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# Multilateral Management as a Fair Solution to the Spratly Disputes

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## ARTICLES

### Multilateral Management as a Fair Solution to the Spratly Disputes

Wei Cui\*

#### ABSTRACT

*The Spratlys are a scattered group of islands in the South China Sea over which China, the Philippines, Vietnam, Malaysia, and Brunei have made conflicting jurisdictional claims. Although there has been significant academic discussion of this dispute, the Author argues that much of it is hampered by a discourse obsessed with the regional balance of power and security-related strategies that are only tenuously related to each nation's specific legal claims in the Spratlys. In this Article, the Author suggests that a more productive approach to the Spratly disputes is one focused on finding a solution that is "fair" to all the parties. The Article then examines several distinct substantive notions of fairness potentially applicable to the Spratly disputes and applies these ~~reforms~~ reforms to various existing proposed solutions, ultimately rejecting proposals that call for an allocation of rights in the Spratlys. Finally, the Author proposes that a multilateral management authority might satisfy each party's interest in fairness, at least in terms of participation in the ongoing process of allocation.*

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\* The Author is very grateful to Nancy Chapman for extensive and timely editorial comments during the writing of the Article.

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- 1-9 Spratly Claims, Occupations, and Proposed Solutions  
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## I. INTRODUCTION

A new chapter recently opened in the scholarly study of sovereignty disputes over the Spratly Islands in the South China Sea. In at least two independently researched, major publications, scholars have applied, in an uncommonly thorough manner, international law governing territorial acquisition and maritime resource jurisdiction to the history and current circumstances of the Spratly region and have arrived at similar conclusions. In an effort to interpret China's claims and actions in the South China Sea in terms of international law, as well as in comparison with the claims and actions of other countries in the region, Greg Austin has argued that the People's Republic of China (PRC) possesses rights in the Spratly Islands equal, but not superior, to the rights of the other countries.<sup>1</sup>

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\*\* All plates and charts in the Exhibits are taken from MARK VALENCIA ET AL., *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (1997), and VICTOR PRESCOTT, *LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA* (1999).

1. See generally GREG AUSTIN, *CHINA'S OCEAN FRONTIER* (1998).

Though less interested in being sensitive to the PRC's legal positions and developmental objectives, Mark Valencia, John Van Dyke, and Noel Ludwig (Valencia) came to a similar finding: "The claims of all of the South China Sea countries have significant weaknesses if examined according to the principles of international law."<sup>2</sup> Other scholars are also beginning to join the consensus that none of the individual claimants competing for control of all or part of the Spratlys—the PRC/Taiwan, Vietnam, the Philippines, Malaysia, and Brunei—would prevail over the others under international law.<sup>3</sup>

The development of such a consensus is valuable for a variety of reasons. First, the consensus demonstrates that the international law governing territorial acquisition and maritime resource jurisdiction is clear enough to produce agreement about its application, even in circumstances as complicated as those surrounding the Spratlys.<sup>4</sup> Second, it has revealed a host of exaggerated claims, obfuscations, and deliberate misreadings of international law advanced by the governments and media of the claimant countries for exactly what they are—just so much posturing. The debunked claims range from absolute claims to sovereignty, such as China's claim to the whole of the South China Sea on the basis of historical title, to illegitimate systems of baselines such as those published by Vietnam, China, and the Philippines.<sup>5</sup> Scholarly criticism alone, of course, will not force governments to withdraw their unfounded claims. But wide agreement about this criticism should impart a sense of futility to those insisting on these claims. At the very least, it should help reduce the amount of *self*-deception on the part of scholars and policymakers from the claimant countries concerning the superiority of their arguments.

In a more positive vein, a scholarly consensus that, under international law, no single country would prevail on the issue of

2. MARK VALENCIA ET AL., *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (1997).

3. See, e.g., David Denoon & Steven Brams, *Fair Division: A New Approach to the Spratly Islands Controversy*, in 2 *INTERNATIONAL NEGOTIATION* 303, 329 (1997); Daniel J. Dzurek, *The Spratly Islands Dispute: Who's On First?*, in 1 *MARITIME BRIEFING* (Int'l Boundaries Res. Unit, Univ. of Durham, 1996).

4. In the rest of the paper, the Author will use the expression "the Spratlys" to denote both the islands in the Spratly group and the water and seabed surrounding them (thus as a shorthand for "the Spratly region"). The distinction between Spratly islands and features, on the one hand, and the maritime space surrounding them, on the other, will be made when necessary.

5. Notably, although Austin aims to develop a position sympathetic to China's claims, he also forcefully rejects a global objection to international law that is sometimes advanced in connection with the Spratly disputes, namely that an alternative conception of international law based on the Chinese tradition exists, thereby undermining the applicability of contemporary international law, originated in the West, to the South China Sea. AUSTIN, *supra* note 1, at 38-40.

sovereignty in the Spratlys could strengthen the resolve of the respective governments to shelve their sovereignty claims and pursue their interests in the region through other means. It should also encourage scholars to go beyond conventional international law governing territorial acquisition and maritime resource jurisdiction to design new ways of ensuring international cooperation in the region. This is not to say that conventional international law, including the U.N. Convention on the Law of the Sea, has lost its relevance. Quite to the contrary, accurate interpretation and application of existing international law may be crucial to achieving equity in schemes of international cooperation.

Whether aimed at refining our understanding of the legal claims surrounding the Spratlys, or at advancing positive solutions to the region's disputes, scholarship on the South China Sea is now also enhanced by the greater availability of information about the geographical and other natural characteristics of the region. In a series of publications,<sup>6</sup> the Australian geographer Victor Prescott has updated his 1981 survey<sup>7</sup> of both the geography and the baseline and boundary claims in the South China Sea, synthesizing and clarifying information that would otherwise have been difficult to compile and understand from other sources.<sup>8</sup> In his book *Sharing the Resources of the South China Sea*,<sup>9</sup> Valencia offers nearly 20 colored maps that constitute an invaluable aid to newcomers to the subject. Descriptions and photographs of more and more of the Spratly Islands and features have also become available online.<sup>10</sup> More than ever before, the sense of mystery that has long shrouded the Spratlys seems to be receding.

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6. David Hancox & Victor Prescott, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands*, in 1 MARITIME BRIEFING (Int'l Boundaries Res. Unit, Univ. of Durham, 1995); VICTOR PRESCOTT, *LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA* (1999); Victor Prescott & Clive Schofield, *Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean*, in 3 MARITIME BRIEFING (Int'l Boundaries Res. Unit, Univ. of Durham, 2001).

7. EAST-WEST ENVIRONMENT AND POLICY INSTITUTE, RESEARCH REPORT NO.2, J.R.V. PRESCOTT, *MARITIME JURISDICTION IN SOUTHEAST ASIA: A COMMENTARY AND MAP* (1981).

8. See PRESCOTT, *LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA*, *supra* note 6, at 47-49. See also 1-3 JONATHAN I. CHARNEY & LEWIS M. ALEXANDER, *INTERNATIONAL MARITIME BOUNDARIES* (1996-1998) (containing existing maritime boundary agreements among littoral countries of the South China Sea).

9. See generally VALENCIA ET AL., *supra* note 2.

10. See, e.g., Qwest, *Spratlys Dispute*, at <http://www.users.qwest.net> (links regarding the Spratlys Dispute, including maps, photos, and statistics); *Spratly Islands Scrapbook*, at <http://members.tripod.com/paracels74/photo.htm> (featuring maps and photos); Map and Travel Guide, *Spratly Islands*, at [http://wildmalaysia.net/dest\\_layang\\_2.html](http://wildmalaysia.net/dest_layang_2.html).

This Article takes advantage of these recent advances in legal scholarship and improvements in information available to the international public through commentary and development of a particular proposal for a regional, multilateral, cooperative regime in the Spratlys. The proposal was originally advanced by Valencia.<sup>11</sup> The ways in which his proposal requires further development and elaboration will be described below. It should be noted first, however, that the abstract idea of a multilateral joint management regime for the Spratlys soon might cease to be a novelty, if it has not already.<sup>12</sup> It is the details of such a regime that require exploration and advocacy. This Article aims to begin this process by demonstrating how a joint management scheme can be made equitable for all parties involved through delineation of the area it covers and through the design of certain aspects of its administrative structure.

A main thesis of this Article is that, despite the fact that scholars, governments, and the interested public are now better positioned to assess the claims and disputes surrounding the Spratlys, attempts to find a solution to these disputes are hampered in a fundamental way: they are mired in a discourse dominated by concerns about the regional balance of power. Much time is devoted to deciphering and speculating about the claimant countries' larger security-related strategies, which tend to be only tenuously related to specific legal claims in the South China Sea.<sup>13</sup> Instead of achieving lucidity through a hard-nosed recognition of the necessity of *realpolitik*, however, this discourse is often vague, highly unreflective, and normatively confused. It speculates on how the parties might chance upon a solution to a local problem, as the larger games of international security and power play out in the region, instead of looking at how a concrete solution to the Spratly disputes could itself bring all claimants together.

The Article argues that it is time for the discussion of the Spratly disputes to focus on potential solutions that strike all parties as *fair*. In a fair solution, the most powerful party would not necessarily get the greatest share, but rather a fair share. And it gets that share not because of its power, but because, in all fairness, that's what it deserves. Simple as this idea may seem, it has been unduly neglected.

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11. VALENCIA ET AL., *supra* note 2, ch. IX.

12. All of the claimant countries seem to have proposed joint development, the creation of marine reserves, or stewardship by a particular country as alternatives to pressing sovereignty claims. However, most of these proposals seem to have been advanced during diplomatic maneuvers and usually contain elements that a rival country would easily find objectionable. *See generally* VALENCIA ET AL., *supra* note 2, chs. III-V.

13. *See generally infra* Part II.

Part of the reason for this neglect, of course, may be that a discussion of the Spratly disputes based on fairness is not easy to envision. International law regarding territorial acquisition does not make any explicit reference to norms of fairness.<sup>14</sup> On the other hand, international law regarding maritime jurisdiction makes prominent reference to the notion of equity, most notably in the U.N. Convention on the Law of the Sea (UNCLOS), in connection with the delimitation of maritime boundaries between states with opposite or adjacent coasts.<sup>15</sup> The precise meaning of equity is not stated, however; instead, one needs to consider how international courts and arbitration tribunals have applied the term to particular disputes to understand what equity in maritime delimitations amounts to. Over time, international tribunals have deployed a range of tools—including considerations of coastal proportionality<sup>16</sup> and the use of straight baselines to ascertain the general direction of the coast<sup>17</sup>—to fashion equitable delimitations. But more often than not, such tribunals do not fully elaborate or defend their verdicts before pronouncing them fair or equitable.<sup>18</sup> This fact diminishes the relevance of the UNCLOS' appeal to equity for the resolution of the Spratly disputes: most commentators agree that the claimants to the Spratlys are unlikely to resort to either courts or arbitral tribunals to resolve their disputes because the complexity of the disputes makes judicial or arbitral decisions concerning them highly unpredictable.<sup>19</sup> Without articulated principles of fairness and without the hope of resorting to an impartial tribunal, how can any party know what a fair solution to the Spratly disputes would mean?

The approach of this Article is to work out an answer to this question by developing arguments for a particular version of the idea of a Spratly joint management authority. The idea comes from Valencia,<sup>20</sup> but he advances it only as one possible solution to the regional dispute among many others.<sup>21</sup> He considers not only other

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14. See JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 8-9 (2002).

15. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 74, 83, 1833 U.N.T.S. 397, 422.

16. *E.g.*, North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3. (Feb. 20); Delimitation of the Continental Shelf (U.K. v. Fr.), 18 R.I.A.A. 3 (June 30, 1977), *reprinted in* 18 I.L.M. 398 (1979).

17. *E.g.*, W. Michael Reisman, *International Decision: Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)*, 94 AM. J. INT'L L. 668, 732 (2000).

18. For a recent verdict that illustrates this point, see Professor Michael Reisman's analysis of the Eritrea-Yemen Arbitration. *Id.* at 726, 733, 734.

19. Denoon & Brams, *supra* note 3, at 316; VALENCIA ET AL., *supra* note 2, at 59-60.

20. VALENCIA ET AL., *supra* note 2, at 210-17.

21. *Id.* at 210, 217-28.

versions of a multilateral management regime, but also gives significant attention to non-traditional ways of dividing up jurisdiction over the Spratlys.<sup>22</sup> What Valencia does not discuss, however, is the attractiveness of these proposals relative to one another. There is no discussion, for example, of the ways in which establishing a joint management authority might be superior to allocating control. Nor is there an attempt to compare and rank the different ways for setting up the joint management authority. Most importantly, Valencia leaves it unclear how an assessment of the relative merits of these proposals would even proceed. Would the assessment be based on which proposal is most likely to be embraced by the parties in the near term? If so, what would be the bases of such predictions? Or would the assessment be based on normative considerations such as fairness and efficiency? And in that case, how would those norms be fleshed out? By remaining largely silent on these questions, Valencia leaves the rationale behind most of his proposals opaque. It is in this sense that these proposals, including the version of the joint management authority idea advocated in this Article, are in need of further elaboration.

This Article sets forth arguments for a particular proposal of multilateral management that are framed in terms of fairness and that make few assumptions about security strategies of the claimant countries. In the process of doing so, the Article also offers an answer to the question: what does a fair solution to the Spratly disputes mean? The answer comes in two stages. First, it is difficult to find principles of fairness to guide the allocation of control (such as dividing up jurisdiction) over the Spratlys. This is because, on the one hand, those principles of fairness that are strong enough to generate determinate allocations presume conditions of the principles' application that do not obtain in the Spratly context. On the other hand, principles of fairness that are more clearly applicable are too weak to generate determinate results. Therefore, a fair solution to the Spratly disputes cannot be understood in terms of a fair, final allocation of the region's goods.

Second, this Article suggests that a particular principle of fairness—formulated in Part III.B.—that is too weak to generate a fair allocation may nonetheless be strong enough, when combined with other considerations, to clarify what it means for parties to participate fairly in the multilateral management of Spratly resources. The basic idea is that although the distributive outcome of a multilateral regime may be unforeseeable for the claimants, the possibility for each party to have a fair share in its management might be sufficient for it to be regarded as a fair solution.

