

Full Length Research Paper

Malaysia's policy towards its 1963 - 2008 territorial disputes

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Malaysia has a number of territorial disputes such as Sipadan- Ligitan, Batu Puteh, Limbang and the Spratly Islands. So far, it had settled two of the disputes through the International Court of Justice (ICJ) that is Sipadan-Ligitan and Batu Puteh Islands. Other disputes remain outstanding and/or unsettled that is the Spratly Islands and Limbang. This paper provides an overview of the disputes and Malaysia's approaches to manage and/or settle them. As such, it analyzes the factors that influence Malaysia's policy in this regard. Analysis of the factors suggests that Malaysia's policy towards territorial disputes has been mainly shaped by the Prime Minister's Department. Other key foreign policy bureaucracies, such as the Defense and Foreign Ministries, have also been found to play an instrumental role especially through the National Security Council of which the two ministries are part of the other important bureaucracies include ISIS and MIMA. It also suggests that Malaysia's policy has adopted a pragmatic stature in which it allows for a combination of approaches to settle the disputes. This includes unilateralist approach as in Swallow Reef case, multilateralist as in Amboyna Cay case and bilateralist as in Sipadan and Batu Puteh cases. Finally, based on the analysis, this paper suggests several recommendations with regard to Malaysia's handling of the territorial disputes.

Key words: Territorial disputes, international court of justice, ASEAN high council, security, Malaysia.

INTRODUCTION

This paper examines Malaysia's policy for the settlement of its territorial disputes. It presents an overview of Malaysia's territorial disputes, analyze its positions on those disputes and finally analyze the factors behind Malaysia's policy towards its territorial disputes.

Malaysia proper is composed of two land masses with a total area of 330,252 square kilometres (sq. km); (1) West Malaysia or Peninsula Malaysia and (2) East Malaysia on Borneo Island. Both are separated by the South China Sea with a usual flight distance of 920 nautical miles (nm) or 1711 kilometres (km).¹ With the coastline of some 4,675 km (that is West Malaysia 2,068 km, East Malaysia 2,607 km), Malaysia's geographical condition exemplifies the most common boundary problems faced by most coastal countries throughout South-

east Asia. Bordered by Thailand, Indonesia, Singapore and Brunei, Malaysia is involved in territorial disputes and overlapping maritime claims with almost all its neighbours. Malaysia's territorial and maritime disputes stretch from the Gulf of Thailand, the Andaman Sea, the Straits of Melaka, the Straits of Singapore, the South China Sea, the Sulu Sea, and to the Celebes Sea.

Malaysia has adopted several methods to deal with the disputes. Among others Malaysia with Indonesia signed an agreement on both continental shelf boundaries (CSB) on October 27, 1969). It was followed by a tripartite agreement with Indonesia and Thailand delimiting their CSB in the northern part of the Straits of Melaka on December 21, 1972 (Leng, 1980). Another treaty between Malaysia, Indonesia and Thailand for joint resource development in the Gulf of Thailand was signed in 1978 (Sohn and Gustafson, 1984:65). Malaysia also signed a treaty demarcating its maritime boundary with Singapore through the Straits of Johor on August 7, 1995 (Haller-Trost, 1998). Recently, Malaysia had opted for judicial

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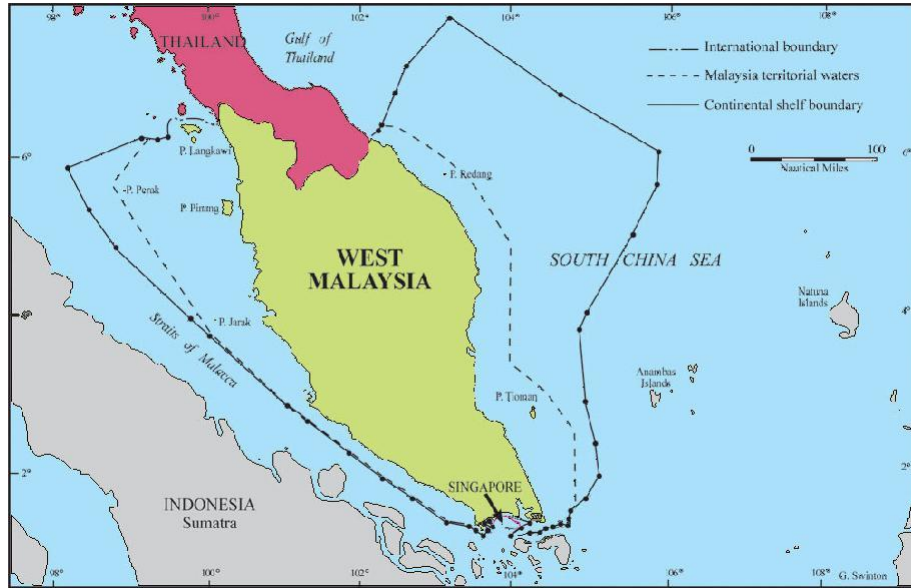


Figure 1. West Malaysia's EEZ and CS. Adapted from Haller-Trost (1998).

settlement by the International Court of Justice (ICJ) to settle its territorial disputes involving Indonesia (1998) and Singapore (2003).² Other territorial disputes, for example those involving Brunei such as Limbang is yet to be solved permanently while several islets of the Spratly Islands e.g. Amboyna Cay remain unsolved too. However, Malaysia has considered dispute over Sabah and a few disputed islands in the Spratlys e.g. Layang-Layang Island to have been solved.

