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The Spratly Islands Dispute: China Defines the New Millennium

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THE SPRATLY ISLANDS DISPUTE: CHINA DEFINES THE NEW MILLENNIUM

OMAR SALEEM*

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Aside from the basic African dialects, I would try to learn Chinese, because it looks as if Chinese will be the most powerful political language of the future.¹

INTRODUCTION

The foregoing statement of Malcolm X, made in the 1960s, verbalizes perceptions embraced forty years later. China is a growing and prosperous nation that many predict will become the second most powerful military and economic nation in the world, behind the United States, within the early part of the new millennium.² China's tremendous economic and military development generates the perception that a United States-China conflict is either exaggerated or inevitable.³ China's developmental goals include a claim of right to the Spratly Islands in the South China Sea.⁴ The China/Taiwan⁵ claim to the Spratly Islands is antagonistic towards the claims asserted by Brunei, Malaysia, the Philippines, and Vietnam who each claim the Spratly Islands in whole or in part.⁶ The various claimants have

1. AUTOBIOGRAPHY OF MALCOLM X 416 (reprint edition 1992).

2. See RICHARD BERNSTEIN & ROSS H. MUNRO, *THE COMING CONFLICT WITH CHINA* 21 (1998) (stating that although China has behaved like a rogue nation in the past, it will become the world's second most powerful military power with comparable economic power).

3. See *id.* (proclaiming China to be a major military machine with visions of becoming the most powerful nation in the world and a growing threat to American interests). But see EZRA VOGEL, *INTRODUCTION TO LIVING IN CHINA: US-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 30-31 (1997) (characterizing China as an ally and advocating increased interaction and trade between the United States and China).

4. 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, 399 (1991).

5. See *Some Questions and Answers on the China-Taiwan Dispute*, available in (visited Mar. 10, 2000) <<http://www.nando.net/newsroom/nt/312exchiqua.html>> (detailing the current dispute between China and Taiwan and defining the controversy over Taiwan).

6. See Lian A. Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands*, 13 AM. U. INT'L L. REV. 727, 749 (1998) (stating that each nation bases its claim on both legal and historical grounds).

found themselves in a stalemate with occasional military skirmishes. China's tremendous military and economic growth enables China to demand that any resolution of the dispute meet its base expectations. Any direction China takes to resolve the Spratly Islands dispute will impact Asia and the Western world, defining world politics in the new millennium. This Article focuses on China's perception of the Spratly Islands dispute and China's potential courses of conduct as it relates to resolving the dispute.

Part I of this Article provides a description of the problems, tensions, and rewards associated with the acquisition of the Spratly Islands. Part II discusses the correlation between China's growth and the United States' concerns regarding the Spratly Islands. Part III is an overview of the conflicting claims asserted by China, Vietnam, the Philippines, Malaysia, and Brunei to establish ownership of the Spratly Islands. Part IV presents China's current and historical approaches to international law in the context of an examination of various theories of international law which include sovereign/enforcement theory, treaties, natural law, and the realist school of thought. This discussion provides a background in order to predict China's future course of conduct in relation to the Spratly Islands. In this Part, the Article explains that because China is a realist nation, China's economic and military power will solidify or exacerbate tension between the claimants.

Part V of this Article provides projections for the future of the Spratly Islands and indicates that the dispute is plagued with factors such as the plight of the status quo, shortcomings in international law, tense United States-China relations, and a dire shortage of recommendations to resolve the dispute. Part VI presents recommendations to resolve the Spratly Islands dispute. The conclusion suggests that the ownership of the Spratly Islands should be characterized as "relations" rather than a "thing" and therefore vests each claimant with stakeholder rights to the oil and fish reserves in the Spratly Islands based on their relationship with the Spratly Islands. The extent of a particular claimant's relationship to the Spratly Islands would be based on the number of claims it has asserted. The claims are tallied and the total determines a claimant's right of percentage to the reve-

7. *Id.* at 749.

nues. The conclusion also addresses possible criticisms of the point system. Finally, this Article suggests a bid for a peaceful resolution of the Spratly Islands dispute through increased dialogue in the region to develop viable solutions, increased United States-China relations, and an adoption of B.A. Hamzah's confidence building measures⁸ along with the point system.

I. THE SPRATLY PROBLEM

The territory commonly called the Spratly Islands is a disputed area located in the South China Sea.⁹ The Spratly Islands consist of hundreds of small islets, coral reefs, sandbars, and atolls covering 180,000 square kilometers¹⁰ and different countries refer to the islands by different names. Vietnam named the islands "Truong Sa" Islands,¹¹ China named them "Nansha" Islands,¹² and the Philippines calls them the "Kalayaan" Islands.¹³ The struggle among various countries to name the islands is an attempt to establish and solidify a perceptual transformation and paradigm for vested property interests or ownership of the islands. There has been a continual political tug-of-war between Brunei, China/Taiwan, Malaysia, the Philippines, and Vietnam over control and ownership of the islands.¹⁴ Each nation has claimed rights to all or part of the Spratly Islands. The numerous claims overlap and result in considerable tension in Southeast Asia.

The crux of the Spratly Islands dispute centers on the potential

8. See *infra* notes 213-22 and accompanying text (describing B.A. Hamzah's proposed confidence measures).

9. See Chang, *supra* note 4, at 400 n.8 (explaining that the Spratly Islands are named after the British Sea Captain Spratly).

10. But see Christopher Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations Between China and Taiwan*, 32 NEW ENG. L. REV. 819, 824 (1998) (stating that the actual land mass of the islands only amounts to 3.1 square miles).

11. See Lee G. Cordner, *The Spratly Island Dispute and the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 61, 65 (1994).

12. *Id.* at 64.

13. *Id.* at 66.

14. See *generally id.* at 62 (concluding that various claims to the Spratly Islands are based on sometimes incomplete and ancient interpretations of ownership which has the potential to provoke armed conflict).

wealth and strategic military value of the Islands. The Spratly Islands are located in the South China Sea, 900 miles south of the Chinese island of Hainan, 230 miles east of Vietnam, 120 miles west of the Philippine island of Palawan, and 150 miles northwest of the Malaysian state of Sabah.¹⁵ They connect the Indian and Pacific Oceans and thereby establish a major sea-route and strategic military position linking Asia, Africa, and Europe.¹⁶ An estimated eighty percent of Japan's and seventy percent of Taiwan's oil and raw material imports pass through the South China Sea,¹⁷ while twenty-five percent of the world's oil production passes through the area *en route* from the Middle East to Japan and the United States.¹⁸ Control of the Spratly Islands could serve as a means to impact oil transports both in Southeast Asia and the remainder of the industrialized world because ownership and control of the Spratly Islands provides sovereign rights over the adjacent waters and seabed.¹⁹ Many analysts consider the South China Sea area, which encompasses the Spratly Islands, to have vast riches of oil and natural gas.²⁰ Chinese officials estimate the oil reserves at one trillion U.S. dollars.²¹ Many analysts believe it is one of the most lucrative fishing areas in the world with an annual value estimated in the mid-1990s at three billion U.S. dollars.²²

In addition to the potential economical wealth, the Spratly Islands have strategic value as well. During World War II, Japan used the Spratly Islands as military outposts for both invasions and block-

15. *Id.* at 61.

16. Cordner, *supra* note 11, at 61.

17. See Paul Martin, *Regional Efforts at Preventive Measures: Four Case Studies on the Development of Conflict-Prevention Capabilities*, 30 N.Y.U. J. INT'L L. & POL. 881, 928 (1998).

18. Nicholas Marsh, *The Spratly Islands Dispute* (visited Jan. 21, 2000) <<http://www.ukdf.org.uk/rs14.htm>>.

19. See generally Donald E. Karl, *Islands and the Delimitation of the Continental Shelf: A Framework for Analysis*, 71 AM. J. INT'L L. 642 (1977) (discussing the treatment of islands in delimitation of maritime boundaries between opposite and adjacent states).

20. See Cordner, *supra* note 11, at 61.

21. See Marsh, *supra* note 18.

22. See BOB CATLEY & MAKMUR KELIAT, *SPRATLYS: THE DISPUTE IN THE SOUTH CHINA SEA* 47 (1997) (stating that the annual catch amounts to between 2 and 2.5 million tons).

ades.²³ Near the close of the twentieth century a Japanese military analyst theorized that whichever nation controlled the Spratly Islands would gain regional hegemony in the new millennium.²⁴ Among the various nations that claim ownership of the Spratly Islands—Brunei, China/Taiwan, Malaysia, the Philippines, and Vietnam, China's claim presents the most intriguing issues that will define international affairs in the new millennium. China is in the best position among the claimants to become an uncontested power in Asia, filling the vacuum created when the Soviet Union and the United States withdrew from Southeast Asia.²⁵ China's military strength has had a fundamental impact on the dialogue and proposals initiated to resolve the Spratly Islands dispute. Any agreement concerning the Spratly Islands that does not satisfy China's interests would fail at its inception and possibly result in military conflict involving one or more of the claimants and the United States.

II. CHINA'S GROWTH AND THE UNITED STATES' CONCERNS

The different perceptions of China's intentions in Southeast Asia arise, in part, from China's military and economic expansion in its eastern coastline. China developed a Positive Defense Strategy in 1995, called Jixi Fang, which established a military security belt around China spanning from China's northeast coast to its southeast coast.²⁶ The range of the belt is enormous. It encompasses southern China and includes the Spratly and Paracel Islands in the South

23. See *id.* at 47 (asserting that Japan's occupation of the Spratly Islands during World War II provided a strategic outpost relative to Western colonial powers and an opportunity to advance in the Southeast Asian region).

24. See Mito, *supra* note 6, at 729 n.8 (quoting from a statement in the *Filipino Express*, Mar. 3, 1996, available in 1996 WL 15673215).

25. See 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, 427 (1997) (concluding that China may pursue a resolution to its claim to the Spratly Islands without military conflict in the absence of a United States and Soviet presence in the region).

26. See James Lilley, *The United States, China, and Taiwan: A Future with Hope* (Symposium: Bridging the Taiwan Strait-Problems and Prospects for China's Reunification or Taiwan's Independence), 32 NEW ENG. L. REV. 743, 744 (1998) (outlining the boundaries of China's security belt around its coastal areas).

China Sea and extends north beyond Taiwan.²⁷ China established the belt to protect its most prosperous economic areas in the southeast and eastern coastal regions, including Hong Kong, Macau, Shanghai, and Guangdong.²⁸ The belt continues further north to the Senkaku Islands (the Chinese name, Diaoyus) and out towards the East China Sea to the Korean peninsula.²⁹ The belt manifests China's claim of sovereignty over its coast, continental shelf, exclusive economic zone, adjacent territories, and areas with historical contacts such as the Spratly Islands.³⁰ China's land mass enables it to claim ownership of vast coastal areas and nearby seas. Such claims have repercussions in Asia because numerous other nations in Asia also claim the same seas and adjoining areas. In addition to the belt, the statement made in 1995 by Qian Qichen, then Foreign Minister, and later the Vice Premier of State Council, that it was time for the United States to stop considering itself the savior of the East,³¹ exemplifies China's intent and potential to emerge as a major power.

The coastal belt coupled with Minister Qichen's statement has international implications because the United States engaged in numerous military conflicts in Asia during the last century, ensuring that a single nation could not emerge as a major power and a controlling military, economic, or ideological force in Asia. Between 1899 to 1901 the United States conquered the Philippine Islands. The United States did so in order to protect the United States' interests in the area following the war with Spain, as well as to quash Filipino efforts for independence. In 1900, the United States joined Great Britain, France, Germany, Russia, Austria, Italy, and Japan to stop the Boxer Rebellion in Beijing because this rebellion threatened European interests in China. The United States fought against Japan

27. *Id.*

28. *See generally* CHINA, A COUNTRY STUDY 19 (Frederica M. Bunge & Rinn-Sup Shin eds., 1981).

29. *See* Lilley, *supra* note 26, at 744.

30. *Id.*

31. *See* BERNSTEIN & MUNRO, *supra* note 2, at 20 (asserting that this statement indicates that China's strategic thinking had changed). The authors claim that despite rhetoric to the contrary, China has positioned itself to become the most powerful nation in the world, and despite United States-China dialogue over the years China has done nothing to remedy the three areas often at issue: human rights, arms proliferation, and trade imbalance. *Id.* at 9.

in World War II from 1941 to 1945. From 1950 to 1953 the United States fought the North Koreans and Chinese to prevent Soviet rule over Korea. During the period of 1964 to 1975, the United States fought against North Vietnam to prevent the communist north from controlling South Vietnam. In sum, from 1899 to 1975 the United States engaged in battle after battle in Asia for control.³²

At the close of the twentieth century, China has the goal to modernize its nuclear capacity and make its military forces more accurate, easier to launch, mobile, and less vulnerable. The United States is faced with the realization that in the new millennium China will be a world power, and the uncontested power in Asia. The United States must prepare for evolving future relations with China. The belt, along with China's military growth, are perceived challenges to United States' interests in Asia because they have a potential impact upon existing sea-lanes, oil reserves, the Senkaku Islands,³³ the Korean Peninsula, Taiwan, and the Spratly Islands. The Taiwan issue, with the adjunct concern of the Spratly Islands, presents complex concerns and the possibility of conflict between China and the United States.³⁴

32. Historically, the United States has waged war against Asia on the premise that Asia was a place that should be contained because Asian nations were incapable of understanding and controlling world politics. See generally HENRY KISSINGER, *AMERICAN FOREIGN POLICY* 48 (1974); cf. LOUIS HENKIN ET AL., *RIGHT V. MIGHT* 50-51 (1989) (concluding that wars have been nonexistent among the major powers or on the Western Hemisphere after the two world wars).

33. See Sara Galley, *United Nations Convention on the Law of the Sea*, 1996 COLO. J. INT'L ENVTL. L. & POL'Y 109, 112 (1996) (finding that as in the case of the Spratly Islands, oil reserves are also behind the dispute between China and Japan over the Senkaku Islands); see also Yoshiro Matsui, *International Law of Territorial Acquisition and the Dispute Over the Senkaku (Diaoyu) Islands*, 40 JAPAN. ANN. OF INT'L L. 3, 3 (1997) (stating that Japan's claim to the Senkaku Islands has been disputed by China and Taiwan since 1971 when a survey found possible petroleum resources on the continental shelf surrounding the islands).

34. See Julian Baum et al., *Taiwan Upping the Ante*, FAR E. ECON. REV., July 22, 1999 (visited Nov. 1, 1999) <http://www.feer.com/9907_22/p18taiwan.html> (recounting an incident in 1996 where China and the United States nearly engaged in battle when China threatened Taiwan by firing missiles into the Taiwan Strait and the United States responded by sending two aircraft carriers to the region). Three years later, in July 1999, the United States expressed its position after Taiwan's president suggested that Beijing and Taiwan interact with each other as sovereign states. *Id.*

There has been an uneasy tension between Taipei and Beijing since the 1949 civil war when Chiang Kai-Shek fled the mainland to Taiwan. Both Taipei and Beijing claim the status as the representative government of China. This tension has had international ramifications. In an effort to dissipate Taipei's discomfort about a possible invasion by the mainland and to nurture the burgeoning economic development and democracy in Taipei,³⁵ the United States entered into the 1979 Taiwan Relations Act ("TRA") under President Carter's administration.³⁶ The TRA was President Carter's attempt to reassure Taipei that the international community acknowledged its right to exist, independent of Beijing.³⁷ Previously, under the Nixon Administration, the United States recognized Beijing as the governing power pursuant to the 1972 Shanghai Communiqué.³⁸ The TRA was also an effort by the United States to send a firm message to Beijing, which the United States perceived as militarily inept in 1979. The TRA specified the United States' objectives concerning cultural, commercial, and military relations with Taiwan.³⁹ It articulated the United States' position, emphasizing that since Taiwan has both economic and geopolitical significance for the United States, the United States has an obligation to provide both military and eco-

35. See Howard Shapiro, *CLE Conference The Tides of Trade: The Four Tigers*, 2 INT'L LEGAL PERSP. 87, 87 (1990) (including Taiwan with its vast technological development, as one of the Four Tigers). The other Tigers are Hong Kong, Singapore, and South Korea. *Id.* See generally Robb M. LaKritz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development In Post-Mao China*, 11 EMORY INT'L L. REV. 237, 237 (1997) (arguing that China will become the new Tiger, but that the freedoms associated with market participants will remain non-existent in China).

