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NORTHEAST ASIAN HISTORY FOUNDATION

Managing Editor's Comments

Welcome to Volume 5, No. 2, the summer/fall 2018 issue of the *Journal of Territorial and Maritime Studies*. *JTMS* is particularly delighted to publish this volume with a new editor, Professor Ajin Choi (Yonsei University). The editorial team of *JTMS* will continue to endeavor to contribute to interdisciplinary study relating to territorial and maritime issues.

Three key phrases represent this volume of *JTMS*: maritime space, dispute settlement and international law. All five articles in this volume deal with maritime issues, which shows the great interest of scholars in this space.

The first article is Valentin J. Schatz's "The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone: A Historical Perspective." This article concerns the exclusive economic zone (EEZ), one of the most troubled maritime zones. Much has been said about the emergence of the EEZ under international law so far. Schatz, however, shows the originality of his research by focusing on the role of fisheries access agreements (FAAs) in the creation of the concept of the EEZ. This interdisciplinary approach—legal and historical—results in interesting insights on the concept of the EEZ.

Brian McGarry's article, "The Settlement of Maritime Boundary Disputes in Southeast Asia and Oceania: A Synthesis in Light of Indonesian Practice," chooses Indonesia's practice on maritime delimitation as a case study. McGarry infers notable findings from this by assessing the utility of various modalities that Indonesia used for its delimitation. These findings are expected to provide practical information for those who engage in maritime delimitation as well as academics.

The third and fourth articles deal with a common topic from different perspectives. Diego Mejía-Lemos and Edgardo Sobenes Obregon analyze *res judicata* in the International Court of Justice's cases particularly concerning maritime delimitation. Both articles—Mejía-Lemos' "The Principle of *Res Judicata*, Determination by 'Necessary Implication,' and the Settlement of Maritime Delimitation Disputes by the International Court of Justice" and Sobenes Obregon's "*Res Judicata* and the Test of Finality"—adopt as a methodology a comparative case study of the International Court of Justice. Both articles provide remarkable conclusions on the identification of conditions for *res judicata*. However, they are also distinguishable: while Mejía-Lemos analyzes the conditions for *res judicata* to be applied in relation to "necessary implication," Sobenes Obregon studies the same by using a "test of finality." It should prove an interesting experience for readers to read and compare these two topically-similar, but different articles.

The last article in this volume is Joshua Nash's "Inside(r)-Outside(r): Linguistics, Sociology, and the Microterritoriality of Maritime Space on Pitcairn Island." This research represents the basis of the author's field work on Pitcairn Island and invites readers to explore linguistic, cultural and island studies.

The editorial team of *JTMS* expresses our sincere thanks to our readers for your interest. We always make our best effort to discover insightful research concerning territorial and maritime issues.

Hyunjung Kim
Managing Editor

The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone: A Historical Perspective

Valentin J. Schatz

Structured Abstract

Article Type: Research Paper

Purpose—While international legal scholarship has devoted significant attention to the factors contributing to the emergence of the customary international law concept of the exclusive economic zone (EEZ), the role of fisheries access agreements (FAAs)—as an important factor contributing to this legal development—is often omitted or understated. This article provides a historical perspective through an in-depth study of the contribution of such FAAs to the emergence of the EEZ.

Design, Methodology, Approach—Overall, the article employs a legal history approach to a question of public international law. In doing so, the article applies a hermeneutic approach to the interpretation of treaty law. It employs an empirical approach to the question of the formation of customary international law in so far as State practice is concerned. Due to the difficulty in accessing representative State practice, the empirical approach is limited to inferences drawn based on available practice and the absence of contrary practice.

Findings—Provisions in FAAs and practice derived from FAAs can be evidence of *opinio iuris*. FAAs have contributed significantly to the formation of the customary international law concept of the EEZ.

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Originality, Value—This article provides an in-depth study of the contribution of FAAs to the emergence of the customary international law concept of the EEZ. The article provides a case-study of how treaty provisions may generate *opinio iuris*—the findings of which can be generalized and applied in other contexts.

Keywords: customary international law, exclusive economic zone, exclusive fishery zone, fisheries access, law of the sea, preferential fishing rights, treaties

Introduction[1]

From the 1970s onwards, coastal States around the world started concluding fisheries access agreements (FAAs) with other States in order to grant these States access to fish stocks located within the exclusive jurisdiction of coastal States—a practice that is still very much alive today, albeit to a more limited extent. It is no coincidence that the advent—and the peak—of FAAs fall within the same period of time during which the concept of the exclusive economic zone (EEZ), as a maritime zone of 200 nautical miles (nm) in which coastal States enjoy sovereign rights over marine living resources, emerged. Indeed, these FAAs were often concluded to soften the impact of EEZ declarations on the existing high seas fisheries of other States in the relevant areas. However, the contribution of the practice deriving from FAAs on the emergence of the concept of the EEZ as well as the rules contained in the EEZ fisheries regime—and *vice versa*—has not been subject to a comprehensive and in-depth study.[2]

The present article undertakes to fill this gap. In doing so, the article adopts a legal history approach to seek to establish a connection between early FAA practice and the emergence of the EEZ. For lack of space, the article is restricted to the impact of FAAs on the emergence of that concept as such rather than detailed aspects of the EEZ fisheries regime. First, it briefly discusses the status of the EEZ as a rule of customary international law largely identical to its codification in Part V of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[3] Second, the article explains the nature and function of FAAs. Third, the article discusses how treaty provisions may contribute to the emergence of rules of customary international law generally. The article then highlights how FAAs and related State practice have contributed to the emergence of the EEZ as a maritime zone of 200 nm in which coastal States enjoy exclusive fishery rights under customary international law even prior to the adoption of UNCLOS. The analysis shows that the emergence of the EEZ followed a stepwise process that started with the emergence of the concept of the exclusive fishery zone (EFZ) and the concept of preferential fishing rights. Lastly, the article offers some concluding remarks.

The Customary Status of the EEZ Fisheries Regime

In accordance with Part V of UNCLOS, coastal States may claim an EEZ of up to 200 nm measured from the baselines of their territorial sea.[4] In that zone, coastal States have sovereign rights (as opposed to full sovereignty like in the territorial sea) for the purpose of exploring, exploiting, conserving and managing the marine living resources.[5] Therefore, other States and their nationals may only fish in the EEZ with the consent of the coastal State.[6] As the International Tribunal for the Law of the Sea (ITLOS) confirmed in its *Sub-Regional Fisheries Commission Advisory Opinion*, the coastal State's sovereign rights over the living resources of the EEZ also entail a primary responsibility of the coastal State to regulate its EEZ fisheries and enforce its fisheries legislation.[7]

It is generally accepted that the right of coastal States to claim an EEZ of 200 nm forms part of customary international law.[8] At the very least, the concept of the EEZ, i.e., the allocation of, *inter alia*, sovereign rights and jurisdiction concerning marine resources to the coastal State based on the attribution of a maritime zone of up to 200 nm subject to declaration, constitutes customary international law.[9] However, in the past some authors have expressed doubts that all provisions of Part V of UNCLOS have acquired customary status and restrict their findings to "the broad rights of coastal and other States enumerated in Articles 56 and 58 of the Convention."[10] Others argue that, while State practice may not be uniform in all respects, the comprehensive nature of UNCLOS supports not only the customary status of the concept of the EEZ as such but also the accompanying regime of Part V of UNCLOS in some detail.[11] In this respect, it has been proposed to consider State practice not in line with UNCLOS as "deviations from customary international rules" rather than conduct aligned with rules of a different content.[12] As the present article is not concerned with the customary status of detailed aspects of the EEZ fisheries regime codified in Part V of UNCLOS but with its customary status generally, these broad findings are sufficient for the present purposes.

Fisheries Access Agreements (FAAs)

In maritime zones in which coastal States enjoy exclusive rights to fisheries, any fishing by other States or their nationals is subject to the consent of the coastal State. Such fisheries access to maritime zones within national jurisdiction is—and has previously been—granted by way of FAAs.[13] As agreements concluded between sovereign States, FAAs are treaties governed by public international law.[14] For the EEZ, Article 62(2) of UNCLOS states that access is granted "through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in [Article 62(4)]." Irrespective of whether the coastal State grants foreign nationals or vessels access to its fisheries or not, any foreign fishing activities fall under the jurisdiction of the coastal State and must therefore comply with the

applicable domestic fishing laws and regulations.[15] The coastal State has a corresponding right—and primary responsibility—to enforce its fisheries laws and regulations.[16] In some cases, foreign operators obtain so-called "private licenses" directly from the coastal State, in the absence of—or parallel to—an FAA with the flag State.[17] It is submitted that such private licenses may also constitute relevant State practice in the present context. They are, however, not the focus of this article—and of less importance given that they involve private actors which do not (in most cases) represent the official views of their flag States. As is shown in the following section, it is the view and practice of States entering into FAAs with coastal States that is essential in determining whether FAAs have contributed to the emergence of the customary international law concept of the EEZ.

The Relevance of FAAs for the Formation of Customary International Law

As FAAs are treaties, they do not in principle create rights and obligations for States not party to the respective FAA in accordance with the fundamental rule of treaty of *pacta tertiis nec nocent nec prosunt*.[18] For FAAs, this means that they only apply to waters under the jurisdiction of the parties to the relevant FAA. Irrespective of these considerations, a rule of customary international law identical to treaty rules may emerge[19] and treaty provisions may play a role in this process.[20] Such a rule of customary international law—in the present case the right of States to claim an EEZ of 200 nm in which they enjoy sovereign rights over marine living resources—is in principle binding on all States.

Under Article 38(1)(b) of the Statute of the International Court of Justice (ICJ-Statute), which is generally considered as the key authority in this regard, customary international law is defined as "evidence of a general practice accepted as law."[21] From this definition, two main requirements can be distilled for the formation of a rule of customary international law: State practice ("general practice") and *opinio iuris* ("accepted as law").[22] If the original "source" of a new customary rule is a treaty rule, there is an additional requirement that the treaty rule in question must be of a "fundamentally norm-creating character."[23] This is understood as requiring the rule to be both abstract and general.[24]

However, even if a treaty rule has the same content as an alleged new customary rule, it is not self-evident that State practice in the application of that treaty rule is in fact evidence of *opinio iuris* in that regard. On the contrary, the general presumption will have to be that States bound by such a treaty rule act precisely because they intend to comply with their treaty obligation, not because they are of the view that they are bound by an identical rule of customary international law.[25] For this reason, the International Court of Justice (ICJ) stated in the *North Sea Continental Shelf Cases* that from "[the parties'] action no inference could legitimately be drawn as to the existence of a rule of customary international law."[26]

Whenever the type of treaty in question is essentially of a contractual (*traités-*

contrats) rather than a law-making (*traités-lois*) character, which is also true of FAAs, particular caution is called for.[27] However, it cannot be entirely ruled out that some provisions even of what some would classify as a contractual treaty might be evidence of *opinio iuris*.[28] Instead, a treaty provision's ability to generate *opinio iuris* must be determined on a case-by-case basis. Nonetheless, whenever the ability of a treaty rule to contribute to the emergence of a customary international law rule is at issue (such as in the present case), additional requirements must be fulfilled. In particular, the relevance of provisions contained in FAAs for the establishment of *opinio iuris*, and thus for the formation of customary international law, must be ascertained based on whether the provisions in question contain a statement about a rule of general international law external to the treaty. If such a statement is present, the relevant provision can display *opinio iuris* both with respect to rights and obligations. To illustrate this point, a treaty rule containing a right or obligation to do "X" usually lacks an external component. A treaty rule containing a right or obligation to do "X as permitted/required by customary international law," on the other hand, is an express statement about the existence of a relevant customary rule external to the treaty—and thus a reflection of *opinio iuris*.[29]

As will be discussed below, fisheries treaties have considerable potential in proving assumptions about the nature and extent of coastal State rights and jurisdiction in a maritime zone—based on the explicit or implicit acceptance of such rights and jurisdiction by other States. The act of entering into an FAA with a coastal State signifies acceptance of the coastal State's sovereign rights over the living resources in the area of application of the FAA. It would be difficult to argue that such acceptance is limited to that individual FAA and contains no statement regarding the rights of the coastal State generally. To make such an argument would mean claiming that a flag State entering into such an FAA would intentionally take part in a breach of public international law by the coastal State.[30] Therefore, an external component, namely a statement concerning the extent of coastal State rights and jurisdiction, is always inherent in FAAs.[31]

The establishment of *opinio juris* with respect to obligations in provisions in FAAs is equally not automatic. Obligations laid down in treaty provisions generally arise from the treaty and are not proof of *opinio iuris* concerning the existence of an obligation under customary international law.[32] In some cases, however, the relevant treaty provision contains a statement indicating the parties' view that an obligation exists not (only) under the treaty but (also) under customary international law—for example, a rule of reference incorporating general international law into the treaty.[33] A good example that has received considerable attention may be borrowed from international investment law, where many bilateral investment treaties (BITs) contain provisions which oblige States to "accord investments or returns of investors of the other Contracting Party […] fair and equitable treatment *in accordance with principles of international law*."[34] Without entering into the details of the debate concerning the customary status of fair and equitable treatment (FET), it may be pointed out for the sake of comparison that many commentators consider that FET forms part of customary international—and that instead of merely codifying

pre-existing customary rules, "[t]he conventional framework served as the primary source for the customary formation of FET."[35] Where a provision in an FAA possesses a comparable external component, it may be seen as generating *opinio iuris* with respect to an obligation under general international law.

The Emergence of the EEZ and the Role of *opinio iuris* Established by FAAs

As the concept of the EEZ, as a *sui generis* zone under customary international law, evolved prior to its codification in Part V of UNCLOS,[36] many of the rules and practices codified in Part V of UNCLOS already existed in some form or another prior to UNCLOS. The following section shows how FAAs contributed to the emergence of the EEZ as a zone of 200 nm in which coastal States enjoy sovereign rights over marine living resources.

The emergence of the EEZ fisheries regime and its predecessors (to be introduced below), namely the concept of the 12 nm EFZ and the concept of "preferential fishing rights," are excellent examples of how FAAs, despite their contractual nature, have contributed to the establishment of *opinio iuris*. The following section addresses these developments in chronological order. As a starting point, it should be noted that all States enjoy a (qualified) freedom of fishing on the high seas under both customary and treaty law.[37] This means, in principle, that no single State may claim exclusive or even preferential access to high seas fisheries at the expense of other States. However, through the gradual extension of coastal State rights and jurisdiction over marine living resources during the 20th century, the area in which this freedom applies has decreased dramatically.

The Emergence of the EFZ

The starting point for the emergence of the EEZ as a new concept under customary international law could be seen in the emergence of a new maritime zone covering the 3–12 nm (and 6–12 nm) belt beyond the territorial sea (which then had a breadth of only 3 nm) in which coastal States would enjoy exclusive fishery rights (the exclusive fishery zone (EFZ)).[38] At the first United Nations Conference on the Law of the Sea held in Geneva from 24 February to 27 April 1958 (UNCLOS I), a number of States proposed an extension of the breadth of the territorial sea to 6 nm and the creation of an EFZ of up to 12 nm measured from the baselines from which the territorial sea is measured (i.e., the 6–12 nm belt beyond the territorial sea).[39] However, no compromise on either the maximum breadth of the territorial sea or the recognition of an EFZ could be reached at UNCLOS I. Accordingly, the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ)[40] does not define the maximum breadth of the territorial sea. Article 1(1) of the CTSCZ merely provides that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea," whereas

Article 6 of the CTSCZ states that "[t]he outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea" without indicating the extent of the "breadth of the territorial sea." However, this also meant that the breadth of the territorial sea remained subject to general international law and that the CTSCZ has to be interpreted accordingly.[41] The concept of the EFZ, on the other hand, was neither considered to constitute part of the territorial sea nor of the contiguous zone, meaning that it was not covered by the existing zones acknowledged by the 1958 Geneva Conventions (see discussion below).

As such, the concept of an EFZ was generally considered incompatible with Article 1 of the 1958 Convention on the High Seas[42] which states, in its Article 1, that the high seas cover "all parts of the sea that are not included in the territorial sea or in the internal waters of a State" (therefore arguably leaving no room for an additional *sui generis* zone) and, in its Article 2(2), that all States enjoyed freedom of fishing in the high seas.[43] Therefore, the question whether the maximum breadth of the territorial sea remained at the generally accepted 3 nm, or at 6 nm plus an EFZ of another 6 nm, or indeed at 12 nm, remained contested.[44] As a result, the second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960 was convened to, *inter alia*, "[consider] further the questions of the breadth of the territorial sea and fishery limits," but proposals for an EFZ of up to 12 nm failed (by *one* vote).[45]

Participation in the 1958 Geneva Conventions remained relatively low and, as a result, proved to be less of an obstacle to the extension of coastal State jurisdiction than might have been expected. This lack of support "was particularly reflected in the rapidly developing state practice with respect to claims to fishing zones."[46] Indeed, the proposal for an extended territorial sea and EFZ at UNCLOS I and II, which had only failed by one vote, "greatly strengthened the political legitimacy" of the concept of the EFZ.[47] The new developments were not restricted to unilateral claims[48] but also involved recognition of the right of coastal States to an EFZ beyond the territorial sea between 3 nm (at the time) and 12 nm by other States in various fisheries agreements.[49] This practice was relatively widespread amongst major coastal States and fishing States—with such practice particularly concentrated in Europe.[50]

As early as 1960, the United Kingdom and Norway concluded an FAA, the preamble of which expressly took into account "the proposal on the breadth of the territorial sea and fishery limits which was put forward jointly by the Governments of the United States of America and Canada at [UNCLOS II] in 1960 and which obtained 54 votes."[51] In the preamble, the parties also affirmed "their belief that an Agreement to stabilize fishery relations between the two countries should be based on the aforesaid proposal, and should not contemplate the exclusion of fishing vessels from any area beyond the limits of the fishery zone referred to in that proposal." Article II of the FAA granted Norway the right to exclude fishing vessels registered in the United Kingdom from "an area contiguous to the territorial sea of Norway extending to a limit of 6 miles from the base line from which that territorial sea is measured." However, Article III of the FAA granted such vessels the right to continue "to fish in the zone between the limits of 6 and 12 miles from the base line from

which the territorial sea of Norway is measured"—although that right would expire in 1970. Thus, Norway and the United Kingdom endorsed the concept of an EFZ that would at least cover the belt from 3–12 nm.

Equally, in 1961, Iceland concluded two exchanges of notes with the United Kingdom[52] and Germany[53] respectively in order to settle a dispute concerning Iceland's (then) contentious claim to a fishery zone of 12 nm. These agreements recognized the Icelandic claim but also granted the United Kingdom and Germany fisheries access to the outer 6 nm of Iceland's new fishery zone for a transition period of three consecutive years. These exchanges of notes were mixed agreements, but they included a fisheries access component.[54]

In a 1962 FAA,[55] Norway granted the Union of Soviet Socialist Republics (USSR) access to "a Norwegian fishing zone between the limits of six and twelve miles from the base line from which the territorial waters of the Kingdom of Norway are measured"[56] in return for access to "Soviet territorial Waters in Varangerfjord between the limits of six and twelve miles from the shore"[57] with both access arrangements expiring in 1970.

Perhaps the most significant development came with the conclusion of the 1964 London Fisheries Convention (LFC), which was concluded between several European States and provided for reciprocal fisheries access in specifically designated coastal waters.[58] Article 1(1) of the LFC states that "[e]ach Contracting Party recognizes the right of any other Contracting Party to establish the fishery régime described in Articles 2 to 6 of the present Convention." This statement is completed by Articles 2 and 3 of the LFC. Article 2 states that "[t]he coastal State has the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea." In addition, Article 3 of the LFC states that "[w]ithin the belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal State." However, other States had a continued right to fisheries access if their "fishing vessels […] have habitually fished in that belt between 1st January, 1953 and 31st December 1962." The LFC entered into force in 1966 and by 1971 it had twelve parties, all of which were European coastal States (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom).[59] Reference to the regime established by the LFC was also made in a 1964 FAA between the United Kingdom and Norway which implemented the earlier FAA of 1960.[60] This bilateral agreement is relevant in so far as Norway never became a party to the LFC.

After the conclusion of the LFC, the practice of claiming an EFZ became more widespread in other regions of the world. In 1965, Japan and South Korea concluded an agreement (not strictly speaking an FAA) in which they "mutually recognize[d] that each High Contracting Party has the right to establish a sea zone (hereinafter 'fishery zone'), extending not more than 12 nautical miles from its respective coastal base line, over which it will have exclusive jurisdiction with respect to fisheries."[61] After New Zealand had claimed an EFZ, it concluded an FAA with Japan in 1967 which implicitly recognized New Zealand's EFZ by granting Japan access (until 1970)

to certain fisheries in the 6–12 nm belt of the EFZ.[62] One year later, Australia concluded a similar FAA with Japan, which in principle excluded Japanese fishing vessels from fishing in the 12 nm EFZ of Australia, as well as the Territory of Papua and the Trust Territory of New Guinea (which are today part of independent Papua New Guinea) except for specific access arrangements.[63] As far as North America is concerned, in 1967 the United States and Mexico concluded an FAA which provided for reciprocal access to parts of the 9–12 nm belt of their respective EFZs.[64] Similarly, in 1968 Mexico concluded an FAA with Japan which granted Japan access to parts of the 9–12 nm belt of the Mexican EFZ.[65] Finally, the practice of establishing EFZs was also not absent from the African continent, as evidenced by a 1969 FAA between Spain and Morocco, which granted Spain access to parts of Morocco's EFZ of 12 nm.[66]

Overall, the examples given here (which are by no means exhaustive) are evidence of the practice of as many as 22 States from different parts of the world (and including most important fishing nations at that time) recognizing the right of coastal States to establish an EFZ of 12 nm. In light of the freedom of fishing on the high seas enshrined in the HSC, these treaties did not codify a pre-existing rule of customary international law. To the contrary, the *opinio iuris* reflected in the recognition of the concept of the EFZ in FAAs[67] was constitutive of a new rule of customary international law. In fact, it has been suggested that the striking absence of strong opposition against these EFZ claims was not only due to the near-agreement at UNCLOS II but also due to the fact that almost all coastal States claiming an EFZ continued to grant other States' fisheries access to this zone.[68] Seen from this perspective, FAAs may have had an additional catalytic effect in generating *opinio iuris*. Thus, the ICJ's finding in its 1974 judgments in the *Fisheries Jurisdiction Cases* that "the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction […]; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted" and that this concept had "crystallized as customary law in recent years arising out of the general consensus revealed at [UNCLOS II]" appears to be well founded.[69]

During UNCLOS I and II, most States regarded the EFZ as a *sui generis* concept that was different from the territorial sea. This position was confirmed by the State practice presented here. The coastal State's rights in the EFZ were indeed restricted to exclusive rights to fisheries and did not amount to a form of "sovereignty" that could be likened to the coastal State's rights in the territorial sea. It follows that the EFZ must be regarded as the functional predecessor of the EEZ rather than as a step in the gradual extension of the territorial sea towards 12 nm.[70] Indeed, the ICJ stated in the *Fisheries Jurisdiction Cases* that the EFZ granted coastal States exclusive rights to fisheries "independently of its territorial sea" and was therefore "a *tertium genus* between the territorial sea and the high seas."[71] If this is true, the declaration of recognition of the coastal State's right to an EFZ of up to 12 nm in FAAs may be regarded as a precedent for similar declarations in later FAAs which concerned the existence of a right of coastal States to claim an EEZ of 200 nm in which they enjoyed sovereign rights to marine living resources (discussed in the next section).

The Emergence of the Concept of Preferential Fishing Rights

Soon after the emergence of the concept of the EFZ, a further development concerning fishery rights of coastal States took place. Even when the waters beyond the territorial sea and beyond the EFZ (i.e., the waters beyond 12 nm of the coast) were still part of the high seas for the purposes fisheries, the question of whether the interests of certain States (e.g., coastal States, distant water fishing nations, geographically disadvantaged States) should be somehow reflected in a more nuanced regime of priorities for fisheries access to these areas was present.[72] To this end, Article 6(1) of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas recognized that "[a] coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[73] Of course, this was a vague concept and as the remaining paragraphs of Article 6 prove, the coastal State's special interest mainly concerned unilateral conservation measures and fell short of exclusive jurisdiction.[74] Parallel to the development of the concept of "special interest," the concept of "preferential fishing rights" of coastal States in the waters adjacent to their coasts emerged. Unlike the former, the latter concept focused on preferential fisheries access rather than conservation—at least in situations where the coastal State's population was highly dependent on its coastal fisheries.[75] However, the concept did not provide for exclusive fisheries jurisdiction either. As one author put it, the difference between the concept of the EFZ and the concept of preferential fishing rights is that the latter "relates to catch and not to jurisdiction" whereas in the former "the exclusiveness relates to jurisdiction and not necessarily to catch."[76]

To some extent, the interest of coastal States in preferential fishing rights was reflected in both bilateral and multilateral treaties.[77] However, it appears that this practice was rather scarce. For example, the preamble of the multilateral Arrangement relating to Fisheries in Waters surrounding the Faroe Islands concluded by Belgium, Denmark, France, the Federal Republic of Germany, Norway, Poland and the United Kingdom in 1973 recognized "that the Faroe Islands should enjoy preference in waters surrounding the Faroe Islands" and its Article 4 contains preferential fisheries access for the Faroe Islands by exempting the Faroe Islands from seasonal and spatially restricted closures for trawl fishing established by Article 3(1).[78] Equally, Article II(1) of the Agreement on the Regulation of the Fishing of North-East Arctic (Arcto-Norwegian) Cod concluded by the United Kingdom, Norway and the USSR in 1973 allocated the biggest share of the envisaged quota to Norway as the coastal State, whereas Article II(2) granted Norway an additional quota for "coastal cod" which was to be considered as a separate stock.[79]

In 1975 the United States and Poland concluded an agreement in which both States agreed to take "into account anticipated legal and jurisdictional changes in the regime of fisheries management based upon the consensus emerging from the Third United Nations Conference on the Law of the Sea."[80] The principles governing fisheries access to the waters adjacent to the territorial sea of the United States envisaged by Article 2(1)(c) of that agreement included "preferential harvesting rights for

United States fishermen based on their capacity to harvest the living resources." As evidenced by Article 2(2) of that agreement, the United States' preferential harvesting rights were of a nature that could have fully displaced Polish fishing vessels if no surplus was available.

While the examples given here are not exhaustive, it seems that—when compared to the practice supporting the concept of the EFZ—practice in support of the concept of preferential fishing rights was neither widespread nor uniform. Nonetheless, in its *Fisheries Jurisdiction* judgments of 1974, the ICJ took note of, *inter alia*, this treaty practice in determining the legal status of the concept of preferential fishing rights:

> State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States […]. [T]he preferential rights of the coastal State were recognized in various bilateral and multilateral international agreements.[81]

The ICJ then went on to accept the status as a rule of customary international law of "the concept of preferential rights of fishing in adjacent waters in favor of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries."[82] Thus, the ICJ expressly made use of statements of acceptance of preferential fishing rights in fisheries treaties in order to establish *opinio iuris* with respect to the customary status of that concept.

Thus, treaties similar to FAAs were seen by the ICJ as contributing to *opinio iuris* concerning the alleged customary international law concept of preferential fishing rights for coastal States (under certain conditions).[83] This finding has been subject to considerable criticism and—in the view of the present author—rightly so. There is scarce evidence of relevant State practice and the negotiation history of the agreements discussed above (the first two of which were mentioned by the ICJ) does not imply that flag States had accepted a legal obligation to grant coastal States preferential access.[84] Indeed, with the possible exception of the preamble of the Faroe Arrangement, it is doubtful that these treaties contained an external component that could be evidence of *opinio iuris*. While the ICJ's finding is not entirely convincing, it is proof of the willingness of the ICJ to use the recognition of legal concepts in regional fisheries treaties as evidence of *opinio iuris*.

The Emergence of the EEZ

Most of the text of the EEZ fisheries regime of Part V of UNCLOS was agreed upon by 1976—six years before UNCLOS was signed and 18 years before its entry into force.[85] Nonetheless, as late as 1977, some authors still insisted on the basis of the ICJ's judgments in the *Fisheries Jurisdiction Cases* that the concept of the EEZ had "no present standing in international law."[86] However, on the basis of the evidence available, it seems more likely that, already in the late 1970s, the EEZ's "acceptance as part of existing or emerging customary international law was anticipated

or reflected by national legislation and measures and by many bilateral fisheries agreements."[87] In this regard, it should be noted that while many States did not at first claim "full EEZs" but extended EFZs of up to 200 nm, the latter can be considered as reflecting a part of the former and are thus included in the notion of the EEZ.

Indeed, soon after the ICJ had found in its *Fisheries Jurisdiction* judgments that the concepts of the 12 nm EFZ and preferential fishing rights constituted rules of customary international law, an increasing number of coastal States began to unilaterally claim zones of up to 200 nm in which they asserted sovereign rights over marine living resources and enacted national legislation to make use of these sovereign rights (EFZs/EEZs).[88] The *opinio iuris* of these States concerning the existence of their right to a 200 nm zone was evidenced by their own claims. Of particular weight, however, is the *opinio iuris* of States other than those States asserting the right in question. In other words, it is important to study the reaction of other (affected) States to the claims of coastal States to extended jurisdiction. While there were at first many objections to the claims to coastal States to an EFZ/EEZ of 200 nm, States also increasingly began to conclude FAAs concerning EFZs/EEZs in the 1970s.[89] Of these FAAs, most were concluded either between developing coastal States and developed nations with fishing fleet overcapacities (as is still the case today)[90] or between developed States in order to phase out previous fishing activities in areas which now fell within new EFZs/EEZs.[91]

It is submitted that these FAAs are evidence of *opinio iuris*.[92] In the Asia-Pacific region, for example, New Zealand concluded FAAs with Japan,[93] South Korea,[94] and the USSR[95] in 1978, all of which contained clauses in their preambles recognizing New Zealand's claim to sovereign rights over marine living resources within a zone of 200 nm. The United States concluded FAAs containing similar clauses with South Korea[96] and Japan.[97] A clause in the preamble of the 1978 FAA between New Zealand and Japan read as follows:

> Recognizing that, in accordance with relevant principles of international law, the Government of New Zealand has established a zone of 200 nautical miles within which it exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources[.]

