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Editor's Comments

Dear *JTMS* Readers,

We are pleased to present this summer/fall issue of *JTMS* with the world on lockdown and engaged in efforts to reduce the impact of COVID-19. As a result, borders that had been reduced in importance in a world of global commerce have seen a resurgence in places like Europe. Travel bans have come into effect in what may be interpreted as the securitization of a public health issue, also emphasizing the importance of border control. At the same time, while some states wrestle with the pandemic, some states at different points in their battle with the illness have taken advantage of the preoccupation of other states to push territorial issues. In a world such as this, *JTMS* is doing its utmost to highlight these issues and bring our readers the most current research on maritime and territorial politics, security, history, and law. With this in mind, the summer/fall issue covers a range of topics that we hope will interest our readers.

First, Arron N. Honniball examines the legal consequences of the USA's illegal, unreported or unregulated (IUU) fishing definition, including the lessons thereof for all port and market states. He uses the *2019 Report to Congress* to provide a case study on limitations to U.S. trade measures addressing foreign states facilitating IUU fishing. Comparative analysis to international fisheries law and other unilateral practice provides wider lessons. Analyzing historic U.S. practice suggests forthcoming reform. Honniball finds that excluding illegal fishing in foreign EEZs from the identification and certification procedure is inconsistent with domestic and international policy objectives and that experimentation with a broader interpretation of "genuine link" when identifying foreign flag states is highly questionable. He also finds that procedural transparency and non-discrimination are improved when market states highlight legislative gaps or report on states considered but not identified. He concludes that reform of the U.S. definition may broaden trade measures affecting foreign states wishing to retain market access.

Second, Fru Norbert Suh I shows how international regime complexity affects coherence in understanding EU–Africa relations and how Africa has been able to instrumentalize this condition. Building upon existing literature on EU–Africa with a focus on international cooperation, democracy/human rights/good governance, and international solidarity regimes, Suh considers complex regimes as any rule agreement in EU–Africa relations that can be instrumental in promoting incoherence and cracks in the relation owing to its ambiguity. Suh finds that international regime

complexity favored three core political behaviors on the part of Africa: forum-shopping, regime-shifting and strategic manipulation of values, showing that international regime complexity can sometimes be a source of agency or political expediency for actors hitherto perceived as weak in global politics.

Third, Nitin Agarwala explains how the Bay of Bengal has been a fractured region since the weakening of imperialism due to fear of re-colonization, lack of trust, historical baggage and inward-orientation. Due to the rise of China and India, the Bay has once again become an arena of activities forcing littoral states to engage in a number of sub-regional groupings with the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) as the only intra-regional grouping between South Asia and Southeast Asia. He explores whether BIMSTEC can actually help the Bay to re-emerge as the "center of activities" and the possible "route to course" for such a re-emergence. Using a comparative approach, Agarwala looks at various groupings in this region in general and BIMSTEC in particular, as a medium to help the Bay to achieve its lost unity and identity. This article serves as an explanation of how the nations of South Asia and Southeast Asia, by their concerted efforts of working together, can re-integrate the region to its earlier glory.

Fourth, Osatohanmwen Anastasia Eruaga and Maximo Q. Mejia, Jr.'s, offering addresses the growing concerns about the impact of private sector entities on the sovereignty of states, especially in handling commonly shared challenges. Their study involves an empirical investigation using multi-methods to analyze the reasons and linked outcomes of applying Nigeria's gun control to foreign vessels in the Gulf of Guinea. Key informant interviews (n = 11) were conducted with subject matter experts, while the views of seafarers were elicited through questionnaires (n = 44). The study confirms that the domestic legal system remains significant and can alter the level of influence of a transnational phenomenon (such as the Private Maritime Security Company [PMSC] industry) by constraining their methods of operation, also highlighting the reframing of PMSC services to fit within the characteristics of the region. Eruaga and Mejia Jr.'s article aids in understanding international maritime security governance as a complex adaptive system which may require changes or responses.

Fifth, Chris O. Ikporukpo notes that, in spite of the globally accepted principle of *uti possidetis juris*, which defines the inviolability of international boundaries, boundary disputes continue to exist. Marine boundary disputes are particularly complex and are usually exacerbated by the presence of economically viable natural resources, especially oil. Such disputes in many cases result in military buildup and in some cases international wars. This article analyzes the interaction between the presence of oil and the emergence of boundary disputes as a driver of militarization in the Gulf of Guinea (GoG). Ikporukpo's article is analytically descriptive, depending essentially on descriptive statistics. Secondary sources including the publications of GoG countries and OPEC, along with many other works are cited, providing the required data. In order to provide a contextual background, he analyzes three paradigms on maritime boundaries. These are *mare liberum, mare clauseum*,

and regulated sea. He finds that all the maritime boundary disputes in GoG have been driven by the presence of oil and gas, leading some countries to protect their marine oil resources, resulting in an arms race in the GoG and armed conflict in a few cases.

We would like to thank our editorial board, our authors, our peer reviewers and you, our readers for their continued support. We look forward to bringing you even more great research and continuing to develop and improve the research program of *JTMS*.

Jongyun Bae
Editor

Unilateral Trade Measures and the Importance of Defining IUU Fishing: Lessons from the 2019 USA "Concerns" with China as a Fishing Flag State

Arron N. Honniball

Structured Abstract

Article Type: Research Paper.

Purpose—Existing scholarship addresses difficulties with international law's "definition" of IUU fishing but not those arising from unilateral definitions. This article examines the legal consequences of the USA's IUU definition, including the lessons thereof for all port and market states.

Design, Methodology, Approach—The *2019 Report to Congress* provides a case study on limitations to U.S. trade measures addressing foreign states facilitating IUU fishing. Comparative analysis to international fisheries law and other unilateral practice provides wider lessons. Analyzing historic U.S. practice suggests forthcoming reform.

Findings—Excluding illegal fishing in foreign EEZs from the identification and certification procedure is inconsistent with domestic and international policy objectives. Experimentation with a broader interpretation of "genuine link" when identifying foreign flag states is highly questionable. Procedural transparency and nondiscrimination are improved when market states highlight legislative gaps or report on states considered but not identified.

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Practical Implications—The definition of IUU fishing is instrumental in the design of trade measures. Reform of the U.S. definition may broaden trade measures affecting foreign states wishing to retain market access.

Originality, Value—This analysis assists scholars and policy makers in evaluating the rights of market states. Unilateral and regional trade measures are shaping the evolving role of market states in fisheries law.

Keywords: due diligence, EEZ, flag state, IUU Fishing,
Moratorium Protection Act, stateless vessel, trade measures

I. Introduction[1]

On September 19, 2019, the USA's National Oceanic and Atmospheric Administration (NOAA) publicly released its 2019 biennial report to Congress, *Improving International Fisheries Management*,[2] identifying Ecuador, Mexico and the Republic of Korea as states whose vessels are reportedly engaged in illegal, unreported or unregulated (IUU) fishing activities under Section 609(a) of the *High Seas Driftnet Fishing Moratorium Protection Act*.[3]

The biennial identification of foreign states is the first step in the USA's unilateral three-step identification and certification procedure which analyzes the enforcement of international fisheries law by foreign states. The USA will take measures against any state receiving a negative certification, including the closure of U.S. ports and U.S. markets to that state's fishing vessels, catch and fishery products.[4] Additional economic sanctions may also be imposed.[5] The USA is not unique in imposing such trade measures. The EU,[6] as well as numerous Regional Fisheries Management Organizations (RFMOs),[7] also identify non-cooperating or non-compliant states that may be subject to comparable trade measures.

Nonetheless, unilateral measures in pursuit of a global common interest, i.e., "ending" IUU fishing,[8] may raise questions of legitimacy, sufficiency or coherence if domestic laws and policies substantially differ from their purported international law and policy basis. Systemic differences may first and foremost arise from different definitions of IUU fishing. Unlike the EU's practice, which largely follows the international law "definition" of IUU fishing in the *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU),[9] the USA has prescribed a definition of IUU fishing that is fundamentally different in scope. To highlight this difference and its legislative impact, this article first introduces the USA's identification and certification procedure (Part II). More specifically, this article addresses the consequences and acceptability of the U.S. definition of IUU fishing as not including vessels engaged in illegal fishing in the waters under the jurisdiction of a foreign state.

A novel section in the *2019 Report to Congress* entitled "Concerns with China's Fishing Practices"[10] is then both demonstrative of such a legislative gap and the currently hobbled U.S. response (Part III). When the USA implements the identification

and certification procedure, the U.S. definition of IUU fishing precludes consideration of alleged widespread illegal fishing by Chinese-flagged vessels in the exclusive economic zones (EEZs) of foreign states. States have a certain degree of flexibility in defining IUU fishing.[11] However, this practice demonstrates that the current definition results in an identification and certification procedure that is inconsistent with U.S interests and is insufficient to address the USA's global policy objectives and responsibilities. The lessons learned should promote U.S. legislative reform and equally assist other market states in designing unilateral measures that properly address a global common interest.

The *2019 Report to Congress* also raises concerns with IUU fishing by stateless vessels with the "characteristics" of Chinese flagged vessels (Part IV). The identification and certification procedure seeks to address poor governance by foreign states. Given the lack of an attributable flag state for vessels without nationality, state-to-state trade measures targeting flag states should exclude IUU fishing by vessels without nationality. Any possible trade measures against a flag state on the basis of the "characteristics" of stateless vessels is inappropriate.

This article concludes with the way forward for the USA and other states adopting unilateral trade measures to combat IUU fishing (Part V). Wider lessons on ensuring transparent and unbiased implementation of market state measures are also raised.

Finally, this article focuses on China because it is the subject of the new "concerns" section of the *2019 Report to Congress*. An independent *IUU Fishing Index* also ranked China as the worst performing flag state in 2019 (excluding landlocked states).[12] But, it is not the objective of this paper to address the factual basis of NOAA's concerns, nor the Chinese response. The arguments below concern the appropriate substantive design of trade measures. These design arguments do not affect the market states' procedural discretion in implementation, nor suggest China must be identified.

II. Existing Tools: U.S. Identification and Certification of States Engaged in IUU Fishing[13]

Through the *High Seas Driftnet Fisheries Enforcement Act*[14] and the *High Seas Driftnet Fishing Moratorium Protection Act*[15] the USA has given itself a legal tool to address foreign states or fishing entities that engage in IUU fishing.[16] This mechanism involves three steps.

First, having collected and analyzed data from various sources, the USA will identify foreign states "whose vessels engaged in illegal, unreported, or unregulated fishing."[17] States may also be identified for certain violations of RFMO measures to which the USA is a party, or for not effectively regulating IUU fishing in a fishery where no RFMO exists.[18]

U.S legislation sets minimum standards on what should be in the U.S. definition of IUU fishing.[19] Implementing regulation then defines IUU fishing:

Illegal, unreported, or unregulated (IUU) fishing means:

(1) In the case of parties to an international fishery management agreement to which the United States is a party, fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, bycatch reduction requirements, shark conservation measures, and data reporting;

(2) In the case of non-parties to an international fishery management agreement to which the United States is a party, fishing activities that would undermine the conservation of the resources managed under that agreement;

(3) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures, or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(4) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement.

(5) Fishing activities by foreign flagged vessels in U.S. waters without authorization of the United States.[20]

The U.S definition delineates the scope of identification and thus the U.S procedure and trade measures. This definition differs from the international definition found in the IPOA-IUU. The IPOA-IUU does not provide a universally accepted legal definition of IUU fishing, but it does provide an "authoritative description of the types of activities that states wish to legally constrain."[21] IUU fishing is defined as:

3.1 Illegal fishing refers to activities:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying

the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.[22]

For example, the U.S. paragraph 4 on unregulated fishing activities that impact vulnerable marine ecosystems is arguably broader in some respects than paragraph 3.3.2 of the IPOA-IUU. In the words of one objecting state, it goes beyond internationally agreed binding standards and a failure to meet non-binding standards found in UNGA resolutions or FAO guidelines should not be defined as IUU fishing.[23] This author does not take a position on that debate, but it does highlight the differences of opinion on whether an activity is conducted "in a manner inconsistent with State responsibilities"—an explicit requirement under the IPOA-IUU definition but not the U.S definition. For proponents of treating some unregulated fishing as similar to illegal fishing for the purposes of imposing measures, that requirement is a necessity of the IUU definition.[24] For others,[25] imposing U.S. standards without any reference to flag state responsibilities would likely be circumspect as supporting an assertion to high seas fishing denied to foreign states.

There are two relevant points for this paper on which the U.S definition of IUU fishing is narrower than the international definition. First, the conduct of vessels without nationality is not included. As NOAA points out, the international definition may, for example, be used to identify vessels engaged in IUU fishing that should be denied port entry under the *Port State Measures Agreement*[26] and U.S law.[27] That would include the conduct of vessels without nationality. But these vessels would be inappropriate to include in any definition of IUU fishing used to identify responsible flag states. Vessels without nationality are by definition lacking in the "genuine link" required to hold any flag state accountable.[28] This demonstrates that the definition of IUU fishing in domestic law need not be identical to the international definition.

Second, the U.S. definition includes illegal fishing activities in waters under the jurisdiction of the USA (para. 5), but does not, in general, include illegal fishing in the waters under the jurisdiction of a foreign state (IPOA-IUU, para. 3.1.1). This also excludes fishing activities that are unreported or misreported to foreign coastal states (IPOA-IUU, para. 3.2.1), which for convenience is treated by this article as a form of illegal fishing.[29]

Therefore, by design, the U.S. identification procedure can only consider illegal fishing in foreign EEZs if that conduct is also in violation of (U.S., para. 1; IPOA-IUU, paras. 3.1.2–3.1.3, 3.2.2)—or undermines the effectiveness of (U.S., para. 2; IPOA-IUU, para. 3.3.1)—conservation and management measures (CMMs) adopted by an RFMO to which the USA is a party.[30] In light of the *2019 Report to Congress*, this paper will return to the topic of whether it remains appropriate to exclude illegal fishing in the waters under the jurisdiction of a foreign state (Part III) or vessels

without nationality (Part IV) from a definition of IUU fishing that "establishes a process to identify and certify nations […] to promote sustainable fishing activities by their vessels."[31]

In short, the U.S. definition of IUU fishing is limited to fishing activities that directly infringe upon U.S. fisheries interests, apart from activities that impact vulnerable marine ecosystems (VMEs) located outside an RFMO area. Foreign flag states undermining sustainable fisheries globally, in fisheries in which the USA does not have a stake, cannot be identified—with the exception of deep-sea fishing shown to impact VMEs.

Following identification, the second stage involves notification and consultation of the identified state. The purpose is to encourage the state "to take the appropriate corrective action."[32]

The third and final stage involves U.S. certification of whether the foreign state has taken sufficient corrective action to address the IUU fishing activities.[33] The next *Report to Congress* after identification should include this certification; positive for states that address the IUU fishing activities, negative for those which cannot provide sufficient evidence of actions taken. If a certification decision cannot be reached in time, a discretionary shipment-by-shipment market entry procedure could apply to fish or fish products from the vessels of the identified but uncertified state.[34]

When a state receives a negative certification, its flagged-vessels and the state's catch and fishery products may be subject to U.S. restrictions on importation[35] and the denial of port entry or other port privileges.[36] Additional economic sanctions may be imposed if the previous measures prove unsuccessful, or the targeted state retaliates.[37] Additional economic sanctions may "prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization […] or the multilateral trade agreements."[38]

By denying a foreign state market access for its fish or fish products, or ports access for fishing vessels flying its flag, the USA hopes to persuade the foreign state to adopt reform and to exercise effective flag state jurisdiction. The USA has, in principle, the right to exercise jurisdiction over foreign vessels or products seeking access to American ports or the American market.[39] Furthermore, if the USA limits itself to exercising its own international law rights, in a manner consistent with its other obligations under international law, these measures are an exercise of retorsion and not countermeasures.[40] As an internationally lawful—but unfriendly—act, retorsion is distinguishable from countermeasures by the fact retorsion does not require any prior violation of international law by the targeted state.[41]

A clear legal basis and the lack of any need to demonstrate the foreign state violated international law would provide the U.S. with considerable discretion in which states it identifies and the process or threshold it uses for identification. Hence, the USA may use a broader definition of IUU fishing for its identification and certification procedure. Defining deep-sea fishing that impacts VMEs as IUU fishing only imposes stricter conservation standards for fishery products exported to the U.S.

market, or for fishing vessels visiting U.S. ports. It does not define IUU fishing for the purposes of any extraterritorial regulation,[42] nor impose any countermeasures that would require demonstrating the flag state has first violated international law.