OVERVIEW OF MALAYSIA'S TERRITORIAL DISPUTES

Malaysia became independent on August 31, 1957. It acceded to the first United Nations Convention the Law of the Sea (UNCLOS 1 - 1958) on December 21, 1960, adopted its Continental Shelf Act on July 28, 1966 and proclaimed the extension of its territorial sea from 3 nautical miles (nm) to 12 nm on August 2, 1969. On December 21, 1979 Malaysia published its new map called *Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*³ (that is New Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia; hereinafter, *Peta Baru*) and officially proclaimed its Exclusive Economic Zone (EEZ) on April 25, 1980 (Haller-Trost, 1998 and Valencia, 1991) (Figures 1 and 4). However, the above actions especially the release of *Peta Baru* have been disputed by at least eight of Malaysia's neighbouring countries.

Malaysia's territorial disputes include: (1) Sipadan–Ligitan Island with Indonesia, (2) Batu Puteh Island with Singapore, (3) Limbang, Lawas, Terusan, Rangau and Louisa Reef with Brunei, (4) the Spratly Islands with the Philippines, Vietnam, China and Taiwan.

Indonesia: Sipadan–Ligitan Islands dispute

The dispute between Malaysia and Indonesia can be traced back to September 16, 1963 when Sabah, Sarawak and Singapore, which were British colonies, joined the Federation of Malaya, since then known as Malaysia. Prior to 1963, Malaya composed of states in what is now the Malaysian Peninsula, had gained its independence from the British on August 31, 1957. Following the formation of Malaysia on September 16, 1963, with the original Malaysian government having previously acceded to the UNCLOS I treaties of 1958 on December 21, 1960 Malaysia adopted its Continental Shelf Act on July 28, 1966 and later proclaimed its twelve nm territorial sea on August 2, 1969.⁴ As Malaysia was now composed of two land masses separated by the South China Sea, its newer boundaries of territorial waters, EEZ and continental shelves greatly overlapped those of Indonesia's Kalimantan on the Borneo Island.

In order to solve the problems, Malaysia and Indonesia held several meetings to delineate their CSB. From September 9 to September 22, 1969, both countries were engaged in a series of negotiations in Kuala Lumpur. In those meetings, both governments reached important agreements relating to the delimitation of their CSB and several overlapping claims on a few islands in the Straits of Melaka as well as several of those in the South China Sea. However, the countries failed to reach an agreement particularly with regard to certain delimitation points in the Celebes Sea. Specifically, they could not agree on the sovereignty status of the Sipadan and Ligitan Islands which are located off the south-eastern coast of Sabah in the Celebes Sea. Notwithstanding the disagreement, Malaysia and Indonesia signed the agreement delimiting their CSB on September 22, 1969 and officially en-

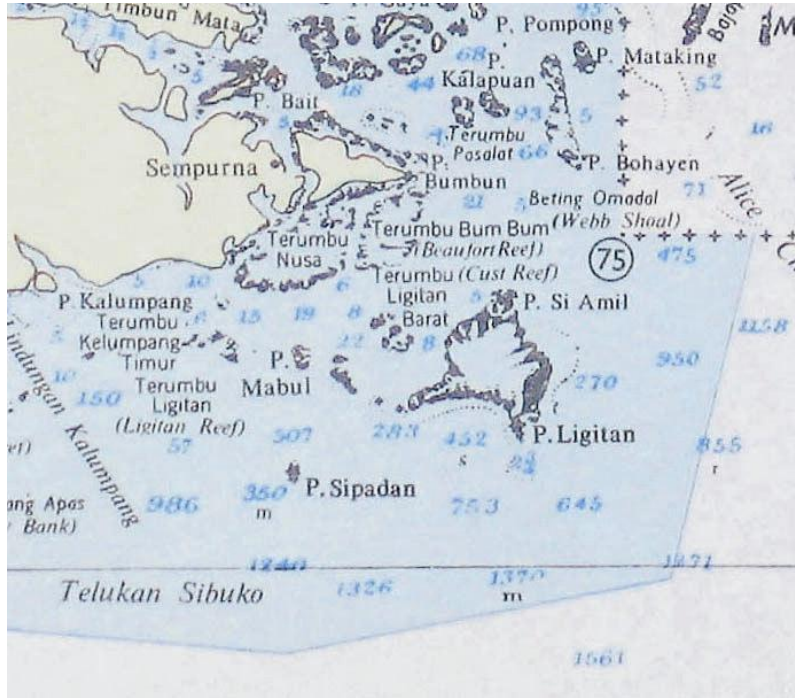


Figure 2. Sipadan and ligitan islands. Adapted from *Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*. 1979. Map. Kuala Lumpur. Directorate of national mapping Malaysia.



Figure 3. Batu Puteh Island. Adapted from *Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*. 1979. Map. Kuala Lumpur. Directorate of national mapping Malaysia.

forced the treaty on October 27, 1969. The exchange of ratification between the two countries was done on November 7, 1969.⁵ In effect, the Treaty resolved the CSB problems between both countries primarily in the Straits of Melaka, the Straits of Singapore and in the

South China Sea (that is western side off the East Coast of West Malaysia and eastern side off the Coast of Sarawak) but not that of Celebes Sea (Sipadan-Ligitan Islands).⁶