Similar statements can be found in trans–Atlantic FAAs such as the 1975 FAA between Canada and Norway, which contains the following clause in its preamble:

> Recognizing that both Governments propose to extend their areas of jurisdiction over such living resources pursuant to and in accordance with relevant principles of international law, and to exercise within these areas sovereign rights for the purpose of exploring and exploiting, conserving and managing these resources[.][98]

Of this FAA, it has been said that it "was the first [Canadian] agreement signed which recognized Norwegian rights to a share of the surplus in exchange for *de facto* recognition of an eventual [200 nm] Canadian zone."[99]

The same clause exists, for example, in the preamble of 1976 FAA between

Canada and Portugal[100] and in the preamble of the 1976 FAA between Canada and Spain.[101] Equally, the preamble of the 1977 FAA between the United States and the European Economic Community (EEC) acknowledged "the fishery management authority of the United States as set forth in the Fishery Conservation and Management Act of 1976"[102]—legislation unilaterally enacted by the United States in order to establish a 200 nm fishery conservation zone in which the United States claimed exclusive fisheries jurisdiction.[103] Similar statements can be found, for example, in the preambles of the 1977 FAA between the United States and Cuba[104] (the latter being evidence of at least some Latin American practice) and the 1976 FAA between the United States and Poland.[105] Relevant practice from the 1970s can also be found on the African continent. For example, the preamble of the 1981 FAA between Mauritania and the USSR takes "into account the decision of the Islamic Republic of Mauritania to establish a 200-mile economic zone."[106] Equally, the preamble of the 1979 FAA between South Africa and Spain contained the following statement:

> Recognizing the fact that the Government of the Republic of South Africa has extended its jurisdiction over the living resources of its adjacent waters pursuant to and in accordance with relevant principles of international law, and exercises within a zone of 200 nautical miles sovereign rights for the purpose of exploring and exploiting, conserving and managing these resources[.][107]

It may be concluded that the practice was widespread and involved most major fishing nations. One aspect of the examples provided above, however, could be criticized—namely the fact that all States engaging in the practice of recognizing other States' EEZ claims were in fact also coastal States themselves and did therefore act with the prospect of gaining sovereign rights over marine living resources in extensive marine areas. On this basis, and given the risk of "creeping jurisdiction" by coastal States through such practice, it could be argued that their *opinio iuris* should not carry the same weight as the *opinio iuris* of landlocked States. While this argument is not entirely without merit, it should be borne in mind that most of the States entering into FAAs (e.g., the United States, the USSR or Japan) are also important flag States which are traditionally opposed to extensions of coastal State jurisdiction despite the fact that they are coastal States themselves. In addition, few landlocked States have a considerable fishing fleet—and those that do have such a fleet do often not pursue a very active fisheries policy that would lead to vocal objections to the practice of coastal States and other flag States. Given these considerations, it seems legitimate to uphold the inferences drawn above with respect to the *opinio iuris* generated by FAAs recognizing coastal States' rights to an EEZ.

Conclusion

The present article has shown that there was a gradual development from complete freedom of fishing on the high seas adjacent to a coastal State's territorial sea towards a fisheries regime that provided for exclusive fishing rights of coastal States

in maritime zones of increasing breadth. This development was influenced by State practice arising out of FAAs. First, FAAs and related practice were a major source of *opinio iuris* with respect to the emergence of the EFZ of up to 12 nm as a rule of customary international law. Second, it is doubtful whether the concept of preferential fishing rights ever attained the status of a rule of customary international law as asserted by the ICJ—and FAAs in the strict sense did not contribute significantly to the development of that concept. Third, similar practice to that which contributed to the emergence of the 12 nm EFZ was later adopted with respect to EFZs/EEZs as zones of 200 nm in which coastal States have sovereign rights over living resources. Specifically, the article has shown that the unilateral EEZ claims of coastal States which are often referenced in literature dealing with the emergence of the EEZ were accompanied by FAAs recognizing coastal States' rights to claim an EEZ of 200 nm. These FAAs are clear evidence of the acceptance by other States of coastal States' claims to an EFZ/EEZ. Consequently, they were evidence of *opinio iuris* with regard to the status of the EEZ/EFZ as a rule of customary international law prior to its codification in Part V of UNCLOS. Of course, the development of the EEZ fisheries law regime did not stop with the entry into force of UNCLOS, and neither did the influence of FAAs on that regime. FAAs continue to shape the content of the rules of Part V of UNCLOS because they may constitute subsequent State practice relevant to the interpretation of Part V of UNCLOS.[108] Equally, given the fact that Part V of UNCLOS continues to provide only a general framework for EEZ fisheries regulation, FAAs continue to be used as specific and more detailed regulatory tools in EEZ fisheries management throughout the world.

Notes

1. Earlier versions of this paper were presented at a Junior Scholars' Workshop prior to the 6th Asian Society of International Law Biennial Conference, 24 August 2017, Seoul, South Korea and the 2nd Hamburg Young Scholars' Workshop in International Law, University of Hamburg, 15–16 September 2017, Hamburg, Germany. The author would like to express his gratitude to everyone who provided feedback during these workshops. In addition, the author would like to thank two anonymous reviewers for their constructive feedback and suggestions.

2. Regarding this research gap, see Kenneth J. Keith, "Book Review: The Oxford Handbook of the Law of the Sea," *American Journal of International Law* 110(2) (2016), p. 390, at p. 395. For the purposes of this article, the term "contribution" will be used as a reference to an impact on the emergence, modification or elimination of a rule of public international law via State practice and *opinio iuris*.

3. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

4. Article 55 UNCLOS.

5. Article 56(1)(a) UNCLOS.

6. On this concept of "sovereign rights," see Alexander Proelss, "Article 56," in Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS)—A Commentary* (Munich: C.H. Beck/Hart/Nomos, 2017), paras. 8–10.

7. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* [2015] ITLOS Case No. 21, paras. 104–106, 124. See also Valentin Schatz, "Combating Illegal Fishing in the Exclusive Economic Zone—Flag State Obligations in the Context of the Primary Responsibility of the Coastal State," *Göttingen Journal of International Law* 7(2) (2016), p. 383, at p. 395.

8. *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, p. 13,

p. 33; Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea* (Dordrecht: Brill Nijhoff, 1989), p. 28, with further references. See also Proelss, "Article 55," in Proelss (ed.), 2017, para. 3; Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol. 2 (Dordrecht: Brill Nijhoff, 1993), p. 519.

9. Dolliver Nelson, "Exclusive Economic Zone," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press, 2008), para. 91.

10. Robin Churchill and Vaughan Lowe, *The Law of the Sea,* 3rd ed. (Manchester: Manchester University Press, 1999), pp. 161–162; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991), p. 283; Francisco Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge: Cambridge University Press, 1989), p. 252.

11. Proelss, 2017, para. 3: "the concept itself and most parts of the regime codified in Part V." See also Daniel P. O'Connell, *The International Law of the Sea,* Vol. 1 (Oxford: Clarendon Press, 1982), p. 49.

12. James Harrison, *Making the Law of the Sea* (Cambridge: Cambridge University Press, 2011), p. 56. https://doi.org/10.1017/CBO9780511974908.

13. Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Dordrecht/Boston/Lancaster: Martinus Nijhoff, 1987), pp. 77–78.

14. See Article 2(1)(a) of the *Vienna Convention on the Law of Treaties (*VCLT), 23 May 1969, 1155 UNTS 331.

15. For the EEZ, see Article 62(4) UNCLOS.

16. For the EEZ, see Article 73(1) UNCLOS.

17. See, for example, Suzannah F. Walmsley et al., "Comparative Study of the Impact of Fisheries Partnership Agreements," *Technical Report Prepared for the UK Department for Environment Food and Rural Affairs and the Department for International Development* 3 (2007), p. 63, at p. 68; Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (Oxford: EC Law Library, 2010), pp. 351–359. https://doi.org/10.1093/acprof:oso/9780199275847.001.0001.

18. Articles 34 and 35 VCLT. See discussion by Valentin J. Schatz, "The Contribution of Fisheries Access Agreements to Flag State Responsibility," *Marine Policy* 84 (2017), p. 313, at pp. 315–316.

19. Article 38 VCLT. See also Mark E. Villiger, "Article 38," in Mark E. Villiger (ed.), *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Nijhoff, 2009), para. 4.

20. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, p. 3, at para. 72; Alexander Proelss, "Article 38," in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012), para. 10.

21. *Statute of the International Court of Justice*, 26 June 1945, available at http://www.icj-cij.org/en/statute#CHAPTER_II, accessed February 10, 2018.

22. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, pp. 42 ff.

23. *Ibid.*, para. 72.

24. Proelss, 2012, para. 9.

25. Villiger, 2009, para. 5; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, para. 76.

26. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, para. 76.

27. Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources,* 2nd ed. (The Hague: Kluwer Law International, 1997), p. 189; Schatz, 2017, p. 316.

28. Richard R. Baxter, "Treaties and Customs," *Collected Courses of the Hague Academy of International Law* 128 (1970), p. 25, at p. 82; Vladimir D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff, 1997), p. 256.

29. Compare also Arthur M. Weisburd, "Customary International Law: The Problem of Treaties," *Vanderbilt Journal of Transnational Law* 21 (1988), p. 1, at p. 23.

30. That breach would entail an excessive exercise of jurisdiction by the coastal State over living marine resources in an area that forms part of the high seas. See Article 87(1)(e) UNCLOS.

With respect to claims to sovereignty over parts of the high seas, see also the prohibition in Article 89 UNCLOS.

31. This is not, however, necessarily true of flag State rights laid down in FAAs. For example, the inclusion of provisions on flag State rights to access to coastal State fisheries in FAAs does not in turn generate *opinio iuris* with respect to such a right of flag States generally even absent an FAA. Here, the FAA's provisions on access themselves are the sole source of the flag State's right to access—and they will generally lack an external component. See Tullio Treves, "Customary International Law," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press, 2012), para. 49.

32. See, for example, the discussion of the relevance of so-called "compliance clauses" in FAAs providing for flag State responsibility for the emergence of a parallel obligation of flag States to ensure that vessels flying their flag do not engage in illegal fishing in the coastal State's EEZ under customary international law by Schatz, 2017, p. 316.

33. Rules of reference concerning fisheries law (arguably also including soft-law standards enunciated in non-binding instruments) can be found, for example, in Articles 61 (3) and 119(1)(a) UNCLOS. See Valentin J. Schatz, "Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ," *Ocean Development and International Law* 47(4) (2016), p. 327, at p. 337.

34. Example taken from Canadian BITs (emphasis added). See discussion by Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), pp. 25–26.

35. See Tudor, 2008, p. 83, with further references.

36. *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, p. 33; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, ICJ Reports 1984, p. 246, at p. 294; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, p. 38, at p. 59.

37. See, in particular, Article 87(1)(e) UNCLOS.

38. For a discussion of both the original and contemporary concepts of the EFZ, see further Shalva Kvinikhidze, "Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EFZ," *The International Journal of Marine and Coastal Law* 23 (2008), pp. 271–295. https://doi.org/10.1163/092735208X272238.

39. See, e.g., UN Doc. A/CONF.13/C.1/L.159-L.168, 15 April 1958, United States of America: Proposal, Official Records of the United Nations Conference on the Law of The Sea, Volume III (First Committee [Territorial Sea and Contiguous Zone]), p. 253. See also discussion by Rainer Lagoni and Alexander Proelß, "Festlandsockel und ausschließliche Wirtschaftszone," in Wolfgang Graf Vitzthum (ed.), *Handbuch des Seerechts* (Munich: C.H. Beck, 2006), pp. 222–224, with further references.

40. *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 515 UNTS 205.

41. See Article 31(3) VCLT.

42. *Convention on the High Seas*, 29 April 1958, 450 UNTS 11.

43. Cf. Lagoni and Proelß, 2006, p. 224–225. But see Carolyn Hudson, "Fishery and Economic Zones as Customary International Law," *San Diego Law Review* 17 (1980), p. 661, at pps. 670–673.

44. See discussion by René J. Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea,* Vol.1 (Dordrecht: Nijhoff, 1991), pp. 262–263.

45. UN Doc. A/RES/1307 (XIII), 10 December 1958, Convening of a Second United Nations Conference on the Law of the Sea. For a general discussion, see Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas," *American Journal of International Law* 54 (1960), p. 751. https://doi.org/10.2307/2195140.

46. Donald R. Rothwell and Tim Stephens, *The International Law of the Sea,* 2nd ed. (Oregon: Hart Publishing, 2016), p. 10.

47. B. Johnson and D. Middlemiss, "Canada's 200-Mile Fishing Zone: The Problem of Compliance," *Ocean Development and International Law* 4 (1977), p. 67, p. 71. https://doi.org/10.1080/00908327709545582.

48. An incomplete list of unilateral claims to a 12 nm EFZ is provided by Kvinikhidze, 2008, pp. 290–291.

49. Jean E. Carroz and Michel J. Savini, "The New International Law of Fisheries Emerging from Bilateral Agreements," *Marine Policy* 3 (1979), p. 79, at p. 79; Rothwell and Stephens, 2016, pp. 10–11.

50. Yoshifumi Tanaka, *The International Law of the Sea,* 2nd ed. (Cambridge: Cambridge University Press, 2015), 25: "some twenty coastal States."

51. *Fishery Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway*, 17 November 1960, UK Treaty Series 25 (1961).

52. *Exchange of Notes Settling the Fisheries Dispute between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Iceland*, 11 March 1961, UK Treaty Series No. 17 (1961).

53. *Exchange of Notes Constituting an Agreement concerning the Fishery Zone around Iceland*, 19 July 1961, 409 UNTS 47.

54. These exchanges of notes also contained compromissory clauses which served as the ICJ's basis for jurisdiction in the *Fisheries Jurisdiction Cases* cited above. For the ICJ's findings on jurisdiction, see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 49, para. 23; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 3, para. 23.

55. *Agreement on Fishing between the Government of the Union of Soviet Socialist Republics and the Government of the Kingdom of Norway*, 16 April 1962, 437 UNTS 194.

56. Article II.

57. Article III.

58. *Fisheries Convention*, 9 March 1964, 581 UNTS 57. The LFC remains in force and has not lost all of its relevance today. For a discussion of its status and of recent developments concerning fisheries access in the waters of the member States of the European Union in light of Brexit, see Valentin J. Schatz, "Brexit and Fisheries Access: Some Reflections on the UK's Denunciation of the 1964 London Fisheries Convention," *EJIL: Talk!—Blog of the European Journal of International Law*, July 18, 2017, https://www.ejiltalk.org/brexit-and-fisheries-access-some-reflections-on-the-uks-denunciation-of-the-1964-london-fisheries-convention/, accessed February 10, 2018.

59. See UK Depositary Status List, Fisheries Convention, signed at London, 9 March–10 April 1964 (with Protocol of Provisional Application and Two Agreements as to Transitional Rights), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/625470/15._Fisheries_Convention_1964_status.pdf, accessed February 10, 2018.

60. See particularly Articles 1 and 2 of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway for the Continuance of Fishing by Norwegian Vessels within the Fishery Limits of the United Kingdom of Great Britain and Northern Ireland*, 28 September 1964, UK Treaty Series 43 (1965).

61. See Article 1(1) of the *Agreement between Japan and the Republic of Korea concerning Fisheries*, 22 June 1965, *International Legal Materials* 4 (1965), p. 1128.

62. See Articles 1 and 2 of the *Agreement on Fisheries between Japan and New Zealand*, 12 July 1967, 683 UNTS 54.

63. See Article 1 of the *Agreement on Fisheries between the Commonwealth of Australia and Japan*, 27 November 1968, 708 UNTS 202.

64. See Paras. 1–4 of the *Agreement between the United States of America and the United Mexican States on Traditional Fishing in the Exclusive Fishery Zones Contiguous to the Territorial Seas of Both Countries*, 22 June 1965, *International Legal Materials* 7 (1968), p. 312.

65. See Article 1 of the *Agreement between Japan and the United Mexican States on Fishing by Japanese Vessels in the Waters Contiguous to the Mexican Territorial Sea*, 7 March 1968, 682 UNTS 274.

66. The agreement was concluded on 7 February 1969. The author was unable to obtain the original text. However, the content of the agreement is reported, *inter alia*, by María del Mar Holgado Molina and María del Sol Ostos Rey, "Los Acuerdos de Pesca Marítima entre España y Marruecos: Evolución Histórica y Perspectivas," *Estudios Agrosociales y Pesqueros* 194 (2002), p. 189, at pp. 193–194.

67. See also Robin R. Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the

International Court of Justice to the Debate on Coastal States' Fisheries Rights," *International and Comparative Law Quarterly* 24 (1975), p. 82, at p. 88: "There seems to be sufficient evidence, in the form of State claims accepted or acquiesced in, either tacitly *or by agreement*, by other States, to justify the claim that an exclusive fishing zone up to 12 miles from the coastal State's baselines, is recognized as being a rule of customary international law" (emphasis added).

68. Johnson and Middlemiss, 1977, pp. 71–72.

69. *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 3, para. 52; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 49, para. 44.

70. Rothwell and Stephens, 2016, pp. 86–87.

71. *Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 3, paras. 52 and 54; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 49, paras. 44 and 46.

72. J. C. Phillips, "The Exclusive Economic Zone as a Concept in International Law," *The International and Comparative Law Quarterly* 26(3) (1977), p. 585, at p. 600.

73. *Convention on Fishing and Conservation of the Living Resources of the High Seas* of 29 April 1958, 559 UNTS 285.

74. D H. N. Johnson, "The Special Interest of Coastal States," in Robin R. Churchill, K. R. Simmonds and J. Welch (eds.), *New Directions in the Law of the Sea,* Volume III (New York: Oceana Publications Inc., 1973), pp. 46–51.

75. Kvinikhidze, 2008, pp. 272–273.

76. Churchill, 1975, p. 88.

77. Phillips, 1977, pp. 600–601.

78. *Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands*, 18 December 1973, UK Treaty Series No. 28 (1975).

79. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on the Regulation of the Fishing of North-East Arctic (Arcto-Norwegian) Cod*, 15 March 1974, UK Treaty Series No. 35 (1974).

80. *Agreement Regarding Fisheries in the Northeastern Pacific Ocean off the Coast of the United States*, 16 December 1975, 1067 UNTS 245.

81. *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits, Judgment, ICJ Rep 1974, p. 3, at para. 58; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, ICJ Rep 1974, p. 175, at para. 50. For detailed commentary on these judgments, see Churchill, 1975, at p. 82.

82. *Ibid.*, para. 52.

83. The concept of preferential fishing rights resurfaced in the UNCLOS III negotiations in proposals to include into UNCLOS a provision which would give coastal States preferential access to waters adjacent to their territorial sea even if they should choose not to claim a (full) EEZ—subject to further regulation through bilateral agreements. See Andrés Aguilar, "The Patrimonial Sea or Economic Zone Concept," *San Diego Law Review* 11 (1973–1974), p. 579, at p. 584.

84. Churchill, 1975, pp. 94–97: "the vital element of *opinio juris* seems to be completely missing."

85. Keith, 2016, p. 395.

86. Phillips, 1977, p. 585.

87. Keith, 2016, p. 395.

88. Kwiatkowska, 1989, pp. 27–28, with further references.

89. Annick Van Houtte, "Flag State Responsibility and the Contribution of Recent International Instruments in Preventing, Deterring and Eliminating IUU Fishing," in FAO, *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing* (2003), FAO Fisheries Report No. 722 (2004), p. 47, at p. 49. See also the list of agreements concluded between 1975 and 1978 provided by Carroz and Savini, 1979, at pp. 79 ff.

90. Van Houtte, 2004, p. 49.

91. Carroz and Savini, 1979, p. 82.

92. This is also briefly hinted at by Churchill, 1975, p. 92.

93. *Agreement on Fisheries between the Government of New Zealand and the Government of Japan*, 1 September 1978, 1167 UNTS 441.

94. *Agreement on Fisheries between the Government of Korea and the Government of New Zealand*, 16 March 1978, 1167 UNTS 415.

95. *Agreement on Fisheries between the Government of the Union of Soviet Socialist Republics and the Government of New Zealand*, 4 April 1978, 1151 UNTS 273.

96. *Agreement concerning Fisheries off the Coasts of the United States*, 4 January 1977, 1067 UNTS 209.

97. *Agreement concerning Fisheries off the Coasts of the USA*, 18 March 1977, 1095 UNTS 201.

98. *Agreement between the Government of Canada and the Government of Norway on Their Mutual Fishery Relations*, 2 December 1975, 1132 UNTS 124.

99. Johnson and Middlemiss, 1977, p. 77.

100. *Agreement between the Government of Canada and the Government of Portugal on Their Mutual Fishery Relations*, 29 July 1976, 1132 UNTS 375.

101. *Agreement between the Government of Canada and the Government of Portugal on Their Mutual Fishery Relations*, 10 June 1976, 1058 UNTS 290.

102. *Agreement between the Government of the United States of America and the European Economic Community concerning Fisheries off the Coasts of the United States*, 15 February 1977, 1087 UNTS 225.

103. Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, Fishery Conservation and Management Act of 1976, https://www.fws.gov/laws/lawsdigest/fishcon.html, accessed February 11, 2018.

104. *Agreement concerning Fisheries off the Coasts of the United States*, 27 April 1977, 1087 UNTS 320.

105. *Agreement concerning Fisheries off the Coasts of the United States*, 2 August 1976, 1068 UNTS 4.

106. *Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Islamic Republic of Mauritania on Cooperation in the Field of Marine Fisheries*, 31 January 1981, 1311 UNTS 162.

107. *Agreement on Mutual Fishery Relations*, 14 August 1979, 1314 UNTS 246.

108. A possible example would be the relevance of "compliance clauses" in FAAs as subsequent practice that can be taken into account in the interpretation of Part V of UNCLOS with regard to flag State responsibility for illegal fishing in other States' EEZs pursuant to either Article 31(3)(b) VCLT or, more likely, Article 32 VCLT. See Schatz, 2017, pp. 316–317.

Biographical Statement

Valentin J. Schatz is a Ph.D. candidate and research associate fo the Chair for Public Law, in particular Public International Law and European Law of the University of Trier, held by his supervisor Professor Alexander Proelß. He completed his undergraduate studies at the University of Passau, Germany (where he obtained his law degree) and the University of Dundee, United Kingdom. His Ph.D. research focuses on the international law of marine living resources.

The Settlement of Maritime Boundary Disputes in Southeast Asia and Oceania: A Synthesis in Light of Indonesian Practice

Brian McGarry

Structured Abstract

Article Type: Research Paper

Purpose—This study reviews the sophisticated diversity of recent approaches to the resolution of delimitational and related maritime disputes among Indonesia's neighboring States, and presents potential approaches to unresolved disputes in Southeast Asia and beyond the region.

Design, Methodology, Approach—The study highlights Indonesia's experiences due to the range of approaches it has employed and issues which have arisen in the settlement or non-settlement of boundary disputes with its 10 maritime neighbors. The study first offers a taxonomy of these approaches: zero-sum negotiated solutions (e.g., treaty-based maritime delimitation); mutual-benefit negotiated solutions (e.g., joint development of the continental shelf); amicable third-party resolution (e.g., boundary conciliation); and adversarial third-party resolution (e.g., arbitration).

Findings—The study identifies and compares modalities that are found to varying degrees within each of these general approaches, and offers conclusions as to whether their utility or non-utility in prior practice can be effectively extended to unresolved disputes in the region. Such modalities include: strategic considerations (e.g., incremental approaches to dispute settlement); procedural difficulties (e.g.,

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post-negotiation ratification); potential third-party involvement (e.g., intervention of third States); and durability issues (e.g., perceptions of legitimacy).

Practical Implications—By systematizing common benefits and drawbacks across a range of approaches to maritime boundary disputes, the study provides and assesses tools for governments regarding the resolution of outstanding conflicts, including vulnerabilities to unilateral settlement pursuant to existing dispute settlement treaty provisions.

Originality, Value—The study differs from existing commentary due to its identification of strategic and other modalities in boundary practice which may be of interest to scholars and the governments of coastal states. It is also unique in its illustrative but comprehensive exploration of one government's myriad maritime boundary concerns.

Keywords: delimitation, dispute settlement, joint development, maritime boundaries, Southeast Asia

Introduction

The present study reviews the sophisticated diversity of approaches to the resolution of delimitational and related maritime disputes among States in Southeast Asia and Oceania, and on this basis systematizes potential approaches to unresolved disputes within and beyond the region.[1] The coordination and identification of nomenclature for the varied dimensions of this practice—particularly as concerns Indonesia, the world's largest archipelagic State, which possesses delimited or undelimited maritime boundaries with 10 other States—holds potential value for not only governmental and intergovernmental stakeholders in the region, but also policymakers across a geographically broader spectrum. A comprehensive perspective on these approaches may not only maximize the efficient utilization of economic and natural resources, but also reduce the likelihood of boundary issues giving rise to military conflict.[2]

With a predominant focus on Indonesia's prolific experience in maritime boundary practice,[3] *Part II* of this article offers a taxonomy of these general approaches. By grouping these approaches within specific categories, the article permits closer examination of the relevant differences between such examples of boundary practice. These categories consist of: zero-sum negotiated solutions, which aim to draw definitive boundaries in treaty form; mutual-benefit negotiated solutions, which prioritize the economic gains of two States over the clarification of their respective sovereignty claims (such as seen in joint development agreements); amicable third-party dispute settlements, which introduce an external actor into a boundary dispute, but which depend upon the post hoc conclusion of a zero-sum treaty or mutual-benefit arrangement in order to give effect to a third party's recommendations (such as seen in boundary conciliation); and adversarial dispute settlement, through which two States consent in advance to comply with a third party's final and binding resolution of a boundary dispute (such as seen in arbitration).

In discussing practical examples from each of these four categories, *Part II* takes an inclusive approach to case law, exploring synergies between boundary conflicts and regional disputes that may not directly concern delimitation, such as cases regarding sovereignty or entitlements. *Part III* of this article identifies and compares certain modalities that are found to varying degrees within each of the four categories of dispute resolution, and considers how their utility or nonutility in prior practice may be effectively extended to unresolved boundary disputes by governments in Southeast Asia and beyond. *Part IV* concludes with brief remarks regarding the application of tactics in prospective maritime boundary practice.

Taxonomy of the Approaches

Zero-Sum Treaty Negotiation

The negotiation of maritime boundaries is a task that varies according to the political and geographic dynamics between neighboring States, but it does not exist in a normative vacuum. Unlike boundaries between provinces and other intra-State jurisdictions, the negotiation of international boundaries has been informed by a body of norms developed through adjudicative bodies such as the International Court of Justice ("ICJ") and codified in multilateral treaties, most notably the UN Convention on the Law of the Sea ("UNCLOS"), to which all Southeast Asian States other than Cambodia are currently Contracting Parties.

UNCLOS Article 15 provides that the territorial seas of opposite or adjacent States shall be delimited according to a median line using equidistant base points, unless variance is justified by historic title or other special circumstances, or else the parties agree to a different delimitation. In the absence of credible evidence of historic title,[4] it would appear that the most likely means for a State to achieve a negotiated territorial sea delimitation that does not rely upon equidistance methodology is to expand the scope of the negotiation and, in so doing, offer a *quid pro quo* concession that incentivizes its neighboring State's consent to depart from Article 15's default approach. In contrast, the delimitation of the exclusive economic zone ("EEZ") offers no default methodology in the absence of agreement. UNCLOS Article 74(1) requires only an "equitable solution" based on the means stated in ICJ Statute Article 38, which are as vague and permissive as the "equitable solution" they are intended to serve in this context. Indeed, this implied reference to the primary source cited in Article 38(1)(a) ("international conventions, whether general or particular, establishing rules expressly recognized by the contesting states") establishes an arguably circular logic, insofar as the conclusion of a boundary treaty informs, and thus ensures accordance with, the recognized sources of international law. The same language is incorporated in UNCLOS Article 83(1) concerning continental shelf delimitation. States thus have far greater flexibility in negotiating boundary treaties under the EEZ and continental shelf regimes than they do in the territorial sea.

This is not to say that international courts and tribunals have not provided

guidance to negotiators in the interpretation of Articles 74(1) and 83(1). Indeed, the ICJ has recognized and applied a three-step version of the corrective equity approach advanced by earlier arbitral tribunals in continental shelf boundary disputes, consisting of drawing a provisional equidistance line, adjusting for relevant circumstances, and reviewing for proportionality.[5] Yet the distinction between a mere adjustment based on relevant circumstances and a full "change" from the primacy of equidistance may be difficult to discern in practice, as noted by several Judges of the International Tribunal for the Law of the Sea ("ITLOS") when adopting this approach in *Bangladesh v. Myanmar*.[6]

Among its 10 opposite or adjacent neighboring States, Indonesia has negotiated maritime boundary agreements in whole or in part with all except Palau and Timor-Leste. In terms of EEZ delimitation, its experience with India reflects a notable approach. The two States had agreed upon a boundary between their continental shelves in the 1970s.[7] As opposed to Indonesia's practice with Malaysia—which includes a 1970 agreement formally imposing a territorial sea delimitation upon a previously agreed continental shelf delimitation[8]—the subsequent practice of these two States reflects a *mutatis mutandis* application of this boundary to the EEZ, without necessitating the conclusion of a separate treaty.[9]

This practice merits two reflections. First, it should be borne in mind that while the continental shelf regime traces its roots to post–World War II unilateral declarations and multilateral conventions, the EEZ is a regime that in principle did not emerge until the adoption of UNCLOS in 1982. The effect of this development was to remove large swaths of maritime space from the high seas, and place it under the economic control of coastal States. Thus, in the instance of States with opposing coasts less than 400 nautical miles apart, a new regime emerged without necessitating the governance of bilateral delimitation treaties.

Second, while continental shelf jurisdiction in the absence of opposite coastal States or extended continental shelf claims extends, like the maximum length of the EEZ, 200 nautical miles from the coast, it should be noted that these regimes are not necessarily coterminous. Given the separate treatment of these regimes in UNCLOS—and considering the above said flexibility in their delimitation, under Articles 74(1) and 83(1)—States remain at liberty to agree to separate arrangements as to these areas.

