

3.0 THE SPRATLY ISLANDS DISPUTE: AN OVERVIEW

Six governments claim all or part of the Spratly Islands. China, Taiwan and Vietnam claim sovereignty and jurisdiction over the Spratly Islands within the sweep of their broader claims to the South China Sea. The claims of Brunei, Malaysia and the Philippines are limited to parts of the Spratlys. The resulting overlap has created a volatile situation of contested claims and provocative actions and responses. Despite the launch of confidence-building measures through dialogue processes, resolution of the sovereignty issue that lies at the heart of the dispute remains elusive. As a result, “the area remains a scab over a festering sore ready to be picked for political leverage.”¹

This chapter provides background to the Spratly Islands dispute. It begins by discussing the geography, natural resources and strategic significance of the area. The two latter aspects are commonly identified as the principal factors motivating the competing claims to sovereignty and jurisdiction in the area. Moving from the general to the specific, the territorial claim of each party and the bases they advance in support of it are then outlined.

3.1 The Spratly Islands

Geography

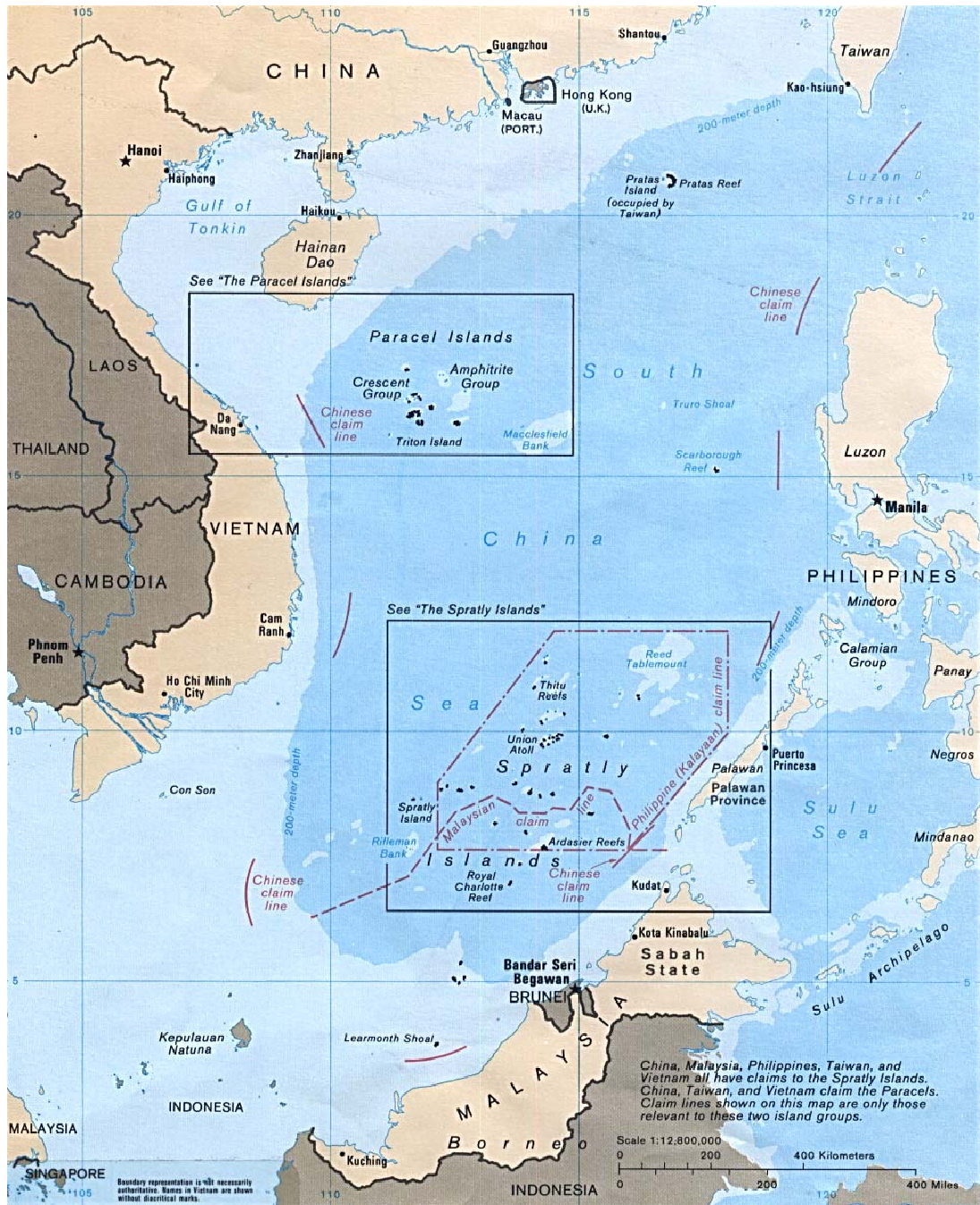
The Spratly Islands are situated in the southern part of the South China Sea, comprising one of the four main island groups present.² A semi-enclosed sea, the South China Sea covers an area of 648,000 square nautical miles stretching lengthwise from Singapore in the southwest to Taiwan in the northeast, and breadthwise from Vietnam to Sabah³ (see Figure 2).

¹ Mark J. Valencia, Jon M. van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, Martinus Nijhoff Publishers, The Hague, 1997, p. 130.

² The other groups being Pratas Island, Paracel Islands and Macclesfield Bank.

³ J.R.V. Prescott, *The Maritime Political Boundaries of the World*, Methuen, London, 1985, pp. 209-10

Figure 2: The South China Sea Islands



Source: "The South China Sea Islands", <<http://www.middlebury.edu/SouthChinaSea/maps/schina_sea_88.jpg>>, accessed 5 June 2003.

A universally accepted definition of the Spratly Islands has yet to emerge. As Victor Prescott states, “[t]here is no single authoritative definition of the Spratly Islands”⁴ although in his view they “lie south of parallel 12° north and east of meridian 112° east, but exclude all islands within the archipelagic baselines of the Philippines and those which lie 40 nautical miles (nm) off the coast of Borneo.”⁵ Renate Haller-Trost specifies the co-ordinates “between latitude 6° to 12° and longitude 109°30’E to 117°50’E”⁶ while Dieter Heinzig suggests it is the area between 4°N and 11°30’N and 109°30’E and 117°50’E.⁷ David Hancox and Victor Prescott identify the “Spratly Islands region” as lying with one exception “south of 12°N and southwards of the 200 metres isobath off the continental and insular coasts that define the South China Sea. The exception is the Luconia Shoals that lie just landwards of that isobath ...”.⁸ The area associated with the Spratly Islands is shown in Figure 3. An estimate of the total area concerned is 172,000 square nautical miles.⁹

The number of features located within the Spratlys varies depending on the source cited. Prescott states twenty-six islands or cays certainly exist, with a further seven sets of rocks above high water.¹⁰ Other commentators suggest 25 to 35 islets above water at low tide,¹¹ over 100 islands, reefs and banks,¹² 300 to 400 features¹³ and a Chinese claim of 193 reefs, shoals, underwater reefs or hidden shoals.¹⁴ The features themselves are physically small in size. Itu Aba island is the largest at 1.4

⁴ *Ibid.*, p. 218.

⁵ *Ibid.*

⁶ R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective*, Kluwer Law International, London, 1998, p. 295.

⁷ Dieter Heinzig, *Disputed Islands in the South China Sea. Paracels-Spratlys-Pratas-Macclesfield Bank*, Otto Harrassowitz and Institute of Asian Affairs in Hamburg, Wiesbaden, 1976, p. 17.

⁸ David Hancox and Victor Prescott, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands*, Maritime Briefing 1(6), International Boundaries Research Unit, University of Durham, Durham, 1995, p. 2.

⁹ Victor Prescott, *Limits of National Claims in the South China Sea*, ASEAN Academic Press, London, 1999, p. 7.

¹⁰ Prescott, *The Maritime Political Boundaries of the World*, p. 218.

¹¹ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 5.

¹² Heinzig, *Disputed Islands in the South China Sea*, p. 18.

¹³ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 295.

¹⁴ *Xinhua*, 14 February 1994 cited in Greg Austin, *China's Ocean Frontier: International Law, Military Force and National Development*, Allen and Unwin, St. Leonards, 1998, p. 131.

Figure 3: The Spratly Islands Maritime Area

Source: Victor Prescott and Clive Schofield, *Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean*, Maritime Briefing 3(1), International Boundaries Research Unit, University of Durham, Durham, 2001, p. 60.

kilometres (km) long and 400 metres (m) wide.¹⁵ Indeed, “[t]he total land area of the Spratlys above the highest astronomic tide has been estimated to be less than 8 km² (3 sq. miles) yet they are scattered over an area of around 24,000 km².”¹⁶ In 2000, Vietnam occupied at least 19 features, the Philippines eight, China seven, Malaysia five and Taiwan one.¹⁷ Brunei apparently claims Louisa Reef but has not occupied it.¹⁸ Figure 4 shows features occupied in the Spratly Islands.

The bottom topography of the Spratlys consists of benches, hills and shoals.¹⁹ Atop them sit the myriad reefs, banks and other features identified on navigational charts as the “Dangerous Ground” and over which the claimants in the Spratlys have competing sovereignty and jurisdictional claims. Mark Valencia describes the geology of the deep South China Sea as containing:

the 2-km (1.24-mi)-thick South China Basin, the shallow Spratly and Reed Bank basins, which rest on a microcontinental block, an unnamed and largely unknown basin parallel to the coast of central Vietnam, several thin subbasins in the Paracels, and an unnamed 2-km (1.24-mi)-thick basin in deep water in the northern part of the South China Basin.²⁰

Areas lying partially or completely under 200-1,500 metres of water in the Spratlys include the Central Luconia Platform, the Baram Delta and the Brunei-Sabah, northwest Palawan and Reed Bank basins.²¹

¹⁵ Victor Prescott and Clive Schofield, *Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean*, Maritime Briefing 3(1), International Boundaries Research Unit, University of Durham, Durham, 2001, p. 58.

¹⁶ *Ibid.*

¹⁷ *Ibid.* The figure for Malaysia appears incorrect: I calculate that Malaysia occupied eight features in 2000. See Footnote 185 on pg. 104 herein.

¹⁸ *Ibid.*

¹⁹ Joseph R. Morgan and Mark J. Valencia, “The Natural Environmental Setting” in Joseph R. Morgan and Mark J. Valencia (eds), *Atlas for Marine Policy in Southeast Asian Seas*, University of California Press, Berkeley, Los Angeles and London, 1983, pp. 6-8. See also Joseph R. Morgan and Donald W. Fryer, “The Marine Geography of Southeast Asia” in George Kent and Mark J. Valencia (eds), *Marine Policy in Southeast Asia*, University of California Press, Berkeley, Los Angeles and London, 1985, p. 13.

²⁰ Mark J. Valencia, “Oil and Gas Potential, Overlapping Claims, and Political Relations” in George Kent and Mark J. Valencia (eds), *Marine Policy in Southeast Asia*, University of California Press, Berkeley, Los Angeles and London, 1985, p. 158.

