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'Asia's Cauldron'

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This essay was originally submitted to POLS 348: International Organization & Law with Dr. Chad McCracken in December of 2016. The topic of this essay is the legal disputes of the South China Sea, written from the persepctive of someone outside the IREL major. The title is a reference to Robert Kaplan's book.

The South China Sea sees billions worth of commercial products cross its waters every day, "Roughly two thirds of South Korea's energy supplies, nearly 60 percent of Japan's and Taiwan's energy supplies, and 80 percent of China's crude oil imports come through the South China Sea" (Kaplan 2015). Bordered by seven distinct nations (including Taiwan), these waters are divided by a plethoric maze of overlapping claims of sovereignty dating back to the 1970's. It was then that the seven bordering nations laid anchor in what would become the most hotly contested sea in the world. In 1988, Chinese naval forces gunned down sixty-four Vietnamese soldiers defending a small disputed reef in the Spratly Islands. This archipelago lies in a strategic trading highway and its mere 14 islands are bitterly fought over by China, Malaysia, Brunei, Vietnam, and Taiwan. Why are people dying over a spit of beach in the middle of the ocean? For one, China estimates 125 billion barrels of oil beneath the sea floor of the region, which would be the second largest reserve in the world (U.S. Energy Information Administration n.d.). Malaysia and Vietnam have been propped up by the United States, firmly entrenching U.S. economic interests and dictating U.S. response to Chinese aggression. The globe's lonely two superpowers are preparing their fleets for the inevitable confrontation that lies on the open sea. Already, Chinese vessels were taped harassing and blockading the US Navy ship Impeccable in 2009, which led to secretary of state Hillary Clinton boldly stating that the United States has a "national security" interest in the South China Sea ("The South China Sea" 2016). Despite decisive American rhetoric that the Sea is endowed with freedom of navigation by international law, the Chinese have maintained a course of assertive expansion illustrated by the ongoing construction of artificial military island bases and oil rigs in Vietnamese and Malaysian claimed waters. The United States and the international community as a whole is desperate for a resolution. International law can deliver that.

I will draw three legal conclusions from the issue at hand. One, The People's Republic of China (PRC) claims "historic water" sovereignty to the region falling within

the "nine dash line" territory as denoted in Figure 1. I will consider the legal criteria necessary to validate this claim and whether the PRC have met this threshold. Two, the South China Sea is a semi-enclosed sea governed by Part IX of the United Nations Convention on the Law of the Sea (LOS), which prompts countries bordering such seas to "co-operate with each other." I will demonstrate if the efforts of the PRC, Vietnam, and the other coastal nations to comply with this international standard have been satisfactory. Three, I will consider the American claim for freedom of navigation in the Sea, especially the legal credibility the maritime giant possesses as a non-signatory to the Law of the Sea Convention.

While pouring over a recent Chinese-made world map, one would clearly observe a bold nine-dash line that loops down into the blue waters off the coast of China's southernmost seaside. Since the nationalist government of the PRC came to power in 1947, this U-shaped series of lines delineated its maritime claim in the South China Sea. The UN Convention on the Law of the Sea (LOS) grants littoral states an Exclusive Economic Zone (EEZ) as far as 200 nautical miles from their coastlines. However, the ICJ created an exception to that guarantee in Fisheries Jurisdiction case that would overturn the LOS EEZ provision if the following criteria are established, generating a "historic water"—(1) the exercise of authority over the area by the state claiming the historic right; (2) the continuity of this authority for a considerable duration; [and] (3) the recognition of other states of this authority (World Courts 1974). The third criterion stands out as the most contentious, many scholars hold recognition to mean utter acceptance by, while many believe acquiescence to be sufficient. Moreover, the claim of "historic water" is different than a "historic right" in that sovereignty over disputed territory cannot be claimed with a "historic right" claim (Leonardo 2012). Therefore, a region needs to be declared a "historical water" to strip another nation of its 200 nm EEZ guaranteed by UNCLOS as China seeks to do to the adjacent states in the South China Sea.

