A BROAD FRAMEWORK FOR THE EXPLORATION OF SOUTH CHINA SEA HYDROCARBON DEPOSITS IN THE CONTEXT OF THE TRANS-ASEAN GAS PIPELINE

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[Proposals to interconnect the existing gas infrastructure of ASEAN states by means of a Trans-ASEAN Gas Pipeline carry considerable potential for increased economic development, efficiency and improved energy security in South East Asia. Longer-term plans to expand the Trans-ASEAN Gas Pipeline into remote and stranded hydrocarbon deposits in the South China Sea are, however, more problematic. Much of the South China Sea is subject to overlapping and contradicting claims of sovereignty by several different nations. These claims are deeply embedded in the historical and political evolution of the region and have led to considerable international tension. Most notably, China makes significant claims to much of the South China Sea, including areas subject to ASEAN's gas development plans. It is unlikely that these conflicting claims will be resolved before the South China Sea's highly contested hydrocarbon resources are sought to be exploited. However, recent developments in the relationship between ASEAN and China indicate that an interim arrangement in respect of contested areas and joint development of the South China Sea is possible. Indeed, such an interim arrangement holds great potential to be economically, socially and politically beneficial to the entire region. The challenge is to develop a framework capable of unlocking this potential.]

CONTENTS

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I INTRODUCTION

The body of international law governing the extraction and exploitation of offshore energy and resources has been paid scant attention relative to the development of maritime law generally. However, interest has increased over the last decade as technology now allows for more efficient and viable extraction of these resources from the seabed. There are, of course, a number of regions in which certain offshore oil — and in particular gas — fields are subject to different claims of sovereignty by various nations. Arguably, over the next century, nowhere will such claims be of greater concern for global security and development than in the South-East Asian region.

Energy and energy security will become critical to the continued development and stability of the South-East Asian region over the coming century. The availability of reliable, secure, high quality and affordable energy supplies will have a clear impact on every component of continued regional development. In order to address these issues, the Association of South-East Asian Nations ('ASEAN')[1] has embarked on the Trans-ASEAN Gas Pipeline ('TAGP') project. The initial phase of the TAGP aims to link existing ASEAN gas pipelines. Over the longer term, it is envisaged that the TAGP will link ASEAN states to more stranded and isolated hydrocarbon deposits in the South China Sea.

There are many areas in this region subject to overlapping or contradicting claims of sovereignty by different nations. Importantly, two non-ASEAN jurisdictions are involved in some of these competing claims: the People's

[1] ASEAN was established under the *Declaration Constituting an Agreement Establishing the Association of South-East Asian Nations (ASEAN)*, opened for signature 8 August 1967, 1331 UNTS 235 (entered into force 8 August 1967). It comprises Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Thailand, Singapore and Vietnam: see ASEAN, *Overview Association of South Eastern Asian Nations* (2004) 1 <http://www.aseansec.org/147.htm> at 1 May 2004.

Republic of China ('China') and the Republic of China ('Taiwan'). Given the growing importance and scarcity of energy resources generally, it is highly unlikely that the relevant conflicting claims of sovereignty will be resolved before the exploitation of those resources is sought. Consequently, regional states will need to come to an arrangement whereby disputed resources can be exploited jointly whilst respecting, or at least not prejudicing, each other's claims of sovereignty or sovereign rights. This will require the cooperation of all of the states involved. Thus, in order for the TAGP to reach its potential and fully achieve its objectives, both China and ASEAN states need to be involved. Only with the political stability brought by a comprehensive regional arrangement will the TAGP attract the enormous amounts of private foreign investment and private involvement required.

The purpose of this article is not to suggest fixed maritime boundaries for any state in the South China Sea area. Further, this article will neither form a position as to the merit of any claims made by such states, nor consider these claims in depth. Instead, this article will discuss how international boundaries are determined and treated under international law (also known as delimitation). The article will then discuss delimitation in the context of unitising hydrocarbon deposits, as well as suggesting a broad model for a TAGP framework that includes China. The aim of the proposed framework is to provide comprehensive mechanisms for regional states to achieve a satisfactory interim outcome in contested areas of the South China Sea. This must be achieved whilst encouraging private investment, by securing private rights in order to facilitate exploitation of the Sea's hydrocarbon deposits. Finally, this article proposes a dispute resolution system for the framework, using elements from functioning international dispute resolution regimes aimed at securing both public and private rights.

II THE NATURAL GAS INDUSTRY IN ASEAN

The ASEAN region enjoys the world's fourth largest proven gas reserves.[2] Currently, the majority of gas produced within ASEAN is exported as liquefied natural gas to Japan, Korea and Taiwan. However, whilst the internal market for natural gas in the ASEAN region is growing, the level of foreign demand for ASEAN liquefied natural gas (particularly from Japan, Korea and Taiwan) is decreasing.[3]

During the 1990s, natural gas demand in ASEAN grew by an average of 14 per cent per annum. This growth is expected to continue at the slower rate of seven per cent per annum over the next 20 years.[4] Domestic demand for gas in the region has come primarily from the industrial sector and, to a lesser extent, for use in power generation. However, the power generation market is now growing at a faster rate than the industrial sector.

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[2] Christopher Joyner, 'The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation' in Ranjeet Singh (ed), *Investigating Confidence-Building Measures in the Asia–Pacific Region* (1999) 53, 67.

[3] Cecilya Malik, 'Natural Gas Demand and Supply in ASEAN' in Mohammed Wahid et al (eds), *The Natural Gas Based Industry in the 21st Century, Proceedings of the Sixth AEESEAP Triennial Conference* (2000) 531, 537.

[4] Ibid.

Singapore is the only country in ASEAN without any natural gas resources.[5] Gas reserves in other ASEAN countries range from five trillion standard cubic feet ('TSCF') in the Philippines to 166 TSCF in Indonesia. Indonesia possesses the largest component of ASEAN's proven reserves of natural gas, with a majority of these located in Natuna (49 TSCF) and East Kalimantan (47 TSCF). Total gas reserves in the region are approximately 339 TSCF. Of these reserves, 189 TSCF are proven, 95 TSCF are probably exploitable, and 55 TSCF are possibly exploitable.[6]

In order to develop the industry and ASEAN economies, significant energy infrastructure reform and investments are required.[7] To achieve this growth, ASEAN is in the very early stages of implementing the TAGP. The TAGP is intended to increase the efficient utilisation of existing, proven and tapped reserves, and to allow the region to develop probable and possible stranded and isolated gas fields[8] whose location or small size do not currently justify commercial production.

Typically, national oil and gas companies are responsible for the production, transmission and distribution of natural gas in the ASEAN region.[9] Foreign companies are often involved in technical operations such as gas exploration and development through contractual arrangements — most commonly joint ventures — with national oil and gas companies. With the exception of the Philippines, pipelines are mostly owned and operated by state-owned companies. This concentrated state ownership of pipeline infrastructure has led to monopolistic market conditions.[10] However, most ASEAN economies are engaged in the privatisation of their respective gas industries.[11] In any case, the sheer scale of the TAGP will require enormous private sector investment and involvement.

III THE TRANS-ASEAN GAS PIPELINE

A *Outline*

The TAGP will incrementally build upon existing national grids by adding a number of new bilateral pipeline connections.[12] The first stage of the TAGP will involve seven new gas pipeline interconnections:

(a) Duri to Melaka;
(b) West Natuna to Duyong;
(c) East Natuna to the Joint Development Area to Erawan;
(d) East Natuna to West Natuna to Kerteh to Singapore;

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5 Asia Pacific Energy Resource Centre, *Natural Gas Pipeline Development in Southeast Asia* (2000) 16–20 <http://www.ieej.or.jp/aperc/final/se.pdf> at 1 May 2004.

6 Malik, above n 3, 533–4.

7 US Embassy, Jakarta, Indonesia, *Trans-ASEAN Gas Pipeline — Just a Pipe Dream?* (2001) <http://www.usembassyjakarta.org/econ/aseanpipe1.html> at 1 May 2004.

8 Ibid.

9 Asia Pacific Energy Resource Centre, *Natural Gas Pipeline Development*, above n 5, 3.

10 Ibid 51.

11 Ibid.

12 Guillermo Balce, *Synergizing the Regional Power Transmission Plan with Gas* (2002) <http://www.aseanenergy.org/publications_statistics/papers/papers.htm> at 1 May 2004.

(e) East Natuna to Sabah to Palawan;
(f) Malaysia–Thailand Joint Development Area to the Malay–Thai border; and
(g) Pauh to Arun.[13]

The new pipelines will cover a distance of 4200 kilometres and absorb at least US$7 billion in investment and funding at the implementation stage.[14] In order to complete the initial phase, existing gas networks between member states will be linked by new pipeline infrastructure to the gas fields of the Andeman Sea, the Gulf of Thailand, the South China Sea, Kalimantan and Sumatra.[15] Four groups will oversee the TAGP:

(a) the ASEAN Energy Ministers;
(b) the ASEAN Council on Petroleum ('ASCOPE');
(c) the ASEAN Gas Consultative Council ('the Council'); and
(d) the TAGP Task Force.

ASCOPE will be a joint venture entity between participating TAGP states and it will oversee the implementation and operation of the TAGP.[16]

B *The* Memorandum of Understanding

At this stage, the TAGP is embodied in the *ASEAN Memorandum of Understanding on the Trans-ASEAN Gas Pipeline Project*.[17] The *Memorandum* was adopted by all ASEAN states on 5 July 2002, and broadly sets out the path ASEAN will take in developing the TAGP. It is important to note that such memorandums, particularly those adopted by ASEAN, are traditionally quite sparing in their detail. The initial implementation stages, including the policy framework of the TAGP were to be developed by 2004.[18] However, no additional formal instruments beyond the *Memorandum* for the implementation of the TAGP have been executed or ratified at this stage.

The *Memorandum* embodies a broad understanding that envisages a common market for gas within the ASEAN region. Briefly, it provides as follows:

(a) Member states will engage in, either independently or with other member states, studies relating to the:
    (i) financing of the TAGP;
    (ii) technical specifications for networks resulting from the TAGP;
    (iii) access and use of the network;
    (iv) security of gas supply and emergency supply arrangements;
    (v) health, safety and environmental issues resulting from the TAGP;

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13 ASEAN, *Report of the Senior Officials Meeting on Energy of the 19th ASEAN Ministers on Energy Meeting* (2001) 2 <http://www.aseanenergy.org/download/reports/some-meti/SOME%2019th%20AMEM.pdf> at 1 May 2004.

14 ASEAN, *Infrastructure* (2002) 3 <http://www.aseansec.org/idcf/pdf/Prev%20Infrastructure.pdf> at 1 May 2004.

15 Ibid 3.

16 Kamarul Yunus, 'ASEAN to Form Joint Venture Company to Manage Gas Project' *Business Times* (Kuala Lumpur, Malaysia), 15 February 2002, 3.

17 Opened for signature 5 July 2002 <http://www.aseansec.org/6578.htm> at 1 May 2004 ('*Memorandum*').

18 ASEAN, *Hanoi Plan of Action* (1999) <http://www.aseansec.org/8754.htm> at 1 May 2004.

(vi) transit rights, including the issuance of permits, licences, consents or other necessary authorisations in relation to gas being transported through the territory of an ASEAN member state;
(vii) relaxed taxation and tariff regimes in relation to the TAGP; and
(viii) potential further economic use of abandoned pipelines in member states.

(b) ASCOPE will initiate the formation of the ASEAN Gas Consultative Council. The Council will comprise representatives from member states, ASCOPE members and the ASEAN Centre for Energy. The Council will assist ASCOPE in the implementation of the *Memorandum*.
(c) Any member state, on the basis of security, public order or public health, can suspend for a maximum of 60 days, in whole or in part, the implementation of the *Memorandum*.
(d) The *Memorandum* will remain in force for 10 years and may be extended by the consent of all member states.
(e) Member states may also withdraw from any participation in the *Memorandum*, and thus the project.[19]

C *Territorial Disputes in the South China Sea*

East Asian maritime boundaries are amongst the most contentious in the world.[20] Very few of these boundaries are recognised by all relevant parties.[21] For the region to gain the efficiencies and generate the returns required to make the TAGP viable, additional fields may have to be explored and exploited. This will create significant potential for regional tension, unless a comprehensive framework can be negotiated to ensure maximum benefit versus cost for all interested parties. Until the possibility of such tension is mitigated, or at least minimised, any investment in the TAGP by private actors will be riskier and more expensive than necessary.

In his discussion of the legal implications for constructing a gas pipeline from Papua New Guinea to Cape York, White identifies five categories of issues that are relevant to constructing a suitable framework for the TAGP.[22] For the purposes of this article, three of these categories will be discussed. In regards to the TAGP, these categories are, as paraphrased from White's suggestions:

(a) state sovereignty in respect of project infrastructure located in that state's territorial sea;
(b) sovereignty and sovereign rights in the various joint development areas; and

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19 *Memorandum*, above n 17, arts 3, 4, 7, 8(4), 8(5).
20 See Jonathan Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea' (1995) 89 *American Journal of International Law* 724.
21 Ibid 724–5.
22 Michael White, 'Australian Offshore Oil and Gas: Seabed and Water Column Issues' in Marcus Haward (ed), *Integrated Oceans Management: Issues in Implementing Australia's Oceans Policy* (2001) 109, 116.