²¹ *Ibid.*

Figure 4: Occupied Features in the Spratly Islands

Source: Victor Prescott and Clive Schofield, *Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean*, Maritime Briefing 3(1), International Boundaries Research Unit, University of Durham, Durham, 2001, p. 59.

The South China Sea and its margins lie in a monsoon region.²² In January and February the north monsoon peaks, bringing strong northeasterly winds that can exceed wind-force 5 (39 kilometres per hour, km/hr).²³ April and May are the transition months to the south monsoon. In July and August the south monsoon is strongest and wind forces in the open sea can reach wind-force 4 (20-29 km/hr). Between September and November the shift back to the north monsoon occurs.²⁴ Surface currents in the Spratlys are affected by these weather patterns, with an anticlockwise northeasterly circulation pattern evident in the north monsoon season and a clockwise gyre present off the coast of Borneo in the opposite season.²⁵ Annual rainfall in the southern part of the South China Sea exceeds 3000 millimetres, contrasting with about 1000 millimetres received in the northern sector.²⁶

Natural Resources

(i) Hydrocarbons

The geology of the Spratlys is not well understood.²⁷ One hypothesis is that the area from Luconia Shoals in the south to southwest Mindoro in the north separated from the continental margin of China in the Middle Eocene and moved southwards.²⁸ The Baram Delta Province located offshore from Brunei “is a clastic depocenter east of the Central Luconia Province and separated from it by a major fault zone or hinge line – the Baram Line/Tinjar Fault Zone.”²⁹ Oil production from a number of offshore fields in the area is well established.³⁰ In the central Spratlys, the plateaus contain many shoals and banks on top of which lie coral reefs.³¹ Reed Bank

²² Prescott, *The Maritime Political Boundaries of the World*, p. 210.

²³ Morgan and Fryer, “The Marine Geography of Southeast Asia”, p. 14.

²⁴ *Ibid.*

²⁵ Brian Morton and Graham Blackmore, “South China Sea”, *Marine Pollution Bulletin* 42(12), 2001, pp. 1238-39.

²⁶ Prescott, *The Maritime Political Boundaries of the World*, p. 210.

²⁷ Valencia, “Oil and Gas Potential, Overlapping Claims, and Political Relations”, p. 173.

²⁸ *Ibid.*

²⁹ Mark J. Valencia, *South-East Asian Seas: Oil Under Troubled Waters. Hydrocarbon Potential, Jurisdictional Issues, and International Relations*, Oxford University Press, Singapore, 1985, p. 75.

³⁰ See list in *ibid.*

³¹ *Ibid.*, p. 80.

is the largest continuous shoal area present³² and may have hydrocarbon potential.³³ Within the overlapping claim area of Malaysia and the Philippines the presence of “elongated sediment pods several kilometers thick” has been revealed.³⁴

Policymakers in the littoral states of the South China Sea, and Asia more broadly, confront a long-term rising demand for energy to power national economic development, the downturn caused by the 1997-1998 financial crisis notwithstanding.³⁵ A number of countries in the region are established oil importers - - Japan, the Philippines, South Korea and Taiwan -- and by 2010-2025 they may be joined by Brunei, Indonesia, Malaysia and Vietnam.³⁶ In this context, much has been made of the oil and gas potential of the South China Sea.³⁷ Brunei, Indonesia, Malaysia and Vietnam are established producers of oil and/or gas from offshore fields in the Sea. In March 1976 the Philippines discovered a large quantity of oil offshore from Palawan in the South China Sea in the Nido Reef area. Commercial production from the field began in 1979.³⁸ In October 2001 the Philippines began gas production from the Malampaya-Camago offshore field near Palawan Island and in December the same year discovered oil in a reservoir beneath the area.³⁹ In April 2002 the Philippines indicated it would submit a claim for an extended continental shelf of 350 nm to the United Nations Commission on the Limits of the Continental

³² *Ibid.*

³³ *Ibid.*, p. 81; Valencia, “Oil and Gas Potential, Overlapping Claims, and Political Relations”, p. 173.

³⁴ *Ibid.*, p. 175.

³⁵ See for example Robert A. Manning, *The Asian Energy Factor. Myths and Dilemmas of Energy, Security and the Pacific Future*, Palgrave, New York and Basingstoke, 2000, pp. 61-74; Kent E. Calder, *Asia's Deadly Triangle. How Arms, Energy and Growth Threaten to Destabilize Asia-Pacific*, Nicholas Brealey Publishing, London, 1996.

³⁶ Manning, *The Asian Energy Factor*, p. 73 and pp. 180-181; “Brunei opens new areas for oil and gas exploration”, *Kyodo News*, 11 November 2000; “Brunei changes economic tack as oil reserves shrink”, *South China Morning Post*, 4 August 2000.

³⁷ Some in the media use, almost mantra-like, the descriptor “the oil-rich Spratlys”. One journalist unswayed by the hype is Barry Wain. See for example, Barry Wain, “The Myth of the ‘Oil-Rich’ Spratlys”, *The Asian Wall Street Journal*, 23 June 2000.

³⁸ Diane C. Drigot, “Oil Interests and the Law of the Sea: The Case of the Philippines”, *Ocean Development and International Law* 12 (1-2), 1982, p. 24.

³⁹ Donnabelle Gatdula, “Malampaya yields oil”, *Philippine Star*, 4 December 2001; Fil Sionil, “Palaw natural gas production starts in October”, *Manila Bulletin*, 12 July 2001. See also Manning, *The Asian Energy Factor*, p. 174 and pp. 180-183; United States Department of Energy, Energy Information Administration, *Country Analysis Briefs: Philippines*, Washington D.C., 2002, <<<http://www.eia.doe.gov/emeu/cabs/philippi.html>>>, accessed 27 August 2002.

Shelf by 2008 with the objective of gaining sovereign rights over prospective oil and gas reserves in the area.⁴⁰

To date, hydrocarbon exploration has concentrated on the Reed Bank basin on the eastern margin of the Spratlys, the central Spratlys area and the Vanguard Bank area on the western side.⁴¹ Estimates of the potential oil and gas reserves in the South China Sea vary enormously. For example, a 1989 Chinese survey of the Spratlys concluded that “the sea floor contained 25 billion m³ of natural gas, 370,000 tons of phosphorous and 105 billion barrels of oil ... The James Shoal area contained another large deposit basin with an estimated 91 billion barrels of oil.”⁴² Other estimates range from six billion barrels of oil equivalent in the Spratlys⁴³ to 28 billion barrels.⁴⁴ A lack of data about the geology of the area and ambiguity in the geographical coverage of the surveys makes corroboration difficult⁴⁵ although analyses by independent institutions support the area’s hydrocarbon potential. A further uncertainty is whether any find would meet the engineering, economic, environmental and legal criteria that major oil companies apply as part of a pre-investment analysis.

Malaysia has proven oil reserves of 3 billion barrels and 74 trillion cubic feet of natural gas.⁴⁶ It has increased its efforts to develop new oil and gas sources in the South China Sea,⁴⁷ including changes to production sharing contracts and offshore

⁴⁰ Christine Herrera, “RP hopes to tap 331 billion barrels of oil”, *Philippine Daily Inquirer*, 27 April 2002.

⁴¹ Mark J. Valencia, “Troubled Waters”, *Bulletin of the Atomic Scientists* 53, 1997, p. 52

⁴² Cited in John W. Garver, “China’s Push Through the South China Sea: The Interaction of Bureaucratic and National Interests”, *The China Quarterly* 132, 1992, p. 1015.

⁴³ A 1995 estimate by Russia’s Research Institute of Geology of Foreign Countries cited in Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 10.

⁴⁴ A 1994 U.S Geological Survey estimate of reserves cited in International Energy Agency, *China’s Worldwide Quest for Energy Security*, OECD/IEA, Paris, 2000, p. 59.

⁴⁵ For example, it is not clear whether a 1994 estimate by China’s Ministry of Geology and Mineral Resources of 225 billion barrels of oil equivalent refers to the Spratlys area only or to the entire South China Sea. Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 9 commenting on an article by Bruce and Jean Blanche, “Oil and Regional Stability in the South China Sea”, *Jane’s Intelligence Review*, November 1995, pp. 511-14.

⁴⁶ United States Department of Energy, Energy Information Administration, *Country Analysis Briefs: Malaysia*, Washington D.C., 2002, <<<http://www.eia.doe.gov/emeu/cabs/malaysia.html>>>, accessed 22 August 2002.

⁴⁷ See for example, “Exxon and Petronas to tap US\$150m gas field”, *The Star*, 22 March 2002; “Exxon, Petronas to invest \$150m”, *Gulf News*, 21 March 2002.

exploration policy in a bid to promote increased deep water exploration.⁴⁸ In July 2002 Murphy Oil, a US exploration company, discovered oil approximately 150 km off the Sabah coast in about 1,340 m of water in the Sabah Trough, the first deepwater oil find in the area. The discovery, named Kikeh after a fish native to Malaysian waters, has recoverable reserves estimated at 400-700 million barrels of oil. This equates to 21 per cent of the country's current oil reserves.⁴⁹ Production may begin in 2006.⁵⁰ The find is an area that both Malaysia and Brunei claim as part of their exclusive economic zone and to which each has let exploration concessions. Malaysia awarded its concession to a subsidiary of Petroliam Nasional Berhad (Petronas), the national oil company, and to Murphy Oil while Brunei selected a French-led consortium comprising Total, Fina and Elf. Another concession may be let to Royal Dutch/Shell.⁵¹ In May 2003 Malaysia proposed a joint development arrangement but Brunei has yet to respond formally.⁵² By the end of August 2003 both Brunei and Malaysia had sent naval vessels to block ships of their respective concessionaires, both Total and Murphy Oil had suspended their work and discussions between Malaysian Prime Minister Mahathir and the Sultan of Brunei, Hassanai Bolkiah, failed to resolve the matter.⁵³

In 1993 China became a net oil importer. Supply countries now include Yeman, Oman, Saudi Arabia, Iran, Indonesia, Angola, Argentina the United States (US) and Russia.⁵⁴ In 2000 China nearly doubled its crude oil import to 70 million

⁴⁸ *Business Times* (Malaysia), June 1993 cited in Alice D. Ba, "China, Oil, and South China Sea: Prospects for Joint Development", *American Asian Review* 12(4), 1994, p. 133.

⁴⁹ S. Jayasankaran and John McBeth, "Oil and Water", *Far Eastern Economic Review*, 3 July 2003, p. 17.

⁵⁰ "Malaysia – Deepwater Sabah revives oil hopes", *Lloyd's List*, 15 April 2003; Noel Tomnay and Helen Munro, "New Southeast Asia discoveries, drilling suggest growth in deepwater exploration", *Offshore*, 1 April 2003.

⁵¹ Jayasankaran and McBeth, "Oil and Water", p. 17; "KL plan to end oilfield row with Brunei", *The Straits Times*, 3 July 2003.

⁵² "Malaysia, Brunei fail to end offshore oil dispute", *Kyodo News*, 23 August 2003; Jayasankaran and McBeth, "Oil and Water", p. 17.

