

The United Nations Convention on the Law of the Sea and International Maritime Disputes: A Case Study of the South China Sea

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Abstract. International Maritime Unity where the whole world would collectively use the oceans, which occupies over 70% of the earth surface and its resources have been of great concern over the years. To accomplish this lofty goal, independent nations came together to put their ideas together in a well codified document in 1958 and 1982, leading to the final adoption of the United Nations Convention on the Law of the Sea in 1994 (UNCLOS). This document, amongst other things gave 12 nautical miles from the base line as national territorial sea, and a 200 nautical mile as Exclusive Economic Zone. This paper therefore probes into the effectiveness of this international maritime regime in the settlement of the disputed Spratly islands and waters of the South China Sea claimed by China up to 90% and in contest by five other South East Asian Nations; Vietnam, the Philippines, Malaysia, Taiwan and Brunei. It concludes that China had not abided by the UNCLOS by insisting on its ownership claims in the disputed islands and water despite the decision of an arbitration tribunal. It however recommends, among other things, economic exclusion of China to serve as deterrent to other potentially belligerent nations.

Keywords: United Nations, Convention, Law, Sea, Dispute, International Maritime

1. Introduction

From time immemorial, the sea has been of immeasurable and invaluable importance to humankind. The sea was/is a means of communication between the peoples occupying various parts of the world as the sea is linked together the world over. Also, the sea is a major source of various kinds of mineral resources and aquatic organisms. This has necessitated the development of

rules that will guild international behaviour in the use of the sea to avoid clashes over ownership of islands and territorial waters. Consequently, the law of the sea was developed with the fundamental principles that the land set areas of the sea, and therefore, “the land territorial situation constitutes the starting point for the determination of the maritime rights of a coastal state” (Shaw, 2008).

Before the law of the sea was fashioned, attempt was made by states to control the seas by making it part of their national possession as was the case with Portugal in the seventeenth century. A national right over the seas was seriously berated prompting response from the statesman of obvious distinction, Hugo Grotius. In a publication titled *Mare Liberum*, he postulated the doctrine of freedom of the sea (Grotius, 1950). The reason for Grotius stance was in order that the Dutch could participate in the East Indian Trade. This view later prevailed due partly to the fact that it coincided with the thoughts of European states especially in Northern Europe who had long demanded freedom of the sea so that they could explore and expand trade up to the East.

The freedom of the sea later became an integral norm of international law even if it was not initially applicable to all seas. Before the 20th century, much of the history of the law of the sea revolves around the extent of the territorial sea or its demarcation with the high sea and other known zones.

States along the coast later exercised control in the contiguous zone and there is currently a shift in international law to support of control of larger zone by these coastal states exclusively. Shaw noted that: The predominance of the concept of the freedom of the high sea has been modified by the realization of

resources present in the seas and seabed beyond the territorial seas. Parallel with the developing tendency to assert ever greater claims over the high seas, however, has been the move towards proclaiming a 'common heritage of mankind' regime over the seabed of the high sea. (Shaw,2008)

To effectively manage the conflicting principles of the law of the sea, a series of conferences were held which ultimately led to four 1958 conventions on the law of the sea. The 1982 law of the sea conference started as early as 1974. This 360 articles and 9 Annexes convention was adopted by the votes of 130 countries to 4, with 17 abstentions and entered into force on November 16, 1994 a year after the required ratification by 60 state parties.

Arguably, the most essential part of UNCLOS is the rule of 12 miles of territorial sea for exclusive shipping and 200-miles Exclusive Economic Zone (EEZ) for economic activities such as fishing and mining. Accordingly, the 200 miles EEZ placed a large disproportionate share of maritime resources in the control of very few coastal states. Though outside the EEZ, a procedure was devised through an International Sea-Bed authority, for equitable exploration of the riches left in the ocean (beyond the 200 nautical miles). It is important to note that the exclusive economic zones (EEZ) of all coastal states covers a third of all oceans of the world.(Goldstein and Pavehouse,2010:184)

Control of islands and its large exclusive economic zone have given rise to a number of protracted inter-state conflicts some resulting to outright war. This paper therefore posits that the issue of EEZ contained in the UNCLOS, rather than help resolve inter-state maritime disputes exacerbates it. This case is espoused quite elaborately with specific references to the spratly islands in South China Sea.