On December 21, 1979, Malaysia published its new

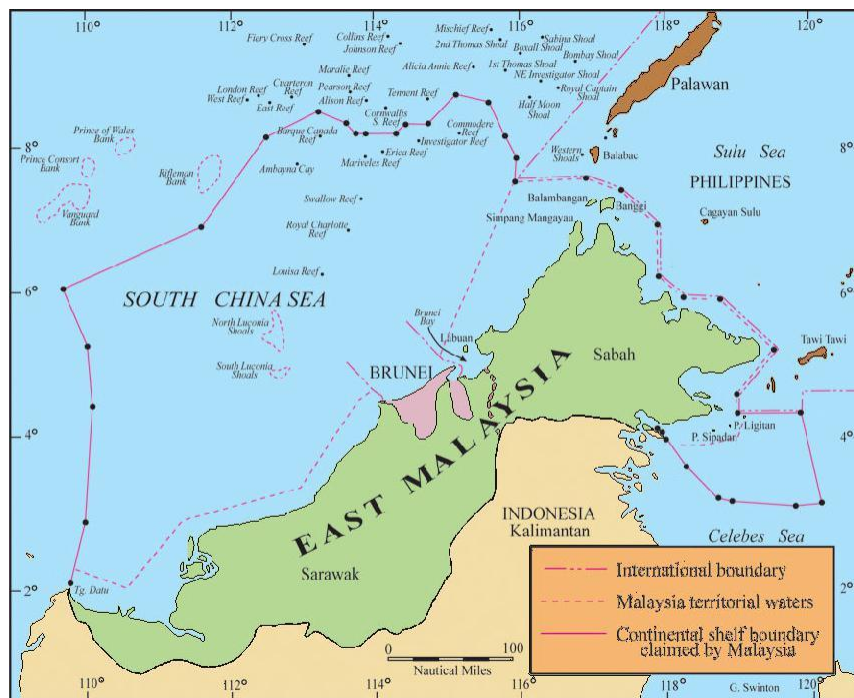


Figure 4. East Malaysia's EEZ, CS and Disputed spratly islands. Adapted from Haller-Trost (1998).

map, *Peta Baru*, showing the territorial waters and continental shelf boundaries of Malaysia. The new map shows both Sipadan and Ligitan Islands as part of Malaysia. Since the sovereignty issues over Sipadan–Ligitan Islands were previously not addressed in the CSB Treaty, Indonesia formally objected to the new map of Malaysia on February 8, 1980 (Yusof and Khatijah 1993). The problem was discussed by the then Malaysian Prime Minister Hussein Onn and Indonesian President Suharto in a meeting on March 26, 1980. Several meetings followed thereafter. Mahathir, Malaysia's new Prime Minister and President Suharto met three times in three consecutive years of 1992, 1993 and 1994. Still, no solution was reached in any of those meetings.

However, in October 1991, both countries agreed to set up a separate new special committee called the Joint Working Group (JWG) to deal specifically with the Sipadan and Ligitan dispute. The JWG met on July 6, 1992, January 26 - 27, 1994 and on September 8, 1994 respectively. All meetings broke down. On September 14, 1994, following the failure of JWG, Malaysia proposed to Indonesia to have the dispute referred to the ICJ. Nevertheless, the proposal was immediately rejected by Indonesia arguing that a third party like the ICJ did not understand the problem and therefore was unfit to sit in such a dispute. Indonesia, on the other hand, preferred ASEAN High Council. The Council is an ad-hoc body which was first introduced by the Treaty of Amity and Cooperation I (TAC I) of 1976. The Council's membership comes from representatives at the ministerial level from

each of the member countries. The Council has two main functions; (1) upon the breakdown of direct negotiations; to recommend means of settlement such as good offices, mediation, inquiry or conciliation and (2) upon obtaining written agreement of disputing countries; to constitute itself into a committee of mediation, inquiry or conciliation. The ICJ, on the other hand, is the United Nations' judicial organ which is empowered to adjudicate disputes arising from conflicting interpretations and applications of the UN endorsed international treaties, international customs and general principles of law as recognized by civilized nations.

Despite Indonesia's strong disagreement, Malaysia persisted and Indonesia eventually gave in. In October 1996, Malaysian Prime Minister Mahathir Mohamad and Indonesian President Suharto agreed to refer the sovereignty dispute of the two islands to the ICJ. On November 2, 1998, Indonesia and Malaysia submitted their intention to the ICJ by notifying its Registrar of the *compromis* signed by both countries on May 31, 1997 in Kuala Lumpur. It entered into force on May 14, 1998.⁷ After four years, on December 17, 2002, the ICJ ruled, by 16 votes to 1, that the sovereignty over Pulau Ligitan and Pulau Sipadan belonged to Malaysia.

Singapore: Batu Puteh Island dispute

Singapore together with North Borneo and Sarawak achieved independence from the British

through the Federation of Malaysia on September 16, 1963.⁸ Singapore, however, withdrew from the Federation two years later on August 9, 1965. Consequently, the withdrawal brought up chains of issues and problems between both countries such as boundary and territorial issues. The dispute over Batu Puteh Island is one of them. Singapore protested over the inclusion of Batu Puteh Island as part of Malaysia's territory, as shown in *Peta Baru*, through a diplomatic note dated February 14, 1980. Following the protest, the Malaysian Foreign Ministry (*Wisma Putra*) held several meetings with its Singapore counterpart in order to resolve the dispute bilaterally. The first bilateral negotiation was held in December 1981. However, the talks reached a deadlock.

Eventually, in September 1994, Mahathir Mohamad and Lee Kuan Yew agreed in principle to submit the case to the ICJ.⁹ Following Mahathir and Lee's "principal agreement" in 1994, Malaysia held several other meetings with Singapore in 1995 and 1996 in order to finalize the modalities of the submission to the ICJ.¹⁰ On February 6, 2003, the Foreign Ministers of both countries, Malaysian Hamid Albar and Singaporean S. Jayakumar, signed the *compromis* for submission to the ICJ of the Batu Puteh dispute and the nearby two features of Middle Rocks and South Ledge that lie 3 nm from Batu Puteh. It was signed in Putrajaya, Malaysia. On May 23, 2008, the ICJ ruled by 12 votes to 4, that the sovereignty over Pulau Batu Puteh belonged to Singapore.