⁵³ *Ibid.*, "Talks between Brunei and Malaysia Inconclusive", *Rigzone*, 25 August 2003; Jasbant Singh, "Sultan of Brunei, Mahathir to hold talks on oil dispute", *Associated Press*, 22 August 2003; "Malaysia, Brunei fail to end offshore oil row", *Reuters*, 22 August 2003; "Malaysia, Brunei discuss territorial dispute after oil exploration suspended", *The Straits Times*, 21 June 2003; "Border dispute hinders Total's work", *The Star*, 17 June 2003.

⁵⁴ Manning, *The Asian Energy Factor*, p. 115; International Energy Agency, *China's Worldwide Quest for Energy Security*, pp. 50-53 and Table A-1 in the Appendix of that work.

tons.⁵⁵ One projection suggests that by 2020 China's oil demand could rise to more than eight million barrels per day to power its economic development, which would make it a major player in world oil markets.⁵⁶ To assure the country's energy security the Chinese government has launched a strategy that includes increasing domestic exploration and production, diversifying supply sources to central Africa, Latin America, southeast Asia and Russia, taking equity in oil fields and pipeline projects in central Asia, southeast Asia, the Middle East and Latin America and committing itself to build a strategic oil reserve of 44 million barrels (equivalent to one month's supply) within the next five years.⁵⁷ Greater use of natural gas in the domestic energy mix is also being encouraged. In August 2002 China awarded a contract to Australia's North West Shelf Venture to supply 3 million tonnes/year of liquefied natural gas (LNG) to Guangdong province over the next 25 years, beginning in 2005. The contract is worth between A\$700 million to A\$1 billion annually. The fuel will be used in power generation.⁵⁸ As part of the deal, the China National Offshore Oil Corporation (CNOOC) will acquire a 25 per cent stake in the China LNG Joint Venture established to operate the contract. In addition, CNOOC will pay US\$348 million for about a 5.3 per cent interest in the upstream production and reserves of the North West Shelf Project.⁵⁹ China extended its commitment to Australian LNG in October 2003 when CNOOC signed an agreement with the Gorgon Venture Participants (comprising Chevron Texaco, Shell and ExxonMobil)

⁵⁵ United Nations Conference on Trade and Development, *Review of Maritime Transport, 2001*, United Nations, New York and Geneva, 2001, p. 7.

⁵⁶ International Energy Agency, *World Energy Outlook 1998 Edition*, OECD/IEA, Paris, 1998, p. 293.

⁵⁷ See Manning, *The Asian Energy Factor*, p. 86; International Energy Agency, *China's Worldwide Quest for Energy Security*, p. 10; "Four sites chosen for strategic oil reserve", *Business Daily Update*, 11 April 2003; Anne Hyland, "China buys into Asian oil fields", *Australian Financial Review*, 14 March 2003; Hamish McDonald, "China's oil future includes buying more foreign reserves", *Sydney Morning Herald*, 19 September 2002; David Lague, "China. The Quest for Energy to Grow", *Far Eastern Economic Review*, 20 June 2002, pp. 14-18; Amy Myers Jaffe and Steven W. Lewis, "Beijing's Oil Diplomacy", *Survival 4(1)*, 2002, pp. 115-34; "China's Oil: Taken hostage", *Economist*, 14 July 2001, pp. 28-29; Erica Strecker Downs, *China's Quest for Energy Security*, RAND, Santa Monica, 2000; John Wong, *China's New Oil Development Strategy Taking Shape*, East Asian Institute Occasional Paper No. 7, World Scientific Publishing and Singapore University Press, Singapore, 1998.

⁵⁸ "Australia Wins Contract to Supply Gas to China", Joint Media Release, The Hon. Alexander Downer, MP, Minister for Foreign Affairs, Australia, 8 August 2002, <<http://www.foreignminister.gov.au/releases/2002/joint_gas.html>>, accessed 9 August 2002; "China LNG Delivers Australia's Largest Ever Trade Deal", Media release, The Hon. Mark Vaile, MP, Minister for Trade, Australia, 8 August 2002; <<http://www.trademinister.gov.au/releases/2002/mvt094_02.html>>, accessed 9 August 2002.

⁵⁹ China National Offshore Oil Corporation, Press Release, "CNOOC Limited Acquires a Stake in the Australian North West Shelf", China National Offshore Oil Corporation, 16 May 2003.

to take a 12.5 per cent stake in the proposed development of the Gorgon gas field at Barrow Island off Western Australia's north-west coast. CNOOC also signaled its intention to purchase up to 100 million tonnes of LNG from the Gorgon field over 25 years from 2008, valued at approximately A\$30 billion.⁶⁰

The argument that a desire to reduce its oil import dependence explains China's assertive behaviour in the South China Sea is tempered by two considerations. First, the potential of South China Sea oil and gas has to be placed in the broader context of the concrete measures the Chinese government has implemented to assure the country's energy security (see above).

Second, even if the considerable political, legal, technical and economic challenges of oil and gas development in the contested areas of the South China Sea were overcome the production volume might only be a modest offset against, rather than substitute for, imported sources. Robert Manning suggests, for example, that any production from a significant find in the South China Sea is only likely to be a marginal contribution to China's oil import demand in 2020. At that time China's projected total demand may be within the range of 6-9 million barrels per day. This compares with a highly optimistic production level of 500,000 barrels/day from a field in the Spratlys.⁶¹

For China and the other claimants, oil and gas production from fields in the deeper parts of the Spratlys is alluring as a means to offset current and projected oil import dependence. In practice, a number of caveats apply. They include uncertainty about estimates of the total oil and gas reserves present, the commercially viable volume, the opportunity cost of developing a new field compared to purchasing stocks in the international oil market, technical and environmental challenges of hydrocarbon development in deep water and the anticipated share of different fuels in the national energy structure.

⁶⁰ "China's CNOOC to buy stake in Australia LNG field - Source", *China Daily*, 24 October 2003; Gorgon Venture Participants, "CNOOC and Gorgon Sign LNG Deal. Media Statement", 24 October 2003, <<http://www.gorgon.com.au/mediarelease_241003.html>>, accessed 27 October 2003.

⁶¹ Manning, *The Asian Energy Factor*, p. 190.

(ii) Fisheries

Fish provide an important source of protein to local communities in southeast Asia, with per capita fish consumption in all but Cambodia exceeding the world average.⁶² In China per capita fish consumption has increased rapidly over the last 20 years, highlighting the growing role of fish as food.⁶³ In 1996, the Philippines ranked thirteenth among the world's top 51 fish producing countries, with total production of 1.8 million tonnes (or 1.9 per cent of the world catch of 94.6 million tonnes that year).⁶⁴ Production from Malaysia's marine fishery in 1995 was just over 1.1 million tonnes, valued at 2.7 million ringgit.⁶⁵ Revenue from fishing contributes 8 to 10 percent of Sabah's annual gross domestic product and compared to other Malaysian states it is a fish exporter.⁶⁶ Figures for total marine fish production, marine fish export value and fish consumption for several of the South China Sea littoral states are shown in Table 2.

The South China Sea is one of the world's richest commercial fisheries, with pelagic species being the most important.⁶⁷ Among the world's fishing zones defined by the United Nations Food and Agriculture Organisation (FAO) the area encompassing the South China Sea (zone 71) ranks fourth in terms of total marine production.⁶⁸ Citing estimates produced by others, John McManus notes that the annual catch from the waters of the Sabah-Palawan area of the Spratlys is about 10,000 tons, valued at approximately US\$15 million.⁶⁹ Target species in the South China Sea include scads, mackerels, tuna (skipjack and yellowfin), sardines,

⁶² See Kuan-Hsiung Wang, "Bridge over troubled waters: fisheries cooperation as a resolution to the South China Sea conflicts", *The Pacific Review* 14(4), 2001, p. 535.

⁶³ United Nations, Food and Agriculture Organisation, *The State of World Fisheries and Aquaculture 2000*, Food and Agriculture Organisation, Rome, 2000, <<<http://www.fao.org/DOCREP/003/X8002E/x8002e04.htm>>>, accessed 21 May 2001.

⁶⁴ United Nations, Food and Agriculture Organisation, "The Republic of the Philippines", Food and Agriculture Organisation, Rome, <<<http://www.fao.org/fi/fcp/en/PHL/profile.htm>>>, accessed 22 August 2002.

⁶⁵ Mohd. Mazlan Jusoh, Keynote Address on "Sustainable Development of the Mariculture Industry in Malaysia, *Mariculture Industry in Malaysia*, Maritime Institute of Malaysia, Kuala Lumpur, 1997, p. 1.

⁶⁶ "Marine Resources Play Vital Role in Sabah's GDP", *Bernama*, 27 February 2003.

⁶⁷ Wang, "Bridge over troubled waters", pp. 534-35.

⁶⁸ Daniel Y. Coulter, "South China Sea Fisheries: Countdown to Calamity", *Contemporary Southeast Asia* 17(4), 1996, p. 375.

⁶⁹ John W. McManus, 'The Spratly Islands: A Marine Park?', *Ambio* 23(3), 1994, p. 182.

anchovies and shrimps.⁷⁰ Most of the fishery resources in the area are either shared stocks or highly migratory species.⁷¹ This makes adherence by the littoral states to the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) highly relevant. As of 19 August 2003, China had made a declaration on the agreement while Indonesia and the Philippines had signed it.⁷²

Table 2: Selected Fisheries Statistics

Country	Total marine fish production, 1997 (Mill. tonnes)	Value of total marine fish exports, 1997 (US\$ mill.)	Per capita supply, 1999 (kg/yr)
Brunei	0.004	Not recorded	21.4
China (excludes HK/Macau)	10.7	313.9	25.3
Malaysia	0.9	12.5	51.7
Philippines	1.5	16.2	29.1
Singapore	0.7	31.4	Not recorded
Thailand	2.2	27.3	32.2
Vietnam	0.7	12.8	17.2
World	72.5	3.7 billion	15.8

Source: Compiled from FAOSTAT Database, “Fishery data, Primary products”, <<<http://apps.fao.org/cgi-bin/nph-db.pl>>>, accessed 28 May 2001.

Over time fishing pressures have intensified and fishermen are working farther offshore, increasing incidences of alleged poaching and illegal fishing in

⁷⁰ Wang, “Bridge over troubled waters”, p. 536.

