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Managing Editor's Comments

On behalf of the new editorial team, it is my great honor to welcome all readers to the *Journal of Territorial and Maritime Studies*, Volume 3, No. 2, Summer/Fall 2016 issue. Since this volume, Yonsei University has taken over editorial responsibilities of *JTMS*, sponsored by the Northeast Asia History Foundation. It is privilege and pleasure for Yonsei University to host the editorial offices of *JTMS*. The new editorial team is comprised of the Editor, Jungmin Seo (professor, Yonsei University), and two managing editors, Lonnie Edge (professor, Hankuk University of Foreign Studies) and myself (professor, Yonsei University). All members of the editorial team will endeavor to provide more interdisciplinary insights into territorial and maritime issues for readers.

In this Volume 3, No. 2, there are five articles and one book review, all of which are filled with interesting and original ideas about current important subjects. This issue of *JTMS* is primarily concerned with maritime activities and disputes. The ocean has been a major arena of conflicts between states and persons. The use of living and non-living resources and their protection have great importance for the international community. There has been growing interest in how to harmonize different interests for the ocean between defenders of development and environmental protectionists, coastal states and flag states, and state parties to maritime delimitation disputes. This issue of *JTMS* aims to address such conflicts of interest among various actors in the ocean and to examine ocean institutions and governance as a tool for conflict management and settlement.

Danae Azaria's article "The Scope and Content of Sovereign Rights in Relation to Non-Living Resources in the Continental Shelf and the Exclusive Economic Zone" calls attention to exploration and exploitation of oil and gas in functional zones from a legal perspective. This article studies property over these resources, access to confidential information about them, coastal states' jurisdiction over artificial structures serving for their exploitation, and coastal states' rights and jurisdiction in relation to interests of the international community. By examining recent case law, Azaria attempts to reveal international law applicable to these complex and interesting issues.

Ioannis Konstantinidis observes relations between delineation and delimitation of the continental shelf beyond 200 nautical miles (outer continental shelf) in the article "Between Villa Schröder (ITLOS) and the Peace Palace (ICJ): Diverging Approaches to Continental Shelf Delimitation Beyond 200 Nautical Miles." There has been no consensus as to such relations despite states' increasing claims on the

outer continental shelf. Konstantinidis examines recent cases submitted to two judicial institutions, in which they revealed the opposite understandings of the definition of continental shelf under the UN Convention on the Law of the Sea. He thereby provides possible solutions for overcoming such contradictory interpretation.

Hwang Junshik addresses "Challenges on the Ocean and the Future of the Law of the Sea: Environment, Security, and Human Rights." The UN Convention on the Law of the Sea, initially considered as a comprehensive instrument for the ocean, has turned out be insufficient and fails to cope with new problems occurring in the seas. Hwang indicates a deficiency of the law of the sea in response to marine biodiversity of areas beyond national jurisdiction, threats to maritime security, climate change and human rights abuses in the operation of law enforcement on the ocean. His article illustrates recent global law-making efforts for such emerging maritime issues. Dynamics of the law of the sea are also explored in this article.

Articles by both Chung-min Tsai and Stefan Talmon observe maritime disputes in Asia. Tsai focuses on the East China Sea surrounding Diaoyu/Senkaku islands while Talmon examines the South China Sea disputes between the Philippines and China. Tsai's article "Sino-Japanese Relations over the East China Sea: The Case of Oil and Gas Fields" presents a fresh analysis on this much-discussed subject by focusing on exploitation of natural resources rather than on the territorial sovereignty issue, and by adopting the historical institutionalist approach. Talmon invites readers to one of the hottest spots around the world: the South China Sea. In his article "Objections Not Possessing an 'Exclusively Preliminary Character' in the South China Sea Arbitration," the author observed how the Philippines shaped their claims against China before the arbitral tribunal and China's objections to the latter's jurisdiction. His article provides a legal understanding of maritime disputes in the South China Sea by means of thorough analysis of the tribunal's award on jurisdiction and admissibility and predictions for further proceedings.

Finally, our book review section is devoted to the review of the book *International Law and International Relations* coauthored by David Armstrong, Theo Farrell, Helene Lambert (New York: Cambridge University Press, 2012, 2d. ed.) This book is expected to suggest a theoretical framework that might be useful for *JTMS* readers to develop interdisciplinary research concerning territorial and maritime issues.

The new editorial team of *JTMS* will work hard to become a platform for theoretical and practical discussion of territorial and maritime issues. We look forward to growing and developing our readership while expanding the discourse on territorial and maritime studies.

Hyun Jung Kim
Managing Editor

The Scope and Content of Sovereign Rights in Relation to Non-Living Resources in the Continental Shelf and the Exclusive Economic Zone

Danae Azaria

Structured Abstract

Article Type: Research Paper

Purpose—This article discusses the content of sovereign rights of coastal states in the continental shelf and the exclusive economic zone by reference to recent international case law.

Design, Methodology, Approach—It touches on issues of property over non-living resources, access to confidential information about such resources, the exclusive rights and jurisdiction exercised over infrastructure necessary for the exercise of sovereign rights, and the delineation of the scope of such sovereign rights by their interaction with other interests—individual or community interests—protected by international obligations, such as investment protection, freedom of navigation and the obligation to make contributions for the exploitation of non-living resources in the continental shelf beyond 200 nautical miles.

Findings—The article argues that activities surrounding the exploration and exploitation of non-living resources in these maritime areas have been the drive for the development of the law of the sea and will continue to be so.

Practical Implications—The article explains the outer limits and legal implications of sovereign rights and exclusive jurisdiction in relation to non-living resources

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within national jurisdiction by explaining their content and by establishing their scope by reference to their interaction with other interests (of other states or community interests) protected by obligations of coastal states. These questions are of practical importance to coastal states and other states, as well as individuals, as shown in recent case law.

Originality, Value—It thus sheds light on underexplored aspects of the content of sovereign rights that have recently been the subject of international disputes and may be expected to continue to give rise to such disputes between states.

Key words: coastal states, continental shelf, freedom of navigation, international disputes, law of the sea, non-living resources, sovereign rights

1. Introduction

Under customary international law, as reflected in the Law of the Sea Convention ("LOSC"),[1] states enjoy sovereignty in their territory, including their internal waters, and in their territorial sea.[2] In contrast, in the continental shelf and the exclusive economic zone states enjoy exclusive sovereign rights: a type of "functional sovereignty,"[3] in the sense that these have to be connected to particular grounds permitted by international law.[4] More specifically, sovereign rights have to be connected to exploring and exploiting natural resources on the continental shelf (LOSC Article 77[1]), or to exploring, exploiting, conserving and managing the living or non-living resources in the exclusive economic zone, and other activities for the economic exploitation of the exclusive economic zone, such as the production of energy from the water, currents and winds (LOSC Article 56[1][a]).[5]

The basic tenet of the coastal state's sovereign rights in relation to non-living resources in the continental shelf and exclusive economic zone is that the coastal state will choose whether non-living resources will be explored and exploited, and if so, who and how will explore and exploit them. But, recent case law has revealed other aspects of the content of sovereign rights, such as access to confidential information about non-living resources within national jurisdiction, and conservation of non-living resources. It had also illuminated the relationship between the sovereign rights of the coastal states and the exclusive jurisdiction of the coastal state with the rights of other states or community interests that international law protects.

The following sections discuss these issues in relation to non-living resources falling exclusively within the national jurisdiction of one state[6] by focusing on LOSC and by analyzing international case law. Section 2 touches on the content of sovereign rights by looking at their relationship to property, confidential information about non-living resources, conservation and exploitation rates, as well as the rights and jurisdiction that the coastal state exercises over infrastructure which is essential for the exercise of sovereign rights concerning the exploration and exploitation of non-living resources. Section 3 touches on the balance between the rights of the coastal state with those of other states or other interests protected by international law with a view to

delineating the scope and outer limits of the sovereign rights of the coastal state and their exclusive jurisdiction (where applicable). Section 4 provides some conclusions.

2. The Content of Sovereign Rights in Relation to Non-Living Resources in the Continental Shelf and the Exclusive Economic Zone

In the continental shelf, sovereign rights are inherent and exclusive. The coastal state does not need to proclaim a continental shelf.[7] If it chooses not to explore or exploit the resources of the continental shelf, no other state may explore or exploit the resources of the continental shelf without the express consent of the coastal state.[8] In contrast, the exclusive economic zone needs to be proclaimed, and upon proclamation[9] sovereign rights over the exclusive economic zone are exclusive.

In LOSC, the provisions concerning the continental shelf cross-refer to provisions of the Part on the exclusive economic zone, which apply *mutatis mutandis* to the continental shelf. Where a coastal state has proclaimed an exclusive economic zone, the provisions on the exclusive economic zone and on the continental shelf together regulate the rights and duties of states within two hundred nautical miles off the coast vis-à-vis the exploration and exploitation of non-living resources.[10]

Under customary international law, states enjoy permanent sovereignty over natural resources in areas where they enjoy sovereignty and sovereign rights.[11] Permanent sovereignty over natural resources entails that states are free to dispose of their natural resources without interference in areas where they enjoy sovereignty or sovereign rights, unless they are otherwise constrained by rules of international law.

However, beyond this general proposition different aspects of the content of sovereign rights can be identified, which will be discussed in the following sequence: section 2.1 deals with the question of whether sovereign rights entail ownership for the coastal state and what the implications are for private companies; section 2.2 analyzes the acquisition and use of confidential information, as an aspect of sovereign rights; section 2.3 shows that general customary international law does not require coastal states to explore and exploit particular sources of energy within their national jurisdiction, nor does it place requirements as to the rates at which such sources are to be exploited; section 2.4 discusses the manner in which the law of the sea regulates drilling, artificial islands, installations and structures, placing emphasis on the rights and jurisdiction that the coastal state enjoys and exercises over such infrastructure which is essential for the exercise of sovereign rights concerning the exploration and exploitation of non-living resources.

2.1 Sovereign Rights and Property

Sovereign rights over the non-living resources of the continental shelf are exclusive and relate only to the exploration and exploitation of the continental shelf and

its resources. However, it is doubtful that the state is vested with ownership over the non-living resources of the continental shelf *in situ*. In light of the fact that the coastal state may choose to provide private investors (foreign and domestic nationals) with ownership over the hydrocarbons in its continental shelf, the question about whether sovereign rights entail ownership of the coastal state over non-living resources in the continental shelf may become important. A private entity can acquire ownership only from a rightful owner. This is especially relevant in relation to the old style concession agreements that states concluded with foreign investors, which transferred ownership of a hydrocarbon deposit *in situ*.

Higgins suggests that sovereign rights do not *ipso facto* translate into the coastal state's ownership over the deposit *in situ*.[12] Rather the concession holder acquires ownership over the extracted produce once that is reduced to possession.[13] There is no clear answer under the law of the sea as to whether sovereign rights mean that the coastal state has ownership over a hydrocarbon deposit, and state practice varies. Some domestic legal orders vest the state with ownership over the offshore non-living resources in the continental shelf, while others specifically refer to sovereign rights.[14] Nevertheless, given the exclusiveness of the coastal state's rights over the continental shelf for the exploration and exploitation of resources, there is no likelihood that another state would make a claim that the coastal state does *not* have title or ownership over non-living resources in its continental shelf, given that the issue of ownership is mainly linked to the activity of exploration and exploitation of resources for which the coastal state exercises exclusive sovereign rights.

From the point of view of investors, modern contractual relationships with the state for the purpose of exploring and exploiting the resources of the continental shelf take the form of licenses or contracts that do not envisage ownership over the deposit. An investment made in relation to the exploration and exploitation of a non-living resource in the continental shelf or in relation to the production of electricity from winds or currents in the exclusive economic zone may take the form of a license or contract to exploit. As a separate matter, under bilateral and multilateral investment treaties, such arrangements may fall within the meaning of the term "investment" thus being afforded the applicable treaty protection. Whether such protection exists, will depend on the scope of application of each treaty.[15]

Furthermore, international law does not specifically address ownership over infrastructure (artificial islands, installations and structures, as well as pipelines connected with such infrastructure), which is constructed, operated and used for the exploration and exploitation of non-living resources in the continental shelf and the exclusive economic zone. As explained in section 2.4 below, the coastal state enjoys an exclusive right to construct, authorize and regulate the construction, operation and use of such infrastructure and exercises exclusive jurisdiction over them. However, this does not necessarily translate into ownership over such infrastructure. This matter is left to domestic law,[16] and states or companies may have ownership over such infrastructure,[17] but the coastal state exercises exclusive jurisdiction over it.

Having explained that the law of the sea does not specifically award to the coastal

state ownership over the non-living resources in the continental shelf and the exclusive economic zone, but that sovereign rights entail exclusiveness for the exploration and exploitation of such resources having comparable results to ownership, the following section examines exclusive access to confidential information about the non-living resources of the continental shelf and the exclusive economic zone.

2.2 Exclusive Access to Confidential Information

Information about the resources of the continental shelf, meaning information about the availability of the resources, the nature, extent and location of deposits, and the economic feasibility of exploiting the resources,[18] is important to coastal states for economic reasons: such information may attract numerous investors, and may influence negotiations for arranging such development.[19] The Côte d'Ivoire/Ghana boundary delimitation before the Special Chamber of International Tribunal for the Law of the Sea ("ITLOS") has recently brought to light an aspect of the sovereign rights of the coastal state that has been underexplored in scholarship and case law: that concerning access and control over confidential information about the resources of the continental shelf.

In 2014, Côte d'Ivoire and Ghana concluded a Special Agreement to submit the dispute concerning their maritime boundary in the Atlantic Ocean, more specifically that relating of the continental shelf, to a special chamber of the Tribunal (pursuant to Article 15[2] of the Tribunal's Statute). Within the disputed area to be delimited by the Special Chamber, Ghana had awarded oil contracts to a number of companies and was planning to award new oil contracts.

Côte d'Ivoire requested the Special Chamber to prescribe provisional measures (pursuant to LOSC Article 290[1]), which would *inter alia* require Ghana to take all steps necessary to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area from being used to the detriment of Côte d'Ivoire.[20] It argued that since the term "sovereign rights" in the LOSC has been interpreted by ITLOS in its earlier case law to include "all rights necessary for and connected with the exploration and exploitation of the resources of the [continental shelf],"[21] the term also entails the exclusive access to confidential information about the resources in the continental shelf.

Ghana requested the Chamber to reject all provisional measures requested.[22] It disputed the existence of an exclusive right to access confidential information under LOSC.[23]

The Special Chamber was called upon and had competence only to rule on the request for provisional measures, which it "consider[ed] appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision" (LOSC Article 290). It thus did not need and was not competent to determine the existence and content of the rights invoked by the parties.[24] Pursuant to its case law on provisional measures it had to be satisfied that the rights invoked by Côte d'Ivoire were

plausible,[25] and that there is "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute."[26]

It found that "in the circumstances of this case, […] Côte d'Ivoire has presented enough material to show that the rights it seeks to protect in the disputed area are plausible,"[27] and that the acquisition and use of information would create a risk of irreversible prejudice to the rights of Côte d'Ivoire should the Special Chamber, in its decision on the merits, find that Côte d'Ivoire has rights in the disputed area.[28] The reasoning of the Chamber that acquisition of confidential information concerning the natural resources of the continental shelf is a *plausible* aspect of the sovereign rights connected to the exploration of the continental shelf was not further elaborated. However, it could be seen as a reiteration of the reasoning of the claimant (Côte d'Ivoire), which seems to be based on the "effective interpretation" of LOSC—a technique of interpretation which finds expression in the customary rule on treaty interpretation set forth in Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT")[29]: treaty terms are to be interpreted in good faith thus being given their full meaning, and have to be interpreted in light of their object and purpose of the treaty.[30]

The Judgment on the Merits is pending. However, the Judgment may clarify the content of sovereign rights in this respect under the LOSC. Arguably it may also inadvertently assist in the clarification of the content of sovereign rights under customary international law, to the extent that the content of the sovereign rights in the continental shelf, which exist under treaty and custom, have identical content.

Nevertheless, the Special Chamber ordered Ghana to "take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain *from being used* in any way whatsoever to the detriment of Côte d'Ivoire."[31] What the Special Chamber did *not* do is to require Ghana to return information already acquired to Côte d'Ivoire and importantly to abstain or require entities that are acting pursuant to its authorisation from abstaining from ongoing and future acquisition and use of such information *per se* (irrespective of whether the use is or not detrimental). In this respect, the Order of Provisional Measures is characterized by some inherent inconsistency between on the one hand, the *exclusive* acquisition (and use) of confidential information concerning the resources of the continental shelf being a (plausible) aspect of sovereign rights over the continental shelf, and on the other hand, the acquisition and use of such confidential information by another state, irrespective of whether such use is or is not to the detriment of the sovereign coastal state. Exclusivity, as a feature of sovereign rights, means that no other state may acquire and use such information, and is independent from the manner in which confidential information may be used by another.

This approach by the Special Chamber can be explained by the facts of the case, and Côte d'Ivoire's request of provisional measures in this particular form. The dispute for which it was called to issue provisional measures had to do with maritime delimitation, which is pending on the merits. At the provisional measures stage of

the proceedings it is yet unclear, which of the two parties to the dispute has exclusive sovereign rights over the overlapping claims area before the Chamber. The Order of the Special Chamber in relation to the access to confidential information is essentially an exercise of balancing the future interests of either party to the dispute: either party to the dispute may turn out to have exclusive sovereign rights in the form of access to confidential information concerning non-living resources in the continental shelf, which is to be delimited in the merits.

As a separate matter, there is no ground to argue that the coastal state cannot make available such confidential information or contracts for acquisition of such information to private companies. As long as the coastal state itself makes the choice to provide information to companies or conclude contracts with companies in order to retrieve information about the resources in its continental shelf, this would be consistent with its sovereign rights. Its decision-making power emanates from the coastal state's sovereign rights concerning the exploration of the continental shelf and the exploitation of its resources.

Having depicted what recent case law has revealed concerning the exclusive acquisition and use of confidential information about the resources of the continental shelf as an aspect of the sovereign rights of the coastal state over the continental shelf (and by implication and *mutatis mutandis* of the exclusive economic zone), the following section explains that international law does not place restrictions on states vis-à-vis their choice to exploit (or not) offshore non-living resources within their national jurisdiction and vis-à-vis the rates of exploitation should they choose to exploit them.

2.3 No Restriction Under International Law Concerning the Sources to Be Exploited and the Rates of Exploitation

Permanent sovereignty permits coastal states to undertake conservation measures vis-à-vis their non-living resources. However, neither the law of the sea nor general international law place obligations on coastal states to exploit their natural resources in marine areas within their national jurisdiction (or onshore for that matter). Nor do they require coastal states to exploit specific non-living resources or undertake economic activities at sea within national jurisdiction (e.g., by developing renewable sources of energy within their exclusive economic zone).[32] Additionally, assuming that coastal states exploit non-living resources within their jurisdiction, international law does not require them to do so on the basis of specific exploitation rates, and there is no obligation to conserve non-living resources (hydrocarbons) in the continental shelf and exclusive economic zone of one state.

First, in relation to living resources the LOSC expressly requires coastal states to promote the optimum utilization of living resources within national jurisdiction (Article 62[1]). It also requires that coastal states ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation, and that such measures shall be designed "to maintain or restore populations of harvested species at levels

which can produce the maximum sustainable yield" (Article 61[3]). Additionally, in relation to resources beyond national jurisdiction LOSC provides for their conservation. More specifically, in relation to living resources on the high seas LOSC requires "[a]ll States […] to take [measures] as may be necessary for the conservation of the living resources of the high seas" (Article 117), and that "[i]n determining the allowable catch and establishing other conservation measures for the living resources in the high seas, [they] shall [take measures designed] to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield" (Article 119[1][a]). In relation to the resources of the Area (meaning beyond national jurisdiction), LOSC prescribes that the International Seabed Authority shall adopt appropriate rules for the "conservation of the natural resources of the Area" (Article 145).

Despite the express inclusion of some standard of exploitation rates and conservation obligations vis-à-vis living resources within and beyond national jurisdiction, and in relation to non-living resources beyond national jurisdiction, LOSC does not include similar provisions concerning non-living resources within national jurisdiction.[33] It thus allows for the *a contrario* argument that coastal states are not obliged under LOSC to conserve and exploit non-living resources within national jurisdiction in a sustainable manner or on the basis of a particular exploitation rate.[34]

Second, as a separate matter, there is a question as to whether beyond LOSC, but under general customary international law, states are obliged to exploit their natural resources in a sustainable manner. This issue revolves around the question whether sustainable development constitutes a rule of customary international law—an issue about which opposing views have been voiced[35]—and what its content is.

The definition of the concept of sustainable development was framed in the context of the Brundtland Commission Report (1987) to mean development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[36] The Brundtland Commission Report in relation to exhaustible natural resources, such as fossil fuels and minerals, explains that "their use reduces the stock available for future generations. But this does not mean that such resources *should not be used*."[37] The report goes on to encourage that such exhaustible resources should be exploited in "sustainable depletion rates," there is no evidence that customary international law specifically requires such "sustainable depletion rate" for hydrocarbons and minerals within one state's jurisdiction (offshore and/or onshore). In any event, the Report suggests that sustainable development (irrespective of its legal value) does not prevent states from exploiting such exhaustible resources.

A number of non-binding declarations have since included a reference to sustainable development,[38] but there is no evidence that such non-binding instruments expressed the *opinio juris* of states that adopted them. Nor is there any extraneous (to these instruments) evidence of *opinio juris*.

The legal value and the content of sustainable development has arisen in contentious proceedings before a number of international courts, tribunals and quasi-judicial bodies. However, this case law does not offer support to the argument that

under international law states are obliged to conserve non-living resources within the continental shelf and the exclusive economic zone or to exploit them sustainable or on the basis of a particular depletion rate.

In 1997, in *Gabcikovo-Nagymaros* the International Court of Justice ("ICJ") dealt with a dispute between Slovakia and Hungary concerning a 1977 bilateral treaty on a joint project to build a hydroelectric facility on river Danube. The dispute was couched in terms of termination of the treaty under the law of treaties and of circumstances precluding wrongfulness under the law on state responsibility. However, in the part where the ICJ determined how the parties had to negotiate in order to reach an agreement about the modalities for the execution of the Court's Judgment (pursuant to the 1993 Special Agreement by which the parties to the dispute agreed to submit the dispute to the jurisdiction of the ICJ), the Court considered that the provisions of the 1977 Treaty (Articles 15 and 19) impose on the parties a "continuing—and thus necessarily evolving—obligation to maintain the quality of water and to protect nature, taking into account […] new norms […]."[39] The ICJ went on to explain that international law included at the time of the judgment obligations of "vigilance and prevention […]," and that "new norms and standards have been developed [that] have to be taken into consideration, [be] given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[40]

The ICJ did not pronounce that "sustainable development" is a rule of international law. It referred to it as a "concept" and acknowledged the existence of rules of international environmental law that it did not specifically identify (beyond vigilance, prevention), which allows for the interpretation of its reasoning that a number of norms and standards may exist under the umbrella or label of "sustainable development" without sustainable development having a specific normative value *per se*.[41] Nor did it explain the precise content of the "concept of sustainable development." In any event, given the facts of the case, the Court connected the "concept" to a shared water resource.

Since then, other international tribunals and quasi-judicial bodies have referred to the "principle of sustainable development." The first case—*Indus Waters Arbitration (India/Pakistan)*—relates to an international watercourse (a shared water resource), as *Gabcikovo-Nagymaros* did. The second case—*China-Rare Earths*—relates to the exploitation of non-living resources within the national jurisdiction of one state, and is thus more relevant for the present analysis.

In 2013, in the *Indus Waters Arbitration (India/Pakistan)* the Arbitral Tribunal dealt with the interpretation and application of a bilateral treaty between India and Pakistan in relation to two hydroelectricity projects on a shared watercourse between these two states. In the Partial Award, it interpreted the bilateral treaty taking into account rules of customary international law, and more specifically the obligation to prevent transboundary environmental harm and the obligation (that the ICJ had identified in *Pulp Mills*)[42] to undertake "an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse

impact in a transboundary context, in particular, on a shared resource."[43] In this context, the Tribunal made reference to the "principle of sustainable development,"[44] thus marking a jurisprudential shift from the use of the term "concept" to that of the term "principle."

However, its pronouncement does not robustly support the existence of a rule of customary international law on sustainable development that requires states to exploit non-living resources within national jurisdiction in a sustainable manner or in accordance to particular depletion rates. First, the Tribunal did not explain why it considered that sustainable development is a "principle." Nor did it provide any evidence that sustainable development is a rule of international law. Second, its pronouncement was incidental: it did not need to refer to a principle of sustainable development to reach the conclusion that under customary international law states are obliged to undertake an environmental impact assessment, where there is risk of significant transboundary harm, especially in relation to a shared resource. This obligation exists under customary international law independently from any discussion about sustainable development, as the ICJ found in *Pulp Mills*, to which in fact the Arbitral Tribunal in *Indus Waters* referred. Third, even assuming *arguendo* that such a principle exists under custom, this case along with *Gabcikovo-Nagymaros*, could be seen as authorities determining the existence of such a rule in relation to shared resources, and particularly international watercourses, but not necessarily non-living resources within the exclusive jurisdiction of one state: in the continental shelf and in the exclusive economic zone.

In contrast, in 2014, a WTO Panel and the WTO Appellate Body touched on sustainable development in relation to the exploitation of non-living resources in *China-Rare Earths*.[45] The Panel Report, which was not repealed by the Appellate Body Report in this respect,[46] by virtue of the general rule of treaty interpretation set forth in VCLT Article 31, and more particularly pursuant to the means of interpretation found in paragraph (3)(c) of this rule, suggested that sustainable development is a "principle of international law." The Panel took into account this "principle" in order to interpret the GATT, and more particularly the term "conservation" found in the general exceptions provision (GATT Article XX[g]).[47]

However, the reasoning of the Panel is misplaced. First, it alludes to "international agreements" in order to sustain the existence of such a principle, while the instruments it refers to are all non-binding declarations,[48] and does not address how these non-binding instruments either reflect or have lead to the formation of a rule of customary international law. Second, the Panel and the Appellate Body did not explain whether and did not suggest that the content of sustainable development *requires* (rather than allows) states to conserve and to exploit their resources on the basis of specific depletion rates. The language of the Panel Report suggests that permanent sovereignty over natural resources and sustainable development *permit* a state to take conservation measures, but does not use any language suggesting that these two "principles" *require* them to do so. In fact, the dispute was couched in terms of the general exceptions of GATT Article XX(g). China argued that it was permitted under GATT Article XX(g) to take measures *prima facie* inconsistent with

the other provisions of GATT, since its measures "relat[ed] to the conservation of exhaustible natural resources [and that] such measures are made effective in conjunction with restrictions on domestic production or consumption." There is no evidence from the Panel and Appellate Body Reports[49] that China argued that it was required, as opposed to permitted, pursuant to sustainable development to conserve exhaustible natural resources. On the other hand, permanent sovereignty over natural resources permits states to conserve non-living resources, but such freedom can be constrained by other rules, such as the GATT.

These cases do not support the proposition that sustainable development (even assuming *arguendo* that it is a rule of general international law) imposes obligations on states to include or exclude particular sources of energy from their energy mix, to abstain from exploiting particular non-living resources, including renewable sources of energy, or that it prescribes some standard concerning the rates of depletion of exhaustible non-living resources (such as hydrocarbons and minerals) located exclusively within the jurisdiction of one state.

However, other international obligations may not limit the manner in which states may explore and exploit such resources, and thus indirectly have an impact on which resources are to be exploited and at which rate.[50]

Given that the exploration and exploitation of non-living resources within national jurisdiction takes place from relevant infrastructure, the following section examines the content of sovereign rights in this respect along with the (exclusive) jurisdiction that the coastal state exercises over infrastructure that is essential for the exploration and exploitation of the non-living resources the continental shelf and the exclusive economic zone (or for other economic activities in the exclusive economic zone, including the production of energy from renewable sources).

2.4 Drilling, Artificial Islands, Installations and Structures

In relation to drilling specifically, which is the main—yet not the sole—method by which the exploration and exploitation of hydrocarbons on the continental shelf takes place, under LOSC, the coastal state has the exclusive right to authorize and regulate it on the continental shelf *for all purposes*, meaning beyond the purpose of exploring and exploiting the resources of the continental shelf (LOSC Article 81). For instance, a coastal state may withhold consent for marine scientific research by another State or competent international organization if it "involves drilling into the continental shelf" (LOSC Article 246[5][b]).

More generally, exploration and exploitation of non-living resources on the continental shelf and the exclusive economic zone take place from artificial islands, installations, and structures, which are regulated by LOSC Articles 60 (Part on the exclusive economic zone) and 80 (Part on the continental shelf). Article 80 incorporates the rules of Article 60 concerning artificial islands, installations and structures on the continental shelf. Article 60 also regulates artificial islands, installations and structures for the production of electricity of renewable sources of energy.

In the continental shelf and the exclusive economic zone, the coastal state has the

exclusive right to construct, to authorize and to regulate the construction, operation and use of artificial islands in general, and of installations and structures for the purposes for which it enjoys sovereign rights in the exclusive economic zone and the continental shelf, and as a separate matter installations and structures which may interfere with the exercise of the rights of the coastal state in the zone (LOSC Article 60[1]). The freedom of the high seas to construct artificial islands and other structures (LOSC Article 87[1][d]) does not apply to the EEZ (LOSC Article 58[1]).[51] This exclusive right is partly the corollary of the sovereign rights that the coastal state has in the continental shelf and the exclusive economic zone,[52] but goes beyond sovereign rights: the right to construct artificial islands is not connected to the coastal state's sovereign rights.[53] However, the focus of the analysis here is sovereign rights over non-living resources.[54]

As a separate matter, the coastal state has exclusive (prescriptive and enforcement) jurisdiction over artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws.[55] Although the use of the two different terms "exclusive right" and "exclusive jurisdiction" suggests that these are two different issues, the Convention does not explain this difference. It has been argued that the fact that the coastal state installs or authorizes the construction, operation and use of such infrastructure in the exclusive economic zone does not entail (at least in theory) that it has sovereign rights over such infrastructure *per se*, since such proposition may suggest that sovereign rights would extend to the exclusive economic zone as a physical space, while the whole regime of the exclusive economic zone reflects the very compromise between the sovereign rights of the coastal state and the rights and interests of other states in navigation and communication.[56] In practice, the difference between exclusive jurisdiction over artificial islands, installations and structures and sovereign rights may be seen as minimal, since they are both exclusive (Article 60[2]). Although the exclusive jurisdiction over such infrastructure is general (while the right to construct and authorize the construction, operation and use of such infrastructure is partly connected to sovereign rights—but not for artificial islands), it is exclusive jurisdiction exercised over infrastructure specifically (at least partly) connected to sovereign rights.[57]

Coastal states may, where necessary, establish reasonable safety zones around artificial islands, installations and structures (which cannot exceed 500 meters around them), and is obliged to maintain permanent means for giving warning of their presence must be maintained (Article 60[3]), and to give due notice of the extent of safety zones (Article 60[5]).

In the safety zones, coastal states may take appropriate measures to ensure safety of the structures, but also the safety of navigation (Article 60[4]). This obligation emphasizes the balancing act between the sovereign rights and jurisdiction of the coastal state in the exclusive economic zone and the rights of other states in this maritime zone. The outer limits of the coastal state's sovereign rights and exclusive jurisdiction vis-à-vis infrastructure, which is essential for the exercise of their sovereign rights, is further discussed in section 3 below, which analyzes the balance between the coastal state's exclusive jurisdiction over such infrastructure, and other interests, including freedom of navigation.

3. Delineating the Scope of Sovereign Rights and Exclusive Jurisdiction of the Coastal State: The Balance with Other Interests

Sovereign rights interact with other interests reflected in international obligations. Other interests can be classified as individual interests, which are reflected in obligations that are owed in a bilateral/reciprocal manner between states,[58] and with community interests, which are reflected in obligations owed indivisibly and collectively among states transcending the individual interests of the subjects to which the obligations are owed (*ergo omnes* and *ergo partes*).[59] This classification determines who has standing to invoke responsibility for a breach of such obligations.[60] It may arise as an admissibility objection before an international court or tribunal and determines who may resort to countermeasures under the law of state responsibility (where these are not excluded by *lex specialis*).[61]

3.1 Individual Interests of Other States

The right of the coastal state to authorize drilling in the territorial sea is subject to the obligation not to hamper the right to innocent passage, which translates to bilateralizable obligations under LOSC (and custom), as it reflects the individual interest of each flag state (LOSC Article 24).[62] Beyond the territorial sea, the water column will either be the high seas, where the coastal state has not proclaimed an exclusive economic zone, or in cases it has proclaimed an exclusive economic zone, the freedom of navigation and of laying pipelines and cables apply in the exclusive economic zone (LOSC Article 58[1]). However, owing to the common nature of the high seas *per se*, the obligations of states vis-à-vis the high seas are *erga omnes partes* under LOSC, and *erga omnes* under custom. Thus, the balance between the right to exploit non-living resources in the continental shelf and the exclusive economic zone with the freedom of navigation is discussed in section 3.2 below, where community interest obligations are analyzed.

Beyond the law of the sea, obligations (under treaty) concerning the protection of foreign investors are also reflective of individual interests of states as the predominant interest that they address is the protection of nationals abroad.[63] Although the law of the sea does not touch on the protection of foreign investors, the scope of application of bilateral or multilateral investment treaties, such as the Energy Charter Treaty ("ECT"), may include investment made in the continental shelf and the exclusive economic zone, including in the form of licences or contracts for the exploitation of hydrocarbons or the production of electricity by renewables structures. For instance, under ECT Article 1(6)(f), any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector, meaning an "economic activity concerning the exploration, extraction [and production] of Energy Materials and Products" in the Area of a Contracting Party. The term "Energy Materials and Products" in Article 1(4) which cross-refers to Annex EM includes *inter alia* oil, gas and electricity. Thus

non-living resources in the continental shelf are included, along with the production of electricity, which may take place from renewable energy infrastructure in the exclusive economic zone. Moreover, contrary to LOSC, where the term "Area" means marine spaces beyond national jurisdiction, the term "Area" in the ECT refers only to space within national jurisdiction of the ECT Contracting Parties, including territory and "the sea, sea-bed and its subsoil with regard to which that Contracting Party exercise sovereign rights and jurisdiction" (ECT Article 1[10]).

