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Contents

Managing Editor's Comments

Welcome to Volume 4, No. 2, the Summer/Fall 2017 issue of the *Journal of Territorial and Maritime Studies*. *JTMS* hopes to strengthen interdisciplinary discussions on territorial and maritime issues. In this issue, there are six research articles and two commentary essays. Each of these pieces provides remarkable insights for those who wish to understand current critical topics on land and at sea. This issue is mostly devoted to maritime topics, though two articles deal with territorial disputes.

First, Herbert Aclan Loja's article, "Legal Status of the Airspace Over an Indeterminate Territory: The Case of the Spratly Islands," deals with airspace issues in the South China Sea, a topic which has rarely been explored by scholars. The author applies findings of Arbitral Award on *Eritrea v Yemen* to the Spratly Islands in order to reveal the legal status of the airspace above the islands. This gives reason for a reassessment of the foundation of the claimant states' territorial claims to the Spratly Islands based on ancient or historic title and *res nullius*. The concept "territorial sovereignty indeterminacy" provides readers with the opportunity to reconsider claimant states' rights on disputed territory and its airspace. In addition, Loja advocates for a less adversarial way of pressing for the claims.

Then, Fru Norbert Suh I's article notes that little has been done to investigate the historical origins of international concerns about security on the waterways. Suh I aims to fill this gap by identifying and analyzing the historical foundations in the comparatively little-known Gulf of Guinea (GoG) maritime zone. The article finds that international concerns about maritime security/insecurity have primarily been driven by awareness about the economic and strategic importance of maritime zones, and the ability of actors to transform them into melting pots for international trade, commerce, and other exchanges, which influenced perceptions and feelings of security/insecurity. Suh I concludes by emphasizing the relevance of the past in understanding current security issues and how knowledge about it can improve on the quality of decisions about security.

Peter Murphy's article, "Maritime Disputes as a Test of Communist Party Legitimacy," explores a popular topic from an innovative perspective. China is a key maritime player and the South China Sea issues have been an area of major research interest for scholars. The author examines these common issues with a unique lens. Murphy's research question—to what extent booming territorial and maritime disputes in the South China Sea have contributed to the legitimacy of the Communist Party of China (CPC)—gives readers refreshing opinions about the South China Sea disputes.

Vaibhav P. Birwatkar invites readers to examine the shipping industry's corporate social responsibility and resulting environmental degradation brought on by increased shipping volume in a globalized world. The article "Corporate Social Responsibility: All at Sea" shows that if maritime shipping and the full life cycle of the shipping companies' operation is viewed as a whole, questions of sustainability begin to emerge. It comprehensively explains why shipping companies should be concerned about good public reputation and what issues are highly important in enhancing a good image of shipping industries. This analysis is expected to particularly appeal to those who work in, and research, shipping fields.

Myungsik Ham and Elaine Tolentino's article, "The Use of Force at Home and Abroad Through Diversionary Foreign Policy: The Case of Preah Vihear," concerns a territorial sovereignty issue between two Southeast Asian states: Thailand and Cambodia. The two states have been in conflict over Preah Vihear, an ancient Hindu Temple. The coauthors aim to explain why, and to what extent, domestic political leaders use sovereignty disputes rooted in history. Based on a conceptual framework of "diversionary foreign policy," this article is also concerned about what Thai and Cambodians leaders intended to gain by appealing to public's historical antagonism over a territorial dispute. This article is expected to contribute to Southeast Asia studies in relation to territorial issues.

The final research article is a case study titled "Litigating to Negotiate Access to the Pacific Ocean: A Study of the *Bolivia v. Chile* Case," coauthored by Miriam Cohen and Mareike Klein. This article provides an original perspective on a rarely explored issue: landlocked states' interests under international law. The coauthors' comments on the International Court of Justice's judgment on the preliminary objections in *Bolivia v. Chile* case also highlight Latin America's growing interest on legal mechanisms as means of maritime and territorial disputes.

Last but not least, are the two commentary articles in this issue. Tying in with the Southeast Asia focus of Loja and Ham and Tolentino, Vivian Louis Forbes contributes to *JTMS* with his article "Territorial Sea Limits in the Singapore Strait." Current developments relating to the Singapore Strait have led us to pay more attention to this issue, as shown in bilateral delimitation agreements between Indonesia and Singapore in 2017 and Malaysian application for revision of the judgment of the International Court of Justice (ICJ) regarding the *Pedra Branca/Pulau Batu Puteh* case. Forbes reveals that there still exist two "gaps" in maritime delimitation in Singapore Strait and predicts future negotiations.

The second commentary piece is Stefan Kirchner's essay that allows us to go north. "The Future of the Central Arctic Ocean: Protection Through International Law" examines opportunities and challenges that the Arctic Ocean has been faced with from a legal perspective. Starting from analysis of a "Constitution for the Oceans"—UN Convention on the Law of the Sea—the author examines strengths and weaknesses of current international legal regime applicable to the Arctic Ocean.

Due to page constraints and the large number of submissions for this issue, the book reviews section has been pushed back to the next issue, planned for later this

year. We hope that our readers and contributors understand and look forward to continuing the book reviews in our Winter/Spring 2018 issue.

As always, the editorial team of *JTMS* is grateful to our readers for your concerns and interests. We wish you a joyful journey of exploring territorial and maritime issues with *JTMS*.

Hyun Jung Kim
Managing Editor

Legal Status of the Airspace Over an Indeterminate Territory: The Case of the Spratly Islands

Herbert Aclan Loja

Structured Abstract

Article Type: Research Paper[1]

Purpose—This paper proposes an alternative approach in addressing the legal status of the Spratly Islands and its superjacent airspace.

Design, Methodology, Approach—The paper adopts the conceptual framework of territorial sovereignty indeterminacy first articulated in the case of *Eritrea v. Yemen* (1998) in determining the legal status of the Spratly Islands. Relevant provisions of the 1951 San Francisco Peace Treaty and pertinent United States of America (U.S.) archival records will be examined.

Findings—The proposition that the Spratly Islands may have the status of an indeterminate territory possessed of an indeterminate territorial airspace finds strong support from the terms of Article 2(f) of the San Francisco Peace Treaty and from the behavior of the states parties particularly of the U.S. before, during, and after the conclusion of the treaty.

Practical Implications—The paper invites a reassessment of the foundation of the claimant states' territorial claims to the Spratly Islands based on ancient or historic title and *res nullius*. It advocates for a less adversarial way of pressing for the claims.

Originality, Value—This is the first instance where the concept of indeterminate territory is applied in examining the legal status of the Spratly Islands and its airspace.

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Keywords: Air Defense Identification Zone, airspace,
freedoms of navigation and overflight, indeterminate territory,
San Francisco Peace Treaty, Spratly Islands

Introduction

The People's Republic of China (China) has announced on several occasions that it is keeping open the option to declare an air defense identification zone (ADIZ) in the South China Sea (SCS) which may cover the disputed area of the Spratly Islands.[2] Maritime powers particularly the United States of America (U.S.) and the United Kingdom (UK) have declared that they will continue to exercise their international law right of navigation as well as overflight in the relevant areas of the SCS.[3] While existing literature has dealt with these high seas rights in relation to the Spratly Islands and the SCS, no attempt has been made to look at the legal status under international law of the airspace superjacent the Spratly Islands. Dutton talks of freedom of navigation and overflight in the context of the exclusive economic zone (EEZ) in the SCS including the Spratly Islands.[4] Yang articulates the observance of these freedoms in the SCS and the Spratly Islands in accordance with international law.[5] Roach speaks of the right of overflight in relation to Chinese artificial islands in the Spratly Islands.[6]

This paper takes a different approach by employing the ruling in *Eritrea v. Yemen* and argue that an indeterminate territory, not being *res nullius* or *res communis*, generates its own territorial airspace which, although considered also as indeterminate for being an inseparable part of the subjacent indeterminate territory, is no longer part of the international airspace. Claimant states may consequently subject the territorial airspace of an indeterminate territory to domestic law jurisdiction.

The current disputed status of the Spratly Islands will be explored along this line. Part I of the paper examines the issue of territorial sovereignty indeterminacy under international law and relates it to the question of whether the legal status of the Spratly Islands may be described as one of indeterminacy. Part II then proceeds to consider the legal status of the Spratly Islands as one of indeterminacy. Part III explores the legal status of the airspace above the Spratly Islands and its implications. Part IV looks at the intermediate considerations in view of the indeterminate status of the Spratly Islands and its airspace in the midst of a seemingly intractable territorial dispute. Part V concludes that notwithstanding the indeterminate territorial status of the Spratly Islands, its air column, even if arguably also indeterminate, no longer forms part of the international airspace and can be subjected to the municipal jurisdiction of any claimant state.

The paper will not address which country has a better claim, right or title to the Spratly Islands. Any reference with respect to the basis of the contending claims is done solely for the limited purpose of seeking to establish the status of territorial indeterminacy of the Spratly Islands.

I. Territorial Indeterminacy: Concept in *Eritrea v. Yemen*

The notion of territorial indeterminacy may be said to have been first articulated in the case of *Eritrea v. Yemen*.[7] The arbitral tribunal in this case speaks of two instances where the status of territorial indeterminacy may arise. Indeterminacy may ensue by reason of treaty or as a consequence of the application of the principle of *uti possidetis*.

A. Indeterminacy Arising by Treaty

Sovereign title to a territory may become indeterminate by treaty stipulations when the former sovereign renounces title over a territory to unnamed recipients and the settlement of the question of sovereignty is reserved by the states parties.[8] In the peace settlement following the First World War (World War I), the Allied Powers signed with Turkey the Treaty of Lausanne on July 24, 1923.[9] Article 15 of the treaty explicitly provided for the relinquishment by Turkey of specific islands in the Aegean in favor of Italy.[10] However, Article 16 of the treaty, dealing with the renunciation of rights and title by Turkey with respect to other territories, not only lacked specificity as to the territories subject of the renunciation but also did not provide for the recipients in whose favor the renunciation was made.[11] It merely stipulated that "the future of these territories and islands being settled or to be settled by the parties concerned."

Eritrea and Yemen agreed to arbitrate their dispute over the islands and islets which straddled the Red Sea opposite their respective coasts. They asked the tribunal to *inter alia* make "an award on territorial sovereignty" and to base the ruling on the applicable international law particularly that of historic titles.[12]

Acts of the Colonial Powers in the Inter-war Period. The actuations of colonial powers Italy and Great Britain during the inter-war period, before and after the signing of the Treaty of Lausanne, were crucial to the finding of the status of indeterminacy of the islands. It appeared that the proviso in the treaty placing the islands under indeterminate status was framed in consideration of the Italian territorial ambitions and claims of title by Yemen.[13] But in particular, the arbitral tribunal looked at the 1938 Rome Conversations between Italy and Great Britain which contained the understanding to keep the status of indeterminacy of the islands.[14] It determined such understanding as consistent with the purpose of Article 16 of the treaty.[15] In addition, administrative powers and functions exercised by Italy over some of the islands always came with repeated assurances to the British on preserving the indeterminate status of the islands.[16] During its presence in the area until 1967, the British vigilantly maintained the legal status of indeterminacy of the islands in accordance with the treaty.[17]

The arbitral tribunal interpreted Article 16 of the Treaty of Lausanne to have resulted to a situation where what was previously a sovereign title of Turkey became indeterminate *pro tempore* until title was settled by the concerned parties, "present

(or future) claimants *inter se*."[18] In other words, it "created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties."[19] But no such settlement or attribution of title was subsequently had.

Historic or Ancient Title. The tribunal characterized historic title into two imports. One sense speaks, though not exclusively, of historic bays where a title "has so long been established by common repute that this common knowledge is itself a sufficient title."[20] The other relates to a title "that has been created, or consolidated, by a process of prescription, or by possession so long continued as to have become accepted by the law as title."[21] This latter sense relies in essence on "continuity and the lapse of a period of time."[22]

Eritrea traced its historic title argument through the alleged title of Ethiopia which the latter was said to have inherited from Italy when the Italian colony of Eritrea became federated with Ethiopia in 1952–1953 and subsequently annexed by the latter.[23] When Eritrea became independent in 1993, it allegedly succeeded to the title of Ethiopia over these islands.[24] Moreover, it contended that Article 16 of the Treaty of Lausanne which provided for the future settlement of the islands to the parties concerned transformed the former Turkish islands in the Red Sea into *res nullius* susceptible of acquisition under international law.[25] And through effective occupation, it further bolstered its territorial sovereignty claim.[26]

Yemen asserted that its ancient and historic title over the islands could be traced all the way back to the existence of an entity, *Bilad el-Yemen*, in the 6th Century A.D.[27] This entity supposedly survived and retained its separate identity even when it was incorporated into the Ottoman Empire and an administrative unit known as *vilayet* of Yemen created in its place.[28] Yemen argued that this ancient title never ceased to exist even when Turkey lost World War I in 1918 and as a consequence was made to renounce title to some territories under the Treaty of Lausanne.[29] With Turkey's renunciation of the title over the islands in the Red Sea, it concluded that title over them reverted back to Yemen.[30] Since Yemen was not a party to the treaty, the treaty should be considered as *res inter alios acta* as regards Yemen.[31]

Non-Survival of Historic or Ancient Title. In dispensing with the respective claims of historic or ancient title of Eritrea and Yemen, the arbitral tribunal ruled that these purported titles did not survive the medieval conquests and western colonialism.[32] It recalled the Ottoman and Turkish hegemony and the change in the power relations upon the entry of Italy and Great Britain in the area.[33]

Eritrea's alleged historic title originated when Italy, without the consent of Turkey, entered into agreements with local rulers, began colonizing the African coast, and declared the creation of the colony of Eritrea.[34] Italy was among the victorious Allied Powers which defeated Turkey in World War I, consequently resulting to the signing of the Treaty of Lausanne where Turkey renounced under Article 16 its possessions in the Red Sea area.[35] But Italy was itself stripped of its African possessions when it became one of the losing parties in the aftermath of the Second World War (World War II).[36] Article 43 of the 1947 Treaty of Peace with Italy contained another renunciation, general in nature, where Italy renounced whatever rights and claims it had under Article 16 of the Treaty of Lausanne.[37] But during the inter-war period,

Italy and Great Britain maintained the status of indeterminacy of the islands.[38] As previously mentioned Eritrea became part of a federation with and then annexed by Ethiopia. After a long civil war, it gained its independence in 1993. Its so-called "chain of titles" was, according to the tribunal, not definitive and continuous.[39]

With respect to the ancient title claim of Yemen, the tribunal determined the lawful character of the military occupation of Yemen by the Ottoman under the principle of intertemporal law.[40] Otherwise stated, since conquest at the time was considered a lawful mode of territorial acquisition, Ottoman sovereignty over Yemen was likewise lawful. More importantly, it was not disputed that Turkey used to be the recognized sovereign power over both the African and Arabian littorals of the Red Sea area until 1880 and remained so with respect to the Arabian littoral until Turkey lost in World War I.[41] When it signed the Treaty of Lausanne and renounced all its possessions in the Red Sea, it did so as a sovereign with the unencumbered power to alienate its territorial possessions.[42]

The tribunal also noted that the western European powers dominated the Red Sea area that both Ethiopia and Yemen could exercise acts of state authority over the islands only after the British left in 1967.[43] It resolved that even assuming the historic and ancient titles of Eritrea and Yemen, respectively, existed, they simply did not survive military conquest and colonialism. The continuity of whatever historic or ancient title they had was broken and could not be construed as peaceful, established, and uninterrupted.[44]

Not Res Nullius and No Automatic Reversion. Contrary to the view expressed by Eritrea, the islands in spite of their indeterminate status did not become *res nullius* and open to unilateral territorial acquisition.[45] They remained covered by the Article 16 provision that their title was to be settled by the "concerned parties."[46] This particular provision negated the "possibility that a single party could unilaterally resolve the matter by acquisitive prescription."[47] Neither could title automatically revert back to Yemen for lack of continuity since as previously noted its purported title did not survive Ottoman military occupation and western European colonialism.[48]

Res Inter Alios Acta Unavailing. Yemen posited that the Treaty of Lausanne was *res inter alios acta* with regard to Yemen since it was not a party to the treaty.[49] It was alleged that the treaty could not impinge upon the prior existing ancient title of Yemen.[50]

The arbitral tribunal explained that while treaties respecting boundaries and territories are *res inter alios acta* as to third parties, they nonetheless possess a legal reality which has *erga omnes* effect upon non-parties.[51] A non-party which has a better title than the party making a disposition can therefore legally raise the principle of *res inter alios acta* since no such transfer could be effected without its consent.[52] While technically the treaty was *res inter alios acta* as to Yemen, it was legally unavailing because Turkey had title to the islands at the time when the treaty was entered into between the parties.[53] Parties to the treaty, which included Turkey, had in 1923 the power over the disposition of the islands.[54]

Inapplicability of the Concept of Sovereignty Title. The arbitral tribunal found it unconvincing to extend the same understanding of the concept of sovereignty to

the pre–Ottoman Yemen. It doubted whether the authority of a medieval mountain territory of Yemen could encompass the islands.[55] It considered as problematic the "sheer anachronism" of attributing to pre–Ottoman Yemen the "modern Western concept of a sovereignty title, particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen."[56]

Recent Effectivités or "Historic Claim of a Different Kind" as Basis of Award. In the end, with Eritrea and Yemen failing to prove that their historic titles over the islands, islets, and rocks were "of such long-established, continuous and definitive lineage,"[57] the tribunal had to resort to the "relatively recent history of use and possession" to support its award on territorial sovereignty.[58] This recourse was entertained because Eritrea and Yemen also relied on "a form of historic claim of a rather different kind," that is, one founded "upon the demonstration of use, presence, display of governmental authority, and other ways of showing possession which may gradually consolidate into a title."[59]

Recognition of Historic Rights. Eritrea and Yemen established that there existed a traditional fishing regime governing both Eritrean and Yemeni fishermen in some of the disputed islands.[60] After awarding the territorial sovereignty of the various islands to the two claimant states, the tribunal obligated Yemen with respect to certain islands to ensure respect, free access and enjoyment, and perpetuation of the traditional fishing regime.[61] It reasoned that the award and exercise of sovereignty was "not inimical to, but rather entails, the perpetuation of the traditional fishing regime."[62]

B. Indeterminacy Arising in Relation to Uti Possidetis

The principle of *uti possidetis* aims to secure "respect for the territorial boundary at the moment when independence is achieved. Such territorial boundaries might be no more than delimitation between different administrative divisions or colonies all subject to the same sovereign."[63] In other words, "the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term."[64] The status of indeterminacy may arise in the course of the application of the principle when the extent of the administrative boundaries which became the international borders of post-colonial states is not known or cannot be ascertained with certainty.[65] The arbitral tribunal in *Eritrea v. Yemen* expressed some hesitation whether the principle of *uti possidetis* which was then "thought of as being essentially one applicable to Latin America" could be extended to the situation in the Middle East after World War I.[66] Nonetheless, even during the Ottoman sovereignty of both sides of the coasts of the Red Sea, it was not clear which island or islands come within the administrative jurisdiction of which Ottoman administrative coastal entity.[67]

This indeterminacy arising from the uncertainty of administrative boundaries prior to the breakup of an empire will not be further elucidated since it does not appear to be relevant to the discussion of the Spratly Islands. In the Spratly Islands situation, there was no erstwhile empire in common which broke up and gave rise to several states upon decolonialization.

C. Indeterminate Territory and Disputed Territory Distinguished

From the previous discussion, an indeterminate territory may be distinguished from disputed territory primarily on the basis of the treatment of title. As to the former, the sovereignty title of a territory is held in abeyance by treaty or becomes uncertain because of undetermined administrative borders of the preceding state prior to its breakup into new states.[68] As to the latter, the issue relates to which claimant state has superior or better title to a territory.[69] In addition, the former cannot be acquired by acquisitive prescription for being no longer *res nullius*[70] while in the latter, acquisitive prescription may be a basis to establish title.[71] It may happen that an indeterminate territory may be the subject of a territorial dispute where the issue of superior or better title, right, or claim would arise.[72]

D. Summary

Indeterminacy may occur when the contracting parties to a treaty agree to keep the title over a particular territorial possession indeterminate (such as a renunciation to unnamed recipients) to be settled at some future time. The contracting parties must have the power or authority of disposal over the territory in question.[73] There exists a claimant or claimants with respect to the territory subject of the disposition. And when the question arises on the status of the title to the territorial possession, the acts of the contracting parties prior, during, or subsequent to the treaty confirm the preservation of the status of indeterminacy.

Indeterminacy may also arise in the course of the invocation of *uti possidetis*. Such is the case when the former administrative borders of an empire or state, which become international boundaries upon the creation of new states, are not certain.

In essence, for a territory to be considered indeterminate, it must have already been brought to the sovereignty of a state. Territorial sovereignty then becomes uncertain, not because of abandonment, but by reason of treaty stipulations or unclear former administrative borders upon the break-up of a state.

II. Spratly Islands: Legal Status of Indeterminacy

With the decision in *Eritrea v. Yemen* serving as reference, the legal status of the Spratly Islands will be evaluated in the light of the San Francisco Peace Treaty, the acts of some of the states parties prior to, during, and after the conclusion of the agreement, and the legal import of the contending claims of China, Vietnam, and the Philippines.

A. The Spratly Islands

There is no commonly agreed understanding of what constitutes the Spratly Islands.[74] During the negotiation for the extension of the U.S. military bases in the

Philippines in 1976, former U.S. Ambassador to the Philippines Sullivan remarked that the breadth of the Spratly Islands depends on who defines it.[75] Dzurek observed the lack of a commonly agreed definition of the Spratly Islands.[76] But there is a common understanding that it is "measurable and identifiable."[77]

Hancox and Prescott treat the Spratly Islands region, with the exception of Luconia Shoals, as lying "south of 12°N and seawards of the 200 metres isobath off the continental and insular coasts that define the South China Sea."[78] Prescott and Schofield clarified this to mean the "many islands, rocks and reefs … located in the southern part of the South China Sea extending for approximately 460 nm from southwest to northeast and 220 nm from east to west."[79] They computed the "area of land, sea and seabed lying within the line of equidistance surrounding the Spratly Islands [as measuring] 165,000 sq. nm."[80] Cordner describes the Spratly Islands as "situated in the South China Sea," comprising of "a collection of hundreds of shoals, reefs, atolls, and small, mostly uninhabited islets."[81]

British Claim, French Annexation, and Japanese Shinnan Gunto. The British claim published in Hong Kong in 1889 covers only the Spratly Island and Amboyna Cay features.[82] It describes the Spratly Island as "situated in Latitude 8° 38' N., and Longitude 111° 54' E.," and the Amboyna Cay at "Latitude 7° 52' N. and Longitude 112° 55' E."[83] There appears to be no record of protest from any state regarding the British claim.

When the French formally declared on July 25, 1933, the annexation of "six small islands, with their dependent islets, which lie between 11° 29' and 7° 52' N. Lat. and 114° 25' and 111° 55' E. Long." in the South China Sea,[84] they expanded the Spratly Islands to include the Spratly Island and the Amboyna Cay, previously claimed by the British, as well as Itu Aba, North Danger, Loaita, and Thitu.[85] Like the British, they did not enclose their claim within definite boundaries.

On March 31, 1939, the Japanese, unlike the British and the French, enclosed their claim in the Spratlys area within clearly identifiable metes and bounds. They named the annexed territory as Shinnan Gunto (Sinnan Islands) which not only encompassed the British and French claims but also covered other insular features.[86] This area, which lies "in the east central portion of the South China Sea, between 7° and 12° N. Lat. and 111° 30' and 117° E. Long.,"[87] had been substantially enlarged by the Japanese to cover thirteen identified small islands and other unidentified coral reefs.[88] This territorial entity at the point "nearest the Philippines is only 48 statute miles from the southern tip of the island of Palawan, but the nearest island is some 200 miles distant."[89]

Philippine Kalayaan Island Group, Vietnamese Truong Sa, and Chinese Nansha. Like Japan, the Philippines enclosed its claim in the Spratly Islands within well-defined coordinates and named it the Kalayaan Island Group (KIG). Under Presidential Decree No. 1596 promulgated on June 11, 1978, KIG lies between 7° 40' and 12° N. Lat. and 112° 10' and 118° E. Long.[90] While it does not include the Spratly island itself, which is situated at 8° 38' N. Lat. and 111° 54' E. Long., it covers all the insular and other features, including the sea-bed, sub-soil, continental margin as well as the superjacent airspace.[91] In 2009, the Philippines changed the status of the KIG, for

purposes of determining the baselines, to that of regime of islands pursuant to Article 121 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[92]

Both Vietnam and China claim the entire Spratly Islands which they consider as an archipelago, Truong Sa in Vietnamese and Nansha in Chinese.[93] They have not defined the exact extent of their archipelago's boundaries.[94]

B. A Case of Indeterminacy

The legal status of the Spratly Islands has been the subject of conflicting assertions. Even legal experts, academics and commentators are divided on the issue of which state has title to or superior or better claim to the area.

Guo and Jiang basically rely, among other things, on discovery and occupation (including acts of administration), historic title, and the recovery of the islands after World War II as basis for China's claim over the Spratly Islands.[95] Chiu and Park suggest that China appears to have a stronger claim to the Spratly Islands based on occupation of the islands post–World War II.[96] Dzurek concludes that the Republic of China (ROC) has the strongest claim but the claim suffers from the non-recognition of ROC's government by the other claimants.[97]

Dupuy and Dupuy maintain that China's claim to the Spratly Islands based on historical factors will not pass the standards of public international law as China has not exercised sovereign authority in an effective, continuous, and peaceful manner, free from protests and objections from other interested states such as Vietnam.[98] Nguyen argues that the Spratly Islands belong to Vietnam by historic title as shown by acts of state authority exercised by the Nguyen Lords and Kings and as a successor to the titles, rights, and claims of France and the erstwhile Republic of Vietnam.[99]

Roque doubts whether Vietnam's claim can prevail over that of China's because of estoppel and remains skeptical whether China "can present the most superior claim" on the basis of historic title.[100] He opens the possibility that the Philippines can establish a better claim based on geography and the effect of the Japanese renunciation.[101] Yorac contends that the Spratly Islands may properly belong to the Philippines by reason of effective occupation after the islands became a "territory without owner or effective sovereign" when Japan renounced its right to the islands to unnamed recipients.[102] Aguda and Arellano-Aguda press the case for the Spratly Islands as properly belonging to the extended continental shelf of the Philippines.[103]

This paper takes the view that title to the Spratly Islands remains indeterminate. The states parties to the 1951 Treaty of Peace with Japan (San Francisco Peace Treaty)[104] decided to keep it indeterminate primarily because of the question on Chinese representation.

Article 2(f) of the San Francisco Peace Treaty. After the defeat of Japan in World War II, she was stripped of some of her territories and possessions. With respect to her possessions in the SCS particularly the Spratly Islands, Article 2(f) of the San Francisco Peace Treaty provides that "Japan renounces all right, title and claim to the Spratly Islands…" Like Article 16 of the Treaty of Lausanne in *Eritrea v. Yemen*, Article 2(f) did not state the beneficiary of Japan's renouncement of right, title and

claim and the manner in which the settlement of title to the territory be effected. While the Treaty of Lausanne expressly reserved the settlement of the territorial title to the interested parties, the San Francisco Peace Treaty was simply silent as to the future and manner of settlement of the status of or title to the islands.

This silence was deliberate. U.S. delegate John Foster Dulles confided that there were some Allied Powers which suggested for the definitive disposition of each of the former Japanese territories.[105] But this recourse would elicit intractable disagreements among the allies as to what should be done to these territories.[106] The preferred course was to leave their disposition to the future through international processes other than the San Francisco Peace Treaty.[107]

The subsequent 1952 Treaty of Peace between the Republic of China and Japan[108] did not appear to help clarify the issue of the territorial sovereignty over the Spratly Islands. Article 2 of the treaty simply recalled Article 2(f) of the San Francisco Peace Treaty by stating that "[i]t is recognised that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951…, Japan has renounced all right, title, and claim to … the Spratley Islands…."

State Acts Before, During, and After the Conclusion of the San Francisco Peace Treaty. During the course of World War II, the leaders of the United States, China and the United Kingdom met in Cairo, Egypt from November to December 1943. On December 1, 1943, they issued the Cairo Declaration which *inter alia* sought, after the unconditional surrender of Japan would have been achieved, to strip Japan of "all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914."[109] These island territories also included the Spratly Islands.[110] This was followed on July 26, 1945, with the issuance of the Potsdam Declaration by the heads of the Governments of the U.S., China, and the UK, and later concurred in by the Soviet Union, which reiterated that the "terms of the Cairo Declaration shall be carried out."[111] The Potsdam Declaration aimed at limiting the extent of Japanese sovereignty to the "islands of Honshu, Hokkaido, Kyushu, Shikoku and such other minor islands" to be determined by the four allied powers.[112]

Almost contemporaneous to these events, the United States Department of State (U.S. DOS) began considering for post war foreign policy planning the strategic implications of the transfer of sovereignty of the Spratly Islands to France, the Philippines, and China.[113] The U.S. DOS Territorial Subcommittee of the Division of Political Studies perceived that France had a "stronger claim to sovereignty than any other state on the basis of first formal annexation of part of the islands and of acts which might be regarded as constituting occupation" and saw the transfer of possession to France (or to the Indo-Chinese government) as presumably not constituting a security threat to the other territories of the SCS.[114] But it viewed this option as possible of arousing "resentment in China" and "would be regarded by many, in view of the exceptional physical characteristics of the islands, as less desirable than international control."[115]

As regards the suggestion that the islands be handed over to the Philippines, the subcommittee noted at the time that the Philippines had "made no official claim to the Spratly Islands, but some of the leading Filipinos have expressed a keen interest

in them, based on the principle of propinquity."[116] The Japanese-claimed Shinnan Gunto ocean area was "closer to the Philippines than to any other territory" and lay "on the direct line between Manila and Singapore."[117] The subcommittee nonetheless opined that "it might be inadvisable to deny the stronger legal claim of France in favor of the Philippines."[118] Besides, it took into account the latter's "negligible amount of shipping" and lack of experience in administering dependent islands.[119]

With respect to the option of transferring the islands to China, the subcommittee regarded China's claim as not appearing "to have substantial foundation."[120] It noted that the "American Embassy at Nanking reported that the Chinese claim was weakened by the fact that a Chinese official textbook described the southern boundary of Chinese waters as extending just below Paracel Island, considerably to the north of the area in dispute."[121] Besides, the islands were "located at considerable distance from Chinese territory."[122] Retention by Japan of the islands could never be countenanced because of the security threat such possession caused the neighboring territories and because of the explicit intention under the Cairo Declaration to remove the islands from Japanese possession.[123]

These views, later incorporating the relevant portions of the Potsdam Declaration, remained substantially unaltered throughout 1946.[124] It was suggested that the U.S. should not take "any positions as to the sovereignty" of the islands.[125] It was further advocated that if "France and China or any other claimant should be unable to arrive at amicable settlement by diplomatic negotiation, the United States should favor the submission of the dispute to international arbitration or adjudication."[126] One of the committees already foresaw that because of the strategic location of the islands, recognizing "the sovereignty of any single power [over the islands] would almost inevitably give rise to international protest and friction."[127] It preferred the proposal to have the islands transferred to the United Nations.[128]

After the Japanese surrender on July 2, 1945, and Japan's occupation principally by the U.S., Secretary of State John Foster Dulles negotiated with other governments the terms of the peace treaty leading to the conference in San Francisco.[129] In this conference, China's representation was excluded as no invitation was extended to either the People's Republic of China (PRC) or the ROC.[130] The Soviet delegate proposed that the PRC should be invited but the proposal was ruled out of order.[131] He would later on moved to have the Spratly Islands given to the PRC but again he was ruled out of order.[132] The final draft of what later became the San Francisco Peace Treaty had Japan renounced her right, title and claim over the Spratly Islands, but no recipients were named much less the future settlement of the right, title and claim over them outlined. The Soviet Union did not sign and never became a party to the treaty.

The U.S. position has had been fairly consistent even after the signing of the San Francisco Peace Treaty. It further clarified its position in the course of the July 3, 1976, negotiating session for the renewal of the U.S. military bases in the Philippines. Former U.S. Ambassador to the Philippines Sullivan acknowledged that internationally the Spratly Islands are a disputed territory and expressed the preference of the U.S. for a peaceful resolution of the dispute among the claimants.[133] He described that "there were no [caretaker] arrangements on the Spratlys which were

left in limbo as disputed territories."[134] The Philippines may be said to have coaxed the U.S. to highlight the legal status of indeterminacy of the Spratly Islands.

The Japanese renunciation of title, right and claim over the Spratly Islands under the San Francisco Peace Treaty without identifying the recipients of such divestment and the absence of stipulations as to how the territory was to be settled, and the actuations of the parties particularly of the U.S. before, during, and after the conclusion of the treaty strongly suggest that the states parties intended the situation of the sovereign title to the islands to remain indeterminate. It may not be implausible to construe that the parties, having been aware of the competing claims in the area, the problem of which legitimate Chinese representation to recognize, and the onset of the Cold War, chose to refrain from awarding the Spratly Islands to any state, opting instead to have the matter settled peacefully through diplomatic negotiation, arbitration or adjudication. It is in this sense that somehow it was the U.S. position which prevailed in the manner of the disposition of the islands after the Japanese renunciation of right, claim, and title.

Ancient or Historic Titles of China and Vietnam. Under the modern conception of ancient or historic title as expounded in *Eritrea v. Yemen*, both the ancient or historic titles of China and Vietnam may not have survived military conquest and Western colonialism. For China, whatever ancient rights it might have had in the Spratly Islands since time immemorial may have been interrupted by the British claim in 1889 over the Spratly island and the Amboyna Cay, which appears not to have been protested by any state, by the French annexation of some islands and islets in the area in 1933, and by the Japanese annexation of the Spratly Islands in 1939. For Vietnam, its claim of historic title may have been broken by the British claim and the Japanese annexation. Likewise, its claim to succession of the French right or title may have suffered the same fate because of the Japanese interlude.

It is arguable under the intertemporal law at the time that the Japanese annexation could be taken as lawful since conquest and subsequent effective occupation were accepted modes of territorial acquisition.[135] Only later was conquest expressly prohibited under Article 2(4) of the United Nations Charter.[136] It is important to note that the French did protest the Japanese annexation and the British supported the French position.[137] But it is equally important and instructive to realize that the U.S. never protested the annexation itself.[138] The U.S. reservation on the Japanese annexation centered only on its observation that the area claimed by Japan could not "properly be treated as one island group" and blanketing insular features and ocean area in between "with respect to which Japan [had] exercised no acts which might properly be regarded as establishing a basis for claim to sovereignty" could have international validity.[139] In essence, the U.S. never protested to the Japanese annexation of the individual islands and islets over which Japan exercised effective occupation. It is in this light that Japan's annexation of some of the islands and islets in the Spratly Islands could have matured into lawful territorial sovereignty (if not colorable title), the sovereignty title to which Japan renounced in the San Francisco Peace Treaty.

Res Nullius Claim of the Philippines. The Philippine claim based on *res nullius*[140]

may have been further weakened by the decision in *Eritrea v. Yemen*. As previously discussed, a sovereign territory which became indeterminate by virtue of a treaty does not become *res nullius* subject to acquisitive prescription.[141] Like the Red Sea Islands in the Treaty of Lausanne, the Spratly Islands was at the lawful disposal of the parties to the San Francisco Peace Treaty, to which Japan was itself a party. It cannot be acquired through unilateral act of a state such as the Philippines, also a party to the San Francisco Peace Treaty, because the parties to the treaty chose to keep the status of the Spratly Islands indeterminate by failing to name the recipients consequent to the Japanese divestment of title.