⁷¹ *Ibid.*

⁷² From data prepared by the United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, <<http://www.un.org/Depts/los/reference_files/status2003.pdf>>, accessed 17 October 2003.

waters of neighbouring states.⁷³ Malaysia, for example, loses approximately one billion ringgit of fish annually to foreign fishermen poaching in its territorial waters. In response, the government approved extra patrols in the South China Sea and the Straits of Malacca.⁷⁴ To address unintentional incursions into foreign territorial waters Malaysia's foreign minister mooted the installation of global positioning system (GPS) equipment on Malaysian trawlers.⁷⁵ A Chinese survey indicated that fishing harvests north of the Spratlys have been declining and that the resource may be depleted within a decade because of illegal and over-fishing.⁷⁶

In response to the problem of too many fishermen chasing too few fish some countries have introduced management measures. Malaysia reintroduced its vessel buyback scheme to reduce the fleet size.⁷⁷ Annually since 1999 China has issued a moratorium prohibiting its fishermen from fishing in parts of the South China Sea, Bohai Sea, East China Sea and Yellow Sea between June and August.⁷⁸ Thus unilateral action has been protested by other South China Sea claimants.⁷⁹

Competition over the South China Sea's natural resources does not preclude co-operation in addressing shared environmental threats relating to sustainable fisheries, protection of marine biodiversity and combating the threat of marine

⁷³ See for example, "Philippine navy nabs 21 Vietnamese fishermen", *Associated Press*, 26 May 2003; "Brunei holds 17 Vietnamese for alleged fisheries offences", *Borneo Bulletin*, 13 May 2003. Reprinted in *BBC Monitoring Asia Pacific*, 13 May 2003; "Navy Says PRC, SRV Boats Intruded into Philippines-controlled Waters in Spratlys", *Philippine Daily Inquirer*, 23 April 2001; Michael Dwyer, "Tensions Soar Over Disputed Spratly Isles", *Australian Financial Review*, 8 February 2000; Geoffrey Till, "China, Its navy and the South China Sea", *Royal United Services Institute Journal* 141(2), 1996, p. 47.

⁷⁴ Farush Khan, "RM1b revenue loss sparks war on illegal fishing", *The Straits Times*, 27 February 2002.

⁷⁵ "FM wants M'sian trawlers to install GPS to avoid encroachment", *Bernama*, 19 July 2001.

⁷⁶ Chien Chung, "Economic Development of the Islets in the South China Sea", Paper presented at the South China Sea Conference sponsored by the American Enterprise Institute, 7-9 September 1994, p. 21 cited in Coulter, "South China Sea Fisheries", p. 378.

⁷⁷ United Nations, Food and Agriculture Organisation, *Review of the State of the World Fishery Resources: Marine Fisheries, Western Central Pacific*, FAO Statistical Area 71, FAO Fisheries Circular No. 920, Rome, 1997, <<<http://www.fao.org/fi/publ/circular/c920/area71tf.asp>>>, accessed 21 May 2001.

⁷⁸ See for example, "Fishing ban extended to boost stocks in key areas", *South China Morning Post*, 8 May 2003; "China to begin summer fishing ban", *Xinhua*, 7 May 2003; "China – Fourth Fishing Ban on South China Sea to Begin", *Xinhua* report reprinted in *Bernama*, 29 May 2002; Zhao Huanxin, "Plenty More Fish in South China Sea", *China Daily*, 2 August 2000; "China: Fishing Ban Proves Effective", *China Daily*, 31 July 1999.

⁷⁹ See for example, "In Brief. Vietnam has protested China's ban on fishing", *Saigon Times*, 22 May 2003; "Spokesperson asserts Vietnam's "indisputable sovereignty" over Spratly islands", Voice of Vietnam text web site report, 31 May 2002. Reprinted in *BBC Worldwide Monitoring*, 3 June 2002.

pollution. Illustrating the extent of these threats are recent findings that 82 per cent of the area's reefs are degraded beyond healthy levels, almost 70 per cent of the original mangrove cover has been lost and pollution from land-based and marine sources is becoming serious.⁸⁰ In response, in March 2001 the United Nations Environment Programme (UNEP) launched a regional environment project covering the South China Sea and the Gulf of Thailand. The five-year, US\$32 million project is funded by the Global Environment Facility and the governments of Cambodia, China, Indonesia, Malaysia, the Philippines, Thailand and Vietnam. An action programme and the establishment of a regional environmental management framework are priority initiatives.⁸¹ Another co-operative environmental programme is the South China Sea Monsoon Experiment. This brings together scientists from the six governments with claims in the South China Sea and colleagues from Indonesia, Singapore and Thailand to examine the timing, duration and intensity of the summer monsoon in order to improve the accuracy of regional climate and weather models.⁸² Both of these initiatives are consistent with Article 123 of the 1982 United Nations Convention on the Law of the Sea (LOSC). This enjoins states bordering an enclosed or semi-enclosed sea to co-operate with each other directly or through an appropriate regional organisation in the management, conservation, exploration and exploitation of the living resources present and the protection and preservation of the marine environment, as well as co-ordinating their scientific research policies and, where appropriate, carrying out joint research programmes.

Strategic Significance

Lim Joo-Jock suggests that the South China Sea is the core of a geostrategic region.⁸³ In his view the South China Sea serves three strategic functions. First, in

⁸⁰ Barry Wain, "The Sea: Asia's Depreciating Asset", *The Asian Wall Street Journal*, 8 June 2001. See also David Rosenberg and Miranda Hillyard, "Coral Reef Pollution in the South China Sea", <<http://www.middlebury.edu/SouthChina_Sea/miranda/index.html>>, accessed 23 July 2001; World Resources Institute, "Reefs at Risk: East Asia", <<<http://www.igc.apc.org/wri/indictrs/reefasia.htm>>>, accessed 23 July 2001.

⁸¹ "UNEP Launches Regional Marine Environment Project", *Xinhua*, 28 March 2001.

⁸² Dennis Normile and Li Hui, "Science overrides politics for East Asian monsoon study", *Science* 280(5362), 1998, p. 373; 'Experiment helps track monsoon', *China Daily*, 18 April 2001.

⁸³ Lim Joo-Jock, "The South China Sea: Changing Strategic Perspectives" in Chia Lin Sien and Colin MacAndrews (eds), *Southeast Asian Seas. Frontiers for Development*, McGraw-Hill International Book Co., Singapore, 1981, p. 236.

geostrategic terms the Sea's ingress and egress points enable access to a maritime region in which land and sea are closely linked as well as occupying about the same-sized area.⁸⁴ Historically, the Sea has provided an entry point into a region perceived to be rich in resources and it has facilitated seaborne trade links between East Asia and Europe and military advantage in time of war.⁸⁵ For example, during the Second World War Japan used Itu Aba as a submarine base from which to launch operations.⁸⁶ During the Cold War the two superpowers found the South China Sea and its entry points provided useful, although not essential, transit for their forces in and between the Pacific and Indian Oceans.⁸⁷ In transiting to bases in the far east, naval vessels of the Soviet Union used Macclesfield Bank as a mid-sea anchorage.⁸⁸ On either side of the South China Sea each superpower maintained military bases: the US at Clark airfield and Subic Bay in the Philippines and the Soviets at Vietnam's Cam Ranh Bay. The two rivals also regarded the Sea as a "route to succour allies and bring naval influence to bear on enemies and to discourage any hostile acts by potential foes."⁸⁹

Despite the demise of superpower rivalry, Lim's identification of the value of transit passage through the Sea and the strategic advantages of control over it continues to hold. Freedom of navigation and of overflight in the South China Sea and the straits that adjoin it (Malacca, Sunda, Lombok and Ombak-Wetar) are a shared interest of regional and extra-regional states.⁹⁰ Influence over or control of the area would enable a wide 'footprint' to be cast in terms of surveillance and interdiction activities as well as the possibility to threaten to or disrupt regional sea lines of communication (SLOCs). It has been suggested, for example, that China is

⁸⁴ *Ibid.*, p. 226.

⁸⁵ *Ibid.*, p. 227.

⁸⁶ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 21. On hydrographic surveying in the South China Sea by Japan between 1936 and 1941 see David Hancox and Victor Prescott, *Secret Hydrographic Surveys in the Spratly Islands*, ASEAN Academic Press, London, 1999, pp. 113-131.

⁸⁷ Lim, "The South China Sea: Changing Strategic Perspectives", p. 228. See also Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea", *Ocean Development and International Law* 25(1), 1994, p. 61; Mark J. Valencia, "Asia, the Law of the Sea and international relations", *International Affairs* 73(2), 1997, p. 275.

⁸⁸ James A. Gregor, *In the Shadow of Giants: The Major Powers and the Security of Southeast Asia*, Hoover Institution Press, Stanford, 1989, p. 88 cited in Duk-Ki Kim, *Naval Strategy in Northeast Asia. Geo-strategic Goals, Policies and Prospects*, Frank Cass, London and Portland, 2000, p. 69.

⁸⁹ Lim, "The South China Sea: Changing Strategic Perspectives", p. 229.

⁹⁰ Valencia, "Asia, the Law of the Sea and international relations", p. 274.

likely to maintain its presence in the Spratlys to influence use of the international sea lanes when and if necessary.⁹¹

The second strategic function of the South China Sea relates to its location astride major regional SLOCs. By volume, over half of the world's supertanker traffic and merchant shipping passes through the South China Sea region each year.⁹² It is an important 'maritime bridge' connecting Asia to markets and raw materials suppliers in Europe, South Asia, the Middle East, North America and Australasia as well as facilitating intra-Asian trade. Unhindered movement of oil shipments from the Middle East to northeast Asia is important from both an energy and economic security perspective. For example, Japan's dependence on open SLOCs is high given that 75 to 80 per cent of its oil imports from the Middle East are transported across the South China Sea.⁹³ About 70 per cent of Taiwan's oil and raw materials imports are transported across the sealanes of the South China Sea.⁹⁴ South Korea also has an interest in open SLOCs given that it imports most of its oil supply. More generally, "[f]ive of the top ten petroleum product routes in the world involve shipments to or within Asia."⁹⁵ The region also accounts for significant volumes of iron ore, coal and grain shipments.⁹⁶

The Malacca, Sunda and Lombok straits are the main entry points for merchant ships transiting to and from Asia to the Middle East, Africa and Europe (see Figure 5). While closure of these shipping lanes would not be catastrophic because alternative routes exist, the extra sailing time involved has cost, convenience and fleet capacity implications.⁹⁷ In this regard, "[t]he factor that converts a *localized* maritime concern (SLOC closure) to a *global* economic event (freight rate crisis *cum*

⁹¹ Daojiong Zha and Mark J. Valencia, "Mischief Reef: Geopolitics and Implications", *Journal of Contemporary Asia* 31(1), 2001, p. 92.

⁹² United States Department of Energy, Energy Information Administration, *South China Sea Region*, Washington D.C., 2002, <<<http://www.eia.doe.gov/emeu/cabs/schina.html>>>, accessed 14 February 2003.

⁹³ United States Department of Energy, Energy Information Administration, *Japan*, Washington D.C., 2001, <<<http://www.eia.doe.gov/emeu/cabs/japan2.html>>>, accessed 3 June 2001.

⁹⁴ Cheng-yi Lin, "Taiwan's South China Sea Policy", *Asian Survey* XXXVII(4), 1997, p. 338.

⁹⁵ United Nations Conference on Trade and Development, *Review of Maritime Transport, 2001*, p. 90.

⁹⁶ *Ibid.*, pp. 7-9; United Nations Conference on Trade and Development, *Review of Maritime Transport, 2002*, United Nations, New York and Geneva, 2002, pp. 7-12.

⁹⁷ John H. Noer, *Chokepoints: Maritime Economic Concerns in Southeast Asia*, National Defense University Press, Washington D.C., 1996, p. 4 and p. 33.

capacity shortfall) is the large volume of shipping and world trade transiting the South China Sea.”⁹⁸ (emphasis in original.)

