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Date Sept 29, 1987
Abstract

The Spratly Islands conflict is somewhat artificial. While longstanding issues of territorial sovereignty are certainly part of this dispute, it is the yet unconfirmed suspicion that oil and/or natural gas exist beneath the seabed that has made this issue so contentious and, on occasion, has forced some of the disputants to exchange gunfire on the high seas. The untried assumption that hydrocarbons exist beneath the Spratly archipelago is now treated as fact. Not only have numerous academics adopted it as part of their work, but because the governments involved in this dispute have also accepted this conjecture as fact, they have all pursued confrontational and aggressive policies in the Spratly area.

In order to refocus the nature of the discourse surrounding the Spratly conflict, this paper will take as its point of departure the fact that no one yet knows the true hydrocarbon wealth of the Spratly chain. With this in mind, the author proceeds to revisit a number of the related issues that have further contributed to this conflict, including the widespread belief that all of the littoral states will confront an energy shortage --- an expectation that further raises the stakes of the Spratly issue. In challenging these commonly accepted ideas, the paper also poses a challenge to the structural realist school of thought which, until know, has been the theoretical paradigm of choice when examining the Spratly conflict. The author argues that, because ignorance and misinformation have fed the Spratly conflict, constructed realism provides students with a much better framework for analysis. Rather than accepting the notion that the interests of the states are determined exogenously and through a calculation of relative capabilities, the evidence suggests that the disputants have created a security dilemma for themselves through their own mistaken
perceptions and interpretations. Therefore, in order to peacefully manage this issue, the project must be to arrive at a multilateral mechanism that keeps the facts at the forefront and helps reshape the existing discourse.

As part of this analysis, the paper provides a review of the UN Convention of the Law of the Sea (UNCLOS) and, while praising its contribution to setting a consistent set of ground rules, highlights its inability to address the Spratly issue on its own. By accounting for the unique history behind the Spratly dispute, and looking closely at some of UNCLOS' central ideas, the author sheds some light on the sorts of difficulties that have emerged thus far in attempting to apply the Convention to the Spratly conflict.

In order to address these issues, the author suggests the creation of the South China Sea Forum for Consultation and Dispute Mediation (the Forum). Based on the impressive work of the South China Sea Informal Working Group at the University of British Columbia, the Forum would provide a unique mechanism with which to expand the existing Track II (unofficial) diplomatic dialogue that has emerged thus far regarding the Spratly dispute. Not only would it provide a way to help move the work of the Informal Working Group into official policy channels, but it would also help broaden regional participation in resolving South China Sea issues. While the suggestion being made in this paper is not without its difficulties, it represents a creative contribution to the growing body of policy relevant work being done on South China Sea issues while, at the same time, suggesting how the Asia Pacific region might confront its other outstanding territorial disputes.
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Introduction

At a time when many academics and journalists alike are trumpeting the ongoing prosperity and integration of the Asia Pacific region, many of the region’s longstanding security issues are being subsumed beneath naive hopes that economic interdependence will somehow transcend the region’s historic divisions and cause policy makers to forget East Asia’s complex and difficult security issues. Despite this, there remain significant territorial disputes that threaten regional stability and they show no signs of subsiding in the wake of East Asia’s economic growth and prosperity.

The dispute over the Spratly Islands is one such issue. Nestled among the Philippines (off the island of Palawan), Malaysia, and Vietnam, this dispersed collection coral reefs, atolls, shoals and islets is the subject of an ongoing dispute between China (including Taiwan), Vietnam, Malaysia, the Philippines, and Brunei. In total, the Spratlys comprise approximately 150 islets, reefs and sand banks scattered over approximately 70,000 km$^2$ of the South China Sea and stretch for more than 500 nautical miles (nm) from north to south. Based on its nearest points, the Spratly archipelago is less than 100 nm from the coasts of both the Philippines and Malaysia and some 350 nm east of Vietnam.\(^1\) Were it not for their location along some of the world’s most valuable shipping routes, and the yet unconfirmed suspicion that they may be hiding significant deposits of oil and natural gas\(^2\), the Spratly issue might have remained relatively obscure and unimportant.

The significance of the Spratlys is manifold. Not only does the Spratly question embody

\(^1\)Marwyn S. Samuels, [Contest for the South China Sea](New York: Methuen, 1982, Appendix F: A Basic Gazeteer).

a series of different issues (relating to questions of territorial sovereignty, natural resources, and economic development), but their unique location alongside some of the region’s most valuable shipping lanes suggests that continued conflict over the Spratlys may threaten East Asia’s economic prosperity as the bulk of the region’s trade is seaborne. As the Spratlys are scattered over a major portion of the South China Sea, unresolved questions over ownership and control leave the entire South China Sea open to the control of a single nation-state. As some have already noted, the Spratlys could be the basis for claiming a large sea area as either territorial sea or economic zone, including the seabed beneath.\(^3\)

As has been pointed out by Martin Katchen, because the Spratlys are so widely dispersed, the main sea lanes through the South China Sea will fall in the territorial or archipelagic waters of either China or Vietnam should either nation possess all of the Spratlys and choose to assert itself. In addition, the Palawan Passage between the Spratly Islands and the Philippines would fall within the territorial waters of the Philippines on the basis of the islands it now possesses, should it decide to make the claim.\(^4\)

Despite the international significance of this issue, and the fact that the Spratly question has plagued the region for some time, there remains a dearth of accurate information on the hydrocarbon potential of the Spratlys and, as a result, the sorts of issues that are truly driving this

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\(^4\)Martin H. Katchen, “The Spratly Islands and the Law of the Sea: ‘Dangerous Ground’ for Asian Peace”, *Asian Survey*, Vol. 17, No. 12 (December 1977), pp. 1167-1181. Of course, Katchen’s analysis is somewhat dated as it reflects the state of UNCLOS at the time of writing. Under UNCLOS III, neither Vietnam nor China qualify as archipelagic states and, therefore, are not subject to the specific criteria provided for archipelagic states in UNCLOS. This does not, however, deny Katchen his basic point regarding the vastness of the Spratly chain and the implications that sovereign control for the rest of the South China Sea.
dispute.

Contributing to this oversight in the existing body of research is the fact that there is an embarrassing amount of misinformation about the Spratly issue available for consumption by unsuspecting students. One of the key illusions that continues to plague the literature is the assumption, employed by numerous pundits, that there is oil and natural gas under the seabed of the Spratly chain. Unfortunately, this sort of speculation is now treated as if it is fact and it has led to misunderstandings on the part of students and policy makers alike. Moreover, this assumption has raised the stakes of the dispute and has resulted in inter-state violence on the high seas.

Broadly conceived, this thesis has two main objectives. The first is to move away from the myths and refocus attention on the known facts of the Spratly archipelago. Keeping these facts in mind, the paper will undertake an assessment of the primary mechanism available to help resolve the issue, the UN Convention on the Law of the Sea, in order to determine whether or not it is well-suited to helping ameliorate this particular conflict. As part of this first objective, an attempt will be made to assess the various theoretical perspectives that have been put forth to account for this dispute and, in doing so, shed some light on how misinformation and misperception have contributed to the evolution of the Spratly conflict.

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6This is not to say that all assessments of the Spratly dispute make this mistake. In particular, the author is thinking of: Craig A. Snyder, “Making Mischief in the South China Sea”, CANCAPS Paper Number 7, August 1995, p. 1, footnote #3.
Having accomplished this, the second objective is to arrive at a suitable mechanism that will help expand the unofficial (or ‘Track II’) dialogue that has emerged surrounding the South China Sea and, in doing so, contribute to the peaceful management of Spratly/South China Sea issues. Having reviewed the United Nations Convention on the Law of the Sea (UNCLOS or UNCLOS III), as well as the growing number of Track II dialogue mechanisms in the region, the thesis will outline the creation of a new forum that seeks to address the shortcomings of the existing mechanisms while gently pushing the mediation/settlement process forward.

Not only will this thesis provide a more nuanced interpretation of the Spratly Islands dispute, and how the forces shaping the Spratly question have evolved over time, but it will also review carefully the key issues that are thought to be driving the conflict. For example, by reexamining the suggestion that there may be hydrocarbons beneath the seabed, and carefully assessing the true energy needs of the states involved, this paper will revisit the argument put forth by some that control of the Spratlys will help resolve the oil/energy shortages that many of the littoral states are expected to confront. By refocusing the existing academic and intergovernmental discourse regarding the Spratly islands, this project will provide analysts with a more complex understanding of this conflict and guide them to a more useful discussion of how it might be resolved.

The thesis is organized in the following way. First, chapter one provides some historical background to the conflict as well as an overview of each state’s claim. Following on this, chapter two grapples with the key theoretical paradigm suggested thus far to explain the Spratly conflict (structural realism) while also suggesting how, rather than being dictated by exogenous structural factors, the Spratly conflict is the result of misinformation and misperception. In order to show how some available norms and practices have contributed to this unfortunate process,
chapter three undertakes a close assessment of UNCLOS III and some of the unique difficulties it confronts in trying to provide the disputants with a framework for managing the conflict. With an eye to addressing these shortcomings and the obstacles that confront the various unofficial mechanisms, chapter four suggests the creation of a new mechanism that builds on existing tools and seeks to further entrench regional cooperation on this issue.
Chapter One

The Nature of Each Claim

Throughout the history of the Spratly conflict, each of the six disputants has laid its claim using a variety of, sometimes contradictory, criteria. While some states claim that they were first to discover the Spratlys and, hence, have a legitimate claim to sovereign control, others argue that having demonstrated effective administration and control (i.e., through continued occupancy, maintaining regular patrols and/or establishing oil exploration rigs in the adjacent waters) entitles them to portions of the Spratly chain. In some cases, some states have attempted to use the stipulations outlined in UNCLOS III pertaining to exclusive economic zones (EEZs) and/or archipelagic states. As this chapter will show, the use of these conflicting approaches has resulted in a terribly complicated series of claims and counter-claims that has baffled existing mechanisms for dispute resolution on the high seas.

Questions over ownership and control of the Spratlys have been complicated by more than a century of colonial competition beginning in the early 1800s. As the French and British empires crumbled away through the nineteenth and twentieth centuries, they left in their wake a series of power vacuums and, as a result, a dearth of regularized/systematic mechanisms with which to resolve competing interests and questions of sovereignty. Issues surrounding the South China Sea first began to garner international attention towards the end of the nineteenth century as the various foreign powers in the region, Britain, France and Japan, competed and negotiated with one another and with China over sovereign control of the South China Sea. As these various powers withdrew from Southeast Asia, other states were brought into the fray, some (such as Vietnam) by virtue of their colonial inheritance of claims to the South China Sea. One of the greatest difficulties in deciding the legitimacy of each claim is arriving at a common set of
criteria on which states can establish their claims. While China, Taiwan and Vietnam claim the entirety of the Spratlys due to what they perceive as their historical right to the area, Brunei, Malaysia and the Philippines argue that the extension of their continental shelves entitles them to parts of the Spratly archipelago. Unfortunately, there is no agreement as to who ‘discovered’ the Spratlys first and whose historical claim should take precedence.

Similar disagreements exist on how to reconcile the historically-based claims with those that employ the norms of international law and territorial delineation outlined in UNCLOS. Hence, one of the difficulties is agreeing to what sort of claim (historical discovery, colonial inheritance, continental shelf claims, etc.) should be deemed legitimate. Once this is sorted out, it is necessary to then discern the accuracy of each claim, regardless of how/why it is being made. These are not mean tasks.

While attempting to generalize about each disputant’s claim to the Spratlys is a virtually impossible task, it is useful for the reader to gain a broad understanding of how each party sees its claim and how these claims are perceived by the others involved. The following paragraphs, while by no means an exhaustive review, are meant to outline and summarize the nature of each disputant’s claims.8

China

Although Beijing contends that their claim to the entirety of the South China Sea dates to

7At the same time, the Philippines’ claim is also based on the notion that some of the Spratlys were discovered in 1956 by Thomas Cloma, a private Filipino citizen, and that, up until that time, the Spratlys were considered terra nullius.

8For a much more thorough examination of each country’s position, see: R. Haller-Trost, The Spratly Islands: A Study on the Limitations of International Law (University of Canterbury, Kent: Centre of South-East Asian Studies, 1990).
the 1700s, one of China’s earliest (and most formal) claims emerged with the signing of the Convention Respecting the Delimitation of the Frontier between China and Tonkin (resulting from the Sino-French War of 1884-1885) on June 26, 1887. Article 3 of the Convention provided for a delimitation line to divide French and Chinese territorial claims in the South China Sea. Despite its ambiguities, Chinese officials interpreted Article 3 as giving Beijing ownership and control of the Paracel and Spratly Islands.9 Throughout the rest of the nineteenth century and the early twentieth century, the Chinese made various attempts, much to the chagrin and opposition of the French and the Japanese, to implement the Convention by continually attempting to assert their control and authority over the South China Sea.10

The Spratly Islands conflict became of renewed importance in the closing days of World War II, when Nationalist China (hereafter referred to as the ROC to denote China’s official name before the defeat of Chiang Kai-Shek’s Nationalist forces in 1949) occupied and established an operations base on the island of Itu Aba. Although the dispute had been evolving for several decades, it continued to be, as Marwyn Samuels notes, “a question of sovereignty”. French troops continued to play a role in the dispute by claiming certain islands for themselves and/or aiding Vietnamese claims in the region. Furthermore, ambiguous settlements at the conclusion of World War II11, and the eventual failure of the French empire in Indochina, left the status of


10Samuels, pp. 52-69.

11In particular, the author is referring to the San Francisco Treaty of September 1951 and the Sino-Japanese Peace Treaty signed on April 28, 1952. In both treaties, Article 2 states that “Japan renounces all rights, title and claim to the Spratly Islands and to the Paracel Islands”.
the Spratlys undecided and enabled the ROC to assert *what it felt* was effective control over the Spratly group. Of course, other states involved in the dispute argue that the legal basis of this claim is, at best, dubious.\(^{12}\)

Sporadic claims were laid throughout the next three decades by five of the six disputing governments. During this time, many of these claims went largely unnoticed by the international community and, as a result, were not closely scrutinized to determine their legitimacy. In August 1951, Chou En-lai, then serving as the PRC's Foreign Minister, responded to the draft of the San Francisco Treaty by clearly outlining Peking's position on the South China Sea:

> In fact, the Paracel Archipelago and Spratly Island, as well as the whole Spratly Archipelago ... have always been Chinese territory. Though occupied for some time during the war of aggression unleashed by Japanese imperialism, they were taken over by the then Chinese government following Japan's surrender. The Central People's Government of the People's Republic of China declares herewith: The inviolable sovereignty of the People's Republic of China over Spratly Island and the Paracel Archipelago will by no means be impaired, irrespective of whether the American-British draft for a peace treaty with Japan should make any stipulations and of the nature of any such stipulations.\(^{13}\)

Despite the fact that China, like all the other disputants, has ratified UNCLOS (it did so in 1993), this historically-based argument continues to lie at the foundation of its claim to the Spratlys to this day.\(^{14}\) In fact, as recently as February 25, 1992, the Standing Committee of the National People's Congress adopted the Law on the Territorial Waters and their Contiguous

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\(^{12}\)Not only has this claim been disputed for the normal reasons of territorial integrity and sovereignty, but there is considerable debate over the extent to which states can exercise 'effective sovereignty and control' over uninhabitable islands (i.e., islands that, in adhering to the stipulations outlined in UNCLOS III, one must conclude cannot support economic activity or human habitation).