Prior to Papua New Guinea's independence in 1975, Australia on its behalf had concluded with Indonesia three 1971 continental shelf delimitation agreements in the Timor and Arafura Seas.[10] In 1980, Indonesia and Papua New Guinea concluded a new agreement that incorporated and extended, by means of equidistance, the 1971 boundary northward 200 nautical miles from the two States' baselines.[11]

This extension of seabed delimitation included as well as a provision concerning the superjacent water column. Given the extent of intermixing between Indonesian archipelagic waters and the Timor and Arafura seawaters, such clauses may be viewed as particularly salient for archipelagic States, as the potential for marine pollution to spread through these mixwaters underscores the value of clearly defined environmental enforcement and EEZ boundaries.[12] While the agreement envisages in

undefined form the cooperative management and coordination of policies concerning marine living resources in these areas, it provides a much firmer normative framework concerning subsistence fishing, preserving "[t]he right of nationals of either Party who have, customarily and by traditional methods, fished in the waters of the other Party […]."[13]

Indonesia's treaty practice with Singapore is particularly notable as regards baselines, insofar as it gives no effect to artificial means that would otherwise extend baselines seaward. The two States' 2009 and 2014 boundary agreements extend by short distances the border that had been affected by earlier agreement.[14] Given Singapore's land reclamation activities in the intervening period, it is worth noting that neither of the more recent agreements took such activities into account when extending the boundary line.[15] Also noteworthy is the 2009 treaty's use of archipelagic baselines to Indonesia's marginal benefit in the delimitation.

Indonesia would leverage this practice to greater benefit in its far more extensive delimitation with the Philippines in 2014. The Philippines is the State with which Indonesia (or indeed, any other State) has most recently begun to delimit maritime spaces, with two decades of negotiation culminating in a boundary agreement in the Sulawesi Sea. Aside from the breadth and complexity of this agreement, which includes eight turning or terminal points and extends for over 600 nautical miles, its most notable aspect is that it delimits the EEZ without prejudice to continental shelf delimitation.[16] This may reflect the application of equidistance delimitation being modified to an extent in favor of Indonesia, due to its longer archipelagic baselines in relation to the delimitation area.[17]

Indonesia's delimitation practice with Thailand reveals a flexible approach to equidistance methodology, and a preference for relegating to separate treaty negotiations two delimitations that diverge on this basis. The two States' 1971 boundary treaty delimits an expanse of continental shelf with fairly uniform morphological characteristics. By contrast, their 1975 agreement abandons this approach when addressing an expanse of continental shelf with divergent morphology in relation to their coastlines. The negotiation of this delimitation was undoubtedly complicated further by the promising nature of petrol exploration in this particular area. As such, the treaty's requirement of cooperation "[i]f any single geological petroleum or natural gas structure extends across the boundary line" may be seen to reduce the risk of delimitation for either delegation to this negotiation.[18]

The 2003 continental shelf boundary agreement between Indonesia and Vietnam also partly abandons equidistance methodology, though this would appear to be due principally to conditions above sea level.[19] These include a high level of disparity in the two States' coastlines vis-à-vis this maritime area, as well as discrepancies in the distance between each State and its relevant islands. In those areas where equidistance was maintained, Indonesia again benefits from a favorable trajectory arising from its use of archipelagic baselines. The agreement only expressly covers the continental shelf boundary and—consistent with a general trend in latter-day Indonesian boundary practice—in respect of those areas where equidistance was not maintained Indonesia has confirmed that the agreement does not prejudice

any divergent claims as to the EEZ. Indeed, the inherent difficulties of regulating enforcement jurisdiction when seafloor and water column boundaries follow different trajectories underscore how much value Indonesia has placed in the liberty to negotiate, as a general practice, each of these regimes separately.

The series of Indonesia's bilateral delimitation negotiations demonstrating the single greatest source of innovation in zero-sum boundary practice has been with Australia. Since the 1970s, the two States have crafted agreements that cover approximately 1,300 nautical miles of seabed and aquatic territory, on the basis of various principles of natural prolongation, equidistance, and modified effect for insular features.[20] In some instances these agreements have framed and influenced each other in innovative ways, such as the parties' agreement to a provisional fisheries boundary on the basis that a prior agreement be preserved regarding Indonesian nationals' traditional fishing activities in Australian waters.[21]

The aforementioned 1971 agreements between Australia and Indonesia established seabed boundaries on the basis of roughly equivalent coastal geographies, requiring few turning points to affect an equidistance delimitation. Further simplifying these negotiations was a relative lack of available geological data concerning the parties' continental margins. The two neighbors followed this with a 1972 seabed boundary agreement spanning the Arafura and Timor Seas, which have taken on economic and environmental significance for both States. The 1972 agreement left a gap between two delimitations due to Portugal's control of the East Timor region and refusal to participate in trilateral negotiations. This agreement also benefited Australia's claims to an area north of the equidistance line between its coast and that of Indonesia, due to the area's morphological characteristics and the ICJ's espousal of natural prolongation in its 1969 *North Sea* Judgment (on which basis the parties to that landmark case—three neighboring States along a concave coast—negotiated boundaries which enlarged West Germany's maritime entitlement vis-à-vis those of Denmark and the Netherlands).[22]

State practice and delimitational case law since the 1982 adoption of UNCLOS have tended to depart from the ICJ's early embrace of the equidistance approach, instead favoring median line boundaries when delimiting between States with opposing coastlines less than 400 nautical miles apart.[23] In 1972, however, Indonesia readily accepted Australia's proposed application of natural prolongation principles, resulting in a seabed boundary quite closer to the island of Timor than to the Australian coast.[24] Indonesia would come to publicly regret accepting this position during the 1972 negotiations.[25]

Following the two States' 1973 arrangements concerning area which would ultimately rest with Papua New Guinea upon its independence, Australia and Indonesia returned to negotiations after Australia declared in 1979 an EEZ defined by strict equidistance. Indonesia's opposition to this methodology in the area concerned arose from the presence of Ashmore and Cartier Islands, which Indonesia argued would result in disproportionate delimitation if these features were given full EEZ effect. Under the terms of the parties' 1981 agreement,[26] these features were treated as *de facto* "rocks" in the parlance of Article 121 of the following year's final UNCLOS

text, resulting in radii of 12 nautical miles. Indonesia's achievement of favorable terms in this regard was likely helped by the absence of major fishing activities in the disputed area and the expressly provisional nature of the agreement.[27]

The parties' 1997 agreement extended delimitations drawn provisionally in 1981, modifying this arrangement only by adjusting the radii of the two insular features from 12 to 24 nautical miles.[28] This is a relatively minor adjustment as compared to the full effect of a 200 nautical mile EEZ, and one that reasonably accommodates the contiguous zones provided for in UNCLOS Article 33. The agreement provided Australia with significant seabed territory subjacent to Indonesian EEZ waters in the region of the 1981 arrangement, while effecting new delimitations north of Christmas Island and south of Java that provided Indonesia with approximately two-thirds of the parties' overlapping maritime and seabed claims.

However, the remarkable achievement of the 1997 agreement—which has been credited in part to the ability of delegations to negotiate in locations other than Jakarta and Canberra[29]—has also been overshadowed by forces beyond the negotiators' direct control. A shift in legal representation of the region of East Timor from Indonesia to the UN Transitional Administration in East Timor in 1999 raised a significant technical issue for the 1997 agreement, as it referred to now-defunct treaties and obligations concerning the region of East Timor vis-à-vis Indonesia. As a result, the 1997 agreement is not in force and negotiations on its fate remain pending.

Mutual-Benefit Treaty Negotiation

A failure to resolve overlapping claims through delimitation agreements may lead to a reluctance among petrochemical companies and foreign investors to pursue operations in a given continental shelf area. For example, in the South China Sea, disputes concerning sovereignty and delimitation between neighboring States have left neighboring States unable to demonstrate clear title to mineral deposits and therefore attract large-scale investment.[30] The consequences of unresolved overlapping claims are not limited to the continental shelf regime, as the absence of an agreed system of legal governance may also problematize fisheries management.[31] While an agreed delimitation may be particularly difficult to obtain when overlapping claims arise in narrow waters such as the Timor Sea and the Torres Strait, such conflicts may be partly resolved by creating neutral areas in which claimant States share rights to seabed or aquatic resources.[32]

The rationale behind joint development zones—to exploit disputed resources in a manner that is efficient, fair, and mutually beneficial—is evident in multiple bilateral arrangements in Southeast Asia, such as a 1992 arrangement between Malaysia and Vietnam.[33] One of the most notable examples of such efforts is the 1989 Timor Gap Treaty between Indonesia and Australia,[34] which was at the time the most comprehensive joint development agreement in existence.[35] This agreement addressed the Timor Gap, which had been omitted from the delimitation in the parties' 1972 agreement due to Portugal's control of East Timor and refusal to participate in trilateral negotiations. In revisiting this area, Australia and Indonesia temporarily

resolved a negotiation deadlock and attempted to ensure efficient exploration and exploitation activities by creating a zone of cooperation consisting of three regions. In the regions closest to either party's coastal baselines, that State would hold the right to grant exploration and exploitation contracts, provided that 10 percent of resulting revenue is remitted to the other State. In the middle region, a body composed of both States' agents was established to supervise activities and jointly grant licenses. The Timor Gap Treaty took a maximalist approach to the facilitation of investment in this area, including extensive annexes such as a model Production Sharing Contract and codes regarding mining and taxation.

While the agreement provided that it would serve for 40 years, with the possibility of endless renewals at 20-year intervals, it also stipulated that Indonesia and Australia would continue to seek a mutually agreeable permanent boundary in this region.[36] Indeed, the preamble to the agreement specifically refers to UNCLOS Article 83, which stipulates that, pending a permanent delimitation agreement, States shall "make every effort to enter into provisional arrangements of a practical nature" and shall not "jeopardize or hamper the reaching of the final solution," providing that such provisional arrangements "shall be without prejudice to the final delimitation." However, the independence of Timor-Leste and its repudiation of territorial agreements concluded by Indonesia on its behalf have mooted this objective.

The utility of the establishment of a joint development zone in the 1989 Timor Gap Treaty may be viewed in contrast to the establishment of overlaid EEZ and continental shelf jurisdictions in the parties' 1997 agreement. Unlike the voluminous text and annexes of the 1989 agreement, the 1997 agreement did not attempt to comprehensively address the regulation of the geographic area concerned, omitting reference to marine scientific research, environmental protection, and the construction of installations. Observers have noted that UNCLOS does not adequately address such situations, as several of its provisions refer to "the" coastal State (thus leaving rights and duties difficult to discern in overlaid regimes).[37]

On the date of Timor-Leste's independence in 2002, it concluded the Timor Sea Treaty with Australia, establishing a Joint Petroleum Development Area ("JPDA") in the area formerly occupied by the joint control zone in the Timor Gap Treaty.[38] Whereas under the 1989 agreement the States shared revenue equally, 90 percent of such funds were to be disbursed to Timor-Leste under this new agreement. In other respects, however, the Timor Sea Treaty retained fundamental provisions of the Timor Gap Treaty, including its provisional status.[39]

Nevertheless, political difficulties arose concerning a region of seabed exploration fields known as the Greater Sunrise area, nearly 80 percent of which lay on what Australia considered to be within its claimed territory, beyond the geographic scope of the JPDA.[40] The parties eventually resolved this impasse through a 2006 interim resource sharing protocol.[41] While this agreement vests Timor-Leste with jurisdiction over the water column above the JPDA, it defers the parties' respective claims in the Timor Sea for up to 50 years, subject to expiration if the parties could not agree upon a development plan for the Greater Sunrise area within six years or begin production operations within 10 years of adoption. Despite its innovation of

such detailed moratorium provisions and establishment of a joint Maritime Commission possessing a broad mandate regarding the JPDA,[42] circumstances arising from the negotiation of the 2006 agreement which subsequently came to light have resulted in a series of judicial and quasi-judicial proceedings which, *inter alia*, resulted in the treaty's joint termination in January 2017.[43]

Another regional example of joint zonal management, a 1979 agreement between Malaysia and Thailand, reflects a tension-reducing incentive to pursue joint arrangements in regions where exploitable resources are likely to be found.[44] As in the Timor Gap Treaty, the importance of this incentive is emphasized in preamble text. In this sense, the establishment of joint management arrangements fulfils the obligation that UNCLOS Articles 74(3) and 83(3) imposes on Member States with opposite coasts and overlapping claims to endeavor to conclude "provisional arrangements of a practical nature which do not jeopardize or hamper the reaching of final agreement."[45] The arrangement between Malaysia and Thailand established broad principles concerning the joint development of petroleum and other non-living natural resources in a defined continental shelf area. This 50-year agreement provides for equitable cost-sharing in their joint activities and the peaceful resolution of disputes, and was supplemented by a protocol concerning more complex matters concerning regulatory implementation, which was not signed until 1990.[46]

Amicable Third-Party Resolution

Treaty negotiations may subjugate legal norms to political considerations.[47] In the context of boundary disputes, this reflects to some extent the normatively ambiguous nature of the express terms of the delimitation provisions found in UNCLOS, and the resulting inefficiency of negotiation on the basis of purely legal considerations.[48] Such negotiations do not exist in a vacuum, and may involve a broader *quid pro quo* or demonstrate value placed upon good neighborly relations. For example, benefits disproportionately conferred upon Australia in the Timor Gap Treaty were widely considered to have constituted a political reward for Australia's recognition of Indonesia's annexation of East Timor.[49]

Yet negotiation is only one of the methods for the peaceful settlement of disputes, as stated in UN Charter Article 33. These methods include as well equally amicable procedures that utilize the involvement of a neutral third party. Methods such as mediation may facilitate amicable settlement by providing a third party's objective input on legal interests addressed in this non-legal context.

As regards maritime boundary disputes, the most important form of amicable third-party dispute settlement in practice has been conciliation. Under UNCLOS Art. 298(1)(a), traditionally ad hoc boundary conciliations have taken an innovative new shape. While either party remains free to reject the conciliation commission's report,[50] UNCLOS nevertheless requires an obligation of conduct: any UNCLOS Member State may unilaterally require another Member State to participate in good faith in compulsory conciliation procedures regarding a boundary dispute.[51]

The first and thus far only instance of UNCLOS Part XV boundary conciliation

is a case initiated in 2016 by Timor-Leste against Australia. While Timor-Leste could not initiate a boundary adjudication against Australia due to the latter's recent adoption of reservations to compulsory jurisdiction over boundary disputes through both UNCLOS and Article 36(2) of the ICJ Statute, it had in recent years initiated two arbitrations and an ICJ case on a range of related matters, on the basis of jurisdictional instruments other than UNCLOS.[52]

Adversarial Third-Party Resolution

As an adversarial process, judicial resolution offers two key distinctions from amicable third-party resolution. First, dispute settlement mechanisms such as adjudication and arbitration delegate to the neutral third party the power to issue a decision that binds the parties without any further agreement on their part. Second, this decision is based on applicable law, and in principle eschews the broader political considerations that may inform the approaches discussed above. The interpretation and judicial development of these legal norms may follow evolutions and reasoning unforeseen by the parties upon submitting the case, leading to unpredictable results. As such, judicial resolution entails significant risks for States.[53]

While ITLOS has made important contributions to the settlement of maritime disputes in Southeast Asia (i.e., through its delimitation beyond 200 nautical miles in *Bangladesh/Myanmar*,[54] and its provisional measures Order in the *Straits of Johor* land reclamation dispute between Malaysia and Singapore),[55] the ICJ remains the judicial forum with the greatest depth of experience in boundary disputes. Yet its Judgments in maritime disputes in Southeast Asia have focused primarily on principles of sovereignty over islands.[56] This was the case in Indonesia's only appearance before the Court, in the *Pulau Ligitan and Pulau Sipadan* dispute submitted jointly by special agreement with Malaysia. Faced with insufficient evidence of legal title, the Court in that case awarded sovereignty of the namesake maritime features to Malaysia on the basis of the parties' competing *effectivités*[57] and the absence of reference to these features as base points or turning points in Indonesia's maps of its archipelagic baselines.[58] By illustrating the potential use of government-published baseline maps for evidentiary purposes in subsequent sovereignty disputes, this latter rationale for the Court's decision demonstrates the elusive but extraordinary value of foresight and inclusiveness when publishing such maps.

While one of the perceived benefits of judicial resolution is legal certainty, another regional dispute concerning island sovereignty—the *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* case between Malaysia and Singapore before the ICJ—recently called such permanence into question. In its 2008 judgment, the Court awarded sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore and sovereignty over Middle Rocks to Malaysia, allocating sovereignty over South Ledge to the State in the territorial waters of which it is located.[59] In 2017, Malaysia instituted two new cases arising from each dispositive finding that had not favored Malaysia in 2008, requesting both interpretation of the Court's earlier holdings

regarding sovereignty over insular features and revision thereof in light of "new facts" uncovered through archival research.[60]

These interpretation and revision mechanisms—found in the governing texts of both the ICJ and ITLOS—might raise the question as to whether judicial resolution in an institutional forum truly provides greater certainty than other modes of boundary dispute settlement. It should nevertheless be borne in mind that both institutions prescribe a very high threshold for requests to revise Judgments, which no State has yet satisfied.[61] Ad hoc arbitration, the default mechanism for cases initiated unilaterally under UNCLOS,[62] may guarantee against even this remote prospect of uncertainty since these tribunals do not resolve disputes pursuant to an institutional statute, and thus do not generally possess tools of substantive revision or obligations of interpretation for indefinite periods of time.[63] Relevant examples in recent arbitral practice include the maritime delimitation between Bangladesh and India,[64] and the determination of entitlements in the *South China Sea* arbitration.[65] Yet as controversy concerning the latter case suggests, legal certainty may be seen to entail more than just *de jure* permanence, and may in the arbitral context also entail *de facto* considerations of perceived legitimacy.

Assessment of the Approaches

Strategic Themes

In terms of zero-sum and mutual-benefit negotiation, two key dynamics may be observed in the treaty practice discussed above. The first dynamic concerns to what extent the treaty-making strategy employs what may be called "incrementalism": the conclusion of an agreement addressing a subset of the dispute, with the expectation of the future settlement (using any of the four approaches identified above) of the remainder of the dispute.

At first glance, incrementalism may be seen as a conservative tactic for resolving the underlying dispute through the practicable management of offshore rights.[66] Practice between Indonesia and Papua New Guinea would seem to support this conclusion. As discussed above, Australia (in respect of Papua New Guinea's territory) and Indonesia concluded in 1971 three continental shelf delimitation treaties in the Arafura and Timor Seas. Following Papua New Guinea's independence from Australia, Indonesia and Papua New Guinea in 1980 concluded an agreement incorporating the boundary established in the earlier treaties and extending it northward by means of equidistance. This agreement also reveals incrementalism insofar as it establishes relatively firm rules for subsistence fishing by traditional methods while envisaging, but not clearly defining, subsequent cooperation regarding other uses of fisheries.

Yet the principal weakness of incrementalism in treaty practice is the risk of miscalculating the possibility and consequences of political shifts and emerging disputes following the conclusion of an initial agreement, thus complicating bilateral

relations and making negotiation more difficult.[67] This risk is evident in practice between Malaysia and Thailand. As discussed above, the two States concluded in 1979 an agreement establishing broad principles governing the joint development of non-living resources in a defined area of overlap within their respectively claimed continental shelf entitlements. Malaysia and Thailand pursued an incremental strategy in this dispute by relegating complex matters regarding regulatory implementation to a separate protocol. The fact that this protocol was not signed until 1990 may suggest the relative undesirability of States binding themselves to framework agreements that are then subject to disputes and implementation difficulties. As such, while regional practice suggests the benefits of bifurcating negotiation phases, States must weigh this incremental strategy against the legal uncertainties and bilateral tensions that may arise in treaty relations when the fine print is delayed by changes in government administrations and by commercial and fishing disputes.

The second dynamic evident in treaty practice concerns to what extent the treaty-making strategy relies upon what may be called "boilerplatism": the use of textual devices of general application that have been incorporated in prior agreements. Reliance upon certain clauses that have proven useful in past practice is not per se problematic. As discussed above, Indonesia has utilized this tactic to quite successful ends. For example, the use of a "without prejudice" clause in its 2014 EEZ delimitation treaty with the Philippines would seem to protect the parties' preferred incremental approach (i.e., forestalling the conclusion of a continental shelf boundary). In the absence of such a clause, the complexity of the agreement's turning points over the course of 600 nautical miles might otherwise suggest a more comprehensive intent. Similarly, the use of an "expressly provisional" clause in its 1981 EEZ delimitation treaty with Australia arguably helped Indonesia to achieve favorable terms therein. The further value of this approach as a framing device for setting the terms of a permanent delimitation is evident in the two States' 1997 treaty, in which they agreed to permanently affirm this boundary, making slight adjustments regarding insular features but retaining the delimitation methodology used in the provisional terms of the 1981 agreement.

In other respects, however, the 1997 treaty suggests the critical risks of utilizing boilerplatism in boundary treaty practice. Unlike the tome that the parties authored in 1989, this treaty opted for a dangerous degree of simplicity, relying by default on some of the more ambiguous provisions of UNCLOS, rather than establishing a *lex specialis* to comprehensively regulate these issues. This preference for reliance on previously agreed rules may accelerate the treaty negotiation process by removing the need to negotiate new terms, but the weakness of this strategy is most readily apparent in the 1997 treaty's inclusion of provisions that incorporate by reference the rules established in the 1989 agreement concerning joint development in the Timor Sea. As discussed above, the subsequent independence of Timor-Leste has led to the nullification of the 1989 agreement, and thus negotiators' preference for boilerplate cross-references in the text of the 1997 treaty has given rise to major hurdles concerning its amendment and ratification.

Recurring Limitations

The approaches identified in regional practice cannot be understood as overly prescriptive, and cannot be strategically applied to a boundary dispute if viewed in isolation from the specific dynamics of the dispute. Nevertheless, certain case-specific limitations arise frequently in the application of each of these approaches, and may thus be valuable to consider for illustrative purposes.

In treaty negotiation, such limitations may possess a factual or political character. In terms of the zero-sum approach, uncertainties concerning factual issues such as geodetic datum can clearly stall the progress of negotiations.[68] Political shifts may also impede the ratification of negotiated agreements, as discussed above in respect of mutual-benefit practice between Australia and Indonesia and between Malaysia and Thailand. The mutual-benefit approach may raise related limitations concerning the effectiveness of an established authority in managing a joint development zone, based on whether the underlying agreement attempts to ensure its members' independence from political winds in either State party to the agreement.

In third-party resolution, such limitations may be considerably more varied, depending on the mechanisms of the specific forum in question. In terms of the amicable approach, the paucity of practice under UNCLOS conciliation—which leaves intact the traditional freedom of parties to reject the report of the conciliation commission but innovates an obligation of conduct to engage in the process leading to this report—leaves open questions as to the minimum threshold for good-faith participatory efforts. As discussed above, the sole conciliation initiated thus far under UNCLOS Article 298, between Australia and Timor-Leste, raised no apparent concerns in this respect. The adversarial approach, on the other hand, raises foundational considerations of jurisdiction. Australia has over the years adopted a conservative tactic in this respect, filing a reservation against the arbitration of maritime boundaries pursuant to UNCLOS Article 298 and amending its declaration recognizing the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute to include a reservation against the adjudication of such disputes. Beyond this foundational assessment of the relative vulnerability or opportunity seen in arbitration or adjudication, the adversarial approach raises procedural considerations, such as a theoretically problematic interaction between a court or tribunal's issuance of provisional measures and the parties' obligations to pursue cooperative arrangements pursuant to UNCLOS Articles 74(3) and 83(3) or *lex specialis* agreements.[69]

Trilateral Contexts

The examples from practice discussed above have focused on the settlement of boundary disputes between two governments. Yet the consideration of boundary dynamics in Southeast Asia suggests the varied questions that can often arise as regards the interests of third States. In both treaty negotiation and third-party res-

olution, the principal variable is whether the third State chooses to participate in the process.

Regional treaty practice has provided potential guidance for the establishment of boundary tripoints among three negotiating parties, such as the 1971 agreement among Indonesia, Malaysia, and Thailand, and the 1978 agreement among India, Indonesia, and Thailand.[70] As the complexity of boundary negotiations may be significantly heightened in a trilateral context, however, existing practice in relation to non-participating third States provides perhaps more practicable guidance. Notable in this regard are bilaterally negotiated tripoints based on the claims of Indonesia, Malaysia, and Singapore, as well as those of Malaysia, Thailand, and Vietnam.[71]

Regional practice before international courts and tribunals has provided a significant body of jurisprudence on the interests of third States in the settlement of disputes that involve questions relating to maritime boundaries. Often these have included disputes that do not directly concern boundaries, but indirectly raise such questions insofar as they relate to disputes concerning sovereignty or entitlements. In terms of third States that seek to participate in this process, reference points include the Philippines' failed intervention request in the *Pulau Ligitan and Pulau Sipadan* case submitted to the ICJ by Indonesia and Malaysia, and the participation of several neighboring States as authorized observers in the *South China Sea* UNCLOS arbitration between the Philippines and China. In terms of third States which abstain from this process, contemporaneous ICJ disputes (and divergent Judgments) between Australia and Portugal in *East Timor* and between Australia and Nauru in *Phosphates in Nauru* have proven instrumental in attempting to clarify the doctrine of absent third parties in international dispute settlement.[72] Whereas in the former case the Court found that proceeding to the merits of the case in the absence of Indonesia would impermissibly require it to adjudicate the validity of the Timor Gap Treaty,[73] in the latter case it concluded that it could proceed to the merits because a Judgment on the existence or content of Australia's responsibility toward Nauru (pursuant to a trusteeship agreement to which New Zealand and the United Kingdom were also parties) did not require it to make findings as to those third States' responsibilities.[74]

Notably, viewing maritime boundary disputes through a trilateral lens further reveals the possible involvement of third entities beyond States. These entities may include intergovernmental organizations, such as the role of ASEAN in attempting to manage tensions associated with overlapping claims in the South China Sea (though without direct, multilateral involvement in the determination of these boundaries). Regional entities may indeed take a more pronounced role in facilitating and endorsing attempts to resolve bilateral boundary disputes through the approaches discussed above.[75] Such entities may also include global treaty bodies, such as the Commission on the Limits of the Continental Shelf ("CLCS") established under UNCLOS. While a body such as the CLCS could in theory play an informal role in facilitating the settlement of disputes concerning overlapping extended continental shelf entitlements,[76] its work in practice has tended to be impeded by the formal protest of one State in response to another State's submission of claimed

entitlements, such as with Timor-Leste's protest to Indonesia's submission. Nevertheless, this protest power may play an important role as a bargaining chip in resolving boundary disputes. In this regard, a State may offer during negotiations to remove its protest (thus allowing the CLCS's affirmation of entitlements to proceed) in exchange for concessions regarding a broader delimitation dispute.

Non-Aggravation and Durability

The ultimate value of any of the approaches identified above depends upon the extent to which they do not exacerbate disputes, as well as the legal certainty of the resolutions to which they lead. In terms of negotiated approaches, the durability of agreements may for democratic States broadly entail the perceived legitimacy of achieved solutions and underlying processes. More specifically, objectives of legal certainty have been primarily safeguarded through the use of specific treaty language. For example, in the 1975 treaty between Indonesia and Thailand concerning an area of the continental shelf where there was significant petrol exploitation potential, the parties included text requiring cooperation "if any single geological petroleum or natural gas structure extends across the boundary line." In this manner, the use of "prospective text" foreseeing later mutual-benefit negotiation reduced the political and economic risks of negotiating an otherwise zero-sum delimitation agreement.

In the absence of specific treaty language, regional practice demonstrates the possibility of "*mutatis mutandis*" extension of boundaries from one maritime regime to another, such as in the 1970s negotiation of continental shelf delimitations between India and Indonesia.[77] The parties deemed that their practice would constitute a *mutatis mutandis* application of the continental shelf boundary to the EEZ, without necessitating a separate treaty defining the boundaries of that zone. At least in this particular instance, the approach may be seen to serve the two States' interests in efficiently clarifying the legal status of this regime and avoiding potential disputes regarding their respective economic rights therein.[78]

Compared to the prospect of prolonging a dispute while maintaining a negotiating position that may never prevail, the establishment of conciliation commissions has proven "swift, cheap and successful" by removing some of the political burdens inherent in bilateral boundary negotiations between States with democratically elected governments.[79] The limited practice of UNCLOS conciliation in this respect demonstrates a "concentrative function" that may improve the manageability of a range of disputes between two States without prejudicing their ultimate resolution. This is evident in Timor-Leste's decision to terminate each of its previously initiated arbitrations against Australia (and a related ICJ case) during the course of the parties' conciliation. Indeed, this concentrative function bore fruit in the parties' jointly authorized October 2017 announcement that "[h]aving reached agreement on maritime boundaries, engagement with the Greater Sunrise Joint Venture and the development of Greater Sunrise will now become the principal focus of the Parties." The conciliation commission noted therein that "this has been done in a bilateral setting, without the need for intervention by the Commission."[80] The parties

formalized their Maritime Boundary Treaty in March 2018 at UN Headquarters in New York, and the commission deposited its report and recommendations with the UN Secretary-General in May 2018.[81]

As such, these two States have successfully demonstrated the utility of the UNCLOS conciliation process in avoiding the further stagnation or escalation of boundary-specific and related economic disputes in an area of overlapping maritime claims. Moreover, in proceeding through the facilitation of the commission, the parties appear to have been mindful to remedy certain shortcomings in the prior arrangements. For example, whereas one of the recent arbitrations instituted (and terminated) by Timor-Leste against Australia concerned ambiguity in the JPDA as to the exclusivity of either State's jurisdiction over pipelines stemming from their joint development area, the 2018 Maritime Boundary Treaty clearly sets out to clarify this question for the purposes of the parties' new jointly operated special regime in the Greater Sunrise Fields.[82] Failing that, the parties have moreover agreed to a mechanism providing for either party's unilateral submission of resulting disputes to arbitration.[83]

Having thus logically transitioned to a reflection on adversarial proceedings, the principal question raised by regional practice in this respect is arguably one of legal certainty. This may seem counterintuitive, in light of the fundamental character of *res judicata* decisions rendered by international courts and tribunals. Nevertheless, certain caveats to this principle may arise. For example, the multiplicity of dispute settlement fora concerning the spectrum of issues relating to boundary disputes—as seen in the aforementioned proceedings between Australia and Timor-Leste, as well as other parallel inter-State proceedings beyond this region[84]—may raise significant burdens on governments, requiring greater case management capacity.[85] Such multiplicity may further raise the specter of conflicting decisions and cross-institutional interference.[86] The possibility of such caveats is further evident in the aforementioned 2017 requests for revision and interpretation initiated by Malaysia before the ICJ in respect of the Court's 2008 Judgment in *Pedra Branca, Pulau Batu Pateh, and Middle Rocks*.