Res Inter Alios Acta and Automatic Reversion Unavailing. Technically the San Francisco Peace Treaty was *res inter alios acta* with regard to China as neither PRC nor ROC was allowed to represent China in the San Francisco Conference which culminated in the signing of the treaty. But following the holding in *Eritrea v. Yemen*, the principle of *res inter alios acta* can only be legally significant as to China if it can present a superior or better title to the Spratly Islands. Mere insistence of territorial sovereignty even by protests without sufficient legal basis would not suffice to give China a better title following the reasoning in *Eritrea v. Yemen*.

Dulles explained that neither PRC nor ROC was invited to the San Francisco Conference as there was disagreement which government could legitimately represent China because of the Chinese civil war.[142] The U.S. and UK diverged on the issue of representation with the former favoring the ROC[143] and the latter the PRC.[144] Dulles elucidated that the terms of the treaty nonetheless preserved the rights of China, and China could enter into a separate treaty with Japan on the same terms as the San Francisco Peace Treaty.[145]

Since the purported ancient title of China could be said not to have survived conquest and colonialism, it would follow that there could be no automatic reversion of territorial sovereignty and possession of the Spratly Islands to China (or Vietnam for that matter). The ancient or historic title could not be said to have remained continuous, peaceful, and uninterrupted.

Sway and Sovereignty Over the Islands. The claim of ancient title by China over the Spratly Islands could have been further diluted by China's publications which placed the Chinese SCS boundaries to the north of the Spratly Islands.[146] It had been reported that the Ministry of Information of China (ROC) published the China Handbook, 1937–1943, which indicated the "southern boundary of China as 15°16'N. Lat., the most southerly of the Paracel group, as a part of China."[147] This would place the Spratly Islands as claimed by the British, annexed by the French, and blanketed by the Japanese as Shinnan Gunto outside of these coordinates. This calls into question the Chinese claim of sovereignty over the distant and probably uninhabited Spratly Islands reportedly used only periodically by traditional fishermen of the surrounding territorial areas.

Recent Effectivités as Basis of Award. If the legal status of indeterminacy of the Spratly Islands and the dispute of sovereignty title were to be submitted to arbitration, it would likely be the recent manifestations of the exercise or display of state or governmental authority that would play a vital importance in the arbitral award.

Following the language in *Eritrea v. Yemen*, the recent display of state or government authority of China, Vietnam, and the Philippines over the islands and islets in the Spratly Islands may gradually ripen into a title or titles of a different kind.

C. Summary

In sum, Article 2(f) of the San Francisco Peace Treaty through which Japan renounced its title, right and claim to the Spratly Islands without neither naming the recipients nor providing for the manner in which the territorial sovereignty and possession were to be settled strongly suggest that the parties to the treaty intended to make indeterminate the legal status of the Spratly Islands. This may be validated by looking at the thinking and actuations of the parties particularly the U.S. before, during, and after the conclusion of the San Francisco Peace Treaty. The legal status of indeterminacy may further find support because none of the competing claimants appears to be able to present a better title. Nevertheless, the indeterminate status of the Spratly Islands does not make it *res nullius* susceptible to unilateral acts of acquisitive prescription since at the time of the conclusion of the San Francisco Peace Treaty, the Spratly Islands was at the lawful disposal of the parties to the treaty.

After having discussed the legal status of indeterminacy of the Spratly Islands, the paper will now turn to addressing the legal status of the airspace above the Spratly Islands. China has been reported to have kept open the option of establishing an air defense identification zone or an exclusion zone over the airspace above the SCS.[148] This exclusion zone may be expected to cover the airspace above the Spratly Islands.

III. Airspace Over the Spratly Islands: Legal Status and Implications

As previously discussed, an indeterminate territory such as the Spratly Islands is no longer *res nullius* or an entity which belongs to no one. Neither is it *res communis* or belonging to everyone since its sovereignty title merely assumes an indeterminate status to be possibly settled in the future.

A. Indeterminate Not Res Nullius or Res Communis

An indeterminate territory possesses an indeterminate airspace. Kish points out that the legal status of the airspace follows that of the relevant subjacent surface.[149] For littoral land territories, including islands, sovereignty of the state is not confined to the land surface alone but extends to the airspace not just above the land but also above the adjacent territorial sea, now extended to 12 nautical miles by Article 3 of UNCLOS. This customary rule is reflected in Article 1 of the 1944 Convention on International Civil Aviation (Chicago Convention), Article 2 of the 1958 Convention on the Territorial Sea and Contiguous Zone, and Article 2(2) of UNCLOS. In this air volume from the land territory extending seaward to 12 nautical miles, sovereignty is exclusive and absolute such that no right of overflight is countenanced much less

innocent passage recognized.[150] Beyond the 12-mile territorial sea limit, the freedom of the high seas right of overflight is preserved in the airspace above the EEZ and the high seas.[151] Since the legal status of the airspace generally follows that of the subjacent surface, an indeterminate territory possesses also an indeterminate airspace.

This indeterminate airspace cannot be equated to an international airspace or the air volume beyond the territorial airspace.[152] In fact it no longer forms part of the international airspace. It should be remembered that an indeterminate territory used to have a sovereignty title which became indeterminate and its indeterminacy does not result to the territory becoming *res nullius* or *res communis.* The same may be said of the airspace above the indeterminate territory from which the airspace derives its legal status.

As applied to the Spratly Islands, since its legal status may be one of indeterminacy, its airspace may likewise be indeterminate. But it is neither *res nullius* nor *res communis* as the indeterminacy does not result to either status. Consequently, it is not part of international airspace.

Notwithstanding the indeterminate status of the airspace above the Spratly Islands, it does not mean that there is absence of rules to maintain safety and order in the area with respect to civil aviation. The International Civil Aviation Organization (ICAO), a United Nations specialized agency formed pursuant to the Chicago Convention,[153] has in place three flight information regions (FIRs) of Ho-Chi-Minh, Manila, and Singapore, which intersect at 10°30'N 114°00'E, approximately right in the middle of the airspace superjacent the Spratly Islands, to provide air navigation aids to civilian aircrafts flying in that area.[154] The FIR is designed to provide some order to ensure safety of navigation in the airspace over the high seas consistent with Article 12 of the Chicago Convention. Article 12 provides that above the high seas, the "rules in force shall be those established under this Convention." This does not imply that ICAO recognizes the airspace above the Spratly Islands as international airspace because ICAO has no competence to change the legal status of territories or resolve territorial disputes.[155]

While the airspace above the Spratly Islands may be indeterminate, claimant states are not precluded from attempting to exercise acts of state or governmental authority over what they perceive to be their territorial airspace and enforce their domestic laws over the claimed airspace. A previous Philippine law treated the airspace over the Spratly Islands as territorial airspace.[156] China tried to modify the FIR arrangements in the area by insisting that it should be the one to provide air navigation aids over the airspace of the South China Sea area.[157] It has been reported to have warned aircrafts approaching or entering the airspace above its occupied insular features.[158] Recently, it announced that it is not ruling out the option of setting up an exclusion zone in the SCS which might include the Spratly Islands.[159]

B. Challenges and Implications Consequent to Indeterminacy

The existing indeterminacy of the Spratly Islands affords claimant states the leeway to pursue more forceful actions to consolidate their possessions or to strategically

temper the breadth of their claims. Claimant states can change the current situation and enforce their alleged exclusive sovereignty over the airspace of the Spratly Islands. If they choose to enforce sovereignty over their alleged territorial airspace, they can prevent foreign aircraft from overflying. Aircraft entering the claimed territorial airspace without permission can be buzzed, intercepted, and forced to land. They even risk being shot down notwithstanding Article 3*bis* of the Chicago Convention which obligates contracting parties to "refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."[160] But while the claimant states have so far respected the ICAO FIRs and have restricted their response to warnings against violating aircrafts, the situation could dramatically change.

If claimant states would enforce sovereignty on their claimed territorial airspace, the difference in the extent and nature of their claims would further compound the problem. There remains the question whether Spratly Islands should be treated as a single geographical entity or an archipelago, or a group of islands and islets with subgroups of islands and islets capable of being individually subjected to sovereignty.

Should the Spratly Islands be treated under the regime of islands, there will be portions of the airspace beyond the territorial seas, between the islands and insular features, where high seas freedoms such as overflight may be exercised by foreign state aircraft. As mentioned, the Philippines has modified its claim to that of regime of islands over portions of the Spratly Islands. This would allow the existence of non-territorial airspace, or the airspace beyond the 12-mile territorial sea limit, between the islands and insular features that it is claiming.

If the Spratly Islands were to be treated as a single unit drawn on straight baselines, then the waters between the islands may be considered as internal or archipelagic waters, as the case may be, and the airspace above this singular entity extending seaward for another 12 nautical miles subject to territorial sovereignty. Even if the Spratly Islands were to be treated as a single unit, such as for instance to refer to the breadth of Shinnan Gunto, its metes and bounds needs to be readjusted. It has to be determined which insular features and portions of the Spratly Islands qualify as baseline points for drawing the enclosure. The entity may either shrink or enlarge depending on what insular features qualify as baseline points and so does its airspace.

A similar situation would arise if the Spratly Islands were treated as an archipelago. The waters between the islands may assume the status of archipelagic waters and sovereignty would extend even to the airspace above it.[161]

But even if the Spratly Islands were to be treated as a single unit or even as an archipelago, it would still face the difficult hurdle of complying with the relevant provisions of UNCLOS on archipelagic states and the drawing of archipelagic baselines. Under Article 47(1) of UNCLOS, only archipelagic states may draw such baselines to enclose the islands and interconnecting waters and treat the waters within as archipelagic waters.

If China and Vietnam would enclose its Nansha archipelago and Truong Sa archipelago, respectively, with straight or archipelagic baselines, then the disputed airspace over the disputed islands would be considerably large and would even encompass the airspace claimed by the Philippines under the regime of islands. But this enclosure would likely create more friction emanating even from non-claimants. It should be recalled that the U.S. considered the way in which the enclosure was made by Japan in 1933 of the islands and other insular features in the SCS as of doubtful validity in international law.[162] The U.S. has been somewhat consistent in its view as shown by its freedom of navigation missions in the Spratly Islands.[163] It has recently sailed within 12 nautical miles from China's reclaimed insular features as well as those features occupied by Vietnam and the Philippines.[164]

It is to be noted, however, that in the *South China Sea Arbitration (Philippines/PRC)*, it was held that neither the UNCLOS nor customary international law allows states to use archipelagic or straight baselines to enclose offshore or dependent archipelagos and generate maritime entitlements as a single unit.[165] Hence, the proposition that the high-tide features of the Spratly Islands could be enclosed in straight baselines to approximate archipelagic baselines does not appear to have solid traction.

While artificial islands have no territorial sea and airspace entitlements and are allowed only a 500-meter safety zone radius,[166] there has developed a heightened ambiguity over which insular feature in the Spratly Islands now qualifies as an island, a rock, or artificial island because of the continuing reclamations. An island generates a territorial sea and other maritime entitlements such as a contiguous zone, EEZ, and continental shelf.[167] A rock "which cannot sustain human habitation or economic life of [its] own" has no EEZ or continental shelf, but is entitled only to a territorial sea[168] and, depending on its location, to a contiguous zone.[169] Both island and rock have territorial airspace extending seaward up to the limit of the 12-mile territorial sea. China treats the reclaimed islands as having a territorial airspace. It has repeatedly warned foreign military aircrafts flying near or over them.[170] An aircraft flying above the Spratly Islands has to deal with various competing state jurisdictions.

Nonetheless, in the *South China Sea Arbitration (Philippines/PRC)*, no high-tide feature in the Spratly Islands was held to be capable of sustaining human habitation and economic life of its own.[171] Some insular features were even classified as low-tide elevations with no territorial sea entitlement.[172]

Perhaps one of the unintended consequences of *Eritrea v. Yemen* in primarily grounding a ruling on recent display of state authority over a disputed indeterminate territory is that claimant states in the Spratly Islands may be encouraged to also opt to reinforce their claims through legislation or regulation establishing an ADIZ. Through the mechanism of an ADIZ, the littoral state can locate, identify, and control any aircraft flying through its ADIZ with or without intention of penetrating the territorial airspace.[173] Interception, forced landing, and even use of weapons may be used by the coastal state concerned against aircraft not complying with the pertinent ADIZ regulations. China has established an ADIZ over the East China Sea in 2013 which elicited varied responses from Japan, South Korea, and the U.S.[174]

It is quite possible that once China would announce and create an ADIZ in the SCS to encompass the Spratly Islands, the other claimants might also declare or enlarge their existing ADIZs.[175] The Philippines has a Cold War–era ADIZ covering only the northern part of the Philippine archipelago.[176] Vietnam also has an existing ADIZ[177] and may decide to activate and broaden it should the other claimants subject the Spratly Islands to ADIZ coverage.[178] The overlapping jurisdictions, should ADIZs be declared over the Spratly Islands, would have the potential of jeopardizing the air navigation safety of civil aircraft. They would also further undermine the security situation not only among claimants but also non-claimants who would be drawn to the area to enforce what they think as their right to exercise freedom of navigation and overflight under international law.

IV. Intermediate Considerations

There have been several suggestions on how to untangle the somewhat intractable situation in the Spratly Islands. Suggestions range from "freezing" the territorial sovereignty claims[179] to negotiating a bilateral, trilateral or multilateral settlement between and among claimants,[180] or even a multilateral settlement to include some interested maritime powers to address the issue of freedom of navigation and freedom of overflight in the Spratly Islands.[181] This paper will not delve into the merits of these propositions.

In the intermediate, claimant states to the Spratly Islands should reassess the foundation of their claims. Claims based on ancient or historic title and *res nullius* may not survive current international law. More likely, as in *Eritrea v. Yemen*, recent *effectivités* may have a better chance to ground one's claims. And instead of resorting to increasingly gradated use and display of state authority, it is never a bad idea to appeal to sobriety by reevaluating the international law basis of the claims, consider the advantages of negotiation and negotiating earnestly, and even perhaps arbitrate under an arbitral language agreement where all claimants retain the flexibility to save face.

V. Conclusion

An indeterminate territory, not being *res nullius* or *res communis*, generates its own territorial airspace. Although this territorial airspace is likewise considered as indeterminate as it follows the status of the subjacent indeterminate territory, it ceases to be part of the international airspace. A claimant state can subject it to its domestic law jurisdiction.

As applied to the Spratly Islands in the South China Sea, the islands may have the legal status of an indeterminate territory. Notwithstanding its indeterminacy, it has its own territorial airspace. While this territorial airspace is also indeterminate as it is inextricable from the status of the subjacent indeterminate land and sea territory,

it no longer forms part of the international airspace. Claimant states to the Spratly Islands like China, Vietnam, and the Philippines can subject the airspace of the Spratly Islands or a portion or portions thereof to their municipal law jurisdictions on the ground that their purported sovereignty extends to the airspace above the disputed islands, islets, and other insular features.

Should a claimant state decide to gradually consolidate its claim, it may enclose the Spratly Islands within an air defense identification zone. If this transpires, it may lead to overlapping of jurisdictional rules as other claimants may be expected to also establish their own ADIZ versions. It will also elicit responses from non-claimant states principally from maritime powers insisting on continuously exercising their customary (and conventional) international law right of navigation as well as overflight in the relevant areas of the South China Sea.

Claimant states China, Vietnam, and the Philippines should reexamine the foundation of their territorial claims to the Spratly Islands. Their ancient or historic title and *res nullius* claims may not survive the current understanding of territorial sovereignty under international law. It is never a bad idea to stay sober, negotiate, and save face for a mutually beneficial arrangement. It is to the best interest of claimant and non-claimant states alike.

Notes

1. Substantially based on the conference paper presented at the 2016 Regional Conference of the Asian Society of International Law, June 14–15, 2016, Hanoi, Viet Nam.

2. Chinese Foreign Ministry Spokesperson Hua Chunying, Regular Press Conference, May 7, 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1261660.shtml, accessed June 5, 2016; Foreign Ministry Chinese Foreign Ministry Spokesperson Hong Lei, Regular Press Conference, April 1, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1352614.shtml, accessed June 5, 2016.

3. See Asia Maritime Transparency Initiative (AMTI), Center for Strategic & International Studies, "A Freedom of Navigation Primer for the Spratly Islands," http://amti.csis.org/fonops-primer/, accessed June 5, 2016; see also Justin McCurry, "South China Sea Dispute: British Ambassador Steps into Row Over Pilot 'Intimidation,'" *The Guardian*, January 19, 2016, http://www.theguardian.com/world/2016/jan/19/south-china-sea-dispute-british-ambassador-steps-into-row-over-pilot-intimidation, accessed June 5, 2016.

4. Peter Dutton, "Three Disputes and Three Objectives: China and the South China Sea," *Naval War College Review* 64(4) (Autumn 2011), pp. 42, 50–54.

5. Zewei Yang, "The Freedom of Navigation in the South China Sea: An Ideal or a Reality?" *Beijing Law Review* 2012(3), pp. 137, 139–140, accessed April 30, 2017. https://doi.org/10.4236/blr.2012.33019

6. J. Ashley Roach, "China's Shifting Sands in the Spratlys," *American Society of International Law* 19(15) (2015), https://www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys, accessed June 2, 2016.

7. Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998 (*Eritrea V. Yemen*), *Reports of International Arbitral Awards (R.I.A.A)* 22 (2001), pp. 209–332.

8. *Ibid.*, paras. 165, 445.

9. Treaty of Peace, signed at Lausanne, July 24, 1923, *League of Nations Treaty Series (L.N.T.S)* 28 (1924), pp. 11–113, entered into force, August 6, 1924; See also *Eritrea V. Yemen*, note 7, para. 157.

10. *Eritrea V. Yemen*, *Ibid.*; See also Seokwoon Lee, "Intertemporal Law, Recent Judgments and Territorial Disputes in Asia" in *Maritime Boundary Disputes, Settlement Processes, and the*

Law of the Sea, Seoung-Yong Hong and Jon M. Van Dyke, eds. (Leiden and Boston: Martinus Nijhoff Publishers, 2009), p. 130 (notes).

11. *Eritrea V. Yemen*, *Ibid.*, para. 157; Lee, *Ibid.*, p. 130 (notes).
12. *Ibid.*, paras. 7, 102.
13. *Ibid.*, para. 154.
14. *Ibid.*, paras. 169–171, 173–174.
15. *Ibid.*, para. 173.
16. *Ibid.*, paras. 174–176, 178, 242, 448, 489.
17. *Ibid.*, para. 456.
18. *Ibid.*, paras. 165, 188, 445.
19. *Ibid.*, para. 445.
20. *Ibid.*, para. 106.
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*, paras. 13–14.
24. *Ibid.*, para. 13.
25. *Ibid.*, para. 19.
26. *Ibid.*, para. 13.
27. *Ibid.*, para. 31.
28. *Ibid.*, para. 32.
29. *Ibid.*, paras. 32–34.
30. *Ibid.*, paras. 32–34, 441.
31. *Ibid.*, para. 34.
32. *Ibid.*, paras. 125, 444–445, 449, 456.
33. *Ibid.*, paras. 125, 153, 445, 456.
34. *Ibid.*, para. 14.
35. *Ibid.*, paras. 17–19.
36. *Ibid.*, para. 195.
37. *Ibid.*
38. *Ibid.*, paras. 169–171, 173–176, 178, 242, 448, 456, 489.
39. *Ibid.*, paras. 448–449.
40. *Ibid.*, para. 444.
41. *Ibid.*, para. 133.
42. *Ibid.*, paras. 444–445.
43. *Ibid.*, paras. 125, 456.
44. *Ibid.*, paras. 125, 443.
45. *Ibid.*, paras. 165, 183.
46. *Ibid.*, paras. 165.
47. *Ibid.*
48. *Ibid.*, paras. 125, 165, 443.
49. *Ibid.*, paras. 99, 153.
50. *Ibid.*, paras. 31–32.
51. *Ibid.*, para. 153.
52. *Ibid.*
53. *Ibid.*, paras. 153, 445.
54. *Ibid.*, paras. 445.
55. *Ibid.*, para. 446.
56. *Ibid.*
57. *Ibid.*, para. 449.
58. *Ibid.*, para. 450.
59. *Ibid.*
60. *Ibid.*, para. 526.
61. *Ibid.*
62. *Ibid.*
63. *Burkina Faso V. Mali*, *International Court of Justice Reports* (1986), pp. 554–651, 566, para. 23.

64. *Ibid.*
65. See *Eritrea V. Yemen*, note 7, paras. 96–97.
66. *Ibid.*, para. 99.
67. *Ibid.*, paras. 97–99.
68. *Ibid.*, paras. 96–97, 165, 445.
69. See *Island of Palmas* case (Netherlands/United States), *R.I.A.A* 2 (1928), pp. 829, 839.
70. *Eritrea V. Yemen*, note 7, paras. 165, 183.
71. See *Ibid.*, paras. 19, 165. See also *Island of Palmas* case, note 69.
72. *Eritrea V. Yemen*, note 7.
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Biographical Statement

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Insecurity in the Gulf of Guinea (GoG): Reinventing the Past to Explain the Origin and Development of Maritime Insecurity

Fru Norbert Suh I

Structured Abstract

Article type: Research paper

Purpose—While many studies on maritime security/insecurity focus on understanding the immediate threats to maritime security, very little has been done to investigate the historical origins of international concerns about security on the waterways. This paper aims to fill this gap by identifying and analyzing the historical foundations of international concerns about maritime security/insecurity in the comparatively little known Gulf of Guinea (GoG) maritime zone.

Design, Methodology, Approach—The paper uses a chronological thematic approach based on event analysis of the events that marked a turning point in the history of the region from when it was opened to the outside world.

Findings—It finds that international concerns about maritime security/insecurity were primarily driven by awareness about the economic and strategic importance of maritime zones, and the ability of actors to transform them into melting pots for international trade, commerce, and other exchanges, which influenced perceptions and feelings of security/insecurity.

Practical implications—The study provides evidence that while it may be erroneous to assume that all aspects of the past will repeat themselves, reconstructing

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them establish circumstances that condition the present and future of maritime security/insecurity.

Originality, value—The paper emphasizes the relevance of the past in understanding current security issues and how knowledge about it can improve the quality of decisions about security. The findings have important implications for maritime security stakeholders.

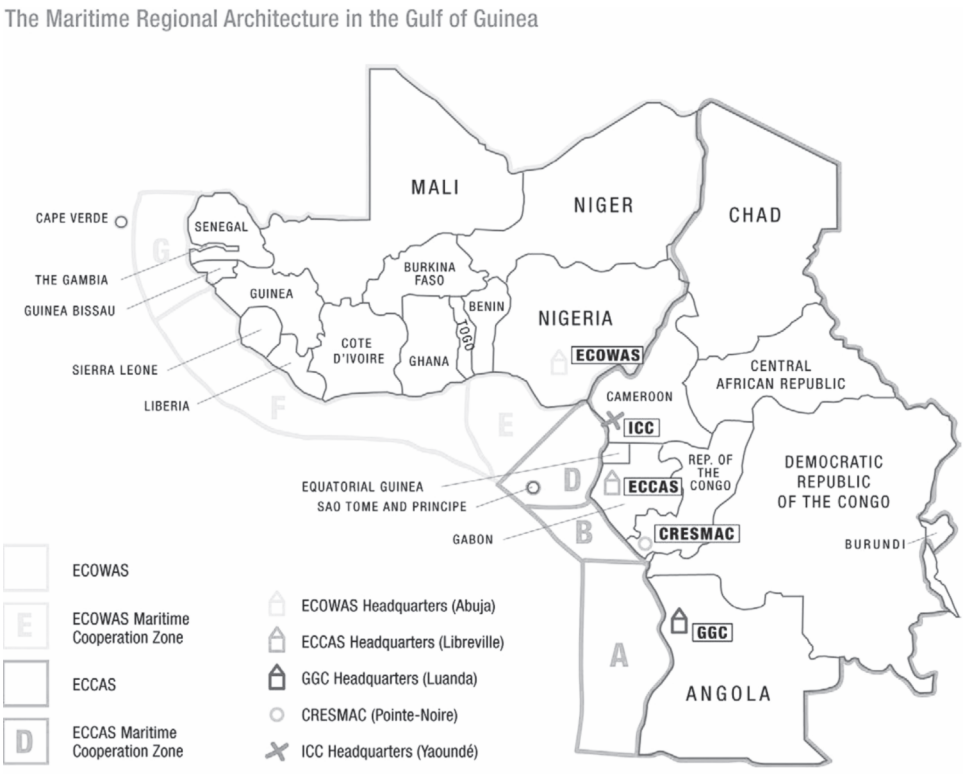
Keywords: colonialism, Gulf of Guinea (GoG), internationalization, legitimate trade, maritime security/insecurity, resistance, slave trade

Introduction

The heads of states and governments from the Economic Community of West African States (ECOWAS) and Economic Community of Central African States (ECCAS) countries met at a summit on "Maritime Safety and Security in the Gulf of Guinea" between 24 and 25 June 2013 in Yaoundé, the capital of Cameroon. At this time, maritime security advocacy agencies had declared the Gulf of Guinea (GoG) a "new danger zone." The International Maritime Bureau (IMB), Risk Intelligence, Oceans Beyond Piracy (OBP), International Maritime Organization (IMO), International Crisis Group, among others, are unanimous that the GoG is a danger zone along the Gulf of Aden. Hijackings, short-term disappearances of tankers, robbing of supply ships, hostage taking, and kidnappings for ransom are criminal incidents that jeopardize the smooth functioning of legitimate international trade in the region.[1] The region, which is rich in mineral resources (mostly oil) in high demand in the world market (it supplies 40 percent of the oil for Europe and 29 percent of the oil for the U.S.),[2] is located on the coast of West Africa. The GoG comprises 16 African countries sharing some 6,000 kilometers of unbroken coastline. These countries include Angola, Benin, Cameroon, Central African Republic, Congo, Ivory Coast, Ghana, Togo, Senegal, Gabon, Equatorial Guinea, Sao Tome and Principe, Sierra Leone, Liberia, Democratic Republic of Congo, and Nigeria.

From an economic and strategic perspective, the GoG is a prime sea-route for international trade and commerce, and this position is particularly relevant in a context where over 90 percent of global freight is by sea. For example, the GoG is used to connect the Far East with the Americas and Europe via the Atlantic. Although the Arab Gulf, Middle East, and North Africa routes are shorter, they are less secure due to recurrent wars and piracy.[3] The GoG also serves as a crucial access point for landlocked countries like Mali, Chad, Burkina Faso to carry out the export and import of goods and services.

The paper examines the historical origins of the strategic and economic importance of the GoG, as a factor of maritime security/insecurity. The focus is to see how part of Africa's history can explain the clash between security and insecurity in the GoG maritime zone. It argues that ever since the region was opened to the outside world, it became a hotspot for international trade and commerce and because of its



The Maritime Regional Architecture in the GoG. Source: Jacobsen K L and Nordby J R M, *Maritime Secutiry in the Gulf of Guinea* (Royal Copenhagen: Danish Defence College, 2015, p. 33).

strategic and economic relevance; it has oscillated between security and insecurity, stability and instability, tension and détente. The paper uses a chronological thematic approach based on event analysis of the events that marked a turning point in the history of the region from when it was opened to the outside world. It finds that each historical event had a significant influence on perceptions and feelings of security and insecurity in the maritime region. From earliest contacts with Europeans through to slave trade/legitimate trade and the two Great Wars and their aftermath, the region has experienced tumultuous moments.

Background Study

Studies on the GoG always ask the question: why does the GoG attract maritime insecurity and what can be done about it?[4] Structural and situational answers have been used to explain the growth and development of maritime insecurity, and solutions which range from country, bilateral, regional, continental and global efforts.[5] For example, the literature on the paradox of riches reflected in such titles as "The

beauty and the thief: Why the Gulf of Guinea Attracts Maritime Insecurity," establishes that it is paradoxical to possess wealth but not be able to develop because of it. Maritime insecurity has been blamed for this paradox. That is why a prescriptive literature emerged, to propose solutions to the problems of maritime insecurity in the region. For example, Anyimadu proposes a solution based on copying the example of the success stories from elsewhere, such as the Indian Ocean, among others.[6]

Whatever the solution, it is important to note that a solution is primarily determined by the nature and type of the threat. Piracy has been identified as one of the most critical threats to maritime security. Jacobsen and Nordby propose four types of piracy (kidnapping-for-ransom, petro-piracy, unreported piracy, and petty piracy).[7] Ukeje and Mvomo Ela find that both situational and structural factors led to the emergence of insecurity in the GoG.[8] They also find that countries of the GoG have failed to adopt a cogent and coherent security policy, strategy and framework to effectively tackle the threat—hence the reason why it still persists. Although the work establishes the weakness of the post-colonial State in effectively dealing with the threat, among other causes, which in effect, is an appeal for meaningful international support, the approach of this study establishes that insecurity in that maritime zone has historical origins owing to its strategic and economic relevance to international trade.

The Historical Event Analysis Approach

An event is understood not simply as anything that happens but as that relatively rare subclass of happenings that significantly transforms structures.[9] One of the most unchallenged definitions of "event" is that of Gerner and her colleagues, according to which an event is "an interaction, associated with a specific point in time, that can be described in a natural language sentence that has as its subject and object an element of a set of actors and as its verb an element of a set of actions, the contents of which are transitive verbs."[10] In any case, an event involves an actor, a target, a time-period, an activity, and an issue that the activity resolves.[11]

Events in this study were selected according to their degree of interaction and transaction[12] between the actors, the magnitude of their influence on perceptions of security/insecurity, and the extent to which they transformed the structure of the region. Historical events such as the trans–Atlantic slave trade, legitimate trade, colonialism, etc., all meant the exchange of goods and movement of people across the waters. The GoG region was critical to the penetration, advancement, and consolidation of European colonial enterprise in Africa, via missionary, commercial and consular activities.[13] Those were events that marked a turning point in the history of international navigation. This means that the GoG also has something to offer when it comes to understanding the practice of international trade and commerce on the waterways. Today, the GoG has become the new frontier for what is widely referred as the "second scramble" for Africa; only that this time, the price is not territories but access to and control of newly discovered vast hydrocarbon resources.[14] This concept of "second scramble" implies that there was a first scramble revealed

by history and according to which the GoG, sometimes referred to as "Bight of Benin" was the theatre for unprecedented economic, political, diplomatic and military intrigues/rivalries among key European colonial powers jostling to gain access to and control new territories.[15]

What this discourse suggests is that it will be undoubtedly beneficial for policy makers and analysts to include the historical context in the design and implementation of appropriate maritime security policies. Ukeje and Mvomo Ela[16] think that, in addition to contemporary developments, the historical context is also important in today's efforts to counter maritime insecurity. Regrettably, such wider discussion is often missing at high-level political summits such as the meeting of the Heads of States and Governments of the West and Central Africa, which took place in Yaoundé, Cameroon, in June 2013, to produce a comprehensive strategy for maritime security in the GoG. As uncertainty is mounting in the GoG, it would not be a bad thing for decision makers to seek comfort by looking for something positive in the past. After all, politicians have been known to sometimes appeal to historical facts to justify political claims.

History as method is concerned with attempts to understand the origin and chronological evolution of ideas and events as well as their impact on the human community. The importance of this approach, as well as its impact on contemporary workings in the region, is the fact that, it shows that the actors involved in the GoG as individuals, groups, States, communities and organizations repeatedly encounter the same kind of challenge—that of maritime insecurity in the GoG. If an attempt is made to understand how this problem was tackled in the past, this understanding can develop a better response to the problem when it reoccurs. In this regard, the re-examination of the past to understand the nature of maritime insecurity in the GoG is useful as it instructs that maritime security in the GoG was, is, and is likely to be a contemplated issue.

Where do policy makers and stakeholders go from here? While it is acknowledged that efforts so far, undertaken to effectively tackle maritime insecurity in the GoG, have yielded only minor results, knowledge about past attempts to deal with insecurity in that region can be inspirational. For example, reading about how European powers converged in Berlin in 1884–85 to regulate the use of waterways in the GoG, among other places, to avoid conflict among themselves (an initiative that was largely successful), can inspire African States in the region to do the same. Although it may be erroneous to assume that all aspects of the past will repeat themselves, it is arguably true that what has happened is connected to what is and what will be. Reconstructing the events of the past is in effect an attempt to establish circumstances that condition the present and future of maritime security/insecurity in the GoG.

To a large extent, the long history of maritime security/insecurity has shaped the way pirates and hijackers of today engage in forms of diverting the attention of monitoring ships to perpetuate illegal activities. The presence of merchant ships often loitering in this region also represents a continuation of an old age practice. Now that States in the region are struggling with more or less significant support from the international community to monitor the region, merchant ships and vessels

have been taken advantage of due to the limited capacity of these States to secure offloading. Pirates anchor around the calm areas of water in order to wait for the right moment to strike a loitering vessel. Anchorages and approaches to the ports of Bonny and Lagos (Nigeria), Cotonou (Benin), Lomé (Togo), Tema (Ghana), and Abidjan (Côte d'Ivoire) are particularly vulnerable with large numbers of merchant ships often loitering in these areas.[17] In the process, the age-old practice of fierce resistance to British naval patrols is reinvented and even taken for granted.[18]

It is expected that through this approach, the study sheds light on current maritime insecurities by widening the scope of knowledge of policy makers, researchers and stakeholders on the historical roots of maritime insecurities in the region and how it was tackled. From there, hopefully, it can contribute to the on-going national, regional, continental and global approaches to maritime insecurity. To adopt appropriate measures, it is important to understand that it is not only just in recent times that the GoG waterways began to serve as a critical gateway to the world.

The Concept of Maritime Security/Insecurity

The concept of maritime security is one of the latest buzzwords in international relations.[19] This is because it captures a normative resonance and embraces a range of meanings. Bueger proposes an understanding of maritime security by exploring the relations of the term to others.[20] Four of these require consideration: sea power, marine safety, blue economy, and human resilience. The first two of them are particularly relevant for this study because they are somewhat historical concepts. The concepts of sea power and marine safety are century old understandings of danger at sea.[21] Sea power is related to maritime security in that it addresses how far state forces should act outside their territorial waters, engage in other regions than their own and have a presence in international waters.[22] The Berlin West African Conference of 1884–85 adopted the notion of free navigation on the waterways of Africa to address this issue. Similarly, anti-slave ships such as the West Africa squadron were stationed at strategic corners of the waters to secure a sea lane for legitimate trade using deterrence and surveillance.

The concept of "marine safety" addresses the safety of ships and maritime installations with the primary purpose of protecting maritime professionals and the marine environment.[23] The concept has been appropriated by the IMO and encompasses the regulation of the construction of vessels and maritime installations, the regular control of their safety procedures as well as the education of maritime professionals in complying with regulations and the prevention of collisions, accidents and the environmental disasters these may cause.[24]

Maritime security is also linked to economic development because throughout history the oceans have always been of vital economic importance. That is why the concepts of "blue economy" and "blue growth" aim at linking and integrating the different dimensions of the economic development of the oceans and constructing sustainable management strategies for these.

Finally, human security also provides a significant understanding of maritime

security. Given that human security concerns food, shelter, sustainable livelihoods and safe employment, fisheries are therefore a vital source of food and employment, notably in the least developed countries, and IUU Fishing is a major problem impacting human security.