Questions of legality may however arise upon whether these rights are implemented in a manner consistent with the USA's other obligations under international law, notably limitations in international trade law. Similar port state and market state measures have been challenged under the *General Agreement on Trade and Tariffs* (GATT).[43] Of particular contention are the requirements in the chapeau to Article XX, whereby a measure must not be unduly restrictive on trade and must not unjustifiably discriminate against GATT parties. World Trade Organization (WTO) law appears to allow considerable space for unilateral trade measures combatting IUU fishing, if properly designed and implemented.[44]

The USA implements other comparable identification and certification procedures to address other global common interests. These may overlap with the IUU fishing identification procedure. For example, the highly destructive nature of large-scale pelagic driftnet fishing is recognized by the international community.[45] The proactive response of the USA, including its unilateral trade measures, played no small part in building multilateral consensus and giving effect to the global moratorium found in non-binding UNGA resolutions.[46] States "whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation" may therefore be identified.[47] Again, the applicable fish and products from that state may be subject to import prohibitions or greater documentation requirements. The fishing vessels of identified states are denied port entry or other port privileges. Additional economic sanctions are again possible.[48]

Another comparable procedure addresses the bycatch of protected living marine resources (PLMR).[49] This includes very specific requirements for reviewing foreign laws, such as "in the case of pelagic longline fishing, includes mandatory use of circle hooks."[50] It is interesting to note the *2019 Report to Congress* also highlights the possible expansion of this procedure to address seabird conservation as a "global concern."[51] In the case of special interests such as shark conservation, identification by the USA may actually occur under the procedure for IUU fishing, PLMR or an additional high seas shark conservation comparability procedure.[52]

Finally, in practice the USA has rarely resorted to imposing measures because foreign states are generally given a positive certification in the *Report to Congress* following identification for IUU fishing. An exception occurred in 2017 when Mexico received a negative certification for IUU fishing (U.S. definition, paras. 3 and 5).[53] Mexican-flagged vessels fishing in the Gulf of Mexico were subject to denial of U.S. port access and services.[54] An earlier case involving Italian large-scale driftnet fishing vessels resulted in Italy being identified, but an agreement on measures necessary "to effect the immediate termination of Italian large-scale high seas driftnet fishing" resulted in trade sanctions being avoided.[55] From 1996 to 2015, Italian exports of applicable fish and fish products to the USA were nonetheless subject to additional documentation requirements.[56] Turning to previous U.S practice on China, the *2009 Report to Congress* identified China as having vessels engaged in IUU fishing activ-

ities.[57] As China took appropriate corrective measures, it was given a positive certification in the *2011 Report to Congress*.[58]

III. Existing Gaps: States Having Vessels Engaged in Illegal Fishing in Foreign EEZs

The *2019 Report to Congress* is the first occasion in which NOAA has included a section highlighting allegations of IUU fishing by the vessels of one state which do *not* fall within the U.S. definition of IUU fishing. The report summarizes alleged illegal fishing and related activities by Chinese-flagged vessels in the EEZs of Argentina, Senegal, Guinea, Sierra Leone, Guinea Bissau, Vanuatu, Micronesia, Ecuador and Peru. NOAA's research raised further examples indicating "a possible pervasive problem from Chinese-flagged fishing vessels."[59] Previous reports included "countries of interest," but these were states that adequately responded to avoid identification and not those responsible for IUU fishing activities excluded from the U.S. definition.[60]

This is also a notable escalation in attention by *Reports to Congress* on illegal fishing in foreign EEZs. Previously, at most the *2013 Report to Congress* made passing references to the activities of Ghanaian-flagged and Korean-flagged vessels in Liberian waters,[61] and the *2009 Report to Congress* raised concerns over activities excluded by "the geographic scope and nature of alleged IUU fishing."[62] NOAA's increasing interest in China correlates with rising political and economic tensions between the USA and China. But it also correlates with the significant expansion of China's distant water fleet in terms of vessels and their catch, distance and fishing efforts in foreign EEZs.[63]

The major drawback of some forms of IUU fishing falling outside the identification framework is that the formal procedure and consultations cannot by triggered. In prescribing this geographic limitation in the U.S. definition of IUU fishing, the trade measures, by design, discriminate between foreign states facilitating illegal fishing that directly infringes upon U.S. fisheries interests and foreign states facilitating other illegal fishing. Including U.S. fisheries interests within the design of trade measures, as opposed to NOAA's discretion in the implementation of those trade measures, is distinguishable and results in practices difficult to rationalize on any other basis. Comparable EU practice does not discriminate between illegal fishing in its design of trade measures, but still retains EU discretion in where it focuses its attention for implementation.[64] EU fisheries interests could be a factor for consideration during implementation.

A comparison between China and Korea in the *2019 Report to Congress* is illustrative of this disconnect between NOAA's IUU fishing concerns and the current design of trade measures purportedly "to promote sustainable fishing activities by their vessels."[65] NOAA's significant concerns with China's control of a large number of vessels illegally operating across a large number of maritime zones (IPOA-IUU, para. 3.1.1) is prohibited from being considered for identification. And yet, Korea is identified

because of NOAA's relatively minor concerns with the adequacy of Korean sanctions applied against two vessels (IPOA-IUU, para. 3.1.2; U.S. definition para. 1).[66] International law does not dictate that state-to-state trade measures must combat all forms of IUU fishing. Nonetheless this article will now argue that this discrimination in the design of trade measures between states facilitating different forms of illegal fishing does not serve the interests of the USA or the international community.

Reform is possible as the USA is not prohibited by international law from using state-to-state trade measures to address states facilitating illegal fishing in foreign EEZs. Indeed, Vietnam was notified under the EU's non-cooperating states procedure for, among other reasons, not controlling its vessels illegally fishing in foreign EEZs.[67] The same can be said of U.S. domestic legislation, whereby the *Moratorium Protection Act* does not prohibit NOAA from defining illegal fishing in foreign EEZs as IUU fishing for the purposes of identification and certification.[68]

In (re)designing trade measures, it was noted that the domestic definition of IUU fishing is flexible (Part II). However, in using a holistic definition as the starting point envisaged by the IPOA-IUU,[69] states should then avoid significant differences in definition without reason. States should be moving toward greater specificity on the activities that constitute IUU fishing. Any unreasoned exception for an entire form of IUU fishing further risks a fragmented and ineffective global response to IUU fishing.[70] In particular, exceptions that are inconsistent with the recognized threats of IUU fishing—including in non–U.S. EEZs—will diminish the genuine and rationale link between the identification and certification procedure and its objectives.[71] This disconnect can result in *prima facie* arbitrary and unjustified discrimination, as highlighted in the 2019 China/Korea example.

More generally, Swan argues that ensuring consistency in defining basic terms such as IUU fishing is one objective of domestic fisheries legislation.[72] Departures from consistency in basic terminology is discouraged because this may undermine wider compliance with—and enforcement of—fisheries conservation and management measures. The USA could hypothetically persuade all flag states to not facilitate IUU fishing as currently defined in U.S. law. However, this could result in illegal fishing under flags of non-compliance simply migrating to waters under the jurisdiction of foreign states, safe in the knowledge that identification and trade measures are inapplicable. Rather than assisting those developing states without the necessary resources and infrastructure to protect their waters from foreign illegal fishing,[73] the current design of U.S. trade measures could perversely exacerbate their struggle.[74]

The question therefore becomes whether there are justified reasons for this significant divergence in the definition of IUU fishing when adopting state-to-state trade measures? For example, reasoning is apparent in the decision to exclude, as a basis for identification, non-compliance with CMMs of RFMOs to which the USA is not a party. From the perspective of U.S. interests, "it could result in a nation's identification for violations of international measures to which the United States is not bound, and was not involved in developing."[75] That reasoning follows international practice recognizing that a state is not necessarily bound by the measures of such RFMOs,[76] although certain states may still be bound via the *UN Fish Stocks*

Agreement (including the USA).[77] In terms of international interests, GATT may otherwise raise concerns of discriminatory restrictions being applied to the foreign state's access to a fishery that the USA does not impose on itself.[78]

These concerns do not arise in respect of the flag states' obligations on illegal fishing in foreign EEZs. The coastal state's law provides the conservation and management measures binding upon all vessels conducting fishing activities in the EEZ, regardless of flag state.[79] In turn, both the *SRFC Advisory Opinion* and the *South China Sea Award* held that UNCLOS imposes on flag states a due diligence obligation to ensure its vessels are not illegally fishing in a foreign state's EEZ.[80] Soft law instruments support this conclusion,[81] and EU notifications under the non-cooperating states procedure interpret the flag state's obligation as customary international law.[82] Within the IPOA-IUU definition, para. 3.1.1 is the most well-defined and universally accepted form of IUU fishing, including multilaterally agreed obligations on the flag state. The U.S. definition thus excludes trade measures building on the clearest case of a flag state not meeting established international obligations.[83]

This also undermines further U.S. objectives, namely, to remain a global leader in sustainable fisheries where combatting IUU fishing is a global threat requiring coordinated global action.[84] As a key market state in "the exploitation of fisheries products globally,"[85] the USA recognizes it has a responsibility to combat IUU fishing. Other large market states, including the EU, share this responsibility to not allow their markets to support IUU fishing.[86] The role of market states in international fisheries law is in a state of flux, so market state leadership on state-to-state trade measures is first and foremost gained through their appropriate design. The *2019 Report to Congress* is further evidence that the current identification procedure unnecessarily excludes a potential global threat to sustainable fisheries.[87] A design that should not be followed by other market states.

Furthermore, it is generally accepted that environmental trade measures are not purely altruistic but serve domestic economic interests such as protecting local businesses and consumers.[88] This is not inherently wrong. Flag states also conduct distant water fishing for geostrategic reasons unconnected to their economic or social fisheries interests.[89]

However, limiting trade measures to IUU fishing activities that directly infringe U.S. fisheries interests does not necessarily protect the domestic market or consumers. For the U.S. fishing industry, foreign vessels may gain an unfair advantage by operating under flag states unwilling or unable to enforce international fisheries conservation and management measures.[90] The current U.S. definition excludes using trade measures to address the unfair advantages provided by flag states *unwilling* to enforce legal requirements for fishing in foreign EEZs. By contrast, the more recent *Maritime SAFE Act*[91] provides capacity building to foreign flag states that are *unable* to enforce international fisheries conservation and management measures.[92] Being based on the IPOA-IUU definition, this includes capacity development on the ability to address illegal fishing in foreign EEZs.[93] The current design of U.S. trade measures is comparatively insufficient to level the playing field for the U.S. fishing industry.

NOAA is aware that this fundamental gap in the design of U.S. trade measures arises from the domestic definition of IUU fishing in NOAA's implementing regulation and not the *Moratorium Protection Act*.[94] In this author's opinion, questions of where unilateral action and resources should focus is a question best left to the implementation of trade measures as opposed to their design. The *2019 Report to Congress* suggests that NOAA agrees. NOAA intends to redesign the identification and certification procedure to include the flag state responsibilities for vessels illegally fishing in the EEZ of foreign states:

> NOAA will undertake a regulatory action to broaden, consistent with the statute, its regulatory definition of IUU fishing for the purposes of identification under the MPA to include situations where there is a clear pattern of vessels flagged to a nation conducting fishing activities in the EEZ of other nations without authorization of the respective coastal state. This will enable us, in future reports to Congress, to identify any nation that meets those criteria.[95]

An analysis of previous *Reports to Congress* and subsequent domestic amendments suggest that legislative reforms do actually occur after gaps are identified by NOAA's *Reports to Congress*. Early *Reports to Congress* included subsections on "other" information. These noted a state's non-compliance with RFMO reporting requirements, but also that this was not used for identification.[96] This was because U.S. law was unclear upon whether such non-compliance could form the basis of identification "in the absence of some linkage to the activity of vessels."[97] In 2013, NOAA clarified its position by opting for the broader interpretation,[98] followed by amendments in 2015 explicitly providing for the identification of states on the basis of their own acts or omissions.[99]

Other limitations to the identification procedure have also been addressed once they came to light. In 2015, the years of practice reviewed for identification was expanded from two to three years.[100] The possibility of identifying a fishing entity was also added.[101] Finally, in 2016, the number of IUU fishing vessels required for identification was dropped to one.[102]

Until the U.S. definition is reformed, NOAA's concerns with China's flag state jurisdiction will still be subject to follow-up engagement and analysis by NOAA:

> NOAA will engage with China to seek information on its efforts to exercise responsible flag state control over its distant water fishing vessels and to confirm that it is taking the necessary steps to ensure compliance by its fleet. We will also continue to take steps to ensure that the United States is not importing seafood derived from this type of IUU fishing activity.[103]

Thus, NOAA's reporting on its issues with Chinese-flagged vessels also represents a possible willingness to address a major fishing state subject to significant IUU fishing concerns. In international fisheries law this can only be a welcome development. A repeat criticism of the EU's comparable non-cooperating states procedure has been the uneven distribution of its identifications when compared to the distribution of IUU fishing practices.[104] Among others, Odom argues "there is significant commonality between the nations who ranked poorly in *IUU Fishing Index* and the

nations that have received yellow and red cards," but the lack of yellow cards for "big offenders" (China, Japan or Russia) could demonstrate systemic discrimination.[105] The USA appears here more willing to identify major fishing states, but only time will tell if the USA expands its very limited negative certification practice and the consequences therewith. Ecuador has been identified in 2011, 2013, 2015, 2017, and 2019, yet never negatively certified. The lasting impact of identifications alone, without negative certifications in practice, is therefore questionable. Until then, it is even less clear what "steps" will be taken regarding non-identified China.[106]

IV. Existing Gaps: Vessels Without Nationality Engaged in IUU Fishing

The *2019 Report to Congress* also highlights many cases of IUU fishing by stateless vessels (vessels without nationality) "that have characteristics of Chinese registration but which China has denied are Chinese-flagged vessels."[107] Given the significant number of stateless "Chinese characteristic" vessels on the North Pacific Fisheries Commission (NPFC) *IUU Vessel List*,[108] this raises the question whether it remains suitable that the identification and certification scheme cannot address the activities of vessels without nationality.

As noted above (Part II), the conduct of vessels without nationality is not normally attributable to a flag state. The fact that this practice is included in a section on "China's practices" may demonstrate experimentation with a broader interpretation of the "genuine link" and thereby knock-on effects for the breadth of vessels covered by a flag state's due diligence obligation.[109] This interpretation would include, in addition to the state's formal response, the weighing of the "characteristics" of registration. This could prevent states using ambiguities in the legal status of a vessel to raise uncertainties in the applicable principles of international law.[110] For example, a state may be deterred from interdicting fishing vessels on the high seas under Article 110(d) of UNCLOS if it is unsure whether the vessel is without nationality. Compensation is due if suspicions are unfounded.[111] If political tensions with China exist, the possibility of further dispute may discourage interdiction unless Article 110(d) clearly applies.

However, a very solid counter argument is that any subjective element on whether "characteristics" are sufficient to raise flag state obligations is also open to misuse. For example, the lack of transparency in identification thresholds under the EU's non-cooperating states procedure has resulted in uncertainty as to whether the EU actually goes beyond international standards, and its stated objectives thereof.[112]

The NPFC Convention Area concerns the high seas. Therefore, only the failure to fulfill the jurisdictional duties of port states or states of nationality[113] could facilitate vessels without nationality conducting IUU fishing therein. A more readily available response by the USA would be to take enforcement action directly against the vessels without nationality.[114]

If NOAA was set on using the identification procedure it should look beyond

identifying a flag state responsible, instead focusing on "actions of nation" that violate and undermine CMMs to which the USA is party.[115] If the relevant RFMO has a CMM on the control of nationals, a state of nationality could be identified if it failed to investigate or take appropriate action against a national reportedly engaged in IUU fishing. This has never been the basis of identification, although it has been discussed by NOAA in the cases of Korea, Spain and Russia.[116]

In contrast, the EU non-cooperating states procedure would be more readily applicable. The EU procedure reviews states fulfilling their responsibilities as flag states, coastal states, port states and market states.[117] The EU had developed extensive practice on its interpretation of port states duties in international fisheries law and has not hesitated in notifying states of possible EU trade measures if these duties are not fulfilled.[118] Concerning China, it is an NPFC member and denies these listed vessels are Chinese flagged vessels. Apart from allowing port entry for inspection or other enforcement action, China's port state duties include an obligation under international law and the *NPFC Convention* to deny port entry to these vessels—regardless of the Chinese homeports painted on the vessels' hulls.[119] Proactive states are best monitoring and assisting China in meeting its clearer port state obligations.

V. Conclusion

The U.S. identification and certification procedure principally aims to address one of several driving forces of global IUU fishing, namely poor governance by flag states. Until international cooperation is fully forthcoming,[120] there will be a place for unilateral trade measures by states concerned that non-compliant or non-cooperating states are undermining their interests, or those of the international community.[121]

The *2019 Report to Congress* represents an invaluable lesson to all states on the importance of how IUU fishing is defined when designing state-to-state trade measures. A number of benefits arise from following the international definition of IUU fishing, but states are not bound to do so.

Designing state-to-state trade measures to exclude flag states facilitating illegal fishing in foreign EEZs was seen as unnecessary and inconsistent with international and national interests. From the international perspective, it excludes the most well-defined and universally accepted form of IUU fishing, which is also subject to multilaterally agreed flag state obligations. If unilateral trade measures are building on the primary responsibility of flag states,[122] they should first and foremost apply here. Domestically, this exclusion undermines U.S. "global leadership" and fails to protect the U.S. market and operators from the unfair advantages provided to foreign operators illegally fishing in foreign EEZs. The 2019 concerns with China highlight that this limitation should be discouraged and reform is necessary.