36. Taiwan Relations Act (TRA), Pub. L. No. 96-8, 93 Stat. 14 (1979), 22 U.S.C.A. sec. 3301.

37. See Glenn R. Butterton, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 CATH. U. L. REV. 51, 60-62 (1997) (stating that although the Taiwan Relations Act established diplomatic relations with the People's Republic of China, it also provided for a commitment to Taiwan's defense).

38. See BERNSTEIN & MUNRO, *supra* note 2, at 22 (specifying the United States' position on the Taiwan issue); see also 66 DEP'T ST. BULL. 435 (Mar. 20, 1972); 11 I.L.M. 443 (1972). The Shanghai Communiqué, signed on February 27, 1972, was an agreement between China and the United States which established that there is only one China, of which Taiwan is a part.

39. See Taiwan Relations Act (TRA), Pub. L. No. 96-8, 93 Stat. 14 (1979), 22 U.S.C.A. 3301.

conomic security against Mainland invasion, intervention, and coercion.⁴⁰ Taiwan and the Taiwan Strait, a waterway approximately 100 miles wide that separates the Mainland from Taiwan, are part of the northern end of the belt established by Beijing.⁴¹ It extends from north of Taiwan to the Spratly Islands in the South China Sea. If both Taiwan and the Spratly Islands come under the Mainland sphere of influence then China will have increased control over the lucrative resources and shipping lanes in the South China Sea.⁴² How will China gain control over the Spratly Islands? Will China use its military and/or economic power? While China defines itself in the twenty-first century, it is confronted with multifarious boundary disputes with India, Russia, Tajikistan, North Korea, and Vietnam (in the Gulf of Tonkin), and disputes concerning ownership of the Paracel Islands (involving Vietnam), the Senkaku Islands (involving Japan), and the Spratly Islands (involving Malaysia, the Philippines, Vietnam, and Brunei). The resolution of any of these disputes could have international implications on trade and the balance of power both in Asia and the Western World. The remainder of this Article specifically examine the Spratly Islands dispute.

III. CONFLICTING VIEWS

The Spratly Islands are a highly prized area in the South China Sea claimed by China/Taiwan, Brunei, the Philippines, Malaysia, and Vietnam. Each claimant values the potential wealth associated with oil reserves in the region. As a result of the inability of these countries to agree on a solution to the Spratly Islands issue, there is currently a stalemate. Each country believes that their claim to the Spratly Islands has a basis in history, emotions, economics, and politics.

40. See Nicholas Rastow, *Taiwan: Playing for Time*, 32 NEW ENG. L. REV. 707, 709 (1998) (stating that diplomatic relations with the People's Republic of China is dependent on the expectation of a peaceful determination of the future of Taiwan).

41. See Lilley, *supra* note 26, at 744.

42. Control of shipping lanes has been at the root of international conflicts in places such as the Panama Canal, South Africa and the Suez Canal.

A. CHINA

China's scholars contend that Chinese history, as it relates to the Spratly Islands, dates back thousands of years. The Chinese dynasties of the Xia (twenty-first to sixteenth centuries B.C.), the Shang (sixteenth to eleventh centuries B.C.), the Zhou (eleventh century to 221 B.C. covering the Spring and Autumn Period 770 to 476 B.C. and the Warring States Period 403 to 221 B.C.), the Qin (221 to 206 B.C.), the Han (206 B.C. to 220 A.D.), the Tang (618 to 907), the Song (960 to 1279), the Yuan (1279 to 1368) the Ming (1368 to 1644) and, the Qing (1644 to 1911/12) each have historical contacts with the Spratly Islands.⁴³ Scholars date China's knowledge and control of the Spratly Islands to a time prior to the Han Dynasty.⁴⁴ There are numerous Chinese publications that refer to the South China Sea Islands such as historical books, records, poems, and classic Chinese text.⁴⁵ For example, a seventy-one volume collection called, *Yi Zhou Shu* (Scattered Books of the Zhou Dynasty), which was written during the Qin Dynasty (over 200 B.C.) refers to the Xia Dynasty rulers who ordered the "barbarians" from the South China Sea area to provide them with pearl-carrying shellfish and turtles.⁴⁶ There is evidence that this practice of providing a tribute to the rulers continued through the Shang Dynasty.⁴⁷

The classical poetry collection *Shi Jing*,⁴⁸ and other Chinese classics written in the Spring and Autumn Period such as *Zuo Zhuan* (Zuo's Commentaries)⁴⁹ and *Guo Yu* (Statement of the States)⁵⁰ refer to the South China Sea islands. Chinese scholars contend that the ancient writings establish that China was aware of, made expeditions

43. See generally Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 1, 15, 20 (1997).

44. *Id.* at 15.

45. *Id.* at 15-36.

46. *Id.* at 15.

47. *Id.* at 16.

48. See Shen, *supra* note 43, at 16.

49. *Id.*

50. See *id.* at 17 (explaining that statements were made by nobles in reference to the South China Sea, demonstrating that rulers were aware of the islands).

to, and controlled the Spratly Islands as early as the Spring and Autumn Period and the Warring States Period of China.⁵¹ After that period, between the Han Dynasty (206 B.C. to 220 A.D.) and the Song Dynasty (960 A.D. to 1279 A.D.) extensive Chinese scholarship demonstrates that Chinese sailors sailed to, and exercised jurisdiction over, the Spratly Islands.⁵² Furthermore, the Song dynasty (960 to 1279 A.D.) produced numerous chronicles, records, and books which refer to the South China Sea Islands.⁵³ The Yuan Dynasty's (1279 to 1360 A.D.) exercise of jurisdiction over the South China Sea Islands included: sending surveyors, recording naval inspections, and patrolling the area.⁵⁴ The Ming Dynasty (1367 to 1644) and the Qing Dynasty (1644 to 1911) maintained records that contained geographical descriptions of the Spratly Islands.⁵⁵ Consequently, in 1911, during the emergence of the Republic of China under Chiang Kai-Shek, China exercised jurisdiction over the Spratly Islands through business endeavors, surveys, military personnel, exploitation of natural resources, published maps, and the construction of structures.⁵⁶ In effect, China contends that it was the first country to discover and exercise dominion and control over the Spratly Islands.⁵⁷

51. *Id.* at 15-36.

52. *Id.* at 17-21 (determining that Chinese crews continuously passed through and around the South China Sea, renamed the sea, and described its features). They even named the islands. *Id.*

53. *See* Shen, *supra* note 43, at 21-26 (concluding that although there may be discrepancies in the translation of these writings, the islands were clearly within the Song empire's boundaries).

54. *See id.* at 27-29 (finding that maps produced in the Yuan dynasty included the islands).

55. *See id.* at 29-36 (referring to continued activities in and around the islands that demonstrated Chinese sovereignty over the islands).

56. *See id.* at 37 (stating that at that time, the development of the South China Sea islands was a priority for the Chinese government).

57. *See* CHOON-HO PARK, EAST ASIA AND THE LAW OF THE SEA 214 (1983) (quoting Shi Ti-Tsu, *South China Sea Islands, Chinese Territory Since Ancient Times*, PEKING REV., Dec. 12, 1975, at 10-11). Shi Ti-Tsu stated that:

[m]ore than 2,000 years ago, Chinese individuals were already sailing on the turbulent waves of the South China Sea, as recorded in ancient Chinese literature. By the time of the Western and Eastern Han dynasties (206 B.C. to 220 A.D.), the South China Sea had become an important navigation route for

China's claim of sovereignty over the Spratly Islands has not gone unchallenged. From 1933 to 1939, the Spratly Islands were part of French Indochina.⁵⁸ During World War II, Japan occupied China⁵⁹ and took possession of the Spratly Islands, among other islands and territories. Japan used the Islands as naval bases for both staging invasions and blockades.⁶⁰ After the war the islands were returned to China under both the 1943 Cairo Conference⁶¹ and the 1945 Potsdam Proclamation.⁶² In 1946, China held a take-over ceremony on the Spratly Islands, and at the 1952 San Francisco Allied Peace Conference Japan stated that it had renounced all rights to Taiwan, the Spratly Islands, and other islands that it occupied during the war. In 1955, the International Civil Aviation Organization ("ICAO") held the Conference on Pacific Region Aviation in Manila and assigned Taiwan the task to improve meteorological observations throughout

China. As navigation steadily developed, long years of sailing the seas enabled the Chinese people to become the first discoverers and the masters of the South China Sea Islands. These valuable islands, surveyed, worked and administered without a break became an inalienable part of our beautiful motherland.

Id.

58. *See id.* at 185-86, 215 (discussing France's economically and strategically based reassertion of its protectorate, Vietnam's claims to the Spratly Islands almost fifty years after agreeing to cede control of them to China).

59. *See generally* IRIS CHANG, *THE RAPE OF NANKING* (1997) (detailing the defeat, humiliation, and genocide suffered by one Chinese city and its population at the hands of Japanese invaders in 1937-38).

60. *See* PARK, *supra* note 57, at 215 (stating that Japan used the Spratly Islands as submarine bases during World War II).

61. *See* Conference of President Roosevelt, Generalissimo Chiang Kai-Shek, and Prime Minister Churchill in North Africa, *released to the press* Dec. 1, 1943, DEP'T ST. BULL., Dec. 4, 1943, at 393, 3 Bevens 858 [hereinafter Cairo Declaration] (resolving, among other things that "all the territories that Japan has stolen from the Chinese . . . shall be restored to the Republic of China [and that] Japan will . . . be expelled from all other territories which she has taken by violence and greed.").

62. *See* Proclamation Defining Terms for Japanese Surrender, July 26, 1945, para. 8, DEP'T ST. BULL., July 29, 1945, at 137, 3 Bevens 1204, 1205 [hereinafter Potsdam Proclamation] (asserting that, as one condition of its surrender, "[t]he terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and minor islands as [the Allied signatories] determine.").

the Spratly Islands.⁶³ As early as the 1950s mapmakers in several nations marked the Spratly Islands as Chinese territory on their world maps.⁶⁴ Notwithstanding the aforementioned instances of recognition of Chinese sovereignty claims to the Spratly Islands by certain cartographers, Vietnam and the Philippines have demonstrated their unwillingness to accede to any such claims through a series of military confrontations with China.

B. VIETNAM

Vietnam, similar to China, also claims ownership of the entire Spratly Islands.⁶⁵ The Spratly Islands are situated 800 kilometers east of Ho Chi Minh City.⁶⁶ Vietnam, a country in need of capital,⁶⁷ has an intense desire to acquire the potential wealth of oil and gas located in the Spratly Islands.⁶⁸ Vietnam's claim is based on two theories. First,

63. See Bennett, *supra* note 25, at 448 & n.135 (citing the People's Republic of China's ("PRC") use of this request by the ICAO as one specific instance of international recognition of its sovereignty over the Spratly Islands).

64. See THE PENGUIN ATLAS OF THE WORLD 41 (J.S. Keates ed. (U.K.), 1956); THE LAROUSSE ATLAS OF THE WORLD (France, 1956); THE STANDARD WORLD ATLAS (Japan, 1952), cited in *The Question of the South China Sea* (visited Aug. 23, 1999) <<http://www.china-embassy.org/Cgi-Bin/press.pl?SouthChinaSea>>.

65. See Joyner, *supra* note 10, at 821 nn.3-4 (discussing violent clashes between China and Vietnam in 1987 and 1988 that resulted in significant loss of Vietnamese lives and vessels; and noting that, while these conflicts demonstrate China's naval superiority, the Vietnamese continued to build up their naval presence in the islands). The 1988 clash between the two states has been described as their "most serious conflict" since China's 1979 invasion of Vietnam in response to Vietnam's invasion of Cambodia and a dispute concerning the Gulf of Tonkin. See Daniel Sutherland, *China Assails Vietnam Over Island Group: Hanoi Said to Double Forces Near Spratlys*, WASH. POST, Apr. 6, 1988, at A32 (reporting on the issuance of a warning by China to Vietnam, demanding its withdrawal from "Chinese islands and atolls").

66. See generally Joyner, *supra* note 10, at 824 (setting forth the geographical coordinates of the archipelago).

67. See generally Peter G. Furniss, Recent Development, *The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization*, 35 HARV. INT'L L.J. 238, 242 (1994). (asserting that Vietnam's desire to normalize trade relationships and gain access to blocked International Monetary Fund ("IMF") funds springs from its "desperate" need for capital to rebuild its destroyed infrastructure).

68. See Joyner, *supra* note 10, at 833-34 nn.40-44 (discussing the results of undersea seismic surveys in the Spratly Islands, conducted in the 1960s and the de-

Vietnam claims that it has exercised historical dominion and control over the Spratly Islands, dating back to 1650 to 1653.⁶⁹ Notwithstanding the fact that the government of North Vietnam had concurred with Chinese claims of sovereignty over the Islands in the 1950s, the reunited Vietnam reasserted its claim to the entire archipelago.⁷⁰ Vietnam argues that its right to the Spratly Islands vested at the San Francisco Allied-Japanese Peace Conference in 1951 when Japan relinquished all right to the islands⁷¹ and Vietnam asserted its claim.⁷² Second, Vietnam claims a right to the Spratly Islands because the Islands are within its continental shelf.

velopment, by China, of its offshore petroleum industry). *But see id.* at 835 n.45 (noting that some experts have concluded based on more recent geological findings that the initial estimates of oil potential were exaggerated).

69. *See* Cordner, *supra* note 11, at 65 (stating that although the Vietnamese government has recently claimed ownership of the Spratly Islands extending back to the eighteenth century, it has failed to offer any evidence to substantiate the claim). The Vietnamese government has stated that:

[f]rom time immemorial, these islands have been frequented by Vietnamese fisherman who went there for tortoises, sea slugs, and other marine creatures. In recent times, the Paracels have attracted exploiters of phosphates, rich beds of which are produced by the interaction of the guano of seabirds with the tropical rains and coral limestone. Like the Paracels, the Spratlys are closest to Vietnam geographically and have been part of her territory early in history. In 1834, under the reign of Emperor Minh Mang, the Spratly Islands appeared in the first Vietnamese map as an integral part of the national territory.

See Park, *supra* note 57, at 65 (quoting Fact Sheet No. 2/74, issued by the Embassy of South Vietnam on Jan. 28, 1974).

70. *See* Cordner, *supra* note 11, at 65-66 (arguing that because the current government of Vietnam is the successor state to the government of North Vietnam, the latter's concession to Chinese claims over the Spratly Islands is binding under international law principles).

71. *See* Treaty of Peace with Japan, Sept. 8, 1951, ch. II, art. 2(f), 3 U.S.T. 3169, 3172, 136 U.N.T.S. 45, 50 ("Japan renounces all right, title and claim to the Spratly Islands. . .").

