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# An Analysis of the South China Sea Dispute: Focusing on the Assessment of the Impact of Possible Solutions on the Economies of the Region.

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**An Analysis of the South China Sea Dispute: Focusing on the Assessment of the  
Impact of Possible Solutions on the Economies of the Region.**

**Sacha A. Amry**

**December 2014**

**Master's Thesis**

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## Abstract

The purpose of this thesis is to examine the South China Sea dispute and to analyze why the dispute has yet to escalate, as well as the strategic importance of the South China Sea dispute in relation to international trade. This thesis will also study possible solutions and effects on both the region and the international community. I argue here that while the ASEAN countries have continued to make valuable efforts at finding multilateral solutions to the dispute, China has resisted these efforts by demanding its own bilateral negotiation process. The Spratly Islands and the Parcel Islands, both located in the South China Sea, has become an obstacle to creating multilateral security in the region. The question of who owns the Spratly Islands, which are scattered throughout an 800 square kilometer area, was largely ignored until the 1970s when oil companies began exploring the area. Therefore, sporadic military confrontations over sovereignty, sovereign rights, and jurisdiction have taken place. China, Vietnam, Taiwan, the Philippines, Malaysia, and Brunei claim parts or all of the aforementioned islands; thus, the Spratly and the Parcel Islands have become an important flashpoint in the dispute.

The primary concern of the South China dispute lies at China's "tongue-like nine dashed lines" that is construed through the South China Sea, in areas where several other countries dispute their claims. With this in mind, China's perspective requires a more in-depth analysis. ASEAN member states have informally adopted their own way of managing conflict in what is known as the "ASEAN Way" which is a style that is informal and personal where policymakers constantly utilize compromise, consensus, and consultation. Due to the complexity of the South China Sea dispute, negotiations have been lagging since the 2002 Declaration on the Conduct of Parties in the South China Sea. The UN Convention on the Law of the Sea excludes rocks incapable of sustaining human habitation as stated in Article 121. Rocks, which cannot sustain human habitation or economic life of their own, shall have no exclusive zone or continental shelf. All of the claimant countries of the South China Sea dispute are signatories to the UN Law of the Sea Convention, which created guidelines concerning the status of the islands, the continental shelf, enclosed seas, and territorial limits with the exclusivity of an economic zone within the South China Sea dispute. Therefore, following the Convention's dispute mechanism may allow and assist in resolving the dispute between the claimant countries.

## **Chapter 1-Introduction**

This thesis undertakes an analysis of the South China Sea dispute, focusing on an assessment of the impact of possible solutions on the economies of the region, as well as on international trade. Additionally, access to potential resources is key to the dispute and will be discussed in greater detail on this aspect beyond the scope of this thesis.

The Spratly Islands and the Paracel Islands, both located in the South China Sea, have become an obstacle in creating multilateral security in the region. China, Vietnam, Taiwan, the Philippines, Malaysia, and Brunei claim parts or all of the aforementioned islands; thus, the Spratly and the Paracel Islands have become an important flashpoint in the dispute.<sup>1</sup> The Indonesian-sponsored dialogue on the issue, which took place in the 1990s, has lost its momentum in the current climate. Due to the complexity of the South China Sea dispute, negotiations have been lagging since the 2002 Declaration on the Conduct of Parties in the South China Sea, although this Declaration provided some groundbreaking steps towards resolving the issue. The Declaration states that concerned countries must resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force. The Declaration asserts that this should be undertaken through friendly consultations and negotiations, and the concerned countries have been urged to exercise self-restraint in order to peacefully manage the dispute<sup>2</sup>.

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<sup>1</sup>Ralf Emmers (2005), *Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo*, Singapore: Institute of Defence and Strategic Studies.

<sup>2</sup>"*Declaration on the Conduct of Parties in the South China Sea*," ASEAN, accessed October 1, 2010, <http://www.aseansec.org/13163.htm>

## **Justification/Rationale**

The importance of the South China Sea dispute within the context of international trade has created tremendous attention that spans the international spectrum. This attention has caused the international community to question the possible effects of any outcomes or solutions. As Marvin Ott, a public policy scholar at the Woodrow Wilson International Center for Scholars at Johns Hopkins University states, “They [the trade routes] are not only major trade routes, they're, in fact, the world's most valuable trade routes ... these [are] the busiest trade routes in the world. In addition to that, they're strategic.”<sup>3</sup> The tension has increased because of China's revised policy on the South China Sea. The Chinese state that the South China Sea is now a part of its “core interests,” meaning that the issues of the South China Sea has the same importance to mainland China as the issues of Taiwan, Xinjiang, and Tibet<sup>4</sup>. If the case is in any way neglected, the escalation will likely continue. In addition, there has been little to no change in the management of the issue or in its possible resolution among all of the involved countries to the dispute.

The purpose of this thesis is to examine the South China Sea dispute and to analyze why the dispute has yet to escalate, as well as the strategic importance of the South China Sea dispute to international trade. In addition, this thesis intends to propose a solution to the dispute by pulling from a variety of sources. Since any potential solution to a problem could ultimately lead to an impact, this thesis will also study

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<sup>3</sup> What's At Stake In The South China Sea? Interview with Marvin Ott by Neal Conan on NPR Radio “Talk of the Nation” October 18, 2010.

<sup>4</sup>Fang, Yang, *China's Position On The South China Sea: Problems And Progress*. (Eurasia Review News & Analysis. Accessed, December 9, 2010, <http://www.eurasiareview.com/analysis/10263-chinas-position-on-the-south-china-sea-problems-and-progress>)

possible solutions and effects on both regionally and internationally. I have chosen this topic because the South China Sea is a vital waterway in international trade; therefore, the control of this strategic trade route can have a large impact on international security and commerce. Furthermore, the disputed area is thought to have one of the largest reserves of natural gas and oil as well as an abundance of seafood. As the issue at hand continues to evolve over an extended time frame, it is critically important to assess the situation before any potential military escalations.

The study of the South China Sea dispute is important in the realm of international studies because any eventual solution to the issue will affect international trade and more importantly, international security. Furthermore, a peaceful settlement of this dispute can be used as a model in solving other disputes that are similar in nature. An example of the global similarities can be seen in the recent dispute in the northern seas between the United States, Canada, Russia, Finland, and other Nordic countries. Finally, the South China Sea dispute is also an important illustration of how countries use their soft and hard powers in solving disputes.

### **Hypothesis**

In this thesis, I will argue that whatever the ultimate solution, trade will be greatly impacted. Since the creation of the Association of South East Asian Nations (ASEAN) and the recent economic integration (free trade) between China and its South East Asian neighbors, the region has finally found an opportunity for an enduring peace. However, the case of the South China Sea dispute is a possible flashpoint that may reignite tension in the region. For my thesis, I will propose a solution to the dispute, looking specifically at the proposed solution's economic impact on the region and on international trade. In

relation to the South China Sea dispute, two important questions arise: to what extent does this conflict affect international trade? What are the economic implications of the given solution? Additionally, I will look at possible ways to resolve the dispute through peaceful dialogue, as well as the types of measures necessary to prevent regional conflict from reoccurring. This hypothesis rests on the assumption that increased multilateral assistance will allow affected countries to understand the necessity of resolving the dispute. I argue here that while the ASEAN countries have continued to make valuable efforts at finding multilateral solutions to the dispute, China has resisted these efforts by demanding its own bilateral negotiation process. I will also argue that a multilateral solution is optimal, and that China's policy of seeking bilateral arrangements will block a fair future solution. Lastly, I argue that the other parties to the dispute are working together to build enough leverage together to force China to negotiate multilaterally.

### **Method of Analysis**

In order to understand the dispute on the South China Sea, I will draw on several qualitative studies relying on descriptive or case information based on historical summaries and claims by each of the involved countries. To support my thesis I will utilize multiple sources. I will first look at the historical records of the dispute. I will then analyze scholarly solutions on the basis of international law and the “ASEAN Way” of managing conflicts. Additionally, I will examine the geographical flashpoints of the dispute, the Spratly and Paracel Islands, and their importance in finding a solution. Whatever the resolution of the dispute will be, China’s actions will greatly impact on the outcome; therefore, I will also analyze the Chinese view in depth.



I will attempt to support the latter hypothesis by looking at cases drawn from several resources. Since the issue at hand is unfamiliar to most audiences, I will provide a brief background on the issue. Then, I will analyze the historical origins of the dispute that have led to a larger escalation in the realm of global security.

In addition to this background, I will assess an array of study groups, starting with the “Ongoing Workshops on Managing Potential Conflicts in the South China Sea,” which was initiated by Indonesia and funded by Canada in the 1990s. I believe it is important to study the workshops, from the beginning to the most recent, as this will provide an overview of the development of the issue in each of the affected countries, and will illustrate where they stand on the issue as it evolves. Furthermore, by assessing the workshops I hope to help readers understand the reasons that military escalation has been deterred. By analyzing and understanding the entire spectrum of the study groups, I hope to develop strong insights into the negotiations, and to clearly identify the individual aspirations of all involved countries.

Following the assessment of the study groups, I will look at the different perspectives from the viewpoint of international law. Since the case concerns a territorial sea dispute, the United Nations Convention on the Law of the Sea (UNCLOS) Treaty of 1982 is the most pertinent international law that applies to this conflict. The ratification of the treaty by countries has created credibility for the claimant countries to defend their own arguments for control over their respective sections of the Spratly Islands and the Parcel Islands. The treaty established specific jurisdictional limits on the ocean area that a country or countries may claim, and includes a 12-mile territorial sea limit and a 200-

mile exclusive economic zone.<sup>5</sup> Due to the specifications of the treaty, this has made the issue even more difficult to resolve, since the boundaries of the territorial sea limit overlap. While the treaty has provisions for the overlap, China seems to want to claim all water and ignore the language of the treaty.

Another important aspect of the dispute on the realm of international law is what institutional action the international community can provide. I will examine the extent of how the International Court of Justice can help resolve the issue. I also seek to understand the extent that the United Nations Security Council has helped mitigate military actions between claimant countries.

From the beginning of the dispute in the 1970s, there has been little involvement of foreign or Western influence. The influence of the “ASEAN WAY” or the “Asian Way” has almost certainly contributed to non-military-escalation up to the current point. The path of the ASEAN Way starts first with nationalism—the common conviction that Asians must develop their own means of achieving security. Secondly, the Asian approach cultivated during the Cold War shows a history of bilateralism in security relations. Finally, the Asian approach is economic. Rapid growth in much of the region has necessitated multilateral cooperation, not merely to facilitate further growth, but also to avoid political friction.<sup>6</sup>

As the primary purpose of this thesis is to find a long-lasting solution to the South China Sea conflict, it is important to understand the possible implications of the dispute. Therefore, this study will look into social, emotional, economic, cultural, and political

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<sup>5</sup>*United Nations Convention of the Law of the Sea*. United Nations, accessed October 25, 2010, [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)

<sup>6</sup>Gurtov, Mel (2002), *Pacific Asia?: Prospects for Security and Cooperation in East Asia*. Lanham, Maryland: Rowman Littlefield Publisher, Inc.

implications of the dispute on the claimant countries. In order to understand these solutions, we must fathom the aspirations of each claimant countries.