Although sovereign rights over non-living resources in marine spaces within national jurisdiction mean that the coastal state is free to dispose of these resources and regulate their exploration and exploitation at its will, coastal states may undertake obligations concerning the treatment of investors within their national jurisdiction which may limit the manner in which they treat the activity of the investor and by implication the exploration and exploitation of the non-living resources therein.

Having examined how sovereign rights may be limited by individual interests of other states, as reflected in international obligations, the following section touches on community interest obligations of coastal states.

3.2 Community Interest Obligations

A number of community interest obligations restrain the sovereign rights of coastal: for instance, freedom of navigation; the obligation to preserve the marine environment; and the obligation to share in the proceeds of the exploitation of the resources in the continental shelf beyond 200 nautical miles, when this exists.

3.2.1 Freedom of Navigation

Freedom of navigation, a freedom of the high seas (LOSC Article 87[a]), applies in the EEZ (LOSC Article 58[1]). While the coastal state has the exclusive right to construct, authorize and regulate the construction or operation and use of artificial islands, installations and structures and safety zones around them, these cannot be established where interference may be caused to the use of recognized sea-lanes essential to international navigation (LOSC Art 60[7]; Article 5, Geneva Convention on the Continental Shelf).[64] Corollary of this obligation are also the obligations to give due notice must of the construction of such infrastructure along with the extent of their safety zones, as well as their removal.

As explained in section 2.4 above, the coastal state also enjoys exclusive (prescriptive and enforcement) jurisdiction over such infrastructure in the exclusive economic zone and on the continental shelf. But, the question about the outer limits (and thus by implication scope and content) of its enforcement jurisdiction becomes pertinent, owing to the potential effect on freedom of navigation. This question lies at the heart of the *Arctic Sunrise Arbitration*. In light of the facts of the case, the arguments were couched in terms of environmental protest, which the Arbitral Tribunal recognized as an aspect of freedom of navigation.[65]

Arctic Sunrise, a Greenpeace vessel carrying the flag of the Netherlands, launched five inflatable boats, which entered the safety zone of and attempted to board

Gazprom's platform in Russia's exclusive economic zone engaging in environmental protest. The next day Russia boarded and seized the vessel within its exclusive economic zone, but outside the 500 meters safety zone surrounding the platform. The Netherlands protested against Russia's conduct and initiated arbitration for seeking the release of the vessel and crew, a declaratory award of the Tribunal that Russia had breached its obligations under LOSC and customary international law, a formal apology, assurances and guarantees of non-repetition and compensation for losses owing to Russia's measures.[66] They also succeeded in convincing ITLOS to issue provisional measures. Russia did not participate in any of these proceedings.[67]

The following analysis focuses on the Award on the Merits and only on the (four) aspects of the arbitration that are relevant to the discussion here concerning the content of sovereign rights and the exclusive jurisdiction over infrastructure that is necessary for the exercise of such sovereign rights.

First, the Netherlands argued that it had standing to invoke Russia's responsibility for a breach of freedom of navigation because freedom of navigation corresponds to an *erga omnes partes* obligation. The Tribunal considered it unnecessary to establish that the Netherlands has standing in this respect, given that the Netherlands was the flag state and had standing on this ground as an injured state (specially affected by this violation).[68] However, the Netherlands' argument adds to state practice in support of the community nature of freedom of navigation. In 1973, Australia had argued in the contentious proceedings it brought before the ICJ against France that the latter's nuclear tests in the Pacific Ocean obstructed navigation on the high seas thus violating freedom of navigation, and that Australia had standing to invoke France's responsibility owing to the *erga omnes* nature of the obligation violated.[69]

Second, according to the Tribunal the coastal state exercises exclusive (prescriptive and enforcement) jurisdiction within the 500 meters safety zone, provided that such measures are aimed at ensuring the safety of navigation and of the structures.[70] However, the commission of an alleged unauthorized entry into a safety zone or of terrorist offenses within the safety zone do not provide a basis under international law for boarding a vessel in the exclusive economic zone (outside the safety zone) without the consent of the flag state.[71] This is permitted only on the basis of the right of hot pursuit, the conditions of which were not met in this case.

Third, the Tribunal examined whether the coastal state (Russia) had a right to enforce its laws regarding non-living resources in the exclusive economic zone in order to justify the boarding of *Artic Sunrise*.[72] It recognized that there is no provision in LOSC explicitly permitting the coastal state to board vessels in its the exclusive economic zone in relation to its sovereign rights regarding non-living resources, as is the case for living resources (LOSC Article 73).[73] But, it found that the coastal state has "enforcement rights" regarding non-living resources in the exclusive economic zone. However, it did not find it necessary to examine the full extent of such enforcement rights, because Russia's conduct was unconnected to sovereign rights in this case.[74] Therefore, one issue that remains open, and it is likely to lead to future disputes, since the Tribunal did not address it, is whether under LOSC enforcement of the laws of the coastal state concerning non-living resources in the exclusive

economic zone can be exercised only through hot pursuit (which needs to meet a set of stringent requirements under LOSC Article 111) or independently of it. Given that LOSC prescribes for enforcement in the exclusive economic zone and the continental shelf of laws applicable in the exclusive economic zone and the continental shelf on the basis of hot pursuit (LOSC Article 111[2]), the *a contrario* argument could be made that such enforcement can only take place on the basis of hot pursuit. This argument may be supported by the Tribunal's reasoning (in relation to the other grounds discussed above) that connected enforcement in the exclusive economic zone to hot pursuit, but the Tribunal's silence in relation to this issue may nonetheless render such argument weak.

Fourth, the Tribunal concluded that the protection of the sovereign rights over non-living resources (in the exclusive economic zone and the continental shelf) is a legitimate aim that allows the coastal state to take appropriate measures to prevent interference in the exclusive economic zone with such sovereign rights.[75] This finding is important concerning the scope and content of sovereign rights over non-living resources. It distils some understanding about the manner in which the balance of rights and duties of the coastal state and of other states in the exclusive economic zone is to take place, as reflected in the "due regard" obligations established in LOSC for both the coastal state (Article 56[2]) and other states (Article 58[3]) in their activities in the exclusive economic zone, and that of rights and duties of the coastal state and of other states concerning activities in the continental shelf by prohibiting the coastal state from *unjustifiably* interfering with navigation (Article 78[2]).

According to the Tribunal, appropriate measures to prevent interference with such sovereign rights in the exclusive economic zone and *mutatis mutandis* the continental shelf must be reasonable, necessary and proportionate in order to be lawful.[76] Although it is not made precise in the Award which basis within LOSC the Tribunal used to reach such conclusion, its finding is based on the interpretation of LOSC Articles 56(2), 77 and 78. Due regard must be given to the rights of other states, including the right to protest,[77] and the exercise of the rights of the coastal state over the continental shelf must not infringe or result in any unjustifiable interference with the rights of other States. This led the Tribunal to conclude that even if the boarding and seizing of *Arctic Sunrise* were conducted in the exercise of Russia's sovereign rights over the continental shelf, they would not have complied with LOSC, because they would have infringed and unjustifiably interfered with freedom of navigation and other rights and freedoms of the Netherlands in the exclusive economic zone of Russia.[78] Thus, sovereign rights may be a ground that allows the coastal state to take preventive enforcement measures in the exclusive economic zone that interfere with freedom of navigation, but such measures have to comply with the requirements of reasonableness, necessity and proportionality.

3.2.2 Preservation and Protection of the Marine Environment

Another community interest with which sovereign rights of the coastal state need to be balanced is the protection of the marine environment. Under LOSC,

states are obliged to protect and preserve the marine environment (Article 192). Their sovereign rights to exploit their natural resources are expressly subject to this obligation (Article 193). Additionally, in relation to pollution from seabed activities within national jurisdiction, parties to LOSC are obliged to adopt domestic legislation and enforce such legislation to prevent, reduce and control pollution of the marine environment arising from such activities (Articles 208 and 214).

These obligations are obligations of conduct, and more specifically of due diligence. They are breached not when harm to the marine environment or pollution occurs, but when states do not act diligently. They also require states to draw up a legal framework within their domestic legal order with a view to ensuring that the marine environment is preserved and protected and pollution is prevented, reduced and controlled, and to enforce this framework on private operators, including the investors that operate in the exclusive economic zone and on the continental shelf.[79] Furthermore, LOSC provides for procedural obligations (of monitoring, undertaking environmental impact assessments and reporting) concerning risks or effects of pollution of the marine environment or significant harmful changes to the marine environment (LOSC Articles 204–206). Importantly, the obligations in LOSC Part XII do not introduce restrictions on the basis of a transboundary effect on the environment or on the basis of a jurisdiction criterion: within or beyond national jurisdiction (as the general obligation under customary international law concerning the prevention of significant transboundary harm does).[80]

Obligations within LOSC for the protection of the marine environment regulate and place restrictions on the manner in which states exercise their sovereign rights over non-living resources, and thus indirectly have an impact on the choice of resources to be exploited and how they will be exploited. Permanent sovereignty over natural resources is explicitly subject to the obligation to preserve and protect the marine environment. As a separate matter, customary international law obligation to prevent significant transboundary harm and the procedural obligations that it entails (to notify, to undertake an environmental impact assessment and to monitor) may restrict the choice of resources to be exploited and the manner in which they will be exploited.[81]

3.2.3 Contributions Relating to the Exploitation of the Continental Shelf Beyond 200 Nautical Miles

Sovereign rights of coastal states parties to LOSC concerning non-living resources in the extended continental shelf are limited by the obligation. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles, when this exists (LOSC Article 82[1]). The payments and contributions are to be made every year with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution will be 1 percent of the value or volume of production at the site. The rate will increase by 1 percent for each subsequent year until the twelfth year and shall remain at 7 percent thereafter (LOSC Article 82[2]). This arrangement practically encourages coastal

states to exploit as soon as possible and within five years a deposit in their extended continental shelf in order to avoid making payments after the fifth year, implicitly rejecting any sustainable rate of depletion in relation to such resources.

Developing states that are net importers of mineral resources produced from the continental shelf are exempt from the revenue-sharing requirements (LOSC Article 82[3]). The payments or contributions are to be made through the International Seabed Authority, which shall distribute them to LOSC parties, "taking into account the interests and needs of developing States, particularly the least developed and land-locked among them" (LOSC Article 82[4]).

The obligation to make contributions from the exploitation of the extended continental shelf builds on the regime of the Area and its resources, which together constitute common heritage of mankind (LOSC Article 136), and strikes a balance between the sovereign rights of the coastal state and the *erga omnes partes* regime of the Area. The regime of the Area and its resources reflects the community interest of LOSC parties: there is no individual interest of LOSC parties primarily protected by such obligations and institutional equipment. What is created is a matrix of rules that protects a community interest of treaty parties, especially given that the Area and its resources fall beyond any party's national jurisdiction, and an international organisation, which oversees the exploitation of the Area and its resources, and implements the LOSC regime. By necessary implication the obligation to make payments or contributions in kind relating to the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles, is owed indivisibly between LOSC parties and reflects a community interest. It is an *erga omnes partes* obligation.[82]

This community interest obligation restricts the permanent sovereignty over natural resources, which applies in relation to resources over which coastal states exercise sovereign rights. Coastal states (LOSC parties) are not unlimited in disposing of the profits from the exploitation of resources in their extended continental shelf. Rather they are obliged to share some of these proceeds with other LOSC parties through the institutional arrangements provided for in LOSC (the Authority).

4. Conclusion

Non-living resource activities within national jurisdiction have been a driver for the making of the law of the sea. It can be expected that their importance for coastal states, including the increasing importance placed on renewable sources of energy, especially given the economic and energy security (of supply and of demand) interests of states, will continue to shape the future clarification and development of the law, including through dispute settlement. International case law offers evidence of such clarifications as to the content of sovereign rights (e.g., in relation to acquisition and control of confidential information about non-living resources in the continental shelf, and the right, but not obligation, to take conservation measures vis-à-vis such resources) and their scope as it is determined by reference to the relationship between sovereign rights over non-living resources and the interests of other states or community interests.

In the LOSC, the techniques for resolving these tensions vary. At times, the Convention subjects the right to exploit non-living resources to other obligations (e.g., the obligation to protect and preserve the marine environment; the obligation to make payments or contributions in respect of the exploitation of non-living resources in the continental shelf beyond 200 nautical miles; and the obligation not to unjustifiably interfere with freedom of navigation in the exercise of sovereign rights relating to the continental shelf). In other cases, it introduces obligations on states to take into account particular interests, to pay due regard to the rights of other states (e.g., navigation). How and when such balances are struck depend on a case-by-case examination, practically allowing for future determinations either through third party resolution or by some form of agreement between parties to a dispute. As a general observation, the rules concerning sovereign rights over non-living resources in the continental shelf and the exclusive economic zone offer evidence that permanent sovereignty over natural resources is not a rule *jus cogens*: they can be derogated from by other rules of international law.

Notes

1. United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 3.
2. Article 1, Convention on the Territorial Sea and the Contiguous Zone (29 April 1958), 516 UNTS 205 ("CTS"); LOSC Article 2.
3. R. Higgins, *Problems and Process, International Law and How We Use It* (New York: Oxford University Press, 1994), p. 131.
4. *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, paras. 211, 215.
5. *Ibid.*, para. 221.
6. Non-living resources straddling maritime boundaries or in areas that are un-delimited are not discussed here.
7. LOSC Article 77(3); *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Reports 1969, p. 3 at para. 19.
8. LOSC Article 77(2); Article 2, Convention on the Continental Shelf.
9. There is no indication in LOSC as to the form that the proclamation of the exclusive economic zone may take.
10. Under customary international law, "[a]lthough the continental shelf and the exclusive economic zone are different and distinct, the rights, which the exclusive economic zone entails over the seabed of the zone, are defined by reference to the continental shelf regime." *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13 at 33, para. 34.
11. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Reports 2005, p. 168, para. 244.
12. Higgins, *supra* note 3, at 138.
13. *Ibid.*
14. C. Redgwell, "Property Law Sources and Analogies in International Law," in A. McHarg et al. (eds.), *Property and the Law in Energy and Natural Resources* (New York: Oxford University Press, 2010), 100–112 at 109, http://dx.doi.org/10.1093/acprof:oso/9780199579853.003.0005.
15. See also analysis in section 3.1 below.
16. Redgwell, *supra* note 14, at 110.
17. In relation to transboundary infrastructure of this kind, states may conclude treaties.
18. Request of Provisional Measures by Côte d'Ivoire, 27 February 2015, p. 17, para. 30.
19. *Ibid.*, p. 18, para. 33–34.
20. The other provisional measures requested by Côte d'Ivoire were to require Ghana to

suspend all ongoing oil exploration and exploitation operations in the disputed area; to refrain from granting any new permit for oil exploration and exploitation in the disputed area; to take all necessary steps to preserve the continental shelf, its superjacent waters and its subsoil; and to desist and refrain from any unilateral action entailing a risk of prejudice to the rights of Côte d'Ivoire and any unilateral action that might lead to aggravating the dispute. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire*), Order of Provisional Measures, 25 April 2015, para. 25.

21. *Ibid.*, para. 47; *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, para. 221.

22. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire*), Order of Provisional Measures, 25 April 2015, para. 26.

23. *Ibid.*, para. 55.

24. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua*); *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013, p. 354, at p. 360, para. 27.

25. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire*), Order of Provisional Measures, 25 April 2015, para. 40.

26. *Ibid.*, para. 41; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010, p. 58, at p. 69, para. 72.

27. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire*), Order of Provisional Measures, 25 April 2015, paras. 61–62 and 94.

28. *Ibid.*, para. 95.

29. Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

30. PCIJ: *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)*, Order of 19 August 1929, PCIJ (1929), Series A, No. 22, p. 5 at 13; *Acquisition of Polish Nationality*, Advisory Opinion of 15 September 1923, PCIJ (1923) Ser B, No. 7, p. 6 at 16–17. ICJ: *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995, p. 6, para. 35; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav, Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, ICJ Reports 2011, p. 644, para. 109; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353, para. 134; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, p. 6, para. 47. H. Lauterpacht, *The Development of International Law by the International Court* (Stevens, 1958), pp. 221–266; G. Fitzmaurice, "Vae Viciis or Woe to the Negotiators! Your Treaty or our 'Interpretation' of It?," *AJIL* 65 (1971), 373, http://dx.doi.org/10.2307/2199244.

31. Emphasis added. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire*), Order of Provisional Measures, 25 April 2015, para. 108(b).

32. EU law is an exception in that it requires EU member states to include in their energy mix energy coming from renewable sources. *Directive 2009/28/EC on the Promotion of the Use of Energy from Renewable Sources* establishes a common framework for the promotion of energy from renewable sources and sets mandatory national targets for each EU member state for the overall share of energy from renewable sources in gross final consumption of energy in 2020 (Article 3; Annex I). *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC*, OJ L 140/16, 5.6.2009.

33. Albeit LOSC Article 56(1)(a) provides that coastal states have sovereign rights in relation *inter alia* to the conservation of both living and non-living resources, but does not specifically require coastal states to take conservation measures in that provision, but further elaborates such obligations in relation to only living resources in LOSC Articles 61 and 62.

34. See also analysis in D.M. Ong, "Towards an International Law for the Conservation of

Offshore Hydrocarbon Resources within the Continental Shelf?," in D. Freestone, R. Barnes and D.M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (New York: Oxford University Press, 2006), pp. 93–119 at 96–107, http://dx.doi.org/10.1093/acprof:oso/9780199299614.003.0006.

35. Supporting that sustainable development is a rule of international law: P. Sands, "International Law in the Field of Sustainable Development," *BYIL* 65 (1994), pp. 303–381; P. Sands and J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law* (New York: Cambridge University Press, 2012), pp. 206–217. Supporting that sustainable development is not a rule of international law: A.V. Lowe, "Sustainable Development and Unsustainable Arguments," in A.E. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (New York: Oxford University Press, 1999), pp. 19–37, http://dx.doi.org/10.1093/acprof:oso/9780198298076.003.0002; P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* 3d ed. (New York: Oxford University Press, 2009), pp. 199–202.

36. Report of the World Commission on Environment and Development: Our Common Future ("Brundtland Commission Report"), Chapter 1, section 3, para. 27 and Chapter 2, para. 1.

37. Emphasis added. Brundtland Commission Report, Chapter 2, para. 12.

38. E.g., Rio Declaration on Environment and Development, 1992.

39. *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, para. 140.

40. *Ibid.*, para. 140.

41. A.V. Lowe, "Sustainable Development and Unsustainable Arguments," in A.E. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (New York: Oxford University Press, 1999) pp. 19–37, http://dx.doi.org/10.1093/acprof:oso/9780198298076.003.0002.

42. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14 at 83, para. 204.

43. *Indus Waters Kishenganga Arbitration (Pakistanv. India)*, Partial Award, 18 February 2013, para. 449–450.

44. *Ibid.*, paras. 449–450.

45. Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, circulated on 26 March 2014.

46. Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, circulated on 7 August 2014.

47. Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, circulated on 26 March 2014, para. 7.262.

48. *Ibid.*, paras. 7.263–7.264.

49. The written pleadings under the DSU proceedings are not made publicly available.

50. See analysis in section 3.2.2 below concerning the obligation to protect and preserve the marine environment.

51. *A contrario* interpretation of LOSC Article 58(1), which refers to some but not all freedoms of the high seas listed in LOSC Article 87.

52. The Geneva Convention on the Continental Shelf did not provide the coastal state with an exclusive right to construct and authorize the construction, operation and use of installations and devices. Those not directly connected with the continental shelf resources could be constructed by any state, subject to the consent of the coastal state concerning any research relating to the continental shelf (GCCS Article 5[8]).

53. Coastal states may prohibit the construction, operation and use of artificial islands, installations and structures in the exclusive economic zone that are connected to marine scientific research (LOSC Article 246[5][c]).

54. For jurisdiction over artificial islands and installations and structures in the EEZ: D.J. Attard, *The Exclusive Economic Zone in International Law* (New York: Oxford University Press, 1987), pp. 87–93. For reasons behind the difference of jurisdiction over artificial islands and installations and structures: B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht, NL: Martinus Nijhoff Publishers, 1989), pp. 112–113.

55. In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (LOSC Article 60[2]). "[T]he Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned [in Article 60(2)]." *M/V "SAIGA"*

(No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, para. 127.

56. R-J Dupuy, Chapter 5—"The Sea Under National Jurisdiction," in R-J Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea* (Dordrecht, NL: Martinus Nijhoff Publishers, 1991), pp. 247–313 at 291.

57. Contrast Article 60 paragraphs 1 and 2.

58. B. Simma, "Bilateralism and Community Interest in the Law of State Responsibility," in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, NL: Nijhoff, 1989), pp. 821–844 at 822–823.

59. *Text of the Draft Articles on Responsibility of States for (in Footnotes) Internationally Wrongful Acts with Commentaries Thereto*, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001, Vol. II, pp. 31–143 at 126, para. 7.

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65. *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Award on the Merits, 14 August 2015, para. 227.

66. *Ibid.*, para. 4.

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68. *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Award on the Merits, 14 August 2015, para. 186.

69. Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, 23 November 1973, *Nuclear Tests (Australia v. France)*, ICJ Reports 1974, para. 462.

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78. *Ibid.*, para. 321.

79. On the content of due diligence obligations and the requirement on states vis-à-vis private operators: *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14, para. 197. See also analysis in D. Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (New York: Oxford University Press, 2015), pp. 60–62.

80. P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (New York: Oxford University Press, 2009), pp. 137, 167. Contra: P. Sands and J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law* (New York: Cambridge University Press, 2012), pp. 201.

81. In this respect, Boyle and Freestone persuasively argue that although international law does not require states to develop sustainably, it does require them to make development decision that are "the outcome of a process which promotes sustainable development." A. Boyle and D. Freestone, "Introduction," in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (New York: Oxford University Press, 1999), pp. 1–18 at 17, http://dx.doi.org/10.1093/acprof:oso/9780198298076.003.0001. For customary nature of procedural obligations: *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14, paras. 204–205; *Corfu Channel Case*, Judgment of 9 April 1949, ICJ Reports 1949, p. 4 at 22. LOSC also contains relevant procedural obligations: Articles 204–206.

82. The obligation is not *erga omnes*, because there is no evidence in LOSC or the circumstances of its conclusion that these provisions were intended to create obligations or rights of third states vis-à-vis LOSC; nor is there any evidence that any third state has accepted such obligations or assented to such rights, even assuming that such intention was established. The customary rule set forth in VCLT Article 36 requires the intention of parties to create a right for third states and the (tacit) assent of the beneficiary states. The rule set forth in VCLT Article 35 concerning obligations for third states requires the intention of parties to create obligations for third states and the acceptance in writing of the third state(s) in question. For importance of circumstances of the treaty's conclusion for assessing the intention to create rights or obligations for third states: *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)*, Order of 19 August 1929, PCIJ (1929), Series A, No. 22, p. 5 at 20.

Biography

Danae Azaria, Ph.D, UCL, LLM, UCL, is a lecturer in Law at University College London ("UCL"), Faculty of Laws. Her monograph, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford University Press, 2015), has been included in the series Oxford Monographs in International Law. She is a qualified attorney at the Athens Bar, a member of the Legal Advisory Task Force of the Energy Charter Secretariat, and the UK representative of the management committee of the EU–funded network of experts on the legal aspects of Maritime Safety and Security.

Between Villa Schröder (ITLOS) and the Peace Palace (ICJ): Diverging Approaches to Continental Shelf Delimitation Beyond 200 Nautical Miles

Ioannis Konstantinidis[1]

Structured Abstract

Article Type: Research Paper

Purpose—Maritime boundary disputes are among the most common types of disputes in international law. Since their establishment, international courts and tribunals are faced with cases relating to the delimitation of maritime zones. The delimitation of the continental shelf beyond 200 nautical miles is a delicate process because of the involvement of the Commission on the Limits of the Continental Shelf, which examines submissions and makes recommendations on the outer limits of the continental shelf beyond 200 nautical miles. This article highlights certain aspects of the obscure relationship between the Commission on the Limits of the Continental Shelf and international courts and tribunals.

Design, Methodology, Approach—Focusing on the recent jurisprudence of the International Tribunal for the Law of the Sea and the International Court of Justice, this study attempts to deconstruct and analyze the judges' reasoning, in a situation where an international court or tribunal is asked to delimit the continental shelf beyond 200 nautical miles, prior to the recommendations of the Commission on the Limits of the Continental Shelf.

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Findings—Based on recent jurisprudence, it could be argued that the approach adopted by the International Tribunal for the Law of the Sea constitutes a turning point in continental shelf delimitation beyond 200 nautical miles. It plays a major role in filling certain institutional and inter-institutional weaknesses of the Convention, in cases where States ask international courts or tribunals to resolve a boundary dispute involving the delimitation of the continental shelf beyond 200 nautical miles, prior to the Commission's recommendations.

Practical Implications—Useful for both academics and practitioners, this study provides a comparative analysis of the approaches adopted by international courts and tribunals concerning the relationship between the Commission of the Limits of the Continental Shelf and international judicial organs.

Originality, Value—This article highlights the importance of the declarations, separate and dissenting opinions of certain judges, who raise concerns and propose solutions to certain institutional *lacunae* of the United Nations Convention on the Law of the Sea.

Key words: admissibility, article 76, continental shelf beyond 200 nautical miles, delimitation, international courts and tribunals, jurisdiction

Introductory Remarks

The outer limits of national jurisdiction are of great importance in the law of the sea, as they constitute the limits of the international seabed area (hereinafter referred to as the "Area").[2] Within these two areas, different regimes apply. The coastal State has sovereign rights over its continental shelf, while the legal regime applicable to the Area is prescribed by Part XI of the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention" or "UNCLOS"),[3] the relevant annexes and the 1994 Agreement relating to the Implementation of Part XI of the Convention (hereinafter referred to as the "1994 Agreement").[4] The Area and its resources are the common heritage of mankind[5] and the International Seabed Authority (hereinafter referred to as the "Authority") is the international organization charged with organizing and controlling the activities in the Area.

The exercise by the Authority and the coastal State of their respective rights over these distinct areas necessitates the delimitation between the Area and areas of national jurisdiction. According to Article 76 of the Convention, the continental shelf consists of the seabed and subsoil that extends to the outer edge of the continental margin, or to a distance of 200 nautical miles if the outer edge of the continental margin does not extend up to that distance. When the continental margin extends beyond 200 nautical miles, the Commission on the Limits of the Continental Shelf (the "Commission" or the CLCS) intervenes in the establishment of the outer limits by the coastal States and endorses the validity of the claims. Pursuant to Article 76 of the Convention, the coastal State shall make a submission to the Commission, which in turn makes recommendations. Final and binding outer limits of the

continental shelf are established by the coastal State on the basis of the Commission's recommendations. Those limits constitute at the same time the limits of the Area.

However, the above scenario does not always match the reality of practice. Once it issues its recommendations, the Commission plays no role in the establishment of the outer limits. The Commission is unable to control whether the established limits follow its recommendations. More importantly, the procedure of the establishment of the outer limits of the continental shelf is relatively slow, mainly for two reasons. First, the Commission has received a significant number of submissions over the past few years, resulting in a dramatic increase of its workload.[6] Not being a permanent organ, the Commission holds meetings for a specific number of weeks per year. It seems that it will need several years in order to examine all submissions that it has received to date. Second, pursuant to paragraph 5(a) of Annex I to the Rules of Procedure of the Commission, in the event that there exists a land or maritime dispute, the Commission shall not consider a submission made by any of the States concerned in the dispute.[7] However, the Commission could proceed with the examination of the submission, subject to the prior consent given by all States that are parties to such a dispute or to the resolution of the dispute. In fact, several States have opposed the examination of submissions by the Commission due to existing disputes. In this case, the procedure before the Commission is simply blocked and as a consequence the coastal State cannot establish its outer limits.

In view of this procedural impasse, could parties to a dispute request an international court or tribunal to delimit their continental shelf beyond 200 nautical miles? In other words, do international courts and tribunals have jurisdiction to delimit the continental shelf beyond 200 nautical miles prior to the Commission's recommendations?

It is the purpose of the present paper to address this question by focusing on the recent jurisprudence of the International Tribunal for the Law of the Sea (hereinafter referred to as the "Tribunal" or ITLOS) and the International Court of Justice (hereinafter referred to as the "Court" or ICJ).[8] It provides an in-depth analysis of the diverging approaches adopted by ITLOS in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*,[9] and by the ICJ in the *Territorial and Maritime Dispute*,[10] opposing Nicaragua and Colombia.[11] Finally, it highlights the importance of the reasoning developed by ITLOS and proposes solutions that could be taken into account by international courts and tribunals in similar cases.

Divergence Between ITLOS and the ICJ

The Landmark Decision of the Tribunal to Delimit the Continental Shelf Beyond 200 Nautical Miles

Prior to delimiting the continental shelf beyond 200 nautical miles between Bangladesh and Myanmar, the Tribunal had to determine whether it had jurisdiction

to proceed. Recognizing that the parties to the dispute had accepted its jurisdiction by way of declaration in accordance with Article 287 of the Convention,[12] it held that the subject-matter of the dispute fell within its jurisdiction *ratione materiae* and that it was in a position to delimit the territorial sea, the exclusive economic zone and the continental shelf up to 200 nautical miles between the parties.[13] Neither Bangladesh nor Myanmar contested its jurisdiction on these matters.

The question of whether it had jurisdiction to delimit the continental shelf beyond 200 nautical miles was much more challenging. Myanmar objected by specifying that even if the Tribunal had jurisdiction, it should not exercise it. According to Myanmar, a decision on the continental shelf beyond 200 nautical miles would prejudice the rights of third parties, including rights related to the Area.[14] In addition, Myanmar contended that the establishment of the outer limits of the continental shelf by the coastal State is a prerequisite for the Tribunal to rule on the delimitation of the continental shelf beyond 200 nautical miles. Furthermore, it stressed that the role of the Commission is essential in this process, given that the coastal State shall establish the outer limits of its continental shelf on the basis of the Commission's recommendations, in accordance with Article 76(8) of the Convention. Myanmar stressed that the first step in the delimitation process is the formulation and adoption of the recommendations by the Commission:

> To reverse the process, as Bangladesh urges the Tribunal to do, to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance.[15]

Myanmar thus proposed that the Tribunal suspend the delimitation process until the Commission makes its recommendations.[16]

As far as Bangladesh is concerned, it was of the view that the Tribunal was expressly authorized by the Convention to decide on the delimitation of the continental shelf beyond 200 nautical miles. Bangladesh observed that Article 83 of the Convention deals with the delimitation of the entire continental shelf, as it does not make any distinction between the continental shelf within and beyond 200 nautical miles.[17]

ITLOS pointed out that that there is a single continental shelf and that there is no distinction between the continental shelf within and beyond 200 nautical miles. In reply to Myanmar's argument regarding the Area, the Tribunal observed that:

> [A]s is evident from the Parties' submissions to the Commission, the continental shelf beyond 200 nm that is the subject of delimitation in the present case is situated far from the Area. Accordingly, the Tribunal, by drawing a line of delimitation, will not prejudice the rights of the international community.[18]

Having rejected Myanmar's first argument, the Tribunal confirmed that there is a series of steps that must be followed in the delimitation process. It noted that a disagreement on the base points to be used in the delimitation does not constitute an obstacle to the delimitation, and that this applies similarly to the non-established outer limits of the continental shelf.[19] Moreover, the Tribunal assessed the roles of

the Commission and the Tribunal with regard to the continental shelf beyond 200 nautical miles. It admitted that, in accordance with Article 76(8) and Annex II of the Convention, the right of the coastal State to establish final and binding limits is of pivotal importance, and it recalled the essential role of the Commission in this process.[20]

However, it stated that there is a clear distinction between the delimitation of the continental shelf under Article 83 of the Convention and the delineation of its outer limits according to Article 76 and Annex II of the Convention. In the Tribunal's view, the Commission plays an important role in the delineation of the outer limits and this role is without prejudice to the delimitation of the continental shelf through recourse to the dispute settlement procedures of Part XV of the Convention.[21]

It also indicated that the judicial delimitation of the continental shelf is without prejudice to the exercise by the Commission of its functions in the process of the delineation of the outer limits. To support its argument, ITLOS referred to cases where the Commission had issued its recommendations following the delimitation of the continental shelf beyond 200 nautical miles between States by way of agreement.[22]

Similarly, the Tribunal examined the cases where the ICJ and arbitral tribunals determined that they had no jurisdiction to delimit the continental shelf beyond 200 nautical miles, in particular the case between Canada and France[23] and the case between Nicaragua and Honduras.[24] It concluded that it was not relevant to refer to those cases because "the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."[25]

Having dealt with the general questions relating to its jurisdiction to decide on the delimitation of the continental shelf, the Tribunal had to address the specific circumstances of the case in order to determine whether it would exercise its jurisdiction. It pointed out that, according to the argument raised by Bangladesh, in the case of a dispute resulting from the delimitation of the continental shelf between States with adjacent or opposite coasts, the Commission cannot examine the submission without the prior agreement of the parties concerned. In that particular case, in its *note verbale* to the Commission dated 23 July 2009, Bangladesh requested the Commission not to consider the submission of Myanmar.[26] Myanmar did the same on 31 March 2011.[27] As a result, the Commission decided to suspend the examination of the submissions made by both States.[28] Given the positions of the parties to the dispute, the Tribunal informed the parties that if it decided not to delimit the continental shelf beyond 200 nautical miles, the delimitation of the continental shelf would remain a pending issue:

> The consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved. […]A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only

> fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention.[29]

It concluded that any inaction on behalf of the Commission and the Tribunal would make it impossible for State Parties to the Convention to fully enjoy their rights over the continental shelf.