Figure 5: The Strategic Chokepoints of the Malacca, Sunda and Lombok Straits

Source: John H. Noer, *Chokepoints: Maritime Economic Concerns in Southeast Asia*, National Defense University Press, Washington D.C., 1996, p. 3.

⁹⁸ *Ibid.*, p. 33.

Within the South China Sea, established shipping routes lie to the east and west of the Spratlys, avoiding the middle area marked on navigation charts as the “Dangerous Ground”. From Singapore mariners are advised to follow one of two routes to Hong Kong, Shanghai and other northern ports. The eastern route parallels the Sarawak-Brunei-Sabah coast and then enters the Palawan Passage before heading to Manila and then across to Hong Kong. An alternative western route passes between Macclesfield Bank and the Paracel Islands.⁹⁹

The Southeast Asian context of the South China Sea is the third strategic function identified by Lim.¹⁰⁰ He suggests that the Sea can be considered a break between the land powers of the northern part of Southeast Asia and the south.¹⁰¹ Viewed in this context, the peninsular parts of Thailand and Malaysia form a strategic land ridge¹⁰² leading into the “heart of maritime Southeast Asia.”¹⁰³

A further strategic function of the South China Sea concerns the possibility of using some of the features as basepoints for claiming extended maritime jurisdiction over the waters and resources pursuant to the LOSC.¹⁰⁴ The convention distinguishes three types of seabed elevations: islands, low-tide elevations and elevations that are never above sea level.¹⁰⁵ All three types are found in the Spratly Islands and the South China Sea more broadly.¹⁰⁶ Under Article 121 of the convention an island can generate the full suite of maritime zones measured from coastal baselines, that is a territorial sea, a contiguous zone, an exclusive economic zone (EEZ) and continental shelf. By contrast, rocks that cannot sustain human habitation or economic life of their own cannot generate an EEZ or continental shelf, only a territorial sea and a

⁹⁹ Hydrographer of the Navy, *Ocean Passages for the World*, Third Edition, United Kingdom Hydrographic Office, Taunton, 1973, p. 106.

¹⁰⁰ Lim, “The South China Sea: Changing Strategic Perspectives”, p. 226 and pp. 229-30.

¹⁰¹ *Ibid.*, p. 229.

¹⁰² Wu Yuan-Li, *The Strategic Land Ridge*, Hoover Institution Press, Stanford, 1975 cited in *ibid.*

¹⁰³ *Ibid.*, p. 230.

¹⁰⁴ Gerardo M.C. Valero, “Spratly archipelago dispute. Is the question of sovereignty still relevant?”, *Marine Policy* 18(4), 1994, p. 316.

¹⁰⁵ Alex G. Oude Elferink, “The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?”, *Ocean Development and International Law* 32(2), 2001, p. 177.

¹⁰⁶ *Ibid.*, pp. 177-78.

contiguous zone. The term “island” is defined in paragraph 1 of Article 121;¹⁰⁷ the term “rock” is undefined in the convention. The island-rock definitional problem is well recognised,¹⁰⁸ including in the case of the South China Sea.¹⁰⁹

An EEZ and continental shelf attaches to some of the islands in the South China Sea,¹¹⁰ which may motivate the states involved in the dispute to retain or seek to acquire these features.¹¹¹ Chapter 4 describes the different methods of territorial acquisition under international law.

3.2 Sovereignty Claims

This section describes the sovereignty claims of the six governments directly involved in the Spratly Islands dispute. For convenience, the claimants are considered in alphabetical order.

Brunei

In 1988 Brunei published a map showing a claim to a rectangular shaped area extending from its coast to Rifleman Bank,¹¹² a feature occupied by Vietnam. Within this area lies Louisa Reef (see Figure 6). It is unclear whether Brunei claims sovereignty over this feature; some scholars argue in the affirmative,¹¹³ while others

¹⁰⁷ “An island is a naturally formed area of land, surrounded by water, which is above water at high tide.” United Nations Convention on the Law of the Sea, Article 121, paragraph 1, <<http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>>, accessed 23 July 2003.

¹⁰⁸ See for example, Jon M. van Dyke and Robert A. Brooks, “Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources”, *Ocean Development and International Law* 12(3-4), 1983, pp. 265-300; Clive R. Symmons, *The Maritime Zones of Islands in International Law*, Martinus Nijhoff, The Hague, 1979.

¹⁰⁹ See for example, Oude Elferink, “The Islands in the South China Sea”, pp. 173-74; Marius Gjetnes, “The Spratlys: Are They Rocks or Islands?”, *Ocean Development and International Law* 32(2), 2001, pp. 191-204; Jon M. van Dyke and Dale L. Bennett, “Islands and the Delimitation of Ocean Space in the South China Sea” in Elizabeth Mann Borgese, Norton Ginsburg and Joseph R. Morgan (eds), *Ocean Yearbook 10*, The University of Chicago Press, Chicago and London, 1993, pp. 54-89.

¹¹⁰ Oude Elferink, “The Islands in the South China Sea”, pp. 182.

¹¹¹ *Ibid.*, p. 183.

¹¹² Cordner, “The Spratly Islands Dispute and the Law of the Sea”, p. 68.

¹¹³ Haller-Trost states that Malaysia and Brunei dispute ownership of the feature. See Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 189 and p. 225.

Figure 6: Brunei's Maritime Claim in the South China Sea

Source: R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective*, Kluwer Law International, London, 1998, p. 501.

disagree.¹¹⁴ There is consensus, however, that Malaysia also has a claim to the feature. The roots of Brunei's eastern and western boundary delimitations with Malaysia lie in the North Borneo (Definition of Boundaries) Order in Council No. 1517 and the Sarawak (Definition of Boundaries) Order in Council No. 1518 of 11 September 1958.¹¹⁵ Brunei's claim incorporating Rifleman Bank appears to be based on an extended continental shelf of 350 nm.¹¹⁶ If so then as a party to the LOSC Brunei must comply with the procedure set out in Article 76 concerning the definition of the continental shelf.¹¹⁷ This includes a requirement to submit information on an extended continental shelf claim to the Commission on the Limits of the Continental Shelf established under the convention. A complicating factor is that the Commission will not consider any submission unless all states involved in a continental shelf delimitation or territorial dispute consent.¹¹⁸ A further difficulty with Brunei's apparent extended shelf claim is that "the East Palawan Trough terminates the natural prolongation of the continental shelf 60 to 100 miles off Brunei."¹¹⁹

Haller-Trost suggests Louisa Reef is probably a rock rather than a low-tide elevation.¹²⁰ It is unable to sustain human habitation or economic life on its own in its existing state.¹²¹ Brunei has not allocated a territorial sea to the reef in its maps.¹²²

¹¹⁴ Citing a 27 January 1992 report in the Borneo Bulletin that was in turn cited by a confidential US report, Greg Austin writes "In 1992, Brunei made plain that it had no territorial sovereignty claim over Louisa Reef, the one land feature lying in areas it claims as resource zones which are disputed with other states." Yann-huei Song writes that "Brunei does not claim territorial sovereignty over any of the islands in the area [South China Sea]" although in 1984 it "declared an EEZ that includes Louisa Reef". See Austin, *China's Ocean Frontier*, p. 212; Yann-Huei Song, *United States and Territorial Disputes in the South China Sea: A Study of Ocean Law and Politics*, Maryland Series in Contemporary Asian Studies, Number 1-2002 (168), School of Law, University of Maryland, Baltimore, 2002, p. 72.

¹¹⁵ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 45. See also the detailed discussion on pp. 44-66 and pp. 367-68 therein.

¹¹⁶ Cordner, "The Spratly Islands Dispute and the Law of the Sea", p. 68.

¹¹⁷ Brunei ratified the LOSC on 5 November 1996. Previously in 1982 it had claimed a 200 nm fishing zone and in 1984 a 200nm EEZ.

¹¹⁸ United Nations, Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/3/Rev3, Annex I, paragraph 5(a), 6 February 2001, <<<http://odes-dds-ny.un.org/doc/UNDOC/GEN/N01/239/51/PDF/N0123951.pdf?OpenElement>>>, accessed 23 July 2003.

¹¹⁹ Cordner, "The Spratly Islands Dispute and the Law of the Sea", p. 68.

¹²⁰ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 225.

¹²¹ *Ibid.*

¹²² *Ibid.*

China

China claims “indisputable” sovereignty over the Paracel and Spratly Islands because it was the first to discover, name, exercise jurisdiction over, develop and undertake economic activities there.¹²³ In the Spratlys its claim covers all the features present as a single entity.¹²⁴

In support of its claim to both island groups, China cites historical evidence beginning with voyages by its ships across the South China Sea 2,000 years ago in the Han dynasty (206-220 A.D.) and continuing during the T’ang (618-960 A.D.) and Ming dynasties (1368-1644).¹²⁵ Citing a number of sources, Valencia, van Dyke and Ludwig note that intermittent reference to, and maps of, the islands and other features appear in Chinese records from the 12th to 17th centuries.¹²⁶ As Samuels points out, however, these references are likely to relate to the Paracel Islands and Macclesfield Bank rather than the Spratlys.¹²⁷ In particular, the traditional shipping route from China’s southernmost tributary and trading partners was along the western and southwestern edge of the South China Sea linking the Hainan-Paracels corridor with the Vietnamese coast and thence to Singapore or Sumatra.¹²⁸ “In effect, the traditional route avoided or, at least, skirted, the Spratly Islands on the west.”¹²⁹ A 1730 text written by Ch’en Lun-Chiung, the *Hai-kuo wen-chien lu* (Sights and Sounds of the Maritime Countries), included a description of an area called Ch’i-chou Yang (Sea of Seven Islands) to the east of which is found the *Ch’ien-li shih-*

¹²³ Ministry of Foreign Affairs of the People’s Republic of China, *Historical Evidence to Support China’s Sovereignty over Nansha Islands*, <<<http://www.fmprc.gov.cn/eng/5765.html>>>, accessed 3 May 2001; Ministry of Foreign Affairs of the People’s Republic of China, *Jurisprudential Evidence to Support China’s Sovereignty over the Nansha Islands*, <<<http://www.fmprc.gov.cn/eng/5773.html>>>, accessed 3 May 2001; Ministry of Foreign Affairs of the People’s Republic of China, *Its Origin*, <<<http://www.fmprc.gov.cn/eng/5767.html>>>, accessed 3 May 2001; China’s Indisputable Sovereignty Over the Xisha and Nansha Islands, *Beijing Review*, 18 February 1980, pp. 15-24.

¹²⁴ Austin, *China’s Ocean Frontier*, p. 131.

¹²⁵ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 20; Daniel J. Dzurek, *The Spratly Islands Dispute: Who’s On First?*, Maritime Briefing 2(1), International Boundaries Research Unit, University of Durham, Durham, 1996, p. 8. The voyages of Admiral Zheng Ho between 1403 and 1433 were indicative of the vitality and geographic reach of China’s maritime interests during the Ming Dynasty. By the end of the 15th Century, however, official support for maritime exploration terminated because of factional disputes within the regime, the high cost of building and maintaining the fleet and other economic factors. See Marwyn S. Samuels, *Contest for the South China Sea*, Methuen, New York and London, 1982, pp. 20-21, p. 24 and pp. 31-32.