I will then look into possible solutions to the dispute through analyzing approaches suggested by writers, diplomats, and scholars such as Hasjim Djalil, B.A. Hamzah, Mark Valencia, and Omar Salaam.<sup>7</sup> B.A. Hamzah has suggested the use of the 1959 Antarctic Treaty as a model to resolve the dispute. Mark Valencia has offered the solution of carving up the disputed area by each claimant. Omar Salaam's hypothesis states that eventually, the Spratly Island dispute will reach one of five possible conclusions; first, one of the claimant countries will take all of the territory through a tribunal, dispute resolution, or military force; second, the most powerful nations will share the wealth of the Spratly Islands and the less powerful would become disenfranchised; third, all the disputants will share the wealth equally; fourth, all the states will share in proportion to an articulated distribution scheme; and lastly, none of the states have access to the wealth.<sup>8</sup> Salaam continues to state that unless the claimant countries of Brunei, China, Taiwan, Malaysia, the Philippines, and Vietnam reach an agreement to share the resources of the Spratly Islands, China will eventually become frustrated and more militarily aggressive. Finally, any resolution of the dispute will involve China and will, therefore, have an impact upon both Asia and the broader international community.

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<sup>7</sup> Omar Saleem (2000), "The Spratly Islands Dispute: China Defines the New Millennium." American University International Law Review Vol 15:527., 528-582.

<sup>8</sup>Saleem, 569.

## Chapter 2-Review of the Literature

In the book *War or Peace in the South China Sea?*, compiled by Timo Kivimäki, the primary reason for the dispute is explained as not being military security, but actually because the disputed area is a source of seafood and other important resources.<sup>9</sup> For the people of Southeast Asia, the dispute constitutes a major interest, as the majority of people live by the sea; thus, this proximity affects the populations economically and ecologically.

In addition, the book *The Security Environment in the Asia-Pacific* confirms that the geographical importance for sea-lane transportation, regional and international security, and international trade bring the issue prominently to the international stage.<sup>10</sup> Therefore, the dispute has become an important international security issue seen by external actors (e.g. European Union, US, Japan, etc) as the dispute brings into question international peace and security.

*Sharing the Resources of the South China Sea* provides an in depth look at the impact of international law on possible solutions.<sup>11</sup> The author claims that the World Court (International Court of Justice or ICJ) could serve as a conduit to resolve the Spratly-related territorial disputes. In order for the World Court to hear a case, however, all disputants must be willing to permit the Court to become involved and render a binding decision. James Kiras believes that China is unwilling to take this route of

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<sup>9</sup>Timo Kivimäki (2002), *War or Peace in the South China Sea?*, Copenhagen, Denmark: NIAS Press.

<sup>10</sup>Hung-mao Tien, Tun-jen Cheng (2000), *The Security Environment in the Asia-Pacific*, (New York: Institute for National Policy Research.

<sup>11</sup> Mark J. Valencia, Jon M. Van Dyke, Noel A. Ludwig (1997), *Sharing the Resources of the South China Sea* The Hague, The Netherlands: Kluwer Law International.

conflict resolution, given that it claims rights to a sea area extending 1,000 nautical miles south of Hong Kong. Kiras cites four motives driving China's resistance to international arbitration: (1) land-based resource scarcity; (2) population growth; (3) aspirations to become a regional naval power; and, (4) territorial claims far exceeding anything established in existing international maritime law.<sup>12</sup> This thesis will take a closer look at the possible resolution if all participating parties agree on a solution by the World Court.

Niklas Swanström's dissertation paper provides an in depth look at how effectively the ASEAN countries have managed the issue for thirty years by implementing the "ASEAN Way" of managing conflicts.<sup>13</sup> Therefore, this paper will also study this "ASEAN Way" of resolving disputes, as this path has succeeded in mitigating armed conflicts in this volatile region.

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<sup>12</sup> Kiras, James. "The South China Sea: Issues of a Maritime Dispute." *Peacekeeping & International Relations*. Jul/Aug 1995: 3-4.

<sup>13</sup> Niklas Swanström, "Conflict Management and Negotiations in the South China Sea: The ASEAN Way?" (PhD Diss: Uppsala University)

### **Chapter 3-Background**

The dispute in the South China Sea involves the countries of China, the Philippines, Malaysia, Brunei, Vietnam, and Taiwan all claiming these small chains of islands that consist of mainly rocks and reefs. Each country is claiming some of or an entire part of the Paracel Islands and Spratly Islands. According to the International Hydrographic Organization, the South China Sea lies south of mainland China and Taiwan; north of Indonesia, Malaysia and Brunei; east of the Philippines; and west of Vietnam.<sup>14</sup> It is an area of about three million square kilometers of water. The seabed area of the South China Sea consists of about one million square kilometers of continental shelf. There are more than 200 islets, rocks and reefs in the area; most of them are not suitable for human habitation. Due to its rich natural resources and strategic location, the area has become of economic and security importance in the region. As previously stated, the area is suspected of containing extensive deposits of hydrocarbon and fossil oil, though it is not yet proven. The exploitation conducted by Malaysia and the Philippines on their own continental shelf has given weight to such speculations.

The Spratly and Paracel Islands consist of more than 100 small islands and reefs that are surrounded by rich fishing grounds, and more importantly, the potential of large gas and oil deposits. They are claimed in their entirety by China, Taiwan, and Vietnam, with portions being claimed by Brunei, Malaysia and the Philippines. Some of the islands are currently occupied by relatively small numbers of military forces from China, Malaysia, the Philippines, Taiwan, and Vietnam. Brunei has established a fishing zone that overlaps a southern reef, but has not yet made any formal claim. Since the Spratly

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<sup>14</sup>International Hydrographic Organization, *Limits of Oceans and Seas*. 3<sup>rd</sup> edition 1953.

and Paracel Islands are the flashpoint in this dispute, understanding the basis of the claims by each participating country is of critical importance.

As stated, the South China Sea is one of the most strategic waterways in the world. These waterways are important for the passage of military and commercial vessels, especially large tankers. Thus, its importance extends to claimant countries, but also to international trade.

### **International Trade**

Following the implications of the dispute on the claimant countries, we also must look at the impact on external countries such as the United States, Japan, and the European Union. Their primary concerns in this matter are based on their respective national security as well as global security. Furthermore, it is important to discuss the implications of the dispute on international trade.

For the East Asian economies such as Japan, the South China Sea is extremely important for its economic and strategic lifeline since more than eighty percent of its oil imports are transported through these waterways. Furthermore, through these waterways exist the routes for Japanese and South Korean trade with Africa, Middle East, Europe, and the rest of Asia. Therefore, Japan and South Korea have a large interest in preserving peace and stability in the South China Sea.

The United States, too, has a large interest in preserving peace and stability in the region. In addition to the United States' commercial usage, these waterways provide the essential movement of American military worldwide to conduct its global strategy security or for the stated purpose of defending its allies.



### What's All the Fuss?

All of the actors involved have good arguments for claiming all or part of the South China Sea. With the exception of Brunei, all of the countries have occupied several of the rocks and reefs that comprise the Spratly Islands. The Chinese have also occupied an area quite far south of the South China Sea. The significance of the territorial claims is clear; it is basically a scramble for resources, comprised of a rich sea life and deposits of oil and gas, which are reported to be abundant in the area.<sup>15</sup>

<sup>15</sup>Hashim Djalil (1998), "The South China Sea Island Dispute." Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation. Kluwer Law International: 109-134.



## **Hydrocarbons**

Little attention had been given to sovereignty in the South China Sea until the 1960s and 1970s, when international oil companies began prospecting in the region.<sup>16</sup> Its potential as a significant source of energy and other resources is central to the examination of the current tensions. A 1995 study by Russia's Research Institute of Geology of Foreign Countries estimated that the equivalent of 6 billion barrels of hydrocarbons might be located in the Spratly Islands area, of which 70 percent would be comprised of natural gas. Chinese media outlets have referred to the South China Sea as the “the second Persian Gulf,” and some Chinese specialists have asserted that the South China Sea could contain as much as 130 billion barrels of oil and natural gas. Chinese officials estimate the oil reserves at one trillion US dollars.<sup>17</sup> In any event, the fact that the area remains subject to dispute is likely to block most oil companies from taking the financial risk of carrying out the exploration necessary to determine whether the potential yields in the area are commercially viable.

## **Commercial Fishing**

Despite the overlapping jurisdictional and territorial claims at the heart of the dispute, much of the vast area remains unregulated. Among the consequences of this is the lack of a clear jurisdiction in the region, which is leading to a rapid environmental degradation due to the lack of emergency procedures to deal with maritime or environmental crises. It is also causing depletion of fishing stocks, including tuna stocks

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<sup>16</sup> Snyder, Scott (August 1996), *The South China Sea Dispute: Prospects for Preventive Diplomacy. The United States Institute of Peace.*

<sup>17</sup> Ibid.

that migrate to the South Pacific.<sup>18</sup> Many analysts believe it is one of the most lucrative fishing areas in the world, with an annual value estimated in the mid-1990s at three billion US dollars.<sup>19</sup> Countries are also considering that the seafood found in the region is a staple food for most of the claimants, and the economic prospects of exporting this commodity in the region are very bright.

### **Commercial Shipping**

As a strategic passageway, the South China Sea is unquestionably important. It contains critical sea lanes through which precious commodities flow from the West (Europe, Middle East, and Africa) and West Asia (South and Southeast Asia) to Japan, China, and Korea. The area also connects the Indian and Pacific Oceans, thereby establishing a major sea-route and strategic military position linking Asia, Africa, and Europe. The vitality of the sea-route also comprises an estimated eighty percent of Japan's and seventy percent of Taiwan's oil and raw material imports. Twenty-five percent of the world's oil production passes through the area *en route* from the Middle East to Japan and the United States.<sup>20</sup> The control of the Spratly Islands could serve as means to impact oil transport both in Southeast Asia and the remainder of the industrialized world because ownership and control of the islands provides sovereign rights over the adjacent waters and seabed.

Furthermore, the United States and other countries use the South China Sea as a transit point and operating area for their navy and air force bases in Asia between the

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<sup>18</sup>Ibid.

<sup>19</sup>Saleem, Omar. (2000) The Spratly Islands Dispute: China Defines the New Millenium. American University International Law Review. Vol 15, pg 527-582.

<sup>20</sup>Ibid.

Pacific and the Indian Ocean and Persian Gulf. Therefore, any military conflict that threatens the strategic interest of the US, Japan and other countries may invite their involvement to preserve navigational freedom in these critical sea lanes.

## **Chapter 4-Flashpoint Who Claims What?**

The question of who owns the Spratly Islands, which are scattered within an 800 square kilometer area, was largely ignored until the 1970s when oil companies began exploring the area. As international maritime laws have been slow in being codified and institutionalized following World War II, this has led to the likelihood of conflict. Therefore, sporadic military confrontations over sovereignty, sovereign rights, and jurisdiction have taken place.

### **Basis of Brunei Darussalam's Claim**

Brunei Darussalam does not claim any of the islands, but claims part of the South China Seas nearest to it as part of its continental shelf and Exclusive Economic Zone (EEZ). In 1984, Brunei declared an EEZ that includes Louisa Reef.<sup>21</sup> Louisa Reef lies about 120 miles northwest of the Brunei coastline and 408 miles from Vietnam. According to J. Ashley Roach of the Center of Naval Analysis describes it as a quadrilateral reef with sides about 1.2 miles long with a number of rocks on its surface. The UN Convention on the Law of the Sea gave way for Brunei to claim part of the area due to its continental shelf argument giving it rights to the islands under the Convention. Brunei asserts that the southern part of the Spratly chain is actually a part of its continental shelf, and therefore, is its territory and resources.

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<sup>21</sup>Territorial claims in the Spratly and Paracel Islands. GlobalSecurity.org. Retrieved from <http://www.globalsecurity.org/military/world/war/spratly-claims.htm>. Accessed April 30,2010.