72. *See* Cordner, *supra* note 11, at 65 (observing that Vietnam's claim of sovereignty over the Islands went unchallenged at the San Francisco Peace Conference because the PRC was not present). The PRC immediately and forcefully rebutted Vietnam's claim. *See id.* at 64 (quoting the PRC's foreign minister as stating that its sovereignty over the islands will not be affected by the language of the peace treaty with Japan).

C. THE PHILIPPINES

The Philippines' claim to the Spratly Islands is based on economic need, proximity, and abandonment of rights by all other nations that led to Philippine discovery of the Islands in 1947.⁷³ Interestingly, following the war with Spain in 1898, the United States and Spain signed a treaty that among other things defined the "Philippine Islands" and transferred them to the United States. The treaty, however, neglected to include the Spratly Islands in this land transfer.⁷⁴ The Philippines, like Vietnam, has had clashes with China over the Spratly Islands. In 1998, Beijing expanded some permanent structures it had built earlier on Mischief Reef.⁷⁵ The Philippines claimed Mischief Reef within its exclusive economic zone and asserted that the Spratly Islands are over one thousand miles away from China's coast,⁷⁶ and that China's structure was for military use rather than shelter for fisherman. As a result, there have been several conflicts between China and the Philippines in the later part of the twentieth century.

D. MALAYSIA AND BRUNEI

Both Malaysia and Brunei claim interests in the Spratly Islands based on geographic proximity within their respective continental shelves.⁷⁷ Under the Law of the Sea Treaty,⁷⁸ state territory includes

73. See Cordner, *supra* note 11, at 66 (describing the "discovery" of most of the islands, now known as the Spratly Islands, by a Filipino private citizen). The Filipino "discoverer" proclaimed the islands a new state in 1956 and transferred ownership to the Philippines in 1974. *Id.*

74. See Treaty of Peace, Dec. 109, 1898, U.S.-Spain, art. III, 30 Stat. 1754, 1755-56 (setting forth the geographical coordinates defining the territory transferred).

75. See generally Joyner, *supra* note 10, at 821 n.5 (describing the PRC's original invasion of Mischief Reef in 1995).

76. The Spratly Islands are 900 km southwest of Manila, and 1,300 km south of Hong Kong.

77. See Cordner, *supra* note 11, at 67-68 (setting forth Malaysia and Brunei's respective continental shelf based claims of sovereignty over certain southern Spratly islands).

78. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, S. TREATY DOC. NO. 103-39, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

both a continental shelf,⁷⁹ which allows for the exploitation of natural resources, and an exclusive economic zone which can extend limited sovereignty to a distance of approximately 200 nautical miles from the coastline.⁸⁰ Malaysia also asserts that it has discovered and currently occupies several islands.

The competing claims asserted by China, Vietnam, the Philippines, Malaysia and Brunei generate the potential for military conflict due to the economic and military strategic value of the Spratly Islands. Among all the claimants, China has the greatest military ability to seize the Spratly Islands. The question remains, however, as to how China will resolve this disputed issue.

IV. CHINA'S PAST APPROACHES TOWARDS INTERNATIONAL LAW

There are various theories of international law. An explanation of the theories is vital towards an understanding of how China perceives international law and what theory it will embrace to resolve the Spratly Island dispute.

A. SOVEREIGN ENFORCEMENT THEORY

Sovereign/Enforcement theorists, such as the early nineteenth century English scholar John Austin, advocated that international law is nonexistent, or at best merely international morality.⁸¹ In Austin's view, international law is an inaccurate term because "law" necessitates a sovereign and enforcement paradigm. Law, from Austin's

79. *See id.* pt. VI, art. 77, S. TREATY DOC. NO. 103-39, at 126, 21 I.L.M. at 1285 (setting forth that a state has the exclusive sovereign right to explore its continental shelf and exploit its natural resources). Part VI of the UNCLOS defines the continental shelf and sets forth the rights and duties of the coastal state and all other states within that area. *See id.* pt. VI, arts. 76-85, S. TREATY DOC. NO. 103-39, at 125-28, 21 I.L.M. at 1285-86.

80. *See id.* pt. V, arts. 55-75, S. TREATY DOC. NO. 103-39, at 115-25, 21 I.L.M. at 1280-84 (defining the limits of the EEZ and setting forth the rights and duties of the coastal state and other states within the EEZ). All other states may use the EEZ with the same freedoms accorded to them with respect to the "high seas" under the UNCLOS. *See id.* pt. V, art. 58, S. TREATY DOC. NO. 103-39, at 116, 21 I.L.M. at 1280.

81. *See* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED ETC.* (Isaiah Berlin et al. eds., Noonday Press 1954).

positivist perspective, is a series of mandates established by an overseer that enforces them through deprivations and disabilities. For example, a country enacts a statute, drafts a constitution, establishes common law, or follows religious dictates to determine what constitutes an offense and then penalizes violators. In Austin's view the international arena lacks both the sovereign nature to enact the law and the ability to sanction countries that violate the law.⁸² This lack of enforcement is reflected in the principle, *par in parem non habet imperium*, a cogitation indicating that one state is not invested with legal or official authority to exercise jurisdiction over another state because of their equal legal status.

A modern positivist, philosopher, and law professor H.L.A. Hart, endorsed Austin's position with an addendum followed by jurisprudential countenance. Hart concedes, unlike Austin, that international law exists. He contends, however, that it "consists of only primary rules of obligation,"⁸³ which are devoid of enforcement mechanisms sufficient for recognition as a Copernican system of law. Hart, in effect, perceives international law as primitive, unfilled, and frustrated in realizing an aim. International law, in his view, is not law; rather it is a set of unenforceable moral directives.⁸⁴

China, prior to the leadership of Deng Xiaoping and particularly during the Mao Zedong era, embraced the Austin/Hart position that international law was simply a form of international morality.⁸⁵ China

82. *But see* Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth Century International Law* 40 HARV. INT'L L.J. 1, 13-17 (1999) (arguing that society, and not sovereignty, is the foundation of international law); Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130, 1332-34 (1961) (suggesting that international law should not be discounted on the theory that a state will not submit to an adverse decision by an international tribunal because the United States often accepts adverse decisions by domestic tribunals notwithstanding the absence of a superior sovereign compelling it to comply).

83. H.L.A. HART, *THE CONCEPT OF LAW* 209 (1961) (likening international law to a "simple form of social structure" given the absence of an international legislature, courts of mandatory jurisdiction, and centralized enforcement).

84. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 42 (1977) (noting Hart's argument that it is inadequate for a rule to be characterized as solely morally binding).

85. *See* A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 4 (1962) for a discussion of Chinese international law in ancient China.

viewed the morality as a putative euphemism for western imperialism. The Chinese leadership perceived international law as a mechanism or tactic for “civilized states” to control and oppress “uncivilized states.”⁸⁶ China’s position concerning the legitimacy of international law is amply depicted by China’s meager amount of scholarship on international law from 1965 to 1979.⁸⁷ Discussions of international law were jettisoned in the interests of communism.⁸⁸ China refused to embrace new ideas and focused on the task of what

86. See JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE’S CHINA AND INTERNATIONAL LAW* 62-63 (1974) (reproducing a 1958 essay by a Chinese writer who argued against the existence of general international law; and, while acknowledging the Charter of the United Nations can be invoked to resist aggressive acts by powerful states, he asserted that there was potential danger in accepting all United Nations actions in the sense that the body was subject to manipulation by powerful capitalist states); Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650, 652-53 (1997) (discussing the impact that Asian Pacific states have had on international law through an analysis of their distinctive features). The term “civilized” is taken from article 38 of the Statute of the International Court of Justice, which provides that the International Court of Justice shall settle disputes through the application of, *inter alia*, “the general principles of law recognized by civilized nations.” See *Statute of the International Court of Justice* (visited Feb. 24, 2000) <<http://www.icj-cij.org/icjwww/ibas...ments/ibasictext/basicstatute.htm>> (emphasis added). The Charter of the United Nations was signed by fifty nations in 1945 that shared similar cultural, historical, and religious backgrounds. Since that time, eighty-nine countries have decolonized and most have belief systems at variance with western values. See Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650, 652 (1997).

87. See MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA* 43 (1999) (suggesting that China’s legal order had been destroyed through, among other things, legal nihilism anti-intellectualism); Hungdah Chiu, *Chinese Views on the Sources of International Law*, 28 HARV. INT’L L.J. 289, 289 (1987) (stating that during the Cultural Revolution, the government of the PRC prohibited the study of law, international and domestic). China was at a stage which the United States currently wants to explore, namely less use of lawyers and more reliance upon mediation to settle disputes. See generally Qizhi Luo, *Autonomy, Qualification and Professionalism of the PRC Bar*, 12 COLUM. J. ASIAN L. 1, 8-9 (1998) (commenting on the exclusion of lawyers from the political and social arenas in China during this period and the reliance upon mediation).

88. Centuries of leadership from the Forbidden City followed by communist rule has placed China in a position where it has placed little emphasis on the development of both a domestic and international legal system. See Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 J. CHINESE L. 145, 146-48 (1993); STANLEY B. LUBMAN, *CHINA’S LEGAL REFORMS* 1-3 (1996).

has been termed "saving China."⁸⁹ During this period, China suffered from flashbacks of its history of defeats and oppressions beginning in the early nineteenth century. China suffered a defeat in the Opium War against Great Britain from 1839 to 1842.⁹⁰ In 1856, Great Britain again defeated China.⁹¹ In 1885, France defeated China for control of Vietnam,⁹² and in 1894 Japan took Taiwan from China.⁹³ The military losses were compounded by the imposition of international treaties upon China by the Western powers. Some commentators have asserted that these "unequal treaties" imposed on China between 1842 and 1911 deprived China of the attributes of sovereignty and created a sense of mistrust in the Chinese psyche concerning international relations.⁹⁴

Despite the trauma suffered in international relations during the nineteenth century, the Chinese civilization, which has endured 4,000 years, constitutes the longest continuous civilization. In response to a question posed by an American writer concerning the impact of Mao Zedong's Cultural Revolution in China on the Chinese people, a Chinese citizen remarked that the fifty years of communist rule in China is but a speck of time in China's history and when placed in context, "[t]he Cultural Revolution was hardly anything."⁹⁵ His observation is amply supported by post-Mao social re-

89. See JOHN KING FAIRBANK, *THE GREAT CHINESE REVOLUTION: 1800-1985*, 287-88 (1986) (arguing that the intellectuals of China traditionally oriented toward issues of state, continued this tradition during the Maoist era, fueled by a strong spirit of nationalism).

90. See Wendy Abraham, *Imperial China- Origins to 1911*, located in CHINA, A NATION IN TRANSITION 3, 26 (Debra E. Soled ed., 1995) (noting that the Opium War defeat marked the beginning of a series of humiliating defeats to foreign powers that would span 100 years).

91. See *id.* at 31.

92. See *id.* (discussing in brief the conflict between France and China over the control of Vietnam).

93. See *id.* at 32 (noting that the China's loss of Taiwan resulted from Japan's victory over China in Korea).

94. See Bennett, *supra* note 25, at 442-43 (1992) (attributing the Chinese mistrust of international law, in part, to unequal treaties).

95. PAUL THEROUX, *RIDING THE IRON ROOSTER: BY TRAIN THROUGH CHINA* 81 (1988). Another Chinese citizen stated that "these intervals of unrest, sixty to a hundred years in length between dynasties, through the forty-six centuries of [Chinese] history" are not "wars," they are merely "period[s]." *Id.* (quoting from the

forms which have fostered a perspective in China that both national⁹⁶ and international law⁹⁷ markedly differently from the Mao era, and have nurtured a preponderating and indefatigable China which has begun to utilize international rules and norms.

Economically China began to assimilate into the world economy in the later part of the twentieth century. China has the world's third-largest economy, and enormous economic growth potential.⁹⁸ Its economic growth has impacted its economic policies.⁹⁹ China has begun cooperation between United States and Chinese lawyers,¹⁰⁰ has encouraged foreign investments and joint ventures,¹⁰¹ hosts all the major American accounting firms, and hundreds of thousands of its citi-

writings of another Western author).

96. See Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT'L L. 229, 293 (1999) (noting the adoption by China of domestic contract laws patterned on contract laws in Western states).

97. See Chiu, *supra* note 87, at 290 & n.6 (noting that the period between 1979 and 1984 is marked with over 700 articles on the subject of international law; and providing a citation to an index that lists periodical articles).

98. See Omar Saleem, *Be Fruitful, and Multiply, and Replenish the Earth, and Subdue it: Third World Population Growth and Global Warming*, 8 GEO. INT'L ENVTL. L. REV. 1, 29 (1995) (attributing China's economic growth potential to the size of its population). *But cf.* Mark Landler, *Choking on China's Air, But Loath to Cry Foul*, N.Y. TIMES, Feb. 12, 1999, at A3 (reporting on the potential downside of heavy economic growth).

99. President Clinton perceived economic growth as a means for China to resolve its human rights problems and encourage democracy. Clinton advocated the Most Favored Nation ("MFN") trade status with China as a means to end human rights abuses. Perhaps the future will demonstrate that along with economic growth that the internet will open doors and foster democracy in China.

100. See James Podgers, *Forging a Far East Alliance: Initiatives Aim to Foster Stronger Legal Structures in China*, A.B.A. J., Jan. 1999, at 89 (reporting on initiatives of the American Bar Associations and others aimed at coordinating with Chinese lawyers in order to develop China's legal system); Robert A. Stein, *Two Billion Reasons to Cooperate*, A.B.A. J., Feb. 1999, at 86 (arguing that the programs underway by the Asian Law Initiatives Council, among others, will result in a reduction of human rights abuses in China).

101. See BERNSTEIN & MUNRO, *supra* note 2, at 13, 105-07 (attributing China's welcoming of foreign investments to Deng Xiaoping's comparatively liberal policies, providing anecdotal evidence of investments and joint ventures by major American corporations in China, and noting the Chinese government's strategy in 1994 of enlisting American corporations to dissuade the Clinton administration from canceling China's most favored nation trading status).

zens are employed by foreign companies.¹⁰² China has embraced American technology wholeheartedly. In the early 1990s, AT&T sales in China exceeded 81 million U.S. dollars.¹⁰³ Both Boeing and General Electric have a significant presence in China.¹⁰⁴ In 1998, Microsoft established a \$80 million U.S. dollar research laboratory in Beijing, China. One of the laboratory's first projects was the Venus operating system that allows China's electronic industry to assemble a Web browser, a low-end personal computer, and a video compact disc player into a box, which sits atop a television. This device allows the millions of Chinese who cannot afford a personal computer to use the Internet.¹⁰⁵ Bill Gates, CEO of Microsoft stated, "Our goal [in China] is a very aggressive goal, and that is to introduce millions and millions of people to computers and to the Internet."¹⁰⁶ Motorola, another high technology corporation, invested 1.5 billion U.S. dollars in China, which in 1997 to 1998, established Motorola as the largest American corporate investor in China.¹⁰⁷

102. See Saleem, *supra* note 98, at 29 (noting that many people are employed by foreign companies in Beijing).

103. See *id.* (noting that sales for AT&T were high and in conjunction with Chinese interests).

104. *Id.*

105. See James Kyngé, *Microsoft Carves Major Inroad for Internet in Communist China*, FIN. TIMES, Mar. 13, 1999, at 7 (reporting Microsoft's deal to install the Internet in homes in China through the affordable Venus system). Bill Gates made this announcement at a news conference in Shenshen, China in early 1999. His goal was to bring affordable Internet service to the homes in China. The Venus system was projected to cost less than two-hundred dollars, compared to the significantly greater costs of a personal computer. Gates based his decision to design the Venus system on China's growing consumer appliance market, the popularity of video compact disc in China, and a Chinese parents' willingness to spend money on their child in a culture where families are only permitted to have one child. See *China Now Home to 53 Million 'Little Emperors'* (last modified June 15, 1999) <<http://www.insidechina.com/features.php3?id=73492>> (discussing how the one child policy in China has caused Chinese parents to primp and pamper their sole offspring).