If one takes a broader perspective, the subsequent *Maritime SAFE Act* states U.S policy as including "develop[ing] holistic diplomatic, military, law enforcement, economic, and capacity-building tools to counter IUU fishing [as defined in IPOA-

IUU]."[123] On law enforcement, the *Lacey Act* punishes, among others, persons importing into the USA the fisheries catch or products resulting from illegal fishing in foreign EEZs.[124] On economic tools, the *Seafood Import Monitoring Program* progresses toward closing the U.S. market to fish or products resulting from IUU fishing, including illegal fishing in foreign EEZs.[125] Now, these measures address the personal economic advantages of IUU fishing and not poor flag state governance. Yet they do reiterate the anomalous nature of narrowly designing trade measures within an IUU fishing policy and toolbox which endeavors to be integrated and holistic.[126]

In contrast, the exclusion of vessels without nationality from the U.S. definition of IUU fishing rightly reflects the lack of any flag state responsible for exercising jurisdiction and thus possible U.S. identification. The *2019 Report to Congress* controversially raises attribution on the basis of a vessel's "characteristics" similar to a flag state's vessels. This carries inherent risks of abuse and existing responses in international law are more appropriate. Trade measures against flag states facilitating IUU fishing should continue to exclude vessels without nationality, by design.

Moving forward, the USA should amend the identification and certification procedure to include flag states responsible for illegal fishing in foreign EEZs. This will remove an unnecessary and discriminatory distinction in the design of U.S. trade measures combating IUU fishing. If necessary, the USA may then still exercise its discretion in implementation to focus identifications on fishing activities that directly infringe upon U.S. fisheries interests. Any question of identifying flag states for IUU fishing by stateless vessels with "characteristics" of that flag state should be dropped. If the USA wishes to make progress here, it will need to follow the EU's example and design trade measures that address coastal states, port states, market states and states of nationality that are facilitating IUU fishing.

For the EU moving forward, the non-cooperating states procedure follows the IPOA-IUU definition of IUU fishing. The critiques of bias or discrimination in EU trade measures therefore result not from design, but implementation.[127] This is in part due to the initial audits and informal dialogues remaining confidential. Commentators and states only have access to the EU's reasoning in the more limited cases of a foreign state being issued a pre-identification notification ("yellow card"). Perhaps the EU has or is engaging China in confidential dialogue. The lack of transparency on which states are subject to continuing informal dialogues or have implemented reforms necessary to avoid a yellow card therefore increases the perceived discrimination. It would be in the interest of the EU and its partners to follow the transparency evident in the *Reports to Congress*. Similar to NOAA's "concerns," the EU could list its ongoing informal dialogues and omit any substantive details that could jeopardize the process. Informal dialogues that conclude in a yellow card being unnecessary could then be reported in detail similar to NOAA's reporting on states considered but not identified. These minor reforms would greatly improve procedural transparency and shed further light on how states interpret their obligations to combat IUU fishing in international law.

Finally, whether trade measures are substantively and procedurally fit for purpose and whether they should then be implemented against a foreign state are sep-

arate questions. The difficult and potentially controversial task of identifying states—including if this should include China—is left to NOAA.

Notes

1. The author is indebted to Gilles Hosch, Vu Hai Dang, Dita Liliansa and the three reviewers for their insightful comments on an earlier draft. All faults remain that of the author.

2. "Improving International Fisheries Management: 2019 Report to Congress," *NOAA,* 2019, https://www.fisheries.noaa.gov/foreign/international-affairs/identification-iuu-fishing-activities, accessed March 22, 2020.

3. Pub. L. 104–43, 3 November 1995, as added Pub. L. 109–479, Jan. 12, 2007, 120 Stat. 3630; amended Pub. L. 111–348, Jan. 4, 2011, 124 Stat. 3669; Pub. L. 114–81, Nov. 5, 2015, 129 Stat. 654, 655; Pub. L. 114–327, Dec. 16, 2016, 130 Stat. 1995. A line office of NOAA is responsible for identification and certification (National Marine Fisheries Service). For simplicity this article refers to NOAA or the USA.

4. 16 United States Code [2018] ss. 1826j(d)(3), 1826a(b)(3)(A)(i), 1826a(a)(2)(a).

5. 16 United States Code [2018] s. 1826a(b)(4).

6. Council Regulation (EC) No 1005/2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (as amended and consolidated 09/03/2011) OJ L 286/1, 29/10/2008, chap. 6.

7. Stretching back to the 1990s, Linda A. Chaves, "Illegal, Unreported and Unregulated Fishing: WTO Consistent Trade Related Measures to Address IUU Fishing," in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15–19 May 2000*, FAO, (Rome, FAO Fisheries, 2001), Report No. 666 para. 20; Arron N. Honniball, *Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing* (Dissertation, Utrecht University, 2019), pp. 230–232, http://dspace.library.uu.nl/handle/1874/375223, https://doi.org/10.2139/ssrn.3527434, accessed March 22, 2020.

8. UNGA, "Transforming Our World: The 2030 Agenda for Sustainable Development," (2015), A/RES/70/1, Sustainable Development Goals 14.4.

9. FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome: FAO, 2001); IUU Regulation, Article 2(2)–(4).

10. NOAA 2019 (n 2), p. 37.

11. Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden: Brill, 2010), p. 37, https://doi.org/10.1163/ej.9789004175754.i-341.

12. Poseidon Aquatic Resource Management and Global Initiative Against Transnational Organized Crime "IUU Fishing Index, Rankings," http://www.iuufishingindex.net/ranking, accessed March 22, 2020; Note, Zhang Chun, "China Targets Distant-Water Criminals with New Fisheries Law," *Chinadialogue Ocean*, January 21, 2020, https://chinadialogueocean.net/12714-china-fisheries-law-distant-water-fishing/, accessed March 22, 2020.

13. Part II substantially revises and expands part 6.2.4 of Honniball, 2019.

14. Pub. L. 102–582, Nov. 2, 1992, 106 Stat. 4901; Pub. L. 109-479, Jan. 12, 2007, 120 Stat. 3632; Pub. L. 114-81, Nov. 5, 2015, 129 Stat. 656.

15. See note 3. All future references to U.S. law in this paper use the codified version, as found in the *United States Code [2018]*, and *United States Code of Federal Regulations [2018]*.

16. Fishing entities (e.g., Chinese Taipei), 16 U.S.C. [2018] s. 1826j(a)(3). Overview of practice until 2015, Gilles Hosch, *Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches* (Geneva: International Centre for Trade and Sustainable Development, 2016), pp. 38–43; discussing advantages and disadvantages of expanding this practice, Katrina Wyman, "Unilateral Steps to End High Seas Fishing," *Texas A&M Law Review* 6(1) (2018), p. 259.

17. 16 U.S.C. [2018] s. 1826j(a)(1); 50 United States Code of Federal Regulations [2018] s. 300.202.

18. 16 U.S.C. [2018] s. 1826j(a)(2).

19. 16 U.S.C. [2018] s. 1826j(e)(3).

20. 50 CFR [2018] s. 300.201.

21. Seokwoo Lee, Anastasia Telesetsky and Clive Schofield, "Slipping the Net: Why Is It So Difficult to Crack Down on IUU Fishing?" in *Freedom of Navigation and Globalization* Myron H. Nordquist et al. (Leiden: Brill 2014), pp. 95–96, https://doi.org/10.1163/9789004284081_007.

22. FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome: FAO, 2001); IUU Regulation, para. 3; affirmed, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature November 22, 2009, UNTS No 54133 (entered into force June 5, 2016) Article 1(e). Note the caveat in IPOA-IUU, para. 3.4.

23. NOAA, "High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures to Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources," *Federal Register* 76(8) (2011), p. 2017.

24. Jens T. Theilen, "What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing," *The International Journal of Marine and Coastal Law* 28(3) (2013), pp. 542–543, https://doi.org/10.1163/15718085-12341284; Osvaldo Urrutia, "Combating Unregulated Fishing Through Unilateral Trade Measures: A Time for Change in International Fisheries Law?" *Victoria University of Wellington Law Review* 49(4) (2018), https://doi.org/10.26686/vuwlr.v49i4.5346.

25. Andrew Serdy, "Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal," *Ocean Development & International Law* 48(3–4) (2017), pp. 355–356, https://doi.org/10.1080/00908320.2017.1349525.

26. PSMA Article 9; NOAA, "High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures to Address Shark Conservation," *Federal Register* 78(11) (2013), p. 3341.

27. 16 U.S.C. [2018] s. 7402(2), using the IPOA-IUU definition.

28. *United Nations Convention on the Law of the Sea*, opened for signature December 10, 1982, 1833 UNTS 3 (entered into force November 16, 1994) Articles 91(1), 94; M/V "Virginia G," (Panama/Guinea-Bissau), Judgment [2014] ITLOS 19, ITLOS Reports 2014 4 [110–113].

29. Theilen 2013, p. 541.

30. E.g., Taiwan and its vessel fishing in the Marshall Islands' EEZ in violation of a WCPFC CMM; U.S. Department of Commerce, *Implementation of Title IV of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006: Biennial Report to Congress* (Washington, D.C.: U.S. Department of Commerce, 2011), p. 107.

31. NOAA 2013 (n 26), p. 3341.

32. 16 U.S.C. [2018] ss. 1826j(b)–(c); 50 CFR [2018] ss. 300.202(b)–(c).

33. 16 U.S.C. [2018] s. 1826j(d); 50 CFR [2018] s. 300.202(d).

34. 50 CFR [2018] s. 300.207.

35. 16 U.S.C. [2018] ss. 1826j(d)(3), 1826a(b)(3)(A)(i).

36. 16 U.S.C. [2018] s. 1826a(a)(2)(a).

37. 16 U.S.C. [2018] s. 1826a(b)(4)(A).

38. 16 U.S.C. [2018] s. 1978; NOAA 2013 (n 26), p. 3340.

39. Most literature equates the denial of a privilege that is enforced in the territory of the port state or market state as territorial prescriptive jurisdiction, period. As conditions of extraterritorial conduct are often imposed, recent PhDs challenge this assumption for both port states and market states and offer alternative basis; Honniball 2019, pp. 71–88; Eva Romée van der Marel, *Evaluating Market Conditionality in Fisheries: Interactional Law and Global Administration* (Dissertation, University of Tromsø, 2020), pp. 271–281.

40. Thomas Giegerich, "Retorsion," in *Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2011), https://doi.org/10.1093/law:epil/9780199231690/e983.

41. International Law Commission, "Responsibility of States for Internationally Wrongful Acts," United Nations, 2001, UN Doc A/RES/56/83 (Annex) Article 49.

42. See the distinction between regulation and import standards raised in discussions on another comparable U.S. trade measure; NOAA, "Fish and Fish Product Import Provisions of the Marine Mammal Protection Act," *Federal Register* 81(157) (2016), p. 54397.

43. General Agreement on Tariffs and Trade, October 30, 1947, 55 UNTS 308 (entered into force January 1, 1948); *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body* (1998) WTO DSB DS58, WT/DS58/AB/R; *Chile—Measures Affecting*

the Transit and Importing of Swordfish, Request for the Establishment of a Panel by the European Communities (2000) WTO DSB DS193, 00–4761; *European Union—Measures on Atlanto-Scandian Herring, Request for the Establishment of a Panel by Denmark in Respect of the Faroe Islands* (2014) WTO DSB DS469, 14-0096.

44. Margaret A. Young, "International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing," *Marine Policy* 69 (2016), p. 209, https://doi.org/10.1016/j.marpol.2016.01.025; Robin Churchill, "International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing," in *Strengthening International Fisheries Law in an Era of Changing Oceans*, eds. Richard Caddell and Erik J Molenaar (Oxford: Hart, 2019), https://doi.org/10.5040/9781509923373.ch-014.

45. 16 U.S.C. [2018] ss. 1826(b)(5)–(6).

46. Donald R. Rothwell, "The General Assembly Ban on Driftnet Fishing," in *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford: OUP 2000), https://dx.doi.org/10.1093/acprof:oso/9780199270989.003.0006.

47. 16 U.S.C. [2018] s. 1826a.

48. 16 U.S.C. [2018] ss. 1826a–1826b.

49. 16 U.S.C. [2018] s. 1826k; 50 CFR [2018] ss. 300.200–300.209.

50. 16 U.S.C. [2018] s. 1826k(c)(1)(A); 50 CFR [2018] s. 300.203(e)(1)(i); NOAA, 2011 (n 23), p. 2016.

51. NOAA, 2019 (n 2), p. 14.

52. 16 U.S.C. [2018] ss. 1826j(a)(1), 1826k(a)(1), 1826k(a)(2). For the latter see, 50 CFR [2018] s. 300.204.

53. NOAA, *Improving International Fisheries Management: January 2017 Report to Congress* (2017), p. 29.

54. NOAA, *Notification to Mexican Fishing Vessels Subject to Port Denial Under the High Seas Driftnet Fishing Moratorium Protection Act* (2017).

55. NOAA, *2015 Report of the Secretary of Commerce to the Congress of the United States Concerning U.S. Actions Taken on Foreign Large-Scale High Seas Driftnet Fishing* (2015), p. 12.

56. NOAA, "Determination That Italy Is Not a Large-Scale High Seas Driftnet Nation," *Federal Register* 80(112) (2015), p. 33245.

57. U.S. Department of Commerce, *Implementation of Title IV of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006: Biennial Report to Congress 2009* (Washington, D.C.: U.S. Department of Commerce, 2009), pp. 94–96.

58. U.S. Department of Commerce 2011 (n 30), pp. 84–86.

59. NOAA 2019 (n 2), pp. 37–38.

60. NOAA, *Improving International Fisheries Management: February 2015 Report to Congress* (2015), pp. 30–33; U.S. Department of Commerce 2011 (n 30), pp. 100–109.

61. NOAA, *Improving International Fisheries Management: Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006* (2013), pp. 23, 26.

62. U.S. Department of Commerce 2009 (n 57), p. 86.

63. Reniel B. Cabral et al., "Rapid and Lasting Gains from Solving Illegal Fishing," *Nature Ecology & Evolution* 2(4) (2018), p. 650, pp. 650–651, https://doi.org/10.1038/s41559-018-0499-1; Douglas J. McCauley et al., "Wealthy Countries Dominate Industrial Fishing," *Science Advances* 4(8) (2018), p. 4, https://doi.org/10.1126/sciadv.aau2161.

64. IUU Regulation Ch. VI procedural requirements do not impact the EU's initial selection of third countries.

65. NOAA 2013 (n 26), p. 3341.

66. NOAA 2019 (n 2), pp. 29–30.

67. EU Commission Decision 2017/C 364/03 2017 (OJ C 364, 27/10/2017, P 3–9) paras. 14–19, 42.

68. 16 U.S.C. [2018] s. 1826j(e)(3).

69. FAO, *IPOA-IUU* 2001, paras. 3, 8, 9.3, 16.

70. Lee, Telesetsky and Schofield 2014, pp. 97–98.

71. The significant relationship between the level of illegal fishing and indices of coastal state governance suggest benefits would best be achieved by improving governance in foreign

EEZs. David J. Agnew et al., "Estimating the Worldwide Extent of Illegal Fishing," *PLOS ONE* 4(1) (2009), p. 4, https://doi.org/10.1371/journal.pone.0004570.

72. Judith Swan, "IUU Fishing and Measures to Improve Enforcement and Compliance," in *The Future of Ocean Governance and Capacity Development*, ed. International Ocean Institute-Canada (Leiden: Brill, 2019), p. 359, https://doi.org/10.1163/9789004380271_060.

73. Chaves 2001, para. 7 where the most egregious examples occur.

74. See IUU fishing's impacts on coastal communities, assisted by open international markets: U.R. Sumaila et al., "Illicit Trade in Marine Fish Catch and Its Effects on Ecosystems and People Worldwide," *Science Advances* 6(9) (2020), pp. 1–3, https://doi.org/10.1126/sciadv.aaz3801.

75. NOAA 2013 (n 26), p. 3342. The foreign state need not be a member of the RFMO, e.g., Nigeria identification; NOAA 2015 (n 60), p. 18.

76. Most recently, PSMA Article 4(2)–(3).

77. *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, adopted December 4, 1995, 2167 UNTS 3 (entered into force December 11, 2001) Articles 8 and 17.

78. Serdy 2017, p. 356.

79. UNCLOS Articles 56, 61(1)-(2), 62(4); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion* [2015] ITLOS 21, ITLOS Reports 2015 4 [98, 104–106]; *The South China Sea Arbitration (The Republic of Philippines V the People's Republic of China)*, *Award* [2016] PCA 2013–19 (Arbitral Tribunal [UNCLOS, Annex VII]) [736–740].

80. UNCLOS Articles 58(3), 62(4), 192–193; *SRFC Advisory Opinion* 2015, paras. 121–129; *South China Sea, Award* 2016, paras. 741–744.

81. FAO, *Code of Conduct for Responsible Fisheries* (Rome, FAO 1995) paras. 7.6.2, 8.1.1., 8.2.2, 8.2.7; FAO, *IPOA-IUU* 2001, paras. 34, 45, 48; FAO, *Voluntary Guidelines for Flag State Performance* (Rome, FAO 2015) paras. 6, 9, 35, 42.