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22. *Id.*



The Article is divided into three sections. Part II explains why the discourse about regional balance of power in the South China Sea has become an increasingly uncertain foundation for exploring solutions to the Spratly disputes. It also argues that discussing a fair solution to regional disputes by no means neglects the fact that states tend to pursue self-interest in the international arena.

Part III has three different purposes. First, it illustrates, through the example of an allocation proposal advanced by political scientists David Denoon and Stephen Brams,<sup>23</sup> that the effort to articulate principles of fairness in the resolution of international disputes can be reasonably rigorous theoretically. Second, it shows that it is possible to articulate principles of fairness by reference to international law, even when such principles are not explicitly codified in international law. Third, it concludes that, despite the positive implications of the first two points, no proposed principles of fairness can generate a fair allocation of control over the Spratlys as of yet. Instead, a conception of fairness in terms not of final allocation, but of participation in the ongoing process of allocation, is more promising for the Spratly context.

Part IV then shows how such a conception of fairness might be realized through a multilateral management authority in the Spratlys, which would cover a large area bound by what has come to be called “the Prescott line.”

In the Appendix, the effect of different ways of drawing straight baselines in the South China Sea on the delimitation of the joint management area is considered. Although controversial straight baselines have been published by Vietnam, China, and the Philippines, their effect on the shape of a multilateral solution to the Spratly disputes is relatively small.

## II. THE UNCERTAIN FOUNDATION OF THE CURRENT DISCOURSE ON THE SPRATLY DISPUTES

Since the 1990s, attention to the Spratly disputes has been dominated by a concern to devise diplomatic measures that would prevent a possible escalation of conflict in the region.<sup>24</sup> The discourse articulating that concern tends to trace the threat of conflict to changes in regional power configurations that favor China.<sup>25</sup> With the end of the Cold War, both Russian and U.S. interests and presence in Southeast Asia began to decline, while China’s rapid

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23. See generally Denoon & Brams, *supra* note 3.

24. VALENCIA ET AL., *supra* note 2, at 2.

25. *Id.* at 5.

economic development has made it into perhaps *the* new world power to watch.<sup>26</sup> Security issues in the region have thus acquired a completely different character from two decades ago. Slightly preceding these developments, in 1987 the PRC began to establish a physical presence in the Spratlys where Taiwan, Vietnam, the Philippines, and Malaysia had already occupied islands and features.<sup>27</sup> Although China had long made sovereignty claims to the Spratlys, and although Taiwan had occupied Itu Aba, the largest island in the Spratlys, since 1956, the PRC's new activities in the Spratlys sparked alarms about an era of Chinese "expansionism."<sup>28</sup>

China's move into the Spratlys in turn led to a series of military and civilian skirmishes with the other claimant countries.<sup>29</sup> In March of 1988, an armed clash erupted between China and Vietnam near a small reef in Union Banks, during which China sank three Vietnamese vessels and troops of the two sides fired on each other.<sup>30</sup> In 1992, China announced an oil exploration concession to the U.S. company Crestone Energy Corporation in the Vanguard Bank area, which lies within Vietnam's claimed continental shelf. China pledged to protect the company's operations with force<sup>31</sup> and subsequently deployed submarines to patrol the area.<sup>32</sup> An unarmed confrontation broke out between China and Vietnam in this area in 1994.<sup>33</sup> On the western front of the South China Sea, a pattern of confrontations between China and the Philippines began to establish itself in 1994.<sup>34</sup> Philippine armed forces would detain PRC fishing vessels near islands that the Philippines claim and charge them with illegal entry, illegal possession of explosives, and illegal fishing activities.<sup>35</sup> The Chinese authorities would then counter Philippine claims of sovereignty and jurisdiction with their own.<sup>36</sup> One incident was also reported where China detained Philippine fishermen.<sup>37</sup> In 1995, the Philippines discovered that Chinese personnel had built structures on Mischief Reef (135 nautical miles [nm] off the coast of Palawan) and

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26. *Id.*

27. *Id.* at 5, 7-9.

28. *Id.*

29. *Id.* at 21.

30. AUSTIN, *supra* note 1, at 84; VALENCIA ET AL., *supra* note 2, at 21-22.

31. VALENCIA ET AL., *supra* note 2, at 90.

32. Scott Snyder, *Special Report of the United States Institute of Peace: The South China Sea Dispute: Prospects for Preventive Diplomacy* 5 (Aug. 1996), at [http://www.usip.org/oc/sr/snyder/South\\_China\\_Sea1.html](http://www.usip.org/oc/sr/snyder/South_China_Sea1.html).

33. AUSTIN, *supra* note 1, at 87; VALENCIA ET AL., *supra* note 2, at 130-31.

34. VALENCIA ET AL., *supra* note 2, at 79-80.

35. *Id.*

36. *Id.* at 79.

37. *Id.*

deployed naval and air forces in protest.<sup>38</sup> Chinese-Philippine skirmishes have been a yearly occurrence ever since.<sup>39</sup>

It must be emphasized, however, that non-violent confrontations in contested international waters are to be expected, and Spratly claimants other than China have also had clashes among themselves.<sup>40</sup> China has not been more disposed than others to use military force or violent means in these confrontations.<sup>41</sup> More generally, all of China's actions in the South China Sea that have been interpreted as evidencing an expansionist intent—strengthening its naval and air capability, occupying islands and features that others have claimed, enhancing and expanding its physical presence in the Spratlys so as to legitimize occupation, enacting domestic legislation that make sovereignty claims to the region, attracting Western oil companies to explore disputed areas, and refusing to particularize or justify its territorial or maritime claims<sup>42</sup>—have had plenty of counterparts in the actions of the other claimants. For example, the newest occupations in the Spratlys have been by the Philippines<sup>43</sup> and Malaysia.<sup>44</sup> Moreover, the latest sovereignty claims have been made by the Philippines, and these claims have drawn objections from other countries.<sup>45</sup> Greg Austin disputes

38. AUSTIN, *supra* note 1, at 88-92; VALENCIA ET AL., *supra* note 2, at 79-82.

39. Though some of these incidents involved Chinese fishermen being detained by Philippine armed forces near the Palawan, the majority of recent conflicts have taken place near Scarborough Reef, which is not part of the Spratly group of islands and which is claimed by both China and the Philippines. The Chinese Foreign Ministry reported the following incidents near Scarborough Reef: expulsion of Chinese fishermen by the Philippine navy in January and February of 2000; a Chinese fisherman being killed by Philippine naval police in May of 2000; a Chinese fishing ship sunk by the Philippine navy on May 23, 2000, with three crew members from the sunk ship detained; expulsions of a Chinese fishing boat in February of 2001; Philippine forces boarding a Chinese fishing boat and confiscating tools and catch in March of 2001; and the arrest of 95 Chinese fishermen in January and February of 2002. Reports available in Chinese at the Chinese Foreign Ministry's website. See Chinese Foreign Ministry, *Reports*, at <http://www.fmprc.gov.cn>.

40. VALENCIA ET AL., *supra* note 2, at 8-9.

41. AUSTIN, *supra* note 1, at 301.

42. These are some of China's actions named to support a portrait of China as an unpredictable and noncooperative party in the South China Sea. See VALENCIA ET AL., *supra* note 2, ch. IV.

43. *Id.* at 82.

44. Chinese Foreign Ministry Report, Mar. 17, 2001, at <http://www.fmprc.gov.cn>. The only claimant country that occupies fewer islands in the Spratly group than China is Brunei. The Chinese Foreign Ministry also protested Vietnam's plans to establish local government in the Spratlys in February 2001. *Id.*

45. PRESCOTT, *supra* note 7, at 31-34 (reporting that two draft bills in the Philippine senate from 1987 and 1990 developing Philippine territorial claims to the Spratlys). Because the Philippines is an archipelagic state, on the basis of a claim to the Spratly Islands, it can also draw straight baselines around these islands and claim the enclosed waters as archipelagic waters, pursuant to Article 47 of UNCLOS. Chinese sources also report that the Philippines have recently supported its

interpretations of China's actions in the South China Sea as expansionist by pointing to a range of similar actions by other nations.<sup>46</sup> Nonetheless, it has become common to depict China as posing a threat to security in the South China Sea, as "[stalling] for time to build up its economic and military might . . . [and aiming] to create a new status quo in which it dominates the region."<sup>47</sup> Assertions of this kind have often found their way into scholarly publications and the news media.<sup>48</sup>

The problem with speculation about China's "expansionist" intent and its consequences is not just that they may be unfair to China (it need not be denied that China's military policy in the South China Sea is a source of tremendous uncertainty). One should also ask whether such discussions are at all conducive to finding a solution to the Spratly disputes. For a number of reasons, those genuinely interested in such solutions may want to take a step back from a discourse obsessed with power politics.

The first of these reasons is the vagueness that plagues attempts to predict the future balance of power in the South China Sea. Just as often as alarms are sounded about Chinese expansionism, commentators have spoken of a "window of opportunity" for a comprehensive resolution of the Spratly disputes.<sup>49</sup> A Special Report on the South China Sea by the U.S. Institute of Peace in 1996 stated,

It may still be possible to find a political, "win-win" settlement. . . . No country in the region currently possesses the military capabilities needed to assert and maintain its claims, relations in the region are generally cooperative, and no claimant has yet discovered commercially viable quantities of oil or natural gas.<sup>50</sup>

The report went on to qualify this statement, saying that "all these factors are subject to change" and that new developments may set "the stage for a more far-reaching conflict than the current one."<sup>51</sup> Though eminently sensible, vague assessments such as this provide little power either to predict or to interpret actual developments in the South China Sea.

Recent events offer a poignant example of the failure of commentators focused on power politics to anticipate and track actual

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sovereignty claim to Scarborough Reef and right to police the area on the grounds that the Reef lies within the Philippines' Exclusive Economic Zone. Chinese Foreign Ministry Report, *supra* note 44.

46. AUSTIN, *supra* note 1, at 301.

47. VALENCIA ET AL., *supra* note 2, at 129.

48. See, e.g., Omar Saleem, *Spratly Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. REV. 527 (2000); VALENCIA ET AL., *supra* note 2, ch. IV.

49. VALENCIA ET AL., *supra* note 2, at 131.

50. Snyder, *supra* note 32, at 1.

51. *Id.*

developments in the South China Sea. After Vietnam became a member of the Association of Southeastern Asian Nations (ASEAN) and began to revive its relationship with the United States in 1995, some commentators thought it likely that Vietnam's dominant "strategy vis-à-vis China" would be to pursue such new alliances to combat Chinese "hegemony."<sup>52</sup> This idea seemed so plausible that Valencia all but assumed Vietnam's voice in writing the following:

Vietnam believes China wants to . . . establish a legal regime [in the South China Sea] that is tantamount to China's territorial waters. . . . Indeed, Vietnam believes that in the long-term, China desires hegemony over the South China Sea and that it will do or say whatever it needs to achieve this goal—step by inexorable step. . . . Now that Vietnam has joined ASEAN . . . [it] may turn the tables on China.<sup>53</sup>

Although the authors noted that Vietnam and China began intensive efforts to improve relations following President Jiang Zemin's November 1994 visit to Vietnam, they did not see this "seemingly stunning reversal of positions and atmospherics" as requiring reassessment of what was in China's or Vietnam's best interest, apparently doubting that the Sino-Vietnamese efforts could be in good faith.<sup>54</sup>

As it turned out, China and Vietnam reached a historic Land Border Agreement in 1999.<sup>55</sup> On December 25, 2000 the two countries signed the "Agreement on the Demarcation of the Territorial Seas of the Beibu Bay [i.e., Gulf of Tonkin], the Exclusive Economic Zones and the Continental Shelf," as well as the "Agreement on Fishery Cooperation in the Beibu Bay."<sup>56</sup> Although

52. VALENCIA ET AL., *supra* note 2, at 90-95.

53. *Id.* at 91-92.

54. They opined that "a high degree of tension between the two ancient enemies lies just below the surface." *Id.* at 95.

55. *ASEAN Annual Security Outlook 2000: China*, at <http://www.aseansec.org> (reporting that "all the issues relating to the land border have been resolved"). The same source claims that "proceeding from the overall interest of safeguarding regional peace and stability, China has maintained a highly restrained, responsible and constructive attitude on the issue of the South China Sea, adhering to friendly consultations in resolving disputes with the countries concerned." *Id.*

56. The Chinese Foreign Ministry offers the following background information:

The negotiation on the demarcation of the Beibu Bay started in 1974 and it took over 20 years. In 1993 the two states signed The Accord on the Basic Principles for the Resolution of the Question of Boundary Territory . . . and unanimously agreed to divide the Beibu Bay through negotiations according to the principle of fairness and in consideration of all the relevant circumstances of the Beibu Bay. Towards the end of 1999, after the signing of The Chinese-Vietnamese Treaty on Land Boundary, the pace of negotiation on the Beibu Bay obviously quickened and the negotiation unfolded in an all round way. In the year of 2000, pushed by the leaders of the two states and under the direct guidance of the governmental delegations on boundary negotiation, the Chinese-Vietnamese Joint Working Group on the Demarcation of the Beibu

neither the maritime delimitation agreement nor the fishery agreement has yet been ratified or made publicly available,<sup>57</sup> Chinese reports indicate that the remaining negotiations center on completing the fishery agreement and that it is intended that the two agreements be ratified together.<sup>58</sup> Once ratified, the Gulf of Tonkin maritime delimitation agreement will be the first bilateral agreement either Vietnam or China have entered into concerning the demarcation of territorial waters, exclusive economic zones, and the continental shelf.<sup>59</sup> Moreover, the Philippines will become the single remaining South China Sea country that has entered into no bilateral delimitation agreements with other countries. Of course, both the content and the politics behind the Sino-Vietnamese agreements will have to be closely examined before it can be known whether they are successful solutions to past disputes.<sup>60</sup> But a discourse that does no more than cast a skeptical light on such apparently positive developments certainly seems unfit for efforts to explore solutions to the Spratly disputes.