### **Basis of Malaysia's Claim**

Malaysia also argues its case under the continental shelf, a 12-mile territorial sea, an exclusive economic zone (EEZ), and an extended continental shelf in the southern part of the South China Sea. Malaysia has been involved in the dispute since 1979, just prior to the UN Convention on the Law of the Sea came into effect. Malaysia currently controls three of the islands that it considers to be within its continental shelf, but it claims the whole chain.<sup>22</sup> Malaysia's claims are based upon the continental shelf principle, and have clearly defined coordinates. Malaysia has also tried to build up one atoll by bringing soil from the mainland. The continental shelf argument derives its right to the islands under the Law of the Sea Convention.

J. Ashley Roach, former US Navy Captain and Legal Advisor to the US Department of State stated, that in 1969, an agreement between Indonesia and Malaysia made clear boundaries between the two countries' continental shelves in the South China Sea from Johor and from Borneo. In relation to the Brunei, both countries had also agreed in March 16, 2009 on their maritime borders in which both nations recognized the 200 nautical miles arrangement as well as its exclusive economic zones.<sup>23</sup> Since, Malaysia and the Philippines were former colonies of the United Kingdom and the United States, respectively, both have agreed on the 1930 treaty between their former colonials.

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<sup>22</sup>Spratly Islands Dispute. (May 1997) American University:Trade and Environment Database. Retrieved from <http://www1.american.edu/projects/mandala/TED/SPRATLY.HTM>. Accessed April 30,2010.

<sup>23</sup>Roach, J. Ashley (August 2014.), Malaysia and Brunei: An Analysis of their Claims in the South China Sea. Center for Naval Analysis Occasional Paper.

### **Basis of Republic of China's (Taiwan) Claim**

Taiwan's argument is the same as that of China, from a historical perspective. Taiwan has maintained a garrison on the biggest of the islands, Itu Aba since 1956. It claimed the island based on its assertion that Taiwan and its Kuomintang government is the true China. Since Taiwan claims to be the true China, it believes the Spratly's belong to them and not to the People's Republic of China. Their main concern is that China alone or China and Vietnam will gain control and thus, have a monopoly on the South China Sea.<sup>24</sup> Chinese nationalists (The Kuomintang), set foot on the Spratly Islands on December 1946 and occupied the most important island: Itu Aba, the largest island in the Spratly chain. Since then Taiwan continue to occupy Itu Aba. Thus, Taiwan, as the Republic of China (ROC), claims exactly the same territories as the People's Republic of China.<sup>25</sup>

### **Basis of the Philippines Claim**

The primary focus of the Philippine government is to claim the Scarborough Shoal and the Kalayaan island group. The Kelayaan group of islands encompasses a variety of notable islands, shoals and reefs in the Spratly Island chain, which includes Reed Bank, Mischief Reef, Itu Aba, Second Thomas Shoal, and Fiery Cross Reef. The Scarborough Shoal is mostly submerged at high tide; due to its submersion of the shoal during high-tide it is argued that it is thus part of the Philippine continental shelf and should be classified as a high-tide elevation and therefore entitled to a 12-nm territorial

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<sup>24</sup>American University, *Spratly Islands Dispute*.

<sup>25</sup>General (Rtd) Schaeffer, Daniel. Recent Development in the South China Sea: Implications to Peace, Stability, and Cooperation in the Region. *Analyser les Mutation, Anticiper Les Futures – GMAP*. Association de Droit Suisse, Siégeant à Genève. Lettre No. 4-Fevrier 2010- Letter No. 4-February 2010.

sea.<sup>26</sup>

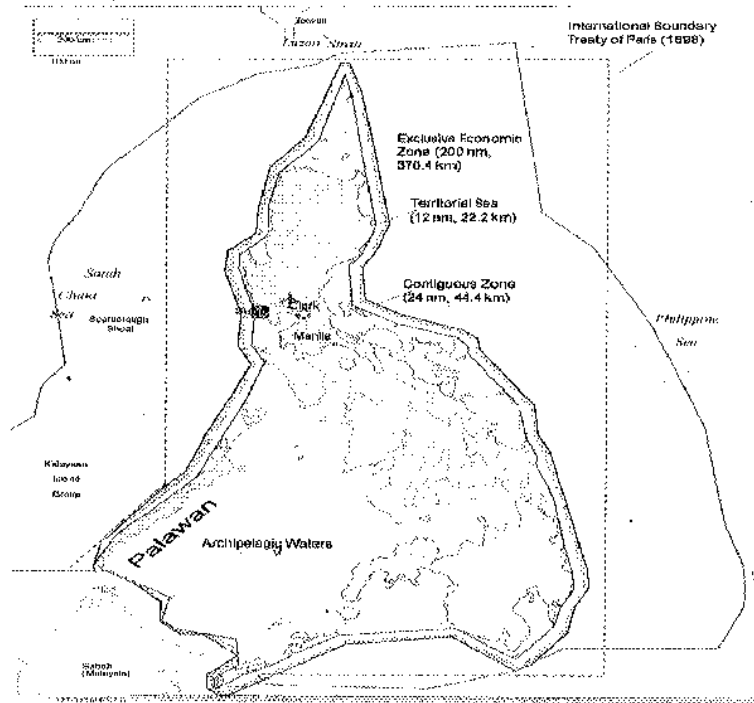


Figure 1. The Philippine archipelago. The "box" outlined by a broken red line represents the amounts ceded from Spain to the United States in 1898. Source: CNA Graphics.

<sup>26</sup> UNCLOS, Continental Shelf

The history of the Philippines can be traced to the Spanish-American War in which the Spanish government ceded to the United States the lands and waters of what is now the Philippines as it was agreed via the Treaty of Paris. (SEE FIGURE ABOVE) In 1933, the United States ceded all the lands it had received under the Treaty of Paris to the people of the Philippines; however, the United States continued to be protector of the Philippines until the Philippine legislature established self-rule. In 1946, the United States formally recognized Philippine independence, and all of those territories inside the Treaty Box (SEE FIGURE) were ceded to the modern day Republic of the Philippines. Neither Scarborough Shoal nor the features now claimed by the Philippines as part of its Kalayaan island group claim were part of the original Treaty Box. In 1955, the Philippines notified the Secretary General of the United Nations that it regarded all waters inside of the Treaty Box to be territorial waters. The Philippines' claim the Spratly Islands and the Scarborough Shoal based on economic need, proximity, and abandonment of rights by all other nations which led the Philippines to claim the islands in 1947 and therefore *terra nullius* is in effect when the Kelayaan group of islands were discovered by Tomas Cloma.<sup>27</sup>

The Philippines claim that the Spratly have clear and defined coordinates. In 1971, the Philippines officially claimed 8 islands that it refers to as the Kalayaan islands, arguing that: 1. the Kelayaan were not part of the Spratly Islands; and 2. the Kelayaan had not belonged to any country and were open to being claimed. In 1972, these islands were designated as part of the Palawan Province, and it has a mayor and local government to see to the needs of its 222 inhabitants. The features consist of six islets, two cays, and two reefs. The latter arguments are based on customary law, *res nullius*,

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<sup>27</sup> Shen Jianmen. South China Sea Dispute . pg 144



which states that that there must be both abandonment of possession and the intent to abandon; one condition without the other being insufficient.<sup>28</sup> Due to the absence of any claim by any country at the time, the Philippines claimed the area. In the late 1970s when hydrocarbons were discovered, other countries began to espouse their claims. However, based on *res nullius* the Philippines have the strongest argument.

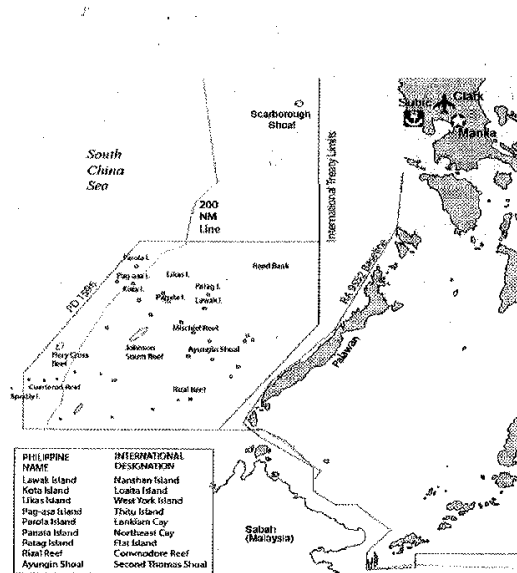


Figure 5. The Kalayaan Island Group Claim. Source: CNA Graphics.

Captain Mark Rosen, Executive Legal Advisor to the Center for Naval Analysis stated that the Philippines established a 200-nm continental shelf in 1994 as measured from the new archipelagic baselines. The Philippines' claim was made with the Commission on the Outer Limits of the Continental Shelf (CLCS) in 2009. The

<sup>28</sup>Macdonell, John. Occupation and "Res Nullius." Journal of the Society of Comparative Legislation. New Series, Vol. 1, No.2 (Jul 1899) pp 276-286.

Commission sided with the Philippines, agreeing that it was entitled to an extended continental shelf of 350 nautical miles.<sup>29</sup> The Philippines occupied eight features from 1968 to 1971 and in 1978, President Ferdinand Marcos issued a Presidential Decree to formally assert sovereignty over the Kelayaan island group. The presidential decree depicts the same way as China's nine dashed-line claim.<sup>30</sup> Then, in 2009, the Philippine government enacted new legislation to amend its prior archipelagic baseline claims. The baselines were adjusted to conform to the requirements of Article 47 of the UNCLOS, which states that baselines cannot generally exceed 100 nautical miles in length.

The Scarborough Shoal is the largest atoll in the South China Sea that contains a chain of reefs and rocks. This particular area has been a source of contention between the Philippines and China since 1997 because it is rich with living marine resources. There was a serious stand-off in April 2012 when a Filipino warship confronted eight Chinese fishing vessels that were harvesting marine resources in the Shoal.<sup>31</sup> The Shoal is roughly 120 miles off the west coast of Luzon and is well inside the 200-nm claimed exclusive economic zone (EEZ) of the Philippines and the continental shelf. (SEE FIGURE ABOVE). The features are nearly 500 nautical miles from the nearest point of the coast of China. Apart from the presence of fishing and law enforcement vessels from China recently, the area is unoccupied and not realistically capable of human habitation unless it takes place on artificial structures.

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<sup>29</sup> Mark E. Rosen, JD, LL.M. Philippine Claims in the South China Sea: A Legal Analysis. Center for Naval Analysis Occasional Paper. August 2014.

<sup>30</sup> Ibid

<sup>31</sup> B. Glaser. Trouble in the South China Sea. Foreign Policy. September 17, 2012. <http://foreignpolicy.com/2012/09/17/trouble-in-the-south-china-sea/>

The Philippines' only claim to the Shoal is as a high-tide elevation (or rock), not as an island as defined in Article 121 of UN Convention on the Law of the Sea. Given that this Shoal already sits on the Philippine continental shelf and EEZ, the 12-nm zone around it would simply be assimilated into the larger EEZ and continental shelf (although the features would generate their own territorial sea).

The Philippines, like Vietnam, has had clashes with China over the Spratly Islands. In 1998, Beijing expanded some permanent structures it had built earlier on Mischief Reef. The Philippines claimed Mischief Reef as within its exclusive economic zone and asserted that the Spratly Islands are over one thousand miles away from China's coast, and that China's structure was for military use rather than shelter for fisherman. As a result, there have been several conflicts between China and the Philippines since the latter part of the twentieth century.<sup>32</sup>

### **Basis of Vietnam's Claim**

Vietnam's argument is similar to that of China by claiming the ownership of the entire Spratly Islands and the Paracel Islands. The Spratly Islands are situated 800 kilometers east of Vietnam's capital, Ho Chi Minh City. Vietnam, a country in need of capital has an intense desire to acquire the potential wealth of oil and gas located in the Spratly's. Vietnam's claim is based on two theories. First, Vietnam claims that it has exercised historical dominion and control over the Spratly Islands, dating back to 1650. Although the government of North Vietnam had concurred with Chinese claims of sovereignty over the Islands in the 1950s, but the reunification government reasserted Vietnamese claim to the entire archipelago. Vietnam now argues that their right to the

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<sup>32</sup> Saleem, 542.