Brunei: Lawas-Limbang-Terusan-Rangau-Louisa reef

In August 1980, Britain, on behalf of Brunei, which was still its protectorate protested against the *Peta Baru*. The maritime boundary of Brunei originates from the colonial years when Brunei and the Malaysian States of Sarawak and Sabah were British colonies. Brunei's east and seaward sea boundaries were established on September 11, 1958 through the *North Borneo (Definition of Boundaries) Order in Council No. 1517* and the *Sarawak (Definition of Boundaries) Order in Council No. 1518* (Haller-Trost 1998). Despite Malaysia having accepted the two ordinances prior to the inception of the Federation of Malaysia, the *Peta Baru*, however, did not reflect this. Brunei reacted, among others through a speech reportedly delivered by Brunei's Sultan Omar Saifuddin in 1970 in which Omar stated that Limbang belonged to Brunei (Pelita Brunei 30 September 1970).

Brunei later published three series of maps showing its territorial waters, its continental shelf and fishery limits. The maps are called *Map Showing Territorial Waters of Brunei Darussalam* (1987), *Maps Showing Continental Shelf of Brunei Darussalam* (1988) and *Maps Showing Fishery Limits of Brunei Darussalam* (1988) (Haller-Trost 1998: 46-48). Brunei's claims on Limbang, Terusan, Lawas and Rangau and the Louisa Reef became official with the

publication of those maps. Limbang is especially significant in that it stands between two parts of Brunei proper. It is also rich in timber. Additionally, the Louisa Reef (6°20'N, 113°16'E) (Haller-Trost 1998:225) is also known as *Terumbu Semarang Barat Kecil*. It lies off the coast of Sarawak and belongs to the Spratly's group of islands. After publishing the maps, Brunei ratified UNCLOS III, on November 5, 1996. Malaysia had ratified UNCLOS III a month earlier on October 14, 1996.

Both countries have since entered into a number of negotiations to resolve the issues. In May 2003, Brunei Sultan Hassanal Bolkiah and Prime Minister Mahathir met at Pulau Pinang to discuss the issue. No resolution was reached. Two months later, Malaysian Deputy Prime Minister Abdullah Badawi went to Brunei for renewed discussions. On July 14, 2003 Bernard Dompok, the Minister in the Prime Minister's Department of Malaysia was reported to have said that Malaysia and Brunei would hold talks in order to reach a "win-win" solution to resolve rival territorial disputes that had interrupted both countries' offshore oil and gas exploration work <<http://www.gasandoil.com/goc/news/nts33214.htm>>.¹¹

On August 22, 2003, Sultan Hasanal Bolkiah of Brunei and Malaysian Prime Minister Mahathir Mohamad, once again held a meeting in Putrajaya in order to resolve the offshore dispute, including Limbang. However, the meeting failed.¹² In the meantime, Malaysia had already rejected the idea of third party arbitration (that is the ICJ) (Horton 2003). On August 24, 2006, the Sultan of Brunei Hasanal Bolkiah met with Malaysia's current Prime Minister Abdullah Badawi in Terengganu, Malaysia to discuss, among others, bilateral issues such as the overlapping EEZ claims in the disputed oil blocks and maritime cooperation between the two governments. Recently, on Mac 16, 2009, both countries reaffirmed their commitments to solve their territorial disputes by signing the Letter of Exchange in Bandar Seri Begawan to lay down a concrete end to the disputes.

The Philippines, Vietnam, China and Taiwan: The spratly islands dispute

The Spratlys disputes are Malaysia's most complex territorial disputes in the South China Sea. (Figure 4). They involve multiple claimants that subsequently overlap other multiple co-claimants. To identify a claim with a particular state and then to discuss it separately is highly complicated. This is so because a dispute consistently leads to other claimants' claims as well. Specifically, China, Vietnam and Taiwan claim the whole of the Spratly Islands while Malaysia, the Philippines and Brunei claim only parts thereof. A good example is Amboyna Cay. It is simultaneously claimed by China, Malaysia, Taiwan and Vietnam. What makes the claims on features in the Spratlys distinguishable from others is which countries have literally and technically bolstered their claims on them (that is troops stationed or

structures built thereon). Except for Brunei, all claimants have occupied respective claimed features.

In order to fit into the paper's objective, it focuses its discussion over the Spratlys dispute on features on which Malaysia has laid its claims and acted to within a subcategory. Since the disputes in the Spratly Islands involve 6 coastal states/governments, it only elaborates on Malaysia's actions in the Spratlys with Vietnam and the Philippines. These two countries are chosen because, besides the agreed present resolutions (that is the "Declaration on the Conduct of Parties in the South China Sea 2002" (DOC 2002)), the amount of Malaysian correspondence, remarks and actions against the two, and vice versa, with regard to their overlapping claims in the Spratlys, significantly resemble each other. Thus, they are considered essential to the evaluation of Malaysia's policy towards territorial disputes with regard to the Spratlys.

