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Freeze the tropical seas

An ice-cool prescription for the burning Spratly issues!

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Recently, the Spratly crisis erupted again. This time, a Sino-Filipino military confrontation took place in the Philippines-claimed area of the archipelago. Although both sides demonstrated a high degree of self-control, the old problem remains and could explode again at any time. The reason for the latest episode is not difficult to understand. Past efforts only touched upon the tip of the iceberg. While calling for shelving of the sovereignty issue, they never indicated how this was to be brought about and very little progress has been made in the negotiations in the past several years. The author submits that the only solution, for the present at least, is the Antarctic formula. Although one might argue that the Antarctic regime, at first sight, does not fit the Spratly situation, the legal foundation of the claims to the Spratlies is comparable to that in the Antarctic case. Moreover, there are no sector claims in the disputed area, which makes the Antarctic approach even more appropriate in the South China Sea. Copyright © 1996 Elsevier Science Ltd

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Introduction to the Spratlies—the legally disarrayed ‘Dangerous Ground’

The South China Sea has nearly 200 uninhabited islands that are hardly visible on an ordinary map.¹ They are divided into four main groups: the Pratas Islands (Dungsha Qundao), the Paracel Islands (Xisha Qundao), Macclesfield Bank (Zongsha Qundao) and the Spratly Islands (Nansha Qundao).² Most of them are coral reefs that cannot sustain human habitation.³ For this reason these islets had been largely ignored for most of history⁴ and were used only by fishermen and sailors in need of shelter or as landmarks.⁵ In 1969, however, a United Nations seismology report suggested that there might exist substantial resources of petroleum and natural gas under the China Seas.⁶ This renewed international attention in the area.⁷ This is particularly true of the Spratlies since the Philippines found, in 1978, economically exploitable oil and gas reserves there.⁸ Due to these tangible economic benefits⁹ the Spratly Island group has become the focus of South China Sea contests.¹⁰ Since then, the coastal states on the South China Sea littoral have become increasingly entangled in a growing web of conflicting unilateral assertions to varying degrees of competence over the control of these insular formations, as well as the utilization of living and non-living resources in their vicinity.¹¹

The Spratly Islands are designated on mariner's charts as ‘Dangerous Ground’.¹² Geographers do not agree on a single definition of the area occupied by the islands that constitute this particular group, but most observers include in the Spratly group those islands found in the South China Sea south of 12° north and east of 111° but excluding islands within 40 nautical miles (nm) of the coast of Brunei and Malaysia and those found within the treaty limits of the Philippines.¹³ Thus the

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¹C.H. Park, 'The South China Sea disputes: who owns the Islands and the natural resources?' *ODIL*, Vol 5 (1), 1978, p 28.

²D.J. Dzurek, 'Boundary and resource disputes in the South China Sea', *Ocean YB*, Vol 5, 1985, p 259.

³J.M. Van Dyke and D.L. Bennett, 'Islands and the delimitation of ocean space in the South China Sea', *Ocean YB*, Vol 10, 1993, p 54.

⁴*Ibid.*

⁵*Op cit*, Ref 1.

⁶Generally see K.O. Emery *et al.*, 'Geological structure and some water characteristics of the East China Sea and Yellow Sea', *Technical Bulletin*, No 2 (Committee for the Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas [CCOP] of the United Nations Economic Commission for Asia and the Far East [ECAFE], 1969). See also R. Haller-Trost, *The Spratly Islands: A Study on the Limitations of International law*, Occasional Paper No 14 (Canterbury, Kent, Centre of South-East Asian Studies, University of Kent at Canterbury 1990) pp 54–55.

⁷G.M.C. Valero, 'Spratly archipelago dispute: is the question of sovereignty still relevant?' *Marine Policy*, Vol 18 (4), 1994, p 314.

⁸S. Davidson, 'South East Asia: the Spratly Islands', *IJECL*, Vol 3 (4), 1988, p 347.

⁹L.G. Corder, 'The Spratly Islands dispute and the law of the sea', *ODIL*, Vol 25 (1), 1994, p 61.

¹⁰K. Sun, 'Dawn in the South China Sea? A relocation of the Spratly Islands in an everlasting legal storm', *SAYIL* Vol 16, 1990/91, p 35.

¹¹Valero, *op cit*, Ref 7.

¹²M.H. Katchen, 'The Spratly Islands and the law of the sea: "Dangerous Ground" for Asian peace', *Asean Survey* Vol 17 (12), December 1977, p 1170.

¹³J.R.V. Prescott, *The Maritime Political Boundaries of the World*, 1985, p 218.

¹⁴Katchen, *op cit*, Ref 12, p 1169.

¹⁵H. Chiu, 'Spratly Archipelago', in *Encyclopedia of Public International Law: Geographic Issues* IXL, 1990, p 357.

¹⁶Dzurek, *op cit*, Ref 2.

¹⁷J.V. Prescott, *Maritime Jurisdiction in Southeast Asia: a commentary and map* (Honolulu: East-West Center, Environment and Policy Institute, 1981, 32–33).

¹⁸*Ibid.*, p 30.

¹⁹Dzurek, *op cit*, Ref 2.

²⁰H. Chiu and C.H. Park, 'Legal status of the Paracel and Spratly Islands', *ODIL*, Vol 3(1), 1975, p 23, footnote 16.

²¹Chiu, *op cit*, Ref 15.

²²C. Hobday, 'The Spratly Islands', in A.J. Day, ed, *Border and Territorial Disputes* 1982, p 329.

²³Dzurek, *op cit*, Ref 2, pp 259 and 261.