82. Commission Decision 2015/C 324/10 (OJ C 324, 2/10/2015, pp. 17–28) para. 36.

83. U.S. trade measures against the more subjective and ill-defined unregulated fishing, Urrutia 2018, pp. 688–689.

84. "National Ocean Council Committee on Combating IUU Fishing and Seafood Fraud: Accomplishments," *NOAA*, January 2017, pp. 1–7, https://www.iuufishing.noaa.gov/Portals/33/2017_NOC%20Accomplishments%20Report.pdf?ver=2017–01-19–144636–010, accessed March 22, 2020.

85. *Joint Statement Between the European Commission and the United States Government on Efforts to Combat Illegal, Unreported and Unregulated (IUU) Fishing*, Washington, D.C., September 7, 2011.

86. IUU Regulation preamble [9].

87. Using market dominance to promote sustainable fishing globally would have included fisheries in EEZs. The high seas only accounts for 5–10% of global catch, Sumaila et al., 2020, p. 5.

88. Rothwell 2000, p. 134; Juan He, "Do Unilateral Trade Measures Really Catalyze Multilateral Environmental Agreements?" *International Environmental Agreements: Politics, Law and Economics* 19(6) (2019), pp. 584–585, https://doi.org/10.1007/s10784-019-09453-8.

89. Enric Sala et al., "The Economics of Fishing the High Seas," *Science Advances* 4(6) (2018), p. 7, https://doi.org/10.1126/sciadv.aat2504.

90. NOAA, *Leveling the Playing Field: NOAA's Priorities to Combat Global IUU Fishing in 2013*, https://www.fisheries.noaa.gov/webdam/download/66787749, accessed March 22, 2020.

91. *National Defense Authorization Act for Fiscal Year 2020*, Pub. L. 116-92, December 20, 2019, Title XXXV, Subtitle C.

92. *Ibid.*, ss. 3532(9) priority flag states, 3552(b)(3) selection criteria, 3542–3546 capacity development.

93. *Ibid.,* s. 3532(6).

94. NOAA 2019 (2), p. 22.

95. *Ibid.*

96. E.g., on China, U.S. Department of Commerce 2009 (n 57), pp. 95–96.

97. *Ibid.,* pp. 83–89.

98. NOAA 2013 (n 26), p. 3338.

99. 16 U.S.C. [2018] s. 1826j(a)(2); NOAA 2019 (n 2), p. 18 identifying Ecuador and Korea on this basis.

100. NOAA 2017 (53), pp. 17–18, 21.

101. U.S. Department of Commerce 2009 (n 57), pp. 83–84; 16 U.S.C. [2018] s. 1826j(a)(3).

102. U.S. Department of Commerce 2009 (n 57), p. 83; NOAA 2019 (n 2), p. 18. Likewise, a flag state may violate its due diligence obligations concerning a single vessel, *SRFC Advisory Opinion* 2015, paras. 146–150.

103. NOAA 2019 (n 2), p. 38.

104. Hosch 2016, pp. 36–38. On the disturbing pursuit of goals other than combating IUU see the examples provided by van der Marel 2020, pp. 185, 202.

105. Jonathan G. Odom, "Europe's Double Standard for China's Overfishing," *EJIL: Talk!* April 16, 2020, https://www.ejiltalk.org/europes-double-standard-for-chinas-overfishing/, accessed March 22, 2020.

106. "Nathan Rickard (Trade Counsel to the Southern Shrimp Alliance) Witness Statement to Hearing: Oversight of NOAA's Report on Illegal, Unreported, and Unregulated Fishing," Subcommittee on Water, Oceans, and Wildlife (U.S. House of Representatives Committee on Natural Resources), 2019, 1324 LHOB 13, https://docs.house.gov/meetings/II/II13/20191114/110213/HHRG-116-II13-Wstate-RickardN-20191114.pdf, accessed March 22, 2020.

107. NOAA 2019 (n 2), p. 38.

108. *Ibid.*, and subsequent practice, *NPFC IUU Vessel List for 2019* (entered into force November 29, 2019), https://www.npfc.int/system/files/2020-02/NPFC%20IUU%20Vessel%20List%20for%202019.pdf, accessed March 22, 2020.

109. A topic that continues to resurface as requiring "clarification," in order to combat IUU fishing and flag states of non-compliance; UNGA, "Resolution 73/125: Sustainable Fisheries [...]," 2018, A/RES/73/125 para. 86.

110. The use of maritime militias equally relies upon legal ambiguities, Rob McLaughlin, "The Law of the Sea, Status and Message Ambiguity," in *Law of the Sea in South East Asia: Environmental, Navigational and Security Challenges*, eds. Donald R. Rothwell and David Letts (London: Routledge, 2019), https://doi.org/10.4324/9780429021053-8.

111. UNCLOS Article 110(3).

112. Eva Romée van der Marel, "An Opaque Blacklist: The Lack of Transparency in Identifying Non-Cooperating Countries Under the EU IUU Regulation," in *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas Under National Jurisdiction and Beyond*, eds. Lawrence Martin, Constantinos Salonidis and Christina Hioureas (Huntington, NY: Juris, 2017); IUU Regulation preamble [30–31], Chapter VI.

113. A state exercising jurisdiction over natural or legal persons independent of the flag state concerned.

114. NPFC, *Conservation and Management Measure on Vessels Without Nationality*, CMM 2016-06 (in force January 16, 2017), paras. 3–4.

115. 16 U.S.C. [2018] s. 1826j(a)(2)(A).

116. NOAA 2013 (n 61), pp. 26, 30, 34.

117. IUU Regulation Article 31(3).

118. Arron N. Honniball, "What's in a Duty? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses," *The International Journal of Marine and Coastal Law* 35(1) (2020), p. 19, https://doi.org/10.1163/15718085-23341067.

119. NPFC, *CMM 2017-02 to Establish a List of IUU Vessels* 2017 paras. 24(c), 24(f); *Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean*, February 24, 2012, U.S. Senate Treaty Doc. 113–2 (entered into force, 19 July 2015), Articles 14, 17.

120. Multilateralism is preferred, FAO, *IPOA-IUU* 2001, para. 66.

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122. FAO, *IPOA-IUU* 2001, para. 9.1.

123. *National Defense Authorization Act for Fiscal Year 2020,* ss 3534, and 3551(c) on a working group's responsibilities to ensure an integrated response to IUU fishing globally.

124. E.g., Jan Glazewski, "United States V. Bengis: A Victory for Wildlife Law and Lessons for International Fisheries Crime," *The International Journal of Marine and Coastal Law* 29(1) (2014), p. 173, https://doi.org/10.1163/15718085-12341302.

125. Juan He, "From Country-of-Origin Labelling (COOL) to Seafood Import Monitoring Program (SIMP): How Far Can Seafood Traceability Rules Go?" *Marine Policy* 163(96) (2018), p. 166, https://doi.org/10.1016/j.marpol.2018.08.003.

126. *Ibid.*, p. 172 also calls for proactive market state measures, aligned with other MSC.

127. The differences of discrimination in form or fact; Honniball 2019, pp. 181–185, 256.

Biographical Statement

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International Regime Complexity in EU–Africa Relations

Fru Norbert Suh I

Structured Abstract

Article type: Research paper

Purpose—The purpose of this paper is to show how international regime complexity affects coherence in understanding EU–Africa relations and how Africa has been able to instrumentalize this condition.

Approach—The work builds on existing literature on EU–Africa relations with a focus on international cooperation, democracy/human rights/good governance, and international solidarity regimes. It defines a complex regime as any rule agreement in EU–Africa relations that can be instrumental in promoting incoherence and cracks in relations owing to its ambiguity.

Findings—This paper finds that international regime complexity favored three core political behaviors on the part of Africa: forum-shopping, regime-shifting and strategic manipulation of values.

Practical implications—Although these political behaviors affect coherence in EU–Africa relations, they are more or less perceived as expressions of African agency in global politics.

Originality—This paper shows that international regime complexity can sometimes be a source of agency or political expediency for actors hitherto perceived as weak in global politics.

Key words: Africa, African agency, EU–Africa relations, International regime complexity

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I. Introduction

Relations between Europe and Africa have historically been characterized by European domination.[1] The emergence of the EU (representing Europe) and its connection to Africa through a framework of partnership agreements is raising hopes about the transformation of the relationship from a dominant-subordinate one to a partnership or win-win. Both parties have agreed to pursue certain norms and values and to work in synergy for their mutual development in such areas as peace and security, democratic governance and human rights, trade, regional integration and infrastructure, Sustainable Development Goals (SDGs), energy and climate change, migration, mobility and employment, science, information society and space. These agreements are backed by three different but interrelated legal frameworks, namely: the Cotonou Partnership Agreement (CPA), the Economic Partnership Agreement (EPA) and the Joint Africa EU Strategy (JAES). It might be tempting to think that in spite of this partnership dimension of the relation, nothing fundamental has changed in the behavior of both actors, and that the EU is still acting as though it was the "master" and Africa the "servant." At best, it is thought that the EU–Africa partnership is another European domination of Africa.[2] This perspective finds credence in the failure of both parties to sometimes respect their partnership agreements and the tendency of one (EU) to act as donor, and the other (Africa), acting as recipient. Whatever the case, these agreements are complex regimes, and this raises questions about coherence in understanding relations. How can it be understood, for example, that Africa, through the African Union (AU) was at odds with the EU over the 2011 Libyan crisis in spite of the agreement on political dialogue? How can it be understood that in spite of the agreement to respect human rights, the EU still had to enter into an ongoing battle with Africa over the rights of individuals in regard to their sexual orientation? How can incoherence be understood and explained in EU–Africa relations and what does this imply for the relationship and from an African perspective? These and other related questions are examined in this paper.

International regime complexity (IRC) partly explains incoherence in EU–Africa relations. The proliferation of different frameworks raises questions about inter-linkages and the ability to approach the partnership between the EU and Africa in a coherent manner (see Figure 1). The dominance of the oldest cooperation framework between the EU and Africa, the Africa Caribbean and Pacific group of States (ACP), is being challenged by the emergence of the new key frameworks of the Joint Africa EU Strategy (JAES) and the Economic Partnership Agreements (EPAs). Yet, these new frameworks are still in their fledgling stages, and many uncertainties surround their future status and value. In terms of trade regime, for example, the preferential access to EU markets enjoyed by ACP countries for over 30 years on a nonreciprocal basis is under pressure to comply with World Trade Organization (WTO) rules.[3]

The proliferation of these frameworks coupled with the emergence of "new" actors to enter partnership agreements within and around the EU–Africa partnership has sometimes been perceived as positive for Africa. Some see these new partners

as "providing an alternative to counterbalance Western partners, new markets and a different model of development, as well as the transfer of skills and resources."[4] Regime complexity, therefore, offers opportunities and inspires different strategies for Africa's conscious or unconscious engagement in other multilateral fronts.

Basically, the purpose of this paper is to elicit reflection on a possible source of incoherence in EU–Africa relations with a focus on complex regimes in the partnership framework. An emphasis is made on Africa's ability to instrumentalize regime complexity as well as its perception of it as more or less an expression of agency.

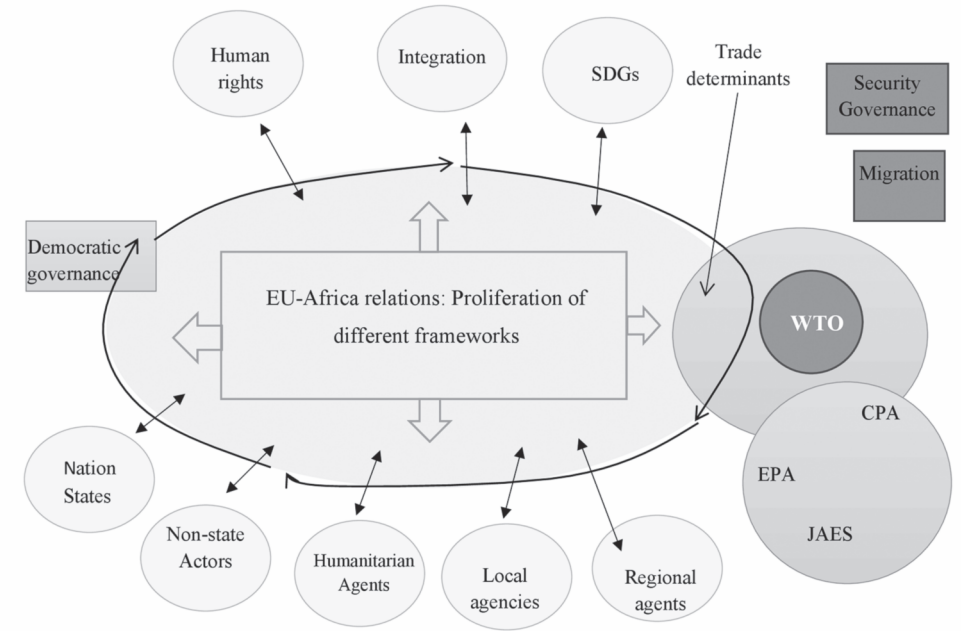

Fig. 1. The proliferation of different frameworks in EU–Africa relations (Source: Author, 2018).

The figure above indicates regime complexity in EU–Africa relations. There are multiple frameworks and the institutions involved handle overlapping political, economic and development cooperation issues between the EU and African countries, regions and the continent. These overlaps have led to a certain lack of clarity on what is the best forum to discuss and decide issues. This illustration corroborates Alter and Meunier's contention that "international agreements are negotiated by governments, transformed into domestic implementing legislation by legislative bodies, actually implemented by sub-state actors (administrative agencies, state governments, local police, contracted firms, NGOs, etc.), whose actions get reviewed by domestic and sometimes international courts. The result is that treaty implementation involves actors who played little to no part in crafting the original agreement."[5]

1.1 Some Approaches and Perspectives in EU–Africa Relations

Several approaches have been used to describe and explain EU–Africa relations. However, two of them are common in the literature. The first is a neo-colonial approach that is common among authors studying Franco-African relations. According to this perspective, EU–Africa relation is still caught in the web of neo-colonial tendencies particularly from France, a major former colonial power in Francophone Africa.[6] For Guy Martin, France still has the tendency to exercise neo-colonial control over its former colonies. He finds that French policies of reform are a smoke screen behind which the traditional status quo policy of *francafrique* is maintained.[7] French interests are protected by French government "traditionally through the African affairs *cellule* at the Élysée Palace; through its global power businesses such as Total and Areva, and through its occult *reseaux* (networks such as the Freemasons)."[8] This approach is essential in revealing the fact that individualistic tendencies can influence coherence in EU–Africa partnership. However, it does not consider the effect of the presence of a partnership between EU–Africa and perhaps how that partnership may be used to overcome neo-colonial practices. It is true that France, an influential actor in African politics is still maintaining ties of particularistic connections with certain African countries.[9] The emergence of the EU–Africa partnership might not have completely eradicated this tendency but both parties have pledged to observe principles such as democracy and human rights, which is redefining the Franco-African bond. It is argued that democratization process in Africa after the Cold War saw the old French puppets being challenged through the ballot box by free polls conducted for the first time in Francophone Africa.[10] While there is no substantial data to corroborate this argument, further research into EU–Africa relations could consider how African countries at individual or collective levels instrumentalize the EU–Africa partnership to weaken neocolonial influence and ties.

A *collectivity* approach has also been adopted to see how far EU–Africa relations can develop into a win-win. This approach stems from the fact that Africa has been considered a victim in international relations.[11] This consideration is derived from the dominance of the donor-recipient practices between the two parties.[12] Thus it was believed that if Africans speak and act as one man, Africa stands the chance to substantially influence outcomes in its relation with other actors. Rooted in pan–Africanism, this approach advocates a United States of Africa and considers it an effective instrument to promote African agency in the international arena.[13] It was argued that "true African unity was anathema to both the Superpowers and the ex-colonial masters, and all sorts to emasculate the continent."[14] This approach minimizes the complexity of regimes that determine Africa's relations with the EU, and how it sometimes enables manipulation of values.

Another approach is to investigate the EU's "actorness" in its relations with other actors including Africa.[15] The intention here is to see how far the EU has gone or can go to influence substantial outcome in its foreign policy. This approach tries to put the EU at the center of any action with other actors of the international scene. It can therefore be said to be somewhat biased in investigating what other actors in

relation with the EU can or cannot do. A set of literature focuses on identifying winners and losers in the EU and Africa.[16] This win-lose approach is interesting because it can reveal the strengths and weaknesses in the partnership. However, it neglects the complexity of the trade and economic regime including parallel regimes that could expose the partnership to manipulation for political expediency. For example, ACP governments in the West African regional configuration were able to challenge the EU's agenda by seizing on ambiguities in the legal frameworks governing the international trading system.[17] Little has been documented about the international condition as it is and how it can be instrumental in understanding incoherence in EU–Africa relations. Even where an attempt is made to explain incoherence, focus has always been on the international trade regime and from the perspective of the EU.

The approach in this paper is the political instrumentalization of regime complexity from an African perspective. It considers how complex regimes have been exploited by stakeholders in EU–Africa relations to their own advantage. Complexity as part of a condition in EU–Africa relations has enabled Africa to take affirmative action in international politics in general and specifically in its relations with the EU. Such affirmative action can sometimes be at odds with rule agreements in the cooperation, however, it can also be perceived as an expression of African agency.