Progress in Sino-Vietnamese negotiations is only the most dramatic example of the kind of events that are neglected by South

Bay held the 12th to 18th rounds of negotiation. The fishery experts group held 6 rounds of negotiation. The mapping experts group held 7 rounds of negotiation. In between, Wang Yi, Head of the Chinese Governmental Delegation on Boundary Negotiation and Assistant Minister of the Chinese Foreign Ministry and Le Cong Phung, Assistant Minister of the Vietnamese Foreign Ministry held three informal impromptu meetings and gave the negotiation direct guidance. The two countries finally ascertained the sea area boundary line and at the same time made an appropriate arrangement for the fishery and realized the common understanding reached by the leaders of the two countries of resolving the question of demarcation of the Beibu Bay within the year of 2000.

Chinese Foreign Ministry Report, *China's Maritime Demarcation and Bilateral Fishery Affairs*, July 9, 2001, available at <http://www.fmprc.gov.cn/eng/14698.html>.

57. Interview with Allen Langland, U.S. Dep't of State, East Asia Bureau, Vietnam Desk (Mar. 23, 2002); Interview with Ted McDormand, Prof. of Law, Univ. of Victoria, Can. (Mar. 25, 2002); Interview with Jonathan I. Charney, Lee S. & Charles A. Speir Chair in Law, Professor of Law, Vanderbilt University Law School (Mar. 24, 2002).

58. See Chinese Foreign Ministry Report, *Premier Zhu Rongji Met with Vietnamese Prime Minister Phan Van Khai*, June 11, 2001, available at <http://www.fmprc.gov.cn/eng/20363>.

59. Vietnam has entered into one bilateral maritime agreement before with Malaysia, but it was not a delimitation agreement, but rather an agreement to share a small area both countries claimed as historical waters. PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6, at 25-26; 3 INTERNATIONAL MARITIME BOUNDARIES, *supra* note 8, at 2335-45.

60. See Ramses Amer, *The Sino-Vietnamese Approach to Managing Boundary Disputes*, in 3 INTERNATIONAL MARITIME BRIEFING (Int'l Boundaries Res. Unit, Univ. of Durham, 2001) (analyzing the history of Sino-Vietnamese negotiations leading up to the border, maritime space, and fishery agreements).

China Sea commentary dominated by considerations of power politics. Less dramatic examples include the fact that, although maritime disputes between China and the Philippines have occurred with high frequency and show no sign of abating, there has been no indication that these disputes would escalate either. Repeatedly, the two governments have been able to curtail the effects of these run-ins.<sup>61</sup>

A second reason to be wary of the prevalent South China Sea discourse focused on regional conflict is that it necessarily introduces a strong element of subjectivity, and, along with that, disagreement. The claimant countries have significantly different assessments of regional security issues both among themselves and from observer countries such as the United States and Japan. Therefore, to “put oneself in the shoes” of any of the claimant countries requires a reflective attitude that current discussions do not always demonstrate.

Two examples illustrate this last point. The first concerns the different attitudes claimant countries have displayed towards engaging in multilateral, as opposed to bilateral, negotiations to settle disputes. It was mentioned earlier that most of what China has done in and with respect to the Spratlys amounts to no more than what other claimant countries have also felt unconstrained to do.<sup>62</sup> It is therefore fair to ask why China should be regarded as the uniquely aggressive party. Some commentators have pointed to one potentially distinctive feature of the Chinese stance: although China has shown interest in shelving sovereignty claims and negotiating joint

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61. In 1998, for example, China and the Philippines defused a potential crisis after the Philippine navy seized 20 Chinese fishermen and their boats near Mischief Reef, and after the Philippines published photographs showing that the PRC had been expanding its four-year-old constructions on the reef. Michael Richardson, *A Nervous ASEAN Will Approach China Over Expansion in Spratlys*, INT'L HERALD TRIB., Dec. 14, 1998, at 4 (reporting on the seizure); Stein Tonnesson, *Can Conflicts Be Resolved by Shelving Disputes?*, 30 SECURITY DIALOGUE 2, 179-82 (1999) (reporting on the publication of Mischief Reef pictures). Tonnesson writes:

The Philippines assert, apparently with good reason, that the constructions on Mischief Reef are of a military nature and are transforming the reef into an artificial island. The PRC alleges that the constructions are mere shelters for fishermen. This second Mischief Reef crisis, however, did not provoke the same massive criticism of China from the side of the ASEAN countries as the first one did in 1995. . . . [Moreover, after] the first Mischief Reef incident, the PRC . . . signed a code of conduct with the Philippines. In accordance with [the code], there were bilateral talks in March 1999 between the PRC and the Philippines to defuse the crisis.

*Id.* See also China-Philippine Joint Declaration on the Framework for Bilateral Cooperation in the 21st Century, art. 9 (Beijing, May 16, 2000), available at <http://www.isinlaw.org> (reaffirming commitment to confidence building and 1995 bilateral code of conduct).

62. See *supra* notes 42-46 and accompanying text.

management arrangements, it has been willing to do so only on a bilateral, not multilateral, basis.<sup>63</sup> In any bilateral negotiation with any one of the other Spratly claimants, of course, China seems to enjoy the advantage of being the more powerful country, and one might well be skeptical whether the outcome would be fair. Some advocates of multilateral negotiation, however, have been unabashed in describing its main attraction in terms of the possibility of forming an ASEAN alliance against China—that is, of involving non-claimant countries like Indonesia and Thailand and perhaps even outside powers like the United States and Japan.<sup>64</sup> Countering Chinese power has become a goal in itself, not finding a peaceful solution to the Spratly disputes. Instead of recognizing the aggressive—indeed, to China, incendiary—nature of these suggestions, these commentators have counted China’s refusal to “internationalize” the South China Sea dispute as a sign of non-cooperation.<sup>65</sup>

The second example has to do with Taiwan’s role in the Spratlys. For better or worse, China has long secured commitments to the “one China” policy from ASEAN members, including the claimants to the Spratlys.<sup>66</sup> If it weren’t for this fact,<sup>67</sup> the South China Sea disputes would be even thornier than they are. Yet apparently, not all U.S. commentators feel that *their* country is committed to the “one China” policy and some may be willing to see the Taiwan issue as an open one in the South China Sea as well.<sup>68</sup> This introduction of the U.S. perspective evidences a failure to “put themselves in the shoes” of the claimants.

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63. See, e.g., VALENCIA ET AL., *supra* note 2, at 75, 76, 83.

64. *Id.* at 76.

65. *Id.*

66. See, e.g., *ASEAN Annual Security Outlook 2001: China*, available at <http://www.aseansec.org>; Sino-Philippine Joint Press Statement, art. 11 (May 16, 2000), at <http://english.peopledaily.com> (reaffirming Philippine commitment to one China policy); Sino-Indonesian Joint Declaration on the Direction of Future Cooperation, art. 8 (May 8, 2000), available at <http://www.isinolaw.org> (reaffirming Indonesian commitment to one China policy); Sino-Malaysian Joint Declaration on the Framework for Future Cooperation, art. 5 (June 5, 1999), available at <http://www.fmprc.gov.cn> (reaffirming Malaysian commitment to one China policy); Sino-Vietnamese Joint Declaration on Comprehensive Cooperation in the New Century, art. 10 (Dec. 25, 2000), available at <http://www.fmprc.gov.cn/eng/6948.html> (reaffirming Vietnamese commitment to one China policy, recognizing Vietnamese trade relations with Taiwan as of an unofficial nature).

67. One might suggest an additional reason why the legal status of Taiwan should not affect the Spratly disputes. While Taiwan has occupied the island of Itu Aba since 1956, the government of Taiwan has staked out a general claim to the Spratlys on the basis of China’s historical title. Taiwanese independence, however, is precisely premised on the idea that the Taiwanese government is no longer a Chinese government in exile. It might therefore seem inconsistent for Taiwan to claim independence and to make a general territorial claim to the Spratlys at the same time.

68. VALENCIA ET AL., *supra* note 2, at 83.



The third reason a power-politics-oriented discourse on the Spratlys might be inappropriate for exploring solutions to the conflict is its logical relation specifically to proposals for instituting multilateral management. At best, highlighting potential conflicts in the South China Sea furnishes an inconclusive argument for the desirability of a Spratly multilateral regime. Diplomatic measures aimed at conflict prevention come in a great variety of forms, and multilateral resource management is by no means prominent among them. Either multilateral agreements directly addressing security issues, or even bilateral agreements on security or joint development, are much more likely alternatives. At worst, a discourse highlighting the conflicts of interest among states serves to undermine, rather than reinforce, belief in the feasibility of multilateral regimes. It is rarely the case that a country would put aside its national interest to engage in an international regime for the “common good.” In fact, a recent study of five international resource management regimes explicitly rejects the hypothesis that regimes form when “a shared conception of the common good [prevails] over national interest perspectives.”<sup>69</sup> In other words, one cannot rationally believe at the same time both in the existence of genuinely irreconcilable interests among nations *and* in a genuine possibility for an international regime constituting peaceful settlement among the same nations. Talk of China’s “inexorable advance” only suggests strategies of “containment.” It is inconsistent with advocacy for peaceful settlement of disputes.<sup>70</sup>

What the foregoing considerations suggest is that the prevalent discourse about security concerns in the South China Sea constitutes both an unreliable, and normatively unsound, basis for assessing the desirability and feasibility of multilateral resource management in the Spratlys. What one would naturally want to know, then, is what a more reliable and cogent basis for such an assessment might be.

Given any proposal of ways to resolve the Spratlys dispute—be it a proposal for allocating controls to individual countries, or a proposal for joint management schemes—one can ask whether such a proposal might strike all of the claimant countries as *equitable*. Suppose that a proposal that strikes all parties as equitable is available. The significance of this is that, at least under certain conditions, the relevant parties might agree to implement the proposal, instead of pursuing their own interests at the expense of others. Moreover,

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69. ORAN R. YOUNG & GAIL OSHERENKO, POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES 240 (1993).

70. This is a basic objection to the way Valencia motivates his examination of proposals for allocation and joint management schemes: it is logically confused. The language of “inexorable advance” is from Chapter VI (The Danger of the Status Quo), VALENCIA ET AL., *supra* note 2, at 130.

should they reach such an agreement, how they would behave—what strategies they would pursue—in the absence of such an equitable solution becomes irrelevant. In other words, if we can find a solution to the Spratly disputes that is equitable, then we can advocate that solution while avoiding all the pitfalls involved in trying to predict what the claimant countries would do in a pure game of power.

What are the conditions under which different parties will agree to implement an equitable proposal instead of pursuing their own interests at the expense of others? The following general answer seems plausible: no party should be considerably worse off under the agreement than if it pursued its interest without the agreement. Exactly what this means will become clearer in Part IV of this Article, where the equity of a particular proposal for joint management is considered. There are certain principles of fairness that conceptually tie the notion of fairness to legitimate claims under international law. As long as there is no great discrepancy between an individual party's allowable claims (by which the equitability of a solution is measured) and that party's interests (by which its well-being is measured), then an equitable solution cannot make any party worse off.<sup>71</sup> In particular, it will be explained in detail why China might find a multilateral management authority attractive, even if it is one under which, occasionally, the other claimant countries can form an alliance against China.

On the other hand, an equitable proposal need not make some of the parties significantly *better* off under the agreement than they would be without the agreement. It is possible that some commentators advocating a comprehensive solution to the Spratlys dispute have painted a pessimistic, even alarmist, picture of what would happen if no such solution is reached, because they want to forestall the cynical objection—why bother coming up with such a solution, if no one is much better off under it than under the status quo? That cynicism itself, however, may be based on an assumption that the issue must be a high priority on the agendas of all the key players in order to facilitate international regime formation. A recent study of international environmental regimes has found such an assumption to be unsupported by empirical evidence.<sup>72</sup>

What the foregoing considerations suggest, in short, is that seeking fair solutions to international disputes need not be based on

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71. In other words, if, for each party to the Spratlys disputes, its significant interests are reflected in its allowable maritime and territorial claims, then the condition described in the text is likely to be fulfilled. To put it slightly differently yet again, as long as there is no significant gap between a party's allowable claims and its interests, no significant gap should appear between the party's interests and what it gets under an equitable solution.

72. YOUNG & OSHERENKO, *supra* note 69, at 240-41.

the idealistic hope that countries will act altruistically at the expense of their self-interest. Instead, what it requires is identifying situations where nations may be indifferent between the options of collaborating to achieve a fair solution, on the one hand, and fending for themselves in power politics, on the other. In such situations, a successful argument for the fairness of particular solutions can significantly enhance their chances of being adopted.

Scholars who have recently proposed tentative solutions to the Spratlys dispute often give considerable prominence to the discourse on regional security.<sup>73</sup> By contrast, they have not worked out the kind of detailed argument that is needed to defend the equitability of their proposed solutions. If the foregoing line of reasoning is persuasive, however, scholarly priority should be just the reverse: it would be more fruitful to argue first, in a convincing manner, for the equity of particular solutions. Of course, in addition to equity, one can try to demonstrate the efficiency of these particular solutions as well in terms of how the resources in the region might be explored, exploited, and conserved.

The rest of this Article will follow this strategy. The most difficult part of the strategy is articulating criteria of fairness and efficiency to assess alternative proposals. Part III attempts to tackle this topic.

### III. THE MEANING OF A FAIR SOLUTION TO THE SPRATLY DISPUTES

As mentioned in the introduction, most commentators agree that the claimants to the Spratlys are unlikely to resort either to courts or arbitral tribunals to resolve their disputes.<sup>74</sup> Solutions would thus have to take the form of direct settlements among the claimants. In general, proposed solutions can be divided into two families. One consists of proposals for allocating Spratlys features (islands, reefs, shoals, submerged banks, etc.) and maritime space to individual claimant countries, granting them exclusive jurisdiction over the allocated parts. These are referred to below as proposals for allocating control. The other family consists of proposals for setting up a joint development authority over a common area, though these proposals differ among themselves as to how that area is to be defined.