Chinese legal scholars seek to affirm the first element of "historic water" declaration, the exercise of authority, by tracing back records to as early as the Han Dynasty (r. 206 BC to 220 AD). Furthermore, evidence exists that the Song dynasty (960-1276) had given specific names to various islands and incorporated them under the administration of the modern Guangxi province. Chinese "naval patrols" further exhibit Chinese authority during this period, but Republican France and Imperial Japan boast evidence the PRC authority was expelled for significant durations. Following Japanese surrender of World War II, China reclaimed the "territory" it had ceded during the war, most notably the Spratly Islands. In December 1946, an acceptance ceremony was conducted on Itu Aba, the main island of the Spratly's. Here, a memorial was erected to commemorate the Chinese troops that defended it during the war. This evidence of authority clearly places the Spratly's in the back pocket of the Chinese does it not? The Chinese rolled into the South China Sea with navy destroyer vessels in the 1940's while the six other littoral nations were shackled by primitive underdevelopment. Even if the first element of "historic waters" is realized, continuity and recognition of authority are required as well. We will examine those next.

Legal weight is added to the "historic waters" claim from the Island of Palmas Case. After Spain ceded authority over the Philippines to the Americans in 1898, the United States claimed the historic rights of an island off the shore of Indonesia where the Spanish had allegedly possessed authority. However, the Dutch had asserted sovereignty on the island through a collection of treaties with native Princes. While the Dutch recognized the internal administration of the local Princes, conversely the local Princes withheld direct relations from any other foreign powers, including Spain. Dutch currency, Dutch flags, tax records to the Dutch, the Dutch coat of Arms on official documents, and even Dutch naval patrols provide concrete evidence of actual authority. Thus, the Permanent Court of Arbitration held that the Dutch had exercised, "open and public... continuous and peaceful display of State authority" (United Nations 2006). This example highlights that the actual display of authority over a territory is essential to claim sovereignty. Despite Spanish maps indicating that the island was under their control, international law deemed that the colonial empire possessed no true authority of the island. Considering this legal precedent, the Chinese claim to all of the islands within the nine-dash line is severely weakened. While Chinese cartography has depicted the islands exclusively under their dominion, the facts on the ground do not demonstrate sole possession as the Dutch did in Island of Palmas Case. Exclusivity is an integral piece China is lacking in their legal claim which spells unequivocal failure to meet the continuity or acceptance requirements of the Fisheries Jurisdiction case.

Transitioning to the second major legal dispute of the South China Sea, the United Nations Convention on the Law of the Sea (LOS) has been deemed the constitution on territorial waters. Despite the United States' failure to ratify the document, the multinational agreement reflects customary law because its provisions are adhered to virtually uniformly by all states and these states comply purely based on legal rationale. Part IX, titled Enclosed or Semi-Enclosed Seas, is a fundamental international law currently violated by all of the South China Sea nations. Article 123 of LOS writes, "States bordering an enclosed or semi-enclosed sea should cooperate with each other... directly or through an appropriate regional organization" (United Nations 1982). COBSEA and PEMSEA are the

two unsuccessful attempts at regional organization, and neither is effective enough to satisfy the standard this law requires. The Coordinating Body on the Seas of East Asia (COBSEA) is an environmental action plan with China, Vietnam, the Philippines, Malaysia, Indonesia, and Singapore as some of the participating states. However, over the past fifteen years the organization has faced insurmountable financial issues (Adler 2011). COBSEA was funded by UNEP, but in 2006 it was cut off. Now interest by participating states has dwindled, resulting in an utter absence of any organization managing the fisheries in the South China Sea. PEMSEA is another regional organization with China, Vietnam, Philippines other bordering states; however, it was legally separated from the United Nations Development Program in 2010. Since the split, PEMSEA has competed with COBSEA for funding and professional expertise as it seeks to serve an identical function. By the legal standard of LOS, this is unacceptable. The United Nations ought to combine the international entities, restore financial support, and carve out a strong legal personality for this new entity founded upon Article 123 of LOS. This rebranded regional body should possess the legal capacity to hold states accountable for international law wrongdoings, such as the collision between the US surveillance plane and Chinese jet fighter in 2001 or the Impeccable incident in 2009. The Organization of the Black Sea Economic Cooperation (BSEC) provides a valuable framework for the South China Sea nations to imitate. This regional organization includes twelve member states aimed at fostering multilateral political and economic cooperation around another enclosed body of water. Following the BSEC Charter in 1999, the organization gained full-fledged legal identity becoming a key mediator of international disputes. Moreover, the BSEC obtained the status of observer in the UN General Assembly. This facilitated multiple agreements between the organization and UNEP and UNDP, strengthening the financial security, political ties, and international legal capacity of BSEC (BSEC n.d.). The South China Sea region desperately needs an organization of this nature, and it is certainly achievable under current international law.