An African approach to maritime security has developed recently, according to which maritime security is anything that creates, sustains or improves the secure use of Africa's waterways and infrastructure that supports these waters.[25] These include policies, laws, rules and regulations as well as actions and operations undertaken by known conventional actors to ensure the sustainable, safe use of the waters. It also embraces a vast range of policy sectors, information services, and user communities, including maritime safety, search, and rescue, policing operations, operational safety for offshore oil and gas production, marine environmental monitoring and protection, naval operations support.[26] The objective is to reduce risk and fear among conventional users of the waters.

Maritime insecurity, on the other hand, is the presence of fear and risk in the conventional ways of doing business on the waterways and beyond. It encompasses a range of threats such as maritime inter-state disputes, maritime terrorism, piracy, trafficking of narcotics, people and illicit goods, arms proliferation, illegal fishing, environmental crimes, or maritime accidents and disasters.[27] Logically, maritime security means the absence of these threats. Any threat to the conventional way of doing business along the said waterways is considered maritime insecurity. As at now, pirate attacks, which stood at 1,434 incidents between 2003 and 2011, to criminal activities linked to theft and illegal trade in crude oil, trafficking of persons, drugs, firearms and pharmaceutics, IUU fishing, waste dumping, and pollution, just to name these few, represent the newest threats.[28] However, and as shall be demonstrated, these threats derive from age old practices rooted in the emergence of the GoG to an international navigation zone.

Historical Experiences of Security/ Insecurity in the GoG Maritime Zone

Early Europeans and the Internationalization of the GoG

Maritime insecurity in the GoG first received international attention when the region was opened to world trade and commerce. By the second half of the 15th century, European monarchies had increased their power and resources, which enabled them to turn their energies beyond their borders to the GoG. In the early 16th century, European adventurers launched their small fleets into the vast reaches of the Atlantic Ocean and reached the GoG. These voyages marked the beginning of a process that led to radical changes in the political, economic and socio-cultural life of the entire GoG.

Portugal took the lead in the European exploration. Beginning in 1420, under the sponsorship of Prince Henry the Navigator, Portuguese fleets began probing

southward along the GoG, where they discovered a new source of gold. The GoG was then called the Gold Coast. Portuguese explorer Bartolomeu Dias was the first European to circumnavigate the GoG.[29] The aim of these explorers was to seize the trade of Indian Ocean and of the distant Spice Islands that was controlled by Arab merchants and traders. The GoG was strategic in that it enabled the Portuguese to check rival traders, and the ease with which they established their maritime hegemony was the result of their vastly superior naval technology, seamanship, and firepower unmatched by anything existing in the region at the time.[30] The maritime activities of Portuguese sailors, explorers, and traders along the GoG represented a maritime threat to Arab traders and merchants who had gained control of the Indian Ocean. These Arab traders interpreted the presence and activities of Portuguese sailors and traders in the GoG as threats to theirs over the waterways of the Indian Ocean. The clash over control of the waterways was further intensified by the absence of a regulatory and binding navigation framework. However, the Portuguese were able to consolidate their hold in the region by building a fort there in 1481.[31]

The Portuguese also intended to discover and trade in gold, which was in high demand in Europe at the time. When gold was effectively discovered, regular trading relations were established at numerous ports of call between Awim and the Volta. New maritime markets were created, and this stimulated trade over wide areas and the trend away from subsistence economy gained pace.[32] In fact, the demand for gold occasioned considerable economic activity in the area in the later part of the 15th century and led to other explorations and discoveries. Fernão do Pó reached the GoG, including São Tomé and Príncipe and Helmina, in 1471 while Senegal and Cape Verde were reached in 1445 and 1446. In 1482, Diogo Cão reached the Congo River. He discovered that the area was well located on the sea route between West Africa, Europe, and America. In an attempt to control the wealth and land of the people, trading stations were opened at several points along the coast. The explorers also reported about the wealth of the area and this was how the GoG came to be known and began attracting international attention. The activities of European traders, explorers, and sailors, were dominant to the point that the trans–Saharan trade[33] was threatened and bypassed in favor of direct trade with West Africa by sea. Strategically, the GoG had become the original point of contact between the coastal peoples and the Europeans. However, with the advent of the slave trade, another form of maritime insecurity emerged in that region.

Slave Trade and Humanitarian Insecurity in the GoG

The first structural form of international trade that was introduced and practiced in the GoG was the Transatlantic Slave Trade also known as the Triangular Trade. It was the largest form of slave trade experienced in Africa, and it began in the 15th century. It consisted of the transportation of large numbers of African captives in ships from the coast of the GoG across the Atlantic Ocean to the Americas to work as slaves in European-owned plantations. The growth in the demand for slaves in Europe and America caused the GoG to be reinvented as a secure terrain to carry

out the slave trade. To that effect, slave stations were opened by the Portuguese off the coast of Guinea between 1460 and 1466 to ensure a regular supply of slaves. When Britain, France, Germany, Spain, and the Netherlands later joined Portugal, more slave stations were opened and transactions intensified between Africa, Europe, and America via the water. The GoG was then known as "Portuguese Guinea" or the "Slave Coast." Strategically, it was the point of departure for African slaves (considered as cargo) to such destinations as Bristol and Liverpool.

Slaves were first used to work in Cape Verde cotton and indigo plantations, but later, with the development of sugar, cotton and tobacco plantations in the Caribbean and the Americas, they began transporting slaves to their South American colonies. In return, African slave dealers got European goods like firearms, alcohol, cotton goods, and beads. Ports around the GoG served as the stock exchange market for these goods. It is estimated that some 11 million Africans were loaded on slave ships en route to the West Indies across the Atlantic Ocean and more than 1,200,000 slaves were shipped from the Bight of Benin alone.[34] In any case, estimates of the number of Africans sold into the trans-Atlantic slave trade range from about 9.6 million at the lower scale to about 15 million at the upper.[35]

During this period, maritime insecurity was interpreted as an attempt to raid slave ships off the coastal waters to Europe or ships carrying finished products from Europe to Africa. There were reports of attacks on British slave vessels in Calabar in Nigeria. The ports around the GoG, the point of departure for the slaves was perceived as a "danger zone" for the African population and a "lucrative" zone for slave dealers. By 1706, English ships had transported more than 10 thousand slaves from the Gold Coast. Between 1750 and 1807, the British transported to the GoG 49,130,368 pounds of gun powder and exported from the area slaves valued at 53,669,184 pounds.[36] The so-called Middle Passage was the Lion's den or the "way of death" for African slaves. There is evidence that several million Africans died on the journey across the Atlantic and a voluminous literature now exists on the physical and psychological experiences of slaves during the Middle Passage. It is estimated that mortality rates among slaves during the Middle Passage in certain periods was as high as 20 percent, that rate having fallen to about 5 percent during the closing decades of the trade in the 19th century.[37] Furthermore, the Middle Passage was far more than being simply a trans-Atlantic journey for millions of Africans, on the contrary, it was also a symbol of the social divisions that came to separate the people of Africa and Europe.[38]

Table 1 indicates that the trans–Atlantic trade route secured the highest number of slaves compared to the trans–Saharan, Indian Ocean, and Red Sea routes. A total of 8,732,270 slaves were shipped across the Atlantic Ocean against only 7,047 for the Indian Ocean, 59,337 for the Red Sea, and 654,527 for the trans–Saharan which, in effect, was the dominant route prior to the trans–Atlantic one. This implies that more slaves were drawn from the regions in and around the GoG and the trans–Atlantic slave route was the most secure of all and the trans–Atlantic slave trade the most lucrative. Even the combined number of slaves from the three other routes (720,911) does not even come to a quarter of the total number of slaves shipped from the GoG via the Atlantic Ocean. In any case, slaves supplied by the Atlantic system

Country	Number of slaves per slave-route/type of slave trade				Total slaves
	Trans-Atlantic	Indian ocean	Trans-Saharan	Red Sea	
Angola	3,607,020	0	0	0	3,607,020
Nigeria	1,406,728	0	555,796	59,337	2,021,859
Ghana	1,614,793	0	0	0	1,614,793
Democratic Republic of Congo	759,468	7,047	0	0	766,515
Benin	456,583	0	0	0	456,583
Senegal	278,195	0	98,731	0	376,926
Togo	289,634	0	0	0	289,634
Congo	94,663	0	0	0	94,663
Sierra Leone	69,607	0	0	0	69,607
Cameroon	66,719	0	0	0	66,719
Ivory Coast	52,646	0	0	0	52,646
Gabon	27,403	0	0	0	27,403
Liberia	6,790	0	0	0	6,790
Central African Republic	2,010	0	0	0	2,010
Equatorial Guinea	11	0	0	0	11
Sao Tome and Principe	0	0	0	0	0
Total	**8,732,270**	**7,047**	**654,527**	**59,337**	**9, 453,179**

Table 1: Estimated total slave exports between 1400 and 1900 from the GoG. Source: Selected from Nunn N, "The Long Effects of Africa's Slave Trades," *The Quarterly Journal of Economics* (2008 139–176, pp. 152–153).

represented the largest known transfer of people prior to the 19th century. With the growing interest in slaves to work in plantations, African states, and in particular, those States of the GoG, became the targets of European commercial interests, and as the trade expanded, competition for European markets increased. It is estimated that between 1518 and 1860, some 15 to 25 million Africans were transported to the Americas, and in the network there were also powerful African slave merchants/dealers, most of whom came from Ghana.[39]

Political instability was another significant outcome of the slave trade in the GoG. It brought about villages or states raiding one another for slaves which in turn led to uncertainty and insecurity. In extreme cases, intra-state and inter-state conflicts over slaves caused the collapse of preexisting forms of government. In 16th century northern Senegambia, the Portuguese slave trade was a key factor leading to the eventual disintegration of the Joloff Confederation, which was replaced by the much smaller kingdoms of Waalo, Kajoor, Baol, Siin, and Saalum.[40] The most dramatic example still comes from another GoG territory—the Congo Kingdom of West-Central Africa. There, as early as 1514, the kidnapping of local Congo citizens for sale to the Portuguese had become rampant, threatening social order and the King's authority. In 1526, the King of Congo himself, Affonso, wrote to Portugal complaining that there were many traders in all corners of the country, who were bringing ruin, enslaving and kidnapping people, including nobles and members of his own family.[41]

It was for some 400 years that the GoG was strategically and economically viable and secure for the slave trade. Nevertheless, European slave dealers interpreted and perceived maritime insecurity as relating to the pirating of slave ships, but for the greatest number of African population along the area, maritime insecurity was reflected in the fear of one day becoming a slave captive for a journey of no return across the GoG waterways.

Legitimate Trade, European Scramble and Colonialism from the GoG

The GoG was also strategic in the abolition of slave trade, the introduction of legitimate trade, European scramble and eventual colonization of Africa. It was critical to the penetration, advancement, and consolidation of European colonial enterprise and presence in Africa via missionary, commercial and consular activities. It was a theater for unprecedented economic, political, diplomatic, military intrigues/rivalries among key European powers jostling to gain access to and control new territories.[42]

Britain took the lead in the abolition of slave trade. Naval patrol ships belonging to the British Royal Navy were stationed around the ports of the GoG to check suspected slave ships.[43] In 1851 a British anti-slave-trade squadron bombarded Lagos. From 1825 to 1865 the British navy used twenty ships to arrest 1,287 slave ships and free about 130,000 slaves.[44] Maritime security was redefined as operations to track down slave ships and maritime insecurity was seen as any attempt to smuggle slaves out of the GoG. During that period about 1,436,000 slaves were smuggled to America.[45] Coastal Chiefs were also convinced to sign abolition treaties with European abolitionists. However, resistance from some of them meant that they had become threats to human security.

With the introduction of legitimate trade, the GoG was reinvented as the world trade center for the exchange of African raw materials for European finished goods. Ships that left the ports of the GoG for Europe were loaded with raw materials such as timber, palm oil, rubber, cotton, minerals and ivory in return for European products

such as gunpowder, wine, etc. It is estimated that between 1905 and 1912 Togo's external trade increased by 86 percent and Cameroon's by 154 percent.[46] Nevertheless, the introduction of legitimate trade was not a guarantee of maritime security given that conflicting European economic interest along the area meant another form of insecurity.

Some European countries claimed a monopoly over some navigable waters in the GoG thereby preventing others from navigating the waters (the case of Belgium over River Congo). The clash of European interests along the area in the 19th century led to the Berlin West African Conference of 1884–85.[47] The conference involved 14 countries roughly all the States in Europe except Switzerland, along with Turkey and the United States—following intensified colonial rivalries in the GoG. The aim was to obviate the misunderstandings and disputes which might in future arise from new acts of occupation on the coast of Africa.[48] The Final Act of the Conference comprised six chapters summarized as (1) a declaration relative to freedom of trade in the Congo, (2) a declaration relative to slave trade, (3) a declaration relative to the neutrality of the Congo, (4) an act of navigation for the Congo, (5) an act of navigation for the Niger, and (6) a declaration introducing into international relations certain uniform rules with reference to future occupations on the coast of the GoG.[49] One of its resolutions was to free navigation in the Congo and Niger waters. This resolution was among the first international legal attempts to regulate the use of African waters. It redefined maritime security as the freedom of navigation along the waters of the GoG and insecurity as any attempt to deny access to these waters.

The principle of effective occupation was also adopted as a means to regulate the peaceful acquisition of territories. It meant an effective control of the coastal areas including the hinterlands through three core methods: cession, conquest, and occupancy.[50] In line with this resolution, Europeans were able to penetrate the hinterlands from the sea coast and the navigable rivers of Niger, Senegal, and Gambia. In 1884, German flags were raised in Cameroon and Togoland. In 1886 the French occupied the coast between Lagos and Togo, and the rest of the West African coast not claimed by Britain, Portugal, Germany, or Liberia. The four British colonies in West Africa were Gambia, the Gold Coast, Sierra Leone, and Nigeria. Treaties of annexation were signed with African chiefs as recognition of European right and control over the occupied territory. However, Europeans sometimes faced stiff resistance which they successfully suppressed and established themselves as full-time authorities in the territories. This meant that they had gained the right to use the coastal waters and lands for their economic and other activities. That was how the GoG was instrumental in bringing about colonialism.

Implications

The Berlin Conference and eventual colonialism had some significant implications for security/insecurity in the GoG. For Europeans, it marked the end of scramble over the waters and ushered an era of regulation of waterways, which, in effect meant that maritime-related disputes were prevented or could be settled peacefully.

Some measure of maritime security was gained given that after the conference, no significant conflict occurred between European powers over the use of the waters and the occupation of GoG territories.

However, if the Berlin Conference created a sense of security among Europeans in the GoG, Africans, on the other hand, resented the loss of their hegemony over the waters and even over their own land. Indeed, the resolution on the abolition of the slave trade was a welcome humanitarian initiative, but the legalization of colonialism, without the express consent of Africans sowed the seeds of future conflicts. The fact that colonialism redrew boundaries without regard for pre-existing ethnic, political, trade boundaries and ties, meant long term political and social instability in many parts of the GoG. Colonial boundaries caused longstanding grievances as well as economic underdevelopment due to a history of economic subordination to Europe. The atrocities in the Belgian Congo, the outbreak and extension of World War I to the GoG, African independence movements, modern hostilities among ethnic groups, ongoing wars and humanitarian crises, and mass emigration from GoG due to lack of economic opportunities, are possible long-term effects of the Berlin Conference and colonialism of the people, waters, and land of the GoG. The partition of GoG territories among the European powers symbolized the inevitable geographic reorientation of GoG and a wholesale dismantling of their States, societies, and livelihoods to be replaced by European models, so that by the eve of World War I, a new type of fragmentation had changed the face of GoG forever.

Resistance to Colonialism to Secure the GoG for Africans

Europeans had set up trading companies and stations along the coast of the GoG. They were supplied by coastal middlemen with raw materials from the interior. However, they clashed with these middlemen in their attempt to bridge their trade monopoly by penetrating into the interior. The GoG again became insecure for European powers when indigenes staged resistances against the conquest and exploitation of their territory.

Europeans interpreted African resistances as threats to their activities on land and sea in the GoG. Africans attacked European supply vessels and cargo ships, companies situated along the coast, and businessmen. Duala Manga Bell, a famous Cameroonian coastal resistor was hung when he resisted German attempts to expropriate the rich Douala coastal land in 1914. British also faced uprisings in Nigeria. Nevertheless, the most spectacular resistance was against the French by Samori Toure in Guinea who headed the Wassulu Empire which at its height included parts of present-day Guinea, Mali, Sierra Leone and Northern Ivory Coast.

Although the resistances failed, since the Africans were virtually unarmed and the reprisals were often cruel and disproportionate, resistance to colonial penetration was an attempt by Africans to limit European control over the waters and to keep a monopoly over trade along the GoG. The failure of coastal resistances meant that the coastal groups had lost control over the strategic lands and waters of the coast including their trade monopoly.

The GoG from the Two Great Wars to Post-Colonial Africa

The GoG was also the arena of fierce battles during the two Great Wars of 1914 and 1939. During the wars, the area was used as a fighting and hunting ground for African soldiers. Colonial masters recruited soldiers from among the inhabitants of the area. The French recruited some 137,000 soldiers. The British are said to have used 300 000 troops from the area. During World War II the Royal West African Frontier Force was increased from 8,000 to 146,000. Northern Nigeria provided the most soldiers, and they played an important role fighting in East Africa against the Italians.

It was the gateway for the penetration of military troops. In Cameroon for example, Anglo-French (Ally) forces came in from Gabon and Nigeria to oust the Germans. They captured the strategic waters in Douala on September 27, 1914, and took Buea, another strategic coastal town on November 13. The GoG was also a refuge area for some Germans who fled from the interior. For example, Col. Zimmerman and some German troops fled from Mora in Cameroon to the Spanish colony of Equatorial Guinea. The war also brought in deadly pandemics which threatened security in the area. In 1918, towards the end of World War I, for instance, it is estimated that an influenza pandemic killed more than 120,000 in French West Africa and 70,000 in French Equatorial Africa.[51]

With the end of colonialism, the control of maritime security and safety was left in the hands of new African governments although European businessmen retained a strategic supervisory role over the waters. The GoG still continued to serve as the exchange center for raw materials and other equipment. It was not until mineral resources notably oil emerged and gained an unprecedented value in the world market that the GoG assumed a new strategic and economic importance, leading to "new" maritime security challenges.

Beyond the Past: "New" Stakes and Threats

Today, the GoG is a strategic global trade route through which around 30,000 commercial vessels travel every year.[52] It has a market size of about 300 million consumers.[53] The region provides immense potential for maritime commerce, resource extraction, shipping, and development. Indeed, container traffic in West African ports has grown 14 percent annually since 1995, the fastest of any region in Sub-Saharan Africa. The GoG has also become a hub for global energy supplies with significant quantities of all petroleum products consumed in Europe, North America, and Asia transiting this waterway.[54] The effective execution of development plans for most of the States in the region depends on 60 percent of their revenues coming from hydrocarbon resources either sourced from or transiting through the waterways of the region.[55] The estimated projection of proven deposits in the region is about 50.4 billion barrels, with an actual production of 5.4 billion barrels per day.[56] Paradoxically, the communities in the region have not been able to fully benefit from these immense potentials because of "new" security challenges.

Piracy, Oil Theft and Unlawful Activities

The term "piracy" encompasses two distinct sorts of offenses: the first is robbery or hijacking, where the target of the attack is to steal a maritime vessel or its cargo; the second is kidnapping, where the vessel and crew are threatened until a ransom is paid. In 2012, the GoG surpassed that of the Gulf of Aden as the region with the highest number of reported piracy attacks in the world. These attacks, which are sometimes violent, seem to be growing every day because of the limited maritime security presence off the West African coast. In 2013 alone, 1,871 seafarers were victims of attacks and 279 were taken hostage in 2013.[57] Although it is difficult to give precise figures to the annual losses incurred in the region through piracy, estimates of the annual cost of piracy range from $565 million to $2 billion.[58]

Date	Incident	Observation
28 September 2008	Attack of several bank buildings in the city of Limbe, Cameroon	Attack by perpetrators from the sea. 01 dead.
October 2008	Attack on Bakassi waters with hostages taken	Hostages taken: 07 French, 02 Cameroonians and 01 Tunisian
17 February 2009	Attack on Malabo (Bioko island)	Pirates from sea attacked the presidency and bank building
24 February 2010	03 Trawlers attacked	In Rio del rey
29 March 2010	Attack on the gendarmerie brigade of Bamuso	
17 May 2010	Attack on 02 ships	Buoy A (Wouri channel) hostages taken
25 July 2010	Attack on 02 trawlers OLUKUN4 and KULAK7	Cap Debundscha
12 September 2010	Attack on 02 ships (SALMA, AMERIGO VESPUCI)	Buoy Wouri channel base
16 November 2010	Attack on MOUNGO7	Moudi site, 05 dead
01 February 2011	Attack on 21st BAFUMAR at Ekondo Titi	01 dead and 01 injured
07 February 2011	Attack on the gendarmerie post in Bonjo Bakassi	02 dead, 01 wounded and 10 hostages
27 February 2011	Attack in KANGUE village	02 hostages
18 March 2011	Attack on ECOBANK Bonaberi	05 dead and 07 wounded at sea, 02 attackers apprehended
19 March 2011	[Confrontement] at sea between RIB/DELTA patrol and the alleged attackers of ECOBANK	18 dead
23 July 2011	Attack on 02 MONGO MEYEN I and II trawlers in Equatorial Guinea waters	In the Bata zone
28 July 2011	Attack on 02 trawlers in Equatorial Guinea waters (to be confirmed)	Bata region
09 October 2011	Attack on a Gendarmerie unit from Isangele on a recommended mission to the Bakassi peninsula	02 gendarmes killed

Table 2: Timeline of attacks of violence in ECCAS waters. Source: Ukeje, C and Mvomo Ela W, *African Approaches to Maritime Security—The Gulf of Guinea* (Abuja: Friedrich-Hebert-Stiftung, 2013, p. 17).

In 2014, a total of 41 incidents were confirmed to the IMB PRC in West Africa.[59] The target of the hijackings is mainly product tankers from which the cargo is stolen and transshipped to smaller tankers. Although the hijacking of vessels appeared to have subsided in the last quarter of 2014, it does not mean an end to piracy.

Oil theft and bunkering represent yet another category of threats to the smooth conduct of commerce in the GoG. According to a press release from the Council of European Union (EU) on the region, Nigeria alone loses between 40,000 and 100,000 barrels a day due to theft.[60]

Trafficking in narcotics, fake and substandard pharmaceutics are yet other threats to security in the GoG. The area has become one of the preferred transit hubs in the global trade in narcotics and psychotropic substances largely from South America, as well as a destination for fake and substandard pharmaceuticals coming from Asia and the Far East.[61]

Illegal Unreported and Unregulated (IUU) Fishing

The GoG has become a juicy haven for IUU fishing trawlers from diverse regions of the world. Although it may be hard to produce exact figures in this domain of illegal maritime activity, as well as its real insecurity impact, experts estimate that 11 to 26 million tons of sea products are extracted annually in that manner.[62] It is also observed that 40 percent of the region's annual catch is estimated to be illegal, unregulated, or unreported and the region has kept the position of the highest region of illegal fishing in the world.[63] This represents up to 37 percent of the region's catch, resulting in economic losses and compromising the food security and livelihoods of coastal communities.[64] In addition to the environmental damage, the large catches made by illegal boats deplete fish stocks and deny fish to local, artisanal fishermen.[65]

Pollution

Pollution is another significant threat to maritime security in the GoG. It has been revealed that aggressive natural resource exploitation degrades the environment and pollutes ecosystems.[66] High levels of water and air pollution, for example, are contributing factors to instability in the region, not only regarding environmental and economic impact but also by their contribution to a climate of desperation among the population.[67] Oil production companies located in the region release toxic gases into the air which damage the environment and community health. The 3.3 million deaths caused by outdoor pollution annually,[68] suggests that if nothing is done, the GoG is likely, in the not too distant future, become an environmental deathtrap. This is plausible because levels of oil production are not only rapidly increasing, but they have incurred and continue to incur spills and leakage of oil into the marine environment, polluting the ecosystem and further endangering fisheries and livelihoods. The threat of pollution is real in the GoG given that it jeopardizes the ecological base of the long-term development of the region.[69]

Sociopolitical and Economic Instability

The latest political, social and economic developments in the GoG indicate preoccupying instances of uncertainties. Underlying threats to maritime security are also the weakness of the post-colonial State. States within the areas have not been able to control their maritime borders effectively. One reason could be that Africa continues to look at the sea from a distance. As Coelho explains, post-colonial Africa remained beyond sea issues for most of the second half of the 20th century, busy as it was with settling disputes and consolidating political borders in the hinterland and deprived of the means to integrate the sea into its national economies.[70] State weakness offers ideal conditions for extremists looking for a foothold, to the point that these areas are the primary locations for terrorist organizations. Instability essentially means uncertainty and range from extremely violent—terrorist attacks, civil war, ethnic cleansing, massacres, coups, and revolutions—to lesser forms of instability such as protests, strikes, riots, and declarations of emergencies. All these elements make the region unsafe for international navigation.

Conclusion

The international concern about security in the GoG is not a recent matter. Maritime security/insecurity in the GoG started receiving sustained international attention when the earliest Europeans first reached the area in the 15th century and opened up trading posts along the coast. This marked the beginning of a series of activities between the GoG and the international system which was not without concerns for maritime security and safety. Slave trade was the most dominant and lucrative of all, with about four centuries of practice. During the period, the waterways of the GoG and in particular, the Atlantic Ocean were seen as the Lion's den for African slaves or a way of death. However, concerns about human security, coupled with economic motives led to efforts to abolish the slave trade and substitute it with legitimate trade, under the watchful eyes of well-established colonial States and governments. With colonialism, European countries took over control of not only the waterways of the GoG but the land and people as well, following the prescriptions of the Berlin Conference of 1884–85, which was convened purposefully to address security concerns in the region. The process was not completely a peaceful one either as these Europeans met with sometimes stiff resistances from the people of the GoG. Colonialism might have come to an end but it left an indelible mark on the way the people of GoG had to perceive the relationship between them and with the outside world especially when it came to managing the resources of the GoG.

Maritime security conferences such as the Yaounde tripartite conference of June 24 and 25, 2013, held as a follow up to a United Nations Resolution and witnessed by stakeholders at all levels, was, from every indication, a continuation of a series of forums inspired by and drawn from history. They are aimed at finding a lasting solution to safety and security concerns in this internationally coveted maritime

domain. However, given the strong and dynamic resolutions that were arrived at, it can only be expected that participating and concerned countries follow-up on them to build the structures and centers that are needed for permanent peace and security to reign in the GoG, just like the resolutions of Berlin Conference which succeeded to restore security and safety among Europeans over the use of waterways. This paper might not have exhausted the entire literature on the historical origins of maritime insecurity, but it provides a clue to understanding the historical and strategic dynamics of security/insecurity in the GoG.

Notes

1. For example, a 2012 World Bank report reveals that piracy-related incidents cost the world's economy between 740 and 950 million U.S. dollars, a figure that is due to increase if noth - ing is done. The 2013 Global Piracy Report states that more than 300 persons were taken hostage, with 21 of them injured by knives or guns.
2. It was in the last decades of the 20th century that Africa's natural resources and revenue raised the profile of Africa in the geopolitics of world resource endowment. For details see C. Ukeje and W. Mvomo Ela, *African Approaches to Maritime Security—The Gulf of Guinea* (Abuja: Friedrich-Hebert-Stiftung, 2013).
3. Ukeje and Mvomo Ela (2013), p. 9.
4. Joana Ama Osei-Tutu, "Beauty and the Thief: Why the Gulf of Guinea Attracts Maritime Insecurity" *Policy Brief* (Koffi Annan International Peacekeeping Training Centre, 2014).
5. J.V. Ntuda Ebode (ed.), *Terrorisme et piraterie: De nouveaux defis securitaires en Afrique centrale* (Yaounde: Friedrich Ebert Stiftung, Presses Universitaires d'Afrique, 2010).
6. A. Anyimadu, *Maritime Security in the Gulf of Guinea: Lessons Learned from the Indian Ocean* (London: Chatham House, Africa, 2013).
7. K.L. Jacobsen and J.R.M. Nordby, *Maritime Security in the Gulf of Guinea* (Royal Copenhagen: Danish Defence College, 2015).
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Biographical Statement

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Maritime Disputes as a Test of Communist Party Legitimacy

Peter Murphy

Structured Abstract

Article Type: Research Paper

Purpose—Discussions regarding China's assertiveness toward disputed maritime territories in the East and South China Seas have mostly examined the issue through the lens of realist international relations theory and power transition theory focusing on China as a rising power challenging the U.S. order. This paper examines the domestic pressure faced by China's ruling Communist Party of China (CPC) as a motivating factor behind China's assertive maritime behavior.

Findings—This examination finds that looking at domestic pressure and the need for the CPC to maintain legitimacy as influencing factors can help explain China's behavior, which would otherwise seem perplexing when viewed only through a realist international relations lens.

Practical implications—This paper offers a deeper understanding of China's motivations behind its recent behavior. This can assist in further analysis and in formulating policy for managing the disputes and efforts to decrease tension in the region.

Originality/Value—By examining the maritime disputes from the perspective of Chinese domestic policy, this paper deviates from the typical approach to framing this issue and offers an alternative to a realist international relations approach that tends to only support zero sum policy.

Keywords: China, East China Sea, legitimacy,
maritime security, maritime territorial disputes, South China Sea

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Introduction

China has become increasingly assertive in recent years in demonstrating its claim to disputed territories in the East and South China Seas. Island building, increased encounters with its Asian neighbors, and confronting U.S. naval vessels and aircraft have repeatedly made international headlines. Amidst the rising tensions, all sides claim to seek a peaceful resolution to the situation. Yet it is difficult to envision a peaceful solution when the situation is viewed as the inevitable result of a rising China deliberately seeking to assert itself as the new regional hegemon.

This paper will argue that instead of viewing China's actions in the East and South China Seas as purely motivated by international politics, it is helpful to examine how China's actions toward maritime disputes affect the legitimacy of the Communist Party of China (CPC). In addition to the pressures of international politics, the CPC is facing tremendous domestic pressure as well. If the U.S. and other stakeholders to the disputes truly seek to work with China for a peaceful solution, it will be helpful to understand the internal politics affecting China's actions.

Realist Theory and Power Transition Theory

When examined through a realist lens, it is easy to see China's increasingly assertive actions in and around disputed maritime territories as the natural result of a rising power as predicted by power transition theory. Power Transition Theory, as first put forth by Kenneth Organski,[1] argues that a rising power tends to eventually challenge the dominant power as the two approach parity in overall power and the rising power is dissatisfied with the current regional or world order. The current dominant power will take action in attempt to maintain its preeminent position and the two are likely to have conflict. Because the circumstances described in power transition theory match the conditions that, according to Thucydides' account of the Peloponnesian War, led Athens and Sparta into conflict, Graham Allison[2] applied this concept to the U.S. and China and concluded they are caught in a "Thucydides Trap," i.e., on a collision course toward conflict. Choosing to refer to the situation as a "trap" is significant as it emphasizes the inevitability of the situation.

Power transition theory and the Thucydides Trap are consistent with John Mearsheimer's offensive neo-realism theory of international politics, as put forth in his book *The Tragedy of Great Power Politics*.[3] This theory is a pessimistic one, depicting great powers as, rather than seeking balance, to be constantly seeking greater power to ensure their security, which in turn threatens their neighbors and causes them to seek greater power as well.[4] The result is a persistent trend toward conflict. These pessimistic theories are very influential on Western, particularly U.S., academics and policy makers, and offer a grim prediction for the future of the U.S. relation - ship with a rising China.

From a neo-realist perspective, a more assertive posture concerning the disputed islands and territories in the East and South China Seas was bound to follow China's

gains in economic and military strength. But as the West views the actions of China through the realist lens, China's actions are also perplexing. In the realist tradition of states acting as monolithic rational actors in a self-help security maximizing structure, China's actions could be seen as counterproductive. While an outcome in the East and South China Seas that results in China's undisputed ownership of claimed territories would no doubt be a favorable outcome to China, current actions appear to be doing more harm than good. The disruption of the status quo is increasing tensions in general. But more specifically, China's actions are causing its potential rivals to band together against a perceived rising Chinese threat.

For example, Vietnam and the Philippines, once rivals in the South China Sea disputes, announced their intentions last year to pursue joint patrols and greater military cooperation in the South China Sea.[5] As a response to rising tensions, Vietnam has also increased its cooperation with India, with the two countries announcing a Joint Vision Statement for military cooperation through 2020.[6] Japan, having already reinterpreted its constitutional military limitations to allow for collective defense in 2014, has also begun to participate in naval exercises with the U.S. and India as part of a trilateral effort to share the task of patrolling the Asian seas to counter rising Chinese military presence.[7] Examples such as these are plentiful in the news in recent years.

Perhaps even more importantly, China's growing assertiveness is creating a desire among the Asian states for increased U.S. military presence in the region. Last year, amidst an atmosphere of increasing cooperation, the U.S. lifted its decades long ban on lethal weapon sales to Vietnam, and the U.S. Navy announced plans for increased port visits to its former enemy.[8] The U.S. Navy also returned to Subic Bay in the Philippines, nearly 25 years after closing its base there.[9] Coupled with the Philippines legal challenge in The Hague International Tribunal against China's claims in the South China Sea, the Philippines seemed poised to move forward on a decidedly anti–China, pro–U.S. foreign policy path, until the new, outspoken, Filipino President, Duterte, made a dramatic turnaround and tilted away from the U.S. and toward China. This dramatic turnaround, however, was due in large part to Duterte feeling personally insulted by former U.S. president Obama and his administration's criticism of Duterte's violent domestic anti-drug campaign and a perceived pattern of overbearing U.S. meddling in Philippines affairs.[10] With Duterte's more favorable opinion of the new U.S. President Trump, an influential Philippine military with strong ties to the U.S., the fact that China remains domestically unpopular in the Philippines, and the fact that the disputed islands remain a point of contention with China, analysts are already predicting the Philippines drifting back to its more traditional position in the U.S. sphere.[11]

Apprehension toward rising Chinese military assertiveness is alarming even the U.S.'s more stable regional allies. When Former U.S. President Obama stationed U.S. Marines in Darwin, Australia, as part of his pivot to Asia, the move was seen as the longtime U.S. ally choosing in favor of the U.S., its military ally, over it largest trading partner, China.[12] Australian officials cited China's rising assertiveness as one of the factors behind the decision.[13] While continued presence of U.S. forces in Korea can be explained by the threat of North Korea, Japan allowing continued U.S. presence

in Okinawa, despite strong local opposition, is because of Japan's growing problems with China in the East China Sea.[14]

This drive toward greater U.S. military presence in Asia can be summarized by recent remarks from U.S. Senator John McCain, calling for a U.S. military buildup in Asia, "I believe there is strong merit for an Asia-Pacific stability initiative which is similar to the European deterrence initiative we've pursued over the last few years."[15] He further explains, "Despite the U.S. efforts to rebalance to the Asia-Pacific, U.S. policy has failed to adapt to the scale of China's challenge."[16] At a time when North Korea is capturing much media focus, McCain is reminding the American people that it is China that needs to be counterbalanced.

