated so far by all claimants has not changed drastically even though China's and Taiwan's leadership has changed recently. Therefore all claimant states will continue to seek the current status quo and will continue to occupy the reefs/islands if given the opportunity, as Malaysia did in June 1999. However, the claimants will not act irrationally to spark any direct confrontation with the other claimants and do not want to be viewed as "the aggressor." All claimants with the exception of Taiwan for the first time collaborated, compromised and demonstrated their willingness to cooperate in order to find solutions to the conflict by signing the Declaration of Conduct Parties in the South China Sea on November 4, 2002 in Phnom Penh. Taiwan's leadership has shown keen interest in participating in forums and other confidence building measures, but it has been sidelined by China. China has clearly indicated that if Taiwan is invited to any of these forums, it will not participate and has reiterated many times that Taiwan should resolve its competing claim bilaterally with China and that China will represent the both of them in all the related negotiations.

E. CONCLUSION

Competing claims in the Spratly Islands started in the 1970s, with each nation justifying its claims utilizing historical evidences, discovery, effective occupation and established laws and regulations stipulated in the 1982 UNCLOS and international laws. Clashes between Vietnam and China and between the Philippines and China, near clashes between Vietnam and the Philippines, and harsh exchanges of diplomatic notes between Malaysia and the Philippines and between China and Malaysia have occurred over the past two decades as a result of this dispute.

Fundamental questions that address these incidents need to be asked; nonetheless, solutions to these questions may not be forthcoming due to the complexity of the disputes. This chapter has examined why the claimants are not able to compromise and collaborate. The complexity of the claims are further compounded by China not recognizing Taiwan as a sovereign state and not allowing Taiwan to take part in any organized official forums to resolve this conflict. This Chapter also examined all the

claimants' military capabilities and the political will of the competing nations pertaining to the Spratlys claims.

The interests of each claimant are different and each has its own priorities in setting their own agendas in this competing claims. As long as their interests are not served, it is difficult to find a compromise in resolving the dispute. If all the claimants claimed all of the Spratlys, it might be possibly easier to propose a solution to the conflict. However, only three of the six do so. Unless some unforeseen circumstance occurs, I believe that this dispute will remain status quo if the claimants agree not to take further actions to add features or structures to the existing claimed areas or to claim any new reefs. All claimants must not adopt "talk and take" strategies and adhere to the declaration that has been agreed upon in Phnom Penn in November 2002.

What are the chances of Taiwan backing down and agreeing to China's "one-China" policy or willing to compromise and allowing China to represent Taiwan in handling these competing claims with the other claimants? Since becoming president, Chen Shui-bian has steered a course of ambiguity to avoid military confrontation with China while, at the same time, not abandoning Taiwan's independence as an option. Chen Shui-bian has difficulty compromising and taking a back seat. Moreover, if he were to do so, it may affect his reelection in 2004. People believe that eventually Taiwan will be able to accept the "one-China" policy. However, Taiwan's legal status has to be resolved with China so that a multilateral arrangement or agreement can be brokered among all the six claimants. Without Taiwan's active participation, any solution to this dispute will be incomplete. Additionally, it is unlikely in the near future, ASEAN states will negotiate with Taiwan in order not to offend China. In these circumstances, not much can be done by Taiwan to press ASEAN to change course. What is the next best option?

Militarily China, with its vast numbers of arsenal in its naval and air inventory can provide security and assert its presence in the disputed areas. Even though the other claimants do not have adequate assets to assert a continuous presence in the disputed

areas, they will continue to station troops in the claimed areas to ensure effective occupation of what they have claimed. They will also continue to patrol their claimed areas with naval ships and maritime patrol/reconnaissance aircraft to provide assurance to their troops in the claimed areas while ensuring continuous logistic support to them as well. Provided restraints or contingencies have been agreed upon among the claimant nations, the chances of these military units initiating a flare-up in the disputed areas and destabilizing the security environment in the South China Sea are low.

The likelihood that Vietnam, China and the Philippines may resort to force again should not be ruled out. Clashes among the other ASEAN claimants are not likely because a mechanism is available in ASEAN to resolve issues among them. Taiwan will continue to maintain Itu Aba Island, which its troops occupy despite not being able to participate diplomatically in forums among the claimants. The potential for skirmishes over this dispute is heightened when the nations' interests are challenged and at stake.

The recently concluded Declaration of Conduct of Parties in the South China Sea, which provides avenues for consultation and dialogue, will be examined in the next chapter to determine whether positive outcomes are viable. As long as claimant nations are willing to agree to disagree, the chance of conflict is reduced. Regional peace and security will encourage a revival of the region's lack lustre economy.

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IV. CONDUCT OF PARTIES IN THE SOUTH CHINA SEA

A. INTRODUCTION

The Declaration of Conduct of Parties in the South China Sea is a product of years of negotiations among the parties involved in the competing claims in the South China Sea. For this purpose ASEAN concluded an agreement with China on a nonbinding declaration that is intended to prevent military confrontations over the disputed areas of Spratly Islands. The initial idea was to formulate a code of conduct. Because of an inability to arrive at a consensus on various issues, a lesser declaration was signed instead with the aim of concluding a code of conduct in the future.

The idea of a code of conduct was mooted in the early 1990s as a result of a series of incidences between the claimants and of China enacting its Law on the Territorial Sea and Contiguous Zone on February 25, 1992, which includes the Spratlys and other islands as part of the Chinese territory.[151] The first military confrontation over these competing claims occurred between Vietnam and China in 1974 over the Paracels Islands, and again in March 1988, over the Spratly Islands. Subsequently there were clashes between the Philippines and China in 1995 over the Mischief Reef. In addition, several near clashes occurred, between Malaysia and the Philippines, between the Philippines and Vietnam, and between the Philippines and China in the 1995. The latest reported incident occurred in mid-2002, when Vietnamese troops fired at a Philippines air force reconnaissance aircraft when it flew over the disputed islands.

All the signatories to the declaration agreed to exercise self-restraint in conducting activities that could trigger off skirmishes, such as building structures, inhabiting in the disputed islands, and conducting seismic research in the disputed areas. They also agreed, to notify the other claimants in advance of any military exercises in the

[151] Yann-huei Song, "Regional Code of Conduct in the South China Sea and Taiwan's Stand," *Institute of European and American Studies Academia Sinica Paper*, Nankang, Tapei, Taiwan, 2000 available at http://www.dsis.org.tw/peaceforum/papers/2000-04/APS000401e.htm (9/3/03)

disputed region. This accord aims to set the framework for future talks among the claimant nations. However, it does not specify certain required details required that negotiators had earlier intended because some of the Spratlys claimants had objections.

Taipei, which is a claimant in this conflict, is not a signatory to the declaration leaving it no avenue to participate in resolving this dispute. China objects to Taiwan's official participation in all discussions concerning these claims and wants Taiwan to resolve this issue with Beijing bilaterally. With the absence of Taiwan, can this declaration be effective? Can it be utilized to resolve or lessen the tensions in the region?

This chapter starts with the definitions of "code", "conduct" and "declaration." and the definition of "multilateralism" is also defined with the aim of analyzing whether the regional institutions conform to the definition. The genesis of the code is discussed, and its principles are examined. The advantages of signing the declaration are evaluated as to whether nations will be able to utilize the declaration to prevent further incidents from occurring. The Track I and II confidences-building mechanisms that are currently available are examined to determine whether they enhance stability in the region. This chapter also discusses the roles played by the United States and Japan. It concludes that the dispute cannot be resolved multilaterally without Taiwan's participation and it argues that Taiwan's involvement may reduce the potential for conflict in the region.

B. GENESIS OF THE DECLARATION OF CONDUCT OF PARTIES IN THE SOUTH CHINA SEA

Dictionary.com defines "code" as a "systematic collection of regulations and rules of procedure or conduct: *a traffic code."* And it defines "conduct" as to "direct the course of; manage or control." "Declaration" is defines as "an explicit, formal announcement, either oral or written." [152] Examining these definitions, a code is a binding set of rules that the contracting parties are required to adhere to when managing the contracting parties claims. Furthermore, the declaration of conduct of parties means, it is a formal written announcement that only manages or controls the disputes and does not bind the

152 The definitions of both the words are obtained from http://www.dictionary.com (9/10/03)

contracting parties together. It additionally states that the contracting parties are not necessarily legally bound by the declaration.