\(^{13}\)As quoted in Samuels, p. 79.

\(^{14}\)Presently, the basic principles outlined in UNCLOS seem to have played, at best, a limited role in helping Beijing decide its claim to the Spratlys. For a closer exploration, see: Jeanette Greenfield, *China's Practice of the Law of the Sea* (Toronto: Oxford University Press, 1992), pp. 150-167.
Areas. The Law decrees that “the extent of the PRC’s territorial waters measures 12 nautical miles from the datum-line of the territorial waters”.\textsuperscript{15} China, however, has not yet published its decided base-lines from which territorial waters in the Spratlys can be measured, thus leaving the whole issue unsettled.

Although the Chinese government has recently made statements suggesting that the Spratlys’ (alleged) resources might be jointly administered, its overtures in this regard continue to cling to the notion that, despite everything, China has a historical right to the Spratlys. As China’s Foreign Minister, Qian Qichen, noted at the July 1995 meeting of ASEAN ministers, although China is prepared to entertain the possibility of working “together with the countries concerned to resolve appropriately the relevant disputes according to the recognized international law”, and that “[j]oint development is the most realistic and practical way of handling the dispute”, China maintains “indisputable sovereignty” over the Spratlys.\textsuperscript{16}

\textit{Taiwan}

Following closely on China’s claim is that of the ROC (Taiwan).\textsuperscript{17} As noted earlier, the aftermath of World War II saw Taiwanese troops as the earliest to occupy part of the Spratly group in the hopes of asserting effective control and authority. As early as 1946, the ROC sent a

\begin{footnotesize}
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\item[17]In fact, despite the fact that both governments articulate separate positions on the Spratlys, their claims coincide with one another. Hence, as far as the Spratly issue is concerned, the outstanding ‘Taiwan issue’ is largely inconsequential.
\end{enumerate}
\end{footnotesize}
marine garrison to Itu Aba. Although they were withdrawn in 1948 in order to fight communist
forces from the mainland, they were redeployed to Itu Aba in 1956 and have remained there ever
since. At the root of Taiwan’s claim, there lies an historical argument similar to that put forth by
China. Even though the Taiwanese government has recently revised its policy on the Spratlys,18
its historical claim is made quite clear at the outset of the document.

On the basis of history, geography, international law and the facts, the Spratly Islands ... have always been part of the inherent territory of the Republic of China. The sovereignty
of the Republic of China over them is beyond doubt.19

While arguing that Taiwanese fisherman have relied on the waters of the South China Sea for
centuries, the ROC also asserts that it has been the most successful at demonstrating effective
administration of some islands in the Spratly chain. While employing the ‘historic waters’
argument is difficult, as it substantially increases the burden of proof, Taipei continues to place
this notion at the centre of its policy towards the South China Sea.

While the ROC’s official position on the Spratlys is often seen as being identical to that
of the PRC, domestic divisions on the issue of ROC-PRC relations prevent a united policy
position as to whether or not Taiwan should identify closely with the position of the PRC in the
South China Sea.20 Those who consider the PRC a genuine threat to Taiwan’s security argue
against an identical position as it would scare disputants away from negotiating directly with
Taipei. However, those that see stable cross-straits relations as key to Taiwan’s continued
economic prosperity assert that close cooperation in the South China Sea is essential to building

18 For more on this, see: Kuan-Ming Sun, “Policy of the Republic of China Towards the

19 “Policy Guidelines for the South China Sea”, included as Appendix 1 in Ibid., pp. 408-
409.

20 This discussion draws heavily from: Cheng-yi Lin, “Taiwan’s South China Sea Policy”,
confidence between Taipei and Beijing. Indeed, neither of these positions is truly in Taiwan’s interests as one would antagonize Beijing while the other would invite the harsh criticism of ASEAN’s members and threaten Taiwan’s growing economic interests there. In the absence of substantial changes to the status quo regarding the ‘Taiwan issue’, Taipei will continue to balance its various domestic constituencies and, in the process, continue to push for the peaceful settlement of the Spratly issue while not seeming to commit too strongly to one side or another.

Vietnam

Much like China and Taiwan, Vietnam’s claim to the Spratlys is also based on what it sees as its historical right. The Vietnamese government argues that, since the 1800s, Vietnamese emperors have effectively administered the Spratlys and that maps from the era show the Spratlys to be under Vietnamese control. While Saigon concedes that it lost interest and failed to effectively administer the Spratlys, it maintains that it regained its right to the archipelago when it inherited the Spratlys from its colonial master upon independence from France. At the Seventh Plenary Session of the United Nations General Assembly in 1951, Prime Minister Tran Van Huu stated that,

As we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our right to the Spratly and Paracel Islands, which have always belonged to Vietnam.21

Although Vietnam’s official position has not changed, the fact that its claim to the entirety of the Spratly chain is based on its colonial inheritance leads to a significant contradiction. France only claimed authority over part of the Spratly chain, not the entire group of islands. Hence, at the most, Vietnam can inherit only those islands over which France had

21Ibid.
legitimate rights — not the whole archipelago. As one can imagine, China and Vietnam cannot agree which has the earliest historical claim and, as a result, which one is superior.

**The Philippines**

Further complicating the Spratly issue are the subsequent claims of the Philippines and Malaysia. The Philippines’ earliest claim was in 1956 when a private Filipino citizen, Thomas Cloma, claimed that he discovered a group of islands and designated them the ‘Kalayaan’ islands (the Freedom islands). More than a decade later, in 1968, the Philippine military occupied eight of the islands in Cloma’s original claim. It was not until 1978, when President Ferdinand Marcos issued Decree number 1596, that the Philippines formally annexed the islands. Since 1968, the Filipino military has posted garrisons on seven of the features. At the same time, it has developed a military air strip on Thitu Island. Until very recently, Manila has relied on its Mutual Defence Treaty (MDT) with the United States in order to maintain its position in the Spratlys. However, with the withdrawal of American troops from Clark Air force Base and Subic Bay, the Filipino government has had to find new ways to defend its interests in the region.

**Malaysia**

Malaysia’s claim followed in 1979. Using its continental shelf, and claiming that certain islands from the Spratly chain fall within its allowable territorial sea and/or exclusive economic zone, Malaysia has claimed a series of the islands for itself also arguing that they were *res nullius* prior to Malaysia’s arrival. While its claim seems to be consistent with the stipulations outlined in UNCLOS, it is, of course, being disputed by a number of the other combatants involved.²²

²²For more on Malaysia’s interpretation of UNCLOS and an exploration of other pieces of legislation it has enacted in order to complement UNCLOS, see: Hamzah Bin Ahmad, *Malaysia's Exclusive Economic Zone: A Study in Legal Aspects* (Selangor Darul Ehsan:
While some, like China and Taiwan, argue that their historical entitlement to the Spratlys supersedes Malaysia's particular interpretation of international law, others dispute Malaysia’s particular interpretation of international law and/or their claim that these particular islands were previously uninhabited.

One issue that is important to all of the smaller states involved is maintaining the freedom of the high seas and ensuring that the sea lines of communication (SLOCS) remain open and accessible. Generally, some US$949.5 billion of trade flow through Southeast Asia's straits and shipping lanes, with the sea lanes in the South China Sea accounting for a significant portion of this figure.\(^{23}\) Given the importance of sea-borne trade to the continued economic prosperity and security of most states in the region, and the strategic economic importance of the sea lanes that sit adjacent to the Spratly archipelago, ensuring that the shipping lanes through the South China Sea do not come under the exclusive jurisdiction of any one state is exceedingly important to the national economic and development priorities of East Asian states. While a number of different issues endanger free access to the SLOCS, including piracy and natural disasters, a number of the key threats include military concerns, such as conflicts between littoral states, and non-military concerns, which include the ‘creeping jurisdiction’ of regional powers (e.g., the PRC).\(^{24}\) As another issue that complicates the existing dispute, finding ways to balance these concerns with

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the various other issues outlined above will certainly prove challenging.

The Spratly islands have, at various times throughout history, been the subject of diplomatic as well as military confrontation. Some recent notable moments in the Spratly dispute were in 1988, 1992, 1994 and 1995. Each of these dates saw naval skirmishes between and among any number of the six combatants; these confrontations have included arresting one another’s fisherman for operating in disputed waters; illegally occupying others’ islands and reefs; the deployment of gunboats to interrupt the supply of food and equipment to oil rigs drilling disturbingly close to (though still outside) the Spratly archipelago; and the exchange of gunfire. More recently, in early 1997, three Chinese warships were sighted near two Philippine-occupied islands, Kota and Panata, where the Philippines navy discovered yet another “hut-like structure” allegedly built for the protection of Chinese fisherman. While the outcome of China’s increasingly frequent incursions on Filipino-controlled features in the Spratlys is not clear, the growing impatience of officials in Manila, as well as the possibility that the Spratly issue may become a central issue in the 1998 election, could endanger the peace.

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Chapter Two - Sovereignty, International Relations Theory and the Spratly Dispute

The Spratly conflict is something of a microcosm of the various issues that affect the Asia Pacific region more generally, including the pressures that economic growth and prosperity place on the exploitation of non-renewable resources, sovereignty, international law, and the possibility of an arms race. In the case the Spratlys, these issues come together and, in doing so, each contributes to the ebb and flow of the conflict. This has resulted in an exceedingly complex situation where facts, myths and expectations have been woven together in an uneven and dangerously frail tapestry. While each of these issues has been addressed in other writings, this chapter will examine each separately and then bring them together into a more fully-integrated and comprehensive discussion. Having explored these issues, this section will also review the various theoretical paradigms that might account for the nature of the conflict and the behaviour of the ‘Spratly six’.

At play in the Spratly conflict is a dual tension between two different perceptions of sovereignty. Prior to the signing of UNCLOS in 1982, the United Nations had attempted to establish a common set of criteria for claiming territorial seas and defining state authority in the oceans. 1958 and 1960, respectively, saw the first and second Conferences on the Law of the Sea. Although both of these earlier Conferences attempted to agree on the width of the territorial sea to be allotted to each state, policy makers could not come to a consensus. Hence, during the

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27 The following section is not meant to be a comprehensive history of the Spratly dispute, but rather is meant to provide a general overview. For a more detailed discussion, please see: R. Haller Trost, The Spratly Islands: A Study of the Limitations of International Law (Canterbury: Centre of South-East Asian Studies, Occasional Paper No. 14, 1990) and Chi-Kin Lo, China’s Policy Towards Territorial Disputes: The Case of the South China Sea Islands (New York: Routledge, 1989).

1960s and 1970s, a number of states attempted to assert de facto authority over territorial seas of various distances. While exclusive fishery zones of some 12 nm beyond the territorial sea became quite common during the 1960s, a number of states had exceeded the 12 nm fishery zone by the 1970s. In fact, some, such as Iceland, attempted to claim a 50 nm fishery zone.29

These various claims, however, were eventually surpassed with the conclusion of the third Conference on the Law of the Sea in 1982, Part V of which outlined the creation of a 200 nm EEZ. Article 57 of UNCLOS defined the extent of the EEZ as “an area beyond and adjacent to the territorial sea”, which “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.30

During the negotiation of UNCLOS I and III, there was an ongoing attempt to grapple with what could be seen as competing ideas as to whether or not states could exercise any sort of authority over natural resources under the seabed. Natural resources discovered under the ocean could be treated in one of two ways: either they could be thought of as the ‘common heritage of mankind’ (CHM --- in which case strategies should be found to ensure that they were jointly administered and developed), or mechanisms could be found to extend national sovereignty and exclusive jurisdiction over these areas.

In some ways, this question was decided in 1958 with the conclusion of the Continental Shelf Convention. Article 1 reads:

For the purpose of these Articles, the term ‘continental shelf’ is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the

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superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar areas adjacent to the coasts of islands.\(^{31}\)

This definition was subsequently adopted at the first UN Conference on the Law of the Sea in 1958 and it has survived through to UNCLOS III. The focus on resource exploitation is clear. Moreover, UNCLOS III has enhanced this principle. Article 76 stipulates that every coastal state has a 200 nm continental shelf for the purpose of resource exploitation rights, irrespective of the true size of its geological continental shelf. As Schrijver points out, the continental shelf regime, and its adoption into UNCLOS I, opened the door for the creation a 200 nm exclusive economic zone (EEZ).

As is clear from the eventual signing, and widespread ratification of UNCLOS III (with the notion of a continental shelf and EEZ\(^{32}\) at its core), the notion that national sovereignty could be extended over resource-rich areas of the ocean has emerged as the dominant theme behind existing international law and accepted conventional practice.\(^{33}\) As Oscar Schachter points out in his thoughtful treatise on the history of international agreements meant to resolve competing claims over the world’s resources, a review of the principles that lie behind the EEZ shows that, at least at the outset, EEZs were conceived with an eye to balancing the two contending


\(^{32}\)There are several issues that the EEZ concept was meant to address besides the more traditional sovereignty-related questions, including the geological realities of the territory in question, the possibility of marine pollution by foreign states, and the need to limit the incursions of foreign fishing vessels who have very little interest in ensuring the long-term viability of fish stocks.

\(^{33}\)In saying this, the author recognizes that the CHM principle is part of UNCLOS III, in particular Article 137. However, as Schrijver notes, resources are to be treated as resources *in situ* (not yet extracted) and, therefore, are "no longer subject to the CHM principle and can be freely disposed of."
arguments noted earlier. While there was increasing pressure from coastal states wanting to assert national sovereignty over the ocean’s resources, there was also a growing notion that there was a need to retain some sense of communal responsibility for the sea. Leaving aside the notion of sovereign control and exclusive exploitation for profit, EEZs were also devised as a mechanism to stave off unfettered exploitation and pollution by other states that had no vested interest in maintaining the environmental integrity of oceans and coastlines adjacent to other states.

However, as suggested above, the notion of an exclusive economic zone became increasingly salient leading up to and during the negotiation of UNCLOS III. Hence, the idea that the oceans (and the resources presumed to be under the ocean floor) were, at some level, to be considered a public good lost its prominence. As an increasing number of studies and surveys began to indicate that the oceans contained significant, though not unlimited, resource wealth, the argument that these riches were to be treated more like private property won the day. As Schachter writes,

In recent years, however, it has become evident that the conditions of joint availability and indivisibility are no longer applicable to the removable resources of the ocean. ... The new resources, oil, gas, and hard minerals, are also not ‘jointly available’. ... Nor can it be said that the exploitation of these resources is indivisible. ... In sum, the criteria of a collective good no longer apply to the removable resources of the ocean, although they still hold for navigation and communication.

While there may be some concern that Schachter’s contribution is rather dated, his thoughtful reflections on the nature and history of the EEZ concept remain relevant to this discussion. Moreover, despite the fact that he published his text twenty years ago, the difficulties he foresaw with UNCLOS were accurate, as is evidenced by the difficulties UNCLOS has encountered in attempting to provide the disputants with a workable framework for the Spratly dispute (see Chapter 3).

For a listing of these principles, see: Schachter, pp. 45-46.

Ibid., p. 39.
However, in a case such as the Spratlys, one must wonder how helpful this idea is when an accurate assessment of the archipelago’s hydrocarbon wealth remains unclear.