Third, freedom of navigation on the open seas is staunchly preserved by the United States, but curiously enough, the Western superpower has not ratified the Law of the Sea Convention. The United States is a leading maritime power with the largest exclusive economic zone (EEZ) and one of the longest continental shelves, but refuses to ratify a treaty to legally protect these holdings of sovereignty. However, much of the treaty has become (or already was) customary law due to the United States strict legal obedience and virtual uniform practice. Over the past two decades the American government has proactively challenged "excessive maritime claims" made by littoral states that are inconsistent with this treaty. In particular, the United States does not recognize claims by states that affect freedom of navigation or violate EEZ's. For instance, the Impeccable incident occurred in Chinese territorial waters was protested by the Chinese as an illegal operation in its EEZ. However, the United States responded that "innocent passage" has been protected by customary international law long before the LOS treaty was created (Steven 2011). This example demonstrates how the United States has been able to enforce the freedom of navigation legal standard without ratifying the very treaty that crystalized the "innocent passage" position. The fact that the United States has not ratified the treaty does not indicate the rule has not become law, but should the United States be able to police states to adhere to a treaty that it did not agree to? In July of 2010, Secretary of State Hillary Clinton delivered a speech stating that all bordering states of the South China Sea should, "clarify their claims... consistent with customary international law, including as reflected in the Law of the Sea Convention" (Clinton, 2011). This example illustrates that the United States does believe it possesses the legal capacity to do so. Yet despite the conviction Clinton portrayed, the United States has seen no end to the territorial disputes as she called for. The essential question approaches, would ratifying the LOS enhance the legal credibility of the United States to police the South China Sea nations? Thus, is customary law intrinsically weaker than treaty law in this case?

Ronald Reagan put it best when he, as sitting US president, struck down ratification of the Law of the Sea Convention in 1983, "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans... as reflected in the Convention" (Reagan 1983). This example highlights the importance of legal rationale (opinio juris) in the creation of customary law. The United States believed freedom of navigation to possess legal rationale even before the Convention was signed into treaty. Furthermore, the United States founded the Freedom of Navigation Program to protect the legal provisions of the LOS, "The effectiveness of the FON program as a means to gain full coastal state compliance with the navigation and overflight provisions of the Convention has been positive. It has clearly and convincingly demonstrated to the international community that the U.S. will not acquiesce in excessive maritime claims. It has played a positive role in curbing non-conforming territorial sea, contiguous zone and exclusive economic zone (EEZ) claims and, arguably, has helped persuade states to bring some of their domestic laws into conformity with the Convention" (U.S. Department of Defense 1993, p. 83). This example further demonstrates the United States is endowed with the legal credibility to police South China Sea nations in

accordance with the LOS convention based on the equal footing of customary law to that of treaty law. There is no superiority between the two.

I conclude that China does not possess an effectual "historic water" claim in the South China Sea due to the deficiency of exclusive authority based on the Fisheries Jurisdiction precedent. Second, COBSEA and PEMSEA can be combined in accordance to Article 123 of the LOS to create a regional body wielding legal personality similar to that BSEC. Lastly, the United States does not suffer any legal shortcomings by not ratifying the LOS convention, rather the key benchmark of opinio juris has been fulfilled, crystallizing freedom of navigation as a customary law on equal footing to that of the treaty law of the convention. As the South China Sea territorial disputes heat up with the potential passage of the TPP and President-elect Donald Trump's interest in Taiwan's independence, these three international legal arguments will be crucial to events unfolding in the region.

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