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Following the Path of Oil: The Law of the Sea or Realpolitik - What Good Does Law do in the South China Sea Territorial Conflicts?

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Wendy N. Duong

Abstract

This Article describes the relevant features of United Nations Convention on the Law of the Sea ("UNCLOS"), demonstrates how the Convention is ill-equipped to handle the complexity of the South China Sea disputes, and explores the role of the private sector behind State actors in any negotiated resolution of these disputes. This Article also surveys the development of these disputes from the last decade to the present day, using as a case study the tension between China and Vietnam in the 1990s when UNCLOS went into force. Although the case study occurred in the past decade, the pattern of behaviors observed may recur at any time, due to the Realpolitik dynamics of the situation. Specifically, this Article argues that: (1) The South China Sea disputes will likely be resolved, if at all, through ad hoc negotiation of bilateral or multilateral treaties influenced by Realpolitik. In such a negotiation, as the proponent and/or implementer of "joint development" among nations, the private sector will play a crucial role behind the frontal role of governmental parties. The private sector could be caught between the competing nations, thereby forced to play the role of an opportunist intermediary while managing political risks. (2) Meaningful treaty negotiation requires equal bargaining powers among the negotiating nations—a utopian picture. Treaty resolution will more likely tip toward the interest of the more militarily and economically powerful State, to the detriment of weaker and smaller nations. The dominant State with the most sweeping claim to the South China Sea is China. Propositions one and two above point to the following reality: A major role in the structuring of a negotiated solution may belong to those companies receiving the support of China, i.e., those multinational enterprises that have the most incentive to please China because of their substantial economic stake in China as a consumer or supplier market. Accordingly, to counterbalance the military and economic dominance of China (and its alliance of private companies behind the scene), the Association of Southeast Asian Nations ("ASEAN") Member States should strategically join forces as one negotiating bloc. Such strategic alliance must be predicated upon the successful building of consensus among the ASEAN claimants. If successful, the multilateral treaty resolution of the South China Sea disputes may serve as an example of, or a de facto predecessor for, the long-desired (yet so far unachievable) regional investment and trade bloc for Asia. Ultimately, it is the powerful oil and gas multinationals—the implementers of upstream technology in the wildcat chase for oil—that fashion and drive the determination of sovereign boundaries, whether or not these economic entities sit at the negotiating table among the Nation-States. As engineer, proponent, and implementer of joint development, these economic enterprises help shape the resolution of the South China Sea disputes, and, hence, ultimately determine the distribution of petroleum resources for the people of East and Southeast Asia. These

observations confirm the “monarch” and “monopoly” theories expounded in the Author’s previous writings: modern international petroleum transactions in the developing economies represent the “confidential handshake” between governments—the modern monarchs—and the multinational corporate rainmakers, to the exclusion of middle-class entrepreneurs and Third World inhabitants. This Article hopefully will serve as another awakening bell.

FOLLOWING THE PATH OF OIL:
THE LAW OF THE SEA OR *REALPOLITIK*—
WHAT GOOD DOES LAW DO IN
THE SOUTH CHINA SEA
TERRITORIAL CONFLICTS?

*Wendy N. Duong**

INTRODUCTION

In 2005, the retail price of gasoline reached an unprecedented figure, calling into question alternative sources of energy or new petroleum reservoirs in faraway places. One such place is the beautiful, yet geologically complex South China Sea (the “Sea”).¹ The Sea has been a subject of intense territorial dis-

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1. The U.S. Department of Energy lists four potential petroleum reserves: the Caspian Sea, the North Sea Region, the Persian Gulf, and the South China Sea. As of 2003, the estimates for the South China Sea, however, were relatively small compared to the Persian Gulf (estimated 7 billion barrels of oil and 150.3 trillion cubic feet of gas for the South China Sea, compared to 674 billion barrels of oil and 1,923 trillion cubic feet of gas for the Persian Gulf). See Energy Info. Admin., U.S. Dep’t of Energy, South China Sea Tables and Maps (Sept. 2003) [hereinafter South China Sea Tables and Maps], <http://www.eia.doe.gov/emeu/cabs/schinatab.html> (last visited Nov. 10, 2006). As of 2001, production for the South China Sea was estimated at 2.2 million barrels of oil per day, and 3.2 trillion cubic feet of gas per year, showing that the South China Sea has not been fully exploited. See DOUGLAS M. JOHNSTON & MARK J. VALENCIA, *PACIFIC OCEAN BOUNDARY PROBLEMS: STATUS AND SOLUTIONS* 8 (1991); *Chinese Bureaucrats Draw the Line*

putes among governments, and a challenging prospect for the adventurous petroleum explorationist. Its geological complexity can make exploration costs astronomical, and territorial disputes can heighten political risks.

Stretching from the southern coast of China toward the equator and joining together all countries of Southeast Asia with its sapphire blue water, the South China Sea owes its international name to its location—south of China. Yet, in Vietnam, it is called “East Sea” (east of Vietnam, rather than “south of China”).² Other Southeast Asian countries call this Sea and the various islands within it different names in their native languages. The variety of local names reflects the intense national spirit attached to the area.

The South China Sea Territorial Disputes

After the Asian currency crisis of the late 1990s, the Pacific Rim was ready to re-emerge economically. But the tragedy of September 11th and the two wars initiated by the United States have steered international attention away from Asia-Pacific to terrorism and the U.S. presence in the Middle East.³ Before this major switch of attention, in the 1980s and 1990s, territorial disputes in the South China Sea bred intermittent military and political conflicts, occupying daily news broadcasts and routinely featured in headlines of the regional media. Despite recent peace-making progress, this Sea and its petroleum resources continue to be the subject of overlapping territorial claims by seven Asian governments: China, Taiwan, Vietnam, Indonesia, Malaysia, Brunei, and the Philippines (the “South China Sea Disputes” or the “Disputes”).

in South China Sea, PETROLEUM ECONOMIST, July 1995, at 16-17 (Chinese scientists have estimated the area to contain about 105 billion barrels of oil, 25 billion cubic meters of gas, and 300,000 tons of phosphorous).

2. This “East Sea” is distinguishable from the “East China Sea,” which is the part of the Pacific Ocean closer to Japan.

3. Asia plays a crucial role in the war against terrorism, with Afghanistan in the heart of the international battle, and Islamic oil-producing Indonesia as the center of the Muslim culture in Southeast Asia. See generally Matt Williams, *Don't Neglect the Spratlys*, FAR E. ECON. REV., Sept. 26, 2002. The Association of Southeast Asian Nations (“ASEAN”) Regional Forum’s discussion of security for Asia Pacific stressed terrorism, Kashmir, and Korea as areas of concern, naming Spratly Disputes only as token. Mr. Williams concluded that “international attention has strayed from South China Sea” disputes and advocated that the “South China Sea must be made a higher priority.” See *id.*

International petroleum companies and consortia have long been exploring for petroleum resources in the area. In the 1990s, the opening up of Cambodia offshore extended frontier exploration acreage all the way south to the Gulf of Thailand. Many production projects have gone on unchallenged and unaffected by the Disputes. For example, the Russians have extracted oil from the lucrative, yet structurally complicated White Tiger field (“Bach Ho”) off the coast of Vietnam.⁴ The Natuna field in the southern part of the disputed area continues to be part of the economic backbone of oil-producing Indonesia.⁵ Shell International has announced discoveries in the deep water blocks off of the Palawan Island in the Philippines.⁶ Other major discoveries have included British Petroleum’s gas field in Vietnam’s Con Son Basin, estimated at approximately three trillion cubic feet.⁷ Reportedly, UNOCAL has also discovered gas off the coast of Vietnam and in land-locked Myanmar and Indonesia.⁸ The China National Offshore Oil Corporation and other companies have also announced oil and gas discoveries in the South China Sea.⁹

Increasing exploration activities, especially in deep-water areas, will refocus international attention on the South China Sea

4. See Sergei Blagov, *Russians Tough it Out in Vietnam’s Oilfield of Broken Dreams*, ASIA TIMES ONLINE, Dec. 3, 1999, <http://www.atimes.com/c-asia/AL03Ag01.html> (last visited Nov. 10, 2006).

5. See LOWELL FELD, INDONESIA COUNTRY ANALYSIS BRIEF (Dep’t of Energy, Energy Info. Admin., 2004), <http://www.eia.doe.gov/emeu/cabs/indonesia.pdf> (last visited Jan. 29, 2007); see also Wayne Arnold, *High Oil Prices Challenge Indonesia’s Economy*, INT’L HERALD TRIB., Aug. 17, 2005, at 14.

6. See INTEC Engineering, Shell Malampaya Pipeline Project, <http://www.intecengineering.com/expertise/pipelines/resumes/02z-0046.pdf> (last visited Nov. 9, 2006).

7. See Press Release, British Petroleum, \$1.3 Billion Nam Con Son Project Delivers First Gas (Nov. 26, 2002), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=2001403>.

8. See Jeff Moore, *UNOCAL’s Stake in Southeast Asia*, ASIA TIMES ONLINE, July 20, 2005, http://www.atimes.com/atimes/southeast_asia/GG20Ae03.html (last visited Nov. 10, 2006).

9. See Alan Boyd, *South China Sea: It’s Not All About Oil*, ASIA TIMES ONLINE, Sept. 06, 2003, <http://www.atimes.com/atimes/China/E106Ad02.html> (last visited Nov. 10, 2006); see also *CNOOC Found New Oil in the South China Sea*, ASIA TIMES ONLINE, June 03, 2004, www.atimes.com/atimes/china/FF03Ad01.html (last visited Nov. 10, 2006); *Husky Says Makes Major Gas Find Off China*, REUTERS, June 15, 2006, <http://news.oneindia.in/2006/06/15/husky-says-makes-major-gas-find-off-china-1150328032.html> (last visited Nov. 10, 2006) (noting discovery of natural gas in South China Sea off Chinese coast south of Hong Kong).

Disputes, primarily because of the competing economic interests at stake. In the past, whether nations stirred up the Disputes (typically in a “chain reaction”) often depended on the drilling activities of the international petroleum companies doing business in the region.¹⁰ The competing countries also asserted their claims publicly to defend their sovereignty, at times referencing the U.N. Convention on the Law of the Sea (the “Convention” or “UNCLOS”). In fact, the political tension and press coverage of the South China Disputes intensified in 1994, when UNCLOS came into effect. But does UNCLOS apply, or does it offer a legal solution for the Disputes?

Summary of Argument

This Article describes the relevant features of UNCLOS, demonstrates how the Convention is ill-equipped to handle the complexity of the South China Sea Disputes, and explores the role of the private sector behind State actors in any negotiated resolution of these Disputes. This Article also surveys the development of these Disputes from the last decade to the present day, using as a case study the tension between China and Vietnam in the 1990s when UNCLOS went into force. Although the case study occurred in the past decade, the pattern of behaviors observed may recur at any time, due to the *Realpolitik* dynamics of the situation. Specifically, this Article argues that:

(1) The South China Sea Disputes will likely be resolved, if at all, through ad hoc negotiation of bilateral or multilateral treaties influenced by *Realpolitik*. In such a negotiation, as the proponent and/or implementer of “joint development” among nations, the private sector will play a crucial role behind the frontal role of governmental parties. The private sector could be caught between the competing nations, thereby forced to play the role of an opportunist intermediary while managing political risks.

(2) Meaningful treaty negotiation requires equal bargaining powers among the negotiating nations—a utopian picture. Treaty resolution will more likely tip toward the interest of the more militarily and economically powerful State, to the detri-

10. See, e.g., *infra* note 47 (discussing Vietnam’s protest over Malaysia’s grant of explorations rights to BhP in an area that is contested by the two nations).

ment of weaker and smaller nations. The dominant State with the most sweeping claim to the South China Sea is China.

Propositions one and two above point to the following reality: A major role in the structuring of a negotiated solution may belong to those companies receiving the support of China, i.e., those multinational enterprises that have the most incentive to please China because of their substantial economic stake in China as a consumer or supplier market. Accordingly, to counterbalance the military and economic dominance of China (and its alliance of private companies behind the scene), the Association of Southeast Asian Nations (“ASEAN”) Member States should strategically join forces as one negotiating bloc. Such strategic alliance must be predicated upon the successful building of consensus among the ASEAN claimants. If successful, the multilateral treaty resolution of the South China Sea Disputes may serve as an example of, or a de facto predecessor for, the long-desired (yet so far unachievable) regional investment and trade bloc for Asia.

Ultimately, it is the powerful oil and gas multinationals—the implementers of upstream technology in the wildcat chase for oil—that fashion and drive the determination of sovereign boundaries, whether or not these economic entities sit at the negotiating table among the Nation-States. As engineer, proponent, and implementer of joint development, these economic enterprises help shape the resolution of the South China Sea Disputes, and, hence, ultimately determine the distribution of petroleum resources for the people of East and Southeast Asia.

These observations confirm the “monarch” and “monopoly” theories expounded in the Author’s previous writings: Modern international petroleum transactions in the developing economies represent the “confidential handshake” between governments—the modern monarchs—and the multinational corporate rainmakers, to the exclusion of middle-class entrepreneurs and Third World inhabitants.¹¹ This Article hopefully will serve as another awakening bell.

11. See Wendy N. Duong, *Partnerships with Monarchs in the Search for Oil—Case One: Unveiling and Re-examining the Patterns of “Third World” Economic Development in the Petroleum Sector*, 25 U. PA. J. INT’L ECON. L. 1171 (2004); see also Wendy N. Duong, *Partnerships with Monarchs in the Development of Energy Resources—Case Two: Dissecting an Independent Power Project and Re-evaluating the Role of Multilateral and Project Financing in the International Energy Sector*, 26 U. PA. J. INT’L ECON. L. 69 (2005).

I. BACKGROUND

A. *The Area of Conflicts*

Various conflicting territorial claims cover the entire South China Sea.¹² China's claims are the most extensive, running all the way from the Chinese coasts to the coasts of Brunei, Malaysia, and Indonesia.¹³ Taiwan's claims are essentially co-extensive with China's, because Taiwan has always maintained it is the legitimate government of mainland China. The Disputes have undoubtedly contributed to political tension among these nations, especially China and Vietnam.¹⁴ The competing sovereign claims have centered around two main geographical points.¹⁵

12. See generally ROBERT CATLEY & MAKUR KELIAT, *SPRATLYS: THE DISPUTE IN THE SOUTH CHINA SEA* (1997) (describing historical development and research studies on the South China Sea, including its strategic importance, and identifying five sensitive areas of territorial conflicts).

13. The only island of any significance that falls outside Beijing's claims is Natuna, occupied by Indonesia. Nonetheless, when China made sweeping claims to the South China Sea, China reportedly drew territorial lines that encompassed certain parts of Indonesia's Natuna gas field developed by Exxon, thereby agitating Indonesia. See Manuela Saragosa, *Beijing's South China Sea Ambitions Rattle Indonesia*, *FIN. TIMES*, May 26, 1995 at 4.

Natuna's adjacent waters are claimed by Vietnam, Malaysia, and Indonesia as within their respective Exclusive Economic Zones. See GlobalSecurity.org, *Territorial Claims in the Spratly and Paracel Islands*, <http://www.globalsecurity.org/military/world/war/spratly-claims.htm> (last visited Nov. 11, 2006).

14. See Saragosa, *supra* note 13.

15. Southeast Asian scholars have focused on four principal territorial conflicts in the South China Sea: 1) The Gulf of Thailand disputes, covering a zone of about 4,000 square nautical miles that is claimed by Thailand, Vietnam, Cambodia, and Malaysia; 2) the Spratlys disputes, involving claims of seven competing governments; 3) the Gulf of Tonkin disputes, involving claims by China and Vietnam; and 4) the Natuna disputes involving claims by Vietnam, Malaysia, and Indonesia. Sovereignty over the Natuna islands themselves is not disputed; what is disputed is the area of the sea surrounding the shelf delimitation line drawn from Natuna. See generally ALBERT CHANDLER & ELAINE CHIEW, *UNSETTLED MARITIME BOUNDARIES: THE GULF OF THAILAND AND SOUTH CHINA SEA* (Inst. for Int'l Research, Asia Pac. Oil and Gas Tax Issues 1993).

The Gulf of Thailand and The Gulf of Tonkin disputes have tentatively been resolved. See ERIK KREIL, *SOUTH CHINA SEA REGION COUNTRY ANALYSIS BRIEF* (Dep't of Energy, Energy Info. Admin., 2003), <http://www.eia.doe.gov/emeu/cabs/schina.pdf> (last visited Nov. 11, 2006). The Natuna disputes originate from the nations' claims to the Spratlys. *Id.* at 1-2. Disputes over the Paracels and the Spratlys are still unresolved. *Id.* at 3.

Other parts of the Pacific Ocean have also been disputed. See Ji Guoxing, *Maritime Jurisdiction in the Three China Seas: Options for Equitable Settlement* 8-14 (Inst. on Global Conflict and Cooperation, Policy Paper No. 19, 1995), <http://igcc.ucsd.edu/pdf/policypapers/pp19.pdf> (last visited Jan. 28, 2007); see also Jonathan Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 *AM. J. INT'L L.* 724 (describing or

1. The Paracel Archipelago

The Paracel Archipelago is a group of approximately 120 small islands¹⁶ about 220 miles southeast of China's Hainan Island.¹⁷ Once claimed concurrently by Vietnam, Taiwan and Beijing, the Paracels have been occupied by China since 1974, when Chinese forces took over the islands from the U.S.-backed South Vietnam.¹⁸ The Disputes are fewer and less intense with respect to the Paracels than with respect to the Spratlys (discussed below), primarily due to two factors. First, China has occupied the area for a long time (over Vietnam's continuous objections).¹⁹ Second, offshore exploration activities have been less frequent near the Paracels. China's military takeover of the Paracels in 1974 amply demonstrated its aggressive stand in the Pacific vis-à-vis a passively observing Asia-Pacific community.

2. The Spratly Archipelago

The second point of conflict, and the more popular one, is the Spratly Archipelago, named after a nineteenth century British whaling captain.²⁰ This is a group of approximately 100 plus islands, reefs, and shoals spread over approximately 7000 square miles in the southern part of the South China Sea, a region of "confused typography."²¹ The Spratlys were temporarily occupied by Japan during the Second World War and were visited

referencing, *inter alia*, disputes in the Yellow Sea, the East China Sea, and the Sea of Japan).

16. See Richard D. Fisher, *Brewing Conflict in the South China Sea* (Heritage Found., Asian Studies Backgrounder No. 17, 1984), http://www.heritage.org/Research/AsiaandthePacific/upload/90517_1.pdf (last visited Jan. 28, 2007) (asserting that the Paracels contain 120 islands). Other secondary sources report that the Paracel group consists of only twenty main islands and others are cays, reefs, and banks. See, e.g., Charney, *supra* note 15, at 732 n.50; Hungah Chiu & Choon-ho Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. & INT'L L. 1 (1975).

17. (See Exhibit B appended to this Article).

18. See CENTRAL INTELLIGENCE AGENCY ("CIA"), THE WORLD FACT BOOK: THE PARACEL ISLANDS, <https://www.cia.gov/cia/publications/factbook/geos/pf.html> (last visited Nov. 11, 2006).

19. See South China Sea Tables and Maps, *supra* note 1. Despite China's continuous occupation of the Paracels since 1974, to date, the Vietnamese Communist Party has steadfastly asserted Vietnam's sovereignty over these islands, detailing historical evidence dating back to the seventeenth century. See Vietnamese Communist Party, The Islands and Seas of Vietnam (*Bien Dao Viet Nam*), http://www.cpv.org.vn/index_e.html (last visited Nov. 11, 2006); see also *infra* notes 206-207.

20. (See Exhibit C appended to this Article).

21. CHANDLER & CHIEW, *supra* note 16, at 21.

occasionally by French and Chinese warships. During the post-war period, however, many islands were unoccupied, except for periodic visits by fishermen during the monsoon months of December and January.²²

Specifically, the group is located between 4^o and 11^o, 30' latitude and 109^o, 30' and 117^o, 50' longitude along the wide expanse of the South China Sea, spreading across the world's busiest sea lanes.²³ Part of the main group lies closest to the Philippines, about 150 miles west of Palawan Island. According to a Chinese source, the group spreads over 1,800 kilometers from north to south, and over 900 kilometers from east to west.²⁴ The group also contains numerous rocks that stand permanently above sea level.²⁵ These rocks, on their own, may not be able to sustain human habitation. Secondary sources and research papers often have reported conflicting figures as to the exact number of structures within the group. As described by commentators, "[t]here are so many Spratly islets, reefs, shoals, rocks, bays,

22. According to Prescott, Johnston, and Valencia, as of the past decade, the status of occupation was as follows:

- China occupied four islands: Nan Xun Jiao (Gaven), Kennan, Yung Shu Jiao (Fiery Cross), and Hua Yang Jiao.
- Indonesia principally claimed the waters surrounding and adjacent to Natuna.
- Malaysia occupied three islands: Terumbu Ubi, Terumbu Layang-Layang (Swallow Reef), and Terumbu Ssemarang Barat Kecil (Louisa Reef). There are sources reporting that Malaysia actually occupied four islands.
- The Philippines occupied seven islands: Loaita (Kota), Thitu (Pagasa), Northeast Cay (Parola), West York Island (Likas), Flat Island (Patag), Nanshan Island (Lawak), and Lankiam Cay (Panata) on Loaita Bank.
- Vietnam occupied five islands: Spratly (Truong Sa), Southwest Cay (Song Tu Cay), Sin Cowe (Sinh Ton), Namyit Island (Nam Yit), and Amboyna Cay (An Bang). The Spratly Island (from which the group gets its collective name) lies the closest to Vietnam.

See generally JOHNSTON & VALENCIA, *supra* note 1; PRESCOTT, *infra* note 25. As of October 2005, Professor Ji Guoxing provided a different tally: Vietnam allegedly has occupied twenty-seven islands and reefs in the western and central parts of the archipelago; the Philippines have occupied eight islands in the eastern part; Malaysia has occupied three in the southern part; China has occupied seven; and Taiwan has occupied one in the central part. See Guoxing, *supra* note 15, at 14-16.

23. See Christopher Joyner, *The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation*, 13 INT'L J. MAR. & COAST. L. 53, 56 (1998).

24. See U.S.-China Econ. & Sec. Review Comm'n ("U.S.C.C."), *The Worrisome Situation of the South China Sea—China Facing the Stepped-up Military Infiltration by the U.S., Japan, and India* (USCC Research Paper) [hereinafter *Worrisome Situation*], <http://www.uscc.gov/researchpapers/2004/southchinaseamilitary.htm> (last visited Nov. 11, 2006).

25. See J.R.V. PRESCOTT, *MARITIME JURISDICTION IN SOUTHEAST ASIA: A COMMENTARY AND A MAP* 36 (1981).

atolls, banks. Between and around them there is so much sea . . . [that] . . . it is difficult to keep a sense of proportion, or to banish a sense of the absurd.”²⁶ Disputes over the Spratlys have been so notorious that they tend to overshadow other disputes in the South China Sea.

The competing nations²⁷ have made numerous claims to the Spratly groups. China traces her claim to the Han Dynasty (206 B.C. to 220 A.D.) and has continued to take over islands and islets. In 1992, China occupied the eighth island in the Spratlys group.²⁸ In the words of a competing claimant, Chinese expansionists view “the entire South China Sea as a Chinese lake.”²⁹ Taiwan “tags” her claims upon China’s historical evidence, contending that Taiwan alone represents the people of China.

Vietnam claims she has acquired sovereignty over the islands since ancient time, especially after she gained independence from France—France integrated the Spratlys into French Indochina in the 1920s.³⁰ Vietnam is currently occupying the Spratly Island, the largest island from which the Spratlys group obtains its collective name.

The Philippines’s claim and Tomas Cloma’s claim share the same origin. Tomas Cloma, the owner of a Philippine fishing vessel company and director of the Philippine Maritime Institute, explored the Spratlys with his brothers and their crews sometime between 1947 and 1956 in their search for better fishing grounds. Mr. Cloma claimed he had discovered and occu-

26. *See id.* at 30.

27. The competing nations are: China, Vietnam, the Philippines, Malaysia, Brunei, Taiwan and Indonesia. *See Worrisome Situation, supra* note 24.

28. *See China ‘Occupied Eighth Spratly Isle,’ STRAITS TIMES*, July 17, 1992.

29. *See Eric Hyer, South China Sea Disputes: The Implications of China’s Earlier Territorial Settlements*, 68 *PAC. AFF.* 34, 36 (Spring 1995); *see also* Statement of the Royal Sovereign Military & Hospitaller Order of St. John of Jerusalem (on file with author) (claiming sovereignty over Spratlys as a result of Thomas Cloma’s claims over the “Freedomland” in the Spratly group).

30. The Vietnam Courier published historical documents claiming sovereignty over the Paracels and the Spratlys dating from French colonialism to 1983. *See The Parcel and Spratly Archipelago II*, *VIETNAM COURIER*, 1985; *see also Tong Luoc Tuyen Cao* 14/2/1974 *cua VNCH ve Hoang Sa* [Summary of the Announcement Dated 14/2/1974 of the Republic of Vietnam Regarding the Paracels Islands], http://www.ykien.net/tl_biengioi02.html (last visited Nov. 10, 2006); *Vuong Hong Anh, Tong Luoc Tuyen Bo cua Thu Tuong Tran Van Huu o Hoa Hoi* 1951 [Summary of Announcement by [Vietnamese] Prime Minister Tran Van Huu at the 1951 Peace Talk], http://www.ykien.net/tl_biengioi01.html (last visited Nov. 10, 2006).

pied fifty-three islands and reefs in the Spratlys and renamed them the "Kalayaan" (Freedomland Island group).³¹ In fact, he declared a new sovereign nation called the "Free Territory of Freedomland," under the theory of "discovery and occupation."³² The Freedomland's Supreme Council later took asylum in Manila and changed the name of the territory to "Kingdom of Colonia." (Later, Cloma also added "St. John" to the name). After 1974, the Supreme Council moved its exile government to Lubuan, Sabah and has since continued to assert sovereignty over the Spratlys in competition with the Philippines and other countries.³³

The Philippines, on the other hand, claims that Tomas Cloma transferred sovereignty of the islands to the Philippines in 1974 through a Deed of Accession and asserts sovereignty over the Kalayaan group by virtue of Presidential Decree 1596.³⁴ Kalayaan was annexed into the Palawan province as a municipality in April, 1972.³⁵ In 1978, Presidential Decree 1599 underscored the fact that Kalayaan is within the Philippines' Exclusive Economic Zone.³⁶

Malaysia contends that approximately twelve structures within the Spratly group are located on its Continental Shelf.³⁷ This claim was first raised in 1979 based on the theories of "discovery and occupation."³⁸

Indonesia has not made a claim to any island within the Spratly group. The majority of scholarly work on the Disputes omits discussion of Indonesia. However, some sources contend that part of the disputed Spratly waters extend into Indonesia's "exploration agreement zone," established for international petroleum exploration and exploitation, based on Indonesia's

31. See Guoxing, *supra* note 15, at 16; see also Marwyn S.amuels, CONTEST FOR THE SOUTH CHINA SEA 81-82 (1982).

32. For a brief discussion of various theories of customary international law supporting sovereign claims, see Wendy Duong, *The Long Saga of the Spratly Islands "Elongated Sandbanks": Overview of the Territorial Disputes Among Vietnam, China, and Other ASEAN Nations in the South China Sea*, 6 TEX. TRANSNAT'L L.Q. 47 (1997).

33. See Statement by the Royal Sovereign Military & Hospitaller Order of St. John of Jerusalem (May 18, 1992) (on file with author).

34. See Joyner, *supra* note 23, at 62.

35. See Guoxing, *supra* note 15, at 16.

36. See *id.*

37. See Lian A. Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands*, 13 AM. U. INT'L L. REV. 727, 744 (1998).

38. See *id.* at 743-44; see also Duong, *supra* note 32.

ownership of Natuna.³⁹

Brunei has claimed the Louisa Reef and the Rifleman Bank as within its Continental Shelf,⁴⁰ relying on a 1954 British decree fixing Brunei's maritime boundaries.⁴¹ Brunei is the only country making a claim to part of the Spratly Islands without occupation of any islands.⁴² Brunei has also claimed a fisheries zone touching upon the extreme southern sector of the disputed area.⁴³

Periodically, the competing nations have engaged in military outbursts and aggression to establish their presence on these islands.⁴⁴ Quite often the weaker nation took the defeat and the stronger State got to "flex the muscles" establishing sov-

39. See *Worrisome Situation*, *supra* note 24; see also Saragosa *supra* note 13 (describing sovereign claims to Natuna Island).

40. See Mito, *supra* note 37, at 746. But see Joyner, *supra* note 24, at 204 (asserting that Brunei's only claim is to Louisa Reef); see also CIA, *THE WORLD FACTBOOK: SPRATLY ISLANDS*, <https://www.cia.gov/cia/publications/factbook/geos/pg.html#Geo> (last visited Nov. 10, 2006) (asserting that Brunei has established a fishing zone that overlaps a southern reef, but has not made any formal claim).

41. See Mito, *supra* note 37, at 746.

42. See Charles Liu, *Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute*, 18 *LOV. L.A. INT'L & COMP. L. REV.* 865, 873 (1996)

43. See South China Sea Tables and Maps, *supra* note 1.

44. *Examples of Military Aggression in the 1980s*: In 1983, Malaysia sent commandos to occupy certain islands only about 40 miles away from Vietnamese fortifications. At various times, Chinese ships allegedly harassed French exploration vessels, and the Chinese naval squadron reportedly conducted exercises near Vietnam-held islands. Other battles between Vietnam and China in the Spratlys occurred in 1988, whereupon the Chinese navy reportedly sank Vietnamese ships and many lives were reportedly lost. In the showdown, Vietnam lost two small warships and seventy men. See *Vietnam Rejects China's Survey for Oil Near Spratlys*, *DEUTSCHE PRESS-AGENTUR*, Sept. 5, 1998.

Examples of military aggression in the 1990s: In 1994, after Mobil Oil Corporation had commenced exploration activities in the Blue Dragon block off the coast of Vietnam, Chinese ships reportedly blocked a Vietnamese oil rig in the area of another concession, the Vanguard Bank, awarded by China to U.S.-based Crestone Corporation. See *infra*, Part VII; see also *Chinese Ships Block Viet Oil Rig in South China Sea*, *STRAITS TIMES*, July 19, 1994. Notwithstanding this military clash, the Vietnam Investment Review allegedly reported a possible US\$170 million loan from China to Vietnam to fund a steel mill—an indication that relations between the two countries were normal in other aspects. See *Vietnamese Leader Do Muoi Arrives in China*, *JAP. ECON. NEWSWIRE*, Nov. 26, 1995 (citing to *VIETNAM INVESTMENT REPORT*). Further details with respect to the Mobil Oil-Crestone Corporation scenario are provided in Part VI below. See *China Says Vietnam Seized Spratly Reefs, Voices Strong Protest*, *AGENCE FRANCE PRESSE*, Sept. 8, 1998 (reporting on China-Vietnam military clash over Spratlys in 1988, 1992, 1998; quoting military strategists as predicting Spratlys to be one of the most dangerous potential flashpoints in Southeast Asia); *China Demands Vietnam Withdraw from Reefs in Spratlys*, *JANE'S INTELLIGENCE REV.*, Oct. 1, 1998 (reporting on military clashes between China, the Philippines, and Vietnam); *Intruding Chinese Trawlers Arrested*, *VIETNAM NEWS*, July 6, 1994 (reporting

ereignty by occupation.⁴⁵ This was the ambiance of the 1970s, 1980s, and especially the 1990s, when UNCLOS went into force. Specifically, the years of 1992 and 1993, which preceded UNCLOS' coming into effect in 1994, marked a period of increased acts of aggression, political tension, and press coverage regarding government-endorsed exploration activities, especially between China and Vietnam.⁴⁶ For almost a decade, China and Vietnam waged a war of words while their navies eyed each other before a watchful regional community.⁴⁷

B. Signs of Progress and Recent Multilateral Agreements

A change in ambiance was noted after the Asian currency crisis of the late 1990s and at the beginning of the new millennium. In general, there has been a decline of military violence committed by the competing nations. Military outbursts and arrests of fishermen, although still occurring,⁴⁸ have been replaced

on Vietnam's arrest of Chinese intruders on Vietnam-controlled islands); *Tensions Mount Over Sovereign Claims on Spratlys Islands*, STRAITS TIMES, July 23, 1992.