In light of the relative ineffectuality of Article 94 of the UN Charter, which provides the Security Council with authority to take action concerning non-compliance with ICJ Judgments, the lack of a comparable central enforcement mechanism concerning inter-State arbitral awards arguably does not play an outsize role in the durability of such awards. However, given the lack of an intergovernmental organization's imprimatur of authority over the issuance of inter-State awards (by contrast to the ICJ as the principal judicial organ of the UN), legal certainty may also be seen to entail perceptions of legitimacy. UNCLOS arbitration has demonstrated recent problems in this respect, notably in the phenomenon of powerful respondents denigrating the authority of Annex VII tribunals and refusing to participate in cases such as *South China Sea*.[87] While this does not necessarily cast doubt on the use of arbitral tribunals to resolve maritime boundary disputes, it does raise questions in some instances as to the enforcement of awards rendered in arbitrations instituted through compulsory, treaty-based mechanisms.

The question may thus reasonably arise as to whether such judgments and awards provide as much certainty as to resolution of boundary disputes as do treaty-based approaches. It may be seen, however, that treaties do not necessarily provide substantially more guarantees of legal permanence than adjudication and arbitration. In this respect, one may consider the termination of territorial treaty obligations in the Timor Gap Treaty following the independence of Timor-Leste. Beyond the creation of new States, caveats to the certainty of treaty-based approaches are also evident in the spying scandal concerning the negotiation of the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea between Australia and Timor-Leste, the revelation of which gave rise to arbitration concerning Timor-Leste's obligations under said treaty. Looking beyond the scope of the present article, it may be worth reflecting on the utility or necessity of extending the norms governing invalidity, termination, and suspension of operation of treaties—as found in Part V of the Vienna Convention on the Law of Treaties—to the durability of inter-State awards and judgments in instances of fraud, material breach, or fundamental change of circumstances.

Conclusion

While Indonesia's practice suggests a clear preference for negotiations,[88] the present article has highlighted some of the values that may be considered in selecting from among the four general approaches to maritime boundary disputes, and has identified in regional practice certain norms in each of these respects. In terms of strategic themes, incrementalism in treaty practice may be complicated when the initial treaty is a broad framework agreement (rather than a clear boundary segment). Additionally, boilerplatism may prove problematic insofar as a treaty cross-references a prior provisional agreement (rather than adapting its terms). While some procedural aspects of third-party resolution may be difficult to predict, jurisdictional considerations regarding adversarial proceedings can be effectively formulated in advance as part of a State's comprehensive boundary strategy. Both amicable and adversarial mechanisms enable States to circumvent the recurring factual and political limitations that may forestall agreements to utilize resources.

Trilateral interests may arise in each of the principal approaches, and the key variable as to how the parties may effectively address third-State interests is whether that State seeks to assert its interest in the negotiations or proceedings. Third-party institutions may affect negotiations in a similarly binary fashion, by either facilitating bilateral consultations (such as through regional integration organizations) or indirectly broadening their dynamics (such as through the availability of quasi-judicial treaty bodies). Finally, the Southeast Asian experience has innovated several tactics that may concern the non-aggravation and durability of solutions reached through each of the four approaches. These include the beneficial use of prospective text in treaty language, the *mutatis mutandis* application of treaty terms through subsequent practice, and the concentrative function of conciliation proceedings. By contrast,

multiplicity in adversarial proceedings may raise questions as to the legal certainty of the results achieved therein.

Notes

1. An earlier version of this article was presented at the 8th International Conference on Boundary Affairs in Pontianak, Indonesia in October 2017, upon the gracious invitation of the Center for International Law Studies and the Faculty of Law Universitas Indonesia. The author is indebted to valuable feedback received from Indonesian negotiators and boundary experts who organized or attended the event.

2. See S.A. Kocs, "Territorial Disputes and Interstate War," *Journal of Politics*, vol. 57(1) (1995), pp. 173–174.

3. See generally V.L. Forbes, *Indonesia's Delimited Maritime Boundaries* (Springer 2014).

4. Reliance upon "other special circumstances" is omitted here due to the ambiguity of the term in the context of bilateral negotiations. Scholars have referred to this clause by: noting that what will meet this threshold will depend upon conditions unique to each area (see N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* [Cambridge University Press 2004], p. 278); emphasizing "historic title" as the more dominant exception in UNCLOS Article 15 (see Z. Keyuan, *Law of the Sea in East Asia: Issues and Prospects* [Routledge 2005], p. 70); and hypothesizing that the phrase could include "acquired rights to non-exclusive uses within those waters" (see W.M. Reisman & M.H. Arsanjani, "Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation," in T.M. Ndiaye & R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007), p. 647).

5. See *Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports 2009, p. 61, paras 120–121, 155. See further B. McGarry, "The Development of Custom in Territorial Dispute Settlement," *Journal of International Dispute Settlement*, vol. 8(2) (2017), pp. 352–355.

6. See *Delimitation of the Maritime Boundary in the Bay of Bengal*, Judgment, ITLOS Reports 2012, p. 4, para 183. See further Joint Declaration of Judges Nelson, Chandrasekhara Rao, and Cot; Separate Opinion of Judge Cot; Separate Opinion of Judge Gao.

7. Agreement between India and Indonesia of 8 August 1974; Agreement between India and Indonesia of 14 January 1977.

8. Treaty between Indonesia and Malaysia of 17 March 1970.

9. See J.R.V. Prescott, "Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia," *International Maritime Boundaries*, rpt. 6–6(1) (1993), p. 1364; S.P. Jagota, *Maritime Boundary* (Martinus Nijhoff 1985), p. 82.

10. Agreement between Australia and Indonesia of 18 May 1971; Agreement between Australia and Indonesia of 9 October 1972; Agreements between Australia and Indonesia of 12 February 1973.

11. Agreement between Indonesia and Papua New Guinea of 13 December 1980.

12. See R.J. Morrison & J.R. Delaney, "Marine Pollution in the Arafura and Timor Seas," *Marine Pollution Bulletin*, vol. 32(4) (1996), p. 329, https://doi.org/10.1016/0025-326X(96)00004-5

13. Art. 5. Cf. arts. 6, 7.

14. Agreement between Indonesia and Singapore of 25 May 1973.

15. Treaty between Indonesia and Singapore of 10 March 2009; Treaty between Singapore and Indonesia of 3 September 2014.

16. Agreement between the Philippines and Indonesia of 23 May 2014, art. I(3).

17. See C.H. Schofield & I.M. Andi Arsana, "Agreement Between the Government of the Republic of the Philippines and the Republic of Indonesia Concerning the Delimitation of the Exclusive Economic Zone Boundary," *International Maritime Boundaries*, rpt. 5–41 (2016), p. 4956.

18. Agreement between Indonesia and Thailand of 11 December 1975, art. 2.

19. Agreement between Vietnam and Indonesia of 26 June 2003.

20. For a history of Indonesia's objectives and efforts negotiating continental shelf boundary agreements in the years between the *North Sea* Judgment and the adoption of UNCLOS, see gen-

erally J.G. Butcher & R.E. Elson, *Sovereignty and the Sea: How Indonesia Became an Archipelagic State* (NUS Press 2017).

21. See D. Colson, "The Legal Regime of Maritime Boundary Agreements," *International Maritime Boundaries*, vol. 1 (1993), p. 58. See further B. Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations," *International Maritime Boundaries*, vol. 1 (1993), p. 81*n*31.

22. *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3.

23. See further D. Nicholson & T. Clarke, "Asia-Pacific: Unfinished Business in the Timor Sea," *Alternative Law Journal*, vol. 38(2) (2013), pp. 122–123. https://doi.org/10.1177/1037969X1303800213

24. See S. Kaye, *Australia's Maritime Boundaries* (Centre for Maritime Policy 2001), pp. 49–50.

25. See S. Stepan, "Credibility Gap: Australia and the Timor Gap Treaty," Australian Council for Overseas Aid (1990), p. 3, http://vuir.vu.edu.au/26190/1/STEPAN_compressed.pdf.

26. Memorandum of Understanding between Indonesia and Australia of 29 October 1981.

27. See R.R. Churchill, "Fisheries Issues in Maritime Boundary Delimitation," *Marine Policy*, vol. 17(1) (1993), p. 49. But see J.R.V. Prescott, "The Problems of Completing Maritime Boundary Delimitation Between Australia and Indonesia," *International Journal of Marine and Coastal Law*, vol. 10 (1995), p. 396, https://doi.org/10.1163/157180895X00141

28. Treaty Between Australia and Indonesia of 14 March 1997.

29. See J.R.V. Prescott, "The Completion of Marine Boundary Delimitation Between Australia and Indonesia," *Geopolitics and International Boundaries*, vol. 2(2) (1997), pp. 132–133, https://doi.org/10.1080/13629379708407593

30. See C.W. Dundas, "The Impact of Maritime Boundary Delimitation on the Development of Offshore Mineral Deposits," *Resources Policy*, vol. 20(4) (1994), p. 277. https://doi.org/10.1016/0301–4207(94)90007–8

31. See P. Hallwood, "An Economic Analysis of Drawing Lines in the Sea," University of Connecticut (2007), p. 406, http://digitalcommons.uconn.edu/econ_wpapers/200721.

32. See A. Melamid, "The Division of Narrow Seas," *Political Geography Quarterly*, vol. 5(1) (1986), p. 39, https://doi.org/10.1016/0260–9827(86)90009–1

33. Memorandum of Understanding between Malaysia and Vietnam of 5 June 1992. See further T.A. Mensah, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation," in R. Lagoni & D. Vignes (eds), *Maritime Delimitation* (Brill 2006), p. 147.

34. Treaty between Australia and Indonesia of 11 December 1989.

35. See C.H. Schofield, "Blurring the Lines? Maritime Joint Development and the Cooperative Management of Ocean Resources," University of Wollongong (2009), pp. 14–15, http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1373&context=lawpapers.

36. See further D. Mercer, "Closing the Gap: Australian-Indonesian Relations, the "Perilous Moment' and the Maritime Boundary Zone," *Journal of Economic and Social Geography*, vol. 90(1) (1999), pp. 70–71, https://doi.org/10.1111/1467-9663.00050

37. See M. Herriman & M. Tsamenyi, "The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?," *Ocean Development and International Law*, vol. 29(4) (1998), pp. 378–379, https://doi.org/10.1080/00908329809546132

38. Exchange of Notes Constituting an Agreement between East Timor and Australia of 20 May 2002.

39. See further S. Derrington & M. White, "Australian Maritime Law Update: 2002," *Journal of Maritime Law and Commerce*, vol. 34 (2003), p. 367.

40. See generally C.H. Schofield, "Dividing the Resources of the Timor Sea: A Matter of Life and Death for East Timor," *Contemporary Southeast Asia*, vol. 27(2) (2005), p. 255. https://doi.org/10.1355/CS27–2E

41. Treaty between Australia and East Timor of 12 January 2006.

42. See further C.H. Schofield, "Minding the Gap: The Australia—East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)," *International Journal of Marine and Coastal Law*, Vol. 22(2) (2007), pp. 218–219.

43. See *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Press Release, 9 August 2017, https://pcacases.com/web/sendAttach/2226.

44. Memorandum of Understanding between Thailand and Malaysia of 24 October 1979. See also *ibid.*, Annex I.

45. See further A. Bergin, "The Australian-Indonesian Timor Gap Maritime Boundary Agreement," *International Journal of Estuarine and Coastal Law*, vol. 5(4) (1990), pp. 390–91, https://doi.org/10.1163/157180890X00353; British Institute of International and Comparative Law, Report on Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (2016), p. 94, https://www.biicl.org/documents/1192_report_on_the_obligations_of_states_under_articles_743_and_833_of_unclos_in_respect_of_undelimited_maritime_areas.pdf?showdocument=1.

46. Agreement between Malaysia and Thailand of 13 May 1990.

47. See C. Cook, "Filling the Gap—Delimiting the Australia-Indonesia Maritime Boundary," *Australian Year Book of International Law*, vol. 10 (1983), p. 175.

48. See I.A. Shearer, "International Legal Aspects of Australia's Maritime Environment," *Australia's Maritime Horizons in the 1980s* (Australian Centre for Maritime Studies 1982), p. 8.

49. See N. Bugalski, "Beneath the Sea: Determining a Maritime Boundary Between Australia and East Timor," *Alternative Law Journal*, vol. 29(6) (2004), p. 289. https://doi.org/10.1177/1037969X0402900606

50. See further R. Beckman, "UNCLOS Part XV and the South China Sea," in S. Jayakumar, et al. (eds), *The South China Sea Disputes and Law of the Sea* (Edward Elgar 2014), p. 246.

51. See further UNCLOS, art. 300; *M/V "Louisa" Case*, ITLOS Judgment of 28 May 2013, para 137.

52. *Arbitration under the Timor Sea Treaty*, PCA Case 2013–16; *Arbitration Under the Timor Sea Treaty*, PCA Case 2015–42; *Questions Relating to the Seizure and Detention of Certain Documents and Data*, Order of 11 June 2015, ICJ Reports 2015, p. 572. The case before the ICJ concerned Australia's treatment of evidence relevant to the first of the Timor Sea Treaty arbitrations.

53. See Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, Dissenting Opinion of Judge Gros, ICJ Reports 1984, pp. 246, 360, para 2; T.L. McDorman, et al., "The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?," *Marine Policy*, vol. 9(2), p. 107, https://doi.org/10.1016/0308–597X(85)90001–6

54. *Delimitation of the Maritime Boundary in the Bay of Bengal*, Judgment, ITLOS Reports 2012, p. 4. In particular, ITLOS in this case rejected natural prolongation as irrelevant to both entitlement and delimitation in the outer continental shelf. See *ibid.*, paras 435, 455, 460.

55. *Land Reclamation in and Around the Straits of Johor*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10. This case concerned whether a land reclamation project by Singapore constituted a threat of serious harm to the marine environment and, if so, whether Singapore was required *inter alia* to conduct an environmental impact assessment and to notify and consult with Malaysia. At the provisional measures stage, ITLOS clarified one aspect of the relationship between diplomatic and judicial means of dispute settlement in finding that a party is "not obliged to continue with an exchange of views when it [has] concluded that this exchange could not yield a positive result." *Ibid.*, para 48.

56. See C.H. Schofield, "The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation," in S. Hong & J. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009), p. 22, https://doi.org/10.1163/ej.9789004173439.i-308.13. See further J.R.V. Prescott & C.H. Schofield, *Maritime Political Boundaries of the World* (Martinus Nijhoff 2005), pp. 265–84.

57. *Sovereignty Over Pulau Ligitan and Pulau Sipadan*, Judgment, ICJ Reports 2002, p. 625, paras. 58, 72, 80, 92, 94, 96, 114, 124, 132, 148; J.M. Van Dyke, "Disputes Over Islands and Maritime Boundaries in East Asia," in S. Hong & J. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009), pp. 47–49, https://doi.org/10.1163/ej.9789004173439.i-308.18. On considerations of *effectivités* and historical records in island sovereignty disputes, see M.J. Valencia, et al, *Sharing the Resources of the South China Sea* (University of Hawaii Press 1997), pp. 17–19.

58. *Sovereignty Over Pulau Ligitan and Pulau Sipadan*, Judgment, ICJ Reports 2002, p. 625, para 137.

59. *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Judgment, ICJ Reports 2008, p. 12.

60. See ICJ Press Release, 30 June 2017, http://www.icj-cij.org/files/case-related/170/170–20170630-PRE-01–00-EN.pdf; ICJ Press Release, 3 February 2017, http://www.icj-cij.org/files/case-related/167/19344.pdf. The parties agreed to discontinue both cases shortly after a new administration assumed office in Malaysia. See ICJ Press Release, 1 June 2018, http://www.icj-cij.org/files/case-related/170/170-20180601-PRE-01-00-EN.pdf; ICF Press Release, 1 June 2018, http://www.icg-cij.org/files/case-related/167/167-20180601-PRE-01-00-EN.pdf.

61. See, e.g., ICJ Statute, Art. 61. Notably, although the UNCLOS negotiators who drafted the ITLOS Statute omitted any provision concerning the revision of Judgments, the Judges themselves, when adopting their procedural rules, largely incorporated the terms of Article 61 of the ICJ Statute. See ITLOS Rules of Court, Art. 127.

62. See further R. Beckman & C.H. Schofield, "Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait," *Ocean Development and International Law*, vol. 40(1) (2009), pp. 24–25, https://doi.org/10.1080/00908320802631551. See generally P. Gautier, "The Settlement of Disputes," in D.J. Attard (ed), *IMLI Manual on International Maritime Law* (OUP 2014), p. 553; B.H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals," in D.R. Rothwell (ed), *Oxford Handbook of Law of the Sea* (OUP 2015), p. 394.

63. Cf. Decision of the Commission (15 Dec. 1933), Mixed Claims Commission: United States and Germany: Decisions and Opinions from January 1, 1933 to October 30, 1939 (Excepting Decisions in the Sabotage Claims of June 15, and October 30, 1939), pp. 1115, 1127–1128 (1940).

64. *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA Case 2010–16, Award, 7 July 2014.

65. *South China Sea Arbitration*, PCA Case 2013–19, Award, 12 July 2016; *Arctic Sunrise Arbitration*, PCA Case 2014–02, Award on the Merits, 14 August 2015.

66. See C.H. Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia*, vol. 29(2) (2007), pp. 292–293, https://doi.org/10.1355/CS29–2D.

67. See C.H. Schofield & M. Tan-Mullins, "Maritime Claims, Conflicts and Cooperation in the Gulf of Thailand," *Ocean Yearbook*, vol. 22 (2008), pp. 108–111. https://doi.org/10.5670/oceanog.2008.08.

68. See H.Z. Abidin, et al, "Geodetic Datum of Indonesian Maritime Boundaries: Status and Problems," *Marine Geodesy*, vol. 28(4) (2005), p. 303, https://doi.org/10.1080/01490410500411745.

69. See N. Klein, "Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes," *International Journal of Marine and Coastal Law*, vol. 21(4) (2006), p. 460, https://doi.org/10.1163/157180806779441129. But see M. Miyoshi, "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf," *International Journal of Estuarine Law*, vol. 3(1) (1988), p. 14, https://doi.org/10.1163/187529988X00012. See further D.M. Ong, "Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?," *American Journal of International Law*, vol. 93 (1999), p. 801, https://doi.org/10.2307/2555344.

70. Agreement between Indonesia, Malaysia and Thailand of 21 December 1971; Agreement between India, Indonesia and Thailand of 22 June 1978.

71. See D. Anderson, "Negotiating Maritime Boundary Agreements: A Personal View," in R. Lagoni & D. Vignes (eds), *Maritime Delimitation* (Brill 2006), pp. 136–137, n. 42; A.G. Oude Elferink, "Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?," in A. Chircop, et al. (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Martinus Nijhoff 2009), p. 609, https://doi.org/10.1163/ej.9789004172678.i-786.152. See further Agreement between Thailand and Vietnam of 11 August 1997.

72. *East Timor*, Judgment, ICJ Reports 1995, p. 90; *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240. See generally B. McGarry, "Third Parties and Insular Features After the *South China Sea* Arbitration," *Chinese (Taiwan) Yearbook of International Law and Affairs*, vol. 35 (2018).

73. *East Timor*, Judgment, ICJ Reports 1995, p. 90, para 34.

74. *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240, para 55.

75. See, e.g., the role of the EU in endorsing the underlying agreement in the *Arbitration between Croatia and Slovenia*, and the role of the Organization of American States regarding the

potential shift from mediation to adjudication in the long-running boundary dispute between Belize and Guatemala.

76. See M. Finnemore & S.J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization*, vol. 55(3) (2001), pp. 747–748. https://doi.org/10.1162/00208180152507614.

77. See J.R.V. Prescott, "Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia," *International Maritime Boundaries*, rpt. 6–6(1) (1993), p. 1364; J.R.V. Prescott, "Agreement Between the Government of the Republic of India and the Government of the Republic of Indonesia on the Extension of the 1974 Continental Shelf Boundary Between the Two Countries in the Andaman Sea and the Indian Ocean," rpt. 6–6(2) (1993), p. 1372.

78. See I. Papanicolopulu, "Some Thoughts on the Extension of Existing Boundaries for the Delimitation of New Maritime Zones," in R. Lagoni & D. Vignes (eds), *Maritime Delimitation* (Brill 2006), p. 223.

79. See R.R. Churchill, "Maritime Delimitation in the Jan Mayen Area," *Marine Policy*, vol. 9 (1985), p. 25 (citing the *Jan Mayen* conciliation between Iceland and Norway). https://doi.org/10.1016/0308–597X(85)90077–6.

80. *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Press Release, 15 October 2017, http://www.pcacases.com/web/sendAttach/2240.

81. *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Press Release, 9 May 2018, https://www.pcacases.com/web/sendAttach/2358.

82. See, e.g., *ibid.*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, para 47; Treaty between the Democratic Republic of Timor-Leste and Australia Establishing their Maritime Boundaries in the Timor Sea signed 6 March 2018, Art. 10.

83. Treaty between the Democratic Republic of Timor-Leste and Australia Establishing their Maritime Boundaries in the Timor Sea signed 6 March 2018, Annex E, Art. 1.

84. These include the *"MOX" Plant* dispute between the UK and Ireland, the *Swordfish* dispute between Chile and the EU, and the *Atlanto-Scandian Herring* dispute between the Faroe Islands and the EU.

85. See generally B. McGarry, "Cost Efficiency in Inter-State Dispute Settlement," in P. Butler, et al. (eds), *Integration and International Dispute Resolution in Small States* (Springer 2018).

86. See generally "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, http://legal.un.org/docs/?symbol=A/CN.4/L.682.

87. See B. McGarry, "Enforcing an Unenforceable Ruling in the South China Sea," The Diplomat, 16 July 2016, https://thediplomat.com/2016/07/enforcing-an-unenforceable-ruling-in-the-south-china-sea/.

88. See H. Chiu, "Political Geography in the Western Pacific after the Adoption of the 1982 United Nations Convention on the Law of the Sea," *Political Geography Quarterly*, vol. 5(1) (1986), pp. 28–29, https://doi.org/10.1016/0260–9827(86)90007–8; I.M. Andi Arsana, "Mending the Imaginary Wall Between Indonesia and Malaysia," *Wacana*, vol. 13(1) (2011), p. 31.

Biographical Statement

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The Principle of *Res Judicata*, Determination by "Necessary Implication," and the Settlement of Maritime Delimitation Disputes by the International Court of Justice

Diego Mejía-Lemos

Structured Abstract

Article Type: Research Paper

Purpose—This article seeks to examine the application of the principle of *res judicata*, generally and in connection with the settlement of maritime delimitation disputes by the International Court of Justice, with a particular focus on the condition for application of *res judicata* that a matter be determined if not expressly, "by necessary implication."

Design/Methodology/Approach—The article analyzes decisions of the International Court of Justice in which relevant aspects of the principle of *res judicata* have been examined, including most notably the character of a matter as having been determined "by necessary implication."

Findings—The article provides an account of the ways in which the principle of *res judicata* has been applied in connection with the settlement of maritime delimitation disputes and examines the significance of the condition of determination by "necessary implication" to the application of the principle of *res judicata* to decisions, generally and in proceedings concerning maritime delimitation disputes. Despite

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the express invocation of the condition of "necessary implication" in decisions concerning maritime delimitation, the article concludes that, given the openness of the condition of "necessary implication," there are no specific aspects of maritime delimitation disputes which lead to a differential application of *res judicata* where a matter is regarded as having been determined by "necessary implication." To conclude, the article suggests that, like in other proceedings, the application of the principle of *res judicata* to matters determined by "necessary implication" depends upon the proper determination of the scope of the decisions at issue, leaving room for a significant use of "necessary implication" in the particular instance of maritime delimitation proceedings.

Practical Implications—The article may provide criteria for the proper treatment of the principle of *res judicata*, including the condition of determination by "necessary implication," in connection with the settlement of maritime delimitation disputes.

Originality, Value—The article presents the first comprehensive and most up to date analysis of the interaction between the principle of *res judicata* and the condition of determination by "necessary implication," in general and as applied in connection with the settlement of maritime delimitation disputes.

Keywords: International Court of Justice,
maritime delimitation disputes, necessary implication, *res judicata*

I. Introduction

The International Court of Justice ("ICJ") has addressed the character, source, scope, conditions for application and effects of *res judicata* in several decisions. An aspect of the treatment of *res judicata* in decisions of the ICJ is the condition of determination of a matter by express means or "necessary implication." The latter means, in turn, raise questions of interpretation having a bearing on the diverse aspects of dispute settlement, including in relation to maritime delimitation.

1. The International Court of Justice on Res Judicata

Res judicata has been widely accepted by international courts and tribunals, and analyzed in scholarship.[1]

Decisions of the ICJ regarding the settlement of maritime delimitation disputes in which *res judicata* has been addressed include, most notably, the judgments in *Land Boundary and Maritime Delimitation (Costa Rica v Nicaragua)* and *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*.[2]

Other cases before the ICJ in which *res judicata* has been applied or denied, and related aspects have been analyzed, include *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*,[3] *Haya de la Torre (Colombia v Peru)*,[4] *South West Africa (Ethiopia v South Africa; Liberia v South Africa) Second Phase*,[5]

Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), *Preliminary Objections (Nigeria v Cameroon)*,[6] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*.[7] By virtue of these decisions, among others, *res judicata* "is now firmly established in the jurisprudence of the Court."[8]

Res judicata had been considered in cases before the Permanent Court of International Justice ("PCIJ"), including *Interpretation of Judgments Nos. 7 and 8 (The Chorzow Factory)*[9] and *Société Commerciale de Belgique*.[10]

Res judicata has also been applied by various international tribunals conducting both inter-state,[11] and mixed,[12] most notably investor-state,[13] arbitrations.

Most recently, the ICJ examined *res judicata* in connection with a dispute involving a maritime delimitation. In the judgment delivered in *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*,[14] joined to *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)*,[15] the ICJ analyzed *res judicata*.[16]

The present article is principally concerned with the relevant decisions of the ICJ.

2. The Character and Source of Res Judicata

Res judicata has been described as a "doctrine,"[17] a "principle,"[18] or both[19]; more specifically, it has been characterized as a general principle of law,[20] a principle of customary international law,[21] or a "rule of international law."[22] Being part of general international law, most notably as a general principle of law, it would be applicable in relation to decisions of an international court or tribunal in the absence of an express provision in the court or tribunal's constitutive instrument.[23] In the particular case of the ICJ, the source of *res judicata* is the ICJ Statute, and the ICJ relies solely on *res judicata* as a principle of conventional international law.[24]

The ICJ has noted that *res judicata* is reflected in Articles 59 and 60 of the ICJ Statute.[25] Provisions of various treaties contain rules to the effect that decisions are "final" and, in some cases, also "without appeal,"[26] such as Article 53(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[27] Article 67 of the American Convention on Human Rights,[28] Article 52 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[29] Article 33 of Annex VI of the United Nations Convention on the Law of the Sea ("UNCLOS"),[30] and Article IV(1) of the Claims Settlement Declaration,[31] concerning the Iran–United States Claims Tribunal, among other statutes of various international tribunals,[32] among others.[33]

Res judicata performs a function of avoiding contradictory decisions, alongside other procedural rules,[34] in circumstances in which a "plurality of courts and tribunals" operate.[35] *Res judicata* operates not merely where there is a plurality of proceedings, but, more precisely, where a proceeding is completed, with regard to any subsequent proceedings.[36]

The ICJ has indicated that *res judicata* "protects" both an international court's or tribunal's "judicial function" and the parties to a "case which has led to a judgment that is final and without appeal."[37] The ICJ has stated that the principle of *res judicata* "establishes the finality of the decision adopted in a particular case."[38]

These two functions are related, in turn, to purposes which provide "the rationale" for the principle of *res judicata*.[39] Two purposes are said to underlie *res judicata*, as a principle, namely a general purpose and a specific purpose.[40]

The "general" purpose is the "stability of legal relations."[41] This purpose concerns the judicial function, as set out in Article 38 of the ICJ Statute,[42] and is regarded as a public policy.[43] The function to "decide" entails the function "to bring to an end" a dispute submitted to the ICJ.[44] This function is performed by other doctrines in national legal orders.[45] Other related purposes include "legal certainty."[46]

The "specific" purpose pertains to the "interest of each party" in precluding arguments about an adjudicated issue in that party's favour,[47] thus having a private aspect, by contrast to the aforementioned "general" purpose.[48] This purpose relates to the "finality of judgments," as provided for in Article 60 of the ICJ Statute,[49] and implies that "[d]epriving a litigant" of this interest would be a "breach of the principles governing the legal settlement of disputes."[50] This aspect of *res judicata* is stated in Article 60 of the ICJ Statute.[51]

The remainder of this article proceeds in four parts. Part II examines other aspects and elements of *res judicata*, particularly as set out in relevant decisions of the ICJ. Part III analyzes in more depth the conditions under which the ICJ has applied *res judicata*, with a particular focus on the condition of determination of a matter by express means or "necessary implication." Part IV discusses selected aspects and recent developments in the application of *res judicata* in connection with the settlement of maritime delimitation disputes by the ICJ. Part V concludes.

II. The Object, Scope and Effects of *Res Judicata*

Part I has examined the concept of *res judicata* and stated that it operates under international law as a principle among other general principles of law. Having addressed the character and source of *res judicata*, this part examines the object, scope and effects of *res judicata*.

1. The Object and Scope of Res Judicata

The object of *res judicata* is a decision which is final.[52] While a final decision undoubtedly has binding effect, not every act of an international court or tribunal having binding effect has *res judicata* effects.[53]

The requirement that a decision be final implies that, in general, decisions on provisional measures,[54] and on preliminary objections,[55] among others,[56] are not the object of *res judicata*.[57]

The scope of *res judicata* has various aspects, which may be analyzed most

notably in terms of the scope *ratione materiae* and *ratione personae* of the decision at issue.