This paper builds on existing literature on EU–Africa relations with a focus on those regimes that make the relationship complex. It identifies complex regimes and shows their implication in EU–Africa cooperation. It defines complex regimes as any rule agreement in EU–Africa relation that, owing to its ambiguity, can be instrumental in promoting incoherence and cracks in relations. It enables us to grasp the details of the effective instrumentalization of IRC in a given domain of a bilateral relations (EU and Africa).

The paper is divided into two main parts. The first part examines IRC as a relevant international relations theory applicable to Africa and shows how it promotes African agency in EU–Africa relations. The second part examines three complex regimes related to forum-shopping, regime-shifting and strategic manipulation of values.

II. IRC and the International Mindset of the African State

2.1 Conceptualizing Regime Complexity

Stephan Haggard and Beth Simmons explain that regime is linked to: (1) patterned behavior (which end up becoming norms and expectations), (2) rules and commitments to secure norms and expectations and (3) multilateral arrangements among States which tend to regulate national action within an issue area.[18] This understanding of regime suggests that the regulation of international life through the promotion of cooperative behavior is what is expected from actors who enter

into agreements. The importance of regimes is to facilitate the institutionalization of international life by regularizing expectations, patterns of behaviors or practices; and by facilitating order and stability.[19] The EU–Africa relationship is governed by regimes that represent strategic and binding expectations defined in partnership agreements. Some of them include peace and security, democracy, good governance and human rights, human development, sustainable and inclusive development growth and continental integration, global and emerging issues.[20]

These regimes have become complex because they are nested—they overlap and are parallel. Regime complexity is, however, appearing as an alternative to the normative understanding of regimes. Regime complexity itself reflected in lack of clarity, can be a source of conflict over implementation of agreed-upon arrangements. Questions such as: How did the regime come about? Who is behind it? Is it the fruit of collective bargaining/decision making? Or is it the outcome of unilateral action? indicate that the international regime is not just about identifying patterns of institutional behaviors. It goes beyond that. The ability of a regime to ensure compliance depends on *original legitimacy*, i.e., whether all the parties who accept the implementation of a rule participated meaningfully in framing it. Some rules or norms have unilateral sources and are expected to be weakly institutionalized. Others are products of collective bargaining and are expected to be binding. Each mode has a different impact on collective compliance. A regime that emerged from interaction among a group of actors and not others is likely to obtain little or no compliance because it is exclusive in character. Nevertheless, compliance in this type of regime could depend on what the regime is offering to those who never participated in crafting it. Regimes such as human rights, good governance and democracy could be said to be products of Western *arrangements*.[21] They were crafted and constructed as reality by the West, without any meaningful participation of Africans. That could partly explain why Africans have either reluctantly embraced those regimes or are doing so with difficulty.

A comprehensive understanding of regime complexity is offered by Alter and Meunier in *The Politics of International Regime Complexity*. They first define a complex system as one with a large number of elements, building blocks or agents capable of interacting with each other and with their environment.[22] Such interaction is not linear because regimes connect to each other in several ways. Alter and Meunier propose three possible patterns of regime complexity: (1) parallel regimes where there is no direct formal overlap; (2) overlapping regimes where multiple institutions have authority over an issue; and (3) nested regimes where institutions are embedded within each other in concentric circles.[23] The third complexity is best captured through the picture of a spaghetti bowl. Complexity can also be seen as (1) the number of actors who engage in cooperation and with authority over an issue area (see figure 2); (2) the nature of cooperation—bilateral or multilateral; (3) the degree of diversity in interest and values; and (4) the degree of diversity in the ability to regulate discourse and allocate resources. The greater the number of actors involved in a regime, the higher the degree of parallel and overlapping preferences and the greater the complexity. Overall, overlapping agreements create spillovers—sub-groups of

States desire different or deeper cooperation than the whole, thus creating additional agreements, the negotiation of second and third agreements leading to ambiguities over their interpretation, and the creation of packages that are more attractive to participants and for which they are willing to agree to at the expense of or in violation of agreements.[24]

Consider the following example. The human rights regime was used as an instrument by Africans to achieve independence (the right to self-determination) and thereafter, substituted for African socialism. Although African leaders transformed human rights into an internal constitutional provision, usually with the help of departing colonial authorities, rights abuses became common as those countires began divorcing human rights from their respective constitutions in the name of African socialism.[25] African socialism argued for an African concept of democracy distinct from Western notions. It was defined as democratic socialism as conceived by Africans in Africa, evolving from the African way of life.[26] It also found a home in pan–Africanism and the Organization of African Unity (OAU) and was reinvented as gateway to rapid economic development. Though it never averted human rights (in fact it insisted on its protection), African socialism gave excessive powers to the African State to control the means of production and distribution and also individual rights. As El-Obaid and Appiagyei-Atua put it: human rights were to be seen as national freedom, not individual freedoms, while the class struggle was to be between the developing nations and the developed ones, the widening gap between the rich/emerging political elites and the ordinary citizens was overlooked. Africans have never denied democracy (they have even always claimed to be democratic) but they have coined it in parallel and overlapping ways. African socialism was in reality a parallel regime to democracy/human rights whose weaknesses influenced the human rights provision of the subsequent African Charter.

The principle of non-interference is another parallel regime to human rights. While a growing number of regional bodies such as ASEAN and the AU have made a formal commitment to human rights, their even stronger commitment to the principle of non-intervention in domestic affairs provides an extra layer of cover against the EU's attempts to impose its own model in region-to-region cooperation. In debriefing sessions with NGOs following various rounds of the EU African Union Human Rights dialogue since 2009, European Commission officials have reported that the African governments have refused to discuss domestic issues except in the most extreme cases, such as Darfur.[27]

In a nutshell IRC refers to nested, partially overlapping, and parallel international regimes that are not hierarchically ordered.[28] This definition suggests some disorder in the international system. However, the disorder is productive because actors do not challenge it. Instead, they take advantage of it to lay claims and obtain benefits which perhaps cannot be found in a non-complex regime.

Figure 2 shows that there are multiple institutions with authority on political dialogue. This implies that decision making in EU–Africa cooperation is not limited to a single institution. For example, the African Group within the ACP Group alone accounts for 4 of the 6 regions, and make up 48 of the 79 countries of the ACP.

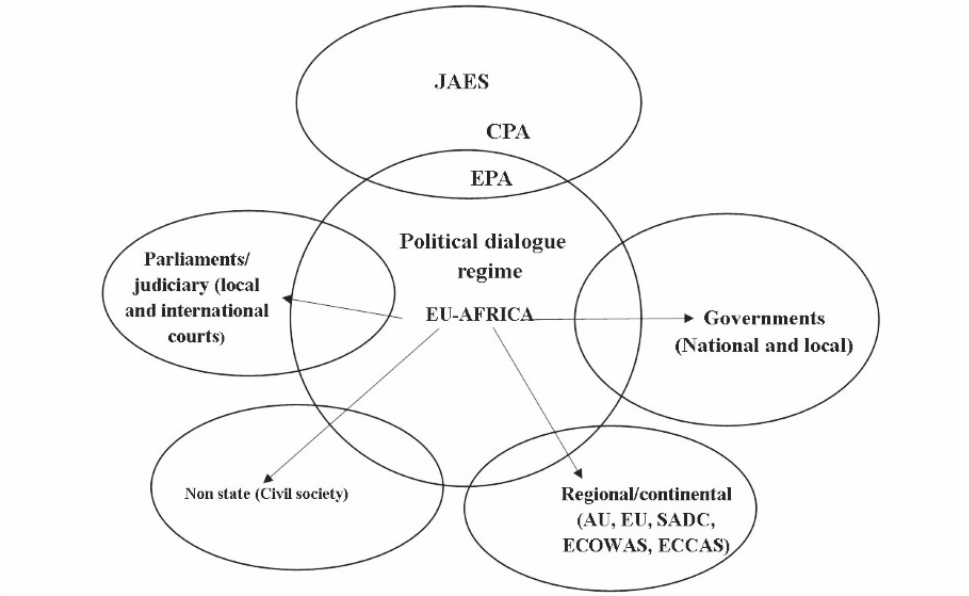

Fig. 2. Duplication of various political dialogue structures in EU–Africa relations (Source: Author, 2018).

These countries and groups have individual decision-making structures which are linked to the AU, ACP and JAES institutions as well as the joint ACP–EU institutions. Under such conditions, and as suggested by Alter and Meunier, this could retard effective implementation because preferences diverge along the implementation line, and other challenges are faced.

2.2 Regime Complexity and African Agency

The argument for a focus on agency is in part an attempt to challenge narratives of Africa that present the entire continent as perpetual victim and lacking political initiative.[29] Although complexity is said to empower the powerful actors because they already have the resources to work through more easily,[30] weaker actors are not disempowered by complexity. IRC offers an opportunity for instrumentalism. Sometimes complexity can be used to empower Africa (a purported weaker actor), even though at other times it can reduce the amount of control Africa may have. Africa has consciously or unconsciously developed an agency attitude as a result of her ability to take advantage of regime complexity. Indeed, if at first, during the colonial period, a dependency attitude prevailed, now there is evidence that such a political attitude is becoming dynamic. The complexity of international regimes enhances in some way Africa's agency in its relationship with the EU, not necessarily in the form of having the courage to undermine an agreement with the EU, but also and possibly in the form of forcing an agenda. African agency is expressed in collective action (one continental voice, e.g., the AU), sub-regional action (regional groupings), individual state action, and non-state action (African diasporas, migrants, etc.).

Two relevant and interconnected situations between Africa and the EU suggest a tendency toward African agency in the relationship. The first is the partnership dimension the relation is taking and the second is the agreement/disagreement/opposition discourse that sometimes characterizes the relation. The existence of concord and discord, agreement and disagreement between Africa and the EU over certain rule agreements is suggestive of African agency which didn't exist until recently. Africa and the EU today agree to disagree and Africans have learned to oppose some EU objectives and goals in the continent and on other matters. In some cases, the AU has pursued strategic goals that are at odds with EU interests or those of EU member states. For example, the AU was fiercely critical of the EU's policy toward Libya in 2011 and the Arab League. The AU's actions in response to the Libya crisis—criticizing the UN-sanctioned NATO intervention, launching its own high-level diplomatic mission to broker a ceasefire and initial non-recognition of the new regime—was notable for the extent to which it stood out from the route pursued by the EU. In climate change negotiations, the three-way polarization between the USA, the EU and China, in a multilateral setting, allowed a freedom of action for key African leaders (notably Ethiopia, South Africa and Sudan) to give expression to a collective "African" voice. The EU members fought a running battle with African and Islamic countries over individual rights related to sexual orientation. The African bloc was able to remove a long-standing reference to sexual orientation as a source of persecution in an annual resolution on extra-judicial killings.

In other cases, individual African states have opposed the EU's intervention in their internal affairs. In Chad—where France drives EU policy—the EU backed a UN peacekeeping force deployed to replace EU troops in 2009. However, at the insistence of the Chadian government and despite EU objections, this force was removed at the end of 2010—a further sign of the EU's limitations in the relationship.

Egypt has been accused of undermining the EU's security concerns because the country was able to manipulate both the EU and the U.S. in their struggles against terrorism. According to Anthony Dworkin, although Egypt's leadership likes to present itself as a valuable partner in counterterrorism for Europe and the United States, Western security officials who have tried to work with Egypt describe a frustrating partnership.[31] These officials say that their Egyptian counterparts display no interest in developing a more focused counterinsurgency approach which implies that Egypt's approach to counterterrorism remains very distant from anything the EU would recognize.

The discourse on partnership in the JAES reflects a broader trend in EU and AU foreign policy. There is an important power dimension to the partnership agenda. The EU is facing increased competition from new powers, including Brazil, Russia, India, China and South Africa (BRICS), as well as from other emerging nations. In this new power constellation, a relationship based on partnership is more easily put in practice. Partnership is determined by shared values, equality and trust. In the context of the JAES, Del Biondo defines shared values as general ideas but also how these ideas are applied to concrete cases: equality as joint decision-making

in agenda-setting and ownership by the weaker partner of capacity-building, and trust reflects the donor's belief that its investments will be worthwhile and the recipient's belief that the donor will not abuse its position of power.[32] This is particularly the case in Africa, where many other international actors are now providing countries and regional organizations with financial support. This makes these countries and regional organizations less dependent on support from the EU.

2.3 Forum-Shopping, Regime-Shifting and Strategic Inconsistency as By-Products of Regime Complexity

Globally, regime complexity facilitates the emergence of African agency. Specifically, agency can be classified under three possible action outcomes: forum-shopping, regime-shifting and strategic inconsistency.

Forum-shopping defines how regime complexity alters the strategic playing field, enabling actors to select international venues based on where they are best able to promote specific policy preferences.[33] Actors wishing to change an existing situation do not have to resort to bilateral interaction alone because other avenues of interaction exist. This could be a threat to bilateral cooperation. The fact that networks of donors (as well as their motives) have become increasingly disparate has increased opportunities for forum-shopping. The emergence of donor countries that did not provide significant amounts of development aid until recently, e.g., Brazil, China, India and Thailand, increases the potential for forum-shopping among Africans. Other international forums such as the International Organisation of La Francophonie, Commonwealth, etc., are all forum-shopping venues which may lower the EU's voice in the continent.

Regime-shifting, unlike forum-shopping, is designed to reshape the global structure of rules.[34] For example, when terms of trade do not favor a State, it can regime-shift by turning to parallel regimes where alternative priorities exist. It is the ability to create and resort to parallel regimes. The juxtaposition of democracy and African socialism examined earlier is an illustration. African countries are no longer afraid to say no in global negotiations related to trade and climate change and have used justice and fairness as parallel regimes to exert blocking power.[35] Africa's deliberative capacity within the World Trade Organization (WTO) cannot be overemphasized. Africa is the largest strategic group within the WTO and has been effective in playing the numbers game: it has a number of states and thus votes in the WTO to block decisions and put issues on the table.[36]

Strategic ambiguity/manipulation of values is when a party creates contradictory rules in a parallel regime with the intention of undermining a rule in another agreement. Strategic inconsistency suggests the ability to manipulate norms and values. It involves the ability to frame ambiguous rhetoric to undermine the understanding and implementation of universal values such as democracy, human rights and good governance. It also includes the circumstantial and selective implementation of a rule. Some States sometimes deny access to human rights in the name of maintaining peace and security. States juggle between access to human rights and rule of law.

The use of State violence is often a justification of restraint imposed on rights and freedoms. The display of these actions suggests that Africa is at least an emerging force to reckon with, and consequently, could be a crucial factor in a situation that could require cooperation.

III. The Manifestation of Regime Complexity on Cooperation

This section is concerned with the operationalization of regime complexity on EU–Africa cooperation. It identifies some issue areas of cooperation between the EU and Africa and considers each as a complex regime. It then examines how Africa uses complex regimes to promote her interests in cooperation.

3.1 The Origin of EU–Africa Cooperation Framework

The relationship between the EU and Africa may have begun in modern times,[37] but it is standing the test of time given that some EU member states still keep ties of particularistic connection with the continent. History teaches that for some 500 years, beginning from the 15th century with the practice of transatlantic slave trade to the mid–20th century with the end of colonialism, Africa was under European domination. Resentment of European domination was justified in African slave rebellions, anti-colonialism uprisings and movements toward national independence.[38] Today, this traditional European mentality of domination still persists even with the creation of the EU, but regime complexity is offering an opportunity for Africa to overturn the situation by regime-shifting, forum-shopping, and strategic manipulation of values. Europe (through the EU) can no longer explicitly dominate Africa, though it still sometimes meddles with internal affairs of African States.[39] The EU–Africa relationship is no longer a master/servant one, but that of partnership and cooperation with official agreements and binding principles which, at least symbolically, recognize both parties as equals in rights, duties, responsibilities and expectations.

If Europe began speaking as one voice through the European Economic Community (EEC), and now the EU, Africa can boast of the OUA and subsequently the AU as the continent's collective voice. From EU–Africa cooperation or partnership, it became the EU-AU partnership in the 5th Summit in Abidjan in November 2017. According to Mattheis and Kotsopoulos, this change is an upgrade in the level of cooperation for it reflects an increasing recognition of the AU as an international actor that is becoming difficult to circumvent when engaging Africa.[40]

The ACP–EU Partnership Agreement builds on 25 years of ACP–EU cooperation under 4 successive Lomé Conventions. Relations between the European community and sub–Saharan African countries go back to the successive Yaoundé Conventions (1963–75). The accession of the UK to European communities in 1973 broadened the geographic scope of the partnership to Commonwealth countries in

Africa, the Caribbean and the Pacific. The "ACP Group of States" was founded by the Georgetown Agreement in 1975. It is the only grouping of poor countries with a permanent secretariat (located in Brussels) and is the world's largest grouping of small island states and landlocked countries.

Although several cooperation agreements govern the EU–Africa relationship—such as the CPA with sub–Saharan Africa; the Euro-med Partnership with North Africa and European neighborhood policy[41]—the EU–Africa Strategic Partnership is the most recent formal channel through which the EU and the African continent work together. It was adopted by Heads of States and Governments at the 2nd EU–Africa summit in 2007, dubbed the Joint Africa–EU Strategy (JAES). The proliferation of these partnership frameworks, along with the emergence of IRC, tends to complicate understanding of coherence in the relationship. For example, global and internal developments are challenging the traditional dominance of the CPA as the key framework for relations between the EU and Africa. In terms of trade regime, the preferential access to EU markets enjoyed by ACP countries for over 30 years on a nonreciprocal basis is under pressure to comply with WTO rules.