2. An Overview of the United Nations Convention on the Law of the Sea

Before this convention came into being in 1994, several conventions had been negotiated in 1958. These were: Convention on the Territorial Sea and the Contiguous Zone, 1958; Convention on the High Sea, 1958; Convention on Fishing and Conservation of the Living Resources of the High Sea, 1958 and Convention on the Continental Shelf 1958.

In the seventeenth century national rights over the territorial seas was limited to only 3 nautical miles from the coastline. However, it became necessary for coastal states to argue in favour of its expansion due

to certain factors. The first was an increasing concern over charge collected on fish stocks of coastal states during long distance fishing. There was also a fear of pollution from waste dumped by transport ships and oil vessels carrying destructive substances. The piles of these wastes had threatened coastal settlements by destroying its businesses especially coastal resort.

This led to claims and counter claims of territorial seas, competition over fish stocks in coastal states waters, expanding maritime pollution and destruction of marine life, growing concern over the exploration of resources on the ocean floor. The fear of a catastrophic international maritime war led to the declaration of the freedom of the sea doctrine.

The UNCLOS ultimately emerged to settle the numerous issues that arose from the use of the ocean and its resources. This was necessary because the ocean was seen as the most important sources of man's survival. Accordingly, the convention's most important character is the clarification of issues relating to shipping and navigational rights territorial sea limit, the exclusive economic zone, conservation and control of living marine resource, maritime protection, marine research regime, a binding procedure for settlement of inter-state disputes, etc.(Oceans and Law of the Sea, the United Nations,1998)

The entire gamut of issue affecting interstate relations on the high sea is exhaustively dealt by UNCLOS. These issue ranges from the legal status of the territorial sea, of the airspace over the territorial sea, and of its bed and subsoil. Others are the right of innocent passage of ships through national territorial waters, the exclusive economic zone, etc.

3. UNCLOS and the Intensification of the Disputes in the South China Sea

The ocean contributes enormously to the sustenance of mankind. Without the ocean man may not survive as a fact! "80 percent of the world's population live on or near a coast and 90 percent of international commerce travels by sea. Additionally, about 65 percent of the world's oil reserves and 35 percent of the world's gas reserves are located in the oceans". (Reveron,2010).

Going back to ancient history, it would be recollected vividly that groups along water bodies were the earliest to attain the status to be described as civilization, e.g.,the Nile Valley and Egyptian Civilization. Realizing this, coastal states have made spirited effort to expand their control over their territorial waters.

The world nations realizing what these clamour could lead to negotiated the United Nations Convention on the law of the sea to set up modalities for the equitable use of the ocean and its resources by all nations.

Accordingly, coastal states were given 12 nautical miles of territorial sea where it could exercise sovereignty over the territorial sea, the airspace, seabed and subsoil. Within the 12 nautical miles of territorial sea, a coastal state has the right to exclude foreigners from the economic activities including foreign fishing vessels and trading. The coastal state by its sovereignty over the territory controls or ensures security and custom affairs. It is equally important to note that these rights of coastal states do not apply to the right of other nations to innocent passage.

Of great importance is the issue of the exclusive economic zone which extends 200 nautical miles from baseline (the low-water mark around the coasts of the state). Coastal states have the right to explore, exploit, conserve, and manage the natural resources in this area whether living or non-living. This extends to the waters superjacent to the seabed and of the seabed and its subsoil; production of energy from the water, currents and wind. This sovereignty also extends to the architecture and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.

Islands –“a naturally formed area of land, surrounded by water, which is above water at high tide”(Convention on Territorial Sea, Article 10(1)) are equally allotted or generate a territorial sea, contiguous zone, exclusive economic zone, and if need be, continental shelf. This does not apply in situations where rock which cannot sustain life on its own or economic activity is deliberately or enormously considered an island.

These enormous benefits allotted to coastal states and extended to islands have been a major cause of bitter and perennial maritime disputes in the South China Sea. Other maritime disputes still exist, for instance, in 1982, Britain and Argentina fought a 10-weeks undeclared war over what the British called Falklands, and the Argentines called Malvinas in the Atlantic (Farley, 2018). Also, the moment, the international court of justice, which is one of the channels of resolving international maritime disputes, is set to convene on September 9, to listen to oral submissions by Kenya and Somalia.(Wakaya,2019).Somalia is claiming an

estimated 62,000 square miles’ oil rich triangle in the Indian Ocean based on article 15 of the Convention of the Law of the Sea.