The objective of having a code of conduct is to lay the foundation for cooperation and peaceful settlement of disputes. By applying the confidence-building measures, ASEAN envisaged that the Spratlys will not become a flash point for conflict. A step-by-step approach was taken in the process of formulating the code of conduct, obtaining consensus, and agreeing to the terms and principles stipulated in the code. The origin of this declaration goes back to the Declaration of the South China Sea issued by the foreign ministers of the ASEAN on July 22, 1992. (hereafter called the Manila Declaration).[153] The Manila Declaration emphasized the "necessit[y] to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force."[154] The declaration contended that all parties are to apply the principles contained in the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC)[155] as the basis for establishing a regional code of conduct for South China Sea. As a result ASEAN tasked Manila and Hanoi to formulate a code based on their experiences with the codes of conduct that they had concluded between China and themselves. Two codes of conduct -- the August 1995 Joint Statement Republic of the Philippines-PRC Consultations on the South China Sea and Other Areas of Cooperation, and the November 1995 Joint Statement on the Fourth Annual bilateral Consultations between the Philippines and Vietnam -- formed the basis for the code.[156]

The drafting processes of the South China Sea code of conduct was discussed and endorsed both in "Track I" mechanisms, (such as ASEAN summits, ASEAN ministerial meetings (AMM) and the ASEAN Regional Forum (ARF)) and "Track II" meetings, which includes the Indonesian-sponsored informal Workshop on Managing Potential

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153 See Appendix 1 for the detail of the 1992 Declarations

154 Kriangsak Kittichaisaree, "A Code of Conduct for Human and Regional Security Around the South China Sea," *Ocean Development & International Law Journal*, No. 32, 2001 p 133

155 See Appendix 2 for the details of the 1976 TAC

156 Nguyen Hong Thao, "Vietnam and the Code of Conduct for the South China Sea," *Ocean Development & International Law Journal*, No. 32, 2001 p 113

Conflicts in the South China Sea (hereafter called the Workshop) and the Council for the Security Cooperation in the Asia-Pacific (CSCAP).[157]

In August 1999, Manila presented a draft code on behalf of ASEAN, and China drafted its own version of the code in October 1999. During the informal summit between China and ASEAN held in Manila on November 28, 1999, China rejected the code drafted by the Philippines, but agreed to hold further discussions on it. During the Tenth Workshop in Bogor, Indonesia on December 5-8, 1999, participants "expressed support for further effort to develop a code of conduct and agreed to continue exchanging views in the Workshop."[158]

Two major revisions were made to the version drafted by the Philippines in August 1999. First, the definitions of the disputed areas were adjusted to include specifically the Spratlys and the Paracel Islands in the South China Sea. This revision was mainly to accommodate Hanoi because of its disputes with China in the Paracels.[159] The second revision deleted exploration and exploitation of resources, which has been a sensitive issue between and/or among the claimants, particularly the Philippines and Vietnam. These two claimants were reluctant to enter into any joint development projects in the disputed areas prior to settling these competing disputes.[160]

The ASEAN–China Informal Consultation on the South China Sea Code of Conduct was held in Cha-Am, Thailand on March 14-15, 2000. China presented its October 1999 draft for discussion in this forum. Both drafts contained several common principles. According to Liselotte Odgaard and Yann-huei Song, both drafts expressed support for the peaceful settlement of disputes without resorting to military actions or using of force. The other aspect included exercising self-restraint in the conduct of activities in the disputed areas in order not to further complicate or magnify the

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157 Ibid Yann-huei Song (2000)

158 Ibid Kriangsak Kittichaisaree (2001 p 134)

159 Ibid Yann-huei Song (2000)

160 Ibid

dispute.[161] Both ASEAN and China agreed to study the possibility of undertaking joint projects in the areas, such as marine environmental protection, marine scientific research, safety of navigation and communication, search and rescue cooperation, and the fight against transnational crimes.[162] They also agreed to use universally recognized principles of international law, including the 1982 UNCLOS, as the foundation governing their relationships.

However, five major differences also exist. First, China insisted that the code should apply to the Spratly group of islands only; whereas, ASEAN wanted the code to be observed in and applied to both Spratly and Paracel groups of islands.[163] China asserted that disputes relating to the Paracels should be resolved between China and Vietnam bilaterally, but ASEAN preferred a combination of bilateral and multilateral consultations on both groups of disputed islands. Second, ASEAN's draft included injunctions against erecting structures on presently uninhabited islands, reefs, shoals, cays and other features in the disputed areas; the Chinese version did not mention these. Third, the Chinese version requested the parties concerned to refrain from use or threat of force or coercive measures, including seizure, detention or arrest of fishing vessels or other civilian vessels in the disputed areas. The ASEAN version only proposed to ensure just and humane treatment of other nationals. Fourth, the ASEAN version asked the parties concerned to inform voluntarily other parties concerned of significant policies and measures that affect the disputed area; the Chinese version does not mention this issue. Fifth, the Chinese version asked all parties concerned to refrain from conducting any military exercises directed against any parties concerned in the Spratlys and the adjacent waters and from conducting close-in military reconnaissance. In addition, the Chinese wanted all military patrol activities to be restricted in the disputed areas. The ASEAN version did not mention this.

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161 Ibid

162 Ibid Liselotte Odgaard (2002 p 242-243)

163 "Keeping the Waters calm in South China Sea," *The Straits Times*, November 21, 2002, Ibid Nguyen Hong, 2001 p 115

Subsequent ASEAN-China formal consultations on the South China Sea code of conduct were held in Malaysia on May 26, 2000, on August 24-25, 2000 in China, on October 11, 2000 in Vietnam,[164] and in Brunei in July 2002 to finalize the major differences in both the proposed draft codes. No apparent clear consensus was met after three years of unresolved discussions and disagreements. With Malaysia's intervention pushing for an interim measures so as not to prolong the issue longer, on November 4, 2002, in Phnom Penh, Cambodia, a Declaration on the Conduct of Parties in the South China Sea formally signed between ASEAN and China, rather than a stronger code of conduct that ASEAN originally wanted. No geographical area is mentioned in the agreed declaration, which allows some ambiguity for Hanoi to interpret the inclusion of Paracels. Furthermore no commitment exist in the declaration stating that parties will not built new structures on islets and reefs as ASEAN wanted. Nevertheless, it calls on states to "refrain from action of inhabiting presently uninhabited islands, reefs," etc specifically some provides some sort of promise towards this goal.[165] Efforts by China to limit military exercises and other activities in the disputed areas of the Spratlys failed, but ASEAN agreed to a provision on voluntary notification of any "joint/combined" military exercises in the South China Sea.[166]

Even though this declaration is non-binding, it is a small step towards consensus building and compromise, by which the majority of the claimants agreed to work together multilaterally. This first step is important because it indicates that the parties to the declaration desire to prevent accidental incidents from happening. China went a step further and agreed to consider acceding to the ASEAN's 1976 Treaty to Amity and Cooperation. Chinese Foreign Minister Li Zhaoxing pledged to seek his country's legislative approval to sign the treaty formally at the October 2003 ASEAN-China summit meeting.[167] On October 9, 2003, China signed the Treaty to Amity and

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[164] Ibid Kriangsak Kittichaisaree (2001 p 134)

[165] Lyall Breckon, "China Caps a Year of Gains," *Pacific Forum*, 2002, CNA Center for Strategic Studies, available at http://www.csis.org/pacfor/cc/0204Qchina_asean.html (9/28/03)

[166] Ibid

[167] Lyall Breckon, "SARS and a New Security Initiative from China," *Pacific Forum*, 2003, CNA Center for Strategic Studies, available at http://www.csis.org/pacfor/cc/0302Qchina_asean.html (10/2/03)

Cooperation in Bali, Indonesia.[168] With the signing of this treaty, some scholars argue that China will be legally bound by it, making the Declaration of the Conduct of Parties in the South China Sea legally binding. Nonetheless, it is still too early to predict how China will act with this signing.

C. THE PRINCIPLES OF THE DECLARATION

When comparing the principles in Declaration of Conduct of Parties in the South China Sea to those of the 1976 TAC, the 1992 Manila Declaration, and the 1997 Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China, several similarities are apparent. These can be summarized as follows:

All parties

- reaffirmed their respect and commitment to the freedom of navigation in and through the South China Sea.
- agreed to resolve their territorial disputes by peaceful means without resort to the use of force.
- pledged to exercise self-restraint in activities that could spark disputes, such as inhabiting still uninhabited features.
- agreed to enhance their efforts to build trust among them.
- agreed to exchange views among defense officials and to give advance notice of military exercises on a voluntary basis.
- agreed to provide humane treatment to any person in danger or distress.
- Agreed to cooperate in marine environmental protection and scientific research, safety of navigation, search and rescue operations and in the fight against transnational crime.

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168 "China and India Signed Treaty of Cooperation," *The Star*, October 9, 2003 available at http://www.thestar.com.my/news/story.asp?file=/2003/10/9/nation/6449536&sec=nation (10/9/03)

Besides these principles, the claimants also pledge mutual respect for the independence, sovereignty, equality, territorial integrity and national identities of all states and non-interference in the affairs of another. In signing the declaration and the other principles agreed during the signing of these three treaties, the claimants have entered into a form of multilateral agreement. These are positive strengths that claimants should capitalize on and work from to resolve or at least manage their differences in order to maintain a secure and safe environment in the Spratlys region. This multilateral agreement has one major flaw, that is, Taiwan is also a claimant but is not a signatory. This flaw aside, if all the claimants strictly adhere to these principles, the opinion is that the severity of the competing claims dispute in the Spratlys can be managed.