From a realist perspective, antagonizing the U.S. and Asian rivals over tiny islands and rocks, with the result of provoking a greater anti–China military cooperation in the region, does not seem prudent for China unless it is part of a deliberate strategy of establishing regional dominance through aggressiveness. In other words, it appears that China is confident in its newly achieved power and is taking action to challenge the reigning power as would be predicted in power transition theory. It is possible to argue that the assertive behavior is necessary because China needs access to the natural resources in and around the disputed territories. But if the issue was primarily over access to natural resources, there should have been greater enthusiasm from all parties to pursue joint development agreements (JDA) as a pragmatic compromised solution.

JDAs have been reached between most of the countries in Southeast Asia in the waters around Malaysia and Indonesia, and in the Gulf of Thailand.[17] Yet finding similar compromised solutions in the middle of the South China Sea remains elusive. Analysts argue that this is because the claims in the South China Sea involve unresolved sovereignty disputes which add political considerations and are emotionally charged.[18] This argument could easily be applied to China and Japan's dispute over Diaoyu/Senkaku as well.

This growing propensity for assertive actions and lack of enthusiasm for pragmatic compromised solutions confuses the U.S. and its allies as to what China's intentions are and how far it is willing to go in confronting rivals over disputed maritime territories. China considers territorial integrity to be a "Core Interest," but there is no consensus as to what a core interest entails as a matter of policy regarding China's disputed territories. Exact wording from the "China's Peaceful Development White Paper," reads as follows:

> China is firm in upholding its core interests which include the following: state sovereignty, national security, territorial integrity and national reunification, China's political system established by the Constitution and overall social stability, and the basic safeguards for ensuring sustainable economic and social development.[19]

It is clear that the stated interests are important, and China has declared that it will be firm in upholding them. But there is confusion surrounding the core interests of territorial integrity, since not all of China's controversial territories are equal. Michael

Swaine, writing for the China Leadership Monitor studied the origin and evolution of how China uses the term "Core Interest" in its statements about international politics. The term first began to appear in a foreign policy context in reference to Taiwan as one of China's core interests in 2002 and 2003.[20] Shortly after, China extended the term to Xinjiang and Tibet as well.[21]

The confusion came in 2010 when Western media, beginning with the *New York Times*, began reporting that China had elevated disputed territories in the South China Sea to "Core Interest," putting them on the same level as Taiwan, Tibet, and Xinjiang.[22] In 2013, media outlets beginning with *Tokyo Kyodo News* began reporting that the China had identified the Diaoyu/Senkaku islands in the East China Sea as a "Core Interest" as well.[23]

While Chinese officials did mention East and South China Seas territories as being associated with the core interest of Territorial Integrity, it is not clear if any of these maritime territories individually, or even if all the maritime territories collectively, represent a "Core Interest" to the extent that Taiwan does, despite how analysts outside of China may have reported it as such. Confusion on this issue of core interests is exacerbated because China has thus far refused to clarify explicitly where East and South China Seas territories rank in their magnitude as "Core Interests," instead keeping its core interest policy somewhat ambiguous.

Given China's deliberate ambiguity toward its core interests and toward what is motivating its surge in assertive behavior in recent years, U.S. and Western analysts, not surprisingly, are interpreting China's words and actions through the international relations lenses that Western analysts are familiar with, projecting offensive realism and power transition theory onto China's actions. From this point of reference, the U.S. and its allies are trying to formulate their response accordingly. It is possible that this is all the result of the "tragedy of great power politics," as Mearsheimer would prescribe. It could, however, be argued that Western models of international relations theory do not apply well to China. To better understand China's intentions in the East and South China Seas, it is helpful to examine the situation from the perspective of China's leaders and what pressures they face. From this perspective, one sees China's foreign policy actions through the lens of the domestic pressures on the CPC, and how maritime disputes factor into its need to maintain party legitimacy.

Why Legitimacy Is Important

First, one must understand why party legitimacy is such an important concept in China. First and foremost, survival of the CPC is tied to its legitimacy; the party must maintain legitimacy in order to continue to exist as the governing body of China. To understand why, it is necessary to understand the concept of political legitimacy, and how it applies to the CPC.

Political legitimacy, as a topic or theory within political science, applies, of course, to all governing bodies, and deals with how and why a governing body is legitimate in the eyes of those it governs, specifically addressing the effectiveness of

the governance, and why those governed accept the governing body's authority to implement policy and law, select leaders, and legitimately use force. Legitimacy has been a topic of discussion among Western philosophers, political theorists, and social scientists for centuries, explored in the writings of notable figures such as John Locke, Max Weber, and Robert Dahl, among many others.

Though there is no universally accepted definition, a definition based in Western liberalism seems to be the most recognized globally. For example, The Fund For Peace, in cooperation with *Foreign Policy Magazine*, publishes an annual Fragile State Index[24] to quantify and rank each country's stability. One of the criteria that factors into the index, State Legitimacy is a measure of the legitimacy of the state's governing body. The measure includes: Illicit Economy, Drug Trade, Corruption, Government Effectiveness, and Power Struggles, none of which would seem controversial. But the index also factors in Political Participation, Electoral Process, Level of Democracy, and Protests and Demonstrations, clearly defining legitimacy based on Western liberal-democratic norms.

China is judged harshly from these standards, and is ranked of 137 out of 178 countries in State Legitimacy, right behind Pakistan and Uganda, two states categorized as highly unstable according to this index.[25] Yet China is the number two economy in the world, commands significant global influence, and is overall ranked relatively stable at 93 out of 178, despite the low legitimacy rating.

The root of the problem is that China's system is not inclusive, the everyday people of China cannot decide who their leaders are. From a Western liberal perspective, it is difficult for a government to maintain legitimacy when people have little to no say in who is elected, and what policies are implemented. China's overall success, then, is a bit paradoxical if China's government is so lacking in legitimacy, at least by Western liberal standards. This is why China is the topic of such a great amount of literature on party legitimacy and speculation on how much longer the CPC can survive.[26]

But China has its own tradition of political legitimacy, and it is one that predates Western liberal philosophy, dating back to the beginning of the Zhou dynasty, circa 1046 BCE, and its "Mandate of Heaven." Under the Mandate of Heaven, a ruler was selected by the heavens to rule, but the mandate could be lost if the ruler's performance caused him to fall out of favor with the heavens. The Zhou used this to justify the legitimacy in seizing power through the overthrow of the previous Shang dynasty.[27] This established a long tradition of legitimacy based on performance in Chinese political culture.[28] Nowhere in the Chinese tradition of legitimacy was the inclusiveness or openness that Western liberalism prescribes.

The exact criteria for what makes for successful governing performance is fluid and can be adapted to the times and the philosophy of the day. As described by Philip Kuhn,[29] Chinese political philosopher Wei Yuan in the nineteenth century articulated how legitimacy of authoritarian, non-inclusive, rule was justified through its efficacy in solving the problems faced by the Chinese nation. To Wei, increasing inclusiveness meant increasing participation from the elite scholarly class in order to increase effective policy, not increasing participation of the masses to create universal democratic

representation. Legitimacy was in the eyes of the literati more so than in the eyes of the masses, as it was the literati who understood the teachings of Confucius and Mencius. Mencius ascribed legitimacy to the ruler following the "Kingly Way," essentially a Confucian moral path dedicated to the benevolent rule of the people.[30] In this way, the concept of maintaining the Mandate of Heaven, i.e., legitimacy, is compatible with any ensuing political philosophy. As Kuhn argued in his interpretation of the writings of Wei Yuan, the Chinese understanding of legitimacy is in the efficacy of the ends, not the means.[31]

Chinese traditional performance legitimacy was also fully compatible with Marxism-Leninism and its Chinese offshoot, Maoism. Based on the concept of Lenin's vanguard party, the vanguard is a revolutionary party necessary to lead the proletariat in their struggle against the oppressive capitalist state. This party would continue to lead the proletariat until communism was achieved. Mao's CPC was essentially a Leninist vanguard party which Mao adapted to China's situation. Notable modifications to traditional Marxism/Leninism that went into creating Maoism are a greater focus on the peasantry, and a need for constant revolution.[32] Under Maoism, the CPC's legitimacy was earned through its effectiveness at promoting revolutionary zeal and adherence to the Chinese Communist ideals, rather than effectiveness at providing for the livelihoods of the Chinese People, hence the frequent purges and episodes like the Cultural Revolution. With the reforms implemented in the late twentieth century under Deng Xiaoping, pragmatism in achieving economic success and continued development became the foundation for the CPC's performance legitimacy. But as Dingxin Zhao[33] argued, the danger in performance legitimacy is that it is based on fulfilling promises, and is thus vulnerable if those promises cannot be kept.

The CPC's struggle with legitimacy then could be described as two-fold. On one hand, it faces a deep traditional need to maintain its "Mandate of Heaven" through constant performance based legitimacy. Its performance can be defined as economic success, Confucian morals, communist zeal, or really anything so long as it is compelling to the people and they feel content enough not to revolt and overthrow the CPC. More recently, however, as China has re-emerged as a global economic power, it has integrated into a world dominated by Western institutions. As Western influences reach the Chinese people, the CPC finds itself under pressure to prove its legitimacy externally as well. This is because the Western assumption is that a democratically elected governing body is legitimate *a priori*, by virtue of the fact that it is a representation of the will of the people. A single party system, therefore, is not inherently legitimate and is under the burden to prove and continue to maintain its legitimacy.

While facing external pressure from the West to justify its one-party system, China also faces increased pressure from within as the Chinese middle class grows and citizens are exposed to more Western norms. If the CPC wants to maintain a non-inclusive, one party rule, essentially rejecting the Western liberal form of legitimacy, it must demonstrate its legitimacy in other ways, namely through effective performance. Given this internal and external pressure to consistently demonstrate legitimacy,

the CPC must continuously make efforts to ensure it is demonstrating its effectiveness.

Why the Maritime Territories Are Important for Legitimacy

It is against this backdrop that the necessity to remain strong on the maritime disputes becomes clearest. The CPC actively promotes itself as the only entity that can protect China's core interests.[34] This encourages nationalism in the public's attitude toward international affairs and is helpful in strengthening the image of the party, and thus can be an effective tool of party legitimacy. But as Zeng and his colleagues[35] point out, this may be out of sync with China's foreign policy goals because it encourages the public to demand a strong stance on the territorial disputes, even if a more compromised approach would serve China's foreign policy better. This was evident in the uproar over the Japanese nationalization of Diaoyu/Senkaku and is also increasingly evident in the Chinese people's attitudes toward the South China Sea.[36]

The problem, then, is that this limits the party's options in its ability to reach for compromised solutions. The CPC must present the image that it is strong on the East and South China Sea disputes. If it is perceived to be weak on these issues, it calls into question its ability to secure the more significant territories, most notably Taiwan. Appearing weak or incapable of securing what rightfully belongs to China does not bode well for a party deriving legitimacy from its ability to protect territorial integrity.

Individual maritime territories on their own are not "Core Interests" of the same magnitude as the core interest of maintaining the Chinese political system. Likewise, they are not of the same magnitude as the core interest of protecting territory such as Taiwan, Xinjiang, and Tibet. Despite any controversy, Xinjiang and Tibet are fully integrated into the Chinese mainland. Taiwan's pseudo independent status is unique, but nearly every world leader recognizes its importance to China's identity. Even U.S. President Trump, after initially stirring controversy by speaking with the Taiwanese president, officially acknowledged the One China Policy regarding Taiwan.[37]

The maritime territories by contrast are disputed and there is no mutual understanding of ownership among regional and world leaders. But China's assertive position in the East and South China Seas in this context becomes necessary as a factor in protecting the more significant core interests. How China manages the disputes over maritime territories sets a tone and establishes precedent which can either strengthen or weaken China's hold on more significant territories. Additionally, the CPC's actions regarding maritime disputes affect the perceived effectiveness of the CPC, necessary to the core interest of maintaining the Chinese political system.

This can help explain why China has not been clear on what "Core Interest" means regarding island territories. China does not want war with the U.S., and a

recent survey shows that the Chinese people do not either.[38] But the same survey shows that the Chinese people absolutely do not want China to back down on these issues. This puts the CPC in a tight position as it must take actions and make statements that look strong in the eyes of the Chinese people, yet try to avoid escalating the situation beyond control. Ambiguous policy and messaging such as a vaguely defined concept of "Core Interests" can be a helpful tool in providing some room to maneuver in such situations. China is showing determination by associating maritime territories with its core interests, yet avoiding establishing firm "Red Lines" that may force the CPC into unfavorable action. This is a wise move when contrasted with, for example, how President Obama's Syria red line turned out to be a political disaster as the U.S. was caught unprepared and unwilling to take action to follow up on its own "Red Line."

Given the risk of war with the U.S. and the risk of driving the nations of Asia together against China, an important question, then, is how necessary is a strong position on island territories for party legitimacy? After all, the party has other tools at its disposal to maintain legitimacy. CPC legitimacy has primarily been maintained through continued economic growth since Deng Xiaoping's reforms beginning in the late 1970s, particularly among those who still remember the misery of the Mao era.[39] Unfortunately, China's rapid economic growth has not been without problems internally.

According to a recent Pew Research Center report,[40] corruption, pollution, uneven wealth distribution, and poor safety standards in food, medicine, and industry potentially undermine China's prospects for continued growth and the support for the CPC. Hu Angang,[41] in analyzing China's growth trajectory, highlights the income gap as a serious problem. China's rapid growth has been at the expense of the egalitarian principles that Mao championed and used to indoctrinate and create the communist identity for the Chinese people. Hu also identified problems in decreasing foreign consumption of exports in the post financial crisis world and the problem of aging population, much like Japan faced after its rapid growth.[42] Like Japan and the four Asian Tigers (South Korea, Taiwan, Singapore, and Hong Kong) of the twentieth century, China's miracle growth cannot continue at such a strong pace forever, and China's growth has already begun slowing down. The sum of all of this is that the CPC may be nearing the limit of how much it can leverage economic growth to promote its legitimacy.

According to the Pew report,[43] corruption among Chinese officials was the number one concern for Chinese people about their government, so it is not surprising that recent Brookings Institute research indicated fighting corruption as one of the most necessary means of enhancing legitimacy.[44] This explains why Xi Jinping has made fighting corruption one of his stated goals. In a speech made to the Chinese Xinhua news agency, Xi referred to catching high ranking corrupt officials, "Tigers," as well as low ranking corrupt officials, "Flies."

> We must uphold the fighting of tigers and flies at the same time, resolutely investigating law-breaking cases of leading officials and also earnestly resolving the unhealthy tendencies and corruption problems which happen all around people.[45]

Xi understands how the perception of corruption is damaging to the party's image, as indicated by his statements to the party's top discipline body:

> The style in which you work is no small matter, and if we don't redress unhealthy tendencies and allow them to develop, it will be like putting up a wall between our party and the people, and we will lose our roots, our lifeblood and our strength.[46]

But fighting corruption can be messy and can create infighting and permanent enemies among the party's factions. When former Politburo Standing Committee member, Zhou Yongkang, was investigated and eventually convicted, the case looked like a factional purge, as Zhou Yongkang was of the same faction as Bo Xilai, the former Party chief in Chongqing who was investigated and convicted two years prior.[47] Even if investigations and convictions are not driven by factional politics, it is difficult to negate that perception.

As John Lee[48] indicates in his analysis, attacking corruption too aggressively is politically risky and can be damaging to the CPC internally. China's political system and its economic growth, fueled by State Owned Enterprises (SOE), is predicated on a system of connection and political position. A strong anti-corruption campaign attacks this very structure.[49] Also, while the Chinese people like to see corrupt officials being rooted out and punished, such actions can draw more negative attention toward the party as scandals are aired publicly.

Given the limits of performance legitimacy based on economic growth and fighting corruption, the CPC needs to augment its perceived efficacy in other ways. Recent studies[50] suggest legitimacy, if taken to mean satisfaction of the Chinese people in the performance of the CPC, derives as much from collective identity and perceived efficacy of the CPC in making China a great nation. Part of this legitimacy, then, is the collective faith of the people in the CPC's ability to protect China's interests from external threats. This fits well with Xi Jinping's grand strategy and the "China Dream" slogan, the essence of which is about state prosperity, collective pride, collective happiness, and national rejuvenation.[51]

Thus, while territorial security is not the only way to build party legitimacy, it is a necessary method. Unlike continually large economic growth, which cannot be sustained forever, or battling corruption, which can be damaging to the party, territorial security projects party strength against outsiders. It creates a sense of defending Chinese "us" against an outsider "them." This is why CPC strength in asserting Chinese interests in the East and South China Seas maritime disputes has shown to be effective way to harness nationalism to enhance the CPC's image based on public opinion surveys.[52]

Conclusion

China's increasing assertive behavior in and around disputed territories in the East and South China Seas, and the U.S. and Asian states' alarm and response does

seem to be playing out according to Mearsheimer's great power tragedy and the patterns of Organski's power transition theory. Theories of international relations such as these are useful frameworks for understanding the relationships between states and the patterns of behavior and trends toward conflict. This paper does not aim to detract from the explanatory power of these theories.

However, considerations of international politics are not the only factors that influence the decisions and actions of states. States formulate policy and decisions through the functioning of the offices of their political structures within their political cultures. Decisions are influenced by the reality of domestic pressures. In this sense, the situation with the CPC's need to maintain legitimacy and nationalism's impact on CPC decisions on the maritime disputes are not drastically different than any other country.

Yet, due to IR's fixation on the third level of analysis, there is little literature or analysis dedicated to understanding the internal factors that shape the CPC's, and by extension, China's, actions in international affairs. If the U.S., its allies, and other stakeholders in the emerging tensions in the East and South China Seas analyze China's behavior only through the lens of neo-realism and power transition international relations theory, they will formulate responses accordingly and continue to escalate the tension. This becomes the self-fulfilling prophecy; because the key players are viewing the situation as a Thucydides Trap, actions aimed only at counterbalancing and containment will ensure that it is a Thucydides Trap. While increased militarism may not necessarily lead to war, it could lead to increased tensions, arms race, lack of stability, and damage economic growth as instability and tension stifle trade and investment.

In order to find a peaceful resolution to the disputes in the East and South China Seas and relieve the increasing tensions in the region, the key stakeholders must find solutions that are acceptable to all parties. In regard to China, understanding the domestic pressure and the CPC's motivation behind their actions could be helpful if both sides truly seek to find some acceptable solution. When the problem is approached from the perspective of domestic politics, a creative solution involving JDAs or some type of partitioning could work if it is framed in a way that allows each side to save face and claim some amount of victory for its people. No solution will be easy, but a compromised solution is possible when all sides consider that no nation would go to war over small islands if nothing more than the islands' own intrinsic value was at stake.

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Biographical Statement

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Corporate Social Responsibility: All at Sea

Vaibhav P. Birwatkar

Structured Abstract

Article Type: Conceptual Paper

Purpose—Globalization is altering business processes as well as producing increasingly serious and challenging questions. It has dramatically increased the demand for transport, also for shipping worldwide, and has had negative impacts on the natural environment. This paper aims to reveal the priorities, searching for solutions for sustainable development, in terms of both the environment and the economy, to further improve the safety and quality standards of the shipping operation.

Design, Methodology, Approach—The analysis examines safety in shipping, which has traditionally focused largely around technical improvements, regulations, procedures, competence and management systems, all of which are essential elements in ensuring a safe and reliable shipping industry.

Findings—The analysis shows that if maritime shipping and the full life cycle of the shipping companies' operations are viewed as a whole, questions of sustainability begin to emerge. Safety is more than quality assets, procedures and management systems.

Practical Implications—The investigation examines corporate social responsibility as a voluntary undertaking that many companies, in increasing volume, are starting to adopt in their operations. Companies have begun to realize that in the long run they can gain more benefits, both monetary and non-monetary, if they go beyond merely complying with the regulations and engage in voluntary social responsibility activities.

Originality, Value—The development of a conceptual framework that incorporates

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corporate social responsibility and thereby safety aspects in the shipping sector is a distinct contribution of this paper.

Keywords: corporate social responsibility, environmental social responsibility, international labor organization, international safety management, maritime safety

What Is CSR?

There have been many definitions of corporate social responsibility; listing the key elements found in various definitions may be more insightful. Buchholz identified five key elements found in most, if not all, definitions:

1. Corporations have responsibilities that go beyond the production of goods and services at a profit.
2. These responsibilities involve helping to solve important social problems, especially those they have helped create.
3. Corporations have a broader constituency than stockholders alone.
4. Corporations have impacts that go beyond simple marketplace transactions.
5. Corporations serve a wider range of human values than can be captured by a sole focus on economic values.

The principle of legitimacy refers to society's granting of legitimacy and power to business, and business's appropriate use of that power and the possibility of losing that power. Corporate social responsibility defines the institutional relationship between business and society that is expected of any corporation. Society has the right to grant this power, to impose a balance of power among its institutions, and to define their legitimate functions. The focus is on business's obligations as a social institution, and society takes away power or imposes some sort of sanction on business if expectations are not met.

The principle of public responsibility means that business is responsible for outcomes related to its areas of involvement with society. The level of application is organizational (that is, the corporation) and confines business's responsibility to those problems related to a firm's activities and interest. This principle includes the view that corporations are responsible for solving the problems they create. The nature of social responsibility will vary from corporation to corporation as each corporation impacts society's resources in different ways or creates different problems. The principle involves emphasizing each corporation's relationship to its specific social, ethical, and political environment.

Last, the principle of managerial discretion refers to managers as moral actors who are obliged to exercise such discretion as is available to them to achieve socially responsible outcomes. Discretion is involved as the actions of managers are not totally prescribed by corporate procedures. The level of application is the individual who has the choices, opportunities, and personal responsibility to achieve the corporation's social responsibility.

Why CSR?

One explanation of why companies adopt CSR practices is the stakeholder theory. The theory holds that companies have a social responsibility that requires them to consider the interests of all stakeholders affected by their actions. The expectation is that stakeholders and businesses working together in hopes of mutual gain will have a significant impact on the business. By creating a shared vision between the business and its stakeholders, innovative solutions can resolve formerly gridlocked problems. This theory is the opposite of the economic agency theory, which argues that obliging businesses to spend resources on concerns other than the pursuit of profit goes against the notion of a free society. However, the stakeholder theory is increasingly being globally accepted by businesses as a framework for all business decisions.

Michael E. Porter, the Bishop William Lawrence University Professor at Harvard University, and Mark R. Kramer, managing director of FSG Social Impact Advisors, partnered with each other to publish "Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility,"[1] winner of the 2006 McKinsey Award as the most influential *Harvard Business Review* article of the year. Porter and Kramer argue that the relationship between CSR and business incentives should be viewed as an interrelated one, rather than an antithetical one. They suggest that if businesses were to consider how CSR could strategically fit in with their respective core practices, they would discover "that CSR can be much more than a cost, a constraint, or a charitable deed—it can be a source of opportunity, innovation, and competitive advantage."[2] Integrating CSR into a company's core business rather than viewing CSR as an ad-hoc philanthropic investment is not only in the best interest of the company, but also in the best interest of society in terms of having a lasting impact.

Porter and Kramer outline the four prevailing justifications for CSR: moral obligation, sustainability, license to operate, and reputation. Proponents of the moral justification argue that companies have a duty "to do the right thing"[3] and honor ethical values. In terms of sustainability, companies should look at the triple bottom line to operate in ways that secure long term needs by avoiding socially detrimental and environmentally wasteful behavior in the present. The issue of sustainability is an issue of trade-offs for the sake of the future. The license to operate argument is pragmatic since every company needs governmental approval to receive a license to operate. Concern about reputation is an issue of satisfying external parties. A long-term commitment to social responsibility can beneficially distinguish a company.

Researcher Heledd Jenkins agrees with Porter and Kramer and refers to this reasoning as the legitimacy theory. The legitimacy theory is based on the notion that by showing stakeholders that a business is dedicated to complying with the stakeholders' expectations, said business can better its reputation and effectively respond to legitimacy threats.[4]

Overall, Porter and Kramer emphasize the importance of CSR for both business and for stakeholders by explaining that successful corporations need a healthy society and any business that pursues its end at the expense of the society in which it operates

will find its success to be illusory and ultimately temporary. Since corporations and society are mutually dependent on each other, business decisions and social policies should benefit both sides and have a shared value. A business or a society that pursues policies that benefit its own interests at the expense of the other risks finding itself on a dangerous path or a temporary gain to one will undermine the long-term prosperity of both. Efficient uses of natural resources allow businesses to be more productive while safe working conditions attract customers as well as lower the internal costs of accidents.

In terms of attracting investors, investors are becoming increasingly more selective when making decisions. Investors are not only interested in high returns on investment, but also in knowing that the organizations where they invest are socially and ethically responsible. Thus, it is important for local businesses to adjust to international trends towards CSR to ensure that investments stay local.

Strategic CSR

Porter and Kramer make a distinction between responsive CSR and strategic CSR. Some companies have a responsive approach to CSR due to society-push or simply they just engage in pure philanthropy and attempt to be a good citizen. Vogel writes that still there has been no proof of CSR as a business case.[5] He analyses the research done in this matter and concludes that there might be a connection between virtue and financial performance but this is hard to prove.

The missing evidence between CSR and CSP (Corporate Social Performance) does not prove that CSR cannot be profitable; rather it is misleading trying to measure CSR activities on business performance. Vogel concludes that SRI (Social Responsible Investments) might not be more profitable than normal investments but they are not risky. And by performing CSR activities, companies might attract more and higher quality investors, and the effect hereof creates a win-win situation for both companies in form of liquidity and reputation, thus company value.

Campbell contributes to the discussion of using CSR as a strategic tool. He emphasizes that the engagement and the necessity of CSR is very dependent on the company situation. Weak and strong companies have different preferences and the weak company might be more focused on survival than any other aspects.

For example, the world's second largest shipping company, Mediterranean Shipping Company (MSC), does not have a Sustainability Report, either in their own website mscgva.ch, or in the internet. It is not possible to find data or material of any sort concerning CSR and sustainable awareness by the company. This lack of information may not be a reflection of MSC's CSR intent. It may be a missed opportunity for promotion about CSR and sustainable activities by MSC, or maybe could mean that at the moment sustainability is not a MSC main objective, and MSC has other priorities, i.e., to increase TEU capacity or the number of ships in the market share, etc.

A competitive environment can also play a role, and CSR activities might or might not be vital for company survival. Whether companies choose to express their CSR activities explicitly or keep them at an implicit level it differs globally due to National Business Systems.

Triple Bottom Line

The Economic Aspect of CSR

Corporate social responsibility should take into consideration and find a balance between the financial, social and environmental factors, which are also referred to as the triple bottom line. However, it should be noted, that the triple bottom line is not a replacement for financial results as an indicator of the company's performance. It is a supplement to financial results, which remain the first and most important bottom line.[6]

A conflict is often seen to exist between CSR and business, since the goal of companies is generally gaining profit instead of pursuing common interest. However, companies are a part of society and cannot operate in complete disagreement with widely supported values. Companies have to ensure sustainable economic growth and take into consideration the economic influences they have on stakeholders.[7]

The link between CSR and financial performance is complicated. In general, it can be stated that responsible actions can produce costs, but due to those actions cost savings in the form of learning and increased efficiency can be achieved. Responsible actions can also produce concrete improvements that are valued by the stakeholders and can lead to both cost savings and increase in the company's income.[8] There is a lack of strong empirical support for the link of social responsibility and financial performance but some efforts for assessing the monetary benefits of CSR have been studied.

The economic aspect of CSR in a company can change according to the prevailing economic situation. The economic attitudes of the companies are very different for example after a depression versus during a strong economic growth period. The companies tend to engage in CSR when they can afford it and there are no other pressing circumstances requiring their economic attention. However, nowadays the decision making process does not rely solely on economic criteria. Long-term success can be reached when the stakeholder benefits and the company's economic perspectives are in balance.[9]

In CSR, the economic aspect not only takes into consideration the economic benefit, but also the environmental and social benefits the company gains by acting responsibly.[10] A company can, at the same time, concentrate on profit maximization and take into account the social demands.[11] CSR is viewed as a necessary business practice in sustaining and growing the business. One of the key benefits of engaging in CSR actions is the ability to create important cost savings through pro-active decision-making, leading to the avoidance of negative societal effects.[12]

Corporate social responsibility can affect the economic functions of a company

by increasing its reputation and brand. CSR increases the attractiveness of the company as an employer and strengthens the loyalty of the employees. CSR also increases the risk management capabilities the corporation possesses.[13] Shipping sector operators are no different from brand owners in any other industry sector. They also need to protect their brand image by demonstrating to their stakeholders that their ships and services are safe and environmentally sound. Even though shipping companies do not necessarily face this kind of publicity and consumer pressure issues directly themselves, many of their customers will. These customers may in that case seek to manage the risks to their reputation by selecting shippers that are verifiably engaged in CSR.[14]

Shipping companies are often concerned with the engagement costs of CSR, which are related to financial and time costs. Some shipping companies seem to believe that it takes too much time to carry out CSR processes and that it does have extra costs associated with it. These costs of CSR activities may include research, engagement, data collection, analysis costs, external consultants, internal staff time, stakeholder participation, report writing and communication, internal management and internal and external auditing. However, generally these costs are seen as minimal and warranted by the shipping companies.[15]

Social responsibility can be perceived as long-run profit maximization.[16] Shipping companies should focus on obtaining long-term profits rather than quick short-term profits, which are often easy to achieve by violating standards and regulations. These long-term profits should not only be monetary profits, but also social and environmental benefits, which are often challenging to measure and can be seen only after a while.[17]

The Social Aspect of CSR

The social aspect of CSR refers to actions taken by a company where the goal is to create business practices that are fair and beneficial to the labor force, the community and the region where the company operates. A company that acts socially responsible takes into account the well-being of the labor force, the corporation and other stakeholders of the company. Social responsibility also connects these stakeholder groups together. A CSR compliant company aims to gain benefits to its interest groups without exploiting or endangering them.[18]

A company engaged in CSR does not take part in child labor or forced labor and tries to investigate the background of its suppliers and sub-contractors so that they do not engage in such behavior either. Generally, when a CSR compliant company chooses its sub-contractors it should have pre-determined, set criteria that include a requirement for responsibility and transparency. This, in return, can increase the efficiency of the business relationship. The aim of a CSR compliant company is to pay a fair salary to its employees and provide them with a safe working environment and working hours meeting the legal standards. A company engaged in CSR tries to strengthen and support the growth of its community by contributing to, for example, health care and education.

One important factor to take into consideration in the social aspect of CSR is globalization. The ethical business conduct rules vary in different countries with different rules and regulations. Companies engaged in CSR often return a part of the profit they have gained to the producer of the raw material, for example, in fair trade agriculture to the farmers, who usually operate in developing countries. A CSR compliant company offers a fair price for their products and services to the producers of the raw material and to other suppliers.

Social responsibility is closely linked to well-being and learning. The main aspects of social responsibility are the well-being and skills of the workers, human rights, product liability and consumerism.[19] Voluntary initiatives in the field of workplace conditions help defend against potential consumer boycotts as well as formal accusations of unacceptable or illegal business practices. Such initiatives can also prevent the need for government regulation by demonstrating that the industry practice satisfies the public interest.[20]

In the short run, manning ships with low-cost seafarers has been proven to lead to cost reduction and competitiveness. Nevertheless, employing low-cost seafarers can risk the shipping companies' competitiveness in the long run. For example, poor adherence to regulations by low-cost developing-world crews can harm the reputation of the shipper and might eventually lead to higher costs in the form of insurance premiums, bank loan rates, crew penalties and company fines.[21]

The goal of a socially responsible shipping company should be to obtain the best available staff onboard and select quality flags as well as place emphasis on proper recruiting, invest in training of the staff and provide good terms and working conditions to them. In addition, the company should communicate openly with its different stakeholders.[22] A shipping company can provide safe and efficient services as well as protect the marine environment when it has a skilled, satisfied and loyal staff onboard. The duty of a shipping company engaging in CSR is to create a social responsibility culture among its personnel.[23]

A committed workforce is regarded as a prerequisite for a company's commercial success. Responsible human resource management policies can lead to competitive advantages in recruiting and retention of talented and motivated employees in an industry experiencing difficulties with labor shortage.[24] Companies that place an emphasis on CSR also tend to have more loyal and committed employees.[25] It can also be concluded that a competent, rested and well-motivated crew can reduce the company's operational costs and the costs relating to the ship's maintenance by increasing efficiency through their knowledge and performance and through their commitment to the goals of the company. A competent crew has an important role in protecting the owner's investment in the form of taking care of the expensive vessels and equipment.[26]

The Environmental Aspect of CSR

A socially responsible company tries to operate in a manner that causes minimal harm to the environment and tries to reduce its environmental impacts as much as

possible. The environmental aspect in corporate social responsibility can mean that a company tries to manage the consumption of energy and non-renewable resources as well as to reduce the waste amounts they produce and to dispose the waste in a safe and legal manner, which in return reduces their ecological footprint. A company engaging in CSR thinks about the full life cycle of their products or services, which means that they take into consideration all the environmental impacts their product or service might produce in all its production phases, starting from raw material growth and harvesting to end disposal by the user. CSR companies often conduct life cycle assessments to their products or services to determine the environmental costs of the different phases. A company engaged in CSR also tries to avoid depleting resources. In the long run, being environmentally sustainable is beneficial for the company.[27]

Environmental concerns practically dominate many political, practical and reputational aspects of shipping. These issues are being actualized at all levels: local, national and international. Shipping, along with other ocean industries, is collectively considered to be responsible for the decline of marine environmental health. As a result, the risk of losing the "social license" to operate at sea has increased. Only fairly limited efforts to act in a more environmentally sustainable way and to differentiate from poor performers have been made by responsible companies.[28]

Environmental social responsibility in shipping is motivated mainly by the need to comply with existing and forthcoming regulation, by the desire to identify efficiency gains by incorporating environmental aspects in the company's strategy and by the desire to gain competitive advantage by establishing a "green" profile. The relevance and importance of the environmental social responsibility in shipping is not going to diminish in the upcoming years. The shipping companies know that neglecting their environmental risks can come with a high price. There is potential to learn how to turn the environmental social responsibility into a business opportunity in the future.[29]

The considerations that could be taken in shipping to reduce the environmental impacts of its operations could include speed reduction or slow steaming. This would benefit the environment and result in noticeable cost savings.[30] Other considerations are linked to fuels, which include biofuels and liquefied natural gas (LNG) and also to new technologies, such as fuel cells and waste recovery systems. These future fuel types and the new technologies could also result in considerable fuel cost savings and reduce emissions.[31] Eide et al. argue that reducing emissions through new technologies and operational measures in shipping seems to be at least cost neutral. These measures and developments could result in fuel savings and the payback of the capital costs would come in a comparably short period of time. However, the new fuels and new technologies need to be further studied to know their true cost saving potentials and benefits for the shipping companies.