45. One such example is China's occupation of the Paracel Islands since 1974. See Chietigh Bajpae, *The Price of Asian Conflict*, ASIA TIMES, May 24, 2005, <http://atimes01.atimes.com/atimes/Asian/Economy/GE24Dk01.html> (last visited Nov. 12, 2006).

46. See, e.g., *Beijing: Spratlys Chinese Territory Since Ancient Times*, STRAITS TIMES, July 10, 1992; *China "Occupied Eighth Spratly Isle," supra note 28; Countries in Spratlys Row Have Beefed up Troops: Hanoi*, STRAITS TIMES, July 6, 1992; Dan Eaton, *China and Southeast Asia to Sign Spratlys Deal*, REUTERS, Nov. 4, 2002 (reporting most recent progress on Spratlys controversy and recognizing overt clashes between China and Vietnam in the 1990s); *Hanoi Expected to Seek ASEAN Support over Spratlys Issue*, STRAITS TIMES, July 21, 1992; *Tensions Are Mounting in the Spratlys*, INT'L HERALD TRIB., July 21, 1992; BARRY WAIN, *China Puts the Squeeze on Vietnam*, ASIAN WALL ST. J., Sept. 30, 1992.

47. See, e.g., Barry Wain, *Beijing and Hanoi Play with Fire in S. China Sea*, ASIAN WALL ST. J., July 20, 1994, at 1. The notorious tension between China and Vietnam should not overshadow similar conflicts among the ASEAN nations, although they might receive less press coverage. For example, in November 1991, Vietnam protested Malaysia's granting of exploration rights to BHP in an area of approximately 1000 square kilometers contested by the two nations. See Greg Englefield, *Conference Held on Island and Maritime Disputes of South-East Asia*, SEAPOL NEWSLETTER, Dec. 1993, at 2.

48. For example, throughout 2001 and 2002 there were many instances of Chinese fishermen being arrested and detained (for up to six months in one instance) for illegal fishing in Philippine waters. See *Another 21 Chinese Fishermen Detained by Philippine Army, Total Hits 118*, PEOPLE'S DAILY, Feb. 9, 2002, <http://English.people.com.cn/200202/09/eng2002020990229.shtml> (last visited Nov. 12, 2006). In 2001, Vietnam reported that 200 fishermen and 17 fishing boats had been seized by "foreign boats" near the Spratly Islands. See *Boat Detentions Spark South China Sea Dispute*, CNN ONLINE (July 21, 2001), <http://archives.cnn.com/2001/WORLD/asiapcf/southeast/07/21/vietnam.spratlys> (last visited Nov. 12, 2006). More common than military arrests, however, is a more overt policy to use diplomacy. Taiwan, for example, discovered Chinese fishing vessels in what it claimed to be its waters in 2005. Taiwan did not arrest the fishermen; rather,

by more conscious diplomatic efforts.⁴⁹ The continuing diplomatic approach has been evidenced by, and may be attributed to, the Declaration on the Conduct of Parties on the South China Sea signed by China and the ten ASEAN members in November 2002 (the “2002 Declaration” or “Declaration”).⁵⁰ The Declaration expresses the signatories’ good faith desire to secure peace for the region, including peaceful resolution for their territorial disputes. It can serve as a political foundation for possible sovereign collaboration in oil and gas exploration in the future.

But it was not until March 2005 that, acting upon the Declaration, the respective State-owned oil companies of Vietnam, China, and the Philippines entered into a tripartite agreement to gather data jointly in the search for oil and gas in the disputed area (the “Tripartite Agreement”). Under this agreement, the countries would jointly gather two and three-dimensional seismic data on a 140,000-square kilometer sea area over a period of three years.⁵¹ The 2002 Declaration and the Tripartite Agreement can be viewed as a hopeful sign for the future end of the South China Sea Disputes. Nonetheless, as explained below, an astute observer must look closely underneath these agreements for other signs of inequity to decipher if there is any true hope.

Until that hopeful day comes, in today’s political and economic climate, no islet or sand bar in the South China Sea, no matter how small, is really immune from territorial claims. To most petroleum companies active in the area, the Disputes are

the Taiwanese National Security Advisor elected to make a diplomatic gesture to inform the world community of the territorial invasion. See Chiu Yu-Tzu, *Chen Travels to the Disputed Pratas Islands*, *TAIPEI TIMES*, July 29, 2005, <http://www.taipetimes.com/News/Taiwan/archives/2005/07/39/22003265485> (last visited Nov. 12, 2006).

49. See Yu-Tzu, *supra* note 48.

50. Declaration on the Conduct of Parties in the South China Sea (“2002 Declaration”), Nov. 4, 2002, ASEAN-P.R.C. [hereinafter 2002 Declaration], <http://www.aseansec.org/13163.htm> (last visited Jan. 28, 2007); see also Eaton, *supra* note 46. The ten ASEAN members are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. See ASEAN, Member Countries, <http://www.aseansec.org/74.htm> (last visited Nov. 12, 2006).

51. See Ministry of Foreign Affairs of the People’s Republic of China, Oil Companies of China, the Philippines and Vietnam Signed Agreement on South China Sea Cooperation, Mar. 15, 2005, <http://www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t187333.htm> (last visited Nov. 12, 2006). The Chinese Embassy’s announcement discusses the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea (“2005 Tripartite Agreement”). The precise area covered by the joint study is not available for the public.

but one more political risk hovering over their investment. The problems these companies are experiencing often lie in the highly competitive bidding for an exploration block and successful partnership with governments. The extremely complex geographical characteristics of the area result in exuberant exploration and development costs, and account for the real obstacle in the full exploitation of the South China Sea.

II. SCOPING THE ISSUES

The principal legal issues underlying the South China Sea Disputes can be categorized into three main groups.

Group #1: Issues Involving Territorial Sovereignty

This group consists of two issues: (i) who owns the Paracel and Spratly archipelagos, and under what theor(ies) of customary international law? and (ii) what is the historical and scientific evidence establishing the competing nations' ownership of the islands, either by historical title or by effective occupation and control? How reliable is the evidence? How can conflicting evidence be weighed, by whom, and to what result?

To establish sovereignty over the islands, the States have resorted to international treaties at the close of the colonial era, as well as to customary international law, including the five modes of territorial acquisition: occupation, prescription, conquest, accretion, and avulsion.⁵² Conquest as a mode of territorial acquisition has been outlawed, but pre-World War II conquests were used to establish national boundaries.⁵³ Each country may be

52. See Duong, *supra* note 32 (discussing and summarizing theories of customary international law that underlie the competing nations' respective claims of sovereignty); see also Choon-ho Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources?*, in *THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE* 486 (Choon-ho Park & Jae Kyu Park eds., 1987). See generally DANIEL DZUREK, *THE SPRATLY ISLAND DISPUTE: WHO'S ON FIRST?* (1996) (summarizing national claims and ranking their strength).

53. See U.N. Charter art. 2, ¶ 4. Territorial sovereignty has traditionally been part of customary international law or, occasionally, has been established via treaties. The view of most international lawyers is that customs are not a form of tacit treaty law, but an independent body of general rules of law applicable to all States, unless a State has unambiguously and persistently registered its objection to such rules. See, e.g., MALCOLM SHAW, *INTERNATIONAL LAW* 68-71 (5th ed. 2003). Once becoming general rules of international law, customary practices bind all States that have not opposed those practices, whether or not the States themselves have participated in the formation of those customs. *Id.*; H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 135-41

claiming a different theory, or a combination thereof.

Because these theories require historical evidence,⁵⁴ countries have continued to release into the public domain facts and proof establishing early habitation, historical title, or continuous occupation in order to bolster their respective legal claims.⁵⁵ The evidence presented by the competing State must eventually be adjudicated in an international tribunal, requiring expert testimony and credibility assessment. A prediction of outcome is speculation at best.⁵⁶ Accordingly, the Article will focus on the next two groups of issues.

(1972). In territorial disputes, the notion that custom may be formed in the absence of specific State opposition may lead to the following dangerous result: Although military conquest has been outlawed, sovereignty over land can still be acquired by adverse possession, if forced occupation remains unchallenged by the world community, nor objected to by the occupied State.

54. *See, e.g.*, Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928) (concluding “[t]he Netherlands’ title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good”).

55. *See, e.g.*, Do Hao, *Truong Sa Islands: New Archeological Findings*, VIETNAM NEWS, June 5, 1994 (discussing new evidence that, as far back as the fifteenth century, Vietnamese fishermen or merchants were living on the Spratly Islands).

56. The International Court of Justice (“ICJ”) awarded the tiny Celebes Sea islands of Ligitan and Sipadan to Malaysia in her territorial dispute with Indonesia. *See Sovereignty Over Palau Ligitan and Pulau Sipadan* (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 17); *see also* Press Release No. 2002/39, I.C.J., Court Finds That Sovereignty Over the Islands of Ligitan and Sipadan Belongs to Malaysia (Dec. 17, 2002) [hereinafter *Ligitan-Sipadan*], <http://www.icj-cij.org/icjwww/idocket/iinma/iinmaframe.htm> (last visited Jan. 28, 2007). At least one commentator has viewed the decision as having negative implications for all claimants in the Spratlys Dispute. *See* Mark Valencia, *The Spratlys Island Dispute*, FAR E. ECON. REV., Jan. 9, 2003. The decision disregarded theories such as “discovery,” “title by succession,” “colonial treaty claims,” or “historical claims” to the two islands that undisputedly are not permanently inhabited. The ICJ held that neither nation successfully established treaty-based title to the islands. Instead, the court took into account specific evidence of continuous, effective occupation, administration or control over a considerable period of time in the absence of protests from others (the notion of “effectivities”), and awarded the islands to Malaysia. *See id.*; *see also* *Ligitan-Sipadan*, *supra*. In the Spratlys Dispute, since the end of World War II, no country has occupied or controlled the Spratlys without protests from others. Evidence of any occupation prior to the twentieth century can be the subject of expert testimony and will have to be evaluated by the ICJ. Further, unlike the Celebes Sea islands, an “either/or” situation in a bilateral dispute, occupation of the Spratlys has been divided among the nations and hence does not clearly lend itself to an “either/or” determination of ownership. Most likely the ICJ would not award the entire Spratly group to any one single claimant. But more importantly, in the Ligitan-Sipadan dispute, the two state claimants consented to the jurisdiction of the World Court. In the Spratly Dispute, it is unlikely that the smaller states can haul China into the ICJ forum in the absence of her consent.

Group #2: Application of UNCLOS

The issues in this group concern: (i) does UNCLOS establish sovereign title to the islands, or does it answer questions of sea-use rights and rights to the exploitation of natural resources?; and (ii) how can overlapping Continental Shelves and Exclusive Economic Zones (“EEZs” or “Zones”) be resolved under UNCLOS?; and (iii) what is the binding effect of UNCLOS upon non-consenting States, in light of the various reservations or declarations made by States parties in the process of ratification or accession?⁵⁷

Group #3: Alternative Solutions

Assuming that the issue of legal ownership of the islands is temporarily held in abeyance, will there be an alternative solution to ownership of petroleum resources in the disputed area, and does UNCLOS provide support for such a solution? What is the real-life working of such a solution?

57. *See infra* notes 121-151 and accompanying text. The Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, contains the following definition of “Declaration”:

Declarations, however they may be known (communications, interpretative declarations, understandings, etc.), either made at the time of signature or at the time of deposit of a binding instrument, are to be distinguished from reservations in that they do not purport to exclude or modify the legal effects of the treaty. The purpose of declarations is rather, in principle, to make more explicit the meaning of a particular provision. However, declarations are made in a political context—for example, to express satisfaction at the adoption of the treaty, or to express regret that a provision has not been included in the treaty and the hope that through an amendment it will be in the future, or to express dismay that a provision has been included which the State concerned finds offensive. While declarations are usually made at the time of the deposit of the corresponding instrument or at the time of signature, they are sometimes made in contemplation of the impending signature of the treaty, after its adoption, and the text of such declarations is then frequently reproduced in the Final Act of the Conference that adopted the treaty.

Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties 63, ST/LEG/7/Rev. 1 (1999) [hereinafter U.N. Summary of Practice]. Chapter VIII of the Summary incorporates verbatim the definition of “reservation” from Paragraph 1(d) of Article 2 of the Vienna Convention on the Law of Treaties, which restates established customary international treaty law on the matter. The Vienna Convention defines the term “reservation” as follows: “Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

In addressing Groups #2 and #3 issues, this Article asserts that: (i) under current geopolitical circumstances, law may not matter in the distribution of petroleum resources; and (ii) in a negotiated treaty solution, factors of *Realpolitik* will continue to disserve the interest of the smaller and economically weaker nations.

III. *THE INEFFECTIVE FRAMEWORK OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA ("UNCLOS") IN THE RESOLUTION OF THE SOUTH CHINA SEA DISPUTES*

A. *Introduction to UNCLOS*

1. History

Adopted and first made open for signature in 1982, UNCLOS was the result of the 1973 Third United Nations ("U.N.") Conference on the Law of the Sea.⁵⁸ UNCLOS's predecessor, the 1958 Geneva Convention of the Continental Shelf (the "Geneva Convention"),⁵⁹ codified the rule of customary international law that a coastal State has sovereignty rights over its Continental Shelf, and no other State may explore or exploit the resources of such Continental Shelf without the express consent of the coastal state.⁶⁰ The Geneva Convention, however, did not sufficiently define the outer limit of the Continental Shelf. Efforts by the Third U.N. Conference on the Law of the Sea were to cure this defect, resulting in the signing of UNCLOS.⁶¹ Not

58. See Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 AM. J. INT'L L. 419, 420 (2002) (noting that "the Third United Nations Conference on the Law of the Sea . . . resulted in the adoption in 1982 of the United Nations Convention on the Law of the Sea.")

59. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

60. The development of international maritime law and the obligations of the coastal States can be traced in the following documents (predecessors of UNCLOS): (i) Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945) [hereinafter 1945 Truman Proclamation]; (ii) Convention on the Continental Shelf, *supra* note 59; (iii) Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; (iv) Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; and (v) Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

61. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; see also Carducci, *supra* note 58, at 420.

only does UNCLOS define the outer limit of the Continental Shelf, but it also establishes an EEZ, which co-exists with the Shelf and entitles the coastal state to the exclusive exploitation of natural resources within the Zone.

In 1990, the United States launched informal negotiations, which culminated in its signing of a Supplemental Agreement on July 28, 1994, purportedly changing UNCLOS's legal regime governing the deep seabed beyond national jurisdiction.⁶² By this agreement, the United States and other developed countries opposed UNCLOS's seabed mining regime as denying the developed nations a voice that equaled their economic interests.⁶³ Nonetheless, because the Supplemental Agreement represents the views of the industrialized nations,⁶⁴ it renders a vital boost to UNCLOS's legitimacy as an enduring symbol of the "new international economic order" of the twentieth century.

In November, 1994, a year after the sixtieth nation had ratified the Convention, UNCLOS met the requirement for going into force, having obtained the sufficient ratification or accession instruments from States.⁶⁵ Almost two years later, on July 28, 1996, the Supplemental Agreement also entered into force.⁶⁶

Notwithstanding the reluctance of the United States—allegedly the world's leading maritime power with the longest coastlines and the largest EEZ—to date 149 States have ratified UN-

62. See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, *opened for signature* July 28, 1994, 33 I.L.M. 1309 (entered into force July 28, 1996) [hereinafter Supplemental Agreement]. The Supplemental Agreement and UNCLOS are to be interpreted and applied as a single treaty, although in case of an inconsistency, the Agreement prevails. See *id.* art. II.

63. See Jason C. Nelson, *The Contemporary Seabed Mining Regime: A Critical Analysis of the Mining Regulations Promulgated by the International Seabed Authority*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 27, 32-33.

64. See, e.g., Gregory F. Maggio, *Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources*, 4 BUFF. ENVTL. L.J. 161, 210 (noting that the "United States and other industrialized countries refused to become Parties to the [original version of UNCLOS] unless these provisions[,] [regarding deep sea-bed mineral resources,] were modified").

65. Division for Ocean Affairs and the Law of the Sea ("DOALOS"), United Nations, Status of the United Nations Convention on the Law of the Sea (Dec. 26, 2006) [hereinafter UNCLOS Status], http://www.un.org/depts/los/reference_files/status2006.pdf (last visited Nov. 12, 2006).

66. See Marjorie Ann Browne, Congressional Research Service, *The Law of the Sea Convention and U.S. Policy* 1, 2 (May 12, 2006), available at <http://www.ncseonline.org/NLE/CRSreports/Marine/mar-16.cfm>.

CLOS and 122 have ratified the Supplemental Agreement.⁶⁷ All coastal state-claimants in the South China Sea Disputes, with the exception of Taiwan, have ratified UNCLOS,⁶⁸ although Vietnam and China have each deposited declarations together with their ratifying documents.⁶⁹ With respect to the Supplemental Agreement, only China, Indonesia, Malaysia, and the Philippines have signed and ratified it; the two remaining claimants, Vietnam and Brunei, have not signed on to the Supplemental Agreement.⁷⁰

2. Overview of UNCLOS's Legal Framework

Overall, the international community of legal scholars and commentators recognizes UNCLOS as the contemporary authority on international maritime law. But this means UNCLOS only regulates sea-use rights among nations and provides a framework for identifying maritime sovereignty over the sea. Within such framework are methods for drawing a sovereign State's coastal "baselines," from which the State can claim a Continental Shelf and the newly introduced EEZ. Such a maritime framework does not establish a State's territorial sovereignty over any island in the South China Sea. Once ownership of an island is established under traditional theories of international law, claims to the Continental Shelf or EEZ can be drawn from the island based on the maritime principles of UNCLOS. In other words, only after sovereignty over land or an island has been established can a State apply UNCLOS to resolve sea-use rights. Sovereignty over an island in the South China Sea means extending the State's territory and coastal baselines to that island. From that island, the State can claim its rights to exploit natural resources in the Continental Shelf/EEZ recognized by UNCLOS.

67. See DOALOS, United Nations, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements (Dec. 28, 2006) [hereinafter Ratifications List], http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Jan. 28, 2007).

68. See *id.*; see also Greg Englefield, *Managing Boundaries in the South China Sea*, 2 *BOUNDARY & SECURITY BULL.* 36 (July 1944).

69. See DOALOS, United Nations, Convention on the Law of the Sea: Declarations Made Upon Signature, Ratification, Accession or Succession or Anytime Thereafter (Dec. 28, 2006) [hereinafter Declarations List], http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Jan. 28, 2006).

70. See DOALOS, United Nations, Law of the Sea Bulletin No. 50, at 6, 8-10, 14 (Feb. 2003), <http://www.un.org/Depts/los/doalospublications/LOSBulletins/bulletinpdf/bulletinE50.pdf> (last visited Nov. 15, 2006).

Ownership of the Paracel and Spratly Islands, therefore, will establish the competing nations' maritime sovereignty over the sea surrounding the islands, where offshore petroleum exploration may be conducted. Legal problems also occur where, in a narrow area of semi-enclosed sea such as the South China Sea or parts thereof, the claimed Continental Shelves and EEZs of several States overlap. This is the gist of the South China Sea Disputes.

The salient features, underlying policies, and binding effect of UNCLOS are examined below.

B. *Relevant Salient Features of UNCLOS*

1. The Establishment of Maritime Boundaries and Sea-Use Rights

UNCLOS establishes the following maritime boundaries:⁷¹

Baseline

Maritime boundaries must be measured from a coastal state's "baselines."⁷² UNCLOS provides methods for drawing the "baseline," depending on the marine characteristics of the area. For example, depending on certain coastal characteristics, a State may draw a "straight baseline"⁷³ by nominating a number of points along its coast and connecting them by straight lines.⁷⁴

Internal Waters

Article 8 of UNCLOS defines the internal waters of a coastal state as the "waters on the landward side of the baseline of the [T]erritorial [S]ea."

Territorial Sea

Article 2 of UNCLOS permits the "sovereignty of a coastal State [to] extend . . . beyond its land territory and internal wa-

71. See also Exhibit A appended to this Article.

72. Convention on the Continental Shelf, *supra* note 59, art. 6.

73. UNCLOS, *supra* note 61, art. 7.

74. *See id.* UNCLOS also provides that these baselines must be "shown on charts of a scale or scales adequate for ascertaining their position," or alternatively, "a list of geographical coordinates of points, specifying the geodetic datum, may be substituted." *See id.* art. 16. The coastal State must deposit a copy of such chart or list with the U.N. Secretary General.

ters and, in the case of archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the [T]erritorial [S]ea.” Under Article 3, “[e]very State has the right to establish the breadth of its [T]erritorial [S]ea up to a limit not exceeding 12 *nautical miles* [approximately 19 km],⁷⁵ measured from baselines determined in accordance with this Convention.” The coastal state has complete sovereignty over its Territorial Sea.

Contiguous Zone

UNCLOS establishes a zone “contiguous to a coastal state’s [T]erritorial [S]ea, which may not extend beyond 24 *nautical miles* [approximately 38 km] from the baselines from which the breadth of the [T]erritorial [S]ea is measured.”⁷⁶ The coastal State may exercise the same control in the Contiguous Zone as in its Territorial Sea. The Contiguous Zone is established primarily for regulatory and police purposes.⁷⁷ In other words, while the coastal state may claim legal ownership over the Territorial Sea the same way it can claim complete sovereign rights over land, it can only claim regulatory and police power over the contiguous zone as an exercise of its sovereign power.

Continental Shelf

Filling in the gap left by the Geneva Convention, Article 76 of UNCLOS recognizes a Continental Shelf which extends to 200 nautical miles (approximately 370 kilometers) from the baselines of the Territorial Sea, or the areas that “extend beyond [a coastal state’s] [T]erritorial [S]ea throughout the natural prolongation of its land territory to the outer edge of the continental margin.”⁷⁸ Where the “continental margin” extends beyond

75. UNCLOS, *supra* note 61, art. 3 (emphasis added).

The conversion of measurement units is as follows:

1 Nautical mile = 1.15077945 miles

1 mile = 1.6093444 kilometers

See NAT’L INST. OF STANDARDS & TECH., GENERAL TABLES OF UNITS OF MEASUREMENT (2006), available at <http://ts.nist.gov/weightsandmeasures/publications/appxc.cfm>.

76. UNCLOS, *supra* note 61, art. 33 (emphasis added).

77. *See id.*

78. *See* 1945 Truman Declaration, *supra* note 60 (proclaiming that resources of the subsoil and sea-bed of the Continental Shelf are within the jurisdiction of the United States).

The Continental Margin is defined as that which “comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with it

the 200 nautical mile limit, or in case of "submarine ridges," the Continental Shelf may be extended up to 350 nautical miles (approximately 647 kilometers) from the baselines from which the breadth of the Territorial Sea is measured.⁷⁹ UNCLOS gives the coastal State sovereign power over its Continental Shelf "for the purpose of exploring it and exploiting its natural resources," such that "no one may undertake these activities without the express consent of the coastal [s]tate."⁸⁰ Such sovereign power "doe[es] not depend on occupation, effective or notional, or on any express proclamation."⁸¹ In the South China Sea, the 200 nautical mile limit has become a source of conflicts, because in the Sea, there are few spots where a coastal state's 200 nautical mile limit can be applied without overlapping with those of other coastal states.

Exclusive Economic Zone

UNLCOS also introduces the concept of the EEZ,⁸² which gives the coastal state the exclusive right to exploit natural resources in the area. While the EEZ is considered a new notion introduced primarily by the Latin American and African State parties, arguably the EEZ also has its roots in existing customary international law, which allows a coastal state to extend its territory into the sea as far as reasonable for national purposes.⁸³

Because the EEZ also extends up to 200 nautical miles from the baselines from which the Territorial Sea is measured, the EEZ is co-extensive with the Continental Shelf. As a result, the two areas are frequently interchangeable, although conceptually they are different, primarily in two aspects. First, only the Continental Shelf may, in certain cases, extend beyond 200 nautical

oceanic ridges or the subsoil thereof." UNCLOS, *supra* note 61, art. 76(3). UNCLOS also establishes the method by which the coastal State shall establish the outer edge of the continental margin. *See id.* art. 76(4)(a).

79. *See* UNCLOS, *supra* note 61, arts. 76(5)-(6). UNCLOS also creates a Commission on the Limits of the Continental Shelf to consider requests of coastal states that seek to establish their Continental Shelves beyond the 200 nautical mile limit. *See id.* art. 76(8).

80. *Id.* arts. 77 (1), (2).

81. *Id.* art. 77(3).

82. *See generally id.* arts. 55-75.

83. *See* Louis Henkin, *Politics and the Changing Law of the Sea*, 89 POL. SCI. Q. 56-57 (1974); *see also* OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 77-78 (1985) (summarizing development of sovereign claims beyond the 200-nautical mile Exclusive Economic Zones).

miles up to 350 nautical miles. Second, the EEZ is a more limited and specific concept than the Continental Shelf. In the Continental Shelf, the coastal state enjoys inherent sovereignty rights.⁸⁴ In the EEZ, the coastal state must proclaim it and will enjoy the exclusive rights to the exploration and exploitation of natural resources.

The "Area"

UNCLOS also established principles governing the "Area," which includes the seabed, ocean floor and subsoil beyond the limits of national jurisdiction.⁸⁵ This "Area" is considered the "common heritage of mankind,"⁸⁶ administered by various international bodies established under UNCLOS.⁸⁷ Since the "Area" is collectively owned by the whole world community, theoretically, any petroleum discovery beyond national jurisdiction, to the extent feasible under current technology, must be shared by all States.

2. Archipelagic Baselines

UNCLOS provides guidance for the drawing of the baselines for "archipelagic states."⁸⁸ The breadth of the Territorial

84. *See, e.g.*, 1945 Truman Declaration, *supra* note 60.

85. *See* UNCLOS, *supra* note 61, art. 1(1).

86. *Id.* art. 136. UNCLOS does not define the "common heritage of mankind." However, Article 137 of UNCLOS provides that:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the [International Seabed] Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Id. art. 137

87. *See id.* arts. 133-91.

88. An archipelagic State may draw "straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago, provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of land, including atolls, is between 1 to 1 and 9 to 1." *Id.* art. 47(1). The length of such baselines shall not exceed 100 nautical miles,

Sea, the Contiguous Zone, the Continental Shelf, and the EEZ shall be measured from such archipelagic baselines,⁸⁹ but only if the islands qualify as an “archipelagic State.”⁹⁰

It is uncertain whether the most disputed point of conflict, the Spratly group, may qualify as an “archipelago,” defined 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 has historically been regarded as such.”⁹¹ Unless the competing sovereign claims are solved under customary international law, the Spratlys themselves may never have any political identity on their own.

Accordingly, UNCLOS rules for drawing “archipelagic baselines” will apply to the Spratlys only if: (i) the Spratlys qualify as an “archipelagic State”—an archipelago in the geographical sense may not automatically qualify as an “archipelagic State” or an “archipelago” in the legal sense under UNCLOS unless the “archipelago” is a political and economic entity; and (ii) the entire Spratly group must be considered non-divisible for purposes of claiming sovereignty. Various States currently occupy various parts of the Spratlys, offering conflicting evidence and arguments about historical title to the public domain.⁹² A genuine issue of law and fact exists whether the group can be divided piecemeal as belonging to various nations, depending on the historical evidence pointing to the earliest, undisputed, uninterrupted, and continuous occupation and control.

If “archipelagic baselines” cannot legally be drawn around

except that only up to three percent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles. *Id.* art 47(2). The drawing of such baselines shall not depart appreciably from the general configuration of the archipelago, and shall not cut off the Territorial Sea of another State from the high seas or the Exclusive Economic Zone (“EEZ”). *Id.* arts 47(4)-(5). The sovereignty asserted by the archipelagic State extends to the waters enclosed by the archipelagic baselines (described as “archipelagic waters”), regardless of their depth or distance from the coast. *Id.* art. 49. The archipelagic State must record the baselines drawn on charts of a scale adequate for ascertaining their position (or alternatively, lists of geographical coordinates), and must deposit such chart or list with the U.N. *Id.* arts. 47(8)-(9).

89. *Id.* art. 48.

90. *Id.* arts. 46-54.

91. *Id.* art. 46 (emphasis added).

92. See Chin Yoon Chin, Potential for Conflicts in the Spratly Islands 5 (Dec. 2003) (unpublished M.A. thesis, Naval Postgraduate School); Joyner, *supra* note 23, at 195.

the entire Spratly group, then baselines must be drawn around the individual islands or islets, but only when such islands or islets are political entities.

3. Exceptions to Maritime Boundaries

Having defined the above maritime boundaries, UNCLOS provides a number of exceptions to these boundaries, summarized below.

a. The "Delimitation" Exception

UNCLOS provides "delimitation" exceptions to overlapping Territorial Seas, Continental Shelves and EEZ's between States with opposite or adjacent coasts.

With respect to the Territorial Sea, Article 15 of UNCLOS states:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its [T]erritorial [S]ea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the [T]erritorial [S]ea of each of the two states is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the [T]erritorial [S]eas of the two States in a way which is at variance therewith.⁹³

Delimitation is part of international law because it has become a widespread practice.⁹⁴ Historically, the International Court of Justice ("ICJ") has rejected a straightforward or

93. UNCLOS, *supra* note 61, art. 15.

94. *See, e.g.*, North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 4 (Feb. 20) (holding that delimitation is to be by agreement in accordance with equitable principles, taking in account all relevant circumstances such as configuration of coast lines, desirability of maintaining unity of deposits, and reasonable degree of proportionality between limits of coast line and area of Continental Shelf). *See generally* Anthony D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM J. INT'L L. 892 (1970) (discussing customary rules of law relating to delimitation). The "equidistance" or "median line" rule as a method of delimitation was also set forth in UNCLOS's predecessor, the 1958 Geneva Convention. Under the 1958 Geneva Convention, delimitation could be achieved via the drawing of a "median line" between the respective coasts, in the absence of an agreement or "special circumstances" to the contrary. *See* Gillian Triggs, Joint Development Zones: A Way Forward 2 (1994) (unpublished manuscript, on file with author); *see also* Convention on the Continental Shelf, *supra* note 59, arts. 5(5), 6(3).

mechanical equidistance drawing of delimitation, in favor of a more fluid equitable solution.⁹⁵ Accordingly, UNCLOS recognizes that the “median line” delimitation can be fluid, based on historic title or other “special circumstances.” The Convention is silent as to what may constitute “special circumstances.”

With respect to the EEZ and the Continental Shelf, Articles 74 and 83 of UNCLOS state in similar language:

The delimitation of the [Continental Shelf/EEZ] between states with opposite or adjacent coasts *shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.* If no agreement can be reached within a reasonable period of time, the states concerned shall resort to the procedures provided for in Part XV [of UNCLOS] [settlement of disputes].⁹⁶

Commentators have viewed Articles 74 and 83 as retarding real-world efforts to resolve overlapping claims to the Continental Shelf/EEZ, by: (i) elevating “equitable solution” as the pre-eminent objective, (ii) diminishing the importance of the more concrete “equi-distant/special circumstances” rule,⁹⁷ and (iii) creating uncertainty through the introduction of the phrase “international law.” These added features inject more vagueness and complication into the legal test. At least one commentator has described the “equitable solution” formula of Articles 74 and 83 as a “moveable feast,”⁹⁸ which compounds rather than clarifying or simplifying the formula for delimitation,⁹⁹ since one

95. See Triggs, *supra* note 94, at 3; see also *North Sea Continental Shelf Cases*, 1969 I.C.J. at 4 (defining “equitable solution”); accord *Convention on the Continental Shelf*, *supra* note 59, arts. 6(1)-(2); L.D.M. Nelson, *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 AM. J. INT’L L. 837, 839-41 (1990). Past State practices show that, when used to resolve territorial disputes, historically, the equidistance rule has been modified frequently. Quite often, the common boundary intersecting point is a “negotiated point” not settled by any mathematical formula. See OFF. OF THE GEOGRAPHER, U.S. DEP’T OF STATE, LIMITS IN THE SEAS—TERRITORIAL SEA BOUNDARY: DENMARK-SWEDEN 3-5 (Ser. A, No. 26 July 16, 1970), available at <http://www.state.gov/documents/organization/61562.pdf>.