D. THE ADVANTAGES OF SIGNING THE DECLARATION

Many scholars believed that the potential for conflict in the Spratlys has greatly receded with the signing of the Declaration of Conduct of Parties, especially after China signed the TAC. Former ASEAN's Secretary General Rodolfo Severino argues that the declaration "conveys a sense of stability in the region."[169] Amitav Acharya believes that "the South China Sea disputes have receded to the background amidst other pressing challenges to regional order."[170] He goes on to argue "the declaration also reflects the fact that China sees a military confrontation over the Spratlys as being detrimental to its interests." Yann-huei Song describes the signing of the declaration as "a major leap for peace."[171] Lyall Breckon, a senior analyst in CNA Center for Strategic Studies argues, "depending on how [the conduct] carried out, it could reduce the chance of territorial disputes in the Spratly Islands…."[172] I argue that the advantages of the signing of this declaration are positive, committing those claimants who have signed to resolve or at

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169 Isagani de Castro, "Big Brother China woos ASSEAN", *Asia Times*, 6 November 2002 available at http://www.atimes.com/Southeast_Asia/DK06Ae02.html (10/3/03). See Amitav Acharya, "Seeking Security In the Dragon's Shadow: China and Southeast Asia in the Emerging Asian Order," *Working Paper*, Institute of Defense and Strategic Studies Singapore, March 03

170 Ibid Amitav Acharya (March 03)

171 Yann-huei Song, "The Signing of the Declaration on Conduct of Parties in the South China Sea and Its Potential Impacts on Taiwan's Rights and Interests," *Peace Forum Essay*, 2002, available at http://www.dsis.org.tw/peaceforum/papers/2002-11/4ps0211001e.pdf (9/4/03)

172 Ibid Lyall Breckon, (2002)

least de-escalate the dispute to a manageable level. This small step may one day culminate in formation of a multilateral regime in the South China Sea to investigate the entire dispute in the South China Sea region. The complexities of the Spratlys disputes require a multilateral approach because there are six claimants involved in these competing claims. China's signing of the TAC is seen as a softening of Beijing's stance and it may open the potential for Taiwan to participate in resolving the Spratlys disputes. Depending on Taiwan's actions and ASEAN's effort to engage China, the outcome of these engagements possibly baring fruits is difficult to predict.

E. MULTILATERALISM IN CONFLICT RESOLUTION

The reasons why these competing claims require a multilateral approach is because only a few areas in the Spratlys involve two competing parties, and as in some of the claims, more than three parties are involved. Therefore, a multilateral approach is appropriate. What is multilateralism? Multilateralism refers to coordinating relations among three or more states in accordance with certain norms and principles.[173] These concepts rest on the normative principle that peace is indivisible, and member states under this institution are obliged to respond collectively in the face of actual or threat of aggression when applied to a certain security arrangement or a collective security system, such as ASEAN and ARF. Response to threats could be by diplomatic means, through economic sanctions or by collective use of force when necessary. This collective response would deter a potential aggressor and the prospect of military action would decline.[174]

The term multilateral can refer to an organizing principle, an organization, or simply an activity. Any of these can be considered multilateral if it involves cooperation among many states. The term does not analytically presuppose a certain number of states, but it could refer a minimum of three to a maximum of unrestricted figures. Multilateral

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[173] John Gerard Ruggie ed, *Multilateralism Matters: The Theory and Praxis of an Institutional Form,* (New York: Columbia University Press 1993), p 8

[174] Ibid p 9-10

refers to an area, rather than a specific point, on a continuum. This means it can be analyzed in terms of degrees or gradations. [175]

Significantly, multilateralism presupposes cooperation. Although not all cooperation is multilateral, all multilateral activities include cooperation. From an instrumental perspective, multilateralism is a means to an end, where cooperation is a process by which states actively adjust their policies to take into account the interests of others. Multilateral activities may also be an end, or consumption good, wherein states prefer to do things multilaterally. [176]

As an organizational form, multilateralism can be a demanding institution. Participating actors are expected to renounce temporary advantages and the temptations to define their national interest. It also requires them to forgo ad hoc coalitions and to avoid policies that are based on short-term interests and situational exigencies. [177]

Having laid out the principle of multilateralism, it is clear that multilateralism is a form of cooperation among three or more states coming together based on accepted norms and principles of behavior and actions across a vast number of issues. The instruments for executing multilateral responses to various issues vary from diplomacy, sanctions or use of force. In the case of ASEAN and ASEAN Regional Forum, they fit the definition of a multilateral institution because the members are expected to abide by the rules and regulations that have been agreed upon during the formation of these institutions. For example, ASEAN has always advocated a non-violent approach in resolving conflict among it members. What confidence-building mechanisms are available to resolve these competing claims?

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[175] Ibid p 54-55

[176] Ibid p 55

[177] Ibid p 56

F. CONFIDENCE-BUILDING MEASURES MECHANISMS

Two multilateral confidence-building mechanisms -- Track I and Track II are available avenues through which the claimants may interact and exchange views on issues that are laid out in the declaration. The Track I official channels are ASEAN summits, a ASEAN ministerial meeting (AMM) and the ASEAN Regional Forum (ARF). Track II meetings include the Indonesian-sponsored informal Workshop on Managing Potential Conflicts in the South China Sea and the Council for the Security Cooperation in the Asia-Pacific (CSCAP).[178]

1. Track I Forum

On August 8, 1967, ASEAN was established with the signing of the ASEAN Declaration (hereafter the Bangkok Declaration) by the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei, Vietnam, Laos, Myanmar and Cambodia which joined ASEAN later. As part of its organization, ASEAN has 10 dialogue partners -- Australia, Canada, China, the European Union, India, Japan, Russia, New Zealand, South Korea and the United States. Additionally ASEAN's organizational structure of consists of the ASEAN summit meeting (the highest authority of ASEAN bringing together the heads of government of the member countries), ministerial meeting, the Standing Committee, Secretariat, various committees and senior officials' meeting.

ASEAN aims to achieve three main objectives: to promote the economic, social and cultural development of the region through cooperative programs; to safeguard the political and economic stability of the region against big power rivalry; and to serve as a forum for the resolution of intra-regional differences.[179]

The other Track I forum is the ARF that was established in 1994. It consists of the 10 ASEAN member states, the 10 ASEAN dialogue partners, one ASEAN observer (Papua New Guinea), as well as North Korea and Mongolia. The ARF complements the

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178 Ibid Yann-huei Song (2002)

179 "Backgrounder: Association Of Southeast Asian Nations (Asean)," *Peoples Daily*, June 15, 2003

various bilateral alliances and dialogues, which underpin the region's security architecture. The formation of ARF is drawn from the ASEAN experience that a process of dialogue can produce qualitative improvements in political relationships. It provides a setting in which members can discuss current regional security issues and develop cooperative measures to enhance peace and security in the region.[180]

The 1995 ARF Concept Paper set out a three-stage, evolutionary approach to develop the ARF, moving from confidence building to preventive diplomacy, and, in the long term, towards a conflict resolution capability. In its first ten years, the ARF has made modest gains in building a sense of strategic community, and, more recently, it has contributed to the region's counter-terrorism work.[181] However, efforts to develop tools of preventive diplomacy and conflict management are still at an early stage. While the ARF continues to focus on confidence-building measures, ARF members have also agreed that preventive diplomacy should proceed in tandem with these efforts, particularly in areas of overlap between confidence building and preventive diplomacy.[182]

Progress toward effective solutions and confidence building via these official channels has been slow. The ASEAN summits, ASEAN ministerial meetings and ARF are all multilateral institutions that pledge to abide by international laws and the 1982 UNCLOS. All claimants -- China, Brunei, Malaysia, the Philippines and Vietnam -- are members in these forums except for Taiwan. Technically, Taiwan is not bound by the guiding principles of these institutions while being free to act unilaterally. The question is what effect could one claimant not legally bound have in the competing dispute? A third party could play a role in this dispute. Using the United States to persuade and pressure Taiwan not to take unilateral action may work in the short term. However in a long-term solution that would engage Taiwan effectively, ASEAN should persuade China to allow Taiwan to become an observer in the Track I forums instead of as an active

180 "Background to ASEAN Regional Forum" Australian Ministry of Foreign Affairs Site available at http://www.dfat.gov.au/arf/background.html (10/10/03)

181 Ibid

182 Ibid

participant. In this manner, Taiwan would be in concert with the ongoing efforts and discussions regarding the issue at hand. This would allow both Taiwan and China to interact with one other in the hope that both parties may take this as a reconciliation process and come to an agreement to resolve their differences over a period of time. John Paul Lederach suggests that a reconciliation process can take place when two parties are given the opportunities to interact and "points of encounter where concerns about both the past and future can meet."[183]

Many scholars believe that the South China Sea disputes cannot be resolved if Taiwan is not allowed to participate in the Track I forums. Benito Lim states that a "multilateral settlement involving Taiwan is doomed to fail from the very start. Yet without Taiwan's participation, the multilateral scheme becomes meaningless."[184] Yann-huei Song argues that the exclusion of Taiwan from the process is inconsistent with the letter and spirit of the 1992 Manila Declaration on the South China Sea.[185] He further states that Taiwan participation will benefit and enhance the regional efforts in confidence building.