Having concluded that it had jurisdiction, ITLOS had to determine if there were entitlements to continental shelf and whether those entitlements overlapped. Myanmar initially contested the Tribunal's jurisdiction to decide on the existence of the entitlements of the parties, arguing that this process fell under the functions of the Commission.[30] In its reply, the Tribunal emphasized that there is a distinction between the entitlement to continental shelf beyond 200 nautical miles and the outer limits of the continental shelf.[31] It concluded that the basis of entitlement to a continental shelf depends on State sovereignty over its land territory[32] and that this does not require the coastal State to establish the outer limits of its continental shelf. The Tribunal seems to propose that the absence of outer limits does not prevent it from deciding on issues relating to entitlement and delimitation:

> Therefore, the fact that the outer limits of the continental shelf beyond 200 nm have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned.[33]

The main question was whether there were overlapping entitlements to continental shelf beyond 200 nautical miles. In the absence of overlapping entitlements, there was no delimitation issue. Bangladesh was of the view that the natural prolongation was the most important criterion for the entitlement to continental shelf beyond 200 nautical miles. It emphasized that Myanmar lacked any entitlement because of a fundamental discontinuity between the landmass of Myanmar and the seabed beyond 200 nautical miles.[34] ITLOS rejected Bangladesh's approach:

> Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose.[35]

The Tribunal recalled that, in accordance with Article 76 of the Convention, the Commission is charged with analyzing the scientific and technical data submitted to it by the coastal State, but it is under the obligation to interpret and apply Article 76. In addition, it contended that, in that particular case, the parties did not contest the scientific and technical evidence submitted to the Commission and that the disagreement between the Parties concerned mostly the interpretation of Article 76 and the continental margin. The Tribunal underlined that the data submitted to the Commission by the parties relating to their entitlement to a continental shelf beyond 200 nautical miles were based to a great extent on the thickness of sedimentary rocks pursuant to the formula contained in Article 76, paragraph 4(a)(i), of the Convention. As a result, it was convinced that that there exists a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200

nautical miles. In this respect, the Tribunal observed that its conclusion in relation to the entitlement to a continental shelf was based on the particular geological characteristics of the seabed of the Bay of Bengal. This particularity had been made available during the negotiations of Third United Nations Conference on the Law of the Sea. With regard to the overlapping entitlements, the Tribunal was of the view that the parties had provided the Commission with the elements proving that their entitlements overlap in the disputed area.[36]

The Tribunal's final conclusion was that there was a continental shelf to delimit. This conclusion was mainly based on the uncontested scientific and technical evidence presented by the parties.[37] Both States agreed on the existence of a continental shelf beyond 200 nautical miles in the Bay of Bengal and in order to convince the Tribunal, they relied on academic and scientific publications.[38]

The Tribunal seized the opportunity to explain the roles conferred to the Commission and to international courts and tribunals. It rightly pointed out that Article 76 of the Convention contains both scientific and legal elements: the Commission, being a scientific and technical organ, is charged with issuing recommendations on the scientific and technical aspects of the application of Article 76, while the Tribunal is competent in matters concerning the interpretation and the application of the legal aspects of the same article. ITLOS decided to proceed with the delimitation of the continental shelf beyond 200 nautical miles because the scientific evidence in that particular case was not contested.

Although its jurisdiction to delimit the continental shelf beyond 200 nautical miles seems to be incontestable, the admissibility of such a request remains ambiguous. For this reason, the Tribunal seems to suggest that the admissibility of similar requests be assessed on a case by case basis: "The Tribunal observes that the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."[39]

Tales from the Peace Palace: A Conservative Approach?

To date, the ICJ has decided on two cases involving the delimitation of the continental shelf beyond 200 nautical miles. In the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*,[40] the Court had the opportunity to put forward an interesting reasoning that differs from the one developed by ITLOS. Having indicated that it would proceed with the delimitation of the maritime boundary between the disputing parties without specifying a terminal point of the maritime boundary in order not to prejudice the right of third parties, the ICJ concluded that:

> It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.[41]

The reasoning of the ICJ does not follow the approach adopted by ITLOS. According to the ICJ, the jurisdiction to delimit the continental shelf beyond 200 nautical miles is subject to the final recommendations made by the Commission. The Court seems to suggest that there is an overlap between the functions of the Commission and those of an international court or tribunal with regard to the continental shelf beyond 200 nautical miles.

More recently, on 19 November 2012, the ICJ rendered its judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia.[42] In its application and memorial, Nicaragua requested that the Court determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia following a median line between their mainland coasts. In its reply—more specifically at point I. 3 of its final conclusions—Nicaragua asked the Court to determine a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both parties.[43]

Although the above request had not been brought before the ICJ throughout the proceedings, the Court decided that it was admissible as it did not modify the subject-matter of the dispute.[44] In fact, Nicaragua's request not only modified the legal basis for the delimitation—the distance criterion was replaced by natural prolongation—but also its primary objective, which was a single maritime boundary. Despite the admissibility of the request, the ICJ decided not to uphold it.

The reasoning behind the ICJ's decision is revealing and helps us understand the position of the Court with regard to the delimitation of the continental shelf beyond 200 nautical miles. Prior to analyzing it in detail, it is worth specifying that during the case, Nicaragua had not made a submission to the Commission. It only provided the Commission with preliminary information. The Commission does not examine preliminary information. Such a submission serves the purpose of preserving the right of a coastal State to make a full submission in the future.[45] Furthermore, the applicable law in that case was customary international law, Colombia not being a State Party to the Convention.

In order to support its request, Nicaragua referred to the Bay of Bengal case before ITLOS. In reply, the ICJ explained that:

> Nicaragua relies on the judgment of 14 March 2012 rendered by ITLOS in the Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS, pp. 1–151 [hereinafter Bay of Bengal case]. ITLOS in this judgment did not, however, determine the outer limits of the continental shelf beyond 200 nautical miles. The Tribunal extended the line of the single maritime boundary beyond the 200-nautical-mile limit until it reached the area where the rights of third States may be affected (Judgment of 14 March 2012, para. 462).[46]

Furthermore, the ICJ pointed out that in the Bay of Bengal case, the parties to the dispute had already made their continental shelf submission to the Commission and that the delimitation effected by the Tribunal in accordance with Article 83 of the Convention did not prevent the Commission from adopting its final recommen-

dations on the outer limits of the continental shelf. In this point, the ICJ followed the jurisprudence of ITLOS by reiterating that the Convention makes a clear distinction between the delimitation of the continental shelf and the delineation of its outer limits.[47]

More significantly, the Court referred to its own jurisprudence, relying on its statements in the case between Nicaragua and Honduras:

> [A]ny claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.[48]

Having recalled the procedure prescribed by Article 76 of the Convention, the ICJ stressed that Nicaragua had only submitted preliminary information to the Commission:

> The Court observes that Nicaragua submitted to the Commission only "Preliminary Information" which, by its own admission, falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which "shall be submitted by the coastal State to the Commission" in accordance with paragraph 8 of Article 76 of UNCLOS.[49]

According to the ICJ, not having followed the procedure prescribed by Article 76, Nicaragua did not prove that its continental margin extended sufficiently to overlap with the 200 nautical mile continental shelf to which Colombia is entitled.[50]

Although the reasoning of the Court follows the analysis put forward in the case between Nicaragua and Honduras, certain points require further clarification. The explanation advanced by the ICJ seems to suffer from a series of uncertainties, which were highlighted by certain Judges in their opinions and declarations appended to the judgment. Judge J. E. Donoghue expressed reservations in her separate opinion.[51] Although she agreed with the decision of the Court to reject the request of Nicaragua, she pointed out that the reference of the ICJ to the 2007 judgment in the case between Nicaragua and Honduras left her perplexed. First of all, she commented on the reference made by the ICJ to the procedure prescribed by Article 76 of the Convention:

> The Court today appears to suggest that it will not entertain a proposed delimitation of continental shelf beyond 200 nautical miles of the coast of a State party to UNCLOS unless the procedures contemplated in UNCLOS Article 76 have been completed, even if the second State involved in the delimitation is not an UNCLOS State party. The stated rationale is that Nicaragua has obligations to other UNCLOS States parties. Nicaragua has obligations to its treaty partners, of course, but the Court offers scant explanation for its conclusion that those obligations preclude delimitation in this case.[52]

In addition, she referred to one of the key problems of the Commission:

> The Commission's expectation that decades will elapse before it will complete the work resulting from the submissions that it has received to date makes it especially unfortunate that the Court has extended its statement from the 2007

> *Nicaragua v. Honduras* Judgment to apply not only to a proposed delimitation between two States parties to UNCLOS, but also to a proposed delimitation as between one UNCLOS State party and one State that is not a party to UNCLOS.[53]

She then explained the respective roles of the Commission and international courts and tribunals with the view to highlighting the current challenges of those *fora*:

> This would leave some UNCLOS States parties in an unsatisfactory situation. If an area is not delimited and therefore remains the subject of a dispute, the Commission will not make recommendations about the outer limits (absent the consent of all involved States). And if the outer limits have not been established on the basis of Commission recommendations, the Court's 2007 statement suggests that it will not proceed with a delimitation. In effect, each institution holds the door open and waits for the other to walk through it.[54]

She concluded that such a situation "constricts the ways in which this Court and the Commission can contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes."[55]

In his declaration, Judge *ad hoc* T. Mensah, former president and Judge at ITLOS, disagreed with the reasoning of the ICJ to reject Nicaragua's request concerning the continental shelf beyond 200 nautical miles:

> In particular, I do not consider that the reference to the Court's statement in the case of *Nicaragua v. Honduras*, to the effect that "any claim to continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder."[56]

In his view, such a statement was incontestable in the case between Nicaragua and Honduras, where both States were parties to the Convention. However, it was not relevant in the case between Nicaragua and Colombia, the latter not being a party to the UNCLOS. Judge *ad hoc* T. Mensah expressed his fears about the reasoning of the ICJ:

> My concern is that the present Judgment might be interpreted to suggest that a court or tribunal should, in every case, automatically rule that it is not able to decide on a dispute relating to the delimitation of the continental shelf beyond 200 nautical miles whenever one of the Parties to the dispute has not followed, or is unable to follow, the procedure set out in Article 76 of UNCLOS. Rather, I think the possibility should be left open that, in principle, a court or tribunal may be able and willing to adjudicate on a dispute relating to delimitation of the continental shelf beyond 200 nautical miles depending on the information presented to it on the geology and geomorphology of the area in which delimitation is sought.[57]

In his declaration, Judge *ad hoc* J.-P. Cot does not seem to share the ICJ's reasons for rejecting the request of Nicaragua, concurring with Judge *ad hoc* T. Mensah:

> In the present case, the Court should have confined itself to examining the evidence set forth during the judicial proceedings in order to reject Nicaragua's claim for a delimitation of its continental shelf beyond 200 nautical miles. On this point, I fully support the views expressed by Judge *ad hoc* Mensah.[58]

The reasoning of the ICJ seems to suffer from its initial position, according to which a State must follow all stages prescribed by the Convention, including the receipt of the Commission's recommendations, prior to bringing a case involving the delimitation of the continental shelf beyond 200 nautical miles before an international court of tribunal.

It is worth noting that this approach was not followed by the arbitral tribunal which adjudicated recently the delimitation between Bangladesh and India in the Bay of Bengal. Constituted pursuant to Annex VII of the Convention, the tribunal rendered its award on 7 July 2014.[59] It is worth noting that three out of five arbitrators were Judges of ITLOS.[60] One of the main issues in that case was the delimitation of the continental shelf beyond 200 nautical miles. Although the parties to the dispute had made their submissions to the Commission, the Commission could not examine them because of the dispute between the parties. The crucial question, again, was whether the arbitral tribunal had jurisdiction to proceed with the delimitation. Having referred to existing jurisprudence, in particular to the case between Bangladesh and Myanmar, the arbitral tribunal concluded that:

> However, recalling the reasoning of the International Tribunal for the Law of the Sea in Bangladesh/Myanmar (Judgment of 14 March 2012, paragraphs 369–394), the Tribunal sees no grounds why it should refrain from exercising its jurisdiction to decide on the lateral delimitation of the continental shelf beyond 200 nm before its outer limits have been established.[61]

The tribunal relied on Article 76 of UNCLOS and the procedure before the Commission in order to emphasize the distinct yet complementary roles of the Commission and a judicial forum.[62] Furthermore, it declared that the inaction or the refusal of the tribunal to delimit the continental shelf would have prevented the parties from enjoying their rights over the continental shelf and would not have been in conformity with the purpose and objective of the Convention:

> In the view of the Tribunal, the consequence of these decisions by the CLCS is such that, if the Tribunal were to decline to delimit the continental shelf beyond 200 nm, the outer limits of the continental shelf of each of the Parties would remain unresolved, unless the Parties were able to reach an agreement. In light of the many previous rounds of unsuccessful negotiations between them, the Tribunal does not see that such an agreement is likely. Accordingly, far from enabling action by the CLCS, inaction by this Tribunal would in practice leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf. The Tribunal does not consider that such an outcome would be consistent with the object and purpose of the Convention.[63]

This tribunal decided clearly not to follow the ICJ's approach. It seems that it sought to clarify the imprecise interpretation given by the ICJ in the case between Nicaragua and Honduras and the case opposing Nicaragua and Colombia. The tribunal's reasoning reinforces and reiterates its support for the approach adopted by ITLOS, endorsing its contribution to the delimitation of the continental shelf beyond 200 nautical miles.

Harmonious Coexistence Between Law and Science

The decision rendered on 14 March 2012 in the case between Bangladesh and Myanmar is important for several reasons. As pointed out by C. Schofield:

> [I]t represents the first venture into maritime boundary delimitation on the part of the ITLOS; it is the first adjudication of a maritime boundary in Asia; and it is the first judicial delimitation of a maritime boundary for parts of the continental shelf located seaward of the 200-nm.[64]

By deciding on its jurisdiction to delimit the continental shelf beyond 200 nautical miles, the Tribunal seized the opportunity to refer to the institutions established by the Convention and to their respective roles. In doing so, it sought to demonstrate that it was the competent international judicial forum to deal with any question relating to the effective implementation of the Convention. The Tribunal's *excès de zèle* is likely due to the fact that the Bay of Bengal case was the first delimitation case brought before it since its establishment. Furthermore, one of the core issues of the dispute concerned the delimitation of the continental shelf beyond 200 nautical miles, which is still one of the most controversial issues in the modern law of the sea. In any event, the Tribunal's approach allowed it to establish itself as a major player in the law of the sea dispute settlement, and to put forward the complementary relationship between law and science in the delimitation process.

The Tribunal's contribution to the delimitation of the continental shelf beyond 200 nautical miles is incontestable and is not limited to the judgment in the Bay of Bengal case. Several Judges of the Tribunal participated in the debate by appending declarations, which expressed separate and dissenting opinions. Although hesitant to recognize the Tribunal's jurisdiction regarding the delimitation of the continental shelf beyond 200 nautical miles, Judge T. M. Ndiaye made a series of concrete and invaluable suggestions that should be taken into account by international courts and tribunals in the future, as they tackle certain shortcomings of the Convention, while contributing to the harmonious coexistence and collaboration of the law of the sea institutions.

The Castalian Spring: Enlightening Observations by the Tribunal's Judges

Raising the question of whether the Tribunal had jurisdiction to delimit the continental shelf beyond 200 nautical miles was a multi-step process. First, the Tribunal had to find out whether Article 83 of the Convention applied to the delimitation of the continental shelf beyond 200 nautical miles. Second, given that the Commission had not made its recommendations to Bangladesh and Myanmar, the Tribunal had to examine the parties' potential entitlements to a continental shelf beyond 200 nautical miles. Finally, having decided on the entitlement and the overlap issues, the Tribunal proceeded with the delimitation.

Out of twenty-two Judges, twenty-one voted in favor of the Tribunal's jurisdiction to delimit the continental shelf beyond 200 nautical miles. Only Judge T. M.

Ndiaye voted against. According to Article 30(3) of the Statute of the Tribunal, Judges have the right of appending declarations, offering separate and dissenting opinions, analyzing several aspects of the judgment and making proposals.

Judge R. Wolfrum welcomed the Tribunal's decision:

> Finally, it is to be emphasized that the Tribunal breaks new ground on the delimitation of the continental shelf beyond 200 nm, an issue that mostly has been avoided by international courts and tribunals thus far. I consider that this part of the Judgment positively contributes to the international case law on maritime delimitation, although some additional reasoning might have enhanced its being fully accepted by other international courts and tribunals.[65]

Judge T. Treves aligned himself with this position, while pointing out that the most significant contribution of the Tribunal's judgment is the recognition of the Tribunal's jurisdiction to delimit the continental shelf beyond 200 nautical miles. The joint declaration of *ad hoc* Judges T. Mensah and B. H. Oxman is also consistent with this view:

> We agree with the Tribunal's conclusion that there is no need in this case for the Tribunal to decline to delimit the continental shelf beyond 200 miles until such time as the Commission on the Limits of the Continental Shelf has made its recommendations and each Party has had the opportunity to consider its reaction.[66]

The *ad hoc* Judges did not miss the opportunity to specify that the Tribunal's judgment is without prejudice to the right of the parties, in accordance with paragraph 8 of Article 76 of the Convention, to fix the final and binding limits of their continental shelf on the basis of the recommendations of the Commission.[67] In his separate opinion, Judge J.-P. Cot noted that the Tribunal's decision to delimit the continental shelf beyond 200 nautical miles promotes the effective cooperation of the Tribunal with the remaining institutions charged with implementing the Convention, and most importantly the Commission.[68]

Despite his disagreement with certain points of the Tribunal's decision—including the interpretation of the notion of natural prolongation and the way it dealt with the parties' entitlement to continental shelf—Judge Z. Gao did not raise objections to the jurisdiction of the Tribunal.[69]

The same applied to Judge A. A. Lucky, who claimed in this dissenting opinion that:

> I find no substance in the argument that this Tribunal does not have the jurisdiction to delimit the continental shelf in the Bay of Bengal beyond 200 nm. The Parties have agreed to the jurisdiction and the scientific and technical evidence is provided in the reports of the experts.[70]

Only Judge T. M. Ndiaye voted against the decision of the Tribunal, stating his reasons in his separate opinion. With prudence and precision, he analyzed several aspects of the judgment, including the jurisdiction of the Tribunal to delimit the continental shelf beyond 200 nautical miles. In his view, the main issue was whether the Tribunal could delimit the continental shelf prior to the approval of the parties' claims by the Commission, in accordance with Article 76(8) of the Convention. His

analysis led him to conclude that the power to assess scientific and technical evidence provided by the parties in relation to their continental shelf beyond 200 nautical miles falls within the competence of the Commission:

> The Tribunal complicated its task by delimiting the continental shelf beyond 200 nautical miles even though the Commission has not pronounced upon the outer limits of each Party's continental shelf.[71]

He continued by highlighting the preliminary objection raised by Myanmar and the suspension of the examination of the submissions of the parties by the Commission due to the *notes verbales* sent to the Commission in this respect.[72] He then turned to the question of the entitlement of the parties to a continental shelf. Once the entitlements had been confirmed, their extent had to be established. In his view, the Tribunal failed to complete this task:

> The great weakness in the present Judgment is that it does not succeed in determining Bangladesh's and Myanmar's precise entitlements to the continental shelf beyond 200 nautical miles. Nor does it succeed in establishing the extent of those entitlements.[73]

It is worth recalling that in order to determine the parties' entitlement to a continental shelf beyond 200 nautical miles, ITLOS argued that it relied on the information and the scientific reports prepared by the parties. It added that the submissions made by the parties to the Commission made it clear that their continental self beyond 200 nautical miles was located far from the Area. However, by that time, none of the submissions had been considered by the Commission. As a result, Judge T. M. Ndiaye sustained that the delimitation line proposed by the Tribunal prejudiced the rights of the international community, since the Commission had not examined the submissions made by the parties. He recalled that:

> It must be kept in mind that judges find entitlements; under no circumstances may they grant them. Owing to the nature of the judicial function and the nature of entitlements, it is all the more imperative that courts rely on existing law, however uncertain may be the principles or rules deriving from the requirement of an equitable solution.[74]

In his view, without overlapping and equal entitlements to a certain area, there is no maritime delimitation, supporting the hypothesis that the Tribunal should not have proceeded with the delimitation of the continental shelf beyond 200 nautical miles. The fundamental idea behind his reasoning is that ITLOS does not have jurisdiction to grant entitlements to a continental shelf beyond 200 nautical miles. This function is performed by the Commission. Once the Commission examines the scientific and technical data, it approves the entitlement or alternatively it invites the coastal State to make a new or a revised submission. Only the Commissions' recommendations endorse the entitlement of the coastal State to a continental shelf beyond 200 nautical miles.

The Tribunal as Guarantor of the Integrity of the Convention

The Tribunal's judgment in the Bay of Bengal case is an historic decision for several reasons.[75] The most important aspect of the judgment is the Tribunal's decision to proceed with the delimitation of the continental shelf beyond 200 nautical miles prior to the recommendations of the Commission—a question that had been avoided by the majority of international courts and tribunals.

A detailed examination of the part of the judgment dealing with the jurisdiction of the Tribunal to delimit the continental shelf beyond 200 nautical miles reveals that the crucial question concerned the articulation of the roles of the Commission and the Tribunal. In fact, according to ITLOS, there is only one legal continental shelf and it is in a position to delimit it.[76] The particularity of the case was due to the fact that the Commission had not issued its recommendations to the parties. The Tribunal estimated that it was crucial to know if the parties had overlapping entitlements to a continental shelf beyond 200 nautical miles. Absent that information, the question brought before the Tribunal was only hypothetical.[77] In fact, according to B. Kunoy:

> [A] dispute regarding overlapping claims to such an outer continental shelf is, in the technical sense, only hypothetical until the Commission has endorsed the outer limits of the continental shelf proposed by relevant coastal States.[78]

This means that the outer limits as proposed by the States prior to the Commission's recommendations are subjective and not binding on third States. However, the fact that a State Party to the Convention makes a submission to the Commissions could suggest that it applies *prima facie* article 76 of the Convention in good faith.[79] If this interpretation is accepted, the request to delimit the continental shelf beyond 200 nautical miles before and international court of tribunal could be admissible. However, the Tribunal did not content itself with the fact that the parties had made their submissions to the Commission. It decided to further develop its reasoning:

> Notwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question.[80]

In addition, the Tribunal examined the uncontested scientific evidence concerning the unique geological characteristics of the Bay of Bengal and the proof presented during the proceedings by the parties. It concluded that there was a thick layer of sedimentary rocks extending from the coast of Myanmar to an area located beyond 200 nautical miles.[81] By proceeding in this manner, it highlighted the complementarity of the roles of the Commission and the Tribunal with regard to the continental shelf beyond 200 nautical miles, offering the possibility to the parties to find a solution to their dispute:

> The Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Seabed

> Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention.[82]

It has to be reminded that the Tribunal was aware of the fact that Bangladesh had objected to the examination of Myanmar's submission by the Commission. As a result, according to the Commission's Rules of Procedure, the Commission did not have the right to examine that submission. Cognisant of this institutional impasse, the Tribunal stressed the danger of this situation:

> The consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved. The Tribunal notes that the record in this case affords little basis for assuming that the Parties could readily agree on other avenues available to them so long as their delimitation dispute is not settled.[83]

Considering the importance of the situation and the fact that such an impasse would compromise the effective implementation of the Convention and prevent States Parties from enjoying their rights over their continental shelf, the Tribunal decided that it had jurisdiction to delimit the continental shelf beyond 200 nautical miles:

> In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.[84]

Furthermore, the Tribunal specified that its decision did not overlap with the functions of the Commission.[85]

As discussed, the majority of the Judges voted in favor of the Tribunal's decision, except for Judge T. M. Ndiaye. In his view, the major problem in that case was the fact that the submissions of both Myanmar and Bangladesh had not been examined by the Commission, and as a result their entitlements to a continental shelf beyond 200 nautical miles had not been confirmed. That situation should have prevented the Tribunal from exercising its jurisdiction.[86]

By proceeding with the delimitation, it seems that the Tribunal granted indirectly entitlements to continental shelf to the parties, a function which is disapproved by Judge T. M. Ndiaye. The Convention provides for a distinct procedure concerning the grant of entitlements. The main actor in this procedure is the Commission and not the Tribunal. He nonetheless recognized that the Commission could not act, as it cannot examine a submission in case of a dispute.

However, he highlighted the complementarity of the roles of the institutions established by the Convention:

> The International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, the International Seabed Authority and the Meeting of

> States Parties to the Convention are organs set up by the Convention. And each must assume a given role assigned to it under the Convention, that of guardian and authoritative interpreter being for the Tribunal.[87]

In his view, it is the Commission the institution charged with assessing the validity of potential entitlements, not the Tribunal. As a result, the Tribunal should have come up with a solution, allowing the Commission to confirm the entitlements of the parties. If this had been the case, he would probably have been able to agree with the remaining Judges.

In his separate opinion, he proposed that ITLOS seek a preliminary ruling from the Commission. Having explained the function of preliminary rulings in the context of the European Union,[88] he concluded:

> For this reason, the Tribunal should have referred the matter to the Commission at this stage in the proceedings, without there being any need for one of the Parties to request it to do so, since the Tribunal should have considered itself unable to dispense justice in the circumstances of the case. It is for the Tribunal to judge whether to make the referral.[89]

In his view, the Tribunal should have had recourse to the president of the Meeting of States Parties to the Convention (hereinafter referred to as "SPLOS") and the president of the Commission in order to find a way to lift the suspension of the examination of Myanmar's submission. This would have required a protocol of agreement with the Commission,[90] in the context of which the Commission would have been invited to issue its recommendations to the parties within one year. By following this process, the Tribunal could have ruled on the continental shelf beyond 200 nautical miles in a separate phase. According to the Judge, the Tribunal has the right to choose the terms in which it wishes to respond to the requests of the parties. As a result, it could have examined separately the question of the delimitation of the continental shelf beyond 200 nautical miles. Such a proposal would have guaranteed the respect for the role of the Commission, offering a solution to a procedural impasse.

Judge T. M. Ndiaye is fully aware of the fact that the Convention does not provide for any *liaison* between the Commission and the Tribunal. However, despite the limited functions of SPLOS,[91] this organ has already responded to a procedural challenge of this kind, namely the deadline of the parties to make a submission to the Commission. In the same way, States Parties to the Convention should take into account the proposal of Judge T. M. Ndiaye in order to include this issue in the agenda of SPLOS for discussion.

Additional solutions could be envisaged to help the Tribunal and other international courts and tribunals to tackle similar issues. Article 289 of the Convention provides that:

> In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with

> Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.[92]

Article 2 of Annex VIII of the Convention gives States Parties the right to designate two experts with generally recognized legal, scientific or technical expertise. This clause applies to all cases where a court or tribunal has jurisdiction to decide on disputes pursuant to Part XV of UNCLOS. It is further analyzed in Article 15 of the Tribunal's Rules of Procedure.[93] At first sight, the application of this article seems to be very important in a case where the delimitation of the continental shelf beyond 200 nautical miles is sought prior to the recommendations of the Commission.

For instance, it is worth examining the following case: A State Party makes its submission to the Commission, while a neighboring State requests the Commission, by sending a *note verbale*, not to examine the submission because there exists a dispute between the two States. Those States decide to bring the case before an international court of tribunal under Part XV of the Convention prior to the Commission's recommendations. The parties to the dispute or the court or tribunal could have recourse to Article 289 of the Convention. The participation of scientific and technical experts could help the courts and tribunals better understand the data allowing them to ascertain the existence of entitlement to a continental shelf beyond 200 nautical miles. On the basis of the experts' reports and the data presented by the parties, the Tribunal could base its decision whether or not to exercise its jurisdiction.

If this is the case, why has this article fallen into desuetude? As professor T. Treves points out:

> In my view, the reason lies in that the scientific or technical experts as envisaged in Article 289 are too close to being judges or arbitrators: they sit with the tribunal and are to be drawn from the lists set out in Annex VIII for selecting specialized arbitrators, who should have not only technical, but also legal expertise. This may make the other judges or arbitrators, which have the responsibility of deciding the case, uncomfortable. Moreover, the fact that the experts under Article 289 are to be no fewer than two and selected in consultation with the parties may cast some doubt as to their effective independence, as it is likely that one of them will be closer (or perceived to be closer) to the positions of one party and the other to those of the other party.[94]

Professor T. Treves' explanation is honest and pragmatic. He considers that the reluctance to apply Article 289 is shared among States, judges and arbitrators. In any case, this article exists and could be used by international courts and tribunals. If we were to believe that the preliminary ruling mechanism and the recourse to SPLOS, as proposed by Judge T. M. Ndiaye, are not realistic solutions given the procedural barriers and State Parties' reluctance, additional solutions should be envisaged that could *legitimize* the jurisdiction of the Tribunal or of other courts and tribunals, in case States bring before them a boundary dispute involving the delimitation of the continental shelf beyond 200 nautical miles, prior to receiving the Commission's recommendations.

The possibility to have recourse to Article 289 seems to be realistic and efficient.

This procedure could allow a court or tribunal to better justify its decision to delimit the continental shelf beyond 200 nautical miles, absent the Commission's recommendations. As far as the continental shelf beyond 200 miles is concerned, science plays a major role. Scientific evidence confirms that a State meets the requirements giving rise to entitlement to a continental shelf beyond 200 nautical miles. In similar situations, applying Article 289 seems to the most reasonable solution with the view to preventing a tribunal from deciding arbitrarily and violating the rights of third States and those of the international community.

Current Challenges

The preceding proposals could be taken into account by the special chamber of the Tribunal in the on-going case between Ghana and Côte d'Ivoire. From a procedural point of view, this new case has several things in common with the Bay of Bengal case. Initially brought before an arbitral tribunal in accordance with Annex VII of the Convention, the case is now before a special chamber the Tribunal following a *compromis* between the parties. Again, the case between Ghana and Côte d'Ivoire concerns, *inter alia*, the delimitation of the continental shelf beyond 200 nautical miles. Both States made their submissions to the Commission in 2009.[95] To date, the Commission has only adopted its recommendations in regard to the submission made by Ghana.[96]

Given the recent developments in the jurisprudence of the Tribunal, we believe that the question of the jurisdiction of ITLOS would not be an issue. Following the case between Bangladesh and Myanmar, it is highly likely that the special chamber of the Tribunal will determine that it has jurisdiction to delimit the continental shelf beyond 200 nautical miles. However, a potential issue could arise regarding the admissibility of such a request. It has to be recalled that in the Bay of Bengal case, the Tribunal mainly observed that its conclusion concerning the entitlement of the parties to a continental shelf beyond 200 nautical miles was based on the particular geological characteristics of the seabed in the Bay of Bengal and on the uncontested scientific and technical evidence presented by the parties. As a result, the Tribunal was convinced of the existence of a continental shelf beyond 200 nautical miles in that region. To our knowledge, the disputed area in the case between Ghana and Côte d'Ivoire does not present the particular geological characteristics of the Bay of Bengal.

If the special chamber decides that the request to delimit the continental shelf beyond 200 nautical miles is admissible, it has to come up with a credible solution to demonstrate that Côte d'Ivoire is entitled to a continental shelf beyond 200 nautical miles. The task is hard and challenging given that the Commission has not issued its recommendations in regard to the submission of Côte d'Ivoire. It seems that recourse to Article 289 of the Convention is one potentially desirable solution. The participation of scientific and technical experts would assist the Tribunal to better understand the data presented by the parties, allowing it to ascertain the exis-

tence of potential overlapping entitlements to a continental shelf beyond 200 nautical miles. This second case gives the Tribunal the opportunity to elucidate the obscure points of the first judgment and to gain once again the confidence of the States Parties to the Convention.

As regards the ICJ, there are currently two pending cases involving, *inter alia*, the delimitation of the continental shelf beyond 200 nautical miles. Following the 2012 judgment in the case between Nicaragua and Colombia, Nicaragua made its submission to the Commission on 24 June 2013. In September 2013, it brought a new case against Colombia before the ICJ. The 2013 case concerns the delimitation of the continental shelf beyond 200 nautical miles. Colombia raised preliminary objections contesting the jurisdiction of the Court. In Colombia's view, the request was inadmissible because the Commission had not made its recommendations to Nicaragua. Although this argument seems to be in line with the Court's reasoning in the 2012 judgment, the ICJ has recently found that Nicaragua's request was admissible.[97]

On 28 August 2014, Somalia brought a case against Kenya before the Court. In its application, Somalia asks the ICJ to delimit the maritime boundary between the two States, including the continental shelf beyond 200 nautical miles.[98] Both States made submissions to the Commission. To date, no recommendations have been issued. It is worth noting that both States have objected to the examination of the submissions by the Commission because of the existence of a dispute between them. As a result, the Commission cannot consider the submissions and issue recommendations. It remains to be seen whether the ICJ will clarify its controversial position, as adopted in the 2012 judgment in the case opposing Nicaragua and Colombia.

Concluding Remarks

Twenty-two years following its establishment, the functioning of the Commission gives cause for concern. Due to institutional issues, the Commission is unable to proceed expeditiously with the examination of the submissions made by State Parties to UNCLOS. In addition, the Convention prevents it from considering a submission in case of maritime or territorial disputes between States. This situation leaves open the delimitation between the Area and the continental shelf beyond 200 nautical miles. It is therefore important to examine whether recourse to the dispute settlement procedures contained in Part XV of UNCLOS could provide solutions to the above issue. In practical terms, the main question is whether an international court or tribunal has jurisdiction to delimit the overlapping claims to a continental shelf beyond 200 nautical miles prior to the Commission's recommendations.