Spratly Islands is vested on the San Francisco Allied-Japanese Peace Conference in 1951, when Japan relinquished all rights to the islands and Vietnam asserted its claim. Second, Vietnam's claims are based on Law of the Sea's article 121 on the continental shelf.<sup>33</sup>

Vietnam claims the entire Spratly Islands as an offshore district of the province of Khanh Hoa, thus, covering an extensive area of the South China Sea. The Vietnamese have followed the Chinese example of using archaeological evidence to bolster sovereignty claims. In the 1930s, France claimed the Spratly Islands and Paracel Islands on behalf of its then-colony, Vietnam.<sup>34</sup> In 1954, the Geneva agreements concluded the first Indochina war. They did not specifically mention the islands but it was clear that, since France was handing over all its Vietnamese possessions to the two Vietnamese governments, North and South, due to the partition at the 17th parallel, the French possessions in the South China Sea should have normally fallen back into the hands of the Vietnamese side.<sup>35</sup>

In addition to the latter arguments, Vietnam's claim to the Spratly Islands--which they call the *Truong Sa* Islands—were part of the empire of Annam, Vietnam's ancestor, in the 19th century. In 1815, an expedition sent by King Gia Long to chart sea lanes occupied and settled the islands. The French, who were Vietnamese colonial rulers, annexed the Spratly Islands in 1933, so Vietnam says the islands are theirs as the inheritors of the French possessions. In September 1973, Vietnam declared that the Spratly Islands were part of the Phuoc Tuy province.<sup>36</sup>

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<sup>33</sup>Saleem, 540.

<sup>34</sup>American University.

<sup>35</sup>General (Rtd) Schaeffer.

<sup>36</sup>American University.



The Paracel islands are under the firm control of China, although it is contested by Vietnam. The firm control of the Parcel Islands by China has kept the dispute calm and relatively stable in comparison to the Spratly Islands until 2012. In May of 2012, CNOOC, a Chinese state-owned oil company was opening nine blocks in what China calls the South Sea to international bids for oil and gas exploration as shown on the map above.<sup>37</sup> In response to the Chinese actions, on June 21, 2012 Vietnam's parliament passed a maritime law that reasserted the country's claims to the Spratly and Paracel Islands.

<sup>37</sup> "Roiling the Waters" Economist July 7, 2012. Retrieved from <http://www.economist.com/node/21558262>. Accessed on December 10, 2014.

## Unexpected Recent Extension of Chinese Claim Extending onto Indonesian Waters

Until recently Indonesia has been immune to the hostilities of the South China Seas. Instead, Indonesia has been an honest broker among the disputing neighboring states: China, Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. On June 23, 2014, Hunan Map, a Chinese publishing company had redrawn China's territorial boundary of the South China Sea from the former nine dash-lines and transformed it to the "ten dash-lines."<sup>38</sup> The ten dash-lines extended China's claim of the South China Sea into Indonesian waters, the Natuna Islands in the Riau province. See below of Map by SinoMaps Press, an arm of the Chinese government.<sup>39</sup>



<sup>38</sup> Ahn, Nguyen Thi Lan. New Ten-Dashed Line Map Revealed China's Ambition. Originally Published on Vietnam Plus on July 17, 2014. <http://southchinaseastudies.org/en/publications/vietnamese-publications/1094-new-ten-dashed-line-map-revealed-chinas-ambition> Accessed December 12, 2014.

<sup>39</sup> Lee, Robert Victor (October 2, 2014), "Is Indonesia Beijing's Next Target in the South China Sea." *The Diplomat*. Retrieved from <http://thediplomat.com/2014/10/is-indonesia-beijings-next-target-in-the-south-china-sea/> Accessed December 12, 2014.

The Natuna archipelago has been the subject of an Indonesia-China tug-of-war before. Until the 1970s the majority of Natuna residents were ethnic Chinese, but anti-Chinese sentiment in Indonesia had led to the decrease of the ethnic Chinese in the islands. Additionally, the Indonesian government started to relocate ethnically Malay Indonesians to Natuna in the 1980s, for the stated reasons of importing skills and relieving population pressures from overcrowded island of Java, and, as perceived by local Chinese Indonesians, for the unstated reason of swamping the ethnic Chinese population with “real Indonesians.”

In 1996, Indonesia, perceiving that China had signaled territorial claims on the seas near Natuna, carried out its largest-ever naval exercise, sending almost 20,000 personnel to the Natuna Sea.<sup>40</sup> Indonesia wanted to demonstrate its resistance to any Chinese attempt to control the blocks of the sea. The actions by the Indonesian Navy and Air Force at the time appeared to deter China’s ambitions. Eighteen years later, China had reasserted itself again encroaching onto Indonesian waters by redrawing the nine dash-lines. In response to this, the Assistant Deputy to the Chief Security Minister for Defense Strategic Doctrine Commodore Fahru Zaini said, “China has claimed Natuna waters as their territorial waters. This arbitrary claim is related to the dispute over Spratly and Paracel islands between China and the Philippines. This dispute will have a large impact on the security of Natuna waters.” He continues, “What China has done is related to the territorial zone of the Unitary Republic of Indonesia. Therefore, we have come to Natuna to see the concrete strategy of the main component of our defense, namely the

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<sup>40</sup> Lee, Robert Victor. Is Indonesia Beijing’s Next Target in the South China Sea. *The Diplomat*. October 2, 2014. <http://thediplomat.com/2014/10/is-indonesia-beijings-next-target-in-the-south-china-sea/> accessed December 12, 2014.

National Defense Forces (TNI).”<sup>41</sup> To ensure China understands of the Natuna islands belonging to Indonesia, the country hosted the 2014 Komodo Multilateral Naval Exercise that included participants from the ASEAN countries, China, the United States, Russia, Australia, New Zealand, India, South Korea, and Japan within the Riau province waters.

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<sup>41</sup> Keck, Zachary. China’s Newest Maritime Dispute. *The Diplomat*. March 20, 2014. <http://thediplomat.com/2014/03/chinas-newest-maritime-dispute/> accessed December 12, 2014.



## Chapter 5-China

The primary concern of the South China Dispute lies at China's "tongue-like nine dashed lines" that is construed through the South China Sea, in areas where several other countries dispute their claims. With this in mind, China's perspective requires a more in-depth analysis.

China by virtue of its size is a key player in the South China Sea dispute witnessed by its growing political, economic, and military power. It seems that the purpose of China's claim in the South China Sea is to simultaneously strengthen its military might, enhance its physical presence in the region, and also to explore future resources for the needs of its growing population. China have developed a "three no's" policy to deal with the South China Sea dispute --no specification of claims, no multilateral negotiations, and no "internationalization" of the issue, including no involvement of outside powers.<sup>42</sup>

China has a policy of "no specification of its claims" in the South China Sea. China's actions indicate that it has claimed sovereignty over the entire South China Sea, but at the same time it refuses to particularize or justify its claim aside from the historical nine-dashed-line map that it has produced. Several questions remain unanswered: does China claim the entire area of the nine-dashed-line or just the islands within it? Or does China claim the exclusive economic zones and the continental shelf features? China realizes that it would be difficult once it specifies its policy under its historic water claims to then avoid having to defend its position under current international law. China agrees with the 2002 ASEAN Declaration on the Code of Parties in the South China Sea that in

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<sup>42</sup> Valencia, Ludwig, Dyke. Sharing the Resource of the South China Sea. pg 77

order for the South China Sea to be resolved, it has to be peaceful and must avoid any unilateral actions.

China opposes any multinational organization managing the resources of the South China Sea. Instead, China favors bilateral negotiations which it can dominate and if necessary, develop a bilateral joint agreement.<sup>43</sup> China wants to avoid any collective ASEAN intervention, which could turn into multilateral negotiations. Another issue that China fears in multilateral negotiations is that the United States or others may manipulate the negotiations.

China's argument in this case is as long as its thousand-year history. Omar Saleem's article in the American University Law Review offers some interesting insight into China's adamant fight for the territory: China developed a Positive Defense Strategy in 1995, called Jixi Fang, which established a military and economic belt along its eastern coastline spanning from its northeast to its southeast coast. China established the belt to protect the most prosperous economic centers lying in coastal regions, including Hong Kong, Macau, Shanghai, and Guangdong.<sup>44</sup> The belt manifests China's claim of sovereignty over its coast, continental shelf, exclusive economic zone, and territories. China's position has repercussions in Asia because numerous other nations also claim the same seas and adjoining areas, thus propagating regional conflict.

China's goal is to modernize its nuclear capacity and make its military forces more accurate, easier to launch, more mobile, and less vulnerable. The belt, along with China's military growth, are perceived to challenge the United States' interests in Asia, because they have a potential impact upon existing sea-lanes, oil reserves, as well as

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<sup>43</sup> Valencia, Ludwig, Dyke. pg 77

<sup>44</sup> Saleem, 533.

locations such as the Senkaku Islands, the Korean Peninsula, Taiwan, and the Spratly Islands.<sup>45</sup> Because Taiwan has both economic and geopolitical significance for the US, it has a historical obligation to provide both military and economic security against mainland China's possible invasion, intervention, and coercion. Taiwan and the Taiwan Strait, a waterway approximately 100 miles wide that separates the Mainland from Taiwan, are part of the northern end of the belt established by Beijing. The Belt extends from north of Taiwan to the Spratly Islands in the South China Sea. If both Taiwan and the Spratly Islands come under the Mainland's sphere of influence then China will have increased its control over the lucrative resources and shipping lanes in the region.

Chinese scholars contend that their historical contact with the Spratly Islands has dated back thousands of years from the Chinese dynasties of Xia (twenty-first to sixteenth century B.C.). Chinese scholars date their control of the Spratly Islands to a time prior to the Han Dynasty proven by ancient publications in books, records, poems, and classical Chinese text. During the Ming Dynasty (1367 to 1644) and the Qing Dynasty (1644 to 1911) the Chinese recorded geographical descriptions of the Spratly Islands thus proving the Chinese argument.<sup>46</sup> Chinese scholar, Jianming Shen stated that the Chinese may have discovered the islands much earlier up to the 770-221 BC during the East Zhou dynasty.<sup>47</sup> Consequently, in 1911, the emergence of the Republic of China under Chiang Kai-Shek, China exercised jurisdiction over the Spratly Islands through business endeavors, surveys, military personnel, exploitation of natural resources, published maps, and the construction of structures. In effect, China contends that it was

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<sup>45</sup>Saleem, 534.