2. Track II Forum

The Center for Strategic and International Studies (CSIS) under the Pacific Forum Program joined nine other institutes in July 1993 in Kuala Lumpur to establish CSCAP as a Track II multilateral security dialogue.[186] The founding members were Australia, Canada, Indonesia, South Korea, Malaysia, the Philippines, Singapore, Thailand and the United States. Several new members include China, Mongolia, New Zealand, North Korea, Russia, Vietnam, and the European Union with India as an associate member. Besides these members and individual, associate members from Taiwan have been invited to participate in this forum since December 1996. For its part, CSCAP brings

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[183] John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, (Washington DC: USIP Press 1997), p 27

[184] Benito Lim, "Contending Claims over the Spratlys: The Chinese Positions," *Panorama* 2/1999, p 113

[185] Ibid Yann-huei Song (2002)

[186] Information obtain from CSCAP web page, http://www.csis.org/pacfor/cscap.html (10/16/03)

together military and civilian officials and academics for informal policy discussion and research; participants attend in their private capacities.[187] This multilateral forum seeks regional security and stability through dialogue, consultations, and cooperation on concrete issues and problems of mutual concern.[188] Furthermore, CSCAP's Steering Committee oversees the work of various working groups and helps to channel CSCAP's deliberations into other regional fora, such as ARF. The main substantive work of CSCAP occurs through international working groups (IWGs) that delve into specific issues and problems.

These working groups are notable for serving as region-wide multilateral fora for consensus building and problem solving, and often they address issues that are too sensitive for official dialogue.[189] Regionally CSCAP has played important roles in fostering dialogue on confidence building measures through its co-sponsorship of its IWG. The IWG has conducted dialogue and research on military transparency, including the feasibility of developing an Asian Arm registry and a generic defense white paper.[190] It has also produced views for formulating policy recommendations for regional government and multilateral organizations. The Maritime Working Group has produced a guide entitled "Guidelines for Regional Maritime Co-operations," which has been reviewed by ARF during one of its Inter-Seasonal Support Groups. As a result, a definitive guide on "Concepts of Comprehensive Security and Cooperative Security" is being produced and is seriously examining future broad-based regional security architectures and the interaction of security and economic issues in the Asia-Pacific.[191] A considerable amount of interaction has occurred between the ARF Track I forum and the CSCAP Track II forum. At the official Track I level, the ARF ministers first

[187] Ibid

[188] Ibid

[189] Ibid

[190] Ibid

[191] Ibid

identified preventive diplomacy as a potential future role of ARF and then called for an independent Track II assessment as to how to bring this about.[192]

The other Track II mechanism, the Informal Workshop on Managing Potential Conflicts in the South China Sea, is the brainchild of Ambassador Hasjim Djalal of Indonesia. The first exploratory workshop was held in Bali in 1990, in which only ASEAN members attended. In this workshop a second workshop was recommended that set the foundations for future workshops.

The University of British Columbia (UBC) is the executing agency for the project. As an agent, UBC provides project administration and research services and contacts with participating governments, the government of Canada, other governments, international organizations, and regional organizations. The Centre for Southeast Asian Studies in Jakarta, Indonesia is the counterpart to UBC. Its participation includes local administration and liaison of regional governments, other governments, international agencies, and regional organizations. The Canadian International Development Agency (CIDA) funded the project.

The aim of the Workshop is to establish cooperation on wide initiatives in building confidence to undertake multilateral cooperation in the South China Sea region. The main objectives of the Workshop are

- to promote and develop confidence building measure and processes in which the countries in the region could solve their problems through dialogue and mutual understanding in the interest of the region as a whole,
- to encourage the parties to any dispute to seek ways and means to settle their disputes by peaceful means, and
- to develop specific cooperative efforts or projects on which all participants could cooperate or learn how to cooperate.[193]

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[192] Ralph A. Cossa, "Promoting Preventive Diplomacy in the Asia Pacific Region," *Pacific Forum Issues & Insights*, No.3-02, July 2002, p 4

The workshop is conducted on an informal basis. The United States, Japan, Australia and regional authorities such as the European Union and the Office of Secretary General of the United Nations support this Workshop. All the participants who attend the Workshop act in their private capacities and are drawn from the ranks of government (mainly departments of foreign affairs, the diplomatic corps, and the military), academia, and research organizations.[194] This informality has both advantages and disadvantages. Although issues can be discussed frankly and solutions debated freely, the concerned countries do not have to react to the workshop recommendations and can even implement policy that contradicts the workshop's recommendations.[195]

A total of twelve workshops have been conducted thus far and its participants have increased from the ASEAN members to include Taiwan, Canada, Australia, Japan, South Korea, Norway and the United Kingdom. Classifying or characterizing the project is not always easy since it functions on a number of levels simultaneously. Basically, this is a resource/environmental track-two diplomacy initiative promoting cooperation in ecosystem management and cooperative security in the South China Sea. This is approached through the identification of areas for potential cooperation between the states of the South China Sea region in marine scientific research, marine environmental protection, navigational safety and sea communications, fisheries assessment and management, non-living resource assessment and development, defense and security issues, territorial and jurisdictional issues (other than claims to ocean-space and islands) and institutional mechanisms for cooperation.

Despite their informal and nongovernmental status, each Workshop has resulted in statements for public release. One key product of the workshop was the July 1991 Bandung Statement, which advises against the use of force to settle territorial and jurisdictional disputes. Where possible, states should consider the possibility of

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193 Hung-mao Tien and Tun-jen Cheng, eds, *The Security Environment in the Asia Pacific*, (New York: East Gate Book 2000), p 290

194 Ibid

195 Ibid

cooperating for mutual benefit. Self-restraint should be exercised to avoid complicating the situation of the competing claims.[196] In addition participants in the workshops were given opportunities to exchange views on their respective national positions regarding the territorial claims in the South China Sea. Because of the sensitivity of the issue, some participants believed that this should not be discussed in informal forum and should be left to the countries concerned to discuss this. In view of this, the presentation of views concerning the Spratlys and other territorial disputes practically ended at the Fifth Workshop in Bukittinggi.

The workshops, however, did discuss several confidence-building measures in more detail. Confidence-building measures should promote a cooperative atmosphere for preventing conflict in the South China Sea and, at the same time, should resolve misunderstandings that still exist among participants. These workshops also sought ways to continue dialogue between and among participants so as to form the basis for formulating an agreement or mutual understanding on a multilateral level at a later stage.

The Track II forums are the only forums where all the Spratlys' claimants had the opportunities to interact with each other and where scholars and officials from Taiwan are actively involved. These forums have given the opportunity for both China and Taiwan to interact unofficially. In January 1994, China and Taiwan announced a concrete proposal on how to cooperate in a joint scientific expedition to survey the waters of the disputed Spratlys region.[197] Subsequent collaborative projects were announced and proposed. In particular, the meteorological units of both sides agreed to conduct meteorological experiments in the South China Sea from 1995-1998. Additionally Bejing's China National Offshore Oil Corporation and Taiwan's state run Overseas Petroleum and Investment Corporation reached preliminary agreement for joint exploration off the Pearl River Delta near the Pratas in the northern end of the South China Sea.[198] However, the joint exploration was put on hold after Lee Teng-hui's visit

196 Ibid p 291

197 Ibid Lee Lai To, (1999 p 130)

198 Ibid

in June 1995 visit to the United States and Beijing's conduct of military exercises and missile tests in the Taiwan Straits in early 1996. Both countries have since resumed talks on this, but progress has been slow. Whether these unofficial talks may lead to official talks between these two claimants is a difficult question to answer.

G. INTERNATIONAL ACTORS

Two international actors -- the United States and Japan have significant interest in the competing claims of the Spratly Islands, even though they are not directly link in the Spratlys quagmire. Any form of flare-up that occurs in these areas invariably will draw at least the United States and Japan into the conflict. The sea-lanes are important to both Washington and Tokyo because their naval ships and merchant shipping transit these sea-lanes to gain access to the Indian Ocean from the Pacific Ocean.

1. The U.S. Roles

The United States is the only remaining superpower that has a formidable naval presence in the Asia-Pacific region. Washington views on the Spratlys disputes will have tremendous impact in resolving this dispute. Washington's Spratlys policy of nonintervention takes no position as to the legal merits of competing claims of sovereignty since the Clinton's administration. Scott Snyder notes that in a May 10, 1995 statement by the U.S. Department of State on the Spratly Islands and the South China Sea, the immediate U.S. interests in the South China Sea disputes included "maintaining peace and stability in the South China Sea, maintaining freedom of navigation, and upholding international law, including the UNCLOS 1982.[199] While maintaining its neutral position on the legal merits of the various territorial claims, the United States expressed concern over destabilizing unilateral actions in the region, declared that maintaining freedom of navigation is in the fundamental interest of the United States, and strongly urged that the disputants peacefully resolve the dispute among themselves consistent with international law, including the 1982 UNCLOS.