96. UNCLOS, *supra* note 58, art. 74(1)-(2) (emphasis added).

97. See, e.g., Triggs, *supra* note 94, at 2-3.

98. See *id.* at 3; see also *Convention on the Continental Shelf*, *supra* note 59, arts. 5-6 (describing delimitation procedures under the U.N. Convention on the Continental Shelf); Nelson, *supra* note 95, at 39-41 (discussing equitable resolutions of maritime issues).

99. UNCLOS establishes that the competing States must show the outer limits of

country's equity can be another country's injustice. One thing remains certain: With respect to the delimitation of overlapping Continental Shelf/EEZ claims, UNCLOS mandates that States negotiate an acceptable "equitable solution" via the signing of treaties, and to utilize the dispute resolution procedures of UNCLOS in the event such treaty negotiation fails.¹⁰⁰

b. The "Enclosed or Semi-Enclosed Seas" Exception

A genuine factual and legal issue exists as to whether the South China Sea, or parts of it, may qualify as an "enclosed or semi-enclosed sea" under UNCLOS.¹⁰¹ Article 122 of UNCLOS states:

For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the [T]erritorial [S]eas and [E]xclusive [E]conomic [Z]ones of two or more coastal [s]tates.

Where territorial claims are made to an "enclosed or semi-enclosed sea," Article 123 of UNCLOS provides that the bordering States "should co-operate . . . in the exercise of their rights and in the performance of their duties under this Convention."

In describing the scope of the States' cooperation, Article 123 expressly refers to issues such as the exploitation of living resources, marine protection, or research endeavors. Yet, the Convention does not mention the exploitation of natural resources (non-living resources such as hydrocarbons), which, under UNCLOS, is the exclusive right of a State proclaiming its EEZ. Although one may argue that to "cooperate" means to abstain from unilateral action or development, a non-consenting State may assert that Article 123's "cooperation" is not intended to displace EEZ jurisdiction and the associated rights and duties accorded by UNCLOS. The argument draws a distinction be-

their EEZs and the lines of delimitation on charts of a scale adequate to ascertain their position. *See* UNCLOS, *supra* note 58, art. 75(1).

100. *Id.* arts. 74, 83 ("the delimitation . . . shall be effected by agreement").

101. For example, the Gulf of Tonkin, part of the South China Sea, is a semi-enclosed gulf embraced by the mainland of China and Vietnam, as well as China's Hainan Island. As of the date of this Article, China and Vietnam have settled (at least part, if not all of) their disputes as to the Gulf of Tonkin. *See infra* notes 228-234 and accompanying text.

tween “living resources” and “natural resources” such that sovereign rights may be “delimited” as to the former, but not the later. Under this argument, a coastal state proclaiming the EEZ is under no good faith duty to “cooperate” with respect to the sharing of the natural resources found in an “enclosed or semi-enclosed sea.” The argument potentially can undercut the overall peace-making spirit of UNCLOS by allowing coastal states to declare overlapping exclusive EEZs without making a good faith effort at “cooperation.” In any event, the language of Article 123 is simply an encouragement (“should cooperate”), not a mandate or imposition of an affirmative duty.

c. Exceptions Concerning the Regime of Islands

Part VIII of UNCLOS, which consists solely of Article 121 addressing “Regime of Islands,” provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or [C]ontinental [S]helf.” Only islands, naturally formed areas of land surrounded by waters and standing above high tide, may be used to make claims to Territorial Sea, Contiguous Zones, EEZs, and Continental Shelves.¹⁰² Thus, the sovereignty owning an “island” may draw the 12 nautical mile Territorial Sea around it, but is not entitled to claiming a 200 nautical mile Continental Shelf or EEZ therefrom if the island cannot support human habitation or economic life.¹⁰³

Commentators relying on various scientific sources have pointed out that several subgroups within the Spratlys may fall under this category and thus cannot serve as the basis for any

102. UNCLOS, *supra* note 58, art. 121. An island is “a naturally formed area of land, surrounded by water, which is above water at high tide . . . Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” *Id.* art. 121(3). At least one scholar has opined that, because the limitation accorded to “rocks” is listed as part of UNCLOS’s “Regime of Islands,” UNCLOS drafters must have meant for the definition of an island to include such “rocks.” So, under this interpretation, an island which is a “rock that cannot sustain human habitation or economic life of its own” will not have a Continental Shelf or EEZ around it. Jonhathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AM. J. INT’L L. 863, 865-76 (1999); *see also* Charney, *supra* note 15, at 731 (raising inquiries such as: What constitutes “rocks” under UNCLOS? As defined by earth sciences? Does “economic life” mean complete self-sufficiency, referring to the past, present, or future?).

103. *See* UNCLOS, *supra* note 58, art. 121; *see also* Charney, *supra* note 102, 863.

Continental Shelf or EEZ claimed by any countries.¹⁰⁴ The data regarding human habitation and economic life will eventually have to be adjudicated in a forum of competent jurisdiction.

In summary, UNCLOS leaves many maritime jurisdiction issues unresolved. It is necessary, therefore, to observe the policies underlying UNCLOS, as they may shed light upon how an international adjudicatory tribunal may interpret the Convention.

C. *Underlying Policies of UNCLOS*

Purportedly to replace the 1958 Geneva Convention, which was developed in the aftermath of the Second World War and at the end of colonialism, UNCLOS articulates several policies designed to achieve world peace.

1. Peace-Keeping Dispute Resolution Commitment

An important aspect of UNCLOS is its commitment to peaceful resolution of sea-use right disputes, and to the use of international tribunals in dispute resolution. Articles 279 and 280 of UNCLOS subject State parties to "peaceful means" of settlement of disputes in accordance with the U.N. Charter or as agreed to by the parties. Choices of procedure and forum include the International Tribunal for the Law of the Sea (established under UNCLOS), the ICJ, or an ad hoc tribunal established under Article 287.¹⁰⁵ Any such tribunal is obligated to apply UNCLOS and other rules of international law.¹⁰⁶

UNCLOS also commits State parties to a duty to "refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the [U.N. Charter]."¹⁰⁷ At the same time, the Convention also

104. Many structures within the Asian side of the Pacific Ocean probably fit this definition, and not just the Spratlys: China's Pratas Reef, Senkaku Island (disputed by China and Japan), the Japanese Danjo Gunto, and the Ryukyu Islands. See, e.g., Charney, *supra* note 15, at 731; Charney, *supra* note 102, at 863; Chiu & Park, *supra* note 16; Choon-ho Park, Book Note, 92 AM. J. INT'L L. 354 (1998) (reviewing MARK J. VALENCIA, JON M. VAN DYKE & NOEL A. LUDWIG, *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (1997)).

105. UNCLOS, *supra* note 58, art. 287.

106. *Id.* art. 293.

107. *Id.* art. 301.

recognizes and reinforces sovereignty power, allowing States to take actions that assert, symbolize and protect their sovereign rights. For example, a coastal state can “arrest” vessels and crews that violate its sovereign rights in the EEZ.¹⁰⁸ The balance between the assertion of sovereignty and the commitment to peace must therefore be delicately drawn, and, to that end UNCLOS offers no concrete guidance.

2. Application of “Equity” as a Vague and Slippery Concept of Customary International Law

Also apparent in UNCLOS is the policy that sovereignty conflicts should be resolved based on principles of equity, a general notion of fairness that does not necessarily imply equality, but should include “elementary considerations of humanity.”¹⁰⁹ For example, Article 59 states:

In cases where this Convention does not attribute rights or jurisdiction to the coastal [s]tate or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal [s]tate and any other State or States, *the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.*¹¹⁰

In any event, the ICJ has applied this rule of equity in delimiting the Continental Shelves between adjoining States,¹¹¹ recognizing equity as a principle of interpretation rooted in customary international law (distinguishable from the English common-law separation between “law” and “equity” as systems of justice administration).¹¹² In boundary delimitation, the ICJ views equity as incorporating “a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about.”¹¹³ It is interesting to note that the drafters of UN-

108. *Id.* art. 73.

109. *Corfu Channel*, 1949 I.C.J. 4, 22 (Apr. 9).

110. UNCLOS, *supra* note 58, art. 59 (emphasis added).

111. *See* *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 46-54 (Feb. 20).

112. *See* *Diversion of Water from Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (June 28); *see also* WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 197 (1964).

113. *North Sea Continental Shelf*, 1969 I.C.J. at 52; *see also* *Corfu Channel*, 1949 I.C.J. at 22.

CLOS Article 59 have chosen to use the aspirational word “should” instead of the mandatory “shall.” Accordingly, it is uncertain how an adjudicatory forum may view its duty to apply Article 59: Is the forum obligated to apply the “equity” test?

One could speculate that an adjudicatory tribunal may look at UNCLOS as a post-colonialism convention, interpreting it in a way that remedially favors the decolonized, developing States. Such speculation does not change the obvious fact that the test outlined in Article 59 offers no clear answer to the Disputes at hand. Rather, “equity” may provide room for contested arguments based on non-legal considerations, leaving the ultimate determination in the hands of international jurists. The “equity” concept offers no real comfort to the private investor getting caught among the competing national interests. To the private sector, a future resolution based on “equity” is simply a non-quantifiable political risk. Not only does this inspirational “good faith” spirit of UNCLOS typify remedial post-colonial conventions, but it also evidences the imprecise nature of public international law. This vagueness encourages the private sector to resort to self-help measures and formulate its own risk management programs. Because notions of “equity” are so unpredictable and imprecise, the private sector may be motivated to form risk-reducing alliances with the government that most favors the investor in order to protect its investment. In fact, the investor will have every incentive to dissuade its government partner from submitting the territorial dispute to an adjudicatory tribunal because the investor cannot rely on or predict legal outcomes. If, because of such non-quantifiable political risk, the private investor forgoes the Foreign Direct Investment (“FDI”) project that can otherwise stimulate local economies ultimately the people who are impacted the most will be the inhabitants of the poorest countries in the region. Those poor countries may have the least leverage in any bilateral or multilateral negotiation to resolve competing sovereignty claims. This is precisely the consequence that “equity” seeks to avoid.

Scholars who are pessimistic about the inspirational nature of public international law will view law with little teeth and guidance as worse than having no law at all. Where law is soft, vague, and purely inspirational, lawlessness may follow. “Soft” or “vague” law will encourage self-help, including the type of con-

tractual alliances that fortify the ruling elites.¹¹⁴

3. Policy Supporting Distribution of Resources in Favor of Developing Countries

But UNCLOS is not always vague; nor does it always rely on inspirational good faith compliance. Where national jurisdiction is not an issue, UNCLOS firmly establishes rules that favor the more disadvantaged nations. For example, Article 136 defines the “Area” beyond national jurisdiction as the “common heritage of mankind,” favoring the landlocked States.¹¹⁵ State parties are prohibited from entering separate agreements in derogation of these principles.¹¹⁶ The Convention also grants “land-locked States”¹¹⁷ and “geographically disadvantaged States”¹¹⁸ the right to participate, on an equitable basis, in the exploitation and appropriation of “living resources” within an EEZ, unless the economy of the coastal state “is overwhelmingly dependent on the exploitation of the living resources of its [EEZ].”¹¹⁹ As a result, the industrialized nations have criticized UNCLOS as promoting the distribution of maritime resources in favor of the developing countries,¹²⁰ the kind of favoritism suited only for a post-colonialism Cold War era when socialism was still reaffirming its influence in competition with free enterprise.

With the above policies clearly expressed in UNCLOS, there is a scintilla of hope that an international adjudicatory tribunal such as the ICJ may interpret the “equity” element of UNCLOS to include a socialist distribution of natural resources in favor of the developing countries. It follows, therefore, that in the South China Disputes, notwithstanding the lack of clear guidance from UNCLOS, the smaller and less powerful ASEAN nations may

114. In international relations, such lawlessness, when uncontested or unopposed overtime, may very well become legitimized or accepted as a *fait accompli*. Perhaps in no other situation can this disturbing aspect of our current international law regime be demonstrated better than China’s occupation of Tibet and the Paracels, in an era where military conquest has clearly been outlawed on the book! See SHAW, *supra* note 53, at 422-24.

115. See *supra* note 87 and accompanying text (discussing UNCLOS’s guidance with respect to legal characteristics of “common heritage of mankind”).

116. See UNCLOS, *supra* note 61, art. 311(6).

117. *Id.* art. 69.

118. *Id.* art. 70.

119. *Id.* art. 71.

120. See *supra* notes 64 (discussing industrialized nations’ view as expressed in the 1994 Supplemental Agreement to UNCLOS).

have the incentive to ratify and rely on UNCLOS, in order to benefit from both these “equitable” policies and the peace-making mission of UNCLOS as safeguard against the military aggression by the more powerful China in the event of armed threats.

D. *Binding Effect of UNCLOS—Is UNCLOS
Really the Law of the Sea?*

If customary international law is the “law of the globe,” does UNCLOS constitute “the law of the sea”? In other words, the following questions must be raised: (i) whether UNCLOS codifies existing customary international law, and/or (ii) whether UNCLOS principles have universally been observed by States over time such that those principles are no longer contractual obligations, but have evolved into customary legal practices binding upon the community of nations as a whole?

1. The Nature of Treaty Obligations and
U.N. Conventional Law

Treaties are formally sources of obligations,¹²¹ but they may not always be statements of law. Treaty obligations must be carried out contractually, but the obligations themselves may or may not constitute law.¹²² Under these principles, strictly as an international convention, UNCLOS is only binding upon State parties, defined as “States which have consented to be bound by this Convention and for which this Convention in force.”¹²³

121. Professor Raustiala talks of two types of international agreements: contracts and pledges. *See generally* Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT’L L.* 581 (2005). Contracts create legally binding obligations, whereas pledges create moral or political obligations. *See id.* at 586. Professor Christine Chinkin has also argued that “the use of a treaty form does not of itself ensure a hard obligation.” Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INT’L & COMP. L.Q.* 850, 851 (1989).

122. *See* Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SOURCES OF INTERNATIONAL LAW* 57, 157-64 (Martti Koskenniemi ed., 2000). Professor Raustiala argues that there is no such thing as “soft law” with respect to international agreements. The concept of “soft law” refers to the spectrum of legality—something between binding law and no law. The critique of “soft law,” according to Professor Raustiala, applies to two types of international agreements: (1) those that are nominally nonbinding, such as “consensus documents” coming out of the 1990s’ U.N.-sponsored summits; and (2) those that are nominally binding but are of soft legal quality because of deficiencies of the accord or in the enforcement framework. *See* Raustiala, *supra* note 121, at 586-87.

123. *See* UNCLOS, *supra* note 61, art. 1(2)(1).

“State parties” include those States that have signed the Convention initially, whose national law requires no subsequent ratification,¹²⁴ as well as States that are deemed as consenting to UNCLOS by way of depositing ratification/accession instruments.

In addition, because a ratifying State may deposit its ratification instrument together with declarations, reservations or objections to limit the applicability of UNCLOS,¹²⁵ the procedure itself may serve to undermine the argument that all of UNCLOS principles are universally accepted. UNCLOS also allows a State party to “denounce” the Convention by written notification addressed to the U.N. Secretary General.¹²⁶ The fact that a State may show its reservation or may denounce UNCLOS may be viewed as characteristic of purely contractual obligations. UNCLOS’ express provisions addressing subsequent ratification, accession, confirmation, reservation, declaration, and denouncement may bolster the Convention’s contractual nature emphasizing consent.¹²⁷ Accordingly, UNCLOS may be perceived as falling short of general international law binding upon non-consenting States. Since a treaty is received as evidence of international law only if non-party States adopt it in their own practices,¹²⁸ the passage of time, and the neglect of States to join as parties or to ratify the treaty may amount to a silent rejection of the treaty.¹²⁹

However, Article 317 (addressing the process of “denouncement”) goes on to state: “The denunciation shall not in any way affect the duty of any State Party to fulfill any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.”¹³⁰

This language points out that, notwithstanding the contrac-

124. *Id.* art. 1(2)(2).

125. *Id.* art. 298(1).

126. *Id.* art. 317. The denunciation shall take effect one year after the date of the U.N.’s receipt of the denunciation notice. *Id.*

127. *See* Nuclear Test Cases (N.Z. v. Fra.), 1974 I.C.J. 457, 472-73 (Dec. 20) (“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of legal obligations. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking.”); *see also* U.N. Summary of Practice, *supra* note 57, § VIII.

128. *See, e.g.*, R.R. Baxter, *Treaties and Customs*, 129 RECUEIL DES COURS 27, 64-67 (1970).

129. *See id.*

130. *See* UNCLOS, *supra* note 61, art. 317.

tual nature of conventional law, UNCLOS drafters intended for it to encompass, or be consistent or coextensive with, principles of customary international law reflected in the Convention. Although customary international law is the "law of the globe," in the contemporary world, the means of creating norms of international law is no longer solely custom, but also by way of a treaty or convention. Multilateral international treaties can become a direct means of changing, developing and creating new norms of general international law.¹³¹ Modern trends in international law acknowledge that multilateral treaties can evidence *jus cogens* binding on all States.¹³² The principles articulated in a treaty may be the codification of existing custom, or may pass into the general corpus of customary international law after signing. Or, a conventional rule may become customary international law if, through the passage of time, the rule evolves into a settled practice, evidencing a common belief among all States that the practice has sufficiently become so widespread as to be rendered universally obligatory.¹³³

Accordingly, in the South China Sea Disputes, a State party relying on UNCLOS may argue that UNCLOS has "passed into the general corpus of international law" by subsequent State practices so as to render it binding even upon non-consenting States. A non-consenting State may be one that has failed to ratify UNCLOS or has ratified it with reservations. In any event, via Article 317, UNCLOS expressly leaves general principles of international law intact notwithstanding the Convention's specific provisions injecting new concepts. Other provisions of the Convention express the same or similar policy. For example, with respect to the delimitation of the EEZ and the Continental Shelf, Articles 74 and 83 of UNCLOS incorporate Article 38 of the Statute of the ICJ, recognizing individual treaty obligations as a source of international law.¹³⁴

In summary, the binding effect of UNCLOS upon a non-consenting party depends on whether UNCLOS only reflects the

131. See Grigory I. Tunkin, *Coexistence and International Law*, 95 RECUEIL DES COURS 1, 21-23 (1958).

132. See MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 22 (4th ed., 1982) (noting treaties can be evidence of customary international law).

133. See *id.*

134. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

view of consenting State parties, or whether the Convention, by common consensus and practice, is considered the codification or evidence of general international law. The general eagerness of the archipelagic States to ratify or accede to the Convention, together with the coming into force of the 1994 Supplemental Agreement representing the view of the industrialized nations,¹³⁵ indicates that certain principles of the Convention have achieved the status of maritime custom, willingly recognized and observed by States as their legal obligations.

On the other hand, a stumbling block preventing a number of industrialized nations (including the United States) from ratification has been the Convention's regime relating to the exploitation of natural resources beyond national jurisdiction,¹³⁶ and the distribution of living resources in EEZs in favor of landlocked States.¹³⁷ These features of UNCLOS may remain pure contractual obligations and prevent all of UNCLOS from becoming evidence of customary international law binding upon the world community.

2. A Note on the Significance of the U.S. Position and Its Reluctance to Ratify UNCLOS

Perhaps a note on the U.S. position will shed further insight on the ultimate question of whether UNCLOS codifies, or has evolved into, customary international law.

The United States played a prominent role in the negotiating sessions that culminated in the adoption of UNCLOS in 1982.¹³⁸ Nonetheless, the United States recognized that Part XI of UNCLOS—establishing an International Seabed Authority to administer the mining of minerals in areas of the deep seabed beyond national jurisdiction—did not further the U.S. interest. Hence, it refused to sign UNCLOS in 1982.¹³⁹ In 1983, President Ronald Reagan instructed the Executive Branch to abide by

135. See *supra* notes 58-70, 121-151 and accompanying text (describing history of UNCLOS and the 1994 Supplemental Agreement).

136. See Denton Hall & J.B. Blanche, *The Spratly Islands Archipelago Influence on Regional Stability in the South China Sea* (June 1995).

137. See UNCLOS, *supra* note 61, art. 69.

138. See *United Nations Convention on the Law of the Sea: Hearing Before the Comm. on Env't and Pub. Works*, 108th Cong. 66 (2004) (statement of John T. Turner, Assistant Secretary of State, Bureau of Oceans and International, Environmental and Scientific Affairs).

139. See *id.*

all provisions of UNCLOS except for Part XI.¹⁴⁰ In 1990, the United States spearheaded the negotiation of the Supplemental Agreement, which opened for signature in 1994, purportedly changing the implementing mechanism of Part XI in a way that legally and adequately protects U.S. industry.¹⁴¹ In the same year, on July 29, 1994, under the Clinton Administration, the United States became a signatory to UNCLOS, after a decade of expressed reservation that the Convention—prior to the adoption of the Supplement Agreement—violated free enterprise principals by mandating the subsidizing of mining costs in favor of poorer nations.¹⁴²

To date, the United States, however, has not ratified either UNCLOS or the Supplemental Agreement in order to incorporate the Convention into U.S. domestic law.¹⁴³ This reluctance is largely due to the congressional concerns that UNCLOS would diminish the private sector's chance for profitability with respect to deep seabed mining, and that the Supplemental Agreement does not adequately restructure Part XI of UNCLOS to conform completely to free market principles.¹⁴⁴ Article 136 of UNCLOS declares that the resources of the seabed belong to "the com-

140. *See id.*

141. According to Assistant Secretary of State John Turner, the Supplemental Agreement does the following: (i) overhauls the decision-making procedures of Part XI to accord the United States and others major economic interests and influence over deep seabed mining decisions; (ii) guarantees the United States a seat on the decision-making body; (iii) gives the United States right of consent over any amendment and veto power in future decisions; (iv) restructures the deep seabed mining regime along free market principles by scaling back the power of the decision-making body and linking operation to actual development; (v) eliminates any obligation upon the United States or other States to finance the deep seabed mining enterprise; (vi) eliminates all requirements for mandatory technology transfer or production controls; and (vii) grandfathers the seabed mine site claims by companies holding U.S. licenses based on certain criteria. *See id.*

142. *See supra* notes 64-65; *see also* Ken Warn, *U.S. Agrees to Sign Law of Sea Treaty*, *FIN. TIMES*, July 2, 1994, at 2. *See generally supra* notes 58-70 and accompanying text (recounting history of U.S. position on UNCLOS over past decades).

143. *See* Ratifications List, *supra* note 67.

144. *See* Doug Bandow, *Don't Resurrect the Law of the Sea Treaty*, 59 *J. INT'L AFF.* 25, 26 (2005); *see also* *United Nations Convention on the Law of the Sea: Hearing Before the Comm. on Env't and Pub. Works*, 108th Cong. 70 (2004) (statement of John T. Turner, Assistant Sec'y of State, Bureau of Oceans and Int'l, Env't'l & Scientific Affairs). Urging the U.S. Congress to ratify UNCLOS, the Bush Administration maintains that challenges to UNCLOS are based on an incorrect interpretation of the Convention, defending the legally binding nature of the changes to UNCLOS brought about by the 1994 Supplemental Agreement. *Id.*

mon heritage of mankind."¹⁴⁵ This means that all nations, even those that are land-locked, can share equally in natural resources within the deep seabed.

More recently, actions have been stirred up on the steps of Capitol Hill on this issue.¹⁴⁶ The Bush Administration has unequivocally announced its support for the United States' ratification of UNCLOS.¹⁴⁷ According to the Administration, the Supplemental Agreement guaranteed access by U.S. industry to deep seabed minerals based on reasonable terms and conditions.¹⁴⁸ In February 2004, the Senate Foreign Relations Committee voted unanimously in favor of sending UNCLOS to the full Senate for ratification.¹⁴⁹ Yet, the Senate has proposed a number of important declarations setting out the United States' reservations in case ratification is in order. These declarations address areas such as dispute resolution and the United States' interest in preserving its maritime regulation and national security.¹⁵⁰ As of the date of this Article, these matters are still pending in Congress.

145. See UNCLOS, *supra* note 61, art. 136.

146. See *United Nations Convention on the Law of the Sea: Hearing Before the Comm. on Foreign Relations*, 108th Cong. (2003) (statement of Sen. Richard Lugar, Chairman, S. Comm. on Foreign Relations).

147. See Bandow, *supra* note 144, at 27; Howard S. Schiffman, *U.S. Membership in UNCLOS: What Consequences for the Marine Environment?*, 11 ILSA J. INT'L & COMP. L. 477, 480 (2005); see also *United Nations Convention on the Law of the Sea Hearing: Before the Comm. on Env't and Pub. Works*, 108th Cong. 15 (2004) (statement of John T. Turner, Assistant Sec'y of State, Bureau of Oceans and Int'l, Env't'l & Scientific Affairs).

148. See Bandow, *supra* note 144, at 27-28.

149. See, e.g., Senator Richard G. Lugar, U.S. Leadership in the World and the Law of the Sea, <http://lugar.senate.gov/sfrc/sea.html> (last visited Nov. 13, 2006); see also *United Nations Convention on the Law of the Sea: Hearing Before the Comm. on Foreign Relations*, 108th Cong. (2003) (statement of Sen. Richard Lugar, Chairman, S. Comm. on Foreign Relations) ("The Law of the Sea Convention has great potential to advance U.S. interests related to navigation of the seas, the productive use of their resources, and the protection of the marine environment."). See generally Marjorie Ann Browne, Congressional Research Service, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003* (June 3, 2005), available at <http://fpc.state.gov/documents/organization/37196.pdf>.

150. See, e.g., Schiffman, *supra* note 147. Most notably, with respect to the dispute settlement under Part XV of UNCLOS, the U.S. Senate has proposed a declaration that designates a "special arbitral tribunal" for disputes related to fisheries, protection of the marine environment, marine scientific research, navigation, and pollution from vessels and from dumping. Other proposed declarations stress the right to establish conditions for entry of foreign ships into U.S. waters, the right to regulate when species are introduced into the marine environment, and the right to fix permissible catch limits of living resources within its EEZ. *Id.* at 481.

The United States' reluctance primarily centers around the sufficiency of the Supplemental Agreement with respect to deep seabed mining, together with the United States' overall concern for its maritime regulation on account of national security interests. Other maritime sovereignty and sea-use right principles of UNCLOS do not pose obstacles for future ratification of UNCLOS by the United States. The fact that the Bush Administration and various research groups strongly support ratification, viewing UNCLOS as a "widely accepted and comprehensive law of the sea,"¹⁵¹ should bolster the argument that UNCLOS' regime with respect to national maritime jurisdiction evidences customary international law.

E. *Summary: The Bundle of Uncertainties Left by UNCLOS*

From the discussion above, it is evident that UNCLOS leaves open several uncertainties.

First, a distinction must be made between competing territorial claims and competing Continental Shelf/EEZ claims. Continental Shelf/EEZ claims concern sea-use rights, whereas territorial claims concern ownership of various islands at sea. UNCLOS does not displace theories such as historic titles or other customary international legal principles upon which a State may base its territorial claims of sovereignty over the islands. These theories are still being raised, with new evidence gathered or publicized by the competing States. Meanwhile, no nation has initiated a legal proceeding before the ICJ, for fear the outcome cannot be controlled.¹⁵² Although the new millennium occasioned a couple of joint governmental agreements promising a conciliatory treaty approach to the Disputes,¹⁵³ overall the Disputes have remained dormant. This status quo may change as

151. See *supra* notes 138-142; see also David Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, (Brookings Inst., Policy Brief No. 137, 2004), <http://www.brookings.edu/comm/policybriefs/pb137.pdf> (last visited Jan. 29, 2007) (advocating U.S. ratification).

152. In the 1990s, when exploration activities near the disputed waters heightened political tensions, there was some speculation that Vietnam might be willing to prosecute a case before the ICJ with the help of a prestigious U.S. law firm. See Barry Wain, *Lawyers Say Vietnam Has a Strong Case*, *ASIAN WALL ST. J.*, July 20, 1994, at 5 (recounting China-Vietnam conflict and referring to representation of Vietnam by Washington, D.C.-based Covington & Burling).

153. See *supra* notes 51-52 (referencing 2002 Declaration and 2005 Tripartite Agreement).

soon as a government announces an important grant of exploratory rights, or an oil and gas operator announces a substantial commercial discovery in or near the disputed waters.

Second, whoever owns the Spratlys, or parts thereof, would ostensibly be entitled to the Continental Shelf/EEZ extruding from the islands(s). Here, UNCLOS triggers more of a legal scramble down the road. The Continental Shelf/EEZ claimed around the Spratlys may inevitably overlap with those claimed by other coastal states in the region. Assuming that the underlying claims of sovereignty are resolved as to the Spratlys, the competing nations must next tackle the question of overlapping Continental Shelf/EEZ claims. UNCLOS mandates treaty negotiation and allows for “delimitation” to be resolved by “equitable solutions.” In the case of a conflict where the Convention “does not attribute rights or jurisdiction to the coastal state or to other States within the [EEZ] [The Convention merely provides that such] conflict should be resolved on the basis of equity”¹⁵⁴ Determination based on “equity” offers no dispositive or predictable answer to the Disputes, as the weighing of equity rests with international judges or arbitrators whose jurisdiction may be conferred solely by the litigants’ consent.¹⁵⁵ Resolutions based on equity cannot be predicted with any degree of certainty, although equity should favor countries with lower gross national product (“GNP”) or per capita income, considering the fact that the Convention was a post-colonialism product and signed by a large number of developing countries.

Third, the 200-nautical mile Continental Shelf/EEZ limit set out in UNCLOS cannot resolve China’s claim, which extends well beyond the 200-nautical mile limit from China’s baseline. This expansive claim, therefore, must be predicated on China’s

154. UNCLOS, *supra* note 61, art. 59.

155. The ICJ only has jurisdiction by the consent of State-party litigants. *See generally* Statute of International Court of Justice, ch. II, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; *see also* Eric A. Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, (John M. Olin Program in Law and Econ. Working Paper No. 234, 2004), http://www.law.uchicago.edu/Lawecon/WkngPprs_226-50/234.eap.icj-bias.pdf (last visited Jan. 29, 2007); Philip V. Tisne, *The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in U.S. Courts*, 29. FORDHAM INT’L L.J. 865, 877-84 (2006) (discussing bases for jurisdiction in the ICJ and its predecessor, the Permanent Court of International Justice (“PCIJ”)); ICJ, Basis of the Court’s Jurisdiction, http://www.icj-cij.org/icjwww/basicdocuments/basictext/basic_basisjurisdiction.html (last visited Nov. 13, 2006).

extension of its coastal baselines to both the Paracels and the Spratlys. If China's ownership of the islands is legally established, then under UNCLOS, China's Continental Shelf/EEZ would encompass most, if not all, of the South China Sea. To support its claim to the Paracels and the Spratlys, China must rely on territorial acquisition principles rooted in customary international law and substantiate its claim with historical evidence. Still, China may not want this evidence adjudicated before the ICJ or an ad hoc tribunal, fearing that such tribunal may apply "equity" in favor of a lesser developed nation, especially in light of China's over-expansive claim. China would prefer ad hoc treaty solutions, whereupon it can form economic alliances with petroleum contractors and exert influence and leverage in the negotiation.

Fourth, under UNCLOS, even if the Spratlys Disputes did not exist, or even if they were resolved in favor of China, China and other ASEAN countries may still dispute their overlapping respective Continental Shelf/EEZ claims in an "enclosed or semi-enclosed sea." Whether the South China Sea or part thereof qualifies as a "semi-enclosed sea" under UNCLOS will introduce another level of uncertainty. If the South China Sea, or part thereof, qualifies as a "semi-enclosed or enclosed sea," then UNCLOS does not mandate treaty solution regarding competing or overlapping Continental Shelf/EEZ claims over hydrocarbons—Article 123 only encourages "cooperation" among the competing States, and only with respect to "living resources," not "natural resources."