<sup>46</sup>Saleem, 533

<sup>47</sup> Shen, Jianming. *Territorial Aspects of the South China Sea Island Disputes. Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation.* Martinus Nijhoff Publisher. 1998. pg 150

the first country to discover and exercise dominion and control over the Spratly Islands.<sup>48</sup>

China's claim of sovereignty over the Spratly Islands has not gone unchallenged from 1933 to 1939 as the Spratly Islands were part of French Indochina (now known as Vietnam). Afterward, during World War II, Japan occupied China and took possession of the Spratly Islands. Japan used the islands as naval bases for both staging invasions and blockades. After the war the islands were returned to China (under Chiang Kai Shek, of what is now Taiwan) under both the 1943 Cairo Conference and the 1945 Potsdam Proclamation. In 1946, China held a take-over ceremony on the Spratly Islands. Then, at the 1952 San Francisco Allied Peace Conference, Japan stated that it had renounced all rights to Taiwan, which includes the Spratly Islands and other islands that Japan had occupied during the war.<sup>49</sup>

Omar Saleem's insight on the reasons for China's development of its Positive Defense Strategy and on its adamant fight for the Spratly Island is credible. Therefore, China's sphere of influence has already been in effect. This is proven as trade between ASEAN, Japan, Korea, and China has been increasing. Therefore, the best argument for China is still in its historical connection. Moreover, it is unlikely China will use force to resolve the Spratly Island dispute in the immediate future because both the international community and international trade would react strongly, as was exemplified when it used military action in 1992 with Vietnam. Moreover, China is a member of the United Nations, and member states are required under the UN Charter to refrain from the threat or use of force to resolve international matters. ASEAN has espoused the peaceful resolution of regional disputes through the Treaty of Amity and Cooperation. But

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<sup>48</sup>Saleem, 538.

<sup>49</sup>Saleem, 539.

Chinese acquisition of the Spratly Islands may become necessary to support China's growing population and increasing rates of resource consumption. Therefore, China's actions continue to be worrisome.

Another argument that had been raised is China's fear of disintegration. China is determined to consolidate and control its claimed areas as a drive to re-establish itself as the dominant power in Asia. Should China lose its claims in the South China Sea to smaller States, this could severely damage its legitimacy as a main power player in the region. At the same time, its losses would exacerbate other contentious regions in the country, i.e. Tibet, the Uighur provinces, the Taiwan issue and the recent democratic movement in Hong Kong.

China claims the sovereignty over four chains of islands: the Paracel islands, the Spratly islands, Pratas islands, and the Macclesfield Bank in the South China Sea. China deemed that the Pratas island chain of islands and the Macclesfield Bank as less controversial and relatively unimportant. The dispute between the two areas has not had any significant impact on international relations; accordingly the value of the Pratas and the Macclesfield Bank is limited. The Pratas is much closer to China and the Macclesfield Bank is a totally submerged atoll, thus it is questionable if what lies underwater may be owned.

David Rosenberg's article "The Rise of China: Implications for Security Flashpoints and Resource Politics in the South China Sea" argued that China has followed a policy of "creeping assertiveness" or "slow-intensity conflict" or "creeping irredentism and ambiguous threats" in the South China Sea.<sup>50</sup> China's regional

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<sup>50</sup> Rosenberg, David. "The Rise of China: Implications for Security Flashpoints and Resource Politics in the South China Sea." Strategic Studies Institute-Department of the US Army. January 2002. Pg 252.

assertiveness can be seen in its current construction of a new island that is capable of accommodating an airstrip and docks for warships on Fiery Cross Reef.<sup>51</sup> Rosenberg also stated that China is following a policy of “strategic pragmatism” in resolving conflicts with others in the region by working to develop regional institutions and codes of conduct to resolve disputes. This was exemplified with the Mischief Reef when ASEAN Foreign Ministers gathered in Brunei in July 1995. Chinese Foreign Minister Qian Qichen expressed China’s readiness to discuss the issue insisting that it would discuss only bilaterally with each claimant. However, beginning in 1999, China and its ASEAN partners resolved to have a mutual agreement to create a code of conduct that would manage the security of the region.

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<sup>51</sup> Perlez, Jane. *China Said to Turn Reef Into Airstrip in Disputed Water*. New York Times Nov 23, 2014.

**Chapter 6-Managing Conflicts: The Cooperative Approach-ASEAN Unity, the  
“ASEAN Way” in Resolving the Dispute**

In the book *Pacific Asia? Prospects for Security and Cooperation in East Asia* by Mel Gurtov, he argues that there are three approaches that stand out in analyzing security concerns in the region. The first is nationalism, the common conviction that Asians must develop their own means of achieving security. He further explains that colonial rule, agreements and treaties orchestrated by the major powers during the Cold War, and big power intervention had taken control of Asia's destiny out of Asian hands.<sup>52</sup> The second aspect of the Asian approach is the Cold War history of bilateralism in security relations.<sup>53</sup> The third area of the Asian approach is economic. Rapid economic growth in much of the region necessitates multilateral cooperation, not merely to facilitate further growth, but also to avoid the political friction that would threaten it.<sup>54</sup>

In considering the latter approaches by Mel Gurtov, ASEAN member states have informally adopted their own way of managing conflict in what is known as the “ASEAN Way.” According to Logan Masilamani and Jimmy Peterson, “The ASEAN Way” is a working process or style that is informal and personal where policymakers constantly utilize compromise, consensus, and consultation in the informal decision-making process. This type of diplomacy allows ASEAN leaders to communicate without bringing the discussions into the public view, hence, avoiding embarrassment that may lead to further

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<sup>52</sup>Gurtov, Mel, 2002. *Pacific Asia? Prospects for Security and Cooperation in East Asia*. Rowman & Littlefield Publishers, Inc

<sup>53</sup>Ibid.

<sup>54</sup>Ibid.

conflict.<sup>55</sup>

Gurtov further characterizes the Asian Way to security as the following:

- Passive rather than active collaboration; reliance on coordination and communication.
- Comprehensive definition of security.
- Consultative, not hegemonic or coalition building.
- Consensual, not contractual.
- Loose rather than tight organization and mission.
- Open (inclusive) rather than closed (exclusive) membership.
- Conciliatory rather than coercive purposes.

Looking beyond the rhetoric, most Southeast Asian states consider the continued US military containment of China a necessity, as Southeast Asian military capabilities are no match for those of China and a common ASEAN defense identity is absent.<sup>56</sup> ASEAN has not explicitly defined China as a potential threat. However, in 1992 ASEAN recommended that the United States maintain its forces in the region since Chinese advances into the South China Sea had implied that Southeast Asia was not immune to the consequences of the strategic choices of China and the US.<sup>57</sup> By the early 1990s, China was gaining a foothold in the backyard of Southeast Asia, threatening to fill the regional security vacuum that might emerge in the event of a reduced US military presence.

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<sup>55</sup> Masilamani, Logan and Jimmy Peterson. The “ASEAN Way”: The Structural Underpinnings of Constructive Engagement, *Foreign Policy Journal* October 14, 2014.

<sup>56</sup> Odgaard, Liselotte, 2002. *Maritime Security Between China and Southeast Asia: Conflict and Cooperation in the Making of Regional Order*. Aldershot: Ashgate.

<sup>57</sup> Tasker, Rodney, August 6, 1992. ‘Facing up to Security’, *Far Eastern Economic Review* (Hong Kong).



The participation of all ASEAN members, except Myanmar, in the informal dialogue on the South China Sea and the ASEAN states' explicit endorsement of the dialogue process in the 1992 ASEAN declaration on the South China Sea indicate that they are in agreement that such dialogue is a feasible way of establishing coexistence with China in the absence of formal dispute resolution mechanisms. The Southeast Asian contribution to a stable balance between the US and China can only be minor. However, within this framework they can promote a practice of consultation, sustaining peace and stability in the South China Sea. This requires that ASEAN states try to avoid and control crises in their relations by respecting each other's spheres of influence.

ASEAN has demonstrated some unity in meeting this requirement. First, ASEAN's members agree that China and Southeast Asia must refrain from intervening unilaterally in each other's spheres of influence. For example, with a thinly veiled reference to China, the 1995 ASEAN foreign ministers' statement on the South China Sea called for all parties to refrain from taking actions destabilizing the region and for an early resolution of the problems caused by the developments in Mischief Reef.<sup>58</sup> ASEAN left China in no doubt that it considered the Chinese occupation of Mischief Reef in the maritime center of Southeast Asia to be an unacceptable encroachment of the tacit border between Southeast Asian and Chinese spheres of influence, to the detriment of regional peace and stability. Furthermore, ASEAN has suggested preventive measures against armed confrontation.

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<sup>58</sup>ASEAN, 1995. 'Recent Developments in the South China Sea. Accessed April 30,2010 <http://www.asean.or.id/5232.htm>.

ASEAN is similarly united in supporting the establishment of a code of conduct. The specific contents of such a code envisaged by individual member-states may vary. For example, ASEAN refrains from suggesting prohibitive measures against construction work on occupied features owing to Malaysian resistance. Similarly, ASEAN does not recommend models of settlement owing to internal disagreement on this issue. For example, the Philippines claims features occupied by Malaysia. Consequently, the Philippines has advocated a settlement that involves declaring the disputed area common fishing ground, while Malaysia is happy with a model based on existing occupations. In view of such disagreements between ASEAN states claiming features in the South China Sea, the ASEAN requirements for a code of conduct is conservative. They focus on restrictions on violence, such as the non-use of force and consultations between defense officials, and the application of international legal provisions pertaining to the South China Sea. The ASEAN approach to managing potential conflicts in the South China Sea implies that the Southeast Asian states have tried to include a code of conduct with China that includes multilateral agreements on sovereignty disputes, let alone multilateral joint development arrangements. The ASEAN member-states are also looking for reassurance that the Chinese presence after the Cold War will not upset the fragile order that has so far ensured regional peace. Southeast Asia is not looking for extensive cooperation with China. That would be a far-fetched goal, given the bleak record of internal ASEAN cooperation. Instead, the member-states are searching for explicit confirmation that China's presence in the South China Sea will not jeopardize peaceful coexistence.

### **Dialogs, Study Groups/Workshops**

In 1988, Indonesian diplomat Prof. Dr. Hasjim Djalal saw that the Paracel Islands and the Spratly Islands were becoming an issue that might get out of control, thus, a threat to South East Asian security. With the guidance of Foreign Minister of Indonesia, Ali Alatas, Dr. Djalal went around to the ASEAN capitals in the 1989. During his visits, he found that all ASEAN member-states agreed that an action to discuss the South China Sea were needed. He also found that the territorial dispute could pose major difficulties in developing cooperative efforts and due to the sensitivity of the issue that the best approach was to be informal, at least in the initial stage. Additionally, he found that ASEAN member-states should coordinate their views first before engaging with non-member states. During his visits, as written in the article “Preventative Diplomacy: Managing Potential Conflicts in the South China Sea,” Dr. Djalil found several factors that were going to be a major security agenda in the region:

- Clashes between China and Vietnam had taken place in 1988 when three Vietnamese vessels were sunk and 70 persons were killed.
- The existence of multiple claims to the South China Sea, particularly around the Spratly islands.
- Long history of confrontation among the countries around the South China Sea.
- Rapid economic development in the region with consequent rush to seek natural resources, living or non-living.
- Strategic significance of the South China Sea to sea lines of transportation and communication for regional as well as international trade.
- Increasing pattern of pollution and safety of navigation as well as the protection

of marine environment and its ecosystem in the South China Sea.

A major confrontation between the countries surrounding the South China Sea would be detrimental to international security and would bring the international community to the region which would be contradictory to the ASEAN Way of managing conflicts. It is therefore essential to seek ways to manage the South China Sea dispute to prevent any military escalation.

### **Indonesian Sponsored Workshops**

As in accordance with the thoughts of ASEAN leaders at the time and funding by the Canadian Government through the University of British Columbia, the First Workshop was held in Bali in 1990 which was exclusively attended by ASEAN member states in order to lay down the groundwork. The following year in Bandung, the Second Workshop was inclusive which included Vietnam (Vietnam did not become full member of ASEAN until 1995), China and Taiwan. Land-locked countries like Laos and Cambodia were also invited.