Kenya on its part insisted that the territory was under her control before the convention became effective.

Coming back to the South China Sea; long before the inception of recognize international maritime law, and throughout much of pre-modern history, the South China Sea played a pivotal role as an ‘intersection of history’ as the primary route for the vital trade connection between China and India, Europe, and Middle East. Many of the claims to the South China Sea are derived from this pre-modern era on the basis that traders and admirals stilted on or stopped at the Spratly and Paracel islands while traversing the South China Sea on trading trips.(Black, 2018).

The Chinese government claims what is contrary to the stipulations of UNCLOS on the definition of Territorial Waters, Contiguous Waters, and Exclusive Economic Zone. Their claim in the South China Sea is often referred to as the nine-dashed line claim. This claim is based on Young Huaizen’s map designed in 1947 for the Nationalist Government that fell after communist take-over in 1949. A renewed claim in 1999 came closer to the shores of nations in that part of the continent than did the map of 1947. As if the Chinese Government has a plan of escalating tension in the region, it defined the extent of its 200nm with the resultant effect of building artificial islands in the Malaysian and Philippine EEZ.

Since the late Ming Period (1403-1644), the South China Sea has been considered international waters, due to an increased European presence as a result of the activities of their trade companies. There is also a fundamental difference between the Chinese understanding of the South China Sea and European view. The Asian contesting states –Malaysia, Taiwan, the Philippines, Vietnam, and Brunei – were seen as tributaries of China or states that paid levy to China in return for protection during this period. This system prevailed throughout most of the Chinese contemporary history until the European colonization of Asia; especially the French colonization of Vietnam in 1885,(Black,(China was unable to render the required protection). It is this trade- route argument that has dominated the Chinese claims in all judicial proceedings. It is equally important to note that:

One third of global shipping, or a total of US\$3.37 trillion of international trade, passes through the South China Sea. About 80 percent of china oil

imports arrives via the strait of Malacca, in Indonesia, and then sail across the South China Sea to reach China ... the area contains at least 11 billion barrels of oil and 190 trillion cubic feet of natural gas... the South China Sea also accounts for 10 percent of the world's fisheries making it a key source of food for hundreds of millions of people(This Weekend in Asia, 2019).

The above is the obvious reasons why China will go any length to win over the islands, and its EEZ. The Philippines is also a major contestant in the South China Sea with claims in the following areas; Scarborough Shoal; Thomas Shoal (site the of a beached former U.S Navy LST), Reed bank (also Reed Table mount) and served features in the Spratly island Chain, also contested by Vietnam and Taiwan.

The Scarborough Shoal is an area highly contested because its rich with fishes. The Philippines were the original fishermen of this area, but they are currently prevented from doing so due to rotating coast guard vessels that is intended to prevent further entry. The Chinese also erected fouling cables to prevent entry. Thomas Shoal was also beached as preventing manoeuvre to prevent China from further occupying features near the Philippines coast.(Rosen, 2014). The features in the Spratly Island Chain is roughly 100 nautical miles west of Palawan Island and was the site of Philippines oil exploration activities in the past. "China's assertion of its nine-dashed-line claim to the South China Sea in its 2009 filing with the UN Commission on the Limits of the Continental Shelf (CLCS) and its most recent action to exclude Philippines fishermen from the waters around Scarborough Shoal emboldened the Philippines government to seek assistance from an international arbitration tribunal."(Rosen, 2014)

It is necessary to go a bit into history to fully understand the position of the Philippines in the South China Sea disputes. After the defeat of Spain in the Spanish – American war, the government of Spain ceded what is today called the Philippines to the United States. This cession of land and territorial waters was formalized through the Treaty of Paris at which the land and water boundaries of the Philippines was clarified inside what is called a Treaty Box. This box was drawn around the 7,107 islands that formed the Philippines archipelago.