²⁴Valero, *op cit*, Ref 7, p 317. See also Davidson, *op cit*, Ref 8 and Sun, *op cit*, Ref 10. In addition to these five claimant states, Brunei has staked its claim to Louisa Reef, one of the 'Southern Shoals'

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Spratly Islands form an irregular ellipse¹⁴ consisting of more than 50 islets, shoals, reefs or cays,¹⁵ scattered over an area of about 70 000 sq nm.¹⁶ The core of this oval is bordered by Louisa Reef in the south (6° 20' N 113° 4' E), Northeast Cay to the north (11° 18' N 114° 21' E), Northeast Cay to the north (11° 18' N 114° 21' E), Ladd Reef to the west (8° 38' 30" N 110° 40' 30" E) and Flat and Nanshan Islands to the east (10° 50' N 15° 49' E).¹⁷ This core from north to south is approximately 315 nm and from east to west 240nm.¹⁸ The islands are tiny. The largest, Itu Aba, is only 940 × 400 meters and rises about 8 feet above sea level.¹⁹ Spratly (Storm) Island, which is about 500m long and 300m wide, probably comes next in importance.²⁰ The centre of these islands is located at a point about 100 km from the Chinese island of Hainan, 700 km from the Paracel Archipelago, 400 km north-east of the northern tip of Borneo or Malaysia and the Palawan Island of the Philippines, and about 500 km from the Vietnamese coast.²¹ Generally speaking, the Spratlies occupy a position of strategic importance as they command the sea passage from Japan to Singapore.²² Moreover, their location may allow for extensive claims to offshore jurisdictions and convenient siting for oil drilling equipment.²³

At present, there are five countries—i.e. the People's Republic of China (PRC), the Republic of China (ROC; Taiwan), Vietnam, the Philippines and Malaysia—claiming, as part of their national territories, at least some of the Spratlies.²⁴ In the cases of the PRC and ROC, both states base their claims, in the main, on discovery, occupation and administration.²⁵ According to this line of argument, they first claim to have the earliest recorded usage of the Spratlies for fishing activities in the Western Han Dynasty (206 BC to AD 24).²⁶ During the 10th–16th centuries, according to them, the South China Sea was used as a principal Chinese transit route for world trade.²⁷ Moreover, they contend that they surveyed, worked and administered the islands in the period AD 206–220.²⁸ Specific records of transit were reported in 1292, during the Yuan Dynasty (AD 1280–1368), and in 1403–1433 by the Chinese navigator Chen-Ho of the Ming Dynasty (AD 1368–1644), when the Spratlies were first roughly charted.²⁹ In addition to these historical records, both claimants also invoke international treaties to boost their position.³⁰ For example, the PRC has cited the Franco-Chinese Treaty of 1887,³¹ article 3 of which provides that the frontier between Vietnam and China is a north–south line at 105° 43' north,³² as clear legal evidence placing the Spratlies on the Chinese side.³³ The ROC relies heavily on the 1952 Treaty of Peace between the Allied Powers and Japan³⁴ in support of its claim to the formations.³⁵ Article 2 para (f) stipulates that 'Japan renounces all right, title and claim to the Spratly Islands and Paracel Islands'.³⁶ In the case of Vietnam, the Vietnamese authority initially argued that it had established title over the Spratlies as early as 1776 when Nguyen Princes first sent detachments to exploit the islands.³⁷ The present Vietnamese government, however, does not refer to the above historical events.³⁸ It now only asserts that France effectively occupied nine islets of the Spratly Islands (including Itu Aba) in 1933.³⁹ In the same year the French Foreign Ministry issued a communiqué on taking possession of the islands in the archipelago and also published it in the official Journal of the French Republic (July 26, 1933).⁴⁰ Moreover, the French Cochinchina Governor Krautheimer issued an ordinance annexing the archipelago to Ba Ria province (Ordinance No. 4762—CP of December 21, 1933).⁴¹ After

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of the Spratlies, which is however permanently under water. Due to this fact, as a result, Brunei does not maintain any official military presence in the Spratly archipelago! See Valero, *op cit*, Ref 7, p 317, footnote 4.

²⁵H.Y. Chen, *Nan-hai chu-tao chu-ch'uan yu kuo-chi chung-t'u* (transl. from Chinese, *The Sovereignty of the Islands in the South China Sea and International Conflict*) 1987, p 105. See also Sun, *op cit*, Ref 10, p 40.

²⁶'ROC has sovereignty over Spratlys', *The Free China Journal* November 17, 1992, p 7.

²⁷Haller-Trost, *op cit*, Ref 6, p 37.

²⁸*Ibid.*

²⁹Chiu and Park, *op cit*, Ref 20, p 10.

³⁰Chen, *op cit*, Ref 25. See also Sun, *op cit*, Ref 10, p 46.

³¹The full title of the treaty is Convention to Delimit the Frontier between China and Tonkin (Vietnam) signed on June 26 1887. For its text, see *Hertslet's China Treaties* Vol 1, 3 edn, 1908, 315 pp.

³²*Ibid.*, 315.

³³Park, *op cit*, Ref 1, p 34. See also Van Dyke and Bennett, *op cit*, Ref 3, p 63; Davidson, *op cit*, Ref 8, p 350; Sun, *op cit*, Ref 10, pp 46–47; Chiu and Park, *op cit*, Ref 20, p 13; Chen, *op cit*, Ref 25, p 78; C. Hobday 'China–Vietnam', in Day, ed, *op cit*, Ref 22, p 279.

³⁴Text can be found in 'Supplement to Document', *AJIL*, Vol 46, 1952, pp 71–86.

³⁵Sun, *op cit*, Ref 10, p 47.

³⁶'Supplement to Document', *op cit*, Ref 34, p 72.

³⁷Valero, *op cit*, Ref 7, p 320. See also Chiu, *op cit*, Ref 15, p 358.

³⁸*Ibid.*

³⁹*Ibid.* See also Van Dyke and Bennett, *op cit*, Ref 3, p 67; Cordner, *op cit*, Ref 9, p 65; Katchen, *op cit*, Ref 12, p 1178; Chiu and Park, *op cit*, Ref 20, pp 8–9 and Hobday, *op cit*, Ref 22, p 330.

⁴⁰Chiu, *op cit*, Ref 37.

⁴¹*Ibid.* See also Chiu and Park, *op cit*, Ref 20, p 9.

⁴²Chiu, *op cit*, Ref 37.

⁴³Dzurek, *op cit*, Ref 2, p 273.

⁴⁴Davidson, *op cit*, Ref 8, p 351.

⁴⁵*Conference for the Conclusion and Signature of the Treaty of Peace with Japan, San Francisco, California, September 4–8, 1951 Record of Proceedings* (Washington DC: Government Printing Office), 1951, p 263. See also Chiu and Park, *op cit*, Ref 20, p 8, Haller-Trost, *op cit*, Ref 6, p 49 and Cordner, *op cit*, Ref 39.

⁴⁶Cordner, *op cit*, Ref 9, p 66. See also Dzurek, *op cit*, Ref 43 and Sun, *op cit*, Ref 10, p 57.

⁴⁷Cordner, *op cit*, Ref 46.

⁴⁸See Davidson, *op cit*, Ref 44. See also Dzurek, *op cit*, Ref 43 and Katchen, *op cit*, Ref 12, p 1179.