106. See *Microsoft: Cheap Net for China*, 1999 Reuters Limited, 7:30 a.m., 10 Mar. 99, PST.

107. See Motorola (China) Electronics Ltd., *Motorola in China 1999* (visited Nov. 3, 1999) <<http://www.motorola.com.cn/english/facts98/>> (noting that, as the largest American investor in China, Motorola was involved in six equity joint ventures, over twenty branches, and many other investments).

The foreign investments in China are rapidly growing.¹⁰⁸ It is estimated that as early as 1994 there were over 200 American investors in Shanghai alone.¹⁰⁹ Corporations with economic interests in China include Ford Motor Company, Time Warner, IBM, Kentucky Fried Chicken, and Boeing.¹¹⁰ Foreign investment throughout China is expected to increase due to China's huge population and its increasing need for airplanes, machinery, transportation equipment, fabricated metal products, dairy products, chicken, and meat.¹¹¹ Among the American corporations that have yet to invest in China, approximately sixty-one percent plan to invest in the new millennium due to domestic market expansion, good economic outlook, improved infrastructure, and enormous export opportunities.¹¹² In conjunction with increased foreign investment, China joined the World Bank, the International Monetary Fund ("IMF"),¹¹³ enjoyed Most Favored Nation ("MFN") status,¹¹⁴ and engaged in international politics for over a

108. *But see* Leslie Chang & Ian Johnson, *Foreign Investment in China Falls as Beijing Meddles With Market*, WALL ST. J., Aug. 20, 1999, at A9 (reporting that the primary obstacle to foreign investments in China is China's policy of managing its markets through bans on new investments to curtail falling prices and oversupply).

109. *See* Saleem, *supra* note 98, at 29 (noting the large number of American investors in Shanghai).

110. *See* BERNSTEIN & MUNRO, *supra* note 2, at 106-07 (noting the emerging trend of business development in China by many American corporations).

111. *See* John W. Head, *International Business and Kansas Lawyers*, 65 J. KAN. B.A. 26, 31 (1996) (anticipating that China's increased needs in these areas will make it an enormous potential market for American businesses).

112. *See* Malcolm S. McNeill, *China's Legal System in Transition: A Report of the ABA Delegation to China*, A.B.A. Sec. of Int'l L. & Prac., Oct. 10-14, 1994, at 3. *But see* James Bates & Maggie Farley, *Hollywood, China in a Chilly Embrace: Stormy Ties Between the Western Industry and Eastern Nation are Fraught with Tangled Rules and Rampant Piracy*, L.A. TIMES, June 13, 1999, at A1 (noting that Hollywood is one American industry which has been unable to actualize a profit in China). The failure of American movies and television to profit in China is due to China's rule and regulations, different cultural standards, politics, race, and nationalism. *Id.*

113. *See* Bennett, *supra* note 25, at 444 (asserting that China's induction into the World Bank and the IMF are testimony to the nation's immersion into the world's economic system).

114. *See* Taunya L. McLarty, *MFN Relations with Communist Countries: Is the Two-Decade Old System Working, Or Should It Be Revised Or Repealed?*, 33 U. RICH. L. REV. 153, 191 (1999) (noting that China signed a bilateral trade agree-

decade with particular intensity. Moreover, it appears that China will soon become a member of the World Trade Organization.¹¹⁵ At the close of the twentieth century, China had the third largest economy in the world, estimated at 1.66 trillion U.S. dollars,¹¹⁶ after the United States and Japan. In the new millennium China is the only country likely to surpass the United States as the world's largest economy and become a major actor in international politics.¹¹⁷ Besides the adoption of international economic norms, China has politically progressed from the Austin/Hart position that international law or relations is merely international morality. Post-Mao China has loomed as an active world leader in international relations within international organizations. At the dawn of the new millennium, China's perception of international law and international relations shifted to a utilitarian approach structured to accomplish national goals.

As a permanent member of the United Nations ("UN") Security Council, China seeks to influence international relations and world political decisions in its own interest. For example, China used its position on the UN Security Council to protect its position concerning Taiwan. In 1997, China vetoed the engagement of military ob-

ment with the United States in 1980, providing mutual MFN benefits between the nations). Since that time, China has become one of the United States' largest trading partners. *Id.* at 191.

115. See Alan S. Alexandroff, *Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 U.C.L.A. J. INT'L L. & FOR. AFF. 23, 30-42 (1998) (noting the various political challenges that the United States Congress faced concerning China's entry into the World Trade Organization). This issue was also a primary issue when China's Prime Minister Zhu Rongji made a historical visit to the United States in April 1999. See Paul Blustein, *Clinton Scrambles to Appease Diverse Critics on China*, WASH. POST, Apr. 15, 1999, at A1 (noting the intense negotiations between Chinese and United States leaders regarding China's status in the WTO); see also The White House, Office of the Press Secretary, *Remarks by the President and Premier Zhu of the People's Republic of China* (last modified Apr. 8, 1999) <http://www.state.gov/www/regions/eap/990408b_clinton_zhu_china.html> (providing a detailed dialogue between the United States and China regarding trade relations).

116. See IMMANUEL C.Y. HSU, *THE RISE OF MODERN CHINA* 976 (1995) (noting that the IMF placed China's economy as the third largest, based on its purchasing power).

117. See *id.* at 978 (linking the growth of the economy to China's likely increased investment in its military).

servers in Guatemala in protest of Guatemala's ties with Taiwan.¹¹⁸ China reversed its decision only after Guatemala pledged not to support UN membership for Taiwan.¹¹⁹ Similarly, China threatened to veto the UN mission in Haiti due to Haiti's ties with Taiwan.¹²⁰ China also threatened to use its Security Council veto power to keep the proposal to maintain UN peacekeeping troops in Macedonia, attempting to force Macedonia to sever its relations with Taiwan.¹²¹ China's actual or threatened veto in the Security Council concerning Guatemala, Haiti, and Macedonia stems from China's position that nations must sever relations with Taiwan and recognize the People's Republic of China as the sole government of China.¹²²

Purported UN Security Council resolutions to indict members of the Cambodia's Khmer Rouge for war crimes—similar to Rwanda/

118. See *China UN Veto Latest Skirmish in Diplomatic War with Taiwan*, AGENCE FR.-PRESSE, Feb. 26, 1999 (noting how China used its veto power in objection of Guatemala's diplomatic relations with Taiwan).

119. See *id.* (highlighting the negotiations between China and Guatemala, which resulted in China lifting its veto during a second vote).

120. See *id.* (noting China's hesitation to permit UN troops in Haiti, due to Haiti's ties with Taiwan).

121. See *id.* (reporting China's veto of the UN peacekeeping mission in Macedonia ignored warnings of further bloodshed in the Balkans). Worldwide, approximately only twenty-eight states recognize Taipei rather than Beijing as the representative government of China. See *id.* Besides the Vatican, Macedonia is the only country in Europe that has established diplomatic relations with Taiwan. See *Taiwan, Macedonia and East Timor* (last modified Jan. 31, 1999) <<http://www.taiwandc.org/news-9904.htm>> (reporting that Taiwan's newly established political ties with Macedonia could serve as a foot-in-the-door to the rest of Europe).

122. See Yung Wei, *Political Development in the Republic of China on Taiwan*, in CHINA AND THE QUESTION OF TAIWAN: DOCUMENTS AND ANALYSIS 74, 76 (Hungdah Chiu ed., 1973) (noting that the period from 1949 to 1953, when the Nationalists moved the seat of government to Taiwan, was a period of struggle for China). China has proclaimed Taiwan as a contumacious province since the 1949 civil war, which divided the two sides when Chiang Kai-Shek's defeated Nationalist forces fled the "mainland." China contends that Taiwan must be brought back to mainland rule under a one-country, two system arrangement that will give Taiwan autonomy and concede authority to China—an arrangement similar to the one between Hong Kong and China. Taiwan embraces the position that unification is feasible, but declares that China must first democratize. See Guiguo Wang & Priscilla M.F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 PAC. RIM. L. & POL'Y J. 279, 281 (1998) (describing the "one country, two systems" policy).

Burundi, and Nuremberg—have lingered, lest China's threat to veto such a proposal due to its former friendly relationship with the Khmer Rouge.¹²³ In the summer of 1999, China contemporaneously expressed vigorous support for Belgrade's leader Slobodan Milosevic and vigorous opposition to the NATO air strikes in Yugoslavia. China's position had diplomats wondering whether China would veto the Kosovo peace plan in the UN Security Council and possibly prolong the war. China based its opposition to NATO air strikes in Kosovo on the conviction that human rights do not usurp sovereignty. China did not want the UN to justify intervention based upon human rights because of China's concerns both in Taiwan and Tibet.¹²⁴

China's postmodern approach to international law is similar to other nations. China has adopted both a flexible and pragmatic approach that exploits international law and rules based on national interests rather than on ideological grounds. International law has become a foreign policy tool to perpetuate China's national policies.¹²⁵ It is improbable that China will rely upon international law to resolve the Spratly Island dispute due to two reasons.¹²⁶ First, the Law of the Sea provisions that establish an exclusive economic zone and a continental shelf are in favor of the other claimants' positions as coastal states. International law also suggests that China's claim of occupation and discovery of the Spratly Islands may undergo challenges be-

123. See *Report of the International Law Commission to the General Assembly*, [1950] 2 Y.B. INT'L COMM'N 364, 374, U.N. Doc. A/1316 (1950).

124. See Andrew Phillips, *Trouble on Two Fronts*, 112 MACLEAN'S, May 24, 1999, at 38 (noting that China, along with Russia, is uncomfortable with the growing Western trend to intervene in nations that extensively violate human rights).

125. See Bennett, *supra* note 25, at 445 (explaining that China views international law as a way to assert its foreign policy goals).

126. See Steven L. Chan, *Differences Between British & Chinese Views of Law Forebode Uncertainties for Hong Kong's People After the 1997 Transfer*, 15 U.C.L.A. PAC. BASIN L.J. 138, 192-93 (1996) (discussing that in a different dispute concerning China, which involved possible remedies for breach of the Basic Law enacted by China to govern Hong Kong after Hong Kong was transferred to China, it had been amply noted that a claim before the International Court of Justice was unlikely because China would refuse to recognize the Court's jurisdiction); see also Chiu, *supra* note 87, at 294 (discussing China's move from a hard to a soft position toward the International Court of Justice in the early 1980s).

cause islands may require more substantial occupation than other types of land masses for a continuous period to establish discovery. China's legal claim of right to the Spratly Islands, therefore, is subject to various interpretations and a possible unfavorable judgment. Second, there is also an abundance of "affect" around the Spratly Island dispute because the numerous claimants perceive the dispute as a challenge to their integrity, and the leaders link their positions and success to their strength, effectiveness to lead, and the viability of the government. Writer Choon-Ho predicted that the Spratly Islands dispute will continue with each of the claimants "testing the others' patience and trying not to lose face."¹²⁷ His prediction proved accurate at the approach of the new millennium when, in an effort to vocalize its claims to the Spratly Islands, the Philippines motioned to place the issue of the Spratly Islands on the agenda of a March 1999 Asia-Europe Meeting (ASEM) held in Germany with a claim that the Spratly issue related to both European and Asian political and security concerns.¹²⁸ The Philippines, however, was outvoted, due to China's threat to walk out of the talks if the Spratly Island dispute was placed on the agenda.¹²⁹

B. TREATIES

Another theory of international law is a positivist view, succinctly

127. Choon-Ho Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources?*, 5 OCEAN DEV. & INT'L L. 27, 54 (1978).

128. See Asia-Europe Foundation, *An ASEM Companion: ASEM 1 to ASEM 2 (ASEM Summits)* (visited Nov. 5, 1999) <http://www.asef.org/asem/asem_1&2_summit.html>. ASEM was established in 1996 to improve political and economic relations between Europe. It holds annual meetings for seven of the nine members of the Association of Southeast Asian Nations along with China, Japan, South Korea and fifteen members of the European Union.

129. See Eirmalasare Bani, *No Coordinated Asian Voice at ASEM Meet*, BUS. TIMES, Apr. 2, 1999, at 18 (noting that the Asian nations participating in the ASEM meeting had agreed to discuss the Spratly Islands issues at a separate forum); Joel Vega, *China Pulls Out Frigates From Disputed Territory*, GULF NEWS, Feb. 17, 1999 (noting how China requested that its diplomats in Europe ask ASEM members not to allow discussion of the Spratly Island territorial dispute during the upcoming ASEM meeting); Free Republic, *Philippines Says Can Upgrade Outpost in Spratlys* (last modified Mar. 3, 1999) <<http://www.freerepublic.com/forum/a36de4dfc599d.htm>> (noting that in response to China's position, the Philippines stated that it planned to upgrade its military facility on Pagasa (Hope) Island, one of the eight areas the Philippines claims in the Spratly Islands).

expressed in Professor Louis Henkin's remark that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."¹³⁰ Under this theory, international law is similar to a contract theory in which the parties agree to be bound. This agreement is usually in the form of a treaty or customary law. Article 34 of the Vienna Convention on the Law of Treaties is similar to contract theory with its requirement that a third state is not bound to a treaty without its consent.¹³¹ The Vienna Convention on the Law of Treaties also has contract undertones with respect to when states are bound;¹³² the right to modify or counteroffer (called reservations);¹³³ the interpretation of treaties;¹³⁴ the invalidity of treaties;¹³⁵ and, the termination of treaties.¹³⁶

China adopted this positivist view of international law and perceives treaties as the fundamental source of international law and relations and has embraced numerous treaties and honored them in a fashion similar to other states.¹³⁷ China's respect for treaties has been

130. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (1979).

131. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

132. *See id.* The Convention notes that states are bound to a treaty through signature (article 12), an exchange of instruments (article 13), ratification (article 14), and accession (article 15). *See id.* arts. 12-15.

133. *See id.* art. 2(d) (allowing a state to sign a treaty and "exclude or to modify the legal effect of certain provisions of the treaty . . ."); *id.* art. 19 (delineating the perimeters to the right of reservations and allows reservations unless prohibited by the treaty, the treaty itself specifies the allowable reservations, or the reservation is incompatible with the objective and purpose of the treaty).

134. *See id.* art. 31 (setting forth, similar to basic contract law, article 31 states that interpretation shall be in good faith and words are prescribed their ordinary meaning).

135. *See* Vienna Convention, *supra* note 131, arts. 48-52 (declaring a treaty invalid for fraud, corruption, coercion, force or threat of force).

136. *See id.* arts. 55- 62 (allowing for termination on such grounds as consent, implied right, a subsequent treaty, a material breach, impossibility of performance, and a fundamental change of circumstances).

137. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 32-33 (1997) (noting that China has entered into and carried out many international treaties and conventions). Among other treaties, China has accepted the Constitution of the International Labour Organization, the Charter of the United Nations, The Statute of the

considerably far from an easy accomplishment due to its experience with “unequal treaties”¹³⁸ which resulted in a loss of China’s sovereignty and control of its territory by western powers.¹³⁹ One of the earliest “unequal treaties” arose out of the Opium War between Britain and China. Britain needed China’s silk, while China was indifferent to British goods. The result was a trade deficiency that Britain sought to remedy with cotton and opium from India. After a decade of struggle against the flow of opium into China, the emperor of China decided to capture foreigners and destroy large quantities of opium. In response, Britain waged war against China. The Opium War lasted from 1839 to 1842. China was defeated and impelled to enter into the 1842 Treaty of Nanjing. China refers to this treaty as the first of a series of “unequal treaties” because under the terms of the treaty, China ceded Hong Kong to the British; abolished the monopoly system of trade; opened ports to British residence and foreign trade; limited tariffs; granted British nationals exemption from Chinese law; paid a large indemnity; and granted a favored trade status to Britain.¹⁴⁰ It is estimated that approximately eighteen countries¹⁴¹ imposed approximately 158 unequal treaties¹⁴² on China between

International Court of Justice, The United Nations Convention on the Law of the Sea, the Charter of Economic Rights and Duties of States, the Convention on the Prevention and Punishment of the Crime of Genocide [with reservations] and the Universal Declaration of Human Rights. LAKSHAM D. GURUSWAMY ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSE BOOK 1495-1549 (1999).