The Philippines senate passed Act No 4003 in 1932, categorizing the water body within the Treaty Box as Philippines territorial waters so that fishing, law, defence and resources development could be regulated.(Rosen,2014: p.2)

In 1933, the United States gave up all the lands and waters it gained from the Spaniard to the people of the Philippines but retained some powers as the protector of the Philippines until 1946 when they were formally granted self-rule. Accordingly, they then took charge of all the territories in the Treaty Box. These territories included the Scarborough Shoal, notable features in the Spratly island chain like Reed Bank, Mischief Reef, Itu Aba, second Thomas Shoal and Fiery Cross Reef together called Kalayaan Island Group (KIG). It is important also to note that these land and water territories were claimed based on the principles of discovery and effective occupation which was not contested by any nation as at the time of independence from the United States. To further maintain control over the archipelago, the Philippines government notified the UN Secretary General in 1955 that if classified the waters within the Treaty Box as internal waters. A series of 80 straight baselines draw the islands more closely and changed the claims of the previous Treaty Box. This was backed by Act No 3046 of June 7, 1961.

The varying position is that which the Philippines admitted that part of the area contested, e.g the Scarborough Shoal, was never in the so called Treaty Box, it insisted that base on effective occupation, it has jurisdiction over the territory (also known as Bajode Masinloc). This territory, they admitted, may have been discovered by Spain and ceded to the United States.

China, on the other hand, exercised sovereignty over, for instance, all territories claimed on the ground that they acquired sovereignty through discovery and occupation before anyone else.

On the part of Malaysia, it submitted a formal claim on parts of the Spratly islands in the South China to the UN Commission on the Continental Shelf on May 6, 2009. The submissions concern the northern coast of Eastern Malaysia consisting of the states of Sarawak and Sabah on the Island of Borneo. This followed its statement upon ratification of UNCLOS in 1996.

The Malaysian position was quickly contested by the People's Republic of China through a diplomatic note submitted to the UN Secretary General Ban Ki-Moon on May, 2009.(Finkbeiner,2013:p.5) The statement claimed that:

China has indisputable sovereignty over the islands in the South China Sea, and enjoys sovereign right and jurisdiction over the relevant waters ...continental shelf beyond 200 nautical miles as contained in the Joint Submission by Malaysia and

....Vietnam has seriously infringed China's sovereignty. (Finkbeiner, p.5-6)

On the whole, Malaysia seem to have stronger claims because it exercises some form of occupation of about 5 of the islands contested by China, while China does not. However, China – Malaysia ties seems relatively cordial since it established diplomatic ties in 1974. With little issues especially due to China's support for the outlayed Malaysian Communist Party, a party whose membership was predominantly Chinese, both countries have strengthened relations over the years. After a high profile Malaysian delegation to China led by Prime Minister Abdullah Badawi (2003-2009) and third of his cabinet and over 500 businessmen. Both countries signed a communiqué pledging "to further strength consultation and coordination at the UN, Asian Regional Forum (ARF) APEC, ASEM (the Asia Europe Meeting) WHO and other multilateral Fora".(Finkbeiner, p.9) The communiqué further made open that:

Both sides also agreed to maintain peace and stability in the South China Sea and to promote the settlement of disputes through friendly bilateral consultations and negotiations in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. The two sides expressed their readiness to study the follow-up actions on the implementation of the Declaration on the Conduct of Parties in the South China Sea. (Finkbeiner,2013)

In spite of the Chinese Military presence in the South China Sea – Malaysia, seems less concern and have increased her trade relations with China over the years.

In Vietnam, the Chinese forcefully capture the Paracel islands in 1974 and the PLA Navy went further to fire bullets in order to take control over some islands in the South China Sea in 1988. The Mischief Reef (1995) and Scarborough Shoal (2012) have been held by Vietnam for many years but had only developed the parts close to its mainland and deliberately avoided military projects that might be seen as offensive by China. Vietnam is also expanding the lands, it occupies by creating land where there was previously water and powering houses on these island with solar. According to the Asian Maritime Transparency Initiative, one of the cardinal reason why these islands is being developed is in order for China to encounter great difficulty if it makes an attempt to reclaim it (Voice of America, April 22,2019).