⁴⁹Y. Lee, 'Nan Chung-Kuo-hai Chung-hsia-yeh chih meng' (transl. from Chinese 'The dream of summer night in the South

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annexation, France built a meteorological station and a radio transmission station on the Itu Aba Island.⁴² In 1956, as a result of succession to French rights in the area,⁴³ the Vietnamese government incorporated the Spratlies into Phuog Tay province for the purpose of administration.⁴⁴ It was emphasized that the Vietnamese delegate once made a statement on September 7, 1951 at the 51 nation conference held in San Francisco to sign the peace treaty with Japan, reaffirming Vietnam's ownership of the archipelago, and was met with no objection at all, '[a]nd as we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our right to the Spratly . . . islands, which have always belonged to Vietnam'.⁴⁵ In the case of the Philippines, the claim to the islands is mainly based upon the 'discovery' of several islands, then asserted to be *terra nullius*, by a Filipino businessman and lawyer, Tomas Cloma.⁴⁶ In 1947 he claimed to have discovered a group of unoccupied islands,⁴⁷ and in May 1956 he proclaimed them as 'Kalayaan' (Freedomland).⁴⁸ This private act was followed by a press conference in 1956 in which the then Minister of Foreign Affairs of the Philippines, Carlos Garcia, stated that the Itu Aba and the Spratly Island proper, due to their proximity to the Philippines, belonged to his country.⁴⁹ In 1971, President Ferdinand Marcos declared that the Spratlies were 'derelict and disputed' and therefore title to them could be consolidated by occupation.⁵⁰ In June 1978, the Philippines finally incorporated, by Presidential Decree No. 1596, some islands of the Spratlies into its territory.⁵¹ In essence, the Philippine claim is said to be based upon 'history, indispensable need, and effective occupation and control'⁵² plus proximity.⁵³ With regard to the Malaysian claim, it is argued that some islets of the Spratlies are situated on its continental shelf.⁵⁴ In 1979, Kuala Lumpur published a map depicting its continental shelf in the area.⁵⁵ In 1983, Malaysian troops occupied Shallow Reef.⁵⁶ The characteristic of the Malaysian claim is that it employed a 'reverse' application of the concept of the continental shelf.⁵⁷

Generally speaking, no country's claim is considered *bona fide* by the others.⁵⁸ Moreover, no claimant is able to establish a firm title and no claimant can effectively negate the claims of the others.⁵⁹ Thus, possession of these islands has been long disputed.⁶⁰ For example, in 1976 there were reports of Philippine aircraft being fired upon by the Vietnamese while flying near Song Tu Tay (Southwest Cay).⁶¹ In 1988, Vietnamese and Chinese vessels exchanged gunfire in the Spratly region, leaving three Vietnamese soldiers dead and more than 70 missing.⁶² Recently, the situation in the area has been even more tense.⁶³ On February 2, 1995, the Philippines sent a patrol ship and reconnaissance aircraft to Panganiban Reef (or Mischief Reef), one of the areas Manila claims, to verify a report by a Filipino fishing boat captain.⁶⁴ He claimed that in January he was detained for a week by Chinese forces who had set up a base on the reef.⁶⁵ Although the reconnaissance flight confirmed the report, President Fidel Ramos did not reveal the news until five days later, when another local vessel carrying the mayor of nearby Pag-asa Island was turned away, allegedly by Chinese ships.⁶⁶ On February 8, Ramos said his government was protesting, through a 'firm aide-memoire', to the presence of Chinese vessels, in that China's actions were 'inconsistent with international law'.⁶⁷ On March 25, as a result, the Filipinos, after destroying concrete markers and small structures erected by the Chinese on three reefs,⁶⁸

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China Sea') *Central Daily News* May 29, 1956, p 2. See also Chen, *op cit*, Ref 25, p 121 and Sun, *op cit*, Ref 46.

⁵⁰'A 2000-year-old claim', *FEER*, Vol 113 (33), 1981, pp 30-3. See also Chen, *op cit*, Ref 25, p 22 and Sun, *op cit*, Ref 46.

⁵¹For the text of the Decree, see Nordquist M.H. and Park C.H. *North America and Asia-Pacific and the Development of the Law of the Sea: the Philippines*, Vol 1, 1981, p 14.

⁵²*Ibid.* See also Dzurek, *op cit*, Ref 2, p 274.

⁵³See footnote 49 and accompanying text *supra*.

⁵⁴K. Das, 'Perched on a claim', *FEER*, Vol 121 (39), 1983, pp 40-41. See also Davidson, *op cit*, Ref 8, p 352, Cordner, *op cit*, Ref 9, p 67, Sun, *op cit*, Ref 10, p 58 and Chiu *op cit*, Ref 15, p 359.

⁵⁵*Washington Post* September 15 1983. See also Haller-Trost, *op cit*, Ref 6, p 65.

⁵⁶Agence France Presse, 'Malaysia has troops on three Spratly Islands', June 27, 1988, 23:52:49, quoting Malaysian Deputy Foreign Minister Abdullah Fadzil Che Wan. See also Van Dyke and Bennett, *op cit*, Ref 3, p 74.

⁵⁷*Sea Changes*, Vol 8, 1988, p 15.

⁵⁸M.J. Valencia and M. Miyoshi, 'South-east Asian Seas: joint development of hydrocarbons in overlapping claim areas?', *ODIL*, Vol 16 (3), 1986, p 234.

⁵⁹Sun, *op cit*, Ref 10, p 35.

⁶⁰Van Dyke and Bennett, *op cit*, Ref 3, p 58.

⁶¹Prescott, *op cit*, Ref 17, pp 21-22.

⁶²Agence France Presse, 'China sets up air traffic control centers to cover Spratlys', June 10, 1988, 03:46:20, quoting Vietnamese sources. See also Van Dyke and Bennett, *op cit*, Ref 3, p 59.

⁶³Spratlys test ASEAN: reefs strain diplomatic relations' *China News* (in English) April 3, 1995, p 4.

⁶⁴'Territorial Imperative', *FEER* February 23, 1995, p 15.

⁶⁵*Ibid.*

⁶⁶*Op cit*, Ref 63.

⁶⁷*Op cit*, Ref 64.

⁶⁸The Philippines destroyed the Chinese boundary markers on the Spratlys; the PRC kept a low profile', *United Daily News* (in Chinese) March 26, 1995, p 10. See also 'The Philippines dismantled PRC's concrete marker on Mischief Reef' *United Daily News* (in Chinese) March 3, 1995, p 10; and 'The Philippine troops continued to destroy the PRC's boundary markers on the Spratlys' *United Daily News* (in Chinese) March 30, 1995, p 3.