3.2 African Usages of Forum-Shopping, Regime-Shifting and Strategic Inconsistency

The premise is that each issue agreement between the EU and Africa represents a regime in its own right and its complexity is determined by its nested, overlapping and parallel character. Regime complexity represents an opportunity for Africans to engage in forum-shopping, regime-shifting and strategic inconsistency/ambiguity which may enhance or undermine cooperation as the case may be. The focus is on three regimes: human rights/democracy/good governance, international cooperation and international solidarity.

3.3 International Cooperation Regime: Sino-African Cooperation

International cooperation is a complex regime primarily because it is nested. EU–Africa cooperation is embedded in infra-cooperation and bilateral arrangements in specific issue areas of financial, technical, humanitarian and emergency aid, technical and scientific cooperation, cultural cooperation, donations and subsidy areas. Multiple axes of cooperation enable Africa to become an integrated actor in its foreign policy rather than a victim of a power struggle or a spectator. Africans have been able to give in to many cooperation partnerships. The State in Africa is member of the UNO and is in unrestricted partnership with the EU, the North, Far East, China, Japan, etc. Belonging to multiple partnerships is perceived as a strategic opportunity because Africans are able to play off partners.

Africa has taken advantage of the emergence of China to enhance its interests in ways that undermine agreements with the EU. China is an alternative source of support to resource-rich African countries such as the Democratic Republic of

Congo, Angola, the Central African Republic and Guinea, where the EU aspires to use its influence. The EU perceives China as a threat and finds that their political, economic and development policies are undermined by China.[42] China has been accused of unethical support for some African States with poor human rights records; China's unconditional aid and loans have undermined European and multilateral efforts to persuade African governments to increase transparency, public accountability and good governance; and the forum on China and Africa cooperation (FOCAC) is suspiciously seen by many as China's means of obtaining political power in multilateral forums such as the UNO.[43] This implies that Africans can sometimes play off the EU when it comes to respecting good governance, democracy and human rights by choosing to deal with "docile" China.

As Mugumya points out, African leaders have found an alternative ideology to "Western hypocrisy" and double standards in its cooperation with China.[44] It is easy for leaders who wish to resist pressure over human rights and political reform to cast doubt on the appropriateness of European prescriptions. Rwandan President Paul Kagame told an interviewer that the EU has overestimated its influence in Africa and its hubris is being tempered by the rise of alternative donors. "There have also been other events globally that have shown the limitations of the West," he said.[45] Xi Jinping, China's designated leader, hosted Zimbabwean President Robert Mugabe in Beijing in November 2012. He also allowed Sudan's President Omar al-Bashir to visit Beijing in June despite an arrest warrant from the ICJ, which China does not recognize.

China has invested massively in infrastructure development where the EU has neglected, and has provided loans and debt relief; including external market opportunities.[46] The inauguration of FOCAC in 2000 was seen by many African States as a positive direction to get Africa out of a dependent cycle.[47] Although the EU and China share common views on poverty reduction and work together toward SDGs, sustainable development in various sectors, aid effectiveness and local ownership[48] there is still ideological overlap related to China's preference for non-interference as opposed to the EU's promotion of good governance.

The EU has reacted to Chinese influence by engaging Chinese and African leaders in trilateral cooperation. The EU has called for increased transparency on trade deals and aid packages and has urged China to behave more responsibly in Africa regarding its human rights and good governance impact. In spite of this trilateral effort, there has been modest overall progress in engaging China and Africa from a European perspective. Setbacks on the trilateral dialogue have led the EU to reduce its ambitions and refocus its efforts on multilateral initiatives such as an OECD that looks at China's experience of poverty reduction and possible applications in Africa. Whatever the case, China's need for stability to protect its investments may create a new opportunity for cooperation with regards to democratic values. For example, at the end of March 2010, China supported a UNSC resolution that mandated the use of force by UN and French forces to protect civilians in Côte d'Ivoire from attacks by government troops. This was a big success for the EU in its attempt through the UN to uphold the results of the elections in 2010 in which President

Laurent Gbagbo was voted out of office. A similar pragmatism was displayed when China mandated election observers to monitor the referendum in South Sudan, where China's own oil and commercial interests mean it has a stake in conflict management.

Africa's forum-shopping for Sino-African cooperation is evidence of the limits of the effectiveness of EU conditionality. Against this background of diminishing leverage, the EU seems to have lost confidence in the effectiveness of coercive measures and have been notably inconsistent in their use of them within the cooperation. Overall, this has contributed to a downward spiral of confidence in promoting human rights. Strategically, many African countries realize the desperate need of both sides, and in many cases, they have been able to juggle between both partners. However, and as Muyunga puts it, Africa needs to proceed with caution so that they ensure they do not lose the support of the EU by being lured by short-term benefits from China.[49]

3.4 The Human Rights/Democracy/Good Governance Regime

Hafner-Burton finds that the presence of nested and overlapping institutions around human rights creates incentives for actors to (1) forum-shop for more power; (2) advantage themselves in the context of a parallel or overlapping regime; and (3) invoke institutions "à la carte" to govern a specific issue.[50] Core values of human rights have sometimes been sacrificed at the expense of contradictory interpretations of the same. In addition, the conditions surrounding human rights are made, contested and implemented in an atmosphere characterized by nested and overlapping institutions, including both international organizations and treaties.[51] Human rights is one of the cardinal principles enshrined in the JAES agreement, but it is not exclusive to it. The EU has often wanted Africa to implement it in a way defined by the West and in all circumstances. Nevertheless, the growing complexity of this regime (which itself enabled the EU to associate trade conditionality to it) is providing an incentive for the State in Africa to review not only its interpretation but also the context under which it can be applied. The notion of EU–Africa solidarity around the principle of human rights is porous, because human rights is an opportunistic notion that is only applied circumstantially. Africans have invoked other institutions to undermine human rights. Diplomacy of solidarity has been used to support regimes that are not committed to human rights. For example, African leaders have been unwilling to publicly criticize Robert Mugabe's human rights abuses. EU support for the ICC case against Bashir had limited impact, as African governments rejected the indictment. Bashir traveled to Kenya and other AU member countries with impunity. However, a European threat to walk out of the EU–Africa summit in Tripoli if Bashir attended persuaded the Libyans to ask the Sudanese leader to stay away. Whatever the case, Europe's ability to affect developments within Sudan appeared limited.

Africa has also forum-shopped for partners that are less strict in regard to human rights. Africa has gone for China or at least, accepted China's invitation to

do business, because China has limited constraints on human rights. Although Europe wants Chinese cooperation to limit the arms trade, support good governance in Africa and apply conditionality to development aid, China's approach to Africa has generally shown little regard for democracy.

Human rights is operating within the State sovereignty regime, still *en vogue* in Africa. According to this State-centric regime, States are elevated as ultimate promoters and guarantors of human rights/democracy/good governance. This implies that States determine when and how to implement human rights or at least, they juggle human rights and the responsibility of the State. The sovereignty regime gives a leeway to States to strategically select human rights partners who are docile and exclude agents outside the State, such as NGOs and civil society, from human rights frameworks and discussions. For example, during its 2016 activities under the theme "African year of human rights with particular focus on the rights of women" in Addis Ababa, the AU did not invite international and local civil society to deliberate as partners. This is an indication that human rights are being accepted with reluctance. Opposition movements and other pro-democracy manifestations have been suppressed (sometimes brutally) or at least denied in the name of rule of law. These are all intervening regimes that make the implementation of human rights difficult. To deviate from the pains that can come with an effective implementation of human rights, Africans have regime-shifted to other regimes (solidarity, sovereignty) and have forum-shopped for unconditional human rights trademarks.

3.5 The International Solidarity Regime

International solidarity is a norm with parallel and overlapping extensions. Solidarity has different connotations for many people. Engaging with "international solidarity," writes Henning Melber, suggests that there are different interpretations at play.[52] The UN counts on international solidarity to implement its policies worldwide, the AU counts on it to survive as an institution, and the EU to attain its objectives. The complexity of international solidarity can weaken commitment to comply in one forum over another. Solidarity usually leaves unanswered the question of who practices solidarity with whom and for which purpose.[53] This has enabled actors to twist the concept in ways that meet their interests. What Africans understand by solidarity may be interpreted as discord by Europeans.

African solidarity implies that Africans support each other and act like their brother's keepers.[54] Africans seem to have understood that "purported" European solidarity, reflected through aid and other forms of unconditional support, mask exploitative habits inherited from the colonial regime. African solidarity has enabled Africans to sometimes disagree or at least pretend to agree with the EU on certain issues, situations and events that would otherwise not be the case. African solidarity is expressed in two ways: *strategic support solidarity* and *strategic indifference solidarity*. The alliance of Africans behind "dictators," or their refusal to publicly condemn peer States with poor human rights records, is an act of African solidarity that challenges the EU–Africa principle of human rights/democracy/good governance.

There was no official African condemnation of Mugabe's regime, which according to the EU is on record for human rights violations. Nor did Africans rise as one to condemn Gaddafi's regime, which was considered a "dictatorship." Even South Africa, an example of an emerging power which considerably respects democracy and human rights domestically, has nevertheless aligned itself against what it portrays as a Western agenda to override national sovereignty in defense of individual rights.[55]

Solidarity also clashes with a parallel regime—non-interference enabling regime-shifting. When the Libyan conflict broke out in 2011, only Rwanda and the Gambia called for quick AU reaction. The fact that the AU overtly abandoned Libya to its fate is an expression of *strategic indifference solidarity*. The AU considered the Libyan affair a purely internal affair which should be left to Libyans, thus warning other actors, including the EU, from taking a position or making pronouncements that can only complicate the search for a solution.[56] Here the AU was a strident critic of NATO action and, on the basis that it was upholding the AU's own rules on conflict and intervention, argued strongly that it should be left to African States to respond to the crisis.[57]

The position of the AU in regard to the Libyan case suggests that Africans can challenge EU solutions to African crises. However, it also reflects a form of regime-shifting and strategic inconsistency. The regime of diplomacy of solidarity also explains to some extent why international sanctions sometimes fail. Mahmud argues that the failure of sanctions to successfully change the behavior of Libya can be found in diplomacy of solidarity.[58]

3.6 Some Possible Implications

IRC intentionally or unintentionally enhances regime-shifting, forum-shopping and strategic manipulation outcomes among Africans. What, therefore, is the possibility that so acting can affect the relationship between Africa and the EU? To answer this question, it necessary to find out whether at any moment in time the EU has reviewed a position in favor of Africa's interests. Again, a tentative response to the question could be found at location of the level of power and who stands to win or lose whenever an agreement is undermined or respected. Regardless, such action may not intentionally mean to produce incoherence and cracks in the relationship. Rather, it is producing overarching effects that give the impression that Africa and the EU can engage in a win-win negotiation. To talk of effective partnership in the relationship is to find out if Africa has been able to not necessarily dictate the pace of the relationship but, at least, to set an agenda. While straight answers are hard to find, there are indicators of such. Basically, the agency model of understanding Africa in international politics is suggesting a possibility of thinking about partnership in the relationship. This model, as demonstrated throughout, the work hinges on the ability of Africa to make shrewd use of IRC by putting its interests first.

Many African States are fiercely protective of their independence and want to emancipate themselves from foreign, and in particular European, influence rather

than comply with EU norms—which appear less appealing. Africa was not satisfied with principles of conditionality and forum-shopped for partners (China) less strict on such, though this may not strictly be Africa's only motivation for forum-shopping. This power dispensation has had the effect of making the EU think twice about its policy on the continent. It might have been argued that complexity gives power to the already powerful (Drezner, 2009), but there is no evidence that it renders the weaker less powerful. Rather, it empowers the weaker because it offers more opportunities than limited partnerships and connections. The struggle among Africans is to use IRC to obtain the power necessary to negotiate with the EU on a basis that put Africa's interests first or at least considers the interests of both parties. The complexity of the international migration regime has been exemplified by Africa as a collective force and as an individual State through its perspective on Libya. In 2010, Gaddafi attempted to exploit the African immigration crisis when he requested the EU pay 5 billion Euros to stop migration. The recent AU–EU summit in Abidjan was partly dominated by struggles against illegal migration from Africa to Europe through Libya and the EU was more or less compelled to take resolutions to that effect.[59] Egypt has been swift in manipulating the struggles of the EU and the U.S. against terrorism to its favor, and even if the EU does not find in Egypt a constructive partner, it may have difficulties in counterterrorism without Egypt's participation. This implies that Egypt has leverage in the relationship, no matter how symbolic that might be.

The emergence of African agency suggests that Africa could be a crucial factor in characterizing EU–Africa cooperation. Paradoxically, to overcome any impasse means dealing with African States' interests, which in turn means that the EU has to abandon its ambition of creating Africa in its image. IRC is providing an opportunity to the EU to simplify its partnership with Africa.

IV. Conclusion

Bilateral EU relations with African countries are complex and diverse. IRC offers prospects of African agency, which are expressed in three key ways: forum-shopping, regime-shifting and strategic manipulation of values. These outcomes have gained currency in three key regimes: international cooperation, human rights/democracy/good governance, and international solidarity. Such actions, which derive from the complexity of regimes, cannot be said to overtly undermine EU–Africa cooperation. They are expressions of African agency which is attempting to put Africa's interests first in a negotiation with the EU. In other words, the complexity of international regimes frame, in some way, African agency in its relationship with the EU, not necessarily in the form of an attempt to undermine an agreement with the EU, but also and possibly, in the form of forcing an agenda.

The multiplicity of AU partnerships is begging the question of what consequences this will have for the future of the Africa–EU Partnership? The EU is not, of course, denying Africans the opportunity to make new friends. However, the EU's

wish is that Africans should "make new friends but keep the old." Recent EU–Africa/AU summits are more or less focused on finding a common ground between the two parties rather than one of the parties (notably the EU) trying to impose an agenda. These very summits are parallel to others, such as the France-Africa Summit, the U.S.–Africa summit, the Sino-Africa summit, the UK–Africa investment summit, etc., which all follow a business-like approach, and which seem—at the moment—to match African priorities better, challenging the EU's value-driven agenda. Because both continents are in partnerships that operate in a complex setting and affect each other, the question is whether EU–Africa cooperation is subsequent to other, more important ones. In any case, forum-shopping, regime shifting and the strategic manipulation of values are all causing the EU to review its strategy toward Africa by underlying the partnership aspect of the relationship and giving Africa a central role.

Notes

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2. See, for example, Sandra Barnes "Global Flows: Terror, Oil and Strategic Philanthropy," *Review of African Political Economy*, 34(104/5) (2005), p. 236, https://doi.org/10.1080/03056240500329148.

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5. Alter and Meunier 2009, p. 15.

6. See Jean-François Bayart, "Bis Repetita: La Politique Africaine de François Mitterand de 1989 à 1995," Colloque sur La politique extérieure de François Mitterand à l'épreuve de l'après-guerre froide, Centre d'études et de recherches internationales (CERI), Paris (May 13–15, 1997), p. 20; Philippe Hugon, *La zone franc à l'heure de l'euro* (Paris: Karthala, 1999), pp. 219–228; Pierre Péan, *L'Homme de l'ombre* (Paris: Fayard, 1990).

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8. *Ibid.* See also Adekeye Adebajo and Kaye Whiteman, eds., *The EU and Africa: From Euroafrique to Afro-Europa*, (London: Hurst, 2012), p. 323.

9. For details see Jean-François Bayart, "Bis Repetita: La Politique Africaine de François Mitterand de 1989 à 1995," prepared for Colloque sur la Politique Extérieure de François Mitterand à l'épreuve de l'après-guerre Froide, Centre d'études et de recherches internationales (CERI), Paris, May 13–15, 1997, p. 20; Philippe Hugon, *La Zone Franc à l'heure de l'euro* (Paris: Karthala, 1999), pp. 219–228; Pierre Péan, *L'Homme de l'ombre* (Paris: Fayard, 1990); François-Xavier Verschave, *Françafrique: Le Plus long scandale de la république* (Paris: Stock, 1998); Antoine Glaser and Stephen Smith, *Ces messieurs Afrique 1: Le Paris-village du continent noir* (Paris: Calmann-

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15. See Maurizio Carbone, "The European Union and China's Rise in Africa: Competing Visions, External Coherence and Trilateral Cooperation," *Journal of Contemporary African Studies*, 29(2) (2011), pp. 203–221, https://doi.org/10.1080/02589001.2011.555195.