¹²⁶ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 20.

¹²⁷ Samuels, *Contest for the South China Sea*, p. 23.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

t'ang (Thousand li Bank).¹³⁰ The latter, in Samuels' view, can be interpreted as the first Chinese reference to the Spratly Islands.¹³¹ Evidence of a Chinese presence in the Spratlys from the 19th Century includes trade with fishermen conducted by persons from Hainan Island and the unearthing of burial markers and personal effects.¹³²

Samuels suggests that an implicit claim to the Spratlys by China might date from 1883 when the government officially protested a German expedition, even though it did not represent a clear statement of Chinese sovereignty.¹³³ He goes on to note that the earliest official Chinese claim to and international agreement on the South China Sea islands was the Convention on the Delimitation of the Frontier between China and Tonkin signed between France and China on 26 June 1887.¹³⁴ Chinese officials have argued that the inference of the delimitation set out in the convention is that the Paracel and Spratly Islands were part of China and recognised as such by France.¹³⁵ Monique Chemillier-Gendreau counters this, suggesting the convention relates to the land territories,¹³⁶ the attribution of the coastal islands of the two states was a supplemental purpose and also at that time claims to maritime space were conventionally limited to a territorial sea while concepts of a contiguous zone, fisheries zone and continental shelf date only from post-World War II,¹³⁷ the frontier delimited was between China and that distinct area referred to by France as Tonkin¹³⁸ and the meridian line has no terminal point specified in the convention because its length relates to the existence of the coastal islands.¹³⁹ Furthermore she notes that neither side brought up the issue of the Paracels and Spratlys during the

¹³⁰ *Ibid.*, p. 34.

¹³¹ *Ibid.*, p. 36.

¹³² Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 21.

¹³³ Samuels, *Contest for the South China Sea*, p. 52. See also Teh-Kuang Chang, "China's Claim of Sovereignty over Spratly and Paracel Islands: A Historical and Legal Perspective", *Case Western Reserve Journal of International Law* 23(3), 1991, p. 405, p. 411 and p. 413.

¹³⁴ Samuels, *Contest for the South China Sea*, p. 52.

¹³⁵ *Ibid.*, p. 53.

¹³⁶ Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, Kluwer Law International, The Hague, 2000, p. 83. This is the English translation of her book originally published in French as *La souveraineté sur les archipels paracels et spratleys*, Editions L'Harmattan, Paris, 1996.

¹³⁷ *Ibid.*, p. 84.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

negotiations.¹⁴⁰ She concludes that the 1887 convention “does not deal with the archipelagos and could therefore have no legal consequences for their status, even indirectly.”¹⁴¹ Indeed, her view is that in the 1880s “Vietnamese title was real and effective. It was not challenged by China either on the ground or at the diplomatic level.”¹⁴²

After the convention was concluded neither France nor China exhibited interest in the Paracels or Spratlys.¹⁴³ Neither an 1894 Chinese map of the unified empire nor a 1906 Chinese geography textbook show the Spratlys as belonging to China.¹⁴⁴ Chemillier-Gendreau concludes that by the late 19th Century China had “voiced no clear claim to either [the Paracels or Spratlys] archipelago”¹⁴⁵ and even at the beginning of the 20th Century it did not demonstrate an interest in the islands.¹⁴⁶ In the 1920s both France and Japan were active in the Paracels and by 1927 their competition extended to the Spratlys, much to China’s concern.¹⁴⁷ On 23 September 1930 France issued a communiqué that it claimed ownership of Spratly Island and Amboyna Cay¹⁴⁸ and proceeded to survey them and other features.¹⁴⁹ On 26 July 1933 a notice in France’s *Journal Officiel* identified the islets claimed¹⁵⁰ asserting they were *terra nullius*.¹⁵¹ The claimed features were Spratly Island, Amboyna Cay, Itu Aba, Loi Ta, Thitu and Northeast Cay and Southwest Cay (the latter two are located in the same feature).¹⁵² Japan was the only country to lodge a protest.¹⁵³

On 30 March 1939 Japan occupied the Spratly Islands and on 9 April the same year Tokyo announced its complete occupation of Pratas Island, the Paracels

¹⁴⁰ *Ibid.*, p. 85.

¹⁴¹ *Ibid.*, p. 95.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, p. 85.

¹⁴⁴ *Ibid.*, p. 75.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, pp. 97-98.

¹⁴⁷ Samuels, *Contest for the South China Sea*, pp. 53-63.

¹⁴⁸ Hancox and Prescott, *Secret Hydrographic Surveys in the Spratly Islands*, p. 84; Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 111.

¹⁴⁹ Hancox and Prescott, *Secret Hydrographic Surveys in the Spratly Islands*, pp. 85-87.

¹⁵⁰ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 111; Samuels, *Contest for the South China Sea*, p. 64.

¹⁵¹ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 111.

¹⁵² Austin, *China’s Ocean Frontier*, p. 134.

¹⁵³ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 111.

and the Spratlys.¹⁵⁴ France protested the Japanese action in the Spratlys but inexplicably not the Paracels.¹⁵⁵ At the end of the Second World War the status of the South China Sea islands was confused. While the February 1946 Treaty of Chung-King authorised the Republic of China's Chiang Kai-shek to occupy the Paracels he unilaterally extended this to include the Spratlys.¹⁵⁶ In October 1946 a French warship, the *Chevreud*, reportedly landed crew on Spratly Island and Itu Aba Island, placing a stone marker on the latter to denote Paris' ownership.¹⁵⁷ The Chinese government responded by sending a four-boat force to take possession of both the Paracels and Spratlys and in December 1947 it formally incorporated the four island groups (Paracels, Spratlys, Pratas Island, Macclesfield Bank) into Kuangtung Province.¹⁵⁸ France did not protest this action.¹⁵⁹

In 1947 the Chinese government published a map showing a U-shaped line that stretches from offshore Vietnam south to near the Natuna Islands before turning back to parallel the coast offshore from Sarawak, Brunei and Sabah, Palawan Island, Luzon and finally through the Bashi Channel between Taiwan and the Philippines¹⁶⁰ (see Figure 7). It is unclear whether the line denotes a claim to the waters and resources enclosed therein; Beijing has never given an official explanation of the line, creating ambiguity about its meaning and co-ordinates.¹⁶¹

Chi-kin Lo suggests the first public sign of the PRC's claim to sovereignty over the Paracel and Spratly Islands dates from a May 1950 article in the *People's Daily* criticising Philippines President Elpidio Quirino for implying the Spratlys belonged to his country.¹⁶² The government subsequently announced its official

¹⁵⁴ Samuels, *Contest for the South China Sea*, p. 64.

¹⁵⁵ *Ibid.*, p. 65.

¹⁵⁶ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, pp. 115-16.

¹⁵⁷ Samuels, *Contest for the South China Sea*, pp. 75-76.

¹⁵⁸ *Ibid.*, p. 76.

¹⁵⁹ *Ibid.*, p. 77.

¹⁶⁰ Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea", *The International Journal of Marine and Coastal Law* 14(1), 1999, pp. 30-34.

¹⁶¹ *Ibid.*, p. 36 and p. 51; Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, pp. 24-28; Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, pp. 329-32; Barry Wain, "Beijing Should Erase the 'U-shaped Line'", *The Asian Wall Street Journal*, 26 May 2000.

¹⁶² Chi-kin Lo, *China's Policy Towards Territorial Disputes. The Case of the South China Sea Islands*, Routledge, London and New York, 1989, p. 27.

Figure 7: China's 1947 U-shaped Boundary Line Map

Source: Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea", *The International Journal of Marine and Coastal Law* 14(1), 1999, p. 29.

position in the context of multilateral and bilateral peace treaties with Japan.¹⁶³ Article 2 of the 1951 San Francisco Treaty stripped Japan of all her rights, title and claim to the Spratlys and the Paracels. The treaty did not specify to whom they would be given, however.¹⁶⁴ Neither the Republic of China nor the People's Republic of China (PRC) was represented in the conference but Foreign Minister Zhou Enlai of the PRC had already voiced a claim by Peking over the four island groups in August 1951.¹⁶⁵ The ambiguity re-surfaced in the Sino-Japan Peace Treaty concluded a year later, which was silent on the matter.¹⁶⁶ Austin argues that between 1946 and 1971, the date when the Philippines occupied three islands, Chinese sovereignty over the Spratlys was unchallenged by any other claimant state.¹⁶⁷ This is at odds with a report prepared by Vietnam's Ministry of Foreign Affairs noting that on 7 September 1951 during the seventh Plenary Session in the San Francisco Peace Conference, Prime Minister Tran Van Huu of the Republic of Vietnam released a statement affirming his country's right to the Spratly and Paracel Islands, "which have always belonged to Vietnam."¹⁶⁸

Throughout the 1950s and into the 1960s China issued numerous statements asserting its sovereignty over the Spratly and Paracel Islands.¹⁶⁹ Peking was especially critical of the perceived role of the US behind the claims and actions of the Philippines and South Vietnam in the Spratlys, which were viewed as part of a broader strategy to contain China and threaten its security.¹⁷⁰ During the 1970s and early 1980s China amplified its claim to the Spratlys but moderated its anti-US remarks.¹⁷¹ The 1970s also saw a greater emphasis of China's claim to maritime space in the South China Sea.¹⁷² This co-incided with the negotiation of a new law of

¹⁶³ *Ibid.*, pp. 27-28

¹⁶⁴ Samuels, *Contest for the South China Sea*, p. 77; Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 120.

¹⁶⁵ Samuels, *Contest for the South China Sea*, pp. 78-79

¹⁶⁶ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 121. Samuels suggests that Japan gave tacit recognition of the Chinese claim to the Spratlys and Paracels, however. See Samuels, *Contest for the South China Sea*, p. 80.

¹⁶⁷ Austin, *China's Ocean Frontier*, p. 149 and p. 160.

¹⁶⁸ Republic of Vietnam, Ministry of Foreign Affairs, *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands*, Ministry of Foreign Affairs, Saigon, 1975, p. 86.

¹⁶⁹ Lo, *China's Policy Towards Territorial Disputes*, p. 30.

¹⁷⁰ *Ibid.*, pp. 32-33.

¹⁷¹ *Ibid.*, pp. 34-37.

¹⁷² *Ibid.*, p. 49.

the sea and its focus on establishing rights and responsibilities for extended national maritime jurisdiction, a process in which China participated fully.

In 1988 China seized Fiery Cross Reef from Vietnam and throughout the 1990s re-affirmed its claim to sovereignty in the Spratlys through a number of means. They included the erection of boundary markers, letting of oil exploration concessions, lodgement of diplomatic protests against the actions of other claimants and occupation of and construction on features.