⁶⁹The PRC demands that the Philippines release its 62 fishermen', *United Daily News* (in Chinese) March 29, 1995, p 10.

⁷⁰*Ibid.* See also footnote 63.

⁷¹'Patrol boats off to Spratlys', *China News* (in English) March 31, 1995, p 1.

⁷²'Cancelling the patrol mission to the Spratlys, the Patrol boats of the Seventh Peace Preservation Police Corps land on

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seized 62 Chinese fishermen and four boats for allegedly poaching in Philippine waters.⁶⁹ They were charged with illegal fishing despite Beijing's demands that they be released.⁷⁰ Moreover, the Philippines began to send more troops to the Philippine occupied parts of the Spratlies.⁷¹ In view of these escalated tensions, the present situation on the Spratlies is said, according to a ROC official, to be on the verge of armed conflict.⁷²

Legal nature of the dispute: an evaluation

The major issue to be resolved in the Spratlies dispute is of course that of sovereignty over the various islands, islets and cays of the archipelago.⁷³ At first glance, there seems to be no common basis for negotiation.⁷⁴ Moreover, it has been criticized that

'Assertions of historic title are ineffective as evidence for establishing the validity of a claim to sovereignty over disputed territory. At the outset, doubts regarding the authenticity of the earliest records, as well as the accuracy of the references made in them, are difficult to resolve with any satisfaction due to the ready availability of controverting evidence from competing sources. Consequently, historic titles are useful to claimant States primarily as a device to legitimize act of occupation undertaken more recently.'⁷⁵

However, a nexus does exist uniting the various claims to the islands.⁷⁶ This is based upon recognition that occupation, as a mode of acquiring title over territory, prevails over historic titles not validated by subsequent manifestations of jurisdiction.⁷⁷ Thus all five claimant states in practice insist upon establishing a correlation between an enforceable initial claim to territory arising from the discovery or absorption of *terra nullius* on the one hand and present actual possession on the other, as a precondition for the recognition of the legitimacy of the asserted title of sovereignty.⁷⁸

In other words, what is actually claimed by the PRC and ROC is that the Spratlies were *terra nullius* prior to their discovery and that they have been 'effectively occupied' by Chinese fishermen 'since time immemorial'.⁷⁹ Hence, the assertion of *terra nullius* status prior to Chinese discovery of the islands is undoubtedly valid.⁸⁰ Moreover, the ROC in effect expressly recognized this when it signed the 1952 Treaty of Peace with Japan.⁸¹ Since under the Treaty 'Japan has renounced all right, title and claim to . . . the Spratly Islands',⁸² the archipelago reverted to the status of *terra nullius*.⁸³ This is also true in the case of Vietnam which relies mainly on the argument of effective occupation.⁸⁴ After all, the French appeared to regard the islands as *terra nullius* when they first occupied some of the formation.⁸⁵ Malaysia actually has no other basis than recent 'effective control' of three insular features. This must be viewed on its merits in competition with other similar claims.⁸⁶ Finally, the Philippines even clearly stated that the Spratlies were *res nullius* and title to them could be consolidated by occupation.⁸⁷

As a result, the present situation on the Spratlies is really that there are contemporaneously competing state activities in the same parcel of territory.⁸⁸ In deciding questions of this kind, resort is often made to the test of effective control associated with 'effective occupation'.⁸⁹ In the *Island of Palmas Case*,⁹⁰ Arbitrator Huber clearly stated that 'discovery does not create a definite title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation'.⁹¹ According to him, 'an inchoate title could not prevail over the con-

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the Pratas', *United Daily News* (in Chinese) April 2, 1995, p 1. In a press conference, Lu Yu-Chun, Director-General of the National Police Administration (of the ROC), told the reporter that it is now very possible for the Philippine and Chinese troops to clash in the South China Sea because of their sovereignty dispute over some of the Spratties. The situation in the area is therefore 'quite dangerous'. See *ibid*. See also 'Spratly patrol postponed to avoid conflict' *China News* (in English) April 3, 1995, p 1.

⁷³Cordner, *op cit*, Ref 9, p 68. See also Park, *op cit*, Ref 1, p 52.

⁷⁴Cordner, *op cit*, Ref 9, p 62.

⁷⁵Valero, *op cit*, Ref 7, p 343.

⁷⁶Dzurek, *op cit*, Ref 53.

⁷⁷Valero, *op cit*, Ref 7, pp 343–344.

⁷⁸*Ibid*, p 334.

⁷⁹Haller-Trost, *op cit*, Ref 6, p 38. See also Cordner, *op cit*, Ref 74.

⁸⁰*Ibid*, p 65.

⁸¹English text of the Treaty can be found in UNTS 138 38 pp. Chinese text of it can be found in Tu H Chung-wai t'iao-yueh kuan-hsi chih p'ien-ch'ien (transl from Chinese *The Vicissitudes of Treaty Relations between China and Foreign States*) 1981, pp 281–283.

⁸²Article 2 of the Treaty.

⁸³Valero, *op cit*, Ref 7, p 340.

⁸⁴Cordner, *op cit*, Ref 9, p 66.

⁸⁵Valero, *op cit*, Ref 7, p 337.

⁸⁶Cordner, *op cit*, Ref 73.

⁸⁷See footnote 50 and accompanying text *supra*. See also Valero, *op cit*, Ref 7, p 342 and Davidson, *op cit*, Ref 54.

⁸⁸J. Brownlie, *Principles of Public International Law*, 4 edn, 1991, p 155.

⁸⁹*Ibid*.

⁹⁰*Island of Palmas Case*, 1928, *Netherlands v US RIAA* 2 829 pp. For a brief extract, see D.J. Harris, *Cases and Materials on International Law*, 4 edn, 1991, pp 173–180.

⁹¹*Ibid*, p 176.

⁹²*Ibid*, p 177.

⁹³Brownlie, *op cit*, Ref 88, pp 124 and 139.

⁹⁴*Ibid*, p 139.

⁹⁵Katchen, *op cit*, Ref 12, p 1180.

⁹⁶*Ibid*.

⁹⁷*Ibid*.

⁹⁸S. Burton, 'Tiny sparks for a major flash point', *Time* June 24, 1991, p 35.

⁹⁹D.C. Drigot, 'Oil interests and the law of the seas: the case of the Philippines', *ODIL*, Vol 12, 1982–83, p 50.

¹⁰⁰See Burton, *op cit*, Ref 98.