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[199] Ibid Scott Snyder (USIP Special Report 1997)

Beside the three immediate interests, Richard E. Hull argues that the United States has "significant economic and strategic interests in Southeast Asia and a mutual security treaty with the Philippines."[200] He mentions that "several U.S. oil companies hold concessions in disputed areas (even though they were advised of the risks beforehand by the U.S. Government)." According to Admiral Michael McDevitt, the United States needs to define its interests more broadly by "asserting that the Spratly dispute clearly has the potential to trigger conflict…the best course of action is to internationalize resolution of the dispute before resources become an issue."[201] He further argues that "it should not be left to fester…[and] a mechanism needs to be put in place to solve the claims." Liselotte Odgaard argues "the United States maritime policy is based on the principle of the freedom of the high seas."[202] In another article she argues that "unless the freedom of navigation through the Southeast Asia waters [is hindered], the United States is not prepared to play an active part in the Spratlys disputes."[203]

With the event of September 11th, this policy may have shifted with the current involvement of the United States in the Philippines in pursuing the suspected terrorist that might have moved its operation to the Southeast Asian region. Besides pursuing and eradicating terrorist networks in the region, the U. S. bilateral engagement with the countries in the region continues. The annual series of exercises, the Cooperation Afloat and Training (CARAT),[204] is seen as a commitment Washington makes to the region. The movement of ships from its bases in Japan and Guam to the region is a test that the U.S. Navy is conducting to demonstrate that the right and freedom of safe passage in the

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200 Richard E. Hull. "The South China Sea: Future Source of Prosperity or Conflict in South East Asia?" *National University Strategic Forum* Number 60, February 1996 available at http://www.ndu.edu/inss/strforum/forum60.html (5/31/03)

201 Michael McDevitt. "China and the South China Sea: A Conference Summary Report." *Pac Net # 15*. April 16 1999

202 Liselotte Odgaard. "Perception, Pragmatism and Political Will: Maritime Disputes and Balances of Power in the Asia Pacific." *Asian Perspective*, Vol.26, No. 4, 2002, p119

203 Liselotte Odgaard. "Deterrence and Cooperation in the South China Sea." *Contemporary Southeast Asia*, Vol. 23, No.2 August 2001, p295-296

204 This is a series of bilateral exercises that the U.S is conducting with the countries in the region. The Philippines, Brunei, Singapore, Malaysia, Indonesia and Thailand are currently the countries that are partner. The move to draw the countries together as a multilateral exercise has met with resistance from some of the countries. I have been personally involved in many of these exercises

sea-lanes of the South China Sea is not hampered. In his speech on taking over command, Admiral Fargo, the current Pacific Command commander, reiterated, "the U.S will continue to show its presence in the South China Sea." Over the last decade, the United States has maintained its neutrality even when the Philippines asked for its assistance during the Mischief Reef debacle with China. The likelihood of the United States using force in this dispute is low provided its rights of safe passage through the sea lanes is not taken away. The United States is supportive of all the Track I and II initiatives to resolve these competing claims in the Spratlys. At all these forums Washington has participated actively and contributed to their successes. The United States declared its endorsement of the 1992 ASEAN Declaration on the South China Sea and its opposition to any claims that were not consistent with international law, including UNCLOS 1982.[205] It has helped the claimants to generate the political will to engage in negotiating process of these forums. Furthermore its continued presence of the U.S in the region has pressured China into not taking any drastic steps in the disputes.

2. Japan's Role

Japan is a strong contender for economic and political influence in the region and the South China Sea. The South China Sea SLOCs play an important role that serves as a link between the Indian Ocean and the Pacific Ocean. This economic lifeline is vital to Japan because most of its energy and maritime trade with Southeast Asia, South Asia, Africa, the Middle East and Europe passes through it. Japanese interest in the preservation of peace and co-operation in the South China Sea remains a major priority. Even though its oil tankers and merchant fleet can take a longer route via the Lombak Straits, this would incur additional cost and risk while taking longer time. The ripple effects this may cause are tremendous. Therefore how could Japan assist in this conflict? Many scholars have argued that, militarily, Japan may not be able to assist because of its historical past. Tokyo is restricted by Article 9 of its constitution. According to Lam Peng-Er, "Japan has played a significant role in the seeking to mediate in the Spratly

[205] Ibid Lee Lai To (1999 p143)

dispute… and to promote a multilateral approach to confidence building in the region."[206] He further stresses that Tokyo was enthusiastic to promote a multilateral security forum in the region to promote "confidence building, greater military transparency and preventive diplomacy in the future." The Nakayama Initiative has been regarded as the antecedent to the formation of the ARF. However, Marvin C. Ott states that "as long as the U.S-Japan Security Treaty remains viable, the Southeast Asian governments are confident that Japan will leave the task of protecting the vital sea lanes to the U.S."[207] Although Japan has been constrained by its constitution and historical past from direct military involvement in the competing claims, its recent proposal to expand cooperation between the Japanese Coast Guard and regional navies to combat piracy in Southeast Asian waters is indicative of this trend.[208]

Japan is valued as an economic engine that powers much of Southeast Asia's economic growth. Its key role is in the economic realm of investment, trade, loans and aid. Tokyo also plays an indirect strategic role by providing military bases and logistical support to its U.S ally maintaining a strategic presence in the disputed region. Tokyo has been an active participant in both the Track I and II forums. It has offered to finance the workshop organized by Indonesia provided that the workshop is conducted in Japan. Although the offer was turned down by Indonesia, its interest reminded others of Tokyo's role in this dispute.[209]

H. ANALYSIS

The Declaration of Conduct of Parties in the South China Sea is short for the code of conduct that ASEAN originally sought. The advantage of this declaration is that it

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[206] Lam Peng-Er, "Japan-Southeast Asia Relations: Trading Places? The Leading Goose & Ascending Dragon," *Pacific Forum Comparative Connection*, 1st Quarter 2002, available at http://www.csis.org/pacfor/cc0201Qoa.html (10/16/03)

[207] Marvin C. Ott, "Southeast Asian Security: A Regional Perspective," *NDU Symposium Papers*, 7-8 March 2000, available at http://www.ndu.edu/inss/press/ASIAN.html (6/8/03)

[208] Richard Sokolsky, Angel Robasa, C.R Neu, *The role of Southeast Asia in U.S Strategy Towards China*, (Washington DC: Rand Publications 2000), p 30

[209] Ibid Lee Lai To (1999 p 144)

acknowledges the need for the claimants to act multilaterally in order to prevent future skirmishes. The principles stipulated in the declaration, if adhered to by all claimants, could also prevent future skirmishes. According to Yann-huei Song, "the signing of the declaration would help build up trust, enhance cooperation, reduce tensions and thus promote peace and stability in the Spratlys/South China Sea area."[210] He goes on to additionally argue that it is a "purely political, non-legal instrument [that] allows for change or abrogation in the event [of] political circumstances changes…. The governments when signing this non-legal instrument do intent to keep the commitment and to expect the other parties to do so." Mely Caballero-Anthony states that "the declaration was no mean feat. It signaled a mutual desire to move forward after three years of futile discussion on a code of conduct."[211] Ralf Emmers argues that "claimant states have indicated a shared interest in promoting Southeast Asian peace and stability by avoiding any confrontation over the South China Sea."[212] Aileen San Pablo-Baviera argues that "a regional code of conduct involving all the claimants and [a] possible opening for accession by other interested states can play a vital role."[213]

Timo Kivimaki, Liselotte Odgaard and Stein Tonnesson argue that the principal failure to sign a code of conduct between ASEAN and China was due to "areas related to military activities."[214] They go on to state that "the code of conduct can do nothing to stop the consolidation of a structure of deterrence in the South China Sea. However, it can help to ensure that deterrence is stable by preventing the volatility." Amitav Acharya argues that "the declaration [is] a confirmation of China's gradual move towards a posture of dealing with ASEAN multilaterally on a subject that it had previously insisted

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210 Ibid Yann-huei Song (Peace Forum Essay 2002)

211 Mely Caballero-Anthony, "ASEAN-China Relations Turn the Corner," *PacNet Newsletter*, December 12, 2002 available at http://www.ciaonet.org/pbei/csis/pac02/cam01.html (8/7/03)

212 Ralf Emmers, ASEAN, China and the South China Sea: Opportunity Missed, *Perspective*, November 2002 available at http://www.ntu.edu.sg/idss/Perspective/Research_050228.htm (5/22/03)

213 Ibid Aileen San Pablo-Baviera (1999 p 78)

214 Timo Kivimaki, Ed, *War or Peace in the South China Sea?*, (Copenhagen: Nias Press 2002), p 150

on resolving on a bilateral basis."[215] He goes on to state that, "the declaration also reflects that China sees a military confrontation over the Spratlys as being detrimental to its interest." According to Rames Amer, he cites the Philippines and China skirmishes over Mischief Reefs as indicative of the fact that a 'code of conduct' in itself is not a guarantee that actions and incidents will not cause tension over disputed areas."[216] Others also argue that "the declaration is simply a statement of purpose that could be subject to differing interpretations, ignored and/or broken at anytime."[217]

I argue that the declaration is a small step taken by ASEAN and China to acknowledge a need to agree to disagree. Even though it is not a legally binding document, it is signed on a premise of "good faith" by all the signatories. Good faith is considered one of the cardinal principles that underpin international relations. Moreover, ASEAN and China have signed a commitment in this declaration; therefore, they are expected to abide by their commitments. The signing of the 1976 Treaty of Amity and Cooperation by China this October is a testament of the commitment made by China. However, it cannot prevent any of them from breaking this commitment if they decide to do so.