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73. See, e.g., VALENCIA ET AL., *supra* note 2, chs. IV, VI; Denoon & Brams, *supra* note 3, at 304-08, 313-14.

74. See, e.g., Denoon & Brams, *supra* note 3, at 316; VALENCIA ET AL., *supra* note 2, at 59-60.

Choosing the most equitable and efficient solution from all solutions proposed requires, first, identifying criteria of equity and efficiency. Even though the purpose of this Article is primarily to develop the idea of a Spratly joint management authority, this Section will first consider a few proposals for allocating control over the Spratlys, as this will gradually clarify the notion of an equitable solution. Such clarification is crucial because the idea of equity has many interpretations. A responsible argument for a fair solution will have to be clear about the interpretation of equity being applied and why that interpretation is more appropriate than others. Some existing proposals for allocating control over the Spratlys employ very clear conceptions of equity, while others claim to be equitable but offer little justification.

With one important exception, the proposals for allocating control considered in this section have all been discussed by Valencia in *Sharing the Resources of the South China Sea*.<sup>75</sup> The family of "allocation" proposals can in fact be further divided: one can either allocate the Spratly features alone or allocate maritime space as well as the features. Proposals for allocating only Spratly features<sup>76</sup> present the following dilemma. On the one hand, there is some agreement among commentators and even governments that none of the Spratly features can generate Exclusive Economic Zones (EEZ) or continental shelf zones.<sup>77</sup> Many features may not even be able to generate a full 12-nm zone of territorial sea.<sup>78</sup> If proposals for allocating Spratly features fail to allocate the maritime space around the features, however, they would not constitute a solution to the disputes in the region because it is the living and non-living resources in the region, and not just the Spratlys features per se, that are of vital importance to the claimants. On the other hand, it is not a foregone conclusion that the international law of the sea may not allow even some of the Spratly features to generate full territorial waters, EEZs, and continental shelf zones. Therefore, it is logically possible that an allocation of Spratly features could be the basis for allocating Spratly maritime space. Even an expert who once

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75. See generally VALENCIA ET AL., *supra* note 2.

76. *Id.* at 133-34. There are two main methods of allocation to be considered:

- (1) Starting from the present pattern of occupation, grant limited sovereignty to the occupants;
- (2) Adopt a system of 'rough equity', where China gets some of the features occupied by Vietnam and the Philippines, and all but two of the features it presently occupies. Other claimants receive features closest to their coastlines.

*Id.*

77. See *id.* at 41-45, and the sources cited in footnotes (e), (f), and (g) therein.

78. *Id.* at 47-48.

considered this possibility, however—and who raised such puzzling questions as how to carry out maritime delimitation between an island and a rock<sup>79</sup>—eventually came to the following conclusion: “It is not proposed to explore the possibility of bilateral boundaries being drawn within the Spratly Region because I have no confidence that any of the countries are prepared to enter into negotiations that would produce such lines.”<sup>80</sup> Because of this inescapable dilemma, proposals for allocating control over Spratly features alone will be omitted in what follows.

Valencia describes five “scenarios” for allocating both features and maritime space in the Spratlys region. There is an important allocation proposal in this category that he does not consider, which has been put forward by David Denoon and Stephen Brams.<sup>81</sup> Neither Valencia nor Denoon and Brams discuss at any length whether there are fundamental ways in which the approach of allocating control is superior to that of setting up a Spratlys multilateral authority.<sup>82</sup> At least at the outset, this Article also will not be concerned with drawing this comparison. The focus will instead be on the issue of how claims about the fairness of particular allocations of control can be defended.

The issue can be introduced by considering one of the five proposed scenarios Valencia describes for allocating control. In this scenario, the Spratly features and maritime space are divided based on “rough equity” and “realpolitik” concerns.<sup>83</sup> Valencia explains this as follows:

This approach is designed to give each claimant a substantial sector. . . . Dividing lines are drawn according to three factors: island occupation, natural spatial divisions between island clusters, and continental shelf claim limits. . . . China would receive the majority of the land features, but the seabed of its maritime space has no hydrocarbon shows and only limited prospects for such. All other claimants receive areas of known hydrocarbon potential. . . . The island and seabed awards thus tend to balance out to achieve a rough sense of equity.<sup>84</sup>

What is given here is a particular distribution of the goods associated with the Spratlys. How is this distribution calculated and in what sense is it fair? Is it fair because each of the five claimants prefers what it gets to what the others get? Or is it that they derive

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79. PRESCOTT, *supra* note 7, at 36-39.

80. *Id.* at 36.

81. Denoon & Brams, *supra* note 3, at 310.

82. *Id.* at 315 (addressing this issue in passing, suggesting that (1) “investors are likely to be leery of a multinational authority,” and (2) that “the political and managerial difficulties of making it work are daunting”).

83. See Exhibit 1, *infra*.

84. VALENCIA ET AL., *supra* note 2, at 144-45.

equal satisfaction from what they individually receive? What assumptions about the preferences of the individual claimants are made and how are these assumptions justified? And finally, which aspect of the bargain is "equity" and which part is "realpolitik"? In fact, Valencia provides no answer to any of these questions, and it is difficult to infer what the answers might be.<sup>85</sup>

To reach fair solutions to international disputes clearly requires more careful consideration. In contrast to the proposal just described, Denoon and Brams' proposal is especially noteworthy for employing a notion of equity that has received rigorous elaboration.

#### A. *The Adjusted-Winner Procedure and Its Application to the Spratlys*

Denoon and Brams' work is an application of a procedure for fair division, called "adjusted-winner," that forms part of the contribution Brams and Alan Taylor have made to theoretical studies of problems of fair division.<sup>86</sup> As with other procedures of fair division, in adjusted-winner the fairness of the outcome is guaranteed by the procedure utilized to reach the result.

A basic feature of the adjusted-winner procedure of fair division ("adjusted-winner") is its recognition that, faced with a situation of fair division, people often attach different values to the items to be divided or different importance to the issues to be settled.<sup>87</sup> In this respect, adjusted-winner is analogous to the well-known device of cake cutting.<sup>88</sup> In the classic cake-cutting procedure between two persons, A and B, A divides the cake into two pieces, and B chooses first.<sup>89</sup> Since A is the second to choose, she has incentive to divide the cake into two pieces that she regards as equal, so as to ensure that the piece she gets will be at least as good as the other.<sup>90</sup> Since B chooses first, the piece he gets will also be, in his eyes, at least as good as the other.<sup>91</sup> If each party acts rationally, therefore, the procedure is guaranteed to generate a result that is "envy-free."<sup>92</sup>

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85. If the claimants had brought the dispute to a court, or to an arbitral tribunal, and if the court or tribunal had issued a verdict prescribing the division that Valencia envisions here, then we could at least try to infer the tribunal's reasoning and assumptions from the way the claimants had presented their case, relevant international law, and so on. *See generally* VALENCIA ET AL., *supra* note 2.

86. *See generally* STEPHEN BRAMS & ALAN TAYLOR, FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION (1996), *cited in* Denoon & Brams, *supra* note 3, at 326 n.19.

87. BRAMS & TAYLOR, *supra* note 86, at 65.

88. *Id.* at 8.

89. *Id.* at 9.

90. *Id.*

91. *Id.*

92. *Id.*

Compare this with a procedure where an impartial third party attempts to divide the cake equitably.<sup>93</sup> If the third person does not have adequate information about A and B's preferences, an equitable division in the third person's eyes may well fail to be envy-free for A and B.<sup>94</sup>

Even though cake cutting can secure an envy-free result, it can be inequitable in an obvious sense: while A regards the two pieces of the cake as equal, B may prefer one to the other. B is therefore likely to derive more satisfaction from the procedure. Moreover, it has been shown that cake cutting can be inefficient, in the sense of not being Pareto-optimal.<sup>95</sup> These and other problems with cake cutting led Brams and Taylor to the design of the adjusted-winner procedure, which they showed to produce results that are envy-free, equitable (in the sense of producing equal satisfaction), and Pareto-optimal.<sup>96</sup>

The procedure works in the following way. In the case of two equal claimants, a list of the goods to be divided is first drawn up, and both parties are allowed an equal number of points, say, one hundred.<sup>97</sup> Each party then secretly prepares a list showing how much they value each of the disputed items, ranking the items by allocating the one hundred points among them.<sup>98</sup> Both parties then submit these "bids" to a neutral arbiter, who rules on the results.<sup>99</sup> Initially, a party wins the items that she has ranked higher than the other has.<sup>100</sup> Ties are awarded to the party with fewer points from clear wins.<sup>101</sup> By this time, one party usually will have won more points than the other, and the results are inequitable. To restore equitability, the process of adjusting is then applied.<sup>102</sup> Items with the lowest ratios of winner-to-loser points are given back to the loser, until winner and loser have an equal number of points.<sup>103</sup> Givebacks may have to be partial in order to achieve this final result.<sup>104</sup> One of the giveback items may therefore have to be divisible.<sup>105</sup>

93. *Id.*

94. This is always a danger with divisions (e.g., of marital property) determined by judges and arbitrators.

95. A Pareto-optimal allocation is one where there is no other allocation that is strictly better for at least one player and as good for all others. BRAMS & TAYLOR, *supra* note 86, at 44.

96. *Id.* at 70-71.

97. Peterson, *infra* note 108, at 285.

98. *Id.*

99. *Id.*

100. *Id.*

101. BRAMS & TAYLOR, *supra* note 86, at 69.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

The procedure can be modified to work for two claimants whose claims are unequal as well: one party will simply start with more points than the other. The result will be equitable in the sense that the parties receive points proportional to the strengths of their claims. Overall, therefore, the sense in which the adjusted-winner procedure is fair and efficient is perfectly transparent.

Not surprisingly, in order to apply such a simple procedure to the problem of allocating control in the Spratlys, Denoon and Brams have had to make very strong assumptions.<sup>106</sup> While challenging these assumptions can prove an easy exercise, it should be noted that it is equally easy to miss what is interesting about Denoon and Brams' idea. Denoon and Brams intend merely to offer illustrations of how the adjusted-winner procedure might be applied to resolve the Spratlys dispute.<sup>107</sup> Quarrels with the details of their illustrations, therefore, do not show that there cannot be more appropriate applications. But more importantly, even if it does turn out that there is no plausible way of applying adjusted-winner to the Spratlys, we should still keep in mind the special promise the proposal has held out—namely, that it envisions a solution based on fairness (and efficiency), and not on the basis of the current or predicted balance of power. Once achieved, solutions of this kind will be particularly stable.

Two of Denoon and Brams' explicit assumptions are particularly strong, and therefore require special examination. First, unlike cake cutting and some other procedures for fair division,<sup>108</sup> adjusted-winner actually does not work for more than two players, and there are five claimant countries to the Spratlys.<sup>109</sup> To sidestep this difficulty, Denoon and Brams propose that "we regard the conflict as, for the moment, one between China and ASEAN (with ASEAN being considered as a single player)."<sup>110</sup> They write,

We think this view is realistic as a first step in resolving the overall dispute. China is by far the largest single claimant, against which the ASEAN countries have formed an implicit coalition. . . . Later we will indicate how the ASEAN countries might, internally, settle their own competing claims.<sup>111</sup>

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106. See generally Denoon & Brams, *supra* note 3.

107. See *id.*

108. The number of additional players these procedures accommodate differs. Cake-cutting can theoretically accommodate any number. Ivars Peterson, *Formulas for Fairness: Applying the Math of Cake Cutting to Conflict Resolution*, SCI. NEWS, May 4, 1996, at 284. See generally H.P. YOUNG, EQUITY IN THEORY AND PRACTICE (1994).

109. These include China/Taiwan, Vietnam, the Philippines, Malaysia, and Brunei.

110. Denoon & Brams, *supra* note 3, at 318.

111. *Id.*



While this proposed simplification might have had the appearance of being “realistic” in the mid-1990s—after the ASEAN Regional Forum’s collective criticism of China in 1995 for the latter’s forceful occupation of Mischief Reef<sup>112</sup>—it is an assumption unable to withstand scrutiny, then or now. To begin with, what does it mean to say that “China is the largest single claimant”? If the assertion is that China has the strongest claims to the Spratlys, then it reasonably will be denied by the other claimant countries—in particular, by Vietnam and the Philippines. On the other hand, if the assertion is simply that China is the most powerful country among all the claimants (and has made the most expansive claims), then it might be true, but irrelevant. Why should we regard a procedure as fair that gives weight not to the legitimate claims of the interested parties, but to their sheer size and strength? Moreover, Denoon and Brams’ use of the label “ASEAN countries” for the four claimants to the Spratlys besides China is itself telling. The justification of the label is presumably that, in the mid-1990s, there was a consensus among ASEAN countries in protesting China’s occupation of Mischief Reef.<sup>113</sup> Yet to import this ASEAN coalition into a process of fair division of the Spratlys seems again to elude the crucial distinction between the just resolution of international disputes, on the one hand, and international strategic alliance on the other.

Even more critically, the two-party set-up also implies a strong degree of homogeneity of interest among the other claimants to the Spratlys besides China<sup>114</sup>—these other claimants must be able to agree on a unified bid in the adjusted-winner procedure against China. The differences in the nature of the governments of these countries, their different economic interests, and the geographical separation of the sub-regions of the Spratlys to which individually they are interested in making claims all suggest that indeed this is highly unrealistic.<sup>115</sup> This is likely to be the objection to Denoon and Brams’ first assumption that is most difficult to counter. Otherwise we would have a general algorithm for reducing multiple player

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112. See VALENCIA ET AL., *supra* note 2, at 79-82.

113. See *id.* at 81, 87, 97.

114. Denoon and Brams acknowledge that Singapore, Thailand, and Indonesia in fact do not have claims in the Spratlys. Denoon & Brams, *supra* note 3, at 326 n.15.