The Spratly Islands (herein, Spratlys) are a group of islands, reefs and shoals located in the southern part of the South China Sea which extends approximately 900 km from southwest to northeast (Prescott and Schofield 2005: 273 - 274). A semi-enclosed sea, the South China Sea covers an area of 648,000 square nautical miles (sq nm) stretching lengthwise from Singapore in the southwest to Taiwan in the northwest and breadth wise from Vietnam to East Malaysia (Sabah). It consists of around 170 plus features that are mostly submerged banks, reefs and low tide elevations that are more accurately known as *pseudo-islands* instead of true islands (Prescott 1985: 209 - 210 and Catley and Keliat 1997:1 - 3). It has an estimated 300 - 400 uninhabitable features which are sporadically situated in the middle of the South China Sea (latitude 6°N to 12°N and longitude 109°30'E to 117°50'E).¹³ Of all the features, only 37 can be considered as tiny islands, with the biggest being "Itu Aba Island" that is 1.4 km long and 400 meters wide.¹⁴ The total land area of the Spratlys is estimated to be less than 3 square miles, scattered over an area of around 240,000 km (Prescott 1985 and Catley and Keliat 1997).

For a start, Malaysia laid its claims on portions of the Spratlys in 1979 through the *Peta Baru*. Its claims were simultaneously protested by China, Vietnam, the Philippines, Brunei and Taiwan. The lists of the claimed features are various. However, as at 2003, eight of them have been occupied by Malaysia (Chung 2004 and Yusuf et al 1993) (Table 1). They are; (1) Ardasier Reef (*Terumbu Ubi*), (2) Dallas Reef (*Terumbu Laya*), (3) Erica Reef (*Terumbu Siput*), (4) Louisa Reef (*Terumbu Semarang Barat Kecil*), (5) Marivales Reef (*Terumbu Mantanani*), (6) Royal Charlotte Reef (*Terumbu Semarang Barat Besar*), (7) Swallow Reef (*Terumbu Layang-Layang*), and (8) Investigator Shoal (*Terumbu Peninjau*).¹⁵ Another three have been occupied by other countries.

The Philippines occupied Commodore Reef (*Terumbu Laksamana*) while Vietnam occupied Amboyna Cay

(*Pulau Kecil Amboyna*) and Barque Canada Reef (*Terumbu Perahu*) (Trost, 1998 and Chung, 2004). Another feature claimed by Malaysia, but not occupied as of 1997, is Luconia Shoal (Valencia et al., 1997). It consists of three groups of reefs; (1) North Luconia Shoals (*Gugusan Beting Raja Jarum*) (2) South Luconia Shoals (*Gugusan Beting Patinggi Ali*) and (3) Central Luconia Field.¹⁶ Malaysia however, has in its possession in Central Luconia Shoal, gas pipelines leading to Tanjung Kidurong in Sarawak (Haller-rost, 1998).¹⁷ The shoals are also part of a dive destinations package operating from Sarawak.

The Philippines: In March 1998, the Philippines military discovered that Malaysia was building structures on the two features. The Philippines, having been assured by the then Malaysian Foreign Minister, Abdullah Badawi that the works had not been authorized by the Malaysian Government, did not make any official protests (Chung, 2004). However, in June 1999, Malaysia built a two-storey structure building, helipad, pier and radar antenna on the two features (Chung, 2004; Prescott et al., 1985 and Emmers, 2005; 2003). This time China, Taiwan and Vietnam protested against Malaysia's latest actions on the respective features.¹⁸

Following the 1999 incident, coupled with the one in 1998, the Philippines sent a diplomatic protest to Malaysia stating that Malaysia had trespassed into its territory (that is Investigator Shoal) and that Malaysia had breached the 1992 ASEAN Declaration on the South China Sea (Manila Declaration) and the subsequent ASEAN agreements relating to the Spratlys. The 1992 Manila Declaration is the specific declaration made by ASEAN countries to restrain states' conducts in the Spratlys. Among others, it calls for peaceful resolution methods to resolve disputes in the Spratlys as emphasized by the Treaty of Amity and Cooperation (TAC). The Malaysia- Philippines episode developed into a series of intense remarks and counter remarks from both countries. The then Malaysian Prime Minister, Mahathir Mohamad stressed that Malaysia was not trespassing into any country's territory and that those structures were meant only for climatic research, marine life studies and as navigational aids. The former Philippine President, Joseph Estrada, enraged by Abdullah's initial assurance, replied that the Philippines might build its own structures.¹⁹ Malaysia defended its actions in the respective features as legal as they were within Malaysia's EEZ. The government of the Philippines did not agree with Malaysia's arguments and threatened to take the matters to the United Nations. Nevertheless, the dispute did not stop both countries from consolidating both claims on several features in the Spratlys. By 1996, the Philippines had 595 troops deployed to guard its (occupied) nine Spratly islands (Collins, 2000). No latest development

Table 1. Spratlys: features occupied by Malaysia, the Philippines and Vietnam.

Features	Malaysia's Occupation
Ardasier Reef (<i>Terumbu Ubi</i>)	1986, 20 soldiers
Dallas Reef (<i>Terumbu Laya</i>)	1987
Erica Reef (<i>Terumbu Siput</i>)	1998
Louisa Reef (<i>Terumbu Semarang Barat Kecil</i>)	1987
Marivales Reef (<i>Terumbu Mantanani</i>)	1986, one platoon
Royal Charlotte Reef (<i>Terumbu Semarang Barat Besar</i>)	N/A
Swallow Reef (<i>Terumbu Layang-Layang</i>)	1983
Investigator Shoal (<i>Terumbu Peninjau</i>)	1999
Features occupied by other claimants	Country and Occupation Year
Commodore Reef (<i>Terumbu Laksamana</i>)	Philippines, 1978
Amboyna Cay (<i>Pulau Kecil Amboyna</i>)	Vietnam, 1975
Barque Canada Reef (<i>Terumbu Perahu</i>)	Vietnam, N/A

over the issue is available.