(c) the implications of Exclusive Economic Zones ('EEZs') conflicting, overlapping with, or protruding into project areas.

This article deals with White's three points above in reverse order with respect to TAGP states. The merits of each state's claims in relation to its maritime boundaries in the relevant area must be determined. Once those claims are established, it will be possible to develop a comprehensive and multilateral blueprint of exactly where overlapping claims lie, along the basis upon which those claims are made. It is from this blueprint that resources can be shared through the unitisation procedure discussed below.[23]

IV DISPUTED FIELDS AND CLAIMS

A *Overview*

As the TAGP expands beyond the initial phase into the South China Sea to develop probable and possible stranded and isolated gas fields, it will move into the Sea's most heavily contested areas. Already, many of the natural gas fields currently being exploited by ASEAN member states are close to, within, or overlapping with, the disputed Spratly Islands area. Further, two non-ASEAN sovereign states, Taiwan and China, also make claims over certain disputed areas in the region.[24] Current tensions in the region have hindered a negotiated outcome to the sovereignty disputes in the South China Sea.[25] The particularly volatile Spratly Islands issue is one such sovereignty dispute and has long been one of the greatest threats to regional security and cooperation.[26] These tensions carry security implications far beyond the region in which they immediately occur.[27]

Indeed, China's expansive claims go well beyond the Spratly and Paracel Islands. China effectively claims all of the South China Sea. Consequently, even much of the initial phase of the TAGP will take place within areas claimed by China. For example, China's maps indicate a claim to the Natuna Islands in the south-west of the South China Sea.[28] The Natuna Islands are well within the

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23 A definition and description of the process of 'unitisation' is provided in Part VII(E) of this article.

24 For example, both China and Taiwan make claims to the Spratly Islands, a small group of islands lying in the South China Sea, some within areas also claimed by various ASEAN states. Some of those islands are either known to, or suspected of, having hydrocarbon deposits within their close proximity. See Michael Bennet, 'The People's Republic of China and the Use of International Law in the Spratly Islands Dispute' (1992) 28 *Stanford Journal of International Law* 425, 425–7.

25 Joyner, above n 2, 53.

26 Gareth Evans, Minister for Foreign Affairs, 'Australia, China and the Region' (Speech delivered to the Chinese Association of Victoria and the Chinese Chamber of Commerce of Victoria, Melbourne, Australia, 24 August 1995) <http://www.dfat.gov.au/archive/speeches_old/minfor/geccc.html> at 1 May 2004.

27 Alexander Downer, Minister for Foreign Affairs, 'Australia and Asia: Taking the Long View' (Speech delivered to the Foreign Correspondents' Association, Sydney, Australia, 11 April 1996) <http://www.dfat.gov.au/geo/na/media/asiadown.html> at 1 May 2004.

28 US Department of Energy, *South China Sea Region* (2003) 2 <http://www.eia.doe.gov/emeu/cabs/schina.pdf> at 1 May 2004.

initial phase of the TAGP[29] and are also subject to claims by Malaysia and Indonesia. In addition, China claims the Malampaya and Camago fields — also claimed by the Philippines, and the Malay Sarawak fields.[30] Each of these fields fall within the initial phase of the TAGP. As the TAGP reaches into more isolated and stranded areas of the South China Sea, these problems will become significantly more acute.

The normal problems arising from the need for a suitable interim arrangement under international law with respect to natural resources located in disputed maritime areas are even more complex in the TAGP Area.[31] Despite this, if the TAGP is followed through with the involvement of China, it carries great potential not only to improve energy security and economic development throughout the South-East Asian region, but also for broader security and political stability in the region.

B *China, the South China Sea and the TAGP*

The need for a comprehensive regional arrangement in the South China Sea — in particular for the Spratly Islands — has already been proposed by Indonesia.[32] A TAGP reaching into stranded and isolated hydrocarbon deposits in the South China Sea offers one way to assist in achieving such an arrangement. Further, the security and viability of the TAGP require the involvement of China in areas subject to competing claims in respect of the initial phase and beyond.

China's approach to claiming sovereignty over the Spratly Islands and other geographical features in the TAGP Area is based on an extremely flexible application of some common and less common principles of international law,[33] together with occasional acts of belligerence.[34] The *Treaty of Peace with Japan*[35] determined in part Japan's postwar boundaries, and abolished Japanese wartime claims of sovereignty over the Spratly Islands.[36] However, that treaty did not provide for any reversion of sovereignty to other states in Japan's absence, and likewise it did not grant the Islands to any particular state.[37] China has taken this to be a de facto confirmation of its claim to sovereignty over the Islands,[38] either

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29 ASEAN, *Report of the Senior Officials Meeting on Energy of the 19th ASEAN Ministers on Energy Meeting* (2001) 2–3 <http://www.aseanenergy.org/download/reports/some-meti/SOME%2019th%20AMEM.pdf> at 1 May 2004.

30 US Department of Energy, *South China Sea Region*, above n 28, 2.

31 For a brief discussion on the Spratly dispute, see Michael Bennet, above n 24.

32 Roseann Bassler, 'International Disputes over Control of the Oceans' (1995) 7 *Georgetown International Environmental Law Review* 855, 856.

33 Bennet, above n 24, 446.

34 Chinese naval patrols are sometimes used in areas subject to overlapping claims: Joyner, above n 2, 68–9.

35 Opened for signature 8 September 1951, 136 UNTS 45 (entered into force 28 April 1952). This is also known as the *1951 San Francisco Peace Treaty*.

36 For a good discussion on this treaty, see Seokwoo Lee 'The *1951 San Francisco Treaty* with Japan and the Territorial Disputes in East Asia' (2002) 11 *Pacific Rim Law and Policy Journal* 63.

37 Ibid 96.

38 Bennet, above n 24, 446–7.

by virtue of the power vacuum created by Japan's defeat in 1945[39] or based upon flimsy historical arguments.[40]

Indeed, China's interest in the region goes well beyond economic incentives.[41] Greater Chinese geo-strategic interests lie at the heart of China's position in relation to the South China Sea.[42] According to Garver, '[i]f the Spratlys are controlled by China … [it] will, *ipso facto*, become a 'South-east Asian nation' in the same sense that the United States is both an Atlantic and a Pacific nation or Russia both a European and Far Eastern one'.[43]

However, the Asian economic crisis of the late 1990s led to an improvement in regional relations, particularly between China and ASEAN.[44] Whilst China traditionally favoured only the joint development of resources in areas under an overlapping claim of China's sovereignty where its joint venture partners agree to recognise those claims,[45] its approach has been softening.[46] Indeed, there have been indications that China now favours an approach that encompasses the joint development of resources.[47] To date, China has favoured bilateral rather than multilateral joint development agreements.[48] However, given the number of overlapping claims in the TAGP Area involving more than two states, the TAGP requires a multilateral joint development arrangement.

China and a number of TAGP states have placed permanent structures on numerous features in the TAGP Area. Indeed, there have been limited clashes between several states in respect of the Paracel and Spratly Islands. China, Vietnam and the Philippines have been responsible for most of the permanent structures in the TAGP Area, as well as for the majority of physical clashes occurring there in respect of competing claims. The clashes have become much less frequent in recent years. Indeed, there has been a cooling of tensions in the region since the late 1990s.

In early 2000, the Philippines proposed a 'common code of conduct' for the South China Sea.[49] China responded by saying that whilst it would not agree to determining the dispute in a manner which did not reflect China's claims, it was open to joint development of the area.[50] This cooling of tensions, together with

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39 Ibid 437.

40 Ibid 446–7.

41 Chris Cockel, 'Expert Believes Oil May Come between US and China', *China Post* (Taipei, Taiwan), 28 April 2003.

42 Michael Leifer, 'Stalemate in the South China Sea' in Knut Snildal (ed), *Perspectives on the Conflict in the South China Sea* (1999) 1, 3.

43 John Garver, 'China's Push through the South China Sea: The Interaction of Bureaucratic and National Interests' (1992) 132 *China Quarterly* 999, 1028.

44 Frank Umbach, *The Regional Power Balance and Potential Hotspots* (2000) 15 <http://www.dgap.org/texte/panorama.pdf> at 1 May 2004.

45 Ibid 17.

46 Alexander's Gas & Oil Connections, *China and ASEAN Nations to Sign South China Sea Accord* (2002) <http://www.gasandoil.com/goc/news/nts24809.htm> at 1 May 2004.

47 See, eg, Ji Guoxing, 'China Versus South China Sea Security' (1998) 29 *Security Dialogue* 101, 107–10.

48 Denny Roy, Asia-Pacific Centre for Security Studies, *China and South East Asia: ASEAN Makes the Best of the Inevitable* (2002) 2 <http://www.apcss.org/Publications/APSSS/China%20and%20Southeast%20Asia.pdf> at 1 May 2004.

49 Paul Markille 'Living Together', *Economist* (London, England), 12 February 2000, 16, 17.

50 Ibid.

growing regional desire to reach a non-confrontational resolution in respect of conflicting South China Sea claims, bodes well for the TAGP.

Cooperative frameworks have great potential to absorb tensions such as those existing in the South China Sea.[51] For an agreement in relation to the South China Sea to be comprehensive, it must include China.[52] Without such an agreement, it is possible that China would be able to lodge a third party suit in the International Court of Justice, claiming that an agreement which did not include China sought to determine China's rights and property between other countries without China's approval.[53] Whilst it is unlikely that such an argument could succeed given the weakness of China's claims to most of the relevant territory,[54] the possibility of a third party suit makes China's inclusion in negotiations essential.

As China reinstates itself as the pre-eminent regional economic and political force,[55] the opportunity for a non-confrontational resolution to the disputes in the South China Sea should not be passed up. The TAGP provides the region with such an occasion.

V THE *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA*

Although firm boundaries may not be determined under the TAGP, each state's territorial claim must be considered and areas subject to overlapping claims must be established.[56] Furthermore, investigations into the merits of each claim are required. The results of this analysis, along with commercial and political factors, will significantly influence the TAGP's structure.

The first step in resolving or accommodating maritime boundary disputes is the *United Nations Convention on the Law of the Sea*.[57] *UNCLOS* is an important starting point for comprehensive negotiations[58] as it provides the basic building blocks for international maritime law, including the extraction of natural resources and the delimitation of international boundaries.[59] Whilst not all

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51 Alexander Downer, Foreign Minister, 'Press Conference by the Hon Alexander Downer MP, Minister for Foreign Affairs at the ASEAN Regional Forum' (Singapore, 26 July 1999) 2–3 <http://www.dfat.gov.au/media/transcripts/1999/990726_asean3.html> at 1 May 2004 ('Press Conference at the ASEAN Regional Forum').

52 US Department of Energy, *South China Sea Region*, above n 28, 3.

53 For a general discussion on third party claims see Julie Sforza, 'The Timor Gap Dispute: The Validity of the *Timor Gap Treaty*, Self-Determination and Decolonisation' (1999) 22 *Suffolk Transnational Law Review* 481.

54 China's claims are mostly historical and often contradictory. For a discussion on China's claims in the South China Sea, see Omar Saleem, 'The Spratly Islands Dispute: China Defines the New Millenium' (2000) 15 *American University International Law Review* 527.

55 See Dennis Roy, *China and Southeast Asia: ASEAN Makes the Best of the Inevitable* (2002) <http://www.apcss.org/Publications/APSSS/China%20and%20Southeast%20Asia.pdf> at 1 May 2004.

56 White, above n 22, 116.

57 Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

58 Scott Snyder, *The South China Sea Dispute: Prospects for Preventative Diplomacy* (1997) <http://www.usip.org/pubs/specialreports/early/snyder/South_China_Sea1.html> at 1 May 2004.

59 *UNCLOS*, above n 57, art 77, provides that states may exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

ASEAN member states have ratified *UNCLOS*,[60] there is a strong argument that its provisions have become part of customary international law.[61]

UNCLOS is a defining instrument in the history and development of international law.[62] It 'modifies [the] political, economic and legal relationships' between states in many ways.[63] This is partly because the application of the provisions of *UNCLOS* by different states to individual situations will vary, as will the international perception of such applications.[64] However, despite the codification by *UNCLOS* of much maritime customary international law, it does not clearly provide for the delimitation of international maritime boundaries.[65]

Consequently, *UNCLOS* is applied differently to a given situation depending on the strategic, economic and national instruments at stake. Whilst a number of attempts have been made to more clearly define international maritime law in respect of extractive activities, there has been very little actual specific regulation.[66] Prior to the 20th century, maritime law was poorly defined and had developed on an ad hoc basis. Indeed, many of the principles have roots in the ancient laws of the Roman Empire.[67] However, the 20th century saw rapid developments in maritime law,[68] particularly as a result of the two World Wars and advances in technology which allowed for the exploitation of resources located further out to sea. These developments will have profound implications for interim joint development arrangements in the TAGP Area.