The scope *ratione personae* of *res judicata* is limited, given the relativity of decisions of international courts and tribunals, including those having *res judicata* effects. The relativity of judgments of the ICJ, pursuant to ICJ Statute Article 59, implies that *res judicata* effects are confined to the case at issue. This implies that the ICJ may reconsider its position on "the substance of the law as embodied in a previous decision."[58]

In particular, the limited scope *ratione personae* of *res judicata* provides a means of protection of third states,[59] particularly in the context of boundary disputes.[60]

The scope *ratione materiae* of *res judicata* is determined by the operative clause of the decision having *res judicata* effects. The ICJ has expressly stated that "[t]he decision of the Court is contained in the operative clause of the judgment."[61] Consequently, only the *dispositif* of a judgment has force of *res judicata*.[62]

Hence, a decision dealing with "issues of substance" is not necessarily object of *res judicata* on the merits, if such issues are not a decision proper on the merits of the dispute.[63] Likewise, a judgment on preliminary objections remains devoid of *res judicata* effects even if it contains considerations on the merits, since such considerations are "part of the motivation," but not "the object of" the decision.[64]

The scope of the decision is confined to the dispute, as set out by the parties in their pleadings and submissions.[65] Being both conclusive and preclusive with respect to the parties' claims and defenses, in their entirety, the *res judicata* effects of a decision extend beyond merely discrete "issues" dealt with in the decision.[66]

Nevertheless, "it may be necessary to determine the meaning of the operative clause."[67] This need arises "in order to ascertain what is covered by *res judicata*."[68] The need may arise, in particular, when "the Parties disagree as to the content and scope of the decision" having *res judicata* effects.[69]

There may be a degree of complexity involved in determinations as to the scope *ratione materiae* of *res judicata* of a judgment.[70] This determination poses a "methodological issue."[71] The method of examination of the precise meaning and scope of a decision comprises a study of the context of the decision, in particular of contextual elements within the decision.[72]

For the purposes of determining the scope *ratione materiae* of *res judicata*, it may be necessary to do so "by reference to the reasoning set out in the judgment in question."[73] The reasoning set out in the *motif* may be taken into account, to the extent that it is indispensable to understand the *dispositif* of a decision.[74]

A determination of the meaning and scope of a judgment's operative clause requires to have regard to the reasoning where such a determination cannot be made "from the text of the *dispositif* alone."[75] The identification of "each element" of the "reasoning" which constituted "a condition essential" to a judgment is required to establish a "precise" understanding of the meaning and scope of the judgment.[76] The identification of "these essential elements," in turn, serves as "a basis to ascertain

the points […] "determined, expressly or by necessary implication" by" the ICJ.[77] Those "points" are to be "given *res judicata* effect."[78]

2. *The Effects of* Res Judicata

The effects of *res judicata* have been described as "far-reaching."[79] The effects of *res judicata* may be both procedural[80] and substantive[81]; "negative" and "positive."[82]

Procedural effects extend to the parties to a decision, and preclude that a matter already settled be "reopened" in the ICJ or in another international court or tribunal.[83] Procedural effects, being preclusive, are often referred to as "negative effects."[84] Procedural effects comprise the inadmissibility of claims in relation to which *res judicata* applies.[85]

Procedural effects extend to rulings on burden of proof.[86] The evidentiary aspects of *res judicata* are related, in particular, to the application of the rule that the applicant bears the burden of proof, according to the adversarial nature of proceedings before the ICJ.[87] Failure to prove a fact "does not automatically prove the opposite fact,"[88] nor does the rejection of an argument which has not been proven "warrant upholding the contrary argument."[89]

In relation to the burden of proof, a situation in which a party fails to fully use its opportunity to prove a claim calls for the application of *res judicata*.[90] In this situation, a party is not given an "opportunity to prove the same facts for a second time in a second case against the same respondent."[91] Consequently, a party is prevented from requesting that the ICJ ascertains anew the same facts.[92] The application of *res judicata* in this situation would be grounded on "reasons of procedural fairness"[93] and "sound administration of justice."[94]

The effects of *res judicata*, nevertheless, "are not confined to litigation."[95] While the "primary effect" of *res judicata* is "procedural," a decision having *res judicata* character may also have substantive effects.[96] Such substantive effects derive from the decision's character as a source of obligation.[97] In particular, a judgment on the merits sets out substantive rights and obligations of the parties to the proceedings,[98] and the parties have an obligation to "carry out the judgment in good faith."[99] As a source of obligation, the decision with *res judicata* character establishes the substantive position of the parties, "as an individualization of objective law."[100] The character of a decision as a source of obligation only implies that the principle of *res judicata* affords no basis for incorporating the doctrine of *stare decisis* into international law.[101]

Substantive effects have been formulated in relation to entitlements to maritime areas object of a judgment with *res judicata* effects,[102] pursuant to Articles 59 and 60 of the ICJ Statute.[103] Article 59 provides that judgments are binding on the parties.[104] Substantive effects are often referred to as "positive," being concerned with the character of the judgment with *res judicata* effects as binding.[105]

Article 60 provides that judgments are final and without appeal.[106] *Res judicata*, therefore, implies that, under Article 59 of the ICJ Statute, a decision on a given

"point in issue" is binding on the parties, and, under Article 60 of the ICJ Statute, cannot be called into question by either party "as a matter of law."[107]

Substantive effects, thus, preclude that a party asserts, vis-à-vis another party to proceedings concluded by a decision with *res judicata* effects, an entitlement in relation to the object of the decision with *res judicata* effects.

Substantive effects may indirectly derive from procedural effects. Turning again to the effects of *res judicata* upon evidentiary rulings, a ruling that a party "has not discharged its burden of proof" in relation to certain facts may have *res judicata* effects.[108] Where a claim to a legal entitlement is "dependent upon" the existence of the facts in relation to which the burden of proof has been ruled, with *res judicata* effects, not to have been discharged, the "entitlement (or the lack thereof)" would be a question also ruled with "*res judicata* effects between those parties."[109]

Substantive effects may concern the implementation of an obligation, not merely its existence and legal force. In particular, substantive effects would extend to "self-help measures,"[110] as means of implementation of international responsibility which may arise from a breach of the obligation upon which *res judicata* may have a substantive effect.

III. Conditions for Application of *Res Judicata* and Determination by Express Means or "Necessary Implication" as Necessary and Sufficient Condition for Application

Part II has set out the scope and effects of *res judicata*. This part is primarily concerned with the conditions for application of *res judicata*.

1. The Condition for Application of Identity of Parties, Object and Legal Ground as Necessary Condition

The identity of three elements is required for *res judicata* to apply[111]: *res judicata* applies where the parties (*persona*), the object (*petitum*) and the legal ground (*causa petendi*) are the same.[112] These elements have been taken into account by the ICJ by reference to, most prominently, the opinion of Judge Anzilotti in *Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory)*.[113]

The International Law Association added to the aforementioned elements a condition, to be met concurrently with the other three, that the proceedings at issue be "conducted before courts or tribunals in the international legal order."[114] Since the international legal order is not institutionalized in its entirety, and the application of international law by a court or tribunal constituted under international law allows to appropriately determine whether a decision of such a court or tribunal is capable of having *res judicata* effects under international law, if the necessary and sufficient

conditions are met, it seems unnecessary to add a condition that the court or tribunal issuing the decision be international. Furthermore, unlike the widely recognized three elements, the proposed additional condition has not been required in state practice or in decisions of international courts and tribunals.[115]

The existence of the above three elements distinguishes *res judicata* from other principles or rules with preclusive effects.[116] For instance, the doctrine of issue estoppel does not require identity of cause.[117]

The identity of elements is a condition for application.[118] The above three elements are often referred as separate and concurrent conditions. Since the requirement is that the three elements be met concurrently, the fact that they are met may be regarded as a single "condition of identity" for the application of *res judicata*.

The existence of the condition of identity is necessary for *res judicata* to apply.[119] The condition of identity as to the above three elements, is, nevertheless, not sufficient.[120] The ICJ has expressly stated that "[i]t is not sufficient, for the application of *res judicata*, to identify the case at issue," as "characterized" by the aforementioned three elements.[121] Consequently, the "identity between requests successively submitted to it by the same parties" and of their object and legal grounds is unsatisfactory.[122]

The ICJ has set out further conditions for the application of *res judicata* to a "given case."[123] In order to establish the applicability of *res judicata*, the ICJ is, thus, called upon to determine "whether and to what extent" a claim "has already been definitively settled."[124]

The ICJ is precluded from considering a matter in a second proceedings if the same matter has been decided in the first proceedings.[125] Therefore, the ICJ "must determine whether and to what extent the first claim has already been definitively settled."[126]

In this vein, a second condition for application is the character of a matter as having "in fact been determined, expressly or by necessary implication."[127] The failure to establish that a matter has not been so determined implies that "no force of *res judicata* attaches to" the decision in question.[128]

2. The Condition of Being Established "expressly or by necessary implication" in International Law, and the Condition of Express Determination or Determination by "necessary implication" as Necessary and Sufficient Condition for Application of Res Judicata

The ICJ has indicated that in order to apply *res judicata*, "it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed."[129]

The ICJ has further stated that "a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it."[130]

A "finding" which "must as a matter of construction be understood, by necessary implication, to mean" a certain perception of the ICJ as to a respondent's "position

to participate in cases before the Court" has served as a basis to proceed to make a finding on jurisdiction which would have the force of *res judicata*.[131]

An issue not raised by the parties, nor expressly addressed in a decision, may be found to have "in fact been decided" in a subsequent decision.[132] The subsequent decision may, in turn, be contradictory with decisions in other proceedings having some relation to the proceedings in question. Such contradiction does not necessarily raise questions as to potential *res judicata* implications.[133] That contradiction, given the lack of a rule of binding precedent in international law generally, does not have any legal consequences.[134]

The above propositions raise the general question of the condition of "necessary implication" as a general matter in international law.[135] The use by the ICJ of "necessary implication" in connection with its application of *res judicata* has drawn criticism by dissenting members in cases such as *Genocide*.[136]

The phrase "expressly or by necessary implication" is employed regarding a variety of fields of international law,[137] including general regimes, such as the law of treaties,[138] the law of international responsibility,[139] and special regimes governing various fields,[140] including the law of international organizations[141] and human rights.[142]

The phrase "necessary implication" is also used in various ways. "Necessary implication" may attribute logical necessity to general or particular propositions. In general, "necessary implication" is used in propositions regarding alleged necessary properties of international law.[143] In a general sense, it also denotes the logical necessity of, or the process leading to, inferences drawn from various propositions.[144] "Necessary implication" may be predicated of relations between international law and domestic law,[145] as well as between general and special international law regimes operating in various fields.[146] Other general uses include determinations of the scope of application of treaties.[147] In particular, "necessary implication" might have a place in the application of international human rights[148] and international criminal law.[149]

The condition of "necessary implication" is of relevance to the law of international organizations. The character of powers as being "conferred upon […] by necessary implication" is a question which continues to raise "the difficult issue of implied powers of international organizations."[150] The nature of powers and functions of an international organization, by contrast to those of a state, is described as being limited under its constituent instrument, by virtue of limitations set out in the instrument "expressly or by necessary implication."[151]

In this vein, positions in favour of restricting the power of international organizations, and in particular the potential for expansion of its scope, rely on the claim that international organization only have powers which "were clearly granted to them, either expressly or by necessary implication, by the founding States."[152]

A subsidiary power of an organization may arise by "necessary implication," where the power is "essential" for the performance of the organization's duties.[153] The condition that a function be "essential" has arguably been construed "widely" by the ICJ[154] and in scholarship.[155] The specific content of "necessary" remains somewhat unsettled in scholarship on the law of treaties generally.[156] In particular, the

"principle of necessary implication" is regarded as providing a basis for the existence of "administrative powers" exercised by United Nations organ in connection with the maintenance of international peace and security.[157]

The condition of "necessary implication" has been examined in a variety of situations in which law of treaties issues have arisen.[158] In general, "necessary implication" has a place in the interpretation of treaties, as recognized in scholarship, early[159] and contemporary.[160] It has been argued that "necessary implication" is in itself an act of treaty interpretation,[161] which is grounded on the principle of effectiveness and based on the object and purpose of the treaty.[162]

Nevertheless, the foregoing analysis shows that "necessary implication" is, instead, an element of the process leading to, or the consequences of, an interpretation of a treaty from which the implication is inferred.[163] For instance, where an implied power is derived "by necessary implication," the implication is a legal consequence of interpreting the respective constituent instrument, not the interpretation itself, which necessarily precedes the implication of the power.[164]

The question of whether a term in an instrument has been given a special meaning would depend on the intention of the author of the instrument, "manifested […] expressly or by necessary implication."[165] In connection with its consent to the ICJ's jurisdiction, a state may exclude in its declaration "principles and rules of international law in any sphere of international relations," by means of a reservation.[166] The reservation must be set out in the declaration "either expressly or by necessary implication."[167] In the absence of such a reservation, express or by necessary implication, the declarant state's silence would not be an obstacle to the operation of international law in force, in its entirety.[168]

The law of treaties issues which involve "necessary implication" include the operation of multilateral treaties setting out territorial regimes. This was the case of the treatment of the Act of Algeciras, a multilateral convention. The Act of Algeciras was arguably superior to prior bilateral treaties according to its Article 123.[169] A "scheme of rights and obligations" was described as having been "established, whether expressly or by necessary implication" by the Act of Algeciras in the relations between Morocco and the United States of America.[170] This scheme could not, arguably, be "impaired" by mere "transactions" between any of the signatories other than Morocco and the United States of America concluded without the consent of the Morocco and the United States of America.[171] The consular system of the Act was primarily adopted "by necessary implication."[172] Adoption by implication was the only means of adoption, because the consular system was "part of the established order at that time."[173] Giving effect to the provisions while ignoring the "basic implication" of consular jurisdiction could "result in anomalies."[174] In order to maintain the Act of Algeciras in a manner having "a logical and coherent structure" it was necessary to have a "full consular system" in operation.[175] The adoption of the consular system was a question independent of the duration of the system as a whole.[176] The latter question concerned the termination of the "agreement by conduct" upon which the system was based, among others.[177]

In relation to a treaty regime having an impact on the protection of the

environment, it has been argued that, "[b]y necessary implication," a finding that risk of causing harm is necessary in order to determine the need for an environmental impact assessment amounts to rejecting the argument that the test is not the risk of harm but its likelihood or probability.[178] Relatedly, it has been argued that a prohibition preventing personnel from Costa Rica from accessing disputed territory, in spite of a finding that Costa Rica's title to territory was plausible, arguably followed "[b]y necessary implication" from an ICJ order concerning "any personnel," whether Nicaraguan or Costa Rican.[179]

The condition of "necessary implication" has been examined in connection with procedural matters. In general, it must be born in mind that requirements under international law for jurisdiction and admissibility may be excluded "expressly or by necessary implication."[180]

The ICJ relied upon "necessary implication" in connection with its "substantial assessment of *jus standi* in two cases."[181] While the ICJ found that the Federal Republic of Yugoslavia ("FRY") was deprived of *jus standi* given that it was not a member of the United Nations in the period 1992–2000, the ICJ found that Serbia had *jus standi* "through the form of decision by "necessary implication."[182] The treatment of *jus standi* in the merits phase of *Genocide* arose from the needs of "an *ad hoc* construction of decision by necessary implication."[183] This treatment arguably consisted in "equalizing […] jurisdiction *ratione personae* and *jus standi*."[184] Relatedly, the 2008 judgment, in contrast to the 1996 judgment, treated the 1992 declaration as "the basis of the jurisdiction *ratione materiae*."[185] This "turn in the treatment of the declaration," regarded in the 1996 judgment as being also "a proper basis of the jurisdiction of the Court *ratione personae*," was likewise arguably dictated by the needs of the 2007 judgment "*ad hoc* construction of […] by necessary implication."[186]

The need to address, "as a matter of logical construction … by necessary implication," whether the FRY had capacity to appear before the ICJ, has been discussed.[187] The "necessary implication" of the "logical construction" of the 2007 judgment in *Bosnia and Herzegovina v Serbia and Montenegro* was a set of findings as to the character of the FRY as State party to the ICJ Statute and member of the United Nations in 1996.[188] This finding stood in contrast to the "novel idea" advanced in the 2008 judgment.[189] According to the 2008 judgment, a jurisdictional "obstacle" in the 2004 judgment in *Legality of Use of Force* "became a minor procedural issue" in the 2007 judgment.[190]

Lastly, "necessary implication" may be involved in determinations of the law applicable to the merits in the case of a treaty setting out obligations of *ius cogens*. It has been questioned whether it can be inferred "by necessary implication" from the basic principle underlying the Genocide Convention, concerning the definition of genocide as a crime which states are obligated to prevent and punish, that the Convention "should […] be deemed to impose" an obligation "to accept direct international responsibility […] and be held to account under the Convention, despite the fact that the article does not contain any provision imposing such an obligation."[191]

IV. *Res Judicata*, the Settlement of Maritime Delimitation Disputes, and the Condition of Determination by "Necessary Implication"

Part III has examined the conditions for application of the principle of *res judicata* in general. Part III has also examined the second, and necessary and sufficient, condition for application of *res judicata*, namely determination of a matter by express means or "necessary implication." In order to shed light on the content of the second condition of application of *res judicata,* Part III has focused on the latter means of determination and has analyzed the condition of "necessary implication."

The substantive effects of *res judicata* are of special relevance to boundary disputes. As pointed out in *Northern Cameroons*, *res judicata* implies the impossibility of changing the legal position created by the judgment with *res judicata* effects.[192]

The ICJ has had an opportunity to examine and apply *res judicata* in connection with proceedings of maritime delimitation. In *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Colombia claimed that the decision adopted by the ICJ in its Judgment of 19 November 2012 "was both expressly and by necessary implication a final one."[193] More specifically, the effect of the 2012 Judgment claimed by Colombia concerned the *res judicata* effect of a ruling on burden of proof.[194] Colombia's claim of *res judicata* concerned paragraph 3 of the dispositif of the 2012 Judgment.[195] This paragraph included the phrase "cannot uphold," in relation to Nicaragua's final submission, regarding its entitlement to a continental shelf beyond 200 nautical miles from the Nicaraguan mainland.[196] Colombia maintained that this phrase amounted to a rejection, whereas Nicaragua considered that, by not stating that its claims were rejected, the ICJ had refrained from deciding on the merits of its final submission.[197] Colombia claimed that Nicaragua was ruled to have failed to discharge its burden of proving that it has an entitlement to a continental shelf beyond 200 nautical miles from the Nicaraguan mainland.[198]

Colombia sought to preclude Nicaragua from contesting the absence of an entitlement to a continental shelf beyond 200 nautical miles as between Nicaragua and Colombia, "in perpetuity."[199] Colombia also sought to preclude Nicaragua from asserting an entitlement to a continental shelf beyond 200 nautical miles as a basis to allege that Colombia had engaged in illegal conduct in the area claimed by Nicaragua.[200] Colombia only claimed, nonetheless, that an entitlement to a continental shelf beyond 200 nautical miles was not opposable to it.[201] Nicaragua, according to Colombia's claim, was not precluded from taking forward its submission before the Commission on the Limits of the Continental Shelf, vis-à-vis "all parties to UNCLOS."[202]

Since *res judicata* is created only as between the parties to a case, the 2012 Judgment did not preclude Nicaragua from asserting an entitlement to a continental shelf beyond 200 nautical miles against "other neighbouring States."[203] Despite the effects of *res judicata*, Nicaragua could pursue the delineation of the outer limits of

its continental shelf "within the framework of UNCLOS."[204] Nor did the 2012 Judgment have any implications regarding the burden of proof regarding third States.[205]

Neither Nicaragua's nor Colombia's analysis of paragraph 3 of the *dispositif* of the 2012 Judgment was "persuasive."[206] As for Colombia's claim, the reason for not upholding a submission may arise from the inexistence of a dispute over a section of a boundary to which the submission not upheld related, thus preventing the ICJ from exercising its judicial function. The inexistence of a dispute, as a primary condition for the exercise of the ICJ's jurisdiction, is not related to a supposed failure to "establish a factual predicate" for claims.[207] Where the issue of a submission not upheld is one in relation to which the ICJ may exercise its judicial function, a finding that the submission cannot be upheld is not necessarily the same as rejecting the submission.[208] This case called for "[a] more fruitful inquiry," concerning why the ICJ decided in paragraph 3 of the dispositif that Nicaragua's final submission could not be upheld.[209] The reasoning indicating the "scope" of paragraph 3 of the *dispositif* of the 2012 Judgment is set out in paragraph 129.[210] Paragraph 129 is limited to a claim to an outer continental shelf overlapping with Colombia's 200-nautical-mile entitlement from Colombia's mainland coast.[211] Paragraph 129, and, "therefore," paragraph 3 of the *dispositif* did not make any determination as to "the area more than 200 nautical miles from either mainland coast."[212]

The application of *res judicata* to the 2012 Judgment was susceptible of separate rulings: in relation to claims relating to areas beyond 200 miles from the Colombian mainland only, and in relation to claims relating to areas beyond 200 miles from the Colombian mainland, but within 200 nautical miles of the Colombian islands.[213] The 2012 Judgment did not distinguish between these two areas of "overlapping entitlement."[214] The 2012 Judgment was susceptible of different interpretations.[215]

In part, *res judicata* could have barred Nicaragua's request.[216] This dissent is confined to a difference over the interpretation of the *dispositif* in the 2012 Judgment.[217] *Res judicata* would have barred Nicaragua's submission relating to Colombia's entitlement as measured from Colombia's mainland coast.[218] The ICJ would have determined in its 2012 Judgment that Nicaragua did not prove that its continental shelf entitlement extended so as to overlap with Colombia's entitlement measured from Colombia's mainland coast.[219] Nicaragua should have been barred from making its claim regarding the Colombian mainland entitlement in application of *res judicata*, for "procedural fairness" reasons.[220]

The "text of the *dispositif*" does not provide an answer to the question as to why the ICJ determined that it was not in a position to delimit as requested in Nicaragua's "submission I (3)," leading to its decision that this submission could not be upheld.[221] One reading of the essential considerations in support of the *dispositif* in the 2012 Judgment is that the ICJ concluded that Nicaragua had failed to establish the facts it asserted as a basis of its submission I (3), although it did not "set out in its reasoning the specific inadequacies of Nicaragua's evidence."[222] This decision was not a decision as to admissibility, but rather on the merits.[223] The 2012 Judgment had a *res judicata* effect only with respect to "any overlap between Nicaragua's entitlement and Colombia's mainland entitlement."[224] This created no *res judicata* effect regarding claims

as to "any overlap between Nicaragua's entitlement and Colombia's insular entitlement in the area beyond 200 nautical miles of Nicaragua's coast."[225] The latter claims, according to this analysis, were admissible.[226]

Nicaragua was regarded as having introduced a "reformulated claim" after the 2007 Judgment.[227] To the extent that the ICJ stated that it needed not address arguments as to the effects of an extended continental shelf of one party on the entitlement to a continental shelf of the other party, it would be impossible to conclude that the ICJ "made a final and binding decision on the merits that can be said to constitute *res judicata*."[228] That such a "final and definitive determination of the merits" was not made is further shown by the structure of the 2012 Judgment.[229] Unlike the conclusion stated in operative paragraph 251 (4) of the 2012 Judgment, based on a scrutiny of evidence in Part V, the statement in operative paragraph 251 (3) was "not a conclusive determination of the subject-matter requested by Nicaragua in its submission I (3)."[230] Therefore, the latter could not constitute *res judicata*.[231] The question of burden of proof was not essential, and it would "read too much" into a *dictum*.[232]

V. Conclusions

The article has sought to provide an account of the ways in which the principle of *res judicata* has been applied generally and in connection with the settlement of maritime delimitation disputes by the ICJ. The article has examined the significance of the condition of determination by "necessary implication" to the application of the principle of *res judicata* to decisions, generally and in proceedings concerning maritime delimitation disputes.

Despite the express invocation of the condition of "necessary implication" in decisions concerning maritime delimitation, given the openness of the condition of "necessary implication," there are no specific aspects of maritime delimitation disputes which lead to a differential application of *res judicata* where a matter is regarded as having been determined by "necessary implication."

To sum up, it is suggested that, like in other proceedings, the application of the principle of *res judicata* to matters determined by "necessary implication" depends upon the proper determination of the scope of the decisions at issue, leaving room for a significant use of "necessary implication" in the particular instance of maritime delimitation proceedings.

Notes

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3. Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, Judgment, 15 December 1949, ICJ Reports 1949, p. 244 ("*Corfu Channel, Compensation*"). See Dodge, 2006, para. 1.

4. Judgment, 13 June 1951, ICJ Reports 1951, p. 71 ("*Haya de la Torre*").

5. Judgment, 18 July 1966, ICJ Reports 1966, p. 6 ("*South West Africa*").

6. ICJ Reports 1999, p. 31.

7. ICJ Reports 2007, p. 43 ("*Genocide*"). For a commentary on this judgment's analysis of *res judicata*, see Ottolenghi and Prows, 2009, p. 37.

8. 2016 Separate Opinion, Greenwood, para. 2, citing opinion of Judge Anzilotti in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J. Series

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9. Judgment No. 11, December 16, 1927, PCIJ Rep Series A No 13.

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11. *The Pious Fund* (United States of America v Mexico), 14 October 1902 (vol. IX, United Nations, Reports of International Arbitral Awards ["RIAA"]), pp. 1–14 ("*The Pious Fund*"); *The Orinoco Steamship Company* (United States of America, Venezuela), 25 October 1910 (vol. XI, RIAA), pp. 227–241 ("*Orinoco Steamship Company*"); *Trail Smelter* (United States of America, Canada), Decision, 11 March 1941 (vol. III, RIAA), pp. 1950–1951 ("*Trail Smelter*"), p. 1950.

12. French-Venezuelan Commission, *Company General of the Orinoco*, 31 July 1905 (vol. X, RIAA), pp. 184–285 ("*Company General of the Orinoco*").

13. *Amco Asia Corporation and others v Republic of Indonesia*, 20 November 1984 (Case No ARB/81/1) (1993) 1 ICSID Rep 413 ("*Amco v Indonesia*"); *Amco Asia Corporation and others v Republic of Indonesia: Resubmitted Case*, Decision on Jurisdiction, 10 May 1988 (Case No ARB/81/1) (1993) 1 ICSID Rep 543 ("*Amco v Indonesia: Resubmitted Case*"); *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, 1 November 1999 (NAFTA Chapter 11 Arbitration Tribunal, Case No. ARB[AF]/97/2) (2000) 39 ILM 537 ("*Azinian v Mexico*"); *Waste Management, Inc. v United Mexican States* (ICSID Case No. ARB[AF]/00/3), Mexico's Preliminary Objection concerning the Previous Proceedings, Decision of the Tribunal.

14. Initiated by an application of 25 February 2014, http://www.icj-cij.org/en/case/157.

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16. *Land Boundary and Maritime Delimitation (Costa Rica v Nicaragua)*, Judgment, 2 February 2018 ("*Costa Rica v Nicaragua*, Judgment"), para. 51, http://www.icj-cij.org/files/case-related/165/165–20180202-JUD-01–00-EN.pdf.

17. 2016 Separate Opinion, Greenwood, para 2, adding that, as a doctrine, it would have "its origins" in "general principles of law"; 2016 Dissenting Opinion, Donoghue, para. 1. It appears that no difference is drawn between "doctrine" and "principle," when used to describe *res judicata*. See also Kolb, 2003, p. 295; Pauwelyn, 2003, p. 115; Dodge, 2006, para. 1; Pauwelyn and Salles, 2009, p. 86 (referring to *res judicata* and *lis pendens* as "preclusion doctrines"); Yang, 2011, p. 355; Focarelli, 2012, p. 329; Martinez-Fraga and Samra, 2012, p. 421; Boisson de Chazournes, 2017, p. 16.

18. *Company General of the Orinoco*, p. 276 (citing *Southern Pacific R. Co. v U.S.*, 168 Sup. Gt. Rep., 1, and holding that "[t]he general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed"). See also 2016 Separate Opinion, Greenwood, para 2; 2016 Dissenting Opinion, Donoghue, para. 1. See also Conway, 2003, 217 (noting that *ne bis in idem* is "the criminal law application of a broader principle, aimed at protecting the finality of judgments, encapsulated in the doctrine *res judicata*"); Pauwelyn, 2004, p. 303 (referring to "principles that may be useful to avoid duplication of proceedings, such as *res judicata*, abuse of process, and *lis alibi pendens*"); Biehler, 2008, p. 157; Yang, 2011, p. 355.

19. Scobbie, 1999, p. 299 ("[t]he doctrine of *res judicata* is perhaps most frequently seen as a general principle of law").

20. *Costa Rica v Nicaragua*, Judgment, para 68, citing *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58 "and authorities cited therein," namely *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 90 91, para. 116; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment (Application by Honduras for Permission to Intervene), ICJ Reports 2011, p. 420 ("well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute"), cited by ILA, 2016, p. 8, para. 23 (adding "i.e., the principle of *res judicata*"); *Amco v Indonesia: Resubmitted Case*, para. 26 ("[t]he principle of *res judicata* is a general principle of law"); *Waste Management v Mexico*, para. 39 ("[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the Inter-

national Court of Justice"), cited by ILA, 2016, p. 20, para. 63*n*124, and Yang, 2011, p. 356*n*105. See also Ciobanu, 1975, p. 135 ("[o]ne of the general principles of law recognized by nations is *res judicata pro veritate habetur*"); Scobbie, 1999, p. 299 (referring to "[t]he doctrine of *res judicata* […] as a general principle of law, imported into public international law by virtue of the operation of Article 38.1c of the Statute of the International Court"); Amerasinghe, 2003, p. 200 (stating that "[t]he principle of *res judicata* as a general principle of law of international adjudication, whether arbitral or otherwise, seems to be well accepted"); Kim, 2004, p. 30; White, 2004, 109 (referring to Phillimore's view that "general principles accepted by States in a domestic context included the principles of good faith and *res judicata*"); Fontanelli, 2012, p. 125, n 28 (referring to Phillimore, who included *res judicata* among general principles of law "already accepted in *foro domestico*"); Nguyen, 2013, p. 135.

21. Boisson de Chazournes, 2017, p. 64.

22. Dodge, 2006, para. 3.

23. *Petrobart Limited v The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, p. 64 ("[t]he Treaty contains no provisions about *res judicata*, but the notion of *res judicata* is undoubtedly recognised in international law"), cited by ILA, 2016, p. 18, para. 56*n*109. See also Amerasinghe, 2003, p. 427 (stating, in relation to the question of whether it applies "in the absence of clear indications in the constitutive instrument […] it is likely that the doctrine is generally applicable as a general principle of law, pursuant to the reference in Article 38[1] of the state to the ICJ"); Nguyen, 2013, pp. 133 and 165 (arguing that "inherent powers might be a practical alternative basis on which non–WTO norms, including *res judicata* and *lis pendens*, can be applied in WTO disputes," but concluding that they may not be so applied, as they fail to meet WTO-consistency criteria).