China's relations with Vietnam over the South China Sea had been characterized by treat and count-treat. Last year, the Vietnamese government increased it claims in the South China Sea by attempting to strengthen ties with the United States. Accordingly, one of the largest U. S Navy Ship, Carl Vinson visited the Danong harbour which is the closest to the disputed Paracel islands. The message this visit sent to the Chinese government is that Vietnam has a powerful friend which is ready to engage in case of a military confrontation in the South China Sea. Although this could still be misleading considering key issues in the country's foreign policy. Attempt was also made by China to drill the disputed Paracel islands in 2014 but torpedoed when the Vietnamese government sent a high profile delegation to the United States for talks. China have constructed artificial islands in the Spratly and Threatened Vietnamese Military bases.

Also in a bid to exercise control over the disputed SCC, in 2-017, Respell – a Spanish energy company was granted license by the Vietnamese government to drill for mineral resources of the country's Southeastern coast. This provoked an immediate response by the Chinese government who threatened military attack on the Vanguard Bank.(Hayton,2019). The contract was revoked, especially due to the fact that the project did not have international backing. The dispute still lingers till date.

Brunei was the least vociferous in the claims in the South China Sea. Perhaps its size and wealth was the cause of this posture (it's a tiny Islamic sultanate). As a result, it became extremely dependent on China for economic and political assistance – both countries have made series of large investment agreement haven improved relations.

Brunei do not claim as much parts of the South China Sea as other contenders. It claims only the 200 nautical miles of Exclusive Economic Zone entitled to as stipulated by the UNCLOS. There are also other of its legal entitlements in the Southern portion of the disputed sea especially Rifleman Bank, Owen Shoal, and Louisa Reef. Brunei do no directly developed any occupy and of the islands neither does it build up any military garrison with which she could enforce such claim. Accordingly, Brunei published its map in 1984 and its edited version in 1988 clarifying its legal boundaries in line with UNCLOS. Since then, it has not made open its means of claiming this proposed territorial sea. Brunei had watched the tension between China, Vietnam and the Philippines in the South China Sea as it if had no stake in the conflict.

China had effectively manipulated some non-claimant nation in the Association of South East Asian Nations (ASEAN) – Cambodia, Myanmar, Laos – not to be too vociferous on the issues through economic aid since these countries were extremely poor. As reported:

In recent years Beijing appears to have added Brunei ... to the list of ASEAN nations potentially willing to display greater deterrence to China's claims in the South China Sea. The apparent shift manifested in April 2016 when Chinese Foreign Minister Wang Yi announced that China had reached a four-point consensus with Brunei, Laos and Cambodia on the South China Sea issue, agreeing the disputes were not an issue for ASEAN and should instead be resolved through dialogue and consultations between the parties directly concerned (Hart, 2018)

This diplomatic maneuvering was a big gain for China because it marked the first time it had succeeded in convincing a claimant nation into accepting its own stance (Hart, 2018) of not reaching agreement on the South China Sea through multilateral forums but rather bilateral talks between the nations involved. As earlier note, China is very much involved in Brunei's economy and it does not want to risk the numerous deals by strengthening its claims in the South China Sea.

Taiwan is claimed by China as part of its territory. Although it has its own government, military and allies, China had insisted on what it calls 'one China policy' and frowns at any attempt to recognize Taiwan as a separate country. This had made it difficult to boldly insist on having a share of the South China Sea. It is not also sure whether to claims waters already controlled by mainland China or those claimed by other coastal states that are disputants. A proposal was advanced by Hayton(Sands,2019) for the replacement of claimed territory (though silent) called U-shaped line with far more proven indigenous claim that is based on historical records. But any attempt to also make it open will be interpreted as unilateral declaration of independence and will certainly elicit political and perhaps, military response from China. The obvious truth however, is that Taiwan would have to make independent claim that must be consistent with UNCLOS stipulations.

4. The Economic and Geo-Strategic Importance of the South China Sea

The South China Sea lane is considered the busiest and most essential sea lane in the world. The World Trade Organization (WTO) reported in 2017 that an estimated 25% of the shipping ply this routes

annually with a trade value of 3.37 trillion dollars (Erkoc). The energy information administration also noted that almost 40% of all Liquefied Natural Gas (LNG) is bought from this region of the world. There is also a very large deposit of hydrocarbon which one estimate put at between 5-22 billion barrels (crude oil) and between 2.5 to 10 trillion cubic metres of natural gas.(Erkoc).The South China Sea lane is also important militarily to the United States whose seventh Fleet patrols regularly from the Pacific to the Indian Ocean.