Predictably, nations have sought to apply the principles of *UNCLOS* to maximise their own territorial claims.[69] States often take an expansive approach as a starting point in any territorial dispute.[70] As a result, conflicting claims to sovereignty inevitably arise, particularly where economic interests and imperatives are concerned (such as hydrocarbon deposits). The process of

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60 Cambodia and Thailand have signed but not ratified *UNCLOS*. Indonesia, Malaysia, Myanmar, the Philippines, Singapore and Vietnam have signed and ratified *UNCLOS*. Laos, as a landlocked state, has neither signed nor ratified *UNCLOS*.

61 Louis Solm, 'The Law of the Sea: Customary International Law Developments' (1985) 34 *American University Law Review* 271. This is because, by virtue of *UNCLOS* having been so broadly ratified, the practice(s) mandated by the *Convention* also satisfy the criteria for making its provisions customary international law. The provisions of the *Charter of the United Nations* dealing with the use of armed force are another example in point: *UN Charter* arts 39–51.

62 Phillip Allott, 'Power Sharing in the Law of the Sea' (1983) 77 *American Journal of International Law* 1, 4.

63 Ibid 1.

64 Ibid.

65 Lian Mito, 'The *Timor Gap Treaty* as a Model for Joint Development in the Spratly Islands' (1998) 13 *American University International Law Review* 727, 733.

66 White, above n 22, 109.

67 David Mitchell, Phillip Collier and Frank Leahy, 'The *United Nations Convention on the Law of the Sea* and the Delimitation of Australia's Maritime Boundaries' [2001] 4 *Trans Tasman Surveyor* 50, 50.

68 Ibid 50–1.

69 The difference between Australia and East Timor in respect of the delimitation of the maritime boundary in the Timor Sea between those two countries as evidenced by the settlement reached in the *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, opened for signature 20 May 2002, [2002] ATNIF 11 (not yet in force) ('*Timor Sea Treaty*').

70 Victor Prescott, 'International Boundaries' (Paper presented at Marine Cadastre Workshop, Melbourne, Australia, 14 November 2002) 2–3 <http://www.sli.unimelb.edu.au/maritime/workshoppresentations/prescott.pdf> at 1 May 2004.

arriving at some kind of resolution to this problem, which is required in order to establish a framework for the TAGP, is known as delimitation.

VI DELIMITATION

Whilst this article does not intend to propose new boundaries or investigate the merits of individual claims made by ASEAN states or other states, a discussion of the relevant law is necessary. The TAGP Area poses particular problems to delimitation as it is subject to a number of conflicting and multi-layered claims of sovereignty based on different aspects of international law. A common approach applied in seeking to delimit a maritime boundary is first to make the largest claim possible.[71] As a result, this situation is hardly surprising given that the ambiguity of *UNCLOS*' provisions allows for differing interpretations as to the maximum extent of a country's possible claim.[72]

In large part, international law will be evidenced by general state practice.[73] However, even general state practice itself is of little assistance in the TAGP Area, as the TAGP states and China act in a wide variety of ways, both to protect their own claims of sovereignty and to prevent the claims of others. The actions taken by China, such as its naval patrols, are indicative of this point.[74]

The sheer number of factors to be taken into consideration when determining a contested maritime boundary between two countries means that it is very difficult to arrive at a final position which is in fact equitable.[75] In the TAGP Area, this position is complicated not only by the number of claimants but also by the historical context in which those countries make their respective claims, along with the different bases upon which those claims are made. Kozyris provides some instructive guidance on the factors to be taken into consideration:

> while there has been no systematic definition of the relevant equitable criteria, here are some examples: (a) the land dominates the sea; (b) equal division of the areas overlap; (c) non-encroachment and no cut-off; (d) proportionality to the length of the coast-lines; (e) preservation of existing fishing patterns; (f) optimum conservation and management of living resources; and (g) lines which reduce the potential for future disputes.[76]

In view of all the factors at play in determining the delimitation of maritime boundaries in the TAGP Area, Kozyris' suggestion is a good starting point for the TAGP. Where states do not have a clearly agreed and defined boundary between themselves in respect of a seabed, the determination of the boundary is normally undertaken in having regard to provisions of *UNCLOS*. However, *UNCLOS* only provides general guidelines, and leaves the nuts and bolts of the process of negotiation to the relevant states.[77] States are required to agree

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71 Ibid 3.

72 Ibid.

73 *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) (Merits)* [1969] ICJ Rep 3, 42.

74 Joyner, above n 2, 68–9. See also the discussion in Part III(B) of this article.

75 Phaedon Kozyris, 'Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality around the Islands' (1998) 26 *Denver Journal of International Law and Policy* 319, 338.

76 Ibid 339.

77 *UNCLOS*, above n 57, art 83.

amongst themselves on the delimitation of their continental shelves on a just and equitable basis and otherwise in accordance with art 38 of the *Statute of the International Court of Justice*.[78] In any case, the obligation to negotiate the delimitation of disputed boundaries is imposed by customary international law.[79] This obligation may encompass hydrocarbon deposits straddling disputed maritime boundaries[80] in the TAGP Area.

Consequently, the starting point for arriving at any framework for the TAGP is determining those areas which are, and those which are not, subject to conflicting claims of sovereignty under international law. The first step in this process is the application of the general principles provided by *UNCLOS*.[81] The different lengths of the relevant coastlines of TAGP states are also of importance.[82] In the TAGP Area this is complicated by the number of rocks and islands relevance located in the disputed area and the proximity of states to each other. The implications under international law created by claims relating to 'rocks' and 'islands' will be discussed below. Thus, developing the TAGP requires a balancing of conflicting principles under international law with the merits and commercial imperatives of the various claims made by the TAGP states and China. Those merits will be determined by:

(a) prioritising equity over equidistance; and
(b) determining an island's maritime boundaries on the same basis as those of a coastal state.[83]

This will be considered in light of influential factors such as the continental shelf, EEZs and whether particular geographical features are 'islands' or 'rocks'.

A *The Continental Shelf*

Article 83(1) of *UNCLOS* provides:

> delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the *Statute of the International Court of Justice*, in order to achieve an equitable solution.[84]

Under art 76 of *UNCLOS*, the continental shelf is the greater of either:

(a) the distance to which the seabed or subsoil of the relevant state extend beyond a country's territorial sea through the 'natural

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78 Thomas Reynolds, 'Delimitation, Exploitation, and Allocation of Transboundary Oil & Gas Deposits between Nation States' (1995) 1 *International Law Students Association Journal of International and Comparative Law* 135, 141.

79 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 28–9.

80 Reynolds, above n 78, 144.

81 Gillian Triggs, 'Legal and Commercial Risks of Investment in the Timor Gap' (2000) 1 *Melbourne Journal of International Law* 98, 117.

82 *Court of Arbitration for the Delimitation of Maritime Areas between Canada and France: Decision in Case concerning Delimitation of Maritime Areas (St Pierre and Miquelon)* (1992) 31 ILM 1145, 1164 ('*St Pierre and Miquelon Arbitration*'). For the original French judgment, see *Affaire de la Délimitation des Espaces Maritimes entre le Canada et la République Française* (1992) 21 RIAA 267.

83 See Kozyris, above n 75, 361.

84 *UNCLOS*, above n 57, art 83(1).

prolongation of its land territory to the outer edge of the continental margin'; or

(b) 'the area to a distance of 200 nautical miles from the baselines from which the territorial sea is measured'.

In the *North Sea Continental Shelf Case*, it was held that in delimiting continental shelves, a state is entitled to a 'continental shelf that constitutes a natural prolongation of its land territory into and under the sea' by virtue of its sovereignty over the land.[85] Two other considerations which are relevant to delimitation in the context of the TAGP were also noted:

(a) the existence of deposits of natural resources in the relevant area; and
(b) the distance of the relevant coast from which the relevant measurements will be applied.[86]

The concept of 'natural prolongation' will carry weighty implications in the TAGP Area, primarily favouring mainland states such as Thailand, Cambodia and Vietnam. The ICJ, however, did not specify or define the extent or meaning of 'natural prolongation'. Kozyris suggests that this has imported unwelcome ambiguity into an already confused area of international law.[87] Additionally, he argues that this problem has been further compounded by the consideration of natural prolongation independently of the principles of equity.[88]

However, the *Convention on the Territorial Sea and the Contiguous Zone*[89] provides that, where a state can show that the continental shelf coincides with the relevant continental margin, that state may extend its boundary accordingly.[90] This provides the basis for regional states such as Vietnam, Thailand, and perhaps more importantly, China, to claim to the edge of their respective continental shelves, to the detriment of archipelago states such as Indonesia.

B *The Exclusive Economic Zone*

The inclusion of the concept of an EEZ[91] in international law through *UNCLOS* has led to increased delimitation disputes between nations, especially where islands are involved.[92] In addition to 12 nautical mile limits,[93] EEZs further complicate the already confused situation in respect of maritime boundaries in the South China Sea.

EEZ disputes are generally treated in the same manner as delimitation disputes. That is, such maritime boundaries must be delimited in accordance with the principles of international law in order to come to a just and equitable

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85 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 22.
86 Ibid 101.
87 Kozyris, above n 75, 335.
88 Ibid 338.
89 Opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).
90 John Holmes, 'End the Moratorium: The *Timor Gap Treaty* as a Model for the Complete Resolution of the Western Gap in the Gulf of Mexico' (2002) 35 *Vanderbilt Journal of Transnational Law* 925, 930–1.
91 The EEZ is provided for in *UNCLOS*, above n 57, arts 55–75.
92 Kozyris, above n 75, 341.
93 *UNCLOS*, above n 57, art 3 provides that '[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles'.

solution.[94] If a solution cannot be negotiated 'within a reasonable time, the state parties are bound to resort to the procedures provided for in pt XV of *UNCLOS*'.[95] The overlapping EEZs in the TAGP Area greatly complicate this.[96]

Article 74 of *UNCLOS* provides the rules for delimiting EEZs.[97] Pursuant to art 74(3), TAGP states are required to 'make every effort to enter into provisional arrangements' in relation to their disputed EEZs in the interim period leading up to a final delimitation pursuant to art 74(1).[98] Lagoni argues that the ambiguous language of art 74(3) imports upon the parties an obligation of good faith to arrive at an appropriate arrangement.[99] However, it appears clear that the obligation of good faith is actually incorporated into the provision by the language of 'understanding and cooperation'. The ambiguous language reflects the practical reality that there can be no prescribed procedure for resolving such disputes between different states. Consequently, a general obligation of good faith is practically the highest threshold that can realistically be set in the circumstances.

In any case, the obligation to negotiate in good faith is well established under customary international maritime law.[100] Lagoni argues that the equitable basis for the doctrine of good faith to negotiate an outcome in delimitation disputes means that extreme claims can be ruled out immediately.[101]

C *Continental Shelf v Exclusive Economic Zone*

Neither the continental shelf nor the EEZ dominate over each other in determining the basis for delimitation.[102] What is clear, however, is that the EEZ

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94 *UNCLOS*, above n 57, art 74(1).

95 Triggs, 'Legal and Commercial Risks', above n 81, 118.

96 In addition to the Spratly Islands dispute, the Diayou/Senkaku Islands dispute between Japan and China provides another example of such claims in an Asian context. See William Heflin, 'Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart' (2000) 1 *Asia Pacific Law and Policy Journal* 18.

97 *UNCLOS*, above n 57, art 74 provides:

> 1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided by in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardise or hamper the reaching of the final delimitation.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

See also Rainer Lagoni, 'Interim Measures pending Maritime Delimitation Agreements' (1984) 78 *American Journal of International Law* 345, 348.

98 Lagoni, above n 97, 354.

99 Ibid 348.

100 *North Sea Continental Shelf Case* [1969] ICJ Rep 3.

101 Lagoni, above n 97, 356.

102 Triggs, 'Legal and Commercial Risks', above n 81, 119.

was not intended to limit the ability of a country to rely on delimitation from its continental shelf.[103] In the TAGP Area, such an outcome clearly favours claimants such as Thailand, Vietnam, Cambodia and China. However, Triggs contends that 'it is difficult to argue that a coastal state is entitled to an equitable delimitation of an overlapping EEZ unless that EEZ purports to include the continental shelf of the opposite state'. [104]

Article 38(b) of the *Statute of the ICJ* requires the Court to take account of state practice in the delimitation of seabed and water column boundaries.[105] However, Charney notes that 'no normative principle of international law has developed that would mandate the specific location of any maritime boundary line'.[106] This is further complicated by the inconsistent approaches applied by TAGP states in asserting their respective claims.