¹⁰¹Valencia and Miyoshi, *op cit*, Ref 58, p 246.

¹⁰²*Ibid*.

¹⁰³*Ibid*.

¹⁰⁴*Ibid*.

¹⁰⁵*Ibid*.

¹⁰⁶*Ibid*, p 214.

¹⁰⁷*Ibid*, pp 237–238.

tinuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State'.⁹² Hence, the essence of the problem now involves proof of possession by states, of manifestations of sovereignty legally more potent than those of other claimants, or, in brief, proof of a better right.⁹³ Of course, the intensity of state activity required will obviously be more in cases where a competing claimant takes an interest in territory than in the case of *terra nullius* in the strict sense.⁹⁴

Efforts in the past: a brief retrospection

In order to resolve the Spratties dispute, quite a number of efforts have been made in the past. These can be summarized as follows.

Firstly, in view of the fact that some effective occupations on specific islands have taken place from 1946 onwards, Katchen suggested that the ROC's claim to Itu Aba, which was occupied by ROC troops between 1946 and 1950 and has been re-occupied since 1955, should be recognized.⁹⁵ He also suggested that Vietnamese claims to the Spratly Island proper, which has been occupied since 1956, should also be recognized.⁹⁶ Moreover, the Philippines should likewise have rights to the islands they have occupied.⁹⁷

Secondly, Van der Kroet once called for 'determined efforts' by the Association of Southeast Asian Nations (ASEAN) and the feuding claimants to put an end to the squabbles of the past.⁹⁸

Thirdly, Drigot suggested that 'in the spirit of the *common heritage of mankind* concept it may be argued that ASEAN or some other configuration of nations in the region should combine forces for joint administration of the contested area and its resources on a trusteeship basis'.⁹⁹

Fourthly, De Venecia recommended that 'the only logical approach is to partition the South China Sea along the lines of Europe's North Sea Convention, or through the creation of a demilitarized five-nation condominium that could jointly develop the under-water resources'.¹⁰⁰

Fifth, Valencia and Miyoshi once suggested that, under one scheme, the Philippines could get the northeast portion extending from Marie Louise Bank in the north to Half Moon Shoal in the south and to Southampton Reefs in the west.¹⁰¹ This area includes the Reed Bank and sediment thickness up to 1 km.¹⁰² Vietnam and China could jointly get the western cluster extending from Trident Shoal in the north to Cay Marino in the south and westward to Ladd Reef.¹⁰³ This area includes most of the occupied islands and sediment pods up to 1 km in thickness.¹⁰⁴ This area could perhaps be further divided between Vietnam and China along a latitude line north of Fiery Cross Reef.¹⁰⁵ Moreover, they promoted the idea of joint development, which 'is, if not a legal obligation, a reasonable solution' to the present problem.¹⁰⁶ According to them, standard ingredients of cooperation of this kind should include unitization provisions for deposits which straddle the boundaries of the joint development area, procedures and principles for conflict resolution, and for transfer of technology, particularly if there is a great gap between the technical levels of the two entities, or if political difficulties exist between one of the partners and the home country of interested companies.¹⁰⁷

Sixth, President Lee Teng-Hui of the ROC and Premier Li Peng of the PRC respectively called for shelving of the sovereignty issue and

focusing on joint development.¹⁰⁸ President Lee of the ROC even contemplated cooperating with the PRC in exploration and exploitation of marine resources in the area, so as to defuse the explosive situation therein.¹⁰⁹

Generally speaking, however, all these efforts ended in failure. This is because, apparently, all the approaches mentioned above would necessarily involve some concessions from the claimants in the sovereignty disputes, which is currently not the case.¹¹⁰ (Present developments in this regard actually go in the opposite direction: 'The squabbles show no signs of abating' vividly describes a situation, where 'the claimants are not likely to lessen efforts to strengthen their ownership rights with an eye toward the future'.¹¹¹ Moreover, the Philippines expressly objects to the proposal of joint development of the Spratlies area since, it is argued, this leaves the question of sovereignty unsettled.¹¹²) Thus, it is the opinion of this author that no resolution will be possible without first *dealing with the issue of the ownership of the islands*. After all, 'sovereignty is not a divisible commodity'.¹¹³ In short, the sovereignty issue is unavoidable, no matter what the approach adopted to try to solve the problem in the future.¹¹⁴

The Antarctic Regime: the only practical way out of the hot water?

As mentioned above, the present problem does not lie in the detailed techniques of demarcation of maritime boundaries, but rather in the fundamental question—who owns what?¹¹⁵ Moreover, national sentiments may easily flare up in any dispute involving territorial claims in Southeast Asia by reason of the historic background and psychological implications,¹¹⁶ which will no doubt further add to the complexity.¹¹⁷ Under these circumstances, thus, it is submitted that the only feasible way (perhaps as a first step) to deal with the Spratlies as a whole seems to be the adoption of the basic formula created by the 1959 Antarctic Treaty.¹¹⁸ Article 4 of the regime stipulates

- '1. Nothing contained in the present treaty shall be interpreted as:
 - (a) a renunciation by any Contracting Part of previously asserted rights of or claims to territorial sovereignty in Antarctica;
 - (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
 - (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.'

The legal essence of this provision is that, in a word, non-recognizing states undertake during the operation of the treaty not to make protests in exchange for undertakings by claimant states not to assert present (or past) territorial sovereignty or to treat the non-repetition of protests as prejudicing the non-recognizing states' legal position.¹¹⁹ Although this has not resolved root questions of territorial sovereignty in Antarctica,¹²⁰ it has however been pointed out that the mechanism has

¹⁰⁸'The South Sea: When will both sides cooperate in development?' *Central Daily News* (in Chinese) April 7, 1993, p 3.

¹⁰⁹*Ibid.*

¹¹⁰Sun, *op cit*, Ref 10, p 59.

¹¹¹See Burton, *op cit*, Ref 98.

¹¹²'Territorial imperative', *op cit*, Ref 64, p 14.

¹¹³Dzurek, *op cit*, Ref 2, p 280.

¹¹⁴Sun, *op cit*, Ref 10, p 59.

¹¹⁵*Ibid.*, p 34.

¹¹⁶C.H. Park, 'Boundary delimitation in the South China Sea' in Johnston D.M. et al ed *International Symposium on the New Law of the Sea in Southeast Asia*, 1983, p 131.

¹¹⁷K.G. Nweihed, 'Delimitation principles and problems in the Caribbean', in F. Jhabrala, ed, *Maritime Issues in the Caribbean*, 1983, p 37.