It could be remembered that the U.S has security alliances with a good number of countries in Asia especially the Southeastern part of it. Some of these countries are: Japan, South Korea, the Philippines, Thailand. Others which they give some level of protection are; Taiwan, Singapore, Vietnam, New Zealand, Indonesia and Malaysia. The protection of these allies had been effective with the presence of the Seventh Fleet that transits the region through the disputed sea.

It is equally important to note that today's world had survives as a result of balance of power. This involves completing independent nations to abide by internationally recognized norms of behaviour and laws. Other fundamental political principles are respect for territorial sovereignty of states, condemnation of territorial expansion, and respect for international law including UNCLOS which specified certain sea lanes as global commons. Other nations of the world including the United States will go any length to ensure these ideals are met. The reason is that if China takes control over the South China Sea, there is the tendency of expanding to the Indian Ocean and the Western Pacific. China had already threatened maritime peace and security by capturing territories of neighbouring states and thereby violated international norms. It is noted quite explicitly that:

If China succeeds, in displacing U. S power in the Western Pacific and Chinese territorial expansion into the South China Sea becomes permanent and codified, global geopolitics will have entered a new and very different era. Southeast Asia will inevitably be rendered subordinate and compliant to China's will. Australia will be isolated with an uncertain future, Japan and South Korea will face a perilous new reality with China in control of sea borne lifeline of both countries. The credibility of U. S support for allies and partners will be shredded. India will lose its current freedom of access into the South China Sea and much of Southeast Asia. European access to Asia will be through Beijing. All this will occur in a region that is increasingly the vibrant centre of world

economy. The message will be clear; the era of American international leadership and predominance is over and a new preeminent power has taken its place. (Otto, 2019). China is bent of claiming the entire South China Sea not only due to its wealth and strategic importance in global commerce but also in order to execute the Belt-and Road initiative (also called, Silk Road) of president Xi Jing Ping. It will require a great deal of effort for China to be compelled to back down and most nations will not be ready to bear the risk.

5. International Arbitration over the Dispute in the South China Sea

The South China Sea disputes had been very contentious over the years. Effort had been made at bilateral and level to settle it. However, when china seized the Scarborough Shoal from the Philippines in 2012, the opportunity presented itself for the first time for arbitration. The encroachment was challenged by Manila at the Permanent Court of Arbitrary in The Hague. The court ruled in 2016 that the nine-dashed-line with which China claimed up to 90% of the South China Sea was not in consonance with the UNCLOS. The tribunal also made crystal clear that the historic right to resources in the South China Sea which China claims is baseless as the waters had always been a global common. However, the ruling was not adhered to due, perhaps, to the fact that the court would not be able to enforce the ruling.

Also, the regional body ASEAN had made little effort to also arrange a multilateral forum to discuss the issue due to the dependence of most of its members on China politically and economically. The prospect of settling the South China Sea discord through a tribunal remains gloomy.

6. Conclusion and Recommendation

Concerted effort had been made by world nations to ensure international maritime regulations which would guarantee universal use of the ocean and its resources. The behaviour of China in the South China Sea demonstrated that not all nations will be law abiding when it comes to strategic interest that is viewed as integral to economic prosperity and national security. In situations where the peace of a region, and by extension, the world is threatened by a members of the United Nations others would have to rise to the occasion to bring down the aggressor however the coast as demonstrated by the United States attempts in the South China Sea. Though the effort by a single actor will not be enough to ensure global balance of power, other nations are expectable

to collaborate in this regard with little consideration to the cost since the negative impact of a destabilized world will be much worse. The study has demonstrated that not all nations will obey international law and that the United Nation Convection on the Law of the Sea (UNCLOS) have not succeeded in ensuring international maritime order especially in the South China Sea, one of the world's most important waters. Hence, the study recommends economic exclusion with regard to international trade. The decision should be a special one to be taken not at the UN Security Council but at a General Assembly of all State Parties to the UNCLOS. In addition, the regional organization of the claimant states in any disputed waters should champion any arbitration so as to ensure transparency. Much more attention should be given to the dispute in the South China Sea for the good of all nations rather than wait for Chinese hegemony in the region which would be detrimental to the whole world in view of the importance to international trade.

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