The actual location of natural resources in the TAGP Area must also be considered.[107] The ICJ suggested that such resource deposits straddling boundaries should be either shared equally or jointly explored.[108] Kozyris suggests that 'where natural prolongations overlap and where resources are located within this overlap, they should be divided equally'.[109]

D *Archipelagos*

UNCLOS also provides a mechanism by which archipelagos can measure baselines around their territories.[110] An archipelagic state is a country 'constituted by one or more archipelagos and may include other islands'.[111] Such islands must be 'so closely interrelated' with relevant interconnecting waters and other natural features that together they form an 'intrinsic geographical, economic and political entity'.[112] Using this mechanism, the territorial seas, contiguous zones and EEZs of Indonesia and the Philippines can be determined.[113]

Once a state is characterised as an archipelagic state under *UNCLOS*, the manner for determining its baselines under international law is expanded. Using the mechanism provided by art 47 of *UNCLOS*, Indonesia and the Philippines, as archipelagic states, 'may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands'.[114]

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103 Ibid.
104 Ibid.
105 Ibid.
106 Jonathan Charney, 'Introduction and Conclusions' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 1, xiii.
107 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 101 (Separate Opinion of Judge Ammoun).
108 Ibid.
109 Kozyris, above n 75, 335.
110 *UNCLOS*, above n 57, arts 46–50.
111 Ibid art 46.
112 Ibid.
113 Charney, 'Central East Asian Maritime Boundaries', above n 20, 727–32.
114 *UNCLOS*, above n 57, art 47.

However, such baselines cannot 'depart to any appreciable extent from the general configuration of the archipelago'.[115] Nor can archipelagic baselines be drawn to or from low tide elevations — such as many of the Spratly Islands — unless the feature hosts a permanent structure such as a lighthouse, or is within the territorial sea of the most proximate island.[116] These concepts are crucial in the delimitation of the TAGP Area. Fundamentally, they turn upon what constitutes an 'island' and a 'rock' under international law.

E *Islands and Rocks*

There are more than 200 small islands and rocks in the South China Sea.[117] The majority of these formations are subject to conflicting claims of ownership.[118] As 'rocks' and 'islands' are treated differently under international law, the characterisation of whether each of these features is a rock or an island is central to a valid and extensive claim of sovereignty over that feature by a TAGP state.

In the *St Pierre and Miquelon Arbitration*, the Court held that '[g]eographical features are at the heart of the delimitation process'.[119] The basis for an equitable distribution of resources[120] and delimitation[121] of boundaries will be greatly impacted by the TAGP Area's geographical features.

F *Rocks*

Rocks 'which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf'.[122] Consequently, TAGP states will inevitably attempt to establish that a geographical feature possessing a large hydrocarbon deposit is not a rock for the purposes of international law as it may be economically feasible. The classic example is the Spratly Islands. As Charney states:

> resources such as fisheries and seabed hydrocarbons in the adjacent territorial sea could be included in the calculation if the rock is, or has the resources necessary for use as, an economically viable base for operations.[123]

In any case, if a rock does not possess its own territorial sea, it may still provide a basis from which the calculation of baselines from other islands or littoral countries may be measured[124] to the extent that they do not 'depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters'.[125]

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115 Ibid art 47(3).
116 Ibid art 47(4).
117 US Department of Energy, *South China Sea Region*, above n 28, 1.
118 Ibid 2.
119 *St Pierre and Miquelon Arbitration* (1992) 31 ILM 1145, 1160.
120 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment)* [1984] ICJ Rep 246, 301.
121 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 96.
122 *UNCLOS*, above n 57, art 121(3).
123 Charney, 'Central East Asian Maritime Boundaries', above n 20, 734.
124 Ibid 734–5.
125 *UNCLOS*, above n 57, art 7(3).

This is where the demarcation of continental shelves, EEZs and the reach of archipelagic waters discussed above becomes fundamental. Baselines can also be drawn to a feature which is only above water at low tide if that feature has a structure such as a lighthouse built on it, or if the relevant baseline is already widely recognised under international law.[126]

G *Islands*

Islands should be given the same rights as a mainland state in relation to the continental shelf.[127] Under *UNCLOS*, an 'island' is defined as 'a naturally formed area of land, surrounded by water, which is above water at high tide'.[128] Land which satisfies this definition is then able to claim territorial seas, contiguous zones and EEZs.[129]

However, an island is incapable of possessing its own continental shelf if the relevant island is superimposed on another country's continental shelf.[130] Where the continental shelf is one continual shelf, especially where its coastline is shared by a number of countries, the entire shelf cannot be said to be the exclusive property of any one country.[131] Consequently, an island situated on that continental shelf will not be deprived of its share of the continental shelf under international law.[132] In such circumstances, delimitation should

> leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the natural land territory of the other.[133]

This principle, as determined by the ICJ, is more commonly known as the principle of 'non-encroachment'. Non-encroachment will play an important role in formulating an interim joint development framework in the TAGP Area, as the situation described in the above quote from the *North Sea Continental Shelf Case* closely resembles that of the South China Sea. The basis of the principle of non-encroachment is that a state's territory should not encroach on the territory of another state.[134] Non-encroachment should be contrasted with the idea of 'no-cut-off', which refers to the principle that a state should not be cut off from the high seas as a result of a delimitation of its, or another state's, maritime

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126 Charney, 'Central East Asian Maritime Boundaries', above n 20, 735.

127 *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK v France)* (1977) 18 RIAA 3.

128 *UNCLOS*, above n 57, art 121(1).

129 Charney, 'Central East Asian Maritime Boundaries', above n 20, 729.

130 *St Pierre and Miquelon Arbitration* (1992) 31 ILM 1145, 1164, 1167. In this case, Canada argued that the islands of St Pierre and Miquelon were incapable of claiming their rights in respect of continental shelves on the basis that they were in fact situated on a continental shelf possessed by Canada.

131 Ibid 1164–5.

132 Ibid 1165.

133 *North Sea Continental Shelf Case* [1969] ICJ Rep 3, 101.

134 Kozyris, above n 75, 358.

boundaries.[135] However, the application of these principles has been sparing and in the context of much more complex factual circumstances.[136]

The elements required to establish territorial sovereignty over an island were established in the *Island of Palmas Case*.[137] The discovery of an island does not confer sovereignty over it upon the discoverer. A state must be able to show continuous and peaceful occupation of the relevant island in order to establish its sovereignty.[138] This requirement may be unnecessary in the event that the island subject to the sovereignty claim is and has always been uninhabited.[139] Where the facts and circumstances relied upon by the state asserting sovereignty are unclear, the ICJ will consider any occupation, exercise of authority, or acceptance of such claims — either expressly or by way of acquiescence — in arriving at a position in relation to the relevant claim.[140] This may, in part, be why China has gone from simply making claims based on historical evidence to occasional acts of occupational of certain geographical features in the TAGP Area.

Beyond simply discovering an island, a country must also be able to demonstrate that it has exercised authority over that island to assert its sovereignty.[141] A simple discovery without any further action may only result in a country holding inchoate title over an island.[142] Accordingly, after claiming sovereignty, if a country fails to exercise clear authority over an island after discovering it, that country may actually waive its right to any claim of sovereignty over the island.[143]

In *Minquiers and Ecrehos (UK v France) (Pleadings)*,[144] certain islands located in the English Channel between England and France were the subjects of disputed claims of sovereignty. Both parties produced evidence claiming possession going back to the Middle Ages. However, the Islands were effectively within the criminal, customs, and impost and revenue jurisdiction of Jersey. Consequently, the Court found in favour of the United Kingdom, closely following the ratio in the *Island of Palmas Case*.[145]

A national oil and gas company or private actor operating and extracting hydrocarbons under the mandate of a TAGP state on a disputed island, would be unlikely to constitute 'authority' for the purposes of customary international law. The security implications of such a situation are considerable. In this context, the

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135 Ibid.

136 Ibid 360.

137 *Island of Palmas Case (Netherlands v USA)* (1928) 2 RIAA 829, 838–40.

138 Mito, above n 65, 731.

139 See *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (Mexico v France)* (1932) 26 *American Journal of International Law* 390, 393–4. For the original French judgement, see *Affaire de l'Île de Clipperton (Mexique contre France)* (1931) 2 RIAA 1105, 1110.

140 See *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK v France)* (1977) 18 RIAA 3.

141 *Island of Palmas Case (Netherlands v USA)* (1928) 2 RIAA 829, 845–6.

142 Ibid.

143 *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (Mexico v France)* (1932) 26 *American Journal of International Law* 390, 393–4.

144 [1953] 2 ICJ Rep 3 ('*Minquiers and Ecrehos Islands Case*').

145 Ibid 47–9; Heflin, above n 96, 33.

ICJ in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening) (Judgment)*[146] quoted the ratio of the *Island of Palmas Case*, and stated that

> practice as well as doctrine, recognizes — though under different legal formulae and with certain differences as to the conditions required — that the continuous and peaceful display of territorial sovereignty … is as good as a title.[147]

As can be seen from the above discussion, the practical application of the principles of delimitation can be an extremely complicated exercise. In the context of hydrocarbon exploitation, these problems are exacerbated in the TAGP Area by its numerous offshore geological formations, islands, adjacent coasts and rocks, together with its multi-dimensional sovereignty disputes. Consequently, a comprehensive interim arrangement which allows for such operations without prejudice to the rights of other states is required.

VII SUGGESTIONS FOR A BROAD FRAMEWORK FOR THE TAGP

A *The First Step*

Australian Foreign Minister Alexander Downer has suggested a three-tier approach to reducing these tensions which can be paraphrased as follows:

(a) the relevant parties need to acknowledge the existence of conflicting claims;
(b) there should be a moratoriumon the occupation of new reefs and on any new constructions; and
(c) there should be agreement on mutual self-restraint to avoid incidents at sea.[148]

Such a moratorium is unnecessary if the construction occurs under a multilateral framework. The TAGP provides the region with such an opportunity.[149] The ASEAN Regional Forum provides a good initial mechanism for exploring such possibilities.[150]

Much of the information required to negotiate effectively and resolve the various maritime sovereignty disputes in the TAGP Area is either unavailable or non-existent.[151] In particular, there are problems establishing the required threshold of control over the many geographical features in the TAGP Area necessary to clarify or support such claims.[152] Consequently, it is unlikely that

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146 [1992] ICJ Rep 351 ('*Gulf of Fonseca Case*').
147 Ibid 563, quoting the *Island of Palmas Case* (*Netherlands v USA*) (1928) 2 RIAA 829, 839.
148 Downer, 'Press Conference at the ASEAN Regional Forum', above n 51, 1.
149 It is noteworthy that there already exists a Joint Development Area in the TAGP Area located in the Gulf of Thailand and agreed between Thailand and Malaysia: see The Institute of Energy Economics, Japan, 'Thailand — Energy Overview' 1 <http://www.ieej.or.jp/aperc/pdf_Nov_20/Thailand.PDF> at 1 May 2004. See also the discussion in Part VII(B) of this article.
150 See Madeleine Albright, US Secretary of State, 'Statement to the ASEAN Regional Forum' (Speech delivered at the ASEAN Regional Forum, Kuala Lumpur, Malaysia, 27 July 1997) <http://usinfo.state.gov/regional/ea/easec/arf727.htm> at 1 May 2004.
151 Charney, 'Central East Asian Maritime Boundaries', above n 20, 728.
152 Ibid.

those sovereignty claims can be resolved in the foreseeable future and, as a result, the maritime borders of the relevant countries will not be definitively settled or agreed upon soon.[153]

In order to allow the TAGP to proceed viably, the various disputed boundaries must be drawn in accordance with the principles detailed in Part VI of this article. If done in this way, each claim can be given weight according to its merit as against the merit of rival claims. It is likely that such a process would also involve considerable political and commercial negotiation between the TAGP states. When this is completed, the many zones of contention and disputed sovereignty in the TAGP Area will be known, and the first basis for unitisation of the underlying resources can be established. Unitisation will be discussed in Part VII(E) of this article.

B *Joint Authority and the* Timor Gap Treaty *Example*

The *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*[154] is an important precedent for joint development in the TAGP Area. Under the *Timor Gap Treaty*, the relevant area between East Timor and Australia was divided into zones according to the nature of the claims made by both countries in relation to each zone,[155] and in the manner discussed above. Applying this principle to the TAGP Area will be more difficult for the TAGP than for the Timor Gap, but not impossible. Now redundant, the *Timor Gap Treaty* arose out of conflicting claims between Australia and Indonesia over the Timor Gap. The claims of both Indonesia and Australia were supported to varying extents under different aspects of international law.[156] The interim measure agreed to by both countries divided the relevant area into three zones, two being under the control of each of Australia and Indonesia respectively, and the third being a shared zone.

A joint authority was established to administer the shared zone, principally in respect of oil exploitation and exploration (mainly through a standard form production sharing contract).[157] The authority also administers ancillary matters such as

> surveillance, security, search-and-rescue and air traffic, hydrographic and seismic surveys, marine scientific research, unitization between Area A and areas outside Area A, and construction of facilities and provision of services outside [sic] Area A.[158]

Using the *Timor Gap Treaty* example, ASCOPE could be the joint authority responsible for overseeing and administering exploration and exploitation

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153 Ibid 729.