In light of recent international jurisprudence, it appears that the ICJ adopted a rather conservative approach. In the case between Nicaragua and Colombia, its reasoning implied that States must follow the procedure provided for in Article 76 of the Convention, confirming that an international court or tribunal can decide on the delimitation of the continental shelf beyond 200 nautical miles, provided that

the Commission has issued its recommendation. However, the ICJ's reasoning does not bring solutions to the blockage in case of maritime or territorial disputes between States and to the incapacity of the Commission to examine submissions expeditiously. Following this line of reasoning, the delimitation between States and the limits of the Area remain a pending issue.

Contrary to the approach recommended by the ICJ, ITLOS determined, in the Bay of Bengal case, that it had jurisdiction to delimit the continental shelf beyond 200 nautical miles between the parties, despite the fact that the Commission had not issued its recommendations. In so deciding, ITLOS was the first international tribunal to shed light on the relationship between the procedure before the Commission and the dispute settlement mechanisms of Part XV of the Convention. Therefore, the Tribunal highlighted the complementary roles of the institutions established by UNCLOS. Its historic decision paved the way for a more efficient and harmonious collaboration between the institutions established by the Convention. Its judgment constitutes a turning point in continental shelf delimitation and plays a major role in filling certain *lacunae* of the Convention.

This approach is in line with the separate opinion of Judge T. M. Ndiaye, who highlighted the potential role of SPLOS and put forward a more practical and refined reasoning: in case States request an international court of tribunal to delimit the continental shelf beyond 200 nautical miles prior to the Commission's recommendations, SPLOS could intervene and request the Commission to consider high-priority submissions. This course of action would allow the Tribunal to proceed with the delimitation, while respecting the procedure provided for in Article 76 of UNCLOS. However, the role of SPLOS is limited to administrative and budgetary issues. In addition, SPLOS has systematically avoided taking a position on substantive issues.[99]

It is hoped that both ITLOS and the ICJ will act wisely and make every effort to shed light on the obscure aspects of Article 76, and to ensure the effective implementation of the Convention.

Notes

1. Responsibility for the information and views set out in this article lies entirely with the author.

2. Article 1(1) of the United Nations Convention on the Law of the Sea.

3. Adopted on 10 December 1982 and entered into force on 16 November 1994. For the current status of the Convention, see: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (accessed 29 April 2016).

4. Adopted on 28 July 1994 and entered into force provisionally on 16 November 1994, in accordance with article 7(1) and definitively on 28 July 1996, in accordance with article 6(1) of the 1994 Agreement. For the current status of the 1994 Agreement, see: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6a&chapter=21&lang=en (accessed 29 April 2016).

5. Article 136 of the Convention. For a detailed analysis, see Kiss, Alexandre-Charles, "La notion de patrimoine commun de l'humanité," *Collected Courses of the Hague Academy of International Law* 175(II) (1982), pp. 99–256.

6. To date, the Commission has received seventy-seven submissions. See: http://www.un.org/Depts/los/clcs_new/clcs_home.htm (accessed 29 April 2016).

7. See Konstantinidis, Ioannis, "Dispute Settlement in the Law of the Sea, the Extended Continental Shelf in the Bay of Bengal and the CLCS: Some Preliminary Observations on the Basis of the Case Bangladesh/Myanmar Before the International Tribunal for the Law of the Sea," *Aegean Review of the Law of the Sea and Maritime Law* 1(2) (2011), pp. 267–285, http://dx.doi.org/10.1007/s12180-010-0015-1.

8. The present analysis focuses exclusively on the jurisdiction of an international court or tribunal to delimit the continental shelf beyond 200 nautical miles. The delimitation methodology is not discussed in this paper.

9. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *Judgment of 14 March 2012.*

10. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), *Judgment, I.C.J. Reports 2012,* p. 624.

11. For an analysis of relevant cases before *ad hoc* arbitral tribunals and arbitral tribunals constituted in accordance with Annex VII of the Convention, see Kunoy, Bjorn, "The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf," *International Journal of Marine and Coastal Law* 25(2) (2010), pp. 237–270, http://dx.doi.org/10.1163/157180910X12665776638704.

12. For the history of the dispute, see Konstantinidis, Ioannis (2011, pp. 272–274). For an analysis of Article 287 of the Convention, see Quéneudec, Jean-Pierre, "Le choix des procédures de règlement des différends selon la Convention des Nations Unies sur le droit de la mer," *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Paris: Pedone, 1991), pp. 381–387.

13. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, §§ 49–50.

14. It seems that Myanmar's position was based on the arbitral award in the case between Canada and France. *Case Concerning the Delimitation of Maritime Areas Between Canada and France*, *Award, 10 June 1992, RSA XXI*, pp. 265–341. See Dipla, Haritini, "La sentence arbitrale du 10 juin 1992 en l'affaire de la délimitation des espaces maritimes entre le Canada et la France." *Journal du droit international* 121(3) (1994), pp. 653–669.

15. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, Rejoinder of Myanmar, A.17, p. 204.

16. *Ibid.*, §§ 342–349.

17. *Ibid.*, § 350.

18. *Ibid.*, § 368.

19. *Ibid.*, § 370.

20. *Ibid.*, §§ 374–375.

21. *Ibid.*, §§ 374–378.

22. *Ibid.*, §§ 379–380.

23. *Case Concerning the Delimitation of Maritime Areas Between Canada and France, op. cit.*

24. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras*), *Judgment, I.C.J. Reports 2007,* p. 659.

25. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, § 384.

26. Permanent Mission of Bangladesh to the United Nations, Reaction of Bangladesh to the submission made by Myanmar to the Commission, 23 July 2009, p. 3

27. Permanent Mission of Myanmar to the United Nations, Reaction of Myanmar to the submission made by Bangladesh to the Commission, 31 March 2011.

28. See *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, CLCA/64, 1 October 2009, § 40, and *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work of the Commission*, CLCS/72, 16 September 2011, § 22.

29. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, § 390 and § 391.

30. *Ibid.*, § 400.
31. *Ibid.*, § 406.
32. *Ibid.*, § 409.
33. *Ibid.*, § 410.
34. *Ibid.*, § 417.
35. *Ibid.*, § 437.
36. *Ibid.*, §§ 442–449.
37. *Ibid.*, § 411 and § 446.
38. *Ibid.*, § 444.
39. *Ibid.*, § 384.
40. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras*),*op. cit.* For an overview of the case, see Tanaka, Yoshifumi, "Reflections on Maritime Delimitation in the Nicaragua-Honduras Case." *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 68(4) (2008), pp. 903–937.
41. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras*), *op. cit.*, § 319.
42. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), *op. cit*. For an overview of the case, see Delabie, Lucie, "Le fragile équilibre entre prévisibilité juridique et opportunité judiciaire en matière de délimitation maritime: l'arrêt de la Cour internationale de Justice dans l'affaire du différend territorial et maritime (Nicaragua v. Colombie)," *Annuaire français de droit international* 58 (2012), pp. 223–252; Grossman, Nienke, "Territorial and Maritime Dispute (Nicaragua v. Colombia)," *American Journal of International Law* 107(2) (2013), pp. 396–403, http://dx.doi.org/10.5305/amerjintelaw.107.2.0396; Fietta, Stephen, and Cleverly, Robin, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford: UK, Oxford University Press, 2016); and Tanaka, Yoshifumi, "Reflections on the Territorial and Maritime Dispute Between Nicaragua and Colombia Before the International Court of Justice," *Leiden Journal of International Law* 26(4) (2013), pp. 909–931, http://dx.doi.org/10.1017/S0922156513000460.
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44. *Ibid.*, § 112.
45. See Oude Elferink, Alexander Gerald, "Meeting of States Parties to the UN Law of the Sea Convention: The Time Limit for Making Submissions to the Commission on the Limits of the Continental Shelf: The Current State of Affairs," *International Journal of Marine and Coastal Law* 23(4) (2008), pp. 769–778, http://dx.doi.org/10.1163/157180808X353966.
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47. *Idem*.
48. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), *op. cit.*, § 126.
49. *Ibid.*, § 127.
50. *Ibid.*, § 129.
51. *Ibid.,*, Separate opinion of Judge J. E. Donoghue.
52. *Ibid.*, § 26.
53. *Ibid.*, § 27.
54. *Ibid.*, § 30.
55. *Idem*.
56. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), *op. cit.*, Declaration of Judge *ad hoc* T. Mensah, § 2.
57. *Ibid.*, § 12.
58. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), *op. cit.*, Declaration of Judge *ad hoc* J.-P. Cot, p. § 20.
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60. Judge R. Wolfrum (president), Judge T. Mensah and Judge J.-P. Cot.
61. *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India, Award of 7 July 2014*, § 76.

62. *Ibid.*, § 80.
63. *Ibid.*, § 82.
64. Schofield, Clive, Telesetsky, Anastasia, and Lee, Seokwoo, "A Tribunal Navigating Complex Waters: Implications of the Bay of Bengal Case," *Ocean Development and International Law* 44(4) (2013), pp. 363–388, http://dx.doi.org/10.1080/00908320.2013.808939.
65. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, Declaration of Judge R. Wolfrum, p. 6.
66. *Ibid.*, Joint declaration of Judges *ad hoc* T. Mensah and B. H. Oxman., § 3.
67. *Id.*
68. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, Separate opinion of judge J.-P. Cot, p. 1.
69. *Ibid.*, Separate opinion of Judge Z. Gao. His principal disagreement concerned the delimitation method applied in the case and the way the provisional equidistance line was adjusted.
70. *Ibid.*, Separate opinion of Judge A. A. Lucky, p. 62.
71. *Ibid.*, Separate opinion of Judge T. M. Ndiaye., § 61.
72. *Ibid.*, §§ 62–65.
73. *Ibid.*, § 85.
74. *Ibid.*, § 88.
75. Magnússon, Bjarni Már (2013. 632–633).
76. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, §§ 362–363.
77. *Ibid.,* § 399.
78. Kunoy, Bjorn (2010, p. 248).
79. See Oude Elferink, Alexander Gerald, "The Continental Shelf Beyond 200 Nautical Miles: The Relationship Between the CLCS and Third Party Dispute Settlement," in Alexander Gerald Oude Elferink and Donald Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Leiden, Netherlands: Martinus Nijhoff, 2004), p. 274.
80. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, § 443.
81. *Ibid.*, § 449.
82. *Ibid.*, § 373.
83. *Ibid.*, § 390.
84. *Ibid.*, § 392.
85. *Ibid.*, § 393.
86. See in this respect, Kunoy, Bjorn (2010, p. 270).
87. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, Separate opinion of Judge T. M. Ndiaye, § 104.
88. *Ibid.*, §§ 99–100. See the in-depth study by Barav, Ami, *Études sur le renvoi préjudiciel dans le droit de l'Union européenne* (Brussels Belgium: Bruylant, 2011). See also Farrell Miller, Alicia, "The Preliminary Reference Procedure of the Court of Justice of the European Communities: A Model for the ICJ?" *Hastings International and Comparative Law Review* 32(2) (2009), 669–692 and Tridimas, George and Tridimas, Takis, "National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure," *International Review of Law and Economics* 24(2) (2004), pp. 125–145, http://dx.doi.org/10.1016/j.irle.2004.08.003.
89. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), *op. cit.*, Separate opinion of Judge T. M. Ndiaye, § 107.
90. *Ibid.*, § 110.
91. Contrary to other treaties, UNCLOS does not establish SPLOS as a Conference of the States Parties acting as the supreme organ of the Convention. SPLOS is not a fully-fledged institution. It is a diplomatic conference convened by the Secretary-General of the United Nations and has certain administrative and budgetary functions. See Treves, Tullio, "The Law of the Sea 'System' of Institutions," *Max Planck Yearbook of United Nations Law* 2 (1998), pp. 325–340.

92. Article 289 of the Convention.

93. To date, this article has never been used. See Rao, Chandrasekhara P., and Gautier, Philippe (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden: Martinus Nijhoff, 2006), pp. 38–39. Surprisingly, the commentary does not refer to the legal expertise of the experts: "In accordance with article 289 of the Convention, in any dispute involving scientific or technical matters, the Tribunal may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts." See also Rosenne, Shabtai, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff, 2007), pp. 235–250.

94. Treves, Tullio, (2012). "Law and Science in the Interpretation of the Law of the Sea Convention: Article 76 between the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf," *Journal of International Dispute Settlement* 3(3) (2012), pp. 483–491, 485, http://dx.doi.org/10.1093/jnlids/ids012. See also the interesting observations by Savadogo, Louis, "Le recours des juridictions internationales á des experts," *Annuaire français de droit international* 50 (2004), pp. 231–258.

95. Ghana made its submission on 12 April 2009. Côte d'Ivoire made its submission on 8 May 2009. It is worth noting that, in response to the submission of Côte d'Ivoire, Ghana sent a *note verbale* to the Commission on 28 July 2009 underlining that: "Ghana wishes to underline that it has no objection to the submission made by Côte d'Ivoire which shall be without prejudice to the final delimitation of the boundary between Ghana and Côte d'Ivoire…." Ghana has thus decided not to object to the examination of Ivorian submission by the Commission.

96. See CLCS/85.

97. For more information, see *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia*), *Judgment, Preliminary Objections, I.C.J. 17 March 2016.*

98. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya*), *I.C.J.*

99. See Harrison, James, "The Law of the Sea Convention Institutions," in Rothwell, Donald R., Oude Elferink, Alexander Gerald, Scott, Karen N., and Stephens, Tim (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), pp. 387–390.

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Challenges on the Ocean and the Future of the Law of the Sea: Environment, Security and Human Rights

Hwang Junshik

Structured Abstract

Article Type: Research Paper[1]

Purpose—The UN Convention on the Law of the Sea (UNCLOS) is facing challenges concomitant with the seismic transformations of the world. This article examines how changes in the areas of environment, security and human rights would affect the UNCLOS system and the way we look at it.

Design, Methodology, Approach—This article will first survey the existing discourses on the challenges faced by the Convention, and move on to discuss the major changes and innovations of the world as they happen now. It will focus on climate change and the ensuing energy revolutions, international security and human rights concerns, and discuss—or ask—how they may affect the general direction of the future development of the law of the sea.

Findings: In regards to the environment, the international community is currently dealing with a new issue of marine biodiversity beyond national jurisdictions. The biggest challenge in the future will be climate change. As discussions on climate change issues progress and widen, the UNCLOS system will be required to play a more relevant role. In the area of international security, future challenges will involve the harmonization of international efforts to fight proliferation of passage rights and freedom of navigation. Also, new legal issues will be raised in terms of national

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security such as the status of unmanned vessels. As for human rights, it was asserted that UNCLOS would not play a central role in the future development of international human rights law. However, the impact of human rights will be felt in a more visible way as rights of individuals are increasingly identified in maritime activities. The law of the sea will be pressured to adopt a more integrated approach with international human rights law.

Practical Implications—To come up with proper responses to any future challenges, practitioners of international law of the sea need to stay abreast of important developments in other fields, since they will be increasingly required to keep UNCLOS relevant in this age of rapid transition.

Originality, Value—Imagining how the changes of the world we live in will inspire or disrupt the relatively stable system of international law governed by the Convention will be meaningful—not just for legal academics, but also for practitioners including those who represent the governments in law-making processes sponsored by UN or other international bodies.

Key words: boarding, climate change, energy revolutions, flag state, freedom of navigation, human rights, marine biodiversity, passage right, piracy, proliferation security initiative, United Convention on the Law of the Sea

Introduction

When the third United Nations Conference on the law of the sea finally produced a legal framework regulating the use of the oceans in 1982, in the form of a comprehensive multilateral treaty entitled the UN Convention on the Law of the Sea (hereinafter Convention or UNCLOS), everyone knew it was imperfect. However, it was widely believed to be the best possible outcome at the time and to possess considerable durability.[2] More than twenty years have passed since it finally came into effect in 1994, and there is no denying that the Convention has become something of a Constitution for the oceans with most of its legal authority and relevance intact in a rapidly changing global legal and geopolitical environment.[3] It is also true, however, that the Convention is facing serious challenges incidental to the ongoing seismic transformation of the world. When a society undergoes changes, its laws are likely to be pressured to change in one way or another. It is inevitable as well for such a grand normative system as the Convention.

The assessment of the Convention's resilience may depend on what kind of challenges we are discussing. For some challenges, the Convention is already well equipped with necessary legal or conceptual tools. Some of the complementary agreements made under the Convention on specific fields such as distant-water fishing helped strengthen the capabilities of the Convention to deal with emerging problems.[4] For others, there exist some gaps or lacunae, as shown in frequent debates on breakthroughs in marine technology and climate change.[5]

One way to understand weaknesses and strengths of the UNCLOS system is to pay attention to the fact that, just like most laws, it is the product of the prevailing worldviews of the time of its making. International law is said to reflect the conflicting pressures of the time,[6] and it is highly plausible that the 1982 Convention can be explained or defined in terms of certain specific characteristics of the world as reflected in the early 1980s. The world was still experiencing the Cold War at the time, hence the same political restraints that applied to inter-state relations between the two big ideological camps might have defined the scope of the UNCLOS. Furthermore, the Convention was negotiated when climate change was not a key issue within the environmental agenda, although there was already full-scale discussion going on about the various aspects of environmental protection including marine pollution and ecosystems and endangered species.[7] Also, no one ever dared to predict the possibility of energy revolutions in 1982. Does that allow the Convention to be characterized as a relic of the fossil-fuel economy? It might be that the founders of the Convention did not fully understand the universal value of human rights since the real Big Bang of the global human rights discourse—circa 1977—had come only a couple of years before the conclusion of the Convention.[8] And, of course, no delegation at the third UN Conference went extra miles to persuade other participants to adapt the new treaty to the imminent rise of China. The list may go on: there could be hundreds of ways to describe fundamental differences between the world in the year 1982 and the current one. Some are relevant, others just theoretical. It might be argued, however, that the Convention has included everything in it with which to address major challenges generated by such transformations of the world. After all, the Convention is part of a myriad of international legal systems, which are firmly rooted in the practice of the actual subjects of the law, that is, sovereign states. Even the United States, probably the single most influential player in the global law making process and one of the most powerful coastal states, is avowedly observant of the principles and rules reflected in the Convention even though it officially remains outside the Convention due to some domestic reasons.[9] This says a lot about the resilience of the Convention. It does not necessarily follow, however, that it is impervious to every major challenge of the world.

In fact, the discussion on the challenges faced by the global framework of the law of the sea is not something new. The traditional areas of discussion include the rights of passage, management of the use of living resources in the high seas, environmental protection, dispute settlement, international security and terrorism. Many are overlapping and inter-related. For example, the management of living resources in the high seas has been discussed as part of broader issues of oceans environment[10]; responses to terrorism and piracy inevitably involve examination of possible restrictions on the traditional right of navigation and passage.[11] Some writers listed major challenges for the 21st century especially in terms of wider acceptance of existing regimes, working out complexities of myriad binding instruments and resolving disputes over navigational rights and freedoms.[12]

Although it will be interesting and necessary to study what kinds of challenges will affect the relevance and resilience of the Convention as a general rule, this article

is not intended to provide some daring prediction into the unforeseeable future: instead, it will focus on a couple of aspects of the most talked-about changes of the world and think about how they could affect the specific area of international law, that is, the UNCLOS system and the way we look at it. The question of how the changes of the world affect law in general is an extremely broad one. How they affect international law is a little more specific, but this still has a broad and somewhat abstract tone to it. How they affect the Convention is quite a concrete question, but it necessarily involves a series of presumptions and a great deal of guesswork. After all, we are not still fully grasping the seriousness of many of the changes and challenges facing the world and poorly prepared to think and act accordingly. Still, trying to imagine how the changes of the world we live in will inspire or disrupt the relatively stable system of international law governed by the Convention will be meaningful—not just for legal academics, but also for practitioners including those who represent the governments in law-making processes sponsored by UN or other international bodies.

This article will first survey the existing discourses on the challenges faced by the Convention, and move on to discuss the major changes and innovations of the world as they happen now. It will focus on climate change and the ensuing energy revolutions, international security and human rights concerns, and discuss—or ask—how they may affect the general direction of the future development of the law of the sea.

Challenges and Responses So Far

It is suggested that, despite the original intent of the Convention to maintain a reasonable balance between the zonal management of the sea by the coastal states and the public interest of the international community as a whole, the tendency of states toward a greater degree of sovereignty undermines the aspect of the common interest.[13] It is also said that the "territorial temptation" of the sovereign states in their dealing with the oceans constitutes considerable pressure on the existing regime of the law of the sea.[14] In particular, it is notable that the zoning of the sea based on distance from the coastal states cannot completely represent the fluidity and dynamics of actual marine ecology.[15] Nature with all the living resources in it does not care about how far international law allows for sovereignty of the coastal states. This way, however, the Convention was able to establish the basic jurisdictional framework for conducting maritime activities and the rights and duties of states in each maritime area.[16]

Looking back at the history of the making of the Convention would make it easy to identify fundamental issues the law of the sea has had to deal with. International law of the sea had been relatively simple and stable up to the early 20th century: The oceans were conveniently divided into the three-mile belt along the coasts and the high seas beyond such national belt; customary international law provided the majority of the necessary rules based on the practice of the states; there was no global body dedicated to the issues related to the use of the oceans.[17] As the demand for

resources increased, along with the growing realization of the enormous economic potential of the oceans, however, so did the necessity felt by the states to impose their sovereignty over larger sea area. This ultimately led to a transformation of the law of the sea from "the law of movement" with focus on the freedom of the sea to a "law of territory and appropriation."[18]

As a matter of fact, the third UN Conference which resulted in the UNCLOS was a remarkable success in many aspects: intellectual and political leadership was prominent, and constructive ambiguity found itself in right places of the text of the Convention, complementing inherent limits of international law making process with essential insights. For example, the delimitation of continental shelf and exclusive economic zones (EEZ) was a subject of endless debates between two apparently irreconcilable positions: the principle of equidistance/median rooted in the Convention on Continental Shelf of 1958 and the equitable principle inspired by the North Sea Continental Shelf Case of the International Court of Justice (ICJ).[19] The final, and somewhat abrupt, compromise made possible by some of the leading figures based on the phrase "in order to achieve an equitable solution" was definitely susceptible to criticism for its very ambiguity. Despite such ambiguity, the successful trajectory of the jurisprudence on the three-step approach nurtured by international tribunals including the ICJ seems to confirm the wisdom of the participants of the third UN Conference.

Environment and Biodiversity

The Convention came into effect 12 years after its adoption in 1982, and the main hurdle was the controversy on the seabed area that was determined to be the common heritage of mankind.[20] This shows that the issues of sovereignty and resources were the major challenges facing the law of the sea at the time. Industrialized countries refused to ratify the Convention in their objection to Part XI concerning the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction—simply called "Area" in the Convention. Only after the new implementing agreement revising Part XI was concluded in 1994 did the Convention come into effect as *the* instrument governing the law of the sea.

The making of the UN Fish Stocks Agreement of 1995 was in parallel with the tumultuous process by which the Convention was put into effect.[21] The FAO adopted the text of the Fish Stocks Agreement intended to implement provisions of the UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory ones in 1993. The international community managed to focus its attention on the issues of management of living resources of the oceans, with the hard-won consensus that the freedom of the high seas is insufficient and inadequate to address the important issue of conservation and management of the certain types of fish stocks moving across the lines of national jurisdiction. The Agreement of 1995 was, therefore, rightly regarded as a praiseworthy attempt to address the need for global management of exhaustible living resources in the high seas (Shearer, 2003).[22] As the second implementing agreement was put in place to support the Con-

vention, this Agreement identifies specific measures to be taken by the states within the boundaries determined by the Convention, operationalizes regional or subregional organizations, and specifies precautionary principles and ecosystem approaches.[23] The overall process of drafting and implementing the Convention and the two implementing Agreements might be said to represent some kind of standard path of creation, codification and modification of the multilateral regulatory system in public international law. It is also possible to maintain, however, that the doctrine of the freedom of the seas has continuously been taken over by the regulatory framework.

Another noticeable trend was the shifting of weight from the doctrine of freedom of the sea to the doctrine of national authority. From the 1950s, states began to assert extensive sovereignty over their adjacent water beyond what was permitted by the existing law of the sea, a wave of changes initiated by the United States in the form of the so-called Truman Proclamation.[24] The Republic of Korea lost no time in joining this global trend by enacting the Fishery Resources Protection Act of 1953, which defined what was commonly known as the "peace line" in the East Sea area.[25] This new trend was transformed into a set of legal norms supported by an increasing number of states. The most dramatic changes resulting from the third UN Conference included the adoption of the 200 NM limits of continental shelf and EEZ. International law has talked of the rule that the land dominates the sea, but this rule has never been so far-reaching. Now the land dominates the sea possibly in the strongest sense of the word.

In a word, the freedom of the high seas was replaced by the extension of regulations in the distant waters, and by the extension of national sovereignty in waters adjacent to the coasts. When we look into the current discussion on the law of the sea, it is clear that the trend of the extension of the regulatory framework is still on. It is to be noted that scholars often declare that current international law is not adequate to protect marine biological diversity outside national jurisdictions and that the 1992 Convention on Biological Diversity does little to help with the situation.[26] Now, the very first substantial issue mentioned by the 2015 resolution of the UN General Assembly on oceans and the law of the sea (A/Res/70/235, adopted on 23 December 2015, hereinafter resolution 235) in its preambulatory part is the marine biodiversity on the high seas; to be more exact, resolution 235 recalls a previous resolution on the development of an international legally binding instrument under the Convention on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction, commonly referred to as BBNJ. The UN General Assembly adopts a resolution on the law of the sea every year, and the survey into such annual resolutions easily reveals the changing awareness of the international society on the challenges in the field of the law of the sea, along with the insight with which the states try to address them. It is safe to say, therefore, that BBNJ is one of the major issues the international community has begun to regard as crucial. So, it is necessary to watch closely the ongoing discussion under the auspices of the UN on BBNJ. The focus of the discussion is the possibility of creating a third implementing agreement for the Convention. Talks on BBNJ officially began in 2004 when the UN General Assembly adopted the Resolution on the law of the sea (A/RES/59/

24). High-level political determination was confirmed to tackle this issue at the UN Conference on Sustainable Development held in Brazil in 2012, which adopted the document title: "The future we want." The discussion lasted for a decade in the setting of UN's informal Working Group. Finally, the ninth Working Group meeting adopted recommendations for the General Assembly in early 2015. Among many things, the states agreed to make an international legally binding instrument under the Convention dedicated to the BBNJ agenda. To help reach consensus on a wide range of relevant issues, they agreed on the road map with a relatively short time frame: there will be four sessions of the preparatory committee from 2016 to 2017 to discuss elements of a draft text of the international legally binding instrument, and the committee will make substantive recommendations on those elements to the General Assembly by the end of 2017. The main agenda includes marine genetic resources, marine protected areas, environment impact assessment, and capacity building and transfer of technology. The final stage of the road map is to decide whether to hold an Intergovernmental Conference (IGC) by the end of the 72nd Session of the General Assembly in 2018. The IGC will be mandated to produce a draft text of the international legally binding instrument based on recommendations made by the preparatory committee.

In the context of BBNJ discussion, no issues are easy to solve: legal nature of marine genetic resources may involve quasi-philosophical debate on the basic concepts and definitions featured in the Convention including the Area; conceptual difficulty expected of the relationship between a new legally binding instrument and the existing law of the sea agreements will fundamentally restrict the scope of application of the new instrument. Appropriateness of establishment of marine protected areas, feasibility and cost-benefit efficiency of environment impact assessment, legal nature of transfer of marine technology also make it less easy to remain optimistic about the timely implementation of what is envisaged by the road map. When we have the adopted text of the international legally binding instrument through an IGC sometime after 2018, we will know more about the trend of national sovereignty and the regulatory aspect of the Convention.

Security

The majority of the above-mentioned resolution 235 addresses environmental issues such as marine biodiversity, capacity building, the Area, marine resources and regular process for global reporting and assessment of the state of the marine environment. But, another important part of the resolution is maritime safety and security. In its preambulatory section, immediately following a number of paragraphs on environment-related concerns, the resolution refers to the continuing problem of transnational organized crime at sea including illicit trafficking of narcotic drugs, the smuggling of migrants, human trafficking, illicit trafficking in firearms, as well as threats such as piracy and terrorist acts. This section highlights the current security challenges at sea.

The UN Convention against Transnational Organized Crime adopted in

Palermo in 2000 and three protocols thereafter (smuggling of migrants, trafficking in persons, and illicit trafficking in firearms) are not part of the law of the sea *per se*, but it is evident that the sea provides much of the routes of trafficking and smuggling in question. Irregular maritime migration has been an issue for a long time, and the growing new trend was that refugees in forced migration were increasingly mixed with voluntary migrants legitimately targeted by the states' migration control schemes such as interception at sea.[27] The recent outpouring of refugees from Syria and related responses from neighboring countries only reconfirms the need to think about the issues of migration and refugee protection more seriously in terms of the law of the sea.

As for issues related to piracy, UNCLOS basically restates what customary international law had to say about piracy. It is a relatively well-settled set of rules, although the definition of piracy in the Convention has been subject to frequent criticism that it is too elliptic or narrow. Another problem relates to the jurisdictional provisions, such as lack of the requirement to make the crime an offense under national law, or lack of the principle of "prosecute or extradite."[28] These alleged shortcomings, however, have been addressed in associated agreements. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, commonly called SUA Convention, provides solutions to some jurisdictional problems related to piracy, and the efforts led by the UN Security Council and the IMO helped close the gap with national legislation.[29] The Security Council, in response to the increasingly exacerbating situation off the coast of Somalia, authorized states to take "all necessary means" to repress piracy including the authorization to enter the territorial water of Somalia to take actions against acts of piracy in a series of Security Council resolutions. What has been authorized in these resolutions, which are summed up in the most recent one (S/RES/2246), continued to be in effect, but the General Assembly seemed to feel compelled to clarify points of international law in this context. The General Assembly resolution 235 notes that the authorization in the relevant Security Council resolutions applies "only with respect to the situation in Somalia" and that they "shall not be considered as establishing customary international law." Given the remarkable improvements of the piracy situation off the coast of Somalia, the concerted efforts at the global and regional levels seem to have worked, even though piracy and armed robbery at sea still remain a threat in the region.[30]

One of the first instances of maritime terrorism in modern history was the seizure of the Achille Lauro in 1985,[31] but the more recent effort of the international community to fight terrorism clashes with the law of the sea when it comes to the issue of proliferation security, among many. Intrusive measures against vessels engaged in proliferation of weapons of mass destruction (WMD) at sea would not always be consistent with the freedom of navigation which constitutes a more robust part of the UNCLOS system. On the high seas, the derogation from the flag state jurisdiction is permissible only on a limited list of grounds specified in Articles 110 (right of visit when a ship is suspected of piracy, slave trade, unauthorized broadcasting, no or false nationality) and 111 (right of hot pursuit). Transporting WMD or parts thereof to or from a country under international sanctions for proliferation

activities cannot be a ground for exceptions to the flag state jurisdiction based on the invincible freedom of the high sea. The situation is similar with the territorial waters. The right of innocent passage through the territorial sea enjoyed by "ships of all States" cannot be suspended or denied for the purpose of implementing proliferation security measures. The Article 19 makes it clear that WMD-related shipping does not make the passage prejudicial to the peace, good order or security of the coastal State. States like the United States and the Russia were so insistent on the narrow interpretation of the exceptions to the right of innocent passage as to jointly declare that the list of exceptions in the Article 19 was an exhaustive one, in the Uniform Interpretation of Rules of International Law Governing Innocent Passage agreed upon in 1989. No major treaties regulating weapons of mass destruction, such as the 1968 Nuclear Non-Proliferation Treaty, contain permission on the interdiction of vessels.[32] It was in this legal context that the idea of Proliferation Security Initiative (PSI) was brought up. Instead of trying to pressure and restrain the traditional principle of international law of the sea, the international community chose to act within the confines of existing law, and began to organize a network of state consent and cooperation to jointly deal with WMD proliferation. The 2003 Statement of Interdiction Principles, a basic document for PSI participating countries, makes it clear that all measures taken are consistent with relevant international law. It does not give member states any right to board the ships of other states on the high seas.[33] The relevant Security Council resolutions also make the same point (e.g. the resolution 1540 of 2004). It remains to be seen whether the demand for broader and more effective proliferation security measures would require any drastic changes in the way the rule of the flag state is applied.

Human Rights

International law of the sea and international human rights law are two distinct sets of law. The gulf between two disciplines is real, and it was asserted that UNCLOS would play a limited role in the future development of international human rights law.[34] The paucity of perception of their linkage or conflict is not surprising. Still, it is not impossible to consider the mutual relevance of one discipline to another (Treves, 2010).[35] For instance, environmental protection and distributive justice for developing states and land locked states may be linked to a broader concept of human rights; obligations to render assistance and rescue, right to fishing, prohibition of the transport of slaves, and prompt release of vessels seem directly related to human rights discourse.[36]

In particular, maritime law-enforcement operations by the governments as in the boarding on the high seas regulated by the Article 110 could be subjected to human rights law, although the Convention does not mention that aspect of the operations.[37] The International Tribunal for the Law of the Sea confirmed that the use of force must be avoided as far as possible in boarding and arresting a foreign ship on the high seas, and that, where unavoidable, considerations of humanity must apply, along with principles of reasonableness and necessity (M/V Saiga case, 1999).[38]

In the case of detention of vessels and their crew, principles enumerated in the International Convention on Civil and Political Rights may be applicable.[39] Refugee crisis can also be discussed in the context of broader human rights law.