As highlighted by Yann-huei Song, Taiwan has been sidelined; therefore, it should be a participant in the formulation process and a signatory. As Lin Cheng-yi points out, "if Taiwan continues to improve its relationship with Southeast Asia, one can be sure that Taiwan will adopt a less ambiguous and more neutral stance between China and ASEAN claimants."[218] Other scholars view this differently and argue that Taiwan should deal with China separately and that they should consolidate their stand to make their claims more concrete in this dispute. This is provided both China and Taiwan are

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[215] Amitav Acharya, "Seeking Security in the Dragon's Shadow: China and Southeast Asia In the Emerging Asian Order," *Institute of Defence and Strategic Studies Singapore Paper No. 44*, March 2003, p 6

[216] Rames Amer, "The Management of the Border Disputes Between China and Vietnam and its Regional Implications," October 2000, available at http://www.eias.org/pdf/briefPapers/ManagementBorderDisputesBetween.pdf (10/3/03)

[217] David G. Wiencek, "South China Sea Flashpoint Revisited," *China Brief*, Vol.2, Issue 4 December 10, 2002 available at http://china.jamestown.org/pubs/view/cwe_002_024_002.htm (7/24/03)

[218] Ralph A. Cossa, "Security Implications of Conflict in the South China Sea: Exploring Potential Triggers of Conflict," *A Pacific Forum CSIS Special Report*, March 1998, p 6

able to put their differences aside regarding sovereignty, which is a difficult and sensitive issue probably requiring a long and tedious process. Additionally ASEAN claimants should unite, setting aside their interests and should approach China to allow Taiwan to participate as an observer initially with the hope that Taiwan can be accepted as a full participant in the future. Finally, ASEAN should continue to pursue its goal of signing a code of conduct to replace the declaration in the future thus making the agreement a binding one.

The multilateral approach of ASEAN in addressing the Spratlys issue has been slow. However, it has registered success in the 1992 Manila Declaration and in China's signing the 1976 Treaty of Amity and Cooperation in October 2003. Scholars have argued that the ASEAN mechanism has not done much in the Spratlys disputes. However, according to Acharya, the subtle approach using the "ASEAN Way," which features "the practice of dialogue and consultations to arrive at a consensus,"[219] is the other successes of ASEAN mechanism. Dialogues and consultations towards consensus can "bring a meeting of the minds," foster the willingness to understand diverse positions, cultivate patience and perseverance, constrain some states from unduly exercising influence or coercion over others and allow smaller states to articulate their position.[220] Marvin C. Ott argues that ASEAN has developed "patterns of consultation and collaboration; mutual trust has been nurtured and political and foreign policy elites have become closely acquainted with one another."[221] A Canadian Department of Foreign Affairs and International Trade report acknowledges that "ASEAN itself as a multilateral cooperation mechanism has been touted as the most successful confidence building process to come out of the Southeast Asian experience."

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219 Amitav Acharya, "Ideas, Identity and Institution Building: From the 'ASEAN Way' to the 'Asia-Pacific Way'?", *The Pacific Review*, Vol. 10, No. 3, 1997, p 319 – 340

220 Ralph A. Cossa, "Promoting Preventive Diplomacy in the Asia Pacific Region," *Pacific Forum Issues & Insights*, No.3-02, July 2002, p 20, Hussain Mutalib, "At Thirty, ASEAN Looks to Challenges in the New Millenium," *Contemporary Southeast Asia*, Vol. 19. No. 1, 1997, p 79

221 Ibid Marvin C. Ott, (March 7 & 8, 2000)

The issuance of a Defense white paper by Beijing in 1995 in the effort to promote mutual understanding and transparency is one of the successes ARF has achieved.[222] Since its inception, ARF has been a multilateral forum and China has became increasingly comfortable with this forum for dialogue, exchanges of views, and other elements of cooperative security. This also serves as a confidence-building mechanism where officials from the claimant states are able to communicate and meet face to face with each other. Scrutinizing ASEAN's objectives and aims, this multilateral institution dedicated to enhancing peace, security and stability in the Southeast Asia region has come a long way. Its effort to engage China, the largest claimant in the Spratlys disputes, has paid off with the signing of the Declaration of Conduct of Parties in the South China Sea and the Treaty of Amity and Cooperation.

Presently, ASEAN is in the process of development and is still experiencing a "hang over" from the 1997 financial crisis and the instability crises in some of its member states. Nevertheless, it remains the most successful multilateral regional institution after the European Union. The ARF has established a number of Inter-sessional Support Group (ISG) and Inter-sessional Meetings (ISM) on confidence-building measures and search and rescue coordination cooperation. The output of these meetings suggests areas where cooperation can be advanced. The meetings are themselves a platform where officials interact with one another. The annual ministerial meetings, senior officers meetings, the inter-sessional activities and other Track I activities are forming a web of vast networks throughout the region. These networks, forming social capitals and bridging across cultures, act as an investment of human capital that has a vast potential to be an important investment for a crisis situation in the region. That Taiwan, the sixth claimant in the Spratlys dispute, was not able to participate in all these forums is one of its major shortfalls. If this could be included into Track I agendas, it would certainly enhance confidence-building measures undertaken.

Can these shortcomings be overcome by its participation in the Track II forums? The activities in the Track II forums started with limited memberships. It was realized

[222] Ibid Lee Lai To, (1999 p 42)

that engagement of all the littoral states in the South China Sea was needed, including all the claimants in the Spratlys dispute. Given the political, economic and cultural diversity of the claimants and their different historical experiences, it was necessary to develop consensus among these diverse groups. Track II diplomacy contrasts with the traditional official government-to-government mode of official Track I diplomacy. It allows freer exchange of ideas and opinions relatively unfettered by government policy positions. Track II processes have close connections with Track I and interstate discussion. For example, work done by the Technical Working group on Legal Matters was taken up by government officials in the region in an attempt to formulate a regional code of conduct.[223] The value of this initiative in laying the foundation is considered one of the advantages of the forums.

Thus far, China has supported the workshop process and its efforts to promote cooperation on various issues that were discussed in the forums. China also acknowledges the need to develop confidence-building measures among the competing states of the Spratlys in order to foster better understanding and to keep the communication open. It has also shown willingness in principle to put aside territorial disputes in favor of joint development.

These two forums have been in existence for over a decade and have been credited with bringing about greater understanding between not just the states concerned, but also the participating experts and officials. States allowing their senior officials to attend in their private capacities suggests that the initiative is being taken seriously by these states. Getting the claimants involved and discussing the ongoing disputes of the Spratlys is an achievement in itself. It allows effective communication to take place, building confidence and trust in the process, and, eventually, the hope that the claimants can collaborate and build consensus to resolve this competing dispute. I would argue that the Track II forums are more successful in confidence building than the Track I forums, where Taiwan is excluded. The competing claims involved six claimants; therefore, it is

223 Ian Townsend-Gualt, "Can International Law Contribute to Preventive Diplomacy in Southeast Asia," *CSIS Issues & Insights* No. 3-02, July 2002, p 40

only logical that all the claimants should be involved in the discussion for the dispute to be amicably resolved. As for the United States and Japan, both have critical roles to play in the disputes. The United States and Japan should continue supporting the initiative taken by Track I and II forums by providing experts and technical expertise in the working groups. The U.S Navy should continue to show its presence to counter the Chinese threat.

I. CONCLUSION

In sum, since the beginning of 1990s, ASEAN has been actively engaging China, the largest and most powerful claimant in this Spratly disputes with the aim to resolve the Spratly disputes diplomatically since Beijing has the history of taking military action in territorial disputes. China's signing of the Declaration of Conduct of Parties in the South China Sea and its accession to the 1976 Treaty of Amity and Cooperation in the Southeast Asia are positive signs indicating its willingness to approach the disputes multilaterally. In the case of ASEAN, it needs to consolidate its stand and persuade China to allow Taiwan to participate as an observer in the Track I forums by blocking its participation as the next course of action. At the same time it should advise Taiwan not to provoke or take drastic and abnormal actions that do not conform to the agreed principles of the declaration and the treaties that have been signed by the other claimants. If both Taiwan and China are able to work together informally, a common belief is that both parties will be able to resolve their differences in due course. Having done this, ASEAN should continue to pursue the code of conduct which it originally desired. Nonetheless, some scholars warn that the option of Beijing using its military in this dispute should not be ruled out, even though it has signed both the declaration and the 1976 TAC, especially when its national interest and sovereignty are at stake. Others view China's softening stance as buying time in order to build up its military capabilities and consolidate its presence in the Spratlys.

I believe that China will not resort to military action before it has exhausted its diplomatic efforts. What does China have to gain by using military force? The current

leadership is more outward looking and open and it does not want to appear as a bully. Military actions will affect the SLOCs in the South China Sea, which in turn will draw the United States into the foray, which China clearly wanted to avoid. Besides China, there is no guarantee that the other claimants will not take military actions unilaterally, especially, the Philippines and Vietnam which both have a history of using military means in the past. Therefore, all the claimants should adhere to the principles of the Declaration and the three treaties. If one claimant does not adhere to the agreed principles, the other claimants need to take some form of sanction or action in order to deter military action to be taken by any of the claimants.