¹¹⁸This is based upon author's LLD thesis *A Common Maritime Regime for the South China Sea*, 1994, University of Cape Town 572. Text of the Antarctic Treaty may be found in Triggs G.D. *International Law and Australian Sovereignty in Antarctica*, 1986, pp 325–30; Harris, *op cit*, Ref 90, pp 213–215.

¹¹⁹H. Fox, 'The relevance of Antarctica to the lawyer', in G.D. Triggs, ed, *The Antarctica Treaty Regime: Law, Environment and Resources*, 1987, p 82.

¹²⁰R. Trolle-Anderson, 'The Antarctic Scene: legal and political facts', in G.D. Triggs, ed, *op cit*, Ref 119, p 60.

been remarkably successful¹²¹ in that it has removed the need for the parties to the treaty to reassert repeatedly their respective views on the issues and has made it possible for the parties to cooperate peacefully in spite of differences of view.¹²² Moreover, this preserving prescription has laid down the basis on which all subsequent conventions can be linked to the Antarctic Treaty itself.¹²³

Other notable features of the Treaty regime include the demilitarized (article 1) and 'nuclear free' (article 5) character of the Antarctica and the provision for periodic meetings (in fact biennial) of the consultative parties (article 9).¹²⁴ The Consultative meetings have adopted over 150 (non-binding) recommendations concerning activities in Antarctica¹²⁵ and have led to other important conservation measures, particularly the 1972 Convention for the Conservation of Antarctic Seals¹²⁶ and the 1980 Convention for the Conservation of Antarctic Marine Living Resources.¹²⁷ The latter establishes a Commission charged with promoting the conservation of marine living resources, primarily krill.¹²⁸ In 1988, the Convention on the Regulation of Antarctic Mineral Resource Activities was adopted.¹²⁹ This provided for a permit system by which national operators (public or private) might explore for or exploit minerals subject to stringent environmental safeguards. However, it was later, in effect, superseded by the Protocol on Environmental Protection to the Antarctic Treaty, 1991.¹³⁰

In the present context, therefore, it is submitted that only the establishment of an Antarctic Treaty-like instrument could provide a basis for further progress.¹³¹ In this way, several basic objectives could be achieved. Firstly, this scheme should be able to allay the fear of the claimant states, at least to some extent, by, in addition to the 'freezing' of territorial claims (that is, the existent claims are secured and will not be undermined in any way in the future), preserving their non-recognizing position towards each other, so that they could start some serious cooperation in substance. The Antarctic experience shows that, with the issue of sovereignty diffused, there may be scientific cooperation rather than political conflict.¹³² Thus, this is probably the most important function of the regime. In the past, the issue of sovereignty effectively blocked every prospect of solving the Spratlies dispute. For example, as mentioned above, the Philippines once objected to the idea of joint economic development since, according to the Philippine argument, that leaves the question of sovereignty unsettled.¹³³ Moreover, the dispute over sovereignty aborted at least one conference in which the cooperation of marine scientific research in the South China Sea was the subject.¹³⁴ That was because the conferees in that conference were suspected of using the occasion to consolidate their respective territorial claims to the disputed islands.¹³⁵ Hence, the dealing with (not necessarily resolving) the sovereignty issue is necessarily the very first consideration of the author's proposal.¹³⁶

Secondly, this scheme could save a lot of time for the claimant states to do something other than protest. Indeed, because protest is sufficient to prevent possession from being peaceful and uninterrupted,¹³⁷ the claimant states spared no effort in the past to protest against one another. A recent example was Vietnam which filed two protests within four days about ROC troops firing upon its fishing vessel in the Itu Aba area.¹³⁸ Thus, the proposed mechanism could channel the energy of claimant states in a more constructive direction.

Thirdly, this may eventually lead to other suggested solutions such as

¹²¹G.D. Triggs, 'The Antarctic Treaty system: some jurisdictional problems', in G.D. Triggs, ed, *op cit*, Ref 119, p 88.

¹²²See Trolle-Anderson, *op cit*, Ref 120.

¹²³'Introduction' in Triggs, ed, *op cit*, Ref 119, p 56.

¹²⁴Harris, *op cit*, Ref 90, p 215.

¹²⁵*Ibid.*

¹²⁶Text of the Convention in *ILM* 11, 1972, 251 pp.

¹²⁷Text of the Convention in *ILM* 19, 1980, 841 pp. For further comments on this instrument, see for example, R.F. Frank, 'The Convention on the Conservation of Antarctic Marine Living Resources', *ODIL*, Vol 13 (3), 1983, 291 pp and M. Howard, 'The Convention on the Conservation of Antarctic Marine Living Resources: a five-year review', *ICLQ*, 38 January, 1989, 104 pp.

¹²⁸Article VII (i) of the 1980 Convention.

¹²⁹Text of the Convention in *ILM* 27, 1988, 868 pp. For further discussions in this respect, see for example, C.C. Joyner, 'The evolving Antarctic Mineral Regime', *ODIL*, Vol 19, 1988, pp 73-95, and K. Sun, 'The Antarctic Mineral Regime and the Common Heritage of Mankind', *Sea Changes*, Vol 10, 1989, pp 67-76.

¹³⁰Text in *ILM* 30, 1991, 1455 pp.

¹³¹See also Sun, *op cit*, Ref 118, p 574.

¹³²See Harris, *op cit*, Ref 124.

¹³³See footnote 112 and accompanying text *supra*.

¹³⁴The 3-day conference was held in Manila, the Philippines, from May 31 to June 2 1993. See 'The South Sea Conference: the ROC demands that the states "open the backyard"' *Central Daily News* (in Chinese) June 4, 1993, p 1.

¹³⁵'With the failure in discussions on the scientific matters, the political goals were not achieved either' *Central Daily News* (in Chinese) June 5, 1993, p 2.

¹³⁶*Cf* the last paragraph of previous section.

¹³⁷L. Oppenheim, *International Law* I, 8 edn, 1955, p 576. Some writers support, or seem to do so, the doctrine that prescriptive title arises even without acquiescence, simply by lapse of time and possession which is not disturbed by measures of forcible self-help. It has however been pointed out that such views are today exceptional and are not supported by state practice or jurisprudence. They generally antedate the period when forcible self-help and conquest were prohibited. See Brownlie, *op cit*, Ref 88, p 158.

¹³⁸'Two protests in four days: the motive of Vietnam is worth noting', *China Times* (in Chinese) April 3, 1995, p 3.