138. See SHAW, *supra* note 137, at n.124 (noting that China disavows treaties where its territory was annexed by other powers).

139. See COHEN & CHIU, *supra* note 86, at 119 (explaining that a history of “unequal treaties” led China to adopt five principles into its treaties: (1) mutual respect for territorial integrity, (2) mutual nonaggression, (3) mutual noninterference in internal affairs, (4) equality and mutual benefit, and (5) peaceful coexistence).

140. See *China: The Opium War, 1839-42* (visited June 18, 1999) <[http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+CN0025\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+CN0025))> (providing an overview of the Opium War and the Treaty of Nanjing).

141. See COHEN & CHIU, *supra* note 86, at 3-22 (listing the countries as Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, Netherlands, Norway, Peru, Portugal, Russia, Spain, Sweden, and the United States). See also Philip R. Abbey, *Treaty Ports & Extraterritoriality in 1920s China* (updated July 22, 1999) <<http://www.geocities.com/Vienna/5048/TREATY01.html>> (listing the countries that had treaties with China establishing consular court jurisdiction over their nationals).

142. BRIAN H.W. HILL, INDEX—GUIDE TO TREATIES (PARTY INDEX VOLUME 1)

1842 and 1949. China considers that period as the “century of humiliation” because China was reduced to a semi-colony for western powers. The primary complaint and criticism of the numerous unequal treaties is the lack of reciprocity in negotiations.¹⁴³ China’s experience with treaties and contact with foreigners was depicted by foreigners obtaining increased influence over China and increased shares of China’s commercial value.¹⁴⁴ Consequently, during the early period of the communist party in China its government denied the existence of treaties and outstanding international obligations.¹⁴⁵

China’s current position on the world stage is to consider treaties as part of its political process, subject to influences of power, expediency and ideology. China considers treaties as the most important source of international law because they reflect the actual agreement between nations. The result is that China follows the rules of international law unless the rules are at variance with Chinese policies and interest—particularly sovereignty interests.¹⁴⁶ Any treaty for the Spratly Islands dispute must comport with China’s domestic agenda and interests to allow the government to maintain its image. It is improbable that China will relinquish any sovereignty interests in the Spratly Islands. If the claimants can agree on a system of distribution and reduce it to a treaty, then the sovereignty issue could, as China has suggested, give way to a joint venture system wherein the countries are able to exploit the natural resources in the South China Sea without military conflicts.¹⁴⁷

1986.

143. See Gretchen Harders-Chen, *China MFN: A Reaffirmation of Tradition or Regulatory Reform?*, 5 MINN. J. GLOBAL TRADE 381, 392-93 (1996) (stating that China’s modern day concern for reciprocity in foreign relations stems from the lack of reciprocity in the “unequal treaties”).

144. PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG’S NEW TERRITORIES* 27-28 (1998) (providing examples of foreign imperialism in China).

145. See O. EDMUND CLUBB & EUSTACE SELIGMAN, *THE INTERNATIONAL POSITION OF COMMUNIST CHINA* 33 (1965) (discussing the international political component of power in China).

146. See Chiu, *supra* note 87, at 294-95 (explaining that China’s position of viewing treaties as the most important source of international law is the prevailing view among scholars and is the position embraced by most nations).

147. See Margaret L. Tomlinson, *Recent Developments in the International Law of the Sea*, 32 INT’L LAW 599, 605 (1998) (describing a summit meeting of states

C. NATURAL LAW

Natural law theorists view humans as intelligent and reasonable beings who reach objectively rational and logical moral decisions or principles without restrictions to any national identity. Natural law, according to Saint Thomas Aquinas, constituted part of the law of God, and was exercised by rational beings in the eternal law. Aquinas declared that reason is the essence of man and part of the ordering of life according to divine will and that natural law is the root of moral behavior.¹⁴⁸ It is generally recognized that certain rights in international law are rooted in natural law, such as the recognition of human rights, nonaggression,¹⁴⁹ and equality of states.¹⁵⁰

The objective morality of natural law theorist is a theme with historical roots in China. Chinese philosophy pullulated in a "humanist morality." If the 4,000 years of Chinese philosophy can be summarized in one word it would be "humanism."¹⁵¹ The Chinese conception of humanism throughout the ancient, medieval, modern and

that reaffirmed a 1992 declaration calling for joint exploration of resources of the disputed territories). Both China and the Philippines have taken this approach. See Roberto R. Romulo, *Philippine Foreign Policy: New Policy In a Changing World Environment*, 17 FLETCHER F. WORLD AFF. 131, 134 (1993) (stating that China proposed joint exploration and development of the resources in the Spratly Islands).

148. See SHAW, *supra* note 137, at 19 (describing a merging of natural law and Christian ideas). Natural law concepts such as freedom and liberty are rooted in the United States Declaration of Independence. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290-91 (1996) (stating that the "language of rights" came naturally to the American colonists).

149. See generally Anthony D'Amato, *International Law and Rawls' Theory of Justice*, 5 DENV. J. INT'L L. & POL'Y 525, 525 (1975) (discussing one theory of justice in international law).

150. See OPPENHEIM'S INTERNATIONAL LAW 339 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (stating that the principle of equality provides that states are sovereign equals and that the principle has its roots in natural law which has been credited with espousing the equality of man).

151. WING-TSIT CHAN, *A SOURCE BOOK IN CHINESE PHILOSOPHY* 3 (1963) (tracing the evolution and interrelationship of Chinese philosophy with a discussion of such schools of thought as Confucianism, Taoism, Buddhism, Neo-Confucianism, and Communism).

contemporary schools of Chinese philosophy is essentially forged in morality. The fall of the Shang dynasty (1751 to 1121 B.C.) established the birth of the Zhou (Chou) dynasty (1122 to 249 B.C.). The latter dynasty differed from the former because its legitimacy was founded upon the premise that morality was the basis of civilization and leadership, while the former dynasty had a realist "might makes right" approach that based its existence on military force.¹⁵² The Shang dynasty emphasized a supreme being and ancestors who manipulated one's destiny, similar to Greek mythology, while the Zhou placed more emphasis on human ability to control destiny through moral deeds. China thereby developed a universal "great norm" of morality or virtue, which dates back to 1111 B.C.¹⁵³

Irrespective of China's philosophical entrenchment in morality, it was a civilization walled-in, with a forbidden city that essentially engendered what professor Robin West would characterize as a "minimally pluralist moral climate."¹⁵⁴ China's history is inimical towards the recognition of a worldwide morality.¹⁵⁵ Mirjan R. Damaska in-

152. *See id.*

153. *See id.* at 4.

154. *See* Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 771 (1992) (using this term to describe another topic, namely, constitutional adjudication, as a "fractured, relativist, nihilist, minimally pluralist moral climate"). China's independent development is a factor of its people, geography, and isolationism until the sixteenth century. *See* Rong-Chwan Chen, *A Boat On A Troubled Strait: The Interregional Private Law of the Republic of China On Taiwan*, 16 WIS. INT'L L.J. 599, 603 (1998) (stating that drastic changes began to take place during the Ming Dynasty).

155. Historically, the classical world in China differed from the classical Greek, Roman, and Judeo-Christian worlds' assumptions and these assumptions impact perceptions and definitions of reason, rational, knowledge, and morality. For example, Chinese philosophy assumed a single continuous world while Western philosophy focused on a two-world theory in which concepts were dichotomized into such categories as "reality/appearance, knowledge/opinion, truth/falsity, Being/Nonbeing, Creator/creature, soul/body, reason/experience, cause/effect, objective/subjective, theory/practice, agent/action, nature/culture, form/matter, universal/particular, logical/rhetorical, cognitive/affective, masculine/feminine and so on." ROBERT G. HENDRICKS (series editor), SUN-TZU THE ART OF WARFARE TRANSLATED WITH AN INTRODUCTION AND COMMENTARY BY ROGER T. AMES (Ballantine Book 1993); *see also* BENJAMIN SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA 3 (1985) (suggesting that each culture generates a minority of thinkers who stand back and create a new and positive creative perspective and accordingly, any rules China adopts it would do so from an entirely different per-

sightfully posited that it is virtually impossible to discuss China's jurisprudence from the framework of western particularities.¹⁵⁶ China shares the reservations of other Asian and African nations that have espoused a critical perspective that depicts natural law as Eurocentric saturated in Christian values.¹⁵⁷

The viability of natural law is essentially manifested in treaties, customs, and general principles of law. Absent such sources, natural law posits what China should do concerning the disputed Spratly Islands rather than what it will do. What should be done is complicated by a multitude of international and national values.¹⁵⁸ Domestically, China's conflicts with Xizang (Tibet) since the 1950s,¹⁵⁹ the Xinjiang-Uygur region (China's Islamic region),¹⁶⁰ and its contemporary

spective).

156. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 2 (1986). "Farther east, in China one encounters systems of justice so different from ours that a discourse inscribed with the particularities of Western development fails us almost completely." See *id.*

157. See Triggs, *supra* note 86, at 654-56 (reflecting the views of many developing and socialist states); see also J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 12-13 (1989). It has been argued that America's approach to comparative theories of law lacks both flexibility and accuracy.

158. The diversity of values is depicted in the evolution of several legal systems throughout the world: (1) the Romanist-Germanic-Civilist legal systems, (2) the Common Law legal system, (3) the Marxist-Socialist legal system, (4) the Islamic legal system, and (5) the Asian legal system. RENE DAVID, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINES* 22-32 (5th ed. 1973), cited in LAKSHMAN D. GURUSWAMY ET AL., *SUPPLEMENT TO BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENTAL LAW AND WORLD: A PROBLEM ORIENTED COURSE BOOK* 116 n.4 (1999).

159. During the Mao Zedong era China perceived the traditional Tibetan culture as an oppressive feudal serfdom similar to the one existing during the European dark ages. In the later part of the twentieth century China began to make reparations and rebuild the temples. See generally Hilary K. Josephs et al., *Independence for Tibet: An International Analysis*, 8 CHINA L. REP. (1994).

160. See generally DRU C. GLADNEY, *MUSLIM CHINESE: ETHNIC NATIONALISM IN THE PEOPLE'S REPUBLIC* (1991) (discussing the history of Islam in China and the tension between Chinese Muslims and other ethnic groups in China). There are approximately fifty million Muslims in China. See Marco Restelli, *China's Secret Holy War*, *WORLD PRESS REV.*, May 1994, at 43. China's official state figures indicate that the number of Muslims in China is 18 million. See *Background Notes: China, October 1998*, Bureau of East Asian & Pacific Affairs, (visited Oct. 1, 1998) <http://www.state.gov/www/background_notes/china_1098_bgn.htm>. China's Muslims live in six provinces: Chinghai, Kansu, Shensi, Yunnan, Ningh-

conflicts with the Falun Gong religious/martial arts sect, are centered around ethnic, religious, and ideological differences that undermine a “unified morality” domestically, while its stance on human rights depicts the absence of a “unified morality” internationally.¹⁶¹ Among the various Spratly Island claimants, there is an absence of a uniform morality beyond general principles of nonviolence, mutual cooperation and negotiation. These terms provide a useful framework, which creates an atmosphere to discuss the conflict, but fails to offer concrete and specific guidelines or rules to resolve the Spratly Island dispute.

D. REALIST

The realist view of international law is that ethics, morality, or ideology are mere euphemisms and elements of the power equation. According to the realist perspective international law is about power politics and the balance of power.¹⁶² The proponents of this view include Edward Hallett Carr, Hans Morgenthau, Dean Acheson, Henry Kissinger, and George Kennan. Former Secretary of State Henry Kissinger remarked that relations between states exist on one of three

sia, and Xinjiang with a history dating back to the early days of Islam. See Omar Haroon, *The Muslims of China Trace a Rich History from the Early Days of Islam*, 7 AL-TALIB THE MUSLIM NEWSMAGAZINE AT UCLA 1, 14 (1996). The internal Muslim conflict in China has the potential to impact Central Asia if China's Muslims seek an alliance with other Muslims in Central Asia. Such an alliance threatens the status quo in China and Central Asia and it would realize the fears of the western world which has historically disfavored a unified and controlling Muslim presence in Asia. See PETER HOPKIRK, *THE GREAT GAME* xviii (1992).

161. See Todd R. Benson, *Taking Security in China: Approaching U.S. Practices?*, 21 YALE J. INT'L L. 183, 188-89 (1996) (stating that China's adoption of international norms and “foreign style” law merely supplements China's customary practices which do not exist in the books, but which are an integral part of China's legal system); see also R.P. Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, 30, 57 (1993) (discussing how rights theories are not theories of natural rights and how the Chinese perception of rights—in particular human rights—will always have a Chinese characteristic). See generally ELISABETH ZOLLER, *ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION* (1985) (advocating extending the characteristics of the American legal system to international law).

162. See FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 7-13 (1985) (stating that “international law, morality, ethics, ideology and even knowledge itself are mere components in the power equation”).

levels: domination, balance of power, or total chaos,¹⁶³ inferring that notions of friendship, morality, and good intentions are irrelevant. The realist view embraces the premise that “might makes right” and that states are the only entities entitled to engage in international relations.

The use or threatened use of force is central to the realist notion. Hans Morgenthau theorized that a state’s primary goal is to maximize its power and that the sources of power are economic, political and military development.¹⁶⁴ China has developed in the respective areas pinpointed by Morgenthau.¹⁶⁵ It is a power-politics nation that has demonstrated an appreciation for armed conflict and deterrence. China used force or the threat of force to curtail pro-independence rhetoric in Taiwan and cries of democracy in Beijing.¹⁶⁶ China developed nuclear weapons as a deterrent to invasion or western manipulation.¹⁶⁷ One commentator noted that China, perhaps with justifica-

163. See BERNSTEIN & MUNRO, *supra* note 2, at 29 (stating additionally that “morality, good intentions and friendly feelings play little or no role,” thus showing that Henry Kissinger was the quintessential realist during the Nixon administration); see also WILLIAM BURR, *THE KISSINGER TRANSCRIPTS: THE TOP SECRET TALKS WITH BEIJING AND MOSCOW 70-82* (1999) (providing the transcript of a conversation on August 4, 1972, between Henry Kissinger and Huang Hua, the People’s Republic of China Ambassador to the United Nations). He later expressed a “softer” view and indicated that the world has become more interdependent and global and that the USSR and the United States can no longer maintain bipolar global domination. See HENRY KISSINGER, *DIPLOMACY* 23-28 (1994). However, his “softer” position merely recognizes a shift of power rather than the demise of the realist view.

164. See Richard D. Beller, *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, 313-19 (1994) (providing a discussion of the realist perspective with a particular emphasis on the scholarship of Hans Morgenthau).

165. See *supra* notes 98-126 and accompanying text (discussing China’s international economic and political development).

166. See, e.g., ORVILLE SCHELL, *MANDATE OF HEAVEN* 15-30 (1994) (providing the history and symbolism of the violence in Tiananmen Square).