The Second Workshop participants first opened with a free discussion to identify topics where cooperation could be achieved. They discussed various categories such as: protection of the marine environment, political and strategic issues, and safety of navigation, marine scientific research, and territorial disputes, including the dispute over the Spratly and Paracel Islands, institutional mechanism for cooperation, and so on.<sup>59</sup> Due to the sensitive nature of the topic on the Spratly and Paracel Islands, participants were given five minutes to express their views.

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<sup>59</sup>Djalal, Hasjim. *South China Sea Island Disputes on Security Flashpoint: Oil Islands, Sea Access and Military Confrontation*. Martinus Nijhoff Publishers. Pg 117-119.

At the Third Workshop held in Yogyakarta in 1992, participants decided that they needed to concretize and materialize their ideas and agreed to create two Technical Working Groups (TWG) on: Marine Scientific Research and on Resources Assessment. Article 123 (d) of the UN Convention on the Law of the Sea, “States bordering on enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties...to this end, they shall endeavor to invite, as appropriate, other interested states or international organizations to co-operate with them...”<sup>60</sup> At the Fourth Workshop in Surabaya in 1993, participating countries identified a number of additional topics where cooperation was a possibility and believed that participants by non-South China Sea experts or countries should be allowed on a case by case basis. As a result, the three agreed upon projects were proposed. Therefore, they were ready to convene the Technical Working Groups to deal with the topics in detail. Three topics were established as a result of this meeting: Protection of Marine Environment, Legal Matters, and Safety of Navigation, Shipping, and Communication.<sup>61</sup> These topic areas were discussed at their respective Technical Working Groups. Ambassador Djalal believed that the cooperative efforts had been positive.

Following the success of the previous Technical Working Groups at the Fifth Workshop held in Bukittinggi in 1994, participants approved the Technical Working Group on Marine Scientific Research to carry out a cooperative study on diversity in the South China Sea. The following year at the Sixth Workshop in Balikpapan, participants approved two more project proposals, which included: the study of the sea level and tide

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<sup>60</sup>Ibid, pg 120

<sup>61</sup>Townsend-Gault, Ian and Hasjim Djalal, *Preventative Diplomacy: Managing Potential Conflicts in the South China Sea*. Published in *Herding Cats: Multiparty Mediation in a Complex World*. Published by United States Institute of Peace. 1999

monitoring within the context of global climate change; and to develop a database, information exchange and networking arrangements amongst scientists. In addition, participants also agreed to undertake various studies within the context of promoting safety of navigation and communication in the South China Sea.

In addition to hosting the Technical Working Groups that Ambassador Djalil and participating countries attempted to hold during these workshops, a second area of focus were to carry out and promote Confidence-Building Measures (CBM) or a Confidence-Building Process (CBP). Therefore, during the Second Workshop in 1991 in Bandung, participants issued a statement explaining that solutions to any territorial or jurisdictional disputes in the South China Sea must be by “peaceful means through dialogue and negotiations,” and that “force should not be used to settle territorial and jurisdictional disputes.” Also “parties involved in such disputes are urged to exercise self-restraint in order to not complicate the situation.”<sup>62</sup> The latter statement became the precursor to the ASEAN Declaration of the South China Sea held in Manila in 1992. Following the 1992 Declaration, the 1994 Fifth Workshop, and the 1995 Sixth Workshop, the principle of “non-expansion of existing military presence” was discussed and was supported by many and opposed by few. It was argued that the informal workshops were not the place to discuss such matters.<sup>63</sup>

A third objective was also in process, namely to encourage more discussion and dialogue among the parties to the territorial disputes so that participating States would find the basis for a solution that would be acceptable to all parties concerned. However, the position of China was that parties concerned bilaterally could only make settlement of

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<sup>62</sup>Djalil, Hasjim. *South China Sea Island Disputes on Security Flashpoint: Oil Islands, Sea Access and Military Confrontation*. Martinus Nijhoff Publishers. Pg 123.

<sup>63</sup>Townsend and Djalil.

the territorial disputes, not regionally, internationally, or multilaterally. As a result of the third objective, Ambassador Djalil saw that China had begun bilateral talks with the Philippines and Vietnam, while, Malaysia, Philippines along with Vietnam had been engaged in multilateral talks.

A non-binding code of conduct had been discussed beginning in the 1996 ASEAN Ministerial meeting in Jakarta. After almost five years of negotiations, China eventually agreed to a political document that was signed by ASEAN members plus China in November 2002 in Phnom Penh, Cambodia. This agreement was the ASEAN Declaration on the Code of Parties in the South China Sea (DOC).<sup>64</sup> China's endorsement of the Declaration helped build confidence among its ASEAN partners.

### **Post Declaration of Conduct**

According to Tran Truong Thuy, China's agreement to signing the ASEAN Declaration on the Code of Parties in the South China Sea was attributed to the September 11, 2001 terrorist attack on the United States. Due to this incident, relations between the US and the Philippines, Malaysia and Vietnam among other Southeast Asian nations improved, primarily due to the ASEAN countries' support of the US war on terrorism. Thuy continues to state that China realized that its participation in the ASEAN Declaration was to discouraged ASEAN member countries from enhancing their political and military relations with the US, thus avoiding US interference in the South China Sea.<sup>65</sup> At the same time, ASEAN states saw China's economic growth as an opportunity.

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<sup>64</sup> Thuy, Tran Truong. Recent Developments in the South China Sea: Implications for Regional Security and Cooperation. [http://csis.org/files/publication/110629\\_Thuy\\_South\\_China\\_Sea.pdf](http://csis.org/files/publication/110629_Thuy_South_China_Sea.pdf) Accessed December 10, 2014

<sup>65</sup> Ibid

Amitav Acharya argued, “From a political angle, the realization of a China-ASEAN free trade zone agreement indicates that historical fraud and political clashes between ASEAN member states and PRC are no longer one of the most important factors influencing ASEAN-PRC relations.”<sup>66</sup>

The outcome of the positive two-way understanding led to the October 8, 2003, Joint Declaration of the Heads of State/Government of ASEAN and China on a Strategic Partnership for Peace and Prosperity. To deepen and broaden ASEAN-China relations and cooperation, among other things, ASEAN and China declared they would pursue joint actions and measures to implement the Declaration in an ‘effective way’ by way of a six point Plan of Action which includes: Political and Security Cooperation, Economic Cooperation, Functional Cooperation (i.e. Public Health Cooperation and Educational Cooperation), Cooperation in International and Regional Fora, Funding on the implementation of the plan of action, and the Institutional Arrangements for the listed points.<sup>67</sup> The understanding also signaled China’s agreement to become a member of ASEAN’s 1976 peace treaty, “Treaty of Amity and Cooperation.”<sup>68</sup> In addition to the Plan of Action to the Implementation of the Joint Declaration, ASEAN member states and China agreed on establishing a joint working group (JWG) at the first ASEAN-CHINA Senior Officials Meeting in Kuala Lumpur on December 7, 2004. The

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<sup>66</sup> Amitav Acharya, Seeking Security in the Dragon’s shadow: China and Southeast Asia in the Emerging Asian Order. IDSS Working papers. March 2003

<sup>67</sup> Plan of Action to Implement the Joint Declaration of the Heads of State/Government of ASEAN and China on Strategic Partnership for Peace and Prosperity. <http://www.asean.org/news/item/plan-of-action-to-implement-the-joint-declaration-on-asean-china-strategic-partnership-for-peace-and-prosperity> accessed December 6, 2014.

<sup>68</sup> Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia. <http://www.asean.org/news/item/instrument-of-accession-to-the-treaty-of-amity-and-cooperation-in-southeast-asia-2> accessed December 6, 2014. Treaty of Amity and Cooperation is a peace treaty among the ASEAN member states.



main task of the ASEAN-China JWG is to study and recommend measures to translate the provisions of the Joint Declaration into concrete cooperative activities that will enhance mutual understanding and trust.<sup>69</sup> The Joint Working Group is also tasked with formulating recommendations on: a) creating guidelines and an action plan for the implementation of the DOC; b) establishing specific cooperative activities in the South China Sea; c) creating a registry of experts and eminent persons who may provide technical inputs, non-binding and professional views or policy recommendations to the ASEAN-China JWG; and d) convening workshops, as the need arises.<sup>70</sup> The joint working group continues to meet annually up to the present time.

At the first meeting of the ASEAN-China Joint Working Group in Manila on August 4, 2005, ASEAN presented a draft of guidelines for the implementation of the Joint Declaration for discussion. However, Thuy stated the main issue is point 2 of the Guidelines on the Plan of Action for the implementation of the Joint Declaration. According to ASEAN practice in dealing with a Dialogue Partner, ASEAN wants to deal with China as a group and to “consult among themselves” before meeting with China, while China prefers consultations with “relevant parties,” not with ASEAN as a bloc.<sup>71</sup> After several meetings of ASEAN-China JWG, a consensus on point 2 of the guideline has not been reached and the agreed upon six joint cooperation projects on less sensitive issues were still on the papers.

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<sup>69</sup> Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea. <http://www.asean.org/asean/external-relations/china/item/terms-of-reference-of-the-asean-china-joint-working-group-on-the-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea> accessed December 6, 2014

<sup>70</sup> Ibid

<sup>71</sup> Thuy, Tran Thuong

Up to now, there has been increased in tension between China, the Philippines and Vietnam. In late June 2012, CNOOC, the Chinese oil company, was given the right to explore nine blocks in what China calls the South Sea for oil and gas exploration. This was possibly due to Vietnam's parliament passing a maritime law that reasserted the country's claims to the Spratly and Paracel Islands in June of that year.<sup>72</sup> Two months prior to that, the Philippines said one of its warships had found eight Chinese fishing vessels near the disputed island. Philippine Navy personnel boarded the Chinese vessels, where the Filipinos claimed they found large quantities of illegal coral and fish. Chinese surveillance ships arrived shortly thereafter, thereby preventing the arrest of the Chinese fishermen.<sup>73</sup>

These events illustrate that while the continuing discussion about how to handle the dispute is a necessary one, frequent conflicts in the water - both large and small - have become a regular occurrence that may threaten the prospect of a permanent and mutually accepted resolution.

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<sup>72</sup> "Roiling the Waters" Economist July 7, 2012. Retrieved from <http://www.economist.com/node/21558262> Accessed on December 10, 2014.

<sup>73</sup> Perlez, Jane (May 10, 2012). Dispute Between China and Philippines Over Island Becomes More Heated. New York Times.

## **Chapter 7- International Law**

The UN Convention on the Law of the Sea excludes rocks incapable of sustaining human habitation as stated in Article 121. Rocks, which cannot sustain human habitation or economic life of their own, shall have no exclusive zone or continental shelf.<sup>74</sup> All of the claimant countries of the South China Sea dispute are signatories to the UN Law of the Sea Convention, which created guidelines concerning the status of the islands, the continental shelf, enclosed seas, and territorial limits with the exclusivity of an economic zone within the South China Sea dispute. Therefore, following the Convention's rules and regulations may allow and assist in resolving the dispute between the claimant countries.

### **Territorial Sea**

The sovereignty of a coastal State extends beyond the boundaries of its land territory and its coastal waters and, in the case of archipelagic States, its boundaries are extended beyond its immediate internal waters but goes to its adjacent seas are part of their territorial seas. Part II of the UN Law of the Sea Convention on "Territorial Sea and Contiguous Zone" states that both coastal States and archipelagic States sovereignty have the right to establish their territorial seas up to a limit not exceeding 12 nautical miles as stated in Article 3. Article 2 of the Convention provides that a limit that goes beyond the territorial sea and also delineates its airspace.<sup>75</sup>

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<sup>74</sup> United Nations Division for Oceans and Law of the Sea. United Nations Convention on the Law of the Sea 10 December 1982. Accessed November 19, 2014.

