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THE TIMOR GAP TREATY AS A MODEL FOR JOINT DEVELOPMENT IN THE SPRATLY ISLANDS

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INTRODUCTION

The Spratly Islands,[1] a collection of small, desolate and uninhabited islands, reefs, and rocks in the South China Sea, became the center of attention for several Asian countries in the early 1970s when preliminary explorations indicated that these islands may lay atop huge untapped oil and natural gas reserves.[2] Six countries: The People's Republic of China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei currently claim territorial sovereignty over the Spratly Islands.[3] The dispute over their ownership remains unresolved.

The claimant countries assert legal and historical arguments in support of their claims and have taken various steps to occupy the Spratly Islands.[4] Meanwhile, despite the claimant countries' expressed commitment to cooperation, diplomacy, and the employment of peaceful means to settle the dispute,[5] tensions remain high and the potential for armed conflict exists.[6] The international

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1. *See* Brian K. Murphy, Comment, *Dangerous Ground: The Spratly Islands and International Law*, 1 OCEAN & COASTAL L.J. 187, 188 (1995) (stating that the Spratly Islands are also known as the Nansha Islands in China, the Truong Sa archipelago in Vietnam, and Kalayaan or "Freedomland" in the Philippines).

2. *See* Hungdah Chiu & Choon-Ho Park, *Legal Status of the Paracel and Spratly Islands*, 3 OCEAN DEV. & INT'L L.J. 1, 4 (1975) (discussing the largest Philippine oil exploration conducted in September 1973 off of Palawan, just east of the Spratly Islands); Murphy, *supra* note 1, at 188 (stating that in 1973 Russian seismologists discovered signs of oil west of the Spratlys). Explorations revealed that the Spratly Islands were practically surrounded by oil-producing areas. *See id.*

3. *See, e.g.*, Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 425 (1992) (setting forth the countries claiming sovereignty over the Spratly Islands).

4. *See generally* MARK J. VALENCIA ET AL., SHARING THE RESOURCES OF THE SOUTH CHINA SEA 20-38 (1997) (describing the basis of each country's claim).

5. *See Chinese General Urges Joint Development of Isles*, PERISCOPE-DAILY DEF. NEWS CAPSULES, May 15, 1996, *available in* 1996 WL 7599379 (stating that China opposes the use or threat of force in settling the Spratly dispute); *Singapore & Thailand Concerned Over Spratlys Dispute*, AGENCE FR.-PRESSE, Apr. 30, 1997, *available in* 1997 WL 2105861 (commenting on China's assurance that military force would not be utilized to settle the dispute); Ma. Christina V. Deocadiz, *Why all the Fuss About this Islands Chain?*, BUS. WORLD (MANILA), Feb. 14, 1997, *available in* 1997 WL 7200297 (explaining the Philippines' desire to use diplomacy in settling the dispute).

6. *See* P. Paramaswaran, *Concerns over Spratlys, Malacca Straits Dog Asian Naval Show*, AGENCE FR.-PRESSE, May 6, 1997, *available in* 1997 WL 2104886

community cautiously monitors this potential flash point[7] because armed conflict could have tremendous consequences, not only for neighboring countries, but for the entire world.[8] The situation in the South China Sea is unstable and tenuous at best.[9] The claimant countries have made little progress toward a compromise,[10] despite

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(stating that analysts perceive the Spratly Islands dispute as one of the most probable sites of armed conflict, other than the Korean Peninsula); *Australia Sees Spratlys as Major Security Threat*, REUTERS N. AM. WIRE, Nov. 22, 1995, *available in* LEXIS, News Library, Curnws File (expressing Australian Defence Minister Robert Ray's belief that other than the Korean peninsula, the Spratly Island dispute represents the most threatening security risk in the region); Richard Lloyd Parry, *No Plain Sailing in Desert Island Dispute*, INDEP. (LONDON), May 20, 1997, *available in* 1997 WL 10468034 (expressing the Philippines' military chief General Arnulfo Acedera's acknowledgment of the possibility of armed conflict over the Spratly Islands). *But see, e.g.*, *China Said Unlikely to go to War over Spratlys*, REUTERS N. AM. WIRE, Nov. 14, 1995, *available in* LEXIS, News Library, Curnws File (stating that engaging in armed conflict would be economically disastrous for China).

7. *See Japan Expresses 'Grave Concern' Over Chinese Vessels in Spratlys*, AGENCE FR.-PRESSE, Apr. 30, 1997, *available in* 1997 WL 2105852 (stating that Japan is closely watching the Spratly Islands situation since it affects regional security and stability); *Singapore & Thailand Concerned Over Spratlys Dispute*, *supra* note 5 (expressing Singapore and Thailand's concern that tensions over the Spratly Islands will lead to decreased stability and strained relations in the region); *Thai Navy Fears Spratlys Dispute May Close Sea Lanes*, SING. STRAITS TIMES, July 2, 1997, *available in* 1997 WL 12137474 (discussing the Thai navy's concern that armed conflict in the Spratlys could close vital shipping and communication lanes). The potentially explosive Spratly Islands dispute has influenced the Thai navy's attempts to add two more submarines to its fleet. *See id. But see U.S. Won't Station Warships Near Spratlys*, ASIA PULSE, July 22, 1996, *available in* 1996 WL 16345998 (noting that the United States is closely monitoring the situation, but does not expect armed conflict to erupt). U.S. commander-in-chief of Pacific Forces, Admiral Joseph W. Prueher, stated that the United States believes that the Spratly Island dispute can be settled through negotiations. *See id.*

8. *See* Chiu & Park, *supra* note 2, at 6-7 (discussing the strategic importance of the Spratly Islands and the surrounding South China Sea); *Asian Countries Beef-up Naval Fleets*, THE FILIPINO EXPRESS, Mar. 3, 1996, *available in* 1996 WL 15673215 (quoting a Japanese military analyst stating "[w]hoever controls the Spratlys will gain regional hegemony in the next century").

9. *See* MARK J. VALENCIA, CHINA AND THE SOUTH CHINA SEA DISPUTES 55 (Adelphi Paper No. 298, 1995) (describing the current situation as a "leaking status quo" or an unstable "do nothing approach").

10. *See id.* at 54-55 (acknowledging that fundamental issues in the Spratly Islands dispute remain unresolved). While the claimant countries are engaged in talks, the talks remain informal and have failed to discuss key issues, such as each country's sovereignty claim and the basis for such claims. *See id.*

the fact that some, including China, have expressed a willingness to shelve the sovereignty dispute and proceed with joint efforts to develop the natural resources of the Spratly Islands.[11]

This Comment suggests that a joint development regime, similar to the one employed by Australia and Indonesia to settle the Timor Gap dispute,[12] presents a possible solution to the Spratly Islands conflict. Part I briefly examines the applicable international law standards and principles. Part II describes the history of the Spratly Islands dispute and briefly analyzes each country's claim. Part III discusses the background and history of the Timor Gap dispute and explores the major provisions of the Timor Gap Treaty. Finally, Part IV recommends that the countries implement more confidence building measures and establish a three-tiered joint development agreement, consisting of twelve separate joint development zones.

I. THE INTERNATIONAL LAW STANDARD

A. JUDICIAL DECISIONS

The *Island of Palmas* case,[13] decided by the Permanent Court of Arbitration in 1928, set forth the factors necessary to establish

11. *See China Establishes Scientific Expeditions*, PERISCOPE-DAILY DEF. NEWS CAPSULES, Mar. 26, 1996, *available in* 1996 WL 7597843 (expressing China's commitment to shelving its differences with the other claimant countries and proceeding with joint exploration of the natural resources of the territory); *Chinese General Urges Joint Development of Isles*, *supra* note 5 (stating Lt. General Xiong Guangkai's suggestion that the claimant countries put aside their differences and jointly develop the area); *Qian on China Stand Over Nansha Islands*, XINHUA NEWS AGENCY, July 30, 1995, available in LEXIS, Worldwide Library, Xinhua File (quoting Chinese Foreign Minister Qian Qichen as stating, "the [Spratly] disputes should be shelved and efforts should be made for joint development").

12. *See infra* notes 178-94 and accompanying text (detailing the major provisions of the Timor Gap Treaty, which provide for the creation of a joint development zone).

13. Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 Between the Unites States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty Over The Island of Palmas (or Miangas) (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928), *reprinted in* 22 AM. J. INT'L L. 867 (1928) [hereinafter Palmas case].

territorial sovereignty over an island.[14] The *Palmas* case concerned the conflicting sovereignty claims of the United States and the Netherlands over an isolated, but inhabited island located between the Philippines and the former Dutch East Indies.[15] The United States claimed that Spain originally discovered Palmas Island and subsequently ceded title to the United States under the Treaty of Paris.[16] The United States also based its claim on the island's contiguity to the Philippines.[17] The Netherlands, on the other hand, claimed sovereignty based on their peaceful and continuous display of state authority over the island.[18] The Arbitrator[19] awarded Palmas Island to the Netherlands and held that the mere act of discovering an island results only in inchoate title[20] and does not suffice to establish sovereignty unless the discovery is followed by a continuous and peaceful display of authority or some degree of effective occupation.[21]

In contrast, the Permanent Court of Arbitration held in the *Clipperton Island* case[22] that France's discovery and declaration of

14. *See id.* at 838 (stating that sovereignty involves "the exclusive right to display the activities of a state" and the "continuous and peaceful display of the functions of state within a given region").

15. *See id.* at 834 (noting that Palmas Island, also known as Miangas, is an isolated island located "half way between Cape San Augustin . . . and the most northerly island of the Nanusa (Nanoesa) group"). The island was inhabited by native peoples. *See id.* at 870.

16. *See id.* at 835-36 (noting that the United States claimed that Palmas Island was part of the Philippine archipelago, which Spain ceded to the United States under the Treaty of Paris). The Treaty of Paris was signed on December 10, 1898. *See id.* at 834. Cession transferred all of Spain's sovereignty rights in the specified region, which included Palmas Island. *See id.* at 841.

17. *See id.* at 836 (indicating the United States belief that sovereign control of the Philippines granted the United States sovereignty over the contiguous Palmas Island).

18. *See* Palmas case, *supra* note 13, at 857 (stating that the Netherlands had displayed sovereignty for the preceding two centuries).

19. *See id.* at 832 (stating that the parties asked Max Huber of Switzerland to serve as the sole arbitrator).

20. *See id.* at 829 (defining "inchoate title" as "a claim to establish sovereignty by effective occupation"). Inchoate title must be completed by effective occupation within a reasonable time. *See id.* at 846.

21. *See id.* at 872.

22. Arbitral Award on the Subject of the Difference Relative to the Sovereignty Over Clipperton Island (Fr. v. Mex.), 2 R.I.A.A. 1105 (Perm. Ct. Arb. 1931), *reprinted in* 26 AM. J. INT'L L. 390 (1932) [hereinafter Clipperton case].

sovereignty in a Honolulu journal were sufficient to establish sovereignty over an uninhabited atoll.[23] The Arbitrator[24] concluded that in some instances, where the territory claimed is completely uninhabited, the requirement of effective occupation may be unnecessary.[25] The *Clipperton* case involved the sovereignty claims of France and Mexico over an uninhabited atoll located off the coast of Mexico.[26] France asserted that a French Lieutenant claimed the island on behalf of the French government in 1858,[27] while Mexico claimed ownership by way of cession from Spain.[28] The Arbitrator awarded Clipperton Island to France, despite the absence of any "positive and apparent act of sovereignty" on the part of France.[29]

The *Clipperton Island* case appears germane to an analysis of the Spratly Islands dispute because the Spratly Islands are similarly isolated and uninhabited.[30] Higher standards for effective control may be applied in the Spratly Islands dispute due to the number of

23. *See id.* at 1109 (concluding that France legitimately acquired Clipperton Island when a French Naval Lieutenant declared sovereignty over the island on behalf of the French government on November 17, 1858).

24. *See id.* at 1105 (noting that Victor Emmanuel III served as the arbitrator in the matter).

25. *See id.* at 1109 (holding that if a completely uninhabited territory is "at the absolute and undisputed disposition" of a state, occupation is completed "from the first moment when the occupying state makes its appearance there").