167. Chronologically, China’s nuclear weapons technology developed as follows: January 1955 Mao Zedong approved the development of nuclear weapons programs; April 1955 the Soviet Union agreed to assist China with research on atomic energy and nuclear physics; March 1956 hundreds of Chinese nuclear scientists were trained in Moscow; October 1957 the Soviet Union agreed to provide China with data on the manufacture of atomic bombs; January 1958 the Soviet

tion, has used force more frequently since 1949 than any other nation.¹⁶⁸ China has used force, directly or indirectly, in numerous conflicts throughout the world including aid to the Afghan guerillas in their effort to overthrow the People's Democratic Party of Afghanistan (PDPA) headed by president Nur Mohammed Taraki;¹⁶⁹ military aid and training for the Frente Nacional de Libertacao de Angola (FNLA) forces in their independence struggle against Portugal;¹⁷⁰ arms to the People's Front for the Liberation of the Arabian Gulf (PFLOAG) rebels against the Sultan of Oman because of Oman's strategic position in the Persian Gulf;¹⁷¹ arms to Iran in its war against Iraq;¹⁷² arms to Yemen in its dispute against the United Kingdom;¹⁷³ attacks against Vietnam for its invasions of Kampuchea (Cambodia);¹⁷⁴ combat against the Soviet Union over border disputes;¹⁷⁵

Union provided China with two R-2 missiles and blueprints; May 1959 the Soviet Union delivered two TU-16 bomber aircraft; June 1959 China decided to develop its own atomic bomb; October 1964 China exploded its first atomic bomb (in the Northwest region of Xinjiang); June 1967 China tested its first hydrogen bomb; December 1968 China tested three-megaton atomic bomb; September 1969 China conducted another three-megaton atomic bomb explosion; October 1970 China exploded a three-megaton hydrogen bomb; November 1976 China conducted a further hydrogen bomb test; 1980 China conducted its final atmospheric test; 1988 the United States suspected, but China never confirmed, that China conducted neutron bomb test; July 1996 China succeeded in miniaturizing warheads; September 1996 China signed the Comprehensive Test Ban Treaty; December 1996 China had an estimated 400 active warheads; November 1999, the United States alleged China stole nuclear secrets; a 1999 report concluded that China stole the United States' weapons secrets and shared them with enemies of the United States; July 1999 China attempted to refute the report and announced it had no need to spy because it had the technology to build neutron bomb and miniature warheads. *See Chronology of China's Nuclear Weapons Technology Development*, INSIDE CHINA TODAY, (visited July 16, 1999) <<http://www.insidechina.com/features.php3?id=79395>> (providing a chronology of China's nuclear weapons development).

168. *See* Lilley, *supra* note 26, at 746 (discussing the instances where force was used against Burma, India, Korea, the Soviet Union, the Taiwan Strait, and Vietnam).

169. *See generally* A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* (1997) (describing the conflict in 1979-89).

170. *See id.* at 201 (describing the conflict in 1975).

171. *See id.* at 187 (explaining the conflict in 1965-76).

172. *See id.* at 50 (commenting on the conflict in 1980-88).

173. *See id.* at 258 (describing the conflict in 1957).

174. *See* WEISBURD, *supra* note 169, at 43 (explaining the conflict in 1979).

bombing of the Quemoy and Matsu islands in the Taiwan Straits;¹⁷⁶ fighting with Vietnam and the Philippines over the Spratly Islands;¹⁷⁷ invasion of Vietnam;¹⁷⁸ the Korean War;¹⁷⁹ arms and training for the Partido Africano da Independencia de Guine e Cabo Verde (PAIGC) forces in Guinea-Bissau in their struggle for independence against Portugal;¹⁸⁰ arms and training for the Frente de Libertacao de Mocambique (FRELIMO) guerillas in Mozambique in their struggle for independence against Portugal;¹⁸¹ arms and training to the Zimbabwe African National Liberation Army (ZANLA) in their struggle against Rhodesian security forces;¹⁸² a border war with India;¹⁸³ and conflicts in Tibet and Burma.

In the new millennium, China may rely less on force and more on economic empowerment,¹⁸⁴ with the concomitant deterrent effect of a

175. *See id.* at 268 (commenting on the conflict in 1969).

176. *See id.* at 178 (exploring the conflict in 1958).

177. *See id.* at 272 (discussing the conflict between China, Vietnam and the Philippines over the Spratly Islands).

178. *See id.* at 280 (discussing China's role in the invasion of Vietnam).

179. *See WEISBURD, supra* note 169, at 103-05 (describing China's involvement in the Korean war).

180. *See id.* at 79 (discussing how China provided arms and military training to the PAIGC).

181. *See id.* at 83 (pointing out how China provided arms and training to the FRELIMO in Mozambique).

182. *See id.* at 91 (discussing China's grant to ZANLA of arms and training in ZANLA's conflict against Rhodesia).

183. *See id.* at 261 (describing the involvement of China in a border war with India).

184. *See Jacques Delisle, Of Chinese Walls, Battering Rams, and Building Permits: Five Lessons About International Economic Law From Sino-U.S. Trade and Investment Relations*, 17 U. PA. J. INT'L ECON. L. 513, 518-19 (1996) (explaining that China and the United States perceive each other as enemies, and that aggression is appropriate to a relationship dominated by economic and commercial issues such as MFN status, entry into GATT/WTO, and intellectual property law); *see also* John G. Roos, *The New Long March*, ARMED FORCES J. INT'L 42 (1997) (discussing how China wants to become the uncontested power in Asia and plans to achieve this goal via both military and economic power). He believed that outright military occupation of the Spratly Islands by China would jeopardize that goal. *See id.*

military big stick.¹⁸⁵ It is unlikely China will use force to resolve the Spratly Island dispute in the immediate future because the international community would probably react strongly.¹⁸⁶ Moreover, pursuant to the UN Charter, states are required to refrain from the threat or use of force to resolve international matters.¹⁸⁷ Similarly, the Association of South East Asian Nations ("ASEAN"), which is comprised of Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei, has espoused the goal of peaceful resolutions for regional disputes, through the Treaty of Amity and Cooperation.¹⁸⁸ Nonetheless, China's military development is enormous, and in the early part of the new millennium its military might and its economic clout will coalesce. Its need for oil and gas will double as its population increases by millions.¹⁸⁹ Commentators predict that 268 million Chinese citizens will be unemployed or underemployed in the new millennium. This may result in a possible regionalism, positioning the prosperous eastern coast of China against the western region where they will resent the imposition of taxes and the lack of economic autonomy.¹⁹⁰ Acquisition of the Spratly Islands and its oil reserves

185. See E.A. Feignbaum, *Soldiers, Weapons, and Chinese Development Strategy: The Mao Era Military in China's Economic and Institutional Debate*, 158 CHINA Q. 285, 312-13 (1999) (describing how China may change its international policy in the new millennium by using its economic power instead of force).

186. The above statement is not offered to eliminate the possible use of force by China to gain control over the Spratly Islands. The statement merely places force as an option second to others. There is a possibility that as China continues to expand economically and militarily that it will use force to resolve what it perceives as the Spratly "border dispute". In modern times nations are likely to use force when the conflict involves a "border" dispute. For example, conflicts in the Arab-Israeli wars, Iraq's invasion of Iran, the Falkland War, "[a]nd flurries of hostilities . . . between India and Pakistan, Greece and Turkey (over Cyprus), Libya and Egypt, Cambodia and Thailand, Vietnam and Cambodia, India and China, Ethiopia and Somalia." HENKIN, *supra* note 32, at 51.

187. See U.N. CHARTER, art. 2, para. 4.

188. See *Treaty of Amity and Cooperation in South East Asia* (Feb. 24, 1976) (visited Nov. 5, 1999) <<http://www.asean.org.id>>.

189. See generally QU GEPING & LI JINCHANG, *POPULATION & THE ENVIRONMENT IN CHINA* (Jiang Baozhong & Gu Ran trans., 1994) (discussing on how China's population impacts its land, forest, grassland, mineral resources, water and energy).

190. See Willy Wo-Lap Lam & Frankie Fook-Lun Leung, *China After Deng: Toughest Tests in Economic Area*, 17 E. ASIAN EXEC. REP., Sept. 15, 1995, at 11-

may become necessary to support China's growing population and increasing rates of consumption.¹⁹¹ Such economic exigencies and the perception that "might makes right" engenders a volatile status quo with several possible future outcomes.

V. PROJECTIONS

China's realist philosophy, combined with a massive military buildup, reunification with Taiwan, a strategy to control the South China Sea and extend its influence into the Indian Ocean,¹⁹² could result in a conflict with the other claimants and the United States. Conflict is avoidable if the claimants overcome factors dealing with the status quo, the shortcomings of current international law, tense United States-China relations, and the inability to agree upon a system of joint development.

The plight of the status quo concern was initially referred to by Mark Valencia when he stated "[d]espite all hope of improvement, the most likely scenario for the future of the South China Sea disputes is the status quo."¹⁹³ The problem with maintaining the status quo is the emotional, cultural and economic variables dormant in the Spratly Island dispute. These variables nurture a volatile status quo, which is reflective of Thomas Hobbes' statement that "in the nature of man, we find three principal causes of quarrel." First, Competition; Secondly, Diffidence; Thirdly, Glory."¹⁹⁴ The Spratly Islands dispute creates grave potential for conflict from the competition for oil and fishing revenues. This quest for revenues is inextricably linked to the political glory and honor that the leadership of the claimant states associate with the acquisition of the Spratly Islands.

12 (discussing how China in the new millennium is predicted to encounter economic problems because of unemployment and regionalism).

191. See Jay Tolston, *Of Kings and Commoners*, U.S. NEWS & WORLD REP., Aug. 16-23, 1999, at 68 (noting that in the past one thousand years China has been one of the countries with the world's largest populations).

192. See HSU, *supra* note 116, at 978.

193. MARK J. VALENCIA, CHINA AND THE SOUTH CHINA SEA DISPUTES 54 (Adelphi Paper 298, 1995).

194. THOMAS HOBBS, LEVIATHAN, THE NATURAL CONDITION OF MANKIND, AS CONCERNING THEIR FELICITY, AND MISERY (1651), reprinted in THE GREAT LEGAL PHILOSOPHERS, at 110 (Clarence Morris ed., 1971).

If the stagnation and latent conflict continue,¹⁹⁵ and China's military might increasingly exceeds that of the other claimants, China will more likely violate international law. The reason for this is because China will fail to see any other recourse.

Another factor that could generate military conflict is the current deficiency of international law. Each party to the Spratly Islands dispute claims the territory in whole, or in part, which makes the sovereignty issue complex and unresolvable by the Law of the Sea and existing international law. The Law of the Sea Treaty is inadequate to resolve territorial disputes because it often creates overlapping claims,¹⁹⁶ ambiguous boundaries,¹⁹⁷ and protects property interests only after sovereignty is established. The existing international tribunals are also unlikely to resolve the Spratly Island dispute because the claimants are reluctant to submit disputes to an adversarial system. There is a general belief among the Southeast Asian nations that international organizations, such as the International Court of Justice ("ICJ"), advocate western philosophy and reach unsatisfactory results. These nations further believe that the disputes in the region are of a sensitive nature, involving sovereignty and domestic policies, which require "good neighborliness," and conciliatory and flexible legal procedures.¹⁹⁸

195. See generally C.R. MITCHELL, *THE STRUCTURE OF INTERNATIONAL CONFLICT* 17 (1981) (describing how incompatible goals are the precursors for latent conflict).

196. See Barry Hart Dubner, *On the Interplay of International Law of the Sea and the Prevention of Maritime Pollution: How Far Can a State Proceed in Protecting Itself From Conflicting Norms in International Law*, 11 *GEO. INT'L ENVTL. L. REV.* 137, 140 (1998) (discussing the inadequacy of the Law of the Sea Treaty when used in solving territorial disputes); see also John E. Noyes, *International Law of the Sea*, 31 *INT'L LAW.* 703, 712 (1996) (discussing how other claims have not been exacerbated by recent claims of exclusive economic zones involving such claimants as Japan and Korea (Liancourt rocks) and Japan and China/Taiwan (Senkaku)); see also Roseann Bassler, *International Disputes Over Control of the Oceans*, 7 *GEO. INT'L ENVTL. L. REV.* 855 (1995) (discussing the numerous overlapping national claims under the Law of the Sea and the resulting disputes involving Aegean Sea, the Spratly Islands, the Timor Sea, the Caspian Sea, the Canadian Continental Shelf, the Gulf of Thailand, and the Yellow Sea).

197. See generally Jonathan I. Charney, *Progress In International Maritime Boundary Delimitation Law*, 88 *AM. J. INT'L L.* 227 (1994) (discussing how, on its face, international maritime law found in the Law of the Sea is undefined).

198. See Triggs, *supra* note 86, at 658-59 (pointing out that Asian countries are

A third factor that could generate military conflict is the tension between the United States and China. The end of the twentieth century demonstrates the tension between the United States and China. In 1995, the United States allowed the Taiwanese President to visit the United States, and in response China held war games and fired missiles into the Taiwan Strait. The United States responded with the placement of two aircraft carrier groups in the Taiwan Strait to protect Taiwan.¹⁹⁹ In 1999, the Clinton Administration vetoed the sale of a \$450 million Hughes communication satellite—alleging security risks—when the Singapore-based consortium, Asia Pacific Mobile Telecommunications (APTM) was suspected to have close ties with China.²⁰⁰ In addition, in 1999, the United States government accused scientist named Wen Ho Lee, who was born in Taiwan, of stealing nuclear secrets from the Los Alamos Laboratory in New Mexico,²⁰¹ and Charlie Trie, John Huang, and Johnny Chung were associated with campaign fundraising abuses.²⁰² In May 1999, the United States bombed the Chinese embassy in Belgrade, Yugoslavia, killing three journalists and injuring numerous others. China deemed the attack deliberate, while the United States claimed it was an accident. In July of the same year the United States indicated that it would strongly oppose China's use of force to resolve the Taiwan issue after Taiwan's president indicated that Taiwan was an independent state. Although the United States supported the one-China model for Beijing and Taiwan, the United States considers China's force as a threat to the stability of the region. Secretary of State Madeline Albright emphasized human rights violations in China would impede United

skeptical about the ICJ's role in resolving legal disputes in the region).

199. See *House Votes to Strengthen Military Ties with Taiwan*, N.Y. TIMES ON THE WEB (Feb. 2, 2000) <<http://www.nytimes.com/library/world/asia/020200 taiwant-us.html>> (noting that the United States in 1996 dispatched two missiles in response to actions whereby China fired missiles at Taiwan).

200. See Jeff Gerth & David E. Sanger, *Citing Security, U.S. Spurns China on Satellite Deal*, N.Y. TIMES, Feb. 23, 1999, at A1 (discussing the United States' rejection of the Hughes deal with Asia-Pacific Telecommunications).

201. See MR. COX OF CALIFORNIA, CHAIRMAN, REPORT OF THE SELECT COMMITTEE ON U.S. NATIONAL SECURITY AND MILITARY/COMMERCIAL CONCERNS WITH THE PEOPLE'S REPUBLIC OF CHINA, H.R. DOC. NO. 105-851 (105th Sess. 1999).

202. Alan Elsner, *Democratic Fund-Raiser Trie Surrenders* (visited Nov. 6, 1999) <<http://www.thecommonman.com/trie-0001.htm>>.