Many companies in the shipping sector are aiming at greening their profiles and are actively involved in environmentally sustainable and CSR strategies. These greening attempts include initiatives, proposal of new designs, marketing campaigns and a change of attitude in sourcing as well as taking part in innovative projects and

research that aims to develop more sustainable new concepts such as greener designs and new fuel types. Shipping companies are also involved in the research on the fields of new fuels and technologies in order to increase the efficiency of their operations and so that they would meet the standards of prevailing and new regulations. Current upcoming regulations include for example the reduction of sulfur and nitrogen oxide levels.[32]

The Key Benefits of Engaging in CSR

Companies engaged in CSR and socially responsible investing have demonstrated that ethical codes, humane social policies, corporate citizenship and proactive environmental procedures reduce corporate risks, enhance the creativity and loyalty of the employees and improve the company's financial performance. Companies that promote sustainability and are concerned and aware of the social, environmental and economical impacts of their operations provide more predictable corporate results for their stakeholders.[33]

The benefits of engaging in CSR can be both monetary and non-monetary. Companies may engage in CSR to avoid exposure of unethical business practices, poor performance or potential negative impacts on local communities etc. Companies may also seek to achieve competitive advantage by going beyond regulations, implementing management systems, working proactively or strengthening employee pride and loyalty.[34] Other somewhat negative incentives to engage in CSR are potential pressure from internal stakeholders and already existing problems in the company's field of operation, such as environmental problems or societal problems. On some sectors, the pressure of external stakeholders such as NGO's or the potential of new regulatory measures may work as incentives to engage in CSR.[35]

The main business benefits associated with the implementation of CSR can be derived from several theoretical and empirical studies[36]; the benefits largely depend on the measures taken, the costs affiliated to them and the time period considered. Benefits can be gained in different fields, such as environment, human resources, customer relations, innovation, risk and reputation management and financial performance. In the environmental field, measures to reduce energy consumption as a CSR measure can lead to cost savings. Rising energy costs and the pricing of emissions increase the cost-saving potential of environmental CSR. In the field of human resources, CSR can reduce the employee turnover and improve employee motivation and efficiency by improving the working environment. From the innovation perspective, CSR can benefit the company in three main ways: innovation resulting from stakeholder communications, identifying business opportunities based on societal challenges and creating an innovative working environment. In the field of risk management CSR enables the companies to prepare for new regulations and enhance their reputation.[37]

Institutional Structure of the Industry Leaves CSR Redundant?

The absence of international organizations and enforcement mechanisms is less characteristic for the shipping industry than for land-based industries. With the international nature of shipping, the potential hazards unsafe ships and their cargo may present to local environments have become evident to most nation states. A belief that safety of shipping operations is achieved most effectively at the international level rather than by individual countries acting unilaterally was spread internationally. Thus, there has been a greater willingness to work to ensure global standards in shipping than in other industries.

International Maritime Organization (IMO)

A demonstration of this willingness came with the formation of the International Maritime Organization in 1948 entering into force from 1958. IMO is working to ensure safety and environmental standards within the shipping industry globally and has developed international conventions such as Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL). The IMO has worked both within a regulatory and a self-regulatory approach toward the industry by developing regulations that become binding upon ratification as well as voluntary codes of conduct.

Traditionally, the IMO standards have concentrated on the technical dimensions of shipping activities such as ship construction, maintenance and operation of equipment. With the increasing recognition of the importance of human factors on safety, the IMO has focused more on developing standards aiming at influencing human behavior. In 1997, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) came into force. The STCW convention sets global requirements to seafarers' training and competencies and empowers IMO to check governmental follow-up actions. Also, the International Safety Management Code (ISM code) entered into force in 1998. The STCW-convention and the ISM-code are expected to raise standards of management and shipboard personnel leading to improved safety and pollution prevention globally. With the increase of international terrorism, security has been lifted on the IMO-agenda resulting in the International Ship and Port Facility Security (ISPS) Code.

IMO's stronger emphasis of the human element has been justified out of a wish to more effectively ensure safety and pollution prevention and not so much out of a wish to safeguard the welfare of seafarers per se. The latter concern has been addressed more forcefully by another UN agency, the International Labour Organization.

International Labour Organization (ILO)

In addition to conventions outlining general labor rights, the ILO is focusing on the welfare of workers in different sectors. The special nature of the conditions

of work and life of seafarers has led ILO to develop a range of conventions and recommendations for the shipping industry. Close to 50 different conventions and recommendations exist pertaining to all phases in a seafarer's career ranging from recruitment practices to repatriation. The instruments, when taken together, constitute a comprehensive set of minimum standards. They are often referred to as the "International Seafarers' Code." For example:

- the minimum age for admission to employment is defined as 15 years
- a medical examination is compulsory prior to employment aboard ship and periodically thereafter
- hiring for shipboard jobs must be conducted with no fee charged to the seafarer
- an indemnity must be paid to a seafarer who loses employment because of a shipwreck
- articles of agreement must contain certain details and they should be signed under certain conditions
- seafarers signed off in a foreign port must be repatriated
- seafarers must enjoy certain social security benefits
- officer competency certificates must be issued under certain conditions
- food, catering and accommodation must meet particular standards
- ship's cooks and able seamen must have certain qualifications
- vocational training and welfare facilities must conform to set standards
- measures must be taken to help prevent occupational accidents to seafarers and to report, investigate and analyze such accidents
- young seafarers under the age of 18 years must be protected with respect to their health, safety and general welfare.

Both the IMO and the ILO depend on ratification of enough member states to ensure binding international rules. The fact that a wide range of international rules have been devised by both organizations into force, illustrates the idiosyncratic nature of shipping. National governments have shown a willingness to support defined minimum standards outlining the confines of industry actors' playing field; these are standards that can be retrieved in national regulation, collective agreements and employment contracts globally. Thus, employment conditions of seafarers are, in many parts of the world, more regulated than those of land-based workers.

Enforcement Mechanisms

To be effective, codified rights have to be enforced. As regulatory agencies, IMO and ILO are responsible for the labor conditions of seafarers, marine environmental protection and safety at sea, but the agencies depend on member states to secure enforcement of rights and standards. The agencies are not empowered to ensure that its member states actually comply with the standards they have approved. The International Commission on Shipping (ICONS) in 2000 performed an extensive global stakeholder dialogue within the maritime industry and concluded that "There

is a general view that there is a sufficiency of law and regulation, but a lack of uniform enforcement, and in some cases a deliberate intent to avoid enforcement."

Flag and Port State Control

International law assigns responsibility for supervision and protection of seafarers' welfare on Flag states. Flag states differ considerably with regard to enforcement. National laws passed often give only theoretical remedies for seafarers and flag state audits may be both infrequent and lax. Some flag states use this latitude as a competitive advantage to attract industrial actors from the sub-standard segment of the shipping market. Flag states also tend to renegade more on social responsibilities than security—"Among all of the flag state responsibilities, the one that is mostly ignored is the requirement to ensure the existence of adequate labour conditions on board vessels flying its flag."

Although the IMO has attempted to take on a stronger compliance role through development of, for instance, the STCW White List and the voluntary Flag State Self-Assessment Form, the *de facto* inability of both IMO and ILO to secure implementation and to sanction non-compliant flag states was raised by the International Commission on Shipping as a major source of concern.

Latitude shown by flag state administrators may, however, be countered by port state controls. ILO Convention No. 147 empowers a state party to inspect any foreign ship calling at its port on the basis of a complaint or evidence that it does not conform to standards of the convention, regardless of whether the flag state of the ship has ratified it. Some flag states use this latitude as a competitive advantage to attract industrial actors from the sub-standard segment of the shipping market. Flag states also tend to renegade more on social responsibilities than security. Vessels are rarely detained solely because of violation of ILO convention No. 147 and inspectors will usually try to link deficiencies related to social issues to safety or environmental deficiencies. The port state control system is not an effective mechanism to ensure that the welfare of crew meets international standards and "there were strong calls from several parties for port State control authorities to greatly increase their vigilance with regard to the human elements and to give particular attention to the ILO No. 147 matters during inspections."

Trade Unionism, Collective Bargaining, Detentions

With the decoupling between flag state and ship-owning country, and with increasing international competition the growing separation between ship-owning countries and labor-supplying countries have presented trade unions with a challenge. The response to this challenge has partly been to oppose one of the perceived root causes of the challenge. The International Federation of Transportation Workers (ITF) has for half a decade worked to remove Flags of Convenience, arguing that when "genuine link" between the ship and the flag is missing, enforcement of seafarers' rights becomes problematic.

Partly, this challenge has been met by development of framework agreements forming the basis for collective bargaining (ITF-agreement, Total Crewing Cost-agreements, ILO agreement). Furthermore, more global alliances between trade unions have been formed. When the Norwegian Shipping Association (representing Norwegian ship-owners and the Norwegian flag NIS) bargain with the most influential Philippine trade union AMOSUP, Norwegian trade unions with which AMOSUP has bilateral agreements, co-sign the collective bargaining agreement, thus adding strength to the agreement. The Philippine Overseas Employment Administration (POEA) acts as arbitration authority.

In a labor-supplying country like, for instance, the Philippines, several grievance procedures for crew are in place. If POEA does not support the seafarer's complaint on a principal allegedly reneging on his responsibilities, the seafarer can call for arbitration by the National Labor Relation Commission or by voluntary arbitrators appointed by the National Conciliation and Mediation Board. Alternatively (or eventually) a seafarer can resort to the use of formal litigation within the court-system to get his grievance properly addressed.

Seafarers' work being contractual and with an oversupply of seafarers, however, some are reluctant to file formal complaints and grievances. In opposition to land-based overseas workers, an elaborate institutional system is in place. With regards to protecting seafarers while out at sea, governments in home countries have larger difficulties.

Trade unions and confessional organizations such as Apostleship of the Sea and Stella Maris then play an important role in seeking to secure workers' rights. They perform unannounced ship visits both randomly and upon tips from seafarers. Detection of poor labor conditions and/or violations of seafarers' rights may be brought up with local authorities potentially resulting in costly detentions and negative records for ship-owners. Fear of becoming informally blacklisted may, however, make seafarers' abstain from contacting ITF or Apostleship of the Seas. And unannounced calls can also be paid on just a minuscule segment of visiting ships. Adding the reluctance of both flag and port state administrations to crack down on poor labor conditions, the fact that sub-standard ship-owners can operate their daily business with a constant violation of ILO and IMO-rules as their modus operandi is explained.

The Nexus Between CSR and Shipping Industry

Shipping industry is an international industry by nature. Shipping companies' services are produced to satisfy the derived demand for the transport of cargoes. This characteristic means that shipping is an activity conducted on a business-to-business basis. Thus, for many experts in the field there was no reason for companies to invest in advertising or in any other activity that could improve their image. What was always crucial for the survival of such companies, especially those of the bulk-shipping sector, in the highly volatile and competitive environment of shipping markets, was

their ability to produce low-cost services. Quality of services or any other characteristic that might improve the image and reputation of a company added advantage only to the extent that the company was able to offer lower cost services.

Traditionally, regulatory bodies at national or international level had focused their attention on the ship owners' side enforcing various conventions and regulations that imposed minimum standards for the operation of shipping companies. This effort however did not prove to be successful not only due to the ineffectiveness and inefficiency of various control mechanisms (i.e., flag states, classification societies, etc.), but also due to quality factors prevailed in shipping industry. Quality has a price and, as with all other goods and services, this price is determined by demand and supply mechanisms. Consequently, according to the literature neither shipowners nor regulation alone can force or impose this price if quality is not demanded by the users of the shipping service, the manufacturers, traders, freight forwarders, or the final consumers. Various market actors (i.e., charterers, surveyors, etc.) were very often ready to lower these minimum standards if this meant increase in the profit margin. In this context shipping industry created negative externalities, which contributed to the creation of a low public image. Loss of lives at sea, damages to the marine environment, and maritime frauds, all contributed to the creation of the bad reputation that shipping industry faces. Such practices clearly suggest that one cannot rely merely on market forces to promote ethical behavior or globally responsible behavior. Although freight markets have recently encouraged shipping companies to deal with the advantages that quality and environmental concern might offer, they have not been sufficient in ensuring such a behavior to all shipping companies.

The biggest problem concerning the industry's bad image is related to the fact that shipping is a responsive industry, not a proactive one. It is evident then that any attempt to create a good public image for the shipping industry should focus on the need to minimize the negative externalities and further to improve the safety and quality standards of the shipping operation. In order to cope with this problem, International Maritime Organization (IMO) moved towards adopting regulations that set minimum standards regarding the safety level of the services offered by the shipping companies. The increased awareness of various stakeholder groups further promoted this endeavor.

As a result, the International Safety Management Code (ISM Code) came into force. The proper implementation of the Code will certainly contribute to the increase of the safety standards and thus will improve the image of the industry. As such, it can be perceived as a first attempt towards social responsibility. However, the implementation of the ISM Code, as well as the various other regulations or conventions imposed by the IMO, is obligatory and not a matter of choice for the shipping companies. It is a precondition to "stay within the rules." Furthermore, ISM Code helps companies focus internally on matters related to their efficiency. As it has been described by a ship-owner, the three main advantages of the ISM Code for the company are: first, the compliance with regulations, second, the increase of maintenance and safety awareness among employees and the reduction in maintenance

costs, and third, the more service centered company. Only those companies that fully comply with the Code's requirements enjoy these advantages. However, as it has been already mentioned, compliance with the ISM Code does go much further than mere certification and the depth of compliance still leaves much to be desired with regard to the enforcement of quality as well as the commitment of the shipping companies.[38] Indeed, data published by MOU's (Paris MOU, 2003; Tokyo MOU, 2003) reveal that although fewer ships have been detained, the number of deficiencies has slightly increased over the past years.

Given the substandard ships that are still in existence producing negative externalities and damaging the image of the industry, a question that is raised is what else needs to be done in order to cope with the problem. Is there any possibility of any regulatory reform to further help solving the problem? As long as the phenomenon is not only related to the substandard operators but also to other parties involved, the answer to the question is ambiguous only to the extent that these new regulations are valid for all parties concerned. Needless to say that control should be equally strict all over the world. In the meantime, what could be more effective in dealing with this issue is to raise the awareness of the CSR to all the stakeholders of the shipping industry. Only when shipping companies and other parties involved in the shipping industry practice a proactive approach to monitoring and evaluating their impact on stakeholders and the wider society can this issue be eliminated. Whenever companies move beyond the requirements of the regulations and start to formulate and implement socially responsible policies and procedures, then business practices will meet society's expectations.

Such issues raise a great concern on CSR consumption. This is not to say that the formulation and implementation of CSR policies at company level offer a panacea for all negative business practice, nor that it is the highway to business and wider society prosperity. However, CSR can be a step-forward to a better understanding of social interaction and interdependence between business and society in general and an alternative way of business conduct from which both business and various stakeholders can mutually benefit under certain circumstances. The definition of CSR employed in this analysis suggests that enterprises should systematically monitor and evaluate their impact on all stakeholders and wider society in order to be considered as socially responsible actors. It is worth saying that each enterprise is or will be (if management wishes) involved in CSR in its own unique way, depending on socio-economic traditions predominant in the area the enterprise is located and on its resources, core competences and stakeholders' interests.[39] Given that ISM Code enforces companies to focus on their internal articulations being at the same time in compliance with the regulations, it cannot be considered as an index of their active attitude towards social responsibility. What is needed to do so is the implementation of other non-obligatory tools that allow companies also to focus on their external environment trying to estimate the impact of their activities on the society. For example, the compliance with ISO 14001 certifies the implementation of an environmental management system, whereas the compliance with ISO 9002 certifies the implementation of a quality management system. While corporate expenses for the

delivery of the certification under these standards are easily realized, the benefits obtained are visible in the long run and occasionally are intangible. A company that complies with ISM Code, ISO 9002 and ISO 14001 demonstrates that it focuses not only on the internal efficiency, but also on the quality of services that produces, as well as on the effects that its operation has on the environment.

In this context, the approaches that shipping companies have employed in terms of their social responsible behavior vary. Based on the definition of CSR employed in this analysis we can distinguish three approaches on the matter. The first could be characterized as adverse to the notion of CSR, the second as typical, while the third as supportive.

The first approach is implemented by a minor group of companies, those called "substandard operators." Competitiveness is a goal of primary importance for them, even if its achievement means decreasing the operating cost by lowering safety and quality standards. An OECD study has indicated that a substandard operator faces a cost advantage ranging from 13 percent to 15 percent compared to his quality competitor who applies a standard level of operation. By implementing this approach, this group of companies, produces negative externalities that destroy the public image of the whole industry. To prevent them from deriving benefits by neglecting to conform to the agreed standards, regulatory bodies at national and international level enforce new regulations. This was the case for the ERIKA I and ERRIKA II packages that European Commission adopted soon after the Erika incident in 1999 and the "Prestige" accident in 2002. Other parties in the maritime industry also adopt this approach as they derive short-run benefits from disregarding agreed standards concerning vessel quality. Apart from ship operators these parties occasionally involve Flag States, charterers, and classification societies.

The second approach, the so-called typical, is implemented by the majority of companies and can be described as an attempt simply to stay within the rules of the game.[40] Under this approach, the responsibility of the companies is to comply with the rules while they are pursuing their basic goal, which is to create profits for their shareholders. These companies apply a standard level of operation and conform to requirements of regulations and conventions that constitute the regulatory framework of world shipping, no matter what the cost for the conformance is. In addition, such companies implement fair and commonly accepted commercial practices in their operation. This means that they manage their activities in a way that neither produces externalities by intention nor affects the public image of the industry.

Finally, the supportive approach is implemented by a group of companies that move beyond the compliance to the rules, comply with non-obligatory standards or even set their own standards regarding their operation. Since limited research on the application of CSR in shipping has been conducted there are no data available regarding the CSR practices adopted by the shipping companies. Thus, in the present survey it is used as a criterion for the classification of the attitude of these companies toward CSR use in their decision to implement voluntarily the aforementioned non-obligatory standards. Companies, which are always eager to undertake the cost of implementing

non-obligatory rules, and standards that help them behave in accordance with the society's expectations should be considered as socially responsible.

CSR Barriers

Barriers to CSR participation exist in all sectors. At the most basic level, lack of knowledge of what CSR is, how to do it and the benefits that can flow from the application of CSR principles and practices are by far the most common barriers. The CSR playing field is large, multifaceted and constantly changing. Thus even with the basic knowledge in hand, it can still be challenging for both individual companies, as well as business sectors as a whole, to determine the components of CSR that are material to their particular needs or circumstances.

Evaluating options and identifying the CSR "acupuncture points" capable of generating measurable benefits obviously requires an approach that is both well-informed and strategic. Moreover, and as noted in this analysis, CSR is a long-term value proposition. Results inevitably take more than a few financial reporting periods to materialize; hence investing in social and environmental performance requires access to "patient" capital. Barrier to participation in CSR activities can also be systemic, particularly in industries that, like the shipping industry, are already highly regulated and have to function across diverse public policy regimes. Arguably, the more disparate, fragmented and dispersed a business sector is, the more challenging it will be to develop a cohesive approach to CSR opportunities and benefits.

Last but not least, at both an industry level and an individual firm level, CSR activities can be complex and costly. The transaction costs involved can be prohibitive for some SMEs and/or businesses that simply do not have the margin to absorb additional costs, even costs that may be capable of paying dividends further down the road.

Strategies for Addressing CSR Barriers: The Role of Industry Associations

Although most of the aforementioned barriers likely apply in the shipping sector, it is important to note that none are new. As is the case with any aspect of business innovation, the process of figuring out the best way to address them is an iterative one involving learning, experience, compromise, negotiation and an ability to work with different perspectives. Experience in other jurisdictions and sectors, suggests that industry association engagement on CSR can be an effective strategy for overcoming CSR barriers. The experience of the natural resource sector and other large-scale export industries in dealing with some of the challenges inherent to CSR participation may be instructive from a shipping sector perspective.

There are at least seven different categories of potential benefits that can flow to industry associations that initiate and maintain a CSR program for their members:

1. Attract and retain members: CSR programming increases the value and relevance of the association to current and prospective members. It can also reduce the risk that members will have their CSR needs met by other organizations.

2. Enhance innovation: Cost-effective pre-competitive CSR collaborations can result in industry innovation, enabling the industry to improve its collective CSR impacts.

3. Build positive government and NGO relations: Associations which increase their CSR expertise will be better positioned to contribute positively to regulatory initiatives by government and other agencies and to engage constructively with NGOs and other stakeholders. As well, associations which have voluntary industry CSR standards which exceed compliance requirements are able to forestall government regulation.

4. Identify industry priorities: Many generic global CSR initiatives and standards are now available and this in turn can make priority-setting difficult. An industry approach can assist member companies to develop an industry relevant model tailored to the sector's most material risks and opportunities.

5. Fulfill association goals: Industry association goals are typically to assist its members to be competitive and profitable. CSR is one tool to enhance member profitability and competitiveness.

6. Build industry reputation and brand: An industry association CSR program demonstrates the industry's commitment to sustainable practices and leadership on CSR. It can build positive stakeholder relationships with customers, communities, NGOs, suppliers, and others, and enhance the sector's social license to operate and grow.

7. Enhance employee recruitment and retention: Industry associations with CSR programs are able to attract and retain the best and brightest employees who prefer to work for organizations aligned with their values.

As the foregoing suggests, a number of benefits can accrue to industry associations which develop programs to help their members improve the sector's CSR performance. Many of these potential benefits would be:

- Access to information on emerging CSR trends and issues of relevance to them
- Assistance in understanding stakeholder interests
- CSR training and tools
- Opportunities for peer-based learning and knowledge-sharing
- Collective action on solutions difficult for the company to tackle on their own
- Ability to have a voice in development of CSR standards for their sector

Conclusion

Companies have pressure to be cost efficient, as customers want to pay less for products. Therefore companies try to be as cost efficient as possible. One possibility

is using labor from countries with cheap labor force. Transportation costs are one way that companies can lower their operating costs when their only business strategy is to offer services at lowest cost. Since customers of transportation companies only care about their transportation costs, transportation companies need to reduce costs in all areas of business, which can lead to irresponsible business practices and to general neglect for safety. The pressure to be cost efficient is even higher on maritime transportation sector, because for years it has been the cheapest way to transport goods all over the world. In order to be a safe and punctual transportation method, shipping needs to follow international laws and regulations, which may cause conflict between safety management and constant need to be cost efficient. Therefore shipping companies, which are following these rules, usually follow the bare minimum or the base level of safety, environment and social management. Since their responsible actions are to merely follow the rules and the bare minimum, according to international regulations, it cannot be defined as responsible business, since CSR is based on voluntarism to act responsibly. However, because customers now demand more than just the lowest prices for products they purchase, responsible business culture and CSR terms has spread from land based industries to shipping industry as well. Increasing trend shows that shipping industry already use CSR and acts responsibly, not just following international rules and regulations, but also voluntarily, acting responsibly on their own areas of business.

Responsible business creates positive image and reputation to a company and also helps to preserve the image thorough crises, like accidents or oil spills. Company, which is caught acting irresponsibly by customers, audits or NGOs may suffer from a weakened brand value, which has a negative effect on the company in economical sense. Acting responsibly cannot be seen as only a way to increase and preserve the good reputation of the company. CSR can increase company's economic growth in the long run. It is not just a tool to act responsibly in a business environment; it is also a tool to improve company itself. Many CSR methods are directed to improve benefits of the workers, by improving working environments, creating safer working methods and prolonging careers. Especially in shipping industry, satisfaction of the employees to their working environment is crucially important, because of challenging schedules and long working periods on board. Skilled workers can be seen a strength to a company and worth keeping. Human resource management has an important role in the shipping industry, since the employees often come from different backgrounds and culture.

Today shipping companies are willing to act responsibly and many of them are able to use CSR as a part of their marketing strategy. Several examples from their websites showed that shipping companies can act responsibly and are willing to develop their CSR strategies in order to ensure sustainable transportation for products and passengers. Large and medium sized shipping companies have adopted CSR terms and are using them effectively together with their customer companies. Smaller shipping companies are still trying to find ways to promote their responsible business as a strategy. However, those small companies might have a lot of potential to act locally and sustainably; they just need to find a way to emphasize it to the public.

Shipping is international business, which affects the lives of many people worldwide. Thus it also has a large impact globally. By acting responsibly shipping industry not only promotes responsible business to other shipping companies, it also promotes it to other land based companies and encourages also them to act responsibly. Since shipping industry has adopted the policy of CSR it will also spread it to other industries.

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The Use of Force at Home and Abroad Through Diversionary Foreign Policy: The Case of Preah Vihear

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Structured Abstract

Article type: Research paper

Purpose—This article aims to examine the Preah Vihear territorial conflict that occurred between Thailand and Cambodia from 2008 to 2011. It aims to explain how the ancient Hindu temple complex of Preah Vihear, a territorial issue rooted in history, turned into a source of international conflict between the two neighbors by exploring the role of key political actors toward the issue from diversionary foreign policy approach.

Methodology—In theory, this article employs diversionary foreign policy to trace the events by which political actors were able to command the use of low-level force. Online journals, newspaper articles and other related publications will be examined to understand and analyze events leading to the territorial conflict.

Findings—In the case of Thailand, the Preah Vihear territorial conflict was a result of the royalist factions' (PAD and the military) strategic use and manipulation of the territorial issue against Cambodia. By contrast, in Cambodia we find that the Preah Vihear territorial conflict was an outcome of Hun Sen's reactive historical disputation of Preah Vihear for power consolidation.

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Practical Implications—Useful for scholars searching for papers related to the study of historical and territorial issues in Southeast Asia given the relative dearth of literature in this area.

Originality—This study provides a more recent case in Southeast Asia of how a territorial issue rooted in historical memory becomes a source of international conflict through the politicization and historical disputation by political actors. In addition, it tests the application of diversionary foreign policy as a conceptual framework to account for a linkage between historical disputation and political leaders' interests.

Keywords: border conflict, Cambodia,
diversionary foreign policy, historical disputation,
historical memory, Preah Vihear, Thailand

Introduction

The controversial ancient Hindu temple complex of Preah Vihear witnessed numerous small scale skirmishes between Thailand and Cambodia from 2008 to 2011 that resulted in several casualties on both sides of the border. After the election of Thailand's Prime Minister Yingluck Shinawatra into office in July 2011, however, the strained situation at Preah Vihear quickly dissipated. The cordial football match was held between Thai and Cambodian government officials led by former Thai premier, Somchai Wongsawat, and Cambodian Prime Minister, Hun Sen, a week after Shinawatra's first official visit to Cambodia. Why the sudden shift in their diplomatic relations? How did the historic temple turn into a territorial border conflict between the two countries? What role did various political actors play in the territorial issue? In order to answer these questions, we examine the domestic political situation of both Thailand and Cambodia prior to and at the time of the border clashes. Each side concocted actions that evidently agitated the dispute although it was unclear who actually started the conflict. However, the intermittent encounters that had lasted for almost three years also find cause from the diversionary motives of domestic political actors in both countries. While the Preah Vihear border conflict has roots from historical antagonism between the Thai and Cambodian people due to their differing construction of the temple's historical memory, we argue that the territorial dispute intensified when key political actors strategically employed the historical issue for diversionary purposes.

In the study of how historical memory matters in international relations, while contesting historical memory generally plays a marginal role in the overall interaction among states, the significance of a historical issue in state relations can increase when political elites use and manipulate it for their own political interests. This has been evident in Northeast Asia among Japan, China and the two Koreas, from the issue of history textbooks and the Yasukuni Shrine tributary visits during the time of Prime Minister Junichiro Koizumi of Japan to the more recent territorial disputes in Diaoyu Islands (Senkaku in Japanese) between China and Japan and in Dokdo

Islets (Takeshima in Japanese) between South Korea and Japan. These controversies originate from their deep-seated mistrust of one another due to conflicting historical memory; however, the continuing discord in their relations was possible because of the manipulation of history by political leaders, causing diplomatic friction in the short-run and presenting a challenge to the overall regional cooperation in the long-run. Cases such as territorial disputes, which may have both tangible (economic) and intangible (religious and historical) value, can further raise the salience of the issue at stake,[1] and bring more incentives for state leaders' political contestation of history particularly when faced with domestic troubles.

How did the Preah Vihear border issue translate into diversionary foreign policy adventures? Why did the historical dispute take a dyadic, not monadic, pattern of diversionary conflict? First, state leaders could sway public sentiment using a contested historical issue because historical memories are an important component of national identity, which distinguishes between the "self," oftentimes depicted as the victim, and "Other" or "the enemy." Thailand and Cambodia consider the Preah Vihear as a part of their identity and territorial integrity[2]; it became a historical flashpoint starting from the 1904 drawing of the Annex 1 map,[3] Thailand's occupation of the temple in 1953, and the International Court of Justice's (ICJ) verdict that ruled in favor of Cambodia over the Preah Vihear's territorial sovereignty.[4] Both countries are more likely to have misperception and suspicion of each other on account of past memories, and political elites in both countries can easily make use of contesting historical memory by fueling the public's sense of national identity to induce nationalism. In return, the exploitation of nationalism gives more justification to use force or threaten to use force strategically to deviate interest away from domestic problems. Political elites employ historical issue through historical disputation, which we define as political leaders' use and manipulation of contesting historical memories to suit their own interests. State leader's historical disputation works to transform socially contesting historical memories into an international conflict. Without historical disputation incited by political leaders, contesting historical memories tend to remain less controversial among states.

Second, the Preah Vihear border conflict between the two countries reveals a dyadic diversionary pattern, which is a rare phenomenon in international conflict. Diversionary dyadic conflict is generally defined as the strategic interaction between two states wherein the targeted state reciprocates the diversionary use of conflict by the initiating state.[5] Most diversionary foreign policy cases are monadic rather than dyadic because the response of the target state is uncertain; rather, the reaction will depend on strategic calculations or the incentives facing state leaders.[6] Political elites from the initiating and targeted states not only consider the domestic political situation in their decisions to use force externally, but also they calculate the likely response of their actions towards one another and the anticipated consequences. The pretext for doing so is that the political survival of elites in both states will also depend on how well their nations perform in the international conflict.[7] In fact, the calculated risk for the survival of political elites to exert diversionary foreign policy is considerably high, which implies the complexity of diversionary use of force to become a

theory as the strategic interaction between the challenger and target state remains inconclusive. However, our research finds evidence that a dyadic diversionary pattern is more likely to take place when historical disputation of a contested issue is employed. In East Asia, the relations among states are significantly affected by the problem of historical memory.[8] When domestic leaders from the initiating side invoke contesting historical memories for its domestic audience, it can elicit an equally negative reaction from the targeted state. And as the case of Preah Vihear border conflict demonstrates, the use of limited force by one side was equally reciprocated by the other side, a dyadic diversionary strategy calculated under the guise of defending each country's sovereignty and national integrity.

This article provides a detailed case study tracing the events by which political actors were able to command the use of low-level force for diversionary purposes. This study further analyzes the issue from the vantage point of different political actors' use of historical disputation that resulted in the international conflict. In Thailand, as the country faced domestic power struggle, the border conflict recurrently occurred under two different competing administrations. While a political pressure group called People's Alliance for Democracy (PAD) stoked nationalist rhetoric in Bangkok, the role of Thai military should be noted in the border conflict. Studies on diversionary theory recognize that the sustenance of the military is essential for political leaders to succeed in exercising diversionary foreign policy.[9] In this case, for the Thai military, since the ouster of the populist regime of Prime Minister Thaksin Shinawatra from power, the historical conflict not only provided a good opportunity for the military to divert domestic audience's attention to the border conflict but also reinforce and safeguard their influence in domestic decisions[10] especially during the military-backed government of Abhisit.

In Cambodia, Prime Minister Hun Sen equally reciprocated Thai military threats despite Cambodia's asymmetric power relations vis-à-vis Thailand. Before the first military clash broke out, Hun Sen and the Cambodian People's Party won the 2008 elections by a relatively wide margin, which affirms his firm grip in domestic politics. However, after 2008, Hun Sen also had to contend with a number of domestic issues, and given his solid command of the military, the conflict with Bangkok provided his regime with a strategic ploy to distract public attention away domestic problems to the border conflict.

Before the Preah Vihear temple's UNESCO inscription on July 7, 2008, the territorial dispute was at the very least restrained, and Bangkok and Phnom Penh's bilateral relations were steadily maintained as evident in the continuous increase in their economic cooperation.[11] As Thailand's domestic political crisis continued in the same year, however, the diplomatic "war of words" and the border clashes followed. How can we then account for the ambiguity in their bilateral relations characterized by positive improvements in the political and economic aspects at one end and the crossfires at the Preah Vihear border at the other end? This paper aims to explain the Preah Vihear conflict by exploring each side's strategic use of limited force. It will begin with a brief review of the concepts of contesting historical memory and diversionary theory of war, and a discussion of the process of how political elites

rendered historical contestation a source of strategic diversion. The next section will discuss the application of the theory in the dyadic cases of Thailand (under Abhisit) and Cambodia. The last section will present the conclusion and discussion of possible implications of the recent ICJ Ruling of 2013 on the Preah Vihear dispute.

Contesting Historical Memory, Diversionary Foreign Policy and Limited Use of Force

History is never absolute as it contains both facts and interpretations by which the latter changes the "objectiveness" of the former.[12] Here, a nation's collective memory in history by and large includes facts and interpretations, a product of the politicized construction of the past acknowledged by the state and society. With the "mythologization" of collective memory, the "historical truth" is no longer a major concern. From this viewpoint, it can be implied that the fabrication of collective historical memory works for the benefit of the state. Historical memory is one element crucial in fostering a deeper sense of national identity and promoting the country's unification. Given that historical memory was created as a by-product of state goals, it goes to show that the public's sense of history and national identity are also being shaped and directed by the state. Thus, if a historical issue becomes the focal point of contestation between two states, a nation's sense of national identity can also be manipulated by state leaders. For instance, key chosen historical landmarks such as war, ethnic conflict, or past trauma play a critical role to construct a sense of national identity and awareness of the other or out-group[13] and their different historical interpretations among nations that share the same history make historical memories a contested field. Here, contesting historical memory becomes a source of international conflict when state leaders promote and use the historical issue to ignite nationalist identity and pursue their own goals. The intensity of the public's response, which could range from feeble to more forceful reactions, can also be considerably influenced by political actors' behavior, especially from nationalist groups in politics and society. In Moon and Li's study,[14] they explain that reactive nationalism, which is defined as "collective expression of nationalist sentiments toward external stimuli that undermine national identity or interests," can be augmented by political leaders for their own interests. Political leader's response towards a historical issue can greatly affect the general public's reaction, either by mitigating or aggravating the event. In other words, the weight of political contestation of historical memory among nations is highly dependent on the role of state leadership. In many instances, historical memory is used as a foreign policy tool by political actors with the assumption that the issue will provide them with political rewards in the short-run. One foreign policy tool being explored in this study is the diversionary theory of war.

Diversionary theory of war is largely defined as state leaders' use of foreign policy, including war, to help them stay in power when faced with domestic challenges. Countless studies have been conducted on the correlation between domestic politics

and international conflict. While historical cases reveal many records of the use of diversionary force, still, scholars have noted the gap between theory and quantitative research.[15] Recent studies have narrowed down their inquiry to test internal conditions under which states would more likely lead to international conflict; the conclusions remain marginal at best as the results suggest many contradictions. The study of regime types—democracy, democratization, and authoritarianism—have also been significantly tested in the literature. Some studies conclude that the diversionary use of force is "generally a pathology of democratic states."[16] In fact, the predominant focus of the literature has been on the use of force by U.S. presidents and other democratic states especially in the post–Cold War period; but diversionary theory also has potential in explaining the threat to use or use of force by non–U.S. leaders and their use of less costly and less risky strategies.[17] In addition, diversionary theory has considerable advantage to account for how the use of force was possible due to contesting historical memories exploited by political elites. This study, therefore, suggests that contesting historical memories among concerned states cause the use of limited force when political elites of country A make use of historical disputation against country B as a diversionary tool. Historical disputation then leads to the actuality of diversionary conflict when the organizational support of the armed forces is in place. The role of organizational coalitions, particularly the military organization, plays a vital function in the success of diversionary conflict. When there is domestic strife or the contestation over political institutions that threaten the military's organizational interests, this will more likely lead to foreign aggression.[18] The study of Preah Vihear border conflict provides an interesting case of how the interplay of different political actors in Thailand and the unique characteristic of Cambodia's long-time Prime Minister Hun Sen come together to engineer the conflict for their own political purposes, which will be discussed in details in the next few sections.