This declaration is hardly a year old. Whether all claimants will adhere to the principles of the conduct is still too early to predict. This dispute requires a multilateral approach and all the claimants are required to participate in the Track I and II confidence building measures mechanism in order to reap positive results. Therefore, Taiwan participation will definitely enhance the confidence-building process and help to prevent untoward incidences from occurring.

V. CONCLUSION

A. INTRODUCTION

The security environment in the Spratly Islands has been a concern of the littoral states of the South China Sea. The implementation of the1982 UNCLOS, which allow states to claim an exclusive economic zone of 200 nautical miles, has resulted in competing claims in the Spratlys region of the South China Sea. These have created overlapping boundaries for which states quarrel over the control of the sea and air space that they have claimed. Lives have been lost through skirmishes between the military forces and the indiscriminate shooting of innocent fishermen who have been fishing in these disputed areas: their traditional fishing grounds since time immemorial. China's expansion in the Spratlys in the last three decades has created concern among the ASEAN states, so ASEAN began actively to engage China multilaterally in the early 1990s, hoping to bind China with some form of agreement. After three years of hard bargaining, collaborations and compromise, a non-binding Declaration of Conduct of Parties of the South China Sea has been signed between ASEAN and China on November 2002 instead of the code of conduct that ASEAN originally desired.

B. REASONS FOR CLAIMS

Why claimants claim the Spratlys can be traced back to the colonial days, when owning territories generated spoils. With the 1982 UNCLOS, states owning territories have the right to claim an EEZ and territorial waters around the claimed territories, where states could exploit the living and non-living resources of these areas. The Spratlys claimants use the 1982 UNCLOS, international laws, customary laws and other justifications to support their claims; nevertheless, each claim has its flaws and strengths. Provided the claimants are willing to resolve their claims by arbitration or agree to resolve through other means, this dispute will remain a potential starter for conflict in this region.

Many scholars have argued that the Spratlys region may possess economic and strategic potential. Oil and gas is important for all the Spratlys claimants, given that they have rapidly been expanding industries and economies. A reliable and cheap source of oil and gas is important to fuel their fast growing industries. Beside that, it is also an important income earner because the revenue generated can help these developing littoral states. Currently, oil and gas explorations are being carried out in the adjacent areas surrounding the Spratlys. Even though there are no concrete reports of the presence of oil and gas in the region, the potentials of the disputed regions of the Spratlys having these precious commodities cannot be ruled out. Malaysia, Brunei, Vietnam have been producing natural gas and oil for a considerable period of time.

Besides oil and gas, the region is a rich fishing ground for the littoral states. This rich protein is a vital food source to most of these states, and the fishing industry has provided a significant number of jobs to the population of these littoral states. It has been widely reported that the Spratlys region is believed to contain rich minerals, such as tin, manganese, copper, cobalt and nickel, in addition to phosphate, which is currently being produced. Some scholars argue that the importance of sea lines of communications and their strategic location are more important to some states. Some even argue that the vast uncharted waters of the areas are more hazardous to shipping than commanding any potential. As long as claimants deem their claims to be their national interest, they will continue to claim the Spratlys. Provided all the claimants can collaborate and compromise multilaterally in this dispute, this region continues to be a potential flash point in the region.

C. POLITICAL WILL

The political will demonstrated by each claimant in this dispute has not changed even though leadership in China, Taiwan and the Philippines has changed in the last few years. Militarily, China is the dominant power and its fast expanding navy is a cause for concern to all the other claimants in this dispute. Its continuing efforts to rebuild stronger structures replacing the older structures in its claimed disputed islands indicate that it

seeks to maintain its continuous presence in the area. The Philippines, being weak militarily, has time and again tried to internationalize the dispute in the hope that the United States will eventually be drawn into this dispute. Washington has repeatedly announced that it will not do so unless the right of safe navigation through the South China Sea is impeded. However, the United States Navy's continuous presence in the South China Sea has contributed to the balance, which China is aware of and has prompted Beijing to announce its assurance that China will not take any unilateral action in this dispute. Malaysia's latest construction at the Investigator Shoal and the Erica Reef indicates that claimants will continue to pursue their claims to strengthen their argument if there is arbitration in the future. It is safe to forecast that irrespective of the military capabilities of these claimants, the political will of these states dictates that all claimants will continue to pursue their claims in the area, provided consensus occurs either to resolve this dispute or to allow it to remain at status quo.

D. DECLARATION OF CONDUCT OF PARTIES

The ASEAN – China Declaration of Conduct of Parties in the South China Sea and China's signing of the Treaty of Amity and Cooperation are positive indications that the claimant states have agreed to act multilaterally and do not want the dispute to be a potential flash point for conflict. The engagement of ASEAN with China has paid off, but some scholars argue that there was a trade-off between ASEAN and China that enabled this declaration to be signed. Whichever argument one makes, to be able to persuade China to agree to resolve this issue multilaterally is in itself an achievement because Beijing has always wanted to resolve territorial disputes bilaterally. Beijing is softening its stance may present some hope for ASEAN to persuade China to allow Taiwan to participate as an observer in this multilateral arrangement. This not only provides the opportunity for Taiwan to participate with the discussions on the dispute, but also acts as a reconciliation process for both China and Taiwan to rebuild their relationship in the hope that they will eventually settle their differences in the future. To this end, ASEAN has to be united and act as one voice. The chances of multilaterally

resolving this dispute will be enhanced if Taiwan is an active participant in the Track I forums.

The major principles of the Declaration of Conduct of Parties in the South China Sea, the Treaty of Amity and Cooperation in the South China Sea and the 1992 Manila Declaration are as follows,

- reaffirm mutual respect and freedom of navigation,
- pledge resolution of disputes by peaceful means without resorting to force and the exercise of restraint in activities that can spark disputes,
- enhance efforts in confidence-building measures, provide for exchanges of views among defense officials and advance notice of any military exercises, and
- enables cooperation in areas of maritime interest.

All these principles, if adhered to, will prevent an escalation of events in this dispute. The potential for claimants to break these principles is a question that cannot be easily answered. What makes this difficult to answer is China, the Philippines, and Vietnam have signed codes of conduct and yet they fought each other after the signing. Each side claimed that the other party was the one that started first. The hypothesis that no clear orders were given to the parties on the ground may be the main course. It is difficult for a commander on the ground to decide when no clear guidelines have been given to them by their higher authorities. Whatever the reasons may be and no matter how good the agreement is without strict adherence and proper orders promulgated to the commanders on the ground, mistakes are likely to occur. Therefore, there is no guarantee that skirmishes will not recur.

E. MULTILATERAL DISPUTES

This dispute involves six claimants and is, therefore, multilateral. Although a multilateral dispute might only be resolved multilaterally, a process towards a multilateral

resolution may often entail bilateral talks between claimants.[224] Sometimes multilateral agreements are also preceded by bilateral treaties between some of the states concerned. Currently there are bilateral arrangements and treaties between the Spratlys claimants with the exception of Taiwan, which does not have diplomatic ties. But economically, Taiwan is one of the largest investors in the ASEAN states. It is difficult to resolve this dispute if Taiwan is not actively involved especially in Track I activities. As believed, one of the visions of the Track II forums is to bring both China and Taiwan closer to forge better understanding and bridge the differences between the two states in the hope that they can amicably settle their differences in the near future.

F. TRACK I AND II MECHANISMS AND THE QUESTION OF TAIWAN

The Track I and II confidence-building mechanisms have been useful forums where discussions involved all the claimants. Mechanisms for dialogue have now been firmly established. A considerable number of confidence-building measures have been instituted or are in the progress of implementation, many of which are designed to enhance transparency. The Indonesian-sponsored Workshops and CSCAP forums have forged interactions among all the Spratlys claimants. What are the chances of these multilateral forums convincing China that Taiwan's participation is vital to the security of the Spratlys? These are slim but not impossible if both parties soften their stances and compromise, collaborate and work together to achieve a common goal. This process may take time and it may not occur in the next three to five years. A more realistic outlook is in the next decade or so.

What is the prospect that the Spratly dispute will be resolved multilaterally? It should not be ruled out that this cannot be done. China's current leadership has only been in power for the last ten months or so. Changes in management style have emerged, and Beijing portrays a more open approach in adhering to international norms. Taiwan has to be cautious and should act rationally in pursuing its diplomatic relations and not

[224] Stein Tonnesson, Sino-Vietnamese Rapproachement and the South China Sea Irritant, *Security Dialogue*, Vol. 34 (1) March 2003, p 65

provoking China. Both Beijing and Taipei should continue to play an active role in the Track II forums and allow time for their relationship to develop so as to bridge their differences. The ASEAN claimants should consolidate their positions and support this initiative. The other important aspect is that all claimants must adhere to the principles of the declaration and the treaties that they have endorsed and signed.

The Declaration of Conduct of Parties in the South China Sea signed between ASEAN and China does not guarantee further disruption in the Spratlys dispute. However, the Track I and II confidence-building mechanisms can assist in promoting transparency, bridging cross culture, building networks, and building social capital so that the claimants can collaborate and compromise in resolving this dispute in the future. With strict adherence to the principles of the declaration and the treaties further clashes can be prevented. Finally, ASEAN should continue to pursue the signing of the code of conduct that it originally desired with all the claimants.