Fifth, even if all sovereign claims are resolved, the archipelagic baselines of the islands must be determined to enable the drawing of the Continental Shelf/EEZ, based on UNCLOS. Here, difficulties arise because under UNCLOS, different jurisdictional rights attach to rocks and islands. Empirically, not every structure within the island group is capable of supporting economic life, and any island or islet that is not capable of human habitation or independent economic life will not have a Continental Shelf or EEZ around it. Many structures within the Spratlys may fall into this category, yet the competing countries have strained to install garrisons or prove human habitations in order to bolster their sovereign claims. The fortified rocks in the South China Sea can hardly sustain the garrisons on them without constant supplies brought in from the continent. All

factual issues regarding independent economic life on the occupied islands must be determined based on scientific, historical, and expert testimonial evidence. For unoccupied islands, habitation and economic activities may have to be proven in the hypothetical, since there may be no actual evidence of human habitation.¹⁵⁶

Sixth, there exists the uncertainty of whether the Spratlys group may be divisible for purposes of claiming sovereignty. A related question is whether a Continental Shelf/EEZ can be drawn from the baselines of the entire Spratly group, or only around some structures but not others (that is, whether a claimant may assert sovereignty over the entire archipelago or only over certain parts or structures thereof). It may be disingenuous to circle an archipelagic baseline around the entire Spratlys group as a single political entity, or to delineate precisely what the group should encompass, because over time new islets may form while existing ones disappear. On the other hand, if a country successfully establishes sovereignty over the entire Spratlys group as a non-divisible entity, UNCLOS's guidelines governing archipelagic states may apply to the entire group as the possession of one single country.

Accordingly, the determination of sea-use rights under UNCLOS must first hinge upon: (i) whether certain structures within the islands are habitable or capable of economic life on their own; (ii) whether the inhabitability of some of the islands within the Spratlys may affect the legal characteristics of the entire group, such that no Continental Shelf or EEZ can be claimed; (iii) whether a State's sovereignty, if established, should extend to *all* islands of the Spratlys group (not just any specific structures thereof), including future formations; and (iv) under these circumstances, whether baselines can be drawn for the Spratlys in accordance with UNCLOS's guidelines governing "archipelagic states" whereas the group may not have any independent political identify of its own.

Seventh, resolution of the above issues depends on extrinsic

156. At least one commentator has opined that "human habitation" under UNCLOS Article 121(3) does not require proof of permanent human residence or continuous economic life capable of sustaining a human being throughout the years. According to this commentator, the legal definition of "rocks" need not conform to scientific or dictionary definitions, just as the term "Continental Shelf" under UNCLOS does not necessarily mirror scientific definitions. See Charney, *supra* note 102, at 867.

scientific or historical evidence that must fit the various legal tests. Further, UNCLOS's "equity" test may invoke cases and arbitral decisions articulating and interpreting the "median line" and "equi-distance" rules, as well as evidence supporting the "special circumstances" exception. The marine characteristics of the islands and the South China Sea should also be taken into consideration. Gathering such data and fitting it into the various legal tests as well as into a "basket" of "equity" considerations would amount to the "crystal ball" task of predicting the ruling of an international judge or arbitrator, who may not be bound by the practice of common-law *stare decisis*.

Eighth, although UNCLOS does not resolve sovereignty conflicts, it does offer principles that are relevant to the outcome, for example, the drawing of baselines from which a Continental Shelf/EEZ can be claimed.¹⁵⁷ But perhaps the most helpful feature of UNCLOS is its establishment of dispute resolution procedures—UNCLOS provides a rather concrete mechanism for the competing nations to arbitrate their Disputes, or to select a forum such as the ICJ for final adjudication. For instance, where UNCLOS mandates the delimitation of the Continental Shelf/EEZ by agreement, the Convention also obligates State claimants resort to the Convention's dispute resolution procedures, should they fail to reach agreement. On the other hand, voluntary submission of the Disputes to a forum, such as the ICJ, remains speculative and remote. Private investors may be anxious to remove the cloud created by the political risk, yet they cannot bring a claim for declaratory action in the ICJ.¹⁵⁸ Further, an ICJ action and judgment will take a long time, and dispute resolution procedures do not become viable options unless and until the Disputes are ripe. Even though some elementary joint governmental framework has been established as evidenced by the 2002 Declaration and the Tripartite Agreement,¹⁵⁹ only a major

157. See UNCLOS, *supra* note 61, art. 15 (prohibiting opposite or adjacent States from extending their territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured). Still, at least one legal expert has pointed out that both China and Vietnam, who have ratified UNCLOS, have also claimed baselines that conflict with UNCLOS principles. See SEAPOL NEWSLETTER, *supra* note 47.

158. See *supra* note 155 (noting that the jurisdiction of the ICJ is based on the consent of the States to which it is open).

159. See generally 2002 Declaration, *supra* note 50; see also Ministry of Foreign Af-

commercial petroleum discovery will enflame the Disputes sufficiently to bring all interested parties to a negotiating table.

Finally, all parties to the South China Sea Disputes have ratified UNCLOS (with the exception of Taiwan),¹⁶⁰ and, hence, UNCLOS is now binding on all those ratifying Asian governments. China and Vietnam, however, have ratified UNCLOS with filed declarations.¹⁶¹ To urge compliance by non-consenting States, a challenging State must establish that UNCLOS represents general rules of international law. Does it? In any event, the Convention stands as the modern statement of international maritime law, whether through contractual obligations or as customary usage. Its underlying policies are important for UNCLOS signatories because they are the inspiration of a global rule of law: The new international economic order must be based on equity and peace, and “flexing military muscle” will never be endorsed by the community of nations in the resolution of economic rights.

In summary, the future for the South China Sea Disputes remains uncertain despite recent progress. One may also question whether these signs of progress—for example, the 2002 Declaration and the 2005 Tripartite Agreement discussed in this Article¹⁶²—are truly progress or merely an interim diplomatic or political move, part of the agendas of the region’s leaders. The private sector’s comfort zone often comes from the success of

fairs of the People’s Republic of China, *supra* note 51. *See generally infra* notes 181-214 and accompanying text (discussing and analyzing the 2002 Declaration and the 2005 Tripartite Agreement in greater detail).

160. *See* Declarations List, *supra* note 69; *see also* UNCLOS Status, *supra* note 65. Although Taiwan has not ratified UNCLOS, Taiwan has not publicly denounced the Convention, either.

161. *See* Declarations List, *supra* note 69. China, in particular, has even enacted legislation annexing the Spratlys to its territory. *See* Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, art. 2, *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf; *see also* Raif Emimers, *Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo* 6 (S. Rajaratnam Sch. for Int’l Studies Working Paper No. 87, 2005), <http://www.rsis.edu.sg/publications/WorkingPapers/WP87.pdf> (last visited Mar. 24, 2007) (discussing China’s belief in its right to use force to protect the Spratlys and their surrounding waters). *See generally infra* notes 181-183 and accompanying text (discussing China’s legislative efforts to annex territory).

162. *See generally* 2002 Declaration, *supra* note 50; Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 51. *See generally* 181-214 and accompanying text (discussing and analyzing the 2002 Declaration and the 2005 Tripartite Agreement in greater details).

the “Joint Development Zone” (“JDZ”) concept, which offers the hope that sovereignty disputes will pragmatically be resolved via economic negotiation. As illustrated below, UNCLOS amply supports the JDZ concept, but provides no roadmap for the architecture of the JDZ itself.

IV. JOINT DEVELOPMENT ZONE AND THE ROLE OF THE PRIVATE SECTOR

A. JDZ as Part of International Economic Law

Territorial disputes are not unusual or unique to the South China Sea, and the Spratlys disputes are not the only example in the region. Other territorial disputes include the Senkoku (China, Japan, Taiwan, and South Korea), Kuriles (U.S.S.R. and Japan), Sipadan and Ligitan (Indonesia and Malaysia),¹⁶³ and “Pedra Branca” (Singapore and Malaysia).¹⁶⁴

Many disputes remain dormant and unresolved, primarily because there is no immediate economic incentive for countries to pursue remedies. Others have been resolved via Joint Development Agreements (“JDA”), creating JDZs in which the competing countries hold shared interests. Examples include the Japan-South Korea Agreement of 1974 regarding the East China Sea, the Indonesia-Australia “Timor Gap” Treaty on the Zone of Cooperation of 1988, the Malaysia-Thailand Treaty on the Establishment of the Joint Authority (MTJA) of 1990, and the Treaty between Malaysia and Vietnam with respect to the Malay Ba-

163. See Ligitan-Sipadan, *supra* note 56 (resolving this dispute).

164. See *supra* note 15 and accompanying text; see also Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries, Malay-Vietnam, June 5, 1992 [hereinafter Malaysia-Vietnam Memorandum], reprinted in 3 INT'L MAR. BOUNDARIES 2341 (Jonathan I. Charney & Robert W. Smith eds., 2002); Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Indon.- Austl., Dec. 11, 1989, 29 I.L.M. 469 (1990); Memorandum of Understanding Between the Kingdom of Thailand and Malaysia on the Establishment of the Joint Authority for the Exploitation of the Resources of the Sea Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, Thail.-Malay., 1979, 1291 U.N.T.S. 250 [hereinafter Thailand-Malaysia Memorandum]; Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Japan-S. Korea, Feb. 5, 1974, 1225 U.N.T.S. 113 [hereinafter Japan-South Korea Agreement]. See generally MARK J. VALENCIA, SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS 107-129 (1985); Kym P. Livesley, *The Timor Gap Treaty*, 90 ENERGY L. 61 (1990).

sin.¹⁶⁵ Outside of Asia Pacific, there have been the successes of the 1976 Agreement between the United Kingdom and Norway regarding cross-boundary petroleum operations,¹⁶⁶ the Persian Gulf Agreement of 1965 between Saudi Arabia and Kuwait,¹⁶⁷ the Agreement between Iceland and Norway,¹⁶⁸ and more recently the JDZ treaty between Nigeria and São Tomé e Príncipe of 2001.¹⁶⁹

The JDZ concept has increasingly been recognized by the international community as a peaceful and pragmatic alternative to settle the economic and emotional battles of competing sovereign claims—"emotional" in the sense that territorial disputes always involve an intense display of nationalism and can lead to uproar, not just among governments, but also in the populace.¹⁷⁰ To the extent that JDZs form norms of practice and can shape future commercial conduct, they could become part of international economic law.

Several approaches to JDZs have been tried, resulting gener-

165. See Malaysia-Vietnam Memorandum, *supra* note 164, at 2341; Thailand-Malaysia Memorandum, *supra* note 164; Japan-South Korea Agreement, *supra* note 164; see also Livesly, *supra* note 164.

166. See Framework Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland And the Government of the Kingdom of Norway, Concerning Cross-Boundary Petroleum Co-Operation, U.K.-Nor., Apr. 4, 2005, available at http://www.og.dti.gov.uk/upstream/infrastructure/nfa_2005.doc (setting out the terms for cross-boundary cooperation between the United Kingdom and Norway with regard to petroleum activities).

167. See Agreement Between the State of Kuwait and the Kingdom of Saudi Arabia Relating to the Partition of the Neutral Zone, Kuwait-Saudi Arabia, July 7, 1965, 4 I.L.M. 1134 (agreeing to partition the neutral zone between Kuwait and Saudi Arabia).

168. See Agreement on the Continental Shelf between Iceland and Jan Mayen, Ice.-Nor., Oct. 22, 1981, 2124 U.N.T.S. 262 (agreeing on the procedure for determining the delimitation line on the continental shelf between Iceland and Jan Mayen).

169. See Treaty Between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Príncipe on the Joint Development of Petroleum and Other Resources, in Respect of Areas of the Exclusive Economic Zone of the Two States, Nig.-São Tomé e Príncipe, Feb. 21, 2001 [hereinafter Nigeria-São Tomé Treaty], available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/STP-NGA2001.PDF> (agreeing on the formation of a Joint Development Zone for the exploration of petroleum deposits in waters claimed by the two countries); see also *infra* notes 289-348 and accompanying text.

170. See Wei Cui, *Multilateral Management as a Fair Solution to the Spratly Disputes*, 36 VAND. J. TRANSNAT'L L. 799 (2003) (encouraging development of a joint management system based on fairness and equity for the development of the Spratlys); Liu, *supra* note 42 (arguing that it is in the best interests of all States with claims to the Spratlys to concede sovereignty over the archipelago to China in exchange for a system of joint resource development of the area).

ally in three types of JDAs. In the first type, exemplified by the Japan-South Korea agreement,¹⁷¹ each country is entitled to appoint its licensee for a licensed area, and the licensees are required to reach a joint agreement. In the second type, such as the Malaysia-Thailand and Nigeria-São Tomé treaties,¹⁷² a supra-national authority is created to grant licenses and determine their terms. In the third type, more common in the Middle East, one nation is given the exclusive and unilateral right to develop the disputed area for the benefit of all countries.¹⁷³ At least one commentator had advocated the practice of forming a joint authority as the preferred model (the "Joint Authority Model"), because such a model purportedly creates a neutral body that administers the whole of the JDZ, based on an intergovernmental agreement establishing the legal and administrative scheme for the JDZ.¹⁷⁴ The issue then becomes whether the administering body is indeed neutral. Part VIII of this Article analyzes the Nigeria-São Tomé treaty as an example of this approach.

B. *Viability of JDZ as a Legal and Contractual Framework*

The JDZ concept is in line with the spirit of UNCLOS as a post-Second World War peace-making treaty. For example, Article 59 of UNCLOS encourages States parties to resolve their Continental Shelf conflicts by agreement, taking into account not only their national interests but also those of the international community.¹⁷⁵ Likewise, Articles 74 and 83 provide that the delimitation of the Continental Shelf/EEZ shall be effected

171. See Japan-South Korea Agreement, *supra* note 164.

172. See Nigeria-São Tomé Treaty, *supra* note 169; see also Thailand-Malaysia Memorandum, *supra* note 164. See generally *infra* notes 289-348 and accompanying text (discussing, inter alia, the Nigeria-São Tomé Treaty).

173. See, e.g., Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights Over Islands Between Qatar and Abu Dhabi, Qatar-Abu Dhabi, Mar. 30, 1969, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/QAT-ARE1969MB.PDF>; see also Hazel Fox et. al., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* 55-56 (British Inst. Int'l and Comparative Law, 1989) (describing the structure of the agreement between Qatar and Abu Dhabi).

174. See Ernst Willheim, *Australia-Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the 'Timor Gap'*, 29 NAT. RESOURCES J. 821, 832-42 (1989) (proposing that a joint authority be responsible for administering the whole of the JDZ under the authority of both disputing nations, with neither conceding their claims to the territory).

175. See UNCLOS, *supra* note 61, art. 59.

by agreement, and "the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature."¹⁷⁶ Together, Articles 59, 74, and 83 form the legal basis for JDZ negotiation under UNCLOS.

Problems remain with the JDZ notion because the JDZ solution is not mandatory. For example, although UNCLOS obligates the disputing parties to resolve the delimitation of the Continental Shelf/EEZ, the Convention only encourages a "provisional arrangement," and, in the case of an enclosed or semi-enclosed sea, the Convention does not mandate joint development of natural resources.¹⁷⁷

Country leaders may still face vehement objection from their constituents, who may view any concession of sovereignty made in a JDZ as an insult to nationalism. A JDA means that one nation agrees to share with others what it once claimed was its territory—a compromise of what the nation otherwise believes to be its good claim. Thus, JDZ negotiation may still break down because of emotional nationalism, and hence may rupture into open hostilities that might otherwise have remained dormant. Negotiating the economic terms of a JDZ may go on endlessly, while the nationalistic fervor may escalate. Further, a JDZ may uproot existing contractual terms between a host government and its petroleum contractor, making concession of economic terms with additional parties even more difficult to achieve.

The JDZ option is also not easy to implement. Three layers of challenges exist in JDZ implementation. First, divergent national interest must be balanced into a compromise. Second, if the JDA is predicated upon UNCLOS Articles 59, 74, and 83, those States who have ratified UNCLOS will then be bound by its dispute resolution alternatives and procedures, should JDZ negotiation result in an impasse. Third, in the process of JDZ negotiation, new obstacles may arise—the negotiating parties must determine percentages of profit, control mechanism for interest holders, and a consensual legal and administrative system to accommodate every participating country.

176. *See id.* arts. 74, 83.

177. *See id.* arts. 74, 83, 123.

V. *THE "SILENT PARTNERSHIP" THEORY—AN EXAMPLE OF REALPOLITIK: THE CHINA-VIETNAM CONFLICT*¹⁷⁸

This part of the Article uses the tension between China and Vietnam in the past decade as a case study of how *Realpolitik* could prompt State actions as well as corporate actions, how these *Realpolitik* factors manifested themselves in the State's commercial relationships with the private sector, and how such relationships could taint the JDA/JDZ negotiation, turning the treaty solution into a political product that undermines the "equity" goals of UNCLOS. The past decade was used as an example because, during that period, UNCLOS went into force, and controversial exploration activities took place in the area, causing intense conflicts between China and Vietnam (the main protagonists in the Disputes) and resulting in overt strategic maneuvers by both nations. The tension between China and Vietnam in the 1990s can recur at any time, notwithstanding recent bilateral and multilateral agreements demonstrating diplomatic improvement and commitment to regional peace.

The competing countries motivated by *Realpolitik* may manipulate the private investor caught in the sovereign conflict.¹⁷⁹ In such a scenario, as pointed out in the case study, four imminent possibilities may result. First, the private investor is likely to fashion self-help, such as forming a silent partnership with a supporting government. Second, such "self-help" mechanisms can fortify an elitist structure that disengages the ultimate goals of negotiated treaty solutions: the attainment of a compromise that represents all national interests aided by the procedural fairness and the integrity of the negotiation process. Third, in working toward a treaty solution, a State may use law (such as UNCLOS) to bolster its political agenda and achieve political objectives. Law, therefore, becomes part of *Realpolitik*, and is used as a tool of manipulation rather than as guidance or imperatives for political conduct.¹⁸⁰ Finally, it is ultimately the silent partner-

178. This part of the Article is based strictly on public information and news reports.

179. See Mark J. Valencia, *How Governments Lure Companies Into the Sea*, *ASIAN WALL ST. J.*, July 5, 1994, at 10.

180. The use of law for tactical manipulation comports with the age-old critique that international law is not "real law" due to a lack of an effective enforcement mechanism—States obey it only when they wish or when it serves their interest because the duties it imposes are enforced only by moral sanctions or fear of provoking general

ship between the most powerful State and the most able industry player that controls the outcome of sovereign disputes over natural resources. The distribution of natural resources, therefore, continues to be the domain of the powerful.

Quite often, a government's *Realpolitik* motive is rarely articulated to the public. Commentators can only speculate by examining governmental actions as indicia of any such hidden agenda. Many such agendas will even be deliberately shielded from the public due to national security, public relations incentives, and/or political concerns. Further, the national interests may be at odds with the personal motivation of individual country leaders, who may or may not always have the best interest of the nation at heart, depending on the political regime and the actors in question. Accordingly, efforts to bolster the countries' respective claims in a territorial dispute may have their roots not only in macroeconomic considerations but also in the personal political motives and careers of the ruling elites. This reality will make it extremely difficult for any legal scholar to evaluate or predict the possible outcome of any legal battles connected to territorial disputes. (Indeed, such an effort will amount to a pure academic exercise, which may infuse more public tension into an arena also entangled with heated nationalism and fierce economic competition.)

Accordingly, in these highly political matters, legal questions should be mapped vis-à-vis factors of *Realpolitik*, and the legal scholar should be prepared to take on the role of a political commentator. The result should be a hybrid, innovative form of legal scholarship that combines real life reporting with legal analysis. In other words, although law remains a relevant and important matter for staging government action, the savvy observer should ask: Ultimately, what good does law do?

hostility. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 142 (1954) (noting that the law of nations "is not law properly so called"); see also Valencia, *supra* note 179 (discussing legality of treaty schemes and its interplay with traditional thinking regarding "soft" international law).

VI. *THE CASE STUDY INVOLVING CHINA AND
VIETNAM IN THE SEARCH FOR OIL*

A. *Nation-States' Efforts to Use Law and Commerce to
Bolster Claims of Territorial Sovereignty*

1. *China's Law of 1992*

On February 15, 1992, two years before UNCLOS came into force, China enacted its Territorial Sea and Contiguous Zone Law ("Law of 1992" or "Law"). The Law declares Taiwan, the Spratlys, the Paracels, and Diaoyu Tai islands (controlled by Japan) as part of China's "territorial land," and reaffirms China's right to use military force to protect these islands. In fact, one regional newspaper noted that under this Law, "there can be virtually no offshore oil drilling in the East or South China Sea without China's permission."¹⁸¹ The Law does not include any coordinates or other indicator of boundaries for these islands. It adopts UNCLOS's concepts of Internal Waters and the 12-nautical mile¹⁸² Territorial Sea limit, selects the straight line method of drawing baselines, and reserves China's right to announce such baselines in the future.¹⁸³

2. *The "Vanguard Bank" Test Case and the
Crestone Concession*

But China did not stop there. In May 1992, only a few months after the enactment of the Law, China awarded an oil exploration deal covering some 30,000 square kilometers (approximately 9,700 square miles) to Crestone Energy Corporation ("Crestone"), a U.S. independent oil company based in Denver, Colorado, on an area called Bai Tu Chinh Reef in Vietnamese, and Wan An Bei in Chinese.¹⁸⁴ This area is also known internationally as the "Vanguard Bank" ("*Wai'an Tan*" in Chinese).¹⁸⁵

181. Harvey Stockwin, *China's Alarming Ripple Effect*, S. CHINA MORNING POST, Mar. 8, 1992, at 9.

182. See UNCLOS, *supra* note 61, art. 3.

183. See Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, art. 2, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf; see also Stockwin, *supra* note 181; *Spratlys Spat Unfolds Navily*, JAKARTA POST, Apr. 18, 1995, at 4 (analyzing effect of China's Law of 1992).

184. (See Exhibit D appended to this Article).

185. See *Obscure U.S. Oilman Bets His Firm on the China Card*, WALL ST. J. ASIA, July 20, 1992, at 5; see also *Scene Set for Clashes Over Rival Sea Claims*, S. CHINA MORNING POST, April 21, 1994, at 10 (recounting China's grant of exploration license to Crestone Cor-

The Vanguard Bank allegedly was located approximately 174 miles (280 kilometers) to the southeast side of the Vietnamese mainland, and approximately 621 miles (1000 kilometers) from the nearest part of China, the Hainan Island.¹⁸⁶ The Vanguard Bank has long been claimed by Vietnam as within its EEZ and Continental Shelf. At the time of China's award to Crestone, Vietnam had scientific platforms on the Vanguard Bank, but no military personnel.¹⁸⁷ It was reported that at its most western point, the Crestone Concession is about 100 miles (161 kilometers) from the Vietnamese coast, and is only about 47 miles (75 kilometers) east of Vietnam's producing oilfield, which is in partnership with Australia and Japan, the *Dai Hung* (Big Bear) project.¹⁸⁸ Holding the contractual license granted by China, Crestone took the position that the Vanguard Bank belongs to China, but also publicly urged the peaceful solution of negotiating joint development.¹⁸⁹

China's move regarding the Vanguard Bank demonstrated its expansionist policy, chilling petroleum companies already operating in Hanoi,¹⁹⁰ and testing Vietnam's reaction. Then, facing the prospect that the United States would soon end the trade embargo against Vietnam, China deliberately awarded the license to a small U.S. independent oil company trying to expand internationally, the type of corporate entity that would likely yield to China's agenda.

Other ASEAN countries hoped for U.S. assistance to counter China's expansionism.¹⁹¹ However, the United States

poration); Press Release, Crestone Corporation, Shanghai Presentation (Dec. 2003) [hereinafter Crestone Press Release] (on file with author); Guoxing, *supra* note 15, at 14.

186. See VIETNAM OIL & GAS REPORT, June 1994, at 9, (on file with author); see also Guoxing, *supra* note 15, at 14.

187. See *Hanoi Defends Claims to Area Covered by Beijing Oil Deal*, STRAITS TIMES, June 28, 1992; *Vietnam Urges China to Scrap Spratly Oil Venture*, STRAITS TIMES, June 23, 1992.

188. See SEAPOL NEWSLETTER, *supra* note 47 at 2; see also Valencia, *supra* note 179.

189. See Crestone Press Release, *supra* note 185 (on file with author).

190. See *China's Spratlys Deal Has Oil Firms in Hanoi Worried*, STRAITS TIMES, June 27, 1992.

191. See *U.S. Ready to Talk on Spratlys*, SUNDAY HER. SUN (Australia), July 26, 1992; *U.S. Urged to Back Talks on Disputed Spratlys*, STRAITS TIMES, Dec. 3, 1992; *U.S. Obligated to Defend Manila if Spratlys Attacked*, STRAITS TIMES, Nov. 12, 1992; *Don't Enforce Claim to Spratlys, U.S. Warns China—Washington Not Backing Any of the Claimants*, SUNDAY TIMES, Nov. 8, 1992; *Spratlys Could be Next Trouble Spot, Says U.S. Commander*, STRAITS TIMES, Oct. 31, 1992.

maintained neutrality, adhering to its official stance of non-involvement, taking the position that the U.S.–Philippine defense treaty of 1951 did not obligate the United States to be involved in military action resulting from the Spratly Disputes.¹⁹² Nonetheless, to protect its commercial and strategic interest in the Pacific Rim, the United States announced its “serious concern [regarding] any . . . restriction on maritime activity in the South China Sea that was not consistent with international law,” and expressed its unwillingness to tolerate any interference with shipping in the region.¹⁹³

3. Vietnam’s “Blue Dragon” Move

In response to China’s action, Vietnam steadfastly denounced the action of Crestone, declaring that, “Crestone no longer has any standing or rating in Hanoi” and should get a “return ticket to Denver.”¹⁹⁴ The official newspaper of the Vietnamese Defense Ministry called the Crestone Concession a clear “violation of the Continental Shelf of Vietnam and of international maritime law.”¹⁹⁵

At the time of the Crestone award, Vietnam was facing a myriad of challenges. The country had just completed about eight years of experimental market economy combined with a single-party Marxist political regime (a combination that Vietnam copied from China).¹⁹⁶ The U.S. trade embargo was still in place, leaving the foreign investment scene in Vietnam to be occupied by Taiwan, Japan, France, Australia, and others. Economic progress was slow due to inexperience, corruption (a

192. See *End of the Sentry*, FAR E. ECON. REV., Nov. 26, 1992. The United States and oil-producing Indonesia were regarded as possible neutral brokers of the Disputes. See *Indonesia and U.S. Looked Upon to Ease Tension in Spratlys*, 9 OIL & GAS NEWS 26, July 13-19, 1992. But see Saragosa, *supra* note 13.

193. See Ian James Storey, *Creeping Assertiveness: China, the Philippines, and the South China Sea Dispute*, 21 CONTEMP. SE. ASIA 9 n.65 (1999).

194. See, e.g., VIETNAM OIL & GAS REPORT, July 1995, at 11 (on file with author).

195. *Scene Set for Clashes Over Rival Sea Claims*, *supra* note 185; see VIETNAM OIL & GAS REPORT, June 1994 (on file with author) (reporting on protesting statements from Vietnamese Defense Ministry); see also *Vietnam Rejects China’s Survey for Oil Near Spratlys*, *supra* note 44 (reporting that Vietnam continued to object to Crestone deal six years after Crestone award) (on file with author).

196. See generally Wendy Duong, *Gender Equality and Women’s Issues in Vietnam: The Vietnamese Woman—Warrior and Poet*, 10 PAC. RIM L. & POL’Y J. 191 (2001) (presenting an overview of Vietnam’s post-war development in order to identify and analyze gender issues in contemporary Vietnamese society).

problem that Vietnam also shared with China), lack of a meaningful rule-of-law system especially in commercial matters, an ideologically divisive nation run by an inert bureaucracy, and a society whose standards of living were at least fifty years behind the free world.¹⁹⁷ National debts owed to the former Soviet bloc had to be paid after twenty years of die-hard commitment of all national resources to the "American War." Among the prospect of wealth was the granting of aggressive petroleum exploration licenses along the country's 2500-kilometer coastline.

It took Vietnam's two years following the Crestone license before the country could mastermind an alliance of offshore oil and gas interests that appeared to counter-balance the threat of the China-Crestone alliance. In April 1994, as soon as the U.S. trade embargo was lifted, Vietnam closed its first petroleum deal with a U.S. company, Mobil Corporation. The industry credited Mobil with discovering the White Tiger oilfield in the South China Sea, but it had to exit the country at the end of the Vietnam War, leaving White Tiger for the Soviet Union to develop.

In the same month as the Clinton Administration's lifting of the U.S. trade embargo against Vietnam, on April 19, 1994, the Vietnamese government signed the "Blue Dragon" contract awarding to a Mobil-led consortium an exploration block close to the Spratlys archipelago and directly adjoining the Vanguard Bank.¹⁹⁸ Blue Dragon was estimated to have recoverable reserves of at least between 500 million and one billion barrels,¹⁹⁹ and gas in the range of 5 tcf.²⁰⁰ Blue Dragon represented the joint interests of Japan, the United States, Russia, and Vietnam.²⁰¹ China immediately objected to Vietnam's action

197. *See id.* at 216-19.

198. *See* R. THOMAS COLLINS JR., BLUE DRAGON: RECKONING IN THE SOUTH CHINA SEA (2002) (journalistic account of Mobil's relationship with Vietnam in Blue Dragon, told by Mobil's former government relations executive). *See generally* Exhibit D appended to this Article.

199. *See* Crestone Press Release, *supra* note 185.

200. *See id.*

201. *See* VIETNAM OIL & GAS REPORT, June 1994, at 8 (on file with author). Vietnam officially released the identity of the Blue Dragon players. The consortium consisted of Mobil, JAPEX and Nissho Iwai of Japan, Indonesia Petroleum Ltd. (INPEX), PetroVietnam, and Zarubezhneft of Russia. *Id.* Vietnam announced the consortium to the public even before the United States lifted its trade embargo against Vietnam. *Mobil, Japan Firms Set up Vietnam Oil Exploration Firm*, VIETNAM NEWS, Feb. 2, 1994. Blue Dragon represented the first exploitation interest held by a U.S. company in Vietnam. *See* COLLINS, *supra* note 198, at 137. Japan held other exploitation interests in the

and claimed rights over Blue Dragon, predicated upon China's claim to the Spratlys.²⁰² Once Blue Dragon had been "spudded,"²⁰³ Vietnam began to move an oil rig into the Vanguard Bank, perhaps to test China's reaction. Beijing immediately displayed its hostility with two Chinese warships, preventing Vietnam from re-supplying the rig.²⁰⁴

B. *Linkage to the Ratification of UNLCOS*

International scholars should expect the signing of treaties to evidence the signatories' international commitment, and not just a political move toward expansionism. Yet, in the case of China and Vietnam, each country's ratification of UNCLOS in the 1990s appeared to be tied to the nation's political agenda with respect to the Spratlys group. In filing their ratification instrument with the United Nations, both countries also filed "declarations" to preserve their respective positions.²⁰⁵

1. Vietnam's ratification of UNCLOS

A couple of months after the signing of the Blue Dragon contract, the Vietnamese National Assembly passed a Resolution

South China Sea other than Blue Dragon. See Petro Vietnam website, <http://www.petrovietnam.com.vn> (last visited Mar. 28, 2007) (describing foreign oil and gas companies' activities offshore Vietnam). Russia held production interest in the White Tiger field beginning in the 1970s. See Blagov, *supra* note 4.

202. *Oilfield is Ours, Says China*, STRAITS TIMES, May 11, 1994; *Vietnam Oil Deal Fuels Spratlys Row*, UNITED PRESS INT'L, May 9, 1994.

203. "Spudding" is a colloquial industry term to refer to the first boring of a hole in the drilling of an oil well. See HOWARD R. WILLIAMS & CHARLES J. MEYERS, *OIL & GAS LAW: MANUAL OF TERMS* 1182 (12th ed. 1991).