¹³⁹Indeed, Starke argues that it is not impossible that the Antarctic Treaty regime could evolve into a condominium. See J.G. Starke, *Introduction to International Law*, 10th edn, 1989, p 116.

¹⁴⁰See footnote 106 and accompanying text *supra*.

¹⁴¹See footnote 99 and accompanying text *supra*.

¹⁴²See Sun, *op cit*, Ref 131.

¹⁴³C.H. Park, 'Offshore oil development in the China Seas: some legal and territorial issues', *Ocean YB*, Vol 2, 1980, p 316.

¹⁴⁴Indeed, of the five claimant states, only Taiwan now still refrains from doing so. The others, including the PRC, Vietnam and the Philippines, have already started oil development in the disputed Spratlies area. See 'The waves of the South Sea are too turbulent; Taiwan is scared away', *The Journalist* (in Chinese) Vol 422, April 9–April 15, 1995, p 44.

¹⁴⁵B.A. Hamzah, *The Spratlies: What Can be Done to Enhance Confidence* (Kuala Lumpur, Institute of Strategic and International Studies Malaysia), 1990, pp 18–21.

¹⁴⁶Harris, *op cit*, Ref 90, p 212.

¹⁴⁷M.J. De Wit, 'Reshaping the Antarctic Treaty, with implications for South Africa', *International Affairs Bulletin*, Vol 9 (2), 1985, p 44.

¹⁴⁸M. De Quintal, 'Sovereignty disputes in the Antarctic', *SAYIL*, Vol 10, 1984, p 161.

¹⁴⁹C.C. Joyner, 'Antarctica and the law of the sea: rethinking the current legal dilemmas', *SDLR*, Vol 18, 1981, p 417.

¹⁵⁰*Ibid*, pp 417–418. See also Harris, *op cit*, Ref 146. For more discussions on the respective claims, see De Quintal n148 162–175. Generally see also Auburn F.M. *Antarctic Law and Politics*, 1982.

¹⁵¹See Harris, *op cit*, Ref 146.

¹⁵²*Ibid*. For the reply of the Department of State of the United States to Admiral Byrd, see G. Hackworth, *Digest of International Law* 1, 1940, p 399. For a succinct discussion of this event, see J.P.A. Bernhardt, 'Sovereignty in Antarctica', *California Western ILJ*, Vol 5, 1975, pp 320–23.

¹⁵³Starke, *op cit*, Ref 139, p 163.

¹⁵⁴*Ibid*. See also Joyner, *op cit*, Ref 149, p 422.

¹⁵⁵In 1955, the United Kingdom instituted proceedings before the International Court of Justice by unilateral application asking the Court to rule on disputes resulting from overlapping claims in the Antarctic Peninsula between the United Kingdom, on the one hand, and Argentina and Chile, on the other. However, the applications met with no response from Argentina and Chile. Hence, the Court, as a result, struck them off its list in 1956. See Harris, *op cit*, Ref 90, p 213.

¹⁵⁶CJ Pleadings *Antarctica Cases* (UK v Argentina; UK v Chile) 74. See also Harris, *op cit*, Ref 155.

¹⁵⁷In this case, the Antarctic was readily accepted as *terra nullius*. See G. Triggs, 'Australian sovereignty in Antarctica Part I', *Melbourne University LR*, Vol 13, p 127.

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the condominium,¹³⁹ the joint development zone,¹⁴⁰ the five-nation trusteeship,¹⁴¹ or, of course, final delimitation.¹⁴² In the meantime, Park correctly suggests that the states concerned proceed with seabed oil development in undisputed near-shore waters and gradually expand their operation seaward.¹⁴³ This policy has in effect already been adopted by the ROC.¹⁴⁴

Finally, it should be added that the proposed framework could prove an attraction to the states concerned in terms of the costs. Apparently, the costs of holding international conferences, with a view to adopting the Antarctic-Treaty-style instrument, would necessarily be much lower than those of military build-up on the specific islands.

The Antarctic Treaty: its applicability and limitation

At this juncture, one may oppose the present proposal saying that it is *not an exact fit* to the troublesome Spratly Islands situation.¹⁴⁵ It is however submitted that the Antarctic Treaty is in principle *applicable* to the disputed area. The reasons are as follows.

(i) The applicability of the Antarctic Treaty to the Spratlies

Antarctica is a huge continental land mass surrounded by deep oceans.¹⁴⁶ An ice-sheet of up to several kilometers in thickness covers this continental mass.¹⁴⁷ Lying in the inhospitable regions of the South Pole, it has since the late 19th century experienced an increase in activity.¹⁴⁸ By 1940, a number of national claims had been made, although it was not until the decade following World War II that they expressed serious interest in the Antarctic.¹⁴⁹ By this time seven governments, i.e. Australia, New Zealand, United Kingdom, France, Norway, Chile and Argentina, had made formal claims.¹⁵⁰ The only major part not officially claimed is Marie Byrd Land.¹⁵¹ That is because Admiral Byrd discovered it and claimed it for the United States, but his claim was not officially adopted.¹⁵² Although the claimant states invariably insist upon the inapplicability to polar regions, with their inaccessibility, climatic conditions, and lack of settlement, of the normal principles of physical assumption of control implicit in the international law of occupation,¹⁵³ they have however in practice sought to fortify their title by the ordinary methods of administrative control, state activity, etc, traditionally employed by states desiring to acquire title by occupation.¹⁵⁴ For example, the United Kingdom, in its applications in the *Antarctica Cases*,¹⁵⁵ clearly defended its sovereignty over Antarctica on the basis of 'historic British discoveries' followed by 'the long-continued and peaceful display of British sovereignty from the date of those discoveries onwards in, and in regard to, the territories concerned'.¹⁵⁶ Hence, it is submitted that the legal foundation of the claims over the Antarctic is actually the same as that in the Spratlies case.

At this juncture, of course, one may still oppose the idea by arguing that the subject-matter in the Antarctic is a continent,¹⁵⁷ whereas the Spratlies are islands. In responding to this, however, the present author must point out that in some prominent cases the international law of occupation, the subject-matter of which is *terra nullius*¹⁵⁸ did apply to islands. In the *Eastern Greenland Case*,¹⁵⁹ for example, the Permanent Court of International Justice upheld Denmark's sovereignty over Greenland as a whole, which is an island.¹⁶⁰ In the *Clipperton Island*

Case,¹⁶¹ the subject-matter, ie Clipperton, is 'a low coral lagoon reef, less than three miles in diameter'.¹⁶² In the *Island of Palmas Case*,¹⁶³ the insular formation in question is even smaller: it is only two miles long and less than a mile wide.¹⁶⁴ In the *Minquiers and Ecrehos Case*,¹⁶⁵ moreover, the International Court of Justice also applied the doctrine of effective occupation to groups of islands (ie the Minquiers and Ecrehos groups).¹⁶⁶ Thus, it is submitted that the Antarctic Treaty regime is legally applicable to the South China Sea, without substantial difficulties.