26. *See* VALENCIA ET AL., *supra* note 4, at 17 (stating that Clipperton lies 600 miles south of Mexico).

27. *See* Clipperton case, *supra* note 22, at 1106 (noting that the French were successful in landing several crew members on the island, but left no evidence of their sovereignty claim). After receiving official notification, the French Consulate in Hawaii published France's declaration of sovereignty over Clipperton Island in a Honolulu journal. *See id.*

28. *See id.* at 1107 (describing Mexico's claim to Clipperton). Mexico asserted that the Spanish Navy discovered the island and that Mexico succeeded the Spanish state in 1836. *See id.*

29. *Id.* at 1106. In awarding the island to France, the Arbitrator stated that Spain's discovery of the island had not been proven and that Mexico had not manifested its sovereign right over the island. *See id.* at 1106-07.

30. *See* Dr. Barry Hart Dubner, *The Spratly "Rocks" Dispute—A "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L.J. 291, 295 (1995) (noting that the Spratly Islands are too small to sustain permanent inhabitants); Bennett, *supra* note 3, at 429, 430 (stating many of the islands are completely underwater or covered mainly by bushes, guano, and a few coconut and plantain trees).

claimant countries involved and the complexity of their claims.[31] Moreover, the International Court of Justice held that when an ambiguity exists, actual displays of authority, evidence of possession,[32] and acquiescence by other states to the exercise of sovereignty are of decisive importance in determining sovereignty issues.[33]

B. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Although the 1982 United Nations Convention on the Law of the Sea ("UNCLOS")[34] embodies customary international law and governs practically every aspect of ocean management,[35] it is of little impact in the Spratly Islands dispute since it fails to provide specific

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31. *See* Bennett, *supra* note 3, at 436.

32. *See* Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17) (involving the sovereignty claims of France and the United Kingdom over a group of islets and rocks located between the coast of France and the Island of Jersey). The two countries produced treaties and other historical documents in an attempt to prove that they possessed ancient or original title. *See id.* at 53. In this particular case, the International Court of Justice found it unnecessary to resolve the "historical controversies." *See id.* at 56. What was of decisive importance to the court was "evidence which relates directly to the possession of the Minquiers and Ecrehos groups" and not "indirect presumptions deduced from events in the Middle Ages." *Id.* at 57.

33. *See* Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.; Nicar. intervening), 1992 I.C.J. 351 (Sept. 11) (concerning islands located in the Gulf of Fonseca, which had once been under the sovereign control of Spain). In 1839, upon the disintegration of the Federal Republic of Central America, Honduras, El Salvador, and Nicaragua emerged as separate States and asserted conflicting sovereignty claims over the islands. *See id.* at 381. In awarding the island of El Tigre to Honduras and Meanguera and Meanguerita Islands to El Salvador, the Court relied upon evidence of possession, control, displays of sovereignty, and the lack of protest by the other countries. *See id.* at 579.

34. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, (1982), *reprinted in* 21 I.L.M. 1261 [hereinafter UNCLOS]. UNCLOS entered into force on Nov. 16, 1994. *See id.*; *China Ratifies U.N. Sea Law Treaty*, ASIAN POL. NEWS, May 20, 1996, *available in* 1996 WL 7591726 (announcing that China ratified UNCLOS on May 15, 1996).

35. *See* R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 15-17 (1988); *see also* Mark J. Valencia, *Troubled Waters: Oil is Only One Reason for Asia's Many-Sided Disputes Over Tiny, Uninhabitable Islands*, BULL. ATOM. SCIENTISTS, Jan. 11, 1997, *available in* 1997 WL 9508983 (stating that UNCLOS "embodies most international law and state practice relating to the oceans").

guidelines for delimiting maritime boundaries.[36] The only guidance UNCLOS provides is that boundary disputes involving the continental shelf or exclusive economic zone ("EEZ") shall be resolved "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."[37]

II. THE SPRATLY ISLANDS

A. BACKGROUND AND HISTORY OF THE DISPUTE

Over one hundred tiny islands, rocks, coral reefs, and atolls[38] make up the Spratly Islands, which are located in the southern portion of the South China Sea, roughly between Vietnam, Brunei, Malaysia, and the Philippines,[39] and approximately 500 miles south of China.[40] The islands are scattered over an area in excess of 180,000 square

36. *See* Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227 (1994) (stating that international maritime boundary law, as codified in UNCLOS is indeterminate); *see also* Charles Liu, Comment, *Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute*, 18 LOY. L.A. INT'L & COMP. L.J. 865, 876 (1996) (noting that UNCLOS provides little guidance in determining the sovereignty of islands); KRIANGSAK KITTICHAISAREE, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA 140 (1987) (stating that UNCLOS does not cover territorial disputes).

37. UNCLOS, *supra* note 34, art. 83, 21 I.L.M. at 1286; *see* Liu, *supra* note 36, at 875 n.68 (noting that article 83 of the Statute of the International Court of Justice provides that "disputes shall be decided in accordance with international law"). International law includes international conventions and custom, general principles of law, and judicial decisions. *See id.*

38. *See* Dubner, *supra* note 30, at 292 (providing several different descriptions of the Spratly Islands and features). The descriptions of the sizes, number, and location of the Spratly Islands vary depending on the source of the information. *See id.; see also* VALENCIA ET AL., *supra* note 4, at 227-34 (providing descriptions and locations of Spratly features that are occupied and/or rise above water at low tide).

39. *See, e.g.*, Liu, *supra* note 36, at 868 (providing a general description of the physical location of the Spratly Islands).

40. *See* Bennett *supra* note 3, at 429 (stating that the distance between the Spratly Islands and the Chinese mainland is more than 500 miles). *But see* Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 61 (1994) (stating that the Spratlys are approximately 900 miles south of China's Hainan Island).

kilometers[41] and many features are entirely submerged.[42]

Prior to oil explorations in the 1970s, the Spratly Islands were largely overlooked.[43] The only natural resources the islands were thought to possess were guano, phosphate deposits, and abundant fish stocks.[44] At that time, the Spratlys were probably known best as a navigational hazard.[45] Mariners were careful to steer clear of the island group designated as "Dangerous Ground" on their maps and charts.[46]

These "tiny specks of rock,"[47] however, emerged as some of the most sought after property in Asia after major oil discoveries were made in the area surrounding the islands.[48] In addition to the potential hydrocarbon wealth of the surrounding seabed,[49] the Spratly Islands

41. *See* KITTICHAISAREE, *supra* note 36, at 141 (estimating the size of the Spratly Island group).

42. *See* Bennett, *supra* note 3, at 429 (stating that many of the Spratly Islands are underwater). The islands that do rise above sea level are too small to support any permanent inhabitants. *See id.* at 430. Itu Aba, also known as Taiping Island, is the largest island in the Spratly group and spans a mere 400 square meters. *See* Murphy, *supra* note 1, at 187.

43. *See* Murphy, *supra* note 1, at 188 (stating that the Spratly Islands were ignored by the world until the second half of this century).

44. *See id.* at 188 (describing the natural resources of the Spratly Islands). The Spratly Islands and surrounding waters contain guano and phosphate deposits, sea shells, turtles, and fish. *See id.*

45. *See id.* (speculating that the islands were best known by mariners because of their treacherous territory).

46. *See* Parry, *supra* note 6 (remarking that the Royal Navy carrier, HMS Illustrious, will be sure to avoid the "Dangerous Ground" of the Spratly Islands while conducting exercises in Asia); Cordner, *supra* note 40, at 61 (stating that the Spratly Islands are labeled as "Dangerous Ground" on navigation charts); Murphy, *supra* note 1, at 188 (stating that mariners avoided the Spratly Islands which were marked as "dangerous ground" on charts); Richard D. Beller, Note, *Analyzing the Relationship Between International Law and International Politics in China's and Vietnam's Territorial Dispute Over the Spratly Islands*, 29 TEX. INT'L L.J. 293, 295 (1994) (citing the Central Intelligence Agency World Factbook, which notes that the Spratly Islands are a "serious navigational hazard").

47. Parry, *supra* note 6.

48. *See supra* note 2 and accompanying text (noting several explorations that revealed the oil-producing potential of the Spratly region).

49. *See* Cordner, *supra* note 40, at 61 (stating that results of a 1969 United Nations report indicate the possibility of rich hydrocarbon deposits in the region); Murphy, *supra* note 1, at 188 (stating that the international oil industry describes the Spratly Island petroleum deposit as an "elephant" with the potential to produce over a billion barrels of oil). *But see* Liu, *supra* note 36, at 869 (stating that oil

are also attractive because of their strategic location.[50] Situated in the middle of the South China Sea, the Spratly Islands straddle major international shipping and communication routes[51] and connect the South China Sea with the Indian Ocean, East China Sea, and Pacific Ocean.[52]

Under UNCLOS, a state exercising territorial sovereignty over an island may declare a territorial sea[53] extending 12 nautical miles from the island's baseline.[54] The sovereignty of the controlling state extends to the air space above and the seabed and subsoil below the territorial sea.[55] In addition, a state exercising territorial sovereignty over an island may declare an EEZ,[56] which extends 200 nautical

deposits in the Spratly Islands are speculative); VALENCIA ET AL., *supra* note 4, at 9-10 (noting that some argue that the Spratly's oil potential is "modest" due to the deep water in the region); Chiu & Park, *supra* note 2, at 5 (stating that oil exploitation is either "technologically impossible or commercially unprofitable" due to the water depth in the Spratly area).

50. *See* Beller, *supra* note 46, at 296 (noting the strategic value of the Spratly Islands). Some analysts assert that the strategic value of the Spratlys outweighs the value of the region's natural resources. *See id.*

51. *See* Cordner, *supra* note 40, at 61 (stating that the Malacca, Lombok, and Sunda Straits, which are vital lines of communication linking the Indian and Pacific Ocean, are proximate to the Spratly Islands); Chiu & Park, *supra* note 2, at 5-6 (noting that the sea lane between the Spratly and Paracel Islands is a major route for the navies of the United States and Soviet Union, oil tankers, and merchant marine vessels); Parry, *supra* note 6 (noting that each year, approximately 15 percent of the world's shipping and 70 percent of the oil imported by Japan, Korea, China, and Taiwan passes through the South China Sea); Deocadiz, *Why all the Fuss About this Islands Chain?*, *supra* note 5 (stating that 90 percent of Japan's petroleum imports pass through the region).

52. *See* Bennett, *supra* note 3, at 431-32 (stating that the sea surrounding the Spratly Islands connects with the Indian Ocean and also connects the East China Sea with the Sea of Japan). The South China Sea also constitutes part of the shortest route between East Asia and Southeast Asia, Africa, Europe, and the Middle East. *See id.*

53. *See* UNCLOS, *supra* note 34, pt. VIII, art. 121.

54. *See* UNCLOS, *supra* note 34, pt. II, § 1, arts. 2-3. UNCLOS provides that the baseline, for purposes of "measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." *Id.* pt. II, § 1, art. 5.

55. *See* Dubner, *supra* note 30, at 296 (providing that a coastal state "has the utmost jurisdiction" over its land, the territory within its baseline, and the territory within its territorial sea).

56. *See* UNCLOS, *supra* note 34, pt. VIII, art. 121.

miles from the island's baseline.[57] Within the EEZ, the controlling state has sovereign rights over the natural resources located in the water, sea-bed, and subsoil.[58] Both of these provisions, coupled with the strategic location and potential oil wealth of the region, underscore the value and importance of the Spratly Islands and undoubtedly motivate the claimant countries' desire to exercise sovereignty over the islands.[59]

B. CLAIMANT COUNTRIES

China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei each assert overlapping claims of territorial sovereignty over all or part of the Spratly Islands.[60] Each of the claimant countries assert a variety of arguments in support of their claims, ranging from historical evidence of discovery and occupation to arguments based on international law principles and UNCLOS provisions.[61]

1. China

Based upon historical evidence that the Chinese discovered and used the islands "since ancient times,"[62] China claims sovereignty over the entire Spratly chain and the surrounding South China Sea.[63] In support of this claim, the Chinese point to descriptions of the islands in Chinese history books, maps, navigational records, and surveys as evidence that they discovered, occupied, and used the

57. *See* UNCLOS, *supra* note 34, pt. V, art. 56-57. The EEZ "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* art. 57.