154 Opened for signature 11 December 1989, [1991] ATS No 9 (entered into force 9 February 1991) ('*Timor Gap Treaty*').

155 Holmes, above n 90, 946.

156 See William Martin and Dianne Pickersgill, 'The *Timor Gap Treaty*: The Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area between the Indonesia Province of East Timor and Northern Australia' (1991) 32 *Harvard International Law Journal* 566.

157 Ibid 570.

158 Ibid 573.

activities undertaken in the TAGP Area, awarding relevant contracts and allocating revenue.[159] This would also assist in soothing strained relations in the TAGP Area by reaching a common and mutually beneficial understanding in relation to the Area's underlying assets.[160] Disputes may be submitted for arbitration similarly to those under the *Timor Gap Treaty*.[161] The fact that current major participants in the gas sectors of the member states are publicly-owned does not preclude such an arrangement. The unitisation of the relevant areas would allow for the prorated distribution of capacity, resources and revenues to all relevant parties regardless of their underlying interests, be they public or private.

Australia was roundly criticised for entering into the *Timor Gap Treaty* with Indonesia. Indeed, Portugal challenged the validity of the *Timor Gap Treaty* at the ICJ on the basis that the UN did not recognise Indonesia's claim to East Timor.[162] Regardless of the merits of Portugal's arguments, the proposal in this article is to involve *all* claimant parties in the TAGP Area to prevent a TAGP state from lodging a third party suit in the ICJ. That state could not assert that the TAGP sought to determine that state's rights without its consent since that state will have been included in reaching an interim arrangement regarding the dispute.

The TAGP framework proposed in this article does not include Taiwan. However, given the nature and lack of recognition — regardless of the merits of any such arguments — of Taiwan's sovereignty,[163] it is questionable whether it could bring such a case under international law. In practice, it could do little from a political or economic perspective. Military action would be unlikely in the context of a comprehensive regional arrangement.

Apart from these significant political difficulties, the *Timor Gap Treaty* and its successor, the *Timor Sea Treaty* have been successful and relatively stable international arrangements from a commercial perspective. Whilst projects carried out under the *Timor Gap Treaty* and *Timor Sea Treaty* have not been without dispute, exploitation of the Timor Sea's underlying resources has occurred in a relatively smooth manner. In any case, where such issues and large investments are involved, it would be extremely rare for such a project to remain dispute free in perpetuity.

C *Sovereignty-Neutral Arrangements and the* Timor Sea Treaty *Example*

Disputes over offshore resources often go to issues of sovereignty. The concept and strength of a state's territorial integrity are inextricably connected to that state's sovereignty.[164] Therefore, a compromise of one can easily lead to a

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159 Holmes, above n 90, 946.

160 See discussion in Mito, above n 65, 731. Mito notes that the *Timor Gap Treaty* assisted in strengthening the bilateral ties between Australia and Indonesia generally.

161 Martin and Pickersgill, above n 156, 568. See also Part VIII of this article on Dispute Resolution.

162 *Case concerning East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

163 See Tzu-Wen Lee, 'Point-Counterpoint: The International Legal Status of Taiwan: The International Legal Status of the Republic of China on Taiwan' (1997) 1 *University of California Los Angeles Journal of International Law and Foreign Affairs* 351.

164 Reynolds, above n 78, 146.

compromise of the other.[165] For this reason, apart from the obvious economic imperatives involved, states are extremely protective of the hydrocarbon and mineral deposits they claim, and consequently, their claims often overlap.

After the separation of East Timor from Indonesia, the *Timor Gap Treaty* became void at international law.[166] Subsequently, Australia and East Timor negotiated a new agreement in regards to joint development of the relevant area, the *Timor Sea Treaty*.

The *Timor Sea Treaty* provides an interim arrangement subject to a final delimitation of the relevant boundaries between Australia and East Timor. Such a provision is mandatory in any interim multilateral arrangement for the TAGP. The wording of such provisions, however, is always controversial. It is submitted that the *Timor Sea Treaty* provides a good example of acceptable wording:

> Nothing contained in this Treaty and no acts taking place while this treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights relating to a seabed delimitation or their respective seabed entitlements.[167]

However, Triggs and Bialek argue that the *Timor Sea Treaty* may possibly not be sovereignty neutral (although Triggs and Bialek do not appear to agree with such an assertion).[168] Whilst the provision could be clearer, it is difficult to see how it could be attributed any other meaning or intention under international law. In any case, a country does not cede its sovereignty solely by reaching an agreement in relation to the unitisation of extracted resources from a disputed seabed.[169]

In their advice on the subject matter submitted to the relevant authorities of East Timor, Lowe, Carleton and Ward contend that the 'without prejudice' treatment provided under art 2(b) of the *Timor Sea Treaty* is only in respect of the area known under the *Timor Sea Treaty* as the Joint Petroleum Development Area ('JPDA').[170] Consequently, they argue by inference that the rest of the disputed seabed between Australia and East Timor — that is, the area lying outside the JPDA — may be taken to be settled on this basis since the relevant article operates only in respect of the JPDA.[171] Lagoni also notes that interim measures can become permanent.[172] Lowe et al assert that '[i]t is much more likely that [a] tribunal would regard the treaty, and the saving clause in its Article 2 quoted above, as limiting the area in need of delimitation to the area confined within the boundaries of the JPDA'.[173]

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165 Ibid.

166 Gillian Triggs and Dean Bialek, 'The New *Timor Sea Treaty* and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3 *Melbourne Journal of International Law* 322, 331.

167 *Timor Sea Treaty*, above n 69, art 2(b).

168 Triggs and Bialek, above n 166, 332.

169 Ibid 333–4.

170 Vaughan Lowe, Christopher Carleton and Christopher Ward, *In the Matter of East Timor's Maritime Boundaries Opinion* (2002) [46]–[47] <http://www.petrotimor.com/lglop.html> at 1 May 2004.

171 Ibid [47]–[48].

172 Lagoni, above n 97, 358.

173 Lowe, Carleton and Ward, above n 170, [47].

The specific treatment of the JPDA under the *Timor Sea Treaty* simply cannot be taken to mean a de facto acceptance of the delimitation of the maritime boundary in the areas outside the JPDA. As Triggs and Bialek argue: 'it remains doubtful that a "without prejudice" clause could be overridden against the views of one of the parties to a bilateral agreement'.[174] In any case, it is doubtful that Australia would accept any further encroachment upon its claim.

International law provides very little guidance with respect to the reliance upon and the operation of 'without prejudice' provisions.[175] However, each state has reserved its rights in relation to the final delimitation of the relevant boundaries. Therefore it cannot be said that the borders of the various zones agreed to, without prejudice between those states, are fixed and *actually exist* as international boundaries. Triggs and Bialek continue by asserting that:

> While adoption of coordinates for the purposes of an interim agreement does not necessarily amount to tacit agreement or an estoppel, 'it serves as a useful piece of evidence of what the states concerned may consider as an equitable solution in the future, unless there is any evidence to the contrary'.[176]

The evidence to the contrary lies in the reservation of rights itself. By reserving rights in relation to the delimitation of the relevant boundaries, states clearly indicate that they have not reached a clear and final position on delimitation and, consequently, that a dispute exists. In any case, it is difficult to believe that any country would follow any order of a tribunal made contrary to this principle. In other words, it is submitted that the reservation of rights is stronger evidence of a failure to reach a settled boundary than the use of agreed coordinates to mark out a JPDA (made without prejudice) over a certain period of time.

Further, in any use of agreed coordinates as evidence as to a settled boundary, a tribunal would have to consider the reason for which the coordinates were agreed to in the first place. Neither the *Timor Gap Treaty* nor the *Timor Sea Treaty* is a delimitation agreement. Both agreements relate to the regulation of commercial resource exploration and exploitation activities in a disputed area over which a delimitation agreement cannot currently be reached. Add to this the clear reservation of rights by both states under the *Timor Sea Treaty* and it is clear that there is simply no settled international delimited boundary in the Timor Gap between Australia and East Timor.

Triggs and Bialek also suggest that the weighting of the Ministerial Council and Joint Committee in favour of East Timor — constituted under the *Timor Sea Treaty* — also lends itself to the argument of de facto limitation.[177] Such a position still fails to circumvent the operation of the reservation of rights in art 2(b) of the *Timor Sea Treaty*. The reason for this lies in the wording of art 2(b) itself. In particular, the opening words — 'Nothing contained in this treaty and no acts taking place while this treaty is in force shall be interpreted as prejudicing [Australia or East Timor's rights]' — is clearly a catch-all. Australia

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174 Triggs and Bialek, above n 166, 334.

175 Ibid.

176 Ibid, quoting, in part, Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (1987) 99 (citation omitted).

177 Triggs and Bialek, above n 166, 333.

would comfortably be able to argue that a competent tribunal would not be able to consider such 'evidence'.

One of the fundamental problems arising out of the *Timor Gap Treaty* and *Timor Sea Treaty* regimes has involved the ability of parties to seek recourse as against parties to the respective treaties as well as the instrumentalities of the treaty, such as the joint authority.[178] Essentially, the 'act of state' doctrine and the doctrine of sovereign immunity can prevent municipal courts from adjudicating on disputes arising out of projects such as those in the Timor Gap or the TAGP. These doctrines operate by virtue of such arrangements involving powers exercised by the relevant state in pursuit of its international relations, for example signing a treaty, or agreeing to a joint development zone with another state. The problem is further compounded by the sovereignty-neutral nature of such projects. A comprehensive and wide ranging dispute settlement regime adjudicating on both first and second tier rights can assist in circumventing such problems. Such a regime is proposed in Part VIII of this article.

D *The Malaysia–Thailand Joint Development Area*

Thailand and Malaysia have an existing agreement creating a Joint Development Area in the Gulf of Thailand.[179] The Malaysia–Thailand Joint Development Area ('MTJDA') is a functioning, operative regional joint development arrangement. However, the underlying agreement concerns an extremely limited delimitation dispute in a highly restricted way. Thailand and Malaysia were simply able to split the sole contested area with a single demarcating line.

The MTJDA is an excellent example of regional cooperation in respect of resource exploitation. However, it is inadequate as an example of a workable framework for the TAGP for a number of reasons. Firstly, the MTJDA does not provide for the kind of sovereignty-neutral joint development arrangement offered by the *Timor Sea Treaty* or suggested here as required by the TAGP. With significant tension and so many competing claims in the South China Sea, arriving at several simple agreed lines would be almost impossible. This problem is compounded by states not only disagreeing as to where the relevant boundaries lie, but also as to how to arrive at and measure them.

Secondly, given the sheer number of jurisdictions involved in the TAGP, it will be crucial to formulate a practical dispute resolution mechanism.[180] Creating an attractive environment for private entities will be fundamental to the TAGP encouraging the enormous amounts of investment needed for its success.[181] In the case of the MTJDA, the legal jurisdictions of Thailand and Malaysia apply

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178 See, eg, *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 197 ALR 461. See also *Horta v Commonwealth of Australia* (1994) 181 CLR 183.

179 *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of the Joint Authority for the Exploitation of the Resources of the Sea Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand 1979*, reprinted in (1991) 6 *International Journal of Estuarine and Coastal Law* 61 ('*Malaysia–Thailand Agreement*').

180 See the discussion in Part VIII of this article.

181 See the discussion in Part VII(F) of this article.

on their respective sides of the agreed demarcation line in the MTJDA.[182] The complexities, nature of relevant competing claims, and the sheer number of jurisdictions involved in the TAGP make this component of MTJDA unworkable in the context of the TAGP. For example, outside of the MTJDA but in the Gulf of Thailand, there are ongoing disputes over maritime boundaries between Thailand, Cambodia and Vietnam — all of whom are members of ASEAN.[183]

Thirdly, the *Malaysia–Thailand Agreement*[184] and implementing legislation[185] set out only a very general, brief framework. Martin and Pickersgill note that much of the mechanics of the MTJDA framework was left to the joint authority.[186] Again, the complexities and nuances involved in formulating a comprehensive framework for the TAGP require a more robust and prescriptive approach.

E *Zones and Unitisation*

As Reynolds states, '[f]luid mineral deposits spanning across national boundaries cannot accurately be determined without the cooperation of all nation states involved'.[187] *UNCLOS* creates an obligation by implication that where natural resources straddle an international boundary, the relevant state parties will be obliged to negotiate in good faith some form of arrangement to account for the extraction of resources from that field.[188] Most commonly this is achieved through 'unitisation arrangements', whereby the parties agree to apportion the extracted resources based upon agreed formulae (prorating), regardless of the location from which those resources are actually extracted in relation to that field.