24. *Corfu Channel, Compensation*, p. 248 ("in accordance with the Statute [Article 60], which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*"). See Ottolenghi and Prows, 2009, p. 38 (observing that "the *Genocide* case did provide one important clarification on the source of res judicata in the Court's jurisprudence, as the Court clearly noted its application of *res judicata* was based solely on its Statute and did not rely on any 'general principle of law'").

25. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58; *Costa Rica v Nicaragua*, Judgment, para 68. See Amerasinghe, 2003, p. 201 (stating that "[i]n the case of the ICJ, Article 60 of its statute incorporates expressly the principle of *res judicata* (subject to Article 61)"); Jacob, 2011, p. 1019 (noting that the ICJ's proposition that a "positive statement" is contained in Article 59 meant "situating Article 59 within the distinctive context of *res judicata*"); Boisson de Chazournes, 2017, p. 65 (commenting on the aforementioned judgment).

26. Amerasinghe, 2003, p. 426*n*1 (listing various treaty provisions).

27. 17 UST 1270, TIAS 6090, 575 UNTS 159. See Stanivuković, 2015, p. 224 (arguing that "Article 53 may be said to embody the principle of *res judicata* within the particular legal order existing under the Convention").

28. OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

29. ETS 5; 213 UNTS 221.

30. 1833 UNTS 3; 21 ILM 1261 (1982).

31. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 ILM 223, 230 (1981); 1 Iran-U.S. CTR 9 (1983); 75 AJIL 422 (1981).

32. Amerasinghe, 2003, p. 426, n 1.

33. Pauwelyn, 2004, pp. 291–292 (referring to WTO Appellate Body reports to that effect).

34. Brown, 1996, p. 375 (noting that "[a]long with collateral estoppel, res judicata is part of the procedural world of the common law"); Guillaume, 2000, 4 (referring to the use in "[s]ystems of national law" of *lis pendens* and *res judicata*, and noting the lack of relevant rules under international law); Pauwelyn, 2003, p. 115 (referring to "other general principles of law, in particular those of *lis alibi pendens* and abuse of process"); Focarelli, 2012, p. 329 (adding that, unlike *res judicata*, "[t]he principle of *lis pendens* is not part of general international law"); Baldwin, 2014, p. 236 (referring to "the closeness between the doctrines of *lis alibi pendens* and *res judicata*");

Boisson de Chazournes, 2017, p. 16 (referring to various "doctrines" including "lis alibi pendens, connexité, res judicata or electa una via," among other "well-known procedural mechanisms"); Gaillard, 2017, p. 15*n*68 (citing *Henderson v Henderson* [1843] 3 Hare 100, and arguing that it "allows a judge to exercise […] discretion" as to "whether the party should subsequently be barred from bringing the matter or claim in the subsequent one").

35. Guillaume, 2000, 4 (adding that *res judicata* effects of decisions issued by "different judicial fora" may pose challenges to "coherence"); Boisson de Chazournes, 2017, p. 64.

36. Pauwelyn and Salles, 2009, p. 85; Martinez-Fraga and Samra, 2012, p. 435*n*59 ("[t]hough conceptually similar to *res judicata*, *lis pendens* applies when the parallel proceedings are ongoing. *Res judicata*, in contrast, relates to the binding and preclusive effects of completed proceedings"); Stanivuković, 2015, p. 220 ("*res judicata* ensures conclusive and preclusive effects of prior decisions in subsequent proceedings"); Collins of Mapesbury, 2016, p. 284, para. 67 (referring to the "*res judicata* effect" of a decision as concerning "i.e., whether they are conclusive in subsequent proceedings").

37. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 90 91, para. 116; *Costa Rica v Nicaragua*, Judgment, para 68.

38. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 125, para. 58, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 90 91, para. 115; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections (Nigeria v Cameroon), Judgment, ICJ Reports 1999 (I), p. 36, para. 12; *Corfu Channel (United Kingdom v Albania)*, *Assessment of Amount of Compensation*, Judgment, ICJ Reports 1949, p. 248. See also Rosenne, 1997, p. 1656 (referring to *Barcelona Traction [Preliminary Objections]*); Gal-Or, 2008, p. 46.

39. 2016 Separate Opinion, Greenwood, para 3. See also Dodge, 2006, para. 1 ("[t]he rationale for the doctrine of res iudicata is two-fold").

40. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, I.C.J. Reports 2007 (I), pp. 90–91, para. 116, quoted in 2016 Separate Opinion, Greenwood, para 3. See also Amerasinghe, 2003, p. 426 (noting that, since "[t]he constitutive instruments of established courts generally expressly state that the judgments of the tribunals shall be final [and binding] and, sometimes, without appeal, and the compromis of arbitral tribunals may have the same or similar language," it follows that "it is clear that the doctrine of *res judicata* is applicable").

41. *Bosnia and Herzegovina v Serbia and Montenegro*, para. 116.

42. *Ibid.*, para. 116. Dodge, 2006, para. 1

43. Dodge, 2006, para. 1 (noting that "as a matter of public policy, there must be an end to litigation").

44. *Ibid.*

45. Brown, 1996, p. 375 (citing the maxim "*interest reipulicae ut sit finis litium*," and stating, in relation to collateral estoppel and res judicata that "[t]he function of these principles […] is to bring an end to litigation").

46. Palombino, 2015, p. 516 (referring to "*res judicata*, as an expression of legal certainty").

47. *Bosnia and Herzegovina v Serbia and Montenegro*, para. 116. See also Jacob, 2011, p. 1023 (stating that "*res judicata* is specifically concerned with […] assuring a litigant the benefit of an obtained judgment").

48. Dodge, 2006, para. 1 (noting that "as a matter of private justice, no one should be proceeded against twice for the same cause [*Ne bis in idem*]").

49. *Ibid.*

50. *Ibid.*

51. 2016 Separate Opinion, Greenwood, para 5 (referring to the Bosnia case and to Article 59 of the ICJ Statute as well).

52. *Trail Smelter*, p. 1950 ("[t]hat the sanctity of *res iudicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law"), quoted by 2016 Separate Opinion, Greenwood, para 2; Dodge, 2006, para. 3; *South West Africa*, pp. 36–37, para. 59 (determining "whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term,—whether it ranks as a 'decision' for the purposes of Article 59 of the Court's Statute, or as 'final' within the meaning of Article 60"). See also Dodge, 2006, para. 1 (referring to "a final adjudication by a court or arbitral tribunal"); Boisson de Chazournes, 2017, p. 64.

53. See Torres Bernárdez, 2006, p. 61; Collins of Mapesbury, 2016, p. 284, para. 67 ("It is important to note that both in international law and in national law there is a difference between the binding character of orders for interim measures [i.e., whether they must be obeyed] and their *res judicata* effect [i.e., whether they are conclusive in subsequent proceedings]. Because of their provisional nature, orders for provisional measures do not create a *res judicata*").

54. *City Oriente Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, May 13, 2008, para. 96 ("[t]he decisions on provisional measures do not constitute *res judicata*, so that the provisional measures ratified hereby may be amended, expanded or revoked at the request of either party at a later stage of the proceedings"), cited by Collins of Mapesbury, 2016, p. 284, para. 73. See also Torres Bernárdez, 2006, p. 61.

55. *South West Africa*, p. 37, para. 59 (concluding that "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection"). See Dodge, 2006, para. 13.

56. See Torres Bernárdez, 2006, p. 61 (referring to the effects of a decision for "an Article 62 intervening State," and noting that "binding effects should not be confused with res judicata effects as recognised in Article 63").

57. But see *Waste Management v Mexico*, para. 45 ("at whatever stage of the case it is decided, a decision on a particular point constitutes a res judicata as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal") and noting that this diverges from the proposition in *South West Africa*, p. 37, para. 59. See Dodge, 2006, para. 13 (noting that *Waste Management v Mexico* "recognized an exception […] where a decision on jurisdiction necessarily decides an identical issue later raised on the merits"). Nevertheless, in *Waste Management v Mexico* the tribunal ultimately decided that "there was no decision by the first Tribunal between the parties which would constitute a res judicata as to the merits of the claim now before us." *Waste Management v Mexico*, para. 46.

58. Lauterpacht, 1982, p. 19 (arguing that, although ICJ Statute Article 59 "limits the formal authority of the decision to the case" at issue, the ICJ's freedom to reconsider the law meant it "is not without usefulness").

59. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 20, 2005), cited by Yang, 2011, p. 358 (commenting that "the new dispute is triggered by EC and not just the original disputants, Uruguay and Brazil. Therefore, it is logical to state the nonapplicability of the principle of *Res Judicata*").

60. Pellet, 2011, pp. 257–259 (arguing that "[t]he means to ensure the protection of third States may seem diverse […] the international court or tribunal may take shelter under Article 59 of the Statute of the ICJ and, more generally the principle of *res judicata*," in spite of the insufficiency of *res judicata* in certain cases).

61. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 61.

62. 2016 Separate Opinion, Greenwood, para 7 (adding that this is so "strictly speaking"). See also Palombino, 2015, p. 511.

63. *Waste Management v Mexico*, para. 39.

64. *South West Africa*, p. 37, para. 59 (adding that "[i]t cannot rank as a final decision on the point of merits involved").

65. Amerasinghe, 2003, p. 435 (stating that "the Court's approach to the scope of *res judicata* can only be determined by reference to the pleadings, and particularly, the submissions of the parties").

66. Brown, 1996, p. 376 (observing that "[i]ssue preclusion prevents a party from raising

issues which have been previously adjudicated, whereas res judicata prevents a party from readjudicating an entire claim which has already been decided").

67. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 61.

68. *Ibid.*

69. *Ibid.* (referring, in this instance, to the decision "adopted in subparagraph 3 of the operative clause of the 2012 Judgment").

70. 2016 Separate Opinion, Owada, para 8.

71. 2016 Separate Opinion, Owada, para 9.

72. "[I]f any question arises as to the scope of res judicata attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given." See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 95, para. 125, quoted in 2016 Separate Opinion, Owada, para 8.

73. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 61.

74. 2016 Separate Opinion, Owada, para 8.

75. 2016 Dissenting Opinion, Donoghue, para. 6, quoting *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)*, Judgment, I.C.J. Reports 2013, p. 306, para. 68.

76. 2016 Dissenting Opinion, Donoghue, para. 6, quoting para. 34 of the 2013 Judgment, alongside *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20, cited in para. 34 of the 2013 Judgment.

77. 2016 Dissenting Opinion, Donoghue, para. 7, referring to "the Court's 2012 Judgment" and quoting Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 95, para. 126, citing 2016 Judgment, para 60.

78. 2016 Dissenting Opinion, Donoghue, para. 7.

79. 2016 Separate Opinion, Greenwood, para 5 (referring to "consequences" instead of "effects").

80. Kreća, 2014, p. 18 (noting that "[t]wo components may be discerned in the substance of *res judicata* as provided in the Statute of the Court," including a "procedural" aspect, under ICJ Statute Article 60).

81. 2016 Separate Opinion, Greenwood, para 5 ("One consequence is that the effects of *res judicata* are substantive, rather than procedural"); Kreća, 2014, p. 18 (referring to a "substantive" aspect, of the "two components" of *res judicata*, under ICJ Statute Article 59).

82. Dodge, 2006, para. 1 (noting that *res judicata* "is said to have both a positive and a negative effect" and "is most commonly associated with its negative effect").

83. *Ibid.*

84. Dodge, 2006, para. 1 ("[t]he negative effect is that an issue decided in a judgment or award may not be relitigated"); Focarelli, 2012, p. 329 (referring to the character of "a final judgment or award" as "incapable of re-litigation in other courts [negative effect]"); Martinez-Fraga and Samra, 2012, p. 421*n*3 (noting that the "use of res judicata with the aim of proscribing a further or subsequent contention is often referred to as 'negative res judicata'").

85. 2016 Dissenting Opinion, Donoghue, para. 3. See also Amerasinghe, 2003, p. 429 (noting that "[t]he doctrine of *res judicata* has been applied specifically […] to render applications 'inadmissible'").

86. 2016 Separate Opinion, Greenwood, para 5.

87. 2016 Separate Opinion, Owada, para 30 (noting that "in the strictly adversarial framework of litigation traditionally accepted by the Court—whether this is a commendable approach for the proceedings of the International Court of Justice is a different matter—the burden of proof, and thus the burden of risk, falls heavily on the shoulders of the Applicant [*onus probandi incumbit actori*) (*Pulp Mills on the River Uruguay (Argentina v Uruguay*], Judgment, I.C.J. Reports 2010 [I], p. 71, para. 162").

88. 2016 Dissenting Opinion, Donoghue, para. 45.

89. *Frontier Dispute (Burkina Faso/Mali)*, Judgment, I.C.J. Reports 1986, p. 588, para. 65, quoted in 2016 Dissenting Opinion, Donoghue, para. 45.

90. 2016 Dissenting Opinion, Donoghue, para. 2.
91. *Ibid.*, para. 42 (referring to the situation of Nicaragua).
92. *Ibid.*
93. 2016 Dissenting Opinion, Donoghue, para. 2.
94. *Ibid.*, para. 42.
95. 2016 Separate Opinion, Greenwood, para 5.
96. Dodge, 2006, para. 1 ("*Res iudicata* is most commonly associated with its negative effect"); Kreća, 2014, p. 18 (adding that the procedural effect consists in "claim preclusion—meaning that a future lawsuit on the same cause of action is precluded [*non bis in idem*]").
97. Pellet, 2015, p. 11 ("the judgments and other legally binding decisions of the ICJ [as opposed to advisory opinions] impose obligations on the Parties. They might accordingly be seen as sources of obligations, but not as sources of international law: they derive from a reasoning *based on sources* of international law and lead to a decision binding for the Parties only." [Italics in the original]).
98. Kreća, 2014, p. 28 (stating that, by contrast to a decision on jurisdiction, "a judgment on the merits of a case possesses binding effect in terms of creating legal duties for the parties").
99. *Société Commerciale de Belgique*, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 176, cited Kreća, 2014, p. 28*n*34. While Kreća appears to infer from the creation of "legal duties for the parties" the obligation to comply with a judgment, the latter obligation is separate from the former obligations, contained in the judgment.
100. Kreća, 2014, p. 18 (referring to substantive effects as being concerned with "the legal validity of the Court's decision as an individualization of objective law in the concrete matter—*pro veritate accipitur*").
101. *Ibid.* (substantive effects are said to be "to the exclusion of the application of the principle of *stare decisis*").
102. 2016 Separate Opinion, Greenwood, para. 5. ("Thus, if a court or tribunal, in a case between two States, determines that one of those States has no entitlement to a continental shelf in a particular area, international law does not permit that State thereafter to assert such an entitlement in that area vis-à-vis the other State party").
103. *Ibid.*
104. *Ibid.*
105. Dodge, 2006, para. 1 ("[t]he positive effect is that a judgment or award is binding upon the parties and must be implemented in good faith [*bona fide*]"); Focarelli, 2012, p. 329 (referring to the character of "a final judgment or award" as "binding between the parties [positive effect] […]"); Martinez-Fraga and Samra, 2012, p. 421*n*3 (observing that "'positive res judicata,' […] concerns the use of an award to enforce its terms").
106. 2016 Separate Opinion, Greenwood, para. 5.
107. *Ibid.*
108. *Ibid.*
109. *Ibid.* ("then a finding that that party has not discharged its burden of proof amounts to a determination of whether or not it has that entitlement").
110. *Ibid.*, quoting French-Venezuelan Mixed Claims Commission, *Company General of the Orinoco Case*, 31 July 1905 (United Nations, Reports of International Arbitral Awards [RIAA], Vol. X, p. 276): "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed."
111. 2016 Separate Opinion, Greenwood, para 4. See also 2016 Separate Opinion, Owada, para. 2 (referring to "essentially formal criteria"). See also Pauwelyn, 2004, p. 291; Stanivuković, 2015, p. 221. But see Bermann, 2012, p. 44 (noting in the context of international commercial arbitration, that "application of the res judicata principle is not always straightforward"); Nguyen, 2013, p. 146 (stating that "[t]he application of *res judicata* is also far from settled in international law […]. It is sometimes argued that 'the excessive insistence' on formal identity of the parties is unsatisfactory, as this will preclude the application of res judicata in most cases").
112. *Trail Smelter*, p. 1952. See also 2016 Separate Opinion, Greenwood, para 4 (namely identify of parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*); 2016 Dissenting Opinion, Donoghue, para. 40 (referring to "the well-known requirements for the appli-

cation of *res judicata*—same parties, object and legal ground"); 2016 Separate Opinion, Owada, para. 2 (referring to the "the existence of three traditional elements, namely the identity of '*persona*, *petitum*, [and] *causa petendi*'"). See also Pauwelyn, 2004, p. 291 (referring to "[1] identity of parties; [2] identity of object or subject matter [it must be the very same issue that is in question]; and [3] identity of the legal cause of action"); Martinez-Fraga and Samra, 2012, p. 421 ("arbitral tribunals accept what is referred to as the "triple identity" test as the determinative standard for the application of *res judicata* to a further proceeding. The triple identity test in *res judicata* prevents relitigation of claims [1] between the same parties [2] regarding the same subject matter, and [3] on the same legal grounds"); Pellet, 2015, p. 12 (referring to "the "triple identity test"; namely, that the "*persona, petitum, causa petendi*" are identical").

113. Opinion of Judge Anzilotti, para. 1. *Trail Smelter*, p. 1952. See also Dodge, 2006, para. 4 (noting that "the question is sometimes divided into […] the object or relief […] and […] the grounds"); Ottolenghi and Prows, 2009, pp. 48–49.

114. ILA, Res Judicata *and Arbitration, Interim Report of the Seventy-First Conference*, Berlin (2004), p. 19 (stating that "[b]roadly speaking, there are four preconditions for the doctrine of res judicata to apply in international law, namely proceedings must: [i] have been conducted before courts or tribunals in the international legal order […]") cited by Yang, 2011, p. 356*n*156. The ILA, under the heading "[s]ame legal order," explains that "*Res judicata* in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal. International dispute settlement organs are not considered to be bound by decisions of national courts or tribunals."

115. ILA, *ibid.*, p. 19*n*120 ("[t]he requirement that items [ii] to [iv] must exist was confirmed by the tribunal in *CME Czech Republic BV v The Czech Republic* […], in Final Award, dated 14 March 2003"). No authority other than Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Clarendon Press, 2003) at p. 50, is provided by the ILA in support of the additional requirement. Cf., *ibid.*, p. 19*n*121.

116. Farnham, 2014, p. 210 (referring to the "Common Law jurisdictions […] theory of issue preclusion [alternatively titled 'collateral estoppel' or 'issue preclusion']" as being "related to, but narrower than, the *res judicata* doctrine," and adding that "Civil Law jurisdictions also tend to apply *res judicata* principles more restrictively by requiring firm adherence to the triple-identity criteria").

117. Pauwelyn, 2004, p. 292 (noting that "under English law, the requirements for issue estoppel are identical to the requirements for traditional *res judicata* to apply, minus the requirement of identity of cause").

118. 2016 Separate Opinion, Greenwood, para 4. See also 2016 Separate Opinion, Owada, para. 2 (referring to "the prerequisite for the application of this principle of *res judicata*").

119. *Ibid.*

120. *Ibid.*

121. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 59 (namely as "characterized by the same parties, object and legal ground").

122. *Ibid.*

123. *Costa Rica v Nicaragua*, Judgment, para 68, citing *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 125, para. 60, "quoting," in turn, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), p. 95, para. 126.

124. *Costa Rica v Nicaragua*, Judgment, para 68. See also 2016 Dissenting Opinion, Donoghue, para. 40.

125. 2016 Separate Opinion, Greenwood, para 4 (a matter must have been decided in "earlier proceedings"); 2016 Dissenting Opinion, Donoghue, para. 40 ("the doctrine of *res judicata* bars an application in a second case").

126. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 59.

127. *Application of the Convention on the Prevention and Punishment of the Crime of Geno-*

cide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007 (I), p. 95, para. 126, quoted in *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 60. *Costa Rica v Nicaragua*, Judgment, para 68.

128. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007 (I), p. 95, para. 126, quoted in *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 60.

129. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 59 (namely as "characterized by the same parties, object and legal ground").

130. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007 (I), p. 95, para. 126, quoted in *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 126, para. 60.

131. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 (I), pp. 98–99, para. 132.

132. 2016 Separate Opinion, Owada, paras 6–7 (referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro]*, Judgment, I.C.J. Reports 2007 [I], p. 101, para. 140).

133. 2016 Separate Opinion, Owada, para 7 (noting that "despite a seemingly contradictory decision of the Court in the 2004 Legality of Use of Force cases […] this precedent did not constitute *res judicata* for the 2007 case, though it could have had *stare decisis* implications for the 2007 issue [I.C.J. Reports 2004 (III), Preliminary Objections, Judgment, p. 1337, para. 76]").

134. *Contra*, 2016 Separate Opinion, Owada, para 7 (suggesting that there may be "*stare decisis* implications").

135. Cecil J. Olmstead, "Economic Development Loan Agreements—Part I—Public Economic Development Loan Agreements; Choice of Law and Remedy," *California Law Review* 48(3) (1960), p. 424, https://doi.org/10.2307/3478806; Chittharanjan F. Amerasinghe, "The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights," *Heidelberg Journal of International Law* 28(2) (1968), p. 257; Delbert D. Smith, "The Conclusion of International Agreements by International Organizations: A Functional Analysis Applied to the Agreements of the World Meteorological Organization," *Loyola University Chicago Law Journal* 2(1) (1971), p. 27; B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague: Martinus Nijhoff, 1977); Ian Sinclair, *The Vienna Convention on the Law of Treaties,* 2nd ed. (Manchester: Manchester University Press, 1984); Dapo Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice," *European Journal of International Law* 9 (1998), p. 437, https://doi.org/10.1093/ejil/9.3.437; Judith Gardam, "Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*," in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), p. 275; Gavan Griffith and Christopher Staker, "The Jurisdiction and Merits Phases Distinguished," in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), p. 59; Anthony Aust, "*Treaties, Territorial Application*," in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law, 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1492, accessed May 14, 2018; Sieg Eiselen, "Proving the Quantum of Damages," *Journal of Law and Commerce* 25 (2006), p. 375; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (The Netherlands, Dordrecht: Springer, 2007), https://doi.org/10.1007/978–1-4020–6362–6; Jillaine Seymour, "Jurisdiction and Responsibility by Necessary Implication: Genocide in Bosnia," *The Cambridge Law Journal* 66(2) (2007), p. 249, https://doi.org/10.1017/S0008197307000384; John H. Knox,

"Horizontal Human Rights Law," *The American Journal of International Law* 102(1) (2008), p. 1; Giorgio Sacerdoti, "WTO Law and the 'Fragmentation' of International Law: Specificity, Integration, Conflicts," in Merit E. Janow, Victoria Donaldson, Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement & Developing Countries* (New York: Juris Publishing, 2008), p. 595; Tarcisio Gazzini, "Personality of International Organizations," in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011), p. 33, https://doi.org/10.4337/9780857931290.00009; Mark Retter, "*Jus Cogens*: Towards an International Common Good?," *Transnational Legal Theory* 2(4) (2011), p. 537, https://doi.org/10.5235/TLT.2.4.537; Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Leiden: Martinus Nijhoff, 2012); Bart M.J. Szewczyk, "Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions," *The George Washington Law Review* 82(4) (2014), p. 1118; Michael Wood, "International Organizations and Customary International Law: 2014 Jonathan J. Charney Distinguished Lecture in Public International Law, Presented at Vanderbilt University Law School on November 4, 2014," *Vanderbilt Journal of Transnational Law* 48(3) (2015), p. 609; Dapo Akande and Antonios Tzanakopoulos, "The Crime of Aggression in the ICC and State Responsibility," *Harvard International Law Journal/Online Journal* 58 (2017), p. 33; Martins Paparinskis, "MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the 'Conventional Wisdom,'" *American Journal of International Law Unbound* 112 (2018), p. 49, https://doi.org/10.1017/aju.2018.28.

136. Ottolenghi and Prows, 2009, p. 48 (adding that, according to the dissenters, "[t]he scope of a judgment's *res judicata* should be discernable from its actual text, rather than by 'necessary implication[s]' to be drawn therefrom, since Article 56 of the Statute requires that '[t]he judgment shall state the reasons on which it is based'").

137. This phrase has also been used regarding relations between international law and systems of internal law. From the standpoint of the significance of an instrument of domestic law in the context of international law proceedings, it has been stated that it would be "unnecessary to argue" in favour of the binding character of a domestic law which has been "validly passed" and is made applicable "either expressly or by necessary implication." Separate Opinion of Sir Percy Spender in *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, Judgment of 28 November 1958, http://www.icj-cij.org/files/case-related/33/033–19581128-JUD-01–05-EN.pdf ("1958 Separate Opinion, Spencer"), p. 74. From the standpoint of the application of international law within a system of internal law, it has been argued that power conferred by domestic law provisions may encompass powers "by necessary implication" to apply international law. A claim to this effect has been made, but conflating power-conferral with permission. See David Haljan, *Separating Powers: International Law before National Courts* (The Hague: Springer, 2013), p. 83 (arguing that "a judge may resort to international law except where the constitution prohibits, and not only where the constitution permits [expressly or by necessary implication]").

138. Phillimore, 1854, p. 72, para. LXIX; Linderfalk, 2007, pp. 287 *et sq*.

139. Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford: Oxford University Press, 2014), pp. 111–112 (referring to Article 41[2] of the Vienna Convention on Diplomatic Relations of 1961, and arguing about in favour of the importance of a states' designation of a government organ primarily responsible for the conduct of the state's international relations, lest the state be prevented in practice from fulfilling treaty obligations requiring "expressly or by necessary implication" that a Foreign Ministry exist).

140. Such fields would include rules of private international law contained in public international law instruments, such as the United Nations Convention on Contracts for the International Sale of Goods, S. Treaty Doc. 98–9 (1983); A/CONF.97/18 (1980); 19 ILM 668 (1980); 52 Fed. Reg. 6262–6280, 7737 (1987); 1489 UNTS 3 ("CISG"). See Eiselen, 2006, p. 381 (arguing that issues not regulated "directly or by necessary implication" in the CISG include procedural issues concerning the *onus probandi* as to the extent of damage).

141. Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity, Fifth Revised Edition* (Leiden: Martinus Nijhoff Publishers, 2011), p. 183 https://doi.org/10.1163/ej.9789004187962.i-1273.

142. Knox, 2008, p. 13 (concerning specific limitation clauses).

143. Ramcharan, 1977, p. 175 (arguing that the International Law Commission, in "pro-

pounding the doctrine of the supremacy of international law over the power of States has, by necessary implication, eliminated the consent theory").

144. Gardam, 1999, p. 289 (arguing that "[t]here is a necessary implication" flowing from the majority's decision in *Nuclear Weapons* and discussing the content of such implication); Eboe-Osuji, 2012, p. 208 (on "the reasoning process of necessary implication" by which Article 3 of the ICTY Statute has been interpreted); Knox, 2008, p. 13 (arguing as to the necessity "by necessary implication" of the absence of any limitation of rights not addressed in "specific limitation clauses").

145. Szewczyk, 2014, pp. 1133–1134, 1171 (discussing the presumption that Congress does not intend to violate customary international law "unless that intent be manifested by express words or a very plain and necessary implication," as set out in *Murray v Schooner The Charming Betsy, 6 U.S. [2 Cranch] 64, 118 [1804])*.

146. Sacerdoti, 2008, p. 595 (arguing that the relevance of "rules and principles" of international law "[b]y necessary implication […] goes beyond the application of customary rules of interpretation in WTO dispute settlement proceedings, as explicitly provided by Article 3.2 of the DSU").

147. Aust, 2006, para 1 ("[o]ther treaties will, by their terms, identify explicitly or by necessary implication the territory of the parties to which they relate"); Paparinskis, 2018, p. 50 (arguing that states determine "whether explicitly or by necessary implication" the application of MFN clauses to other treaties' substantive rules).

148. Amerasinghe, 1968, pp. 278, 281, 300 (arguing that the rule of exhaustion of domestic remedies does not apply where human rights are violated, unless required expressly or "by necessary implication").

149. "Necessary implication" might be involved in certain determinations of responsibility, particularly under individual responsibility under international criminal law. Seymour, 2007, p. 249 *et sq*. Nonetheless, "necessary implication" has been distinguished from the existence of a separate prerequisite, Akande and Tzanakopoulos, 2017, p. 34 (distinguishing "a direct determination of state responsibility as a prerequisite" for finding "individual criminal responsibility under international law" for a crime of aggression, from "an implication—even a necessary implication—that emerges from the finding that a state organ has committed an act of genocide or a crime against humanity").

150. James Crawford, *Brownlie's Principles of Public International Law, 8th ed.* (Oxford: Oxford University Press, 2012), p. 188, https://doi.org/10.1093/he/9780199699698.001.0001.

151. Wood, 2015, p. 614.

152. Nigel D. White, *The Law of International Organisations, 2nd ed.* (Oxford: Manchester University Press, 2005), p. 106.

153. See, generally, Gazzini, 2011, p. 44. As for particular international organizations, see, *i.a.*, Griffith and Staker, 1999, p. 65 (commenting on the World Health Organization's "subsidiary powers"); Olmstead, 1960, pp. 426–427 (referring to "powers necessary and proper to effectuate the organization's purposes and objectives" under the Articles of Agreement of the World Bank, and arguing for the existence of an implied power to "to bring an international claim against a State that may default upon a loan obligation to it").

154. Akande, 1998, p. 444 (adding that, according to Lauterpacht, the ICJ "has not regarded the criterion of essentiality as meaning 'absolutely essential' or 'indispensable'"); Eli Lauterpacht, "The Development of the Law of International Organizations by the Decision of International Tribunals," 152 *RdC* (1976, IV) 387 at 430–432, cited by Akande, 1998, p. 444*n*34.

155. Smith, 1971, p. 32 (relying on "necessary implications" associated to an organization's ability to "function effectively" as a basis for the World Meteorological Organization's treaty-making power).

156. Linderfalk, 2007, p. 292 (arguing that, while for Skubiszewski and Lauterpacht "necessary" has a "weaker sense of *essential* or *vital*," it would rather have a "stronger sense of *indispensable*; *absolutely imperative*").

157. Crawford, 2012, pp. 248–249 (adding that their existence, which "legitimately rests" on necessary implication, "is not incompatible with the view that the UN cannot have territorial sovereignty").

158. Sinclair, 1984, p. 33, n 14 (concerning the rejection of a Malaysian proposal to include the phrase "expressly or by necessary implication" in VCLT Article 8).