Interestingly, even before the conclusion of UNCLOS, Schachter foresaw some of the shortcomings and practical difficulties that the EEZ idea would generate as states attempted to apply it to their own situations. Unsurprisingly, some of the issues he pointed out in 1977 are very similar to those that plague the application of UNCLOS to the Spratly conflict today. He writes that,

On the other hand, we can expect the new system to be subject to many strains and pressures. These will occur partly because conflicts and disputes will surely arise over different interpretations of the rights and obligations of the states concerned. ... There can be little doubt that these issues and others will give rise to numerous differences over the application of general formulas to particular cases.\(^{37}\)

While a more detailed discussion of these sorts of issues will take place in chapter 3, it is interesting to see how international law has evolved; it begins to suggest to the reader why some of the shortcomings in the present discourse over the Spratly question (noted earlier) have emerged. Moreover, it also sheds some light on how international relations theory might help students reconceptualize the problem. To do this, however, a discussion of structural realism (thus far the theoretical school of choice when discussing the Spratlys), and its shortcomings, is necessary.

**Whither IR Theory?**

At the centre of this discussion is the difficult question of how national interests are formed. According to structural realism, interests are decided as a result of an objective assessment of the state’s relative capabilities and, as a result, its position in the international

\(^{37}\)Ibid., p. 48. Also, see Schrijver, pp. 209-213 --- while it is true that Schrijver benefits from perfect hindsight, the difficulties he outlines reflects closely UNCLOS’ experience in the helping to resolve the Spratly question.
system (or structure). Similar to its earlier cousin, classical realism, structural realism also argues that states are engaged in a competitive struggle in which they are the primary actors, relative gains are most important, and conflict is inevitable. Power aggrandizement is valuable insofar as it helps to ensure the state’s survival in the system. Not only does their position in the structure, defined by their relative capabilities, dictate how states perceive international relations, but it also dictates their behaviour. Based on an objective assessment of their military and economic capabilities, governments will choose from a series of foreign policy options. The focus of structural realism is material interests, especially insofar as they contribute to enhancing the state’s relative military and/or economic capabilities. While many structural realists have tended to focus on military procurement as the primary means by which this happens, more nuanced understandings, such as that provided by Robert Gilpin, suggest that power enhancement can also be achieved by ensuring the state’s technological and economic competitiveness. Clearly, ensuring that the state has secure access to crucial raw materials and strategic minerals (e.g., oil) would fall within this paradigm. This accounts for the widespread belief that structural realism offers students a comprehensive analytical tool with which to understand the Spratly conflict.

Alternatively, the fact that the Spratly issue seems to fit so nicely within the structural realist paradigm might merely be a function of how the inter-governmental discourse has evolved. Rather than suggesting that national interests are determined exogenously, one could argue that how these states perceive their interests (i.e., the importance of gaining sovereign control over, and access to, the natural resources that are thought to be below the Spratlys) is a

function of their subjective understanding of the issues and other states' interests vis-à-vis these concerns. Briefly stated, the conflict over the Spratly islands has emerged because of the archipelago's alleged hydrocarbon wealth. The fact that there is no independent research suggesting whether or not this is true has been lost on the disputants. They have chosen to assume that oil and/or natural gas can be found below the Spratlys. This has raised the stakes involved and, in doing so, has shaped their perception of one another's interests. This self-fulfilling process has been exacerbated by the fact that, in order to justify their activities in the South China Sea, many of these governments have articulated these concerns to their respective national constituencies. Regardless of the truth, maintaining an assertive/unaccommodating foreign policy in the Spratlys was perceived as a sign of strength and, eventually, became linked to ensuring the government's electoral/bureaucratic support. Arguably, if these governments were given an opportunity to back away from their stated positions, and re-focus their attention on dividing the myths from the facts, the Spratly issue would have evolved in a remarkably different way.

At play in the Spratly dispute are several phenomena that generate contending pressures and, as a result, raise some questions regarding the nature of the motivations driving state behaviour. In the process, these considerations cast some doubt on the utility of structural realism. As this paper moves readers away from the analysis suggested in the popular journalism and by some academics, one finds that the realist school is not as useful as was originally thought. In order to understand why this is so, it is necessary to revisit an idea that is implicit in the conventional thinking and central to the realist paradigm: the idea that an impending energy shortage will soon confront a number of Asia Pacific states, including each of the littoral states involved in the Spratly conflict. Those that employ structural realism to account for the Spratly
dispute argue that East Asia's increasingly desperate search for secure oil supplies (a material resource central to a state's economic and military capabilities) will escalate the Spratly dispute and force it to become violent.\textsuperscript{39} Indeed, the possibility of an oil shortage is central to the objective assessment of relative capabilities that is so important to the structural realist paradigm. If, however, doubt can be cast upon the notion that the region will face an energy crisis, then structural realism will suffer a considerable blow.

\textit{The Energy Issue - How Real Is It?}

There is a significant body of literature surrounding the importance of strategic minerals to state power and international conflict. Indeed, as David Haglund suggests, a structural realist framework can help students make the links between state access to strategic minerals and resources, military and economic power and the prospects of international conflict over access such minerals. Interestingly, these links are similar to the relationship between the military and the economy suggested by Gilpin.\textsuperscript{40} As Haglund writes,

\begin{quote}
But if, as I suspect, military potential is enmeshed in the same kind of conceptual broadening process that has seen national security come to mean security in an economic as well as physical sense, then surely the military potential of stronger economies -- no matter how it is measured or what it signifies -- has to be greater than that of weaker economies, all other things being equal. ... The point is that while the new geopolitics of minerals is indeed less deterministic than the old insofar as the relationship of minerals to military potential is concerned, it remains the case that issues of minerals access possess meaning in the military context.\textsuperscript{41}
\end{quote}

\textsuperscript{39}For example, see: Mark J. Valencia, "International Conflict Over Marine Resources in South-East Asia: Trends in Politicization and Militarization" in \textit{Conflict over Natural Resources in South-East Asia and the Pacific}, Lim Teck Ghee and Mark J. Valencia, eds. (New York: Oxford University Press, 1990), p. 97 and pp. 103-106. Also, see: "Quenching the Tigers' Thirst", \textit{The Economist}, August 15, 1992, p. 25.

\textsuperscript{40}Gilpin, \textit{War and Change in World Politics}.

In the case of the Spratlys, this sort of analysis has been taken even further. As a result of the considerable growth that each of these economies has experienced since the mid-1960s, a number of these countries are confronting (or will confront) an energy shortage. As the structural realist school would argue, this need for new sources of oil has driven, and will continue to drive, these states towards military conflict.

China provides students with a useful example here. As suggested earlier, China does seem to be confronting an energy shortfall, having become a net importer of oil in 1992. In light of its rising consumption, flagging output and declining oil reserves, China must locate new oil supplies and/or turn to alternative sources of energy if it expects to continue its rapid economic growth and industrialization.42

Table 1: China’s Crude Oil Production versus Consumption, 1990-2000 (mbd)43

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<tr>
<td>Production</td>
<td>2.79</td>
<td>2.81</td>
<td>2.85</td>
<td>2.90</td>
<td>2.91</td>
<td>2.89</td>
<td>2.47</td>
<td>-11.5</td>
</tr>
<tr>
<td>Consumption</td>
<td>2.27</td>
<td>2.41</td>
<td>2.66</td>
<td>2.98</td>
<td>3.00</td>
<td>3.24</td>
<td>4.53</td>
<td>+100.0</td>
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<tr>
<td>Balance</td>
<td>0.52</td>
<td>0.40</td>
<td>0.19</td>
<td>-0.20</td>
<td>-0.09</td>
<td>-0.35</td>
<td>-2.06</td>
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Moreover, there have been several indications that Chinese officials *truly do believe* that

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43 Table taken from Ibid.
below the Spratlys lies a vast quantity of oil\textsuperscript{44} and/or natural gas --- enough to meet the country’s foreseeable demand for oil well into the long-term.

Beginning in 1984, the South Seas Oceanic Research Bureau of the Chinese Academy of Sciences undertook a survey of the Spratlys. Although China’s explorations lapsed for a short while, Beijing then launched an investigation in 1987 intended to explore the possibility of building observation stations on some of the vacant features. China then released the findings of their exploratory activities in December 1989. According to the Bureau, some 25 million cubic metres of natural gas along with 370,000 tons of phosphorous and 105 billion barrels of oil lie below the Spratly chain. As well, it was estimated that the James Shoal area contains an additional 91 billion barrels of oil, making the reserves below the Spratlys considerably larger than China’s on-shore reserves.\textsuperscript{45} Taken together, these numbers compare quite favourably with the 122 billion barrels of oil that Iraq (which is ranked second after Saudi Arabia in terms of proven reserves) is thought to hold.\textsuperscript{46} However, not only do the Chinese believe there to be significant hydrocarbon wealth under the Spratlys, but, as a result of what it believes is an objective understanding of its capabilities and interests regarding this dispute, Beijing sees its sovereign control over these resources as integral to its economic security and, hence, its national survival. In his article attempting to explain China’s aggressive behaviour in the Spratlys, John Garver quotes a senior Chinese official from the Ministry of Foreign Affairs as saying that,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{45} \textit{China Daily}, December 24, 1989. As Snyder points out (see footnote #7), these statistics are yet to be independently verified.
\item \textsuperscript{46} See: Pan Shiying, “The Nansha Islands: A Chinese Point of View”, \textit{Window}, September 3, 1993, p. 28. As well, see: Salameh, p. 134.
\end{enumerate}
\end{footnotesize}
In order to make sure that the descendants of the Chinese nation can survive, develop, prosper and flourish in the world of the future, we should vigorously develop and use the oceans. To protect and defend the rights and interests of the reefs and islands within Chinese waters is a sacred mission. ... since the 1970s, the [Spratly] Islands have been occupied by foreign countries. The Chinese government has solemnly declared many times that these islands and reefs are within Chinese territory and other countries are definitely not allowed to invade and occupy them. The [Spratly] Islands not only occupy an important strategic position, but every reef and island is connected to a large area of territorial water and an exclusive economic zone that is priceless. ... The defence of the territorial unity and the protection of the rights and interests of the oceans are significant to the security and development of a country. We should not only pay attention to events today, but should also look out for the future.  

As one can see, despite the fact that there remains considerable doubt (and rightly so) over the accuracy of these statistics, the Chinese have come to treat them as fact and, as a result, this sort of misinformation has resulted in the formulation of dangerous and aggressive policy.  

Structural realism seems to successfully explain Beijing’s behaviour in the Spratly conflict. However, if one briefly reviews the relative capabilities of another key belligerent, Vietnam, the structuralist position fails to satisfy.

First, the suggestion that each of the disputants will confront, if it has not already, an oil/energy crisis (an argument repeatedly being made by the press and some academics) is too simplistic and indicates a failure on the part of many students to look carefully at the energy prospects of the states involved. While it is true that China became a net importer of oil for the first time in 1992, it is not clear that this sort of shortage is looming for any of the other five combatants. Vietnam, for example, which has been almost as aggressive as China in asserting

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and defending its claim to the Spratlys, does not seem to be confronting an insurmountable oil shortage. According to the Asian Development Bank (AsDB), Vietnam exports all of its domestically-produced crude oil as it does not possess the necessary technology to refine it domestically. It presently imports all of its gas/oil needs. Moreover, aside from the fact that it seems to have been successful at exploiting offshore oil fields that lie within its 12 nm territorial sea, the growing amounts of foreign investment in Vietnam's petroleum industry promises to further increase Vietnam's petroleum production. As indicated in a recent paper on Vietnam's growth prospects and export strength,

The prospects for oil exports [in Vietnam] have been particularly good, with annual production output reaching five million tons of crude oil during 1991. Projections for the remainder of this decade suggest that Vietnam's production of crude will surpass the ten million tons per year level before the year 2000. The increased output is (and will be) due primarily to investments made by the numerous Western oil companies ... These firms are utilizing more efficient, state of the art, high technology drilling processes designed to effect greater recovery yields.

This consideration of Vietnam's resource needs (i.e., a material good that contributes to national power) is compounded by an assessment of Vietnam's relative military capabilities. At this time, it seems that Vietnam's air and naval forces are in a precarious state. Operating with obsolete equipment for which spare parts are rarely available, much of Vietnam's forces are often

49 As indicated by Vietnam and China's exchange of gunfire in 1988 that led to the sinking of three Vietnamese naval vessels and the deaths of approximately 74 Vietnamese officers.


inoperable and, as a result, largely inconsequential to their adversaries in the Spratly dispute.\textsuperscript{52}

As Stormont and Schofield note,

\begin{quote}
At best these vessels have a very limited operational capacity and pose little competition to the naval forces of other coastal states and in particular those of China’s South Sea Fleet.\textsuperscript{53}
\end{quote}

When compared to other parties to the Spratly dispute, especially China, Vietnam’s collection of naval and air force equipment is sorely lacking. While it is thought to possess some 185 armed aircraft, and 20 armed helicopters, it possesses only 7 frigates, 55 patrol craft and no submarines. At the same time, China owns 5000 combat aircraft, 54 large warships, 860 patrol craft and some 51 submarines.\textsuperscript{54} While some of these aircraft, if equipped with enough fuel, could travel to the western edge of the Spratlys, it is highly unlikely that they could loiter there for any useful amount of time.\textsuperscript{55} Furthermore, it is unlikely that the Vietnamese air force would risk such a venture given the age of the fleet and the risk it may pose to their personnel. Keeping in mind the high probability that much of this equipment may be inoperable, Vietnam’s military weakness and inferiority relative to China (and other parties to the Spratly dispute) is made clear.

This leaves one rather confused as to why Vietnam has, thus far, been China’s most aggressive adversary in the Spratly conflict (especially considering the events of 1988) and


continues to represent Beijing's largest obstacle to asserting its claim in the Spratly archipelago.

An assessment of Vietnam's relative capabilities cannot explain Vietnam's behaviour.

While one could argue that the prospect of securing access to even more oil wealth fits nicely within the structural realist paradigm, one could also argue that the perceived need to engage in military conflict to ensure secured access should be offset by Vietnam's considerable (and, arguably, growing) oil wealth, especially if one keeps in mind the fact that the Spratlys' true hydrocarbon wealth remains unclear. Furthermore, a review of Vietnam's military capabilities would certainly not argue for military engagement.

Exacerbating these considerations is the fact that, despite what some think, there may be no good reason to believe that there is any hydrocarbon wealth hidden below the Spratlys. Some energy geologists have suggested that a closer assessment of the geology beneath the Spratlys suggests that there may not be any oil or natural gas in the region at all. As E.F. Durkee, a noted energy geologist, points out,

To date there has never been a single barrel of oil produced in the entire Spratly region of the South China Sea. In fact there is not even good or valid geological evidence to show it will ever become an oil producing province.56

His thinking is corroborated by Ian Townsend-Gault, Director of the South China Sea Informal Working Group at the University of British Columbia. In Townsend-Gault's numerous discussions with officials from Shell and British Petroleum, he too has been told that (leaving aside the considerable risk posed by the ongoing international dispute over the Spratlys) undertaking exploration activities in the Spratlys is not very enticing as a cursory review of the region's geology does not, in fact, suggest the presence of the enormous hydrocarbon wealth that

has driven the conflict thus far.  