115. This point can be made in Denoon and Brams’ own terms. As will be discussed below, they consider six scenarios for the application of adjusted-winner, resulting from the combination of three bidding strategies on the part of China and two bidding strategies for “ASEAN.” It turns out that in none of these scenarios does ASEAN win *both* the Eastern region (presumably of the strongest interest to the Philippines) *and* the Southwest region (presumably of the strongest interest to Vietnam). This seems good reason to believe that “the ASEAN countries” will not agree on either of Denoon and Brams’ two proposed bidding strategies. See *generally id.*

situations—to which the adjusted-winner procedure cannot apply—to situations that allow the procedure's application. We could simply separate off one player, C, from the rest, assess C's claims against the others' claims collectively, make differential (or equal) initial assignments of total points to C and to the rest collectively on the basis of this assessment, run the adjusted-winner procedure, and reiterate the whole process for the non-C parties to divide what they collectively received during the previous round. Presumably, this application of adjusted-winner is invalid, and one cannot make it valid simply by labeling the non-C parties "ASEAN."

The second crucial assumption Denoon and Brams make to get the adjusted-winner procedure going is a division of the Spratlys into five zones for the two players (China and "ASEAN") to bid on.<sup>116</sup> Certainly, the specific division they offer is strictly for illustrative purposes, and there is no point disputing its details. The division does raise a more general issue, however. For adjusted-winner to apply in any context, the parties must agree in advance on a list of separate items upon which to bid. Generally, that is to say, the employment of adjusted-winner comes only at the end of complex negotiations.<sup>117</sup> Suppose we ask, however, on what terms this preceding negotiation could have been conducted. One can contrast two extreme possibilities. On the one hand, all parties may have relatively clear ideas about the economic, military, strategic, symbolic, and other significance—for themselves—of various sub-regions of the Spratlys. Through further articulation in the negotiation process, they may then be able to arrive at a detailed partition of the region, employing criteria that may be complex to the inexpert eye, much as countries now negotiate trade agreements or—to invoke a kind of case where the adjusted-winner procedure is taken to have the most promising application—as spouses on the verge of divorce can identify the significant pieces of marital property to be divided.<sup>118</sup> On the other hand, the parties may have no such clear idea about their preferences at all. What they have instead are general and strong intentions to protect their own interests, but these are not matched by the ability to articulate possible trade-offs among different disputed items. One reason why this might be the case, of course, is that the parties' conflicting interests cannot be captured by

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116. *Id.*

117. This is how the role of adjusted-winner was conceived by Brams and Taylor in the first place. See Peterson, *supra* note 108, at 285 ("The negotiation literature already contains a great deal of material on identifying crucial issues, articulating them, and splitting them up properly. 'Once you've done the hard work of defining the issues, then something like the adjusted-winner procedure can kick in to complete the process,' [Alan] Taylor says.").

118. See generally *id.*

the nature of the disputed items at all. Instead, the conflict might be the product of nationalistic sentiment and suspicion about the intentions of other parties. Alternatively, the parties may simply not have had sufficient opportunity to develop a clear view of the valences of the items in question. Whatever the reason, it is hard to see how parties under this second possibility could successfully conclude the negotiations that are prerequisite to applying the adjusted-winner procedure.

The question, then, is which of these two possibilities more closely characterizes the Spratlys dispute. It is certainly not unthinkable that China, Vietnam, the Philippines, and others in fact have already developed very detailed assessments of the Spratlys' sub-regions. This is not, however, what is generally *presumed* to be the case. Instead, as shown in Part II, the claimants—China, especially—have been seen as acting aggressively but in pursuit of highly non-specific, unstructured, and simplistic goals.<sup>119</sup> China, for example, is often depicted as simply wanting to “dominate” the region.<sup>120</sup> And generally, the claimants' actions are more often interpreted as attempts at preempting the actions of others or as encroaching on others' claims, than as aimed at satisfying independent goals of their own.<sup>121</sup>

This general presumption appears to underlie Denoon and Brams' own discussion. In hypothesizing about the nature of China and “the ASEAN countries”' respective preferences for the various demarcated zones of the Spratlys, they mention the following possibilities:

[1] China seeks to establish firmly its sovereignty in the region but minimize antagonisms with the ASEAN countries . . . [2] China seeks to secure bases in the North Central, South, and Southwest as a means to project its power throughout the entire region . . . [3] China seeks to control the zones with the most promising hydrocarbon deposits . . . [4] ASEAN avoids intruding on the zones closest to China while making strong bids for [areas that] have the greatest economic potential . . . [5] ASEAN tries to force China into noncontiguous zones, thereby impeding China's political-military control over the entire South China Sea.<sup>122</sup>

If China has overwhelming goals that are nonetheless as disparate as “[minimizing] antagonism” and “[projecting] its power throughout the entire region,” or if “ASEAN” has strong but disparate goals such as seizing “the greatest economic potential” and “impeding China's military-political control,” it is difficult to see how they would be able

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119. See discussion *supra* Part II.

120. See, e.g., VALENCIA ET AL., *supra* note 2, at 77-99.

121. See *id.* at 82-83 (discussing hypotheses for China's behavior).

122. Denoon & Brams, *supra* note 3, at 319-21.

to arrive at sufficiently specific trade-offs among these goals to successfully engage in negotiation.

In short, it would appear that the applicability of adjusted-winner to the Spratlys dispute has to assume that the general presumption just described is wrong. Otherwise, the negotiations required before the procedure could come into play could never be completed. This observation might be supported from a slightly different angle. Adjusted-winner, like other procedures of fair division, must be protected from manipulation in order to generate fair results.<sup>123</sup> This is because one party might try to anticipate the other party's rankings and bid in ways that deliberately skew the results.<sup>124</sup> Such strategic uses of the procedure are less likely to occur when information about the other party's intentions is hard to obtain.<sup>125</sup> If the claimants to the Spratlys conceive of their preferences in nonspecific and unstructured ways (e.g., largely on the basis of nationalistic sentiment), however, there will be less insider information, so to speak, to be had about each party's intentions. Therefore, the current general presumption about the nature of the claimants' interests in the Spratlys implies both that the negotiations prior to the application of adjusted-winner would be difficult to carry out and that the procedure itself is likely to be vulnerable to manipulation.

On the basis of the two foregoing assumptions—that the Spratly claimants can be divided into two opposing groups and that the two groups would be able to complete the preliminary divisions of the Spratly region for subsequent bidding—Denoon and Brams proceed to construct three bidding strategies for illustrative purposes for China and two bidding strategies for “ASEAN,” and then to derive six corresponding outcomes of the adjusted-winner procedure.<sup>126</sup> All of these outcomes give both sides between 65 percent and 83 percent of what they are assumed to prefer.<sup>127</sup> As the discussion in the preceding paragraphs shows, however, the two assumptions Denoon

123. Peterson, *supra* note 108, at 285.

124. *Id.*

125. If we combine this condition with the previous one, namely that the parties must know enough about their own preferences to have negotiated an agreement on what the disputed items are, we might say that adjusted-winner works best when each party has a lot of insider information. *See generally id.*

126. *See generally* Denoon & Brams, *supra* note 3.

127. *Id.* at 322-23. The only substantive feature of these outcomes that we should note is that in five out of six scenarios, one of the five demarcated zones has to be shared between the two players. Denoon and Brams suggest that sharing would involve a production and revenue-sharing agreement, but do not say how jurisdictional issues would be resolved. It seems, therefore, that “sharing” is simply multilateral joint development on a smaller scale. This in turn suggests that whatever reservations Denoon and Brams have about the idea of multilateral authority for the whole of the Spratlys may not be insurmountable. *See generally id.*

and Brams make are highly contentious. Without some serious argument, one can rely neither on the idea of a natural division of the Spratlys disputants into two groups, nor that the disputants have detailed conceptions about the values represented by the Spratlys' sub-regions. Weakening these two assumptions, however, threatens to undermine the applicability of the adjusted-winner procedure in this context.

### B. *Fairness and International Law*

Does this mean that it is futile to strive for a fair solution to the Spratlys dispute? Such a conclusion does not necessarily follow. Consider again the difficulties raised earlier regarding Denoon and Brams' second assumption. In fact, the claimants to the Spratlys are probably not characterized by either of the two extreme possibilities cited—that they have highly specific views about the value of sub-regions and potential trade-offs among them or that they have only non-specific, unstructured goals in mind. The truth probably lies somewhere in between. The claimant parties probably have given some consideration to the economic potential of natural resources in the region, the strategic significance of the current pattern of occupation, symbolic meanings that can give rise to domestic political pressure, and so on. Yet their preferences regarding these issues are likely to be incomplete. This does not mean, however, that all that the parties have left are general considerations about regional security and the balance of power. There is clearly another dimension along which they may be prepared to articulate their views—namely, regarding what they think they are entitled to under international law. Indeed, it is likely that the parties attach much significance to their potential legal claims. For example, one can imagine Malaysia and Brunei being attached to the potential rights granted to them by the international law concerning EEZs and the continental shelf, even if they currently do not have specific plans for exploring the resources lying within these zones. Similarly, Vietnam and China may regard as an important fact that the international law of territorial acquisition tends to reward the kind of exploration and occupation they have made in the Spratlys.

These considerations of legal entitlements are distinctive in a number of ways. Compared with typical modes of thinking about balance of power and regional security, they are much more specific and structured. For instance, they are more likely to motivate drawing distinctions among different sub-regions of the Spratlys. On the other hand, because each party's considerations of international legal entitlement draw from a public discourse, they are more predictable than each party's individual calculation of the economic, political, and other utility of the region. This follows from the most

important characteristic of international legal considerations—one that sets them apart from both specific utility calculations and general strategic considerations—namely, that international norms are already incorporated into these considerations. How China, for example, calculates the value of the natural resource potential in the Spratlys is, one might argue, China’s own business. How it goes about deciding what counts as its sovereignty territory, or how it sets up its baselines, by contrast, is not just its own business, but is everyone’s. Similarly, one can only hope that China does not intend to “dominate” the South China Sea, but it might perhaps also be understandable why it might think that it has no choice but to do so, if the alternative is being hemmed in by a number of potentially unfriendly states. What would be much more difficult to understand is if China made the claim that its territorial waters extended not twelve but hundreds of miles.<sup>128</sup>

All this is quite obvious.<sup>129</sup> Its relevance is as follows. Suppose it is agreed that the application of existing international law by itself will not resolve the Spratlys dispute. The possibility remains that one can articulate certain principles of fairness on the basis of existing international law that are at the same time (1) specific enough to be applied in the Spratlys context and (2) independent of the individual countries’ specific utility calculations. If such principles can be found, then they can guide us in assessing proposals either for allocating control or for setting up joint development schemes in the region.<sup>130</sup> The following principle, (P), seems a plausible candidate of this type:

In any fair settlement of the Spratlys dispute, no party should be asked to sacrifice its legitimate claims either without a similar sacrifice on the part of all other parties, or without adequate compensation.

The term in this statement of principle most in need of clarification is “legitimate claims.” “Legitimate” (or, alternatively, “allowable”) claims means those claims that are supported by facts and international law. For example, a claim to absolute sovereignty over a group of islands, made on the basis of historical title, and in

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128. Cf. United Nations Convention on the Law of the Sea, *supra* note 15, arts. 3, 4.

129. Consider the application of adjusted-winner to the division of marital property. It is divorce law that determines who can participate in the division (i.e., the spouses, not the spouses and their friends and allies), and what the terms of participation are (equal). It is within the context of these legal norms that adjusted-winner operates to achieve envy-free settlements, equal satisfaction, and efficiency. See generally Peterson, *supra* note 108.

130. The relevant principles of fairness in adjusted-winner are envy-freeness and equal (or proportional) satisfaction. Their application, however, depends (as has been suggested earlier) on (1) there being only two players, and (2) the players being relatively clear and certain about their preferences. *Id.*

the face of competing claims, is in all likelihood illegitimate. It has no support in international law, under which historical title is only one consideration to be balanced against others.<sup>131</sup> A claim to sharing control of certain resources on the basis of historical title, by contrast, may be legitimate.<sup>132</sup>

To illustrate the application of this principle, return to some of the proposals for allocating control in the Spratlys that Valencia has advanced. Among the five scenarios described, the first two are variations on the same idea (see Exhibits 2 and 3):

- (1) Allocation of the entire South China Sea and its features by equidistance lines from claimed or approximated coastal baselines, ignoring the Spratly and the Paracel islands; and
- (2) Allocation of the entire South China Sea and its features by equidistance lines from claimed or approximated coastal baselines ignoring the Spratlys but giving the Paracel features full effect as Chinese territory.<sup>133</sup>

Under these proposals, the entire South China Sea is allocated, with each claimant exercising exclusive jurisdiction over the part it receives. The result is partially to grant Malaysia and Brunei exclusive maritime jurisdiction over areas they have never claimed—that is, areas beyond their 200-nm EEZs and geographical continental shelves.<sup>134</sup> All of these areas have instead been claimed by Vietnam, China, or the Philippines.<sup>135</sup> Under the two proposals, although the Philippines does not receive all the areas it claims in the

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131. VALENCIA ET AL., *supra* note 2, at 22-23.

132. An abstract consideration of the compatibility of fairness with territorial and maritime claims made under existing international law is the following: An important precondition for parties to reach a fair agreement is that the parties do not make claims that are irreconcilable. That is, for no party involved is it the case that, should it give *any* weight to the claims of others, it would have to relinquish its own claims. Only when claims are not irreconcilable can there be a solution that all perceive to be equitable. Clearly, some claims to the Spratlys *are* irreconcilable with others, such as claims to unconditional sovereignty based on historical title and unmitigated by contemporary international law. By contrast, most claims to sovereignty and maritime jurisdiction based on international law governing territorial acquisition and on the Law of the Sea can be reconciled, in the sense that appropriate weight is given to all legitimate claims. It could be the case, of course, that after all legitimate claims are accorded appropriate weight, it is found that no one's claim prevails over the others'. This is in fact just what legal scholars have recently concluded after applying international law to the various claims to the Spratlys. This is why restricting claims to legitimate ones does not by itself guarantee finding an equitable solution that does justice to all these claims. *Cf. supra* notes 1-3 and accompanying text.