(ii) The absence of sector claims in the South China Sea

Moreover, it is to be noted that there are no sector claims in the disputed area of the South China Sea. This, it is submitted, could no doubt further facilitate the application of the Antarctic regime in the present context.

Indeed, the validity of the sector theory is suspect as a principle of contemporary international law.¹⁶⁷ Using claims based on this principle, certain states with territory bordering on the polar regions have asserted sovereign title to land or frozen sea within a sector defined by the coastline of the territory and by meridians of longitude intersecting at the North or South Pole as the case may be.¹⁶⁸ The proper formulation of the sector theory, as it is applied in the Arctic, is that it is an exceptional extension of sovereignty by a state whose territory already extends into the Arctic circle.¹⁶⁹ It is a claim to the polar extremities of the continent and to related islands lying polewards.¹⁷⁰ The territory thus claimed is either a part of, or adjacent to the same mainland and directly related to it geologically.¹⁷¹ By way of contrast, the Antarctic sectors are based on an arbitrary parallel drawn on the high seas and project towards an alien mainland, which is a reversal of the application.¹⁷² In either case, however, it has been pointed out that the sector principle is no more than a rough method of delimitation,¹⁷³ for the purpose of declaration of interests,¹⁷⁴ and has not become a separate rule of law.¹⁷⁵ Thus, the absence of sector claims in the South China Sea has removed what is probably the most controversial part of the original Antarctic regime.¹⁷⁶

In short, the Antarctic formula in the present case is intended to 'preserve' those effective occupations of various islands rather than sector claims, because the latter simply do not exist in the South China Sea. Indeed, the controversial nature of the sector theory is probably the main reason for some writers to oppose the proposed mechanism as a whole.¹⁷⁷ At this juncture, thus, it is to be emphasized that the present proposal does not include the introduction of sector claims. After all, the formula cannot preserve matters that are non-existent.

Conclusion

Generally speaking, the Spratlies dispute is now escalating, bit by bit, into an international crisis. For example, it has recently been reported that the PRC's troops remain on Mischief Reef.¹⁷⁸ At almost the same time, moreover, Vietnam accused the ROC of occupying another island and sending military personnel and equipment to it.¹⁷⁹ Thus, there seems to be an urgent need for claimant states to begin dialogue, with a view to avoiding armed conflict.

Because of the failure of the methods of the past it is suggested that in

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¹⁵⁸Starke, *op cit*, Ref 139, p 160.

¹⁵⁹*Legal Status of Eastern Greenland Case* (1933) *Denmark v Norway* PCIJ Reports Series AIB No 53.

¹⁶⁰Harris, *op cit*, Ref 90, p 186.

¹⁶¹*Clipperton Island Arbitration* (1931) (*France v Mexico*) AJIL 26, 1932, 390 pp.

¹⁶²Harris, *op cit*, Ref 90, p 183, footnote 19.

¹⁶³See footnote 90.

¹⁶⁴Harris, *op cit*, Ref 90, p 173.

¹⁶⁵*Minquiers and Ecrehos Case* (1953) (*France v UK*) ICJ Reports, 1953, 47 pp. For a brief extract of the case, see Harris, *op cit*, Ref 90, pp 187–189.

¹⁶⁶*Ibid*, p 187.

¹⁶⁷K. Van Zyl, 'Sovereignty in Antarctica', *Sea Changes*, Vol 2, 1985, p 48.

¹⁶⁸Starke, *op cit*, Ref 139, pp 162–163.

¹⁶⁹Van Zyl, *op cit*, Ref 167, p 47.

¹⁷⁰*Ibid*.

¹⁷¹*Ibid*.

¹⁷²*Ibid*.

¹⁷³Brownlie, *op cit*, Ref 88, p 151.

¹⁷⁴*Ibid*, p 152. See also Starke, *op cit*, Ref 153.

¹⁷⁵See Brownlie, *op cit*, Ref 173.

¹⁷⁶Indeed, Brownlie has three reservations here: the 'sector principle' has the defects of any doctrine based upon contiguity; its application is a little absurd in so far as there is a claim to a narrow sliver of sovereignty stretching to the Pole; and lastly it cannot apply to include areas of the high seas. Moreover, he points out, state practice is thought to support the propositions advanced. See Brownlie, *op cit*, Ref 173.

¹⁷⁷See, for example, footnote 145 and accompanying text *supra*.

¹⁷⁸Discussing the Spratlies dispute; PRC and ASEAN today talk', *United Daily News* (in Chinese) April 3, 1995, p 2. See also, 'The Mischief Reef: PRC's five-star flag is flying', *United Daily News* (in Chinese) April 4, 1995, p 10.

¹⁷⁹'Vietnam protests against ROC's firing upon Vietnamese ship: Ministry of Foreign Affairs [of the ROC] reaffirms the sovereignty over the South Sea', *United Daily News* (in Chinese) April 5, 1995, p 1. See also 'Vietnam accuses ROC of occupying another island in the Spratlies', *United Daily News* (in Chinese) April 11, 1995, p 3.

the present case the Antarctic treaty regime be adopted so as to prevent the deterioration of the situation. The basic idea here is quite simple: to 'freeze' the *status quo* of the Spratlies. With the issue of sovereignty defused, it is to be hoped that cooperation, rather than political confrontation, could take place. Geographically speaking, the proposed regime could apply to the area ranging from, say, 7–12° N and 111–118°E, in which most of the Spratlies can be found.¹⁸⁰ Moreover, each island under effective occupation could be allowed to have a maritime belt off its coast, up to a certain distance (not necessarily 12 nm), for security reasons. However, in remaining maritime areas freedom of navigation should be assured.

In short, claimant states in the Spratlies dispute should give the present proposal a chance. If they have tried other methods, why not this one? After all, it is generally agreed amongst them that the Spratlies question should be settled by peaceful means,¹⁸¹ isn't it?

¹⁸⁰See Dzurek, *op cit*, Ref 2.

¹⁸¹W.G. Stormont, 'Managing potential conflicts in the South China Sea', *Marine Policy*, Vol 18 (4), 1994, p 354.