204. See UNCLOS, *supra* note 61; see also U.N. Summary of Practice, *supra* note 57, at 217-20.

205. The term "declaration" is used for various international instruments. The term is often deliberately chosen to indicate that the parties merely want to declare certain aspirations, but do not necessarily create binding obligations. See U.N., UNITED NATIONS TREATY COLLECTION: TREATY REFERENCE GUIDE (1999), <http://untreaty.un.org/English/guide.pdf> (last visited Jan. 29, 2007). On the other hand, independent of U.N. instruments, the ICJ has stated that a State can make "declarations" by way of unilateral acts concerning legal or factual situations, and those unilateral acts may have the effect of creating legal obligations based on the principle of "good faith." In the language of the World Court, "declarations" of this kind may be and often are very specific, and the intention of the State confers upon the declaration the character of a legal undertaking. See *Nuclear Tests Case (Austl. v. Fr.)*, 1974 ICJ 253, 267 (Dec. 20) ("An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding").

on June 3, 1994, ratifying UNCLOS (“Resolution”).²⁰⁶ The Resolution reasserts Vietnam’s sovereignty over the Paracels and Spratlys, and commits Vietnam to “peaceful resolution” by “cooperating with the international community” and “in conformity with UNCLOS.”²⁰⁷ Vietnam also distinguishes the Spratlys Disputes from China’s violation of the Vietnamese Continental Shelf via China’s grant of the Crestone Concession in the Vanguard Bank.²⁰⁸ The Resolution clarifies that Vietnam’s ratification of UNCLOS does not constitute a retreat from its sovereign claims over the islands or the defense of its Continental Shelf.

Vietnam’s ratification of UNCLOS could be seen as its post-Blue Dragon effort to solicit international support and to deter China’s aggression. It was Vietnam’s official answer to China’s Law of 1992, but only after Vietnam had positioned itself with an alliance of international interests in Blue Dragon to commemorate the United States’ return to Vietnam. The timing of Vietnam’s ratification of UNCLOS, therefore, appeared to be strategically planned.

2. China’s ratification of UNCLOS

China signed the Convention in 1982,²⁰⁹ but did not ratify it until June 7, 1996 (although it first announced its intent to ratify UNCLOS in 1994, when its dispute with Vietnam over Blue Dragon was most intense).²¹⁰ Compared to Vietnam’s, China’s ratification of UNCLOS contains a more aggressive and more specific declaration.

First, China reaffirms its sovereignty over the Paracels and the Spratlys as pronounced in its national law (evidencing

206. Resolution Regarding Ratification of the 1982 U.N. Convention on the Law of the Sea Issued by the National Assembly of the Socialist Republic of Vietnam (trans.) [hereinafter Resolution], printed in NHAN DAN [THE PEOPLE’S NEWSPAPER], Official Communiqué of the Vietnamese Communist Party, No. 14289 (June 1994) (on file with author).

207. *Id.* at ¶ 3-4; see Nguyen Van Truong, *Vietnam and the U.N. Convention on the Law of the Sea*, VIETNAM NEWS, July 3, 1994.

208. The Resolution specifically emphasized that “a clear distinction should be made between the settlement of the territorial sovereignty dispute over the [Paracels] and [Spratlys] archipelagoes on one hand, and, on the other hand, the defense of the continental shelf that is fully under Vietnam’s sovereign . . . jurisdiction in conformity with [UNCLOS].” Resolution, *supra* note 206, ¶ 3-4.

209. See Declarations List, *supra* note 69.

210. See *id.*; see also He Jun, *China Set to Join UN Convention on the Sea*, CHINA DAILY, Sept. 9, 1994. Accord UNCLOS Status, *supra* note 65.

China's objection to any interpretation of UNCLOS that may undercut China's sovereignty claims to the two island groups).

Second, China claims a Continental Shelf and EEZ of 200 nautical miles from its baselines drawn under the "straight baseline" method. At least one commentator has pointed out that China's straight baselines drawn along part of its coasts and surrounding the Paracels can be construed as being at odds with UNCLOS, which requires baselines to be drawn at "low water marks"—UNCLOS only allows a straight baseline drawing when the coastline meets certain geographical characteristics.²¹¹ If this view is correct, then China ratified UNCLOS only to violate it!

However, China refrains from drawing straight baselines around the two points of contested territories: the Japanese-controlled "Senkakus" (Diaoyudao), and the Spratlys.²¹² Perhaps as a permanent member of the U.N. Security Council, China is conscious of, and wants to illustrate some degree of loyalty to U.N. instruments.

Finally, China also reaffirms its right to require foreign naval vessels passing through its Territorial Sea to obtain China's prior permission in accordance with the Law of 1992.²¹³ This seems to contradict UNCLOS' rule allowing vessels' innocent passage through the Territorial Sea of a coastal state.²¹⁴ In fact, in its declaration, China specifically states that UNCLOS' innocent passage provisions shall not prejudice China's right to grant or deny prior permission for those innocent vessels to traverse through its Territorial Sea.²¹⁵

Despite the difference in form, certain parts of China's and Vietnam's declaration are in essence the same. Both countries want to assure that their ratification of UNCLOS will not waive their substantive sovereign claims to the islands or the defense of their Continental Shelves. One reality remains certain—the

211. The method of "straight baselines" joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity" UNCLOS, *supra* note 61, art. 7(1); see Barry Wain, *China Snubs the Law of the Sea*, *ASIAN WALL ST. J.*, Nov. 1, 1996.

212. See Wain, *supra* note 211.

213. See Stockwin, *supra* note 181.

214. UNCLOS, *supra* note 61, art. 17.

215. See *supra* notes 209-210.

countries' actions, including their turning to UNCLOS, coincided with the "spudding" and prospect, if any, of commercial discoveries in The Vanguard Band and Blue Dragon!

*C. Prospect of Joint Development or Litigation before the
International Court of Justice*

1. The Chinese Position

All throughout the commotion of the early 1990s, China exhibited conflicting signals. She stated publicly that sovereignty claims could only be resolved through joint development negotiations, implying that international adjudication (permitted under UNCLOS) would not be China's preferred solution to address its claim of sovereignty.²¹⁶ China specifically indicated that she would be willing to explore a "joint development" arrangement with Vietnam, as well as other ASEAN countries.²¹⁷

It is understandable why China would want to reject the ICJ as the forum for resolution of the Disputes—her over-expansive claim might appear *prima facie* unreasonable in light of the "equitable" spirit of a post-colonialism convention like UNCLOS, and hence may not stand up before the ICJ. At the same time, China still hinted at military actions and continued to take over isles and islets.²¹⁸ One could speculate that strategically, China

216. See Michael Richardson, *In Spratlys Crisis, China Offers Joint Development—Again*, INT'L HERALD TRIB., July 22, 1992; see also *China is Open to Spratly Talks*, INT'L HERALD TRIB., July 21, 1992; Reginald Chua & Mary Kwang, *China "Willing to Shelve" Spratly Dispute*, STRAITS TIMES, July 21, 1992.

217. See *China Offers Hanoi a Deal on Spratlys*, PLATT'S OILGRAM NEWS, Sept. 7, 1994; *Malaysia to Study Chinese Offer to Develop Spratlys*, STRAITS TIMES, Aug. 26, 1992; see also *Don't Turn Spratlys into Global Row, Beijing Tells Manila*, STRAITS TIMES, Apr. 15, 1992; *Spratly Jurisdictional Dispute Garners Attention*, 10 PETROCONSULTANTS' INT'L OIL LETTER, Aug. 1, 1994.

218. See, e.g., *China "Occupied Eighth Spratly Isle," supra* note 28; see also *China Tests its Rivals' Resolve in the Spratlys*, *supra* note 44 (reporting on China's exercise of naval ships in disputed area); *Chinese Bureaucrats Draw the Line in South China Sea*, *supra* note 1, at 16 (commenting that "Chinese statements and foreign policy indicate [its determination] to project its naval power into the South China Sea to solidify its claims to the Spratlys."); accord Stockwin, *supra* note 181. With respect to China's intermittent takeovers of islets, the international community as a whole may be less likely to react negatively to any such military occupation because sovereignty has long been disputed and the ultimate outcome so certain. For example, the international community remained complacent when, in the 1970s, China took over the Paracels. At that time, the world's attention was on the end of the Vietnam War—the United States' ultimate failure in Southeast Asia. China's military occupation of some remote island group in the Pacific simply did not receive notoriety and was

staged the most aggressive stand to bully neighboring Asian States into concessions, from which it could eventually back down into a show of international friendship and conciliation in line with the spirit of UNCLOS. This melt-down attitude would pave the way for advantageous joint development negotiation, and would also help China look good before a peace-loving international community.

2. The Vietnamese Position

In the early 1990s, outraged by the Crestone Concession, Vietnam flatly refused any bilateral negotiations with China,²¹⁹ although it indicated its willingness to participate in multilateral negotiations (confirming Vietnam's desire for an ASEAN alliance to counterbalance against China's military and economic muscles).²²⁰ Vietnam's retaining of a prominent Washington D.C. law firm, Covington & Burling, in the 1990s to assess the Vietnamese legal position²²¹ indicated that Vietnam might be amenable to bringing a claim before the ICJ, should there be a commercial discovery in the Vanguard Bank or Blue Dragon.²²² In fact, in such a case, Vietnam might have no choice but to initiate ICJ legal recourse. Bilateral negotiation would not benefit Vietnam, which did not hold much political, economic, or military leverage vis-à-vis China. The Covington & Burling brief favoring the Vietnamese position was released to the *Asian Wall Street Journal*,²²³ indicating Vietnam's intent to rally for international support.

Unfortunately, after a period of unsuccessful and expensive drilling, Mobil Corporation abandoned exploration, leaving

overshadowed by the traumatic fall of Saigon. China has occupied the Paracels for thirty years, and activists have not criticized China for her taking of the Paracels the same way they have condemned her occupation of Tibet.

219. See, e.g., Wain, *supra* note 46 ("Vietnamese analysts believe China is deliberately exerting pressure on Vietnam as part of a wider goal to fill the post-Cold War power vacuum in Southeast Asia"); see also *Hanoi Defends Claims to Area Covered by Beijing Oil Deal*, *supra* note 187.

220. See, e.g., *Hanoi Expected to Seek ASEAN Support Over Spratlys Issue*, *supra* note 46.

221. See, Wain, *supra* note 152, at 5.

222. The mandate given to the law firm was to assess how the ICJ would settle boundary disputes between Vietnam and China with respect to the Vanguard Bank. See VIETNAM OIL AND GAS REPORT, July 1995, at 7 (on file with author).

223. Barry Wain, *Vietnam Fires New Weapon in Oil Dispute: The Law*, *ASIAN WALL ST. J.*, June 17, 1995; see also Wain, *supra* note 152.

Blue Dragon a “dry hole.”²²⁴ Mobil’s exploration division eventually left Vietnam.²²⁵ Since then, Vietnam has had several offshore exploration blocks scheduled for seismic testing, drilling, or production.²²⁶ Petroleum activities have continued off its coasts although its strongest U.S. corporate ally, Mobil Corporation, has left the scene. British Petroleum remains a substantial stakeholder in the area with its gas discovery and offshore pipeline in the Con Son Basin.²²⁷

224. “Dry Hole” is the colloquial expression used by industry to describe unsuccessful drilling. *See* Collins, *supra* note 198, at 7.

225. Within less than a couple of years after Mobil’s departure from Vietnam, on December 1, 1998, Exxon Corporation and Mobil Corporation signed an agreement to merge. As of November 30, 1999, Exxon changed its name to Exxon-Mobil Corporation, and the new consolidated entity was created. *See* Exxon Mobil Corp., Annual Report (Form 10-K) (Dec. 31, 1999). For the few years immediately following the merger, the newly consolidated entity, Exxon-Mobil, known today as the largest international petroleum company in the world, did not return to Vietnam for further exploration activities. *See id.*; *see also* Exxon Mobil Corp., Annual Report (Form 10-K), (Dec. 31, 2000); *see also* PetroVietnam, <http://www.petrovietnam.com.vn> (last visited Mar. 18, 2006) (describing activities of foreign oil companies doing business in Vietnam). In contrast, Exxon-Mobil’s heightened commercial presence in China, especially between 2000 and 2002, was evidenced by numerous corporate press releases announcing Exxon-Mobil joint ventures with Chinese partners in petroleum, petrochemical, and gas pipeline projects. *See* Press Release, Exxon Mobil Corp., ExxonMobil and Sinopec Sign Framework Agreement to Strengthen Strategic Alliance on China (Oct. 2002) (on file with author); Press Release, Exxon-Mobil Corp., ExxonMobil Chemical in China (2001) (on file with author); Press Release, Exxon Mobil Corp., ExxonMobil and CLP Named by Petrochemical for the China West-to-East Gas Pipeline Project (June 2001) (on file with author); Press Release, Exxon Mobil Corp., Coal, Minerals & Power (2000) (on file with author); Press Release, Exxon Mobil Corp., ExxonMobil Chemical and Shanghai Petrochemical Start UP Hydrocarbon Resins Plant in China (Apr. 2000) (on file with author); Press Release, Exxon Mobil Corp., Exxon Mobil Corporation and China Petroleum and Chemical Corporation Expand Strategic Alliance (Sept. 2000) (on file with author); Press Release, Exxon Mobil Corp., ExxonMobil Corporation Invests in China Petroleum and Chemical Corporation Initial Public Offering (Oct. 2000) (on file with author); Press Release, Exxon Mobil Corp., P.C. Tan to Head ExxonMobil’s Ventures in Mainland China (Mar. 2001) (on file with author); Press Release, Exxon Mobil Corp., Vision and Courage on China (2000) (on file with author). As of fiscal year ending December 31, 1998, Exxon Corporation also disclosed majority-owned power plants in China (prior to the Mobil-Exxon merger). *See* Exxon Corp., Annual Report (Form 10-K) (Dec. 31, 1998).

More, recently, Exxon-Mobil has decided to pursue some exploration interests offshore Vietnam, selectively.

226. *See* PetroVietnam, <http://www.petrovietnam.com.vn> (last visited Mar. 18, 2006).

227. *See* British Petroleum, Development Projects, <http://www.bp.com/genericarticle.do?categoryId=3050027&contentId=3050054> (last visited Jan. 31, 2006); *see also, generally* Sheddenuhde, BP Nam Con Son: Vietnam, Vung Tau, <http://www.sheddenuhde.com/BPVietnamVungTau> (last visited Mar. 28, 2007) (detailing and describ-

3. Recent Development

The ups and downs in the two countries' diplomatic relations took a sharp turn to the detriment of Vietnam when, in 1999 and 2000, the two countries signed bilateral agreements to resolve their border disputes (but not on the Spratlys).²²⁸ The unprecedented 1999 agreement resulted in the redrawing of their land boundaries.²²⁹ This re-delineation of land borders allowed China to take over certain areas along the China-Vietnam borders, thereby shrinking the territory of Vietnam.²³⁰ Although modest, the loss of Vietnamese territory outraged several Vietnamese dissidents as well as the exile community in the United States.²³¹

A year later, China and Vietnam also executed two other agreements resolving their disputes with respect to the Tonkin

ing BP's activities in Vietnam via BPVietnam, a foreign-invested company operating in Vietnam).

228. Wei Cui, *supra* note 170, at 809 (mentioning Vietnam-China land border agreement and Tonkin Gulf agreements); *see also* *China-Vietnam Agreement*, N.Y. TIMES, Dec. 26, 2000, at 12 (briefly describing Tonkin Gulf agreements and land border agreement).

229. *See Vietnam Publishes China Border Agreement Without Fanfare*, AGENCE FRANCE PRESSE, Sept. 16, 2001; *see also* Vietnam Agreement, *supra* note 228, at 12; Resolution 36/2000/QH10 by the Parliament of the Socialist Republic of Vietnam ratifying the Land Border Redrawing Agreement between Vietnam And China (June 9, 2000), *published in* NHAN DAN [THE PEOPLE'S NEWSPAPER]. Nhan Dan is the official communiqué of the Vietnamese Communist Party.

The exile community alleged that the Resolution and the Agreement were published on the online version of Nhan Dan on August 29, 2002, three years after the agreement was signed on December 30, 1999, in order to test the reaction of the exile community. *See* <http://www.DanChu.net> (on file with author) (opining that Vietnam's release of the land border redrawing agreement to the exile community is merely a tool for the Vietnamese government to explore the reaction of Vietnamese dissidents abroad).

230. The first recession of Vietnamese territory along the China-Vietnam border occurred during the period of 1886-1895, as a result of negotiation between France and China. *See* Tu Mai, *Mot So Su Lieu Quan Toi Bien Gioi Viet Hoa [A Few Historical Data Relating to the Sino-Vietnamese Border]*, http://www.ykien.net/d_tm_sulieu.html (last visited Mar. 28, 2007).

231. *See, e.g.,* Tran Dai Sy, *Lanh Dao Nha Nuoc Cat Doi Lanh Tho, Lanh Hai cho Trung Quoc [Vietnamese Leadership Gave Away National (Land and Sea) Territory to China]*, <http://www.ykien.net/daisi01.html> (last visited Mar. 28, 2007); Tu Mai, *supra* note 230; Bui Tin, *Xung Quanh Cac Hiep Dinh Viet Trung [Surrounding China-Vietnam Agreements]*, <http://ykien.net/mykbdv24.html> (last visited Mar. 28, 2007); Vien Nghien Cuu Chinh Sach Quoc Gia [Vietnam Policy Research Institute], *Tai Lieu Nghien Cuu Hiep Uoc Bien Gioi tren Dat Lien giua CHXHCN Viet Nam va CHND Trung Hoa [Research Data on The Land Border Redrawing Agreement between the Socialist Republic of Vietnam and The People's Republic of China]*, <http://www.DanChu.net> (on file with author).

Gulf (“*Beibu Bay*” in Chinese, and “*Bac Bo*” in Vietnamese)—the sea area between the northern coast of Vietnam and China’s Hainan Island. One agreement addressed the demarcation of the Territorial Seas and the EEZs of the two countries; the other agreement resolved their dispute with respect to fishing in the Tonkin Gulf. There is no obvious explanation for the recession of Vietnamese territorial sovereignty, although Vietnam maintained that “the Tonkin Gulf agreements completely resolved the Tonkin Gulf disputes, constituting a positive contribution toward regional peace and stabilization.”²³² Again, dissidents and the Vietnamese exile community expressed their outrage, alleging that the new Tonkin Gulf agreements, as shown on maps, yielded to China a substantial part of Vietnamese Territorial Sea and fishing zone, and that, taken together, the land border drawing agreement and the Tonkin Gulf agreements represent a secret pact between Hanoi and Beijing to compromise Vietnamese sovereignty.²³³ Curiously, within a couple of years after these bilateral agreements between China and Vietnam, ASEAN and China entered into the 2002 Declaration, viewed as the parties’ “goodwill” commitment for regional peace.²³⁴

D. *Successful JDZ for the South China Sea Disputes as Predecessor of an All-Continent Asian-Pacific Investment and Trade Bloc*

Intermittently, throughout the 1990s, the role of ASEAN as a sponsor or facilitator of peace talks and negotiated treaty solu-

232. See *Statement of Le Cong Phung, Vice Minister of Foreign Affairs, Hiep Dinh Phan Dinh Bac Bo va Hiep Dinh Hop Tac Nghe Ca Giua Viet Nam—Trung Quoc trong Vinh Bac Bo* [The Tonkin Gulf Demarcation Agreement and the Agreement Regarding Fishing Cooperation between Vietnam and China in the Gulf of Tonkin], http://www.cpv.org.vn/tccs/022001/6_lecongphung.htm (on file with author) (last visited Mar. 2007).

233. For maps published by the exile community showing comparison of territory before and after demarcation agreement, see <http://www.ykien.net/bnbandovbb.html> (on file with author). See also Tran Dai Sy, *Lanh Dao Nha Nuoc Cat Doi Lanh Tho Lanh Hai cho Trung Quoc* [Vietnamese Leadership Gave Away National (Land and Sea) Territory to China], <http://www.ykien.net/daisi01.html> (last visited Mar. 28, 2007); Tu Mai, *supra* note 230; Bui Tin, *Xung Quanh Cac Hiep Dinh Viet Trung* [Surrounding China-Vietnam Agreements], <http://ykien.net/mykbv24.html> (last visited Mar. 28, 2007); Vien Nghien Cuu Chinh Sach Quoc Gia [Vietnam Policy Research Institute], *supra* note 231 (opining that Vietnam’s release of the land redrawing agreement in the Vietnamese language to the exile community is merely a tool for the government to explore the reaction of Vietnamese dissidents abroad).

234. See *supra* notes 48-51 and accompanying text (introducing 2002 Declaration between China and ASEAN as recent sign of progress); see also *infra* 260-272 and accompanying text (analyzing 2002 Declaration in great detail).

tions was discussed.²³⁵ ASEAN involvement in multilateral solutions presented a hopeful prospect for regional stabilization as the 1990s became the decade for Southeast Asia to face “island impasse” and China’s expansionism.²³⁶

Isolated efforts and progress were made among the claimants throughout the 1990s and continuing on to the new millennium. For example, in the middle of open hostility, occasionally press reports also recounted China’s and Vietnam’s expressed willingness to improve their diplomatic relations and to conduct talks.²³⁷ Within months after the “spudding” of Blue Dragon, it was reported that Vietnamese and Chinese officials were exploring dialogues on joint exploration, at the close of an ASEAN meeting.²³⁸ Other ASEAN countries also reportedly discussed regional cooperation on joint research exploration and development,²³⁹ and China showed signs of cooperation.²⁴⁰

235. See Reginald Chua, *ASEAN Likely to Call for Restraint Over Spratlys*, STRAIGHT TIMES, July 20, 1992, at 15; Reginald Chua, *ASEAN Poised for Bigger Role With the Passing of an Era*, STRAIGHT TIMES, July 17, 1992, at 15; Reginald Chua & Mary Kwang, *Settle Spratlys Dispute Amicably: ASEAN Ministers, Tensions Mount Over Sovereign Claims on Spratlys Islands*, *supra* note 44, at 1; Reginald Chua, *Spratlys Declaration “Gives ASEAN New Role in Dispute,”* STRAITS TIMES, July 31, 1992; *Hanoi Expected to Seek ASEAN Support over Spratlys Issue*, *supra* note 46; Paul Jacob, *Reps From 10 Nations Meet for Talks on Territorial Claims in South China Sea*, STRAIGHT TIMES, June 29, 1992, at 11; Raphael Pura, *ASEAN Proposes Guidelines for South China Sea*, ASIAN WALL ST.J., July 23, 1992; Cameron Stewart, *Spratlys Issue Must Be Solved—Ramos*, AUSTRALIAN, July 22, 1992, at 6 (reporting on ASEAN statements).

236. See, e.g., Harvey Stockwin, *Spratlys Spat Unfolds Naivety*, JAKARTA POST, Apr. 18, 1995; Harvey Stockwin, *Will China Be a Super Power?*, JAKARTA POST, Aug. 7, 1996 (analyzing ASEAN-China relations in the 1990s, attributing “China Threat” to China’s expansionist politics).

237. See, e.g., *China Offers Hanoi a Deal on Spratlys*, PLATT’S OILGRAM NEWS, Sept. 7, 2004, at 3; John Rogers, *PetroVietnam to Consider Joint Spratleys Oil Search*, REUTERS NEWS, Aug. 24, 1994; *Vietnam Sends Peace Delegation to China Amid Island Spat*, DEUTSCHE PRESSE-AGENTUR, Sept. 14, 1998 (reporting on Vietnam’s peace talk delegation sent to Beijing in the middle of Spratlys squabble).

238. See, e.g., *China Is Open to Spratly Talks—Foreign Minister Plays Down Island Dispute*, INT’L HERALD TRIB., July 21, 2002; *China, Vietnam Agree to Speed Up Talks on Disputes*, STRAITS TIMES, Dec. 5, 1992; *In Spratlys Crisis, China Offers Joint Development—Again*, INT’L HERALD TRIB., July 22, 1992; *Vietnam, China will Settle Claims Peacefully*, STRAITS TIMES, Dec. 1, 1992; *Hanoi Again Calls for Formal Talks on Spratly Island*, STRAITS TIMES, July 24, 1992; *Spratly Jurisdictional Dispute Garners Attention*, PETROCONSULTANTS INT’L OIL LETTER, Aug. 1, 1994.

239. See *supra* notes 237-238; see also *Manila to Propose International Talks on Spratly Islands*, STRAIT TIMES, July 15, 1992; *Talks Lessen Potential for War Over Spratlys—Scientists Agree on Research in South China Sea*, STRAITS TIMES, June 3, 1993; *Taipei Team for Spratlys to Help Draw Up Policy*, STRAITS TIMES, May 28, 1993.

240. See *Beijing and Manila Agree to Jointly Develop Spratlys*, STRAITS TIMES, Apr. 27,

In summary, the ambiance of the 1990s was filled with conflicting signals. With the “peace-making” nature of UNCLOS in the background, part of the military and the diplomatic activities exhibited by Asian governments in the 1990s could be viewed as strategically necessary to set the stage for treaty negotiation in support of joint development. Perhaps the efforts bore fruit because the 2002 Declaration was signed. But, as explored later in this Article, the 2002 Declaration only evidences a preliminary step—a “nominally binding” good faith sovereign commitment to peace,²⁴¹ considered by its signatories as a sign of “security cooperation” and not economic cooperation.²⁴²

Consequently, it will take a substantial petroleum discovery to trigger any real negotiation for sharing economic interests. When such time arrives, if the goal of the ASEAN nations is to counter-balance the military and economic dominance of China, the ASEAN claimants would need to join forces as one negotiating bloc. While the goals of the ASEAN membership, individually and collectively, may be flexible and have changed over time,²⁴³ a JDZ alliance among the ASEAN claimants is the only way to balance the inequity of power in the region with respect to the possible sharing of petroleum resources.

A formalized investment and/or trade bloc for the entire continent of Asia has been discussed and desired for a long time, yet obstacles have not been overcome, due partly to the political

1993; China “Sincere in Wanting to Settle Spratlys Dispute,” STRAITS TIMES, July 27, 1992; *KL Will Settle Disputes Over 3 Isles Through Talks*, STRAITS TIMES, Dec. 17, 1992; *Malaysia to Study Chinese Offer to Develop Spratlys*, STRAITS TIMES, Aug. 16, 1992; *Manila to Propose International Talks on Spratlys Islands*, ASIAN WALL ST. J., July 15, 1992; *Reps From 10 Nations Meet for Talks on Territorial Claims in South China Sea*, STRAITS TIMES, June 19, 1992.

241. See Raustiala, *supra* note 121 (certain international agreements by their very nature have little binding effect. Examples given were the “consensus” U.N. instruments that typified the 1990s).

242. See Joint Declaration of the Heads of State/Government of the Association of Southeast Asian Nations and the People’s Republic of China on Strategic Partnership for Peace and Prosperity, ASEAN-P.R.C., Oct. 8, 2003, available at <http://www.aseansec.org/15266.htm> [hereinafter 2003 Joint Declaration].

243. ASEAN was initially formed to counter the effect and expansion of communism in Southeast Asia. As the Cold War came to an end, ASEAN has since evolved into a different economic and political body, including serving as Southeast Asia’s de facto trade bloc. See generally ASEAN, Overview: Association of Southeast Asian Nations, <http://www.aseansec.org/64.htm> (last visited Jan. 31, 2007); see also *ASEAN Leaders Will Next Week Discuss Establishing Powerful East Asia Free Trade Area with Japan, South Korea, and China*, ECON. NEWS, Nov. 24, 2004.

dynamics and cultural diversity of Asia.²⁴⁴ So far, ASEAN has successfully created a free trade area among its members, the ASEAN Free Trade Area, as well as among its members and the three giants: Japan, China, and South Korea—ASEAN Plus Three (“APT”).²⁴⁵ Recently, there has been talk among Asia-Pacific leaders toward the establishment of a new expanded regional grouping, including India, Australia, and New Zealand, potentially a “balance-off” against China.²⁴⁶ Those efforts, however, are limited to trade matters, rather than the more sensitive

244. See Richard Stubbs, *ASEAN Plus Three [the APT]—Emerging East Asian Regionalism*, 442 *ASIAN SURVEY*, XLII, No. 3, May/June 2002 (discussing competing voices of regionalism within Asia and recent stagnation of two major regional groupings: ASEAN and APEC); see also Harold Ditcher, *Legal Implications of An Asia-Pacific Economic Grouping*, 16 *U.P.A. J. INT’L L.* 99, 142 (Spring, 1995) (“A related problem for the countries of Asia-Pacific region is the weakness of the national courts in their respective domestic contexts.”); Thomas Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?*, 13 *DUKE J. COMP. & INT’L L.* 337 (2003) (commenting on Asia’s lack of comprehensive trade policy analogous to NAFTA or EU); Jeffrey A. Kaplan, *ASEAN’s Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 *UCLA PAC. BASIN L. J.* 147 (1996) (discussing tardiness in legal infrastructure for ASEAN in its effort to hammer out the ASEAN Free Trade Area (AFTA)); Yoshi Kodama, *Development of Inter-State Cooperation in the Asia Pacific Region: Considerations for Regional Trade Compacts*, 2 *NAFTA: L & BUS. REV. AM.* 70 (1996) (reporting on progress of regional arrangements in Asia Pacific Region); accord Byung-Woon Lyoo, *Building the Northeast Asian Community*, 11 *IND. J. GLOBAL LEGAL STUD.* 257 (2004) (discussing need for Northeast Asian economic organization, thereby confirming Asian fragmentation of regional economic interests); Jack Garvey, *AFTA After NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 *BERKELEY J. INT’L L.* 245, 246 (1997) (“[T]he three major potential players — the United States, China and Japan — have relations to the other Pacific Basin States that generate a variety of tensions working against a leadership role, whether due to past imperialism, current economic competition, or ideological and cultural differences.”).

245. See, e.g., Ali Alatas, “ASEAN Plus Three” Equals Peace Plus Prosperity (Jan. 5, 2001) (unpublished paper delivered at the Institute for Southeast Asian Studies’ 2001 Regional Outlook Forum), <http://www.iseas.edu.sg/trends221.pdf> (last visited Jan. 31, 2007); JEFFREY ROBERSTON, DEPARTMENT OF THE PARLIAMENTARY LIBRARY, *ASEAN PLUS THREE: TOWARDS THE WORLD’S LARGEST FREE TRADE AGREEMENT?* (Nov. 12, 2002), <http://www.aph.gov.au/library/pubs/RN/2002-03/03RN19.pdf> (last visited Jan. 31, 2007); see also Kuala Lumpur Declaration of the ASEAN Plus Three Summit, Dec. 12, 2005, available at <http://www.aseansec.org/18036.htm>; *ASEAN Leaders Will Next Week Discuss Establishing Powerful East Asia Free Trade Area with Japan, South Korea, and China*, *ECONOMY NEWS*, Nov. 24, 2004. See generally *supra* note 243 and accompanying text.

246. See Edward Cody, *Asian Leaders Establish New Group*, *THE WASH. POST*, Dec. 15, 2005; see also Joint Declaration of the Leaders at the ASEAN-Australia and New Zealand Commemorative Summit, and Chairman’s Statement of the ASEAN-Australia and New Zealand Commemorative Summit, Nov. 30, 2004, available at <http://www.aseansec.org/16748.htm> (last visited Mar. 26, 2006); Won-Mog Choi, *Regional Economic Integration in East Asia: Prospect and Jurisprudence*, 6 *J. INT’L ECON. L.* 49 (2003) (reporting and commenting on prospect of free trade talks between ASEAN and East Asia countries). *Com-*

issue of foreign investment or petroleum resources.²⁴⁷

The joining of ASEAN nations on one side of the JDZ negotiating table against China must be predicated upon the successful building of consensus among the ASEAN claimants—a process that would first require lengthy, painstaking, and individual bilateral negotiation between any two ASEAN claimants before the whole group can be united economically. The prospect may be difficult and protracted, but not impossible. There have been successful bilateral commitments resolving territorial disputes in the region. For example, J.R.V. Prescott, a leading expert on maritime boundaries, reported that as of the 1980s, there were already fourteen international agreements defining twenty-three boundary segments in Southeast Asia.²⁴⁸ Since then, JDZs have been established between Thailand and Malaysia, and between Malaysia and Vietnam (governing development in the Malay Basin in the southern part of the Gulf of Thailand).²⁴⁹

A JDZ ASEAN alliance is not too far-fetched, because the 2002 Declaration already signals the alliance of ASEAN as one signature bloc against China in order to secure a good-faith commitment to peace. ASEAN has also joined forces vis-à-vis China in establishing a cooperative framework for future bilateral relations, including a joint declaration on Strategic Partnership for Peace and Prosperity.²⁵⁰ Thus, China has already reached out to

pare East Asia Trade Bloc to Emerge Within 20 Years, PEOPLE'S DAILY, Dec. 1, 2002, with *East Asia Trade Bloc Would Balance NAFTA and EU*, ASIA TODAY, Nov. 10, 2004.