[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)

<sup>75</sup> Ibid

All States, whether coastal or land-locked, enjoy the right of innocent passage through territorial seas. The definition of “passage” in the UN Law of the Sea Convention allows States to navigate through the territorial sea of a country for the purpose of traversing the sea without entering internal waters in an expeditious means.<sup>76</sup> Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State with conformity of the convention.<sup>77</sup> However, if during the navigation it is rendered necessary to anchor and stop this action must be by *force majeure* or distress or for the purpose of assistance in danger or distress. Therefore, a ship will be considered prejudicial if it acts as a threat or uses force against the sovereignty of the State.

### **The Archipelagic State**

Part IV of the UN Law of the Sea defines the islands and the archipelagic States in which the legal status of territorial limitations applies. Article 47 of the treaty outlines the baseline in which an Archipelagic State may draw the starting point for its 12 mile territorial sea. The length of the baseline shall not exceed 100 nautical miles and the baseline may not be drawn to and from low-tide elevation unless a structured installation such as a lighthouse has been permanently built above sea level.<sup>78</sup> Additionally, if a part of the baseline lies between two parts of an immediate neighboring State, existing and all other legitimate interest in which the latter State has traditionally exercised shall be respected. Article 48 states the breadth of the measurement of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be

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<sup>76</sup> Ibid. Article 18

<sup>77</sup> ibid. Article 19

<sup>78</sup> Ibid

measured from the archipelagic baselines as stated in Article 47.<sup>79</sup>

Part IV of the convention also touches on the Right of Innocent Passage. Article 52 provides all States to enjoy the right of innocent passage through the archipelagic waters as in accordance with Part II of the convention. At the same time, Article 52 states that the Archipelagic State may suspend the passage of foreign ships if it is essential for its security. Additionally, Article 53 states the archipelagic States may designate sea-lanes within its jurisdiction and prescribe traffic entries.

### **Exclusive Economic Zone**

Under Part V of the Convention, every coastal State is entitled to claim an Exclusive Economic Zone (EEZ). This area is beyond and adjacent to its respective territorial sea.<sup>80</sup> Article 56 of the treaty outlines parameters for the establishment of a coastal State's Exclusive Economic Zone (EEZ) that extends 200 nautical miles from its coastline or 188 miles from the outer limit of a twelve mile territorial sea.<sup>81</sup> Article 56 also gives sovereign rights for exploration, exploitation, conservation, and resource management of living and non-living natural resources of waters in the country's exclusive economic zone.

Article 59 provides the basis for resolutions of conflicts in regards to the attribution of rights and jurisdiction in the exclusive economic zone. If a conflict were to arise within the exclusive economic zone, the conflict should be resolved on the basis of equity and in the light of all relevant circumstances in the interest of all involved

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<sup>79</sup> Ibid

<sup>80</sup> United Nations Division for Oceans and Law of the Sea. United Nations Convention on the Law of the Sea 10 December 1982. Accessed April 30, 2010

[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)

<sup>81</sup> Ibid. Article 57 States that the EEZ cannot extend beyond 200 nautical miles.

countries as well as to the international community. With regards to the installation of structures or artificial islands, Article 60 provides the baselines within the exclusive economic zone. Within the exclusive economic zone, the coastal States shall have the exclusive right to construct, authorize, and regulate the construction and its operation.<sup>82</sup>

In the South China Sea, such a disposition introduced the opportunity for Malaysia and Brunei to cover maritime areas overlapping some of the Southernmost islands of the Spratly's: seven islands for Malaysia, three of which are militarily occupied, and one, Louisa reef, for Brunei.

### **Continental Shelf**

The fourth important part of the UN Law of the Sea is Part VI on the Continental Shelf, which justifies claims by Brunei, Malaysia and the Philippines. Part VI defines the extension of the continental shelf of coastal States boundaries and contains the parameters for a country's continental shelf or to a distance of 200 nautical miles from the baselines of the breadth is measured where the outer edge of the continental margin does not extend to that distance as stated in article 76. The continental shelf is defined as the underwater portion of the country's coastal land mass -- including the sea bed as well as the subsoil of the shelf.<sup>83</sup> The deep ocean floor, however, is not considered part of a country's continental shelf. Similar to the exclusive economic zone, the continental shelf's sovereign rights are dependent upon the coastal State's jurisdiction where it can exploit and explore its natural resources.

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<sup>82</sup> UNCLOS Article 60 coastal states have the jurisdictional over any installations of structure and artificial islands.

<sup>83</sup> UNCLOS Article 76

The Philippines had stated its continental shelf extension and its claim, but its claim is weak because the depth of the Palawan Through separates the Spratly Islands from the Philippine archipelago and there is no natural prolongation as stated in Article 76 of the Law of the Sea Convention to extend a claim beyond the 200 nautical mile limit.<sup>84</sup>

Additionally, Malaysia's claim on the South China Sea also arises from Article 76 continental shelf argument in order for Malaysia to protect its extended maritime zones. It arises from the Geneva Convention of 1958 pertaining to territorial waters and continental shelf boundaries, which Malaysia signed in 1960.<sup>85</sup> Malaysia passed its own Continental Shelf Act in 1966 and 1969, defining it continental shelf as "the seabed and subsoil of submarine areas adjacent to the coast of Malaysia," up to 200 meters deep or the limit of exploitability.<sup>86</sup> Malaysia then published a map in 1979 entitled "Map Showing the Territorial Waters and Continental Shelf Boundaries," which has been its most explicit continental shelf claim. Although Malaysia claims the South China Sea is based on the continental shelf, this argument remains weak. Article 76 Section 1 of the Law of the Sea Convention only addresses "the seabed and subsoil of the submarine areas extended... [from a] a natural prolongation of its land to the outer edge of the continental margin," not as Malaysia had claim of land or rocks that rises above sea level.<sup>87</sup>

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<sup>84</sup> Valencia, Ludwig, Dyke. Sharing the Resources of the South China Sea. Pg 35.

<sup>85</sup> Ibid pg 36

<sup>86</sup> Ibid pg 36.

<sup>87</sup> Ibid pg 37

## **The Cairo Declaration**

As briefly mentioned earlier in chapter six on “China,” the Cairo Declaration in Egypt was the result of a meeting between Franklin Roosevelt, Winston Churchill and Chiang Kai-Shek on November 27, 1943 in Cairo, Egypt which declared that "all the territories Japan had stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China” (now Taiwan).<sup>88</sup> No mention was made of the Paracel and the Spratly Islands for the simple reason that, at the time, these islands were still under the French colonial administration, exerting sovereignty over them on behalf of the Vietnamese.

France never officially abandoned, nor renounced its sovereignty over the Spratly Islands. In these conditions, the contention introduces a specific legal case between China and Vietnam. The French’s unclear position over the Spratlys’ status consequently and unfortunately opened the way to the present discord about the islands.

## **Settlement Mechanism**

To be clear, the Law of the Sea Convention does not contain any provisions in any of its articles that discuss the resolution of disputes over any territory, islands, or other types of territory. While the convention provides several bodies for adjudicating disputes, or for a Commission to oversee claims to continental shelves beyond 200 miles, there is nothing in the body of the UN Law of the Sea that deals with sovereignty issues. The UN Law of the Sea addresses the establishment of maritime jurisdiction zones. In fact, the application of the UN Law of the Sea is premised on the assumption that a

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<sup>88</sup>Birth of the Constitution of Japan. Cairo Communiqué. National Diet Library. Accessed April 30, 2010 <http://www.ndl.go.jp/constitution/e/etc/c03.html>



particular State has undisputed title over the territory from which the maritime zone is claimed.<sup>89</sup> There is no rule in international law that prescribes sovereignty over islands on the basis of making a maritime claim.

So, if the UN Law of the Sea Convention does not provide a basis for settling island disputes, then what mechanisms do States have? The First attempt to resolve sovereignty disputes should be by bilateral negotiation. Failing this, several types of third party arbitration are available, i.e. the International Court of Justice or the Arbitral Tribunals. Another method to address sovereignty issues is to base a resolution on possible joint development schemes that could make a link between sovereignty disputes and the influence that islands have over maritime delimitation.

#### **Settlement Mechanism by way of International Law of the Sea (Article 287 and 298)**

The International Tribunal for the Law of the Sea (Annex VI) was established by the 1982 UN Convention on the Law of the Sea as one of the means for settlement of disputes regarding the interpretation and application of the provisions of the Convention. Other alternative mechanism for dispute settlements in the Convention are the International Court of Justice and *ad hoc* arbitral tribunals established in accordance with the Convention's Annexes VII (Arbitration) and VIII (Special Arbitration).<sup>90</sup> Part XV, Article 279 and Article 280 of the 1982 UN Convention on the Law of the Sea on Settlement of Disputes states that parties are obligated to settle disputes by peaceful

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<sup>89</sup>Smith, Robert W. and Bradford Thomas, *Setting the Stage on Security Flashpoint: Oil Islands, Sea Access and Military Confrontation*. Martinus Nijhoff Publishers. 1998 Pg 66-67.

<sup>90</sup>Mensah, Thomas A. "The International Tribunal for the Law of the Sea: The First Year." Oceans Policy: New Institutions, Challenges, and Opportunities. 1999 Pg 73.

means chosen by the involved parties themselves.<sup>91</sup> In the event that the disputing parties had reached no settlement by negotiation, conciliation or other peaceful means, Article 287 states that the Convention provides for compulsory dispute settlement. Section 1 of Article 287 wrote that a declaration must be made, and one of the following means may be chosen by the agreed parties: a) the International Tribunal for Law of the Sea, b) the International Court of Justice, c) the Arbitral Tribunal or d) the Special Arbitral Tribunal.<sup>92</sup>

There are important differences between the Tribunals and the Court. The International Court of Justice can only deal with disputes in which the parties are States; parties who are not States do not have access to the International Court of Justice. On the other hand, Tribunals deals with not only States but non-State characters.

### **International Court of Justice**

The International Court of Justice may entertain two types of cases: legal disputes between States submitted to it by them (contentious cases), and requests for advisory opinions on legal questions referred to it by United Nations organs and specialized agencies (advisory proceedings).

Only States (Member States of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases. The Court is to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

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<sup>91</sup> UNCLOS Article 279 and 280.

<sup>92</sup> UNCLOS Article 287

- by entering into a special agreement to submit the dispute to the Court;
- by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;

The reciprocal effect of the declaration made by the States under the Statute whereby each State accepts the jurisdiction of the Court, as compulsory, in the event of a similar declaration made by another State. A number of these declarations, which must be deposited with the United Nations Secretary-General, contain reservations excluding certain categories of dispute.

### **Tribunals (Annexes VI, VII, VIII)**

On the other hand the International Tribunal for the Law of the Sea has the competency to deal not only with disputes between two or more States, but also those involving entities which are not States. First, an important aspect of the Tribunal is that of decisions made within its two Chambers to deal with special categorized cases: the Seabed Disputes Chamber and the Chamber of Summary Procedure. Furthermore, the Tribunals have the jurisdiction on cases relating to:

- Cases between two or more states relating to the interpretation or application on the provisions of the Convention.
- Disputes between a State and the International Seabed Authority concerning access to resources.
- Disputes between a State and non-state entity.

- Disputes between the Authority and the non-state entity.