As states increasingly assert their jurisdiction over foreign vessels and people on board, more issues relating to human rights will be raised. Under the current framework, it is unclear whether these issues fall within the actual scope of the law of the sea. It is clear, however, that two regimes of law do coincide in many situations and will do so more in the future (Treves, 12).[40]

A Changing World and the Law of the Sea

Climate Change and Energy Revolutions

In 2014, the presidents of the United States of America and the People's Republic of China, the two largest sources of greenhouse gas emissions, issued a joint statement on climate change, in which they confirmed that climate change is one of the greatest threats facing humanity. President Obama, in his final state of the union address early this year, said that non-believers who want to dispute the science around climate change would be "pretty lonely" because they would be debating the U.S. military, most of the country's business leaders, the majority of its people, almost the entire scientific community and nations around the world. When the Paris climate conference (COP21) resulted in the first-ever universal, legally binding agreement on climate change in December 2015, it was accepted as a powerful signal confirming the commitment of the international society in fighting climate change for a low-carbon future in the most serious manner. Now, there is no denying that climate change constitutes one of the most important challenges, with the significant potential to change the world, as we know of—once and for all. In many countries, climate change has made business leaders and policy makers rethink their long-term strategies. The European Commission adopted the EU Strategy on adaptation to climate change in 2013 and set out a framework and mechanisms to strengthen the EU's preparedness for climate impacts.[41] New regulations are introduced to deal with climate change, providing market participants with new conditions and new incentives. Companies respond creatively to opportunities and risks brought by climate change and related public policy.[42] Raised awareness, technological breakthroughs and investor preferences all contribute to rapid transition toward a low carbon economy. They have to adapt with or without government intervention. Innovations—unprecedented in scope, intensity and complexity—follow. For example, Bloomberg News reported that the 2020s would be the decade of the electric car. Today, according to Bloomberg News, electric cars make up less than 1 percent of the global car market but a dramatic hike is expected in the share of the electric cars in the global auto market, with thirty five percent of new cars with a "plug" by 2040. Bloomberg News says, "electric vehicles could displace oil demand of 2 million barrels a day" in early 2020s. This means a new oil crisis, with the "Big Crash"

inevitable.[43] Another factor is a revolution in solar energy technology. The energy storage systems for solar power dramatically improve and become more affordable. An increasing number of countries are expected to reach a grid parity, which means that they are able to generate electricity with solar power or other alternative energy sources at the same price (parity of cost of electricity) as from fossil-fuel based electricity grid.[44] This only helps speedy disruption of oil industry. Mark Carney, Governor of the Bank of England, said, given the IPCC's estimate of a carbon budget (an amount of carbon that can be burnt while still having a likely chance to limit the global temperature to 2 degree above pre-industrial levels), "the vast majority of reserves" of oil, gas and coal would be "unburnable without expensive carbon capture technology."[45] A more radical suggestion has been made: there would be a clean disruption or total collapse of the existing energy industry by 2030, caused by revolutionary transitions to solar power and electric vehicles.[46] Solar energy might do to fossil fuel what smart phones did to non-smartphones: a dazzlingly quick and almost complete replacement. When Klaus Schwab, founder and executive chairman of the World Economic Forum, warned that we are "on the brink of a technological revolution that will fundamentally alter the way we live, work and relate to one another."[47] He referred to a "Fourth Industrial Revolution," the digital revolution spurred by a fusion of new technologies penetrating the lines between the physical, digital, and biological spheres. He was not exactly talking about climate change and energy revolutions, but this fourth industrial revolution seems to possess similar characteristics to what climate change has brought to global economy.

Will this "revolution" affect the UNCLOS system, and if so, how? There has been discussion on how the UNCLOS could cope with issues of climate change related to the oceans environment. Experts say the most immediate threats posed by climate change are sea-level rise and disruption of marine ecosystem for coastal states and small islands.[48] Some small islands countries are predicted to disappear in several decades, and this may have implications for our thinking on maritime jurisdiction.[49] UN General Assembly has continuously expressed its concerns about climate change in its oceans-related resolutions. It is possible to identify provisions of the Convention that might have something to do with climate change, such as the Articles 192 and 194, but the environmental rules contained in the Convention are centered on how to address physical contamination.[50] Still, it is to be remembered that the domains of the law of the sea and international environmental law overlap each other to a considerable degree "with each informing the other at a fundamental level."[51] IMO comes into play when dealing with real climate change issues. It is known that emission from the shipping industry account for three percent of the global greenhouse gas emissions. IMO has been trying to regulate ship emissions by, for example, introducing an energy efficiency design index.[52]

Despite a variety of measures conceived by IMO and other international bodies in the context of regulation of activities on the oceans, it seems very unlikely that the UNCLOS can play a major role in the global efforts against climate change. This does not mean, however, that climate change is irrelevant for the future of the Convention. As the discussion on climate change progresses and widens, the UNC-

LOS will be required to *be* relevant. It is sometimes asserted that technological progress such as the development of climate engineering—large-scale technical interventions into the natural climate system—is "amongst the primary reasons that pose considerable challenges to the international law of the sea" because the new technology involves difficult interpretation of the provisions of the Convention on scientific research installations or equipment in the marine environment in the Part regulating Marine Scientific Research as well as rights and duties of states in the EEZ.[53] If we were to have a fourth implementing agreement to the Convention, after a planned conclusion of an international legally binding instrument on BBNJ, it might be something about climate change. Given the transformative impact of climate change discussion, we need to think about a more integrated approach for the law of the sea and the climate change regime. That will be one of the imminent challenges to be faced by the Convention.

It is to be noted that climate change and energy revolutions may have another implication for the law of the sea. When we discuss coastal states tending to expand their sovereign authority seaward, it is mostly about wanting to secure more natural resources under their jurisdictions. But imagine a scenario of less demand for fossil fuels and a disruptive change in existing energy industry mentioned above. This would likely affect demand for marine non-living resources in general. A major part of pressure for exclusive economic right would be gone. What would this scenario mean for the law of the sea landscape in the long run? This might lead states to think less of the significance of the maritime delimitation with neighboring states, and there might be less chance for disputes to occur over some reserves of fossil fuels. Without doubt, it is a good thing. If this were to actually happen, we need to think hard about how to develop jurisprudence of maritime delimitation in a way that could support more peaceful, cooperative construction of the relevant provisions including the Articles 74 and 83 on delimitation of EEZ and continental shelf, respectively.

Security and Human Rights

Issues abound in the category of maritime security, and it is difficult to identify only a couple of the most pressing challenges for the future. Securing freedom of navigation is definitely a top priority as the navigational freedom and passage rights were critical for global economic growth and prosperity based on safe and secure movement and exchange of commodities and goods.[54] The international community has been relatively successful in dealing with piracy, as evidenced in the improvement of situations in Somalia and the Malacca straits.[55] There will be continued demand for stronger responses to terrorism. Global efforts to fight proliferation of WMD remain robust. Recently adopted sanctions by the UN Security Council against North Korea—resolution 2270—for its destabilizing nuclear and missile-related activities prove that the law of the sea is vital in structuring an international sanctions regime against norm-violators (S/RES/2270). Resolution 2270 sets out several measures to be taken at ports or with regard to shipping: all states are obliged to inspect the cargo in their seaports that originated from or is destined for North Korea; they have to pro-

hibit their nationals from leasing or chartering their flagged vessels to North Korea, and from registering vessels in North Korea, owning or providing any vessel classification and certification service to any vessel flagged by North Korea; they are called upon to deregister any vessel owned or operated by North Korea; and any vessel related to target individuals or entities or containing banned cargo is denied entry into ports of all states. This resolution can be regarded as containing one of the strongest sanctions ever against North Korea. Its reference to deregistration of North Korean vessels, in particular, indicates the willingness of the international community to deal with the issue of flag of convenience, although the Security Council did not prohibit it this time. If there is proof that the practice of the flag of convenience contributes to substantial violations by North Korea of the sanctions regime and erosion of the essential authority of the Security Council for that matter, then there might be serious discussion on outlawing the practice for certain relevant entities.

Passage rights and freedom of navigation are directly related to national security for both shipping countries and coastal ones. Behind any international controversies over freedom of navigation lie geopolitical and security concerns as well as economic ones. Countries understand it and reveal their understanding by action. According to press reports, the United States has continued the freedom of navigation programs in many parts of the world's oceans including the South China Sea, and China asserted the right of transit passage by having its naval fleet navigate through the waters around the Aleutian islands near Alaska last year. The freedom of navigation program of the United States is unique in its publicly declared intention to refuse to acquiesce in certain local examples of limitation of passage.[56] One is reminded here of the British fleet navigating through Albanian territorial waters described in the Corfu Channel case of the ICJ. In that case, Albania claimed the action of the British fleet was not innocent because it was a political mission, not for a real innocent passage. This claim was not accepted by the Court, which believed what mattered was the manner of passage, not its purpose (ICJ, 1949).[57] Would the Court pass a same judgment if such a situation were to occur in the present? Most likely, yes. How long will this case remain a relevant, valid precedent? No one knows for sure. In fact, history teaches us that some kind of grand hegemonic framework may come into play in this context. After all, international law of the sea has alternated between *mare clausum* and *mare liberum*.

From a more practical point of view, there are some interesting technical questions that require legal determination. Autonomous vehicles are expected to bring about noticeable changes to the way we use and think about vehicles, and now the shipping industry is faced with the possibility of using autonomous unmanned vessels. Companies, engineers and regulators still have their own doubt about the prospect of unmanned vessels dominating the shipping industry anytime soon.[58] It is undeniable, however, that unmanned cargo ships represent another aspect of new technical revolutions.[59] Under the current law of the sea, ships enjoy the right of navigation, although it is actually the flag state that actually exercises the right.[60] The Article 17 of the Convention states ships of all states enjoy the right of innocent passage. The Article 90 states every state has the right to sail ships flying its flag on

the high seas. Are autonomous ships entitled to enjoy the same right as the traditional ships? This will clearly be a new chapter of the law on passage rights and navigational freedom. IMO's COLREGs have certain rules that might be of relevance for unmanned vessels, for example in terms of the responsibilities of vessels to avoid collision.[61] Safety issues need to be addressed in the context of the International Convention for the Safety of Life at Sea (SOLAS) as well. Experts point out the need to clarify the legal status of autonomous vessels under the Convention, COLREGs, SOLAS and other maritime rules, and it might be necessary to consider a new legal instrument dedicated to regulation of unmanned or autonomous vessels. In fact, this is not just a safety issue, and states may regard it as part of their national security concerns: would coastal states allow what is not exactly a traditional ship to enjoy innocent passage through their territorial waters, even when it is not easy to distinguish unmanned vessels from technologically innovative information gathering and research machines which happen to be capable of navigating at sea? Unmanned vessels might blur the thin line between navigation and marine scientific research if autonomous navigational techniques rely on real-time analysis of scientific data instantly gathered on the navigation route. Technological breakthroughs tend to make us rethink fundamental concepts and definitions. We might have to rethink what we want to mean by ships, navigation, marine scientific research and a host of other concepts that appear in the Convention.

No such futuristic conceptualization is required when we discuss how human rights law meets the law of the sea. Still, the impact of human rights will be felt in a more visible way as rights of individuals are increasingly identified in maritime activities both by governments and private sectors. When activists from non-governmental organizations protest at sea near drilling platforms or whaling fleets, it may be an exercise of freedom of expression and peaceful assembly.[62] At the same time, it could be regarded by opposing party as an infringement of the use of the oceans or freedom of navigation.[63] Another important set of issues involves labor rights. News reports on the supply of seafood using slave labor startled the world.[64] This reminded governments and civil societies of the need to incorporate human rights issues with the law of the sea discourse. UN General Assembly was paying attention: resolution 235 refers to the working conditions of seafarers and fishermen. This is also related to human trafficking and forced labor on fishing vessels. The same resolution notes the ongoing cooperation between international organizations including the work conducted by the UN Office on Drugs and Crime and ILO on that issue. IMO is working on the fair treatment of seafarers, and ILO has adopted Maritime Labor Convention that focuses on the safety and human rights of maritime workers. Still, resolution 235 does not have an independent section for human rights issues: they are addressed under the rubric of safety and security. The General Assembly may need to consider reserving a separate space for human rights issues at sea. Concepts of human rights increasingly become sophisticated and powerful. Any law enforcement actions on any part of the oceans involving humans will be subject to principles of due process. For example, the Convention is silent on whether states are allowed to arrest a ship without nationality on the high seas, although they have

the right of visitation on such a ship under the Article 110.[65] This provision and related academic arguments for or against such arrest did not seem to take into consideration individual rights of the crew on board, but if actual seizure of a stateless ship takes place, it is very likely that the crew will have a better chance at challenging it based on their individual rights to due process, instead of constructive interpretation of the relevant articles of the Convention.[66]

Future of the Law of the Sea: Integrated Approach?

In order to come up with appropriate responses to possible challenges in the field of the law of the sea, it is important to understand how such challenges would affect the balances the Convention is supposed to maintain. Environment, security and human rights concerns discussed above are among those most likely to present the most difficult challenges: climate change and biodiversity issues will transform the way we explore and exploit the distant oceans and their resources, and may change the concept of equitable solutions to many of the problems addressed by the Convention including maritime delimitation. The law of the sea will not be able to sustain its relevance without paying sufficient attention to climate change regimes. New technological revolutions will likely shake up and reshape the shipping industry and the demand for more integrated rules will ensue; freedom of navigation is already under pressure by a variety of international security concerns; the rights of individuals subject to law enforcement at sea have the potential to reshape the discourse on regulation of maritime activities. It is only a matter of time before the law of the sea will be compelled to integrate human rights in this traditionally state-centered issue area.

International law changes as the conditions under which states behave change. Trying to identify major challenges faced by the law of the sea could help states deal with the implications of such transition with more ease. The international community is more or less on the right track in their efforts to respond to future challenges in this field, as shown in a long list of issues to be taken care of by the UN General Assembly in the form of yearly resolutions on the law of the sea. They need to be adjusted, however, to reflect more accurately and in a timely manner the ongoing transformation of the world. Each issue has its own place or channel for discussion: climate change is being discussed within the UN Framework Convention and its associated pacts, international security mostly within the UN Security Council and human rights within international covenants supported by UN Human Rights Council and relevant judicial bodies. What is important is that practitioners of international law of the sea stay abreast of important developments of each of those fields, since they will be increasingly required to keep the Convention relevant in this age of rapid transition.

Notes

1. This article is based solely on the personal opinions of the author and does not in any way represent the official position of the Government of the Republic of Korea.

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Sino-Japanese Relations Over the East China Sea: The Case of Oil and Gas Fields

Chung-min Tsai

Structured Abstract

Article Type: Research Paper

Purpose—The East China Sea (ECS) dispute is characterized as a mixture of various issues, at the forefront is the issue regarding political sovereignty over the Diaoyu/Senkaku islands and the economic benefits of the surrounding oil and gas fields. The purpose of this article is to focus on the energy potential in the ECS and argues that the nature of the disputes has not changed in the past two decades and has always been on maritime delimitation.

Design, Methodology, Approach—Different from both the macro-level regional international relations and the micro-level domestic narratives, this article adopts a meso-level political economic analytical framework. By adopting historical institutionalist approach, this study examines how China and Japan interact over the issue of gas field in the East China Sea.

Findings—The maritime dispute is constrained by growing Sino-Japanese economic relations. In order to maintain a critical and deepening economic relationship between the two countries, China and Japan have adopted the tactics of self-constraint and have limited their charges of the other side's wrongdoing to certain level. The status of the oil and gas fields in the East China Sea is thus made quite stable and both sides will give tacit consent to the disagreement on boundary delimitation without taking further substantial action.

Practical Implications—This article provides a different perspective in analyzing

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Sino-Japanese relations. For policy makers, it proposes a political logic of conflict management between two countries that economic interaction may not well facilitate political negotiation but it at least prevents political conflict from escalating

Original Value—This article enriches our understanding of the constant nature of maritime dispute between China and Japan—with maritime delimitation as the bottom line, thereby realizing that although the tension is unavoidable there are always possibilities for negotiation and dialogues.

Key words: East China Sea, maritime dispute, maritime delimitation, Sino-Japanese relations, 2008 Principled Consensus

Introduction

The East China Sea dispute is characterized as mixed due to involvement of maritime boundary delimitation, ownership of the disputed islands, exploitation of energy resources, and fisheries. Two issues occupy the center of the dispute between China and Japan over the East China Sea (ECS): political sovereignty of Diaoyu/Senkaku islands and the economic benefits of the oil and gas fields. Although these two concerns are intertwined with each other, they have distinctive core claims and are not always brought up together. The former is about the ownership of these small islands, and the latter focuses on the energy potential. Hence, they are highly correlated but can be explored independently and generate policy implications for Sino-Japanese relationship. This article focuses on the issues of oil and gas fields in the ECS and argues that the nature of the disputes has not changed in the past two decades and has always been centered upon boundary delimitation. China and Japan have different ideas regarding where the border line should be drawn but have not presented any new written or verbal asseveration beyond that. The maritime controversies are constrained by growing Sino-Japanese economic relations so that they have at most led to the suspension of interaction instead of stirring radical conflicts.

Recently Japan has seemed to shift their concerns from energy resources to national security in recent gas and oil development in the East China Sea but their critique of China is not an allegation with concrete proof. In addition, the territorial dispute of the Diaoyu/Senkaku islands has not been involved in the recent debates in the ECS. In order to maintain critical and deepening economic relationship between two countries, China and Japan have adopted the tactics of self-constraint and limited their charges of other side's wrongdoing to certain level. The status of the oil and gas fields in the ECS will then be quite stable and both sides will give tacit consent to the disagreement on boundary delimitation without taking further substantial action.

Some scholars argue that the convergence between the nationalist sentiment of the public on one hand and the material interests in resources and security of the policy makers on the other hand makes it very difficult for political leaders to manage the ECS disputes.[1] Nonetheless, the ideational and material dimensions seem to be

independent as time passes. It demonstrates that both China and Japan distinguish between these issues. On the ECS issues, there are two groups of arguments. On the one hand, some scholars adopt a macro-level perspective of the international relations of East Asia and argue that the interaction between China and Japan on ECS reflects an ongoing power shift in the region, which is China's rise and Japan's decline.[2] On the other hand, there are micro-level "domestic narratives" indicating that both countries deal with this issue in response to domestic pressures, namely, from an assertive posture against Japan in Chinese society as well as among Japan's nationalist right-wing groups.[3] One relevant thesis is that the United States plays a key role in easing the tension between China and Japan on ECS, but the changes in Japan's China policy eventually would come from within.[4] This article takes a meso-level political economic approach and contends that economic interaction may not facilitate political negotiation well but it at least prevents political conflict from escalating. The complex and fluctuating nature of oil and gas field dispute in the ECS exhibits that there is the overarching limiting factor of the Sino-Japanese economic relationship prohibiting the deterioration of the issue.

This article begins with brief description of the early stage of the long-standing dispute in offshore oil and gas activities in the ECS and how China and Japan reached a principled consensus in 2008. The following section presents the latest development of the dispute in the post-consensus era and details the interaction between the two sides. In the next section I place the dispute within a broader context of the growing nature of the China-Japan economic relationship and demonstrate how the tension is constrained by examining the economic data. The article concludes with a discussion of the broader implications for trust-building, maritime cooperation, and Sino-Japanese relationship. This article enriches our understanding of the constant nature of the maritime dispute between China and Japan—with maritime delimitation as the bottom line, thereby realizing that although the tension is unavoidable there are always possibilities for negotiation and dialogues.

Dispute Over Oil and Gas Fields in the East China Sea

The territorial dispute stems from disagreement over where the maritime delimitation between the two countries is and where their economic exclusive zones (EEZ) lie. While Japan claims that the sea border should be drawn equidistant between the two countries, China insists its claim on the natural extension of its continental shelf under its jurisdiction. China's claim brings its EEZ much closer to Japan's coast. The distance between two claim lines is roughly 100 miles. Due to technological, economic, and political reasons, offshore drilling for oil and gas did not begin until the mid–1940s. In 1961 American geologist K. O. Emery and Japanese geologist Hiroshi Niino suggested for the first time that the ECS was rich in oil resources and later in 1968 they published an article confirming that the continental shelf of the ECS was abundant in hydrocarbon resources.[5] In 1966 the UN Economic Commis-

sion for Asia and the Far East organized the Committee for the Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas to assist investigations of the ECS. The findings were published in the "Emery Report" in 1969.[6] Although there is no clear data available, an early estimate of potential oil deposits created a figure for a potential 7.5 billion barrels. A more recent estimate shows that there may be about 100 billion barrels. There are also 200 billion cubic meters of natural gas reserves. For resource-poor Japan and import-dependent China, the oil and gas deposits in the contested area are critical to their energy security.[7]

While the energy reservoir was investigated in late 1960s, the dispute over the gas and oil fields did not emerge until the 1980s. China began to explore the ECS in the 1970s and found the Xihu Trough which is located in the center of ECS basin and 450 kilometers southeast of Shanghai. Since 1980, China has initiated the development projects in Pinghu, Chunxiao (Shirakaba in Japanese), Tianwaitian (Kashi in Japanese), Duanqiao (Kusunoki in Japanese), Canxue, Baoyunting, Wuyunting, and Kongqueting. In addition, China also discovered the Yuquan, Longjing, and Hushan oil/gas fields. The Pinghu field was the first field put into operation. It has been transporting natural gas to Shanghai since 1998. China has explored and developed the fields of Duanqiao, Canxue, Chuanxiao, and Tianwaitian independently without foreign investment. In 2003, Sinopec and CNOOC signed contracts with Royal Dutch/Shell and Unocal Corporation to explore three blocks and develop two in the Xihu Trough with the initial investment of 85 million USD. The project, however, was cancelled after a year and Royal Dutch/Shell and Unocal Corporation indicated that the decision was based simply on commercial considerations. In April 2004, China's minister of foreign affairs, Li Zhaoxing proposed to develop them jointly but was rejected by the Japanese government. Instead, Japan authorized the drilling rights to Teikoku Oil Company to develop the area adjacent to the median line claimed by the Japanese government. It demonstrates that Japan has shifted to a stronger position of confronting China.

The tension has since been intensifying due to the urgent energy needs of both countries. In May 2004 China granted exploration rights in ECS to several companies and initiated serious exploration in the Chunxiao gas field which is located on the Chinese side and four kilometers from the median line. In May 2005, Japan's Ministry of Economy, Trade, and Industry authorized Japanese companies to explore natural gas in contested areas. In September 2005, both the ruling coalition and the opposition party in the Japanese legislature prepared bills to propose measures for protecting Japanese drillers and fishermen in the disputed waters. During this period Japan had frequently detected Chinese naval vessels, exploration ships, a nuclear submarine, and aircraft in this area. Sino-Japanese understandings in the ECS further deteriorated in April 2005 due to anti–Japanese demonstrations in several local cities in China. Later, in October, Japanese Prime Minister Koizumi Junichiro visited the Yasukuni Shrine and in December Minister of Foreign Affairs Aso Taro commented that the increase in China's military power is a threat to Japan's security. As a result Japan stopped issuing loans to China and China refused to hold high-level meetings with Japan. Therefore, the talks on the ECS suspended.

Negotiations between China and Japan resumed several months later in March 2006 as China proposed a new joint development project with a focus on two areas. Japan rejected the proposal and asked China to stop all exploration and development activities in the field. Meanwhile China's Sinopec was already officially producing up to 300,000 cubic meters of gas a day from the Chunxiao field since January 2006 during the period of stalled discussions. In April, China laid pipelines and cables around the Pinghu field located very close to median line claimed by Japan and issued a ban on ships entering the area. Japan argued that China violated Japan's sovereignty and the United Nations Convention on the Law of the Sea (UNCLOS) which took effect in 1982. China responded that the area was not covered by the UNCLOS. China ratified the UNCLOS on June 7 1996 and Japan followed soon after, signing on June 20. This leads to the current development that further complicates the ECS issue today, namely that both sides agree to follow UNCLOS but interpret its articles differently. In fact, UNCLOS has not only provided a legal and normative discourse on Asia's maritime affairs but has also created or magnified maritime disputes in Asia. UNCLOS does not define clearly how to solve the disputes and only urges the parties involved in disagreements on the demarcation of EEZ and/or delimitation should negotiate on the fair principle, seek acceptable solutions to all, and avoid anything harmful to an eventual agreement.[8] When Abe Shinzo became Prime Minister in September he tried to mend Japan's relationship with China through his first official visit to Beijing (traditionally Japan's prime ministers make their first official visit to the U.S.) in October. It was also the first time the top leaders of both countries had met since October 2001.[9] The Chinese authority also regarded Abe's visit as a turning point in declining bilateral relations.[10] Both governments announced a joint statement and confirmed to "accelerate the process of consultation on the issues of the ECS, adhere to the broad direction of joint development and seek for a resolution acceptable for the both sides."[11]

Overall, on the issue of natural resources in the ECS, both sides have made several principle claims. For China, they are straight baselines connecting base-points on the mainland coast and the outermost coastal islands; a territorial sea extending 12 nautical miles from these baselines and from offshore islands; a continuous zone extending 12 nautical miles from territorial sea; a continental shelf extending throughout the natural prolongation of its land territory to the outer edge of the continental margin. Japan's claims are "a system of straight baselines; a 12 nautical mile territorial sea extending from these straight baselines; an unspecified continental shelf; and a 200-nautical mile EEZ from the straight baselines."[12]

In addition, between June 2006 and April 2007, China National Offshore Oil Corporation (CNOOC) had announced production plans from several gas fields, including Chungxiao, Bajiaoting, Pinghu, and Tianwaitianthat. These actions also incentivized Japan to facilitate further negotiation. Despite a turbulent political relationship between China and Japan, the Department of Asian Affairs of China's Foreign Affairs and the Asian and Oceanian Affairs Bureau of Japan's Foreign Affairs Ministry had held six rounds of formal meetings between 2004 and 2006.[13]

When former Chinese Prime Minister Wen Jiabao visited Japan in April 2007,

the ECS issue was brought up again and China and Japan agreed to "conduct joint-development as a provisional framework until the final delimitation based on principles of mutual benefit principles … at relatively large waters which is acceptable for both sides."[14] They set up a clear schedule and hoped to report concrete measures on joint development to the leaders in the fall of 2007. Former Japanese Prime Mister Yasuo Fukuda visited China in December 2007 and a consensus on the ECS issue was again announced. It seemed that both countries could arrive at a win-win situation if they put their differences and the need for a comprehensive solution aside. A workable partial solution could be realized with the improvement in the bilateral relations. Unfortunately, both Wen's Tokyo trip and Fukuda's Beijing trip in 2007 did not yield much concrete progress.[15] They only reached the consensus on cooperation without influencing the legal status of both sides before the delimitation problem could be solved.

In Hu Jintao's Japan visit in May 2008, he mentioned that prospects lie ahead for China and Japan to jointly explore the hydrocarbon resources under the ECS without hurting the legal status of either side.[16] Nonetheless, there was only one very vague expression "to work together to make the East China Sea a 'Sea of Peace, Cooperation and Friendship'"[17] and no progress was reported. Surprisingly, a month after Hu's visit, the Spokesperson of China's Foreign Affairs Ministry Jiang Yu announced that China and Japan reached a principled consensus on the East China Sea Issue through consultation on equal footing on June 18, 2008 (2008 Principled Consensus) and was released concurrently by the Ministries of Foreign Affairs of China and Japan.[18] Both countries made concessions in order to reach an agreement on solving the problem. China agreed Japan's legal person to join the existing development plan in the Chunxiao field, which is located four kilometers on the Chinese side of the median line boundary claimed by Japan while Japan agreed to include areas east of the median line for joint development. That is to say, the Chunxiao field is not included in the joint development area, as described in the section 2 of the 2008 Principled Consensus. However, as serious criticism was aroused in Chinese society both parties made efforts to clarify the ideas of cooperation and joint-development. The Sino-Japanese relationship has long been constrained by anti–Japanese sentiment among Chinese public due to the memory of Japan's invasion between 1937 and 1945. On the formal statement on Sino-Japanese relations, including the 1972 joint statement, 1978 friendship treaty, 1999 partnership declaration, and 2008 joint statement, it shows that Beijing has an incentive to keep a good relationship with Japan and offer at least implicit concessions. Against this background, the formal documents between China and Japan exhibit deliberate ambiguity which allows the Chinese authority to claim that they have not reconciled with Japan. Hence, the nature of the 2008 Consensus is fragile and there have been no developments in turning it into an international agreement due to the lack of reciprocity.[19]

In February 2010, the Japanese government worried that the gas under the areas claimed by Japan would be siphoned away by China's gas production on the Chunxiao field unilaterally. It threatened to take legal action against China. China disregarded the warning and kept moving drilling equipment to the platform above the

Chunxiao field. In September, there was a trawler incident that occurred close to the waters of Diaoyu/Semkaku islands and soon spiraled into a major diplomatic confrontation. Anti-Japanese demonstrations erupted in many Chinese cities. Sino-Japanese relationship had been suffering from the aftermath of this incident until early 2011. The Fukushima disaster that struck northeast Japan heavily provided an opportunity for both sides to resume exchanges. While Japanese foreign minister Matsumoto Takeaki met Chinese vice-president Xi Jinping in Beijing in July 2011, they agreed to work on improving communication and building up a crisis management mechanism. The proposal was later confirmed again by Japan's Prime Minister Noda in his Beijing trip in December.[20]

Recent Developments Since Late 2012

In September 2012, the Japanese government spent 26.2 million USD purchasing three of five uninhabited islands in the ECS from a private Japanese owner. This action led to an escalation in a dispute that had been pacified for several years.[21]

In December 2012, China submitted the information about the limits of the continental shelf beyond 200 nautical miles from the baselines to the Commission on the Limits of the Continental Shelf of United Nations. Japan protested and asked the Commission not to consider China's submission. China provided more information to strengthen their standpoint.[22] In July 2013, China's president Xi Jinping stressed that the building of maritime power is a critical part of socialism with Chinese characteristics.[23] Japan's ruling party, Liberal Democratic Party, soon made decision to deny China's construction and projects in the ECS. In November 2013, China announced an Air Defense Identification Zone covering a large swath of airspace over the ECS and the disputed islands, overlapping that of Japan's. Later in December, Japan's Prime Minister Abe Shinzo visited the Yasukuni Shrine and triggered a bitter argument. A report by the International Crisis Group argues that Sino-Japanese tensions have been escalating and transforming into confrontation which seemed very difficult to solve by diplomatic engagement.[24] In November 2014, China and Japan's top leaders eventually met in the APEC summit following two years of Chinese animosity toward Japan's Prime Minister Abe Sinzo and the nationalization of the Diaoyu/Senkaku islands. It was an ice-breaking talk but the atmosphere was awkward since Chinese president Xi neither smiled nor responded to Abe's conversation during the handshake.[25] Several days before the summit meeting, Chinese Councilor Yang Jiechi met Japan's National Security Advisor Yachi Shotaro and reached a four-point principled agreement on handling and improving bilateral relations. Point three indicates that both sides have acknowledged the different positions on the ECS and agreed to prevent the tension from escalating through dialogue and consultation. They would establish the mechanism of crisis management in order to avoid unforeseen emergencies.[26] After having no official interaction for two years and two months, the foreign ministers of China and Japan, Wang Yi and Kishida Fumio, also held formal talks and promised to boost bilateral cooperation by resum-

ing various high level meetings.[27] It seemed that China and Japan were achieving a rapprochement but unfortunately Japan's Foreign Affairs Minister maintained that there was no territorial dispute over the islands.[28] Although the Chinese embassy in Tokyo strongly criticized Mr. Kishida for his remarks, Mr. Kishida emphasized that the four-point consensus was a result of negotiations between two countries. The document should be respected but not legally binding.[29] Obviously, each side has taken advantage of interpreting the ambiguous consensus. China claims that Japan has agreed with them that there is a dispute over the contested area; Japan has insisted its long-lasting principles when recognizing that both sides have different views and should work together to solve the problems.

In March 2015, China and Japan held security talks for first time in four years (since January 2011). Both of them realized very clearly that there have been fears that a clash between Chinese and Japanese paramilitary vessels patrolling the contested area could trigger a conflict.[30] It is imperative for them to establish a crisis management mechanism, such as a hotline, to keep friction from escalating into confrontation. In June, China and Japan negotiated to establish a maritime communications mechanism (MCM), primarily a defense arrangement.[31] In fact, negotiations on setting a MCM began in April 2008, and both sides reached the agreement on three points after having meetings in November 2009, July 2010, and June 2012.[32] The January meeting yielded a significant development: the change in scope from just a maritime communication mechanism to maritime and aerial communication mechanism. Since the incidents in the air are an increasing concern,[33] the scope of MCM has extended to aerial communications in the meeting in January 2012. Meeting was suspended in June in that China refused to agree with Japan that territorial waters and airspace should be excluded.

In November, the defense ministers from both sides, Chang Wanquan and Nakatani Gen, held a meeting for the first time since June 2011. They affirmed the importance of this mechanism to avoid accidental clashes within territorial sea and national airspace (Diaoyu/Senkaku Islands are excluded). Although Mr. Nakatani commented that defense cooperation and exchanges between China and Japan are necessary for stability in Asia, no significant progress has been substantiated. The dispute remains on whether or not the proposed system should cover the Diaoyu/Senkaku islands.[34] China-Japan negotiations on the ECS issues exhibit the on-and-off nature. The lack of a trustful commitment to constrain provocative behaviors demonstrates that political will matters the most in managing tension over the region. The significance of signing these agreements and establishing communications mechanisms is greatly reduced when such activities are more political than operational. Some may view these actions as Japan and China's commitment to manage the dispute, but tensions will continue so long as the dispute on the sovereignty of Diaoyu/Senkaku islands remains.