247. See, e.g., ASEAN, Trade, <http://www.aseansec.org/12021.htm> (last visited Jan. 31, 2007); see also George O. White, *From Snowplows to Siopao-Trying to Compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 TULSA J. COMP. & INT'L L. 177 (2000).

248. See *Chandler & Chiew*, *supra* note 15.

249. See *id.*; see also Statement of Randall C. Thompson, President of Crestone Energy Corporation (on file with author) (The Malaysia-Vietnam JDZ was allegedly a joint development on block PM-3 awarded to IPL, Hamilton Oil, and BHP); Talisman Energy, PM-3 Commercial Arrangement Area (CAA), <http://www.offshore-technology.com/projects/pm3> (last visited Jan. 31, 2007); 3 INTERNATIONAL MARITIME BOUNDARIES, *supra* note 164; Memorandum of Understanding Between the Kingdom of Thailand and Malaysia on the Establishment of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand (Feb. 21, 1979) (on file with author). For other successful JDZ's, see discussion in Part VI, *supra*. (on file with author)

250. See 2003 Joint Declaration, *supra* note 242. Other similar achievements and dialogues between China and ASEAN, as well as China's gesture of cooperation include: the 1997 Joint Statement of the Meeting of the Heads of State/Government of the Member Countries of ASEAN and the President of the People's Republic of China of 1997, the ASEAN Plus Three Cooperation, the ASEAN Regional Forum ("ARF"), the Asia Cooperative Dialogue ("ACD"), the Asia-Pacific Economic Cooperation ("APEC"),

ASEAN after staging war games in the 1990s. Surely ASEAN countries must have realized the power of unity—as Benjamin Franklin has stated: “We must all hang together, or assuredly we shall all hang separately.”²⁵¹ Further, since China is also disputing other parts of the Pacific Ocean vis-à-vis Japan, North Korea, and South Korea,²⁵² the alliance of ASEAN into one negotiating bloc will present ASEAN as a force of unity and will strengthen the membership’s bargaining power and leverage—China will stand alone against other constituents of the region.

The joining of the ASEAN claimants in a JDZ solution will also present other positive possibilities. If a unified ASEAN negotiating bloc can be created vis-à-vis China for joint petroleum development in the South China Sea, any such successful negotiation can signify a tremendous step in consensus building. The success itself may even be viewed as an embryonic predecessor of a unified legal community and economic bloc for Asia Pacific (as the counterpart to NAFTA or the EU). In fact, the concept is much farther reaching than NAFTA or the EU, because unlike these trade blocs, joint petroleum development would constitute an “investment bloc” whereupon natural resources will be shared. Regional organizations have been established for the management of living resources, one example of which is the Fisheries Task Force of the Pacific Economic Cooperation Committee (“PECC”) linking Southeast Asia, the South Pacific, and Pacific Latin America.²⁵³ Yet, natural resource distribution across borders has always invoked more tension, obstacles, and debates. Thus, the successful JDZ grouping of the ASEAN claimants vis-à-vis China can establish a precedent that exceeds the

the Asia-Europe Meeting (“SEM”), the Forum for East Asia-Latin America Cooperation (“FEELAC”), the October 8, 2006 Instrument of Access by China to the Treaty of Amity and Cooperation in Southeast Asia, the Fiftieth Anniversary of the Five Principles of Peaceful Co-Existence at the Great Hall of the People of Beijing, China, and other regional and trans-regional mechanisms. *See id.*

251. *See* JOHN BARTLETT, *FAMILIAR QUOTATIONS* (Christopher Morley & Louella D. Everett eds., 11th ed. 1941). For another example demonstrating the joining forces of ASEAN, see Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, available at <http://www.aseansec.org/1217.htm>.

252. Shanghai’s expert Ji Guoxing listed three separate disputes in the “China Seas,” representing China’s claims to (1) the Yellow Sea; (2) the East China Sea, encompassing Japan-occupied Senkaku Islands; and (3) the South China Sea, encompassing claims made against the ASEAN Member-States. *See* Guoxing, *supra* note 15.

253. *See* Pacific Economic Corporation Council, The Coordinating Group, http://www.pecc.org/coordinating_group.htm (last visited Jan. 31, 2007).

present scope of the only formal (and the most developed) trade block in existence today, the EU. However, three characteristics distinguish the EU model as a regional trade bloc from an ad hoc China-ASEAN joint petroleum development treaty solution for the South China Sea Disputes.

First, since the South China JDZ treaty solution does not involve or address the economic interests of the landlocked States, the JDZ model cannot be compared to the EU model, whose membership consists of countries regardless of coastal characteristics.

Second, a JDZ treaty solution addresses the sharing of natural resources resulting from FDI. The EU model does not reach FDI. In FDI matters, sovereignty distinction in the EU remains intact notwithstanding a super-layer of regional legal positivism.

Third, in the JDZ treaty solution, the private sector can become the driving force shaping sovereign negotiation and a participant in the structuring of the JDZ itself. In contrast, the EU law-making model represents the voice of collective sovereignty and not the private sector. The impact of the private sector is so pivotal in the JDZ solution because of the following reality: Whether the geopolitical factors are ripe for a JDZ solution largely depends on the action of the private sector, even if the legal disputes are among sovereignties. This is so because in the developing Asia, it is often the capital and technology of the private sector that account for a petroleum discovery in the area of conflict. International petroleum exploration has always been a hit-or-miss business made feasible via expensive state-of-the-art upstream technology applied in a complex environment of depleted natural resources. In such an environment, quite often, the private investor acts either as the sole technology/capital provider or transferor, or as joint venture partner of governments. The private sector's role is presented in further detail below.

E. The Difficult, Unique, and Indispensable Role of the Private Sector

In the absence of an existing joint development treaty, in order to conduct exploration, typically the private sector will have to ally with at least one government in the region in order to get a license to drill. In an ambiance of territorial conflicts, the investor will pick and choose the government with which to

do business, probably over the objections of others. That means the execution of a petroleum contract between the investor and the licensing government, while other competing governments may challenge the contract in the press or via diplomatic channels.

For example, as seen in the China-Vietnam tension of the 1990s, Crestone Corporation knocked on China's doors, and Mobile Corporation knocked on Vietnam's doors. Undoubtedly, both companies faced objections and pressure from the two host countries, each having the incentive to force its private contractor into advocating for the host country's legal and political positions before a watchful industry and international community.²⁵⁴ Thus, the following scenario would entirely be possible.

The private investor could face "manipulation" and retaliation by the competing States. For example, Vietnam publicly barred Crestone from competing for business in Vietnam.²⁵⁵ As a small independent company, Crestone easily chose to ally with China, the larger nation that was willing to support Crestone. On the other hand, a multinational like Mobile might have a much more complex decision to make.

Behind the scene, Mobil could easily be pressured by both countries to make a choice—whether to publicly support Vietnam or China. The choice would depend on how the corporation weighed the relationship between Mobile and Vietnam in the upstream segment of the business via its exploration investment offshore Vietnam in Blue Dragon against Mobil's economic interest and footholds in continental China, including investment in the downstream segment (which could mean a consumer market of billions of people), as well as Mobil's potential future interests in China. The choice would amount to an economic balancing act: Which segment of the business occupied a larger market share or generated more profit for the corporation? Which county held a better prospect as a supplier or consumer market for the corporation at that time? It would entirely be possible that within the corporate structure, the upstream division and the downstream division would take contradictory actions and come into conflict, each division wanting to maintain

254. See Valencia, *supra* note 179.

255. See *supra* notes 196-197.

its own market share and the support of the host government essential to such market share. The career of the executive in charge of each division could also be affected.

While Vietnam might pressure Mobil to take a public stand on the Spratly Disputes and to support the assertion of Vietnam's sovereign power over Blue Dragon, China might also choose to manipulate Mobil in other ways. It was entirely possible that Chinese officials could contact the downstream affiliate of Mobil in China, pressuring the affiliate and threatening a reduction of government support for Mobil's downstream presence in the mainland, unless Mobil backed away from its support of Vietnam in the upstream segment. Or, China might pressure Mobil into persuading Vietnam to accede to China's joint development model in the South China Sea—as Vietnam's upstream technological and joint venture partner, Mobil would be in a strategically unique position to put such pressure upon Vietnam. All such manipulation would entirely be within view, whether or not these manipulative tactics were announced to, reported in, or detected by the press.

Placed between a rock and hard place, and possibly made subject to manipulation (as demonstrated above), the private investor must thus navigate itself out of the competing sovereign interests while maintaining its economic footholds in each country to achieve corporate profit goals. As a small independent producer, Crestone could afford to forego business opportunities in Vietnam in favor of the bigger piece of the pie—the support of China. Unlike Crestone, Mobil, as a multinational with larger portfolio of international assets and multiple profit centers, might not be so ready to sacrifice its presence in either country.

It follows, therefore, that it would take a sizable commercial discovery close enough to the disputed waters for a multinational like Mobil to make a definitive choice that can stir government economic retaliation. In other words, the heat and pressure to propose and implement an inter-governmental JDZ (with a possible realignment of interests behind the scene) will not begin until a sizable commercial discovery becomes imminent. Yet, this is the kind of heat and pressure that would be welcomed by any private investor, compared to the alternative scenario: a “dry hole” or being chased out of the host country. In fact, the JDZ provides the right avenue for the private investor to take

control of the situation while guarding its profit goals. The commercial discovery and prospects of JDZ implementation would quickly turn the situation around and place the private investor in the position of the manipulator, as compared to the previous position—that of the manipulated. This is possible because in a JDZ environment, it is the international petroleum company—the investor—that is responsible for the commercial discovery, the technology, the actual performance of petroleum activities, as well as all pertinent technical or proprietary data. The private investor holds the key to the reservoir of future energy resources, and can occupy the driver's seat. It can be the gatekeeper as well as a mover-shaker for the successful structuring and implementation of a JDZ. Its role and opportunity as the real-life mastermind of JDZ is evident.

Specifically, the petroleum contractor and/or operator may choose to act, or be asked by the dominant State to act, as a silent or behind-the-scene partner in the JDA/JDZ negotiation and implementation. In the coalition of interests, if a powerful government joins forces with a powerful private interest, they can form an alliance that will undoubtedly control the negotiation table, leaving the lesser able players vulnerable to pressure, exploitation, and oppression. JDA/JDZ negotiation is in essence a negotiation of economic rights, in which the private interests are stacked against the national interests of competing governments toward a compromise. The scenario thus accords the private investor the type of pivotal role that can be played to reinforce the existing economic relationships between the private investor and the dominant State. Smaller States that realize the real-life partnerships between the private sector and the dominant State may be inclined to forego their legally strong sovereign claims in favor of JDA/JDZs as a practical solution, all because of *Realpolitik*. The smaller States may end up accepting a smaller stake in the JDZ, thereby bearing the same fate as minority shareholders in a U.S.-based closely held corporation. Yet, unlike the corporate minority shareholders, the small State in a JDA/JDZ negotiation does not have the protection of common law legal doctrines designed to watch out for the minority interests against the majority's oppressive tactics.²⁵⁶

256. There is U.S. caselaw that provides protection for minority shareholders under theories such as the "oppression" doctrine, the "equal access" doctrine, or the

More dangerously, lopsided JDA/JDZ resulting from less-than arms-length negotiation can contribute to the formation of international economic law. The British Institute for International and Comparative Law (“BIICL”) has drafted a model JDA with commentaries on key issues.²⁵⁷ Favoring the important role of the petroleum contractor in a JDZ, the BIICL’s model JDA contains provisions addressing rights of contractors and protecting them against cancellation of existing production-sharing or development contracts.²⁵⁸ The dominant feature of the model is the favoring of production of resources, thereby promoting and securing the economic interest and technical expertise of the private sector.²⁵⁹ Although each JDA is different and may not have binding effect beyond the specific circumstances it purports to solve, together successful JDAs may form norms of practice. Over time they gain popularity, and future JDZs may be fashioned based on, or with reference to, such norms. In that regard, if regularly consulted or followed, JDA/JDZ may establish a body of precedents, constituting *lex contractus* and *lex mercatoria* in modern international economic law—the type of normatives that govern international commercial conduct.

In principle, a JDZ could be structured to achieve proportionality and equal protection to all national interests at stake. For example, in a JDZ model that requires the establishment of a “Joint Authority” to enter into development contracts with the private sector, such Joint Authority may be made up of an equal number of members from each participating country. In reality, the petroleum contractor who signs the development contract with the Joint Authority will control data and technology, and will drive the negotiation and implementation toward the goal of

“common law preemptive right” doctrine. See, e.g., *Hollis v. Hill*, 232 F.3d 460 (5th Cir. 2000) (applying “oppression doctrine” to protect passive shareholders against oppression by dominant controlling shareholder in closely held corporations); *Byelick v. Vivadelli*, 79 F. Supp. 2d 610 (E.D.Va. 1999) (formulating common law preemptive right in closely held corporations and imposing upon majority shareholders fiduciary duties owed to minority shareholders in corporate issuance of stock); *Donahue v. Rodd Electrotype of New England, Inc.*, 328 N.E.2d 505 (Mass. 1975) (addressing corporate redemption of shareholders’ stock and common-law equal access rule to protect minority shareholders in closely held corporations).

257. See BRITISH INSTITUTE OF INTERNATIONAL COMPARATIVE LAW (“BIICL”), *JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS: A MODEL AGREEMENT FOR STATES FOR JOINT DEVELOPMENT WITH EXPLANATORY COMMENTARY* (1989); see also *supra* note 229.

258. See BICCL, *supra* note 257, at 5.

259. See *id.*

preserving its existing economic interests in the region. The member country in which the private investor holds the largest aggregate commercial stake will have the investor's support. This dominant State may end up receiving the upper hand and more negotiation leverage in the fashioning of contractual provisions, as well as in the day-to-day implementation of those contractual provisions. This can happen when one side of the negotiation—the private investor—is in fact the silent partner of a particular government that serves on the Joint Authority. The neutrality of the Joint Authority and equal representation of the national interests will, therefore, be displaced.

One may argue that the smaller States—most likely the minority interests holders—should exercise their rights as constituents of the Joint Authority and refrain from awarding petroleum contracts to multinationals that already have or are eyeing substantial existing commercial interests in the more dominant State. In other words, it is the responsibility of the smaller States to avoid the “silent partnership” that may disserve them. While this argument may make sense in theory, it ignores today's reality. Recent mergers in the petroleum industry and the popularity of risk- and technology-sharing petroleum consortia have resulted in the concentration of capital and technology in just a handful of petroleum entities. The smaller State may not have much of a selection from which to choose a disinterested operator for the JDZ.

VII. *THE PATTERN OF INEQUITY IN RECENTLY SIGNED JDA'S AND OTHER DISATISFACTORY ASPECTS OF TREATY SOLUTIONS*

This Part provides an overview of recently signed treaties or JDAs that corroborate the concerns expressed above. These recent treaty solutions offer evidence that (i) inherent inequity may exist in the JDA/JDZ negotiation process due to *Realpolitik* (a treaty commitment to resolve territorial disputes via JDA/JDZ solutions may just be part of such *Realpolitik*); and (ii) such an inherently inequitable framework does not accord protection for the smaller or lesser developed nations, notwithstanding the fact that equity is the principle underlying UNCLOS as the modern leading authority on maritime jurisdiction, sea-use rights, and EEZs.

Four recent multilateral treaties and one commercial agreement are examined below for this type of evidence.

A. *The 2002 Declaration on the Conduct of Parties in the South China Sea, Executed By and Between China and ASEAN*

As its name illustrates, the 2002 Declaration, signed by the ASEAN Member States and the People's Republic of China,²⁶⁰ is merely a declaration of good faith.²⁶¹

The 2002 Declaration is paved with politically correct words and concepts. It recognizes "the need to promote a peaceful, friendly, and harmonious environment in the South China Sea between ASEAN and China for the enhancement of peace, stability, economic growth, and prosperity in the region."²⁶² It seeks to achieve these goals through "peaceful resolution of territorial and jurisdictional disputes, self restraint, confidence-building measures, and cooperative activities."²⁶³ The parties may "pursue consultations," and "stand ready" to continue efforts aimed at "promoting good neighborliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes."²⁶⁴

Specific commitments include the following. First, the parties "undertake" to settle jurisdictional and territorial disputes peacefully, without use or threat of force, and to "refrain from . . . inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features."²⁶⁵ This commitment will hopefully prevent military occupation of uninhabited islands and hence preserve the ecology there. Additionally, the parties may volun-

260. See *supra* note 50 and accompanying text.

261. The term declaration is used for various international instruments. Declarations are not always legally binding. The term is often chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. Declarations can, however, also be treaties in the generic sense, intended to be binding at international law. It is, therefore, necessary to establish in each individual case whether the parties intended to create binding obligations. Ascertaining the intention of the parties can often be a difficult task. Some instruments entitled "declarations" were not originally intended to have binding force, although their provisions may have reflected customary international law or may have gained binding character as customary law at a later stage. On the other hand, depending on intent, a declaration can be a treaty in the proper sense. See *supra* note 205.

262. See 2002 Declaration, *supra* note 50, pmbl.

263. *Id.*

264. *Id.* § 7.

265. *Id.* § 5.

tarily exchange relevant information, hold discussions between their military and defense officials, “ensur[e] just and humane treatment of all persons who are either in danger or in distress,”²⁶⁶ and voluntarily notify other parties “of any impending joint/combined military exercise.”²⁶⁷ This commitment will hopefully deter any arrests or violence committed upon innocent fishermen making a living in the disputed area. Pending a comprehensive and durable settlement of the disputes, the parties may also engage in cooperative activities such as marine environmental protection and scientific research, and search-and-rescue operations. This commitment will hopefully deter environmental damage and further joint scientific research. Finally, the parties reaffirm the importance of adopting a code of conduct on the South China Sea, but no such code of conduct has actually been issued, other than the general features stated above.

It is important to note that although these expressions of commitment may appear quite specific, they do not use legally binding language.²⁶⁸ The 2002 Declaration states that parties “undertake” to achieve peace, but does not state that the parties shall take any such action. In many instances, the Declaration uses the “permissive” form, “may,” short of a legal mandate. Although the Declaration suggests that consultation among the States should be pursued, it does not require such consultation. While the Declaration vocalizes the need for deeper cooperation

266. *Id.* § 5(b).

267. *Id.* § 5(c).

268. Researchers have concluded that the Declaration is only aspirational, and not legally binding. *See, e.g.*, Chin Yoon Chin, Potential for Conflicts in the Spratly Islands (Dec. 2003) (unpublished M.A. thesis on file with author). Historically, a commitment to peace by China as an aspirational means to resolve territorial conflicts has not produced effective real-life result. *See* Alan Boyd, *South China Sea: Pact Won't Calm Waters*, *ASIA TIMES*, Jul. 2, 2003. For example, China and India signed onto the Five Principles of Peaceful Coexistence of 1954, committing both countries to peace with respect to China's control of Tibet. Later, these “Five Principles” were written into the preface to the Agreement Between the People's Republic of China and the Republic of India on Trade and Intercourse Between the Tibet Region of China and India, Apr. 29, 1954, <http://www.tibetjustice.org/materials/china/china4.html> (last visited Jan. 31, 2007). Notwithstanding these Five Principles, the two nations engaged in the Sino-Indian War of 1962, with unresolved questions left open, ultimately leading to the Agreement between the Government of the Republic of India and the Government of the People's Republic of China on the Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question, Apr. 11, 2005, http://www.ipcs.org/guiding_principles.pdf (last visited Jan. 31, 2007).

among ASEAN and China, it does not compel such cooperation. This type of aspirational language may fall short of an intent needed for the Declaration to have the binding effect of a treaty.²⁶⁹ In other words, if China refuses to exercise these options, citing national interest reasons, the ASEAN States may not be able to hold China to a specific international obligation, or subject her to an enforcement scheme before a monitoring body. ASEAN, however, can certainly condemn China as a bad faith actor in the pool of public opinion. The 2002 Declaration, therefore, has the “soft” impact as our current system of aspirational customary international law, at best.²⁷⁰

More importantly, the Declaration does not address joint petroleum development. It simply reaffirms the parties’ commitment to international law and “their respect for . . . freedom of navigation in and overflight above the South China Sea.”²⁷¹ Nothing in the Declaration discusses rights to natural resources or resolution of conflicting sea-use rights. One can easily conclude that the Declaration deliberately did not mention petroleum rights, as any such effort could immediately result in impasse. The Declaration, therefore, merely evidences the parties’ undertaking to avoid military aggression. It does not address the underlying territorial disputes that may drive military conflagrations. Just like UNCLOS, the Declaration is a peace-making effort. Its broad reference to international law does not render specific nor fill the gap of uncertainty left by UNCLOS.

In summary, although the 2002 Declaration does unite ASEAN against China and hence can be viewed an important step towards a “peaceful, friendly, and harmonious environment in the South China Sea”²⁷² in contrast to the turmoil and upheavals of the 1990s, most likely the Declaration will not be sufficient to ensure such stability because of the lack of specificity or an enforcement or monitoring mechanism that can assure State parties’ accountability. As an expression of best efforts and a statement of good intention to ease tension, perhaps the Declaration provides ASEAN with peace of mind because it can now rely on the good faith of China expressed in a politically correct

269. See 2002 Declaration, *supra* note 50.

270. Raustiala, *supra* note 121, at 581 (categorizing international agreements into legally binding “contracts” versus morally and politically binding “pledges”).

271. See 2002 Declaration, *supra* note 50.

272. See *id.* pmb1.

international agreement—the Declaration tells ASEAN that China understands the need for a long-term solution, the goal of peace, and perhaps the important role of ASEAN as a potential negotiating bloc. If the Declaration is a “grand salute,” it must be fortified and further demonstrated by smaller, yet concrete gestures, particularly in relationship to natural resources development. Future measures are yet to be seen. As such, the Declaration cannot yet serve as the predecessor that may precipitate the future formation of an investment and trade bloc for Southeast Asia. Further efforts by ASEAN will be necessary.

B. *Latest Joint Agreement in Southeast Asia: 2005 Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea By and Between the State Oil Companies of China, Vietnam, and the Philippines*

None of the three governments published the verbatim text of the Tripartite Agreement for public perusal,²⁷³ perhaps due partly to the often confidential nature of seismic studies or geological surveys in petroleum exploration projects. Or, perhaps this obvious lack of transparency speaks a silent message to the world about the inter-government workings and power balance (or lack thereof) among these Asian States, especially on petroleum resources, which can easily be defended by these governments as state secrets involving national and economic security.

Accordingly, minimal information is available about the Tripartite Agreement other than press reports and carefully worded rhetorical diplomatic and policy statements made by the respective governments on their official websites.²⁷⁴ These sparse and

273. See, e.g., Ministry of Foreign Affairs of the People's Republic of China, *supra* note 51.

274. For example, all throughout the making of the Tripartite Agreement, China's Foreign Minister held regular press conferences to announce China's commitment of resolving disputes through negotiations without waiving any territorial claims. His statements were often collaborated by the Ministry of Commerce. See Ministry of Commerce of the People's Republic of China, China, Vietnam Agree on Joint Exploration in South China Sea (Jul. 20, 2005), <http://english.mofcom.gov.cn/aarticle/counselorsreport/asiareport/200507/20050700181583.html> (last visited Jan. 31, 2007). On the Vietnamese side, much less information was available, except for the same “positive rhetoric” expressed by the Vietnamese Foreign Minister in response to reporters' questions—a commitment to peace and stability without any waiver of Vietnam's sovereignty claims. See Ministry of Foreign Affairs of Vietnam, Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea: Answer to Correspondent by Mr. Le Dzung, the Spokesman of the Vietnamese Ministry of Foreign

carefully constructed governmental statements, together with public discussions by outside observers and news sources, shed some limited insight into, and corroborate the following salient features of this Tripartite Agreement.

1. The Admittedly Commercial Nature of the Tripartite Agreement

The Agreement calls for a joint three-year seismic study in the South China Sea.²⁷⁵ The survey, which subsumes about 143,000 square kilometers, will take place in three stages.²⁷⁶ Ac-

Affairs (Mar. 14, 2005), http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050314164241 (last visited Jan. 31, 2007). Following Vietnamese President Tran Duc Luong's official visit to China in the summer of 2005, the two countries issued a joint statement addressing, inter alia, the Tripartite Agreement. The joint statement repeated the redundant rhetoric—that the two governments “highly value[d]” the Tripartite Agreement because it fostered greater stability in the region. See Ministry of Foreign Affairs of Vietnam, Vietnam and China Issue Joint Statement (Jul. 21, 2005), <http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns050726144049> (last visited Jan. 31, 2007). Independently, the Philippines echoed the same rhetoric sentiment, although its leaders made stronger statements, praising the signatories at the recent ASEAN-Japan summit. See President Gloria Arroyo, Statement of the President at the ASEAN-Japan Summit (Dec. 13, 2005), http://www.ops.gov.ph/speeches2005/speech-2005_decl13c.htm (last visited Jan. 31, 2007). The Philippine authority also took pride in the Tripartite Agreement as historic and “model-setting.” See Ignacio R. Bunye, Statement of Secretary Ignacio R. Bunye: Re Signing of the PNOCEC, CNOOC and PETROVIETNAM Tripartite Joint Marine Seismic Undertaking (Mar. 14, 2005), <http://www.news.ops.gov.ph/archives2005/mar14.htm> (last visited Jan. 31, 2007) (calling the Agreement a “model-setting approach on South China Sea issue”); see also Republic of the Philippines, China, Vietnam, RP Ink Historic Joint Oil Seismic Research Accord in South China Sea (Mar. 14, 2005), <http://www.gov.ph/news/?i=7285> (last visited Jan. 31, 2007) (reporting on Philippine President Gloria Arroyo's statement describing the Agreement as “historic” and “a breakthrough in implementing [the 2002 Declaration]”). The Philippines also emphasized specifically that the Agreement would set a cooperative trend not only for governments, but also “for future multi-lateral agreement among the different oil companies of the different countries in the region.” Republic of the Philippines, *supra*.

275. *Seismic Replaces Gunboats*, INT'L GAS REP., Mar. 24, 2004, at 23.

276. See *Seismic Research Deal Worth \$10M up for Bidding*, PHIL. DAILY INQUIRER, Jul. 27, 2005, at 5; see also *Philippines, China, Vietnam to Explore S. China Sea Areas*, JAPAN ECON. NEWSWIRE, Mar. 14, 2005. The exact area covered by the seismic study cannot exactly be pinpointed without the actual text of the Tripartite Agreement and map exhibits, if any, although description given by the press suggests that the study is conducted in the area of the Spratly Archipelago. According to press reports, however, the seismic study is supposed to be done in “[the] South China Sea and covers a 142,886 square kilometers of agreed upon areas and will run for three years.” *Philippines, China, Vietnam to Explore S. China Sea Areas*, JAPAN ECON. NEWSWIRE, Mar. 14, 2005. According to one Philippino press report, “[t]he agreement with China and Vietnam calls for a joint oil exploration venture in the disputed *Spratly Island, an oil rich island south of Palawan.*”

quisition of geo-scientific seismic data was set to begin in late 2005, followed by the processing and interpretation of the gathered data.²⁷⁷ China National Offshore Oil Corp., Vietnam Oil and Gas Co., and Philippine National Oil Co. undertake the work at an estimated cost of US\$10-\$20 million²⁷⁸ to ascertain the potential oil and gas reserves in the surveyed area.²⁷⁹

Hailed as a diplomatic breakthrough for stability in the region,²⁸⁰ the Tripartite Agreement nonetheless has been viewed by the respective governments as merely a joint commercial effort, and not a political document that would alter in any way the countries' respective territorial claims to the South China Sea. For example, the Philippines' Energy Secretary, Vincent Perez, noted publicly that "we have not touched on any of the political issues, the territorial claims, sovereignty issues. This is a purely commercial transaction, supported by the respective governments. . . ."²⁸¹ The Agreement itself expressly holds that it "will not undermine the basic positions held by [the respective governments], and predicates its existence upon the spirit of peace, stability, cooperation, and development in accordance with [UNCLOS] and [the 2002 Declaration]."²⁸²

2. A Note of Concern

This type of rudimentary "joint study" agreement is common among private petroleum co-producers as a strategic alliance for the purpose of sharing costs and data. The fact that private co-producers have been substituted by State-owned pro-

Alena Mae S. Flores, *PNOC DOE WOO China Oil*, *MANILA STANDARD*, Sept. 8, 2005 (emphasis added).

277. See *Seismic Research Deal Worth \$10M up for Bidding*, *supra* note 276, at 5; see also Flores, *supra* note 276 (joint project "will gather geoscientific data to assess the petroleum resource potential of an agreed area in the South China Sea covering 142,886 square kilometers").

278. See *Seismic Research Deal Worth \$10M up for Bidding*, *supra* note 276, at 5.

279. See Ma Theresa Torres & Niel Villegas Mugas, *RP, China, Vietnam to Explore Spratlys*, *MANILA TIMES*, Mar. 15, 2005.

280. For example, China's Foreign Ministry Spokesman, Liu Jianchao, reported in a press conference on Mar. 15, 2005, that the Agreement "will make historic contribution to the peace, stability and development in the South China Sea." Press Conference, Foreign Ministry Spokesman Liu Jianchao, Mar. 15, 2005, <http://www.china-embassy.org/eng/fyrth/t187617.htm> (last visited Jan. 31, 2007).

281. See *Philippine President Luds Spratly Agreement with China, Vietnam*, *ASIA AFRICA INTELLIGENCE WIRE*, Mar. 15, 2005.

282. See Ministry of Foreign Affairs for the People's Republic of China, *supra* note 51.

ducers does not necessarily render the Tripartite Agreement a JDA in the classic sense of the term. After all, the Tripartite Agreement is not executed by the respective States, but only by their commercial arms. At best, it may qualify as a joint statement of intent among the respective governments to research fully the petroleum potential of the hotly disputed South China Sea.

Nonetheless, the Tripartite Agreement does take on symbolic significance because it is the first sign of State cooperation shown under the 2002 Declaration, in which ASEAN joined to secure China's good faith commitment to peace. While limited in scope (a small step toward a larger goal, yet to be achieved), the Tripartite Agreement evidences the region's push towards stability, whereupon China has agreed with two members of ASEAN for a shared seismic database.

But a different type of question must be asked, especially if this is the type of standard "joint study," cost and data-sharing confidential agreement often found in the private sector in preparation for joint exploration down the road. Although all three governments appeared enthusiastic about the Tripartite Agreement, realistically why did two poorer and smaller ASEAN nations, which are geographically much closer to the Spratlys than China, feel motivated to share costs and data with a giant country that had claimed the entire sea as its "neighborhood pond"? It should be noted further that this type of cooperation is exhibited in an era where: (i) China has openly advanced expansionism,²⁸³ (ii) Vietnam has yielded and made explicit territorial concessions with respect to its northern border and the Gulf of Tonkin,²⁸⁴ and (iii) both Vietnam and the Philippines have been suffering from political and social turmoil within their own territory. For example, the Philippines (or on a larger scale, Southeast Asia) has always suffered from internal political unrest and increasing extremist terrorist activities within its own borders.²⁸⁵ While actively seeking WTO membership,²⁸⁶ Vietnam

283. See, e.g., *infra* note 385 and accompanying text (describing China's failed attempt to take over UNOCAL and her successful acquisition of assets in oil-producing Kazakhstan).

284. See, *supra* notes 230-235 and accompanying text (discussing the China-Vietnam Tonkin Gulf Agreements and land border redrawing agreement).