133. VALENCIA ET AL., *supra* note 2, at 143-44.

134. *Id.* at 140-46.

135. *Id.* at 134-46.

Spratlys, it receives a majority of them.<sup>136</sup> By contrast, Vietnam loses much and China loses almost all of the areas to which they lay claim in the Spratlys.<sup>137</sup> This is partly because of the gratuitous “gift” to Malaysia and Brunei and partly because where China and Vietnam’s claims conflict with the claims of the Philippines, Malaysia, and Brunei, China and Vietnam’s claims are given no weight.<sup>138</sup>

The violation of principle (P) is clear. China and Vietnam’s claims on the basis of historical title and effective occupation clearly have some force under international law and cannot simply be ignored.<sup>139</sup> Proposals (1) and (2) are thus inequitable—they are not based on the legitimate claims of the parties contemplating an agreement, and they in fact deny some of these legitimate claims.

A different basic objection to proposals (1) and (2) is that they have no basis in international law, under which the equidistance principle is applied for the purpose of boundary delimitation with respect to EEZ and continental shelf claims.<sup>140</sup> The principle is not supposed to be used to extend any country’s maritime jurisdiction *beyond* its EEZ and continental shelf claims.<sup>141</sup> Proposals (1) and (2) thus amount to a complete rejection of a fundamental tenet of international law of the sea—namely, that there are areas of the sea (e.g., those defined as the high seas) that do not belong to any one country but belong to a regional or global commons.<sup>142</sup>

Either of these two objections may seem sufficient to disqualify proposals (1) and (2) from serious consideration. Another pair of Valencia’s proposals, however, is subject only to the first objection,

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136. This is because the Philippines made a claim to the Spratlys beyond what EEZ or continental shelf principles would justify. The Philippine claim began with Tomas Cloma’s 1956 declaration to have “discovered” the Spratlys when they had allegedly been “*res nullius*” (in 1947); the claim continued through Ferdinand Marcos’ Presidential Decree in 1978 proclaiming the “Kalaya’an Island Group” to be part of the Philippines; and it was embodied in two draft bills in the Philippine senate from 1987 and 1990. Of all existing claims to the Spratlys, it is probably most difficult to predict how the Philippine claim would be treated under international legal authority. This issue is further discussed in the Appendix. For discussions of the Cloma claim, see VALENCIA ET AL., *supra* note 2, at 33-35; AUSTIN, *supra* note 1, 152-54. For discussion of Presidential Decree 1596 and the two senate bills, see PRESCOTT, MARITIME JURISDICTION IN SOUTHEAST ASIA, *supra* note 7, at 18-21; PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6, at 31-34.

137. VALENCIA ET AL., *supra* note 2, at 143-44.

138. *Id.*

139. For a discussion of the strength of China’s claims to the Spratlys as compared to the claims of other countries, see AUSTIN, *supra* note 1, ch. V.

140. VALENCIA ET AL., *supra* note 2, at 49-50.

141. *Id.*

142. *Id.* at 39-59.



- (3) Allocation of the South China Sea and features on the basis of equidistance lines out to the limit of the countries' 200 nm EEZs and their geographical continental shelves, ignoring both the Spratly and Paracel features;
- (4) Allocation of the South China Sea and features on the basis of equidistance lines out to the limit of the countries' 200 nm EEZs, and their geographical continental shelves, ignoring the Spratlys, but giving the Paracels full effect as Chinese territory.<sup>143</sup>

Proposals (3) and (4) acknowledge that there is rarely basis in international law to extend maritime jurisdiction beyond the 200-nm limit.<sup>144</sup> They both leave a high seas area in the middle of the South China Sea, even if there is no shown hydrocarbon resource in that area. Suppose that this area is taken to be a regional commons and subjected to some form of joint management authority.<sup>145</sup> Could these proposals be taken as a basis for settling the Spratlys dispute? As is clear from the foregoing discussion, a form of inequity still remains: where China and Vietnam's claims on the basis of historical title and effective occupation conflict with the claims of the Philippines, Malaysia, and Brunei on EEZ and continental shelf premises, the conflict is resolved in favor of the latter three countries with no compensation to the first two. Therefore, principle (P) is again violated. Because of this inequity, we should not expect China and Vietnam to agree to these two proposals.

It is important to contrast the foregoing argument, that proposals (1) through (4) contain clear inequities, with an observation of a very different kind. Under proposals (1) or (2), China is in fact excluded from all of the Spratlys features. Even proposals (3) and (4) would greatly limit the areas that China would receive. One might say that this is the most obvious reason why these proposals are inadequate: China would never accept them. Such a remark, however, eludes a distinction of vital importance. China's rejection of the proposals could be based on two completely different kinds of motivations: (1) it might simply have rejected what is unfair, as its legitimate claims would have been denied under the proposals; or (2) it might have believed that, as a powerful interested country, it could strike a better bargain. It is unfortunate that very often, only the second motivation is attributed to China.<sup>146</sup>

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143. *Id.* at 144-45.

144. *Id.* at 145. *See infra* Exhibits 4 and 5.

145. Such an elaboration of proposals (3) and (4) would be identical with one version of the joint management schemes to be discussed later. *See infra* Part IV.

146. Denoon and Brams report that the idea behind proposals (3) and (4) "was proposed informally by the Indonesians as a way to clarify questions of sovereignty and to minimize debate about procedures. Although the 'doughnut' solution has the merit of simplicity, it would . . . greatly [limit] the areas China would receive. Not surprisingly,

### C. Fair Final Allocation v. Fair Participation

So far, (P), a principle of fairness that makes reference to international law, has seemed useful for assessing proposed solutions to the Spratly disputes: it has helped to show what is wrong with two allocation proposals (each with two variants). Yet, although (P) has sufficient content to rule out some allocations as unfair, it is unlikely to lead to a discovery of the allocation that is most fair.

This is because the application of (P) involves looking for denials of legitimate claims that are not accompanied by adequate compensation. On reflection, it seems that international courts or similar impartial tribunals would be positioned best to determine which territorial or maritime claims are legitimate under international law and to differentiate between degrees of legitimacy.<sup>147</sup> Therefore, it seems that courts or similar impartial tribunals would be the most qualified to apply (P). Yet, as mentioned earlier, probably no claimant country to the Spratlys would trust an international tribunal for a final resolution of the Spratly disputes. The explanation is that (P) is simply too weak and would still leave the tribunal with too much discretion in fashioning a final allocation. Thus, it must be admitted that no principle of fairness has yet been found that would solve the Spratly disputes with a fair final allocation.

We are by no means compelled, however, to conceive of fairness only in terms of what each party gets in the end. In the study referred to earlier of international regime formation (based on investigation into five different international environmental regimes), researchers found that the equity of an international regime is a necessary condition for its formation.<sup>148</sup> Yet, interestingly, at the same time, there is evidence that for an international regime successfully to form or remain effective, participants should neither have certainty about the distributional consequences of the regime (e.g., the material benefits as compared with cost), nor attempt to bargain directly in terms of these consequences.<sup>149</sup> Some of the regimes studied deliberately created “a veil of uncertainty” to make it

Beijing rejected the idea.” Denoon & Brams, *supra* note 3, at 315. Denoon and Brams thus ignore the possibility that the Indonesian suggestion was unfair to China. *Id.*

147. Such determinations may take into account scholarly legal analyses similar to that by Greg Austin, Mark Valencia, and others. See generally AUSTIN, *supra* note 1; VALENCIA ET AL., *supra* note 2, at 1-4.

148. Specifically, the hypothesis confirmed was that bargaining to set up a multilateral regime “cannot succeed unless it produces an outcome that participants can accept as equitable, even when the adopting of equitable formulas require some sacrifice in efficiency.” YOUNG & OSHERENKO, *supra* note 69, at 235-36.

149. *Id.* at 238-39.

“difficult for individual participants to foresee how the operation of institutional arrangements will affect their interests over time.”<sup>150</sup> Conversely, in other situations where “the costs and benefits of participating [were] relatively easy to compute,” regimes failed to form or became less effective.<sup>151</sup> These findings suggest that countries make judgments about fairness on bases other than distributive outcomes.

These findings about international regimes are, in one way, completely unsurprising: they merely echo what we know about distributive justice in domestic contexts. What is basic to our thinking about distributive justice within one national polity are not considerations of what each citizen gets in the end, but whether citizens have a fair share in the ongoing social process that determines individual allocations, including the democratic political process governing redistribution. Without knowing whether what we each get in the end really is fair, we focus on issues like whether dominant social institutions advance the interests of all citizens, whether citizens’ interests are adequately represented in the political process, and whether fundamental rights and liberties are protected (so that not everything is up for grabs through political contest) in order to decide whether we live in a just society.<sup>152</sup> It is these indicia of fair participation, and not any particular distributive result, that assure us the allocation of the benefits of social cooperation is equitable.

Analogously, in the international context, when parties with legitimate claims to the same resources find it difficult to arrive at a fair final division of these resources, they may well be motivated to enter into joint management of these resources because it is easier for them to agree on what fair participation in joint management requires. This is a general reason why multilateral management can be attractive. And, given the preceding arguments in this Section, it constitutes a powerful reason for Spratly claimants to consider a joint management authority in the South China Sea. Part IV considers what fair participation in the joint management of the Spratlys could look like.

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150. *Id.* at 13.

151. *Id.* at 238 (suggesting that “de[-]emphasizing or avoiding distributive issues enhances the ability of the participants to engage in a search for mutually beneficial solutions,” and that, in addition to creating “the veil of uncertainty,” one should strive to “[expand] the contract zone”).

152. See generally JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard Univ. 1999) (1969).

## IV. A JOINT MANAGEMENT AUTHORITY

The most fundamental issue for any proposal for multilateral management in the Spratlys is the definition of the area to be governed by the multilateral regime. Only after deciding this issue can one consider questions about the structure of the organization and how power is to be distributed among participants. Valencia describes four major possibilities for defining the shared management area,<sup>153</sup> yet, as mentioned in the introduction, he does not discuss the relative merits of these distinct alternatives, nor does he suggest how to choose among them. Advocates for any one of the alternatives, therefore, would have to construct arguments on their own.

The first of the four alternatives is the following:

- (A) The “area of shared management would be that area within the line equidistant between the Spratly features and undisputed national territory.”<sup>154</sup>

Valencia attributes the idea of such a geographical line to Victor Prescott.<sup>155</sup> The author of the “Prescott line,” however, apparently did not have a Spratly joint management authority in mind. Instead, what Prescott proposes is merely to “divide the South China Sea into two parts and consider them separately” in examining the limits of national claims in the region. He wrote:

The first part consists of the continental margins and overlying seas that border the South China Sea adjacent to the claimant fringing states. The second part consists of the remainder that comprises the seas and seabed attached to the Spratly Islands. This division is made for the following reasons. The margins are generally claimed from territories that are not in dispute; most of the international boundaries delimited on the margin will result from bilateral negotiations; there are significant areas of the margin that fringing states can claim without any objection from other states; all fringing states are already exploiting areas of their continental margins and adjacent seas; some bilateral boundaries have already been drawn and there are prospects that other delimitations will occur in the foreseeable future. In contrast, possessions in the Spratly region are disputed by at least three countries; . . . no boundaries have been delimited in this region; it is likely that any early solutions would involve multilateral

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153. VALENCIA ET AL., *supra* note 2, at 205-06.

154. *Id.* at 205. *See infra* Exhibit 6.

155. VALENCIA ET AL., *supra* note 2, at 222. Although Valencia and his colleagues do not state whether the “undisputed national territory” used to generate the Prescott line includes the Paracels, Prescott’s presentation makes it clear that it does. PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6, at 17-19.

negotiations; . . . exploitation of the seas occurs on an ad hoc basis and there has been no significant exploitation of the seabed. . . .

The division between the two areas was defined in the following manner. The outer most projections and islands of all states bordering on the South China Sea were identified. The outermost islands, rocks, and occupied low-tide elevations of the Spratly Region were identified. A median line was drawn between these two sets of features on the British Admiralty Chart 1263.<sup>156</sup>

It is not clear why the median line proposed by Prescott is the best way to divide the South China Sea into two regions characterized by the contrasting sets of features listed in the quoted passage. Conversely, once the line is drawn, it may not be clear that Prescott's explicit justification is adequate. For example, according to a chart drawn by Valencia, for example, the Prescott line encloses large areas where only two countries hold competing claims<sup>157</sup> and is therefore certainly not a delineation of areas subject to multiple (meaning more than two) claims. This is just to say that the choice of the Prescott line for delineating the area for multilateral management requires further justification. Indeed, providing such further justification is a major purpose of this Section.

Valencia does make one important argument for choosing the "Prescott line," however. He notes that the use of the median line here is unusual in light of international law.<sup>158</sup> Because equidistant lines are usually drawn only between territories that can generate maritime zones, the Prescott line, in effect, pretends that the Spratly Islands as a group can generate their own maritime zones.<sup>159</sup> When the Prescott line is used to demarcate an area for multilateral management, however, we might consider the novel creation as not really contradicting international law, as the maritime zones around the Spratlys are not generated on any country's behalf.<sup>160</sup>

The other possibilities for delineating a joint management area are more straightforward:

- (B) "The shared management area would be the area beyond 200 nm from legitimate coastal baselines, and beyond the legal limit of the coastal continental shelves."<sup>161</sup>

This suggestion is identical with the idea behind proposals (3) and (4) in the previous Section:<sup>162</sup> any part of the South China Sea that has not been allocated according to EEZ or continental shelf principles

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156. *Id.* at 4-6.