Vietnam: Vietnam, on the other hand, has been protesting against the *Peta Baru* since 1982. What followed thereafter was a spate of protest notes exchanged between the two countries. Following Vietnam's protest in 1982, it declared the new limits of its territorial waters and laid its claims on Swallow Reef in November 1982. Two months after Malaysia submitted a diplomatic note of protest in January 1983 stating its refusal to recognize Vietnam's baselines. On March 25, 1983, Vietnam replied stating that its CSB was consistent with international law. On May 19, 1983, Malaysia's Deputy Minister in charge of legal matters was reported to have stated that Malaysia's right to Amboyna Cay and Swallow Reef was a simple matter of geography (Lo, 1989).

Despite Vietnam's claim on Swallow Reef, Malaysia went ahead and occupied the reef on September 4, 1983. Vietnam immediately protested on September 7, 1983. Malaysia responded and demanded that Vietnam withdraw from Amboyna Cay (Yusof and Khatijah 1993). Malaysia continued to insist on its right over Amboyna Cay when in 1988, Malaysian Deputy Foreign Minister, Abdullah Che Wan was reported to have asserted that Malaysia's claims were legal and in line with international law. In 1992, the *Yang Dipertuan Agong*, the Constitutional Head of Malaysia, even visited Swallow Reef.

The closest confrontation the two ever came to was when a group of Malaysian engineers visiting Amboyna Cay placed a stone marker next to an existing one (Vietnamese) in 1978. Prior to that, Vietnam had occupied Amboyna Cay twice in 1956 and 1973, but never maintained a permanent presence there. However, when Malaysia placed the stone marker in 1978, Vietnam returned in 1979 and removed Malaysia's marker (Yusof and Khatijah 1993). Vietnam has not left the island ever since. It has also expanded its naval and air facilities thereon, including an airstrip. In total by 1996, Vietnam had occupied 25 islands in the Spratlys with 600 troops stationed thereon (Collins, 2000).

Malaysia's mounting concerns over controversies sur-

rounding the Spratlys were interpreted, among others, by its stopping from occupying newer features since 1999. In 2002 Malaysia had played an active role in mediating a non-binding declaration of the South China Sea. The 2002 "Declaration on the Conduct of Parties in the South China Sea" (DOC) is an extension of the 1992 Manila Declaration. Apparently, the DOC was specifically designed to deal with claiming states' actions in the Spratlys (Hasjim and Gault, 1999; Trost, 1998; and Catley et al., 1997). The DOC, signed on November 4, 2002 by ASEAN countries and China, mainly calls for states to reaffirm their determinations to maintain peace and stability in the region by exercising self-restraint in their conduct and to seek for mutual peaceful solutions to the Spratlys dispute.²⁰ The DOC particularly urges disputing states to "refrain from action of inhabiting the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner". The DOC also emphasizes that the states concerned put emphasis on bilateral or joint cooperation. The DOC, however, does not spell out any binding legal force mechanisms to be applied. Rather, it serves more as a moderating or restraining mechanism to states' actions in the Spratlys.

AN ANALYSIS OF MALAYSIAN FOREIGN POLICY

The overview of the territorial disputes suggests the fundamental bureaucratic factors which played essential roles in influencing Malaysia's policy towards its territorial disputes.

The prime minister department and national security division (NSD)

The Prime Minister's Department is the key governmental policy institution in the formulation of Malaysia's policy of this regard. Hence, the Prime Minister is the final decision maker in Malaysia. In the disputes of Sipadan-Ligitan

and Batu Puteh, it was the Prime Minister, Mahathir Mohamad who decided that Malaysia would bring the disputes to a third party resolution (that is the ICJ). Referring to the failure of bilateral negotiations to settle both the Sipadan-Ligitan and Batu Puteh disputes, notwithstanding his initial reservation against the idea of the ICJ, Mahathir stated that;

“(Since it is very clear that both parties cannot accept each other’s claims and cannot reach a decision, it is natural that we go to a third party [the ICJ]”.²¹

The Sipadan-Ligitan dispute, for example, had also shown the key advisory role of the NSD, as affirmed by the statement issued by the Malaysian Foreign Ministry Secretary-General. It is unlikely a coincidence when the Secretary-General issued his statement on September 13, 1994, while the Prime Minister issued his a day after on September 14, 1994. The fact that the Prime Minister had made the decision only a day after the Foreign Ministry Secretary-General issued his statement could be considered as a strong indicator of the strong influence the NSD had over the dispute.

Malaysia’s ministry of defense (MINDEF)

MINDEF was chiefly responsible for providing a military backdrop against Malaysia’s territorial claims. As such, it can be argued that MINDEF was dominating the foreign relations scene more than any other governmental agencies. Although no military clash took place between Malaysia and its co-disputants, MINDEF had indeed played a leading role in influencing Malaysia’s policy towards territorial disputes. For example, this can be seen from the role played by the Malaysian Royal Navy Force (MRNF) which consistently carried out its naval patrols in and around the disputed islands, especially Batu Puteh and Sipadan-Ligitan Islands, in spite of the security uncertainties surrounding them. This had proved to be influential in influencing Malaysia’s view and policy towards the territorial disputes in question. The strong effect brought about by the MRNF to the Batu Puteh dispute, as an instance, was especially evident when Singapore had to ask Malaysia to stop sending its naval ships into Batu Puteh waters in return for Singapore’s permission to allow Malaysian fishermen to fish in the waters nearby Batu Puteh Island.