In July 2015, Japan's Chief Cabinet Secretary Suga Yoshihide protested that China has been constructing gas field facilities in disputed territory in the ECS since 2013. The ambitious Chinese gas project is close to Japan's proposed median line.[35] Japan made similar remarks when China's project first initiated two years ago but

have seen no further action.[36] China's Foreign Ministry Spokesperson Hua Chunying responded very briefly in a regular press conference that "China's relevant activities are in waters within China's jurisdiction beyond any dispute. The protests by Japan are groundless, and China does not accept the unreasonable request of Japan."[37] Japanese Prime Minister Abe Shinzo said in a Meeting of the House Representative's special committee on security legislation that "I strongly object to (China) repeatedly going ahead with unilateral development." In the same meeting, Japan's defense minister Nakatani Gen indicated that China "could install a radar system on the platform or use it as an operating base for helicopters or drones conducting air patrols." Japan was protesting that China has set up military equipment on the ocean exploration platform.[38] It is the first time that Japan has shown security concerns over China's installment in the gas field in the ECS. On July 21, Japan released its 2015 annual defense white paper which stresses that "Maritime security is of critical importance to Japan…. Japan relies on sea transportation of import energy resources. Accordingly, ensuring secure sea lanes is vital for the survival of the nation." The frequent presence of Chinese vessels and aircrafts "are dangerous acts that could cause unintended consequences."[39] Japan's foreign ministry also released a map and aerial photographs of China's 16 drilling platforms and the Chief Cabinet Secretary Suga Yoshihide commented that "it is extremely regrettable that China should conduct unilateral development of resources."[40] The Chinese government has expressed strong discontent and said the document has deliberately played up the "China threat" thesis and stirred up tension.[41] While looking at the map released by the Japanese Ministry of Foreign Affairs to clarify the white paper, all structures lie on the Chinese side of the equidistance line which Japan has always insisted. It means these Chinese activities were in uncontested waters.[42]

Interestingly, Japan's Agency for Natural Resources and Energy of the Ministry of Economy, Trade, and Industry have both indicated that they do not believe there is a huge reservoir of energy close to the geographical median line claimed by Japan in the ECS. If this is true, it seems incomprehensible that China has spent so much money constructing these structures.[43] It was the first time the Japanese side made a statement which underestimated the importance of natural resources in the ECS. Prime Minister Abe also charged China's misbehavior of running against 2008 Principled Consensus while defending the controversial new security bill in a special meeting of the Upper House. It would help Abe to push the bill through by letting the public feel the changing external security environment and confirm the necessity of the bill. While China and Japan's foreign ministers met at the ASEAN meeting in Malaysia in August, they still held same point of views and had no consensus. In the China-Japan-South Korea trilateral summit meeting in November, Abe again raised the issue of China's unilateral development of the gas field in the ECS and urged China to follow the 2008 Principled Consensus. In a sideline meeting between China and Japan's foreign ministers, Wang Yi kept a tough tone on the issue.

In October, China formally rejected Japan's draft agreement since both sides had different ideas regarding inclusion of territorial waters and airspace.[44] In December, the fourth round of high level consultations on maritime affairs was held in

Xiamen city and officials from the two countries ministries on foreign affairs, defense, transportation, security, environment, energy and aquatic product attended.[45] Unfortunately, there was no significant breakthrough due to long-lasting dispute on China's development in the ECS gas field.

In the past two years, China and Japan have frequently interacted at various levels but they have not made any important advancement in resolving the differences. Nonetheless, there is a positive sign that the ties between Beijing and Tokyo are thawing and both sides would at least like to communicate. Due to Japan's nationalization of Diaoyu/Senkaku islands in September 2012 and China's unilateral declaration of an air defense identification zone in November 2013, the Sino-Japanese relationship had been frozen and skirmishes erupted regularly. Not until Japan's former Prime Minister Fukuda made a secret visit to Beijing in mid–2014 have the tensions eased. In recent discussions it has become very clear that the dispute remains focused on the very fundamental disagreement over the maritime delimitation, but both sides have refrained from stretching the dispute beyond the issues of ECS. That is to say, dialogue regarding economic sanctions such as China's suspension of rare earth exports to Japan in 2010 did not take place.

The ECS Issues Within the Context of Increasing China-Japan Economic Interaction

When we place the dispute of gas fields in the ECS in a broader context of Sino-Japanese relations with a focus on economic interaction it is not surprising that friction between China and Japan has been quite limited only to different interpretations of their mutual consensus. China and Japan have been diligent to restrain tensions from spilling over into other fields. The trend for Sino-Japanese economic relationship over the past two decades has been one of evermore close relations, very different from their political interaction. China is Japan's largest trading partner, whose trade volume accounts for one-fifth of Japan's trade. Japan is China's second largest trade partner and largest investor with more than 100 billion USD in 2014.[46] From the data gathered from both China and Japan, it is very clear that the Sino-Japanese trade relationship has been increasing in the past two decades. (See Table 1 and Figure 1.) The only turbulence that has happened between 2008 and 2010 was probably due to global financial crisis.

In addition, Japan has provided China with official development assistance (ODA) to China since 1979 and accumulated approximately 3.3 trillion yen (about 29.3 billion USD) in loan aid, 157.2 billion yen (about 1.4 billion USD) in grant aid, and 181.7 billion yen (about 1.6 billion USD) in technical cooperation.[47] Although China surpassed Japan as the world's second largest economy in 2010, Japan has still offered ODA to China even now. When China and Japan nearly suspended all high level communications between September 2012 and July 2014, the amount of trade and investment continued to increase. China's investment in Japan even doubled in 2013 after Japanese government nationalized Diaoyu/Senkaku islands.

Table 1: China-Japan Trade Relationship

	China (million USD)		Japan (billion Yen)	
Year	Export	Import	Export	Import
1995	28462.69	29004.76	2,062	3,381
1996	30886.22	29180.84	2,382	4,400
1997	31819.82	28992.98	2,631	5,062
1998	29660.11	28275.07	2,621	4,844
1999	32410.6	33763.38	2,657	4,875
2000	41654.31	41509.68	3,274	5,941
2001	44957.57	42796.91	3,764	7,027
2002	48433.84	53466	4,980	7,728
2003	59408.7	74148.13	6,635	8,731
2004	73509.04	94326.73	7,994	10,199
2005	83986.28	100407.68	8,837	11,975
2006	91622.67	115672.58	10,794	13,784
2007	102008.59	133942.37	12,839	15,035
2008	116132.45	50600.04	12,950	14,830
2009	97867.66	130914.9	10,236	11,436
2010	121043.49	176736.1	13,086	13,413
2011	148270.49	194563.52	12,902	14,642
2012	151621.83	177833.95	11,509	15,039
2013	150132.45	162245.4	12,625	17,660
2014	149391.34	162920.51	13,381	19,176

Source: State Statistical Bureau of PRC, http://data.stats.gov.cn/easyquery.htm?cn=C01; Historical Statistics of Japan, http://www.stat.go.jp/english/data/chouki/index.htm

On the Japanese side, the Prime Minister Abe Shinzo appears to be less eager to build strong ties with China, especially in comparison with the policies during Abe's first administration. The shift in the Japanese industrial overseas focus from China to Southeast Asia may explain the declining amount of Japanese investment in China since 2012.[48] (See Table 2 and Figure 2.) As for the Chinese side, president Xi Jingping has to weigh the pros and cons in Sino-Japanese relations. In the economic slowdown China appears to gain more benefits from improving its bilateral relationship with Japan in terms of economic cooperation. Hence, China-Japan rapprochement is expected. The recent development of the dispute in the ECS also reflects this concern. It has not demonstrated that increasing economic interdependence between China and Japan will decrease the risk of conflict as conventional

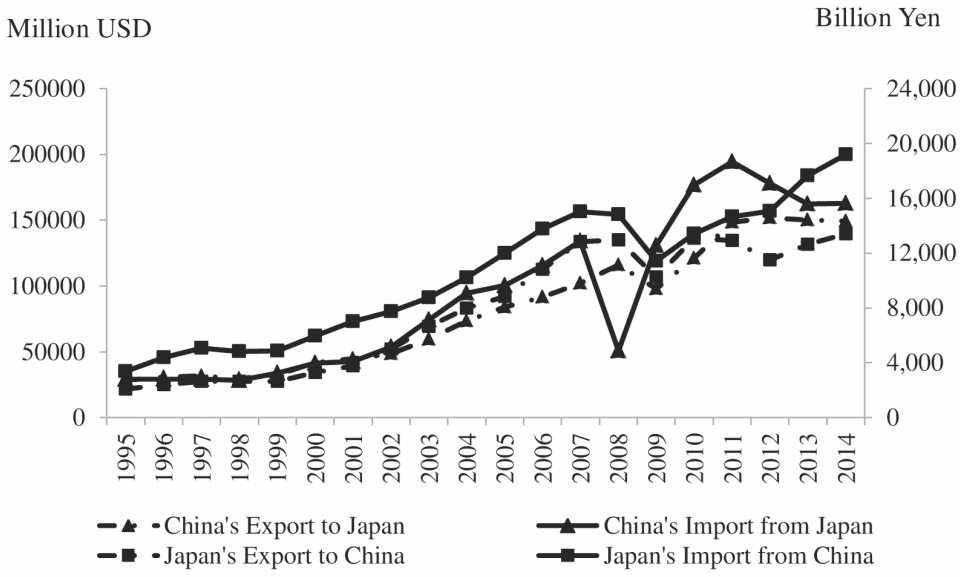


Figure 1: China-Japan Trade Volumes

liberalism proposes.[49] Neither does the economic interaction improve the image of China in Japanese society. Japanese perceptions of favorability toward China remain incredibly low with only 7 percent viewing China positively according to a Pew Survey on Global Views on China conducted in 43 countries. 91 percent of Japanese surveyed view China unfavorably, making Japan the number one country with the most unfavorable views. Vietnam is second on the list, with 78 percent viewing China unfavorably. In comparison, the U.S. views China with a 55 percent unfavorability rate.[50] Instead, the interaction between China and Japan over the ECS shows that dialogues are necessary and both governments must have the intentions for and perseverance to communicate and negotiate with each other. The core dispute remains, and this has not deteriorated as the economic relationship grows closer.

The economic data between China and Japan has shown a different picture from political interaction between the two sides. We may argue that the close economic links fail to improve political communication. By the same token, we have not found that political hostility spills over into the economic field. By examining the responses of China and Japan to each other's misbehavior in the ECS, we clearly see how mutual economic reliance pressures both countries not to adopt economic sanctions and stretch the issue into other fields.

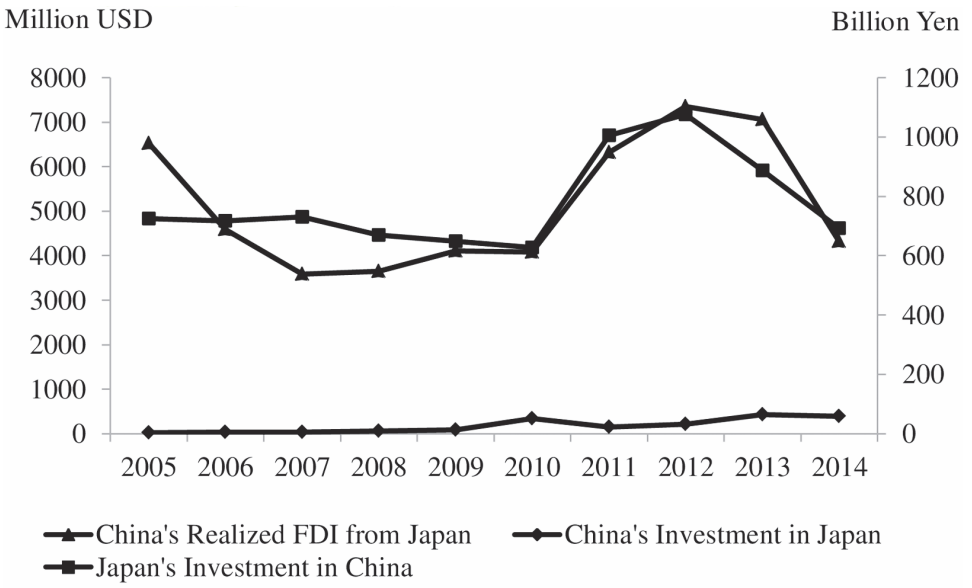
Conclusion

Competition between the two countries for natural resources in the ECS has been intensifying since 2004 and preventing their relationship from improving. Hence, conflict seems to be inevitable and a compromise is necessary. Both sides

Table 2: China-Japan Investment Relationship

Year	Japan's Investment in China (billion Yen)	China's realized FDI from Japan (million USD)	China's Investment in Japan (million USD)
2005	726	6529.77	17.17
2006	717	4598.06	39.49
2007	731	3589.22	39.03
2008	670	3652.35	58.62
2009	649	4104.97	84.1
2010	628	4083.72	337.99
2011	1,005	6329.63	149.42
2012	1,076	7351.56	210.65
2013	887	7058.17	434.05
2014	693	4325.3	394.45

Source: State Statistical Bureau of PRC, http://data.stats.gov.cn/easyquery.htm?cn=C01; Japan Statistical Yearbook 2016.



China-Japan Investment Relationship

have known quite clearly that joint development is a pragmatic solution and the Sino-Japanese relationship is too important to be destroyed by these disputes. Before the 2008 Principled Consensus, both sides agreed on the idea of joint development but had different interpretations of what it would mean or imply and what areas

should be jointly developed. Unfortunately, even after the 2008 Principled Consensus the same dilemma has prevailed.

This long-lasting controversy over the maritime delimitation has been the core element of the dispute for more than two decades. Looking from a positive perspective, both China and Japan have shown self-restraint and have not expanded their claims. The possible solution of this specific issue lies on three basic conditions: First, Japan needs to acknowledge that they cannot claim EEZ or continental shelf based on the disputed territory, namely, Diaoyu/Senkaku Islands. Second, a unified boundary for both EEZ and continental shelf is necessary. Apparently two boundaries based on different claims are the roots of the constant sources of irritation and provocation in the bilateral relationship. Third, cooperation in developing fisheries, minerals, and hydrocarbon resources is necessary regardless of the controversial maritime delimitation. Sharing common goals and benefits will strengthen the relationship.[51]

With the developing Sino-Japanese trade and investment relationship, both countries (especially China) have an increasing motivation to reach a substantial compromise that would allow them to develop oil and gas jointly in the ECS or at least achieve a partial solution to put disputes aside. Today, while China is experiencing an economic slowdown and the global energy market is reshuffling, the ECS gas field dispute is not necessarily linked to both countries' energy security. There is a more relaxed environment for both sides to negotiate. From the stumbling interaction between China and Japan on this issue we have witnessed an advancement (although very slowly) in the building up of a cooperative relationship and institutional mechanisms. Before the issue of maritime demarcation is solved the economic relationship will continue to play a role in containing the conflicts, and dialogues will continue.

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Objections Not Possessing an "Exclusively Preliminary Character" in the South China Sea Arbitration

Stefan Talmon

Structured Abstract

Article Type: Research Paper

Purpose—The purpose of this article is to identify the criteria to be applied by UNCLOS Annex VII arbitral tribunals in deciding whether an objection possesses an "exclusively preliminary character" and to examine the treatment of preliminary objections by the Tribunal in the South China Sea Arbitration.

Design/Methodology/Approach—Analysis of the Award on Jurisdiction and Admissibility in the South China Sea Arbitration and the case law of international courts and tribunals on the question of preliminary objections.

Findings—The Tribunal in the South China Sea Arbitration largely followed in the footsteps of the International Court of Justice when dealing with preliminary objections but there are three notable exceptions which might undermine the credibility of the Tribunal and its Awards.

Practical Implications—The article may provide China with arguments for rejecting the Tribunal's Awards in the South China Sea Arbitration and will inform judges and international lawyers about the proper treatment of preliminary objections in law of the sea cases.

Originality, Value—This article presents the first comprehensive analysis of the treatment of preliminary objections in the decisions of UNCLOS Annex VII arbitral

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tribunals and, drawing on the jurisprudence of the International Court of Justice, provides guidance to these tribunals on how to treat such objections.

Key words: dispute settlement, jurisdiction and admissibility, law of the sea, preliminary objections

I. Introduction

On October 29, 2015, the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") in the *Arbitration between the Republic of the Philippines and the People's Republic of China* (the "*South China Sea Arbitration*" or, in short, "*SCS Arbitration*") issued its Award on Jurisdiction and Admissibility.[1] The arbitration concerns disputes between the parties over maritime entitlements in the South China Sea, the status of certain maritime features in the South China Sea and the maritime entitlements they are capable of generating, and the lawfulness of certain actions by the People's Republic of China ("China" or "PRC") in the South China Sea that the Philippines alleges violate the Convention.[2]

The Philippines requested the Tribunal to rule on 15 specific final submissions set out in its Memorial of March 30, 2014, and confirmed at the close of the oral hearing on jurisdiction and admissibility on July 13, 2015.[3] The submission can be grouped into three inter-related issues. First, the Philippines seeks declarations that the parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by the Convention only and that any Chinese claims reflected by the so-called "nine-dash line" are inconsistent with the Convention and therefore invalid (Submissions No 1 and 2). Second, the Philippines seeks determinations that, under the Convention, Scarborough Shoal (Huangyan Dao) and eight maritime features in the Spratly Islands Group (Nansha Qundao), which are claimed by both China and the Philippines, are either "rocks" or "low-tide elevations" and, as such, are capable of generating only an entitlement to a 12 nautical mile ("nm") territorial sea or no maritime entitlement at all. In particular, the Philippines seeks declarations that none of these features can generate an entitlement to an exclusive economic zone ("EEZ") or continental shelf (Submissions No 3–8). Third, the Philippines requests the Tribunal to rule that China violated the Convention by interfering with the exercise of the Philippines' sovereign rights and jurisdiction, by interfering with the Philippines' freedom of navigation, and by conducting construction and fishing activities that harm the marine environment (Submissions No 9–15).[4]

China made it clear from the outset that it would neither accept nor participate in the arbitral proceedings because the disputes presented by the Philippines were outside the jurisdiction of the Tribunal. A Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration, issued on December 7, 2014, put forward three main objections to the Tribunal's jurisdiction.[5] First, the subject-matter of the

arbitration, in essence, is "the extent of China's territorial sovereignty in the South China Sea" and, in particular, its "sovereignty over the Nansha Islands as a whole."[6] The jurisdiction of the Tribunal, however, is limited to "disputes concerning the interpretation or application of this Convention,"[7] and territorial sovereignty disputes are not governed by the Convention. Second, even assuming, arguendo, that the subject-matter of the arbitration concerns the interpretation or application of the Convention, the subject-matter in question forms an integral part of the maritime delimitation disputes between the two countries. Disputes concerning maritime delimitation (as well as disputes concerning historic titles, military activities and certain law enforcement activities) have been validly excluded from the Tribunal's jurisdiction by a declaration filed by China in August 2006 under Article 298 of the Convention.[8] Third, the recourse to arbitration is excluded because China and the Philippines have agreed to settle their disputes in the South China Sea exclusively by negotiations.[9]

The Tribunal treated the Chinese Position Paper and certain other communications from China as "a plea concerning jurisdiction" and decided to bifurcate the proceedings to address the questions of the Tribunal's jurisdiction and the admissibility of the Philippines' claims at a separate phase of the proceedings before dealing with the merits of the case.[10] Accordingly, from July 7 to July 13, 2015, the Tribunal conduced a hearing in The Hague focused on jurisdiction and admissibility. The Tribunal did not limit the hearing to the objections raised by China, but invited the Philippines to address other possible jurisdictional questions. In its Award, the Tribunal dealt with China's preliminary objections to its jurisdiction but also decided *proprio motu* "possible issues of jurisdiction and admissibility even if they [were] not addressed in China's Position Paper."[11]

The Tribunal's Award on Jurisdiction and Admissibility is remarkable in that the Tribunal found only with respect to five of the 15 submissions that it had outright jurisdiction (Submissions No 3, 4, 6, 7, and 11). With respect to Submissions No 10 and 13 it found that it had jurisdiction on condition that claimed rights and alleged interferences occurred within the territorial sea of Scarborough Shoal. The Tribunal reserved consideration of its jurisdiction over Submission No 15 to the merits phase because, on the basis of the information available, the Tribunal was unable to determine whether a dispute between the parties concerning the interpretation or application of the Convention existed. This left seven, i.e., a relative majority of all submissions where the Tribunal found that a determination of its jurisdiction "would involve consideration of issues that do not possess an exclusively preliminary character, and accordingly reserve[d] consideration of its jurisdiction to rule on Submissions No 1, 2, 5, 8, 9, 12 and 14 to the merits phase."[12] This raises the question of when objections to jurisdiction and admissibility do not possess an exclusively preliminary character.

The paper first identifies the criteria to be applied by UNCLOS Annex VII arbitral tribunals in deciding whether an objection possesses an "exclusively preliminary character," and then critically examines the Tribunal's decision that objections to seven of the Philippines' submissions do not possess an exclusively preliminary char-

acter so that, consequently, their consideration is to be joined to the merits phase of the case.

II. Preliminary Objections in the South China Sea Arbitration

In its fourth Procedural Order of April 21, 2015, the Tribunal decided to treat China's communications as constituting a plea concerning its jurisdiction for purposes of Article 20 of the Tribunal's Rules of Procedure.[13] Article 20, which deals with "Preliminary Objections," provides:

1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of any claim made in the proceedings.

2. A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Counter-Memorial. A Party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

4. Prior to a ruling on any matters relating to jurisdiction or admissibility, a hearing shall be held if the Arbitral Tribunal determines that such a hearing is necessary or useful, after seeking the views of the Parties.[14]

According to paragraph 3, the Tribunal may uphold or reject any preliminary objection in whole or in part. The third alternative provided in paragraph 3, that the Tribunal may declare that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, is often overlooked. But, the Tribunal focused on this third alternative early on in the proceedings. In paragraph 2.2 of the fourth Procedural Order, the Tribunal stated that "[i]f the Arbitral Tribunal determines after the Hearing on Jurisdiction that there are jurisdictional objections that do not possess an exclusively preliminary character, then, in accordance with Article 20(3) of the Rules of Procedure, such matters will be reserved for consideration and decision at a later stage of the proceedings."[15] In other words, such matters will be joined to the merits of the case.

On June 23, 2015, the Tribunal sent a letter to the Philippines asking it to "address any objection that [the Philippines] considers could reasonably be advanced to the jurisdiction of the Arbitral Tribunal or to the admissibility of the Philippines' claims" irrespective of whether such objection had at any point been raised by China.

The Tribunal also provided the Philippines with an Annex of 38 issues set out in eight different categories, listed A to H, which the Philippines may wish to address at the July hearing. In section H of the Annex the Tribunal inquired whether there is "any potential issue of jurisdiction or admissibility [which] does not 'possess an exclusively preliminary character,' such that it should be deferred for consideration in conjunction with the merits of the Philippines' claims."[16] On July 6, 2015, the Tribunal put six questions to the Philippines to be addressed at the hearing. In question six the Tribunal invited the Philippines again to clarify whether there were any issues of jurisdiction or admissibility which should be deferred to the merits.[17]

The Philippines' position on the question of whether possible objections to the Tribunal's jurisdiction and the admissibility of the claims possessed an exclusively preliminary character was not consistent throughout the proceedings. It initially argued that "the jurisdictional issues in the case […] are plainly interwoven with the merits" and depend "in significant measure [on] the same facts and arguments on which the merits of the case depend" and "therefore do not possess an exclusively preliminary character."[18] At the hearing, however, the Philippines argued that there was no need to defer any question of jurisdiction or admissibility to the merits phase.[19] The Philippines emphasized that all issues of jurisdiction argued during the Hearing "could and should be resolved at this stage of the proceedings."[20] In the end, the Tribunal considered the view expressed in the course of the hearing as representing the position of the Philippines on this question.[21]

In his closing remarks at the end of the hearing the President of the Tribunal again highlighted the third alternative of dealing with preliminary objections. The President stated:

> [I]f the Arbitral Tribunal determines that there are jurisdictional objections or issues of admissibility that *do not possess an exclusively preliminary character*, then, in accordance with Article 20(3) of the Rules of Procedure, such matter will be reserved for consideration and decision at a later state of the proceedings.[22]

This leaves the question of what rules or criteria the Tribunal must apply in determining whether any of the jurisdictional objections or issues of admissibility addressed during the hearing did not possess an exclusively preliminary character and must therefore be reserved for decision in conjunction with the merits.

III. Whether Objections Do Not Possess an "Exclusively Preliminary Character"

1. The Question of Bifurcation Distinguished

Article 20(3) of the Rules of Procedure in the *SCS Arbitration* and the identical provision in the Rules of Procedure in the *Arctic Sunrise Arbitration* provides that the Tribunal "shall rule on any plea concerning its jurisdiction as a preliminary question, unless [it] determines […] that the objection to its jurisdiction does not

possess an exclusively preliminary character."[23] This provision thus takes a strict approach to bifurcation. Any preliminary objection automatically results in the bifurcation of the proceedings. Objections are generally to be decided at the preliminary objection stage of the proceedings. Only if an objection does not possess "an exclusively preliminary character" can it exceptionally be deferred for consideration at the merits stage.

The Rules of Procedure of UNCLOS Annex VII tribunals in other arbitrations have adopted a more flexible approach to bifurcation. For example, the Rules of Procedure in the *Guyana v. Suriname Arbitration* provided in Article 10(3) that the "Arbitral Tribunal, after ascertaining the views of the Parties, may rule on objections to jurisdiction or admissibility as a preliminary issue or in its final Award."[24] Similarly, the Rules of Procedure in the *Chagos Marine Protected Area Arbitration* provided in Article 11(3) that the "Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award."[25] These provisions are neutral as to the phase of the proceedings at which objections should be resolved. They leave it to the Tribunal's discretion whether to address them as a preliminary matter or defer them for consideration with the merits. In particular, any decision of the Tribunal on bifurcation does not necessarily depend on whether objections do or do not possess an exclusively preliminary character.

The different wording of these two sets of Rules of Procedure means that the arbitral awards in *Guyana v. Suriname* and the *Chagos MPA Arbitration* cannot give much guidance on the question of the exclusively preliminary character of objections. In the *Chagos MPA Arbitration* the question of whether an objection does not possess "an exclusively preliminary character" was not addressed at all and all preliminary objections of the United Kingdom, irrespective of their character, were decided together with the merits.[26] The Tribunal in *Guyana v. Suriname* also deferred its decision on Suriname's preliminary objections to the final award simply stating that:

> [B]ecause the facts and arguments in support of Suriname's submissions in its Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend, and the objections are not of an exclusively preliminary character, the Tribunal does not consider it appropriate to rule on the Preliminary Objections at this stage.[27]

Rules of procedure which expressly refer to objections not possessing an "exclusively preliminary character" do not establish any specific test to be applied in determining the character of a preliminary objection. Guidance on the question of whether an objection does not possess an exclusively preliminary character must therefore be sought in decisions or awards of international courts and tribunals operating under the same or largely similar rules of procedure as the Tribunal in the *SCS Arbitration*.[28]

2. *The Jurisprudence of the International Court of Justice as a Point of Reference*

The "exclusively preliminary character" test in Article 20(3) of the Rules of Procedure in the *SCS Arbitration* is modelled on Article 79(9) of the Rules of Court of the International Court of Justice ("ICJ"),[29] and Article 97(6) of the Rules of the International Tribunal for the Law of the Sea ("ITLOS"),[30] which provide in almost identical terms that the Court or Tribunal

> shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstance of the case, an exclusively preliminary character. If the Court [Tribunal] rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

The jurisprudence of the ICJ and the ITLOS are apt points of reference for determining the character of preliminary objections considering that they are among the other possible means listed in Article 287(1) of the Convention for the settlement of disputes concerning the interpretation or application of the UNCLOS. The ITLOS so far has had no opportunity to pronounce on the "exclusively preliminary character" test; this leaves the jurisprudence of the ICJ as a point of reference. The ICJ has had a long history of deciding whether or not to reserve preliminary objections for consideration and decision at the merits stage of the proceedings because they lack an "exclusively preliminary character."[31] It is for that reason that the Tribunal in the *SCS Arbitration* made reference to "the accumulated jurisprudence of the International Court of Justice" when applying the test.[32]

Before examining the ICJ's jurisprudence on the "essentially preliminary character" of objections it is necessary to recall that the ICJ's practice on joining preliminary objections to the merits has changed over the years. Originally, under its 1946 Rules of Court, the ICJ could either "give its decision on the [preliminary] objection or … join [all or part of] the objection to the merits."[33] This wording gave the Court significant discretion.[34] Preliminary objections were joined to the merits whenever it was in the interest of good administration of justice or a decision on the preliminary objections raised questions of fact and law with regard to which the parties were in disagreement and which were too closely linked to the merits to adjudicate upon them.[35] The ICJ availed itself of this possibility on several occasions.[36] The legal situation under the 1946 Rules of Court is similar to the situation under the Rules of Procedure in *Guyana v. Suriname* and the *Chagos MPA Arbitration* and thus cannot provide any guidance on the content of the "exclusively preliminary character" test.

In 1972, the possibility to join an objection to the merits was deleted from the Rules of Court.[37] The revision of the Rules was prompted by the *Barcelona Traction* case, where the Court had joined the preliminary objection to the merits, but ultimately decided the case on the preliminary objection, after requiring the parties to plead the merits fully. This was regarded as an unnecessary prolongation of an expensive and time-consuming procedure.[38] As a consequence, the ICJ's Rules of Court

were amended.[39] A new provision was introduced that is identical with Article 79(9) of the present Rules of Court quoted above.

According to the ICJ, the clear advantage of the new rule is "that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately."[40] The aim of the new rule was "not to exclude the power to examine a preliminary objection in the merits phase, but to limit the exercise of that power, by laying down the conditions more strictly."[41]

While under Article 79(9) the Court can no longer formally join an objection to the merits, it can still reach *de facto* the same result by declaring that an "objection does not possess, in the circumstances of the case, an exclusively preliminary character."[42] The change of the Rules in 1972 was intended to be not just one of drafting but of substance.[43] Under the old Rules, the Court could order a joinder whenever it was in doubt of whether an objection was so related to the merits, or to questions of fact or law touching the merits, that it could not be considered separately without going into the merits.[44] This is no longer the case. Now the consideration of a preliminary objection can only be reserved for the merits stage if the objection *does not* have an exclusively preliminary character because it contains both preliminary aspects and aspects relating to the merits.[45] Under the ICJ's current Rules of Procedure and, consequently, under the Rules of Procedure in the SCS Arbitration, objections must be decided at the preliminary stage wherever reasonably possible: *in dubio preliminarium eligendum*.

According to Article 79(8) of the Rules of Court, the ICJ may, whenever necessary, request the parties to argue *"all* questions of fact and law" (including those touching upon certain aspects of the merits)[46] in order to enable it to determine its jurisdiction or the admissibility of the case at the preliminary state of the proceedings. Rather than carrying the preliminary objections over into the merits phase, as had been done prior to 1972, questions of fact and law "touching upon," but not "prejudging," the merits are now brought forward into the jurisdictional phase. This allows the Court to dispose of the objections at the earliest possible stage in the proceedings.

Article 20 of the Rules of Procedure in the *SCS Arbitration*, quoted above,[47] does not include a rule equivalent to Article 79(8) of the ICJ's Rules of Procedure. In both cases, however, an objection to jurisdiction is to be dealt with as a preliminary issue and may only be considered in the merits phase of the proceedings if it "does not possess an exclusively preliminary character." The underlying rationale for both provisions is based on the principles of sound administration of justice and procedural economy. It was therefore correct that the Tribunal in the *SCS Arbitration* drew upon the ICJ's jurisprudence with regard to the "exclusively preliminary character" test in Article 79(9) in order to determine whether to deal with China's pleas concerning jurisdiction and the admissibility of the Philippines' claims as a preliminary matter or to rule on such a plea in conjunction with the merits. Following the ICJ's restrictive approach of ruling on objections at the preliminary objections stage of the proceedings unless they do not possess "an exclusively preliminary character"

is also in line with the Tribunal's obligation to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute."[48]

The absence in the Tribunal's Rules of Procedure of a rule equivalent to Article 79(8) did not constitute an obstacle in the *SCS Arbitration* as the Tribunal had requested the parties to "fully address all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute."[49] In order to examine whether the Tribunal correctly declared the possible objections to its jurisdiction and to the admissibility of the Philippines' claims to be not of an "exclusively preliminary character," it is therefore useful to outline the ICJ's jurisprudence where the specific test of "exclusively preliminary character" has been applied.

3. Preliminary Objections and the "Exclusively Preliminary Character" Test in the ICJ's Jurisprudence

In the jurisprudence of the ICJ four different categories of preliminary objections may be distinguished.[50] First, there are objections that cannot be the proper subject of a preliminary objection. Such objections constitute a defense on the merits and must be rejected at the preliminary objections stage of the proceedings.[51]

Second, there are objections that are so independent of the merits that their exclusively preliminary character can never be in doubt. These objections can be decided at once. Thus, the Court said in the *Barcelona Traction* case:

> It is evident that certain kinds of objections […] are so unconnected with the merits that their wholly preliminary character can never be in doubt. They could arise in connection with almost any set of facts imaginable, and the Court could have neither reason nor justification for not deciding them at once, by way of either acceptance or rejections.[52]

This category of objections, for example, includes preliminary objections concerning the timeliness of an application for interpretation of a previous decision,[53] or—in the law of the sea context—the timeliness of an application for prompt release of a vessel and its crew.

Third, there are the objections that are so intertwined with the merits of the case that they can only be dealt with along with the merits as their preliminary treatment would otherwise risk prejudging or adjudicating upon (parts of) the merits.[54] One may think of an objection that a claim should be dismissed because of a violation of the clean hands or good faith principles.[55] Such objections clearly do not possess an exclusively preliminary character and are therefore to be joined to the merits. However, such clear cut situations are the exception, rather than the rule.