However, despite what a closer assessment of the Spratlys’ geology might suggest, not only has the prospect of oil wealth driven the Spratly dispute to the brink on several occasions, but this sort of thinking has driven China and Vietnam to grant concessions to American oil exploration firms in disputed areas of the South China Sea.  

In May 1992, Beijing granted an exploration concession to Crestone Energy Corporation. The extensive area over which this concession has been granted, termed Wananbei-21 (or Vanguard Bank), is part of Vietnam’s continental shelf and exclusive economic zone in the Tu Chinh Reef. Despite this, Beijing argues that Crestone’s concession is, in fact, within the Spratly chain and, hence, subject to the territorial water/EEZ rights emanating from features in the archipelago, not the Vietnamese coast. Following on this, Vietnam signed a similar agreement with Mobil Corporation in April 1994 granting it a concession over an adjoining field just west of Crestone’s operations. Beijing, of course, has argued that, as the South China Sea is part of its ‘inland waters’, Mobil’s activities are illegal and constitute a violation of its territorial sovereignty. To reinforce this point, Beijing deployed two warships in July 1994 to intercept vessels meant to resupply Crestone’s exploratory facilities in the Wananbei-21 area.

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57Discussion between author and Dr. Townsend-Gault, 2 July 1997.

58It is important to keep in mind that these concessions have not been in the Spratlys but, at best, on the fringes of the archipelago. Despite this, they do reflect the extent to which the states involved in this dispute are willing to test one another’s resolve because of concerns over hydrocarbons. Arguably, both Beijing’s and Hanoi’s decisions to hire American exploration firms was also a ploy to involve Washington in the Spratly conflict and, if possible, enlist the assistance of American forces in defending their respective claims. American officials, however, have clearly stated their intention to remain clear of South China Sea issues and not defend any of their allies’ claims to disputed territory.

More recently, China opened a new area of dispute in the South China Sea by placing an oil exploration rig some 65 nm off the coast of Vietnam. In response, Hanoi has sought the support of its ASEAN allies and, in doing so, has re-configured the already tenuous balance of power that exists between China and those Southeast Asian states with claims in the South China Sea. Moreover, given that Hanoi has ruled out the possibility of using existing negotiating channels, China’s incursion runs the risk of disrupting its bilateral relations with one of its stiffest opponents regarding South China Sea/Spratly issues.  

Once again, despite the lack of evidence suggesting the presence of hydrocarbons underneath the Spratlys, certain players have undertaken some initial exploration in disputed surrounding areas and have, on occasion, threatened one another with violence in order to assert and defend their positions. Not only is this alarming for the very reason that it threatens the long-term security and stability of the region, but it is worrisome (and somewhat absurd) that these states are willing to go to such lengths while lacking basic objective information.

Therefore, gaining a comprehensive understanding of the Spratly dispute is marred by two considerations. The first is a closer assessment of the energy needs and military capabilities of the most aggressive states involved. A rational examination of the structural considerations does not, for example, lead one to the policy position that Hanoi has adopted. In order for structural realism to be considered a truly useful theoretical paradigm, it would have to successfully explain the behaviour of all the disputants (or, at the very least, the behaviour of the key states involved). As one can see, it is unable to do so. Second, if one steps away from the officially stated positions of each disputant, and takes a moment to focus on the what experts know about the geology below the Spratly chain, light is shed on how misinformation has wound

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its way through the ‘conventional wisdom’ and how it has resulted in confrontational behaviour and, ultimately, something that resembles a classic security dilemma.

The Military Balance ... or Imbalance?

Another element of the conventional analysis that fits very nicely within a structural realist framework is what some perceive to be a growing arms race among the six disputants.61 In fact, some have even gone so far as to suggest that this arms race is a direct function of the Spratly conflict. As Salameh writes,

Oil wealth beneath the South China Sea is fuelling an explosive arms race in South-east Asia. ... it is China's need for oil and its claim of sovereignty over the South China Sea that is a major cause for concern among the five other claimants of the Spratly Islands.62

Structural realism would also expect an emerging balance of power among the six disputants. Because of the troubled history among the six combatants, the sporadic military confrontations that have taken place between Hanoi and Beijing, and the argument that below the Spratlys lie vast quantities of hydrocarbons, one should be able to see, at the very least, what seems like the roots of balancing behaviour. According the structural realism, this effect should be reinforced by the fact that (with the exception of the nascent work of the ARF) the region lacks multilateral cooperative arrangements through which information is shared and tensions are ameliorated.63


62Salameh, pp. 142-143.

63See: Tim Huxley, Insecurity in the ASEAN Region (London: Royal United Servies Insititute for Defence Studies, 1993); Lee Kim Chew, “Rivalries Among ASEAN States
Despite all this, an arms race and a balance of power phenomenon has not taken hold of the Spratly six.

Indeed, some of the evidence suggesting that such an arms race truly does exist is quite compelling as there has been a concomitant arms build-up throughout the region, particularly among the contenders in the Spratly dispute.64 Indeed, military spending in East Asia amounted to some U.S.$105 billion in 1992. By 1995, it had surpassed U.S.$130 billion. As an arms importer, East Asia accounted for 34% in 1991, which is up from 15.5% in 1982.65 To push this point, these same alarmists point to the fact that the military acquisition/modernization programs of the states involved seem oriented towards maritime security and power projection capabilities. While this is true, and it is certainly conceivable that the Spratly issue has shaped the orientation of these programmes, a more careful examination of the evidence does not show an arms race as structural realism would predict. While accurate information on what each of the states owns is difficult to come by, an appraisal of the military modernization programmes in the region will shed some valuable light on the issue.66


66Unless otherwise indicated, statistics on military hardware have been taken from: International Institute for Strategic Studies, Military Balance (London: Brassey’s for the IISS, 1995). The following paragraphs comparing the relative military capabilities of the states involved in the Spratly dispute draw heavily from: Clive H. Schofield and William G. Stormont, “An Arms Race in the South China Sea?”, op. cit.
China, in particular, has been especially enthusiastic in expanding and upgrading its navy and airforce. Over the past two decades, the People’s Liberation Army (Navy), or PLAN, has been pursuing a rapid modernization programme. For the navy’s surface fleets, this has included the procurement of newer destroyers as well as the refitting and upgrading of existing vessels. As for submarines, the PLAN have purchased approximately 10 Kilo-class conventional submarines from Russia. As well, May 1994 saw the new Song (or 39 class) submarine enter service, giving the navy the capability to launch antiship missiles. Finally, the navy has begun to facilitate a greater exchange of vessels from the East China Sea and North Sea Fleets to the South China Sea Fleet. This will help expand the reach of China’s navy, giving it significantly more power projection capability into the South China Sea.

Up until very recently, the composition of the air force has not been promising for Chinese interests in the South China Sea. As the Economist writes: “Most of China’s fighter aircraft, whether in the airforce or the navy, are decrepit.” While sizeable, the air force is composed mainly of ageing short-range fighters and approximately 30 Hong-6 bombers armed with C-601 antiship cruise missiles. Although the Hong-6s are able to reach the Spratlys without the need of refuelling, they are unable to remain over the Spratlys for an extended period of time. In order to rectify this, the air force has undertaken a series of new purchases, including 26 Su-27 Flanker fighter aircraft in 1992. These recent acquisitions, along with China’s purchasing priorities over the medium term, will give China a remarkable fleet of aircraft especially when compared to those of the other combatants.


While China has clearly undertaken a series of bold expenditures and procurement decisions, existing evidence does not indicate that the other states involved in the conflict have done the same --- at least not to a degree that would suggest an action-reaction pattern characteristic of an arms race. While the Taiwanese navy and airforce has been undergoing some substantial improvements, with the modernization of its navy and the acquisition of more than 200 new advanced fighter aircraft, its military is focused on the defence of the islands, not power projection into the South China Sea. While these new acquisitions could be seen, at least in part, as a response to China’s military procurement patterns, one should not over-state this link. Taiwan’s purchases are also motivated by its broader security policy (that focuses on the defence of the island), its dependency on sea-borne trade (which requires freedom of the seas) and the overall decline of American troops from the Asia Pacific theatre which, in the minds of policymakers in Taipei, may leave Taiwan somewhat vulnerable to attack from the mainland.

The most recent acquisition programme undertaken by the Filipino government was an approximately US$6.5 billion modernization initiative that was approved by the Filipino senate in December 1996, much of which is intended for the navy. While some attribute this to China’s incursions on Mischief Reef and recent sightings of Chinese warships near Philippine-controlled islands in the Spratlys, it should be kept in mind that this Bill had been proposed in the Senate several months prior to China’s moves in the Spratlys and, in fact, is part of an ongoing modernization programme that began more than a year previously. Moreover, while this may seem to be driven by events in the Spratlys and indicative of power-balancing behaviour, these modernization programmes are insufficient if what Manila is trying to do is enhance their

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military capabilities to compare with China's. With the withdrawal of American troops from Subic Bay and Clark Airforce Base, Manila was forced to end its dependence on the United States for its national security. Arguably, the shifting balance of power in the Asia Pacific region, and the end of Cold War security guarantees, was a more powerful motivator to modernize than China's salami tactics in the Spratlys.

Malaysia, up until recently, has always had insufficient air and naval forces given the vast maritime territory that it must defend. While its most recent acquisition of some smaller attack craft and then several newer fighter planes will enhance significantly its potential power projection capabilities in the South China Sea, it is not clear that these new pieces of equipment were purchased with the South China Sea in mind. These new acquisitions are easily justified given Malaysia's growing economic prowess and the legitimate need it has to defend its territorial boundaries.

In assessing Brunei and Vietnam, the argument that there is an arms race in Southeast Asia becomes even more dubious. Although these two states lie at virtually opposite ends of the economic/wealth spectrum, neither have undertaken any significant military procurement programmes. Vietnam is hardly in a financial position to afford such costly improvements while Brunei simply does not see it as necessary. The challenge that this poses to those structural realists who perceive an arms race is especially acute when one considers the fact that Vietnam, much like China, claims the entire Spratly chain as its own. Yet, despite this, it has not undertaken a military modernization programme in line with those of its key competitors.

According to Gilpin and Waltz, the economic benefits to be accrued from sovereign

70Ibid.

71Schofield and Stormont, p. 298.
control over the alleged resources below the Spratlys would drive all of the above states to enhance their military capabilities in order to ensure that they can continually assert and defend their claims in the archipelago. This would then be exacerbated by the nexus of oil, energy and economic issues. What, then, can explain the significant increases in military spending that have gone on in the region? A close assessment of the situation suggests that this can be attributed to the following factors: East Asia’s remarkable economic growth since the mid-1960s; shifting geopolitical realities in the post-Cold War era; and the decline of America’s military presence in the region.72

As noted earlier, one would be remiss to ignore the possibility that the Spratly conflict has helped shape the nature of the military acquisitions presently being undertaken by East Asian governments. However, there are a variety of disputes presently brewing throughout the region that also centre on maritime/boundary questions. Aside from the South China Sea, there is also: the conflict between between Malaysia and Indonesia over the small islands of Sipadan and Ligitan; competing claims between China and Taiwan; as well as the Japanese-Chinese rivalry over the Senkaku Islands in the East China Sea.73 Arguably, these other disputes could be equally responsible for the apparent focus on maritime security that has shaped Beijing’s most recent military acquisitions. Add to this the fact that virtually all of the states in East Asia possess significant coastlines in need of adequate defence, the maritime focus of recent military procurement patterns should be of no surprise. As Desmond Ball points out,


73A more complete listing of these and other conflicts that plague East Asia can be found in Ibid., pp. 88-89.
The most cost-effective approach to greater self-reliance tends to involve the employment of maritime strike capabilities, since the most vulnerable point for opposing forces is generally in the maritime approaches, where they can be hit with surface-to-surface or air-to-surface anti-ship missiles.\textsuperscript{74}

Hence, the nature of the recent modernization programmes should not be attributed exclusively to difficulties in the South China Sea. Moreover, as Vietnam’s case reiterates, some states have not undertaken any military modernization programmes at all. Hence, not only does the situation lack the action-reaction dynamic that defines any arms race (and that would be expected when employing structural realism), but in the case of one key belligerent, there does not seem to be any new procurement at all, let alone a modernization programme, that may be shaped by considerations of growing maritime security interests. As Schofield and Stormont write,

\begin{quote}
As far as an arms race in the region is concerned, that force modernization is proceeding apace is undeniable. Whether this constitutes an arms race is more debatable. In virtually all cases there is a dire need to replace antiquated equipment. Arms procurements have been driven by rapid economic growth after generally more depressed expenditures in the 1980s. In addition, such acquisitions reflect an understandable reaction to the removal of Cold War certainties, the power vacuum (real or imagined) left by a scaling down of the U.S. presence in the region, and the perception that one can’t rely on the traditional suppliers of arms. Hence the increased emphasis on self-reliance and technology transfer. Continuing insurgencies in the Philippines and Indonesian uncertainty in East Timor also necessitate a rapid reaction capability.\textsuperscript{75}
\end{quote}

As one can see, it is very difficult to argue that the Spratly issue is the key factor driving Southeast Asia’s growing arms expenditures. Given all of the other domestic and international issues that are also likely to act as motivating factors behind these ambitious arms acquisition programmes, the structural realist conclusion that the Spratly conflict has generated an arms race is premature.

Indeed, the complexity of the issues entailed in the Spratly dispute do not necessarily lend

\textsuperscript{74}Ibid., p. 83.

\textsuperscript{75}Schofield and Stormont, p. 305.
the Spratly question to an easy structural realist analysis. While the structural realist paradigm does offer some explanatory power (e.g., of the possible motivations behind China's desire to control the entire archipelago), it is not able to fully explain all of the phenomena currently at play in the Spratly dispute. As this chapter has shown thus far, if one takes the two key phenomena that structural realism would have expected (i.e., the idea that the Spratly conflict is driven by competition over raw materials and that an arms race has resulted from the Spratly issue), and undertakes a more comprehensive assessment of the issues involved, structural realism is left wanting as a convincing explanatory framework.

**Constructed Realism and the Importance of Process**

Discrepancies such as these require one to refocus the nature of the investigation. At some level, the states involved suffer from some delusions as to what hydrocarbons really do exist below the Spratly chain; it is a sort of false consciousness. Somewhere, the fact that no one knows whether or not hydrocarbons even exist below the Spratlys has been forgotten. As a result, the suspicion that there may be oil and/or natural gas below the Spratlys has become a self-fulfilling prophecy that, at least for some, is driving aggressive behaviour. While all the elements are present to make a realist case (competition over limited resources that are intrinsic to state power, thus leading to concerns over relative gains), these elements have been somewhat 'constructed' by the participants themselves.

Constructed realism, then, seems to offer a workable theoretical framework with which to gain a comprehensive understanding of the Spratly conflict.\(^{76}\) The aggressive behaviour of the

combatants in the Spratlys, partly a function of the suspicion that there may be hydrocarbons below, results in a dynamic that fits very nicely within the realist school of thought. Each of the combatants have come to mistrust one another. As a result, they perceive a conflict whereby relative gains, rather than absolute gains, are central. Moreover, what they perceive as being their interests has been shaped by the aggressive, and sometimes violent, competition that has plagued the Spratly question for some time. The Spratly's history, rife with unilateral claims of sovereignty, incursions on one another's territory, and occasional exchanges of gunfire resulting in death, has created an environment where each perceives the other as an enemy or, at the very least, a threat. This has been exacerbated by the fact that, through UNCLOS and the claiming of EEZs, the notion that there may be valuable resources, rightly or wrongly, continues to be made a central element in this dispute and, as a result, shapes each disputant’s perceived interests. However, if the governments involved were to spend more time focusing on the facts (i.e., what is and is not known about the existence of hydrocarbons below the Spratlys), then the Spratly issue might have turned out quite differently and decidedly less confrontational.