16. R. Idrissa, "Un dialogue sur fond de divergence: L'impact de la politique migratoire europeenne sur l'integration Ouest-Africaine. Le cas du Nigeria, du Mali et du Niger," *Friedrich Ebert Stiftung*, 2019, http://library.fes.de/pdf-files/iez/15340.pdf; B.L. Dicko, "La gouvernance de la migration malienne a l'epreuve des injonctions contradictiores de l'UE, Fes Mali Policy Paper," *Friedrich Ebert Stiftung*, 2018, http://library.fes.de/pdf-files/bueros/mali/15441.pdf; F. Korch and P. Ogendi, "Stormy Times Ahead? The Africa-EU Relations in the Run to the 2017 Summit Africa–EU Policy Dialogue Platform Series," *Friedrich Ebert Stiftung*, May 2017, http://library.fes.de/pdf-files/bueros/aethiopien/13762.pdf; "Migration: In it for the Long Run? Africa-EU Policy Dialogue Platform Series," *Friedrich Ebert Stiftung*, September 14, 2016, http://library.fes.de/pdf-files/bueros/aethiopien/13073.pdf; Friedrich Ebert Stiftung, "Le Cameroun face a l'Accord de Partenariat Economique (APE) avec l'Union Europeenne: Menace ou Opportunite?" *Friedrich Ebert Stiftung*, November 2015, http://library.fes.de/pdf-files/bueros/kamerun/12360.pdf; Friedrich Ebert Stiftung, "Making Migration Beneficial to Europe and Africa: Joint Policy Brief/Seminar Report," *Friedrich Ebert Stiftung*, 2015, http://library.fes.de/pdf-files/iez/12053.pdf; Friedrich Ebert Stiftung, "Building a Sustainable Partnership for the Future? The EU–Africa Relations in the Run-up to the 2014 Summit, Conference Report," *Friedrich Ebert Stiftung*, September 2013, http://library.fes.de/pdf-files/iez/10310-20131106.pdf, accessed April 20, 2020; Friedrich Ebert Stiftung, "EU–Africa Relations After the Fourth Summit Finding Common Ground," Friedrich Ebert Stiftung, September/October 2014, https://library.fes.de/pdf-files/iez/11159-20150123.pdf, accessed April 20, 2020; B. Coquet, J-M Daniel and E. Fourmann, "L'Europe et l'Afrique: Flux et Reflux," http://www.politique-africaine.com/numeros/pdf/049006.pdf, pp. 6–30. pp. 19–20. In spite of the partnership effort, Africa's external debt to Europe and public development aid represent in the eyes of these authors a tendency for Europe to continue dominating its former colonies.

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19. *Ibid.*

20. The EU–Africa Strategic Partnership is the formal channel through which the EU and

the African continent work together. It was adopted by Heads of State and Governments at the 2nd EU–Africa Summit in 2007 dubbed JAES—Joint Africa-EU Strategy.

21. As a conventional concept, human rights has its origins from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Inter-American Convention on Human Rights, and the UN Covenant on Civil and Political Rights, between the 40s and 50s when Africa was still under foreign domination. See Andrew Moravcsik, "The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 52(2) (2000), pp. 217–252, https://doi.org/10.1162/002081800551163.

22. K.J. Alter and S. Meunier, "The Politics of International Regime Complexity," *Perspective on Politics* 7(1) (2009), pp. 13–24, p. 14, https://doi.org/10.1017/S1537592709090033.

23. *Ibid.*, p. 15.

24. *Ibid.*

25. Ahmed El-Obaid Kwadwo Appiagyei-Atua, "Human Rights in Africa—A New Perspective on Linking the Past to the Present," *McGill Law Journal* 41 (1996), pp. 819–854.

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27. Susi Denisson and Anthony Dworkin, "Towards an EU Human Rights Strategy for a Post-Western World," *European Council on Foreign Relations (ECFR)* (2010), p. 3.

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29. William Brown, "A Question of Agency: Africa in International Politics," Paper presented at BISA-ISA Joint International Conference: Diversity in the Discipline, Edinburgh, June 20–22, 2012. p. 17.

30. Daniel Drezner, "The Power and Peril of Regime Complexity," *Perspective on Politics* 7(1) (2009), pp. 65–70, p. 68, https://doi.org/10.1017/S1537592709090100.

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34. *Ibid.*

35. For details see Siphamandla Zondi et.al., "Meeting Summary: Emerging Agents of Change? Africa and International Negotiations," *Chatham House*, 2011, https://www.chathamhouse.org/sites/default/files/public/Research/Africa/020211summary.pdf.

36. *Ibid.*

37. Yunguo 2008, pp. 9–23, p. 13.

38. *Ibid.*

39. *Ibid.*, p. 13. Politically, for example, Europe judges and measures Africa with its own values, resorting to sanctions or military means when Africa fails to meet EU standards of HRs, GG, etc. Economically, Europe often regards its responsibility and assistance as a favor or charity; more it imposes the Western economic model, e.g., structural adjustment programs (SAP).

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China-Europe-Africa Cooperation: Chances and Challenges, *Proceedings of the 6th Shanghai Workshop on Global Governance*, ed. Yu Yan (Shanghai: Friedrich-Ebert-Stiftung and Shanghai Institutes for International Studies, 2008), pp. 5–8.

43. *Ibid.*, p. 7.

44. *Ibid.*, p. 9.

45. Denisson and Dworkin 2010, p. 2.

46. Details of Chinese initiatives and investments in 2006 in Africa stand as follows: China is said to be the third biggest trading partner of Africa with trade valued at $55.5 million, mostly imports of oil and raw materials; 800 Chinese companies invested $1 billion USD; China imports 32 percent oil from Africa—oil related investment amounting to at least $16 billion; China has cancelled almost $1.3 billion in debt owned by 31 African countries, abolished tariffs on 190 kinds of goods from 29 least developed countries in Africa and promised to do so for more than 400 goods; since 1956, China has completed 900 projects of economic and social development in Africa; China has provided scholarship for 18,000 students from 50 African countries; China has sent 16,000 medical personnel who have treated more than 240 million patients in 47 African countries and there are approximately 3,000 Chinese forces participating in UN peacekeeping in Africa. See Mugumya 2008, p. 7.

47. *Ibid.*

48. At the 9th EU–China summit in 2006, China hesitantly agreed to a dialogue on peace, stability and sustainable development in Africa—which was seen as a first step towards larger dialogue and acknowledgement of common issues.

49. Mugumya 2008, p. 9.

50. Emilie M. Hafner-Burton, "The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe," http://pages.ucsd.edu/~ehafner/pdfs/regime_complexity.pdf, accessed June 12, 2017.

51. *Ibid.*

52. Henning Melber, "International Solidarity as an Emerging Norm in the United Nations: Opening Speech at the International sef: Expert Workshop. International Solidarity, Yesterday's Ideal or Emerging Key Norm?" 2016, http://www.hammarskjoldinquiry.info/pdf/ham_105_Melber_speech_Berlin_010916.pdf, accessed November 18, 2017.

53. *Ibid.*

54. The concept of African solidarity partly derives from the Pan African movement under the drive of Kwame Nkrumah (first president of independent Ghana). He believed that it was necessary to speak with one voice as an effort to balance up with the political, diplomatic and even economic weakness of individual African States.

55. J.C. Hoste and A. Anderson, "African Dynamics at the Climate Change Negotiations," *Egmont Institute Africa Policy Brief* (2012), p. 3.

56. It should be noted that Africa never intervened directly and militarily as did U.S., Britain and France before it continued under NATO.

57. Hoste and Anderson 2012, p. 22.

58. S. Mahmud, "Controlling African States' Behavior: International Relations Theory and International Sanctions Against Libya and Nigeria," in *Africa's Challenge to International Relations Theory*, eds. K.C. Dunn and T.M. Shaw (Basingstoke: Palgrave, 2001), p. 130, https://doi.org/10.1057/9780333977538_9.

59. Andrew Lebovich, "Misunderstanding Migration in North and West Africa," *European Council on Foreign Relations*, December 5, 2017, http://www.ecfr.eu/article/commentary_misunderstanding_migration_in_north_and_west_africa, accessed December 10, 2017.

Biographical Statement

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The Re-Emergence of the Bay of Bengal

Nitin Agarwala

Structured Abstract

Article Type: Research Paper

Purpose—The Bay of Bengal has been a fractured region since the weakening of imperialism due to fear of re-colonization, lack of trust, historical baggage and inward orientation. Due to the rise of China and India, the Bay has once again become an arena of activities forcing littoral states to engage in a number of sub-regional groupings with BIMSTEC (Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation) as the only intra-regional grouping between South Asia and Southeast Asia. The paper explores if BIMSTEC can actually help the Bay to re-emerge as the "center of activities" and the possible "route to course" for such a re-emergence.

Design, Methodology, Approach—Using a comparative approach, the author looks at various groupings in this region in general, and BIMSTEC in particular, as a medium to help the Bay to achieve its lost unity and identity.

Findings—BIMSTEC can become a bridge between South Asia and Southeast Asia if member states allow bilateralism to develop into multilateralism and focus more on trade, investment, connectivity and energy. Since BIMSTEC is more than a grouping, by being a defined region of the Bay of Bengal, its success means the re-emergence of the Bay of Bengal.

Practical Implications—This contribution explains how the nations of South Asia and Southeast Asia, by their concerted efforts of working together, can re-integrate the region to its earlier glory.

Originality, Value—This contribution examines the growth of sub-regional

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partnerships and how the success of an intra-regional partnership can help the entire region prosper.

Keywords: Bay of Bengal, BIMSTEC, re-emergence,
sub-regional partnership

Table of Acronyms

ADB	Asian Development Bank
AMRO	ASEAN+3 Macroeconomic Research Office
APEC	Asia-Pacific Economic Cooperation
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASEM	Asia-Europe Meeting
BCE	Before the Common Era or Before the Current Era
BIMP-EAGA	Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area
BIMST-EC or BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
BISNC	BISNC
BIST-EC	Bangladesh, India, Sri Lanka, Thailand Economic Cooperation
BNPTT	BIMSTEC Networks of Policy Think Tank
BOBP-IGO	Bay of Bengal Programme Inter-Governmental Organisation
CAREC	Central Asia Regional Economic Cooperation
CE	Common Era or Current Era
CGIF	Credit Guarantee and Investment Facility
CTI	Coral Triangle Initiative
EAS	East Asia Summit
ECO	Economic Cooperation Organization
EMEAP	Executives' Meeting of East Asia Pacific Central Banks
ESCAP	Economic and Social Commission for Asia and the Pacific
EurAsEC	Eurasian Economic Community
FEALAC	Forum for East Asia-Latin America Cooperation
FFA	Forum Fisheries Agency
FTA	Free Trade Agreement
GMS	Greater Mekong Subregion Economic Cooperation Program
IFAS	International Fund for Saving the Aral Sea
IMT-GT	Indonesia-Malaysia-Thailand Growth Triangle
IOR-ARC	Indian Ocean Rim Association for Regional Cooperation
IT	Information Technology
IUU	Illegal, unreported and unregulated (fishing)
MRC	Mekong River Commission
NARBO	Network of Asian River Basin Organizations
PIF	Pacific Islands Forum
PPP	Public-Private Partnership
RCI	Regional Cooperation and Integration
SAARC	South Asian Association for Regional Cooperation
SACEP	South Asia Co-operative Environment Programme
SASEC	South Asia Sub-regional Economic Cooperation
SCO	Shanghai Cooperation Organisation
SEANZA	Central Banks of Southeast Asia, New Zealand, and Australia
SEAWUN	Southeast Asian Water Utilities Network
SOPAC	Pacific Islands Applied Geoscience Commission
SPC	Secretariat of the Pacific Community
SPECA	UN Special Programme for the Economies of Central Asia

SPREP	Pacific Regional Environment Programme
SPTO	South Pacific Tourism Organisation
TTF	Technology Transfer Facility
UNCTAD	The United Nations Conference on Trade and Development

I. Introduction

The Bay of Bengal since times immemorial has encouraged trade and cultural connectivity between its littorals, namely India, Bangladesh, Sri Lanka, Myanmar, Thailand, Malaysia, Singapore and Indonesia. With colonialism, the region became economically stronger and allowed seamless movement of military troops and agricultural products. However, in the latter half of the 19th century with the weakening of colonialism and newfound independence, the littorals developed a mind of their own and their cohesiveness and unity weakened, causing the Bay to lose its identity.

Inward-looking economic policies and mistrust between these littorals created a sharp line of distinction that forced the region to be recognized as two separate entities—the eastern half as "Southeast Asia" and the western half, which included India, as "South Asia." Of these, the Southeast Asian nations, which were more cohesive and like-minded, decided to restore their lost identity and unity by creating a "successful" sub-regional grouping of ASEAN in 1965. Seeing the success of ASEAN, despite differences, the South Asian nations came together under SAARC in 1985. However, there was no real effort to revitalize the entire region as one and to its ancient glory until the 1990s, when India launched its "Look East" Policy, and then through BIMST-EC in 1997.

Today, an increasing population in this region has resulted in an increased demand for energy and resources by the two rising powers of Asia, viz. India and China, thereby forcing the Bay of Bengal, that controls the transit of nearly 90 percent of world trade on it, to once again re-emerge at the heart of international politics by becoming an arena of connectivity and strategic competition for control over energy resources, shipping lanes, and cultural influence. To add to this, the silent challenge of climate change is having a severe effect on the densely populated littorals of the Bay.[1]

To ensure the well-being of their people, a must for any nation, a multitude of bilateral and multilateral sub-regional partnerships, programs and initiatives for improving trade, transportation, tourism, energy, security and social and cultural exchange have become the norm for the littorals of this region. Though there is no doubt that the Bay of Bengal is regaining its importance,[2] this paper aims to look at the partnerships, programs and initiatives in this region that are propelling the Bay to re-emerge and achieve its lost glory and importance. In doing so, the paper will focus primarily on BIMSTEC since it is the only initiative that tries to connect South Asia to Southeast Asia and can possibly help the Bay of Bengal to achieve its lost unity, glory and identity. The question this study aims to answer is whether BIMSTEC can help the Bay of Bengal to re-emerge as the "center of activities" and the possible "route to course" to achieve this goal.

This article has been arranged in six sections. The second section provides a historical background of the Bay of Bengal to show how for many years it has been the center of activities. The third section presents an insight into the need for cooperation, the patterns of cooperation used and the partnerships that exist in the Asia-Pacific region. The fourth and the fifth sections focus on BIMSTEC and the possible route it needs to chart to help the Bay of Bengal to re-emerge and regain its lost glory. The sixth and final section concludes the paper.

II. Background

The Bay of Bengal, the largest bay of the world, named after the region of Bengal, covers an area of about 2,172,000 square kilometers (839,000 square miles), is fed by a number of large rivers and boasts of numerous ports, both big and small. Numerous islands, though small, including chains of occasionally active mud volcanoes, both habited and uninhabited, dot the Bay. The Bay has been recognized as one of the world's largest marine ecosystem due to the presence of biological diversities such as coral reefs, estuaries, fish spawning, nursery areas, and mangroves. It is rich in natural resources such as oil, natural gas, methane hydrates and strategic minerals that can be harvested from the available polymetallic nodules. The Bay hosts vital maritime trade routes for Bangladesh, India, Indonesia, Myanmar, Sri Lanka and Thailand, and for the landlocked states of Bhutan, China, India and Nepal while economically supporting countries like the Maldives (for fishing), Malaysia (for fishing and trade), and Singapore (for container traffic from the littoral states of the region).[3]

This region, in its first reference worldwide given by Ptolemy (150 CE), was addressed as the *Gangeticus Sinus* meaning "Gulf of the Ganges" on the world map.[4] Later, for many centuries, and in many languages, it was known as the "Chola Sea," the "Chola Lake"[5] and Kalingorda or "Kalinga Sagar."[6] Subsequently, the Portuguese gave it the name "Golfo de Bengala."[7] Whatever the name, the Bay has been instrumental in the spread of trade, religion, culture, and migrants over the years. It has been a maritime thoroughfare for trade between India and China[8]; a conduit for the spread of Buddhism and Indian art, culture and civilization to Cambodia (as ReamKer),[9] Malaysia (as Hikayat Seri Rama), Thailand (Buddhism in 3 BCE, and as Ramakien), Myanmar (as Rama Vatthu) and Indonesia (as Ramayana Kakawin)[10]; with people moving freely between the littorals of the Bay of Bengal until the early 20th century, thereby giving the region a feeling of "a neighborhood."