58. *See* UNCLOS, *supra* note 34, pt. U, art. 56(1)(a). The coastal State also has jurisdiction with respect to establishing and using artificial structures, scientific marine research, and marine environment protection systems. *See id.* art. 56(1)(b).

59. *See* Bennett, *supra* note 3, at 431 (stating that China's sovereignty claim is motivated by the Spratly Island's strategic location and natural resource wealth); Cordner, *supra* note 40, at 61 (commenting that sovereign control over the Spratlys, along with the ability to declare territorial seas and EEZs, would yield a "commanding position").

60. *See, e.g.*, Cordner, *supra* note 40, at 62.

61. *See generally* VALENCIA ET AL., *supra* note 4, at 20-38 (evaluating the strength of each countries' claims).

62. Cordner, *supra* note 40, at 62.

63. *See* Deocadiz, *Why all the Fuss About this Islands Chain?*, *supra* note 5 (noting that China claims the entire South China Sea and refers to the region as the "China Lake").

Spratlys as fishing grounds as early as the second century B.C.[64] Additionally, China asserts that a 1887 treaty between France and China[65] further evidences Chinese ownership of the Spratlys, which lie east of the delimitation line.[66]

Each of China's claims, however, is weak.[67] China relies on unconvincing evidence, the 1887 treaty with France, to prove its ownership of the Spratly Islands.[68] Although China appears to have

64. *See* Bennett, *supra* note 3, at 434 (stating that China claims to have discovered the Spratly Islands during the Han Dynasty (206 B.C. to A.D. 24)); Cordner, *supra* note 40, at 62 (stating that Chinese navigators reported specific transit records in 1292 and between 1403-33). A book published by a Chinese scholar in 1730 describes the geography of the Spratly Islands. *See id. See generally* Teh-Kuang Chang, *China's Claim of Sovereignty Over Spratly and Paracel Islands: A Historical and Legal Perspective*, 23 CASE W. RES. J. INT'L L. 399, 403-06 (1991) (citing at least nine Chinese books that describe the geography of the Spratly Islands and document Chinese voyages to and activities in the Spratly region); Tao Cheng, *The Dispute Over the South China Sea Islands*, 10 TEX. INT'L L.J. 265, 273-76 (1975) (discussing ten frequently cited instances that form the basis of China's claim); Chiu & Park, *supra* note 2, at 9-11 (describing references to the Spratly Islands in Chinese books and maps).

65. *See* Cordner, *supra* note 40, at 62-64. The treaty, dated June 26, 1887, was entered to delimit territory between China and Vietnam, which was established as a French protectorate in 1884. *See id.* France claimed all territory "west of 105 degrees 43 minutes east of Paris . . . therefore ceding territory east of this line to China." *Id.*

66. *See* Chiu & Park, *supra* note 2, at 11 (citing the Convention Respecting the Delimination of the Frontier Between China and Tonkin (Vietnam), signed June 26, 1887 that provided France all territory "west of 105 degrees 43 minutes east of Paris . . . therefore ceding territory east of this line to China"). Because the Spratly Islands are located east of the boundary line created by the 1887 treaty, the Chinese argue that the islands belong to them. *See id.*; *see also* Murphy, *supra* note 1, at 191.

67. *See* Murphy, *supra* note 1, at 201 (concluding that China's claim, evaluated under the Palmas Island Arbitration standards, lacks legal strength); Dubner, *supra* note 30, at 309 (identifying the Chinese government's failure to include the Spratly Islands on a 1928 official chart of Chinese territory as one weakness in China's claim); Bennett, *supra* note 3, at 449 (concluding that China's claim lacks merit under international law); *see also* VALENCIA ET AL., *supra* note 4, at 23 (pointing out additional weaknesses in China's claim). *But see* Liu, *supra* note 36, at 871 (stating that historical records, as well as modern manifestations of sovereignty support China's claim); Chang, *supra* note 64, at 408-13 (explaining that China has continuously and peacefully occupied the Spratly Islands, as established by international law). China acquired inchoate title by virtue of its discovery of the Spratly Islands and has "maintained continuous sovereignty" since Admiral Cheng Ho's first voyage to the South China Sea in 1405. *Id.* at 410.

68. *See* VALENCIA ET AL., *supra* note 4, at 21 (stating that China's claim, based

had the earliest recorded contact with the Spratly Islands,[69] China's historical evidence fails to provide any conclusive proof of routine occupation and, at most, supports only a claim of inchoate title.[70] In 1988, China began efforts to occupy and station troops on vacant islands.[71] China presently occupies nine Spratly features.[72]

2. *Taiwan*

Taiwan's claim to the Spratly Islands is essentially the same as China's and is based on historical discovery and use of the islands.[73]

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upon the 1887 treaty, is weak since the Treaty did not name any islands). France subsequently argued that the delimitation line only pertained to the northern portion of the South China Sea. *See id.;* Cordner, *supra* note 40, at 64 (noting that both Chinese and French interpretations of the Treaty are controversial). In addition, the Treaty did not specify any north, south, or eastern limits. *See id.*

69. *See* Liu, *supra* note 36, at 879 (stating that China's documented discovery of the Spratly Islands 2,000 years ago "predates Vietnam's earliest record of contact with the islands by over a millennium"); Dubner, *supra* note 30, at 308 (stating that China may have had the earliest contact with the Spratly Islands, despite the dispute over the dates of discovery).

70. *See* Cordner, *supra* note 40, at 62, 65 (describing China's historical evidence as sparse, intermittent, and incomplete). Occasional and infrequent visits by mariners and fishermen do not satisfy the standard of continuous occupation. *See id.*; Murphy, *supra* note 1, at 200 (stating that records support China's claim that it was the first to discover the Spratlys, however, there is no convincing evidence of a peaceful and continuous display of Chinese authority, as required to establish sovereignty under the Palmas Island Arbitration); *see also* Beller, *supra* note 46, at 305 (admitting that Chinese history books documenting China's discovery of the Spratly Islands are a biased source of information).

71. *See* Murphy, *supra* note 1, at 201. Vietnam was simultaneously engaged in efforts to occupy vacant features. *See id.* In March 1988, a clash erupted between China and Vietnam when China ambushed three Vietnamese supply ships, killing several Vietnamese sailors. *See id.* at 195.

72. *See* Ma. Christina V. Deocadiz, *The South China Sea Conflict: Exactly What are the Stakes?*, BUS. WORLD (MANILA), July 9, 1997, *available in* 1997 WL 11539606; VALENCIA ET AL., *supra* note 4, at 22 (listing the nine features occupied by China). China currently occupies Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Kennan Reef, Loaita Cay, North Danger Reefs, Subi Reef, and Whitson Reef. *See id.* at 21-22. Some sources indicate that each of the features China occupies remain submerged at high tide. *See id.* at 22.

73. *See* Cordner, *supra* note 40, at 62 (stating that Taiwan's claim begins with the same historical claim as China's). After Taiwan and China separated in 1947, Taiwan attempted to advance its own claim to the Spratlys. *See id.*; *see also* VALENCIA ET AL., *supra* note 4, at 29 (stating that Taiwan claims to be the legitimate government of China); Bennett, *supra* note 3, at 448 (noting that China incorporates Taiwan's claim into its own because China does not recognize

In addition, Taiwan claims that after the Japanese invaded Hainan Island, the Paracel Islands, and the Spratly Islands in 1939,[74] the Japanese placed the Spratly Islands under Taiwan's jurisdiction.[75] In 1946, Taiwan attempted to establish a garrison on Itu Aba following Japan's withdrawal at the end of World War II, but was also forced to withdraw when China took over Hainan Island in 1950.[76] Taiwan did not occupy the Spratlys again until 1956 when it reestablished a garrison on Itu Aba.[77]

Taiwan's claim is based upon the same historical evidence as China's and thus suffers from the same weaknesses, attributable to unconvincing and intermittent proof.[78] Taiwan may, however, have a strong claim to Itu Aba Island, which it has continuously occupied since 1956.[79]

3. Vietnam

Based upon historical documents evidencing Vietnamese visits and administration,[80] both before and after French occupation,[81]

Taiwan as a separate state).

74. *See* Cordner, *supra* note 40, at 64 (stating that Japan established "the first recorded permanent garrison and effective sovereign control over the Spratlys").

75. *See* Dubner, *supra* note 30, at 310 (noting that Taiwan was, at the time, a territory of Japan).

76. *See* Cordner, *supra* note 40, at 64.

77. *See id.* (stating that Taiwan has maintained a garrison on Itu Aba since 1956).

78. *See id.* (providing that Taiwan and China rely on the same ancient evidence in support of their claims).

79. *See* Murphy, *supra* note 1, at 193 (stating that the Taiwanese navy regularly patrols the island). Taiwan's occupation appears to be the longest continuous occupation of any Spratly Island since the dispute began. *See id.*; *ROC Construction of Airstrip Postponed*, PERISCOPE-DAILY DEF. NEWS CAPSULES, Jan. 18, 1996, *available in* 1996 WL 7596130 (stating that Taiwan postponed its plans to construct an airstrip on Taiping Island). Taiwan also postponed plans to encourage emigration from Taiwan to the Spratlys due to "sensitive issues" concerning the Spratlys. *Id.*; *see also Taiwan to Delay New Airport on Taiping Island*, AIRPORTS, Jan. 30, 1996, *available in* 1996 WL 8111979 (noting that although it has delayed plans to build an airstrip on Taiping Island, Taiwan will proceed with plans to promote tourism to the Spratlys).

80. *See* VALENCIA, ET AL., *supra* note 4, at 30 (stating that Vietnamese court documents dating between 1460 and 1497 indicate that the Spratly Islands were Vietnamese territory). Seventeenth century Vietnamese maps depict the Spratlys as Vietnamese territory. *See id.*; Cordner, *supra* note 40, at 65 (noting that official documents claim to trace Vietnamese ownership back to 1650). Vietnam has not,

Vietnam claims ownership to the entire Spratly chain.[82] In addition, Vietnam claims that it succeeded France's claim when Vietnam was granted independence.[83] Vietnam reaffirmed its sovereignty claim at the 1951 San Francisco Peace Conference.[84]

Vietnam's claim to the Spratly Islands is weak for several reasons. First, Vietnam's historical claim, like China's, suffers from evidentiary weaknesses;[85] second, Vietnam did not succeed France's 1933 claim;[86] third, there are significant lapses in Vietnamese control

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however, identified the basis for this claim. *See id.* Vietnam also claims that the Spratlys were governed from 1816 by Emperor Gia-long. *See id.*; Deocadiz, *The South China Sea Conflict: Exactly What are the Stakes?*, *supra* note 72 (stating that Vietnam claims its fisherman have fished in the Spratly region for centuries).

81. *See* VALENCIA ET AL., *supra* note 4, at 30. Vietnam was established as a French protectorate in 1884. *See id.*; Deocadiz, *The South China Sea Conflict: Exactly What are the Stakes?*, *supra* note 72 (stating that France occupied the Spratly Islands from 1933 to 1939). In 1939, Japan invaded the Spratlys and used them as a submarine base during World War II. *See id.*

82. *See* Cordner, *supra* note 40, at 65; VALENCIA ET AL., *supra* note 4, at 8 (stating that Vietnam, along with China and Taiwan, claims all features that rise above sea level). *See generally* Chang, *supra* note 64, at 416 (outlining five grounds upon which Vietnam bases its claim).

83. *See* Beller, *supra* note 46, at 305 (stating that Vietnam's claim to the Spratlys is based upon its succession to France's title). Vietnam first asserted that it succeeded France's claim at the 1951 Peace Conference. *See id.* at 308; *see also* Chiu & Park, *supra* note 2, at 8 (citing the Vietnamese delegate to the 1951 Peace Conference's affirmation of Vietnam's ownership of the Spratlys); Chang, *supra* note 64, at 416 (noting that none of the fifty-one powers at the Peace Conference made any objection to Vietnam's claim); Murphy, *supra* note 1, at 192 (expressing surprise that France, a participant in the Conference, did not reassert its sovereignty claim); Cordner, *supra* note 40, at 65 (noting that the 1939 Japanese invasion of the Spratly Islands ended France's sovereignty claim).