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APPENDIX A. ASEAN DECLARATION ON THE SOUTH CHINA SEAMANILA, PHILIPPINES, 22 JULY 1992

WE, the Foreign Ministers of the member countries of the Association of Southeast Asian Nations;

RECALLING the historic, cultural and social ties that bind our peoples as states adjacent to the South China Sea;

WISHING to promote the spirit of kinship, friendship and harmony among our peoples who share similar Asian traditions and heritage;

DESIROUS of further promoting conditions essential to greater economic cooperation and growth;

RECOGNIZING that we are bound by similar ideals of mutual respect, freedom, sovereignty and jurisdiction of the parties directly concerned;

RECOGNIZING that South China Sea issues involve sensitive questions of sovereignty and jurisdiction of the parties directly concerned;

CONSCIOUS that any adverse developments in the South China Sea directly affect peace and stability in the region;

HEREBY

1. EMPHASIZE the necessity to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force;

2. URGE all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes;

3. RESOLVE, without prejudicing the sovereignty and jurisdiction of countries having direct interests in the area, to explore the possibility of cooperation in the South China Sea relating to the safety of maritime navigation and communication, protection against pollution of the marine environment, coordination of search and rescue operations, efforts towards combating piracy and armed robbery as well as collaboration in the campaign against illicit trafficking in drugs;

4. COMMEND all parties concerned to apply the principles contained in the Treaty of Amity and Cooperation in Southeast Asia as the basis for establishing a code of international conduct over the South China Sea;

5. INVITE all parties concerned to subscribe to this Declaration of principles.

Signed in Manila, Philippines, this 22nd day of July, nineteen hundred and ninety-two

HRH Prince Mohamed Bolkiah
MINISTER OF FOREIGN AFFAIRS
BRUNEI DARUSSALAM

Ali Alatas
MINISTER FOR FOREIGN AFFAIRS
REPUBLIC OF INDONESIA

Datuk Abdullah Bin Haji Ahmad Badawi
MINISTER OF FOREIGN AFFAIRS
MALAYSIA

Raul S. Manglapus
SECRETARY OF FOREIGN AFFAIRS
REPUBLIC OF THE PHILIPPINES

Wong Kan Seng

MINISTER FOR FOREIGN AFFAIRS

REPUBLIC OF SINGAPORE

Arsa Sarasin

MINISTER OF FOREIGN AFFAIRS

KINGDOM OF THAILAND

Source: Available at http://www.aseansec.org/1196.htm (10/02/03).

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APPENDIX B. TREATY OF AMITY AND COOPERATION IN SOUTHEAST ASIA INDONESIA, FEBRUARY 24, 1976

Preamble

The High Contracting Parties :

CONSCIOUS of the existing ties of history, geography and culture, which have bound their peoples together;

ANXIOUS to promote regional peace and stability through abiding respect for justice and the rule or law and enhancing regional resilience in their relations;

DESIRING to enhance peace, friendship and mutual cooperation on matters affecting Southeast Asia consistent with the spirit and principles of the Charter of the United Nations, the Ten Principles adopted by the Asian-African Conference in Bandung on 25 April 1955, the Declaration of the Association of Southeast Asian Nations signed in Bangkok on 8 August 1967, and the Declaration signed in Kuala Lumpur on 27 November 1971;

CONVINCED that the settlement of differences or disputes between their countries should be regulated by rational, effective and sufficiently flexible procedures, avoiding negative attitudes which might endanger or hinder cooperation;

BELIEVING in the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony;

SOLEMNLY AGREE to enter into a Treaty of Amity and Cooperation as follows:

CHAPTER I: PURPOSE AND PRINCIPLES

Article 1

The purpose of this Treaty is to promote perpetual peace, everlasting amity and

cooperation among their peoples which would contribute to their strength, solidarity and closer relationship,

Article 2

In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles :

a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;

b. The right of every State to lead its national existence free from external interference, subversion or coersion;

c. Non-interference in the internal affairs of one another;

d. Settlement of differences or disputes by peaceful means;

e. Renunciation of the threat or use of force;

f. Effective cooperation among themselves.

CHAPTER II: AMITY

Article 3

In pursuance of the purpose of this Treaty the High Contracting Parties shall endeavour to develop and strengthen the traditional, cultural and historical ties of friendship, good neighbourliness and cooperation which bind them together and shall fulfill in good faith the obligations assumed under this Treaty. In order to promote closer understanding among them, the High Contracting Parties shall encourage and facilitate contact and intercourse among their peoples.

CHAPTER III: COOPERATION

Article 4

The High Contracting Parties shall promote active cooperation in the economic, social, technical, scientific and administrative fields as well as in matters of common ideals and aspiration of international peace and stability in the region and all other matters of common interest.

Article 5

Pursuant to Article 4 the High Contracting Parties shall exert their maximum efforts multilaterally as well as bilaterally on the basis of equality, non-discrimination and mutual benefit.

Article 6

The High Contracting Parties shall collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia. To this end, they shall promote the greater utilization of their agriculture and industries, the expansion of their trade and the improvement of their economic infrastructure for the mutual benefit of their peoples. In this regard, they shall continue to explore all avenues for close and beneficial cooperation with other States as well as international and regional ~organisations outside the region.

Article 7

The High Contracting Parties, in order to achieve social justice and to raise the standards of living of the peoples of the region, shall intensify economic cooperation. For this purpose, they shall adopt appropriate regional strategies for economic development and mutual assistance.

Article 8

The High Contracting Parties shall strive to achieve the closest cooperation on the widest scale and shall seek to provide assistance to one another in the form of training and research facilities in the social, cultural, technical, scientific and administrative fields.

Article 9

The High Contracting Parties shall endeavour to foster cooperation in the furtherance of the cause of peace, harmony, and stability in the region. To this end, the High Contracting Parties shall maintain regular contacts and consultations with one another on

international and regional matters with a view to coordinating their views actions and policies.

Article 10

Each High Contracting Parties shall not in any manner of form participate in any activity which shall constitute a treat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party.

Article 11

The High Contracting Parties shall endeavour to strengthen their respective national resilience in their political, economic, sociocultural as well as security fields in conformity with their respective ideals and aspirations, free from external interference as well as internal subversive activities in order to preserve their respective national identities.

Article 12

The High Contracting Parties in their efforts to achieve regional prosperity and security, shall endeavour to cooperate in all fields for the promotion of regional resilience, based on the principles of self-confidence, self-reliance, mutual respect, cooperation of solidarity which will constitute the foundation for a strong and viable community of nations in Southeast Asia.

CHAPTER IV: PACIFIC SETTLEMENT OF DISPUTES

Article 13

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

Article 14

To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

Article 15

In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

Article 16

The foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offers of assistance.

Article 17

Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(l) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

CHAPTER V: GENERAL PROVISION

Article 18

This Treaty shall be signed by the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand. It shall be ratified in accordance with the constitutional procedures of each signatory State. It shall be open for accession by other States in Southeast Asia.

Article 19

This Treaty shall enter into force on the date of the deposit of the fifth instrument of ratification with the Governments of the signatory States which are designated Depositories of this Treaty and the instruments of ratification or accession.

Article 20

This Treaty is drawn up in the official languages of the High Contracting Parties, all of which are equally authoritative. There shall be an agreed common translation of the texts in the English language. Any divergent interpretation of the common text shall be settled by negotiation.

IN FAITH THEREOF the High Contracting Parties have signed the Treaty and have hereto affixed their Seals.

DONE at Denpasar, Bali, this twenty-fourth day of February in the year one thousand nine hundred and seventy-six.

Source: Available at http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/aseantre.htm (10/3/03)

APPENDIX C. DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA

The Government of the People's Republic of China and the Governments of the Member States of ASEAN,

REAFFIRMING their determination to consolidate and develop the friendship and cooperation existing between their people and the governments with the view to promoting a 21st century-oriented partnership of good neighbourliness and mutual trust;

COGNIZANT of the need to promote a peaceful, friendly and harmonious environment in the South China Sea between ASEAN and China for the enhancement of peace, stability, economic growth and prosperity in the region;

COMMITTED to enhancing the principles and objectives of the 1997 Joint Statement of the Meeting of President of the People's Republic of China and the Heads of State/Government of the Member States of ASEAN;

DESIRING to enhance favourable conditions for a peaceful and durable solution of differences and disputes among the countries concerned;
HEREBY DECLARE the following:

1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;

2. The Parties are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;

3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and over flight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self- restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays and other features and to handle their differences in a constructive manner;

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

a. Holding dialogues and exchange of views as appropriate between their defense and military officials;

b. Ensuring just and humane treatment of all persons who are either in danger or in

distress;

c. Notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and

d. Exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

a. Marine environmental protection;
b. Marine scientific research;
c. Safety of navigation and communication at sea;
d. Search and rescue operation; and
e. Combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation, should be agreed upon by the Parties concerned prior to their actual implementation.

7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;

9. The Parties encourage other countries to respect the principles contained in this Declaration;

10. The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

Done on the Fourth Day of November in the Year Two Thousand and Two in Phnom Penh, the Kingdom of Cambodia.

Source: Available at **http://www.aseansec.org/13163.htm** (10/2/03)

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