285. See, e.g., Steven Rogers, *Beyond the Abu Sayyaf*, 83 FOREIGN AFF. 16 (2004) (discussing how ethnic unrest and political instability have plagued the Philippines since its

faced claims of oppression from various impoverished, dissident ethnic and religious groups, backed by international human rights non-governmental organizations (“NGO”) and international criticism of the government’s control over the population’s freedom of speech.²⁸⁷

The disturbing question is whether the larger goal of regional peace and stability practically amounts to subtle pressure for the smaller States to make contractual concession and recognize the might of the more powerful State. Is this not the same statement as: “Dear neighbor, I accede to your military and economic power by signing a peace treaty with you whereupon I will share the costs of your entering and peeping into the fruit trees of my back yard?”²⁸⁸

independence in 1946 and noting that Abu Sayyaf, a terrorist group, has recently made the Philippines its home); see also Rommel C. Banlaoi, *Maritime Terrorism in Southeast Asia: the Abu Sayyaf Threat*, 4 *NAVAL WAR C. REV.* 58, 63-80 (2005); Bernadette S. Sto. Domingo, *Bush Urges Philippines to Step up Efforts Versus Terror Groups*, *BUS. WORLD*, Jul. 13, 2005; Bernadette S. Sto. Domingo, *U.S. Issues New Travel Warning, Cites Crime Situation, Terror Threats*, *BUS. WORLD*, Jul. 28, 2005; Heda Bayron, *Philippine Military Captures Indonesian Terrorist Suspect* (Voice of America radio broadcast Mar. 23, 2005) (transcript on file with author); *U.S. Ranks the Philippines as Terrorist Lair In S.E. Asia*, Sept. 19, 2005, http://news3.xinhuanet.com/english/2005-09/19/content_3515192.htm (last visited Jan. 31, 2007).

286. See World Trade Organization (“WTO”), Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 31, 2007), Vietnam made headway in fulfilling WTO requirements toward full membership. See WTO, *Bilaterals Done, Multilateral Nearly, Viet Nam’s Membership Now In Sight*, Jul. 19, 2006, http://www.wto.org/english/news_e/news06_e/acc_vietnam_19july06_e.htm (last visited Jan. 31, 2007) (announcing the status of Vietnam’s membership negotiations, which indicates that full membership is imminent). As of the date of this publication, Vietnam has been admitted to the WTO.

287. See, e.g., Ron Chepesiuk, *Blocking the Net: Corporations Help Government Shut Down the Information Superhighway*, *VERMONT GUARDIAN*, Sept. 16, 2001, http://www.thsv.org/news_details.aspx?newsID=783 (last visited Nov. 12, 2006); Montagnard Foundation, *Secret Trials: Vietnam Sentences More Christian Montagnards to Prison* (Nov. 1, 2001), http://www.active.org.au/sydney/webcast/front.php3?article_id=1168 (last visited Feb. 6, 2007); see also Human Rights Watch, *Human Rights Conditions in Vietnam: July 23, 2002 Testimony of Nguyen Vu Binh*, Dec. 29, 2003, <http://www.hrw.org/english/docs/2003/12/29/vietna6887.htm> (last visited Feb. 6, 2007); REPORTERS WITHOUT BORDERS, *VIETNAM—2004 ANNUAL REPORT*, Mar. 5, 2004, http://www.rsf.org/article.php3?id_article=10227&Valider=OK. But see Press Release, Amnesty International, *Freedom for Elderly Prisoners of Conscience*, Jan. 31, 2005, <http://news.amnesty.org/index/ENGASA410032005> (last visited Feb. 6, 2007).

288. See Amitav Acharya, *Seeking Security in the Dragon’s Shadow: China and Southeast Asia in the Emerging Asian Order* 5-6 (Inst. of Def. & Strategic Studies, Working Paper No. 44, 2003), <http://www.rsis.edu.sg/publications/WorkingPapers/WP44.PDF> (last visited Feb. 6, 2007) (noting that China refused to accede to Vietnam’s demand to have the 2002 Declaration apply to the Paracel Islands, claimed by Vietnam although occupied

Further, the Tripartite Agreement can evidence a deliberate sidestep from the central legal issues. Just as the 2002 Declaration fails to compel cooperation and sidesteps the competing oil claims, the Tripartite Agreement outlines a narrow scope of cooperation for what the countries call a commercial project. Within the framework of the Tripartite Agreement itself, presumably, the parties must have reached agreement on a number of critical issues such as choice of law, confidential undertakings, the proportionment and assignment of costs, and the delineation of tasks. Yet, none of these details is revealed to the public. Further, are there expert contractors performing the Seismic Study using state-of-the-art technology? If yes, who are they? Given China's power, the lack of transparency on these terms can be worrisome. China, with her might, can easily use the Agreement to subsidize the cost of data gathering and research, while potentially having full access to the data gathered, at all times preserving the option to "muscle" Vietnam and the Philippines into a less than equitable position during subsequent joint development negotiation.

Finally, the other competing sovereignties—Taiwan, Malaysia, Brunei, and to a limited extent Indonesia—are not parties to the Tripartite Agreement. Can the Tripartite Agreement be seen as an effort at "slicing up" the unity of ASEAN and other claimants down the road? Viewed this way, the Agreement can

by China, and that this refusal, among other factors, diminishes the 2002 Declaration's significance as a confirmation of China's willingness to address competing claims on a multilateral basis). To the internet community of dissident Vietnamese, this type of "recession" agreement is just another signal that the government of Vietnam has sold out its sovereignty to China. *See supra* notes 230-235 (outrage expressed by Vietnamese in exile opposing the China-Vietnam land border redrawing agreement and Tonkin Gulf Agreements).

As a matter of human interest, the author notes here the specific case of Nguyen the Toan, an exiled Vietnamese lawyer who used to practice in the now defunct Republic of Vietnam. A political immigrant and currently the owner of a restaurant in northern Virginia, where dissident Vietnamese in exile often congregate, Mr. Toan drafted a document entitled "Indictment" condemning the Vietnamese Communist Party for selling Vietnamese territory to the Chinese Communist Party. He distributed his "Indictment" to the patrons of his restaurant as a gesture showing his American freedom of speech, with the intent of one day filing this "Indictment" in the name of the Statehood of Vietnam before the ICJ to seek a declaratory judgment rendering the recession of Vietnamese territory invalid. The author received a copy of the "Indictment" during a visit to his restaurant this year. *See* Nguyen the Toan, *Indictment of the Vietnamese Communist Party for Its Criminal Act of Ceding the Nation's Territory to China* (unpublished manuscript, on file with the author).

ultimately deepen divisions and discord. The real impact of the Tripartite Agreement, or what is truly behind it, remains speculative and opaque.

C. JDA Between Nigeria and São Tomé e Príncipe—The Joint Authority Model and the Issue of Equal Bargaining Power Between the Signatory States

On February 21, 2001, the Federal Republic of Nigeria (“Nigeria”) and the Democratic Republic of São Tomé e Príncipe (“São Tomé”) signed a bilateral treaty creating a JDZ (the “Nigeria–São Tomé Treaty” or “Treaty”).²⁸⁹ This Treaty was ratified by the respective governments in February 2002. The JDZ subsumes contested waters in the Atlantic Ocean south of Nigeria and north of São Tomé.²⁹⁰ Sixty percent of revenue generated from the JDZ goes to Nigeria and forty percent to São Tomé.²⁹¹ São Tomé, the smaller State, is the minority interest holder. The Treaty creates (i) an Authority who acts on behalf of the two nations and enters into petroleum contracts with the private sector,²⁹² and (ii) a Joint Ministerial Council (“Council”) that oversees the Authority’s actions.²⁹³

At first sight, it must be noted that the pairing of Nigeria and São Tomé in this bilateral Treaty represents the same kind of disparity in power, size, and economic wealth as exists in the case of Vietnam and China. Analyzing the nature of the joint development relationship between Nigeria and São Tomé requires an understanding of each country. São Tomé, the second smallest country in Africa, achieved independence from Portugal in 1975. Since 1991, the country has boasted a multiparty democracy, withstanding unsuccessful military coups in 1995 and 2003.²⁹⁴ Its elections were reportedly fair and peaceful in general, although political instability, weak institutional structures, and corruption have damaged and retarded São Tomé’s

289. See Nigeria–São Tomé Treaty, *supra* note 169.

290. See *id.* art. 2.

291. See *id.* art. 3.1.

292. See *id.* art. 9.

293. See *id.* arts. 6, 8.

294. See Gerhard Seibert, *São Tomé e Príncipe: The Difficult Transition from Aid-dependent Cocoa Producer to Petrol State* 1 (Afr. Studies Ass’n of Austl. & Pac. Annual Conference, Nov. 26–28, 2004), <http://www.ssn.flinders.edu.au/global/afsaap/conferences/2004proceedings/seibert.PDF> (last visited Feb. 6, 2007).

political process.²⁹⁵ With an estimated gross domestic product (“GDP”) of US\$214 million²⁹⁶ and an external debt (as of 2003) of US\$282.5 million, its largely agricultural economy is not particularly strong.²⁹⁷ The combination of a weak economy and high external debt likely prompted São Tomé to seek wealth through oil revenues, as many of its neighbors have done. In 1998, the country worked with the Environmental Remediation Holding Corporation (“ERHC”), a Nigerian-owned company that has received substantial awards in bidding rounds, to establish an EEZ that extends 200 miles from its land.²⁹⁸ São Tomé has lodged its claimed EEZ with the U.N.²⁹⁹ Over the course of three years, São Tomé was able to reach agreements with Equatorial Guinea and Gabon on the boundaries of their maritime borders based on the principle of equidistance. Unable to conclude a similar delimitation agreement, Nigeria and São Tomé decided to create a JDZ.³⁰⁰ A comparison of maps shows that the JDZ subsumes a considerable part of São Tomé’s EEZ, and appears significantly closer to São Tomé’s territory.³⁰¹ Thus, it is possible even for a layperson to observe the possibility that São Tomé may have compromised its EEZ claim in order to secure the JDZ with Nigeria. Furthermore, as a newcomer to the oil industry (São Tomé has never produced oil),³⁰² São Tomé may not be familiar with the oil industry and may accept the JDZ in exchange for guidance and expertise from oil-producing Nigeria.

In comparison, Nigeria is a much more powerful and globally significant country, nearly twice the size of California and

295. *See id.*

296. *See* CIA, THE WORLD FACTBOOK: SÃO TOMÉ AND PRINCIPÉ, <https://www.cia.gov/cia/publications/factbook/geos/tp.html> (last visited Nov. 12, 2006).

297. *See id.*

298. *See* Seibert, *supra* note 294, at 3-4.

299. *See* Law 1/98 on Delimitation of the Territorial Sea and the Exclusive Economic Zone art. 1 (São Tomé & Príncipe), *available at* <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/STP.htm>.

300. *See* Seibert, *supra* note 294, at 8.

301. *See* JOINT DEVELOPMENT AUTHORITY, GUIDE TO THE 2004 JDZ LICENSING ROUND 21 (2004), <http://www.nigeriasaotomejda.com/PDFs/JDZ%20Brochure.pdf> (last visited Nov. 12, 2006); *see also* DOALOS, United Nations, São Tomé and Príncipe Official Maritime Claims, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/STP_MZN17_1998b&w.pdf (last visited Nov. 12, 2006); Petroleum Geo-Services (“PGS”), Nigeria—São Tomé and Príncipe Joint Development Zone MC3D, <http://www.pgs.com/upload/29685/data.pdf> (last visited Nov. 12, 2006).

302. *See* Seibert, *supra* note 294, at 1.

boasting a GDP of \$125.7 billion.³⁰³ Approximately twenty percent of its GDP comes from oil revenues, although eighty percent of these revenues flow to only one percent of the population.³⁰⁴ Historically, its government and military have been actively involved in promoting and protecting the country's oil industry and related infrastructures. Accusations of corruption and cronyism have circulated concerning the government and its oil dealings for many years. Oil has dominated the Nigerian economy for decades, but poverty has worsened.³⁰⁵ Corruption and inefficiency among government officials, oil company staff, and local contractors are regarded as the chief cause of this poverty and slow development, despite the country's wealth of oil.³⁰⁶

This Treaty represents the Joint Authority Model, which purportedly secures the equal participation of the negotiating States. However, the lack of transparency and specificity renders it inefficient as a model for the securing of equal bargaining powers between the two governments and the people they allegedly represent.

1. The Council

Article 6.2 of the Treaty states that: “[T]he Council shall comprise not less than two nor more than four Ministers or persons of equivalent rank appointed by the respective Heads of State of each State Party.”³⁰⁷ This provision does not necessarily secure an equal number of Ministers from each signatory State, although there are Treaty safeguards to make sure that representatives of both signatory States participate in decision-making. For example, “[t]he quorum for a valid meeting of the Council shall be at least half the members, including at least one appointed by each of the States Parties,” and “[a]ll decisions of

303. See CIA, *THE WORLD FACTBOOK: NIGERIA*, <https://www.cia.gov/cia/publications/factbook/print/ni.html> (last visited Nov. 12, 2006).

304. See ELIAS JOHNSON, *NIGERIA COUNTRY ANALYSIS BRIEF 6* (Dep't of Energy, Energy Info. Admin., 2005), <http://www.eia.doe.gov/emeu/cabs/Nigeria/pdf.pdf> (last visited Feb. 6, 2007).

305. See Emeka Duruigbo, *Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds*, 30 N.C.J. INT'L L. COM. REC. 121, 127-28 (2004). More recently, petroleum activities in the volatile Niger Delta have reportedly been interrupted due to political unrest. See Joe Bavier, *Niger Delta Oil Companies Shut Some Facilities, Withdraw Workers*, VOA NEWS, Sept. 23, 2005.

306. See Duruigbo, *supra* note 305, at 139.

307. See Nigeria-São Tomé Treaty, *supra* note 169, art. 6.2.

the Council shall be adopted by consensus.”³⁰⁸ Furthermore, “no decision of the Council shall be valid unless it is recorded in writing and signed by at least one member from each State Party.”³⁰⁹ Council meetings require the presence of at least one minister from each State, and decisions require adoption by consensus and signature by at least one minister from each State.

The Council has ultimate power over joint development. It is charged with approving development contracts proposed by the Authority, to be entered into with private contractors. Under specific circumstances, the Treaty allows the Council to provide direct input into the management of the Authority, and not just acting as an overseeing body. For example, the Council may assign Executive Directors to head departments of the Authority in positions such as Secretary and Head Secretariat.

2. The Authority

Accountable to the Council,³¹⁰ the Authority can acquire and dispose of property, manage activities relating to the exploration and exploitation of the resources, and oversee and control the activities of the contractors.³¹¹ The Authority’s decisions requires consensus, although “[w]here consensus cannot be reached, the matter shall be referred to the Council.”³¹² Governed by a Board of Directors (“Board”),³¹³ the Authority has legal personality and can act on behalf of the States.³¹⁴ The Board consists of four Executive Directors.³¹⁵ Two are appointed by the Head of State of Nigeria and two are appointed by the Head of State of São Tomé.³¹⁶ To constitute a meeting of the Board, at least one appointee from each State must be present.³¹⁷ Thus, at least on the surface, the structure allows equal participation by the States in management and decision-making. Executive Directors normally hold office for six years, renewable

308. *Id.* arts. 7.1, 7.4.

309. *Id.* art. 7.6.

310. *See id.* art. 8.2(f).

311. *See id.* art. 9.6.

312. *Id.* art. 10.5.

313. *See id.* art. 10.1.

314. *See id.* art. 9.2.

315. *See id.* art. 10.1.

316. *See id.*

317. *See id.* art. 10.4.

once “or until a replacement is appointed.”³¹⁸ These directors then appoint other personnel, subject to the Council’s approval.³¹⁹ To be valid, Board decisions must be recorded in writing and signed by at least one Executive Director from each party.³²⁰

The Authority is seated in Abuja, Nigeria, with a subsidiary office in São Tomé.³²¹ The management structure of the Authority and its decision-making process is perhaps more balanced than that of the Council. After all, under the Treaty, two representatives from each State comprise the Board.³²²

3. Balancing of Power Between the Two Signatory States, Transparency, and Corruption

Public information as of the date of this Article indicates that the Council may now consist of twelve members³²³ who are foreign affairs and energy ministers from Nigeria and São Tomé.³²⁴ Nonetheless, no public information can be found to determine whether the composition of the Council allows for equal numbers of Nigerian and São Tomé ministers. Nor is public information available as to whether safeguards are built into the appointment process to avoid nepotism or conflicts of interest, or on the balance of power among the ministers (for example, whether Nigeria as the majority interest holder enjoys a greater say either *de jure* or *de facto*). The unavailability of this type of information hinders transparency in a part of the world notorious for corruption—Nigeria, in particular, has frequently been cited by Transparency International as one of the most cor-

318. *Id.* art. 10.1.

319. *See id.* arts. 10.2, 10.8.

320. *See id.* art. 10.7.

321. *See id.* art. 9.4.

322. As of the date of this Article, the two Nigerian representatives to the Board are H.A. Tukur, Executive Director of Finance and Administration, and S.U. Obiorah, an engineer who is Executive Director of Monitoring and Inspections. *See* Press Release, Nig.-São Tomé & Príncipe Joint Dev. Auth., Two New Executive Directors Appointed to the JDA Board (Oct. 29, 2004), <http://www.nigeriasaotomejda.com/PDFs/New%20Directors.pdf> (last visited Feb. 6, 2007). São Tomé’s representatives are Carlos Gomes, an engineer who is Chairman of the Board of the Council and Executive Director of Commercial Investments, and Dr. Jorge Do Santos, Executive Director of Non-Hydrocarbon Resources. *See id.*

323. *See Oil Block Award Runs into Rough Weather*, LIQUID AFRICA, May 24, 2005.

324. John C.K. Daly, UPI Energy Watch, WASH. TIMES, May 23, 2004, available at <http://www.washtimes.com/up-breaking/20040426-033305-2012r.htm>.

rupt regimes in the world.³²⁵ Recent reports allege that São Tomé's President, Fradrique de Menezes, denounced the Authority's contract recommendations in the 2004 licensing round. São Tomé's President claimed that indigenous Nigerian firms with connections to Nigerian President Olusegun Obasanjo were awarded significant interests in the blocks.³²⁶

The Treaty gives considerable power to Nigeria and São Tomé's Heads of State to appoint whomever they want to the Authority's Board of Directors and to its overseeing body, the Council. Given the region's history of development problems and corruption, it seems likely that the Treaty scheme indulges the Heads of State to appoint friends, family, or industry leaders, and to award contracts to companies who have been loyal to each respective government. For example, Article 15 of the Treaty states that, "[u]nless otherwise expressly approved by the Council, no Executive Director, officer, or other staff member of the Authority may have any . . . financial interest in development activities in the Zone."³²⁷ However, this conflict of interest safeguard does not apply to the appointment of the ministers serving on the Council. Further, the provision also allows the Council to make exceptions to the financial interests safeguards, thereby nullifying the protection, at the discretion of the Council.

4. Compromise of Sovereignty and the Vulnerability of the Smaller, Lesser-Developed State—The Dilemma of the Minority Interest Holder

Given the disparity in size, economic wealth, and political power between the two States, it is no surprise that São Tomé and Nigeria have established a JDZ that subsumes large portions of São Tomé's claimed EEZ. While São Tomé managed to enter

325. See TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2006, 298-302 (2006), available at http://www.transparency.org/publications/gcr/download_gcr#download. Transparency International ("TI") cites Nigeria as the sixth most corrupt country of the 159 surveyed in TI's corruption perceptions report, a composite index that utilizes surveys of business people and country analysts. Nigeria is therefore perceived as being more corrupt than even countries which have recently been plagued by civil war such as Somalia, Sudan, and Iraq.

326. See Mike Oduniyi, *Protests Stall Award of Oil Blocks in JDZ*, THIS DAY (Nigeria), May 24, 2005; see also *Oil Block Award Runs into Rough Weather*, LIQUID AFRICA, May 24, 2005.

327. See Nigeria-São Tomé Treaty, *supra* note 169, art. 15.1.

agreements concerning its EEZ with Equatorial Guinea and Gabon, these two States are more commensurate to São Tomé's economy. Presumably, São Tomé's did not carry that same stature vis-à-vis Nigeria. Rather than engaging in a protracted, costly set of negotiations, it was predictable that São Tomé chose to reach an accord in order to begin reaping oil revenues. São Tomé might have asserted a valid legal claim when delimiting its EEZ, but relinquished this claim when confronted with Nigerian demands for a piece of the pie—a demand backed by a larger economy, larger military, and ultimately more bargaining power. It is unclear whether the 60-40 split reflects the strength of São Tomé's legal claim.

Finally, the unequal 60-40 split that might appear to be an unwise, counterproductive arrangement between São Tomé and Nigeria can also signal the specter of corruption within São Tomé,³²⁸ corroborated by news reports regarding irregular business dealings between São Tomé and the oil industry.³²⁹ An astute observer cannot help but raise the question: apart from the lack of bargaining power, is it possible that São Tomé agreed to a 60-40 split in the JDZ because its leaders were concerned with filling their own pockets, and a quick agreement with Nigeria would likely further this goal? The lack of transparency in the developing world's confidential negotiations necessitates the inquiry and makes room for speculation.

5. Selection of Private Investors and Operatorship

Under the auspices of the Treaty, the Authority held two licensing rounds to award upstream petroleum contracts. The first licensing round lasted six months (April-October 2003),

328. See Siebert, *supra* note 294, at 20.

329. For discussion of São Tomé's long chronicle of questionable, seemingly corrupt relationships with the oil industry, see generally *id.* at 12-13. For more recent reports alleging corruption during the 2004 licensing round (the second licensing round) and illegal payments by the EHRC to the São Tomé government, see *São Tomé to Make Public Reaction to Oil Probe*, VANGUARD (Nigeria), Jan. 2, 2006 [hereinafter *Make Public Reaction*]; see also Zoe Eingstein, *São Tomé Says it Needs Nigerian OK to End Flawed Oil Deals*, HOUSTON CHRONICLE, Dec. 10, 2005 (noting serious irregularities in the block award procedure); Jacinta Moran, *Nigeria, São Tomé to Proceed with Signings, Won't be Derailed by São Tomé Attorney General's Concerns: Daukoru*, PLATTS OLIGRAM NEWS, Dec. 22, 2005. São Tomé's government has reportedly conducted an investigation into the allegations, although as of the beginning of 2006, its report has not been released. See *Make Public Reaction*, *supra*.

and resulted in the award of only one block in the JDZ. Chevron-Texaco was awarded a fifty-one percent stake, Exxon-Mobil was awarded a forty percent stake, and Dangote-Energy Equity Resources was awarded a nine percent stake.³³⁰ In other words, during the first licensing round, prestigious bidders were given six months to put together bids and proposals.

In contrast, in 2004, the Authority held the second licensing round, but kept it open for only one month, giving contractors the minimal time and a very fast track to meet financial and technical requirements. The difference in the time duration allotted to each of the two licensing rounds could appear questionable to any observer, especially when only one block was awarded during the first round, which lasted half a year, compared to the five blocks that were awarded during the second round, which lasted only one month. One would likely think that the situation should have been the reverse—that much less time should have been allotted to the first licensing round—the award of one single block, compared to the second round—the award of five blocks! The Authority gave no other public explanation for this seemingly incongruent phenomenon, other than what it had announced to the press.³³¹

Consequently, under this fast-track procedure, the 2004 licensing round resulted in the award of five more blocks to consortia consisting of a number of U.S. companies, Nigerian companies, and an Indian company.³³² The second round attracted smaller, relatively unknown independent entrepreneurial companies of lesser stature than the prominent multinationals like Chevron-Texaco and Exxon-Mobil. Thus, the nature of these

330. See Nigeria; "Why JDZ is Offering Four Blocks in Next Licensing Round," AFR. NEWS, Nov. 1, 2004 (on file with author); see also OFF. OF THE ATT'Y GEN., SAO TOME AND PRINCIPE, INVESTIGATION AND REVIEW: SECOND BID ROUND, JOINT DEVELOPMENT ZONE 2-9 (Dec. 2, 2005) [hereinafter INVESTIGATION AND REVIEW: SECOND BID ROUND] (on file with author).

331. The other blocks were not awarded during the first licensing round. The Authority claimed it "needed additional time to review the conditions for eligibility in terms of financial and technical capability of the bidders as well as the quality and coverage of data." See Okiemute Akoko, *Further Block Awards Not Discussed at Joint Ministerial Council Meeting*, WORLD MARKETS RES., June 18, 2004 (on file with author).

332. The Nigerian companies included Conoil, Hercules, Overt, (all in Block 4) and Filtim Huzod (in Block 6). See Jacinta Moran & James Norman, *Addax Takes Spot in Nigeria-São Tomé JDZ Replaces US' Noble Energy in Deepwater Block 4*, PLATTS OLIGARM NEWS, Nov. 2, 2005. ONCG Videsh was the Indian company awarded the 2d block. See Neil Ford, *São Tomé So Near, Yet So Far*, AFRICAN BUSINESS, Aug. 1, 2005.

bidders should have resulted in more time given them to justify their technical experience, financial capabilities, and industry experience. Yet, these small independents had only a month to satisfy and respond to bidding requirements, including the task of proving their financial and technical capabilities. Questions may legitimately be raised whether these smaller, lesser-known companies were pre-approved under less than transparent criteria applied by the Authority, or whether the multinationals in the first licensing rounds were given favoritism (i.e., much more time to bid and work out their alliances) because of their stature and existing governmental relationships. Overall, a neutral observer cannot help but return to the perplexing question: Why was the second round licensing round open for a much shorter period of time than the first licensing round?

News reports point to some of the possibilities, centering on the awardees for the second round. For instance, the President of São Tomé, Fradrique de Menezes,³³³ complained that the indigenous Nigerian companies awarded interests in the blocks are connected to the Nigerian Presidency.³³⁴ This allegation seems to have some backing. ERHC, a company incorporated in the United States but owned by a Nigerian business man (with ties to the President Obusanjo),³³⁵ enjoys a thirty-six percent stake in the entire licensing round spread out over all five blocks, with a sixty percent majority stake in block four,³³⁶ the most sought-after contract area.³³⁷ ERHC has little experience in deep sea drilling.³³⁸ Charges of corruption and bribery surround São Tomé leaders' relationship with ERHC.³³⁹ Suspicion also surrounds Filtim Huzod, a relatively unknown player in the industry with little to no previous experience in deep sea drilling, who was nonetheless awarded an eighty-five percent interest in block six.³⁴⁰ The company is allegedly owned by former

333. See Oduniyi, *supra* note 326.

334. See *id.*

335. See Ford, *supra* note 332; Seibert, *supra* note 294, at 9.

336. See, e.g., INVESTIGATION AND REVIEW: SECOND BID ROUND, *supra* note 330, at 4-10.

337. See Oduniyi, *supra* note 326; *JDZ Licensing: Conoil on the March Again, THIS DAY* (Nig.), Dec. 27, 2005.

338. See Ford, *supra* note 332; Seibert, *supra* note 294, at 13.

339. See Seibert, *supra* note 294, at 4-6, 9-11.

340. See Afrol News, *São Tomé-Nigeria Oil Blocks Finally Awarded* (June 1, 2005),

Nigerian politicians.³⁴¹ In addition, A. & Harman, Godsonic Oil and Gas, Momo Oil, and Equinox Oil and Gas are allegedly connected to high-level Nigerian politicians and military officials.³⁴² Finally, in block five, International Commerce and Communications, a Cayman Islands registered company, and Oil Exploration Consortium, formed in Texas, were jointly awarded a seventy-five percent interest. Both were relatively unknown companies.³⁴³

Overall, most of the awardees in the second round remain largely unknown. Most of the thirty-three bids submitted for pieces of the licensed blocks came from smaller, independent firms.³⁴⁴ The possibilities of irregularities and self-serving interests that might have accounted for the very short bidding period for the second round remain a mystery.

On the other hand, it is very evident that the second round resulted in awards given to indigenous Nigerian companies or smaller-statured entrepreneurs, rather than conventional industry leaders of the West that already hold firm footings in the region and in the JDZ (by virtue of the first licensing round).³⁴⁵ The Authority should be commended for that result. After all, the gist of the development theory is to empower local stakeholders to advance local industry and lessening reliance on the West, but the theory would only work if the diversification extends beyond the country's elites. It should be noted that while São Tomé holds a forty percent stake in the JDZ by virtue of its territorial claim, no São Tomé companies formed bidding consortia for partly owned interests, or entered bids of their own.³⁴⁶

<http://www.afrol.com/articles/16483> (last visited Feb. 6, 2007); *see also* Ford, *supra* note 332 (noting that Filtrim Huzod is a "lesser known company").

341. *See id.*

342. *See* Oduniyi, *supra* note 326. A. & Hartman was awarded ten percent of Block 2. Godsonic Oil and Gas was awarded five percent of Block 4. Momo Oil & Gas was awarded a five percent stake in Block 2, along with three other companies, listed as SOJITZ, IMT Int., and NISSHO IWAI. Equinox Oil and Gas is sharing a ten percent stake in Block 3, along with Equinox & Energy Limitada and with Petrochina. *See, e.g.,* INVESTIGATION AND REVIEW: SECOND BID ROUND, *supra* note 330, at 8. No other public information is available on these awardees.

343. *See São Tomé-Nigeria Oil Blocks Finally Awarded, supra* note 340.

344. *See* Ford, *supra* note 332.

345. *See id.*

346. *See* Oduniyi, *supra* note 326.

6. De Facto Control Over the JDZ by the Private Sector

Under Article 24 of the Treaty,³⁴⁷ the “obligations of contractors in respect of petroleum activities in the Zone shall be exclusively determined by the financial terms of petroleum development contracts approved under this Article.”³⁴⁸ Thus, neither the Treaty nor actual licensing rounds conducted thereunder changes the norms in Third World oil economies: (i) petroleum development contracts are negotiated between big businesses and State authorities, (ii) the State’s need for and dependency on foreign capital and technical expertise would practically result in significant power resting with the private contractor, and (iii) the development contract is typically a fortification of a mutually beneficial government-industry relationship. Typically in a JDZ arrangement, instead of negotiating financial terms with one government, the private contractor will negotiate with a coalition of several governments. If a private contractor maintains an ongoing existing relationship with a particular government within the coalition, naturally the private contractor and that government would tend to make a pact in the negotiation of interests within the Zone. The pattern continues, and the possibility exists that powerful autocratic governments and powerful monopolistic players in the oil industry may continue to lean on each other. The JDZ is just the mechanism to avoid protracted legal battles without hard-to-predict outcomes among governments to enable speedy production. In such a mechanism, powerful States and their industry partners are well-positioned to occupy the driver’s seat.

The confidential nature of negotiation with the private sector leaves many questions open with respect to the Nigeria-São Tomé arrangements. Who are the appointees to decision-making bodies and what are their histories? What are the sources of revenue for State parties—tax, royalty and/or production share, or a combination thereof? Will there be contractor contributions for local personnel training, social services or local goodwill programs, as well as environmental protection, workforce safety, and sustainable development programs? How are these benefits and goodwill programs, if any, allocated between the participating States? (Not all of these benefits can be quantifi-

347. See Nigeria-São Tomé Treaty, *supra* note 169, art. 24.

348. See *id.* art. 24.1.

able in accordance with the 60-40 percent split.) What are the safeguards for the minority interest holders in the JDZ decision-making body (São Tomé in this case)? Are local citizens employed in the JDZ, at what level, and from which country? How much of industry's revenues is being reinvested in Nigeria and São Tomé, in what way, and under what allocation formula between the two countries? These questions will have to be addressed in the development contracts to be spearheaded by and negotiated with industry. If industry is in bed with its chosen government in these negotiations to fortify their existing relationships in the region, it takes no great creativity or a sense of paranoia to understand that the smaller and less-leveraged State may be disadvantaged.

D. *Recent Development with Respect to the Timor Gap JDZ*

On May 20, 2002, Australia and the newly independent State of East Timor signed the Timor Sea Treaty ("TST"), which creates a JDZ in the Timor Sea.³⁴⁹

On its face, the TST generously allocates approximately ninety percent of petroleum in the zone to East Timor and only ten percent to Australia.³⁵⁰ Hence, at first glance, the TST seems to favor or at least create a balance of power for the benefit of the smaller State, East Timor. A closer look at the surrounding circumstances and historical development raises concerns whether such appearance of balance is only skin-deep, and that the potential ills as examined in other recent JDZs may also be lurking.