159. Phillimore, 1854, p. 72, para. LXIX (noting that "necessary implication" may have a bearing on the meaning attributed to a treaty provision in "the practice of nations," the basis of any "usual interpretation").

160. Linderfalk, 2007, pp. 287 *et sq* (commenting on the work of Gordon, Schwarzenberger, and Merrills, among others, in support of his proposition that "necessary implication" is a form of interpretation in itself).

161. Linderfalk, 2007, p. 287 (arguing that "[n]ecessary implication […] means an act of interpretation based on the assumption that the parties to the interpreted treaty have expressed themselves through implication").

162. Linderfalk, 2007, pp. 289–291 (referring to the work of Amerasinghe and Waldock).

163. Linderfalk's formulation of implementation shows that interpretation is distinguishable from implication. Linderfalk, 2007, p. 293 ("In the rule of necessary implication, an implication is necessary if [and only if] it can be considered indispensable either to ensure that the application of the interpreted treaty provision does not result in a state of affairs which is not among the teloi of the treaty […]").

164. *Contra*, Linderfalk, 2007, p. 287 (arguing as to "necessary implication" that "such an act of interpretation is denoted using two different terms" and that "[a] first term, implied powers, is used when the content of the interpreted treaty provision is a norm that confers a power on an international organisation").

165. Dissenting Opinion of Judge Torres-Bernárdez, Judge ad hoc (translation) in *Fisheries Jurisdiction (Spain v Canada)*, Judgment of 4 December 1998, http://www.icj-cij.org/files/case-related/96/096–19981204-JUD-01–09-EN.pdf ("1998 Dissenting Opinion, Torres-Bernárdez"), para. 278.

166. *Ibid.*, para. 415.

167. *Ibid.* See also Sinclair, 1984, p. 73.

168. *Ibid.*

169. Dissenting Opinion by Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau in *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment of 27 August 1952, http://www.icj-cij.org/files/case-related/11/011–19520827-JUD-01–01-EN.pdf ("1952 Dissenting Opinion"), p. 217.

170. 1952 Dissenting Opinion, p. 217 (referring to the Act of Algeciras' "status in regard to the old bilateral treaties, as an independent and superior act" pursuant to Article 123 thereof).

171. *Ibid.* (adding that this was "fundamental").

172. *Ibid.* ("The consular system has been adopted in the Act, not so much by express provision as by necessary implication.")

173. 1952 Dissenting Opinion, p. 218 ("It would have occurred to no one to do so except by implication […]").

174. *Ibid.* (referring to the "bare provisions" of the Act of Algeciras).

175. *Ibid.*

176. *Ibid.*

177. *Ibid.* ("even without the Act, the system, being based inter alia upon long-established usage, which is only another name for agreement by conduct, can only be terminated in the way in which international agreements can be terminated").

178. Separate opinion of Judge ad hoc Dugard in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Judgment of 16 December 2015, http://www.icj-cij.org/files/case-related/152/18868.pdf ("2015 Separate Opinion, Dugard"), para. 19.

179. Dissenting Opinion of Judge ad hoc Dugard in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order of 16 July 2013, para. 9.

180. Crawford, 2012, p. 717.

181. Dissenting opinion of Judge ad hoc Kreća in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 18 November 2008, http://www.icj-cij.org/files/case-related/118/118–20081118-JUD-01–10-EN.pdf ("2008 Dissenting Opinion, Kreća"), para. 9.

182. 2008 Dissenting Opinion, Kreća, para. 9.

183. *Ibid.*, paras. 63, 116.

184. *Ibid.*, para. 63.

185. *Ibid.*, para. 116.
186. *Ibid.*
187. Separate opinion of Judge Skotnikov in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 3 February 2015, http://www.icj-cij.org/files/case-related/118/118–20150203-JUD-01–04-EN.pdf ("2015 Separate Opinion, Skotnikov"), para. 7.
188. 2015 Separate Opinion, Skotnikov, para. 7 (namely, "at the time of the filing of the relevant Application instituting proceedings, namely, 20 March 1993").
189. *Ibid.* ("namely that, although the Court was open to the FRY only as of 1 November 2000, the date of its United Nations membership […] this did not matter, since Croatia could simply have refiled its Application of 2 July 1999 after 1 November 2000").
190. *Ibid.*
191. Separate opinion of Judge Owada in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 26 February 2007, http://www.icj-cij.org/files/case-related/91/091–20070226-JUD-01–05-EN.pdf, para. 44.
192. Cited by Kreća, 2014, p. 19 (stating that "the effect of *res judicata* also extends to the judgment of the Court establishing the impossibility of changing the created legal situation").
193. *Delimitation of Continental Shelf beyond 200 nautical miles (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, pp. 100, 127, para. 66 (namely, the "decision, whereby the Court effected a full delimitation of the maritime boundary between the Parties").
194. 2016 Separate Opinion, Greenwood, para 6.
195. *Ibid.*, para 7.
196. *Ibid.* (namely Nicaragua's "final submission I [3]").
197. *Ibid.*
198. *Ibid.*, para 6.
199. *Ibid.*
200. *Ibid.*
201. *Ibid.*
202. *Ibid.*
203. *Ibid.*
204. 2016 Dissenting Opinion, Donoghue, para. 45.
205. *Ibid.*, para. 46.
206. 2016 Separate Opinion, Greenwood, para 8.
207. *Ibid.* (referring to *Burkina Faso/Niger*).
208. *Ibid.* (referring to *Oil Platforms* relevance, albeit limited, to Colombia's arguments).
209. *Ibid.*, para 9.
210. *Ibid.*, para 11.
211. *Ibid.*, para 12. Neither did the ICJ assess what Nicaragua had proved, nor did the ICJ decided what it "had to prove" in connection with the claim to an outer continental shelf overlapping with Colombia's entitlement as measured from the Colombian mainland coast. 2016 Separate Opinion, Greenwood, para 20.
212. *Ibid.*, para 12. Unlike the 2012 proceedings, Nicaragua's claim concern a delimitation of an entitlement to areas "irrespective of whether […] measured from the Colombian mainland coast (in the east) or the coasts of Colombia's islands (in the west)." 2016 Separate Opinion, Greenwood, para 13.
213. *Ibid.*, para 21; 2016 Dissenting Opinion, Donoghue, para. 1.
214. 2016 Dissenting Opinion, Donoghue, para. 4.
215. *Ibid.* (adding that her interpretation of the 2012 Judgment, being at odds with the one reached by the majority, "gives rise to [her] partial dissent").
216. *Ibid.*, paras. 1, 4 (adding that her dissent is "partial"). *Contra*, 2016 Separate Opinion, Greenwood, para 21.
217. *Ibid.*, para. 41 (having noted that she did "not take issue with the Court's summary of the law").
218. *Ibid.*, para. 1.
219. *Ibid.*
220. *Ibid.*, para. 2.

221. *Ibid.*, para. 25.
222. *Ibid.*, para. 36. This is without prejudice to her view that the ICJ's formulation of its reasoning in this regard is "entirely in line with its traditions of judicial drafting." 2016 Dissenting Opinion, Donoghue, para. 38.
223. *Ibid.*, para. 52.
224. *Ibid.*, para. 44.
225. *Ibid.*
226. *Ibid.*
227. 2016 Separate Opinion, Owada, para 10.
228. *Ibid.*, para 24, quoting Judgment, I.C.J. Reports 2012 (II), pp. 669- 670, para. 130.
229. 2016 Separate Opinion, Owada, para 26.
230. *Ibid.*, para 28.
231. *Ibid.*
232. *Ibid.*, para 31, quoting, and describing as a "*dictum*," a statement in *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 669, para. 129, to the effect that "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf."

Biographical Information

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Res Judicata and the Test of Finality[1]

Edgardo Sobenes Obregon

Structured Abstract

Article Type: Research Paper

Purpose—The aim of this paper is to provide a fresh analysis of the elements that compose the general principle of *res judicata*. On the basis of recent decisions of the ICJ, the Author argues that when dealing with *res judicata* the Court not only focuses on identifying the traditional elements of the principle, but it also engages in the task of determining whether it has, as a matter of law, decided the issue of the new proceeding in a previous one. This paper invites the reader to consider "*finality*" as a necessary condition for the principle to be activated, which can be established through a *test of finality*.

Design, Methodology, Approach—This paper presents a retrospective analysis of relevant cases of the Court that have dealt with the principle of *res judicata* and its traditional elements. It pays special attention to the judgment of the Court of 17 March 2016 concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) (Preliminary Objection)*, which to a certain extent inspires this review of the traditional elements that compose the principle of *res judicata*.

Findings—The results provide support for the Author's hypotheses that even if the three traditional elements of the principle are present in a new proceeding, i.e., *personae*, *petitum* and *causa petendi*, the Court can still decide that *res judicata* does not apply if the issue at the heart of the dispute has not previously been decided.

Originality, Value—This paper presents for the first time the "*test of finality*" and "*finality*" as a necessary condition for *res judicata* to have an effect.

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I. Introduction

In 2016, the principle of *res judicata* was discussed by the International Court of Justice ("ICJ") in its Judgment in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (hereinafter "NICOL II").[2] In this Judgment, the Court decided, among other points, that it had jurisdiction to entertain the first request put forward by Nicaragua which, according to Colombia, was barred by the principle of r*es judicata*.[3] This first request by Nicaragua consisted of the determination of the "precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012."[4]

In a previous case in 2012, namely the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*) ("NICOL I"), the ICJ decided that at the time it was not in a position to delimit the continental shelf ("CS") beyond 200 nm from the Nicaraguan baselines as requested by Nicaragua.[5] In accordance with the reasoning of the Court, at that time Nicaragua had only submitted preliminary information[6] to the Commission on the Limits of the Continental Shelf ("CLCS") and, thus did not established that it "has a continental margin that extends far enough to overlap with Colombia's 200 nautical-mile entitlement to the continental shelf."[7]

Indeed, the Court found in 2016, that in 2012 it could not uphold Nicaragua's claim, because Nicaragua "had yet to discharge its obligation," under paragraph 8 of Article 76 of UNCLOS and "deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles."[8] In response, on 24 June 2013 Nicaragua submitted its full submission to the CLCS and fulfilled its procedural obligation under Article 76(8) of UNCLOS.[9]

After fulfilling what has been termed by the Court as a *"prerequisite* for the delimitation of the continental shelf beyond 200 nautical miles"[10]; that is, a full submission to the CLCS, Nicaragua decided to initiate a new case against Colombia on the points that were not dealt with in the first case, i.e., "the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia."[11]

Colombia contested the jurisdiction of the ICJ on the grounds that "the Court ha[d] already adjudicated on Nicaragua's requests in its 2012 judgment,"[12] in the realm of NICOL I. According to Colombia, the three elements for the application of *res judicata* were present in NICOL II: an identity between the parties *(personae)*,

the object *(petitum)* and the legal ground *(causa petendi)*.[13] However, and despite the presence of the three traditional elements of *res judicata*, the Court rejected Colombia's objection and confirmed that it "did not settle the question of delimitation in 2012."[14]

The decision of the Court was far from a harmonious one, as can be easily discerned from the fact that the Court was split and the decision was reached only with the vote cast by the President. Seven Judges of the Court considered that "[n]ot only does the rejection of Colombia's third preliminary objection constitute a misreading of the Judgment of the Court in [NICOL I] … but it also detracts from the values of legal stability and finality of judgments that the principle of *res judicata* operates to protect."[15] The group of seven Judges went further and stated:

> [t]he final submission I (3) of Nicaragua in the *Territorial and Maritime Dispute* case and the First Request in Nicaragua's Application in the present case have both the same object (the delimitation of an extended continental shelf entitlement that overlaps with Colombia's 200-nautical-mile entitlement, measured from the latter's mainland coast), the same legal ground (that such an entitlement exists as a matter of customary international law and under UNCLOS), and involve the same Parties. Nicaragua is therefore attempting to bring the same claim against the same Party on the same legal grounds. As explained above, the Court rejected Nicaragua's final submission I (3) in the 2012 Judgment. Nicaragua's First Request in the present Application is thus an exemplary case of a claim precluded by *res judicata*.[16]

The majority disagreed and the Court proceeded to the merits of the case. This contribution will broadly consider the elements of the principle of *res judicata* and its application by the Court. Moreover, the author will try to clarify if, as suggested by some judges, the recent approach adopted by the Court in NICOL II undermines the values of legal stability and the finality of judgments.

II. The Principle of *Res Judicata*

Res Judicata is "a general principle of law which protects … the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal."[17] The foundation of the principle can be distilled down to two basic principles: the first concerning the finality of a litigation, which serves as a means to conclude a dispute and thus strengthens the legal security and the maintenance of international peace, and the second corresponding to the legal doctrine of "*Non bis in idem*."

Article 60 of the Statute of the Court is intended to "preserve the integrity of judgments of the Court."[18] It enshrines the formal aspect of the principle of *res judicata* by stating that "[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." The first sentence of the Article pertains to the formal aspect of the principle, which establishes the finality of judgment and infers the non-

existence of an appeal mechanism. The second part of the sentence provides the "possibility for the parties to seize the Court to interpret its judgment."[19] The judgment of the Court is binding on the parties to a specific dispute[20] and can only be subject to revision under the conditions establish in Article 61 of the Statute. It is the combined effect of Articles 59, 60 and 61[21] that reflect the general principle of *res judicata*,[22] a principle which is "one of the most essential and settled rules of the law of international tribunals."[23]

As indicated above, the traditional and widely accepted approach to the principle identifies three elements that compose *res judicata*: *persona*, *petitum* and *causa petendi*.[24] However, the importance of one key element or condition of the principle is usually overlooked, and that is the condition of *finality*. Judge Greenwood explained in his separate opinion in NICOL II that "the identity of these three elements [*personae, petitum and casusa petendi]* is a necessary, but not a sufficient, condition for the application of *res judicata*."[25] Does this mean that finality is a required condition for the *res judicata* effect? The answer is not clear. However, the recent decisions of the ICJ seem to suggest that the condition of finality indeed has a pivotal role.

III. Application of the Principle

Res judicata does not operate automatically by the mere application of the three elements. For *res judicata* to apply, the Court must first determine if the issue at hand has been decided with the force of *res judicata*[26] in a previous proceeding. If, as the Court clearly stated in the *Genocide* case, "a matter has not *in fact been determined*, expressly or by necessary implication then no force of *res judicata* [is] attache[d] to it."[27] This broad understanding of the principle[28] can also be found in the Court's judgment of 4 May 2011, on the application of Honduras to intervene in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*[29] and more recently in the Court's judgment of 17 March 2016 in NICOL II, as discussed below. This broader approach toward the principle indeed suggests a more flexible understanding of *res judicata* that is not limited by the presence of the three traditional elements.

In the Interpretation of Judgments Nos. 7 and 8 Concerning the Case of *The Chorzów Factory (Germany v. Poland)*, Germany requested the Permanent Court of International Justice to rule that its earlier decision precluded Poland from acting to remove from the land registers the name of the owner of the Chorzów factory. The Court validated the German contention, and stated:

> [t]he Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding legal force between the Parties; so that the legal question thus established cannot again be called into question insofar as the legal effects ensuing therefrom are concerned.[30]

In accordance with the above, a legal question cannot be called into question again if the same legal question has already been decided by Court in a previous

case. This decision has been echoed by the ICJ in more recent cases. In the *Haya de la Torre* case, the Court rejected the *res judicata* effect because it considered that the question of whether Colombia was obliged to surrender Mr. de la Torre to Peru "was not submitted to the Court [in the *Asylum* case] and consequently was *not decided* [or answered] by it."[31] In other words, the legal question of the previous case was different from the legal question in the new case, which left the new issue undecided and with no binding force as far as the new proceedings was concerned.

In the aforementioned cases, the Court focused not only on identifying the three traditional elements of the principle, but also on determining if the issue at the core of those cases was truly decided. In support of the latter assertion, one can refer to the *Genocide case*, where the Court determined:

> [the] principle signifies that the decisions of the Court are not only binding on the Parties, but are final, in the sense that they cannot be reopened by the parties *as regards the issues that have been determined…*[32]

By using verbs such as determine, settle or decide, the Court engages in the task of determining whether it has, as a matter of law, decided the issue of the new proceeding in a previous one. In the *Genocide* case, Judge Owada elaborated on this and emphasized that the principle should not be applied in an automatic fashion. On the contrary, he emphasized the need for the Court to determine "the scope of what has been decided as *res judicata* in the concrete context of the case."[33]

Following its previous practice, the Court stated in NICOL II that it "is not sufficient … to identify the case at issue by the same parties, object and legal ground … it must determine whether and to what extent the first claim has already been *definitely* settled."[34] In this case, it is quite evident that the Court did not consider the elements as the only critical point, but also whether the issue at heart of the previous case was resolved in its previous Judgment.

As recognized in the doctrine and by the Court in its own jurisprudence, one of the two purposes of *res judicata* is to strengthen the stability of relations by bringing litigation to an end.[35] Under this assumption, the condition of finality seems to constitute the fertile soil needed for *res judicata* to apply. It is not possible to reach an end in an inter–State dispute if the issue at the heart of the dispute has not been definitively settled.

The finality test is scattered throughout the jurisprudence of the Court. For example, also in the *Genocide* case, the Court rejected the objection of Serbia on the basis that if it had upheld the contentions of Serbia in that case, the Judgment of 1996 would have effectively been reversed.[36] The position adopted by the Court in this case is similar to the one adopted by the Court in the application to intervene filed by Honduras in NICOL I. In its application for permission to intervene, Honduras stated that its request was:

> aimed at protecting Honduras's interests of a legal nature by eliminating the existing uncertainty in respect of the fixing of its maritime boundaries with Nicaragua in the maritime zone north of the 15th parallel that is the subject of these proceedings, with a view to enhancing legal security for all States wishing

> to carry on their legitimate activities in the region. These legal interests are at stake in the proceedings. The present Application for permission to intervene is aimed at ensuring that they are not affected by the Court's decision in the future.[37]

The Court rejected Honduras' intervention on the basis that "[w]hat was decided by the Court with respect to the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea [was] definitive."[38] It is the understanding of scholars that "the Court clearly sought to prevent Honduras from re-litigating a matter that had already been considered by the Court."[39] Had the Court accepted the application to intervene of Honduras, the Court's Judgment of 2007 would have been affected and the authority of its prior judgment would have been undermined.

The decision adopted by the majority in NICOL II is also similar to the one adopted by the Court in the *Genocide* case and the request to intervene by Honduras. In its 2016 judgment, the Court recalled that the principle establishes the finality of the decision adopted in a particular case.[40] It then clarified its 2012 judgment "did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast." If the Court had upheld the objection of Colombia, the potential entitlement of Nicaragua would have been affected beyond repair. As the same Court acknowledged:

> It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.[41]

This suggests that a key question to ask in order to identify the *res judicata* effect is; will a decision on a new case contradict or affect a decision already taken by the Court in a previous case? If the answer is *yes,* and all the elements of the principle are met, then *res judicata* could apply. The Court had already determined that for it to be precluded by the *res judicata* principle:

> [i]t is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same parties; it must determine whether and to what extent the first claim has already been definitively settled.[42]

As indicated at the beginning of this contribution, the Court rejected the effect of *res judicata* in regard to the first request of Nicaragua in NICOL II. In its reasoning, the Court examined the application of the principle to subparagraph 3 of the operative clause of the 2012 Judgment and its correlation to Nicaragua's new claim. In its examination, it took into account the reasoning "of the motif as far as it [was] indispensable in understanding the *dispositif*,"[43] and found that in 2012 it had concluded that it was "not in a position to delimit the continental shelf boundary

between Nicaragua and Colombia"[44] and, as a result, it needed "*not [to] address* any other arguments developed by the Parties, including the argument as to whether"[45] Nicaragua has an entitlement to an extended CS beyond 200 nm. This part of the Judgment was pivotal for the determination of the scope of the principle. As Judge Greenwood clearly expressed it in his Separate Opinion:

> [i]f the court was taking a decision that Nicaragua had not proved that it had a continental margin beyond 200 nautical miles—a decision which would have had the most important consequences for both Nicaragua and Colombia and their peoples—it is hard to believe that it would have done so without making any analysis of the evidence put before it or without revealing at least the result of that analysis in its Judgment.[46]

Judge Owada shared the position of Judge Greenwood and explained that "[the] pronouncement was made in the absence of any substantive analysis of the factual and legal issues that would have been necessary for resolving the claim of entitlement."[47]

The Court concluded that in 2012 it did not decide on the merits of the request of Nicaragua, but on its own capability of being in a position to address the matter in the proceedings concerning NICOL I.[48] Effectively, in its 2016 Judgment the ICJ confirmed that the language used by the Court in 2012 (i.e., "in the present proceedings"[49]), "indicates that the Court did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200"[50] nm from its coast. In other words, the ICJ did not decide on the entitlements of Nicaragua beyond the 200 nm and thus, no force of *res judicata* was found to be attached to its new claim. It would be important to carry on further research on the competence of the Court to determine its own capability for deciding certain claims that are conditioned with certain procedural requirements or that required complex technical analysis. The latter could become more frequent in the future, especially due to the potential increase of cases that will concern complex matters that require the implementation of new technologies and new forms of evidence, such as climate change and sea level rise.

Another recent example of the potential importance of the *test of finality* has been recently confirmed in a dispute between Nicaragua and Costa Rica. In a land boundary delimitation case, Nicaragua asked the Court to declare that a stretch of "coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River constitutes Nicaraguan territory."[51] For its part, Costa Rica asked the Court to reject Nicaragua's submission and to declare it inadmissible. The Costa Rican position was that the sovereignty over that part of the territory had already been settled by a previous judgment[52] of the Court (*Certain Activities* case)[53] and thus, the Court was barred by *res judicata*.

The Court delivered its decision on the admissibility of the claim together with the judgment on the merits of the case, and found that nothing in its previous judgment indicated that the Court had already taken a decision on the question of sovereignty over "the coast of the northern part of Isla Portillos, since the question had been expressly excluded"[54] and for that reason "it is not possible for the issue of

sovereignty over that part of the coast to be *res judicata*."[55] Similar to the *Haya de la Torre* case, the Court rejected the *res judicata* effect because it considered that the sovereignty over that part of the territory was not submitted to the Court in the *Certain Activities* case and, consequently, the matter had not previously been determined or "definitely settled." No *res* was *judicata* and Nicaragua's claim was considered to be admissible by the Court.

IV. Conclusion

The intention of this contribution was to clarify if, as suggested by some Judges,[56] the approach adopted by the Court in the NICOL II undermined the value of legal stability and finality of judgments. The answer seems to be no. For the legal stability and finality of judgments to be undermined, there would have to be a decision to undermine in the first place, and as acknowledged by the Court in its Judgment of 2016, it did not rule on the substance of Nicaragua's submission I (3) back in 2012. If the Court would have agreed with the objection of Colombia, the position of both countries would have been undermined, because in 2012 the Court did not carry out any substantive analysis of the factual and legal issues that would have been necessary for resolving the claim. The decision of the Court established an important balance between the elements of *res judicata* and the finality of the claim.

The cases mentioned above exemplified that even if the three traditional elements of the principle of *res judicata* are present in a new proceeding, the Court can still decide that the principle does not apply if the issue at the heart of the dispute has not previously been decided. The scope of the binding force of a decision of the Court is the starting point for determining which *res* has been *judicata*, or if any *res* has been *judicata*.

As demonstrated in this paper, even if there is no certainty that finality constituted an additional element to the principle of *res judicata*, the recent jurisdiction of the Court suggests a more flexible approach to the elements of the principle in contentious cases. Even if the existence of this fourth element is vague, one can find some guidance as to the minimum standard "which any judgment on the merits should meet in the ambit of maritime delimitation of the continental shelf"[57]or other similar cases.

The recent jurisprudence of the Court suggests the need to test the condition of finality for the application of the principle. It also emphasizes the weight of all the parts of a judgment for determining if a case is barred by *res judicata* due to the junction of its elements; *personae, petitu*, *causa petendi* and the condition of finality. That said, whether one would like to call finality an "element" or a "condition" seems to be a purely semantic question. The guide for the application of the principle must be the same as the objective of the Court, which is to settle dispute between States and thus strengthen the legal security and the maintenance of international peace.

Notes

1. The views expressed in this paper are strictly personal to the author.
2. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia*), Preliminary Objections, Judgment, ICJ Rep. 2016, p. 100 ("Judgment of 2016").
3. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), Judgment, ICJ Rep. 2012, p. 624.
4. Application, 16 September 2013, para. 12.
5. *Supra* note 2, at para 129.
6. *Supra* note 2, para. 127.
7. *Supra* note 2, para. 129.
8. *Supra* note 1, para. 84.
9. http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm.
10. *Supra* note 1, para. 105.
11. Application, 16 September 2013, para. 2.
12. *Supra* note 1, para. 47.
13. *Supra* note 1, para. 56. *See* also Andreas Kulick, "Article 60 ICJ Statute, Interpretation Proceedings, and the Competing Concepts of Res Judicata," *Leiden Journal of International Law* 28(1) (2015), p. 74, https://doi.org/10.1017/S0922156514000545.
14. *Supra* note 1, para. 85.
15. *Judgement of 2016,* Joint Dissenting Opinion, para. 1.
16. *Ibid.,* para. 18
17. *Supra* note 1, para. 58. *See* also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica* v. *Nicaragua*), Judgment of 2 February 2018, para. 68.
18. Andreas Zimmermann, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), p. 1276 referring to the *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections) (Nigeria/Cameroon*), Diss. Op. Koroma, ICJ Reports (1999), pp. 49, 52.
19. *See supra* note 12, p. 74.
20. Article 59 of the Statute of the Court
21. *See* Shabtai Rosenne, *The Law and Practice of the International Court 1920–2002, 4th ed.* (Leiden: Nijhoff, 2006), Vol. III, p. 1598.
22. Also, paragraph 1 of Article 94 of the UN Charter echoes the binding nature and the *res judicata* effect of the judgment of the Court.
23. Zimmermann, 2006, p. 1267.
24. *Factory at Chorzów,* Dissenting Opinion (M. Anzelotti), at 23. In his Dissenting Opinion Judge Anzelotti also characterized res judicata as one "of the general principle of law recognized by civilized nations."
25. *Judgment of 2016,* Separate Opinion of Judge Greenwood, para. 4.
26. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Rep. 2007, para. 126.
27. *Ibid.* (*emphasis added*).
28. Michael Ottolenghi and Peter Prows, "Res Judicata and the ICJ's Genocide Case: Implications for Other Courts and Tribunals?," *Pace International Law Review* 21(1) (2009), p. 50; "softening of the triple identity test for *res judicata*."
29. *Territorial and Maritime Dispute (Nicaragua v. Colombia*), Application by Honduras for Permission to Intervene, Judgment of 4 May 2011, [2011] ICJ Rep. 659.
30. *Interpretation of Judgments Nos. 7 and 8 concerning the Caw of The Chorzów Factory (Germany v. Poland), PCIJ Series A. No. 13, Judgment No. 11 of 16 December 1927*, p. 20. This paragraph states that for the principle to be applied, the legal question has to be clearly answered, and if the legal question has not been established or answered, *res judicata* does not apply.
31. *Haya de la Torre Case*, Judgment, 1951, ICJ Rep. 1951, p. 79.
32. *Supra* note 25, para. 115 (*emphasis added*).
33. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Rep. 2007, Separate Opinion

of Judge Owada, para. 15. *Ibid.*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, para. 3 (stating: "simply put, *res judicata* applies to a matter that has been adjudicated and decided. A matter that the Court has not decided cannot be qualified as *res judicata*").

34. *Supra* note 1, para 59 (*emphasis added*).

35. *Supra* note 25, para. 116. The second purpose is to avoid the re-litigation of a case that has been already adjudicated by the Court.

36. *Supra* note 25, at 96, para. 128 (*emphasis added*).

37. *Application for Permission to Intervene by the Government of Honduras, Case concerning the Territorial and Maritime Dispute (Nicaragua v. Honduras)*, 10 June 2010, para. 13, p. 9.

38. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), *Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, para. 64, p. 442.

39. *See supra* note 12, A. Kulick, at 86.

40. *Supra* note 1, at 125, para. 58. See also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria*), Preliminary Objections *(Nigeria* v. *Cameroon*), *Judgment, I.C.J. Reports 1999 (I)*, p. 36, para. 12; *Corfu Channel (United Kingdom* v. *Albania*), *Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 248).

41. *Supra* note 1, para. 84.

42. *Supra* note 1, para. 59.

43. *Supra* note 1, *Judgment of 2016*, Separate Opinion Judge Owada, para. 8.

44. *Supra* note 1, para. 66.

45. *Supra* note 2, *Judgment of 2012*, para. 130 (*emphasis added*).

46. *Supra* note 1, *Judgment of 2016,* Separate Opinion of Judge Greenwood, para. 17.

47. *Supra* note 1, Sep.Op. Owada, para. 22.

48. *Supra* note 1, para. 82 (quoting the 2012 Judgment).

49. Referring to NICOL I.

50. *Supra* note 1, para. 83.

51. CR2017/16, Submission B 1(a), p. 27.

52. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua* v. *Costa Rica*), *Judgment,* I.C.J. Reports 2015, p. 665.

53. CR2017/14, Submissions 1 (a), p. 27.

54. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua*), Judgment of 02 February 2018, p. 31, para. 69.

55. *Ibid.*

56. *Supra* note 15, para. 18.

57. Matteo Sarzo, "Res Judicata, Jurisdiction Ratione Materiae and Legal Reasoning in the Dispute Between Nicaragua and Colombia Before the International Court of Justice," *The Law and Practice of International Courts and Tribunals* 16(2) (2017), p. 224. https://doi.org/10.1163/15718034-12341355.

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Inside(r)-Outside(r): Linguistics, Sociology and the Microterritoriality of Maritime Space on Pitcairn Island

Joshua Nash

Structured Abstract

Article type: Research Paper

Purpose—This article investigates how the explicit and fixed inside-outside (landward-seaward) absolute spatial axis used to describe offshore space linguistically in the Pitcairn Island language, Pitcairn, can be applied metaphorically to a more implicit and flexible onshore social axis of insider-outsider in Pitcairn Island society. It merges studies of small-scale territoriality of linguistic and sociological space with an appreciation of land based versus maritime exchange around the island.

Design, Methodology, Approach—This study is founded in the findings of a three-month fieldtrip to Pitcairn Island in 2016 to collect linguistic, ethnographic, maritime-cultural, and sociological data. The results are based on over 50 hours of interviews with 18 mainly elderly members of the Pitcairn Island community.