Preah Vihear Territorial Conflict Between Thailand and Cambodia

From late April to early May 2011, the most violent clash broke out between Thai and Cambodian military troops along the Preah Vihear border. The conflict took place for almost two straight weeks with reports mentioning 18 fatalities.[19] The military collision persisted even with a ceasefire agreement already brokered between army officials from both sides. This has been the bloodiest encounter between the two countries since the clash started in 2008.

The Preah Vihear border issue is one manifestation of centuries old historical disputes and rivalry between the two kingdoms. The origins of the dispute began as far back when Cambodia was still under French protectorate status and Thailand was then called the Kingdom of Siam. Between the periods 1887–1893 and 1902–1908, a series of treaties were concluded between France and Siam that led to following: (a) the latter's withdrawal of several of its territorial claims including the border

province of Siem Reap, and (b) a 1904 convention, which described the frontier in the Dangrek Mountains, and set forward a Mixed Commission composed of officers from both countries to delineate a frontier.[20] Known as the Annex 1 map, it was produced in 1908 with the location of Preah Vihear displayed in Cambodian territory.[21] There was no direct proof of the binding character of the map in part due to the lack of documentation in that period. The Siamese Government nevertheless asked the French Government to have the map reproduced, and no claim of error on the map or any direct assertion that Preah Vihear belonged to Thailand was made by the Siam Government until 1940 when it occupied parts of Cambodia including Preah Vihear during the Franco-Thai War.[22] In 1946, Thailand agreed with France to a return to the status quo prior to 1941, and again shortly after Cambodia became an independent state in 1953, Thai troops seized the area. From 1954 to 1958, the two parties' protracted negotiations resulted to a failure to come up with an agreement, which led to the downgrading of their diplomatic relations and the closing of the Preah Vihear border. In 1961, the Cambodian government sent a legal petition against Thailand to the ICJ regarding territorial sovereignty claims.[23] The ICJ in 1962 ruled in favor of the Kingdom of Cambodia. The ICJ, however, made no successive ruling on the 4.6 sq. km. land surrounding the temple for which a demarcation line along the border has never been completed. Since then, major flashpoints of diplomatic tensions between Thailand and Cambodia have frequently involved the disputed Preah Vihear territorial concern.

On July 7, 2008, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Committee approved Cambodia's application to have the Preah Vihear enlisted as a UNESCO World Heritage Site during its 35th convention in Paris, France, to which the Thai government supported and thus further legitimized Cambodia's claim to the temple. Just several days after its enlistment, on July 15, Thai nationalists along with Thai soldiers crossed the already closed border to plant the Thai flag on the territory reigniting their territorial squabble. Both Thailand and Cambodia consequently decided to send and increase troops along parts of the disputed border. Starting on October 3, 2008, a number of crossfires have transpired since the Preah Vihear was placed in the UNESCO World Heritage Site listing.

Thailand's Domestic Crisis and Strategic Historical Disputation of Preah Vihear

Why the discord? The circumstances which led to the territorial border conflict against Cambodia cannot be fully understood without examining Thailand's domestic political situation.[24] This section analyzes the turn of Thailand's domestic political events from 2006 to 2011 that evidently provoked the border skirmish. Specifically, we will examine the internal dynamics under the leadership of Abhisit Vejjajiva that made use of historical disputation of the temple and subsequently led to the external conflict. Particular attention will also be given to the role of the Thai military in this context.

For several years up until the 2011 elections, there had been brewing political

division in Thailand that continued to unsettle the country's political and economic stability. The political turmoil had derived from two main factions: pro–Thaksin circles including the political party of the People's Power Party (PPP) and anti–Thaksin groups made up of "the nonelected 'holy trinity' of monarchy, military, and bureaucracy,"[25] the Democratic Party (DP), and PAD or "Yellow Shirts." The roots of the crisis began in 2006 when the former Prime Minister Thaksin was removed from power via a bloodless coup d'état carried out by a royalist faction in the armed forces and backed by Privy Council members, the monarchy, and PAD, a political pressure group consisting of dissatisfied capitalists, academics, politicians, the bureaucracy, civil society groups, and the media.[26] Together, these anti–Thaksin forces used "royalist ideology" to set the groundwork for the 2006 coup.[27]

Less than a year after Thaksin was removed from office, the Yellow Shirts regrouped with a broader-based coalition. Starting in May 2008, PAD went on street protests in response to the selection of a Thaksin clique that was said to be Thaksin's proxy government—the People's Power Party—as the new head of parliament which won majority seats in the December 2007 general elections. The year 2008 was predominantly a turbulent year due to repeated PAD demonstrations and violence that nearly left the Thai economy in crumbles as it jeopardized the country's tourism industry. The PAD protesters occupied government buildings and airports in their attempt to unseat the PPP-led government from office.

Meanwhile, on June 18, 2008, Thai Foreign Minister Noppadon Pattama signed the Thai-Cambodian joint communiqué but was eventually rejected by Thailand due to PAD's ultra-nationalist rhetoric in Bangkok, accusing Noppadon and the PPP administration of selling Thai sovereignty to Cambodia in exchange for economic concessions. Two days after the Preah Vihear was placed in the UNESCO list, pressures from the capital forced Noppadon to resign on July 10. On July 15, after three PAD protestors crossed the barbed-wire fence along the temple and were arrested by Cambodian officials, the Thai Army amplified its troops along several areas of the disputed border. And on October 3, 2008, the first fire exchange between Thai and Cambodian troops occurred on the disputed territory.

On December 15, 2008, the military-backed government of the DP under the leadership of Abhisit Vejjajiva was instated into power. In exchange for the army's espousal, Abhisit authorized the appointment of cabinet positions to the Bhumjai Thai Party, a military affiliated political party.[28] Alongside ex-military officers in Senate positions, these posts further augmented the military's political clout within the country's civilian rule. His administration was equally met with heavy opposition from Thaksin supporters, the "Red Shirts," starting in April 2009 when they stormed the Fourth East Asian Summit in Pattaya and forced its cancellation. The Red Shirts' bloody demonstrations escalated the following year in March–May 2010. Finally, on May 19, the army overran the Red Shirts' camp which culminated into their leaders' surrender and an end to the protests.

While the DP and PAD dubbed as "royalist twins" fought together to politicize the Preah Vihear and remove the PPP administration,[29] Abhisit once in power tried to distance itself from PAD to enhance the government's image much to the PAD's

indignation.[30] With the falling out between PAD and the DP government, PAD once again organized mass rallies against the DP government, invoking ultra-nationalist crusades and capitalizing on Preah Vihear. PAD's inundations initially did not gain strength as even the military brass kept silent about the Preah Vihear dispute.[31]

On December 29, 2010, seven Thai nationals were arrested by Cambodian soldiers for allegedly crossing the border. And in the following year on February 1, two of them were sentenced to lengthy imprisonment for purportedly spying.[32] The PAD's barrage against the Abhisit administration regained force as they occupied the Government House and called on him to step down for failing to resolve the Preah Vihear issue.[33] At the same time, the Army's neutrality over the Preah Vihear took another turn with the February 4–7 gun-fire exchange which resulted in damage to the temple caused by Thai military artillery. On March 2011, the Army further displayed an aggressive position toward the temple issue by rejecting a February 22, 2011, agreement among the foreign ministers of Thailand, Cambodia, and ASEAN Security Council ministers in Jakarta, Indonesia that allowed sending Indonesian observers to the border. The Abhisit government which initially approved the Indonesian observers also bowed to the Army's rejection. With no clear resolution of the Preah Vihear issue in sight, the rejection of ASEAN's mediation, and the Thai-Cambodian armies' stand-off at the border, the latest and longest exchange of gun fires took place from April to May 2011.

On account of Thailand's domestic issues, the intense and continuing political polarization overlapped with the growing tensions between Thai-Cambodian relations at the Preah Vihear frontier. While the Abhisit government faced strong domestic opposition, Thailand strengthened and maintained troops along the contested border. Why did Thailand decide to send and maintain troops while in the middle of a domestic crisis? An obvious claim would be that the Thai government aimed to preserve its sovereignty across the border, which had been the Thai rhetoric regardless of who is in power. This paper, however, addresses that Abhisit and the military employed historical disputation against Cambodia in response to the country's domestic crisis, and the Thai military's role in the 2011 sporadic clashes should be noted. In the February 2011 gun battle which culminated into a 4-day heavy artillery exchange, Thailand and Cambodia alleged that it was the other which started firing. However, Thailand's internal politics seemed to be more suspect with the upcoming 2011 elections. Several political analysts' observations mentioned that while Abhisit did not order the shooting, high-ranking Thai military officials launched the border clash to disrupt possible changes to the Thai general elections.[34] Abhisit wanted the elections to be held in the first half of the year 2011, half a year earlier than scheduled, and the armed forces feared that holding earlier elections could possibly bring back Thaksin's political adherents in office. In addition, the 2010 army suppression of the Red Shirts' demonstrations became a tipping a point when the latter's leaders alluded to the monarchy's silence to the crackdown, seen as a sign by the former as a clear threat to the monarchy.[35] As for Abhisit, the upcoming elections gave him ample motivation to use the border contestation to boost his political standing.[36] Regardless of whether Abhisit ordered the use force or not, he played

along with the issue by staying mum about the military's ploy, giving them full support and claiming in his press statement that it was Cambodia who provoked and attacked Thailand first, quoting his remark, "this is the time I would like to see Thais united and supporting our military and soldiers who protect our sovereignty. I believe in our national anthem that Thais love peace but are also ready to fight."[37] His statement called for triggering nationalism among the Thai people and supporting the military in the hopes of saving his political standing in the impending elections. For the Thai military and Abhisit, the clash against the Cambodian armed forces provided them with a strategic opportunity: to divert attention and possibly delay the upcoming elections by creating a situation that portrays Thai sovereignty as still being under significant threat from its neighbor.[38]

In summary, since 2006 Thailand juggled between two factions that supported the monarchy on the one hand and Thaksin on the other. However, the military and Abhisit used the Preah Vihear historical border issue with Cambodia to divert domestic strife to external issue. For the military, the clashes at the border promoted and highlighted their political clout in domestic politics regardless of the political factions in power. Through the Preah Vihear contestation, the military could once more display their special role in Thailand's domestic politics at a time when the country faced political instability. As for Abhisit, the Yellow Shirts' demands for him to step down from office posed a clear challenge to his leadership; and the historical disputation of Preah Vihear might allow his political party to garner the electoral support needed for the 2011 elections.

Reactive Historical Disputation and Power Consolidation in Cambodia

On May 30, 2007, the incumbent Prime Minister Hun Sen declared that 2008 Cambodian elections would be held on July 27, five years after the last election. In January 2008, coinciding with Cambodia's upcoming elections, the Cambodian government publicly announced the proposal to list the Preah Vihear in the UNESCO annual meeting in Paris. From April to May 2008, Thailand and Cambodia had discussed the possible registration, and the Thai government supported Cambodia's move for formal inscription upon a joint-agreement and on conditions that there would be a redrawing of the map which removes the Cambodian 4.2 km border territory, only leaving the temple and the surrounding environment. When the domestic crisis in Thailand began which led to its withdrawal of support, Cambodia went ahead with the application. And with the UNESCO approval on July 8, Phnom Penh residents celebrated the World Heritage Site registration of Preah Vihear, twice, with a bigger celebration held a week after at the Phnom Penh's Olympic Stadium with the return of Deputy Prime Minister Sok An from the UNESCO annual conference. A day after the celebration, Thai nationals protested at the border and were arrested by Cambodian forces. As the number of Thai soldiers increased along the disputed border, the Cambodian government also enlarged its troops, prompting military build-up between the two sides. And despite military tensions across the

border, elections were held on July 28 with Prime Minister Hun Sen claiming victory by a wide margin, making it his second 5-year term in office.

While Hun Sen employed a great deal of rhetoric regarding the holiness of a full-scale war to protect Cambodian national identity, it is quite dubious whether he had valid intentions of actually doing so. An all-out war given the sizeable asymmetric military capabilities between the two countries would be an unwise decision for Hun Sen's political security, especially in case the results do not favor Cambodia. Therefore, why Hun Sen strongly reacted to Thailand's provocation with the use of force and how he could successfully mobilize military tactics are puzzles that we explore in this section. From the point of view of Cambodia, we argue that the Preah Vihear territorial conflict was an outcome of Hun Sen's historical disputation of Preah Vihear to divert public scrutiny of domestic issues.

For Hun Sen, the auspicious timing of contesting historical memories with Thailand provided him with a number of opportunities to consolidate his monopoly in domestic affairs. First, the Preah Vihear enlistment was an opportune time for the CPP (Cambodian People's Party) to garner more support for the upcoming elections by intensifying people's national sentiment and pride. "Two birds hit with one stone" summarizes the coincidental timing of the UNESCO annual meeting and the Cambodian 2008 National Assembly elections as Hun Sen's CPP received increased votes in the elections. For example, the CPP had received 47.3 percent and 58.1 percent votes in 2003 and 2008 National Assembly elections, respectively, with 73 and 90 out of 123 seats.[39] While electoral surveys predicted that Prime Minister Hun Sen's ruling party was expected to retain its majority vote, the UNESCO enlistment of Preah Vihear further enhanced the reputation of the party.[40]

When the territorial border conflict started, it should be noted that Hun Sen did not face serious domestic crisis. In fact, Hun Sen's domestic control was considerably resolute with weak political opposition and moderate economic growth.[41] However, a series of domestic issues after his re-election became apparent: (a) criticisms from political opposition, (b) economic effects of the 2008 global financial crisis, (c) Khmer Rouge trial, and (d) land rights and environmental issues. The Preah Vihear agenda gave him ample motivation to make historical disputation against Thailand to downplay his political rivals and other local concerns. First, even though the CPP won in the National Assembly elections with landslide votes, he continued to face internal political criticisms from the opposition party and urban intellectuals in Phnom Penh. Having been in power as prime minister since 1988, Hun Sen has ruled Cambodia with a strong hand accused of massive corruption, electoral cheating, and political viciousness and abuses.[42] In particular, Sam Rainsy, his closest political nemesis, spoke of a similar revolution in Cambodia to overthrow his political regime, and Hun Sen felt overly sensitive to the possibility of an Arab Spring in Cambodia.[43] Second, Cambodia's booming economy has been highly dependent on the garments industry export. The 2008 global financial crisis heavily affected the Cambodian economy as it brought the amount of garment exports down by more than 20 percent between the years 2008–2009, which resulted in the shutting down of 42 garment factories, 49,000 jobs lost[44] and consequently, numerous garment

workers' strikes. Third, the Khmer Rouge trial was thought to be proceeding too slow as the Cambodian government finds less incentives to bring these ex-leaders involved to justice.[45] Other issues include land grabbing and forced eviction, and illegal logging in which one leading environmental activist was killed under shady circumstances.[46] By subscribing to the border conflict, Hun Sen could use the temple issue to abate these domestic concerns.[47]

The low-level conflict was made possible with the solid backing of the military. In Cambodia, several high ranking officers of the armed forces are Standing Committee members of the CPP Central Committee. This also allowed Hun Sen to spruce up his son's military and political career. Hun Manet was recently promoted to the rank of major general and was said to have led the February 2011 border conflict in order to elevate his standing in the military and prepare him as the next in line to becoming prime minister. Given Hun Sen's political clout over the military, he could without difficulty maneuver military campaigns against Bangkok to further cement his control.

How Hun Sen convincingly propelled Preah Vihear as a vehicle of external conflict stems from misperception and suspicion of socially embedded contesting historical memories between the two countries. Hun Sen could make the most of the temple issue by sparking nationalist identity precisely due to Cambodia's colonial history and troubled recollection of the past vis-à-vis its more "superior" neighbor, Thailand. The embittered "row" between Hun Sen and the Abhisit regime typified this historical enmity. In October 2008, PAD frontrunner and soon to be Foreign Minister, Kasit Piromaya, purportedly insulted Hun Sen by calling him a *Nakleng,* a belittling label in Thai for "gangster." In return, Hun Sen replied with the same indignation and pronounced his readiness to deploy force with the following statements, "What if I insult your king? What would you say if I insulted your prime minister and your ancestors? I'm not angry with you, but please use dignified words…. I tell you first, if you enter [Cambodian territory] again, we will fight … the troops at the border have already received the order."[48] Hun Sen also clearly expressed his particular dislike of Abhisit by insinuating on Thailand's political insecurity with this rhetoric, "I am the leader of Cambodia who was elected by the will of the people, not by robbing power [referring to Abhisit]."[49] Furthermore, he openly exhibited his aversion and lack of regard to the Abhisit government and the PAD by demonstrating his loyalty to the latter's enemy, Thaksin. In November 2009, Hun Sen appointed Thaksin to the post of economic adviser to Cambodia.[50] Consequently, the anti–Thaksin group of Thailand felt all the more outraged because Hun Sen's decision appeared to deride Thai legal judgment and the judiciary system.[51] Thus, the ruckus between Hun Sen and Abhisit government became acute further provoking the domestic audiences of the two countries and galvanizing their bilateral relations. Specifically, Abhisit responded by recalling the Thai Ambassador to Cambodia and issuing this statement, "I think it was not acceptable that Cambodia criticizes our judicial system and politics over Thaksin's case … we always behave as a good neighbor and we also want good neighbors."[52] The decisiveness of Abhisit on this issue immediately saw his popularity among the Thai people soared to an all-time

high.[53] In December 2009, Hun Sen fired back at Abhisit referring to him as the most difficult Thai prime minister he had ever had to work with, supplementing his claim with the following rhetoric, "I'm not an enemy of the Thai people…. But, these two people [Abhisit and Kasit] look down on Cambodia…. Cambodia will have no happiness as long as this group is in power."[54]

Throughout the term of Abhisit's regime, Hun Sen would launch more inflammatory speeches against the former, thereby further spoiling their already dented bilateral relationships. For instance, just several days after a January 2010 border clash, Hun Sen boldly delivered a live coverage speech at the Preah Vihear Temple on February 6, 2010, in front of army troops together with his wife both clad in military camouflage. Once again, he reiterated Cambodia's territorial sovereignty over the Preah Vihear and his unwavering position to deploy the military[55]:

> The Bangkok Post and other news in Thailand said that my visit [to Preah Vihear] is not the right time. if i am your prime minister, i should listen to you but i am the prime minister of Cambodia, which is a sovereign state. Whenever I want to go, it's up to me. It's not up to you. Second, wherever I want to go, it's up to me. It's not up to you.
>
> If you didn't raise the problem from yesterday, i don't talk about it today. So yesterday's news shows this is the Thai's ambition to invade or want to take Cambodian land. That is why we have to strengthen our military. I agree to use the military not only 30,000 troops but maybe more. We don't want to fight, but if the situation forces us to fight, we don't have a choice.

Furthermore, Hun Sen displayed his solid command of the army by ridiculing Abhisit in the subsequent account, "So Abhisit, please listen up. Hun Sen can command the soldiers anytime. It's not like you [Abhisit]. Order left—left; order right—right. It's different from you. Listen well. It is our land."[56]

Overall, Hun Sen could further amplify his popularity and legitimacy among Cambodians and safeguard his leadership through his reactive historical disputation of the Preah Vihear territory. The Thai-Cambodian military stand-off helped strengthen the popularity of the current ruling party as Hun Sen could portray himself as the heroic defender of a national and cultural symbol against a traditional archrival. Hun Sen's repeatedly used calloused speeches against the Abhisit administration and the ways he underscored fear of losing Cambodia's territorial sovereignty due to Thailand's aggressive intrusion could only reinforce his political advocacy.

Conclusion

This paper showed how contesting historical memory can be used as a tool for diversionary foreign policy through the case of the Preah Vihear border conflict. In Thailand, the Abhisit government and the Thai military could organize strategic military conflict by instigating the historical issue of Preah Vihear during a time when Bangkok faced domestic instability. In Cambodia, Hun Sen reactively responded to

Thailand's challenge through diplomatic crusades and limited gunfire exchange as a tactic to secure his political legitimacy. Although it seems unlikely that contesting historical memory functions as a direct linkage of a full-fledged war between involved nations, it is very likely to be an apparent social root of historical disputation leading to diplomatic confrontations and low-level use of force. Also, the paper indicated that contesting historical memory becomes salient during the timing of elections or stages when political leaders vie for power. In Thailand, the issue became very palpable during the period of power transition before the parliamentary elections. In Cambodia, Hun Sen as well made an extensive use of Preah Vihear agenda with the impending national elections.

On November 11, 2013, the Hague Court released its interpretation of the 1962 ICJ decision of Preah Vihear as requested by the Cambodian government, which upheld the 1962 judgment of Cambodia's territorial sovereignty over the whole promontory of the Preah Vihear temple, and obliged the Thai government to withdraw its troops from the territory.[57] The ICJ did not rule on the disputed 4.6 square kilometers surrounding area, thus leaving the border settlement of the dispute to the two states. So the question remains as to whether or not Thailand and Cambodia will be able to find a solution and bring an end to the historical contestation. The border has by far seen less indication of another skirmish with one exception on October 1, 2014, during a routine patrol but was muted by the two sides.[58] We can suppose why the two sides were not eager to agitate the issue might be partly due to the recent 2013 ICJ decision and additionally, the Preah Vihear restoration works that started in February 2014.[59] But the current calm at the border may find more reason from the domestic situations facing Thailand and Cambodia. Thailand has undergone two political transitions since Abhisit lost the 2011 elections: from Yingluck Shinawatra (2011–2014) to the appointment of retired Thai army officer Prayuth Chan-ocha (2014–present) as prime minister after he successfully led a military coup against the former. Now that a key player to the diversionary ploy of Preah Vihear is in power, the easier it is to use the border as a diversionary tool; in fact, just days after the Thai military declared martial law, Cambodia objected to the Thai army's actions at the border after it erected a new barbed wire fence facing the temple.[60] But the Thai military's gambits at the border will all depend on the current military dictatorship's ability to enforce and maintain power especially with Bangkok's transition to the next royalist succession. Already, the military has taken steps to tighten its grip in power when in August 2016, a national referendum held approved a military-drafted constitution by a majority vote of more than 60 percent voted in favor of the constitution.[61] The referendum was held under heavy restrictions as protestations against the draft were banned and scores of people detained. Analysts predict that the military junta will more likely stay in power until a peaceful royal transition takes place.[62]

In Cambodia's 2013 election, the CPP lost 22 out of the 123 parliamentary seats while Sam Rainsy's Cambodian National Rescue Party (CNRP), Hun Sen's closest rival, gained 55 seats. This has been Hun Sen's most significant political challenge in the last two decades: not only did the CPP lose majority vote but also the CNRP's rejection

of the official results due to alleged massive cheating has increased the prospects of further protestations and political instability in Phnom Penh.[63] He has since taken a softer course on Preah Vihear in order to focus his attention domestically, tackling issues of job creation and economic development to salvage his losing popularity.[64] Now, with the 2018 elections, Hun Sen's anxiety over losing the election has prompted a series of political prosecutions of opposition members and his critics, and further threatened an impending civil war should the CNRP win.[65] Hun Sen has twice stoked ultra-nationalism against Bangkok during the timing of elections.[66] This time around, however, with Bangkok is still under the grip of the military regime, Hun Sen's strategic maneuvering of provoking nationalism against Thailand might be at this time unwise. But given that the domestic situation in both countries remain in disarray, the still unsettled 4.6 square kilometer surrounding area, the Preah Vihear border contestation will continue to be a thorn in their bilateral relationships, an easy target that can strategically be exploited under conditions of domestic insecurity.

Notes

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Litigating to Negotiate Access to the Pacific Ocean: A Study of the *Bolivia v. Chile* Case

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Structured Abstract

Article Type: Case Study

Purpose—The purpose of this case study is to discuss the implications of the International Court of Justice's ("ICJ") ruling on the preliminary objections in the *Case Concerning the Obligation to Negotiate in Good Faith (Bolivia v. Chile)*.

Design/Methodology/Approach—This case study relies on academic literature, treaties, past decisions by the ICJ to examine the precedential value of *Bolivia v. Chile*.

Findings: Through an analysis of the preliminary objections phase of a case pending before the Court, this case study found that the ICJ rightly concluded that it had jurisdiction in the *Bolivia v. Chile* case.

Practical Implications—Useful for legal scholars, and lawyers, this paper helps the reader understand how the ICJ interprets international treaties to resolve disputes concerning preliminary objections to the jurisdiction of the Court, and the distinction between legal a political disputes in international adjudication.

Originality/Value—This case study makes an original contribution to the field by providing an overview of previous decisions of the ICJ as background to the analysis of the historical and legal background preceding the *Bolivia v. Chile* case, and considers its precedential value.

Keywords: admissibility, international court of justice, international dispute resolution, jurisdiction, justiciable, landlocked states, Law of the Sea, treaty interpretation, obligation to negotiate, preliminary objections

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Introduction

On April 24, 2013, Bolivia initiated proceedings against Chile alleging that Chile had failed to uphold its obligation to negotiate effectively and in good faith to reach an agreement which would provide Bolivia sovereign access to the Pacific Ocean. In September 2015, the International Court of Justice ("ICJ") rendered its judgment on the preliminary objections raised by Chile in the *Case Concerning the Obligation to Negotiate in Good Faith (Bolivia v. Chile)*.[1] Arguments concerning the non-justiciability of the issues, and the lack of a dispute between the parties permeated the preliminary objections phase of the dispute. In the judgment on preliminary objections, the ICJ took the opportunity to define the subject-matter of the dispute and reaffirmed that its role was to peacefully settle international disputes.

This commentary thus discusses the issues and decision of the ICJ in the preliminary objections phase of the proceedings and highlights how the judgment on preliminary objections further solidifies the Court's jurisprudence distinguishing between legal and political disputes. *Bolivia v. Chile* is not the first case in which the ICJ has been called upon to resolve a dispute relating to the obligation to negotiate in good faith under international law, and the merits of the case will clarify whether such an obligation exists, and can serve more broadly as precedent to help interpret and define the rights of landlocked states and the extent of a state's right to access the sea. This latter question is the crux of the case and will be decided during the merits phase of the proceedings, which the case has not reached at the time of writing. Thus, this commentary will focus on the questions which were the object of the preliminary objections proceedings, namely the ICJ's discussion of jurisdiction in the case.

This commentary reviews the background of the case and arguments of the parties during the preliminary phase of the proceedings and argues that while there is a political context to the case, the Court rightfully decided that the dispute between the parties was one of a legal nature and that it had jurisdiction to entertain the case.

This commentary proceeds first by discussing the historical background of the case and by providing an overview of the preliminary objections proceedings. It then examines some ancillary matters in international law and the way various political factors permeate legal disputes. This commentary argues that *Bolivia v. Chile* provides a unique opportunity for the ICJ to resolve a long-standing dispute between neighboring states, while clarifying the international legal framework with respect to a state's obligation to negotiate in good faith under international law.

Background of the Dispute

1. Historical Overview: From the War of the Pacific to Present Day

The historical background of the case arose out of the 1879–1883 War of the Pacific which took place between Chile and Bolivia. Chile and Bolivia gained their

independence from Spain in 1818 and 1825 respectively. At the time of its independence, Bolivia had a coastline along the Pacific Ocean measuring several hundred kilometers. In 1866, Chile and Bolivia signed the *Treaty of Territorial Limits*, which established a "line of demarcation of boundaries" between the two States. These boundaries were confirmed in the Treaty of Limits between Bolivia and Chile, signed in 1874. Five years later, in 1879, Chile declared war on Peru and Bolivia. The war is now known as the War of the Pacific. In the course of this war, Chile occupied Bolivia's coastal territory.

In 1884, the hostilities between Bolivia and Chile ended with the *Truce Pact* which gave Chile the authority to govern the coastal region. As a result of the *Truce Pact*, Bolivia lost control of its coastline. In 1895, the *Treaty on the Transfer of Territory* was signed between Bolivia and Chile, but it never entered into force. This Treaty included provisions for Bolivia to regain access to the sea, subject to Chile acquiring sovereignty over certain specific territories.

In 1904, the Parties signed the *Treaty of Peace and Friendship* ("*1904 Peace Treaty*"), which officially ended the War of the Pacific between Bolivia and Chile. The treaty entered into force on March 10, 1905. Although Bolivia was granted a right of commercial transit to Chilean ports under this treaty the entire Bolivian coastal territory became Chilean. As a result, Bolivia became a landlocked state which has been trying to recover sovereign access to the sea for over a century.

In 1948, the *Pact of Bogotá* was adopted. Chile ratified the *Pact of Bogotá* in 1967 and deposited its instrument of ratification on April 15, 1974. Bolivia ratified the *Pact of Bogotá* in 2011 and deposited its instrument of ratification on June 9, 2011.

2. Overview of Proceedings Before the Court

In its Application, Bolivia sought to found the jurisdiction of the Court on Article XXXI of the *American Treaty on Pacific Settlement* signed on April 30, 1948 ("*Pact of Bogotá*"). Bolivia requested the Court to adjudge and declare that by virtue of a separate alleged agreement: (1) Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean; (2) Chile has breached the said obligation; and (3) Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean.

On July 15, 2014, Chile raised a preliminary objection to the jurisdiction of the Court. Chile claimed that, pursuant to Article VI of the *Pact of Bogotá*, the Court lacked jurisdiction under Article XXXI to decide the dispute. Chile maintained that the matters at issue in the case were territorial sovereignty and the character of Bolivia's access to the Pacific Ocean. Referring to Article VI of the *Pact of Bogotá*, it contended that these matters were settled by the *1904 Peace Treaty* and that they remained governed by that Treaty, which was in force on the date of the conclusion of the *Pact of Bogotá*. According to Chile, the various "agreements, diplomatic practice[s] and … declarations" invoked by Bolivia concern "in substance the same matter settled in and governed by the 1904 Peace Treaty."

Bolivia's response was that Chile's preliminary objection was "manifestly unfounded" as it "misconstrue[d] the subject matter of the dispute" between the Parties. Bolivia maintained that the subject matter of the dispute concerned the existence and breach of an obligation on the part of Chile to negotiate Bolivia's sovereign access to the Pacific Ocean in good faith. It stated that this obligation exists *independently* of the *1904 Peace Treaty*. Accordingly, Bolivia asserted that the matters in dispute were not matters settled or governed by the *1904 Peace Treaty*, within the meaning of Article VI of the *Pact of Bogotá*, and that the Court had jurisdiction under Article XXXI thereof.

3. The Court's Judgment

The Court rejected the preliminary objections raised by Chile. The Court indicated that it was necessary to first determine the actual subject matter of the dispute and then turn to the question of whether the matters in dispute are matters "settled" or "governed" by the *1904 Peace Treaty*. In reaching its conclusion on the subject-matter of the dispute, the Court considered that,

> while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented in Bolivia's Application.

In the Court's view, there is a distinction to be drawn in the case between a dispute relating to an obligation to negotiate and the content thereof, and a dispute concerning whether Bolivia has a right to sovereign access to the sea: the Application did not ask the Court to adjudge and declare that Bolivia has a right to sovereign access. Rather, the Court concluded that the subject matter of the dispute is whether Chile is obligated to negotiate Bolivia's sovereign access to the Pacific Ocean in good faith, and, if such an obligation exists, whether Chile has breached it.[2]

The next question the Court had to consider was whether the matters in dispute fell under Article VI of the *Pact of Bogotá* and whether the matters in dispute were already settled. The *Pact of Bogotá* provides that parties recognize the compulsory jurisdiction of the Court in all disputes of a juridical nature that arise among them concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute the breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Concerning matters already settled between the Parties, Article VI states that: "The … procedures [laid down in the *Pact of Bogotá*] … may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty." If the parties fail to agree as to whether the Court has jurisdiction over the controversy, the Court itself shall decide that question.[3] Therefore, the Court proceeded to determine whether the matters in dispute are matters "settled" or "governed" by the *1904 Peace Treaty*.

The provisions of the *1904 Peace Treaty* set forth at paragraph 40 do not expressly

or impliedly address the question of Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. Thus, the Court concluded that the matters in dispute are matters neither settled nor governed by agreements or treaties, within the meaning of Article VI of the *Pact of Bogotá*. Consequently, the Court dismissed Chile's preliminary objections.[4] Having discussed the preliminary objections proceedings and the Judgment of the Court, this commentary will now address some issues related to the case.

Ancillary Issues

1. Access to the Sea for Landlocked States in the United Nations Convention on the Law of the Sea

Underlying the dispute between the Parties is the broader question regarding the rights of landlocked States and how international law governs access to the sea. While this case does not concern the interpretation or application of the *United Nations Convention of the Law of the Sea* ("UNCLOS") and the provisions therein related to the rights of landlocked States, it is relevant to discuss the provisions of the UNCLOS so as to frame the dispute between the Parties within a broader perspective. Both Chile and Bolivia ratified the UNCLOS.[5] Despite this fact, Bolivia's claim is not based on the UNCLOS, since the obligation to negotiate a sovereign access to the Pacific Ocean constitutes a demand which extends far beyond obligations owed to landlocked states under the UNCLOS.[6]

Transit and the right to access the sea is a major issue for all landlocked States around the world. There are 43 landlocked States in the world.[7] In 1973, an Alliance of Landlocked and Geographically Disadvantaged States ("Alliance") was formed. The group was comprised of 55 States.[8] The member states in the Alliance stressed that they should have transit rights to and from the sea. The overall result, after the intense negotiations ended, were far from satisfying to members of the Alliance.[9] However, their views were reflected to a certain extent in Article 125 of the UNCLOS.[10] Part 10 of the UNCLOS provides for a right of access for landlocked states to and from the sea. Article 125 delegates this right to landlocked States in order for them to be able to exercise other rights concerning the freedom of the high seas and the so-called common heritage to mankind.[11] For that purpose landlocked states must enjoy the freedom to traverse the transit state itself in order to reach the coast.[12] All modes of transport should be respected with regard to this right. Furthermore, it is up to the States themselves to agree upon the particular form through which landlocked states may exercise their freedom of transit.[13] Ultimately transit states retain their right to enforce measures which protect their legitimate interest in situations where their interests conflict with those of the landlocked state. This is to affirm the complete territorial sovereignty of the transit or coastal state.[14]According to the Chilean Foreign Ministry, Bolivia enjoys the right to retain autonomous customs officials in Chilean ports, and benefits from preferential tariffs, superior terms of storage of goods, tax exemptions and free transit through connecting roads to port facilities. These rights stem from the *1904 Peace Treaty* and more importantly

from subsequent bilateral agreements.[15] In the present case Bolivia asks for greater rights based on another alleged agreement.

This becomes evident when looking at the declaration made by Bolivia upon signing the UNCLOS:

> 3. Freedom of access to and from the sea, which the Convention grants to land-locked nations, is a right that Bolivia has been exercising by virtue of bilateral treaties and will continue to exercise by virtue of the norms of positive international law contained in the Convention.
>
> 4. Bolivia wishes to place on record that it is a country that has no maritime sovereignty as a result of a war and not as a result of its natural geographic position and that it will assert all the rights of coastal States under the Convention once it recovers the legal status in question as a consequence of negotiations on the restoration to Bolivia of its own sovereign outlet to the Pacific Ocean.[16]

According to Judge Türk, the UNCLOS as a whole does not derogate from any greater rights, with respect to transit, that landlocked States may have in particular with transit States.[17] Bolivia's claim relies on the merits of another alleged bilateral agreement with Chile. Bolivia alleges this agreement obliges Chile to negotiate a sovereign access to the sea with Bolivia, and thus offers greater rights than what the UNCLOS provides for landlocked states generally. A key term here is a "sovereign" access to the sea, since Bolivia is already enjoying free transit to the Pacific Ocean.