The majority of objections will fall into a fourth—intermediate—category where objections are *touching upon but not prejudging* the merits.[56] It has been pointed out that "[p]reliminary objections cannot be—and in practice never are—argued in a void, removed from all factual context. And that factual context may well touch on issues the full exposition of which will come later when—and if—the merits phase

is reached."[57] Considering that the change made in 1972 to the ICJ's Rules of Court was to be substantive and not just cosmetic, and was intended to limit the practice of joinder of objections to the merits,[58] these objections must—and in practice have been—treated as possessing an exclusively preliminary character.[59]

While these categories are helpful to provide general guidance, everything will depend on the circumstances of the case. For example, the failure to exhaust local remedies will usually be "a clear-cut issue of a preliminary objection that can be determined on its own." If, however, the merits of the case concern an allegation of denial of justice, and it was in the attempt to exhaust local remedies that the alleged denial of justice was suffered, the objection of non-exhaustion of local remedies will not possess an exclusively preliminary character and will have to be joined to the merits.[60]

In the *Nicaragua* case, the ICJ emphasized that, "[a]bove all, it is clear that a question of jurisdiction is one which requires decision at the preliminary stage of the proceedings."[61] The same is true for questions of admissibility. It is thus only in exceptional circumstances that the ICJ may find that an objection to jurisdiction or admissibility does not possess an exclusively preliminary character.[62] In fact, since the change to its Rules of Court in 1972, i.e., in almost 45 years, the ICJ has done so only on four occasions. In all other cases, the ICJ either accepted or rejected the objection at the preliminary objections phase of the proceedings. In order to better understand the ICJ's restrictive approach it is helpful to look at these four cases in some detail. This restrictive approach is also in line with the general principle that a State "should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established."[63]

In *Nicaragua* and *Land and Maritime Boundary between Cameroon and Nigeria* the ICJ held that an objection that third States may be "affected" by the Court's decision did not possess, in the circumstances of these cases, an exclusively preliminary character. In the *Nicaragua* case the United States raised an objection to the jurisdiction of the Court based on a "multilateral treaty reservation" that limited the ICJ's compulsory jurisdiction with regard to disputes arising under a multilateral treaty to situations where "all parties to the treaty affected by the decision are also parties to the case before the Court."[64] The ICJ held that:

> [I]t is only when the general lines of the judgment to be given become clear that the States "affected" could be identified. By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected. […] At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem. […] since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7 [now paragraph 9], of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character.[65]

In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* the question of "affected third States" was raised by Nigeria as an objection to the admissibility of Cameroon's application to delimit the maritime zones appertaining respectively to Cameroon and to Nigeria in the Gulf of Guinea. The ICJ stated with regard to Nigeria's preliminary objection:

> The Court notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is evident that the prolongation of the maritime boundary between the Parties […] will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States. It thus appears that rights and interests of third States will become involved if the Court accedes to Cameroon's request. […] In order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part. … The Court concludes that therefore the […] preliminary objection of Nigeria does not possess, in the circumstances of the case, an exclusively preliminary character.[66]

In the *Lockerbie* cases, the United States and the United Kingdom raised, inter alia, the objection that Libya had no legal interest to assert the claims that the two States had breached their obligations under the Montreal Convention, and that the Libyan application therefore should be dismissed at the preliminary objections stage. The United States and the United Kingdom argued that the Libyan claims had been rendered moot as a result of binding decisions by the Security Council under Chapter VII of the United Nations Charter, which prevailed over any obligations under the Montreal Convention.[67] The ICJ examined whether the objection based on the Security Council decisions contained "both preliminary aspects and other aspects relating to the merits" or not. The Court found with regard to the United Kingdom:

> That objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United Kingdom seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.
>
> The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to

> judgment on the merits, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United Kingdom on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than "touching upon subjects belonging to the merits of the case" […]; it is "inextricably interwoven" with the merits […].
>
> If the Court were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.
>
> The Court concludes from the foregoing that the objection of the United Kingdom according to which the Libyan claims have been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.[68]

The ICJ consequently joined the objection to the merits.[69] The Court, however, never had an opportunity to rule on this and the other objections of the United States and the United Kingdom because in 2003 the proceedings were discontinued as part of a political settlement between the parties.[70]

The last time the ICJ decided that an objection does not possess, in the circumstances of the case, an exclusively preliminary character was in 2008 in the *Genocide Convention* case between Croatia and Serbia.[71] In response to Croatia's claims that Serbia had breached its obligations toward the people and Republic of Croatia under the Genocide Convention, Serbia raised a preliminary objection *ratione temporis* both to the jurisdiction of the Court and to the admissibility of the claims. Serbia argued that Croatia's claims were based on acts and omissions which took place prior to April 27, 1992, that is to say prior to the formal establishment of the Federal Republic of Yugoslavia (Serbia and Montenegro), the name by which the present Serbia was formerly known. The Genocide Convention, including its jurisdictional clause, could not be applied to acts that occurred before Serbia came into existence as a State and before it became a party to the Genocide Convention. It also argued that acts or omissions which took place before Serbia came into existence could not possibly be attributed to it. The ICJ held:

> In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. *In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it.*
>
> In view of the above, the Court concludes that Serbia's preliminary objection *ratione temporis* does not possess, in the circumstances of the case, an exclusively preliminary character.[72]

The ICJ's decision in the *Genocide Convention* case is instructive for two reasons. First, it shows that whether or not an objection possesses an exclusively preliminary character will depend first and foremost on "the circumstances of the case."[73] It has been said that a "preliminary objection to jurisdiction *ratione materiae* is more likely to appear related to the merits of a case than an objection to jurisdiction *ratione personae* or *ratione temporis*."[74] While there may exist a presumption that an objection to jurisdiction *ratione temporis* has an exclusively preliminary character, there is no hard and fast rule to that effect.

Second, the exclusively preliminary character of an objection in many cases will not depend on the subject matter of the objection but on whether the Court considers that it has before it all the facts necessary to rule on the objection. This was also confirmed in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case where the ICJ summarized its approach as follows:

> In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some element thereof, on the merits.[75]

This approach was embraced by the Tribunal in the SCS Arbitration.[76]

IV. Treatment of Preliminary Objections in the South China Sea Arbitration

Once the Tribunal had decided to treat China's communications as constituting, in effect, "a plea concerning jurisdiction," the Tribunal was under an obligation to rule on this plea as a preliminary question unless it determined that the objection to its jurisdiction or to the admissibility of the Philippines' claims did not possess an exclusively preliminary character.

In the *SCS Arbitration* at least ten possible objections to the Tribunal's jurisdiction and the admissibility of the claims can be identified.[77] The Tribunal treated six of these objections either expressly or implicitly as possessing an exclusively preliminary character and dismissed them right away. This seems to be unproblematic with regard to the preliminary objections based on the obligation to exchange views in Article 283 of the Convention,[78] the agreement to seek settlement of the disputes exclusively by other peaceful means in Articles 281 and 282 of the Convention,[79] and the argument that the unilateral initiation of the arbitration constituted an abuse of legal process in terms of Articles 294 and 300 of the Convention.[80] These objections are so unconnected with the merits that their wholly preliminary character is not in doubt. As the ICJ ruled in the *Barcelona Traction* case, these objections "could arise in connection with almost any set of facts imaginable,"[81] and thus the Tribunal had no reasons for not deciding them at once.

The Tribunal ruled with regard to each of the Philippines' first 14 submissions

that this "is not a dispute concerning […] maritime boundary delimitation."[82] This suggests that the Tribunal regarded the objection based on Article 298(1)(a)(i) of the Convention, which excludes from the Tribunal's jurisdiction "disputes […] relating to sea boundary delimitation," as possessing an exclusively preliminary character. But, the Tribunal also expressly stated that "the limitations and exceptions to jurisdiction in Articles 297 and 298, are in significant respects interwoven with the merits" and, for that reasons to be considered with merits.[83] This seeming contradiction can be resolved by distinguishing two different questions. First, there is the question of whether a specific situation requires the delimitation of overlapping maritime entitlements. This question can be answered at the preliminary objections stage of the proceedings. Second, there is the question of whether a maritime delimitation dispute could potentially arise in the course of the proceedings depending on other decisions to be taken on the merits. This question can only be answered at the merits stage and thus does not possess an exclusively preliminary character. This situation arose with regard to the Philippines' claims in Submissions No. 5, 8 and 9 where the Philippines asked the Tribunal to adjudge and declare that certain maritime features were "part of the exclusive economic zone and continental shelf of the Philippines," and that China's alleged unlawful activities had occurred in "the exclusive economic zone and continental shelf" of the Philippines.[84] The Tribunal's jurisdiction over these submissions would be barred if a feature claimed by China in the South China Sea were found to be an "island" within the meaning of Article 121 of the Convention, entitled to an EEZ or continental shelf overlapping those generated by the Philippines archipelago. In that case, the resolution of the merits of these claims would not be possible without first delimiting the overlapping entitlements, a step which is excluded from the Tribunal's jurisdiction by China's August 2006 declaration. The question of delimiting overlapping entitlements would not arise, if, on the other hand, the Tribunal were to find at the merits stage that none of the features claimed by China in the South China Sea are islands generating an EEZ or continental shelf.[85] Whether there existed any overlapping entitlements depended on the merits determination on the status of the maritime features in the South China Sea. The Tribunal therefore concluded in identical terms for all three submissions:

> The possible jurisdictional objections with respect to the dispute underlying Submission No. 5 [8 and 9] therefore do not possess an exclusively preliminary character. *Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 5 [8 and 9] for consideration in conjunction with the merits of the Philippines' claims.*[86]

The same considerations apply with regard to the exclusion from compulsory jurisdiction of "law enforcement activities" concerning marine scientific research and fisheries in the EEZ and on the continental shelf. The Philippines argued that the Chinese activities complained of in Submissions No 8, 9, 10 and 13 included fisheries-related law enforcement activities.[87] Article 298(1)(b) of the Convention would restrict the Tribunal's jurisdiction if these activities took place in areas that

formed part of China's EEZ or in an area in which the parties possessed overlapping entitlements to an EEZ.[88] The premise of the Philippines' submissions was that only the Philippines possessed an entitlement to an EEZ in the relevant areas. If, however, a feature claimed by China within 200 nm of these areas were an "island" in terms of Article 121 of the Convention, capable of generating an entitlement to an EEZ, the resulting overlap and the exclusion of maritime delimitation from the Tribunal's jurisdiction would prevent the Tribunal from addressing these submissions. This view was initially shared by the Philippines during the hearing.[89] The question of whether the activities could have taken place in China's EEZ depended upon a merits determination on the "island" status of the maritime features in the South China Sea. The possible jurisdictional objection with respect to China's fisheries-related law enforcement activities therefore did not possess an exclusively preliminary character and the decision on the Tribunal's jurisdiction with respect to Submissions No 8 and 9 was reserved for consideration in conjunction with the merits of the Philippines' claims.[90]

In contrast, objections concerning the scope of application of the "law enforcement activities" exception in Article 298(1)(b) of the Convention (i.e. whether the law enforcement activities relate to marine scientific research or a coastal State's sovereign rights with respect to living, rather than non-living resources, or whether they relate to other conduct) and its actual application to a specific situation (i.e. whether the fisheries or marine scientific research related law enforcement activities took place within the established EEZ or on the continental shelf of the coastal State, rather than in its territorial sea or on the high seas) can be decided at the preliminary objections stage of the proceedings.[91] This is confirmed by the Tribunal's decision on Submissions No 10 and 13 that, "to the extent that the [activities of China's law enforcement vessels] occurred within the territorial sea of Scarborough Shoal, the Tribunal […] has jurisdiction."[92]The Tribunal should, however, have gone one step further and should have ruled unconditionally on its jurisdiction. The Tribunal's Rules of Procedure do not know of "conditional findings of jurisdiction" or "continent findings of jurisdiction." Unless it had determined that the objection based on the law enforcement activities exception "does not possess an exclusively preliminary character," the Tribunal should have decided its jurisdiction on the basis of the Philippines' claim that "the conduct at issue was carried out in the territorial sea by law enforcement vessels."[93] At the preliminary objections stage of the proceedings, the Tribunal must not attempt to examine the claim itself in any detail, but must only be satisfied that the claim, as stated by the applicant when initiating the arbitration, is within its jurisdictional mandate.[94]

China objected to the Tribunal exercising jurisdiction on the ground that the subject-matter of the arbitration was, in essence, "the extent of China's territorial sovereignty in the South China Sea" and that territorial sovereignty disputes were not "disputes concerning the interpretation or application of this Convention."[95] The Tribunal ruled that "objections to jurisdiction […] concerning the characterization of the dispute," i.e., whether the dispute concerns the interpretation or application of the Convention or whether it concerns matters beyond the Convention,

was "exclusively preliminary in nature."[96] Consequently, it decided with regard to each of the Philippines' first 14 submissions that this "is not a dispute concerning sovereignty."[97] The existence and nature of a dispute are generally questions that can be approached as preliminary issues in proceedings. If this is correct, one wonders why the Tribunal did not decide the question of whether the Philippines' claim in Submission No 10 to "traditional fishing rights" of Filipino fishermen in the territorial sea of Scarborough Shoal constituted a "dispute concerning the interpretation or application of the Convention." In a letter sent to the Philippines after the end of the preliminary objection stage the Tribunal enquired about "the source, *within the Convention*, of any legal duty not to interfere with traditional fishing rights."[98] The Philippines referred the Tribunal to Article 2(3) of the UNCLOS which provides that the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."[99] According to the Philippines, "other rules of international law" also encompass the obligation to respect fishing rights arising from commitments by the coastal State bilaterally or even unilaterally, as well as commitments based upon customary international law. In the *Chagos MPA Arbitration*, the Tribunal examined under the heading "Jurisdiction over Mauritius' Claim relating to Access to Fish Stocks in the Territorial Sea"[100] whether fishing rights claimed by Mauritius in the territorial sea of the Chagos Archipelago were "relevant to the application of Article 2" of the Convention.[101] The Tribunal held that the phrase "other rules of international law" in Article 2(3) refers only to "the general rules of international law" such as abuse of rights and the law of State responsibility. It does not refer to "particular rights in the territorial sea by virtue of bilateral agreements or local custom."[102] Consequently, the Tribunal in the *Chagos MPA Arbitration* ruled that it had no jurisdiction to rule on the violation of an obligation to respect fishing rights in the territorial sea. The Tribunal in the *SCS Arbitration*, on the other hand, ruled that "to the extent that the claimed [fishing] rights and alleged interference occurred within the territorial sea of Scarborough Shoal, the Tribunal […] has jurisdiction to address the matters raised in the Philippines' Submission No. 10."[103] Even if the Tribunal had wanted to deviate from the ruling of the Tribunal in the *Chagos MPA Arbitration* it should have decide at the preliminary objection stage the question of whether a dispute concerning respect for traditional fishing rights in the territorial sea of Scarborough Shoal constituted a "dispute concerning the interpretation or application of this Convention."

Contrary to the ICJ's consistent jurisprudence that an objection that third States may be "affected" by the Court's decision does not possess an exclusively preliminary character,[104] the Tribunal in the *SCS Arbitration* ruled at the preliminary objection stage of the proceedings that there was "no indispensable third party whose absence deprives the Tribunal of jurisdiction."[105] Vietnam, like China, claims sovereignty over the "Truong Sa (Spratlys) archipelago" as a whole, including all islands, parts of islands, interconnecting water and other natural features closely related.[106] Any decision that certain maritime features in the Spratly Islands "are part of the exclusive economic zone and continental shelf of the Philippines" logically excludes that they are part of the Truong Sa (Spratlys) archipelago which Vietnam claims as its

sovereign territory. A maritime feature can either be "part of" the EEZ and continental shelf of a State or it can be under the territorial sovereignty of another State—it cannot be both. Vietnam's alleged right of sovereignty over the Truong Sa (Spratlys) archipelago, in general, and the relevant individual maritime features, in particular, is not only affected by a decision in the present case, but forms the very subject-matter of the decision. Similarly, any determination that certain maritime features "are not features that are capable of appropriation by occupation or otherwise" prejudges and prejudices Vietnam's claim to sovereignty over these features. Vietnam's statement that it "has no doubt that the Tribunal has jurisdiction in these proceedings"[107] does not absolve the Tribunal from ruling on possible preliminary objections. The obligation set out in Article 9 of Annex VII to UNCLOS that the Tribunal must "satisfy itself […] that it has jurisdiction over the dispute" is an objective obligation, not dependent upon the views—legal or political—of either the applicant or any third State. In order to determine how its Award would affect the rights and interests of Vietnam, the Tribunal Court should of necessity have dealt with the merits of the Philippines' claims. Following the practice of the ICJ, the Tribunal should therefore have concluded that the possible jurisdictional objections with respect to the dispute underlying Submissions No. 4 and 5 do not possess an exclusively preliminary character.

Besides the preliminary objections concerning the exclusion from its jurisdiction of disputes concerning certain law enforcement activities and maritime delimitation, the Tribunal considered two more objections not to possess an exclusively preliminary character. First, the objection based on Article 298(1)(a)(i) of the Convention which excludes disputes "involving historic bays and titles" from the jurisdiction of the Tribunal. The Tribunal considered that the Philippines' claims in Submissions No 1 and 2 reflected a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention.[108] The Tribunal's jurisdiction was dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The Tribunal therefore concluded:

> The nature and validity of any historic rights claimed by China is a merits determination. The possible jurisdictional objections with respect to the dispute underlying Submission No. 1 [and 2] therefore do not possess an exclusively preliminary character. *Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 1 [and 2] for consideration in conjunction with the merits of the Philippines' claims.*[109]

The exception to jurisdiction in Article 298(1)(a)(i) was thus—in the words of the ICJ—"inextricably interwoven" with the merits.

Second, the Tribunal considered the objection based on Article 298(1)(b) of the Convention, which excludes "disputes concerning military activities" from the jurisdiction of the Tribunal, not to possess an exclusively preliminary character. In its Submissions No. 12 and 14 the Philippines requested the Tribunal to rule on the legality of certain Chinese activities at Mischief Reef and Second Thomas Shoal, two maritime features in the Spratly Islands. If the Tribunal were to find that China's

construction activities at Mischief Reef and its activities with regard to the Philippine naval personnel stationed at Second Thomas Shoal were military in nature, the disputes would be excluded from its jurisdiction. Without providing any reasoning, the Tribunal asserted that the "nature of such activities, however, is a merits determination that the Tribunal cannot make at this point in the proceedings."[110] It further stated:

> The Tribunal considers that the specifics of China's activities on Mischief Reef [in and around Second Thomas Shoal] and whether such activities are military in nature to be a matter best assessed in conjunction with the merits. The possible jurisdictional objections with respect to the dispute underlying Submission No. 12 [No. 14] therefore do not possess an exclusively preliminary character. *Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 12 [No. 14] for consideration in conjunction with the merits of the Philippines' claims.*[111]

The statement that the military nature is "a matter *best assessed* in conjunction with the merits" gives the impression that it is left to the Tribunal's discretion whether to address the question of the military nature of the activities as a preliminary matter or defer the question for consideration with the merits. This, however, is not in line with the strict approach laid down in Article 20(3) of the Rules of Procedure which allows the Tribunal to join a matter to the merits only if it does not possess an exclusively preliminary character. The military nature of activities can be determined as a preliminary matter in the same way as the question of whether an activity constitutes "law enforcement activity" related to marine scientific research or fisheries, and where that activity took place.[112] The question of the nature of an activity is independent of its legality—only the latter forms the dispute and is a question for the merits. This leaves the second alternative in the jurisprudence of the ICJ for joining a preliminary objection to the merits, namely that the Tribunal does not have before it all facts necessary to decide the question. There is no indication in the Award that the Tribunal was lacking information on the Chinese activities or that it could obtain further information at the merits stage. During the hearing on July 10, 2015, the Tribunal put six questions to the Philippines asking it, inter alia, to elaborate on the nature and purpose of the Chinese activities at Mischief Reef.[113] In its response the Philippines indicated that "it had presented in its Memorial all the information available to it concerning the construction and operation of the Chinese facilities at Mischief Reef."[114]As the Tribunal was unlikely to receive any further information on the nature of the Chinese activities it should have decided on the objection based on the military activities exception in Article 298(1)(b) of the Convention at the preliminary stage of the proceedings.

V. Conclusion

The Tribunal in the *SCS Arbitration* largely followed in the footsteps of the ICJ when dealing with preliminary objections to its jurisdiction and the admissibility of the Philippines' claims. There are, however, three notable exceptions. First, the ruling

on whether Vietnam was an indispensable third party as a question possessing an exclusively preliminary character; second the ruling that the objection based on Article 298(1)(b), which excludes military activities from the jurisdiction of the Tribunal, does not possess an exclusively preliminary character; and third, the omission to rule at all during the preliminary objection stage on the question of whether a dispute concerning respect for traditional fishing rights in the territorial sea of Scarborough Shoal constituted a "dispute concerning the interpretation or application of this Convention."

The institution of preliminary objections is an expression of the principle that in inter-State litigation jurisdiction flows from the consent of States. No State may be brought before an international court or tribunal unless it has consented thereto. A State raising preliminary objections to the jurisdiction of a court or tribunal is therefore entitled, as a rule, to have these objections answered at the preliminary stage. The institution also serves the good administration of justice by providing an efficient and economic process for addressing the disputes between the parties. In a case where the respondent State has chosen not to participate in the proceedings because it considers the Tribunal to be without jurisdiction and the claims inadmissible it is of the utmost importance for the credibility of the Tribunal and its Awards that it has scrupulously applied the "exclusively preliminary character" test and has decided all matters at the preliminary objection stage that can properly be decided at that stage. The Tribunal in the *SCS Arbitration* has not fully lived up to its responsibility in this respect.

Notes

1. The Tribunal was composed of Judge Thomas A. Mensah (Presiding Arbitrator), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, and Judge Rüdiger Wolfrum. The Award and all other case documents referred to are available on two websites provided by the PCA: http://archive.pca-cpa.org/ showpage65f2.html?pag_id=1529 and http://www.pcacases.com/web/view/7, all websites last accessed on 8 June 2016.
2. On the disputes between the Philippines and China and the early procedural history of the arbitration, see Bing Bing Jia and Stefan Talmon, in the same (eds.), *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014), pp. 1–13.
3. See Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, *Arbitration between the Republic of the Philippines and the People's Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015 (hereinafter "*SCS Arbitration*, Award"), paras. 7, 101, 102.
4. Cf. *SCS Arbitration*, Award, paras. 4–6.
5. People's Republic of China ("PRC"), Ministry of Foreign Affairs ("MFA"), "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Philippines," 7 December 2014 (hereinafter "China, Position Paper"), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.
6. See China, Position Paper, paras. 10, 19, 22, 86.
7. See United Nations Convention on the Law of the Sea, 10 December 1982 ("UNCLOS"), 1833 UNTS 397, Article 288(1).
8. See China, Position Paper, paras. 57–59, 64–69, 86.
9. See *ibid.*, paras. 30–56, 86.
10. See *SCS Arbitration*, Award, paras. 15, 68. See also *ibid.*, Procedural Order No. 4, 21 April 2015.

11. See *SCS Arbitration*, Hearing on Jurisdiction and Admissibility (hereinafter "*SCS Arbitration*, Hearing"), Day 1, 7 July 2015, pp. 19–21 (President Mensah).

12. See *SCS Arbitration*, Award, para. 413.

13. *SCS Arbitration*, Procedural Order No. 4, 21 April 2015. The Order is not publicly available but its content has been summarized in the Tribunal's Fourth Press Release, dated 22 April 2015.

14. *SCS Arbitration*, Rules of Procedure, 27 August 2013, Article 20.

15. See *SCS Arbitration*, Award, para. 68.

16. See *SCS Arbitration*, Award, para. 88. See also *ibid.*, Hearing, Day 2, 8 July 2015, p. 148: 2–5.

17. See *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 26: 2–8.

18. See *SCS Arbitration*, Award, para. 387.

19. See *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 148: 6. But see also *ibid.*, Day 1, 7 July 2015, p. 56: 1–3; Day 3, 13 July 2015, 27: 11.14.

20. *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 28:3–4. See also *ibid.*, Award, para 388.

21. See *SCS Arbitration*, Award, para. 389.

22. SCS Arbitration, Hearing, Day 3, 13 July 2015, p. 83: 1–8 (italics added).

23. See above n. 14, and Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)* (hereinafter "*Arctic Sunrise Arbitration*"), Procedural Order No. 2 (Rules of Procedure; Initial Procedural Timetable), 17 March 2014, Article 20(3), http://www.pcacases.com/ web/sendAttach/1318.

24. Arbitral Tribunal constituted pursuant to Article 287 of the United Nations Convention on the Law of the Sea and in accordance with Annex VII thereto, *Arbitration between Guyana and Suriname* (hereinafter "*Guyana v. Suriname*"), Rules of Procedure, 30 July 2004, http://archive.pca-cpa.org/ROP%20Final%20300704%20(imported)1a7d.pdf?fil_id=683.

25. Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter "*Chagos MPA Arbitration*"), Rules of Procedure, 29 March 2012, http://www.pca-cases.com/web/sendAttach/1567.

26. *Chagos MPA Arbitration*, Procedural Order No. 2, 15 January 2013, Application to Bifurcate Proceedings. See also *ibid.*, Award of 18 March 2015, paras. 31, 160–386, http://www.pca-cpa.org/showpagea579.html?pag_id=1429.

27. *Guyana v. Suriname*, Order No. 2, 18 July 2005, Preliminary Objections, para. 2. The Tribunal did not have to decide on Suriname's preliminary objections; see *ibid.*, Award of 17 September 2007, paras. 279–280, http://archive.pca-cpa.org/Guyana-Suriname%20Award70f6.pdf?fil_id=664.

28. Arbitral tribunals have occasionally dealt with the question of whether objections do not possess an exclusively preliminary character but little guidance can be derived from these decisions; see, e.g., Arbitration before a Tribunal constituted in accordance with Article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976, *Yukos Universal Limited (Ilse of Man) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 583–586, 601(b), http://www.pca-cpa.org/showpage8d50.html?pag_id=1599; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 14 March 1978, Reports of International Arbitral Awards, vol. XVIII (2006), pp. 271, 290–291, para. 16.

29. ICJ, Rules of Court, adopted on 14 April 1978 and entered into force on 1 July 1978; reproduced in ICJ, *Acts and Documents Concerning the Organization of the Court*, No. 6 (2007), p. 141.

30. Rules of the ITLOS, adopted on 28 October 1997, and amended on 15 March and 21 September 2001, and on 17 March 2009, ITLOS/8, 17 March 2009.

31. See, e.g., *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment, ICJ Reports 1957, pp. 125, 149–152; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 44–46. On the ICJ's treatment of the question, see the separate opinion of Judge Cançado Trindade in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, paras. 12–22, http://www.icj-cij.org/docket/files/153/18750.pdf.

32. *SCS Arbitration*, Award, para. 382.

33. ICJ, Rules of Court, adopted on 6 May 1946, Art. 67(5); reproduced in Shabtai Rosenne (ed.), *Documents on the International Court of Justice*, 2d ed. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979), p. 175.

34. See Christian Tomuschat, "Article 36," in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2d ed. (Oxford: Oxford University Press, 2012), p. 706, MN 136.

35. See *The Panevezys-Saldutiskis Railway case*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 53, 56.

36. For references, see Stefan Talmon, "Article 43," in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2d ed. (Oxford: Oxford University Press, 2012), p. 1167, MN 195. The following passage draws in apart on the author's commentary on Article 43.

37. On the change to the Rules, see Ugo Villani, "Preliminary Objections in the New Rules of the International Court of Justice," *Italian Yearbook of International Law* 1 (1975), pp. 206, 214–219.

38. Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 30, para. 39.

39. See ICJ, Rules of Court, adopted on 6 May 1946, as amended on 10 May 1972, Art. 67(7); reproduced in Rosenne (n. 33), pp. 175, 177.

40. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 31, para. 41.

41. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 115, 133, para. 48.

42. Cf. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, para. 53, http://www.icj-cij.org/docket/files/153/18746.pdf.

43. Cf. Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," *American Journal of International Law* 67 (1973), pp. 1, 16; Hugh Thirlway, "The Law and Procedure of the International Court of Justice, 1960–1989, Part Twelve," *British Year Book of International Law* 72 (2001), pp. 36, 144. See also the declaration of Judge Bennouna in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, http://www.icj-cij.org/docket/files/153/18748.pdf. See further the separate opinion of Judge Owada in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment, 3 February 2015, paras. 2–5, http://www.icj-cij.org/docket/files/118/18426.pdf.

44. Cf. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 43.

45. See Tomuschat (n. 43), pp. 706–707, MN 136; Talmon (n. 36), p. 1168, MN 197.

46. Cf. *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, PCIJ, Series A, No. 6, p. 15.

47. See text at n. 14.

48. *SCS Arbitration*, Rules of Procedure, 27 August 2013, Article 10(1).

49. See *SCS Arbitration*, Award, para. 39. See also *ibid.*, Procedural Orders No. 1, 27 August 2013, and No. 3, 16 December 2014, as summarized in the Tribunal's Third Press Release, 17 December 2014.

50. Cf. Thirlway (n. 43), p. 146 who distinguishes three classes of preliminary objections.

51. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, ICJ Reports 2008, pp. 412, 462, para. 136; p. 463, para. 139; and p. 465, para. 143.

52. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 45. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 30, para. 41.

53. See, e.g., *Delimitation of the Continental Shelf between the United Kingdom of Great*

Britain and Northern Ireland and the French Republic, Award of 14 March 1978, RIAA Vol. XVIII, p. 271 at pp. 290–291, paras. 16–17.

54. See, e.g., *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment, ICJ Reports 1957, pp. 125, 150, 152. See also *Panevezys-Saldutiskis Railway*, PCIJ, Series A/B, No. 76, p. 22.

55. See, e.g., *Guyana v Suriname*, Order No 2 of 18 July 2005, Preliminary Objections, para 2; and *ibid.*, Republic of Suriname, Preliminary Objections, Memorandum, 23 May 2005, para 1.10 and paras 7.1–7.9.

56. See *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, PCIJ, Series A, No. 6, p. 15; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, ICJ Reports 1972, pp. 46, 56; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, pp. 832, 852, para. 51.

57. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, CR 2007/18, 6 June 2007, p. 20, para. 8 (Sir Arthur Watts for Colombia).

58. See text above at n. 43.

59. Contra Thirlway (n. 43), p. 146.

60. See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 46.

61. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 30–31, para. 41.

62. Cf. the declaration of Judge Bennouna in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, http://www.icj-cij.org/docket/files/153/18748.pdf.

63. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan*), Judgment, ICJ Reports 1972, p. 46 at p. 56.

64. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, pp. 392, 421–422, para. 67.

65. *Ibid.*, p. 425, paras. 75 and 76. The ICJ examined the question of whether third States could be affected by the Court's decision at the merits stage of the proceedings and upheld the United States' objection; see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 29–38.

66. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 275, 324–325, paras. 116, 117. The ICJ dealt with Nigeria's objection in its decision on the merits and rejected it; see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, pp. 303, 417–421, 455.

67. Cf. ICJ Rules of Court, Article 79(1) which distinguishes between objections to the jurisdiction of the Court or to the admissibility of the application and "other objections." The objection of mootness of the claim may be regarded as such other objection.

68. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 9, 28–29, para. 50. For similar reasoning in the case against the United States, see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 115, 133–134, para. 49.

69. See *ibid.*, Order of 30 March 1998, ICJ Reports 1998, p. 237 and p. 240, respectively.

70. See *ibid.*, Order of 10 September 2003, ICJ Reports 2003, p. 149 and p. 152, respectively.

71. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, pp. 70, 81, para. 22, the ICJ recorded but did not pronounce on the view of the Russian Federation that its objection to the Court's jurisdiction *ratione loci* did not possess an exclusively preliminary character.

72. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, ICJ Reports 2008, pp. 412, 460, paras. 129, 130 (italics added). The ICJ dealt with the objection in the merits phase and in part rejected it; see

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, paras. 79–119, 525(1), http://www.icj-cij.org/docket/files/118/18422.pdf.

73. Cf. ICJ Rules of Court, Article 79(9) ("in the circumstances of the case").

74. See the separate opinion of Judge Cançado Trindade in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, para. 6. See also Fouad Ammoun, "La jonction des exceptions préliminaires au fond en Droit international public," *Comunicazioni e Studi* 14 (1975), pp. 17, 38.

75. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, pp. 832, 852, para. 51. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, para. 53, http://www.icj-cij.org/docket/files/153/18748.pdf. Prior to the change of the Rules of Court in 1972, the ICJ joined objections to the merits if it was not in full possession of the facts; see *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment, ICJ Reports 1957, pp. 125, 152; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 46.

76. See *SCS Arbitration*, Award, para. 382. See also *ibid.*, paras. 16, 24.

77. See, e.g., Stefan Talmon, "The South China Sea Arbitration: Is There a Case to Answer?," in Stefan Talmon and Bing Bing Jia (eds.), *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014), pp. 15, 25–71, http://dx.doi.org/10.2139/ssrn.2393025.

78. See *SCS Arbitration*, Award, para. 391. See also *ibid.*, paras. 332–352.

79. See *SCS Arbitration*, Award, para. 391. See also *ibid.*, Part V of the Award.

80. See *SCS Arbitration*, Award, para. 126. The Tribunal did not rule on Article 294 of the Convention but the provision expressly provides that an objection based on abuse of legal process shall be dealt with in "preliminary proceedings."

81. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 45.

82. See *SCS Arbitration*, Award, paras. 398–411.

83. *SCS Arbitration*, Award, para. 392.