157. VALENCIA ET AL., *supra* note 2, at 205. *See infra* Exhibit 7.

158. VALENCIA ET AL., *supra* note 2, at 205.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See supra* notes 143-45 and accompanying text.

will be declared a regional commons and subjected to the regulation of a regional multilateral authority.<sup>163</sup>

- (C) “[The] area of shared management would include only the area claimed by three or more entities, counting the claims of China and Taiwan as one.”<sup>164</sup>

Valencia calls this the “multiple claim approach” and notes that “[this] approach would considerably narrow the area in question and leave disputes in areas outside the multiple claim area to be resolved by the claimants themselves.”<sup>165</sup>

- (D) The area would be “the area enclosed by connecting the outermost main islands, or alternatively, the outermost drying reefs in the Spratly group.”<sup>166</sup>

This fourth and final possibility thus comes in two versions: (D1) uses the outermost main islands in the Spratly group, while (D2) uses the outermost drying reefs, to delineate the joint management area.<sup>167</sup>

How might one go about comparing these different possibilities? With respect to each, we can ask: (1) how comprehensive is it as a solution to the major disputes in the Spratlys and (2) to what extent is it likely to be perceived as benefiting all parties?

#### A. *Preliminary Rankings of Alternative Boundaries*

Obviously, (A) forms the basis of a more comprehensive multilateral solution than (B), (C), or (D). The only major South China Sea disputes left to bilateral solutions by (A) would be the disputes between China and Vietnam over the Paracels and between China and the Philippines over Scarborough Reef. Another useful comparison along the dimension of comprehensiveness is between (C) and (D). One version of (D), (D1), draws a line that encloses the outermost main islands in the Spratly group, thereby creating an area that is simply a sub-region of the area in (C).<sup>168</sup> The other version of (D), (D2), draws a line that encloses the outermost drying reefs of the Spratlys, creating an area that largely overlaps with the area in (C).<sup>169</sup> The non-overlapping areas jut into regions legitimately claimed by the Philippines and Malaysia in haphazard

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163. VALENCIA ET AL., *supra* note 2, at 205-06.

164. *Id.* at 206.

165. *Id.* See *infra* Exhibit 7.

166. VALENCIA ET AL., *supra* note 2, at 206.

167. *Id.* See *infra* Exhibits 8 and 9.

168. VALENCIA ET AL., *supra* note 2, at 206. See *infra* Exhibit 8.

169. VALENCIA ET AL., *supra* note 2, at 206. See *infra* Exhibit 9.

ways.<sup>170</sup> Overall, each version of (D) is inferior to, or at least not superior to, (C) along the dimension of comprehensiveness.

Why should comprehensiveness matter? The answer is two-fold. First, the more comprehensive the area of the joint management authority, the less need there will be for other kinds of solutions to the Spratly disputes. When this is the case, multilateral management becomes a more *salient* solution to the regional disputes, and being perceived as a salient solution can in fact improve the chances of success.<sup>171</sup> For example, (A) (the Prescott line) vitiates much of the need for bilateral negotiations that (C) (the multiple claim approach) creates. Similarly, a multilateral regime based on (D) at best addresses the same range of disputes as (C) and may in fact address a smaller range. Thus, (A) is more salient than (C), and (D) is at best as salient as (C).

Second, the larger the joint management area, the more there will be for participants in the multilateral regime to bargain over, and “expanding the contract zone” has been found to contribute to the success of bargaining in international regimes.<sup>172</sup> Along the dimension of comprehensiveness, therefore, the following rankings obtain:

(A) > (B); (A) > (C); (A) > (D); (C) > (D)

The second question that can be asked about the four possibilities is how likely each is to be perceived as benefiting all parties. We may begin by observing that (B) implicitly grants all claimant countries exclusive jurisdiction over their EEZ and continental shelf zones, as well as grants them a share in the joint management of the common area.<sup>173</sup> The effects on the claimants, however, are unequal. While Brunei, Malaysia, and the Philippines do not hold claims to areas within China and Vietnam’s EEZs and continental shelf zones, Vietnam and China do hold competing claims—and occupy islands and features—in the EEZs and continental shelf zones of those first three countries.<sup>174</sup> Therefore under (B), Vietnam and China lose on all of their competing claims against Brunei, Malaysia, and the Philippines, and their occupied islands become a common area. Because neither (A), (C), nor (D) implicitly grants exclusive maritime jurisdiction, and because (A) actually takes EEZ and continental shelf jurisdiction away from Brunei, Malaysia, and the Philippines, these three countries should

170. *Id.*

171. This is one of the best-supported findings in the survey led by Young and Osherenko. YOUNG & OSHERENKO, *supra* note 69, at 236-37.

172. *Id.* at 238-39.

173. *See infra* Exhibit 5.

174. *Id.*

find (B) the best option of the four. For China, (B) represents the worst option.<sup>175</sup>

The preferences over (C) display an opposite pattern. Because (C) leaves a number of bilaterally disputed areas between China, on the one hand, and Vietnam, the Philippines, Malaysia, and Brunei on the other,<sup>176</sup> one might argue that China would strongly prefer (C). In this view, China has always endorsed the idea of joint development of resources in areas of maritime dispute, but it has resisted multilateral approaches in favor of bilateral approaches.<sup>177</sup> Because (C) would leave more disputed areas of the South China Sea to bilateral resolution than (A) and (B), China should have a preference for it. The other countries, however, especially the Philippines, wary of bilateral negotiations with a much stronger party, should most strongly reject (C). Because the areas covered by (C) and (D) largely overlap, the pattern of preference surrounding (D) should be similar.

Reasoning in this manner, we can conjecture for each claimant country the following rankings of the four options (assuming the rough equivalence between (C) and (D)):

- China: ((C), (D)) > (A) > (B)
- The Philippines: (B) > (A) > ((C), (D))
- Vietnam:<sup>178</sup> (A) > ((C), (D)) > (B) (?)
- Malaysia:<sup>179</sup> (B) > (A) > ((C), (D))
- Brunei: (B) > (A) > ((C), (D))

What this shows is that (B) (because of the low ranking by China), (C), and (D) (because of the low ranking by the Philippines, Malaysia, and Brunei) have little chance of being perceived as benefiting all parties. By contrast, (A) has a reasonable chance of being so perceived. Thus, (A) dominates the other options along this second dimension, just as it does along the dimension of comprehensiveness.

175. Vietnam at least manages to keep some resource-rich areas in the west Spratlys, whereas China suffers an all-out loss.

176. See *infra* Exhibit 7.

177. VALENCIA ET AL., *supra* note 2, at 83.

178. Vietnam's preference is the hardest to construct. On the one hand, under (A) but not under (B), Vietnamese claims that overlap with the other countries' EEZ or continental shelf claims are given weight. On the other hand, under (B) but not under (A), Vietnam receives exclusive jurisdiction over its EEZ and continental shelf areas. Comparison of (A) or (B) with (C) or (D) for Vietnam is also difficult. However, for (A) to come out ahead—as the text argues it does—it only has to be the case that (A) is not the worse option for Vietnam among all four. And that seems plausible.

179. (B) is clearly the best option for Malaysia. Valencia reports that “Malaysia is not enthusiastic about multilateral joint development, especially in the area it claims.” VALENCIA ET AL., *supra* note 2, at 114. The reason for this is not clear. However, since (A), (C), and (D) all imply multilateral joint development of Malaysia-claimed areas, Malaysia may be indifferent between (C), (D), and (A).



### B. Ensuring Fairness

To say that option (A)—delineating the joint management area along the Prescott line—is more likely than the other options to be perceived as benefiting all parties is not tantamount to saying that it is truly fair. Yet fairness is probably a necessary condition for the success of international regime formation. An unfair arrangement, even if otherwise most promising, is unlikely to resolve the Spratly disputes. Therefore, more needs to be said about the fairness of a joint management authority within the Prescott line.

There are two relevant considerations. First, recall principle (P), which says that no party should be asked to sacrifice its legitimate claims either without a similar sacrifice on the part of all other parties, or without adequate compensation. If the Prescott line is used to circumscribe the joint management regime, then each claimant would “surrender” a significant amount of territory and maritime space it claims or occupies to be managed multilaterally.<sup>180</sup> And no country’s claims would be preempted by another country’s exclusive jurisdiction. In other words, one could say either that the Prescott line maximizes the recognition of all countries’ legitimate claims, or that it minimizes the denial of these claims. Prima facie, therefore, joint management authority within the Prescott line satisfies (P).

This conclusion is not beyond question, however. Joint management within the Prescott line takes away from all countries, except China, areas that fall under their EEZ and continental shelf claims, and these claims are given great weight under international law.<sup>181</sup> By contrast, because of China’s greater distance from the Spratly Island group,<sup>182</sup> China gives up much less in exchange for a share in the joint management authority.

This plausible objection can be countered by a second consideration. While the geographical aspect of a joint management authority within the Prescott line favors China, other aspects of the authority can be structured to compensate for this difference. Most importantly, the joint management authority could be made to enhance the bargaining power of Vietnam, the Philippines, Malaysia, and Brunei vis-à-vis China. That is, a major good it delivers to these countries is the possibility of forming coalitions against China in the authority’s policy-making.

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180. No country of course will be expected to actually surrender their sovereignty and jurisdictional claims.

181. Compare *infra* Exhibit 5 with *infra* Exhibit 6.

182. Or, to be more precise, the Paracel Islands’ greater distance. See *id.*

How might this be so? The joint management authority, which from this point on is understood to cover the area within the Prescott line, will have certain general policy goals, a political structure to develop regulations and projects furthering these goals, as well as the capacity to implement the regulations and projects. For now we are interested in just one of these “constitutional” issues—namely, the political structure of the regime. Two suggestions made by Valencia may help empower the weaker countries against China within a multilateral regime. First, he considers different ways of allocating “percentage shares of benefits and costs of operating the Spratly Management Authority.”<sup>183</sup> The allocation could be “based on the extent of the original claims within the area . . . the length of coastline bordering the South China Sea, contributions to the Authority, or some combination of these considerations.”<sup>184</sup> Allocation according to coastline lengths seems the most reasonable,

Relying on the extent of original claims as a basis for share allocation raises several significant problems. . . . First, the extent of the original claims of China/Taiwan and Vietnam is unclear, and second, countries could be tempted to argue that their original claims were more extensive than they actually were. Because of these difficulties, shares might be allocated based on the claimants’ general directional coastline length on the South China Sea. Under this approach, China and Taiwan together would receive about 31% of the governing shares, Vietnam 26%, the Philippines 21%, Malaysia 20% and Brunei 2%. The major difference between these proportions and those based on the extent of original claims is that China’s share would be reduced from 52% to 31% while those of the Philippines and of Malaysia would be sharply increased.<sup>185</sup>

Second, the same percentage allocation (according to coastline length) may be applied to distribute votes within the main decision body (a Council) of the Spratly Management Authority.<sup>186</sup> According to Valencia’s calculation, in such an arrangement China alone would not be able to block the other countries from forming a two-third’s

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183. VALENCIA ET AL., *supra* note 2, at 210.

184. *Id.*

185. *Id.* at 213-14. The authors go on to suggest that allocation according to coastline length would “greatly [reduce]” the incentive for China to participate. *Id.* This is not necessarily the case, given that the Prescott line favors China from the start.

186. *Id.* at 214. In a system of weighted voting where each country gets five “general weights,” and one hundred “special weights” (resulting in a total of 125 weights) are allocated according to the coastline length, the following distribution would be the result:

China/Taiwan	36
Vietnam	31
The Philippines	26
Malaysia	25
Brunei	7

majority.<sup>187</sup> By contrast, even if China and Vietnam combine their votes, they would not form a two-thirds majority.<sup>188</sup> In other words, Vietnam, Malaysia, and the Philippines would have sufficient room to defend their interests—by forming coalitions—when the Council deliberates on substantive policies that require a two-thirds majority for approval.

Valencia discusses a further mechanism for protecting the special interest participants in joint management may have either in their EEZ and continental shelf zones, or in their traditionally held territory: dividing the joint management area into different sub-zones according to the pattern of competing claims and then assigning a special chamber of the Council of the Authority to each sub-zone.<sup>189</sup> For example, a zone that is characterized by overlapping claims by China, Malaysia, and the Philippines would be represented by a chamber in which China, Malaysia, and the Philippines can vote.<sup>190</sup> Suppose, for example, that it is harder for China to form a majority within such a chamber than it is within the Council.<sup>191</sup> Then in a “combined chambered system,”—namely, one in which a policy can be adopted only if it wins a majority *both* in the Council *and* in the chamber associated with that area—Malaysia and the Philippines are given greater protection.<sup>192</sup>

If a coalition against China were an explicit possibility within the joint management authority, would China still participate? Although China in the past has opposed multilateral processes for resolving the Spratly disputes precisely to avoid confronting an international coalition, the rationale for such an opposition may no longer exist in the context of a Spratly Management Authority. First, the geographical boundary of the regime has already been determined (in China’s favor), and it is most likely that China will share at least some of the benefits (and costs) of resource exploration under the regime. Because not everything is up for grabs, China has less to lose in political contests within the authority. More importantly, it would not have to fear the internationalization of this political process because the charter of the authority would presumably preempt the

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187. *Id.* at 215.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The authors are not clear, however, about what it means to form a majority within a chamber. They also do not explain how in a chamber where, say, only China and the Philippines sit, the Philippines can receive greater protection than it can in the Council. As this last example illustrates, further discussion of chambered systems must explain how chambers can be prevented from being turned into sites for bilateral negotiation (which was partially what the multilateral regime was designed to avoid).

involvement of non-claimant countries, whether they are other ASEAN members or some “outside power.”

*C. Self-Interested Indifference Between a Fair Solution and No Solution*

Only one more issue remains to be considered. Suppose that all the claimant countries are indeed persuaded that, as far as it goes, joint management within the Prescott line could be made into an equitable arrangement. Does that go far enough? Is the fairness of an arrangement sufficient motivation for anyone to participate in it? Is everyone really a lot better off under that arrangement than without the arrangement?

It was suggested in the Part II that to be embraced, a fair collaboration need not drastically improve participants' well being, so long as it does not drastically diminish anyone's well being. That is, when a self-interested agent—the typical nation-state acting in the international arena—faces a choice between two situations, where (1) one situation involves entering into a fair arrangement with other parties, while the other involves refraining from such an arrangement; and (2) it is likely to be equally well (or badly) off in the two situations, then the agent may choose the fair arrangement.