Seismic data is used to derive the formula to prorate a trans-boundary gas or oil field on an equitable basis.[189] Once the field is prorated, it can be hypothetically divided into smaller components or units, which can be used to derive valuations, revenues, potential and capacity. In this way, a unitised field has similarities to a managed fund, or even a unit trust. It is a principle which is commonly used in joint venture arrangements throughout the world, especially in extractive industries.[190] However, an equitable delimitation does not mean that each of the relevant parties gets an equal share of the relevant disputed area.[191]

One of the most significant problems with hydrocarbon deposits which straddle international boundaries is the migration of those deposits.[192]

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182 See *Thailand–Malaysia Joint Authority Act BE 2533 1990* (Thailand) s 21 and *Malaysia–Thailand Joint Authority Act 1990* (Malaysia) s 18.

183 Roseann Bassler, 'International Disputes over Control of the Oceans' (1995) 7 *Georgetown International Environmental Law Review* 855, 861.

184 *Malaysia–Thailand Agreement*, above n 179.

185 See generally above n 182.

186 Martin and Pickersgill, above n 156, 578.

187 Reynolds, above n 78, 162.

188 See the discussion in Commonwealth Joint Standing Committee on Treaties, *Timor Sea Treaties*, 26 August 2002 (Patrick Brazil, Special Counsel to Phillips Fox Lawyers).

189 Holmes, above n 90, 949.

190 Ibid 947–8.

191 *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK v France)* (1977) 18 RIAA 3, 58, 325–6.

192 Reynolds, above n 78, 166.

Unitisation avoids such problems by prorating the deposit on a negotiated basis regardless of the deposit's migration patterns. However, if such a migratory pattern can be reliably determined and reduced to mathematical formulae, there is nothing preventing the parties from incorporating such calculations into the relevant unitisation agreement. As Reynolds argues,

> this is, by far, the best approach to take in terms of simplicity, cost effectiveness, maximisation of hydrocarbon recovery from the deposit, and for the policy reason that it fosters an environment of cooperation between the parties.[193]

Once ASCOPE is functioning, and hypothetical overlapping maritime boundaries are derived in accordance with the principles outlined above, the unitisation of the relevant hydrocarbon deposits can be undertaken on the following bases:

(a) seismic and scientific data gathered in respect of the deposit;
(b) the merits of each state's claims in respect of deposits subject to overlapping claims of other states;
(c) commercial imperatives of states with individual deposits in respect of the deposit and the TAGP generally; and
(d) political imperatives between the relevant states.

F *Investment and Development*

The TAGP must promote enormous amounts of investment in energy-related infrastructure.[194] Whilst a significant amount of this funding may need to come from states themselves as well as international funding agencies, experience shows that private sector involvement will be instrumental in developing the TAGP. For example, the West Africa Gas Pipeline[195] benefits from substantial private financial institutional involvement as well as that of large industry participants such as Chevron and Royal Dutch/Shell.[196]

As with the West Africa Gas Pipeline, the private participants in the TAGP will be some of the largest multilateral organisations in the region, if not the world. However, unlike the West Africa Gas Pipeline, much of the funding required for the TAGP will eventually be directed at development in areas which may be subject to a sovereignty-neutral arrangement between relevant states. Thus, establishing a commercially practical and workable regime for recognition of private rights in the TAGP Area will be critical to the TAGP's long term success.

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193 Ibid 166.

194 ASEAN, *Infrastructure*, above n 14, 1.

195 The West Africa Gas Pipeline is an offshore pipeline running along the coasts of, and connecting, Nigeria, Togo and Benin.

196 Alexander's Gas & Oil Connections, *Nigeria, Benin, Ghana and Togo Sign Treaty on WAGP Project* (2003) <http://www.gasandoil.com/goc/company/cna30896.htm> at 1 May 2004.

As has been shown in Europe, these private and commercial interests require aligning certain legal principles such as those outlined in the *General Agreement on Tariffs and Trade*[197] and the *General Agreement on Trade in Services*[198] with state interests and the TAGP framework.[199] The two most important principles to be taken from these two agreements are the 'national treatment' and 'most favoured nation' principles.[200] Adoption of these principles is necessary due to the multilateral context of the TAGP and the fact that most of the required investment inflow is likely to come either directly or indirectly from developed countries.[201]

Consequently, a comprehensive framework for the TAGP must involve 'first tier rights' and 'second tier rights'.[202] First tier rights involve those rights and obligations created by the agreement of the relevant sovereign states. Second tier rights are those which arise out of the agreement between private entities (such as private enterprises or individuals) and the instrumentalities of the relevant treaty (for example a joint authority). A gas exploration agreement between a company and a joint authority is an example of an embodiment of second tier rights.

However, until regional security can be optimised, the TAGP will find it difficult to attract the levels of investment needed for it to achieve its objectives.[203] Security will not be optimised until sovereignty questions in the TAGP Area are dealt with effectively.[204] As discussed in Part IV(B) of this article, it is difficult to see how this can occur without China's involvement. Private actors simply will not make the required investments in risky security situations or in areas where the title of the underlying asset remains unclear.[205] Joint development of the underlying resources which includes China's participation — the main reason why these sovereignty issues carry such venom — offers the best, and ultimately cheapest, route to circumventing these problems.[206]

Taking a cooperative joint development approach also enhances stability in the region. Firstly, it does not threaten to entangle the US and Japan in regional disputes by virtue of their alliances.[207] Whilst the US and Japan obviously do not have any claims over any territory in the area, those countries will be involved in

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197 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*General Agreements on Tariffs and Trade*) 1867 UNTS 190 ('*GATT*').

198 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B (*General Agreements on Trade in Services*) 1869 UNTS 183 ('*GATS*').

199 Francis Botchway, 'Contemporary Energy Regime in Europe' (2001) 26 *European Law Review* 3, 11. This approach was also adopted in the formulation of the *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 100 (entered into force 16 April 1998).

200 *GATT*, above n 197, arts 1, 3; *GATS*, above n 198, arts 1, 11.

201 Botchway, above n 199, 11.

202 For a discussion on first and second tier rights — albeit in the context of the Timor Gap see Triggs, 'Legal and Commercial Risks', above n 81.

203 US Embassy, Jakarta, Indonesia, *Trans-ASEAN Gas Pipeline*, above n 7.

204 Joyner, above n 2, 82.

205 Ibid.

206 Ibid.

207 Umbach, above n 44, 18.

the development of the region through infrastructure and investment by virtue of their enormous economic and strategic interests.[208] Secondly, although China has never ruled out military options in relation to asserting its sovereignty[209] (with the exception of the Paracel Islands), it is unlikely that any state, including China, could actually militarily enforce and maintain its claim in the disputed areas.[210] However, simple disruption, rather than large scale military confrontation, may be all that is required in terms of force to erode the commercial viability and attractiveness of the TAGP.[211]

The ownership and operation of pipelines are also contentious issues. Where a pipeline passes through areas not subject to overlapping claims, there will be no issue. However, where pipelines run through areas subject to overlapping claims, *UNCLOS* provides some protection.[212] Such pipelines could either be owned by:

(a) ASCOPE, giving each state a commercial interest in the infrastructure;
(b) private actors pursuant to the relevant treaty and protected as between the TAGP states by express provision in that treaty; or
(c) a combination of (a) and (b).

The *Energy Charter Treaty* is a very useful example in this regard. The *Energy Charter Treaty* requires member states to allow for the free transmission of energy resources through their territories,[213] borrowing heavily from the national treatment and most-favoured nation principles of *GATT* and *GATS*.[214] Such a provision in the underlying TAGP Agreement would complement these obligations of TAGP states in respect of the World Trade Organization *Agreements* and provide additional comfort to private investors and operators.

Access to and provision of products from pipelines can best be ensured by the inclusion of national treatment and most-favoured nation principles, both for TAGP and non-TAGP suppliers and customers. However, a balance must be struck between the flexibility required to attract such investment and the structural rigidity imported into a regime by the imposition of necessary norms. As Botchway states:

> a rigid prescription of specified corporate arrangement for energy exploitation and management may be unhelpful in accommodating differing circumstances of time and countries.[215]

Botchway suggests that one way in which this problem might be overcome is by having the relevant arrangements provide as follows:

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208 Cockel, above n 41.

209 Umbach, above n 44, 15.

210 Snyder, above n 58.

211 See Mark Clifford, 'How Asia Can Learn to Live with China', *Business Week Online,* 22 May 2002 <http://www.businessweek.com/print/bwdaily/dnflash/may2002/nf20020522_7657.htm?db> at 1 May 2004 for an interesting (albeit brief) perspective on China's ambitions in the South China Sea.

212 See, eg, *UNCLOS*, above n 57, art 79, which allows for the placement of pipelines through EEZs and upon continental shelves.

213 *Energy Charter Treaty*, above n 199, art 7.

214 See generally, Energy Charter Secretariat, *Applicable Provisions of the* Energy Charter Treaty (2003) 3, 8, 143, 201–5 <http://www.encharter.org/upload/9/1079350242181430521919130807919409284335842033f1311v1.pdf> at 1 May 2004.

215 Botchway, above n 199, 11.

(a) where relevant national standards are equal to or higher than relevant international standards, those national standards should apply to the relevant conducts; otherwise
(b) international law standards should be the minimum standards applied in governing relevant conduct.[216]

However, in the TAGP Area the relevant international standards are either nonexistent or too ambiguous to be relied upon. The relevant national standards can only be applied to those parts of the TAGP Area not subject to overlapping territorial claims.

Bilateral investment treaties remain the main instruments used at the international level for encouraging significant investment.[217] One of the problems posed by the TAGP is the development of a framework conducive to foreign investment. Private entities generally have no standing at international law.[218] This problem is particularly acute in the context of the TAGP since much of the investment will have to be offshore, in the sense that it will be spent in areas either outside the jurisdiction of a state or in an area subject to conflicting claims of sovereignty. The uncertainty created by this problem imports a significant amount of systemic risk into an investment and may consequently discourage the investment from actually being made.

The *Energy Charter Treaty* provides a useful template for a comprehensive agreement in relation to the TAGP. Critically, it provides a mechanism for dealing with classical ideas of state sovereignty:

> although accessibility by foreign interests to the energy resources of a state party is under general constraints, the post investment regime and transit of energy material through member states are largely governed by the treaty.[219]

The *Energy Charter Treaty* achieves this through incorporation of the national treatment and most-favoured nation principles. Additionally, whilst the second element suggested by Botchway is encouraging, member states to the *Energy Charter Treaty* are still able to determine which resources located within which geographical boundaries may be exploited at any one time.[220] Where a number of fields are subject to conflicting claims of sovereignty, such as the case in the TAGP Area, significant problems remain unless an adequate unitisation arrangement exists.

VIII DISPUTE SETTLEMENT REGIMES

A comprehensive dispute settlement mechanism is required for the TAGP to ensure it is as effective, efficient and affordable as possible. The following section proposes a broad framework for such a regime. For the purposes of this article, this regime will be called the TAGP Dispute Settlement Accord.

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216 Ibid 12.
217 Bernardo Cremades, 'Promoting and Protecting International Investments' (2000) 3 *International Arbitration Law Review* 53, 55.
218 Ibid 56.
219 Botchway, above n 199, 13.
220 Gillian Turner, 'Investment Protection through Arbitration: The Dispute Resolution Provisions of the *Energy Charter Treaty*' (1998) 1 *International Arbitration Law Review* 166, 167.

A *Requirements of the TAGP Dispute Settlement Accord*

ASEAN states have traditionally been reluctant to submit their disputes to the ICJ for judicial determination.[221] Commercial arbitration between parties and negotiated resolutions are more common.[222] However, a commonly agreed set of norms to govern investment in offshore TAGP infrastructure requires a dependable and certain dispute resolution procedure.[223] The scale of the TAGP means that enormous direct foreign investment and project finance investment will be required to realise the project. In particular, project finance investment is an increasingly popular mechanism by which developing countries secure funding for large infrastructure development.[224] Since project finance investment involves the repayment of borrowed funds through revenue generated by the relevant project,[225] large multinational financial institutions and companies will become directly involved in the project itself at every level.

The challenge then for the TAGP is to incorporate into its structure a dispute settlement regime that affords *locus standi* to both states and private actors, backed by mutual enforcement procedures in participating states. Whilst states have traditionally been reluctant to enter into dispute settlement arrangements which provide *locus standi* to private actors, the number of arbitration agreements between private actors and states is increasing.[226] The incorporation of private rights into international dispute resolution mechanisms can actually strengthen the integrity of the underlying agreement, rather than weaken it.[227] This would be the case with the TAGP, where investors will seek certainty and predictability when investing in an area with overlapping claims of sovereignty.

The TAGP Dispute Settlement Accord must amount to binding intervention. Given the risks and the number of overlapping claims involved in the project, a robust law that makes the dispute resolution mechanism binding is required. A strong mechanism will maximise the possibility for enforcement of resulting arbitral decisions.[228] Thus, a review of some existing dispute settlement mechanisms is useful in formulating a framework for the TAGP Dispute Settlement Accord.

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221 Gillian Triggs, 'Confucius and Consensus: International Law in the Asian Pacific' (1997) 21 *Melbourne University Law Review* 650, 656.