The Seabed Disputes Chamber of the Tribunal is empowered to deal with disputes concerning the interpretation or application of the provisions of Part XI of the Convention involving activities for exploration and exploitation of the resources in the seabed, ocean floor, and subsoil beyond the States' jurisdiction.<sup>93</sup>

### **Arbitral Tribunal constituted in accordance with Annex VII**

States that do not make a written declaration setting out their choices of the four options as given by Article 287, Section 1 of procedure are deemed to have accepted Annex VII, arbitration.<sup>94</sup> Moreover, if the parties have not chosen the same dispute settlement procedure, the dispute may only be submitted to Annex VII arbitration, in the absence of agreement to another procedure. Arbitral tribunal is composed of five members and is free to determine its own procedure, unless the parties agree otherwise. Annex VII on arbitration suggested that each disputing country provides one member of the Arbitral Tribunal and the remainder be provided from a third country. Arbitral Tribunal offers much greater flexibility than dispute settlement bodies with fixed rules of procedure, such as the International Tribunal Law of the Sea and the International Court of Justice.

Recently, China released a position paper on the matter of jurisdiction in the South China Sea due to the Department of Foreign Affairs of the Philippines presented a

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<sup>93</sup> United Nations Division for Oceans and Law of the Sea. United Nations Convention on the Law of the Sea 10 December 1982. Accessed November 19, 2014. Article 186.

[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)

<sup>94</sup> UNCLOS Article 287, Section 3

written note stating the Philippines initiated an arbitral compulsory proceedings with respect on the dispute with China over “maritime jurisdiction” in the South China Sea on January 22, 2013.<sup>95</sup> The Chinese government refuted the Philippines written request on February 19, 2013. This is a first for the Chinese government to outline a detailed position on the South China Sea dispute. The Chinese response “reiterated that it will neither accept nor participate in the arbitration thus initiated by the Philippines.”<sup>96</sup>

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<sup>95</sup> Tiezzi, Shannon. Why China Won't Accept International Arbitration in the South China Sea. *The Diplomat* December 9, 2014.

<sup>96</sup> Summary of the Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration by the Republic of the Philippines. Foreign Ministry of the People’s Republic of China. December 7, 2014.

## **Chapter 8-Current Proposals for a Solution**

The ASEAN Joint Declaration 1992-Manila Declarations on the South China Sea provides that all parties are to apply the principles contained in the Treaty of Amity and Co-operation in Southeast Asia (TAC) as the basis for establishing a code of international conduct for the South China Sea.

The Declaration on the Conduct of Parties in the South China Sea 2002 (DOC) was signed on 4 November 2002 during the Eighth ASEAN Summit in Phnom Penh, Cambodia by leaders of ASEAN and China. The parties unanimously considered that this event has made an important contribution to the maintenance of peace and security in the region and to the promotion of development and cooperation. The Declaration of Conduct is a first step towards the establishment of a code of conduct in the South China Sea, which has been under discussion for over a decade.

Paragraph 40 the Declaration reaffirmed that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agreed to work towards a Declaration on the Conduct of Parties in the South China Sea. In this regard, “we agree to work closely with China with a view to adopting the Declaration.”<sup>97</sup> With the 2002 Declaration of Conduct, both ASEAN member countries and China have overcome their differences and achieved the first political text for the conduct of parties in the South China Sea.

The Declaration on the Conduct of Parties in the South China Sea has ten points, which state: 1. All parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the

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<sup>97</sup>ASEAN. Declaration on the Conduct of Parties in the South China Sea. Accessed April 30,2010 <http://www.aseansec.org/13163.htm>.

Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law. 2. All parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law. 3. The freedom of navigation in and over flight above the South China Sea is provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea. 4. The parties resolve to settle territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations. 5. To exercise self-restraint in the conduct of activities that would complicate or escalate disputes. 6. All parties to may explore or undertake cooperative activities. 7. The parties stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighborliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes. Points eight, nine and ten, states that all parties will undertake to respect, to encourage, to respect, and to reaffirm the adoption of the declaration of conduct.

The Declaration of Conduct appears to have avoided the biggest obstacle among the claimants in establishing a code of conduct in the South China Sea. This was the question of the scope of application. Furthermore, the Declaration of Conduct is not a legal instrument and thus is technically not legally binding and is even less persuasive than the

code of conduct that many countries in the region had desired. Generally, a political declaration does not provide as clear guidance for state action as a code, but it can be an important document.

Moreover, The Declaration of Conduct is meant to diminish the threat of war or a military clash in the South China Sea. It has important significance in creating an environment for cooperation, peace, and stability in the region and in promoting trust, confidence building, and mutual understanding between ASEAN and China. However, the implementation of the principles contained in the Declaration of Conduct depends upon the good will and efforts of its parties.

### **Possible Moves Towards Resolutions**

Aside from the UN Convention on the Law of the Sea, the World Court (International Court of Justice) could also serve as a conduit to resolve the Spratly-related territorial disputes. In order for the International Court of Justice to hear a case, however, all disputants must be willing to permit the Court to hear the case and render a binding decision. James Kiras believes that China will be unwilling to take this conflict resolution route, given that China claims rights to a sea area extending 1,000 nautical miles south of Hong Kong. Kiras cites four motives driving China's resistance to and international juridical resolution: 1. Land-based resource scarcity; 2. Population growth; 3. Aspirations to become a regional naval power; and 4. Territorial claims far exceed anything established in existing international maritime law.<sup>98</sup>

Omar Salaam observes that eventually, the Spratly Island dispute will reach one

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<sup>98</sup>Kiras, James (1995). "The South China Sea: Issues of a Maritime Dispute." *Peacekeeping & International Relations*. July/August 1995.



of five possible conclusions. The first possible outcome is that one of the claimant countries will take all of the territory through a tribunal, dispute resolution, or military force. Second, the most powerful nations will share the wealth of the Spratly Islands and the less powerful will become disenfranchised. Third, all the disputants share the wealth equally. Fourth, all the states share in proportion to an articulated distribution scheme. Lastly, none of the states have access to the wealth.<sup>99</sup> Unless the claimant countries of Brunei, China, Taiwan, Malaysia, the Philippines, and Vietnam reach an agreement to share the resources of the Spratly Islands, China will eventually become frustrated and more militarily aggressive. Clearly, any resolution of the dispute will involve China and will, therefore, have an impact upon both Asia and the United States.

There may also be other possibilities in resolving the disputed area. Such ideas might be to create a joint authority in the region to develop the resources. Considering that international relations disputes all seem to be zero-sum, this idea may be far-fetched. Another way to mitigate the issue is to continue talks, but this would only leave the issue on the back burner. Then, perhaps resolving the entire issue will expedite solving the bilateral issues first. Once that has been solved, multilateral negotiations can begin. This too seems to be off from the zero-sum deal making.

ASEAN and China Relations have become more vibrant. Recently, on January 1, 2010 ASEAN and China put in place a Free Trade Area. It may be that the best solvable way to satisfy all parties, although not completely, is to share the area. Currently, the primary issue is China's fight for the territory, in which, China may even use military action. But, if we look from the viewpoint of International Law, from the United Nations Convention on the Law of the Sea, the Philippines has the best prospects. This is due to

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<sup>99</sup>Salam, 569.

China's and Vietnam's proximity to the Islands. It is possible to say that the recent developments in the South China Sea are most often a mixture of counterproductive events and at the same time, possible occasions conducive to peace, stability and cooperation. Therefore, there may be solutions but each country in the area must abandon parts of its claims, especially China whose greed cannot be accepted by the other countries or by the United Nations Convention on the Law of the Sea.

## **Chapter 9-Conclusion**

The South China Sea dispute is a complex issue. It involves several claimants with their own complicated arguments that defend their respective causes. Two questions arise from the introduction of this thesis: to what extent does this conflict affect international trade? And what are the economic implications of a given solution? A possible response to these questions is that the South China Sea dispute is in essence a question of territorial sovereignty, which suggests possible effects on and implications for international trade. The UN Convention on the Law of the Sea prescribes a country's jurisdiction over the territorial sovereignty of a State's extended boundary of 12 nautical miles territorial seas and its 200 nautical mile exclusive economic zone from their respective continental shelves. In the case of the South China Sea, there is an obvious overlapping territorial jurisdiction, which makes it difficult to determine any definitive and universally acceptable answer to territorial sovereignty.

The issue could have been resolved via the 1982 UN Convention on the Law of the Sea by using its dispute mechanisms such as the International Court of Justice, Tribunals, or Arbitral Tribunals. In the case of the South China Sea, China has developed the "three no's" policy to deal with the dispute --no specification of claims, no multilateral negotiations (favoring instead bilateral negotiations), and no "internationalization" of the issue, including no involvement of outside powers. Due to this policy, two issues have arisen: 1. China has placed itself in a much stronger position when negotiating with individual countries bilaterally due to the size of its economy and military. Therefore, China's negotiating partners will be less likely to agree on any compromise on this footing. 2. ASEAN member claimant countries are in favor of

having multilateral negotiations that would place Vietnam, the Philippines and Malaysia on an equal footing with China. The two viewpoints between China and ASEAN member claimant countries are on opposite ends, hence, the difficulty to find an agreement.

Before any solutions can be proposed, the issue of sovereignty must be resolved. The region is on a path of rapid industrialization. With speedy development, each claimant country is looking at more self-sustaining resources to meet the needs of their growing populations. With the anticipation of large reserves of oil and gas as well as an abundance of sea life in the South China Sea, there is increased attraction for each state to fight for its individual stakes and control of the South China Sea.

Due to the lack of a compromise, each claimant country is increasing its respective naval capabilities, thereby creating a new naval arms race in the region. Certain action by any of the actors in the dispute may spark conflict as has been proven in the past.

The Indonesian-sponsored workshops provided an interim solution that led to the 2002 Declaration of Conduct and continued discussion amongst claiming countries ranging from security to environmental degradation in the South China Sea. But with the recent Chinese expansion of its claim that intrudes into Indonesian waters this has led Indonesia to become more cautious of its own territory and may question its role as an impartial mediator. Then who can replace Indonesia? During the recent ASEAN Summit on November 13, 2014, in Nay Pyi Taw, Myanmar, Singapore's Foreign Minister K.

Shanmugam stated that Singapore could be an “honest broker.”<sup>100</sup> Singapore is seen as both Asian and “Westernized”. Singapore is small, unthreatening and is able to “speak freely and frankly.” But its small size limits Singapore’s ability to ensure that claimants do not stall the process once the outcome veers unfavorably for them.

There are many possible solutions and understanding each one is vital to an ultimate understanding of the issue. One option might be to create a joint authority in the region to develop the resources. But, as the realist considerations of international relations disputes are taken into account, all seem to be zero-sum, and implementing this idea may be too far-fetched. The constructivist view of the issue may propose another option, which focuses on ongoing talks on the issue, but this would only leave it on the back burner and not necessarily create needed results. Thus, resolution of the issue may have to come from the liberalist view, through solving the bilateral issues first. Once that has been resolved, multilateral negotiations can begin. This approach, too, is laden with problems that stem from zero-sum deals, making it seem that realist theory may dominate.

Ambassador Hasjim Djalil stated that the parties must understand that any armed conflict will not settle the dispute, that each party must have the political will to resolve the issue, and that each party must also refrain from provocative acts.<sup>101</sup> Therefore, the issue at hand is both challenging and complex; a lasting resolution will be one that considers all possible options and their implications for trade and security.

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<sup>100</sup> Chua, Daniel Wei Boon. The South China Sea Disputes: Singapore as an Honest Broker? The Establishment Post. December 16, 2014. <http://www.establishmentpost.com/south-china-sea-disputes-singapore-honest-broker/>

<sup>101</sup> Djalil, Preventative Diplomacy.

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