As Alexander Wendt points out in his work, how states relate to one another is dependent on how they perceive their relationships with other states in the system. Factors that are fundamentally intersubjective, affect states’ security interests and thus the character of their interaction under anarchy. ... A fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of the meanings that the objects have for them.77

To Wendt, and other constructivists, it is the process by which interests are formed that is of unique importance. Wendt alludes to this when he writes that,

77Ibid., p. 396.
... self-help and power politics do not follow either logically or causally from anarchy and that if today we find ourselves in a self-help world, this is due to process, not structure.\textsuperscript{78}

Alistair Johnston explores the question of interest formation more carefully. In his work on understanding China’s foreign policy and strategic behaviour, he argues that China’s international behaviour should not be interpreted as a function of structurally (i.e., exogenously) determined strategic preferences. Instead, when considering China’s foreign policy behaviour, one would do better to consider how China sees itself in this dispute and how this self-perception helps to shape its attitude toward others and, hence, its strategic choices.\textsuperscript{79} In the case of the Spratly conflict, not only does China see itself as the legitimate sovereign authority over the entire South China Sea, but wrapped inside its own perception of itself vis-à-vis the Spratlys is its looming energy shortage. Without a doubt, these considerations have helped to define what Beijing sees as its interests and its position in the Spratlys. Furthermore, it has fed the increasingly confrontational discourse surrounding the Spratly issue.\textsuperscript{80} This process has been repeated in the national capitals of the other disputants as well.

Unfortunately, in the case of the Spratlys, this process has been further exacerbated by

\textsuperscript{78}Ibid., p. 394.


\textsuperscript{80}On this point, it is interesting to note those scholars who argue that China’s increasingly aggressive position vis-à-vis the Spratlys is, in fact, merely a function of both Russia’s and America’s declining military presence in the region. See: Eric Hyer, “The South China Sea Disputes: Implications of China’s Earlier Territorial Settlements”, \textit{Pacific Affairs}, Vol. 68, No. 1 (Spring 1995), pp. 34-44. This thesis, however, cannot explain why some of China’s most aggressive behaviour in the Spratlys was seen as early as 1988 (the infamous Chinese-Vietnamese clash) before Washington began to withdraw its troops from the region and when America’s military presence in the region was still quite considerable.
misinformation, a series of misunderstandings and a troubled history of conflict that has taken on a life of its own. Therefore, what is needed in the Spratly dispute is a mechanism through which the attention of the various combatants can be refocused on the 'facts'. By having a much clearer and more accurate understanding of the situation, it may be possible to redefine the process by which interests and identities are shaped with respect to the Spratly question. The project should be to construct a new process.
Chapter Three - UNCLOS and the Spratly Dispute: Limits to International Law?

Having explored the nature of the Spratly dispute, and the resulting theoretical questions, it is important to move to a more focused assessment of how the issue is being dealt with thus far and the possibility of improving it. In order to do this, this chapter will undertake an assessment of UNCLOS and some of the challenges it confronts in trying to provide the claimant states with a workable framework for managing the Spratly dispute. In doing so, this chapter will highlight some of the important issues of which one must remain wary when trying to reform the process and create a mechanism that will help to manage the conflict.

As the product of almost three decades of multilateral negotiations, UNCLOS III represents the most comprehensive attempt thus far at arriving at a body of commonly accepted norms and standards. Now that it has been ratified by all six of the claimant states, UNCLOS could provide the disputants with a set of commonly accepted norms, principles and rules regarding the division of the ocean, access to its living and non-living resources and, if necessary, an outline of the dispute settlement procedures available to contending states.

As suggested earlier, however, UNCLOS has some remarkable shortcomings. While they do not render UNCLOS completely ineffective, they are considerable enough to make one wonder if UNCLOS, on its own, can provide the disputants with a workable framework for peacefully managing the Spratly conflict. While UNCLOS is the only body of rules and norms governing the oceans, successfully applying UNCLOS to the Spratly dispute is difficult. Disagreeing histories, differing (selective) interpretations of UNCLOS, as well as the Convention’s own vagueries, thwarts any attempt to quickly resolve the Spratly issue with UNCLOS’ stipulations alone.

Indeed, it could be argued that UNCLOS’ very beginnings were handicapped by the
attitudes of those who (also party to the Spratly dispute) were present at the Convention’s signing. The statements made by some of the ‘Spratly six’ were not encouraging and, hence, did not suggest an auspicious future for UNCLOS in Southeast Asia. In the Philippines’ declaration at the signing of UNCLOS, it was clear that Filipino officials were closely guarding their country’s decided position on the Spratly issue. The fourth paragraph of their declaration reads:

Such signing [of the Convention] shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto...\(^{81}\)

In the same vein, the Chinese declaration at the signing focused almost exclusively on the PRC’s position on the Spratly dispute.

With reference to the depository notification C.N.7.1983.TREATIES-1 (Annex B) [of 23 February 1983] and C.N.104.1984.TREATIES-3 [of 22 May 1984] which involve the sovereignty and interests of the People’s Republic of China over its territory of the Nansha Islands, [China] has the honour to reiterate as follows:

The so-called Kalayaan Islands are part of the Nansha Islands, which have always been Chinese territory. The Chinese Government has stated on many occasions that China has indisputable sovereignty over the Nansha Islands, and the adjacent waters and resources.\(^{82}\)

Insofar as these statements reflect an unwillingness to compromise and/or alter positions on the Spratly issue in light of the principles detailed in UNCLOS, it is not difficult to see how UNCLOS, as a Convention meant to provide a workable framework for promoting settlement, might have been handicapped from the very beginning. In fact, the Chinese delegation’s objections to UNCLOS III were a function of the numerous reservations Beijing had about


\(^{82}\)Ibid., p. 40.
particular aspects of the Law of the Sea before it joined the UN in 1971. Even upon signing the 1982 Convention, Han Xu, Chairman of the Chinese delegation had these words:

... we cannot but point out there are still shortcomings and even serious defects in the provisions of quite a few articles in the Convention. The Convention is not entirely satisfactory to us. At the previous sessions of the Conference, we repeatedly pointed out that in the articles of the Convention relating to the innocent passage through the territorial sea there were no clear provisions regarding the regime of the passage of foreign warships through the territorial sea. A considerable number of States including China time and again submitted their amendment in this regard. ... In addition, the relevant provisions in the Convention also contain shortcomings as regards the definition of the continental shelf and the principle of delimitation of the exclusive economic zones and continental shelf between opposite and adjacent states.

In these statements, made early on in the life of UNCLOS III, one can already see some of the substantive difficulties UNCLOS III was to encounter in attempting to help resolve the Spratly dispute.

While UNCLOS’ stipulations are broad and multifaceted, there is a small number of key concepts that lie at its core. While these notions are meant to address a wide array of concerns and issues, the ones most useful to this study are: the notion of a 200 nautical mile EEZ; the notion of historical entitlement and claim; the assumption that UNCLOS’ provisions take precedence over earlier norms/principles embodied in earlier agreements; the legal definition of an island; the rights and privileges of archipelagic states; the drawing of baselines to delineate territorial waters; and the practice of asserting and demonstrating administrative control (sovereignty), when possible, over new territory. Despite the Convention’s apparent breadth, and the fact that it has contributed to the successful resolution of other oceanic disputes, some of UNCLOS’ central concepts and assumptions make its application to the Spratly question

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83 For more, see: Greenfield, pp. 197-200.
awkward.

**Exclusive Economic Zone (EEZ)**

With its notion of an EEZ, UNCLOS frames any sort of inter-state discussion over (sub-) oceanic resources in a way that puts resource/economic considerations at the centre of the discourse.\(^\text{85}\) This is true even in cases such as the Spratly dispute where, given the uncertainty of available information on the Spratly’s hydrocarbon wealth (and the corresponding statements of Durkee and Townsend-Gault), it is not clear that such considerations should be. Employing UNCLOS’ notion of an EEZ in the Spratly dispute may only feed the expectation that there is something below the Spratly archipelago worth fighting for when, in fact, there is no reliable information to indicate that this is true. As the idea of an EEZ lies at the heart of UNCLOS, it raises significant questions as to whether or not UNCLOS, *by itself*, is an adequate and appropriate tool with which to attempt to resolve the Spratly dispute. This idea will be returned to in the final chapter.

**History and Territorial Irredentism**

For several reasons, the Spratly conflict is unique. As a result of the East Asia’s troubled history, boundary and territorial disputes are especially sensitive issues. During the region’s long history of colonialism, virtually every state (with the possible exception of Japan and Thailand) was forced to cede territory (and/or sovereign rights to it) to various foreign powers. In many

\(^{85}\) Cristine Chinkin makes a similar assertion when she argues that these sorts of resource issues will inevitably lead to conflict because of the strategic importance of oil. The argument being suggested in this paper, however, is much more fundamental and specific to the Spratly case. Nonetheless, for a more detailed exposition of Chinkin’s argument, see: Christine Chinkin, “Dispute Resolution and the Law of the Sea: Regional Problems and Prospects” in The Law of the Sea in the Asian Pacific Region, James Crawford and Donald R. Rothwell, eds. (Boston: Martinus Nijhoff Publishers, 1995), pp. 237-238.
cases, this resulted in a sense of national humiliation which, for some, continues to this day. The region’s troubled history has not been forgotten by its citizens; the resulting bitterness and wariness of foreign incursions sits at the heart of the national psyche and is very important in shaping policy perspectives. As Choon-ho Park writes,

When sovereignty was restored to these former colonies or near-colonies during the postwar years, each state became highly conscious of its new status and desirous of preserving it. Only within this context is it possible to appreciate their sensitivity to whatever affects their territorial integrity, a sensitivity that has yet to subside. Thus, a territorial dispute, especially one between a former ruler and the ruled, instantly touches the raw nerves of the people of a former colony and causes their nationalist sentiments to flare up, even if the piece of territory involved is scarcely worth arguing over.86

Therefore, it is very difficult to convince either Hanoi or Beijing to relinquish what they see as their historic entitlement to the South China Sea and the Spratly archipelago. As an integral part of their national territory, the Spratly archipelago represents an area lost previously to foreign powers. For some officials, it is absurd to believe that UNCLOS III, a statute concluded as recently as 1982, supersedes these important historical considerations. While some may argue that the disputants’ willingness to ratify UNCLOS reflects their willingness to adhere to it, despite these other concerns, their failure to invoke it consistently and effectively with respect to the Spratly dispute indicates the extent to which these issues continue to shape the policy decisions. If so, then these considerations should not be treated lightly.

**UNCLOS and the Continued Relevance of Earlier Norms and Practices**

Another related difficulty is the fact that UNCLOS imposes a set of criteria for making territorial claims that contradicts earlier norms that both China and Vietnam had used for

centuries. Both countries argue that, because their traders/explorers/fisherman were the first to
discover the archipelago and use the Spratlys to sustain their livelihood, they were the first
exercise effective administration and control. According to the commonly understood practice of
the time (and for several centuries before and after), such claims were deemed legitimate and, in
fact, were the bases on which colonial powers asserted their claim to various parts of the non-
European world. UNCLOS, however, stipulates that in order to establish a sovereign claim, a
state must exercise *uninterrupted* administrative control over the area in question *wherever doing
so is possible*. Under these requirements, neither China's nor Vietnam's claims are deemed
legitimate. Add to this the fact that China, for example, is being asked to adhere to numerous
international agreements that were reached prior to the PRC's membership in the UN, and it is
easy to see why China might be reluctant to fully embrace certain principles in UNCLOS ---
especially when one considers that UNCLOS III was, in many ways, considered a mere
codification of commonly understood norms in international law. Hence, it is not surprising that
some combatants are reluctant to couch their arguments within the principles of UNCLOS. As
Park writes,

> In the final analysis, international law can effectively resolve only disputes that are
basically legal, whereas the most important disputes, like [the Spratly dispute] with its
highly complicated historical background, are political in nature and susceptible therefore
of political resolution only. ... This point is especially relevant to China; China has a
series of other extremely difficult territorial disputes ... For these reasons, neither party,
China in particular, is likely to seek or agree to any type of legal settlement of the Paracel-
Spratly dispute.  

As suggested in earlier chapters, the historical issues involved in the Spratly conflict will not be
easily addressed. Even in those cases when UNCLOS is employed, parts of it are interpreted or
invoked selectively *despite the fact that doing so is unacceptable in international law and

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87Ibid., p. 489.
contravenes the spirit of the Convention.

The Definition of an ‘Island’

One such area is the definition of an island. Islands, according to UNCLOS, can be used to generate territorial sea and as a base point for claiming an EEZ. The drafters of the Convention, not wanting small uninhabitable rocks and occasionally submerged features to be used as base points, defined an island as ‘a naturally-formed area of land, surrounded by water, which is above water at high tide’. The 1982 Convention differentiates between islands and ‘rocks which cannot sustain human habitation or economic life on their own’. However, in spite of this careful explanation, some claimants (China in particular) have attempted to use submerged features in the Spratly chain for establishing territorial waters and/or EEZs.

For example, both China and the Philippines claim Scarborough Reef which lies some 215 kilometres west of the Philippines. While some features of the Reef are submerged, others manage to remain above sea level at all time. However, as they are unable to generate any sort of economic activity and are essentially uninhabitable, they cannot be used to generate territorial water. In spite of this, China and the Philippines continue to engage in an open confrontation over who has legitimate sovereign control over Scarborough shoal. Maybe more importantly, this has contributed to further confusion over the definition of an island as outlined in UNCLOS.

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88 Article 121 of the 1982 Convention.

89 Article 121(3) of the 1982 Convention.

The selective (or strategic?) ‘misinterpretation’ of specific definitions in UNCLOS has also caused states to pour concrete foundations on top of otherwise submerged reefs to ensure that they remain above sea level at all times. According to UNCLOS, however, islands must be naturally formed in order to be considered legitimate and generate a territorial sea or EEZ. This has not stopped China from fortifying both Mischief Reef and Johnson Reef in order to extend their claims in the Spratlys. The ill-informed statements and mistaken writings of some academics and policy advisors have, at times, reinforced this deficient perspective. As Pan Shiyi of Beijing’s Foundation for International and Strategic Studies has noted,

With ownership of an island or reef, there would come territorial waters. And with territorial waters, there would come oceanic resources ... [Pan also writes that] possession of a one [sic] small island or a piece of reef enables the country to claim a total of 1,500 square kilometres of territorial sea, or three times the size of Singapore. When it comes to the stipulation of economic zones, it enables the country that owns the island to claim 430,000 square kilometres of special economic zone.

Not only have these sorts of mistaken interpretations lead to a series of bilateral confrontations over particular features in the Spratly chain, but they have also contributed to wider confusion within the government over the principles outlined in UNCLOS and a general deterioration of the Convention’s perceived legitimacy as an authoritative body of law.