States-China trade relations.²⁰³ The tension between the United States and China reached a crescendo at the dawn of the new millennium. It could be argued that matters will only worsen as China develops militarily, potentially unites with Taiwan,²⁰⁴ and fails to achieve an end to the Spratly Island dispute. The United States may find itself embroiled in a conflict with China due to ineffective dialogue and fears of China's expansionism. The United States tends to perceive China's growth as a threat to its interests.²⁰⁵ It would, therefore, behoove the United States and the other claimants to reach an agreement over the Spratly Islands while China demonstrates a willingness to cooperate with other nations in bilateral negotiations.²⁰⁶

VI. RECOMMENDATIONS

The problems of the status quo, the shortcomings of international law, and the tense United States-China relations can be resolved if the dispute is settled pursuant to an equitable system of distribution that respects the claimants' respective legal claims to the Spratly Is-

203. Jane Perlez, *Albright Debates Rights and Trade with the Chinese*, N.Y. TIMES, Mar. 2, 1999, at A1 (discussing Madeleine Albright's position regarding China's human rights violations and trade).

204. See *White Paper—The One-China Principle and the Taiwan Issue* (visited Feb. 23, 2000) <<http://www.china-embassy.org/papers/taiwan00.htm>> (stating that “[s]ettlement of the Taiwan issue and realization of the complete reunification of China embody the fundamental interest of the Chinese nation. The Chinese government has worked persistently toward this goal in the past 50 years”).

205. See Ralph N. Clough, *The Status of Taiwan in the New International Legal Order in the Western Pacific*, 87 AM. SOC'Y INT'L L. PROC. 61, 73 (1993). Instead of fear and alarm, the countries should continue to work towards a bright future of which would include trade and academic exchange. See *id.* (stating that it was estimated that in 1992, 43,000 Chinese students were studying in the United States); see also COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, PRESIDENT'S FIVE-YEAR REPORT 1993-1998, at 16-17 (pointing out that during the 1997-98 academic year Columbia University enrollment of international students was 15.9 percent, the highest proportion ever); Jim Rogers, *The China Century is Only 3 Years Away* (visited Nov. 5, 1999) <<http://www.mbnlobal.com/subEmgMKTChina.htm>> (stating that more can be done in pre-college years, like emulating the Australian school system where every child “must learn either Chinese, Japanese, Korean, or some other Asian language.”).

206. See BING BING JIA, *THE REGIME OF STRAITS IN INTERNATIONAL LAW* 175 (1998) (stating that despite China's claim over the Spratly Islands it has not interfered with free passage, and has supported innocent passage through the seas and expressed a willingness to engage in bilateral negotiation).

lands. Eventually, the Spratly Island dispute will reach one of five possible conclusions. The first possible outcome is that one of the claimant countries will take all of the territory through a tribunal, dispute resolution, or military force. Second, the most powerful nations will share the wealth of the Spratly Islands and the less powerful would become disenfranchised. Third, all the disputants share the wealth equally. Fourth, all the states share in proportion to an articulated distribution scheme. Lastly, none of the states have access to the wealth. The first and second possible conclusions are conflict-laden and require an ongoing military occupation of the entire South China Sea. Such an outcome would prove expensive, counterproductive, and economically infeasible. The fifth potential conclusion is impracticable and unlikely to occur unless all the claimants are invaded and colonized or the South China Sea itself suffered a tremendous disaster. A cursory view generates a certain appeal for the third conclusion but such a scenario is not legally probable or practically possible because it lacks recognition of the claimants' various legal positions. Finally, the fourth potential conclusion, which provides a distribution of the wealth, rights, and benefits of the Spratly Islands pursuant to an articulated scheme, appears to be the only viable solution. What distribution scheme is viable? The answer, to quote Shakespeare's Hamlet, "ay there's the rub. . . ."

A. VARIOUS SUGGESTIONS

Unless the claimant countries of Brunei, China/Taiwan, Malaysia, the Philippines, and Vietnam reach an agreement to share the resources of the Spratly Islands, China will eventually become frustrated and more militarily aggressive. Clearly, any resolution of the dispute will involve China and will, therefore, have an impact upon both Asia and the United States far into the new millennium. Suggestions to resolve the Spratly Island dispute vary. There is the contention that all the rights and privileges associated with the Spratly Islands accrue to China because it has absolute sovereignty over the Spratly Islands based on historical realities. Moreover, the Chinese argue that any other solution is simply western politics that focus on incorrect issues, such as China's intentions in Asia.²⁰⁷ Other writers

207. See Shen, *supra* note 43, at 4-5, 72-75 (1997) (discussing how China should have absolute sovereignty over the Spratly Islands and that any other sug-

provide general suggestions which beseech United States-China cooperation,²⁰⁸ a peaceful resolution,²⁰⁹ a negotiated settlement,²¹⁰ the benefits of closer relationship with China under a joint development agreement,²¹¹ or a United States presence as an overseer to prevent an Asian country from unilaterally carving out part of the South China Sea.²¹² Some commentators have offered more specific suggestions and a framework for resolving or tolerating the Spratly Island dispute.

Noted author B.A. Hamzah suggested using the 1959 Antarctic Treaty as a model to resolve the Spratly Island dispute.²¹³ Australia, New Zealand, France, Norway, Argentina, Chile, and Great Britain had overlapping claims to the Antarctic.²¹⁴ Hamzah focuses on Article IV of the Antarctic Treaty that provides that the parties, non-parties, and potential parties retain their asserted rights or claims in sovereignty over the Antarctic. In his analysis of Article IV, Hamzah

gestions as to the Spratly Islands are politically based).

208. See Lilley, *supra* note 26, at 749 (providing alternatives to solving the Spratly Islands dispute).

209. See Brian K. Murphy, *Dangerous Ground: The Spratly Island Dispute and International Law*, 1 OCEAN & COASTAL L.J. 187, 208-10 (1995) (arguing for a peaceful resolution between China and the United States).

210. Cf. Bennett, *supra* note 25, at 450 (stating that confrontation could lead to a widespread of hostilities).

211. See Charles Liu, *Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute*, 18 LOY. L.A. INT'L & COMP. L.J. 865, 883-92 (1996) (discussing the benefits of a trusted relationship, as a consequence of a joint development agreement between China and the United States).

212. See Toni M. Bugni, *The Continued Invasion: Assessing the United States Military Presence On Okinawa Through 1996*, 21 SUFFOLK TRANSNAT'L L. REV. 85, 99 (1997) (discussing the United States' involvement in preventing unilateral exploitation of the South China Sea); see also Edward L. Miles, *U.S. Security Interests in a Post-Cold War World and the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 373, 394 (1997) (arguing that the United States cannot be aloof, and must take an active role in Asia and foster regional balance).

213. See B.A. HAMZAH, *THE SPRATLIES: WHAT CAN BE DONE TO ENHANCE CONFIDENCE* 20 (1990) (suggesting that a way to resolve the Spratly Island dispute is to make use of the Antarctic Treaty of 1959). See generally Mito, *supra* note 6 (suggesting the use of the Timor Gap Treaty as a model in order to solve the Spratly Islands dispute).

214. For an in-depth discussion of the parties involved, and the various articles of the Antarctic Treaty, see F.M. AUBURN, *ANTARCTIC LAW AND POLITICS* (1982).

states, “[t]he freezing of the claim ‘concept’ is in line with the proposal for a concurrent jurisdiction regime along the line of a joint development-type model.”²¹⁵ He suggests that a Spratly Islands treaty could include the characteristics of the Antarctic Treaty such as a moratorium on asserting new territorial claims or enlarging existing ones while the treaty is in force, ecological cooperation, and the exchange of scientific information. He concedes that the Antarctic Treaty is a deficient model for the Spratly Islands because the former calls for non-militarisation and the Spratly Islands already have military stations in the area, which the claimants are unlikely to dismantle, and that the Spratly Islands have a greater strategic significance to the claimants than the Antarctic had to its claimants.²¹⁶ Hamzah’s primary contribution to the discourse involving the Spratly Islands is his suggestion of how to defuse the tension in the area.²¹⁷ He suggests confidence-building measures to minimize conflict in the region. His measures include: unilateral restraint of force; recognition of national sensitivities; avoidance of tension raising activities; cessation of further occupation; restraint of military expansion; adoption of friendly measures and notification of military exercises; and coordination and harmonization of maritime procedures.²¹⁸ Essentially, Hamzah provides safeguards to preserve the peace in a

215. HAMZAH, *supra* note 213, at 21.

216. *See id.* at 19 (suggesting ways to utilize the Antarctic Treaty of 1959 to settle the Spratly Islands dispute; *see also* EMILIO J. SAHURIE, *THE INTERNATIONAL LAW OF ANTARCTICA* 87 (1991) (stating that both regions share prospects of vast oil reserves and that countries such as Japan, the Former Soviet Union, Poland, Chile, Japan and the United States have financial commitments to explore for oil in the Antarctic); GEORGE A. KNOX, *THE LIVING RESOURCES OF THE SOUTHERN OCEAN: A SCIENTIFIC OVERVIEW*, reprinted in *ANTARCTIC LAW AND POLICY* 21-26 (Francisco Orrego Vicuna ed., 1983) (describing how both regions in the Antarctic having living resources, such as whales, krill, squids, seals, birds and fish).

217. *See* HAMZAH, *supra* note 213. Interestingly, China’s embassy contends that there is no crisis in the region and rhetoric to the contrary is based on “ulterior motives. *See The Question of the South China Sea: Its Origin and Current Status* (visited Oct. 28, 1999) <<http://www.china-embassy.org/Cgi-Bin/Press.pl?SouthChinaSea>> (stressing China’s commitment to the peaceful settlement of disputes).

218. *See* HAMZAH, *supra* note 213, at 15-16; *see also* B.A. HAMZAH, *MALAY. INST. MARITIME AFFAIRS, CONFLICTING MARITIME CLAIMS IN THE SOUTH CHINA SEA: THE SCOPE FOR RESOLUTION 1990-1991*.

volatile region. He implicitly adopts Mark Valencia's position²¹⁹ that the Spratly Island dispute is plagued with the plight of the status quo.

Mark Valencia, another prolific writer on the South China Sea, stated, "[d]espite all hope of improvement, the most likely scenario for the future of the South China Sea is the status quo."²²⁰ Valencia asserts that talks among the claimants are unfocused, technical and occasionally interrupted with violence between the claimants.²²¹ He characterizes the situation as a "leaking status quo."²²² He offers solutions that carve up or distribute the Spratly Islands to the claimants based on three different scenarios:

Scenario 1: Allocate the entire South China Sea on the basis of equidistant lines from claimed baselines, ignoring the Spratly and Paracel Islands.

Scenario 2: Allocate the South China Sea out to 200nm from baselines and/or out to the legal limit of the continental shelf, ignoring the Paracel and Spratly Islands.

Scenario 3: Allocate the South China Sea out to 200nm and/or out to the legal limit of the continental shelf on the basis of equidistant lines from claimed baselines, including the Paracel, but ignoring the Spratly.²²³

Pursuant to Valencia's regime each claimant is allocated an area of the Spratly Islands.²²⁴ Valencia's scenarios appear attractive, but they are problematic. He admits that the major problem with each scenario is that China's allocation fails to include the Spratly Islands.²²⁵ Such an outcome is clearly unacceptable to China. Valencia further admits that the allocations could accentuate rather than minimize the strategic concerns of the claimants if any of them claim the exclusive

219. See VALENCIA, *supra* note 193, at 54 (predicting that the future for the Spratly Islands will be the status quo).

220. *See id.*

221. *See id.* at 54-55 (discussing the level of distrust among the claimants).

222. *Id.* at 55.

223. *Id.* at 57.

224. *See id.* (listing the three scenarios, in which each of the present occupants would have sovereignty).

225. See VALENCIA, *supra* note 193, at 61 (arguing that China would probably not accept any of the scenarios, since none of them include a Chinese allocation).

economic zone and continental shelves adjacent to their allocation.²²⁶ He also admits his allocations would suffer from ineffective management controls as well.²²⁷ Furthermore, the area allocated is difficult to define and the claimants are unlikely to agree on an equitable allocation.²²⁸

Valencia perceives the conflict involving the Spratly Islands as one primarily concerned with sovereignty rather than revenues.²²⁹ This position ignores the fact that numerous disputes and military skirmishes among the claimant states occurred after it was asserted that the region contains vast oil reserves. It also downplays the dire economic realities of the Philippines and Vietnam; both of which are among the poorest countries in Southeast Asia. Neither can afford to lose the right and privileges associated with the Spratly Islands.²³⁰

Valencia's suggestions are useful as a starting point towards full discussions among the claimants. Writer Hart Dubner has suggested an amalgamation of Hamzah's confidence building program and Valencia's joint development program.²³¹ While attention-getting, Dubner's suggestion is plagued with the shortcomings of Valencia's allocation scenarios and therefore unworkable.

Valencia conceptualizes the Spratly Island dispute as a vortex with "strategic significance" at its center.²³² This view marginalizes the claimants' legitimate interest in revenues. Alternatively, author

226. *See id.* at 62 (admitting the difficulties associated with an allocation under the three scenarios).

227. *See id.* (discussing the difficulties in enforcing any of the three scenarios).

228. *See* MARK J. VALENCIA ET AL., SHARING THE RESOURCES OF THE SOUTH CHINA SEA 146 (1977) (criticizing the shortcomings of geographically-based allocation exercises).

229. *See id.* at 18 (defining the competing claims as "sovereignty" issues).

230. *See* Nicholas Marsh, *The Spratly Islands Dispute* (visited June 8, 1999) <<http://snipe.ukc.ac.uk/international/dissert.dir/marsh.html>> (stating that "[o]il represents the major lure for the littoral states). The Philippines and Vietnam are some of the poorest states in South-east Asia. *See id.* In 1994, the GDP of Vietnam was \$190. *Id.* The Philippines has the second lowest GDP in ASEAN at \$960. *See id.*

231. *See* Hart Dubner, *The Spratly "Rocks" Dispute: A "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L.J. 291, 318-19 (1995) (describing Hamzah and Valencia's plans to resolve the Spratly Island dispute).

232. *See* VALENCIA ET AL., *supra* note 228, at 155 (highlighting the potential uses of the area for defense, observation, and restricting sea travel).

Choon-Ho Park describes the Spratly Island dispute as a conflict over jurisdiction of both territory and resources.²³³ This approach is more reflective of the multi-dimensional nature of the dispute and captures the political, emotional, national, and economic factors underlying the Spratly Islands dispute. The perception of something more than property rights in land precipitates a different approach towards solving the dispute. Certainly the Spratly Islands and the South China Sea are “physical things” subject to traditional theories of property law. A more useful framework, however, is to perceive “ownership” of the Spratly Islands as a multi-dimension phenomenon beyond something physical. Writer Michael A. Heller has categorized ownership as “physical things,” “legal things,” and “legal relations.”²³⁴

B. THE POINT SYSTEM

This Article proposes defining the Spratly Islands as a dispute about “relations” rather than “things.” Instead of owning the Spratly Islands, the claimants would focus on their relationship to the wealth associated with the Spratly Islands. The “relations” approach would function within a point system to establish the extent of a particular claimant’s relations to, and corresponding revenues from, the wealth of the Spratly Islands. The point system would recognize a claim without the establishment of a hierarchy of claims and without reaching final conclusions of law or requiring a tribunal to address the merits of a claim. The claims asserted by a particular claimant are tallied and the total provides the appropriate percentage of revenues due to each claimant. The claims are based on theories of sovereignty the claimants have hitherto asserted for ownership of the Spratly Islands within contemporary international law, the Island of Palmas case, the Eastern Greenland case, the Clipperton case, and the Law of the Sea.

The Island of Palmas case, a 1928 Permanent Court of Arbitration decision, involved a dispute between the United States and the Neth-

233. See Park, *supra* note 127, at 52-53 (contending that the sovereignty issue is between China and Vietnam, while the resource issue is between Vietnam and all the other coastal states).

234. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1169 (1999).

erlands over certain islands.²³⁵ The United States claimed discovery rights,²³⁶ while the Netherlands claimed “continuous and peaceful display of authority.”²³⁷ The Court held that mere discovery of an island is insufficient and that discovery must accompany a continuous and peaceful display of authority or occupation.²³⁸ The Clipperton Case, decided in 1931 by the Permanent Court of Arbitration, involved a dispute between Mexico and France over sovereignty of uninhabited islands.²³⁹ The Court held that when uninhabited islands are involved, occupation is based on reasonableness and that actual occupation may be unnecessary.²⁴⁰ In 1933, the Court decided the Eastern Greenland case, which involved a dispute between Norway and Denmark over Greenland.²⁴¹ Norway claimed that no one owned Greenland, while Denmark claimed it exercised control over Greenland for centuries. The Court held in favor of Denmark because its claim to Greenland was uncontested until the early part of the twentieth century.²⁴²

A fusion of the Island of Palmas, Clipperton, and Eastern Greenland cases is ineffective to solve the Spratly Island dispute on the merits. First, the claimants are reluctant to place the dispute before an international tribunal that would interpret and apply the case precedent. Second, those cases lack clarity sufficient to decide the Spratly Islands case on the merits. For example, the concept of title by occupation, which China relies upon, is indecipherable with refer-

235. See *The Island of Palmas (U.S. v. Neth.)* (Perm. Ct. Arb. 1928), reprinted in 22 AM. J. INT’L L. 867 (1928) (stating the claims of the United States and the Netherlands over the island of Las Palmas).

236. See *id.* (finding that the United States’ claim of discovery was insufficient as a basis of territorial sovereignty).

237. *Id.*

238. See *id.* at 911 (holding that there were not sufficient grounds to support the United States’ claim of sovereignty based on discovery).

239. See *Fr. v. Mex.*, 6 *Revue Generale du Droit International Public* 3d 129, 129-32 (Perm. Ct. Arb. 1932), reprinted in 26 AM. J. INT’L L. 390 (1932) (stating that the claims of Mexico and France regarding sovereignty over Clipperton Island).

240. See *id.* at 393-94.

241. See *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (Ser.A/B) No. 53.

242. See *id.*

ence to a definition of the degree and kind of possession effective to establish title and define the area of territory possessed.²⁴³ The points system would avoid a decision on the merits of the claimants' positions and merely grant a point based on the claim itself. This broad application of the legal concepts is more effective than grappling with the issue of sovereignty and related concepts as they relate to a particular claimant, and then deciding whether that particular claimant fulfilled the legal requirements. Points are accumulated on the criteria of historical title, treaty transfer, conquest, occupation, prescription, the use of force, the use of force in self-defense, degree of control, and the adjacency of the claimant's coastline and coastal zones.²⁴⁴

Brunei's claim of right to the Spratly Islands involves two reefs: Louisa Reef and Rifleman Reef.²⁴⁵ The basis of Brunei's claim is "based on a 350-nautical-mile continental shelf claim or possibly on its claim to Louisa Reef,"²⁴⁶ earning Brunei one point in the point system.

China's claim to the entire Spratly Islands is based on historical usage of the Spratly Islands because it occupied the Islands and exercised control over them.²⁴⁷ China also asserts a right to the waters and resources of the South China Sea based on the premise that islands, islets, and reefs are in adjacent waters over which China has exercised sovereignty.²⁴⁸ China's two points are added to claims asserted by Taiwan.²⁴⁹ Although such a position is seemingly unfair to Tai-

243. See R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 20 (1963) (defining occupation as "the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State").

244. See Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 728 (1995) (discussing these factors in the context of general issues in the maritime boundaries).

245. See VALENCIA ET AL., *supra* note 228, at 38 (listing Brunei's claims to the Spratly Islands, which include the maritime area surrounding the two reefs).

246. *Id.*

247. See *id.* at 20-22 (discussing China's connection with the Spratly Islands, beginning as early as two thousand years ago).

248. See *id.* at 24 (noting that China claimed sovereignty over the seas around the Spratly Islands in 1992).

249. See *id.* at 29-30 (noting Taiwan's claims of sovereignty, based on historical association with China and occupation of certain islets).

wan, it acknowledges four major points. First, the Peoples' Republic of China ("Beijing") and the Republic of China ("Taiwan") will unite in the new millennium because both believe there is only one China and that the separation is only temporary.²⁵⁰ Second, any joint development program which separates Beijing and Taiwan's claims to the Spratly Islands would become convoluted, discombobulated and generate a dysfunctional joint development formula.²⁵¹ Third, any other arrangement is unacceptable to China. Beijing, China's position in the dispute will be determinative due to China's growing economy and military strength. Fourth, China and Taiwan both agree that there is a need for a united front to gain both strategic control and petroleum rights associated with the South China Sea.²⁵² Taiwan's claim to the Spratly Islands is based on historical usage/occupancy.²⁵³ China and Taiwan's theories for ownership of the Spratly Islands total three, thereby earning China/Taiwan three points.

Malaysia's claim to the Spratly Islands is based on two theories: first, continental shelf extension,²⁵⁴ and, second, the discovery and occupation of six islands.²⁵⁵ Malaysia, therefore, has two points. The Philippines' claim most of the Spratly islets based on adjacency, and

250. See Hong-jun Zhou, *The Legal Order on Both Sides of the Taiwan Strait and the Current Sino-Vietnam Relation*, 87 AM. SOC. INT'L L. PROC. 61 (1993) (describing efforts between China and Taiwan to "relax tensions" in order to further the goal of "One China").

251. Joint development is a complex issue due to the China-Taiwan issue and the absence of a specific formula. See CHI-KIN LO, *CHINA'S POLICY TOWARDS TERRITORIAL DISPUTES: THE CASE OF THE SOUTH CHINA SEA ISLANDS* 181 (1989).

252. See MARK J. VALENCIA, *A MARITIME REGIME FOR NORTH-EAST ASIA* 90 (1996) (discussing joint efforts of China and Taiwan regarding South China Sea issues, despite increasing tensions in their relationship).

253. See VALENCIA ET AL., *supra* note 228, at 29 (discussing Taiwan's Policy Guidelines for the South China Sea and Taiwan's occupation of the Ban Than Reef in 1995). According to Taiwan's Policy Guidelines for the South China Sea, the South China Sea is "within the historic water limit" and is under Taiwan's jurisdiction. See *id.*

254. See *id.* at 36 (explaining that Malaysia's continental shelf argument arises from international treaties and local legislation).

255. See *id.* (listing Ardaiser Reef, Dallas Reef, Louisa Reef, Mariveles Reef, and Swallow Reef as the island Malaysia claims to "occupy").

discovery and prescriptive acquisition,²⁵⁶ providing the Philippines with two points. Finally, Vietnam's claim to the Spratly Islands is based on historical visits/possession "from time immemorial."²⁵⁷ In the alternative, Vietnam asserts succession to France's rights.²⁵⁸ Vietnam's second basis to the Spratly Islands is based on its continental shelf.²⁵⁹ Vietnam's total points are two. The point allocations total as follows: Brunei, one point; China, three points; Malaysia, two points; the Philippines, two points; and, Vietnam, two points. The total points are ten. On a 100-point scale each claimant would receive revenues from the Spratly Islands based on their total points without evaluating the merits of their claim. The claimants would, therefore, receive the following percentage of revenues from oil and fishing in the Spratly Islands: Brunei, ten percent; China, thirty percent; Malaysia, twenty percent; the Philippines, twenty percent; and Vietnam, twenty percent.

The above point system allocations are sensitive to the unique characteristics of the Spratly Islands dispute, which involves five claimants with a mutual aversion towards the litigation process. The points system also "recognizes" each claimant's position without a hierarchy and provides revenues irrespective of the legal merits of a particular claim of right to the Spratly Islands. Furthermore, the point system avoids the complex issue of how to physically partition the Spratly Islands area. It avoids possible future problems that could arise if one country were given islands that later proved more valuable than another claimant's islands because of greater oil exploitation revenues.

C. CRITICISM OF THE POINT SYSTEM

One major concern about the point system arises from the classical Austin paradigm that presents the issues of who would serve as sov-

256. See *id.* at 33-35 (listing the Philippines' claim to the Spratly Islands and adding that the Philippines' claim for economic need is implicit in the dispute itself and applicable to each claimant).

257. *Id.* at 30.

258. See VALENCIA TE AL., *supra* note 228, at 30 (discussing Vietnam's involvement with the Spratly Islands under French rule).

259. See *id.* at 31-32 (noting Vietnam's claim to a continental shelf, which extends 200 nautical miles from its coast).

ereign and enforcer of the point system. This Article suggests that enforcement would be through a collectively formed regional organization. The states would vest the organization with specific powers as defined by the member states; including Brunei, China/Taiwan, Malaysia, the Philippines, and Vietnam. The countries would form a social contract wherein the collective would agree to disagree within the rules established by the regional organization. The Association of South East Asian Nations ("ASEAN"), or any other existing or newly established organization could monitor the rights, duties, and privileges associated with the point system. This would comport with ASEAN's objective to "accelerate the economic growth, social progress, and cultural development" and to "promote collaboration and mutual assistance on matters of common interest of Southeast Asian members."²⁶⁰ A non-tribunal, yet regional type organization is more effective for the Spratly Islands dispute because the regional organization would fail to threaten regional autonomy. A regional organization is also in line with the current trend in various parts of the world and is the anticipated method of dispute resolution in the future due to economic exigencies.²⁶¹

The sovereignty issue or ruling body concern is lineally related to concerns about who would provide protective/enforcement measures, such as environmental controls, under the point system. This critique suggests that the point system would generate economic waste and environmental degradation because the Spratly Islands would remain unowned. The view is that the Spratly Islands would suffer from

260. See Yoshi Kodama, *Asia-Pacific Region: APEC And ASEAN*, 30 INT'L LAW. 367, 383 (1995) (quoting ASEAN's main goals, as set out in the Bangkok Declaration); see also Deborah A. Hass, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U. J. INT'L L. & POL'Y 809, 809 (1994) (citing the ASEAN Free Trade Agreement as a means to achieve ASEAN's goal).

261. See Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485, 551 (1993) (arguing that regional cooperation has grown in various parts of the world and is the expected method of dispute resolution in the future due to "economic exigencies"). But see Gerald A. Malia, *The New "International Tribunal for the Law of the Sea": Prospects for Dispute Resolution at the "Sea Court"*, 7 GEO. INT'L ENVTL. L. REV. 791, 792, 794 (1995) (discussing the provisions in the Convention on the Law of the Sea for an "International Tribunal for the Law of the Sea").

what Hardin theorized as the "Tragedy of the Commons."²⁶² Hardin posited that collective property arrangements encourage abuse and inefficiency.²⁶³ He asserted that if something is unowned, a sense of responsibility is lacking and the property suffers degradation, deterioration, and negative exploitation.²⁶⁴ Private ownership, according to Hardin, is a better arrangement for the Spratly Islands and the surrounding territories.

Hardin's view regarding the value of owning property has solid scholarly antecedents. Notable scholars have addressed the topic of individual property rights. Coase theorized that private ownership spurs private incentives, which, in turn, produce quality controls.²⁶⁵ Coase used the example of a lighthouse to enunciate his position that even a lighthouse, which is a public good, is produced and maintained at a higher quality when privately owned as opposed to publicly owned.²⁶⁶ John Locke also placed tremendous emphasis on private ownership.²⁶⁷ Locke considered property rights tantamount to the rights of life and liberty.²⁶⁸ The only role for government, as it relates to property, is to protect against infringements and punish those who infringe.²⁶⁹ Others made arguments similar to Locke. Frank Michelman asserted that when one's labor is involved, the resulting benefits

262. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968) (criticizing common property ownership in the context of population growth).

263. See *id.* (listing the problems associated with common property ownership).

264. See *id.* (arguing that natural resources, such as shared ocean territories, are wasted due to common use).

265. See R.H. Coase, *The Lighthouse in Economics*, 17 *J.L. & ECON.* 357, 375-76 (1974) (criticizing the "lighthouse" example used by scholars to demonstrate the need for governmental economic functions).

266. See *id.* at 375 (demonstrating that private ownership of lighthouses in Britain proved to be successful with little government involvement).

267. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 14-27 (3d ed. 1966) (explaining how the property given to mankind in common by God ultimately becomes individually owned).

268. See *id.* at 5 (postulating that the law of nature teaches mankind not to harm each other in life, liberty, health, or property).

269. See *id.* at 43-44 (asserting that political societies can only exist if they have the power to preserve their member's property).

should belong to that particular individual.²⁷⁰ Adam Smith, Oliver Wendell Holmes, and Henry Sidgwick each declared that property related to labor is sacred and inviolable.²⁷¹ Jeremy Bentham did not accept Locke's notion of natural property rights.²⁷² Instead, he argued, based on utilitarian grounds, that property rights serve the best interests of society.²⁷³ Property rights, according to Bentham, give a sense of pleasure in ownership and an inducement for productivity.²⁷⁴

A point system for the Spratly Islands would avoid Hardin's tragedy of the commons because each claimant would be an owner or stakeholder.²⁷⁵ Broadly speaking, there are three forms of ownership of property: communal, private, and governmental.²⁷⁶ The stakeholder status would entail a percentage system to distribute the economic wealth of the Spratly Islands. The "private communal" system, embodied by Brunei, China/Taiwan, Malaysia, the Philippines, and Vietnam, would receive the oil and fishing profits of the Spratly Islands. This Article proposes that the points system is a form of communal ownership wherein each nation "owns," yet does not own, the

270. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1204 (1967) (refusing to refute Locke's "labor theory").

271. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 256-89 (1966) (explaining the evolution of wealth from labor and warning that it is dangerous to disturb that natural process); see also *Bleistein v. Donaldson, Lithographing*, 188 U.S. 239, 250 (1903) (espousing the importance of an individual's work in the context of copyright); HENRY SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 83 (2d ed. 1887).

272. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 69 (1975) (arguing that property is the direct result of the law).

273. See *id.* at 69-70 (explaining how the laws of property create riches and spur productivity).

274. See *id.* at 70 (arguing that property rights have "vanquished the natural aversion to labour").

275. See Williams J. Carney, *From Stakeholders to Stockholders: A View from Organizational Theory*, in *WHO OWNS THE ENVIRONMENT* 187 (Peter J. Hill & Roger E. Miners eds., 1998) (criticizing government control of public lands). Carney argues for a system of privatization, rather than government ownership, based on the premise that corporate interest would protect "public lands" better than the government which has proven counterproductive and poorly managed. See *id.*

276. See Harold Demsetz, *Toward a Theory of Property Rights*, reprinted in *FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW* 86, 90 (Avery Weiner Katz ed., 1998) (distinguishing idealized forms of ownership).

South China Sea. The “disputed” area would belong to all the countries involved as common property, and in the spirit of John Adams, the ocean and its treasures would become common property.²⁷⁷

CONCLUSION

The Spratly Island dispute is a complex issue, involving numerous claimants with complex concerns and legal issues. The problem is resolvable with the adoption of B.A. Hamzah’s confidence building measures along with a point system that provides each country with a share of the revenues from the Spratly Islands based on a tally of their respective claims. This system provides an equitable distribution scheme without grappling with the unresolvable and inadequate issues in existing international law. The point system further respects the rights of the various claimants and provides an alternative that may appeal to China.

277. See John Alton Duff, *UNCLOS and the New Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT'L L. REV. 1, 6 n.14 (1995) (citing Ambassador Madeleine K. Albright, who quoted President John Adams, during a 1994 United Nations address).