Bolivia claims that various commitments, exchange of notes, declarations, unilateral acts and other actions, constituted a negotiation process which formed an agreement independent of the *1904 Peace Treaty* which delineated their territorial boundaries.[18] Proposals were made, in particular during the 1950's, the 1970's, and continuing up until 2006, that allegedly constitute an agreement to negotiate a "sovereign" access to the sea. For example, Note No. 9 issued by Chile's Foreign Minister in 1950, states: "My government is willing to formally enter into direct negotiations aimed at finding a formula that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own, and for Chile to receive compensation of a non-territorial character that effectively takes into account its interests."[19] In 1975, the two states signed the *Joint Declaration of Charaña*, which reads: "Both Heads of State, within a spirit of mutual understanding and constructive intent, have decided to continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests…."[20] It will therefore be up to the ICJ to interpret these historical discussions to determine whether they constitute an agreement, and whether Chile has an obligation to negotiate a sovereign access to the Pacific Ocean. As noted above, the UNCLOS does not derogate from a greater right in respect of access to the sea that Bolivia may have with Chile based on an alleged separate agreement.

2. The Justiciability of the Dispute

The distinction between justiciable and non-justiciable disputes is known in Common Law systems as the "political question doctrine." It has been defined as a

doctrine which prevents a court of law from determining issues which are political in essence.[21] It is also understood to be a technique of judicial management used to rule out controversial cases.[22] Legal disputes are justiciable, and political disputes are non-justiciable and are not within the jurisdiction of a court of law. The ICJ has always looked at the applicant's formulation of the issues in order to rule on the justiciability of a dispute.

That Chile's points of objection are political arguments becomes evident when analyzed using the work of Edvard Hambro concerning the jurisdiction of the ICJ. Edvard Hambro, the former Registrar of the ICJ, wrote: "if the parties seek to find out what their respective rights are, the question is legal. If, on the other hand, the parties wish to change the existing law, the question is political."[23] Following that line of reasoning, Chile is effectively saying it is a political dispute, because Bolivia wants to change existing law, namely their boundary treaty. On the other side Bolivia, by claiming that the other party has an obligation towards Bolivia, simultaneously seeks to determine its rights against Chile.

This is not the first time that a party has argued that an issue before the Court is non-justiciable. In the case *Application of the Interim Accord of 13 September 1995* (*Macedonia vs. Greece*), the Respondent, Greece argued that the Macedonian Application was asking the Court to change an existing rule and reverse a decision made by NATO. Greece argued that the Court's judgment would not have any practical effect since the Court cannot modify a decision made by NATO.[24] The Court responded that Greece was correct in stating that the Court could not modify a NATO decision, but that this was not the request of the Applicant, Macedonia. The heart of Macedonia's request lied in something different: the conduct of Greece during NATO's decision-making process which breached an existing obligation towards Macedonia. Ultimately, the Court deemed that Greece's argument was "not persuasive."[25]

Generally, non-justiciability has been a matter of propriety rather than an acknowledgment that the Court lacks the jurisdiction to hear a particular dispute.[26] The objection that a dispute is political is, in itself, more political than legal.[27] In the Advisory Opinion concerning the *Condition of Admission of a State to Membership in the United Nations*, the Court clarified that it could not "attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request…. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it."[28] To be consistent with this view, the Court should not reject an application because of concerns about the political motives preceding the legal question.

A legal dispute, as the term appears in Article 36(3) of the United Nations Charter, is therefore defined not by the nature of the dispute, but by the process for best resolving particular issues.[29] The political-legal distinction is therefore functional.[30] The case between Bolivia and Chile, formulated in abstract terms, is a judicial task concerned with the interpretation of the post–1948 negotiations. Therefore, the ICJ can play a functional role in resolving the legal dispute, in particular when taking into consideration the fact that Bolivia and Chile have not had embassies in each

other's country since the 1970's due to their disagreements concerning Bolivia's access to the sea.[31] A binding judgment from the Court could remove legal uncertainties between the parties with regard to Bolivia's right to access to the sea. A binding decision may also assist two large neighboring countries in South America to effectively cooperate in the future. It is therefore within the Court's function to attribute a justiciable meaning to the claim.

It has been noted, in regards to decisions concerning justiciable and non-justiciable issues, that one could learn a lot from national courts.[32] A statement made by a Supreme Court Judge of the United States in his book, *The Judge in a Democracy*, underlines: "The more non-justiciability is expanded, the less opportunity judges have for bridging the gap between law and society and for protecting the constitution and democracy. Given these consequences, I regard the doctrine of non-justiciability or "political questions" with considerable wariness. Insofar as is possible, I prefer to examine an argument on its merits."[33] Equally in international law, one should if possible attribute a justiciable character to affirm jurisdiction. Otherwise, the more the Court declines jurisdiction, the more restricted it is in exercising its judicial function in more complex cases. In the *Tehran Hostages Case*, the Court recognized the important role of diplomatic institutions in facilitating effective cooperation within the international community.[34] There is a functional distinction between the roles of the Court and political institutions when trying to peacefully settle disputes. A judgment of the ICJ could remove legal uncertainties between the parties and could possibly contribute to more effective, regional cooperation.[35]

In its Judgment on the preliminary objections the Court stated:

> As the Court has observed in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties. The Court considers that, while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the application, namely, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. The Application does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access.[36]

In support of this finding, the Court has never rejected a case because political aspects were involved. The Court has maintained that to dismiss a case because the legal aspect is only one element of a political dispute would be to impose a "far-reaching and unwarranted restriction upon the role of the Court in the peaceful settlement of disputes."[37] In the *Tehran Hostages Case,* Iran urged the Court in a letter "not to take cognizance of the case, which only represents a marginal and secondary aspect of an overall problem."[38] The alleged non-justiciable character was not upheld by the Court, a position which is consistent with the ICJ's jurisprudence. In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the United-States made an argument, claiming that Nicaragua's allegations were "but one facet of complex of interrelated political, social, economic and security matters that confront the Central American region."[39] The Court rejected the argument holding that

it should not decline to take cognizance of the legal aspects of a dispute, merely because the dispute had other aspects as well.[40] Similarly the Court upheld its jurisdiction in the *Nuclear Weapons Advisory Opinion*,[41] which was also surrounded by political controversy. In the *Lockerbie Case* during the first phase, the court confirmed the customary presumption of justiciability despite the highly charged political context in which the case arose.[42]

These landmark cases heard before the ICJ demonstrate the Court's competence to adjudicate cases which involve historical and regional political aspirations, even in contentious situations. In affirming its jurisdiction, as it did in the judgment on preliminary objections in the *Bolivia v. Chile* case, the Court asserted its role as the principal judicial organ of the United Nations in the peaceful settlement of international disputes. In order to maintain its flexibility in that regard, the Court has not sought a definition of legal disputes that is so narrow that it would prevent the adjudication of disputes involving to some extent non-legal issues.[43] The Court recalled in its Judgment

> that Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea nor to pronounce on the legal status of the 1904 Peace Treaty. … Even assuming arguendo that the Court were to find the existence of such an obligation, it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation.[44]

As Bolivia noted before the Court, it did not want to define the form of a sovereign access to the sea in advance, because this issue needed to be decided through negotiations. This reservation is consistent with the Court's opinion in *The Haya de la Torre Case*, also known as the *Asylum Case*. In that case the Court ordered Colombia to terminate the asylum of a Peruvian man.[45] The States could not agree about the manner in which the asylum should be terminated, and asked the Court for a decision.[46] The Court refused to do so, saying that:

> the various courses by which the asylum may be terminated are conditioned by facts and possibilities which, to a very large extent, the parties are alone in a position to appreciate. A choice among them could not be based on legal considerations, but only on considerations of practicability or of political expediency. It is not part of the Court[']s judicial function to make such choice.[47]

Equally, in the present case the form of the access should not be solely based on legal considerations, it must also take into account practical ones (geographic location, costs, etc.) which can only be addressed through negotiations. The Court can make a decision on the main issue dividing the Parties, such as the obligation to negotiate, while leaving other issues (which it cannot decided on) unresolved, such as the form of access. In the *Free Zones Case*, the Court refused to address economic issues left unresolved by an agreement between France and Switzerland.[48] Scholars have affirmed that in certain circumstances the details for carrying out the Court's judgments are to be entrusted to politics and political institutions,[49] negotiations being a political means for parties to agree upon "the details."

The term "sovereign access" stems from previous negotiations where various different proposals were made. One example of a special regime which has been

negotiated is the Czech ports located in Germany. The Treaty of Versailles (1919) guaranteed in article 363 and 364 two northern ports in Germany for the Czech-Slovak State at that time.[50] On the basis of that Treaty, a lease agreement was concluded in 1929 between the city of Hamburg and the Czech-Slovak State.[51] The two ports *Moldauhafe*n and *Saalehafen* are leased for 99 years, and the agreement continues to be valid until 2028 between Hamburg and the Czech Republic.[52] It is governed under the general regime of free zones, and serves the direct transit of goods coming from or going to the Czech Republic.[53] Free access was also guaranteed for inland waterway ships. It is to a certain extent a privileged access. A similar arrangement could potentially be a viable outcome of any future negotiations between Bolivia and Chile.

Conclusion

The case between Bolivia and Chile presents some important aspects concerning the obligation to negotiate under international law. The case will also have an impact on the diplomatic relations between the two states. Although this case concerns a specific regime between the parties, and not the UNCLOS regime, it will be an important precedent that brings some comparative perspective on the rights of landlocked states. The Court has rightly reiterated its mandate to peacefully settle international disputes in affirming its jurisdiction to hear the case on the merits. The Court can also provide, in its judgment on the merits, much needed clarity as to what the obligation to negotiate entails and whether it is in effect an obligation to reach an agreement on the sovereign access to the sea, while leaving it to the Parties to negotiate and decide how sovereign access to the sea will be crafted in practice.

This commentary reviewed the issues decided during the preliminary objection phase and argued that the Court rightly concluded that it had jurisdiction to entertain the case. The *Bolivia v. Chile* case is important because it enables the ICJ to continue to play a role in dispute resolution processes in Latin America through the *Pact of Bogotá*. Historically, there have been numerous cases where the Court has played an important role in resolving disputes in Latin America, which has contributed to the re-establishment of diplomatic relations between the parties involved. During the proceedings on preliminary objections, the Court was called upon to reject jurisdiction on the basis of non-justiciability; the Court took the opportunity to once again re-affirm its judicial role and clarify the dispute between the parties. Even when the subject-matter of the dispute is confined to whether there exists an obligation to negotiate access to the sea, the Court's judgment on the merits can help to clarify matters between the Parties, and provide a path forward.

Notes

1. "Case Concerning the Obligation to Negotiate in Good Faith, Preliminary Objection (Bolivia v. Chile)," *International Court of Justice*, September 24, 2015 ("Preliminary Objections Judgment").

2. "Preliminary Objections Judgment," *supra* note 1, paragraph 34.

3. "American Treaty on Pacific Settlement (The 'Pact of Bogotá')," *Organization of American States*, April 30, 1948, Article XXXIII ("Pact of Bogotá").

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12. *Ibid.* Article 125.

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17. "Landlocked States," *supra* note 9.

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19. The Ministry of Foreign Affairs of Bolivia, *The Book of the Sea* (Bolivia: 2014), p. 125.

20. *Ibid.* p. 127.

21. H. Lauterpracht, "The Doctrine of Non-Justiciable Disputes in International Law," *Economica* 24 (1928), p. 277–317, https://doi.org/10.2307/2548052.

22. James A R Nafziger, "Political Dispute Resolution by the World Court, with Reference to United States Courts," *Denver Journal of International Law and Policy* 26(5) (1998), p. 775–777 ("Political Dispute").

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29. "Political Dispute," *supra* note 22, p. 775–777.

30. *Ibid.*
31. Information obtained from Bolivian Embassy in the Netherlands.
32. "Political Dispute," *supra* note 22, p. 775–777.
33. Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006), p. 177–189.
34. "United States Diplomatic and Consular Staff in Teheran, Judgment (United States v. Iran)," *ICJ Reports* (1980), p. 3.
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Territorial Sea Limits in the Singapore Strait

Vivian Louis Forbes

Structured Abstract

Article Type: Commentary Essay

Purpose—The governments of Indonesia and Singapore, in February 2017, ratified two agreements that delimitated two extensions, in easterly and westerly directions, of their 1973 Territorial Sea boundary in the Strait of Singapore. Two "gaps" exist that require the urgent attention of the three littoral States to delimit the territorial sea boundaries to close the gaps.

Design, Methodology, Approach—The narrative that follows discusses the issues and problems in defining the territorial sea limits in the Strait of Singapore.

Findings: The one in the western sector appears easier to delimit. The gap in the eastern sector may require more time to negotiate especially based on reports that the Government of Malaysia requested, in January 2017, the International Court of Justice to "revisit" the Award of May 23, 2008, in the light of findings of three "vital" documents.

Practical Implications—The determination of territorial sea boundary in particular in the vicinity of Pedra Branca must be considered a priority by the littoral States for many reasons not least for the safety of navigation and maritime security.

Keywords: base point, common point, delimitation, straight baseline, territorial sea boundary

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Introduction

The present study offers an analysis of the international political divisions within the Singapore Strait. An Agreement, signed in 2014, delimited a relatively short segment of a territorial sea boundary in the eastern sector of the Singapore Strait, just south of the suburb of Changi.[1] The Governments of Indonesia and Singapore exchanged instruments of ratification relating to that Agreement, at a ceremony in Singapore, on February 10, 2017.[2]

This event realized the nearly complete political division of the Singapore Strait. Short segments; less than one M in the east and 10.5 M in the west of the Strait, await finalization of delimitation. Ongoing negotiations will be required sooner than later between Indonesia, Malaysia and Singapore to determine Common Points (or Tripoints), if deemed necessary, and then to link the present respective terminal points of existing delimited maritime boundaries, bilaterally negotiated between the countries since 1969, to the respective Common Points.

First, it is necessary to offer a geographical description of the setting in focus, to describe the natural limits of the Strait in the context of this narrative and to comment on the importance and relevance of this major waterway that links the Indian Ocean and the South China Sea. This will be followed with an analysis of the territorial sea boundary delimitation undertaken by the littoral States during bilateral discussions over a period of nearly five decades. Finally, a comment is offered on the prospects of a potential alignment of closing lines. This process is undoubtedly complicated by the fact that the sovereignty issue of Batu Puteh/Pedra Branca/White Rock, Middle Rocks and South Ledge is still open to debate because of findings in January 2017 and ongoing, by Malaysian Officials, of vital documents from archival files at the United Kingdom National Archives,[3] that has the potential to change the ruling of the International Court of Justice (ICJ) of May 23, 2008, and thereby alter the political map, once again, of this regional setting.[4]

Geographical Setting: Singapore Strait

In earlier literature, this stretch of water was also referred to as the Straits of Singapore. For the purpose of this discussion, the singular is employed. Singapore Strait is defined as the area lying between the south coasts of Malaysia and Singapore Island on the North and the islands off the southeast coast of Sumatra on the South between the following limits:

On the West:

The Southeast limit of Malacca Strait, which is, a line from Tanjung Piai (Lat. 1° 16' N, Lon. 103° 31' E,) the southern extremity of Malaysia, to:

PulauIyu Kecil (1° 11' N, 103° 21' E), thence to:
Pulau Karimum Kecil (1° 10' N, 103° 23' E), thence to
Tanjung Kedabu (1° 06' N, 102° 59' E)

On the East:

A line joining Tanjung Penyusop (Datok) (1° 22' N, 104° 17' E, the southeast extremity of Malaysia, to:

Horsburgh Lighthouse (1° 20' N, 104° 24' E), thence to

Pulau Koko (1° 13' N, 104° 35' E) lying off the Northeast extremity of Pulau Bintan.

The entire length of the Strait is about 60 nautical miles (M). At its eastern approach the strait is about 11.5 M in width, abreast of Tanjung Penyusop; the western approach of the strait is nearly 10 M wide. A channel between Pulau Sakijiang Pelepah (Lazurus Island) and Batu Berhanti (1° 17' N, 103° 51' E) which is a mere 2.5 M wide, lies South of Singapore Island. Many channels and Straits lead south out from the Strait of Singapore.[5]

Johor Strait, which is in two parts, separates Peninsular Malaysia from Singapore Island. A Causeway was constructed, in 1940, linking Johor Bahru, Malaysia and Woodlands, Singapore, creating a West Johor Strait and an East Johor Strait. A Second Link Bridge was constructed, in 1997, just north at Tuas that links the Island State and its neighbor, Malaysia, to the north. Indeed, a territorial sea boundary was surveyed and re-defined and delineated within the Johor Strait in 1995. This fact is alluded to later in this narrative.

Various concepts have been put in place so as to enhance marine navigation within the Straits of Malacca and Singapore (SOMS) that include a Traffic Separation Scheme (TSS), Vessel Traffic Information System (VTIS), and a Marine Electronic Highway (MEH) complete with Electronic Charts and Display Information System (ECDIS) and electronic charts to make mariners aware of the hazards to navigation within the Straits.

Hazards to Navigation

Many hazards confront the mariners on ships plying the Straits of Malacca and Singapore.[6] Among the many hazards are some of the following:

Tides

Tides in the Malacca Strait are generally semi-diurnal with a diurnal component towards the south end of the Strait. In the Singapore Strait the tide is generally diurnal. The tidal range within the Straits of Malacca and Singapore (SOMS) varies, for example, in the vicinity of One Fathom Bank it can attain 3.7 meters (m); off Malacca, 1.8 m; off Pulau Iyu Kecil, 2.6 m; and, in the vicinity of Horsburgh Light it is 1.6 m. Deep-draught vessels cannot avoid passing over shoals and hence require sea space to navigate these shoals. Tidal streams are strong and are influenced by monsoon currents. Figure 1 illustrates the varying widths of Singapore Strait.

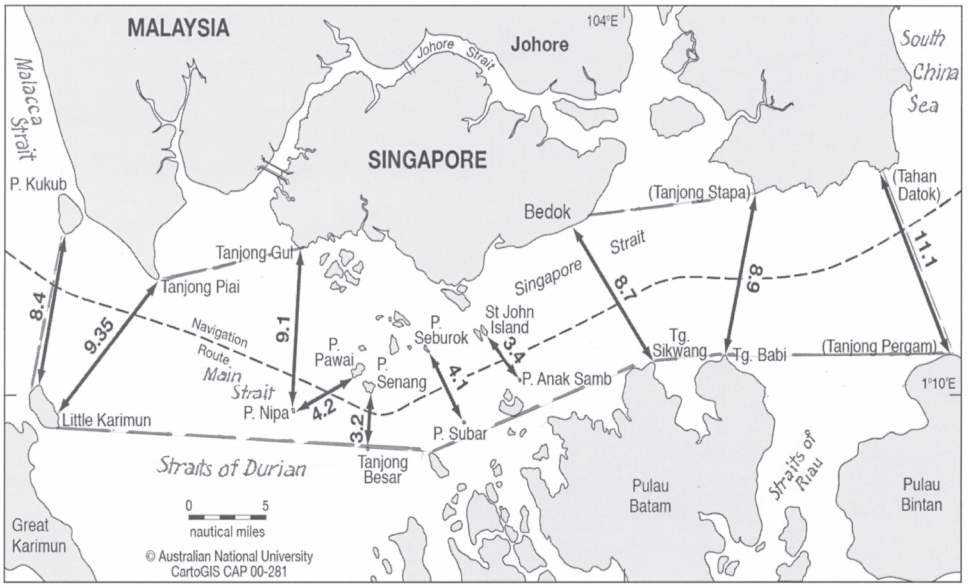


Figure 1: Singapore Strait: its limits, length and varying widths (ANU CartoGIS, http://www.google.com.au/search?q=Map+of+Singapore+Strait).

Critical Tidal Height

Constrictions of channels due to local topography and sand waves on the seafloor, for example, southeast of Rumunia Shoals (Lat. 1° 27' N, Lon. 104° 27' E), at the eastern approaches to the Strait, extend for about 10 M from North patch and consist of coarse sand and gravel, and are steep-to often with deep water in between. In the south, part of the area is ridged with sand waves, over which the least depth may vary from time to time.

Critical Draught of Large Vessels

The critical draught of large vessels must be considered for ships approaching Buffalo Rock (Karang Banteng) [Lat. 1° 09' N, Lon. 103° 49' E] and at another point, which is about 12 M north-east of Horsburgh Light. Deep-draught vessels transiting the Singapore Strait are mandated to use the Deep-Water Route. Deep-draught tankers navigate around this point as they transit through the Straits of Singapore. Other vessels should as far as practicable avoid the Deep-Water Route.

Risk of Collision

Mariners approaching Raffles Lighthouse by ship or boat either from East or West are requested to maintain an efficient lookout for traffic signals that are displayed to warn all shipping that a Very Large Crude Carrier (VLCC) is crossing the Main Strait, by reducing speed or stopping, and should not in any circumstances

cross ahead of such a vessel. Other hazards that may be encountered within the Singapore Strait include, but not limited to, fishing stakes and local fishing operations and acts of piracy or armed robbery, depending on which definition is employed for such terms.

Dependency on Reliable Aids to Navigation

The distance from One Fathom Bank to Horsburgh Light is about 250 M in length. Mariners are warned that long periods of considerable vigilance are necessary in order to maintain safe standards of navigation. This is not only due to natural hazards but also the sheer volume of traffic using the Straits of Malacca and Singapore. Due diligence is required by mariners operating in the southern sector of Singapore Strait, particularly in the jurisdictional waters of Indonesia.

Busy Seaway and Ports of Call

There are three ports of call within the Strait of Singapore. They are the Port of Singapore, Port of Tanjung Pelapas and Port of Johor (Pasir Gudang). During 2016, the number of ships at any one time in the Port of Singapore was about 1,000; indeed, a ship arrives or departs Singapore every 2–3 minutes; and the port handled about 32.6 million tons (Figure 2) equating to nearly 1,066 tons every minute according to statistics maintained by the Ministry of Transport, Singapore. In excess of 130,000 ships of varying size and type transit the Straits Singapore annually. Figure 3, illustrates the projection for 2020 and 2030 of the number of ships (78 percent increase) and deadweight tonnage (164 percent rise).[7]

The Governments of the littoral States are naturally concerned for the safety of ships, the cargo, crew operating the vessels transiting the Straits and for any potential problems that may arise in the event of collisions, terrorist attacks and natural disaster that may have an adverse effect and/or impact on the marine environment and the coastal habitat. In order to manage the Straits it is vital that territorial sea limits are defined and delineated on the largest-scale charts especially in this particular geographical setting.

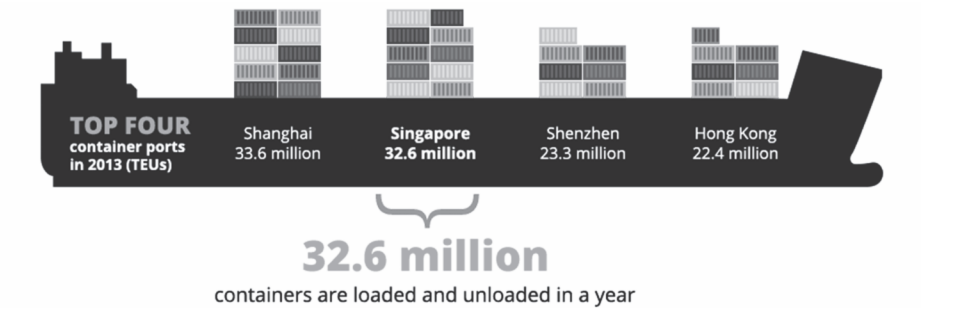


Figure 2: Tonnage loaded and un-loaded at Port of Singapore (Ministry of Transport, Singapore; accessed May 5, 2017).

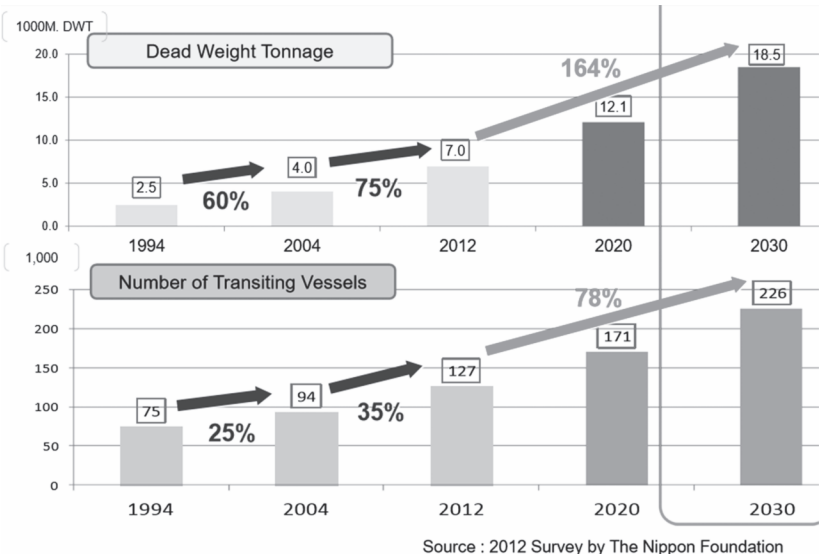


Figure 3: Actual and predicted number of Vessels in transit in the Straits.[8]

Delimited Territorial Sea Boundaries in the Straits of Singapore

Indonesia and Singapore

The territorial sea boundary between the two states in the Strait of Singapore as agreed in May 1973 (Figure 4) utilized the equidistance principle for determining three of the turning points and negotiated positions for the three other points.[9] Indeed, Point 2 was located about 0.5 M inside the 1960 Indonesian archipelagic straight baseline system. The 2002 and 2008 revised archipelagic base points proclaimed (re-defined) by Indonesia in this vicinity now places Point 2 just outside the archipelagic waters of Indonesia. The relevant new baseline connects points 190(B) and 191.[10]

The total length of the geodesics connecting the terminal and turning points of the 1973 boundary was 24.8 nautical miles averaging about 4.9 M. The boundary lies in water depths ranging from 20 to 50 meters. It is aligned to the deep-water channel, which is naturally the recommended deep-draught tanker route. A traffic separation scheme operates in the vicinity.[11]

Whereas, Indonesia adopted a territorial sea limit of 12-nautical miles, Singapore retained a three–M zone. However, in 1980, the Government of Singapore announced that it would exercise its right to extend that limit to 12 nautical miles. On May 28, 2008, Singapore proclaimed a Territorial Sea width of 12 M and an Exclusive Economic Zone (Gov. *Gaz.* May 28, 2005, 5 p.m.—online version).[12]

The agreement to establish a territorial sea boundary in the Singapore Strait between the two countries on May 25, 1973, noted that extensions to the west and east of the nominated terminal points would require further negotiations. The pending

negotiations resumed in February 2005. On March 10, 2009, delegations from Indonesia and Singapore who negotiated, over a four-year period, a western extension to the territorial sea separating the two countries in the western half of the Straits of Singapore signed an Agreement. Three points were identified in that Agreement and their geographical coordinates, referenced to WGS 84 datum, were published. Table 1 offers the list of geographical coordinates of the points as agreed to in May 1973 and Table 2 presents the geographical coordinates of the western projection of the boundary.

Table 1: Geographical Co-ordinates: Turning Points of T.S. Boundary, 1973

Point Number	*Latitude (N)*	*Longitude (E)*
1	1° 10' 46.0"	103° 40' 14.6"
2	1° 07' 49.3"	103° 44' 26.5"
3	1° 10' 17.2"	103° 48' 18.0"
4	1° 11' 45.5"	103° 51' 35.4"
5	1° 12' 26.1"	103° 52' 50.7"
6	1° 16' 10.2"	104° 02' 00.0"

On August 30, 2010, the Ministers for Foreign Affairs of the Parties to the Agreement met in Singapore to exchange Instruments of Ratification, thereby, bringing the Treaty into force. The delegations of the Governments of the Republic of Indonesia and the Republic of Singapore held the Third Technical Discussions on Maritime Boundaries in the Eastern Part of the Strait of Singapore in Singapore on July 12 and 13, 2012, as a follow-up to the Second Technical Discussions, held in Bali on February 8 and 9, 2012. The Indonesian delegation was led by Mr. Rachmat Budiman, (former) Director for Treaties on Political Security and Territorial Affairs, Ministry of Foreign Affairs. The Singapore delegation was led by Mr. Lionel Yee, Second Solicitor-General of the Attorney-General's Chambers.[13]

At the Third Technical Discussions, the delegations continued negotiations on the Terms of Reference and other issues relating to the maritime boundaries between the two countries. Both Heads of Delegation acknowledged that the significant progress reached at the Discussions would contribute to strengthening bilateral relations between the two countries according to the Joint Statement issued on July 13, 2012, that was published in the print and electronic media the following day.

Table 2: Geographical Co-ordinates: Turning Points of T.S. Boundary 2009

Point Number	*Latitude (N)*	*Longitude (E)*
1	1° 10' 46.0"	103° 40' 14.6"
1A	1° 11' 17.4"	103° 39' 38.5"
1B	1° 11' 55.5"	103° 34' 20.4"
1C	1° 11' 43.8"	103° 34' 00.0"

Discussion over the eastern segment commenced following the signing of the 2009 Agreement relating to the extension of the western boundary. With a clearer boundary between the two countries, it was expected that Indonesia could further

explore economic development in its territories near the boundary, which includes the Batam, Bintan and Karimun free trade zones in the Riau Group of Islands.

The agreement was expected to boost economic ties between Indonesia, Singapore and Malaysia, as well as the three neighbors' security cooperation in safeguarding the Malacca Strait. Departing from previous concern, Singapore, which had been actively reclaiming its shoreline, finally agreed not to use its southern reclaimed shoreline as the basis to determine the border. The median line that forms the western segment of the boundary between the two nations was finally drawn from Indonesia's Nipah Island and Singapore's original Sultan Shoal Island, it was observed. The delegation from Singapore had earlier refused to talk about the eastern segment boundary, citing the country's border dispute with Malaysia.

Table 3: Geographical Co-ordinates: Turning Points for Eastern Extension, 2014

Point Number	*Latitude (N)*	*Longitude (E)*
6	1° 16' 10' 12"N	104° 02' 00.0"E
7	1° 16' 22' 48" N	104° 02' 16.6"E
8	1° 16' 34' 06" N	104° 07' 06.3" E

These relatively short lengths of geodesics, created by the 2009 Agreement extend the Territorial Sea boundary by an additional 5.5 M in a westerly direction from Point 1 of the May 1973 Agreement. The two segments defined in the 2014 Agreement projected the boundary in an easterly direction by a distance of 5.3 Miles. The 1973 boundary as well as the western extension of 2009 and the eastern projection of 2014 are depicted in Figure 4.

Malaysia and Singapore

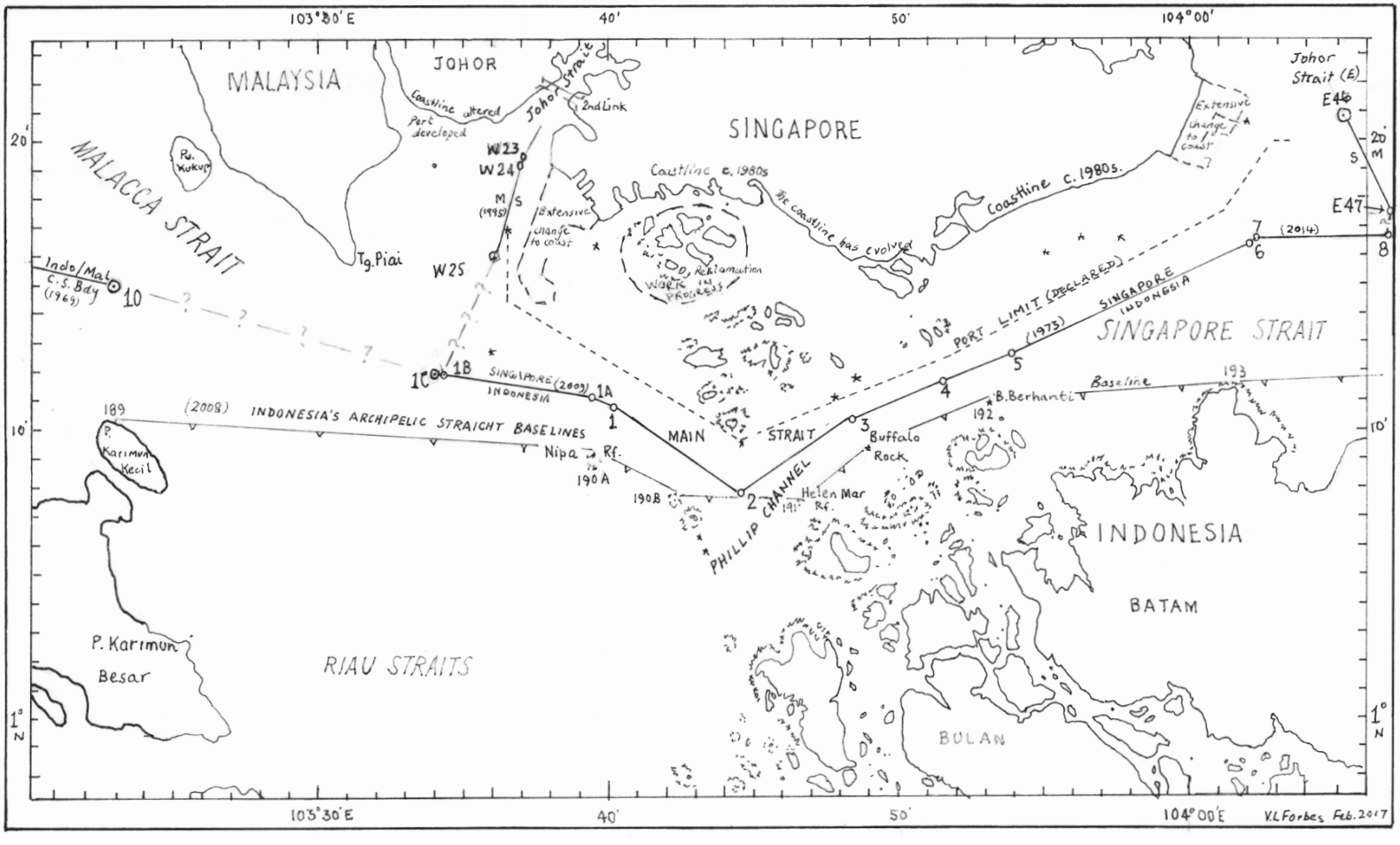
The Malaysia and Singapore territorial sea boundary (Point W1 to W25) in the Johor Strait, west branch was re-defined in 1995 to re-enforce the 1927 Agreement based on the deep-water channel through the entire length in western side of the Johor Strait. Points W24 and W25 will feature in any future negotiation to link the present terminal points in order to finalize the delimitation process in the western approaches of the Singapore Strait.[14]

Likewise, points E46 and E47 will be used in the eastern sector of the Singapore Strait in order to link Point 8 of the 2014 Agreement of the Indonesia and Singapore Territorial Sea boundary extension, as depicted in Figure 4. The overall length of the Territorial Sea boundary between these two littoral States within the Johor Straits measures 50 M.