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92 China’s drive to claim sovereignty over the Spratlys for the purposes of extending its maritime claims in the South China Sea, *despite the fact that the Spratlys may not legally qualify as islands*, is noted in: Michael Bennett, “The People’s Republic of China and the Use of International Law in the Spratly Islands Dispute”, *Stanford Journal of International Law*, Vol. 28, No. 2 (Spring 1992), p. 431.

**Archipelagic States**

Part IV of UNCLOS defines an archipelago as

a group of islands, including parts of islands, interconnecting waters and other natural
features which are so closely interrelated that such islands, waters and other natural
features form an intrinsic geographical, economic and political entity, or which
historically have been regarded as such.\(^{94}\)

UNCLOS affords archipelagic states specific privileges in terms of drawing baselines for
territorial/sovereignty purposes. Specifically, such states have the right to draw baselines around
the fringes of their outermost islands and, in doing so, claim the waters within these boundaries
as sovereign territory. Having established their periphery, archipelagic states can then claim their
territorial sea and other maritime spaces as would any other state. This ultimately results in
substantial areas of the ocean (which otherwise would have been considered part of the high sea)
coming under the sovereign jurisdiction of a single state. In the case of the Spratly dispute, the
Philippines has benefitted the most from this concept and, at various times, has attempted to use
this regime to justify its claim to the Kalayaan islands.\(^{95}\)

The provisions and privileges granted to archipelagic states are unclear and, as a result,
are often open to dispute. Of the states involved in the Spratly dispute, only the Philippines can
legitimately take advantage of the provisions for archipelagic states. However, it has proven very
difficult to harmonize UNCLOS with existing provisions in the Filipino Constitution regarding
internal waters.

Article 1 of the 1987 Philippine Constitution states that “the waters around, between, and

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\(^{94}\)See Article 46 of the Convention.

\(^{95}\)Interestingly, China attempted to use the archipelagic principle in asserting/justifying its
claim to the Paracels. This attempt to invoke UNCLOS in this way, however, is
inappropriate as the PRC can, in no way, be considered ‘a group of islands’.
connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines." To reinforce this assertion, the Filipino government made the following statement:

The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or the high sea from the rights of foreign vessels to transit passage for international navigation.

Consider this in light of the Philippine delegation’s comments at the signing of UNCLOS III noted earlier, and one can see how Manila’s 1978 claim may generate some controversy. Unfortunately, UNCLOS remains unclear as to how to reconcile its own provisions with earlier (and, as in the case of the Spratlys, unsettled) historical claims which, in conjunction with national constitutional provisions, grant states sovereign authority over significant areas of the ocean. In the case of the Republic of the Philippines and its claim to Kalayaan, this failure of UNCLOS is a significant issue and contributes to its inability to resolve the Spratly conflict.

Overlapping EEZs - Obstacles to Dispute Settlement

Even if the parties to the Spratly dispute could amicably decide which of them has legitimate authority over particular islands, UNCLOS would be confronted with another significant problem: overlapping EEZs and conflicting claims as to who has the right to explore/exploit the living and non-living resources in and under the sea. As the various disputants proceed to claim their territorial seas and/or EEZs, the close proximity of the islands

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97 As cited in (no original citation provided): Chinkin, p. 238.
in the archipelago results in a close concentration of conflicting claims. While the application of UNCLOS elsewhere in the world has given rise to the notion that small islands, such as the Spratlys, are not considered as significant as mainlands or the islands of archipelagic states when it comes to claiming EEZs (i.e., not all pieces of territory are equal), this distinction seems to be lost on the claimants to the Spratly archipelago.

While this is not a new issue, the difficulty presented by overlapping EEZs remains an outstanding issue for which UNCLOS, on its own, has no ready answer. This particular issue provides a useful introduction to a discussion of what is, arguably, the Convention's most significant shortcoming: the inability of its stipulations regarding dispute resolution to provide a clear framework with which the claimants can effectively address the sorts of conflicts listed above.

**UNCLOS and Dispute Settlement**

Compared to many other bodies of international law, UNCLOS has a very elaborate series of rules for dispute settlement and mediation.\(^{98}\) Proceeding from the broader UN-wide stipulation that states will find peaceful resolutions to international conflicts, the drafters of UNCLOS III ensured that Parts XI and XV of UNCLOS (outlining available dispute settlement mechanisms) saw to any conceivable conflict that might arise. Hence, parties may choose one or more of the following forums for dispute settlement: the new International Tribunal for the Law

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\(^{98}\)In fact, one of the problems that has been pointed by some critics is that because UNCLOS outlines so many different forms of arbitration and/or adjudication, there arises a problem with consistency and, in some cases, deciding which jurisprudence takes precedence. See: Chinkin, p. 249.
of the Sea; the International Court of Justice\textsuperscript{99}, an arbitral tribunal; a special arbitral tribunal (only for sensitive topics such as fisheries, research, navigation and environmental protection); and/or regional arbitration mechanisms (should they be available).\textsuperscript{100} Regardless of the forum they choose, signatories are required to have their disputes addressed by some forum that can make binding decisions. By requiring this, the drafters of the Convention have (at least in theory) achieved something that is unprecedented in international law. This requirement, however, is not consistent.

In drafting this requirement, the drafters saw the need to balance a series of contending interests from three different constituencies: coastal states that are primarily concerned with the use of their adjacent waters; third (or ‘flag’) states that are interested in using the oceans for a variety of purposes; and the international community which is most interested in ensuring that these sometimes competing sets of interests do not result in armed confrontation.\textsuperscript{101} In order to be able to balance these interests, UNCLOS grants coastal states some considerable exceptions from the requirement for binding arbitration; this is meant to ensure that the sovereign rights of coastal states are not compromised. As some analysts have made clear, agreement would not have been possible without these exceptions.

It seems that the ... exceptions from compulsory judicial settlement were unavoidable because they all touch highly political issues. Otherwise a consensus on comprehensive

\textsuperscript{99}It is worth noting here that, in general, countries of the Asia Pacific region have tended to shy away from having their maritime disputes adjudicated by the ICJ. In fact, the Court has settled maritime boundary delimitation questions in every region of the world except East Asia. For more, see: Chinkin, pp. 258-259.

\textsuperscript{100}Schrijver, pp. 211-212.

and effective dispute settlement procedures providing for final judicial determination had probably not been attainable.\textsuperscript{102}

In the case of certain disputes centering on scientific research in the EEZ or continental shelf of a coastal state, or disputes involving the fisheries of coastal states, coastal states are not required to submit these disputes to binding arbitration.\textsuperscript{103} As well, special exceptions from the requirements of compulsory settlement are also granted for issues of extreme political sensitivity. Such disputes include ocean boundary delimitation, military and law enforcement activities, and conflicts in which the Security Council is exercising its mandate. As alluded to earlier, the exceptions and limitations outlined in UNCLOS are, in many ways, a function of the Convention's own vagueries. As Schrijver points out,

\begin{quote}
The exclusion of disputes over sea-boundary delimitation results from the unclear delimitation critiera under the law of the sea. The exclusion clause entails that coastal States have the right to declare that they do not accept any or all compulsory settlement procedures over the boundaries of their territorial sea, continental shelf, EEZ or historic bays.\textsuperscript{104}
\end{quote}

Having briefly reviewed these 'exceptions', one must wonder as to the efficacy with which UNCLOS can be reasonably expected to approach the complex issues involved in modern maritime disputes (i.e., those involved in the Spratly conflict). Not only does the Convention fail to address a number of glaring difficulties that presently confront the disputants, but despite its relatively comprehensive provisions for dispute settlement, it continues to face the same challenge that has always plagued international law: effective enforcement.

This review of the Convention’s shortcomings, and the notable exceptions it allows its


\textsuperscript{103}Article 297, sections 2 and 3 and Annex V, section 2, 1982 Convention.

\textsuperscript{104}Schrijver, p. 213.
signatories, shows how states involved in the Spratly dispute can choose to invoke UNCLOS only when it is convenient. Alternatively, they can also undertake a selective reading of UNCLOS, only invoking those provisions that serve their interests and/or reading them in a way that would justify their infringement on another states' sovereignty. Key examples of this can be seen in how some states (e.g., China) interpret the legal definition of an island, and the rights therein, as well as in the attempts of other states, such as the Philippines, to abuse the rights and privileges outlined in UNCLOS that accrue to archipelagic states. As long as the parties to the Spratly dispute continue to interpret UNCLOS selectively and, despite their ratification of UNCLOS, fail to accept its norms, principles, rights and obligations in their entirety, UNCLOS, by itself, will never be able to help resolve the Spratly conflict.

However, despite the criticisms levied here, one should not conclude that UNCLOS has no redeeming qualities or that it should not have a role in helping to resolve the Spratly dispute. Rather, what has been suggested above is that UNCLOS needs to be brought to bear on the Spratly question in a way that accounts for the unique characteristics of the dispute. In brief, UNCLOS needs help.

Having briefly reviewed UNCLOS' shortcomings, it is important to now turn to a discussion of possible dispute settlement mechanisms and/or other arrangements that might effectively assist in the peaceful resolution of the Spratly issue. In doing so, it is important to keep in mind two key considerations. First, despite UNCLOS' difficulties, it is the most comprehensive set of rules and principles regulating the use and administration of the world's oceans developed thus far. Furthermore, it is the only mechanism that has been ratified by all of the states involved in the Spratly issue. As Dayanku Zabaidah Binti Pengiran Kamaludin stated while presenting a paper to the Third Workshop on Managing Potential Conflicts in the South
The development of international marine law, including the LOSC (sic), has become complicated and poses some problems regarding definitions, technical details, and jurisdictional matters. These uncertainties inhibit its usefulness as a guideline for dispute resolution. Nevertheless, this by no means renders the Convention useless, so long as the parties concerned have the political will to recognize new obligations, responsibilities, rights and liabilities within its framework.¹⁰⁵

Hence, any speculation as to how other mechanisms might be developed to help resolve this conflict must be done with an eye to how UNCLOS and its key provisions can be integrated into the larger resolution process.

Second, the search for newer alternatives must focus on mechanisms and arrangements that are specific to the Asia Pacific region. If this is the case, then it is imperative that students and policymakers keep in mind the fact that the multilateral arrangements emerging presently in East Asia are still at relatively nascent stages of development. While this affords policymakers considerable room for flexibility and further entrenching of habits of dialogue and cooperation, it also entails a unique set of obstacles and, as a result, requires the architects to find new and creative strategies to ensure success.

¹⁰⁵Rapporteur’s Notes, “Sixth Session: Institutional Mechanisms for Cooperation” in The Third Workshop on Managing Potential Conflicts in the South China Sea, (Vancouver: South China Sea Informal Working Group, UBC Law), p. 31. Dr. Dayanku’s paper is entitled, “The Basis of Institutional Mechanisms for Cooperation”, which can also be found in this volume on pp. 156-159.
Chapter Four - A Search for Solutions

In suggesting how a new process might be constructed in order to peacefully manage the Spratly dispute, one must examine the existing mechanisms and see what lessons can be drawn from previous experience. This chapter will walk the reader through a preliminary discussion of the sorts of official and unofficial (Track II) dialogue mechanisms that presently exist in the Asia Pacific region. Drawing on this discussion, the paper will examine the history of these arrangements and highlight some of the issues to which one must remain sensitive. Implicitly, this chapter makes a distinction between processes and solution concepts. Given the importance placed in chapter two on reshaping the process, the suggestions here aim to do just that in order to give rise to new and innovative solution concepts. The concepts themselves, however, will not be discussed here.106

In order to usefully discuss the potential for creating new mechanisms with which the claimant states could address the Spratly dispute, it is necessary to account for the shortcomings in the official discourse thus far and use these insights to help shape the new process. As noted earlier, this dispute has been riddled with misinformation and, arguably, false expectations regarding the hydrocarbon wealth in the subsoil of the Spratly area. Somewhere in the process the disputants have moved their attention away from the verifiable facts and have let their decisions and behaviour be governed (at least in part) by suspicious promises of oil/natural gas wealth (thus heightening the importance of sovereignty-related claims and concerns). This has

lead to a classic security dilemma in which each state has defined its interests in opposition to those of the other claimants, thus leading to mistrust, suspicion and, in some cases, aggression. This situation has been exacerbated by the inability of UNCLOS to provide a clear set of definitions and useful guidelines for dispute settlement. Therefore, in order to usefully discuss the prospect of reconstructing the dynamic surrounding the dispute, genuine attempts must be made to address these issues.

Until very recently, establishing any sort of workable security architecture in the Asia Pacific region has proven very challenging. While an exhaustive review of these issues would not be appropriate here, it is easy to see how the region’s unique history, as well as its unfamiliarity with multilateral norms and principles, would make the creation of such an arrangement very difficult. Even in those official fora where an attempt has been made to address South China Sea/Spratly issues, such as ASEAN and ARF, very limited progress can be seen in terms of pushing the disputants to engage one another on the most difficult issues. While the Twenty-fifth ASEAN Ministerial Meeting in Manila in July 1992 succeeded in producing a Declaration on the South China Sea, this was, at best, a statement of principles. Further to this, the 1995 meeting of ARF saw Qian Qichen, China’s Foreign Minister, state that ‘joint development’ is the best solution to the Spratly dispute. However, China’s subsequent behaviour in the Spratlys does not convince one of Beijing’s sincerity.107 Maybe it is no surprise, then, that the most successful efforts towards such an endeavour have not, at least in the first instance, come from the official/intergovernmental circles but, instead, have emerged from the growing

number of Track II dialogues throughout the region.

**Track II Efforts**

Characterized by their informality and the understanding that all comments made by participants are unofficial, the growing collection of Track II fora has become one of the primary vehicles through which the nascent construction of a regionwide security framework is now being undertaken. Where official channels (Track I) have been frustrated, Track II pathways have emerged in order to encourage dialogue on issues that governments are, officially, unwilling to engage one another. Somewhere in between Track I and Track II is what some term the ‘managed (or directed) Track II’ processes. While still informal and completely unofficial, the agendas of managed Track II processes are heavily influenced by official channels where preliminary discussions are being attempted on a variety of substantive issues. The managed Track II process provides a mechanism through which ideas tepidly raised in Track I fora can be pursued more aggressively. Although some argue that it is too early to tell, it seems that both varieties of Track II have begun to plant the seeds of regularized exchange and dialogue on the region’s sensitive security issues.\(^\text{108}\)

Therefore, in constructing a workable system that could help address the issues outlined above, Track II arrangements must play a central role. Track II processes enable states to back away from firm policy positions (some of which are taken merely for the benefit of domestic

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constituencies that perceive accommodating policies as a sign of weakness) and to discuss a variety of issues that, in official fora, would not be placed on the agenda. In some cases, these are the sorts of issues where common interests can be identified and, as a result, where one can forge meaningful functional mechanisms for cooperation. In the Spratly Islands dispute, such arrangements may be especially useful. Through repeated assertions and public proclamations as to the importance of the Spratlys to territorial integrity and national pride, a number of the governments involved have aroused public and bureaucratic support for taking firm (if not aggressive) positions vis-à-vis the Spratlys and, thus, have backed themselves into a corner from which they cannot escape without losing public/bureaucratic support. In public domains they are unable to consider alternative, less belligerent, positions for fear that doing so might result in a loss of domestic support. Indeed, one can already see this in the Track II discussions that have emerged around Spratly/South China Sea issues.

The Council for Security and Cooperation in the Asia Pacific (CSCAP)

One of the most successful Track II arrangements to emerge at this point has been the Council for Security Cooperation in the Asia Pacific (CSCAP).