The same argument may be applied in the dispute over Sipadan–Ligitan Island. Although in this case, it was Malaysia that requested Indonesia to scale down its military presence in the Sipadan waters. In this dispute, the important role of MINDEF was prominently demonstrated, especially when the Malaysian Defense Minister, Najib Razak braved a visit to the Sipadan Island at the height of the dispute in 1994. Although the military situation was tense, the visit ended up peacefully. Never-

theless, such a bold action was important to bolster Malaysia’s claim of sovereignty and authority on the island. As a matter of fact, the visit was “modeled” after the *Yang DiPertuan Agong*, King of Malaysia’s 1992 visit to Layang-Layang Island (Swallow Reef) which was and is still disputed today by the Philippines, China and Taiwan.²²

The think tanks: institute of strategic and international studies (ISIS) and Malaysian institute of maritime affairs (MIMA)

The roles of ISIS and MIMA in shaping Malaysia’s policy in this regard were especially instrumental during the administration of Hamzah Ahmad. Hamzah, once attached to the Malaysian Armed Forces College in 1984, was the Assistant Director General of the ISIS in 1990 and the Director -General of MIMA in 1997. During his tenure, Hamzah made an extensive contribution to the literature concerning Malaysia’s maritime and territorial boundary affairs. His numerous works were published by local and international newspapers, journals and books. Hamzah had published, among others, *Malaysia and the Law of the Sea: Post-UNCLOS III Issues*, (Honolulu, 1984) , *Malaysia’s Exclusive Economic Zone*, (Petaling Jaya, 1988), *The Spratlys: What Can Be Done To Enhance Confidence*, (ISIS, 1990), *The Oil Sultanate-Political History of Oil in Brunei Darussalam*, (Seremban, 1991), *Straits of Malacca; International Co-operation in Trade, Funding and Navigational Safety*, (Petaling Jaya, 1997), *Current Issues of Marine and Coastal Affairs in Malaysia*, (KL, 1997), and finally, *Jurisdictional Issues and Conflicting Claims in the Spratlys*, (Manila, 1990).

More importantly, some of the members of the boards of directors of MIMA and ISIS are also members of the National Security Council (NSC). For example, Hamid Othman of the NSD, Khalid Ramli, Director–General of the Implementation Coordination Unit of the Prime Minister’s Department and Ilyas Din, the Chief of the Armed Forces. The expertise as well as the high volume of related analysis and research carried out by ISIS and MIMA such as those of Hamzah Ahmad suggest that they had played a crucial role for influencing Malaysia’s decisions in the disputes. Looking at the institutions’ backgrounds, memberships, organizations, missions and objectives, the roles of these two governments’ affiliated non–governmental institutions in the Malaysia’s territorial disputes were certainly imperative.

Conclusion

The review of the events in the preceding chapters indicates that Malaysia’s foreign policy bureaucracy and the external factors had played key roles in Malaysia’s decision to refer the Sipadan–Ligitan and Batu Puteh

disputes to the ICJ. This research concludes that, despite the pivotal role of the Prime Minister in Malaysia's policy-making apparatus, the Prime Minister had taken into account the views of Malaysian foreign policy bureaucracy prior to making the decision over the country's territorial disputes. However, the agencies with the greater influence include the Armed Forces, the Foreign Ministry officials and its directorates, ISIS and MIMA and the personalities heading them.

The chronology of events indicated that the Malaysian Prime Minister had made his decision only after the bureaucrats from the above agencies had issued their statements. Besides, since the foreign policy bureaucracy comprises a group of experts in the territorial disputes, the Prime Minister seemed to have given considerable weight to their opinions and suggestions before deciding on the courses of actions that Malaysia would and should take with regard to its territorial disputes.

The influence can be seen from the fact that Malaysia, for example, proceeded with its decision for the ICJ dispute settlement despite the then Malaysian Prime Minister's initial unfavorable view of the ICJ. This proves the influence the bureaucrats had exerted on the Prime Minister's decision making capacity. However, this does not deny the fact that the Prime Minister was invariably the final decision maker. In other words, it can be argued that the Malaysian foreign policy bureaucracy does not make foreign policy. Rather, it manages the process and implements the foreign policy decisions. However, it should also be noted that the Prime Minister also does not make foreign policy decisions solely based on his personal analysis and understanding of the situations.

In addition, this research suggests that ASEAN's formal and informal conflict management mechanisms such as the ASEAN High Council has had a considerable influence on Malaysia's decisions as such. Moreover, the high security risk perceived by the policy makers had compelled Malaysia to settle its disputes with its neighbors peacefully in line with the spirit of the ASEAN Way of good neighborly relations. In addition to that, due to the uncertain emerging power structure in the Post-Cold War Southeast Asian region, military approaches to the conflict would put in jeopardy the interests of several major powers like China and the United States of America, prompting the possibility of war and providing the external powers with an opportunity to interfere in regional politics.

Moreover, it can be concluded that from 1963 - 2008 Malaysia's past and present positions on territorial disputes show a combination of unilateralism, bilateralism, multilateralism, and third party adjudication. Unilateralism, interpreted from the publication of the *Peta Baru* provides the basic framework from which Malaysia is to conduct itself in dealing with its territorial disputes. Based on the responses, together with multiple other reasons: political and economic, Malaysia has started to emphasize more on bilateral resolutions over its territorial disputes. The major indicator of this bilateral approach is Sipadan-

Ligitan case. In the case of the Spratlys, the ways Malaysia has dealt with the disputes were highly unilateral. This may be seen from Malaysia's occupation of Swallow Reef and Investigator Shoal. However, in Amboyna Cay case, Malaysia has been calling for multilateral solution.

