

A modest proposal to help ASEAN reconcile their overlapping claims in the Spratlys by Michael McDevitt

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Because the multiple Spratly sovereignty claims largely overlap, attempting to unscramble these claims is generally considered too difficult. What follows is one way ASEAN claimants – the Philippines, Vietnam, Malaysia, and Brunei – could reconcile their competing claims in the Spratly Islands.

The reason for doing so is simple. It would set a positive example for subsequent resolution with China. It would also make it easier for ASEAN to speak with one voice to China regarding a resolution of overlapping claims, and would create a useful precedent for other maritime disputes in East Asia. It might also make it easier for each country to begin to exploit resources in their Exclusive Economic Zones (EEZ).

The following is how such an approach might unfold.

The least complicated of the overlapping Spratly claims are those between the Philippines and Malaysia. Reconciling these overlapping claims:

- Manila would renounce its claim to islands, rocks, and low tide elevations (LTE) that Malaysia currently controls, and vice versa. In practice, this would mean: the Philippines would renounce its claim to rocks named Eric, Investigator, and Marvelles Reefs and to the low tide LTE Ardasier Reef, which Malaysia controls, while Malaysia would renounce its claim to the Commodore Reef/Rizal Reef, which the Philippines controls.

Then, Malaysia would reconcile its claims with Vietnam:

- To make any claims reconciliation scheme work, Hanoi would have to take the essential step of compromising its claim to *all* of the Spratlys. Clearly, this would be difficult because of worries about setting a precedent that China might exploit. Hanoi would also need a compelling public rationale to avoid a nationalist outburst like that which took place when the Chinese National Offshore Oil Company (CNOOC) drilling rig began operations in the contested waters where Vietnam's and China's EEZs overlap. Such a rationale might argue that reconciliation with other ASEAN governments would strengthen its position in the Spratlys legally and militarily, as well as in the court of world opinion.
- Another enticement could prod Hanoi to participate in the reconciliation process: a 1998 legal precedent

suggests that its claim to *all* the Spratlys might not be upheld by an arbitral panel. Specifically:

The arbitration between Eritrea and Yemen is the case most analogous to the Spratlys. In that case sovereignty over the many islands in the Red Sea between the opposite coasts of Eritrea and Yemen was in dispute. The Tribunal found that the evidence did not support Yemen's claim of natural or physical unity for the entire island chain in dispute. Rather the Tribunal analyzed the evidence that applied to each of the six groups of islands and divided sovereignty over the groups between Eritrea and Yemen.

Third, if Hanoi agrees to the reconciliation process, then:

- Vietnam would renounce any claim to Brunei's only claimed Spratly feature: the LTE Louisa Reef.
- Malaysia would renounce its claim to Amboyna Cay and Banque Canada Reef, which Vietnam currently occupies.
- Vietnam would renounce its claim to the features Eric, Investigator, and Marvelles Reefs and the LTE Ardasier Reef, which Malaysia already controls.

These two steps would solve the claims overlap between Malaysia, Brunei, and Vietnam.

Fourth, the Philippines would have to reconcile its claims with Vietnam:

- Manila would renounce its claim in favor of Vietnam to Thitu Island (the second largest Spratly), Northeast Cay, and Loaita Island. In the process, Manila would also abandon its claim to the section of the Spratlys enclosed in its dotted-line box surrounding what it calls the Kalayaan Island Group (KIG), and disestablish that political entity (it was annexed in 1978). Obviously this would be very difficult for Manila, despite the fact that its claim has little or no legal credibility. This action would recognize the reality that the Philippines is never likely to attempt to force Vietnam, China, or Taiwan off the 18 features that those countries already occupy in the KIG, as well as the fact the features it currently occupies are essentially indefensible.

Finally, Vietnam would renounce its claim in favor of the Philippines to four features that Manila can credibly claim based on a principle of first discovery and effective occupation: West York, Nanshan, Flat Islands, and Lankiam Cay. Vietnam would probably argue that these small islands were covered by its original claim, but they are not clearly identified in the original French annexation document and there is little or no historical evidence to support continued activity to reassert sovereignty.

This action would complete the reconciliation of claims among ASEAN claimants. They would also have to recognize that LTEs and totally submerged features, such as Reed Bank or James Shoal, that are on the recognized continental shelf of one of them belong to that coastal state.

This approach comes close to the suggestion made by a number of observers that the best way to solve the Spratly dispute would be to resort to the well-established legal principle of *uti possidetis*, which means that in absence of agreement to the contrary, everybody is entitled to keep what they have. While the process suggested above is not a perfect example of this principle – because it leaves both China and Taiwan out of the process – among ASEAN claimants it comes close.

Finally the ASEAN participants would need to come to some agreement over what features they would consider an island, as defined by UNCLOS, and which features they would collectively agree are rocks. Because of the proximity of many of these features, 200-nm EEZs drawn from features that claimants assert are islands would overlap one another, and would overlap the EEZ drawn from the coastal base-line of each state. Reconciling EEZs is necessary to remove any ambiguity over ownership of resources.

The biggest problem with this proposal is China. What would Beijing do once it learned what was afoot, particularly since the Philippine-Vietnam facet of the deal would greatly strengthen Vietnam's position in the Spratlys? The features that the Philippines would cede to Vietnam would be the 2nd, 5th, and 10th largest of the 13 largest naturally formed features in the Spratlys. Would this action trigger China's use of force, seizing features before Vietnam could take possession?

In fact, given the very difficult compromises that Hanoi and Manila would have to make in giving up portions of their claims, plus the uncertainty surrounding Beijing's reaction, this modest proposal will likely never take place. It does, however, highlight the devilishly difficult problem of eliminating the Spratlys as a potential East Asian flashpoint.

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