Findings—Descriptions of grammaticalized space and offshore maritime territory in the Pitcairn Island language are stricter and less flexible than the more fluid insider-outsider consensus and management of micro social space and territory. An argument merging the role of the researcher-as-outsider interacting with informant-as-insider and real and perceived social threat is advanced.

Practical implications—This multidisciplinary research combines linguistic,

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sociological, and island studies outcomes with relevant territorial and maritime research debates. The spatiality of microterritoriality involving onshore and offshore locations is considered.

Keywords: cultural contact; ethnography; fieldwork; language; maritime territoriality; South Pacific; spatial orientation

> *There is now no Native past without the Stranger, no Stranger without the Native. No one can hope to be mediator or interlocutor in that opposition of Native and Stranger, because no one is gazing at it untouched by the power that is in it. Nor can anyone speak just for the one, just for the other. There is no escape from the politics of our knowledge, but that politics is not in the past. That politics is in the present.*[1]

From Out to In

Spatial contrasts in language are powerful. Differentiations such as *front* and *back*, *up* and down, *in* and *out* are pervasive across languages, societies, and cultures and are the mainstays of everyday communication when describing space.[2] Differing spatial reference systems in Oceanic languages are of interest to linguists, sociologists, and anthropologists because of their ability to aid in the structural classification of languages, societies, and cultures. Such cross-linguistic, cross-social, and cross-cultural investigation presents the study of space, spatial relationships, and locationals as a relevant sub-section of research into frames of spatial reference. Facets of the immense task of describing the spatial typology of such languages have been described in Senft (1997)[3] and Bennardo (2002).[4] Other work into the spatial description of islands,[5] Oceanic atolls,[6] and Mawyer and Feinberg's (2014) "Senses of Space: Multiplying Models of Spatial Cognition in Oceania"[7] reveals the complexity with which island populations become habituated linguistically to land-sea boundaries and create intricate cognitive maps of their environment. The merging of linguistic and social space with maritime microterritoriality is worthy enterprise in the (Oceanic) small island context. Mawyer reminds us:

> Oceanic contexts have played a remarkable role in shaping broadly circulating conversations about culture's role in ordering the social and natural environment and in establishing the foundations on which human beings navigate and experience the world around them.[8]

Where a significant amount of research has been conducted into conceptions of language, space and society in Polynesian languages[9] and Melanesian languages,[10] little work has considered the role of small island, English based contact languages in Oceania and the concomitant social and linguistic spatiality. The case study I use in this article is Pitcairn Island.

Forty-six people live on Pitcairn Island, South Pacific (25° 04'S 130° 06'W), a British overseas territory. About two-thirds of these people consider themselves *Pitcairn Islanders*. The small five-square-kilometer island is famous for its contempo-

rary history derived from a notorious yet famous maritime event, the mutiny on the *Bounty*, which took place in 1789 in what is now Polynesia. One of the results of the inhabitation of Pitcairn Island in 1790 by eight British naval officers and 21 Polynesian men and women is a language and a specific way of perceiving the world related to the events of the *Bounty* and linked to land and people. Pitcairn, the Pitcairn Island language, also spelled Pitkern, is a mixed linguistic expression of English and Polynesian derivation, with its idiosyncratic grammatical and myth-driven nature observable through connections to land, time, memory, and nostalgia. The Pitcairn Islanders and their oral traditions and folklore are arguably indigenous to Pitcairn Island.

Using a sociological focus and the emphasis on the effect of personal fieldwork interaction within the small island society, this exploratory article extends research into Pitcairn Island language, spatial cognition, and place. It is simultaneously relevant to territorial and maritime studies of the Pacific and greater Oceania, because it fits within a fringe area of work in human cultural archaeology in Pacific islands and its relationship to territoriality.[11] Because few non–Pitcairn Islanders, especially researchers, have ever learned and spoken Pitcairn, I argue that my own linguistic competency as an outsider and my ability to access specific cultural realms based in language is critical personally and socially.

Pitcairn, which is poorly described and understood, is extremely endangered and has only around 30 speakers on Pitcairn Island.[12] Despite the immense relevance to language contact linguistics, Pacific language history, and *Bounty* enthusiasts of Pitcairn and its related folklore, myth, and biotic knowledge, the language is in severe danger of dying out without ever being properly documented. In connection to Pitcairn Island land-sea borders exist parallel complexities of social margining and hints as to how we might gain access to such spatial and cognitive information *in situ*, namely from insiders, locals, and language speakers—those in autochthonous or indigenous position. It is here I explicate a larger sociological thesis applying the insider-outsider axis within a brief description of the linguistic use of the inside-outside offshore land-sea axis in descriptions of spatial grammar in Pitcairn. The research question I consider is: How do Pitcairn Island spatial relationships involving an absolute landward-seaward coordinate system—*inside-outside*—represent and embody, at least in part, a description of the sociology and accessibility of such place knowledge within this tiny society? More generally and to a lesser degree, this research considers what spatial orientation systems develop on previously uninhabited, desert islands for which the new forced home was unknown to all comers. More specifically, it furthers investigations into understanding the system of spatial and social reference which developed on Pitcairn Island after 1790.[13]

Methods: Moving In and Getting Inside

This work is based on three months of linguistic and ethnographic fieldwork on Pitcairn Island spanning May–August 2016. During this time, I amassed the

largest collection of Pitcairn Island language recordings in the world and an expansive photographic, ethnographic, archaeological, and cultural landscapes database from which to draw. I conducted more than 50 hours of interviews in Pitcairn and English with 18 mainly elderly members of the community. I worked with these elderly people because they are the custodians of local knowledge and language. I archived linguistic, placename, and traditional ecological knowledge relevant to and based within vital shared happenings and customary ways of doing things. The islander-outsider distinction is the principal social demarcation within the society and means to create microterritorial distinctions. And with more than one quarter of the minuscule population including the administrator, a New Zealand police officer, and a social worker having no Pitcairn Island blood heritage, as well as the island's recent history of child sexual abuse trials resulting in several Pitcairn Island men being convicted and some jailed in the mid–2000s, the future of this insider focused and governed micro society remains far from certain. As the aging population die, which puts into question how Pitcairn Island will continue at all, documenting spatial language and maritime territorial behavior is integral salvage work associated with a quickly disappearing past.

Because of the nature of late modern Pitcairn Island society, I was required to carry out this documentation-cum-linguistic recovery within a situation where some people were not willing to talk to me because I was an outsider-writer-academic. It is possible that the small size of the community has the effect of amplifying the insider-outsider dynamic. Where all people are known intimately within any community, suspicion of outsiders can be magnified. Even if one is not explicitly or perceivably suspicious or dangerous in their intentions, people will not necessarily participate in research, also in part because of the degree of exhaustion experienced by the Pitcairn Islanders in having been repeatedly researched and reported upon in their perennial field site.[14] Like many other low information societies where knowledge that others do not have can be premium, Pitcairn Island presents an example of a people where individuals often take information to the grave rather than impart these intangible, intellectual resources to others, either to insiders or outsiders. The manifestation of these coexistent axes—social space–territory and its palpable reflection in offshore maritime expanse—can be expressed thus: to get inside the inside-outside landward-seaward maritime axis as an outsider, you have to move in socially from outside to inside territory with the insiders. This means becoming accepted.

Becoming the Outsider: Getting Onside and Getting (on) Inside

Figure 1 depicts the inside-outside landward-seaward absolute spatial axis offshore around Pitcairn Island.

In this offshore depiction, one is always inside or outside relative to something or someone else. If I say, "I outside Bop Bop," this means I am on the seaward side of Bop Bop Rock, an offshore islet on the south eastern side of Pitcairn Island. Con-

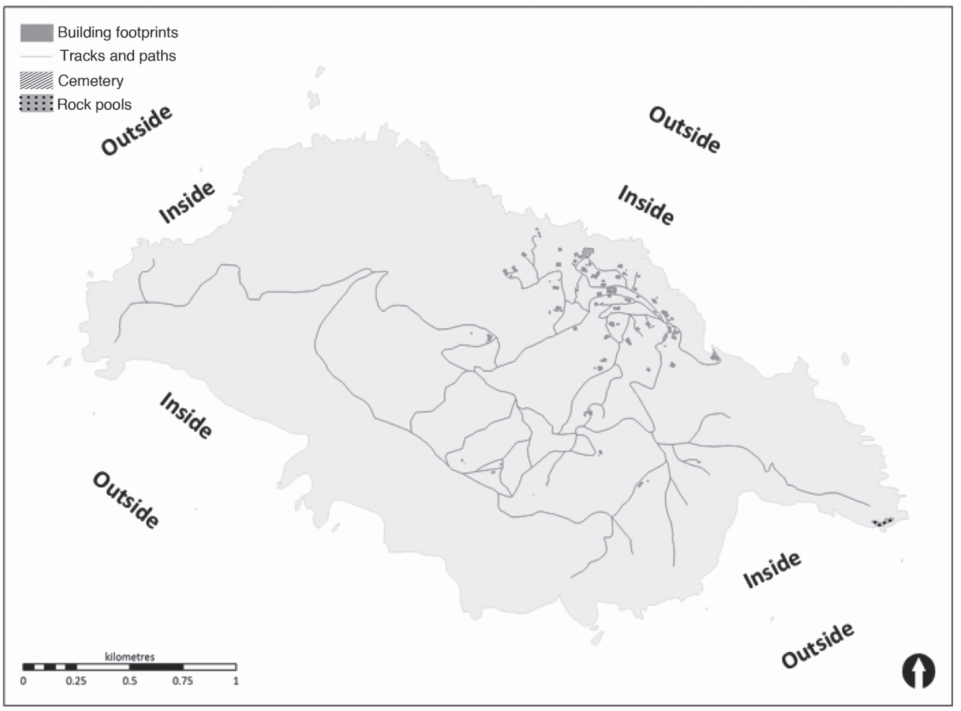

Figure 1. Inside-outside landward-seaward absolute spatial axis offshore around Pitcairn Island (author's image, 2016).

versely, if I shout out to you from a boat, "I inside you," this means I am on the landward side of where you are situated. Within relative spatial figurations come absolute distribution agreement on which all in this minute society agree. Where some may dispute the nature of the variable spectra contained within the insider-outsider social rubric, that is, relatively directed social space, none would differ on the grammatical accuracy of the spatial actualisation of the inside-outside posing. In short, descriptions of grammaticalized space in Pitcairn are stricter and less flexible than the more fluid appreciation of the constitution of the insider-outsider consensus. Language is more fixed than culture; the plasticity of social norms is less solidified than rules of language.

Additionally, there are pronounced differences in the accessibility of grammaticalized space in language by outsiders as compared to available opinions of social positioning. What is verbalized and spoken directly is more attributable, documentable, and less open to opinion than precise and direct questioning about who insiders are and what constitutes an outsider in the fieldwork setting. On a small island with 46 people, of which only approximately 35 were born on Pitcairn Island or of Pitcairn Island parents, accessing the insider is core to accessing the Pitcairn Island ethos of place, place-knowledge, and knowledge management. These insiders, and particularly the older members of this insider group, possess the majority of the linguistic and cultural history knowledge and they mandate either implicitly or

explicitly who is admitted to this interior. I posit that if one gets onside with the insiders, then perhaps they will tell you more about the inside-outside axis. While these older insiders exist within this insider-outsider matrix, their presence also plays a part in its perpetuation. Being outside with insiders is integral to managing and living on island just as much as getting by professionally inside while being an outsider in the fieldwork setting is paramount to collecting key data. Or put succinctly: navigating social barriers and these insider-outsider dialectics ironically and potentially can lead to greater molding within the very same insider-outsider system.

Georg Simmel's take on "The Stranger" implicates the spatial and territorial oppositions involved when creating unity-disunity divisions of insider and outsider:

> He is fixed within a particular spatial group, or within a group whose boundaries are similar to spatial boundaries. But his position in this group is determined, essentially, by the fact that he has not belonged to it from the beginning, that he imports qualities into it, which do not and cannot stem from the group itself.[15]

Simmel's stranger position epitomises the stark insider-outsider axis-as-social delineator. If one is born of Pitcairn Island parents,[16] one is an insider. If one was born of Pitcairn Island parentage, moved away, and came back, one is less of an insider. If one is not born of Pitcairn Island parents, one is an outsider. People born of Pitcairn Island parents in the Australian and New Zealand diaspora are "Pitcairn Island descendants," but they are still outsiders or at least less inside. Outsiders come from *The Outside World* (see definition below), a proper noun and idiomatic expression in Pitcairn and Pitcairn Island English. The Outside World is all parts of the world which are not Pitcairn Island.

What is significant linguistically is that the Pitcairn word for outsider is *stranger*. As historian of science Adrian Young tells us when quoting from one of the most detailed glossaries of Pitcairn language[17]:

> Sometimes I will dispense with the terms "knowledge-maker" and "scientist" altogether, opting instead for the larger category of "stranger." The word is not mine, but rather pulled from the language of the islands [Pitcairn Island and Norfolk Island] themselves, and more specifically from the Pitkern language glossary of a 1964 linguistics text: "**stranger** [`streɪndʒə]: non–Pitcairner" [emphasis in original].[18]

I extend this perspective with my own 2016 field notes gathered during interviews:

> *Outsider*: A pointed descriptor used by insiders to designate people not born on Pitcairn Island or born of Pitcairn Island parents who stay either for short or long periods. Insiders tell that outsiders have never been and mostly will never be accepted by the Pitcairn Islanders, that is, those born on the island, those born of Pitcairn Island parents, and those who have mostly stayed on the island their whole life; *The Outside World*: The place from where the outsiders come.

As a result, the individual or group stranger-cum-outsider is socially removed from significant collective space and has their island applicable decision-making abilities and opinions diminished from the greater functioning of the island. The outsider-

stranger position is one largely devoid of social power and meaning in relation to that availed to insiders. As regards those not born on island, there is often a degree of indifference towards the opinions of these island residents. Of course, outsider only exists in terms of its semantic opposite: the insider. This category is less difficult to describe than the varied designations of outsiders. First, because there are so few; second, because most of these insiders have never left the island for any significant period of time and they participate in maintaining this social axis either implicitly or explicitly.

Inside(r) or Outside(r)?

Within the bounds of this small, sheer island landmass there were at least three languages in contact during the initial linguistic and social gelling stage of the first generation: English, Polynesian languages, and the then developing Pitcairn, what has now become a highly endangered contact language and linguistic hybrid. What spawned as a result of contact between European and non–European influences was a language and a detailed placename system with more than 500 terrestrial names and offshore monikers contained within these small (is)land and sea zones. An intricate way of talking about topographic and hydrographic-cum-maritime space developed and flourished in parallel within this emerging language and toponymic landscape and social bounding.[19] What is significant to a study of Pitcairn Island language and sociology and to applying the metaphor of social space to linguistic spatiality is that both these axes serve utilitarian purposes. Because fishing and navigation have been integral to Pitcairn Island culture and livelihood, offshore orientation and position is crucial. The more than 20 fishing ground names and locations I documented are testament to this utilitarian system.[20] In addition, managing social space using the distinction of insider-outsider is practical. Some are permitted access from outside inside, most are not, nor would they necessarily require insider access.

On the discourse level of daily life on Pitcairn Island, outsiders are allowed to talk about different things to what insiders are permitted to discuss. As a fieldworker, I experienced that indirect questioning and appearing as threat-free as possible led to much more congenial interpersonal dealings and the gathering of better linguistic and sociological data.[21] To illustrate I use an event from May 31, 2016, less than two weeks after arriving on the island, where I asked an insider woman in Pitcairn about the contents of a package she was posting to New Zealand. This incident occurred near the post office and the woman and several insiders made it obvious that such questioning from an outsider was inappropriate. I had transgressed cultural mores, but not without the possibility for reintegration by the same insider, which did occur within a few days. This concurs with the ways and means people on the inside manage people accessing inside information. The nature of insider-insider and insider-outsider interaction is driven by varying degrees of social distancing and the fact that insiders need to get on primarily with other insiders to survive. For insiders, there is not as much at stake regarding getting on with outsiders as with insiders.

After this event and throughout the entire field trip, I experienced that I was in a rare yet somewhat privileged position: I am an outsider who speaks Pitcairn fluently. Language is the most obvious and most used insider-distancing and territory-creating mechanism. I assume this reality would have made my presence and involvement in language and culture matters initially fascinating but simultaneously odd. Because of my knowledge of the language, this may have created some level of expectation about my level of understanding of the expected cultural practices, both those of insiders and outsiders. While my ability to understand and manage the workings of the insider-outsider divide did improve across time, in the post office happening I initiated a process of inadvertent (outsider) transgression, which was met with community (insider) indignation. Once I acknowledged this misdemeanor, what followed with some insiders was a continual and mostly implicit schooling in appropriate insider behavior aimed at resolving my original wrongdoing. This quickly developed into an island-wide acknowledgment of the personal and working connection I had established with the very woman who identified the insider-led statement of slight cultural misconduct. Once I demonstrated that I was willing to engage in this educative process, namely the accessing of insider knowledge, for example, how the inside-outside spatial axis operates, this elderly woman became my mentor and even patron in making sure I received as much information about language, place, and memory as I required. The process begun by my minor social infringement as an iterative and reflexive process led to an overwhelmingly positive outcome.

These techniques and my reasons for being on Pitcairn Island and engaging with the community exist largely in contrast to those of other writers who have written about the place's social dynamics. The most unloved and most revealing work written about Pitcairn Island is surely Dea Birkett's (1997) *Serpent in Paradise*.[22] This account presents a lucid example of the intimate and intricate nature of human and environment dealings. Birkett claimed that her stay was associated with Royal British Mail instead of her actual interest in writing about the island. Because Birkett locates herself in outsider position although she was privy to many insider happenings, it is not clear whether she ever intended to make a lasting connection with the islands' inhabitants. As a result, the book has come to be considered a smear campaign launched by Birkett toward the island in the sense that she deceived the islanders with her dishonest intentions.

In two other cases of outsiders writing about insiders, Kathy Marks writings, particularly her 2008 *Trouble in Paradise* about the 2004 trials,[23] which is realistically the second most unloved book about Pitcairn Island, and the 2015 blog of Rhiannon Adam titled "From London to Pitcairn"[24] have informed to a greater audience the inner functioning of this society. Marks and Adam provide more measured accounts than Birkett, but the writers and their portrayals exist chiefly external to the insider system. Where Birkett and Adam aspire for varying degrees of connection and insider access, something apparent in these women's writing is a fantasy of paradise and its possible discovery on Pitcairn Island. They document this aspect of their respective experiences as the reality of everyday life on the island begins to erode

their bucolic expectation. As a journalist on a shorter and more explicit deployment, Marks presumably never wanted such connection and thus maintains her social distance, while collecting as much insider information as possible. Where Birkett was an observer, Marks a journalist, and Adam a photographer, my outsider role as a documentary linguist and ethnographer with language fluency is entirely different.

This role of researcher-outsider position and its relevance to doing anthropological work on small islands is key to appreciating the broader context of how fieldworkers work in such communities. My Pitcairn Island experiences highlight and expand a recent trend in lesser-known varieties of English and English-based contact languages, many of which are spoken on small and remote islands.[25] I believe that researching the interpersonal and social associated with collected data in these smaller varieties of English is as relevant as analyzing the linguistic features of these languages. Language external factors can definitely offer great insight into understanding language development and change.

To summarize, I use the idea of perceived threat or harm as a means to reconcile the inside-outside/insider-outsider spectrum of linguistic and social space. As an outsider within the insider-outsider sphere, being perceived by insiders as harmless or harmful to the system is the higher order category which matters more than whether one is actually an insider or an outsider. It is not a question of the truth or reality of one's potential power to bring harm than whether one is *perceived* as a threat. If one stays for a long time but is not rendered into the harmful category and remains on the edges of the outside, one still remains simply a tourist or thereabouts in terms of insider-outsider movement.

As a researcher-writer, I was to a degree considered a threat. I was an academic with an agenda to document as much of the language as I could in the period I had available. Not all people in the community appreciated this position. The insider-outsider axis, then, is not as simple as whether one is inside or outside socially, spatially, or linguistically; the axis is further complicated by the insider need to assess *perceived danger* and how outsider threats to becoming aware of the inner workings of the social system may affect the longevity of this very system.

However, there is a discrepancy as regards the islanders who want to protect the famed Pitcairn Island story, regarding the insider-outsider axis, and allowing researchers who are trying to record aspects of the language like the inside-outside linguistic spatiality. *Our Pitcairn Story*, the published diary based in events from the late 1940s to the early 1950s of Maida Moverley, the wife of the island's first schoolteacher seconded from New Zealand, Albert Moverley, was published in 2007 by the Moverleys' daughter. As Diana Moverley writes at the beginning of her introduction to her parents' book:

> This is a story, which has lain undisturbed for fifty-five years. It has waited patiently, in the form of four handwritten, hard-to-read exercise books, for the time when it could safely emerge into the light of day. It is a story, which could not have been published at the time it was written. It would not have been allowed…. The story tells how, and why, optimism slowly turned to disappointment, disillusionment and finally resignation. Perhaps they [Albert and Maida

> Moverley] were a little naïve, but no more so than the average at that time…. It wouldn't have mattered who they were. They were people "from outside" who would have the ability to uncover, report on, and ultimately interfere with certain activities and the way in which certain things were being done. Therefore, they had to be discredited and slandered ahead of time, so that hopefully, no one would believe them.[26]

Although Albert Moverley was a non-linguist who conducted a significant amount of linguistic research on the language and whose name is associated with several of the major works about Pitcairn, e.g., Ross and Moverley's *The Pitcairnese Language* and Anders Källgård's (1981) thesis "Pitcairnese: A Report 30 Years After Moverley,"[27] I found it ironic to learn about the low regard the older island insiders had for the teacher Moverley. In addition to Pitcairn Island's isolation and costs associated with travelling there, I speculate that Diana Moverley's perspective is one of the major reasons why so few social scientists have ever worked on the island, a matter Young (2016) deals with when detailing a history of research into Pitcairn Island and its placement as a perpetual field site-cum-natural laboratory: it has a reputation for being a difficult place to work. Pitcairn Island's remoteness, small number of residents, and the insider suspicion of outsiders have made it a delicate location to engage with the community. Insider-outsider designations, implicit-explicit codes of social conduct, and the requirement of accessing linguistic spatiality like the inside-outside offshore axis for understanding language and place relationships are all suggestive of a demanding research domain.

I must emphasize that this exploration is far from the last word on these matters. While I made the brief claim that the grammaticality of the inside-outside axis in terms of its linguistic inflexibility and accessibility to outsider exists in contrast to the more elastic insider-outsider contradiction, this use of spatial language is but one aspect of a much larger appreciation of relationships involving the linguistic, the social, and the territorial and maritime about which I am currently publishing. What I have presented should drive and direct more interest toward not only Pitcairn Island social science research and territorial and maritime investigations more generally, but open up discussions about the nature of language, space, and social territory in (island) contact language environments more specifically.

Notes

1. Greg Dening, *Beach Crossings: Voyaging Across Times, Cultures and Self* (Philadelphia: University of Pennsylvania Press, 2004), 11.

2. For example, Kensy Cooperrider, James Slotta and Rafael Núñez, "Uphill and Downhill in a Flat World: The Conceptual Topography of the Yupno House," *Cognitive Science* 41(3) (2017), 768–799, https://doi.org/10.1111/cogs.12357; C. Hill, "Up/Down, Front/Back, Left/Right: A Contrastive Study of Hausa and English," in J. Weissenborn and W. Klein (eds.), *Here and There: Cross-Linguistic Studies on Deixis and Demonstration*, pp. 13–42 (Amsterdam: John Benjamins, 1982), https://doi.org/10.1075/pb.iii.2–3.02hil.; Stephen. C. Levinson, *Space in Language and Cognition* (Cambridge, UK: Cambridge University Press, 2003); Stephen C. Levinson and Niclas Burenhult, "Semplates: A New Concept in Lexical Semantics?" *Language* 85(1) (2009), 153–174, https://doi.org/10.1353/lan.0.0090.

3. Gunter Senft, ed., *Referring to Space: Studies in Austronesian and Papuan Languages*. Oxford Studies in Anthropological Linguistics (Oxford: Oxford University Press, 1997).

4. Giovanni Bennardo, ed., *Representing Space in Oceania: Culture in Language and Mind* (Canberra: Pacific Linguistics, 2002).

5. Alexandre François, "Reconstructing the Geocentric System of Proto Oceanic," *Oceanic Linguistics* 43(1) (2004). 1–32, https://doi.org/10.1353/ol.2004.0009.

6. Bill Palmer, Alice Gaby, Jonathon Lum and Jonathan Schlossberg, "Topography and Frame of Reference in the Threatened Ecological Niche of the Atoll," Paper presented at Geographic Grounding: Place, direction and landscape in the grammars of the world conference, 30 May 2016, University of Copenhagen, Denmark; Bill Palmer, "Route Description Tasks in Kiribati," Paper presented at the 8th conference on Oceanic Linguistics. Auckland, New Zealand, 5 January 2010.

7. Alexander Mawyer and Richard Feinberg, "Senses of Space: Multiplying Models of Spatial Cognition in Oceania," *Ethos* 42(3) (2014). 243–252, https://doi.org/10.1111/etho.12058.

8. Alexander Mawyer, "Oriented and Disoriented Space in the Gambier, French Polynesia," *Ethos* 42(3) (2014), 277, https://doi.org/10.1111/etho.12057.

9. See, for example, G. Bennardo, *Language, Space, and Social Relationships: A Foundational Cultural Model in Polynesia* (Cambridge: Cambridge University Press, 2009). https://doi.org/10.1017/cbo9780511581458.

10. Alexandre François, "Of Men, Hills, and Winds: Space Directionals in Mwotlap," *Oceanic Linguistics* 42(2) (2003), 407–437, https://doi.org/10.1353/ol.2003.0021.

11. See, for example, Robert DiNapoli and Alex Morrison, "Human Behavioural Ecology and Pacific Archaeology," *Archaeology in Oceania* 52(1) (2017), 1–12, https://doi.org/10.1002/arco.5124; Robert J. DiNapoli, Alex E. Morrison, Carl P. Lipo, Terry L. Hunt and Brian G. Lane, "East Polynesian Islands as Models of Cultural Divergence: The Case of Rapa Nui and Rapa Iti," *The Journal of Island and Coastal Archaeology* (2017): 1–18. https://doi.org/10.1080/15564894.2016.1276490.

12. There is a similar number of Pitcairn speakers in Pitcairn Island diaspora communities in Australia and New Zealand.

13. See Joshua Nash, "Creole Spatiality and Pitcairn Island: A Comment on Feinberg and Mawyer's Ethos Special Issue Senses of Space," *Ethos* 44(1) (2016), 3–8. https://doi.org/10.1111/etho.12112.

14. See Adrian Young, "Mutiny's Bounty: Pitcairn Islanders and the Making of a Natural Laboratory on the Edge of Britain's Pacific Empire," Ph.D. dissertation, Department of History, Princeton University, 2016.

15. Simmel Georg, "The Sociological Significance of the 'Stranger,'" in Robert E. Park and Ernest W. Burgess (eds.), *Introduction to the Science of Sociology* (Chicago: University of Chicago Press, 1921), 322.

16. Most births in the past four decades have taken place in New Zealand where there are better hospital facilities. There have not been any births of Pitcairn Island parents for more than seven years.

17. Alan S.C. Ross and Albert W. Moverley, eds., *The Pitcairnese Language with Contributions by E. Schubert, H.E. and Alaric Maude, E.H. Flint and A.C. Gimson* (London: André Deutsch, 1964), p. 259.

18. Young, *op. cit.*, p. 34.

19. Martin Gibbs suggests that when conducting fieldwork on Pitcairn Island in 1998 most people agreed that many of the names had been lost from disuse because of the increase in quad bike transport instead of more traditional ways of moving around the island like walking. He also attributes knowledge attrition of toponyms to the diminishing of a story-telling and oral culture and the dying out of some of the older members of the community (Gibbs, personal communication, 5 July 2016).

20. Joshua Nash, "Pitcairn Island, Island Toponymies, and Fishing Ground Names: Towards the Possibility of a Peaceful Onshore and Offshore Reconciliation," *Journal of Territorial and Maritime Studies* 4(1) (2017), 98–108.

21. Maria Amoamo, "Island Encounters: Experiential Modes of Insideness and Outsideness on Pitcairn Island," *Space and Culture* 20(4) (2017), 500–515, https://doi.org/10.1177/1206331217

18495; Maria Amoamo, "Remoteness and Myth Making: Tourism Development on Pitcairn Island," *Tourism Planning & Development* 8(1) (2011), 1–19, https://doi.org/10.1080/21568316.2011.554035.

22. Dea Birkett, *Serpent in Paradise* (New York: Anchor Books, 1997).

23. Kathy Marks, *Trouble in Paradise: Uncovering Decades of Sexual Abuse on Britain's Most Remote Island* (London: HarperCollins, 2008).

24. In Memory of Keane Warren, https://rhiannonsetsoff.wordpress.com/, accessed 4 July 2017.

25. John P. Williams, Edgar. W. Schneider, Peter Trudgill and Daniel Schreier, eds., *Further Studies in the Lesser-Known Varieties of English* (Cambridge: Cambridge University Press, 2015), https://Doi.Org/10.1017/CBO9781139108652.

26. Maida Moverley, *Our Pitcairn Story* (I & G Selby, New Zealand: Diane Moverley, 2007), (digital copy in possession of the author), p. 4.

27. Anders Källgård, "Pitcairnese: A Report 30 Years After Moverley, Concentrating on the Vocabulary," Masters dissertation, English Department, University of Gothenburg, Sweden, 1981.

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Biographical Information

Joshua Nash is an islophilic generalist-cum-linguist working on the language of Pitcairn Island. He writes about ethnography, the anthropology of religion, architecture, pilgrimage studies, and language documentation. He has conducted linguistic fieldwork on Pitcairn Island and Norfolk Island, South Pacific, Kangaroo Island, South Australia, and New Zealand; environmental and ethnographic fieldwork in Vrindavan, India; and architectural research in outback Australia. He is concerned with philosophical and ontological foundations of language and place.

Style Guide

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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

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

2ND ENDNOTE

2. Jervis 1989, p. 160.

CONSECUTIVE ENDNOTE

3. Ibid. p. 50.

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.

Footnote

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

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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

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.

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.

Findings: 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.