84. *See* Chiu & Park, *supra* note 2, at 8 (stating that subsequent to World War II, a fifty-one nation conference was held in San Francisco on September 7, 1951 to sign a peace treaty with Japan); Chang, *supra* note 64, at 416 (stating that Japan was forced to relinquish all territory it had seized during the war, including the Spratly Islands).

85. *See* VALENCIA ET AL., *supra* note 4, at 32 (describing Vietnam's evidence as "sparse, anecdotal, and inconclusive"); Cordner, *supra* note 40, at 65 (describing an 1838 map depicting the Spratly Islands as Vietnamese territory as "inaccurate"). *But see Archaeology Affirms Sovereignty over Spratlys*, PERISCOPE-DAILY DEF. NEWS CAPSULES, Apr. 5, 1996, *available in* 1996 WL 7598291 (stating that Vietnamese archaeological searches revealed that the Vietnamese had lived on Truong Sa and Nam Yet continuously since the 14th century).

86. *See* Cordner, *supra* note 40, at 66 (noting that France specifically stated in 1933 that it did not cede annexation of the Spratlys to Vietnam); Liu, *supra* note 36, at 872 (stating that France claims it never ceded the Spratlys to Vietnam);

over the Spratlys;[87] and fourth, statements made by North Vietnamese government officials in 1956 and 1958 support China's claim to the Spratlys.[88] Despite these weaknesses, however, Vietnam has maintained garrisons on twenty-two Spratly features since 1973.[89]

4. *The Philippines*

The Philippines claims most of the Spratly Islands[90] based upon the theory that the islands were *terra nullius*[91] when a Filipino lawyer and businessman discovered them in 1947.[92] The Philippines also contends that the Spratly Islands were *terra nullius* following the

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Dubner, *supra* note 30, at 311 (claiming that subsequent to France's occupation in 1933, sovereignty was transferred to Japan in 1941); *see also* Beller, *supra* note 46, at 308 (noting that Vietnam failed to take any action following its 1951 claim).

87. *See* Cordner, *supra* note 40, at 66 (commenting that "significant gaps" exist in the history of Vietnam's sovereign control over the Spratly Islands). There was no Vietnamese activity nor any attempts by Vietnam to occupy the Spratlys for fifteen years. *See id.*

88. *See* Murphy, *supra* note 1, at 193 (noting that North Vietnam supported China's sovereignty claim instead of South Vietnam's claim); VALENCIA ET AL., *supra* note 4, at 32-33 (noting that statements made by North Vietnam's Second Foreign Minister in 1956 and Prime Minister in 1958 recognized and supported China's sovereignty claim, thereby weakening Vietnam's current position).

89. *See Vietnam Installs Radio Equipment on Islands*, PERISCOPE-DAILY DEF. NEWS CAPSULES, June 6, 1996, *available in* 1996 WL 7599993 (stating that Vietnam installed radio relay stations and receivers on five islands). This installation is the first phase of a Vietnamese plan to upgrade radio facilities on the Spratly Islands and is designed to provide soldiers stationed on the islands with informative and entertaining broadcasts. *See id.*

90. *See* J.R.V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 218 (1985) (noting that the Philippines' claim excludes Spratly Island and several reefs located in the south); VALENCIA ET AL., *supra* note 4, at 33 (stating that while the Philippines claims most of the Spratly Islands, it does not claim Spratly Island itself).

91. *See* ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 391 (Clive Parry et al., eds., 1986) (defining "terra nullius" as a term of art meaning "a territory belonging to no-one—at the time of the act alleged to constitute the 'occupation'").

92. *See* Cordner, *supra* note 40, at 66 (describing Tomas Cloma's claimed discovery of several unoccupied islands). In May 1956, Cloma named the islands "Kalayaan," or Freedomland, and appointed himself "Chairman of the Supreme Council of the Kalayaan State." *Id.* Cloma's claim generated several diplomatic protests. *See id.* Cloma transferred ownership of Kalayaan to the Philippine government in 1974. *See id.*

1951 San Francisco Peace Treaty, therefore, invalidating all previous claims of ownership and justifying its occupation.[93] Lastly, the Philippines claims that the Spratly Islands lie within its archipelagic territory[94] and are "vital to the country's security and economic survival."[95] In 1978, the Philippines formally claimed the Spratly Islands by presidential decree.[96]

The Philippines arguably possesses the weakest claims to the Spratly Islands.[97] The argument that the islands were unclaimed and unoccupied when Cloma "discovered" them in 1947 is unconvincing and highly unlikely.[98] In addition, Cloma's discovery did not give rise to a claim of ownership on the part of the Philippine government since Cloma was acting in an individual capacity, independent of the

93. *See* Cordner, *supra* note 40, at 66 (noting that the Spratly Islands were "de facto under trusteeship" of the Allied Powers following the 1951 San Francisco Peace Treaty). In response to an incident in 1971, when a Philippine fishing boat was fired upon by Taiwan near Itu Aba Island, the Philippines protested and argued that since China occupied islands, which were trusts of the Allied Powers, it was forbidden from establishing garrisons on the islands without the consent of the Allies. *See id.*; VALENCIA ET AL., *supra* note 4, at 34 (describing the Philippines' belief that their occupation of the Spratly Islands is justified because of the islands' status as trusts and the apparent abandonment of the islands by other countries between 1950 and 1956).

94. *See, e.g.*, Dubner, *supra* note 30, at 312 (noting that the Philippine government's protest to Taiwan over the 1971 incident included the argument that the Spratly Islands are within the archipelagic territory of the Philippines).

95. *See* PRESCOTT, *supra* note 90, at 222 (noting that the Philippines bases its sovereignty claim upon "indispensible need"). *But see* Dubner, *supra* note 30, at 313 (commenting that the Philippines' justifies its claim on "vague security and economic grounds").

96. *See* VALENCIA ET AL., *supra* note 4, at 34 (stating that Philippine President Ferdinand Marcos officially declared that Kalayaan was part of the Philippines in 1978). President Marcos made a similar declaration in 1971 in a diplomatic note to Taipei. *See id.* at 34 & n.147; *see also* Dubner, *supra* note 30, at 312 (noting that the presidential decree does not include Spratly Island); Cordner, *supra* note 40, at 67 (stating that the decree also included the declaration of a 200 nautical mile EEZ).

97. *See* Dubner, *supra* note 30, at 323 (describing the Philippines' claim, based on Cloma's discovery, as "worthless").

98. *See* Murphy, *supra* note 1, at 207 (describing Cloma's purported discovery of the islands as lacking credibility). Prior to 1947, the Spratly Islands undoubtedly had been discovered and explored numerous times. *See id.*; VALENCIA ET AL., *supra* note 4, at 35 (noting that China, Taiwan, and Vietnam challenge the Philippines' assertion that the islands were abandoned prior to Cloma's discovery).

government.[99] Moreover, it is unlikely that Cloma's ninety-day occupation[100] of the Spratly Islands satisfies the *Palmas Island* standard of a continuous display of authority.[101] Lastly, the Spratly Islands are not located within the Philippines' archipelagic territory since the Palawan Trough separates the islands from the Philippine archipelago.[102] In spite of these weaknesses, however, the Philippines has occupied eight features since 1978 and may have a valid claim to these features under the *Palmas Island* standard.[103]

5. *Malaysia*

In 1979, Malaysia claimed twelve features in the southern portion of the Spratly Islands, which Malaysia contends are located on its continental shelf.[104] Malaysia asserts that UNCLOS continental shelf provisions allow a coastal state to exercise sovereignty over islands

99. *See* VALENCIA ET AL., *supra* note 4, at 35 (stating that "independent territorial claims of private individuals are not equivalent to governmental claims unless the individual is acting on the authority of government or the government asserts jurisdiction over the individual"); Cordner, *supra* note 40, at 67 (noting that international law gives the independent activities of individuals little value).

100. *See* Murphy, *supra* note 1, at 207 (noting that Cloma established settlements on the islands, but abandoned them after only 90 days); Bennett, *supra* note 3, at 438 (stating that Cloma abandoned the islands within a few months of discovering them).

101. *See* Murphy, *supra* note 1, at 207 (concluding that although "continuous" was not defined in the *Palmas Island* case, it is unlikely that abandonment after 90 days is continuous).

102. *See* Cordner, *supra* note 40, at 67 (describing the trough as distinct and deep); VALENCIA ET AL., *supra* note 4, at 35 (concluding that the existence of the Palawan Trough weakens the Philippines' continental shelf claim).

103. *See* VALENCIA ET AL., *supra* note 4, at 34 (stating that since 1978, the Philippines has occupied eight Spratly features). The features occupied by the Philippines are Commodore Reef, Flat Island, Lankiam Cay, Loaita Island, Nanshan Island, Northeast Cay, West York Island, and Thitu Island. *See id.* at 34-35. The Philippines has already constructed an airstrip on Thitu Island and has announced plans to build lighthouses on several other features. *See id.*

104. *See* Murphy, *supra* note 1, at 207 (stating that Malaysia established its claim in 1979 based on Article 76 of UNCLOS); VALENCIA ET AL., *supra* note 4, at 36 (listing the twelve features and islands claimed by Malaysia). Malaysia occupies Ardasier Reef, Dallas Reef, Louisa Reef, Mariveles Reef, Royal Charlotte Reef, and Swallow Reef. *See id.* Malaysia also claims, but does not occupy Amboyna Cay, Barque Canada Reef, Commodore Reef, Erica Reef, Investigator Reef, and Luconia Reef. *See id.*

located on its continental shelf.[105] Malaysia also makes a historical claim of discovery and occupation of these features based on a Malaysian map issued in 1979, depicting the southernmost Spratlys as part of Malaysia's continental shelf.[106]

Malaysia's claim lacks strength for several reasons. First, Malaysia's interpretation of UNCLOS is incorrect.[107] While UNCLOS does allow a coastal state to control the resources of its continental shelf,[108] none of the provisions grants sovereign rights to a coastal state over islands located on its continental shelf.[109] Second, Malaysia's 1979 claim of discovery and occupation is fairly recent, as compared to China, Taiwan, and Vietnam's claims, and is challenged by several countries.[110] Lastly, other countries control

105. *See* Liu, *supra* note 36, at 873 (stating that Malaysia's claim relies upon the continental shelf provisions of UNCLOS); Cordner, *supra* note 40, at 67 (describing Malaysia's belief that the continental shelf provisions of UNCLOS and the 1958 Geneva Convention on the Continental Shelf support its sovereignty claim over all features located on its continental shelf).

106. *See* VALENCIA ET AL., *supra* note 4, at 37 (stating that discovery and occupation form the second basis for Malaysia's claim); Cordner, *supra* note 40, at 67 (observing that Malaysia's historical claim "coincide[d] with the issuing of the Malaysian Map of 1979"); Dubner, *supra* note 30, at 313 (stating that the 1979 map declared sovereignty over all features on the Malaysian continental shelf).

107. *See, e.g.*, Cordner, *supra* note 40, at 67 (referring to Malaysia's interpretation of Article 76 as an "inverse application"); Liu, *supra* note 36, at 873 (describing the basis of Malaysia's claim as a "misinterpretation" of UNCLOS).

108. *See* UNCLOS, *supra* note 34, art. 77 (providing "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources").

109. *See* UNCLOS, *supra* note 34, art. 76 (defining the continental shelf of a coastal State as "the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin"); Cordner, *supra* note 40, at 67 (noting that UNCLOS continental shelf provisions do not refer to features "on the continental shelf that rise above sea level"); KITTICHAISAREE, *supra* note 36, at 140 (concluding that UNCLOS does not cover territorial disputes). While the law of the sea specifies the "effect of islands on the ocean regime, it does not, *per se*, determine the legal status of islands." *Id.*; *see* Jonathan I. Charney, *Central East Asia Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 729 (1995) (noting that rights in maritime zones do not form the basis for claiming new territorial rights); PRESCOTT, *supra* note 90, at 222 (stating "[i]t is not waters which give title to islands but islands which confer rights to waters").