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109 As an example, one can observe how the issue of ownership and control over what the Philippines sees as its rightful share of the Spratlys is becoming an increasingly central issue in the run up to the 1998 election. See: “The Scraply Islands”, *Economist*, op cit. and Andrew Sherry and Rigoberto Tiglao, “Law of the Seize...”, *Far Eastern Economic Review*, op cit.

110 The following is merely an overview of CSCAP and its activities. For a more detailed treatment of its evolution, constituent parts and work programme, see: Desmond Ball, “Maritime Cooperation, CSCAP and the ARF” in *The Seas Unite: Maritime Cooperation in the Asia Pacific Region*, Bateman, Sam and Stephen Bates, eds. (Canberra: Strategic and Defence Studies Centre, Research School of Pacific and Asian Studies, ANU, 1996), pp. 1-22 and Evans, op. cit. CSCAP’s members are: Australia, Canada, Indonesia, Japan, South Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand and the United States.
strongest example of a managed Track II process. Born out of the numerous Track II initiatives pursued in the early 1990s, CSCAP was intended to carry out Track II activities in support of the ARF in order to help regularize, enhance and, to some extent, institutionalize exchange and cooperation on a variety of the region’s most pressing security issues. Under joint chairmanship, CSCAP relies on the accumulated expertise and government contacts of research institutes and academic institutions throughout the region. In doing so, it has brought together, through a series of annual plenary meetings and gatherings of its various working groups, academics, policy makers and specialized experts to exchange ideas and consult one another on how multilateral cooperation on security issues might be made more durable. Although the idea of creating such an arrangement confronted considerable skepticism in some national capitals on both sides of the Pacific, the momentum and preliminary success of CSCAP’s activities have helped bring to an end these earlier aversions.

CSCAP’s work programme is conducted primarily through its five working groups. The working groups focus on the following areas: marine cooperation; confidence and security building measures (CSBM); comprehensive and cooperative security; security issues and the potential for cooperation in the North Pacific; and finding ways to promote international cooperation in fighting organized crime. For the purposes of the Spratly dispute, the work of the group focused on CSBM has been most relevant. As with the other working groups, the WG on CSBM has, thus far, focused its efforts on information gathering, continually encouraging participation from as many concerned states as possible while remaining sensitive to

111"Report on the 7th CSCAP Steering Committee Meeting and CSCAP’s 1st Annual Meeting, Singapore, June 3-4, 1997. Attached as Appendix A at end of correspondence from Thomas J. Bata, Sr. and Paul M. Evans, co-chairs of the CSCAP Canadian Member Committee, to Brian L. Job, co-chair of the Canadian Consortium on Asia Pacific Security (CANCAPS), July 2, 1997."
intergovernmental concerns, exploring different ideas for functional cooperation in specific issue areas, and finding ways to integrate agreed proposals into the ARF agenda.

As CSCAP’s track record shows, the Council has successfully moved ahead in its research/discussion function. CSCAP has become the region’s leading forum for the unofficial exchange and discussion of policy-oriented ideas designed to facilitate regional stability and cooperation. Moreover, a brief overview of CSCAP’s upcoming meetings would seem to suggest that, in addition to vigorously pursuing its existing agendas, it is also finding ways to expand its mandate.112

**The South China Sea Informal Working Group (SCSIWG)**

To this date, the most robust attempt to construct a Track II dialogue process surrounding specific South China Sea issues has been a series of informal workshops and meetings, entitled “Managing Potential Conflicts in the South China Sea”, funded by the Canadian International Development Agency (CIDA). Jointly administered by the South China Sea Informal Working Group (SCSIWG) at the University of British Columbia and the Indonesian Ministry of Foreign Affairs, these meetings have succeeded in bringing together government and military officials (in their private capacities) as well as academic experts and scientists from each of the disputing states to discuss, unofficially, the various issues surrounding the use, administration and ownership of the South China Sea.113 Compared to CSCAP, the activities of the SCSIWG

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112 See: “CSCAP Calendar, July - December 1997”, included as Appendix B to Bata/Evans/Job correspondence noted earlier (see footnote 111).

represent the creation of a more flexible Track II process that is not so heavily influenced by official discussions.

Since its inception in 1990, this group has met on twenty different occasions. Alongside these gatherings, five technical working groups (TWGs) have been created to address specific issues and, in doing so, facilitate the possibility of functional cooperation. The TWGs are as follows: Marine Scientific Research, which has met five times in Manila, Surabaya, Singapore, Hanoi and Cebu; Resources Assessment, which has met only once in Jakarta; the TWG on Marine Environmental Protection, which has met in Hangzhou, China; Safety of Navigation, Shipping and Communication, which has met twice in Jakarta and Bandar Seri Begawan; and the TWG on Legal Matters which has met two times, once in Phuket and once in Chiangmai, Thailand.

As the available records from these meetings show, the participants are allowed to survey a number of issues and ideas and, at least for a short while, these private meetings allow them an opportunity to put questions and disputes over ownership and sovereignty aside. From these meetings have emerged several specific project proposals, some of which are ready for implementation. The papers presented and ideas discussed included the possibility of cooperative petroleum research and exploration; the potential for cooperation in managing the substantial fish and seafood stocks in the South China Sea; and the possibility that there may not

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114 By putting questions regarding sovereignty and territoriality aside, the SCSIWG is able to focus the disputants’ attention on the concrete issues of functional cooperation. This is not to say, however, that, at least implicitly, these issues are not addressed. The hope is that by finding ways to engender long-term cooperation in areas such as marine safety and resource exploitation, the costs associated with conflict (which is a function of sovereignty/territoriality concerns) will become too great.

be any oil in the subsoil of the Spratly area at all. In constructing an ongoing dialogue mechanism, these sorts of workshops (or something like them), which allow the disputants an opportunity to refocus their attention on the issues and the possibility of functional cooperation, would be of tremendous value.

**Lessons Learned**

To ensure that any such arrangement (especially one that is meant to help settle maritime disputes in the South China Sea) would survive and continue to be useful over the longer term, it must take heed of the lessons learned thus far from the seminal Track I and Track II initiatives throughout the region. First, it must begin to address an important question that has already confronted those involved with the South China Sea Informal Working Group: when does Track II become Track I? At what point does the mere continuation of these meetings and workshops on an informal/unofficial basis become insufficient? At what point should one begin to expect that the ideas being discussed informally are considered in official circles? This is not to suggest that the SCSIWG should be responsible for ensuring this. Rather, this is the sole responsibility of the national governments involved. Ultimately, only national governments (and they alone) are able to grapple with their own bureaucratic and political constraints. However, some thought should be given as to whether other mechanisms can be developed to enhance the possibility that the impressive work being done in Track II fora, such as the SCSIWG, may find its way onto Track I agendas. This is especially important when considering the involvement of those states

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116 This brief listing is drawn from the available summary of the 1992 meeting cited earlier. In order to gain a more thorough appreciate of the diversity, nature and sensitivity of the issues discussed at these meetings, one would do well to examine some of the other available summaries from earlier and later meetings.
that are reluctant to have their security affairs aired in public/multilateral fora (i.e., the PRC).  

Second, as alluded to earlier, any system must incorporate the principles of UNCLOS III as a regular part of the mediation/dialogue process, thus ensuring that all solutions conform to accepted international law. Not only is this important for the South China Sea/Spratly dispute, but because of the fact that oceanic boundary disputes lie at the root of many of the region’s most burning security questions, this could have significant implications for other potential conflicts in the region.

Third, any arrangement must find a way of involving Japan. This is true for a number of reasons. First, the South China Sea is of crucial importance to Japan as virtually all of its imported oil passes through the shipping lanes adjacent to the Spratlys. Although it is not asserting the same sort of claim to sovereignty as the six key disputants, the resolution of the Spratly question (and any other sovereignty disputes in the South China Sea) is essential to its national interests. Hence, one would be remiss to exclude Japan from a long-term consultative mechanism. In fact, some experts from the region have gone so far as to argue that, because of Japan’s clear interests in maintaining free and open access to the South China Sea, Tokyo may adopt a more aggressive approach towards the South China Sea. As the summary of B.A. Hamzah’s comments at the 1992 workshop of the South China Sea Informal Working Group note,

It might provoke Japan, which has vital strategic and economic interests at stake in the

\[117\] Interestingly, this very issue was raised at CSCAP’s first annual meeting in Singapore on June 3-4, 1997. While most of the member committees suggested that the relationship between CSCAP and Track I fora be strengthened, the Canadian and Chinese committees argued that a closer relationship might put CSCAP’s independence and flexibility at risk. Generally, the nature of the relationship between Track II and Track I fora is an ongoing concern and, as a result, one can expect that this issue will continue to occupy the minds of those who participate in Track II discussions.
region due to its dependency on oil tanker traffic through the South China Sea, to rearm itself, or to reassert its presence in a region which, for well-known historical reasons, is rather apprehensive about Japanese intervention.\^{118}

Second, it would help a number of security analysts on both sides of the Pacific answer what has become something of an old, if still unresolved, question in the academic and policy literature: what sorts of mechanisms can be devised to help Japan expand its contribution to the region’s security in a way that is commensurate with its economic power while still acceptable to its regional neighbours?

The architects of a long-term consultative mechanism for South China Sea issues that seeks to incorporate Track II-style arrangements must also take heed of the lessons learned from previous attempts in the region to establish informal/unofficial consultative arrangements.\^{119}

Many students newer to the study of Asia Pacific diplomacy have forgotten about one of the region’s earliest international non-governmental organizations, the Institute of Pacific Relations (IPR) which was founded in 1925 and faded from sight in 1960. The eventual demise of the IPR is, at least in part, due to the failure of the Institute to shape/adapt itself in response to ongoing changes in the region (e.g., changing issues that required new expertise and the changing governmental perceptions of the IPR and its work). However, this has left more contemporary students of Asian affairs with a number of valuable lessons on which Lawrence Woods has shed considerable light.

As Woods points out, the organization must be widely regarded as possessing expertise in

\^{118}"Fifth Session: Territorial and Jursidictional Disputes" (Rapporteur’s summary of B.A. Hamzah’s presentation), “Managing Potential Conflicts in the South China Sea”, op. cit.

particular subjects relevant to the dispute. In recreating the dialogue process for South China Sea/Spratly conflicts, it should have expertise in the following areas: oil and natural gas exploration; the geological composition of the seabed below the South China Sea, and the Spratlys in particular; fisheries management; the principles and stipulations of UNCLOS III; the particular claims of each of the six states involved in the Spratly conflict and the justifications that underly these claims; the military capabilities of the six disputants; and the ongoing attempts of various states to reinforce their claims through annexation of new islands, the reinforcement of shoals and reefs and/or through the construction of infrastructure on the larger islands. While this may seem like an exceedingly broad purview, it is important for this new arrangement to possess a broad range of expertise. Not only does effective attention to South China Sea issues require it, but it is necessary to ensure that as the issues evolve and change (i.e., as the Track II process successfully reshapes and redefines the actors’ priorities and interests), this new mechanism can remain relevant. As the focus of the group will be on South China Sea and/or Spratly issues, the arrangement still has a narrow focus to ensure that its mandate remains clear and that it remains cohesive.

Another consideration arises concerning who precisely is placed at the helm of this new arrangement and plays primary roles in conducting research. Generally, it is assumed that the more prominent the personalities involved, the greater the chances of success. However, as Woods points out, involving people who are perceived to have privileged access to policy makers

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120 This is an especially important consideration in trying to create such an arrangement for South China Sea issues. Not only is this true because of some of the unique historical claims to the Spratlys, but in trying to employ Track II mechanisms effectively in the Asia Pacific region more generally, any such architecture must remain sensitive to, what Woods terms, “inherited premises” and “cultural differences” which, while they are part of the conflict, they must also be incorporated as part of a working solution.
can invite criticism to the organization in those times when the governments it is seeking to assist/inform come under attack for their policies in the region. For an arrangement focusing on the South China Sea, this is especially important given the fact that, as noted earlier, some of the governments involved have locked themselves to particular positions on the Spratly conflict and the unique sensitivity of sovereignty-related issues in many Asia Pacific societies. These considerations make them particularly susceptible to criticism which might also be aimed at any multilateral arrangement that is perceived to be influencing government decisions.

Finally, in order to ensure that this new arrangement has some longevity, it must build strong constituencies of support in each of the countries involved. While achieving this, in part, relies on the reputation and contacts of those involved, the organization must also pursue a vital and aggressive program of information dissemination to existing and potentially interested groups. Ultimately, the survival of this, and any other arrangement that uses Track II mechanisms, relies on the willingness of national bureaucrats and academic researchers to attend and, in some cases, contribute to the financial costs of sustaining the organization. Aside from the dialogue/dispute resolution function that is, arguably, the primary focus of the group, broader bases of support must be built and maintained in foreign policy and/or intellectual circles at home. If ever questions and criticisms arise as to the efficacy of a new arrangement, the personnel involved will be forced to rely on these constituencies to defend the process and the decisions of national governments and/or leading research institutes to support it. In the event that this happens, there must already be a strong perception among key decision makers and opinion leaders that this small organization serves a useful purpose and that its absence would be truly detrimental to the national interests of those states involved. In order to ensure that this sort of good will can be accumulated, sustained and readily drawn upon, the organization must
engage in information dissemination activities. It must show itself to be providing a useful product that speaks directly to the concerns of other groups in society, such as students, educators and, arguably, journalists.

Having discussed a variety of stipulations and requirements of any prospective security architecture/mechanism, it is now necessary to suggest its form.

The South China Sea Forum for Consultation and Dispute Mediation

Rather than continue with the present arrangement, whereby it is hoped that the work of the South China Sea Informal Working Group (SCSIWG) will eventually find its way onto the official policy agenda, the SCSIWG should consider expanding its mandate to include the provision of dispute mediation services along side its present array of working group meetings and, as a result, rename itself the South China Sea Forum for Consultation and Dispute Mediation (SCSFCDM or the Forum). The dispute mediation branch would, much like the discussions that take place in the various working groups, remain unofficial and informal in order to encourage frank discussion and participation. States with particular bilateral/multilateral disputes could submit them to the mediation panel for deliberation.

By offering an informal/unofficial dispute mediation service, the Forum would be building a testing ground for some of the ideas and proposals that have been generated in its working group meetings. As they would be both housed under the same organization, one can expect that there would be a natural flow of information and an exchange of ideas between the ongoing sets of WG meetings and the mediation service, whereby the thinking and expertise of the WGs would provide the intellectual foundation/stimulus to the solutions considered in the mediation circle. Not only is this testing ground useful for those administering the WGs, in order
for them to see how their ideas might fare, but it would also be a valuable tool for the
governments presently involved in the WG meetings. Thus far, the governments participating in
the WG meetings of the SCSIWG have been doing so in the hope that these deliberations might
lead to innovative policy decisions at the Track I level. There have been very few opportunities
thus far, however, to see this happen. By providing an unofficial mechanism (experimental
forum) through which these ideas can be tested/applied to the possible settlement of some of the
multilateral/bilateral disputes that pervade the Spratly question, the governments can see for
themselves some of the different possibilities that might be available to them and the potential
for the work of the SCSIWG to contribute to the peaceful management of the Spratly conflict at
the official level. If the application proves unsuccessful, then the SCSIWG would be able to
reconsider particular strategies. Arguably, it is better to see the shortcomings of particular
proposals before they become part of the official (Track I) discourse. If, on the other hand,
certain ideas and proposals find favour with the disputants, this may encourage the governments
involved to propose them at the official level.