84. For the text of the Philippines' submissions, see *SCS Arbitration*, Award, para. 101.

85. See *SCS Arbitration*, Award, para. 369. This situation arose only because the Tribunal accepted the Philippines' "assumption" that, for the purposes of the proceedings, China was to be regarded as being sovereign over all insular features in the South China Sea.

86. *SCS Arbitration*, Award, para. 402, 405, 406 (emphasis in original).

87. See *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 84: 16–24; p. 85: 1–4, 22–23; p. 86: 17–22; p. 89: 22–26 and p. 90: 1–3. See also *ibid.*, Award, paras. 173, 371, 405, 406.

88. See *SCS Arbitration*, Award, para 395.

89. See *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 79: 7–17. This position, however, was modified only minutes later; see *ibid.*, Day 2, 8 July 2015, 85: 13–15.

90. See *SCS Arbitration*, Award, para. 406. See also *ibid.*, para 371.

91. See *Arctic Sunrise Arbitration*, Jurisdiction, Award of 26 November 2014, paras. 65–78; *Guyana v. Suriname*, Award of 17 September 2007, *International Legal Materials* 47 (2008), pp. 166, 225–226, paras. 411–416.

92. See *SCS Arbitration*, Award, para. 410.

93. *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 89: 26, and p. 90: 1.

94. Cf. *Amco v. Indonesia*, Decision on Jurisdiction of 25 September 1983, ICSID case No. ARB 8111, ICSID Reports 1 (1993), pp. 389, 405; *Siemens AG v. Argentina*, Decision on Jurisdiction of 3 August 2004, ICSID case No. ARB/02/8, *International Legal Materials* 44 (2005), pp. 137, 167, para. 181

95. See text above at nn. 6, 7.

96. *SCS Arbitration*, Award, para. 391.

97. See *SCS Arbitration*, Award, paras. 398–411.

98. *SCS Arbitration*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, p. 164: 2–6 (italics added). Reference is made to the Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

99. *SCS Arbitration*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, p. 164: 7–11.

100. See *Chagos MPA Arbitration*, Award, heading preceding para. 261.

101. *Chagos MPA Arbitration*, Award, para. 296.

102. *Ibid.*, para. 516.

103. *SCS Arbitration*, Award, para. 407.

104. See above section III.3.

105. *SCS Arbitration*, Award, para. 413.D. See also *ibid.*, paras. 179–188.

106. See Articles 1 and 19 of The Law of the Sea of Vietnam, adopted on 21 June 2012 (entry into force on 1 January 2013), http://vietnamnews.vn/politics-laws/228456/the-law-of-the-sea-of-viet-nam.html.

107. See *SCS Arbitration*, Award, para. 183.

108. See *SCS Arbitration*, Award, para. 164.

109. *SCS Arbitration*, Award, paras. 398, 399. This view was initially shared by the Philippines; see *ibid.*, Day 1, 7 July 2015, p. 55: 20–26, and p. 56: 1–3. But see also *ibid.*, Day 3, 13 July 2015, p. 27: 11–14.

110. See *SCS Arbitration*, Award, para. 396.

111. *SCS Arbitration*, Award, paras. 409, 411.

112. See *Arctic Sunrise Arbitration*, Jurisdiction, Award of 26 November 2014, paras. 65–78.

113. See *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 48: 5–10.

114. *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 48: 16–21.

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Book Review

JTMS publishes short summaries of all books received and complete reviews of selected books. Authors and/or publishers interested in having a summary or review of a territory/maritme-related book appear in our journal should send a complimentary copy to the book review editor. Reviews for other books not appearing on this list may be proposed and written subject to editorial approval. All reviews should be sent the managing editor, Lonnie Edge. jtms@yonsei.ac.kr

The books currently up for review are as follows and suggestions for books to review are always welcomed.

Carcano, Andrea. *The Transformation of Occupied Territory in International Law*. Leiden: Brill Nijhoff, 2015.

Clulow, Adam. *Statecraft and Spectacle in East Asia: Studies in Taiwan-Japan Relations*. London: Routledge, 2011.

Elden, Stuart. *The Birth of Territory*. Chicago: University of Chicago Press, 2013.

Erikson, Andrew S., Lyle Goldstein and Nan Li. *China, the United States, and 21st-century Sea Power: Defining a Maritime Security Partnership*. Annapolis, MD: Naval Institute Press, 2013.

Gutiérrez, Norman A. Martínez. *Limitation of Liability in International Maritime Conventions: The Relationship Between Global Limitation Conventions and Particular Liability Regimes*. New York: Routledge, 2016

Jin-Hyun Paik, Seok-Woo Lee and Kevin Y.L. Tan. *Asian Approaches to International Law and the Legacy of Colonialism: The Law of the Sea, Territorial Disputes, and International Dispute Settlement*. New York: Routledge, 2013.

Kennedy, Greg, and Harsh V. Pant. *Assessing Maritime Power in the Asia-Pacific: The Impact of American Strategic Re-Balance*. Abingdon, Oxon: Routledge, 2016.

Schofield, Clive H., Sokwoo Lee and Moon-Sang Kwon. *The Limits of Maritime Jurisdiction*. Leiden: Martinus Nijhoff, 2014.

Strauss, Michael John. *Territorial Leasing in Diplomacy and International Law*. Leiden: Brill Nijhoff, 2015.

Wilson, Thomas M., and Hastings Donnan. *A Companion to Border Studies*. Hoboken, NJ: Wiley Blackwell, 2012.

A Fruitful Interdisciplinary Dialogue and Its Implications for Maritime and Territorial Disputes

Armstrong, David, Theo Farrell and Hélène Lambert. *International Law and International Relations*, 2d ed. New York: Cambridge University Press, 2012.

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The Revival of Dialogue Between Law and Politics

The viewpoint about the role of international law in understanding international politics has changed following the major events that happened during the twentieth century. The unprecedented tragedy of World War I led liberals to reject the old doctrine of balance of power and believe the binding power of international law and its pacifying effects. After Nazi Germany emerged from the ashes of the previous collision and another major war destroyed the entire world again, a group of realists made a fierce rebuttal against liberalists' "illusion" and advocated the need for realism, which brought back the relevance of international power politics in order to secure a stable world order. This approach, which holds a skeptical view of international law, had largely dominated International Relations (IR) academia as to how international politics during the Cold War era, an era in which two superpowers' confrontation often left little room for international legal rules, should be taught. However, in the wake of the collapse of Soviet Union, which gave rise to the advent of a new world order, the world observed an increasingly "legalized" order in international politics. It meant that international law once again came to play a larger role in the interactions among states. Reflecting this new circumstance, scholars in the two disciplines of International Law (IL) and IR have begun to develop academic collaboration from interdisciplinary perspectives. In the age of legalized world, academia now turns to take interdisciplinary collaborations more seriously.

A Productive Engagement in Interdisciplinary Studies of International Law

Initial efforts of interdisciplinary studies of international law and politics centered on exploring agendas for research and the ways in which scholars in IR and IL bridge the gap between the goals and methods of their own field.[1] Today academic attentions have been paid to applying theoretical and empirical insights, which IR and IL scholars obtained from each discipline to specific issues of international law and politics. Among recent publications made by these attentions, a book written by two prominent IR scholars and one IL leading scholar called *International Law and International Relations* shows a preeminent example of how to conduct interdisciplinary research rigorously and fascinatingly. The most eye-catching contributions of this book are the authors' conscious endeavors to establish theoretical frameworks for interdisciplinary studies on IL on the basis of paradigmatic reasoning and their balanced assessment on the usefulness of these frameworks**.** Although this book's theoretical and empirical base could be largely strengthened if it accepted the insights of classical realism and interpreted empirical evidence more thoroughly, it still suggests several implications contributing to our understanding of maritime and territorial disputes, which are the most illustrative manifestations of intricate nexus between international politics and international law.

Though the authors bring new insights to a changing world order, suggesting the relative decline in U.S. dominance in the past two decades, and expansively introduce the concept of English School and international society for this updated edition, the primary objective and structure of the book remain the same. The authors' aims are to introduce major perspectives on how each discipline understands international law and international relations to students of IR and IL scholarship, derive theoretical lenses from mainstream theories of IR and IL, and apply those lenses to substantive legal reality in world affairs. The book's structure is also well-organized around these themes.

In Part I, the authors address the nature and the evolution of international law and offer three cross-disciplinary explanations of international law. Specifically, Chapter 1 introduces counter arguing/opposing theories on the relevance of international law in international politics and the definition and characteristics of the societal context in which international

politics operate, namely international society. After discussing various theories on the nature of international law, Chapter 2 traces the evolution of international law in a chronological order: how the basic aspects of international law emerged in ancient times, how the development of international law was made by the interactions among various actors in Europe and Islamic world in the Middle Ages, how the fundamental components of modern international law, such as sovereign state and state consent, developed from the emergence of modern state system to two world wars to a globalized contemporary era.

Chapter 3, which is arguably the most noteworthy section of this book, lays out three theoretical approaches for interdisciplinary studies on IR and IL. What makes not only this chapter but also the entire book distinctive is that contrary to other major interdisciplinary studies which pay less attention to develop analytical frameworks, the authors make considerable efforts to build diverse and coherent theoretical "tools" for analyzing concrete issues of international law by drawing on major theories of IR and IL.[2] Specifically, they present each perspective by matching IR realism to IL positivism, IR liberal theory to IL legal process theory, and applying constructivist IR theory to legal studies. It seems to some readers that revealing compatibilities between IR realism and IL positivism is rather preposterous because both perspectives are commonly referred as "natural opposites," as the authors point out (p. 76). However, the authors' careful examination unveils hidden common assumptions shared by both approaches, such as the emphasis on scientific study of the social world or the absence of moral consideration and state-centric structural approaches. Likewise, common principles among IR liberalism and IL legal process theorists are distilled, such as agency-based, value-laden approaches which consider international law as having a broader range of functions than IR realist and IL positivist understanding. Lastly, the authors established a constructivist interdisciplinary lens, which emphasizes the impacts of norms and offers an ideational concept of structure as well as its constitutive effects. Before closing this chapter, what readers should keep in mind is that the authors' primary aim is to build diverse theoretical tools, rather than "to demonstrate the superiority of any particular lens" (p. 76).

Part II consists of five empirical chapters aiming at testing three interdisciplinary lenses. The authors apply three lenses to answering three questions in the major issue areas of international law: how are the contents of international law determined? Which variables do national states that are always reluctant to give up soverignty take into consideration, when they decide to comply with international law? And what are the factors leading to changes in the salient issue areas of international law? In the following chapters, the law on use of force, international human rights law, international criminal law, international trade law, and international environmental law are analyzed through these lenses. Throughout these chapters, the authors outline the major contents of legal rules in each issue area, and address the role of state consent, liberal values, and social course in explaining states' compliance with international law, and assess the validity of three lenses in understanding the changes in legal rules in the major areas of international law.

Chapter 9 of Part III, summarizes key findings of previous chapters and predicts the role of international law in the current changing world order from "unipolar" to "multipolar" order. The demise of Soviet Union created a unique international order in which only one dominant superpower exists. However, in the past few years, the world has witnessed a remarkable shift in world order: U.S. dominant power has started to decline, and other newly emerging powerhouse has come forward. Therefore, the central question about the future of international law should be answered: how will the world order evolve? To what extent could we expect the role of international law to change in the evolving international order? To answer these questions, the authors add three possible scenarios in this chapter. The first scenario expects a more anarchical order in which international law will become more obsolete under the struggle for power between the U.S and emerging great powers such as China and Russia. The second case predicts a turn toward a more traditional perspective, especially in terms of state sovereignty and international law. Underpinning this shift is China's emphasis on the significance of its own state sovereignty and non-interventionism. The third sce-

nario makes a more optimistic prediction: the world continuously would accept the increasing importance of international law in the peaceful settlement of conflicting interests and international disputes as major powers will accommodate this pacifying impacts of international law. The authors conclude that although realist' emphasis on power consideration will never disappear, overt power competition with complete disregard for international law is extremely unlikely; therefore, liberal and constructivist lenses suggest more convincing prediction about the future of international order. Even under the current unipolar order, all major powers promote liberal values to a different but increasing degree and emphasize the importance of international legal regime on securing shared interests. The authors lastly assert that a sort of new "Great Power Concert" model might emerge in which international law is an integral part of its operation.

Taking "Isms" Seriously

As mentioned above, what makes this book distinctive is its conscious emphasis on building theoretical tools for interdisciplinary research, based on mainstream theories of international relations. Three "isms"—realism, liberalism, constructivism—act as foundations of each lens, combining with corresponding legal theories. Although there has been a heated debate regarding the relevance of paradigmatic reasoning in understanding international politics, the authors skillfully distil the core principles from each paradigm, and apply it to studying international legal issues in a relatively unbiased way.[3] Indeed, contrary to some criticisms asserting that "ism"-centric thinking might impede a comprehensive interpretation of world politics, the authors' balanced description about the explanatory power of each lens, especially admitting the explanation of realist-positivist lens, offers a more eclectic way of approaching interdisciplinary study between IR and IL. By doing so, furthermore, this book sharply contrasts with the existing literature, which exclusively emphasizes the role of rational institutionalism and constructivism in studying international law and ignores (or even criticizes) the role of realism for cross-disciplinary studies. It examines how each lens offers a better account of the content, compliance, and changes in various issues of international law and assesses the strengths and weaknesses of each perspective. For example, after analyzing the evolution of the international legal rules in various issue areas and the patterns of state compliance and changes in the various international legal regimes, the authors' conclusions follow. In general, realist-positivist approach better explains the origins of the content of international legal issues: In the specific areas of international law, the consent of states is usually the most influential driving factor of international law making. On the other hand, liberal and constructivist lenses have better explanations of why states comply with international law and what causes the changes in international legal rules. Non-state actors like NGOs and international organizations, and even lawyers, which are driven by liberal values, frequently lead states to comply with international legal rules and to also internalize norms and social learning, which are the main explanatory variables of constructivism and powerful factors resulting in the changes in international law. By doing so, this book presents how scholars coherently analyze the complex issues of international law through utilizing the "mind maps" of IR theories and avoid the pitfalls of being obsessed with a certain theoretical perspective on the real world.

Some Critical Evaluations

Notwithstanding the fruitful progress this book makes, there are several theoretical and methodological choices on which critics may cast doubts; specifically, the ways in which this

book characterize realist-positivist lens and emphasize state consent as supporting evidence for realist theory might be problematic.

Distilling common principles from IR theories and legal theories is of essential importance because not only does it establish foundations for each interdisciplinary lens but also create basic criteria for differentiating them. Therefore, each common principle should contain essential elements, which make each theoretical lens distinctive, thus making different expectations and hypotheses.

The authors present a realist-positivist lens for interdisciplinary research based on core principles. They argue that both realism and legal positivism "are committed to the scientific study" and "purged moral considerations from their respective theories." (p. 83). These statements might imply that other theories embrace moral aspects into their perspectives. But especially in mainstream IR theories, liberal theory (both institutionalist variant and domestic variant) and constructivist theory also aim at studying international politics in a scientific fashion. Their purpose is to make causal inference with regard to political phenomena at international level, not to theorize how international actors should behave in order to make the real world more progressive. Labeling both realism and legal positivism as the sole "scientific" theories may unnecessarily give rise to a misunderstanding, which would consider liberal and constructivist theory as "normative" ones.

Furthermore, the authors put their emphasis on structural approach as one of the shared themes that constitute realist-positivist theory. However, it may be an unproductive choice for two reasons. For starters, most scholars argue that the "hard core" assumptions of realist theory do not contain a structural approach. Power consideration and pessimistic world-view, for instance, are commonly pointed out by realist theorists as basic assumptions of realism, but none of them centers on structural approach.[4] This is partly because not all realist theories take structure seriously; only after Waltz's declaration of the need to develop "system theories" did realism start to value the theoretical and empirical merits of the structural way of theorizing. However, prior to structural variants of realism, classical realists theorized balance of power not in a purely structural way but also emphasized the role of prudent, well-guided statecraft in making balance of power functional. Contrary to structural realism contending the recurrent formation of balance of power regardless of state behavior, therefore, classical realism is not a structural approach. Therefore, presenting realist-positivist interdisciplinary lens as a structural theory may unnecessarily run the risk of excluding the insights of classical realism.

Moreover, focusing on "structure" may introduce the ideas of structural realism, which often present too pessimistic a view on international relations to make propositions appropriate for interdisciplinary studies on international law. Indeed, contemporary structural realist theorists have no reluctance to assert that there is little room for international law in regulating the interactions among states.[5] As some observers point out, "the structural realist stance makes a nice conceptual contrast—a null hypothesis backdrop—for arguments about how international law does matter."[6] Therefore, it might be more fruitful for researchers to apply classical realism to generate realist-positivist interdisciplinary lens in order to study international politics-international law nexus. Indeed, the authors' argument that "two concepts of structure—the balance of power and rules of international law—provided the one area of common conceptual ground where realists and positivists did meet in the past" (p. 86) implies that classical realists and legal positivists do share many theoretical elements, such as the emphasis on balance of power, the intertwined nature of international politics and international law, despite that classical realists often think of the term "balance of power" not from a purely structural perspective. For example, John H. Herz, a notable classical realist who invented the concept of security dilemma, a core concept of realist analysis on conflictual nature of international politics, placed a moderate, but still meaningful emphasis on international law in understanding world politics. He even shares many traits with the New Haven School, as both of them stress a progressive international legal order and do not exclude the impacts of values and normative principles.[7] Even E. H. Carr, who makes a fierce denunciation of post-war idealism, claims that "no community could survive if most of its members were

law-abiding only through an ever-present fear of punishment." Accordingly, the realist view of law, which contends that the authority of law originates from coercion, has only "a part of the truth."[8] Therefore, the insights of classical realism may be a more solid foundation for realist-positivist interdisciplinary lens to generate testable propositions for substantial areas of international law.

Another issue is the way in which this book interprets state consent as empirical evidence. Throughout this book, the authors consider state consent as supporting evidence for the realist lens. For example, when evaluating the usefulness of the three perspectives, the authors claim that the fact that international human rights law mostly consists of treaty law indicates the significant role of state consent, which is consistent with realist lens' prediction (p. 185). They also assert that "international law is reduced to which states have consented," according to "a unified realist lens." (p. 306). Because the core tenets of the realist lens are its state-centric view and emphasis on state consent, when analysis reveals that state consent is a powerful determinant of the contents and changes of international law and state compliance, it should be taken as confirming evidence for the realist lens. Therefore, the way in which the authors interpret state consent is of great importance because the authors tend to focus on what level of actors (namely, state or non-state actors) influence how international law works.

However, what researchers want to figure out may be the *underlying* motives behind state behavior. To put it differently, "why do states act in such a way?" is a question researchers want to find answers to, rather than "do states consent or refuse?" because the former is a more suitable question to evaluate the usefulness of each perspective. Although liberalism and constructivism highlight the role of non-state actors, they center on non-state actors in their analysis on the causes of "state behavior." Liberalists argue that the negotiations among domestic actors and institutional structure matter in determining state behavior. Constructivists contend that states' national interests emerge from their national identity and internalized norms, thus arguing that ideational factors drive state behavior. Realists, assuming national interests are given as seeking security, argue that the distribution of material capabilities shape the parameter of state actions and thus influence how states behave because all theoretical lenses offer different explanations of the causes of state consent, highlighting only state consent cannot eliminate alternative accounts in order to support a certain theory, thus cannot make a decisive evidence for assessing the validity of each. In other words, even if a state presents a formal consent to create a certain international legal rule and comply with it, it can also be explained by liberal and constructivist lens: such consent may represent the preferences of dominant domestic actors, or indicate the outcome of elite learning and norm socialization. Indeed, the authors even argue that when gauging to what extent social processes lead the changes in international criminal law, the breadth of state consent for treaties on international crimes shows the results of elite learning, which is one of the central mechanisms of constructivist theory (p. 231). In sum, a more cautionary approach should be needed when interpreting states' formal consent to evaluate which theory makes the most compelling case.

Implications for Analyzing Maritime and Territorial Disputes

Arguably, the most dangerous flashpoint that could trigger another catastrophic great power conflict is the South China Sea where a series of maritime and territorial disputes among states are in existence. What makes the territorial disputes in the South China Sea dangerous is that two great powers, including the U.S., which still maintains the most powerful military force in the world, and China, whose military (especially naval) capabilities have been continuously augmented at a surprising rate, are involved with the maritime and territorial disputes. Although the former is not a state directly involved in the disputes, it has

strongly chastized Chinese' assertive behaviors in the region and guaranteed the security of other regional states which claims their rights over disputed territories such as the Spratly Islands and the Paracel Islands. The parties that are directly concerned to the disputes, including China and ASEAN (Association of Southeast Asian Nations) states, claim their sovereignty over the regions and the rights to use national resources in their exclusive economic zone, deploy military forces and assets, and criticize the opposite parties as hampering peaceful settlement of the disputes in the South China Sea.

This book has several implications for maritime and territorial disputes, including the ones in the South China Sea. Specifically, three theoretical lenses for studying international law offered by this book can be useful analytical tools for understanding the complexity of contemporary international politics in general and the South China Sea disputes in particular. Currently, international politics and international law are closely interconnected in the disputes in the South China Sea, thus making understanding and settling the disputes more complicated. The relevant parties not only utilize diplomatic strategies for peaceful resolution, but also appeal to international legal rules, especially the Law of the Sea, to legitimize their territorial and maritime claims conflicting with each other. The Philippines' recent action to file an arbitration case against China before the Permanent Court of Arbitration (PCA) is an illustrative example to indicate how a state uses international law to pursue its national interest and gain legitimacy of its claim before the international audience. Up to date, China has preferred bilateral negotiations with each opposite party, including Vietnam and the Philippines, to take advantage of its superior bargaining power. To resist Chinese bilateral strategy, ASEAN states has preferred multilateral negotiation to bilateral diplomacy for compensating their weaknesses in bargaining power. Now the Philippines has introduced a new strategic tool for confronting Chinese efforts by claiming a legal arbitration to invalidate Chinese territorial claim.

Several questions regarding international relations and international law thus arise from the Philippines' strategic choice. Under which conditions do states appeal to international law to legitimize their claim and thus undermine the opposite party's legitimacy and reputation? What kind of costs do these "legal strategies" for statecraft impose on states? Can international legal mechanisms, including arbitration, peacefully settle the disputes in the South China Sea? From the Arbitral Tribunal's decision that it had jurisdiction over the case, another set of questions can be raised: will the final decision the tribunal will make, promote fairness and provide incentives to induce states to comply with its decision? What are the factors that impact the tribunal's interpretation of controversial legal rules and contested claims?

All three lenses formulated by this book could offer convincing explanations for answering these questions. For the realist-positivist lens, the possibility that China would admit the result in favor of the Philippines' claim is relatively low because it declared to exclude compulsory dispute settlement procedure in 2006, thus not giving any consent for accepting the arbitration results to settle the disputes. Furthermore, in perceiving the disputes as the problem of sovereignty, which is one of the core national interests, China is likely to further its claim and attempt to negate the arbitration results by using its superior material power. Hence the distribution of power may ultimately shape the parameters of possible outcomes, although the Filipino strategy of using international law may inflict reputational costs on China and compromise the legitimacy of its claims, hence the distribution of power may ultimately shape the parameter of the probable outcomes. It may even support the ideas of classical realism which admit the limited role of international law but reject its power as a "last resort" for dispute settlement. Weaker powers continue to appeal to international law, and it could affect strong powers' courses of action and even change to a limited extent, but political negotiations and prudent diplomacy will determine the final outcomes in the long run.

For the liberal lens, the reason the court ruled that it had jurisdiction over the case might be the court's willingness to promote the value of "the rule of law" and world peace

by peaceful resolution of the conflicts with legal measures. Considering that even the court's decision may not fundamentally solve the disputes in the South China Sea, the decision would probably mark a clear shift, and the liberalist argument that focuses on the role of individuals and groups in domestic and transnational community gains an empirical support. Furthermore, the possibility that the arbitral tribunal will arrive at a final decision in favor of the Philippines exists. This is because Chinese non-appearance before the Court may lead the judges to conclude that China's non-appearance may hamper the rule of law in international relations, thus leading to unfavorable decisions.[9] In this case, the liberal lens, which centers on promoting liberal values as a function of international law comes to find confirming evidence.

Last but not least, the constructivist lens also has much to offer in terms of the impact of ideational variables and non-material structure. Although Chinese denial of arbitration may present that the degree of norm congruence and elite learning is low in the case of Chinese foreign policy elite circle, the fact that China has explicitly utilized a certain interpretation of international legal rules and made diplomatic narratives based on international law in stating its territorial claims may also show that even elites in an authoritarian state like China internalize the legitimacy and the role of international law to a considerable degree.

Finally, because commentators often point out that the U.S. should ratify the United Nations Convention on the Law of the Sea (UNCLOS), and even China has condemned the U.S. as not acting impartially as the U.S. has not ratified the Convention but argued that Chinese claim does not accord with the Law of the Sea, even a casual observer would raise significant questions in relation to international law in the current international order: why has the U.S. still not ratified the Convention despite increasing pressures at domestic and international level? Does U.S. ratification of the Convention have a clear impact on the current disputes in the South China Sea? The Realist lens might assert that as a leading superpower, the U.S. has tried to maximize its leverage based on its superior bargaining power by not being bound by international law of the sea. The Liberalist lens may suffer from an anomaly that although the Law of the Sea clearly contains one of the core values of international community, namely freedom of navigation promoting free trade and world peace, the U.S., a world-leading democratic great power, which designed most institutional aspects of the current international order, has not yet ratified the Convention. Lastly, constructivists may argue that U.S. narratives, which continuously depend on legal discourse in countering Chinese arguments and growing international and domestic pressures to the U.S. to ratify the Convention. This shows that even the most preponderant power in the world cannot solely depend on its material supremacy and cannot but help to accept the normative, persuasive power of international law. Therefore, the ratification of the Convention might be only a matter of time as norm internalization is becoming more entrenched.

Concluding Remarks

Cross-disciplinary studies on international law have become a burgeoning literature in both IR and IL. It reflects a noteworthy part of international politic life: in the contemporpary world politics, international law is now both a major causal variable in explaining state behavior and a major phenomenon which draws attentions to scholarly investigations from divergent fields. However, a mere accumulation of empirical knowledge cannot lead to a progressive understanding of the world. We need theoretical frameworks for organizing our knowledge about both the political contexts in which international law operates, and the gravity of international law in world affairs. Encouraged by initial efforts for agenda search, interdisciplinary studies on IL now seem to enter a new phase of development. In this sense, *International Law and International Relations* deserves high praise for the progress it presents toward theoretically divergent and empirically inclusive research on international law, and will be considered as one of the remarkable achievements of productive interdisciplinary scholarship.—*Kyung Won, Suh*

Notes

1. See Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* 87–2 (1993), pp. 205–239; Anne-Marie Slaughter, Andrew S. Tulumello and Stephan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92–3 (1998), p. 367–397; Robert O. Keohane, "International Relations and International Law: Two Optics," *Harvard International Law Journal* 38–2 (1997), pp. 487–502.

2. For example, see Beth A. Simmons and Richard H. Steinberg (eds.), *International Law and International Relations* (Cambridge: Cambridge University Press, 2007); Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (New York: Cambridge University Press, 2013).

3. On this debate, see David A. Lake, "Why 'Isms' Are Evil: Theory, Epistemology, and Academic Sects as Impediments to Understanding and Progress," *International Studies Quarterly* 55–2 (2011), pp. 465–80; Henry R. Nau, "No Alternative to 'Isms,'" *International Studies Quarterly* 55–2 (2011), 487–491.

4. For example, see Randall L. Schweller, "New Realist Research on Alliances: Refining, Not Refuting, Waltz's Balancing Proposition," *American Political Science Review* 91–4 (1997), p. 927; Robert G. Gilpin, "The Richness of the Tradition of Political Realism," in Robert O. Keohane (ed.), *Neorealism and Its Critics* (New York: Columbia University Press, 1986), pp. 304–305.

5. See John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19–3 (1994/95), pp. 5–49, for looking at his view on the negligible role of international institutions, which can also be applied to the effects of international law.

6. Richard H. Steinberg and Jonathan M. Zasloff, "Power and International Law," *American Journal of International Law* 100–1 (2006), p. 75.

7. Casper Sylvest, "Realism and International Law: The Challenge of John H. Herz," *International Theory* 2–3 (2010), p. 436.

8. E. H. Carr, *The Twenty Years' Crisis, 1919–1939* (2d ed.) (New York: Harper Perennial, 2001), pp. 178, 176.

9. For the possibility of negative arbitration results led by non-appearance of a dispute party state, see Douglas Guilfoyle and Cameron A. Miles, "Provisional Measures and the MV Arctic Sunrise," *American Journal of International Law* 108–2 (2014), pp. 271–287.

Style Guide

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notes should be brief, used sparingly, and consecutively numbered with subscript Arabic numbers. Please convert all footnotes to endnotes.

Book

1. Robert Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Nuclear Armageddon* (Ithaca, NY: Cornell University Press, 1989), p. 167.

Journal

2. David Karl, "Proliferation Pessimism and Emerging Nuclear Powers," *International Security* 21(3) (1996–97), p. 89.

Website

3. Sangwon Yoon and David Lerman, "Hagel Calls on North Korea to Tone Down Rhetoric," *Bloomberg News*, April 11, 2013, http://www.bloomberg.com/news/2013-04-10/south-korea-braces-for-possible-missile-test-from-north-today.html, accessed January 21, 2014.

Newspaper Article

4. Andrei Lankov, "Stay Cool. Call North Korea's Bluff," *New York Times*, April 9, 2013.

Discursive Note

5. The classic optimist-pessimist debate can be found in Scott Sagan and Kenneth Waltz, *The Spread of Nuclear Weapons: An Enduring Debate*, 3d. ed. (New York: W. W. Norton & Company, 2013). For detailed surveys of the literature more generally, see Peter Lavoy, "The Strategic Consequences of Nuclear Proliferation: A Review Essay," *Security Studies* 4(4) (1995), pp. 695–753; and Francis Gavin, "Politics, History and the Ivory Tower-Policy Gap in the Nuclear Proliferation Debate," *The Journal of Strategic Studies* 35(4) (2012), pp. 573–600.

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Structured Abstract Samples

Article Type: Research Paper I

Purpose—Some scholars imprint an academic discipline by their contribution to the manner in which people think and research, namely, by putting forward novel concepts and insights. The purpose of this paper is to examine the impact of Sumantra Ghoshal's work on the study of subsidiaries and multinational enterprises and organizational formats for foreign operations.

Design, Methodology, Approach—A bibliometric study on Bartlett and Ghoshal's well-known book *Managing Across Borders: The Translational Solution* is performed to assess its impact in international business (IB) research. The entire record of publications in the top leading IB journal, *Journal of International Business Studies* (*JIBS*), is examined.

Findings—Theoretically supported, Ghoshal's work was keenly influenced by his corporate experiences and his constant questioning of the dominant theories and assumptions. The analyses in this paper show the impact of the work on the "transnational solution," namely, on the understanding of multinationals and subsidiaries, thus being one of the most notable contributions for IB research over the past 20 years.

Practical Implications—Useful for graduate students and in writing a literature review, this paper presents an interesting manner to examine a scholar's and a theory's impact on a discipline.

Originality, Value—This paper presents an extensive bibliometric analysis of research published over a time-span of 22 years in international business studies.

Article Type: Research Paper II

Purpose—While many studies on institutional environment have primarily focused on the influence of the host country environment, limited insights have been offered on how the different dimensions of home institutions affect firm internationalization. This paper aims to fill this gap by investigating the effects of regulatory institutions at home.

Design, Methodology, Approach—Using country governance quality to proxy quality of regulatory institutions, this study attempts to reveal how regulatory institutions at home facilitate a multinational enterprise's (MNE's) international expansion and why the influence differs in different country clusters. Using hierarchical linear modeling and cluster analysis, proposed hypotheses were tested with a three-year panel 511 firms from 38 countries.

Finding—The results provide substantial support for authors' hypotheses that MNEs with high governance quality at home are more engaged in internationalization than those with low governance quality at home. Moreover, differences in institutional effect do exist between country clusters.

Practical Implications—This study provides evidence that while country difference exists, governance quality at home can facilitate MNE's expansion into foreign markets. This finding will help managers of any MNEs to consider country-level factors and evaluate the governance quality at home before committing resources into foreign operations.

Originality, Value—Building on the institutional environment literature, this theory and results make original contributions by underscoring how the consideration of regulatory institutions at home can significantly improve understanding of institutional influence on MNEs. The findings have important implications for both international business researchers and managers of MNEs.

JTMS Winter/Spring 2017 Issue Call for Papers

The *Journal of Territorial and Maritime Studies* (*JTMS*) is soliciting submissions for its Winter/Spring 2017 issue. In the interest of increasing submissions for this recently launched publication, *JTMS* is offering authors of articles successfully passing peer review and selected for publication in the Winter/Spring 2017 issue an honorarium of $1000. *JTMS* is an interdisciplinary journal of research on territorial and maritime issues sponsored by the Northeast Asia History Foundation with editorial offices hosted by Yonsei University in South Korea. The journal provides an academic medium for the announcement and dissemination of research results the fields of history, international law, international relations, geography, peace studies, and any other relevant discipline. The journal covers all continental areas across the world, and it discusses any territorial and maritime subjects through the various research methods from different perspectives; moreover, practical studies as well as theoretical works, which contribute to a better understanding of territorial and maritime issues, are encouraged.

Manuscripts should be submitted electronically to *jtms@yonsei.ac.kr*. Manuscripts should follow the *JTMS* style guide available on pages 121–124 and on our website. A length of maximum 9,000 words is preferred for an article, including endnotes, and approximately 2,000 words for a review. Submissions wishing to be considered for the Winter/Spring issue must submit their manuscripts by no later than September 1, 2016. Inquiries may be sent to the email address provided above.

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