110. *See* VALENCIA ET AL., *supra* note 4, at 37 (noting the weaknesses of Malaysia's recently asserted and vigorously contested" historical claim).

several of the features claimed by Malaysia.[111] However, Malaysia's claim to the four features it has occupied since the 1980s may possess more legal strength under the *Palmas* standard.[112]

6. *Brunei*

Brunei claims Louisa Reef and Rifleman Bank,[113] both located in the southern portion of the Spratly Islands, based on the belief that these features are located on an extension of its continental shelf.[114] In support of this claim, Brunei relies on Articles 76 and 77 of UNCLOS[115] and a 1954 British decree establishing Brunei's maritime boundaries.[116] Unlike the other countries, Brunei does not

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111. *See* Dubner, *supra* note 30, at 314-16 (listing claims made by other countries which overlap Malaysia's claim). Vietnam also claims and protests Malaysia's claim to Amboyna Cay. *See id.* The Philippines claims and protests Malaysia's claim to Commodore Reef. *See id.* Brunei claims and protests Malaysia's claim to Louisa Reef. *See id.*; *see also* VALENCIA ET AL., *supra* note 4, at 37 (stating that Malaysia does not effectively control all of the features that it claims); KITTICHAISAREE, *supra* note 36, at 144 (noting that Amboyna Cay is also claimed by China, Vietnam, and the Philippines). Vietnam has occupied Amboyna Cay since 1978. *See id.*

112. *See* VALENCIA ET AL., *supra* note 4, at 37 (describing Malaysian occupied features). Malaysia has occupied Swallow Reef since 1983, Ardasier Reef and Mariveles Reef since 1986, and Dallas Reef since 1987. *See id.* Louisa Reef and Royal Charlotte Reef are "occupied" by a navigation light and beacon, respectively. *See id.*; PRESCOTT, *supra* note 90, at 222 (stating that Malaysia constructed obelisks on both Louisa and Commodore Reef); Murphy, *supra* note 1, at 207-08 (noting that the reefs claimed by Malaysia—Swallow Reef, Ardasier Reef, and Mariveles Reef—have never been occupied by any of the other claimant countries). Malaysia has peacefully and continuously occupied these features since 1983. *See id.*; *see also* VALENCIA ET AL., *supra* note 4, at 36 (stating that Malaysia has also constructed an airstrip and "chalet" on Swallow Reef).

113. *See* VALENCIA ET AL., *supra* note 4, at 38 (stating that Brunei published its claim to Rifleman Bank in 1988 with the issuance of a map). The 1988 map depicted Brunei's continental shelf extending beyond Rifleman Bank. *See id.*

114. *See* Cordner, *supra* note 40, at 69 (stating that Brunei claims Louisa Reef and recently claimed Rifleman Bank); VALENCIA ET AL., *supra* note 4, at 38 (stating that Brunei claims two reefs: Louisa Reef and Rifleman Bank); Liu, *supra* note 36, at 873 (stating that Brunei's claim is based on geographic proximity). *But see* Murphy, *supra* note 1, at 68 (stating that Brunei only claims Louisa Reef).

115. *See* Cordner, *supra* note 40, at 68 (noting that the continental shelf provisions of UNCLOS form the basis of Brunei's claim).

116. *See* Cordner, *supra* note 40, at 68 (citing the 1954 British decree as the basis for Brunei's claim). This decree delimited Brunei's maritime boundaries, which included the continental shelf. *See id.*; *see also* VALENCIA ET AL., *supra* note 4, at 38 (quoting the decree that establishes Brunei's boundary and includes "the

currently occupy any of the Spratly features.[117]

Brunei's claim to Rifleman Bank appears to be based on a 350 nautical mile continental shelf claim[118] and is inconsistent with UNCLOS because the East Palawan Trough[119] separates Rifleman Bank from Brunei and terminates the natural prolongation of Brunei's continental shelf.[120] If Louisa Reef is located on Brunei's continental shelf, Brunei may have a valid claim under UNCLOS to explore and exploit its resources since it is a submarine feature.[121] Malaysia, however, also claims and occupies Louisa Reef.[122]

C. EVALUATION OF CLAIMS

Under international law, each of the claimant countries' sovereignty claims is weak.[123] The evidence presented by China, Taiwan, and Vietnam, in support of their historical claims, is unconvincing and sparse—it merely illustrates the countries' intermittent contact and brief occupation of the islands.[124] Likewise, the claims of the Philippines, Malaysia, and Brunei suffer from

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area of the continental shelf . . . territorial waters").

117. *See* Liu, *supra* note 36, at 873.

118. *See* Cordner, *supra* note 40, at 68 (stating that the basis for Brunei's claim of Rifleman Bank is uncertain, but appears to be a 350 nautical mile continental shelf claim); VALENCIA ET AL., *supra* note 4, at 38 (commenting that Brunei's claim to Rifleman Bank is either based upon a 350 nautical mile continental shelf claim or its claim to Louisa Reef).

119. *See* Cordner, *supra* note 40, at 68 (stating that the East Palawan Trough is located 60 to 100 miles off Brunei).

120. *See* UNCLOS, *supra* note 34, art. 76 (defining the continental shelf).

121. *See* Murphy, *supra* note 1, at 208 (stating that Louisa Reef is not an island since it does not have any permanent dry land). Since Louisa Reef is "essentially part of the seabed," Brunei may exclusively exploit the reef's resources. *Id.*; *see* VALENCIA ET AL., *supra* note 4, at 38 (noting that only two small rocks remain above water at high tide).

122. *See* VALENCIA ET AL., *supra* note 4, at 36, 38 (noting that Malaysia also claims Louisa Reef). Malaysia "occupies" Louisa Reef with a navigation light and an "accommodation module." *Id.* at 36; *see* Liu, *supra* note 36, at 873 (stating that Brunei does not occupy any of the features it claims).

123. *See* VALENCIA ET AL., *supra* note 4, at 39 (concluding that all claims asserted by the countries are weak). *But see* Beller, *supra* note 46, at 310 (concluding that an analysis under international law favors China's claim).

124. *See* Cordner, *supra* note 40, at 68-69 (noting that the historical claims of China, Taiwan, and Vietnam are unconvincing and incapable of demonstrating any effective control giving rise to territorial sovereignty).

factual weaknesses and legal misinterpretations.[125] Although some of these claims may be sufficient to satisfy the *Clipperton* standard,[126] recent cases indicate that evidence of actual possession and use are emphasized more than evidence of discovery.[127]

With the exception of Brunei, each of the countries has made attempts to occupy the islands.[128] Taiwan, for example, has continuously occupied Itu Aba since 1956,[129] and Vietnam, the Philippines, Malaysia, and China have each controlled several features since 1973, 1978, 1983, and 1988, respectively.[130] These occupations most likely satisfy the *Palmas* standard of a continuous display of authority.[131] Other claimant countries, however, have protested and not acquiesced to these sovereign displays.[132]

In an attempt to resolve their differences, the countries have resorted to bilateral negotiations, consultations, and informal regional discussions.[133] These approaches have proved fruitless and little

125. *See generally* VALENCIA ET AL., *supra* note 4, at 33-38.

126. *See supra* notes 22-29 and accompanying text (discussing the Clipperton Island case which held that evidence of occupation may not be necessary to establish sovereignty over uninhabited territory).

127. *See supra* notes 32-33 and accompanying text (summarizing the Minquiers and Ecrehos case and the Case Concerning the Land, Island, and Maritime Frontier Dispute, in which the International Court of Justice resolved conflicting sovereignty claims based upon evidence of possession rather than historical claims of discovery).

128. *See supra* notes 71-72, 77, 89, 103, 112 (describing the features each country occupies).

129. *See supra* note 79 and accompanying text (describing Taiwan's occupation of Itu Aba); VALENCIA ET AL., *supra* note 4, at 39-40.

130. *See* VALENCIA ET AL., *supra* note 4, at 39-40.

131. *See* Murphy, *supra* note 1, at 209 (concluding that Taiwan's and Vietnam's occupations have been long enough to establish sovereignty under the *Palmas Island* standard).

132. *See supra* notes 98, 110-11, 122 and accompanying text (noting that other countries contest the claims of the Philippines, Malaysia, and Brunei); Bennett, *supra* note 3, at 434 (noting that China claims all of the Spratlys and refuses to recognize the claims of other countries).

133. *See* Cecille Yap, *The Claim on Kalayaan Islands in Spratlys Group* BUS. WORLD (MANILA), Feb. 14, 1997, *available in* 1997 WL 7200296 (describing some of the negotiation strategies being used by the claimant countries); *Government to Hold Meeting on Spratlys,* PERISCOPE-DAILY DEF. NEWS CAPSULES, June 17, 1997, *available in* 1997 WL 7724991 (stating that Taiwan's Task Force on South China Sea Affairs will begin a new round of meetings to discuss a five-point plan of action concerning the Spratly Islands). Taiwan's plan

progress has been made.[134] Meanwhile, incidents of armed conflict among the claimant countries have erupted.[135] Most notably, China sank three Vietnamese supply ships in 1988, killing seventy-two Vietnamese.[136] As tension and the threat of armed conflict continues to build, countries are making efforts to increase the size and strength of their military forces in the region.[137]

The presently utilized negotiation strategies have achieved very little, and international law does not provide much guidance in resolving the dispute. The best course of action for all countries involved would be to establish a joint development zone.[138]

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includes the following: plans to safeguard the region, plans to develop and manage the islands, efforts to increase cooperation among claimant countries, peaceful methods for resolving the dispute, and plans to preserve the region's natural ecology. *See id.*; *Chinese Seek to Reassure Manila on Spratlys*, PERISCOPE-DAILY DEF. NEWS CAPSULES, May 10, 1996, *available in* 1996 WL 7599253 (noting that China's Deputy Military Chief and four generals visited Manila in an attempt to calm fears of armed conflict over the Spratlys).

134. *See* VALENCIA, *supra* note 9, at 50-54 (stating that Indonesian sponsored conferences have encouraged and facilitated discussion, but participants are still unable to agree on fundamental matters). The Indonesian talks have "generated more heat than light." *Id.* at 52.

135. *See supra* note 93 (describing a 1971 incident in which a Philippine fishing vessel was fired upon by Taiwan); *see also* Valencia, *supra* note 35 (noting that in April 1988, Malaysia arrested several Filipino fishermen in an area claimed by both Malalysia and the Philippines). In 1992 and 1994, the Philippines arrested Chinese fishermen for fishing near islands claimed by the Philippines. *See id.*

136. *See supra* note 71 and accompanying text (describing the 1988 incident).

137. *See* Uli Schmetzer, *Philippines Shopping for Warships, Jets*, AUSTIN AM. STATESMAN, May 21, 1997, *available in* 1997 WL 2824316 (stating that the Philippine government is buying warships and jets); *Missile Boat Requirement Profiled*, PERISCOPE-DAILY DEF. NEWS CAPSULES, May 9, 1997, *available in* 1997 WL 7724309 (reporting that the Philippines is negotiating with the British Royal Navy to purchase three missile boats equipped with anti-aircraft missiles and deck guns to update its aging fleet); *see also* Nirmal Ghosh, *Manila Steps Up Talks to Buy Missile Boats*, SING. STRAITS TIMES, May 6, 1997, *available in* 1997 WL 7210943 (stating that it is the Philippines' belief that recent incidents in the Spratly Islands have necessitated the rapid modernization of its fleet); *Asian Countries Beef Up Naval Fleets*, THE FILIPINO EXPRESS, Mar. 3, 1996, *available in* 1996 WL 15673215 (remarking that China, Vietnam, and the Philippines are in the process of adding to their military fleet). In 1994, Vietnam added two 455-tonne corvettes to its navy. *See id.* China is attempting to purchase two attack submarines and an aircraft carrier. *See id.* The Philippines is also seeking to purchase second hand patrol boats and frigates. *See id.*

138. *See* VALENCIA ET AL., *supra* note 4, at 60 (commenting that a joint development authority, achieved by negotiation, would be a better result).