There is reason to think that China, in particular, may face such a choice, supposing that its overall national power is bound to increase. First, as Valencia points out, the Prescott line encloses most of the promising areas for hydrocarbon deposits in the South China Sea.<sup>193</sup> Thus, even if China *could* assert historical title to maritime areas lying outside the Prescott line, it may have little incentive to insist on giving such title any weight in a peaceful settlement of the Spratly disputes. Second, as long as China is guaranteed some significant share of the hydrocarbon resources in the Spratlys area, it may not matter much to China that it cannot always secure the most favorable terms in schemes of joint development.

This conclusion is supported by a certain view of China's general energy strategy.<sup>194</sup> Suppose that the way for China to secure the maximum amount of energy resources for itself in the South China Sea is not to pursue a peaceful settlement in the form of a multilateral regime, but to wait for the development of its economic and military power. It can try to dominate other neighboring countries in bilateral negotiations. And it can plan eventually to

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193. *Id.* at 205.

194. The Author derives this view from Austin's discussion. AUSTIN, *supra* note 1, ch. 9.

have the naval capacity to steal natural resource from the South China Sea. This approach carries a high cost both in terms of time and other resources. A strong Chinese navy requires both time and scarce domestic economic resources to develop. Bilateral negotiations may also proceed very slowly, so that China cannot, in the short-term, benefit from known hydrocarbon deposits in the area. In short, for a long time to come, China will not benefit from this “expansionist” strategy in the South China Sea, and the resources in the region will remain largely unexplored.

During this time, however, because of its economic development, China will have evolved from a country self-sufficient in oil and gas production to one of the largest importers of oil and gas in the world.<sup>195</sup> China’s need for hydrocarbon energy will have to be met through purchases from current suppliers (the Middle East, for example) and through resource development in other parts of the world.<sup>196</sup> This need will far exceed the hydrocarbon potential in the South China Sea.<sup>197</sup> Therefore, even if China had a monopoly over the resources in the South China Sea, which it could secure only by pursuing a costly expansionist policy, it still would be heavily dependent upon the world oil and gas market and oil and gas extraction in other parts of the world.

In short, expansionism in the South China Sea would cost China too much while doing too little to address China’s energy needs. By contrast, even if China gave up the resources in the Spratlys to the Southeast Asian countries and simply bought oil and gas from the latter, it might still be able to do so on better terms than if it had purchased the same amount of oil and gas from other parts of the world.<sup>198</sup> It is thus not unlikely that China will find joint management within the Prescott line an acceptable scenario, independently of the arguments concerning the scheme’s fairness advanced earlier. Of course, whether China—or, for that matter, any of the other claimant countries—will indeed accept such an arrangement will not be known until it is actually proposed.

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195. *Id.*

196. Xiaojie Xu, *Oil and Gas Linkages Between Central Asia and China*, at <http://www.rice.edu>.

197. *Id.*

198. Taking part in multilateral resource development in the South China Sea would presumably secure China even better terms, as well as make the resources available to China sooner.

## V. CONCLUSION

While limiting the discussion to certain existing proposed solutions to the Spratly disputes, this Article was intended to suggest a way of thinking about these proposals, and about the disputes in general, that is at odds with the prevailing discourse. Instead of viewing the contention over the Spratlys through the foggy lens of regional security, this Article has argued that scholars and policymakers should search for notions of fairness that allow the contenders to advance their dialogue. The Article's discussion of a particular notion of fairness applicable to the settlement of the Spratly disputes, as well as of the potential implementation of this notion of fairness in a joint management authority within the Prescott line, are quite schematic. Moreover, it may fairly be objected that, even as an outline, the argument for joint management authority is incomplete. In applying the principle of fairness (P), the argument emphasized the importance of giving weight to China and Vietnam's historical claims to the Spratlys. It was also pointed out that drawing the boundary of the joint management authority along the Prescott line possibly favors China. Finally, even after explaining how this latter imbalance might be addressed by suitably designing the political structure of the joint management authority, it was suggested that China might still come away with a decent bargain. It may thus seem that there has been too much focus on why China would be well served by accepting the joint management scheme with little showing that the scheme would strike others as fair.

A more persuasive case for a joint management authority in the Spratlys clearly requires a more full analysis of the interests of all potential participants, where even China's stakes have to be treated in a less cursory fashion. This more comprehensive analysis is beyond the scope of this Article, which aims only to identify the direction that such an analysis might take. The incompleteness of a discussion, however, does not imply lack of impartiality. In particular, the prominence of comments about China's claims and interests in this Article should not be interpreted as evidence of partiality towards China. An elaboration of this last point will also allow a quick review of some key contentions of this Article.

First, suppose that a joint management scheme in the Spratlys, such as one within the Prescott line, is acceptable to China. It would be a serious error to infer simply from this supposition that the scheme must be—or is *prima facie* likely to be—unacceptable in some way to the other Spratly claimants. Such an inference can only be based on a presumption of irreconcilable interests among the claimant countries. Despite a history of conflicting maritime claims

in the region, there is little empirical evidence in support of this presumption, which, shown in Part II, both has failed to generate sound predictions and is normatively at odds with the search for a peaceful solution. Indeed, this presumption has come to seem even more implausible in 2002 as ASEAN and China enter full negotiations regarding an ASEAN-China Free Trade Agreement that would liberalize trade in the region at an even faster pace than the countries' WTO memberships allow.<sup>199</sup> It is a serious question why these countries are taken to be forever doomed to conflict in their maritime claims when they find common interests in so many other substantive areas.

Second, it was assumed in Part III that China and Vietnam's territorial and maritime claims in the Spratlys based on historical title should be given some weight under international law. In addition, some proposals for allocation of control were rejected precisely because they give no weight to these claims. It is likely that this assumption, especially with respect to China's claims, will irritate some readers. But if the discomfort is merely due to the fact that China's claims are not examined more closely, then the reply is that close analysis of the complex territorial and maritime claims in the Spratlys is not the purpose of this Article. Rather, the Article explicitly builds on and refers to previous scholarly analyses.<sup>200</sup> Alternatively, it may be that these readers suspect that a closer examination of China's claims would lead to their complete dismissal. This outcome, however, is quite unlikely in view of the scholarly consensus alluded to at the beginning of this Article, which holds that there are serious weaknesses in each country's claims. In particular, Vietnam and the Philippines' claims to the Spratlys are as expansive as China's and also rest on uncertain foundations.<sup>201</sup> Consequently, any attempt to undermine a particular country's claim is likely to raise doubts about the claims of other countries as well, at least if it is to remain impartial. Such a negative tactic is then likely to lead to a subjective and futile exercise of deciding which country's claims are less unworthy. To say that no country's claims to the Spratlys can be completely dismissed, on the other hand, is precisely to say that these claims will be given some weight under international law. Moreover, it is clear that this latter statement by no means implies that any

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199. Compare Press Release, WTO, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm), with News Release, International Economics, ASEAN—China Free Trade Agreement, at <http://intl.econ.cuhk.edu.hk>.

200. See generally AUSTIN, *supra* note 1; VALENCIA ET AL., *supra* note 2; Denoon & Brams, *supra* note 3; Dzurek, *supra* note 3.

201. See *supra* note 136 and accompanying text (for a discussion of the Philippines' expansive claim to the Spratlys).

country's claims are superior to that of the others. The assumption we have made about the validity of China's claims, in other words, is in fact quite weak.

Third and finally, it should be recalled that the principle of fairness formulated in Part III.B. (principle (P)), which states that in any fair settlement of the Spratlys dispute, no party should be asked to sacrifice its legitimate claims either without a similar sacrifice on the part of all other parties or without adequate compensation, makes no reference to any country's particular circumstances or claims. The plausibility of the principle can be appreciated or debated in the abstract. Such an articulation of a general conception of fairness is perhaps the best guarantee we can have of impartiality in assessing concrete proposed solutions. It ensures that we do not confuse justice with advantage, equity with *realpolitik*. This is the case even when a particular application of the abstract principle is uncertain. For example, our application of principle (P) to the justification of a joint management authority within the Prescott line (in Part IV.B.) is certainly less clear-cut and more controversial than our application of the same principle (in Part III.B) in developing criticisms of certain allocation proposals. Even in the former case, however, the availability of an abstract articulation of the notion of fairness establishes a point of reference. It assures us that we are trying to apply a notion of fairness that is broadly acceptable, and not operating only with China or Vietnam or any other country's sense of fairness. And it is the hope of this Article to have shown that, at present, it is precisely in this regard that scholarly discussion can make the greatest contribution to the real-world resolution of the Spratly disputes.



## APPENDIX: STRAIGHT BASELINES IN THE SOUTH CHINA SEA

Drawing a median line between “the outermost coastal projections and islands of all states bordering on the South China Sea,” on the one hand, and the “outermost islands, rocks, and occupied low-tide elevations of the Spratly Region,”<sup>202</sup> on the other, involves the use of straight baselines in two ways. First, littoral countries have used straight baselines to determine the extension of their maritime jurisdiction and exorbitant baselines may diminish the area falling under joint management.<sup>203</sup> Second, because the Spratlys are a collection of tiny islands, cays, and rocks, straight baselines connecting them seem inevitable for determining the median line between the Spratlys as a whole and bordering states.<sup>204</sup> Drawn without sufficient care, such baselines can diminish the areas that rightfully fall under the bordering states’ jurisdiction.<sup>205</sup>

The straight baselines at the margin of the South China Sea can now reasonably precisely be understood thanks to Victor Prescott’s recent discussion of the subject.<sup>206</sup> Malaysia and Brunei have not drawn any straight baselines,<sup>207</sup> and the Philippines’ archipelagic baselines around its recognized territory—not counting its claim to the Spratlys, of which more anon—are generally recognized as non-problematic.<sup>208</sup> Trouble arises from Vietnam and China’s use of straight baselines, and as far as delimitation around the Spratlys is concerned, there are two problems. First, two of Vietnam’s baselines that connect Hon Hai Islet to other points (see Exhibit 10) are objectionable, “[enabling] Vietnam to claim 14,000 square nm of internal waters and territorial waters than would have been obtained by” more appropriate baselines.<sup>209</sup> Presumably, if these baselines were used to delimit the median line from Spratly features, the area on the other side of the median line would have been diminished by at

202. PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6, at 5-6.

203. For a study of the substance and history of international law regarding straight baselines, see generally W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION (1992). See also generally J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS (1994).

204. See generally REISMAN & WESTERMAN, *supra* note 203.

205. *Id.*

206. See generally PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6.

207. *Id.*

208. PRESCOTT, MARITIME JURISDICTION IN SOUTHEAST ASIA, *supra* note 7, at 14.

209. PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6, at 11-12.

most 7,000 square nm (half of 14,000). To appreciate the significance of this impact, it is useful to know that

[the] total area [within the Prescott line] is 172,000 nm; the area attributable to Scarborough Reef is 54,000 square nm of which 7,500 overlaps with the Spratly Islands region. This means that the total area related to the Spratly Region including Scarborough Reef is 218,500 square nautical miles. . . . [The] marginal area of the South China Sea has an area of 585,500 square nm.<sup>210</sup>

Secondly, China has drawn straight baselines around the Parcel Islands in ways that, according to Prescott, violate international law.<sup>211</sup> Through liberal baselines, “China gains [an additional] 2,800 square nm of internal waters and territorial waters” than it would under more appropriate baselines (see Exhibit 11).<sup>212</sup> These gains derive from baselines that *surround* the Parcel group, however, whereas the only baselines that would affect the drawing of the median line with respect to the Spratlys are those that face the Spratlys. Therefore it is likely that China’s illegitimate baselines in the Parcels have a negligible effect on the Prescott line.

Straight baselines in the Spratlys raise completely different issues. Here, with the exception of the Philippines, all claimants will be able to use only normal baselines along fringing reefs as prescribed in Article 6 of UNCLOS, and “there are no obvious opportunities . . . to draw straight baselines in accordance with Article 7.”<sup>213</sup> By contrast, the Philippines, in virtue of being an archipelagic state, can draw—and has drawn—archipelagic baselines around the Spratly features.<sup>214</sup> If the Philippines can claim the Spratly features, then the water within these baselines would become archipelagic waters. In this sense, the Philippine claim to the Spratlys is more sweeping than either Vietnam or China’s claims to all of the Spratly islands.

Prescott proposed two sets of adjustments to the Philippines’ archipelagic baselines, one of which, because it is roughly perpendicular to the median line between the Spratlys and the Philippines, has no effect on the median line (see Exhibit 12).<sup>215</sup> The

210. *Id.* at 6-7.

211. *Id.* at 17-19. Prescott also criticized China’s straight baselines drawn near and around Hainan Island. *Id.* at 13-17. However, because “the Prescott line” as a median line is measured from the Parcels, the Hainan baselines presumably have no effect on the Prescott line.

212. *Id.* See also *infra* Exhibit 11.

213. *Id.* at 34.

214. *Id.* at 31-34 (describing two Philippine senate bills that specified—and reduced—Marcos’ 1978 Kalaya’an claim). Philippine claims to the Spratlys have always left out three reefs in the Spratly group that lie on Malaysia’s continental shelf. PRESCOTT, MARITIME JURISDICTION IN SOUTHEAST ASIA, *supra* note 7, at 18-21.

215. PRESCOTT, LIMITS OF NATIONAL CLAIMS IN THE SOUTH CHINA SEA, *supra* note 6, at 33.

other adjustment “would reduce the archipelagic waters by about 1500 square nm.”<sup>216</sup> It is not clear, however, whether Prescott’s drawing of the median line is measured from baselines related to the Philippines’ archipelagic baselines. Because the Prescott line was originally drawn not with a Spratly joint management authority in mind, it is likely that the Spratly baselines adopted were less precise, serving only heuristic purposes.

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216. *Id.*

## **EXHIBITS**

## **Exhibit 1**

## **Exhibit 2**

## **Exhibit 3**

## **Exhibit 4**



## **Exhibit 5**

## **Exhibit 6**

## **Exhibit 7**

## **Exhibit 8**

## **Exhibit 9**

## **Exhibit 10**

## **Exhibit 11**

## **Exhibit 12**