At this stage in the process, there are two choices. Either the governments can agree to
apply the solutions arrived at in the Forum’s mediation circle among themselves (which seems to
make the most sense in the case of bilateral disputes), or the Forum can then try to move them
directly onto the region’s official multilateral security agenda vis-à-vis the ARF. While the
Forum will not guarantee the SCSIWG a direct channel into the official discourse, it is hoped
that it will accelerate the movement of SCSIWG research and ideas into official circles.

Much like the SCSIWG, the Forum will not table directly the sensitive sovereignty/
territorial issues that underlie South China Sea conflicts. The Forum will continue the focus of
the SCSIWG on functional cooperation and, at least implicitly, the project will be to move the
disputants away from the prospect of military confrontation. However, because the intention of the Forum is to take the work of the SCSIWG one step closer to the official level, when the disputants experiment with different ideas in the mediation circle, the parties will certainly be forced to grapple with these sensitive and difficult issues at that time.

As part of this attempt to have the SCSIWG broaden its mandate and take on an expanded array of activities, the Forum must also take on a greater information dissemination function. As discussed earlier, such a function is indispensable, especially as foreign policy processes are becoming increasingly open to public viewing and scrutiny. Inevitably, the Forum will require a greater financial contribution on the part of its members and/or on the part of those presently funding the SCSIWG. If at any point this funding, and hence the Forum, comes under threat in any of the relevant national capitals (especially Ottawa), the Forum must have a ready reserve of constituency support and influence to draw upon to defend its existence. In thinking about how the Forum might carry out this function, the Forum might learn from the experience of the Canadian Consortium on Asia Pacific Security (CANCAPS) which, in addition to producing a regular newsletter, CANCAPS Bulletin, and an occasional paper series, CANCAPS Papiers, also holds an annual conference that brings together policy makers, interested academics, graduate students and members of the NGO community to present papers and engage in policy-oriented discussions regarding Canada’s security policy in the Asia Pacific region.\footnote{The purpose here is not to generate more academic material, but rather to articulate to a broader (interested) community the work being done. Assuming that these papers and conferences will retain a policy focus, the Forum should successfully avoid generating volumes of material that would be seen as too ‘academic’ in policy circles.} In addition to this, the Forum would also want to consider undertaking efforts to articulate its goals to public
education officials, the media and public affairs groups interested in foreign policy issues.\textsuperscript{122}

Staffing the dispute mediation portion of the Forum provides an opportunity to involve a variety of other governments that, while not littoral states, have key interests in ensuring the peaceful resolution to the Spratly dispute.\textsuperscript{123} While Indonesia does not lay claim to any of the Spratly Islands, it has clear national interests in ensuring that the South China Sea remains free from any one state’s exclusive sovereign control. Throughout the work of the SCSIWG, Dr. Hasjim Djalal, Indonesia’s Ambassador-At-Large for the Law of the Sea and Maritime Affairs, has played a crucial role in building governmental/institutional support throughout the littoral states for the dialogue process and, in doing so, ensuring the ongoing success of the group’s various meetings. Indonesia and Canada have positioned themselves as trusted facilitators and ‘helpful fixers’ with respect to South China Sea conflicts. Clearly, then, mediators and experts from both Canada and Indonesia would probably prove acceptable candidates to the various governments involved.

Involving Japanese mediators in the Forum would be ideal as it would actively involve yet another state that has clear interests in maintaining free and secure access to the South China Sea.

\textsuperscript{122}In Canada, this would include such organizations as the Canadian Institute of International Affairs (CIIA) and the Canadian Institute of Strategic Studies (CISS). The Forum might, in fact, consider a variety of strategies, including co-hosting an annual conference with either of these organizations and/or using their various publications as additional channels for articulating its activities to a broader audience/constituency.

\textsuperscript{123}In discussing the involvement of other interested states, the prospective involvement of the United States cannot be overlooked. Clearly, America’s involvement in the Forum would be necessary given their interest in ensuring peace and stability in the South China Sea and, more specifically, their specific concern that the Sea’s commercial shipping lanes remain free and open. Precisely how America would choose to involve itself, however, will not be discussed here as it will depend, first, on the sort of role Washington is comfortable with and, second, the extent to which all of the Spratly six are willing to accept an enhanced American role in South China Sea issues. It is, unfortunately, too early to make any reasonable suggestions on either of these points.
Sea. This, however, may not be possible. Although decades have passed since Japanese imperialism in Southeast Asia, many Southeast Asian governments continue to be wary of Japan's role in the region's affairs. The peaceful management of the Spratly issue is important to Japan for several reasons. Not only does some 70% of Japan's imported oil pass through the shipping lanes in the South China Sea, but the Spratly issue is a litmus test as to how China's growing economic and military power will affect its relations with its neighbours. This is of unique interest to Japan as it may also be indicative of how Tokyo and Beijing might resolve their contending claims over the Senkaku (Dioyutai) Islands.124

In trying to find a way to involve Japan in the workings of the Forum, the Forum's administrators may consider looking to Tokyo for funding. While this may, at the outset, only seem to further entrench Japan's inappropriately small role in international/regional security affairs, and invite further criticism of Tokyo's penchant for cheque book diplomacy, such an arrangement may receive a sympathetic hearing in Tokyo. Given Tokyo's strict adherence to the notion of comprehensive security, Japan focuses its foreign policy resources on areas key to its economic growth and prosperity, including ensuring that it has secured and continued access to raw materials and energy supplies. As Eiichi Katahara writes,

Japan's lack of energy and food resources makes it imperative to maintain secure access to overseas energy and food resources as well as markets. ... In this context, the concept of comprehensive security calls for an all-embracing, multidimensional and distinctively cooperative approach for ensuring both military and economic security.125


At the same time, Japan has sought for itself a greater role in helping to resolve the Spratly dispute. While the range of diplomatic activities it has been allowed to undertake has been inhibited by memories of Tokyo’s imperialist past in Southeast Asia, it has, at times, attempted to act as a mediator between various contending interests in the Spratly dispute. Soon after China’s incursion on Mischief Reef in early 1995, the Philippines discussed the issue with Japan at a bilateral meeting in late February and asked Japanese officials to convince Beijing to halt its advances in the Spratly archipelago. Following on this request, a Japanese official raised the issue with Chinese officials on March 2. While these efforts did not result in any substantive change in Beijing’s position, it did demonstrate Japan’s desire to enhance its national prestige by attempting to defuse a regional conflict.\textsuperscript{126} In fact, officials from Japan’s Ministry of Foreign Affairs have, at various points in the past, gone so far as to suggest that Japan would be willing to support the financial costs involved in hosting the workshops of the South China Sea Informal Working Group (described earlier).\textsuperscript{127}

Therefore, given its specific sets of concerns regarding the SLOCs in the South China Sea, and Tokyo’s demonstrated enthusiasm for assuming an enhanced role in regional/international security affairs, it is easy to see how Japan’s financial support of the Forum’s work would fit very well within the government’s conception of comprehensive security. Given the variety of tasks undertaken by the Forum, Japan’s support for the ongoing research of the WGs and/or the dispute mediation service would allow it to play a more active role in international security affairs while still remaining consistent with Article 9 of its

\textsuperscript{126}Lam, p. 1005.

\textsuperscript{127}Ibid., pp. 1007-1008. Unfortunately, this offer was made on the condition that the meetings be held in Tokyo. Arguing that the Chinese were unlikely to agree to such an arrangement, Dr. Hasjim Djalal declined Tokyo’s offer.
Constitution (and the considerable domestic political forces that continually fight to ensure that Japan's security policy remains within its bounds). In fact, as Lam points out,

Among the claimant and non-claimant states that are interested in the Spratlys, Japan probably has the best financial, skilled scientific, and human resources to assist in joint research and development of the South China Sea. Moreover, because of its long-standing exploration and activities in the Spratlys between 1918 and 1945, it is likely to have accumulated valuable information and knowledge that will be helpful for such activity.\(^\text{128}\)

Clearly, such a role for Japan, while it may initially concern some of the parties to the dispute, would likely bring a variety of substantive benefits to the Forum.

Aside from answering what has become an almost time-honoured question on the Track II diplomatic circuit regarding what sort of relationship Track II dialogue mechanisms should have with Track I fora, this sort of architecture also addresses a number of the concerns outlined earlier in this chapter and in previous chapters. Not only does it reinforce the benefits of Track II dialogue mechanisms (one of which, as discussed earlier, is the fact that it provides governments with a chance to back away from their formal positions and focus on the facts of the Spratly archipelago), but it also provides a way to integrate UNCLOS into a unique security arrangement that is designed specifically for Spratly/South China Sea issues. Because the principles and stipulations outlined in UNCLOS form the basis for all of the work undertaken by the SCSIWG, any solution concepts arrived at under the auspices of the Forum will conform to UNCLOS and will reflect a relatively unbiased and comprehensive reading/interpretation of UNCLOS' rules. At the same time, it is able to use its own considerable expertise and ongoing access to policy making elites to work around the Convention's various shortcomings, such as its vague definitions and complicated dispute settlement mechanism. Through its two primary components, the WG

\(^{128}\)Ibid., p. 1007.
meetings and the mediation group, the Forum can work to refine the application of UNCLOS to the South China Sea/Spratly conflicts. As a review of UNCLOS and its application thus far the Spratly dispute (chapter 3) makes clear, it is, arguably, the Convention’s generic approach to oceanic/ocean-based resource questions that inhibits it from being an effective aid in resolving the Spratly dispute. While, in many ways, the drafters of UNCLOS cannot be blamed for this, any opportunity to employ the strengths of UNCLOS while addressing its specific weaknesses vis-à-vis the Spratly dispute, would help to manage the dispute in a way that would be amenable to international law and the increasingly universal norms therein.

This sort of intellectual flexibility should be exploited to its fullest. While it is essential that the Forum’s WGs undertake work that is deemed important by the ARF process, it must also pursue research on issues that are not (yet) considered essential by national governments. The expertise embodied within the Forum will be quite considerable. Therefore, its administrators/researchers should take the initiative to be imaginative and, if possible, anticipate the research/information needs of both the Track II and Track I dialogue processes. Not only will this ensure that the Forum remains relevant to the region’s security concerns and needs, but it will also help maintain the existing momentum and eventually push the agenda forward.
Conclusion

The shortcomings in this proposed arrangement are clear. Aside from the need to convince governments in the region that this new architecture is necessary (a substantial task on its own), there is considerable doubt as to whether or not the administrators of CSCAP and/or ARF would be willing to accommodate another regional organization employing Track II mechanism. While these may be legitimate concerns, the Forum is neither meant to usurp or complicate unnecessarily intergovernmental processes. Rather, CSCAP will retain its preeminent position as the region’s leading regionwide Track II fora in support of ARF. The Asia Pacific region’s security difficulties are manifold. The creation of the Forum will certainly not leave CSCAP with a lack of issues to address. In fact, given CSCAP’s considerable resources and expertise, personnel from the Forum may find themselves in frequent consultation with CSCAP.

A more substantive concern, however, is the fact that the Forum will not do away with the legal/sovereignty/national identity concerns that seem to weigh heavily in the minds of policy officials from the various claimant states. Despite the fact that the Forum, through its reliance on Track II dialogue mechanisms, enables the disputants to focus on various methods of functional cooperation, issues relating to territorial irredentism and historical right will continue to play a role in driving aggressive behaviour and territorial aggrandizement in the Spratlys. In fact, this criticism reflects a key concern with Track II arrangements more generally. When government officials return to their national capitals, step back into their official capacities and must, once again, curry favour with more conservative constituencies who see accommodation in the Spratlys as a sign of weakness, one wonders whether or not the unofficial dialogue of the SCSTWG has a substantial impact on the policy process. Given China’s recent activities on Mischief Reef and
Scarborough Shoal, this remains a legitimate concern.

In order to answer this question, more research must be done on the policy divisions and debates regarding South China Sea/Spratly issues that take place within the relevant bureaucracies of the claimant states. As Cheng-Yi Lin's article (cited earlier in chapter one) makes clear, considerable disagreements exist within policy circles as to whether or not the country should pursue an aggressive policy vis-à-vis the Spratlys. A more careful understanding as to how strong these divisions are, and the relative (or potential) influence of each side on the policy making process, would be of tremendous help. Not only would it help the administrators of the SCSIWG gain an understanding of how their work is perceived by various constituencies within the relevant policy communities, but it would also provide the architects of the Forum with an idea as to how quickly they should proceed and how this new institutional arrangement will fare.

Additionally, more research must be done as to what becomes of the work and ideas discussed in the meetings of the SCSIWG when the government officials involved in the process return to their official capacities. Presently, the record is mixed as this varies from country to country. While officials from the Department of Foreign Affairs in Manila seem quite keen on ensuring that the ideas discussed in this Track II forum are pursued and, as much as possible, integrated into the policy process, the extent to which Hanoi is willing and able to integrate the work of the SCSIWG into their policies remains a mystery. \(^{129}\) A better understanding of how (if) this work shapes the policies of the disputants regarding South China Sea/Spratly issues would, once again, help the administrators of the Forum. It may suggest new areas where the Forum

\(^{129}\)Personal discussion with Mr. Robert Adamson of the SCSIWG.
may want to focus its resources.\footnote{In the case of Vietnam, the government may simply not possess the legal expertise/manpower necessary to attend to these issues. Therefore, this may argue for the provision/exchange of legal personnel to these states in order to ensure that someone is able to pursue these issues once the WG meetings are over.}

In suggesting this new organization, the author is not ignoring the considerable constraints that exist in trying to bring about a peaceful resolution to the conflict. In fact, such an objective, at least in the short to medium-term, is unrealistic. Instead, the focus should be on creating a process through which the conflict can be peacefully managed and, if possible, future incidences of military confrontation can be averted. Not only does this require one to consider how the discourse can be re-focused, but it also requires some serious thought be given to how the ideas and initiatives decided in unofficial fora can be made part of official policy considerations.

In creating the Forum, the author is recognizing that, given the considerable amount of Track II work that has been accomplished by the SCSIWG (all of which was completed quite independently of CSCAP), the opportunity exists at this time to take the considerable momentum and expertise that has emerged through the SCSIWG's work and find ways to apply it and/or link it directly to official policy channels.

Finally, the creation of the Forum will also serve as a valuable guide as to where the next step in the region’s other Track II dialogues might be. If successful, it may suggest a model for other particular disputes that continue to threaten the political, military and economic security of the entire Asia Pacific region. While keeping in mind that the evolution of Track II processes surrounding South China Sea issues (i.e., the work of the SCSIWG) is unique and has not been done for other disputes in the region, if the Forum proves successful, it may suggest an
instructive pattern of functional cooperation.

As noted earlier, building a security structure in the Asia Pacific region requires special sensitivity to the region's history and its unique diplomatic practice. Emphasizing the use of Track II mechanisms as a way to focus on the verifiable facts provides an opportunity to reconstruct the process/discourse that has surrounded various security issues in the region. By doing this, the potential for cooperation and peaceful management of the region's conflicts is greatly enhanced. The creation of the Forum is a recognition of the importance of this sort of work and a modest attempt to have it realize its full potential.