Indonesia and Malaysia

Indonesia and Malaysia signed a territorial sea boundary, about 174 M length, for the southeastern portion of the Malacca Strait and the Western approaches of

Opposite: **Figure 4: Entire length of the Indonesia/Singapore territorial sea boundary.**



the Strait of Singapore in March 1970.[15] Terminal Point 8 (is coincident with Point 10 of the 1969 Agreement between Indonesia and Malaysia which is portrayed on Figure 5) lies about 11 M west of what may likely be the Common Point of the Indonesia-Malaysia-Singapore territorial sea boundary. The closure of the two gaps requires urgent action since the signing of the 2009 and 2014 Boundary extension Agreements between Indonesia and Singapore.

Figures 5 and 6 pre-date the 2009 Agreement and 2014 Agreements, respectively; however, they are included in the present study because they portray the Territorial Sea limits in the Johor Straits and are relevant in appreciating the facts and the issues at hand. The maps show the locations of Point 10; Points W1 to W25, E46 and E47, of the 1995 Territorial Sea Boundary within the Strait of Johor which is nearly aligned with the 1927 Boundary Agreement for Malaysia and Singapore; Points 1 and 2 of the western portion and Point 6 in the eastern sector of the Territorial Sea Boundary between Indonesia and Singapore in the 1973 Agreement; and, that section of Indonesia's revised archipelagic straight baseline system relevant to this geographical area.

Thus, the "western gap" extends from Point 10 (Indonesia/Malaysia, 1970) to Point W25 (Malaysia/Singapore, 1995) to Point 1C of the Indonesia/Singapore, 2009) as depicted on Figure 4. The westward extension to Point 1 of the 1973 was created in 2009, which is discussed below.

Figure 6 illustrates the location of Point 6 of the 1973 Agreement between Indonesia and Singapore; Point E47 of the Malaysia and Singapore Territorial Sea

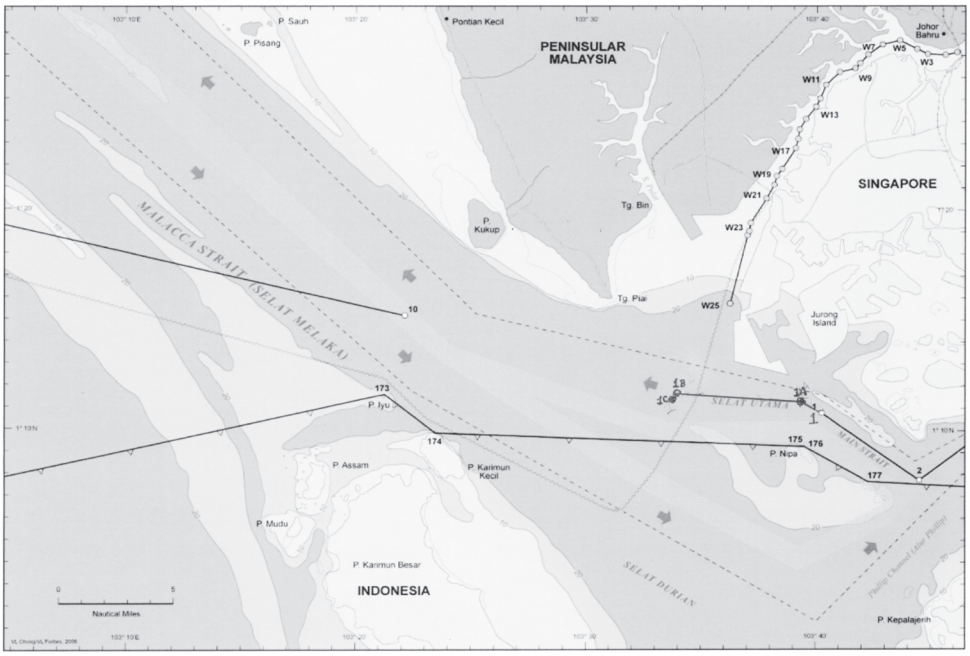


Figure 5: Western sector of the Straits of Malacca and Singapore: the western gap (adaptation of map by Forbes and Chong in Forbes and Basiron, MIMA 2008).

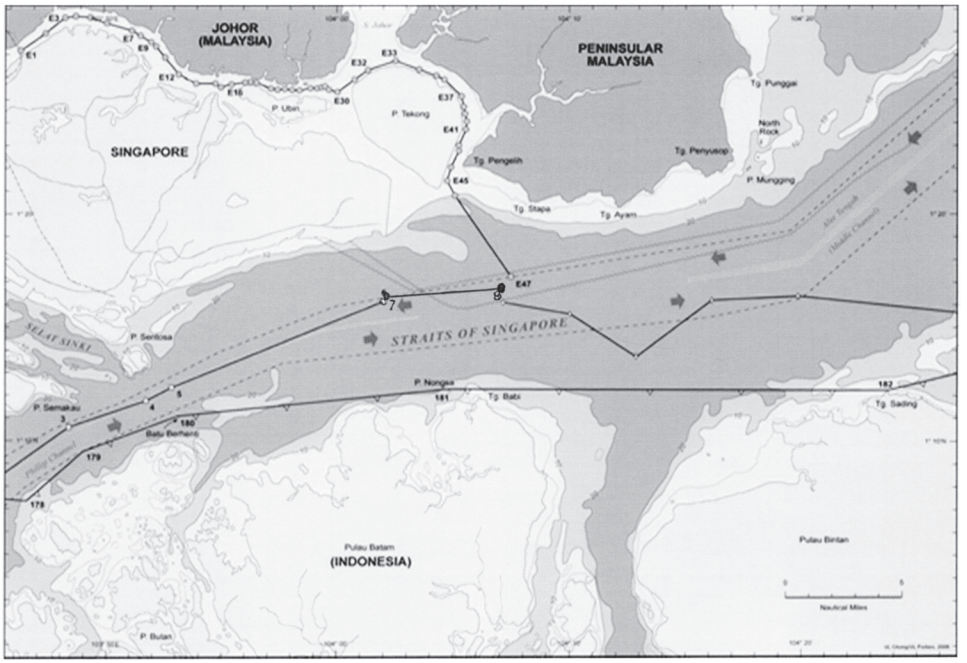


Figure 6: Territorial Sea boundaries: eastern half of the Strait of Singapore (adaptation of a map by Forbes and Chong in Forbes and Basiron, 2008).

boundary; Indonesia's archipelagic straight baseline in the context of the area in focus; and the alignment of Malaysia's 1979 unilateral claim to a continental shelf.

Closing the Gaps in the East and West

A simple straight line linking Point 8 of the Indonesia/Singapore Agreement of 2014 with E47 of the Malaysia/Singapore Agreement would create a territorial sea boundary thereby closing the "eastern gap" and would not involve Indonesia in the negotiation. There would be no need to define a Common Point as E47 could be considered as the Common Point.

In the western approaches to the Strait of Singapore (in the vicinity of Tanjung Piai), the "gap" in the territorial sea boundary has narrowed since 2009 as shown in

Table 4: Reference Points for Determining Common Point (E), Eastern Singapore Strait

POINT	*LATITUDE (N)*	*LONGITUDE (E)*	*COMMENT*
Pt. 8 (Indo/Sing)	01° 16' 34.4"	104° 07' 06.3"	2014 Agreement
E47 (Mal/Sing)	01° 17' 21.3"	104° 07'34.0 "	1995 Agreement
CSB 25	01° 16' 12.0"	104° 07' 00.0"	1979 CS Claim
Common Point (E)	Point E47	Point E47	Author's study

Pt 8 to E47	Distance of 0.8M	Pt 8 (Indo/Sin); E47 (Mal/Sin)
Pt 8 to Indo baseline	Distance of 4.8M	Pt 8 is equidistant from baseline and Changi

Figure 4. Indeed, it is about 11.5 M as indicated in Table 5. The gap as depicted in Figure 5 was narrowed by the action of the 2009 Agreement between Indonesia and Singapore. The location of the gap is between Tanjung Piai (Lat. 1° 16' N, Lon. 103° 31' E), to the northern end of Pulau Karimun Kecil (Lat. 1° 10' N, Lon. 103° 23.5' E) and extends eastward to an area of sea being reclaimed by Singapore as part of the development of Tuas. Singapore has not declared its territorial sea basepoints; Malaysia employs the Low Water Mark as depicted on its official nautical charts.

Table 5: Reference Points for Determining Common Point (W), Singapore Strait

Reference Point to Point	Distance - M	Comment
Pt 1C to Pt 10	11.5	1C (Indo/Sin); Pt 10 (Indo/Mal -8 same as 10
Pt 1C to Pt W25	4.5	1C (indo/Sin); Pt W25 (Mal/Sin)
Pt 10 to Pt W25	13.0	Pt 10 (Indo/mal); W25n(Mal/Sin)
Pt 1C to b'water off Tg Piai	4.7	There appears a breakwater on the LWM
Indo b'line to Mal. LWM	5.9	The nearest ref points for Indo and Mal
Pt 1C to Indo baseline	2.5	Agreed Point 1C to Indo. baseline
Tg Piai Light to Base pt 174	5.8	The distance to the straight baseline

In order to close the "gap" in the territorial sea boundaries of the three littoral States it may be necessary to establish a Common Point (or Tri-junction point) based on the equidistance principle from pre-determined locations, for example, terminal points (Point 10, W25 and 1C) of previously agreed boundaries, territorial sea basepoints or baselines, low-tide elevations (for example, off Tanjung Piai where a breakwater is being constructed). However, as in the case of the gap in the eastern sector, it is possible for the littoral States to come to an agreement whereby a straight line (or geodesic) could link Point 10 to Point 1C; and another straight line (or geodesic) link Point 1C to W25. An alternate view and simple to administer would be delineate one straight line rather than a series of short segments aligned on different directions of the compass.

Once again, this may be easier said than done. It will simplify the situation but more importantly closing the gap would make the implementation and enforcement of rules easier to enforce with reference to maritime security, smuggling and illegal movement of persons and the transfer of goods and cargo to avoid customs and excise duty. Whereas, the western gap would be easier to close, the one in the east, although relatively narrower, may take a little more effort, to resolve on account of developments since January 2017 relating to the Batu Puteh/Pedra Branca and related rocks in ICJ Case of 2008.[16]

The Batu Puteh/Pedra Branca Dimension

Following the publication of the 1979 Map depicting Malaysia's continental shelf limits, Singapore lodged a protest against Malaysia's unilateral map.[17] The resultant dispute was taken to ICJ. The judgment of the ICJ clarified the status of Pedra Branca as an island, the size of a football field. The ICJ did not determine on how

the territorial sea boundary between the two states should be delimited because both the Parties never requested the Court to do so.

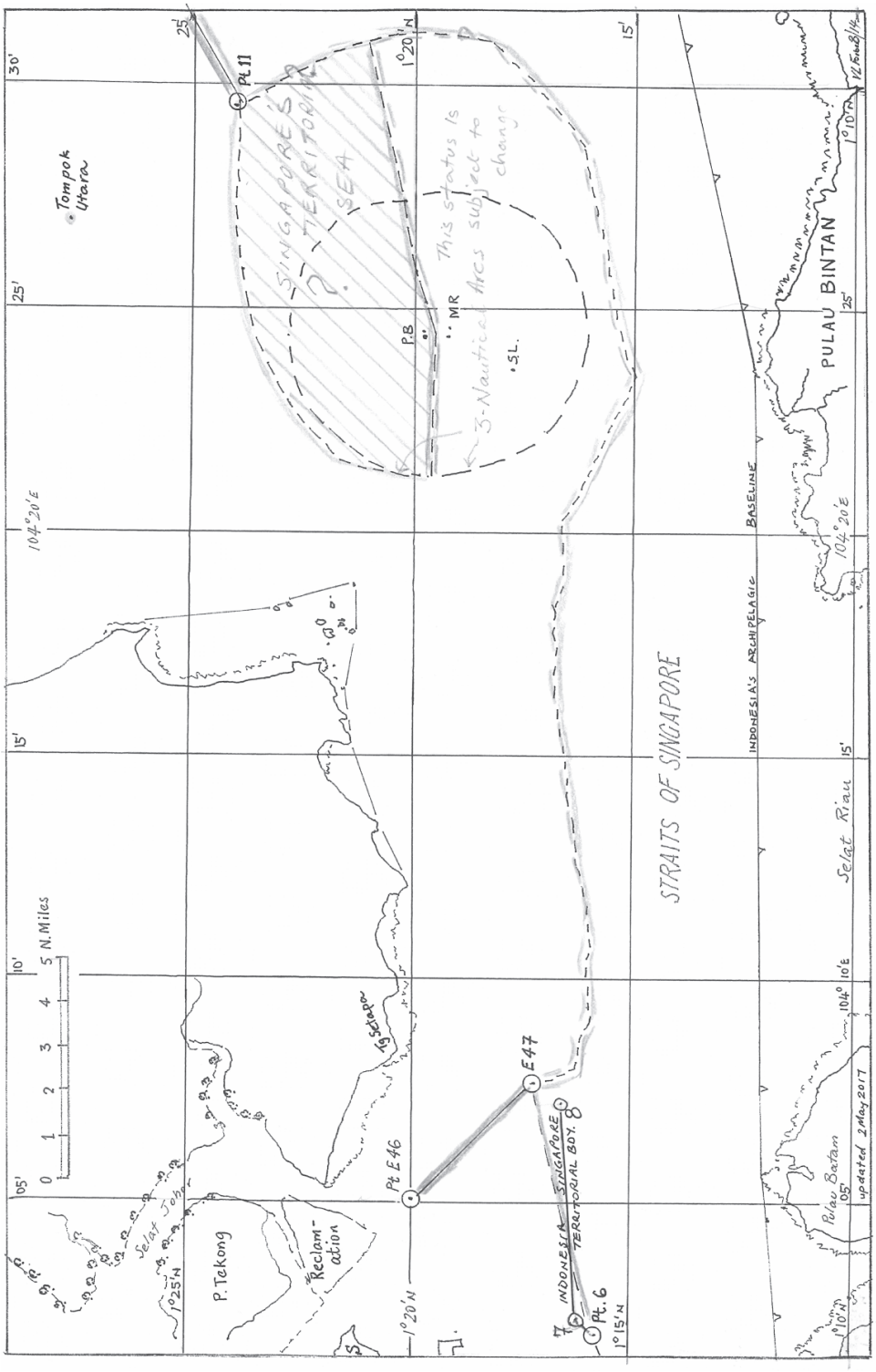
To complicate the sovereignty issue over the three features the confusion set in because of the provisions of Article 121 of the 1982 Convention which offers a definition of an island. The discussion on "marine features"—a broad term for islands, sand cays, reefs rocks which geographers and marine scientists recognize; however, regretfully, lawyers require definitions for each feature; and the issue of entitlement to maritime jurisdictional space of a LTE (Low-Tide Elevation) and artificial islands. Thus, a discussion on marine features has become the focus of attention because of the ICJ's position on South Ledge as an LTE. The issue was compounded by an Award offered by the Permanent Court of Arbitration (PCA) on July 12, 2016, in a case that the Government of the Philippines took against China with reference to the South China Sea dispute.[18]

Furthermore, the ICJ's decision of May 23, 2008, may be "revisited" following the lodgement of an appeal by the Government of Malaysia based on documents that are considered relevant by Malaysia to re-open the case. The documents were "discovered" when files were released by the UK National Archives for public access. The contents and nature of the documents have not been made public hence it is not wise to speculate to a possible outcome. That stated, it will only delay any decision necessary to delimit a territorial sea boundary at the eastern approaches to the Strait of Singapore.

Figure 7 offers a cartographic interpretation the eastern approaches to the Strait of Singapore at the southwestern sector of the South China Sea. The three sets of rocks are known as Pedra Branca (PR), Middle Rocks (MR) and South Ledge (SL) which focused in a Judgment brought down by the International Court of Justice on May 23, 2008. The decision of the Court was to award Pedra Branca to Singapore and Middle Rocks to Malaysia.

Paragraph 18 of the ICJ Judgment of 2008 noted that "Middle Rocks and South Ledge are two marine features closest to Pedra Branca. Middle Rocks are located 0.6M to the south and consists of two clusters of small rocks about 250m apart that are permanently above high water and stand 0.6 to 1.2m high. South Ledge, at 2.2M to the south-southwest of Pedra Branca, is a rock formation only visible at low-tide."

South Ledge, whose geographical coordinates are Lat. 1° 17'51" N, and Lon. 104° 23'33" E, is about 1.6 M to the south-southwest of Middle Rocks. It is a rock formation only visible at low tide. Within the meaning of the 1982 Convention it is termed a Low-Tide Elevation (LTE). This feature lies about 5.5 M north of Indonesia's Archipelagic base point No. 182 which is located on a small island off Tanjung Sading. Each of the three above-named features may be utilized as base points by the sovereign State in establishing a datum to measure the width of its Territorial Sea and other maritime jurisdictional zones where deemed necessary. South Ledge lies within Malaysia's territorial sea. Malaysia asserted that South Ledge, which lies 1.7 M from Middle Rocks and 2.2 M from Pedra Branca, would attach to Middle Rocks rather than to Pedra Branca, for the simple reason that it is located within the territorial sea appertaining to Middle Rocks.



Prior to January 2017, a likely version of the allocated maritime space in the vicinity of Pedra Branca would have this feature given a limited territorial sea, enclaved within Malaysia's maritime space, however defined. A territorial sea boundary between Indonesia and Malaysia from Point 11 of the 1969 Continental Shelf boundary would align to the south of South Ledge and trend westward to meet in the vicinity of E47 and Point 8 employing the equidistance principle to delimit the boundary. Whilst the sovereignty status of Batu Puteh/Pedra Branca, Middle Rocks and South Ledge is still debated within Malaysia and Singapore and possibly at the ICJ once again; geographical reality and historical records infer that Malaysia has a stronger bid as the features lies wholly within Malaysia's perceived territorial sea. That being the case, then Indonesia will need to negotiate with Malaysia a boundary between South Ledge and the Indonesia's archipelagic baselines.

Summary

Negotiations to finalize delimitation of the territorial sea boundaries in the Strait of Singapore have taken place between Indonesia and Singapore, Malaysia and Singapore and between Indonesia and Malaysia. However, by early May 2017, there are two gaps that require closure: one at the western approaches and another at the eastern entrance to the Strait of Singapore. These areas have been found wanting in delineation and closure of a territorial sea boundary since 2009 and 2014, respectively. There is an urgency to delimit the remaining segments of maritime boundaries in order to establish jurisdictional control in the busiest sea-lanes of Southeast Asia.

The determination of territorial sea boundary in particular in the vicinity of Pedra Branca must be considered a priority by the littoral States for many reasons not least for the safety of navigation and maritime security. It is pertinent for Malaysia and Singapore to define and make public knowledge the territorial sea basepoint coordinates if straight baselines are to be used along the coast of southern Johor and the islands of Singapore. This process of delimitation could be prolonged and increase in complexity as a result of new evidence allegedly found and yet to be made public so as to re-open the case at the ICJ since January 2017.

Notes

1. "Treaty between the Republic of Indonesia and the Republic of Singapore Relating to the Delimitation of the Territorial Seas … in the Eastern part of the Strait of Singapore," signed September 3, 2014.

2. "Landmark Sea Treaty with Jakarta Underscores Trust: Vivian," *The New Straits Times*, February 11, 2017, http://www.straitstimes.com/singapore/landmark-sea-treaty-with-jakarta-underscores-trust-vivian, accessed May 17 2017; also shared on the Ministry of Foreign Affairs, Singapore, web page: https://www.mfa.gov.sg/content/mfa/media_centre/singapore_headlines/2017/201702/headlines_20170211.html, accessed May 16, 2017.

3. Buang, Salleh, "Revisiting the ICJ Verdict," *The New Straits Times*, February 16, 2017, https://www.nst.com.my/news/2017/02/212846/revisiting-icj-verdict, accessed May 17, 2017.

Opposite: **Figure 7: Provisional map of actual and potential limits at the eastern approaches.**

4. The Judgment and other relevant documents relating to the Case are to be found on the web pages of the International Court of Justice.

5. The International Hydrographic Bureau, *Limits of the Oceans* SP23, 1953.

6. A detailed commentary on navigation within the Strait of Singapore is contained in the Port of Singapore *Handbook* and the UK Admiralty Hydrographic Office's *PILOTS* of the regional seas.

7. The Ministry of Transport, Singapore and Marine and Port Authority, Singapore, maintains the statistics on shipping and trade for this port.

8. The Nippon Foundation, Japan.

9. "Treaty between the Republic of Indonesia and the Republic of Singapore Relating to the Delimitation of the Territorial Sea."

10. Refer to V.L. Forbes, *Indonesia's Delimited Maritime Boundaries* (Berlin: Springer, 2014).

11. See V.L. Forbes, *The Maritime Boundaries of the Indian Ocean Region* (Singapore: Singapore University Press, 1995).

12. The Proclamation was made five days after the ICJ judgment of May 23, 2008.

13. Refer to V.L. Forbes, *Indonesia's Delimited Maritime Boundaries* (Berlin: Springer, 2014).

14. The Agreement and geographical coordinates of the turning points of this boundary delimitation may be found in V.L. Forbes and Nizam Basiron, *Malaysia's Maritime Realm, An Atlas*, MIMA, 2009.

15. This Agreement and geographical coordinates of the turning points of this boundary delimitation may be found in V.L. Forbes and Basiron Nizam, *Malaysia's Maritime Realm, An Atlas* (Kuala Lumpur: Maritime Institute of Malaysia, 2009).

16. The Judgment and other relevant documents relating to the Case are to be found on the web pages of the International Court of Justice, The International Hydrographic Bureau, *Limits of the Oceans* SP23, 1953.

17. The geographical coordinates of the turning points of this unilateral claim to the continental shelf limit may be found in Renate Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia* (London: Kluwer Law, 1998); V.L. Forbes and Basiron Nizam, *Malaysia's Maritime Realm, An Atlas* (Kuala Lumpur: Maritime Institute of Malaysia, 2009).

18. The Decision of July 12, 2016, and the documents submitted to Permanent Court of Arbitration for consideration in its deliberation is available at the web pages of the PCA.

Biographical Statement

Vivian Louis Forbes is affiliated with a number of institutions and specializes in the study of maritime and terrestrial boundaries and geopolitical issues. He has authored several books on these topics and produced two atlases. He offers lectures, seminars and workshops on the cartographic and geographic aspects of the law sea particularly as they relate to maritime boundary delimitation. Such courses have been offered in many countries.

The Future of the Central Arctic Ocean: Protection Through International Law[1]

Stefan Kirchner

Structured Abstract

Article Type: Commentary Essay

Purpose—This essay examines the implications of the lack of ice coverage in the Arctic Ocean.

Design, Methodology, Approach—The essay raises a fundamental question: should the international community treat the Arctic Ocean like all other seas, or should there be a special legal regime for the High Arctic, similar to that for Antarctica, a kind of global commons, shared by all mankind? Is the Arctic a part of the world like any other, with the Arctic Ocean soon an ocean like the others, with all the international legal standards applying elsewhere also applying here? Or is the Arctic special enough to warrant the creation of a specialized international legal regime beyond the existing law of the sea?

Findings—The idea of an Arctic Ocean Treaty has a certain appeal but is very unlikely to be realized in the near future and might soon no longer be neessary if existing norms of international law are applied consistently.

Practical Implications—It is necessary to use the international legal frameworks, treaties, and norms which already exist today in order to get results quickly and protect this rapidly changing environment.

Keywords: Arctic, Arctic Ocean, climate change, Law of the Sea, shipping

In many ways, the Arctic Ocean is on the way to becoming an ocean like all the others. New record, or at least near-record, lows of ice coverage are reported with

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alarming frequency. From the perspective of shipping, this is an opportunity because the distance from East Asia to Europe along the Northern Sea Route, along Russia's Arctic coastline, or through the North-West Passage, provides a shorter, faster, cheaper, and in some ways even a safer alternative to traveling for example through the Suez Canal, let alone around all of Africa. While there are only a few dozens ships making the journey every year, compared to thousands on classical routes, one can see a trend—especially because other marine activities in the Arctic Ocean are increasing, from drilling for oil and gas to tourism and fishing. Tourism is a particularly important source of income for many Arctic and sub–Arctic communities, especially in Europe. Fishing will become more relevant further north, not least due to the pole-ward migration of fish stocks as a result of global warming. No part of the planet is affected by climate change as much as the Arctic, yet, unlike Antarctica, the Arctic has been home to many peoples for thousands of years. While the Central part of the Arctic Ocean is still covered by ice, the idea of an almost ice-free Central Arctic Ocean, at least during the summer months, is no longer unthinkable. In the last years the predictions when this will happen have changed a lot, but it appears highly likely that there will be a future without (permanent) ice. Indeed, there has already been research on how to get the ice back, once it will be gone.[2]

At some point in the future also central parts of the Arctic Ocean will become accessible. This raises a fundamental question: should the international community treat the Arctic Ocean like all other seas, or should there be a special legal regime for the High Arctic, similar to that for Antarctica, a kind of global commons, shared by all mankind? Is the Arctic a part of the world like any other, with the Arctic Ocean soon an ocean like the others, with all the international legal standards applying elsewhere also applying here? Or is the Arctic special enough to warrant the creation of an international legal regime?

Among lawyers, this has long been discussed and I will not repeat all arguments here—instead, I want to show that current international law can already be used to protect the Arctic more effectively, specifically, the central part of the Arctic Ocean which would not be part of the Territorial Seas (up to 12 nautical miles[3]) nor of the Exclusive Economic Zones (up to 200 nautical miles[4]) of the coastal states. For the purposes of this presentation we will only look at the water, not at subsoil natural resources, such as oil or gas, on the continental shelf, which adds a number of other issues. In other words, at this stage, we are just looking at the surface.

Of course the idea of an Arctic Ocean Treaty has a certain appeal[5]—it would be highly symbolic, the world coming together to save the polar bears. The problem is of course, that the negotiations for such a major international treaty would be time consuming and that success would hardly be guaranteed, especially given the significant economic interests of the Arctic nations (but also non–Arctic countries, such as China[6] and India,[7] which have expressed greater interest in the Arctic in recent years) not only in the Territorial Seas and Exclusive Economic Zones but the nearby High Seas parts of the Arctic Ocean as well.

The Central Arctic Ocean is important for mankind as a whole but, from a legal and economic perspective, it is literally too close to home for many in the Arctic in

order to allow it to become Global Commons in a legal sense. For the purposes of my research, which is still at a very early stage, global commons are goods, in the widest sense of the term, the protection or use of which are meant to benefit everybody, such as Antarctic or the Deep Sea Bed. While the "use" of Antarctica is limited, the Deep Sea Bed-Regime in the Law of the Sea Convention foresees that "[a]ctivities in the [Deep Sea Bed] Area shall be […] carried out […] on behalf of mankind as a whole."[8]

The High Seas are different in that there is freedom for everybody. While there are some limitations which can be understood as benefiting the international community at large, these limitations are based on international treaties, such as MARPOL, concerning the protection of the marine environment. For centuries, the freedom of the High Seas has been a key role of international law. This freedom includes navigation,[9] overflight,[10] fishing,[11] laying cables and pipelines,[12] the construction of artificial islands[13] and scientific research,[14] all of which has to be done peacefully[15] and without the possibility of a state to claim sovereignty[16] but with a duty of flag states to protect living natural resources[17] and to cooperate to protect the marine environment.[18]

In this sense, the High Seas are not global commons in the same way Antarctica is, because the point of departure is the exact opposite: on the High Seas, the freedom to use the sea is limited by protective rules, in Antarctica the protective principle[19] allows for exceptions, such as scientific research[20] (interestingly, the Antarctic Treaty does not affect the use of the High Seas in the geographical area[21] concerned[22]). on the Deep Sea Bed, the global benefits principle of profit sharing[23] is designed in a way to make early investments profitable, too.[24]

The idea of an Arctic Ocean Treaty would be a great solution, not least due to publicity associated with it and potential enforcement structures, but is not realistic in the near future. Therefore it is necessary to use the international legal norms which already exist today in order to get results quickly. (In international law-making, "quick" can be a relative term. The International Code for Ships Operating in Polar Waters which entered into force on the 1st of January of this year had been negotiated for half a dozen years, is based on voluntary guidelines which date back to 2002 and still is criticized by many as not going far enough.) Fortunately there are already ways for more effective law-making: the ability of the International Maritime Organization (IMO) is recognized in the Law of the Sea Convention[25] and it does so in the framework of existing international treaties. The Polar Code for example is binding under both MARPOL and SOLAS. A state which has ratified either MARPOL or SOLAS has to implement the Polar Code for all ships flying its flag. The same approach can be used to protect the Central Arctic Ocean. The Law of the Sea Convention deals with ice-covered areas only with regard to Exclusive Economic Zones[26] but MARPOL allows for the designation also of High Seas as Special Areas,[27] and as Particularly Sensitive Sea Areas (PSSAs).[28] The same approach can be used for the Central Arctic Ocean. This would require negotiations but it could happen within the existing treaty framework of MARPOL. There are already IMO Guidelines for the declaration of PSSAs,[29] which regulate both the process and the conditions. Current PSSAs include small areas such as Malepo Island in Colombia, but also

larger regions such as the Great Barrier Reef, the Wadden Sea, the Baltic Sea, the Western European Waters, which includes the Western coasts of the United Kingdom, Ireland, Belgium, France, Spain and Portugal, from the Shetland Islands to Cabo de São Vicente, plus the English Channel and parts of the North Sea, and the Papahānaumokuākea Marine National Monument in Hawaii, to name just a few.[30]

The same approach can, and should, be used for the Central Arctic Ocean beyond national jurisdiction. At the end of the day, protecting the Arctic marine environment also beyond.

Notes

1. This text is based on a presentation with the title "The Future Legal Status of the Central Arctic Ocean: Global Commons vs. Current Law" which was given by the author during an interdisciplinary workshop entitled "The Future of Polar Governance: Knowledge, Laws, Regimes, and Resources," hosted by the British Antarctic Survey, in cooperation with the University of Leeds and Royal Holloway, University of London, in Cambridge, on March 27, 2017. In order to ensure readability of the text, the presentation style was maintained for this publication.
2. Julia Rosen, "Arctic 2.0: What Happens After All the Ice Goes?," *Nature*, 8 February 2017, http://www.nature.com/news/arctic-2-0-what-happens-after-all-the-ice-goes-1.21431, accessed May 16, 2017.
3. Article 3 Law of the Sea Convention.
4. Article 57 Law of the Sea Convention.
5. See, e.g., Stefan Kirchner, "A Window of Opportunity for an International Treaty to Protect the Arctic Marine Environment," *Current Developments in Arctic Law* 3 (2015), pp. 20–21.
6. Nengye Liu, "China's Emerging Arctic Policy," *The Diplomat*, December 14, 2016, http://thediplomat.com/2016/12/chinas-emerging-arctic-policy/, accessed May 16, 2017.
7. See, e.g., recently Xinhua, "Russia, India Mull Joint Fuel Exploitation in Arctic," *New China*, March 8, 2017, http://news.xinhuanet.com/english/2017–03/09/c_136113734.htm, accessed May 16, 2017.
8. Article 153 (1) Law of the Sea Convention.
9. Articles 87 (1) (a) and 90 Law of the Sea Convention.
10. Article 87 (1) (b) Law of the Sea Convention.
11. Articles 87 (1) (e) and 116 Law of the Sea Convention.
12. Article 87 (1) (c) Law of the Sea Convention.
13. Article 87 (1) (d) Law of the Sea Convention.
14. Article 87 (1) (f) Law of the Sea Convention.
15. Article 88 Law of the Sea Convention.
16. Article 89 Law of the Sea Convention.
17. Article 117 Law of the Sea Convention.
18. Articles 118, 119, 120 and 65 Law of the Sea Convention.
19. Article I Antarctic Treaty.
20. Article II Antarctic Treaty.
21. South of 60° S, Article VI Antarctic Treaty.
22. Article VI Antarctic Treaty.
23. Article 140 (2) Law of the Sea Convention.
24. Part of the income of the Deep Sea Bed Authority consists of payments made by the companies and states engaged in Deep Sea Bed Mining, therefore allowing both economically meaningful mining activities by states and corporations as well as profit sharing with all states, see Rüdiger Wolfrum, "Hohe See und Tiefseeboden (Gebiet)," in *Handbuch des Seerechts*, 1st ed., Wolfgang Graf Vizthum (ed.) (Munich: C.H. Beck, 2006), pp. 287–345, at p. 339.
25. See, e.g., Article 94 Law of the Sea Convention concerning safety and Article 211 Law of the Sea Convention concerning pollution from vessels; for a complete overview see International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for

the International Maritime Organization, Study by the Secretariat of the International Maritime Organization (IMO), January 30, 2014, IMO Doc. LEG/MISC.8, http://www.imo.org/en/OurWork/Legal/Documents/LEG%20MISC%208.pdf, accessed May 16, 2017.

26. Article 234 Law of the Sea Convention,

27. See, e.g., IMO Doc. A.927 (22).

28. On open questions concerning the legal relationship between the Law of the Sea Convention, MARPOL, MARPOL Special Areas and Particularly Sensitive Sea Areas see Haryo Budi Nugroho, "The Particularly Sensitive Sea Area (PSSA): History and Development," in *The Law of the Sea Convention—U.S. Accession and Globalization*, 1st ed., Myron H. Nordquist, John Norton Moore, Alfred A. H. Soons and Hak-So Kim (eds.) (Leiden: Martinus Nijhoof Publishers/Koninklijke Brill, 2012), pp. 529–550, at pp. 547 *et seq*.

29. IMO Doc. A 24/Res.982.

30. For an overview, see http://pssa.imo.org, accessed May 16, 2017.

Biographical Statement

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JTMS is a scholarly journal. Paragraphs must be fully developed without contractions, first and second person pronouns, repetition, jargon, sexist language, awkward syntactical constructions. Use a limited number of succinct headings and subheadings that is underlined or italicized as appropriate. Carefully honed style that is in a mellifluous prose is as important as substantive content. *JTMS* recommends attaining asking colleagues whose writing style you respect for review and revision. Please note that all accepted material is subject to editorial emendation.

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Format: Research should be saved as Microsoft Word document formatted Times New Roman, 12-point font, double-spaced. There should be generous margins, no right-hand justification, and pages numbered consecutively.

Title Page: Title page must include: (1) the title of the article; (2) author's contact information including name, affiliation, address, phone number, fax number, email address; (3) a structured abstract (see samples below) and a few keywords for the article.

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Endnotes: Use full citation endnotes with no bibliography or reference list. End-

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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.

One File: Submit the article as one file in the following order: Title, Structured abstract, Keywords, Contact information, Text, Endnotes, Biographical statement, and Tables and figures.

Structured Abstract

Article Classification: JTMS categorizes articles into 6 of the following classifications: Research Paper, Viewpoint, Technical Paper, Conceptual Paper, Case Study, and General Review. Please write *one* of the categories in which your paper belongs on the article title page.

The article title page must include a structured abstract with 4–5 of the following subheadings: (1) Purpose; (2) Design/Methodology/Approach; (3) Findings; (4) Practical Implications; (5) Originality/Value. The structured abstract, including keywords and article classification, must be 200 words or less.

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 2018 Issue Call for Papers

The *Journal Territorial and Maritime Studies* (*JTMS*) is soliciting submissions for its Winter/Spring 2018 issue. In the interest of increasing submissions for this recently launched publication, *JTMS* is offering authors of articles that successfully pass peer review and are selected for publication in the Winter/Spring 2018 issue an honorarium of $1,000. *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.

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