Several considerations undermine China's assertion of "indisputable sovereignty" over the Spratlys. They include inaction on the United Kingdom's 1877 authorisation of commercial guano collection on Spratly Island and Amboyna Cay¹⁷³ and a similar initiative by Japan during the late 1920s and early 1930s concerning phosphate mining,¹⁷⁴ as well as the apparent failure to protest France's 1933 *Journal Officiel* notice.¹⁷⁵ The non-acquiescence of other nations is another consideration.¹⁷⁶ Currently five other governments claim all or part of the Spratlys, while France's position remains unclear.¹⁷⁷ In addition, Chemillier-Gendreau argues that until 1988 China's claim was "devoid of any trace of effective occupation" and only from then was the beginning of partial occupation present.¹⁷⁸

¹⁷³ M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, Negro University Press, New York, 1926, pp. 6-7 cited in Austin, *China's Ocean Frontier*, p. 133. According to Austin the United Kingdom appears to have abandoned its claim in the Spratlys: see *ibid.*, p. 160. This is not the view of Haller-Trost, who states that while the British Government has not formally renounced its claim it has also not pursued it because it appreciates that its case would not be strong. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, pp. 304-05. In particular Footnote 64 on these pages. See also Geoffrey Marston, "Abandonment of Territorial Claims: The Cases of Bouvet and Spratly Islands" in *The British Yearbook of International Law 1986*, Clarendon Press, Oxford, 1987, pp. 344-56.

¹⁷⁴ Samuels, *Contest for the South China Sea*, p. 63.

¹⁷⁵ *Ibid.*, p. 64; Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 111; Austin, *China's Ocean Frontier*, p. 138.

¹⁷⁶ See Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 24.

¹⁷⁷ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 138. She notes that in 1956 France still claimed the Spratlys even though it did not maintain an effective presence. In contrast, Haller-Trost writes that five years earlier at the San Francisco Peace Conference France did not renew its claim or lodge any reservation when it signed the resulting treaty. Through this non-action, in Haller-Trost's view, the international law principle of estoppel means that France lost any claim it might still have had. Compare Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 124 to Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 309 and pp. 320-21.

¹⁷⁸ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 137. See also Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, pp. 22-24; Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 309.

Despite these problems, Michael Bennett suggests that China has adopted a pragmatic, instrumental approach to international law to support its claim in the Spratlys.¹⁷⁹ It has “combined a history of acts committed by the Guomindang [China’s Nationalist government, replaced by the Communists in 1949], earlier imperial Chinese Governments, and, in the case of the San Francisco Treaty, Western states, to support its claim to the islands.”¹⁸⁰ This, in Bennett’s view, reflects China’s perspective that international law is an instrument of a state’s foreign policy.¹⁸¹ Chapter 5 discusses this issue further in the context of China.

Malaysia

Malaysia’s claim traces to 1979 when it published a map (the *Peta Baru*, or New Map) showing the boundary of its claimed continental shelf,¹⁸² arguing that it has title to features within the enclosed area.¹⁸³ Figure 8 shows Malaysia’s maritime claims in the southern part of the Spratlys. In addition to extension of its continental shelf, Malaysia cites discovery and occupation as the basis of its claim.¹⁸⁴ In total, Kuala Lumpur claims 12 islands and features in the southern part of the Spratlys.¹⁸⁵ Of this number, eight features were occupied in 2003: Ardasier Reef, Dallas Reef, Erica Reef, Investigator Shoal, Louisa Reef, Marivales Reef, Royal Charlotte Reef and Swallow Reef.¹⁸⁶ Of the remaining features claimed by Kuala Lumpur, Commodore Reef is occupied by the Philippines, Amboyna Cay and Barque Canada Reef are occupied by Vietnam and Luconia Reef is unoccupied.¹⁸⁷

The continental shelf extension argument is difficult to sustain. First, under the LOSC a coastal state has sovereign rights not sovereignty over the seabed.¹⁸⁸

¹⁷⁹ Michael Bennett, “The People’s Republic of China and the Use of International Law in the Spratly Islands Dispute”, *Stanford Journal of International Law* 28(2), 1992, pp. 446-448.

¹⁸⁰ *Ibid.*, p. 448.

¹⁸¹ *Ibid.*, pp. 448-49.

¹⁸² Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 323; Austin, *China’s Ocean Frontier*, p. 155.

¹⁸³ *Ibid.*, p. 225.

¹⁸⁴ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 36.

¹⁸⁵ *Ibid.*

¹⁸⁶ Compiled from *ibid* and Rigoberto Tiglao, “Seaside Boom”, *Far Eastern Economic Review*, 8 July 1999, p. 14 concerning the 1999 occupation of Investigator Shoal and Erica Reef.

¹⁸⁷ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 36.

¹⁸⁸ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 324.

Second, neither the LOSC nor Malaysia's 1966 Continental Shelf Act indicate that the continental shelf refers to features that rise above sea level.¹⁸⁹ Third, conventionally under international law title to land generates the right to maritime zones, not vice-versa.¹⁹⁰ Fourth, some of the claimed features, such as Amboyna Cay, lie beyond 200nm from the inferred baselines of Malaysia's 1979 map.¹⁹¹ While the LOSC permits a continental shelf claim up to 350nm from coastal baselines, certain criteria have to be met.

Recognising the problems with the continental shelf extension argument, Malaysia has tended to now emphasise the discovery and occupation rationale.¹⁹² This is also problematic. Precedents established under international law imply that in itself discovery of unoccupied land is insufficient to establish title. Evidence of occupation also needs to be demonstrated and other criteria may be applied, such as effective exercise of authority and acquiescence by other nations.¹⁹³ In the case of Malaysia, its occupation of features is relatively recent (dating from 1983), its claim is contested by other states and it controls only some of the claimed features.¹⁹⁴

¹⁸⁹ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 37.

¹⁹⁰ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 324.

¹⁹¹ *Ibid.*, p. 325.

¹⁹² Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 37.

¹⁹³ *Ibid.*, pp. 17-20.

¹⁹⁴ *Ibid.*, p. 37.

Figure 8: Malaysia's Maritime Claims in the Southern Part of the Spratlys

Source: R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective*, Kluwer Law International, London, 1998, p. 485.

Philippines

In May 1956 Filipino businessman Tomas Cloma proclaimed a new state, Kalayaan (Freedomland), covering a group of 33 features in the Spratlys that he had ‘discovered’ six years earlier and colonised by 1950.¹⁹⁵ The PRC and the Republic of Vietnam protested Cloma’s claim while the Philippines government obfuscated its official position.¹⁹⁶ Cloma’s claim failed but it galvanised a renewed interest in the South China Sea by countries, including the Philippines.¹⁹⁷ On 4 December 1974 Cloma signed a “Deed of Assignment and Waiver of Rights” of his Kalayaan claim to the Philippines government.¹⁹⁸

In 1971 the Philippines government declared that the 53 islands within Kalayaan were *terra nullius* and that Manila effectively occupied and controlled Thitu, Flat and Nanshan islands.¹⁹⁹ A year later Kalayaan was incorporated within the administrative area of Palawan province.²⁰⁰ Presidential Decree 1596 of 11 June 1978 reaffirmed this. The decree also identified the co-ordinates of the Kalayaan Island Group and declared the area’s sea-bed, subsoil, continental margin and air space as part of Philippine territory.²⁰¹ Spratly Island itself was not included.²⁰² Figure 9 shows the Kalayaan claim and its overlap with Malaysia’s claimed continental shelf boundary.

Decree 1596 identified several justifications for the claim. The proximity of the Kalayaan Island Group was vital to the Philippines’ security and economic

¹⁹⁵ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 313; Austin, *China’s Ocean Frontier*, p. 152; Samuels, *Contest for the South China Sea*, pp. 81-82.

¹⁹⁶ *Ibid.*, pp. 82-84; Austin, *China’s Ocean Frontier*, p. 152; Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 313-15; Haydee B. Yorac, “The Philippine Claim to the Spratly Islands Group”, *Philippines Law Journal* 53(2), 1983, p. 45.

¹⁹⁷ Samuels, *Contest for the South China Sea*, p. 86.

¹⁹⁸ Gil S. Fernandez, “The Philippines’ South China Sea Claims” in Aileen San Pablo-Baviera (ed.), *The South China Sea Disputes. Philippine Perspectives*, Philippine-China Development Resource Center and Philippine Association for Chinese Studies, Quezon City, 1992, p. 20.

¹⁹⁹ Austin, *China’s Ocean Frontier*, p. 153.

²⁰⁰ *Ibid.*

²⁰¹ Presidential Decree No. 1596 Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration, Manila, 11 June 1978. Reprinted in Aileen San Pablo-Baviera (ed.), *The South China Sea Disputes. Philippine Perspectives*, Philippine-China Development Resource Center and Philippine Association for Chinese Studies, Quezon City, 1992, p. 55.

²⁰² Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 319.

Figure 9: The Philippines' Kalayaan Claim and its Overlap with Malaysia's Claimed Continental Shelf Boundary

Source: R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective*, Kluwer Law International, London, 1998, p. 509. Note that since 1999 Malaysia has occupied both Erica Reef and Investigator Shoal.

survival; much of the area formed part of the continental margin of the Philippine archipelago; the area did not legally belong to any state but because of history, indispensable need and effective occupation and control it now belonged to the Philippines; and other countries' claims to some of the area had lapsed through abandonment and could not prevail over the Philippines on legal, historical and equitable grounds.²⁰³ Of these justifications, Yorac argues that the Philippines has a persuasive argument for title based on abandonment, *terra nullius* and effective occupation.²⁰⁴

The oil factor is considered to have played a part in the timing of the presidential decree.²⁰⁵ The oil crises of the early 1970s highlighted the Philippines' dependence on Middle Eastern sources and the political, economic and security implications of this.²⁰⁶ In addition, three years after its discovery the Nido Reef field offshore from Palawan was almost entering production (see section earlier on Natural Resources). And exploratory drilling in the Reed Bank area had commenced in 1976.²⁰⁷

Several weaknesses are apparent in the Philippines' arguments. First, Cloma's claim carries no weight in international law since it was the action of an individual and not a government or its representative agent.²⁰⁸ Second, under international law proximity is not a criterion to establish title.²⁰⁹ Third, the non-acquiescence of the other claimants undercuts Manila's assertions of effective occupation and abandonment.²¹⁰ Fourth, the Palawan Trough separates the Spratly Islands from the Philippine archipelago so that there is no natural prolongation of

²⁰³ "Presidential Decree No. 1596 Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration".

²⁰⁴ Yorac, "The Philippine Claim to the Spratly Islands Group", p. 61.

²⁰⁵ Drigot, "Oil Interests and the Law of the Sea", pp. 40-41.

²⁰⁶ *Ibid.*, pp. 24-25. As Drigot notes there, the political dimension had a domestic element: "the continued dependence of this predominantly Catholic country on imported oil from the Islamic nations makes her extremely vulnerable to external political pressures on behalf of the Muslim secessionist movement in the southern part of the archipelago."

²⁰⁷ *Ibid.*, p. 25 and p. 41.