The TST falls under the "Joint Authority Model," as with the case of the Nigeria-São Tomé Treaty.³⁵¹ The TST creates a Joint Commission with "one more commissioner appointed by East Timor than by Australia."³⁵² The Joint Commission is charged with, inter alia, directing a Designated Authority ("DA"); over-

349. See Timor Sea Treaty, E. Timor-Austl., art. 3(b), May 20, 2002, [2003] A.T.S. 13.

350. See *id.* art. 4(a).

351. Another example of the Joint Authority Model is the Thailand-Malaysia Joint Authority created for certain area within the Gulf of Thailand. See *supra* notes 171-174 and accompanying text (discussing various types of JDZ, including the Joint Authority Model, comparing the Timor Gap treaty to the Thailand-Malaysia treaty, and classifying the Thailand-Malaysia treaty as Joint Authority Model).

352. Timor Sea Treaty, *supra* note 349, art. 6(c)(i).

seeing the DA's powers and functions; approving its income and expenditure estimates, procedures, rules, and regulations; and authorizing, performing, and approving inspections and audits of the DA's and contractors' books and accounts.³⁵³ Created as a legal entity with full juridical status,³⁵⁴ the DA can enter contracts, obtain and dispose of property, undertake the day-to-day regulation and management of petroleum activities under the Joint Commission's supervision,³⁵⁵ as well as other environmental, safety, record-keeping, and accounting matters.³⁵⁶ For the first three years of the TST's term, the DA is appointed by the Joint Commission.³⁵⁷ After three years, the DA becomes "the East Timor Government Ministry responsible for petroleum activities"³⁵⁸

Considering that East Timor has one more representative on the Joint Commission that Australia and that, after three years, East Timor's government will take over the DA, the TST appears fair and East Timor's interest should be well-guarded. Other provisions add to this sense of fairness and procedural due process. For example, a Ministerial Council, composed of an equal number of Ministers from both parties, is empowered to "consider any matter relating to the operation of [the TST] that is referred to [the Ministerial Council] by either East Timor or Australia."³⁵⁹ If the Council cannot settle a dispute, the matter is resolved under an established dispute resolution procedure.³⁶⁰ Both countries are responsible for negotiating a Petroleum Mining Code that will establish terms for the exploration and development of petroleum within the JDZ and for the export of petroleum from the area.³⁶¹ Nearly all other matters, including the construction and operation of pipelines, environmental protection, and security measure, demand similar cooperation between Australia and East Timor.³⁶²

Yet, despite the fairness and balancing of power inherent

353. *See id.* annex D.

354. *See id.* art. 6(b)(iii).

355. *See id.* arts. 6(b)(iii), 6(b)(iv).

356. *See id.* annex C.

357. *See id.* art. 6(b)(i).

358. *Id.* art. 6(b)(ii).

359. *Id.* art. 6(d)(i).

360. *See id.* annex B.

361. *See id.* art. 7.

362. *See id.* arts. 8, 10, 19.

and apparent in the TST, East Timor is aggressively seeking a new JDA to regulate petroleum exploration and development in the Timor Sea. The facts surrounding the ongoing dispute between the two countries should pose a legitimate question: Is the TST's fairness is largely a façade, at least from the perspective of the Timorese Government? Although the TST establishes that 90 percent of petroleum shall belong to East Timor,³⁶³ the JDZ covered by the TST subsumes only 20.1 percent of the controversial Greater Sunrise Oil Field ("Greater Sunrise").³⁶⁴ Geographically, the Greater Sunrise gas field is closer to East Timor—the field is situated about 170 kilometers from East Timor and 450 kilometers from Australia.³⁶⁵ Yet, according to the TST, the remainder of Greater Sunrise, widely regarded as holding the bulk of the Timor Sea's petroleum deposits,³⁶⁶ becomes the property of Australia.³⁶⁷ In other words, the section of Greater Sunrise included in the TST allegedly holds only a proportionally tiny amount of oil! Thus, no matter how equitably the TST divides power among East Timor and Australia, its apportionment of the Timor Sea's richest petroleum deposits to Australia (the Timor Sea's richest nation) prevents the TST from acting as an equitable solution to the territorial disagreement between East Timor and Australia. For that reason, despite the signing of the TST, the two governments continued to seek a new joint development agreement. As explained below, the matter recently reached resolution in February 2007. Under this new development, the two State parties each received a 50-50 royalty split for the petroleum resources in the Timor Sea.³⁶⁸

363. *See id.* art. 4(a).

364. *See id.* annex E.

365. *See* Timor Sea Justice Campaign, Press Release, TSJC Slams Govt "Values" Hypocrisy (Aug. 31, 2005) (on file with author); *see also* Timor Sea Justice Campaign, Timor Sea Dispute Background (on file with author).

366. *See* Nigel Wilson, *Dawn at Hand for Sharing Sunrise*, AUSTRALIAN, Jul. 25, 2005, at 29.

367. *See* Timor Sea Treaty, *supra* note 349, annex E. ("East Timor and Australia agree to unitise the Sunrise and Troubadour deposits (collectively know as "Greater Sunrise") on the basis that 20.1 percent of Greater Sunrise lies within the Joint Petroleum Development Area ("JPDA"). Production from Greater Sunrise shall be distributed on the basis that 20.1 percent is attributed to the JPDA and 79.9 percent is attributed to Australia.")

368. *See* East Timor Ratifies Deal with Aust over Oil, Gas Carve Up, AAP NEWSWIRE, Feb. 21, 2007 (on file with author); *Australia, East Timor Bring into Force Timor Sea Oil Treaties*, BBC MONITORING INT'L REPS., Feb. 23, 2007 (on file with author).

1. Pending Negotiation and Proposed Agreement on Greater Sunrise

In 2003, Australia and East Timor signed the Greater Sunrise Unitisation Agreement ("GSUA), which would have given East Timor an eighteen percent stake in the portions of Greater Sunrise not subsumed by the TST. East Timor never ratified the GSUA. The question remains as to why a small, newly formed Nation might have chosen to sign a bilateral agreement which it later could never feel comfortable ratifying.

Both countries have since advanced different interpretations of international law with respect to their legal claims to Greater Sunrise. This subsequent divergence in the interpretation of applicable international law apparently had caused East Timor to reconsider whether the GSUA fairly and equitably divided resources. Based on its 1972 Timor Gap Treaty with Indonesia, Australia argues that the disputed area belongs to it under the concept of natural prolongation, which allows the "continental margin" of a coastal state to include the "submerged prolongation of the land mass of [such] coastal state."³⁶⁹ This theory would allow the boundary, which is significantly closer to East Timor than Australia, to draw most of Greater Sunrise into Australian territory.³⁷⁰ Australia maintains that the TST is already a compromise of Australia's sovereign interest because if the Timor Trough itself were used as the boundary line (as it should be under natural prolongation), even more of Greater Sunrise would fall in Australian territory. Accordingly, Australia asserts that the TST's 90-10 split is extremely generous.³⁷¹

East Timor, on the other hand, can raise the argument that

369. See Zou Keyuan, *Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends*, 9 SINGAPORE YEARBOOK OF INT'L L. 37, 50 n.61 (2005) ("The doctrine of natural prolongation is embodied in UNCLOS, which provides that 'the continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise.'") (citing UNCLOS, art. 76); see also Robert L. Bledsoe & Boleslaw A. Boczek, *THE INTERNATIONAL LAW DICTIONARY* 195 (1987) (geographical definition of Continental Shelf may include "seabed that geologically is not a natural prolongation of land mass at all"); PARRY & GRANT *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 99 (J. Craig Barker & John P. Grant eds., 3d ed. 2004) (distinguishing geological definition of Continental Shelf from its legal definition, which extends throughout "natural prolongation of land territory"); Clive Schofield, *A "Fair Go" for East Timor? Sharing the Resources of the Timor Sea*, 27 *CONTEMP. SOUTHEAST ASIA* 255, 264-65 (2005).

370. See generally Zou, *supra* note 369.

371. See generally *Action in Solidarity with Asia and the Pacific, Timor's Struggle to Plan a*

sea boundaries should not be determined by geological factors, but instead should be fashioned to achieve an “equitable” result, under modern international law—approximately eighty-nine percent of delimited maritime boundaries are based on some form of equidistance.³⁷² If equidistance principles applied, much if not all of the disputed territory would belong to East Timor.³⁷³ The countries took their legal positions to the ICJ, but East Timor cannot have its legal claim adjudicated, because two months prior to signing the TST, Australia withdrew from the jurisdiction of the ICJ.³⁷⁴

The two countries continued working to reach a new agreement over Greater Sunrise, drawing closer to concluding a new treaty.³⁷⁵ It is believed that such a new agreement between East Timor and Australia on the Greater Sunrise Field would split royalties 50/50 between the two countries,³⁷⁶ and would likely delay the permanent delimitation of maritime boundaries between Australia and East Timor for fifty years.³⁷⁷ Such a proposed agreement would certainly result in a more equitable solution than the currently guiding treaty, the TST, which places approximately eighty percent of Greater Sunrise, including the most oil-rich portion, in Australian hands. The young Timorese State would generate significantly more revenue under the 50/50 splitting of royalties in Greater Sunrise. Estimates of the value of oil in Greater Sunrise go as high as US\$40 or \$50 billion,³⁷⁸ though more conservative estimates of US\$10 billion have also been stated.³⁷⁹ The real potential of Greater Sunrise in terms of actual oil revenue is yet to be discovered or ascertained.

Future With Reduced Aid, Jul. 14, 2004, <http://www.asia-pacific-action.org/> (last visited Feb. 6, 2007).

372. See *supra* notes 109-113; Schoefield, *supra* note 369, at 265-68.

373. Timor Sea Justice Campaign, *supra* note 365.

374. See Schoefield, *supra* note 369, at 274.

375. See Timor Sea Justice Campaign, *A Fair Go For East Timor*, (Feb. 2006) available at <http://tsjc.asiapacificjustice.org/news/htm>.

376. Timor Sea Justice Campaign, *supra* note 365; see also Nigel Wilson, *Global Business Brief*, AUSTRALIAN, Aug. 20, 2005, at 32.

377. Timor Sea Justice Campaign, *supra* note 365; James McLaren & James Fahey, Mallesons Stephen Jaques, *Natural Resources and Energy Law Update—Aug. 2005: Recent Development in the Timor Sea Gas Fields*, http://www.mallesons.com/publications/natural_resources/8057036W.htm (last visited Feb. 6, 2007).

378. See Simon Montlake, *Timor-Leste: Asia's Newest Nation Spites Oil*, *BANKER*, OCT. 1, 2005; see also Wilson, *supra* note 376.

379. See Wilson, *supra* note 376.

As of February 2007, East Timor ratified the newly negotiated International Unitisation Agreement (“IUA”) signed in 2006, which allegedly allowed East Timor to earn a fifty percent royalty split in the Zone, while delaying negotiation for a permanent maritime boundary for fifty years. According to news reports, Woodside Petroleum was and still is the Greater Sunrise operator under the old as well as the new treaty regime. A few days later, the Office of the Australian Foreign Affairs Minister issued a press release announcing that the two States have reached agreement, confirmed with diplomatic notes, to resolve the pending disputes, thereby allowing the Greater Sunrise development to go forward. The IUA, together with the Certain Maritime Arrangements in the East Timor Sea (“CMATS”) Treaty, establishes the new legal and fiscal regimes for petroleum resources in the Timor Sea.³⁸⁰

The status of the dispute and sovereign behaviors as described above fit squarely into the thesis raised above—that the rich and more powerful State may be able to pressure smaller States such as East Timor into compromising or relinquishing valid legal claims in the JDZ solution. The question should be raised as to why East Timor initially signed on to the TST as well as the GSUA—the type of commercial treaty that, while benefiting the country, might have granted East Timor much less territory and oil revenues than it may deserve under international law. The new treaties have yet been disclosed fully to the public, although the new terms appear to be quantitatively more favorable to East Timor. Yet, compromise is the spirit of the JDZ concept as a practicable solution. When looked at this way, the JDZ means a concession of principle in exchange for peace!

When we consider the additional fact that the GSUA (signed by both countries but never ratified by East Timor) would have endowed Woodside Petroleum,³⁸¹ one of Australia’s largest oil companies, with the right to develop Greater Sunrise, support for this thesis may fully emerge. Any contractor selection under the newer treaty regime is yet to be implemented and hence remains to be seen. As of now, it is unclear which com-

380. See *East Timor Ratifies Deal with Aust over Oil, Gas Carve Up*, *supra* note 368; see also *Australia, East Timor Bring into Force Timor Sea Oil Treaties*, *supra* note 368.

381. See *id.*; see also Michael White & Ryan Goss, *Australian Maritime Law Update: 2004*, 36 J. MAR. L. & COM. 253 (2005).

pany or companies will be given the right to develop the area. Meanwhile, the complexity of oil processing, including the lucrative and complex operation of shipping petroleum extracted from Greater Sunrise to either Australia or East Timor for processing, has been a source of contention.³⁸² Until all of these issues are formally resolved either diplomatically or contractually, any discussion will just be speculation, and any sovereign action observed by the media may just be all part of *Realpolitik*, paving a way for the final allocation of economic benefits.

CONCLUSION

Some Observations

Other than JDZs, various other models may also be available for resolving the South China Disputes. For example, the establishment of an international natural park³⁸³ over the Spratlys in order to modulate and regulate activities on the island, or a supra-national "Spratly Authority" (analogous to UNCLOS International Sea-Bed Dispute Chamber of the Tribunal for the Law of the Sea, or the Mekong River Commission in Asia³⁸⁴) that can administer resources. Yet, these ideas remain too ambitious, requiring a coalition of sovereignties in an environment where the competing interests are not yet ripe to invoke solid agreements by all States concerned. The challenge is just as complex and grave as the establishment of a "special purpose" investment and/or trade bloc for Asia. On the other hand, there is the growing recognition that the geological complexity of the deep waters surrounding the Spratlys may not justify the costs of exploration—offshore exploration in the South China Sea has always been a costly proposition.

Off and on, the price of oil has more than tripled since late

382. See Schofield, *supra* note 369, at 273-74.

383. Compare Neal A. Kemkar, *Environmental Peacemaking: Ending Conflict Between India and Pakistan on the Siachen Glacier Through the Creation of a Transboundary Peace Park*, 25 STAN. ENV'T'L L.J. 67 (2006), with Barry Hart Dubner, *On the Basis For Creation of A New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENV'T'L L. & POL. REV. 1 (2005) (discussing the possibility of creating an international park out of Arctic Ocean by sovereign States bordering Arctic).

384. See UNCLOS, *supra* note 61, art. 287; Mark J. Valencia, *A Spratly Solution*, FAR E. ECON. REV. (Mar. 31, 2004); see also Joyner, *supra* note 23. For a discussion regarding the Mekong River Basin, see Adam X. Rix, *The Mekong River Basin: A Resource at the Cross-Roads of Sustainable Development*, 21 TEMP. ENVTL. L. & TECH. J. 103 (2003).

2001.³⁸⁵ The Middle East—the belly button to the world’s existing petroleum resources—continues to be a region of political turmoil. Outside the Middle East, the wildcat chase for oil continues. Alternative sources of energy such as electricity have been explored to address the shortage of oil, but one major fuel to generate electricity is gas, and gas is also a hydrocarbon like oil.³⁸⁶ If there is going to be an imminent global energy crisis, the search for petroleum anywhere in the world by any player will immediately take on the gravity of a global concern. The future twists and turns of the world economy and global petroleum supply may just re-instigate international attention to the South China Sea and the hydrocarbon reserves it potentially holds.

China, as one of the two biggest world consumers of oil,³⁸⁷ is a substantial interested party in the South China Sea Disputes. So far, the high costs and sophisticated technology needed for deep water drilling, this Sea’s geological complexity, its strategic importance to the region as a shipping route, and the various territorial disputes, all might have turned this Sea into a mystery. Currently this “mysterious” Sea does not yet occupy a position of competition for the Middle East as a major petroleum reservoir for world consumers.³⁸⁸

The continuous hunt for energy by China and other countries to fuel their economies has pushed their interest in petroleum companies to the forefront. The recent bid by the China National Offshore Oil Corporation for America’s UNOCAL aroused both media attention and political turmoil before it was withdrawn.³⁸⁹ Now China, via the China National Petroleum

385. See, e.g., *The Oiloholics*, *ECONOMIST*, Aug. 27, 2005, at 11.

386. The South China Sea has been proven as a rich reservoir for gas. See *supra* note 7 (describing British Petroleum’s gas discovery and pipeline project in South China Sea); see also Song Nguyen & Anh Minh, *BP Plans New Gas Pipeline Project in Southern Area*, *SAIGON TIMES*, Mar. 8, 2007 (on file with author). Petroleum is defined as including “any mineral oil or reactive hydro-carbon and *natural gas* existing in its natural condition in strata, but does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation.” HOWARD R. WILLIAMS & CHARLES J. MEYERS, 8 *MANUAL OF OIL AND GAS TERMS* (12th ed. 2003) (emphasis added).

387. The two biggest consumers of oil are China and the United States. See Energy Info. Admin., U.S. Dep’t of Energy, *Top World Oil Consumers—2005*, http://www.eia.doe.gov/emeu/cabs/topworldtables3_4.html (last visited Feb. 26, 2007).

388. See *supra* note 3.

389. See A Bill to Prohibit the Merger, Acquisition, or Takeover of Unocal Corpo-

Corporation—allegedly ranked by U.S. Petroleum Intelligence Weekly in 2001 as the tenth largest among the world's top fifty petroleum companies—has bought Petro-Kazakhstan, a Canadian oil producer with all of its assets located in oil-rich Kazakhstan.³⁹⁰ The aggressive stand that China must take and is willing to take to solve its energy needs is evident.

With respect to the South China Sea Disputes, for the past decades, China has shifted positions. As pointed out earlier, in the 1990s, China staged wars and aggressively proclaimed its sovereign rights. She then melted down into a conciliatory stance and reached out to ASEAN via various good faith commitments to peace and cooperation. Yet, in this decade and amidst those recent signs of cooperation, China reportedly has subsidized the fishing trade and increased economic support for Chinese fishing boats in the disputed Spratly area.³⁹¹

Meanwhile, at least one Chinese advocacy group still maintains that the ASEAN claimants had paid “lip service,” conducted political and diplomatic campaigns against China, “invaded” and “occupied” China’s [Spratly] territory, received technological and military aid and donations from the superpowers (including the United States, Japan, and India) in order to accomplish the “China-bashing” task.³⁹² To the contrary, China-threat speculators still argue that (i) China’s goal has always been to fill the strategic vacuum in the South China Sea after the end of the

ration by CNOOC Ltd. of China, S. 1412, 109th Cong. (2005); Expressing the Sense of the House of Representatives That a Chinese State-owned Energy Company Exercising Control of Critical United States Energy Infrastructure and Energy Production Capacity Could Take Action That Would Threaten to Impair the National Security of the United States, H.R. Res. 344, 109th Cong. (2005); *see also* Press Release, Office of Congressman Thomas M. Reynolds, Reynolds Challenges China’s Bid for UNOCAL—Congressman Says Proposed Bid Brings UP National Security, Energy Concerns (June 30, 2005), *available at* http://www.reynolds.house.gov/index.php?option=com_content&task=view&id=61&Itemid=9; Kerry Dumbaugh, Congressional Research Service, *China-U.S. Relations: Current Issues and Implications for U.S. Policy* 4-8 (July 8, 2005), *available at* http://digital.library.unt.edu/govdocs/crs//data/2005/upl-meta-crs-6695/RL32804_2005Jul08.pdf. *See generally* Susan W. Liebele and William H. Lash III, *Exxon-Florio: Harbinger of Economic Nationalism?*, CATO REV. OF BUS. & GOV’T, <http://www.cato.org/pubs/regulation/reg16n1d.html> (last visited Feb. 6, 2007); *China’s Economy*, ECONOMIST, Aug. 2, 2005.

390. *See* PetroKazakhstan Deal Receives Court Approval, CHINA ENERGY WEEKLY, Oct. 28, 2005.

391. *See* Guangxi Fishermen Receive State Subsidies for Fishing in Spratlys Region, Jan. 26, 2001, http://www.ykien.net/tl_viettrung01.html (last visited Feb. 6, 2007).

392. *See, e.g.,* *Worrisome Situation*, *supra* note 24.

Cold War; and (ii) as part of expansionism, once China achieves reunification with Taiwan, she will push for full control of the South China Sea and possibly control of Asia.³⁹³

*The Gloomy Picture for the Developing Coastal State in its
Search for Petroleum and its Assertion of Sovereignty*

It is predictable that if the resources of the South China Sea are confirmed, thereby rendering the Disputes ripe, China will assert its aggressive stand in the structuring and implementation of joint petroleum development for the region. Such a JDZ scenario, under the analysis presented in this Article, is the right environment for the private sector to partner silently with China, to the detriment of the smaller States. The petroleum sector has already been concentrated into a handful of players at the top, as a result of recent multinational mergers. Diversification and monopolization of international market shares have continued to be the trend, leaving the world economy in a handful of multinational corporations with diversified portfolios of international assets that transcend industries and sectors.³⁹⁴ The multinationals that make the most money out of China will support China, and China will line its national interests with those multinationals' corporate interests to support the silent partnership. Such a scenario will justify the cynic's pessimism: what good does law do, if any, in the solving of economic problems? The "legalization" movement, which pushes for the formation of universal legal norms to govern economic conduct—is, and has always been, a byproduct of *Realpolitik*.³⁹⁵

393. See Christopher C. Joyner, *The Spratly Islands Dispute in the South China Sea: The Interplay of Law and Geopolitics*, 13 INT'L J. OF MARINE AND COASTAL L. 53, 64 (1998); see also Francesco Sisci, *The Spratlys Pact: Beijing's Olive Branch*, ASIA TIMES ONLINE (Nov. 6, 2002), <http://atimes01.atimes.com/atimes/China/DK06Ad01.html> (last visited Feb. 6, 2007).

394. One such example is General Electric ("GE"), which owns substantial interests in the energy sector (including power-generation/electricity and oil and gas services), communication/media, national security, consumer products and household appliances, and consumer credit financing. See GE, Annual Report (Form 10-K) (Dec. 31, 2005); see also GE, Business Directory, <http://www.ge.com/en/company/businesses> (last visited Mar. 23, 2006).

395. One example of the legalization movement is the *OECD Convention to Combat Bribery in International Transactions*, Nov. 17, 1997, 27 I.L.M. 1, <http://www.oilis.oecd.org>. The Convention came into being as a result of *Realpolitik*. For decades, U.S. companies, bound by the prohibitions of the U.S. Foreign Corrupt Practices Act, were unhappy that their counterparts in Europe and Asia were not bound by the same prohibitions. The

In summary, the complexity of the region and the uncertainty of the South China Sea Disputes render the peaceful surface of the Pacific Ocean an illusion indeed. Today's leading authority on international maritime law, UNCLOS, offers little help or concrete guidance to the resolution of these Disputes or related sea-use rights. The competing sovereignties—China and the ASEAN nations—will end up executing JDA's as a practical treaty solution for the sharing of natural resources. But such a solution is imperfect. In such a solution, law will matter little and *Realpolitik* will take over. *Realpolitik* suggests that policymakers of a country will seek to increase their power base, and will use whatever economic or military methods necessary to accomplish these pragmatic goals in their self-interest.

What's more, the South China Sea holds strategic and political importance independent of the search for petroleum. The Spratlys group lies in the crossroads of important maritime routes leading ultimately to Japan and the United States. The nation that has sovereign control over the Spratlys, or part thereof, holds the gateway to those maritime routes. This strategic significance cannot be resolved via a JDA/JDZ, which represents only an economic compromise. Even with a successful JDA/JDZ solution, the South China Sea will always hold a security flashpoint for the Pacific and can greatly impact the global economy.

The ASEAN Alliance Proactive Solution

As already explained, in a multilateral economic treaty negotiation, three possibilities may doom the fate of the weaker nation or nations. First, the more powerful State will likely team up with the private sector to safeguard their mutual interests. Second, the private sector will end up suggesting, fashioning, im-

United States ended up lobbying other industrialized nations to impose similar prohibitions on their corporate citizens, such that U.S. companies would no longer be disadvantaged. The Convention came about as the result of the United States' lobbying efforts, demonstrating the commitment of the industrialized nations (the bribe-giving countries) to enact similar anti-bribery laws in order to put all multinational corporate players on the same level playing field in the developing economies (the bribe-receiving countries). See U.S. DEPARTMENT OF STATE, FIGHT GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 3 (2000), available at http://tcc.export.gov/static/exp_000928.pdf; see also Wendy Duong, *Partnerships with Monarchs in the Search for Oil: Unveiling and Re-examining the Patterns of "Third World" Economic Development in the Petroleum Sector*, 25 U. PA. J. INT'L ECON. L. 1171, 1246-47 (2004).

plementing and controlling the framework for joint development. Finally, the weaker nation will be left with no choice but to participate in the lopsided joint negotiation and take its smaller piece of the pie, considering the worse alternative—an ultimate military showdown, or continuing economic and political pressure from the more powerful State.

These sad possibilities confirm once more the highly theoretical nature of “soft” public international law and its heavy dependence on the *Realpolitik* of international relations. Unless and until the power dynamics of international relations can be restructured or shifted based on a new model of globalization—one that operates strictly on the market forces of supply and demand, a truly meaningful “new international economic order” for the twenty-first century remains a vision, but not a reality. This Article simply uses the legal issues in the South China Sea territorial disputes as the contextual springboard for examining this gloomy picture. In such a picture, ultimately the poverty-stricken Third World inhabitants may be “guinea-pigged.”

In anticipation of any JDZ solution motivated by *Realpolitik*, the ASEAN nations should immediately join forces to counterbalance the enormous powerbase of China. ASEAN should not be shy in turning itself into an “international economic cartel.” If and when a silent partnership between China and the petroleum private sector occurs at the JDA/JDZ negotiation table for Southeast Asia, the circumstances will have been conducive to the real economic and political alliance of ASEAN. The right context for ultimately the de facto formation of an embryonic Asia-Pacific Rim investment and trade bloc will then emerge—born out of pressing economic needs as a creature of circumstances, rather than a product of positivism or legalism.

In addition to a real alliance among themselves, the ASEAN leaders must make not only wise short-term decisions, but also careful long-term planning. Long-term planning should include two policies. First, in order to even out and broaden the current power bases, ASEAN, as a pact, must continue to invest in ongoing conciliatory diplomatic ties with other superpowers (including Japan, Russia, North America, Australia, and Western Europe), as well as the developing Europe, Africa, and Latin

America—a notion of “preventive diplomacy.”³⁹⁶ In addition, ASEAN as a bloc (and not just individual Member States) must invest in stronger and broader economic relations with all such countries and potential trading partners. This will help solidify ASEAN’s strength and unity. Second, even with *Realpolitik* considerations, ASEAN leaders must invest long term in their peoples. Call it idealistic, but in a world of *Realpolitik*, this premise demands our belief. The only *Realpolitik* that truly works long-term for leaders of the developing nations is the kind of *Realpolitik* that represents an investment in the people, because the people constitute the labor and consumer force—the real impetus for supply and demand, and the backbone of the economy. The ASEAN leaders, facing their seas of challenges, must do all it takes to let their peoples mature and prosper, not only economically but also intellectually and emotionally (for lack of a better description). Economic prosperity means savvy macro and micro-economic measures to quickly create a healthy middle class and close the gap between the rich and the poor in Southeast Asian societies. Intellectual and emotional prosperity means emphasis and concentration on education, civil liberties, self-reliance, and a rule-of-law system.

It is only in this long-term vision that ASEAN can hope to become an alliance of strength in order to secure its place at any JDZ negotiation table or sovereignty discussion, and ultimately its future as an potential investment and trade bloc vis-à-vis any counterpart, whether it be China, Japan, Russia, America, or Europe.

*An After-Thought: Idealism vs. Realpolitik—
The Interest of the People*

By now, it is hoped that this Article and others have amply demonstrated the impact of *Realpolitik* on petroleum transactions in the South China Sea and the resolution of related territorial disputes. The kind of *Realpolitik* that results in a silent partnership between the giant monarch and the monopolistic corporate mogul as a fact of life will not cause any harm unless it detracts the lives of the most vulnerable sector: the people of East and Southeast Asia. More broadly, this can mean the peo-

396. See, e.g., Hasjim Djalal, *Preventive Diplomacy in Asia-Pacific*, JAKARTA POST, Aug. 26, 1998.

ple of the world in a global economy that suffers from rising energy commodities prices, depleted raw supplies, worsening environmental problems, and divided politics.

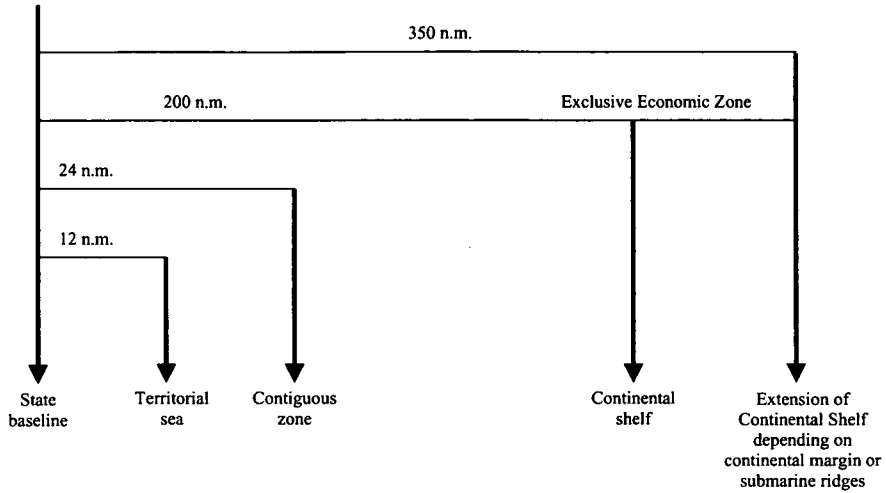
Since previous articles suggested the procedural safeguards of including the voice of the public interest in private, confidential petroleum negotiation,³⁹⁷ these safeguards are repeated here. Somehow, the voice of the public interest, independent of governments, in the form of aspiring, thriving NGOs and international NGOs, must be included in the negotiation and implementation of JDA/JDZ's, in some form or manner. This will supply the transparency and watch-dog function needed to assure that any treaty solution for solving territorial disputes is truly in and for the best interest of the people regardless of borders. Building such procedural safeguards via the involvement of non-governmental organizations is a long-term twenty-first century project full of obstacles and political nuances. It will indeed be a long, hard, and bumpy road.

Any treaty resolution of the South China Sea Disputes must somehow include the voices of the people independent of their autocratic governments (unless these governments implement democracy). Preparation for this process may be difficult and problematic, procedurally and politically, but it must start now.

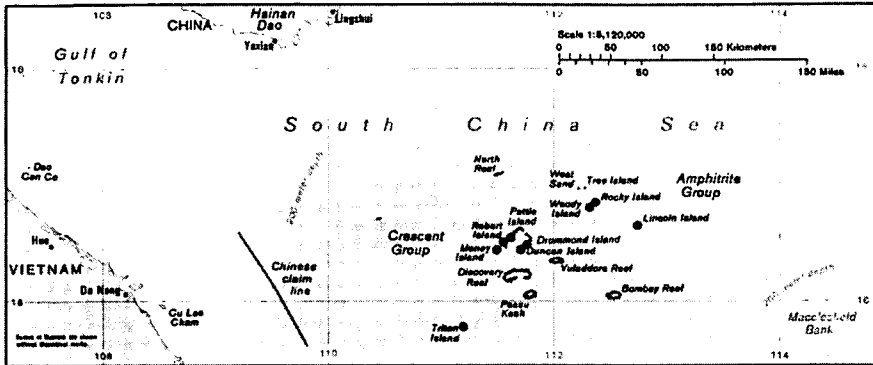
The process begins, as always, with the passionate, hard-to-silence public interest lawyer.

397. *See supra* notes 11, 394.

Appendices



The Paracel Islands



The Spratly Islands