III. THE TIMOR GAP TREATY AS A MODEL FOR JOINT DEVELOPMENT

A. BACKGROUND AND HISTORY OF THE TIMOR GAP DISPUTE

A possible solution to the Spratly Islands dispute could be a joint development agreement modeled after the Timor Gap Treaty. On December 11, 1989, Australia and Indonesia entered into an agreement establishing a provisional zone of cooperation for joint development of seabed resources in the Timor Gap.[139] The resulting Timor Gap Treaty resolved a seventeen-year dispute between Australia and Indonesia over seabed boundary delimitation.[140]

The Island of Timor encompasses approximately 25,000 square meters and is located in the Indian Ocean approximately 300 miles northwest of Australia.[141] West Timor, once part of the Dutch East Indies, became part of the Indonesian Republic following World War II.[142] The eastern portion of the island was a Portuguese colony until late 1975 when Indonesia invaded East Timor and proceeded to incorporate it into the Indonesian Republic.[143]

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139. Australia-Indonesia: Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Austl., Dec. 11, 1989, Austl.–Indon., 29 I.L.M. 475 [hereinafter Timor Gap Treaty]; *see* Stuart Kaye, *The Timor Gap Treaty: Creative Solutions and International Conflict*, 16 SYDNEY L. REV. 72, 90 (1994) (stating that the Timor Gap Treaty entered into force on February 9, 1991).

140. *See* James K. Kenny, Comment, *Resolution III of the 1982 United Nations Convention on the Law of the Sea and the Timor Gap Treaty*, 2 PAC. RIM L. & POL'Y J. 131 (1993) (discussing the agreement regarding the joint use of petroleum reserves).

141. *See, e.g.*, R.D. Lumb, *The Delimitation of Maritime Boundaries in the Timor Sea*, 7 AUSTL. Y.B. INT'L L. 72 (1977); Ernst Willheim, *Australia–Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the "Timor Gap"*, 29 NAT. RESOURCES J. 821, 822 (stating that the distance between East Timor and Australia is less than 400 nautical miles).

142. *See* Lumb, *supra* note 141, at 72 (providing an overview of the island's history).

143. *See* Kenny, *supra* note 140, at 134-35 (stating that Indonesia invaded East Timor on December 7, 1975). Both Portugal and the United Nations condemned Indonesia's actions and recognized the right of the East Timorese to self-determination. *See id.* at 134. Indonesia formally annexed East Timor on July 17, 1976. *See id.* at 135; *see also Portugal Challenges Australia's Role in East Timor*, ASIAN POL. NEWS, Feb. 6, 1995, *available in* 1995 WL 2224471 (providing that the United Nations considers East Timor to be under the administrative power of

The Timor Gap, located in the Timor Sea between Eastern Timor and northwest Australia,[144] was created in 1972 after Australia and Indonesia signed treaties establishing seabed boundaries in an area east of Papua New Guinea[145] and an area south of West Timor.[146] Australia also attempted to negotiate and establish a seabed boundary with Portugal, who controlled East Timor, but was ultimately unsuccessful.[147] Therefore, a gap resulted and remained in the seabed boundary between Eastern Timor and Australia. In 1974, reports of petroleum discoveries in the Kelp structure within the Timor Gap region revealed the significant oil and gas production potential of the region.[148] As oil companies would not likely enter exploration

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Portugal); Kaye, *supra* note 139, at 75 (noting that in 1978, Australia granted de facto recognition of Indonesia's sovereignty over East Timor, despite Australia's initial "unenthusiastic" protest).

144. *See* Willheim, *supra* note 141, at 822 (explaining the boundary dispute).

145. *See* Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, May 18, 1971, Austl.–Indon., 1973 Austl. T.S. No. 31; Willheim, *supra* note 141, at 822 (stating that the 1971 agreement established a 520 nautical mile boundary in the Arafura Sea, extending from "west of Cape York to north of Arnhem Land").

146. *See* Agreement Between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of May 18, 1971, Oct. 9, 1972, Austl.–Indon., 1973 Austl. T.S. No. 32; Willheim, *supra* note 141, at 822 (noting that the second treaty established a 540 nautical mile boundary). This Treaty extended the 1971 boundary westward in two segments, terminating in an area south of West Timor. *See id.* A 130 nautical mile gap was created south of East Timor. *See id.*

147. *See* Anthony Bergin, *The Australian–Indonesian Timor Gap Maritime Boundary Agreement*, 5 INT'L J. ESTUARINE & COASTAL L. 383, 384 (1990) (stating that Portugal preferred to wait until the 1972 United Nations Convention on the Law of the Sea concluded before entering into negotiations with Australia). By the time UNCLOS concluded in 1982, however, Indonesia had already annexed East Timor. *See id.*

148. *See* Kaye, *supra* note 139, at 76 (stating that oil and gas discoveries were first reported in 1974). These reports increased exploratory activity in the region and served as a significant motivating factor in negotiations. *See id.*; *see also* William Martin & Dianne Pickersgill, Recent Development, *The Timor Gap Treaty—The Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area Between the Indonesia Province of East Timor and Northern Australia, Dec. 11, 1989, Australia–Indonesia, Reprinted in 29 I.L.M. 469 (1990)*, 32 HARV. INT'L L.J. 566, 568 (1991) (estimating that the Kelp structure contains between 500 million and five billion barrels of oil and gas deposits); Eric Nelson, *Australia's Reaction to the Violence in East Timor:*

contracts in disputed territory,[149] Australia and Indonesia began negotiations in 1979 to establish a permanent boundary and close the Timor Gap.[150]

Australia claimed that the Timor Trough, a prominent submarine trench located approximately 40 to 70 nautical miles from and running parallel to the coast of Timor,[151] was a natural boundary and represented the outer edge of the Australian continental shelf's natural prolongation.[152] Indonesia, on the other hand, claimed that a single continuous continental shelf separated Timor and Australia, and therefore, a median line or equidistance method should be used to delimit the boundary between the countries' opposite territorial sea baselines.[153]

With neither country willing to concede or compromise their respective positions, Australian officials suggested that negotiations center on a joint development zone.[154] Despite initial reluctance on the part of Indonesia, Australia and Indonesia agreed in principle to implement a joint development zone in October 1985.[155] Although

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Economic Ties with Indonesia May be Keeping Government Quiet, S.F. CHRON., Dec. 2, 1991, at A8 (noting that oil reserves in the Timor Gap region are estimated at one to six million barrels). The area is believed to be one of the world's 25 richest oil deposits. *See id.*

149. *See* Kaye, *supra* note 139, at 76 (noting that in order to exploit oil or gas resources, there can be no uncertainty of seabed ownership).

150. *See* Lumb, *supra* note 141, at 74 (discussing the boundary claims of Australia and Indonesia).

151. *See* Willheim, *supra* note 141, at 822 (noting that the Timor Trough is approximately 3000 meters deep). The Trough, located 30 to 60 nautical miles off of Timor's coast, is closer to Indonesia than it is to Australia. *See id.*

152. *See id.* (noting that the agreed boundary roughly follows the line of the Timor Trough).

153. *See* Lumb, *supra* note 141, at 74 (discussing Australia's view as to which principles of seabed delimitation should be applied).

154. *See id.* (discussing Indonesia's argument for seabed delimitation); *see also* Kaye, *supra* note 139, at 78 (stating that Australian officials first suggested the concept of a joint development zone in 1984).

155. *See* Kaye, *supra* note 139, at 78 (noting that Australia's suggestion of a joint development zone "received a cool reception" from Indonesia); Bergin, *supra* note 147, at 384 (noting that the discovery of petroleum in the seabed increased interest in reaching a settlement); Martin & Pickersgill, *supra* note 148, at 568 (discussing oil as an impetus for agreement). *But see* Kenny, *supra* note 140, at 136-37 (stating that in May 1979, Indonesia was the first to suggest a joint development zone).

relations between the two countries deteriorated in 1986 and slowed negotiations,[156] an agreement was finally reached in 1988.[157] On December 11, 1989, the Foreign Ministers of Australia and Indonesia signed the Timor Gap Treaty while flying over the newly created Zone of Cooperation in the Timor Sea.[158]

B. THE TIMOR GAP TREATY

The Timor Gap Treaty is a long and complex document.[159] The primary purpose of the treaty is to establish a Zone of Cooperation in the Timor Gap for the joint exploration and exploitation of natural resources.[160] The treaty covers an area of approximately 60,000 square kilometers and divides the Timor Gap into three areas, labeled A, B, and C.[161] The treaty will remain in force for at least forty years, or until a permanent boundary is agreed upon.[162]

The boundaries of each of these three areas reflect the maximum possible extent of the countries' claims.[163] The northernmost boundary of the Zone of Cooperation reflects the maximum extent of

156. *See* Bergin, *supra* note 147, at 384 (stating that a visit by Australia's Foreign Minister, Senator Evans, to Indonesia accelerated progress in the negotiations).

157. *See id.* at 384-85.

158. *See, e.g., Indonesia, Australia Sign Timor Gas Pact*, PLATT'S OILGRAM NEWS, Dec. 13, 1989, *available in* 1989 WL 2122297 (stating that Indonesia's Foreign Minister, Ali Alatas, and Australia's Foreign Minister, Gareth Evans, signed the treaty in an Australian airplane, while flying over the Timor Gap).

159. *See* Bergin, *supra* note 147, at 385 (noting that the Timor Gap Treaty encompasses 129 pages and consists of 34 articles and four annexes).

160. *See id.* (stating that the sole purpose of the Zone of Cooperation created by the treaty is petroleum exploitation and exploration).

161. *See* Timor Gap Treaty, *supra* note 139, art. 2(1), 29 I.L.M. at 477 (describing the territorial scope of the treaty).

162. *See id.* pt. VIII, art. 33, 29 I.L.M. at 492 (providing that unless the two countries are able to agree on a permanent delimitation, the Treaty will continue in force for successive 20 year terms following the initial 40 year term); Richard Woolcott, *Australia–Republic of Indonesia Seabed Boundaries Now Settled*, JAKARTA POST, Mar. 27, 1997, *available in* 1997 WL 10016526 (noting that the Timor Gap Treaty is provisional and will be up for review in the year 2031); Bergin, *supra* note 147, at 385 (discussing the scope of the Timor Gap Treaty).

163. *See* Kaye, *supra* note 139, at 79 (stating that the Zone of Cooperation "represents the extremes that both States could claim, and all that lies in between them").

Australia's continental shelf claim,[164] while the southern most boundary reflects the maximum possible extent of Indonesia's 200 nautical mile EEZ claim.[165] Simplified equidistance lines form the eastern and western boundaries.[166] The claims of Australia and Indonesia are also reflected in the boundaries within the Zone of Cooperation.[167] The boundary separating Area C, in the north of the Zone, from Area A, the central area of joint development, represents the 1500 meter isobath.[168] The boundary separating Area A and Area B, in the south of the Zone, represents the median line between the two countries.[169]

Area B, located in the southern most part of the Zone of Cooperation, is subject to the sole jurisdiction of Australia.[170] Australia must notify Indonesia of any petroleum operations[171] and share sixteen percent of the tax revenue generated from petroleum in the area.[172] Area C, in the northernmost portion of the Zone, is under Indonesian jurisdiction.[173] Indonesia must also notify Australia of any petroleum operations in Area C[174] and must share ten percent of the

164. *See, e.g.*, Bergin, *supra* note 147, at 385 (stating that the northern boundary of the Zone of Cooperation roughly represents the axis of the Timor Trough). This boundary represents the furthest extent of Australia's claim. *See* Kaye, *supra* note 139, at 79.

165. *See, e.g.*, Martin & Pickersgill, *supra* note 148, at 569 (providing that the southern boundary represents the edge of a 200 nautical mile EEZ, measured from the Timor Coast).

166. *See, e.g.*, Kaye, *supra* note 139, at 79 (stating that the western and eastern edges of the Zone of Cooperation represent simplified lines of equidistance); *see also* Bergin, *supra* note 147, at 385 (noting that the shape of the Zone of Cooperation has been described as a "coffin-shaped box").