²⁰⁸ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 322.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*, p. 323; Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 35.

the continental shelf.²¹¹ This rebuts the argument that much of the claimed area is part of the Philippines' continental shelf.²¹²

Taiwan

In area, Taiwan's claim in the South China Sea parallels that of the People's Republic of China. History, geography, international law and facts underlie Taiwan's sovereignty claim to the Spratly Islands, the Paracel Islands, Macclesfield Bank and the Pratas Islands according to the 10 March 1993 Policy Guidelines for the South China Sea adopted by Taipei.²¹³ The guidelines also state that "[t]he South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests."²¹⁴ This latter claim is based on the U-shaped line published on a 1947 map issued by the then Nationalist government of China.

Taiwan claimed the Spratly Islands group in 1946.²¹⁵ Between that year and 1950 it occupied Itu Aba but was then absent until 1956.²¹⁶ In response to the 1956 Kalayaan claim made by the Filipino Tomas Cloma (see above), Taiwan re-occupied Itu Aba on 11 July that year²¹⁷ and continues to do so. In the early 1960s Taipei strengthened its presence in the Spratlys through reinforcement of the garrison on Itu Aba, establishment of a regular patrol system among the islands and erection of boundary markers on several features.²¹⁸ In addition, it was announced that a mail service would operate between Kao-hsiung and Itu Aba.²¹⁹ Following an announcement in November 1999 that Taipei would replace its marines with coastguard personnel on Itu Aba (and Pratas Island),²²⁰

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Kuan-Ming Sun, "Policy of the Republic of China towards the South China Sea. Recent developments", *Marine Policy* 19(5), 1995, pp. 402-03, p. 406 and p. 408.

²¹⁴ *Ibid.*, p. 403 and p. 408.

²¹⁵ Austin, *China's Ocean Frontier*, p. 147.

²¹⁶ *Ibid.*; Samuels, *Contest for the South China Sea*, p. 77.

²¹⁷ *Ibid.*, p. 85.

²¹⁸ *Ibid.*, p. 89.

²¹⁹ *Foreign Broadcast Information Service*, 12 August 1974, B2 cited in *ibid.*

²²⁰ "Taiwan can't defend Spratlys, says Tang", *Taiwan News*, 19 November 1999; "Taiwan to withdraw marines from Spratly islands", *Japan Economic Newswire*, 19 November 1999.

implementation of the plan began in early 2000. The effect was to shift responsibility from the Ministry of National Defense to a newly formed Coast Guard Administration.²²¹ Following the signing in November 2002 of the ASEAN-China Declaration on the Conduct of Parties in the South China Sea, Taiwan reiterated its sovereignty over the four main island groups located therein.²²²

Taipei's assertion of sovereignty over the Spratlys as a whole, as opposed to the one feature of Itu Aba, based on continuous occupation and effective control is difficult to sustain.²²³ And while Article 2 of the 1952 Sino-Japan Peace Treaty stated that Tokyo renounced to China all right, title and claim to the Spratly Islands, *inter alia*, it remains unclear whether this means the People's Republic of China or the Republic of China.²²⁴ Despite this conundrum, neither Taipei nor Beijing has challenged the other's claim in the South China Sea nor engaged each other in any military conflict there.²²⁵ Finally, Taipei's historic waters claim in the South China Sea is problematic.²²⁶ Like Beijing, Taipei has yet to explain the meaning and co-ordinates of the area enclosed by a U-shaped line depicted on a 1947 map issued by the Chinese government.

Vietnam

Vietnam's sovereignty claim in the Spratly Islands, an area it refers to as Truong Sa, is based on history.²²⁷ Various dates have been suggested from which Vietnam considered it held title, including between 1460 and 1497 during the reign of King Le Thanh Tong,²²⁸ and 1650 to 1653.²²⁹ Neither Vietnam nor China

²²¹ Barry Wain, "Taiwan's South China Sea Dilemma", *The Asian Wall Street Journal*, 4 May 2001.

²²² Huang Kwang-chun, "ROC Reiterates Sovereignty over 4 Island Groups in South China Sea", *Central News Agency*, 5 November 2002.

²²³ See Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 322.

²²⁴ Samuels, *Contest for the South China Sea*, pp. 79-81.

²²⁵ Lin, "Taiwan's South China Sea Policy", p. 334.

²²⁶ See Sun, "Policy of the Republic of China towards the South China Sea", pp. 403-06; Kuan-Ming Sun, "The Republic of China's Policy Toward the South China Sea: A Review", *Issues and Studies* 32(3), 1996, pp. 44-49.

²²⁷ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 30; Cordner, "The Spratly Islands Dispute and the Law of the Sea", p. 65.

²²⁸ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 30.

²²⁹ Cordner, "The Spratly Islands Dispute and the Law of the Sea", p. 65.

has yet produced documentation that equivocally demonstrates possession before the 18th Century, however.²³⁰ An 1838 map, the “Dai Nam Nhất Thông Toàn Đồ”, identifies the Spratlys under the name Van Ly Truong Sa and shows it as part of Vietnamese territory even though the location of the area is incorrectly identified.²³¹ In 1852 the French “occupation” of Cochin China began and in the following decades the Empire of Vietnam lost interest in the offshore islands.²³² Austin suggests that the “earliest specific official act” that Vietnam can cite in a title claim over the Spratlys is France’s occupation of one of the islands in 1930.²³³ Subsequently, and as noted earlier, in July 1933 France issued a notice in its *Journal Officiel* identifying seven features it had annexed. Vietnam claims this action was made on its behalf, a doubtful proposition in Austin’s view.²³⁴ He argues, moreover, that “[t]here is no evidence that France specifically passed on its rights in the Spratly Islands to the RVN [Republic of Vietnam] when the latter was granted independence on 4 June 1954.”²³⁵ Even if this successor state assertion were sustainable, Haller-Trost identifies a problem of internal logic in Vietnam’s argument: France’s 1933 annexation notice referred to only seven of the more than 300 features in the Spratlys whereas Vietnam claims all of them.²³⁶

In the September 1951 San Francisco Peace Treaty negotiations, Vietnam reaffirmed its claim to sovereignty over the Paracels, Spratlys, Pratas Island and Macclesfield Bank.²³⁷ Samuels suggests this was a protest against an identical claim made in August 1951 by Communist China’s Foreign Minister Zhou Enlai.²³⁸ On 1 June 1956 the South Vietnamese government released a communiqué reiterating sovereignty over the Paracel and Spratlys Islands and

²³⁰ Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 57 and p. 66.

²³¹ Republic of Vietnam, Ministry of Foreign Affairs, *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands*, p. 69.

²³² *Ibid.*, p. 70; Cordner, “The Spratly Islands Dispute and the Law of the Sea”, p. 65; Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 304.

²³³ Austin, *China’s Ocean Frontier*, p. 139.

²³⁴ *Ibid.*, pp. 139-40.

²³⁵ *Ibid.*, p. 140. See also Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 321.

²³⁶ *Ibid.*

²³⁷ Republic of Vietnam, Ministry of Foreign Affairs, *White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands*, p. 86.

²³⁸ Samuels, *Contest for the South China Sea*, p. 79.

referred also to its statement in the 1951 San Francisco treaty negotiations.²³⁹ More troubling in trying to sustain a case of Vietnamese title in the Spratlys were statements by North Vietnam in 1956 and 1958 conceding sovereignty over the area to the People's Republic of China.²⁴⁰ In 1971 and 1973 Hanoi sought to go back on these statements by claiming the Spratlys as Vietnamese territory.²⁴¹ South Vietnam was also active, incorporating ten of the islands into Phuc Tuy province on 6 September 1973 and letting oil concessions.²⁴² In the immediate aftermath of the collapse of the South Vietnamese regime in April 1975, Hanoi quickly occupied the six features in the Spratlys previously held by Saigon to deny them to China.²⁴³

Following reunification in 1976 the Socialist Republic of Vietnam replaced the Republic of Vietnam and Democratic Republic of Vietnam, the appellations of the former southern and northern governments respectively. In 1976 the new government issued a map of a unified Vietnam showing the Paracels and Spratlys as Vietnamese territory, to China's concern.²⁴⁴

The government of the Socialist Republic of Vietnam now argues that the 1956 and 1958 statements were a practical necessity of the times.²⁴⁵ As Haller-Trost notes, however, "any statements issued in relation to territorial matters by the former North Vietnam Government are still binding."²⁴⁶ An attempt by a government to go back on a previously stated position invokes the legal principle of estoppel. The aim of estoppel is "to preclude a party from benefiting by his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party."²⁴⁷ As Bowett remarks,

²³⁹ B.A. Hamzah, *The Spratlys. What Can be Done to Enhance Confidence*, Institute for Strategic and International Studies (ISIS) Research Note, Institute of Strategic and International Studies Malaysia, Kuala Lumpur, 1990, p. 5.

²⁴⁰ See Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 321; Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, p. 77.

²⁴¹ Dzurek, *The Spratly Islands Dispute: Who's On First?*, p. 20.

²⁴² *Ibid.*

²⁴³ Samuels, *Contest for the South China Sea*, p. 107. In 1988 China seized Fiery Cross Reef from Vietnam in a short but bloody engagement.

²⁴⁴ *Ibid.*, p. 108.

²⁴⁵ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 33.

²⁴⁶ Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia*, p. 321.

²⁴⁷ D.W. Bowett, "Estoppel Before International Tribunals And Its Relation To Acquiescence" in *The British Yearbook of International Law 1957*, Oxford University Press, London, 1958, p. 177.

“the principle of good faith lies at the very root of the doctrine of estoppel.”²⁴⁸ This “requires that a party adhere to its statement whether it be true or not.”²⁴⁹ Bowett goes on to identify three essential conditions of estoppel: a clear and unambiguous statement of fact; the statement is made voluntarily, unconditionally and is authorised; and there must be reliance in good faith upon the statement either to the detriment of the party relying on it or to the advantage of the party making it.²⁵⁰ Even where the conditions of estoppel are unmet, an admission by a party may be used as evidence to show a lack of consistency or weakness in its position.²⁵¹

In the early 1990s both Vietnam and China used American oil companies as surrogates for their respective territorial claims in the Spratlys.²⁵² This involved the granting of oil exploration concessions by China to Crestone Energy Corporation and by Vietnam to Mobil in adjacent, contested areas.²⁵³ In 1992 Hanoi distinguished its continental shelf claim in two parts: a mainland shelf that includes Vanguard Bank and Prince of Wales Bank, and the Spratly Islands.²⁵⁴ It maintains, however, its claim to the entire Spratlys “whether by reason of sovereignty ... or by right of mainland continental shelf jurisdiction.”²⁵⁵

²⁴⁸ *Ibid.*, p. 193.

²⁴⁹ *Ibid.*, p. 184.

²⁵⁰ *Ibid.*, p. 202.

²⁵¹ *Ibid.*, pp. 195-97.

²⁵² Dzurek, *The Spratly Islands Dispute: Who's On First?*, pp. 29-33; Adam Schwarz with Matt Forney, “Oil on Troubled Waters. Vietnam’s Conoco deal draws fire from China”, *Far Eastern Economic Review*, 25 April 1996, p. 65.

²⁵³ Valencia, van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, p. 27 and pp. 130-31.

²⁵⁴ Dzurek, *The Spratly Islands Dispute: Who's On First?*, p. 50.

²⁵⁵ *Ibid.*