222 Ibid.

223 See Cremades, above n 217, 56.

224 See generally Dinesh Banani, 'International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction' (2003) 26 *Boston College International and Comparative Law Review* 355.

225 Ibid 358.

226 Gregory MacKenzie, 'ICSID Arbitration as a Strategy for Levelling the Playing Field between International Non-Governmental Organizations and Host States' (1993) 19 *Syracuse Journal of International Law and Commerce* 197, 217.

227 See Andrea Schneider, 'Democracy and Dispute Resolution: Individual Rights in International Trade Organizations' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 587.

228 Andrea Schneider, 'Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations' (1999) 20 *Michigan Journal of International Law* 697, 756.

B *The ASEAN* Dispute Settlement Mechanism

Proceedings initiated in the ICJ are traditionally thought to reflect a western approach to dispute resolution.[229] The regional approach is reflected in the ASEAN *Protocol on Dispute Settlement Mechanism*.[230] ASEAN strongly prefers dispute resolution through consensus.[231] 'Collective measures' are often favoured to reach resolutions.[232] Article 2 of the *Dispute Settlement Mechanism* provides that parties must engage in 'consultations' with another party in order to arrive at an 'amicable' settlement to a dispute. Failing such a resolution being reached, parties are to endeavour to use 'good offices, conciliation or mediation'.[233]

There are two primary reasons why the *Dispute Settlement Mechanism* is unsuitable for the TAGP:

(a) it does not provide recourse for private actors; and
(b) it does not provide the certainty of adjudication where this is necessary to settle disputes.[234]

Further, the idea of sovereign immunity remains an impediment to the effective enforcement of arbitral awards internationally.[235] This problem must be tackled within the TAGP framework.

Arbitration is becoming increasingly acceptable and popular as a dispute settlement mechanism in China.[236] However, less confrontational dispute resolution methods such as conciliation are still favoured over arbitration.[237] China's preference is to exhaust all non-confrontational methods of dispute resolution before resorting to methods such as arbitration.[238] However, there are indications that ASEAN countries are beginning to move towards more comprehensive settled dispute resolution systems such as those provided for by the ICJ.[239] Singapore, Malaysia and Indonesia have all submitted to ICJ

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229 Triggs, 'Confucius and Consensus', above n 221, 658.

230 ASEAN, *Protocol on Dispute Settlement Mechanism* (1996) <http://www.aseansec.org/12814.htm> at 1 May 2004 ('*Dispute Settlement Mechanism*').

231 Mary Hiscock, 'Changing Patterns of Regional Law Making in Southeast Asia' (1995) 39 *Saint Louis University Law Journal* 933, 937.

232 Myung Hoon Choo, 'Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the World Trade Organization' (1999) 13 *Temple International and Comparative Law Journal* 253, 262.

233 ASEAN, *Protocol on Dispute Settlement Mechanism* (1996) art 3 <http://www.aseansec.org/12814.htm> at 1 May 2004.

234 See MacKenzie, above n 226, 217.

235 Ibid 219.

236 Frederick Brown and Catherine Rogers, 'The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China' (1997) 15 *Berkeley Journal of International Law* 329, 333.

237 Christopher Koa, 'The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China through the International Centre for Settlement of Investment Disputes' (1991) 24 *New York University Journal of International Law and Politics* 439, 487.

238 Ibid.

239 Triggs, 'Confucius and Consensus', above n 221, 660.

jurisdiction in relation to disputes arising out of overlapping claims to maritime boundaries.[240]

Whilst the *Dispute Settlement Mechanism* is, in itself, unsuitable as a comprehensive dispute settlement regime for the TAGP, it provides a good first step for dispute resolution under the TAGP. However, for disputes not first settled by 'good offices, conciliation or mediation' a more robust dispute settlement procedure will be required. In the author's view, such an approach could be developed by adapting elements of the dispute settlement regimes of the WTO, the *Energy Charter Treaty* and the International Centre for Settlement of Investment Disputes ('ICSID'). Those elements and their application to the TAGP are discussed below.

C *The WTO* Dispute Settlement Understanding

The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*[241] demonstrates a delicate balance of the political, judicial and practical flexibility required for the TAGP. It has the adjudication procedures needed for a binding system of international rights and obligations.

As a first step, parties must attempt to settle their dispute diplomatically and bilaterally, through a best endeavours requirement, by attempting to obtain satisfactory adjustment of the matter.[242] In this sense, the early stages of dispute resolution under the *Dispute Settlement Understanding* are not unlike those provided by the *Dispute Settlement Understanding*. However, under the *Dispute Settlement Understanding*, if a solution cannot be achieved, a complainant may request that a Dispute Settlement Board panel be established. If a panel is requested, the DSB takes a number of steps to arrive at a resolution to the perceived problem.[243] Broadly those steps are as follows:

(a) the Dispute Settlement Board will recommend that the violating party 'bring the violating measure into conformity';[244]
(b) in making the recommendation referred to in paragraph (a), the Dispute Settlement Board may also suggest appropriate measures to be taken by the offending member in order to do so; and

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240 See *Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, 31 May 1997, Indonesia–Malaysia <http://212.153.43.18/icjwww/idocket/iinma/iinmaframe.htm> at 1 May 2004; *Special Agreement for Submission to the International Court of Justice of the Dispute between Malaysia and Singapore Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, 6 February 2003, Singapore–Malaysia <http://212.153.43.18/icjwww/idocket/imasi/imasiorder/imasi_iapplication_20030724.PDF> at 1 May 2004.

241 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 ('*Dispute Settlement Understanding*').

242 Ibid arts 4–5.

243 Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules — toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335, 336.

244 *Dispute Settlement Understanding*, above n 241, art 19(1).

(c) in the event the offending measure is not brought into compliance, then that member may be required to pay compensation in respect of such failure (to a mutually agreed quantum).[245]

If the offending member then fails to pay such compensation as required under (c) above, the aggrieved party may then request the Dispute Settlement Board to allow it to take countermeasures against the offending party equivalent to the value of the nullification or impairment at the centre of the dispute.[246]

The success of the *Dispute Settlement Understanding* is evidenced by its usage. In its first three years, complaints were brought by a wide spread of member states.[247] It would be contrary to the interests of any one state to undermine the dispute resolution system since that state may need to depend on that system in the future.

A common criticism of the *Dispute Settlement Understanding* is that it requires states to impose countermeasures against offending members rather than such action being collectively undertaken.[248] Pauwelyn argues that it would be fairer to incorporate multilateral countermeasures into the *Dispute Settlement Understanding* in order to share such costs. Nonetheless, there is a significant problem with this suggestion. Whilst the involvement of other states may make it more difficult for offending members not to comply with the TAGP dispute settlement process, involving more states would spread the trade inefficiencies and damage that would arise from taking retaliatory action beyond the parameters of the dispute in question.

An alternative approach involves making compensation automatic in a system similar to the way that countermeasures are automatic under the *Dispute Settlement Understanding*.[249] Pauwelyn argues that, in the context of the *Dispute Settlement Understanding*, such an approach lessens the possibility of a state avoiding payment of compensation. However, by agreeing to a certain amount of compensation, the law-breaker would be more likely to make the payment due to the simple fact that such an amount results from a 'meeting of the minds'. Additionally, having only the complainant take the countermeasures against the law-breaker may simply result in further escalation of the relevant trade dispute.[250]

Rather than the largest states simply forcing their own trade agenda on the rest of the TAGP states, the reality in other systems appears to indicate that states would be more willing to accept compromise in order to further the achievement of broader goals. At the time of the case of *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear* ('*Costa Rica Case*'),[251] the US remained easily the single strongest economic and political force in the

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245 Ibid art 22(2).

246 Ibid arts 22(3), 22(4).

247 US (32%), EU (22%), other developed countries (16%), developing countries (31%), as synthesised in Robert Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1, 22.

248 Pauwelyn, above n 243, 345.

249 Ibid 345–6.

250 Chin Leng Lim, 'Law & Diplomacy in World Trade Disputes' (2002) 6 *Singapore Journal of International and Comparative Law* 436, 495.

251 *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc WT/DS24/R (1996) (Report of the Panel).

international community. However, the rising strengths of the European Union and China, and the consistent presence of Japan, meant that the US had a vested interest in adhering and holding others to a binding trade dispute resolution process.[252] This is because international legal frameworks are reliant upon the cooperation of its member states,[253] as a result of the broader political and commercial imperatives involved.

The disparity in size and wealth amongst TAGP states complicates the problem. Indeed, Hart states that '[t]his fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation'.[254]
The consequence of this is as follows:

> If some men were vastly more powerful than others, and so not dependent on their forbearance, the strength of the malefactors might exceed that of the supporters of law and order. Given such inequalities, the use of sanctions could not be successful and would involve dangers at least as great as those which they were designed to suppress … The only viable system would be one in which the weak submitted to the strong on the best terms they could make and lived under their 'protection'.[255]

The task then must turn to striking the right balance between optimising political will and maximising procedural palatability and enforceability. Flexibility will be critically important to the success of the TAGP and has been present since the early formulation of the *GATT*,[256] and subsequently the *Dispute Settlement Understanding*. In practical terms, there is little that can be done about enforcement except to make compliance with the TAGP framework as palatable and attractive as possible. This requires flexibility within the constraints of the doctrine of national sovereignty.[257] The *Dispute Settlement Understanding* achieves this objective with a few minor shortcomings. Consequently, it provides a limited basis for dispute resolution for the TAGP.

D *The* Energy Charter Treaty *and Private Actors*

Arbitration is increasingly favoured by financial institutions and investors. The benefits of arbitration — such as confidentiality, relative ease of initiating proceedings against foreign respondents, control over the composition of tribunals, and international enforceability[258] — provide investors with the comfort required for large scale international projects such as the TAGP. Compared to court proceedings, arbitration offers a more affordable and, in the context of some jurisdictions, dependable and transparent dispute resolution

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252 See G Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44 *Duke Law Journal* 829, 896.

253 See, eg, Hudec, above n 247, 9.

254 H L A Hart, *The Concept of Law* (2nd ed, 1994) 195.

255 Ibid 198.

256 Frieder Roessler, 'The Scope, Limits and Function of the *GATT* Legal System' (1985) 8 *World Economy* 287, 291.

257 Judith Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90 *American Journal of International Law* 416, 417.

258 See Christopher Style and Stuart Dutson, 'Arbitration, International Commerce and International Finance: Safety First' (1999) 10 *Journal of Banking and Finance Law and Practice* 302, 303–4.

system.[259] Indeed, arbitration has also become an increasingly common feature of Asian legal systems.[260]

One of the shortcomings of the *Dispute Settlement Understanding* in the context of the TAGP is its failure to provide *locus standi* to private actors.[261] Although none of the TAGP states are contracting parties of the *Energy Charter Treaty*,[262] the *Energy Charter Treaty* is instructive in seeking to formulate a dispute settlement procedure for the TAGP framework.

International treaties almost never include non-state actors as parties to the underlying agreement.[263] As individuals and business entities generally lack *locus standi* at international law,[264] the *Energy Charter Treaty* includes a provision which allows a private investor to compel a state to engage in arbitration with it in relation to a dispute.[265] A comprehensive arbitration arrangement will also ensure that the majority of disputes will not be required to submit to the jurisdiction of any particular state. Such a provision does not require each private actor to be a party to the underlying agreement, but it might provide those private actors with additional certainty and thus encourage investment.

The *Energy Charter Treaty* also requires that adequate compensation be paid to aggrieved investors in the event of nationalisation or compulsory acquisition of underlying investment assets.[266] This, coupled with a suitable mechanism for determining the value of adequate compensation, would decrease the inherent risk in, and thus encourage, investment. That mechanism could come from a system similar to that of the *Dispute Settlement Understanding*. However, in the event that a claim were made that adequate compensation was not paid in respect of such an acquisition, the TAGP arrangement would have to provide a comprehensive dispute settlement procedure.

E *International Centre for Settlement of Investment Disputes*

The World Bank also offers an arbitration regime where private actors are provided recourse against states. Under this regime, the ICSID is granted jurisdiction in respect of 'any legal dispute arising directly out of an investment between a Contracting State … and a national of another Contracting State'

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259 See Damian Sturzaker, 'Arbitration in Asia' (2001) 20(3) *The Arbitrator & Mediator* 73, 73.

260 Legislation and ordinance dealing with arbitration and arbitral awards has been enacted throughout Asia over recent years — in China with the *Arbitration Law 1994* (China), in Singapore, a major international arbitration centre, with the *International Arbitration Act 1994* (Singapore), Malaysia with the *Malaysian Arbitration Act 1952* (Malaysia), in Thailand with the *Arbitration Act 1987* (Thailand), in Vietnam with amendments to the *Law on Foreign Investment Law 1996* (Vietnam), and in Indonesia with the *Law on Arbitration and Conciliation 1999* (Indonesia).

261 See Shell, above n 252, 909.

262 Energy Charter Secretariat, *Applicable Provisions of the* Energy Charter Treaty, above n 214, 3.

263 See, eg, Turner, above n 220, 166.

264 Ibid.

265 *Energy Charter Treaty*, above n 199, arts 26(2), 26(3).