167. *See* Kaye, *supra* note 139, at 79 (noting that the treaty "represents the extremes that both States could claim").

168. *See id.* (stating that the line separating Zones C and A approximate the 1500 meter isobath). Australia claimed that the Timor Trough was a natural boundary. *See id.* at 73.

169. *See* Kaye, *supra* note 139, at 79 (noting that a simplified median line between East Timor and Australia divides areas A and B). Indonesia claimed that a median line between the two countries should serve as the boundary. *See* Bergin, *supra* note 147, at 383.

170. *See* Timor Gap Treaty, *supra* note 139, art. 4(1).

171. *See id.* art. 4(1)(a).

172. *See id.* art. 4(1)(b).

173. *See* Kaye, *supra* note 139, at 80 (stating that Indonesia has complete civil and criminal jurisdiction in Area C).

174. *See* Timor Gap Treaty, *supra* note 139, art. 4(2)(a).

petroleum tax revenue generated in the Area.[175] Area A, located in the central portion of the Zone, represents the overlapping territorial claims of Australia and Indonesia and is the area subject to joint control.[176] The proceeds generated from petroleum exploitation in Area A are shared equally by Australia and Indonesia.[177]

1. Major Provisions of the Timor Gap Treaty

In addition to defining the areas governed, the Treaty provides for the creation of a Ministerial Council and a Joint Authority to oversee the various rights and responsibilities involved in petroleum exploration and exploitation in Area A.[178] The Council is composed of an equal number of Ministers appointed from each country.[179] The Ministerial Council meets alternately in Australia or Indonesia once a year or as often as necessary.[180] All Ministerial Council decisions are made by consensus.[181] In addition to overseeing the Joint Authority,[182] the Ministerial Council has the responsibility for making major decisions and overseeing all activities in Area A.[183]

The Joint Authority consists of an equal number of Executive Directors from each country, appointed by the Ministerial Council.[184] All decisions by the Joint Authority are made by consensus.[185] The

175. *See id.* art. 4(2)(b); Kaye, *supra* note 139, at 80 (accounting for the disparity in tax revenue percentages that must be paid by Australia and Indonesia). Kaye identifies three possible explanations for the disparity. First, the allocation of a larger share of tax revenue to Indonesia was possibly meant as an inducement since Indonesia was less than enthusiastic about Australia's joint development suggestion. Second, the size and oil production potential of Australia's Area B is much larger than Indonesia's Area C. Third, the larger percentage of tax revenue allocated to Indonesia may represent Australia's "tacit recognition" of the strength of Indonesia's claim. *See id.*

176. *See* Timor Gap Treaty, *supra* note 139, art. 2(2)(a).

177. *See id.* art. 2(2)(a).

178. *See id.* art. 5(1) (creating the Ministerial Council) & art. 7(1) (creating the Joint Authority).

179. *See id.* art. 5(2).

180. *See id.* art. 5(3) & art. 5(4).

181. *See* Timor Gap Treaty, *supra* note 139, art. 5(5).

182. *See id.* art. 7(3).

183. *See id.* art. 6 (designating the functions of the Ministerial Council).

184. *See id.* art. 9(1)(a).

185. *See id.* art. 7(4). If consensus cannot be reached, the matter is submitted to the Ministerial Council. *See id.*

Joint Authority is responsible for managing petroleum exploration and exploitation activities in Area A.[186] The Joint Authority's other functions include the awarding of Petroleum Sharing Contracts, the division of Area A into contract blocks, and the collection and distribution of proceeds from Production Sharing Contracts.[187]

The Treaty also provides a detailed Petroleum Mining Code[188] and a Model Production Sharing Contract.[189] The Petroleum Mining Code sets forth the obligations and rights of the Joint Authority and petroleum contractors.[190] Under the Petroleum Mining Code, contractors have the right to explore and extract oil while the Joint Authority retains ownership of all petroleum extracted until it is loaded onto tankers.[191] The petroleum is shared by the Joint Authority and contractor according to a formula set forth in the Model Production Sharing Contract.[192] The Model Production Sharing Contract forms the basis for all contracts entered into between the Joint Authority and contractors.[193] In addition to containing a production sharing formula, the Model Production Sharing Contract provides for the relinquishment of petroleum blocks if oil discoveries are not made within specified time frames.[194]

C. EFFECTS OF THE TIMOR GAP TREATY

In addition to resolving a protracted territorial dispute, the Treaty has served to strengthen previously strained relations between Australia and Indonesia.[195] Commentators have referred to the Timor

186. *See* Timor Gap Treaty, *supra* note 139, art. 8.
187. *See id.* (listing the functions of the Joint Authority).
188. *Id.* annex B.
189. *Id.* annex C.
190. *See id.* annex B, art. 4 (setting forth the rights and duties of the Joint Authority and contractors).
191. *See* Timor Gap Treaty, *supra* note 139, annex B, arts. 4(3) & 4(4).
192. *See id.* annex C, § 7.
193. *See id.* annex B, art. 5.
194. *See id.* annex C, § 3; *see also* Kaye, *supra* note 139, at 89 (commenting that the relinquishment provision encourages the efficient development of Area A).
195. *See* Martin & Pickersgill, *supra* note 148, at 566 (characterizing the Treaty as a "substantial step forward in the relations between the two countries"); Kaye, *supra* note 139, at 96 (noting that prior to signing the Treaty, Australia and Indonesia were at an impasse and would not budge from their "entrenched positions").

Gap Treaty as a "triumph of compromise"[196] and an "imaginative approach to breaking the deadlock in boundary negotiations."[197] The only perceived obstacles to the Treaty's success were two legal actions challenging the Treaty's validity.[198] The first came in 1994 when three East Timorese activists sought to have the Treaty nullified by the High Court of Australia.[199] The second challenge came in June 1995 when Portugal contested the Treaty's validity.[200] Both of these challenges, however, were struck down.[201]

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196. *See* Kaye, *supra* note 139, at 95.

197. Bergin, *supra* note 147, at 391.

198. *See* Martin & Pickersgill, *supra* note 148, at 579 (stating that Portugal's challenge to the Treaty's validity poses the greatest threat to the Treaty's success); Kaye, *supra* note 139, at 95 (commenting, with regard to the Treaty's status, that there are several "snakes in the garden").

199. *See* Horta and Others v. Australia. (1994) 181 C.L.R. 183; Kalinga Senevirantne, *Timor Gap Ruling Sets Back Resistance*, INTER PRESS SERV., Aug. 19, 1994, *available in* 1994 WL 2578965 (reporting that three Timorese activists claim that because the United Nations does not recognize Indonesia's annexation of East Timor, Australia's treaty with Indonesia is illegal); *Challenge in Australia to Timor Deal with Jakarta*, PLATT'S OILGRAM NEWS, Aug. 16, 1994, at 4, *available in* 1994 WL 2223881 (stating that the Timorese contend Australia should have signed the Treaty with East Timor instead of Indonesia).

200. *See* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30) (separate opinions of Judges Oda, Shahabuddeen, Ranjeva, and Vereshchetin) (dissenting opinions of Judges Weeramantry and Skubiszewski). Portugal argued that Australia, in signing the Timor Gap Treaty, "infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources [and] infringed [on] the rights of Portugal as the administering Power . . ." *Id.* at 98.

201. *See* Horta and Others v. Australia, (1994) 181 C.L.R. 183 (holding that regardless of the Treaty's validity, it was within the Parliament's constitutional power to enact the Treaty's supporting legislation, which was valid); Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30). The I.C.J., by a 14-2 majority, rejected Portugal's claim. The Court held that it did not have the jurisdiction to assess Portugal's claims since it would be required to rule on the legality of Indonesia's 1976 annexation of East Timor, in the absence of Indonesia's consent. *See id.* at 105; *see also Court Rejects Portugal Stance on Timor*, THE IRISH TIMES, July 1, 1995, at 11, *available in* 1995 WL 14689583 (quoting the Presiding Judge of the International Court of Justice, Mohammed Bedjaoui, as acknowledging that the Court can only exercise jurisdiction over a state with its consent); Christine Forster, *Portugal Loses in Try for Timor's Oil Indonesia and Australia Still in Control*, PLATT'S OILGRAM NEWS, July 10, 1995, *available in* 1995 WL 8136148 (stating that the Court could not rule on Indonesia's conduct since it did not recognize the Court and was not a party to the suit).

Since the signing of the Treaty, numerous production sharing contracts have been approved, oil wells have been drilled, seismic surveys have been conducted, and several major oil discoveries have been made.[202] Since the Treaty has successfully served its primary purpose and the settlement of a permanent boundary in the near future is unlikely, the Timor Gap Treaty is expected to continue in effect until a more permanent solution is found.[203]

D. APPLICABILITY TO THE SPRATLY ISLANDS DISPUTE

The Timor Gap Treaty is one example of a successful joint development agreement,[204] in which two countries have been able to peacefully settle a potentially volatile dispute over precious natural resources.[205] Important differences exist between the Spratly Islands

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202. *See Oil Exploration Contracts Approved for Timor Sea*, THE ASSOCIATED PRESS, Dec. 12, 1991, *available in* 1991 WL 6219058 (stating that as of 1991, eleven petroleum exploration contracts, involving fifty-five oil companies, had been approved). Forty-five oil wells are planned between 1991 and 1997. *See id.*; *Exploratory Oil Drillings in East Timor Gap to Begin Soon*, INDON. INV. HIGHLIGHTS, July 1, 1992, *available in* 1992 WL 2730419 (reporting that at least six large oil companies are expected to invest approximately $450 million in exploration activities over a six year period); Kalinga Seneviratne, *Australia–East Timor: Find Raises Stakes in Court Battle*, INTER PRESS SERV., Oct. 24, 1994, *available in* 1994 WL 2723018 (announcing a major oil discovery by Woodside Petroleum in the Timor Gap). The discovery is estimated to be between 100 and 300 million barrels. *See id.* Nine of the world's largest oil companies have invested over $250 million in oil exploration activities in the Timor Gap. *See id.* They have contracted to drill twenty-three wells by 1995 and an additional twenty-two wells by 1997. *See id.*; *see also Aussie Operators Chalk Up More Offshore Strikes*, THE OIL & GAS J., Jan. 2, 1995, *available in* 1995 WL 7943048 (announcing gas discoveries made by West Australia Petroleum and BHP Petroleum in the Timor Gap). *But see Australia Benefiting More than Indonesia from Timor Gap*, ASIA PULSE, Mar. 14, 1997, *available in* 1997 WL 10648503 (reporting that Australia is receiving greater benefits than Indonesia). More Australian workers are employed in the Timor Gap and approximately eighty-nine percent of production sharing contracts are being awarded to Australia. *See id.*

203. *See* Kaye, *supra* note 139, at 96 (stating that as long as oil exists in the Timor Gap, there is little hope for establishing a permanent boundary).

204. *See generally* Willheim, *supra* note 141, at 832-34 (describing existing models for joint development, including the agreements between Thailand and Malaysia and Korea and Japan); VALENCIA ET AL., *supra* note 4, at 183-85 (listing 12 other joint development precedents); Bergin, *supra* note 147, at 390 (stating that joint development agreements are common "[w]here mineral and hydrocarbon wealth straddles the continental shelf boundary between coastal states").

205. *See* Kaye, *supra* note 139, at 95 (stating that the Timor Gap Treaty avoided

dispute and the Timor Gap dispute. The Timor Gap dispute involved two countries with opposite coastlines and concerned the delimitation of continental shelf boundaries.[206] The dispute did not involve any islands and each country based its claim upon "bona fide legal principles."[207] In addition, there were no incidents of armed conflict, and regional security concerns did not influence the outcome of the dispute.[208] In contrast, the Spratly Islands dispute concerns the sovereignty claims of six countries who each claim all or part of a collection of tiny islands and submerged features.[209] Some of the countries base their claims on historical evidence of discovery and occupation, while other countries rely on legal arguments.[210] Several incidents of armed conflict have occurred and regional security issues are a key factor and concern in the dispute.[211]

Despite significant differences in the factual backgrounds of the two situations, the Timor Gap Treaty could nonetheless serve as a workable model and source of ideas and principles for a solution to the Spratly Islands dispute.[212] In order to achieve success, however, any solution modeled after the Timor Gap Treaty will have to account for these distinctions.