In light of the discussion above, the recommendations below are in order;

First, this research recommends the establishment of the ASEAN Court for settlement of all kinds of disputes among its members. However, it is not necessarily patterned after the ICJ model. No matter what model the ASEAN Court may take, the bottom line is that it should be able to function more effectively than the ASEAN High Council. It should be made able to sit in all kinds of disputes in the region and be equipped with powers to regulate and enforce its decisions. The members should also be made to be committed to observing its decisions. It should be an impartial arbiter free from the manipulations of any ASEAN country. Otherwise, ASEAN may as well just stick to the ASEAN High Council and improvise. Another alternative is that ASEAN may also make the ICJ as one of the alternatives for dispute resolution method available among ASEAN members. In other words, besides the ASEAN High Council itself, ASEAN should state clearly in any of its future undertaking regarding dispute.

Second, Malaysia may continue its pragmatic-realistic approach in its foreign policy. But Malaysia does not need to refer all of its territorial disputes to the ICJ. Malaysia should always keep its options open and may consider the bilateral or multilateral settlement of its territorial disputes with other countries. Currently, the most pressing bilateral territorial dispute that Malaysia has is the Spratlys. The stake in the Spratlys seems to be high due to the presence of the proven off-shore oil deposits closer to the coasts of Sabah and Sarawak. Such crucial economic resources are essential to Malaysia's economic well-being. Therefore, Malaysian policy makers should not jump the gun and refer the disputes over the Spratlys to the ICJ. They may still employ bilateral or multilateral negotiation such as joint development agreement (JDA). Besides, no single justification such as a law treaty, effective control or *uti possidetis* (territories inherited from colonial powers) has proven decisive in the ICJ's boundary dispute jurisprudence as proven by Batu Puteh and Sipadan-Ligitan disputes (Sumner 2004:34). Therefore, joint cooperation (that is JDA) may be seen as one of the best alternatives.

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- on May 14, 1998. For the dispute of Batu Puteh Island, Malaysia and Singapore officially submitted for adjudication to the ICJ on May 9, 2003.
- ³ *Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*. 1979. Map. Rampaian 97, Cetakan 1–PPNM, Syit 1. Kuala Lumpur. Directorate of National Mapping Malaysia.
- ⁴ Sabah is located in the northern part of the Borneo Island. Sabah joined the Federation of Malaysia in 1963. Following the inclusion of Sabah, the Malaysian government had redrawn Sabah's territorial waters and continental shelf in order to endorse the 1954 British declaration of Sabah's east coast waters as historic waters so as to comply with UNLCOS I treaties of 1958.
- ⁵ See International Boundary Study, Series A Limits in the Seas, *Indonesia—Malaysia Continental Shelf Boundary*, (US: Department of State, No. 1, January 21, 1970).
- ⁷ The verdict of the dispute was delivered by the ICJ on December 17, 2002 with the court ruled that Sipadan—Ligitan belonged to Malaysia. "Summary of Judgment of 17 December 2002", International Court of Justice: Press Release 2002/39bis, <www.icj-cij.org/icjwww/idocket/iinma/iinmaframe.htm>, (accessed online 4 August 2006). See also Clive Schofield and Ian Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes", *Harvard Asia Quarterly*, vol. IX, no. 4 (2005).
- ⁸ The dispute over Batu Puteh Island also involves two nearby features namely, Middle Rocks and South Ledge. Unless stated specifically, the term Batu Puteh Island is meant to include both of the two features.
- ⁹ *Straits Times*, 14 September 1994. On the same day, Mahathir also proposed that Malaysia refer the Sipadan—Ligitan dispute to the ICJ.
- ¹⁰ In 1996, both countries met twice in June and December 2006 (*Straits Times*, 17 June 1995; *Business Times*, 7 December 1995).
- ¹¹ "Malaysia and Brunei to discuss territorial dispute", Alexander's Oil and Gas Connection: News and Trends; E & SE Asia, <<http://www.gasandoil.com/goc/news/nts33214.htm>>, (accessed on April 6, 2006).
- ¹² It was suggested that Malaysia had offered Brunei a joint oil–production sharing agreement. "Malaysia and Brunei in oil dispute", http://english.aljazeera.net/Archive/News/GlobalNews/2003_8/MalaysiaandBruneiinoildispute.htm (accessed on April 6, 2006).
- ¹³ Few of the tiny islands contain fresh water and guano—a main ingredient for phosphate production. They support certain life forms like coconut palms and mangrove swamps (Trost, *The Contested Maritime*, 295–296).
- ¹⁴ Itu Aba has a surface area of 0.5 sq. km, while Spratly Island proper is 0.13 sq. km.
- ¹⁵ Malaysia stationed its troops on Swallow Reef on 4 September 1983. Since then Malaysia has built several structures on Swallow Reef; an airstrip, dive resort and military installations with 70 military personnel, <<http://www.globalsecurity.org/military/world/war/spratly.htm>>, (accessed on August 13, 2006).
- ¹⁶ No available Malaysian names.
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- ²¹ *Straits Times*, 14 September 1994.
- ²² In the Constitution of Malaysia, the Yang Dipertuan Agong is also the Supreme Commander of the Malaysian Armed Forces.

¹ The distance is based on the usual flight distance through the South China Sea from Kota Kinabalu, a major city in East Malaysian state of Sabah to Kuala Lumpur, the nation's capital in West Malaysia.

² There are three vital different dates: (1) the signings of the Special Agreements by countries to refer their territorial disputes to the ICJ, (2) the dates for the agreements to enter into force thereof (3) the dates when the Registrar of the Court were notified of the agreements and (4) the dates of the Court's issuance of the official verdict. Each particular date is for particular occasion. To provide uniformity, this research takes the dates of the Special Agreements entering into force as the official dates for the respective countries submitting their cases for the ICJ adjudication. Malaysia and Indonesia officially submitted their dispute over Sipadan–Ligitan Islands to the ICJ