266 Ibid art 12. See also Turner, above n 220, 167.

under certain circumstances.[267] The ICSID regime provides a robust example of a comprehensive international arbitration process aimed specifically at encouraging investment.

The *ICSID Convention* provides a strong basis for the TAGP Dispute Settlement Accord. It was primarily developed to encourage investment in developing nations by providing investors with a mechanism by which they could have disputes adjudicated outside the courts of the host state.[268] This assured foreign investors that they had obtained the benefits of increased stability arising out of a more neutral and transparent forum than those in jurisdictions which they felt they could not trust.[269] This comfort derives from one of the most fundamental and important control mechanisms in the ICSID regime: the exclusion of recourse to judicial institutions for review of ICSID decisions.[270] Koa notes that the

> ICSID provides a politically neutral, accessible, and appealing forum for resolution of investment disputes involving a Chinese party … Furthermore, the *ICSID Convention* promotes mutual agreement among the parties regarding the selection of arbitrators and conciliators.[271]

The *ICSID Convention* also provides for conciliation as a means of dispute resolution.[272]

The main problem with incorporating the *ICSID Convention* into the TAGP is its failure to provide a forum for disputes between two states, as well as a state and one of its own nationals. Another shortcoming of the *ICSID Convention* in the context of the TAGP is the ability of states to attempt to circumvent its operation where a locally organised subsidiary of a foreign investor is involved in the relevant dispute.[273] This is primarily because the term 'foreign control' is not defined by the *ICSID Convention*, and consequently its meaning is taken on a case-by-case basis.

Further, Vietnam is not a party to either the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[274] or the *ICSID Convention*. Consequently, specific provision would need to be made for the enforcement of TAGP Arbitral Awards in Vietnam — if not in each participating state. Such a

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267 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159, art 53 (entered into force 14 October 1966) ('*ICSID Convention*').

268 W Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' [1989] *Duke Law Journal* 739, 750.

269 Ibid 751.

270 Ibid.

271 Koa, above n 237, 488.

272 Erik Langeland, 'The Viability of Conciliation in International Commercial Arbitration' [1995] *Dispute Resolution Journal* 34, 35.

273 Mary Moreland, '"Foreign Control" and "Agreement" under *ICSID* Article 25(2)(B): Standards for Claims Brought by Locally Organised Subsidiaries against Host States' [2000] *Currents: International Trade Law Journal* 18, 19.

274 Opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('*New York Convention*').

provision in relation to arbitral procedures must be made very clear in order for it to avoid Vietnam's judicial gauntlet.[275]

F *Suggestions for the TAGP Dispute Settlement Accord*

The TAGP Dispute Settlement Accord must provide a strong system for the arbitration of disputes. The primary advantages of arbitration are confidentiality, simplicity, efficiency (both quantitative and qualitative), neutrality and speed.[276]

1 Locus Standi *for Private Actors*

As international law currently stands, private actors lack *locus standi* as against states except where *standi* is provided within the jurisdiction of the relevant state for the subject matter of the given claim.[277] Providing private actors with *locus standi* in respect of international rights and obligations assists in strengthening the relevant regime by ensuring that laws are being enforced correctly.[278] One way in which to provide such *standi* is through international commercial arbitration.[279]

Investors generally consider it more risky to invest in developing markets than at home.[280] One of the major contributors to such risk is a lack of *locus standi* provided to such investors as against the relevant state.[281] This risk is often reflected in the cost of transactions through the security and price sought in respect of the project.

2 *Neutrality*

Local courts are generally believed to favour local interests.[282] Consequently, a major motivation behind international commercial arbitration has been to avoid the courts of the relevant jurisdiction.[283] This problem is compounded in the context of the TAGP where several states are involved, each having a claim to title over much of the TAGP Area. The TAGP Dispute Settlement Accord must be sui generis of each participant state's jurisdiction.

3 *Conciliation*

Conciliation can be included as a measure prior to arbitration. However, conciliation is still rarely used in international commercial disputes, with parties preferring to seek the enforceability and dependability of arbitral decisions.[284]

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275 Hiep Truong, 'Encouraging Foreign Direct Investment in Vietnam: Economic Reform, Protection against Expropriation, and International Arbitration' (1999) 8 *Journal of Transnational Law and Policy* 347, 365.

276 Reisman, above n 268, 747.

277 Schneider, 'Evolution of Dispute Resolution Regimes', above n 228, 721.

278 Ibid 725.

279 Ibid 707.

280 David Adair, 'Investors' Rights: The Evolutionary Process of Investment Treaties' (1999) 6 *Tulsa Journal of Comparative and International Law* 195, 195.

281 Ibid.

282 W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Texas International Law Journal* 1, 2.

283 Ibid 2.

284 Langeland, above n 272, 35.

Hybrid conciliation–arbitration systems offer the ability to return flexibility and efficiency to arbitration[285] whilst maintaining predictability and certainty. This could be incorporated into the TAGP by incorporating the language of arts 2 and 3 of the *Dispute Settlement Mechanism*.

4 *Arbitration*

There are five main practical reasons for choosing arbitration as the favoured dispute settlement mechanism against foreign governments:

(a) there is a need to have a legally binding and compulsory dispute settlement mechanism between the relevant parties;
(b) the system cannot be part of or based upon the jurisdiction of any particular state;
(c) arbitration is fair and neutral;
(d) arbitration gives the parties the ability to apply a 'jurisprudential corpus' rather than the substantive law of a particular state; and
(e) arbitration provides significant procedural flexibility, particularly in relation to the selection and application of the arbitral rules to be applied to a dispute.[286]

The TAGP should adopt a model for arbitration based on the example provided by the *ICSID Convention*. However, recourse to arbitration should not be limited only to disputes arising out of investment, but should simply provide recourse where disputes arise out of the TAGP. Further, recourse should not be limited to disputes arising between states and nationals of another state. It should provide recourse for disputes arising out of the TAGP between:

(a) two or more participating states;
(b) one or more states and one or more private actors; or
(c) two or more private actors.

5 *Expropriation*

One of the primary goals of international commercial arbitration is to protect foreign interests from expropriation by the relevant host country.[287] In particular, investor arbitration has been designed in part to relieve this concern. Including specific non-expropriation provisions in the TAGP Dispute Settlement Accord could add to both the financial and political stability of the TAGP and the region. Such a clause could read as follows:

1.1 A TAGP state will not:
(a) expropriate; or
(b) take any action amounting to the expropriation of any TAGP Investments in any Joint Zone.

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285 Stephen Burton, 'Combining Conciliation with Arbitration of International Commercial Disputes' (1995) 18 *Hastings International and Comparative Law Review* 637, 653.

286 Charles Brower, 'Arbitrating against Foreign Governments' (1997) 6 *Journal of Transnational Law and Policy* 189, 190.

287 J Martin Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29 *Golden Gate University Law Review* 465, 465.

1.2 A TAGP state will not:
(a) expropriate; or
(b) take any action amounting to the expropriation of any TAGP Investments in a Non-Contested Zone without paying the owner(s) of the relevant TAGP Investments adequate and just compensation.

6 *Enforcement*

Whilst almost 90 per cent of all awards arising out of international commercial arbitration are voluntarily complied with by the relevant states, enforcement measures remain crucial to any arbitration arrangement. The *ICSID Convention* provides a comprehensive provision dealing with the enforcement of arbitral awards of ICSID tribunals in contracting states.[288] Contracting states are obliged under the *ICSID Convention* to enforce ICSID awards within their respective jurisdictions. Whilst the TAGP arrangement may provide for arbitral awards which would otherwise be enforceable in TAGP states pursuant to the *New York Convention*[289] (except Vietnam), it is arguably more prudent to make the TAGP Arrangement as self-executing as possible. Thus, a provision similar to art 54 of *ICSID Convention* would greatly benefit the TAGP.

7 *Issues of Sovereignty*

Schneider suggests that any arrangement resulting in the kind of dispute resolution mechanism suggested in this article amounts to a commensurate reduction in the sovereignty of the relevant state.[290] However, in the case of the TAGP Area, that sovereignty is already subject to competing claims of other states. The practical effect of these overlapping claims is that that sovereignty is compromised to the extent of the overlapping claim itself. If this were not the case, the dispute would not be so acute. By providing a mechanism to which the relevant states agree — an interim arrangement in respect of the exploration and exploitation of resources in the region — the relevant states improve their sovereignty in the region.

IX CONCLUSION

The TAGP provides the South-East Asian region with much more than simply the efficient extraction of contested hydrocarbon deposits. Indeed, a comprehensive arrangement in respect of the TAGP has great potential to improve political, military and economic stability throughout the region. However, in order for the TAGP to reach its full potential, ASEAN must adopt a methodical and comprehensive approach to formulating an adequate multilateral framework which includes China. Those steps should be as follows:

(a) Agree to include China in the TAGP.

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288 See *ICSID Convention*, above n 267, art 53.

289 The *New York Convention* is the overriding convention governing the enforcement of recognised arbitral awards within and between its contracting states.

290 Schneider, 'Evolution of Dispute Resolution Regimes', above n 228, 730.

(b) Establish agreed zones of overlapping claims of sovereignty in the TAGP Area on the basis of the principles of delimitation provided by *UNCLOS* and customary international law.

Whilst *UNCLOS* does not provide for priority of one principle of delimitation over another, the following methodical approach of arriving at zones of overlapping sovereignty in the TAGP Area may be useful:

(i) identify all 'islands' in the TAGP Area;
(ii) identify all 'rocks' and non-island geographic features in the TAGP Area;
(iii) identify archipelagic baselines from recognised archipelagic states;
(iv) identify straight and ordinary baselines from all other states;
(v) determine all continental shelves in the TAGP Area;
(vi) determine which 'islands' are capable of expanding territorial claim of a TAGP state or China;
(vii) determine EEZs of all TAGP states and China in view of the results of analysis conducted under points (i)–(vi) above;
(viii) determine whether any 'rocks' or 'non-island' geographical features within the territorial seas, EEZs and contiguous zones developed from the above process are capable of creating jurisdictional pockets in these areas in respect of any other state; and
(ix) apply Kozyris' equitable criteria[291] to the results of the above process (including the principles of non-encroachment and no-cut-off) where possible to clarify the boundaries so determined.

(c) Designate ASCOPE as the joint authority for administration of the TAGP once one or more Chinese delegates are appointed to that body.

(d) Formulate an agreed sovereignty-neutral clause for the overriding convention which will embody the TAGP as between participating states (the 'TAGP Convention') in respect of the boundaries and zones of overlapping claims established above. It is submitted that the clause provided in the *Timor Sea Treaty* is a good starting point for this step.

(e) On a without prejudice basis — to future claims of sovereignty — agree to the formulae for prorating the hydrocarbon deposits located in the TAGP Area, subject to the boundaries determined above in the manner described in Part VII(E) of this article.

(f) Unitise the various gas fields on the basis of the formulae derived under (e) above.

(g) Incorporate into the TAGP Convention the national treatment and most-favoured nation principles of GATT in order to:

(i) tie those existing international rights and obligations into the TAGP (since they will be applied to products extracted from

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[291] Kozyris, above n 75, 329. See the discussion above in Part VI of this article.

areas subjected to sovereignty-neutral treatment under the TAGP Convention); and

(ii) provide additional comfort and encouragement to prospective foreign investors in respect of treatment of extracted products in the TAGP Area.

(h) Incorporate into the TAGP Convention a dispute resolution process with at least the following characteristics:

(i) an obligation for TAGP participants to attempt initially to resolve disputes in a manner consistent with arts 2 and 3 of the ASEAN *Dispute Settlement Mechanism*;[292]

(ii) a panel procedure for arbitration in much the same manner as the *Dispute Settlement Understanding*, except that such a system should allow private actors to compel states to engage in arbitration in respect of a dispute in the manner provided for by the *Energy Charter Treaty*;

(iii) a self-executing clause for the enforcement of arbitral decisions and exclusion of national judicial review of such decisions by TAGP states or China such as that provided by the World Bank ICSID regime;

(iv) a compensation mechanism such as that provided for by the *Energy Charter Treaty*, rather than the retaliatory system provided by the *Dispute Settlement Understanding*; and

(v) recourse for all relevant parties in relation to disputes arising between:

(1) two or more participating states;

(2) one or more states and one or more private actors; or

(3) two or more private actors.

By adopting this methodical approach to creating a framework for the TAGP, the full potential of the South China Sea can be unlocked. Not only would the governments and economies of ASEAN benefit from the financial gain flowing from the so far untapped or inefficiently tapped hydrocarbon deposits in that region, but also from increased political security, certainty and economic interdependence. In turn, this situation would reduce risk to and encourage investors, thus reducing the costs of such investments.

The TAGP holds much economic and political potential for the entire South-East Asian region. It is essential that a comprehensive and stable regional framework be established to unlock that potential.

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[292] See Part VIII(B) of this article.