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a major dispute caused by the potential value of the oil located in the region).

206. *See, e.g.*, Kaye, *supra* note 139, at 72 (noting that Australia and Indonesia were unable to agree on how the boundary between their continental shelves should be delimited).

207. *See* William T. Onorato & Mark J. Valencia, *International Cooperation for Petroleum Development: the Timor Gap Treaty*, 5 ICSID REV. 1, 3 (1990); *see also* Martin & Pickersgill, *supra* note 148, at 567 (commenting that international maritime law curiously supported both countries' claims).

208. *See* Onorato & Valencia, *supra* note 207, at 3 (stating that Indonesia and Australia were prime candidates for joint development).

209. *See e.g.*, Cordner, *supra* note 40, at 62.

210. *See generally,* VALENCIA ET AL., *supra* note 4, at 20-38 (discussing the bases of each countries' claim).

211. *See supra* notes 50-52 and accompanying text (illustrating the strategic importance of the Spratly Islands).

212. *See* Bruce Blanche & Jean Blanche, *Oil and Regional Stability in the South China Sea*, JANE'S INTELLIGENCE REV., Nov. 1, 1995, *available in* 1995 WL 14357443 (stating that the Timor Gap Treaty could serve as a model for negotiations).

IV. RECOMMENDATIONS

Despite recent incidents and mounting tension[213] in the Spratly Islands, the claimant countries involved in the dispute should implement a joint development agreement, utilizing the principles and structures employed in the Timor Gap Treaty.[214] Given the claimant countries' recently expressed willingness to peacefully resolve the dispute and explore joint development,[215] such a solution

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213. *See* VALENCIA ET AL., *supra* note 4, at 21-22 (stating that seventy-two Vietnamese were killed in 1988 during a battle with China over Fiery Cross Reef). In 1994, The Philippines arrested fifty-five Chinese fisherman after they attempted to build structures on a Philippine claimed feature. In 1995, China arrested and detained thirty-five Filipino fisherman. *See id.* at 79-80; Nguyen Phan Phuong, *Oil Search Fuels Rising Tension in South China Sea*, INTER PRESS SERV., Mar. 21, 1997, *available in* 1997 WL 7074351 (announcing Vietnam's formal protest to China over a Chinese oil rig that began drilling in Vietnamese waters near the disputed Spratlys); *Vietnam Warned on Spratlys Oil Concessions*, PERISCOPE-DAILY DEF. NEWS CAPSULES, Apr. 19, 1996, *available in* 1996 WL 7598678 (reporting China's disapproval over oil exploration concessions granted by Vietnam to CONOCO in the vicinity of the Spratlys); *China Steps Up Forces in Disputed Spratly Reef*, AGENCE FR.-PRESSE, Apr. 30, 1997, *available in* 1997 WL 2104886 (announcing that China deployed three frigates to a reef claimed by the Philippines); *Philippines Sends Fighter Jets to Spratlys*, AGENCE FR.-PRESSE, Apr. 30, 1997, *available in* 1997 WL 2105854 (stating that Philippine fighter jets are patrolling the Spratlys in response to armed Chinese vessels seen approaching Philippine claimed territory); Ma. Christina V. Deocadiz, *Military to Drive Away, But Won't Detain Chinese Vessels*, BUS. WORLD (MANILA), June 26, 1997, *available in* 1997 WL 11538633 (reporting that Philippine naval vessels fired warning shots to drive away Chinese fishing boats seen near three islands claimed by the Philippines).

214. *See supra* pt. III.B.1 (describing the roles and functions of the Ministerial Council, Joint Authority, Petroleum Mining Code, and Model Production Sharing Contract, as provided for in the Timor Gap Treaty).

215. *See Chinese General Urges Joint Development of Isles*, *supra* note 5 (noting China's suggestion that the claimant countries shelve their disputes and develop jointly); *China, Philippines Vow to Settle Spratlys Issue Peacefully*, AGENCE FR.-PRESSE, June 6, 1996, *available in* 1996 WL 3866261 (reporting that China's foreign minister promised the Philippines' foreign minister that the Spratly sovereignty issue would be settled peacefully); *China Eyes Spratly Solution*, THE OIL DAILY, Apr. 23, 1996, *available in* 1996 WL 8318559 (noting that China, in an attempt to reduce regional tension, has suggested "shelving disputes and accepting common development"); Cecille E. Yap, *RP Okays China Plan on Spratlys Resources*, BUS. WORLD (MANILA), Feb. 25, 1997, *available in* 1997 WL 7200778 (reporting that the Philippines "'agrees in principle' with a Chinese proposal to jointly develop the Spratlys"). Negotiations between China and the Philippines, concerning joint development in the Spratlys, have been ongoing;

would likely be well received.

Prior to establishing a joint development agreement, however, the claimant countries must implement more confidence building measures to foster a greater sense of cooperation.[216] The countries should agree on and implement a multilateral code of conduct providing for the peaceful settlement of all disputes, cooperation, and the exercise of self-restraint.[217] The code of conduct should also contain specific provisions prohibiting the countries from claiming new territory, building new structures, granting oil exploration concession,[218] and expanding military forces in the disputed region.[219] In addition, the countries should agree on measures to gradually achieve demilitarization of the region.[220] If taken, these preliminary measures would help increase the likelihood of creating and implementing a successful joint development agreement.[221]

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however, China has declined to negotiate with any of the other claimant countries. *See id.*

216. *See* VALENCIA, *supra* note 9, at 62-63 (stating that half-measures "help build the confidence necessary to move beyond the unstable status quo to an interim solution that is both equitable and stable").

217. *See id.* (noting that a code of conduct is one example of a half-measure intended to facilitate the negotiation process). The Philippines, China, and Vietnam are already parties to bilateral codes of conduct in the Spratly Islands. *See id.*; *Manila, Hanoi Agree on Code of Conduct in Spratlys*, JAPAN ECON. NEWSWIRE, Nov. 8, 1995, *available in* LEXIS, News Library, Cumws File (announcing that the Philippines and Vietnam have agreed on a code of conduct in the Spratly Islands). The Philippines also signed a similar code of conduct with China. *See id.*

218. *See* Murphy, *supra* note 1, at 210-11 (noting that a significant oil discovery could tempt China to resort to the use of force).

219. *See* VALENCIA ET AL., *supra* note 4, at 120 (noting that a code of conduct could also include measures designed to prevent accidental military encounters and conflicts over fisheries).

220. *See* Yap, *The Claim on Kalayaan Islands in Spratlys Group*, *supra* note 133. A Philippine government official announced that the Philippines proposes demilitarization of the region before implementing any joint development agreement and stewardship of the islands. *See id.*

221. *See* VALENCIA ET AL., *supra* note 4, at 186-87. A successful joint development agreement resolving the Spratly Islands dispute will necessarily address the following key issues/factors: 1) boundaries of the area to be governed by joint development, 2) the status of each country's sovereignty claim during the period of joint development, 3) identification of participants, 4) Taiwan's role, 5) the power relationship amongst the claimants, 6) identification of the resources to be managed, 7) governing structure, 8) which law would apply, 9) fiscal arrangements, and 10) the length of the agreement. *See id.*

Given the complexity of the six countries' overlapping and conflicting claims, a single joint development zone encompassing the entire Spratly region would be extremely difficult to administer and would likely be met with opposition from China.[222] China has indicated its preference to negotiate bilaterally, perhaps to gain an advantage over smaller and weaker countries.[223] In any event, a joint development agreement will not succeed without China's cooperation.[224] Therefore, instead of creating a single joint development zone, the claimants should establish twelve separate joint development zones for each area of overlapping claims.

Mark J. Valencia, a Senior Fellow with the Program on International Economics and Politics at the East-West Center, Honolulu, Hawaii, suggests subdividing the disputed region based upon the countries' overlapping claims.[225] This subdivision takes into consideration the maximum extent of each country's claim, regardless of its strength or validity, and superimposes the claims atop one another, resulting in a patchwork of twelve zones. Based on this subdivision, the claimant countries should enter into a provisional joint development treaty establishing twelve separate joint development zones. The purposes of such zones would be joint exploration and exploitation of hydrocarbon resources, with each zone employing the organizational and decision making structures utilized in the Timor Gap Treaty. In addition, the treaty should freeze all sovereignty claims for the duration of the joint development agreement.

For example, Brunei's claim, which extends out from its coast to an area beyond Rifleman Bank, overlaps in five different areas with the claims of China, Malaysia, Vietnam, and the Philippines. Under a joint development regime, these five areas of overlap would each be

222. *See* Murphy, *supra* note 1, at 210 (acknowledging that China prefers to negotiate bilaterally); *China Favours Bilateral Approach to Spratlys Issue*, ASIA PULSE, Jan. 6, 1997, *available in* 1997 WL 10152295 (acknowledging that the Chinese government prefers a bilateral approach to resolving the conflict over the Spratly Islands). The Philippines has reiterated its preference for multilateral arrangements. *See id.*

223. *See* Murphy, *supra* note 1, at 209-10.

224. *See id.* at 210.

225. VALENCIA ET AL., *supra* note 4, at 217-18. Valencia's subdivision regards the claims of Taiwan and China as one. *See id.*

controlled by a joint development agreement, thereby resulting in five joint development zones within the territory claimed by Brunei.

Separate detailed treaties would govern each joint development zone. These treaties would contain a Mining Code and Model Production Sharing Contract and provide for the establishment of a Ministerial Council and Joint Authority. For further illustration, consider the region encompassing Louisa Reef, within the area claimed by Brunei. This region, which is also claimed by China and Malaysia, would constitute one joint development zone. As established by treaty, a Ministerial Council and a Joint Authority, consisting of an equal number of representatives from Brunei, China, and Malaysia would control this zone. As in the Timor Gap Treaty, the Ministerial Council would meet annually, alternately in China, Brunei, and Malaysia and have overall responsibility with regard to the zone. Similarly, the Joint Authority's responsibilities would include subdividing the zone into commercial blocks and entering into contracts for petroleum exploration in these blocks. The Joint Authority would make all decisions by consensus. Each member would have equally weighted voting rights and the contractor, China, Brunei, and Malaysia would share equally all process generated from hydrocarbon exploitation.

The Spratly Islands joint development structure, however, would deviate from the Timor Gap arrangement in one important aspect. Unlike the Timor Gap agreement, which utilized a two-tiered managerial structure[226] consisting of the Ministerial Council and Joint Authority, the Spratly claimants would need to employ a third tier, or Managerial Council, to oversee and coordinate the activities of the twelve joint development zones. The Managerial Council would contain one Counselor from each of the claimant countries and its role and function would be analogous to that of the Ministerial Council's in the joint development zones.[227]

Scholars and commentators have proposed countless solutions and suggestions to resolve the impasse in the South China Sea.[228] Joint

226. *See* Onorato & Valencia, *supra* note 207, at 6.

227. *See supra* notes 181-83 (describing the duties and responsibilities of the Ministerial Council, as set forth in the Timor Gap Treaty).

228. *See, e.g.*, VALENCIA, *supra* note 9, at 50-67 (discussing several alternate solutions, including outright allocation); VALENCIA ET AL., *supra* note 4, at 133-87

development, however, is the most appealing and promising solution. Since each country's claim would receive full consideration, each country would share in the resources located in the entire area it claims. Joint development would not prejudice or adversely affect any of the countries' claims since all claims would be frozen for the duration of the agreement. Furthermore, by employing the structures found in the Timor Gap Treaty, each country would have an equal voice in the decision making process, thereby equalizing the countries' bargaining power.

CONCLUSION

The Spratly Islands dispute is an inordinately complicated situation for which international law and UNCLOS fail to provide a definitive answer. Any solution to the Spratly Islands dispute, however, will take time. By employing a provisional joint development agreement, the countries will at least be able to jointly and equitably exploit the natural resources located in the region, until a more permanent solution can be agreed upon.

(exploring various solutions, including a marine park and marine regionalism).