The historical use of the Bay dates back to Prince Vijaya (543–505 BCE) who traveled from Bengal through the Bay to colonize Sri Lanka.[11] Under the Pallav dynasty (the middle of the 6th to the middle of the 8th century), trade between India and Southeast Asia flourished and the Bay's littorals came closer. With the Cholas (between the 9th and 13th centuries), commerce in the region saw a new high with the Indian merchants leaving their imprints as far as Java, Indonesia. By the early 11th century, the Cholas had become a regional maritime power and their empire

extended to Sri Lanka, the Maldives, and the Laccadives. This lead to imperial and commercial rivalry by the empires of Srivijaya (a Hindu Malay kingdom around the Straits of Melaka and the Javanese kingdom of Mataram), the Cambodian kingdom of Angkor (in competition with the Dai Viet and Champa), the Burmese kingdom of Pegu (by developing Buddhist connections with Ceylon while linking the Bay's northern commerce overland with Yunnan) and the new Song dynasty in China (960 CE).[12] These commercial rivalries eventually led to the military expedition of King Rajendra, a Chola ruler, in 1025 CE, across the Bay of Bengal to raid the lands of Srivijaya. This attempt was the first such attempt to assert naval supremacy over the Bay with many others, such as those of the Portuguese, the Dutch, the British, and the Japanese, to follow.[13]

Around 1240 CE, invasions by semi-nomadic armed groups from Inner Asia profoundly disrupted regional politics, thereby re-orienting seaborne commerce to overland trade to result in a decline of integration around the Bay, which eventually was corrected after European traders arrived in Asia in the 15th century. These invasions brought about a change in the commercial and cultural life of the Bay of Bengal as Islam began to grow in South and Southeast Asia between the 13th and 14th centuries, giving new prominence to Muslim trading communities from South India. With Muslim rule expanding into South India, the dispersed Muslim communities connected South and Southeast Asia to the Arab world, making the Buddhist and Muslim cultural traffic as the common bond.[14]

The 14th and the 15th centuries saw explorers like Ibn Battuta (1304–1369) of Morocco, Niccolo De Conti (1395–1469) of the Venetian Republic and Admiral Zheng He (1371–1435) of Imperial China venturing through the Bay of Bengal.[15] The 16th century saw the Portuguese empire, the Second Burmese Empire (Taungoo dynasty, 1486–1752) and the Kingdom of Mrauk U (1429–1785) as the major powers in the Bay of Bengal.[16] Such was the interest in the region that navigational charts for the Bay were first prepared by the Portuguese in the 16th century and later refined by the English and the Dutch with the dedicated efforts of theoretical mathematicians and the practical experience of seamen in the 17th century. By the 18th century, numerous European trading companies had established settlements across the region, which culminated into Crown rule in the subcontinent in the 19th century and eventual disruption of the region's traditional maritime networks. What emerged was the British policy of protecting trade routes to China and the Pacific while displaying their complete strategic dominance over the Bay of Bengal in military, economic, demographic and political terms.[17]

To control territories around the Bay, the British needed laborers whom they brought with them from India. It is estimated that nearly 30 million Indians worked overseas between 1834 and 1937[18] and were responsible for change to the demographic and economic landscape of the area by creating tea industry in Ceylon, rice industry in Burma and rubber industry in Malaya. These linkages were supported by infrastructure such as the regular ship connection between Calcutta and Rangoon and dozens of port on the eastern and western coasts of the Bay of Bengal by the British India Steam Navigation Company (BISNC).[19] The early 20th century saw a rapid

increase in trade and migration from India between British India and British Burma allowing fostering of free trade, market economy and strong economic and commercial linkages between the two nations that ultimately saw a decline with their independence in 1947 and 1948, respectively, so as to protect local industries, to restrict labor immigration, for security and threats from neighbors.

The decolonization of the countries of this region and India's leaning away from the Western nations divided the region into South Asia (pro-communism) and Southeast Asia (anti-communism), which was made *de jure*[20] by the formation of the ASEAN in 1967 by the Southeast Asian nations. The demarcating border of Southeast Asia, so created, was limited to Myanmar, with its admission to ASEAN in 1997 while Sri Lanka was denied membership for geographical reasons.[21]

For times immemorial, every aspect of human society, culture and sustenance of life in the Bay has been dictated by the Asian monsoon that animates the Bay by providing fresh water to lower the salinity and allow greater biodiversity to thrive. While the resulting aquatic life provides a crucial source of energy to the population residing along the coasts, the monsoon provides the necessary water resource for daily livelihood and agriculture for the hinterland. With time, as the Bay lost its importance as a lifeline of commerce and to pollution due to numerous human activities as a result of population growth, urbanization close to the shores, industries and building of dams on the rivers that feed the Bay, the very nature of the Bay and the biodiversity that makes it so unique got altered. The oxygen content of these waters has reduced to such an extent that there is a "dead zone" of the size of 600,000 square kilometers, which has been found to be growing steadily.[22] With continued neglect and global warming, the coastal regions of the Bay have become the most vulnerable to climate change in the world, especially since more than half a billion people live directly on the coastal rim that surrounds it, which means that one-fourth of the world's population lives in a country that borders the Bay of Bengal.[23]

Furthermore, the geographical location of the Bay provides with a unique strategic position as it connects the Indian Ocean and the Pacific Ocean via the Malacca Strait, through which transits nearly one-third of global trade. It is no wonder that the two rising powers of the world, India and China, are trying to be assertive and dominative in the Bay.

From the preceding discussion, one realizes that the Bay of Bengal was once the heart of global history, linked by kinship, commerce, and cultural circulation; however, due to the lack of a political structure to knit the region together, the Bay was forgotten in the second half of the 20th century and was divided for control over trade and migration. Over the years, in order to knit back the region and ensure their own growth and development, nations here have engaged in many sub-regional agreements. All these years, these efforts have mostly been limited to countries within the constructs of South Asia and Southeast Asia. It is only now that through an initiative named BIMSTEC, an effort to integrate nations across these constructs has taken shape and the world watches to see if the re-emergence of the Bay of Bengal as the "center of activity" can become a reality or not. The success of BIMSTEC is

hence considered critical to integrate the two sub-regional constructs and bring back glory to the Bay.

III. The Need for Cooperation

Decades of suspicion, mistrust and fear among the countries of the Bay of Bengal[24] have caused various trans-boundary issues to take root.[25] Some of these issues include fishing, oil-spill, pollution control, piracy, human trafficking, illegal human migration, and trade. Even with the issues known, very little has been done by countries here as these issues are trans-boundary in nature and cannot be handled unilaterally. Furthermore, the lack of trust, suspicion and fear has disallowed these issues to be handled without involving the concerned nation(s), thereby allowing the issues to persist and grow. This has necessitated the need to implement sub-regional partnerships, programs, initiatives and agreements and build trust to create areas of cooperation. Independently, both Southeast Asia and South Asia have their own cooperation mechanisms in place but those between these two blocs have been missing. India's "Look East" policy of 1991 that was upgraded to the "Act East" policy in 2014 and the BIMSTEC of 1997 are the only cooperation mechanism between the two blocs.

To date, a multitude of international, regional and sub-regional partnerships operate in the Bay of Bengal, many of which have similar roles and mandates, resulting in limited effectiveness. Due to their overlap and duplication, they have been given the proverbial name "noodle bowl" of treaties (see Figure 1 as a simplistic representation of these groupings). It is imperative to mention that irrespective of their names and the member countries, all these sub-regional partnerships aim at addressing all or some of the four basic areas of cooperation—economic, trade and investment, monetary and financial, and regional public goods.[26]

Before delving into the details and nuances of these sub-regional partnerships in Asia we need to understand the multitude of terms used for these partnerships and the areas which they focus on. Having understood these basics, we will discuss the sub-regional partnerships in Asia, in brief, to better understand how these partnerships have supported the re-emergence of the Bay of Bengal in the last few decades.

Patterns of Cooperation Structures

In order to allow trade and investment to help development through cooperation, developing countries are fostering sub-regionalism through various sub-regional agreements. We need to understand that the concept of region is a very loose notion as regions can be constructed and re-constructed based on the common interests, threats or vision and this concept can create "outsiders" and "insiders." For the purpose of this study, we define "region" as Asia and the Pacific. The various patterns of cooperation structures that evolve, in general, include:

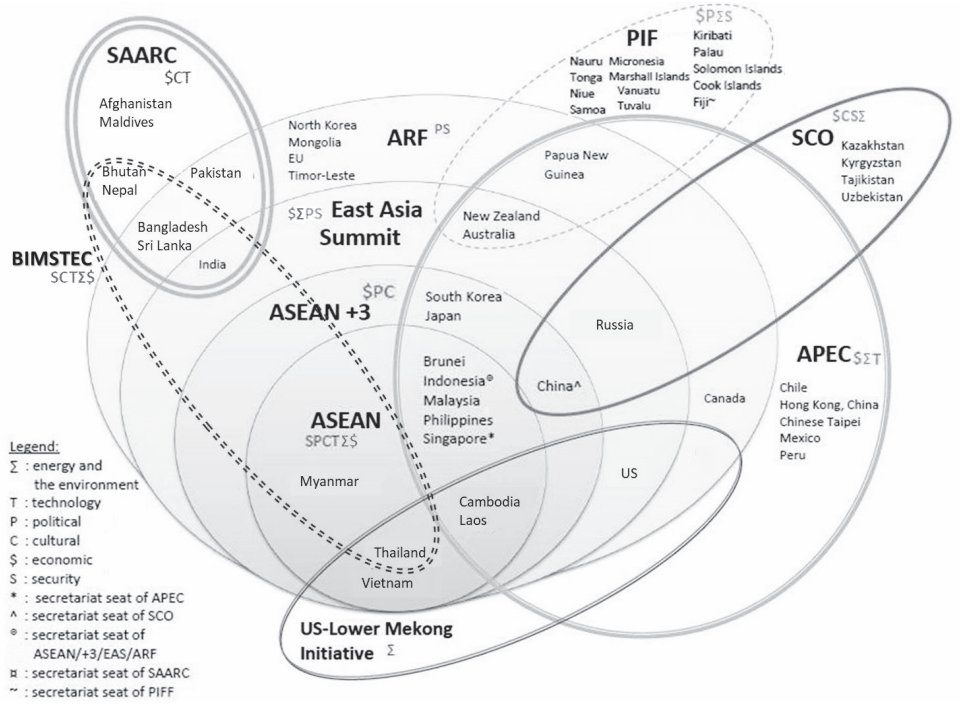


Fig. 1. Sub-regional cooperation structures in Asia. Source: modified from Bower.[27]

(a) A *regional agreement*, wherein regional countries voluntarily enter into an agreement in order to upgrade cooperation through common institutions and rules.[28] The primary objective of such an agreement can be economic, political or environmental. Usually, for governments, it tends to become a political initiative with commercial interests. Agreements allow an increase in international trade and investment and in the formation of regional trading blocs.

(b) Regional agreements allow *regional integration* that is progressed through international institutions, intergovernmental decision-making, or a combination of both. They are aimed to achieve rapid economic development, decrease conflict, build mutual trust and overcome barriers that impede the flow of goods, services, capital, people and ideas. Accordingly, the Regional Cooperation and Integration (RCI) Strategy[29] recommends four pillars for cooperation and integration as seen in Figure 2. These include:

(i) Economic cooperation (infrastructure development such as transport, ICT, technology and energy)
(ii) Trade and investment (trade, investment, domestic regulation, and macroeconomic and financial policy)
(iii) Monetary and financial integration (a single currency and a close to uniform interest rate for the region)
(iv) Regional public goods—environmental protection (shared natural resources) and security (both traditional and non-traditional threats

[IUU fishing, piracy, illegal migration, slave trade] and climate change)

(v) Culture and education

(c) *Regional partnerships* are partnerships formed when two or more countries or organizations of a region either reach a formal or an informal agreement to work together to achieve a common goal. Partnerships are created to achieve greater value, leverage resources, address common issues, provide a communication forum and achieve bold goals.[30]

(e) *Regional programs* are planned activities of particular interest to people living in the area for which the service is provided. These programs should deal with a subject matter of specific interest to the region and with people who are residents or have close connections with the region.[31] They aim to support the region in the efforts of domestic priorities, policy reforms and regional integration.

(f) *Regional initiatives* are initiatives[32] committed to a specific region. These initiatives generally have a broad scope and include several topics of common interest.[33] They may aim at innovative and sustainable practices, building a knowledge base and formulation and implementation of strategies at the country level. The initiative provides an integrated approach to addressing priority issues, and to guide the implementation of country programs.

While the regional cooperation models are effective and are the way ahead, there are risks to regional integration that need to be identified and managed. These include[34]:

(a) Different priorities of countries depending on their connectivity gaps, economic geography, or preferences for sovereignty in specific areas.

(b) Difficulty in assessment of the impact on trade and investment flows, allocation of economic activity, growth, and income distribution.

(c) Inefficient outcomes due to lack of adequate complementary policies and institutions.

(d) Need of policies and institutions to ensure that eventually there are no winners and losers and social, environmental, and governance risks are managed correctly.

Such resulting institutes of regional integration may be either trans-regional (with countries outside Asia), intra-regional (with countries within the region but of different sub-regions), or sub-regional (with countries of the same sub-region). To better understand the architecture of these institutions that have developed in Asia, these institutions are divided into three categories, viz. overarching, functional and facilitating.[35] An overarching institution is an umbrella arrangement that convenes summits and meetings for governments and provides normative and declaratory frameworks to legitimise and support regional cooperation and integration initiatives. The functional institutions are more specialized with a narrow technical agenda that focuses on a specific area (or range of areas) of cooperation while the facilitating institutions provide advisory, administrative, technical, and financial support.

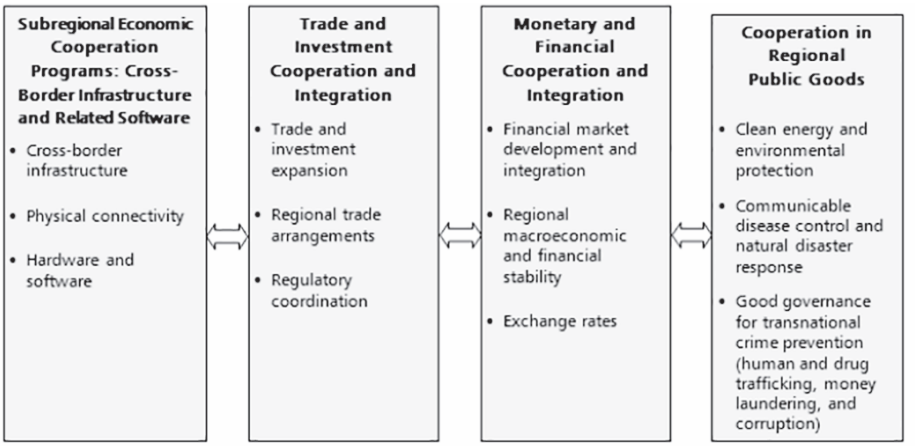


Fig. 2. The four pillars of regional cooperation and integration. Source: ADB, 2008.[36]

Partnerships in the Region

Asia, as a region, is home to 48 developing nations (Central Asia [8], East Asia [6], South Asia [8], Southeast Asia [10], Oceania [2] and the Pacific [14]), and has witnessed a steady increase in institutions of regional integrity. These institutions are aimed to be comprehensive, open, and multi-dimensional and help nations to develop through cooperation.

The existing institutions of regional integration in this region are as seen in Table 1.[37] These institutions and their members (as seen in Fig. 3) indicate that these institutions are haphazard and overlapping. Such overlapping institutions lead to higher transaction cost due to duplication, are difficult and problematic for government agencies to manage due to scarce technical resources and eventually yield lower welfare gains. However, they continue to flourish due to foreign-policies and politics of participating nations. When analyzing the existing institutions in Asia based on the four pillars of RCI strategy (see Fig. 2), what stands out is that regional integration is much higher in East Asia and Southeast Asia while Pacific, South Asia, and Central Asia are the least integrated sub-regions in the world.[38] The main driver of these integrations has been "trade and investment" while "monetary and financial integration" has lagged and both "economic cooperation programs" and "cooperation in regional public goods" have been wanting. This said, it is evident that there is substantial untapped potential for regional integration in South Asia.[39]

It is essential to understand that regional economic cooperation and integration is essential to bring about socio-economic development of the region and also for the implementation of the 2030 Agenda of achieving Sustainable Development Goals by generating large opportunities for enhancing employment and incomes across the region.[40] In return, a lower integration has a direct bearing on connectivity leading to poor infrastructure, which in return affects the development of seaports, ports and harbors, and air services. These in return have a direct bearing on tourism, business and migration.

Table 1. Institutions of Regional Integration in Asia (ADB, 2010)

Trans-regional

Overarching	Asia-Europe Meeting (ASEM); Asia-Pacific Economic Cooperation (APEC); Eurasian Economic Community (EurAsEC); Forum for East Asia-Latin America Cooperation (FEALAC); East Asia Summit (EAS)
Functional	ASEAN Regional Forum (ARF); Indian Ocean Rim Association for Regional Cooperation (IOR-ARC); Shanghai Cooperation Organisation (SCO)

Intra-regional

Overarching	ASEAN Plus Three (ASEAN+3);
Functional	ASEAN+3 Macroeconomic Research Office (AMRO); Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC); Central Banks of Southeast Asia, New Zealand, and Australia (SEANZA); Coral Triangle Initiative (CTI); Credit Guarantee and Investment Facility (CGIF); Economic Cooperation Organization (ECO); Executives' Meeting of East Asia Pacific Central Banks (EMEAP); Network of Asian River Basin Organizations (NARBO)

Sub-regional
Central Asia

Overarching	Central Asia Regional Economic Cooperation (CAREC); International Fund for Saving the Aral Sea (IFAS); UN Special Programme for the Economies of Central Asia (SPECA)

South Asia

Overarching	South Asian Association for Regional Cooperation (SAARC)
Functional	Bay of Bengal Programme Inter-Governmental Organisation (BOBP-IGO); South Asia Co-operative Environment Programme (SACEP); South Asia Sub-regional Economic Cooperation (SASEC)

Southeast Asia

Overarching	Association of Southeast Asian Nations (ASEAN)
Functional	Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA); Greater Mekong Subregion Economic Cooperation Program (GMS); Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT); Mekong River Commission (MRC); Southeast Asian Water Utilities Network (SEAWUN)

Pacific

Overarching	Pacific Islands Forum (PIF)
Functional	Forum Fisheries Agency (FFA); Pacific Islands Applied Geoscience Commission (SOPAC); Secretariat of the Pacific Community (SPC); Pacific Regional Environment Programme (SPREP); South Pacific Tourism Organisation (SPTO)

This all notwithstanding, in the last 70 years, the littoral countries of the Bay

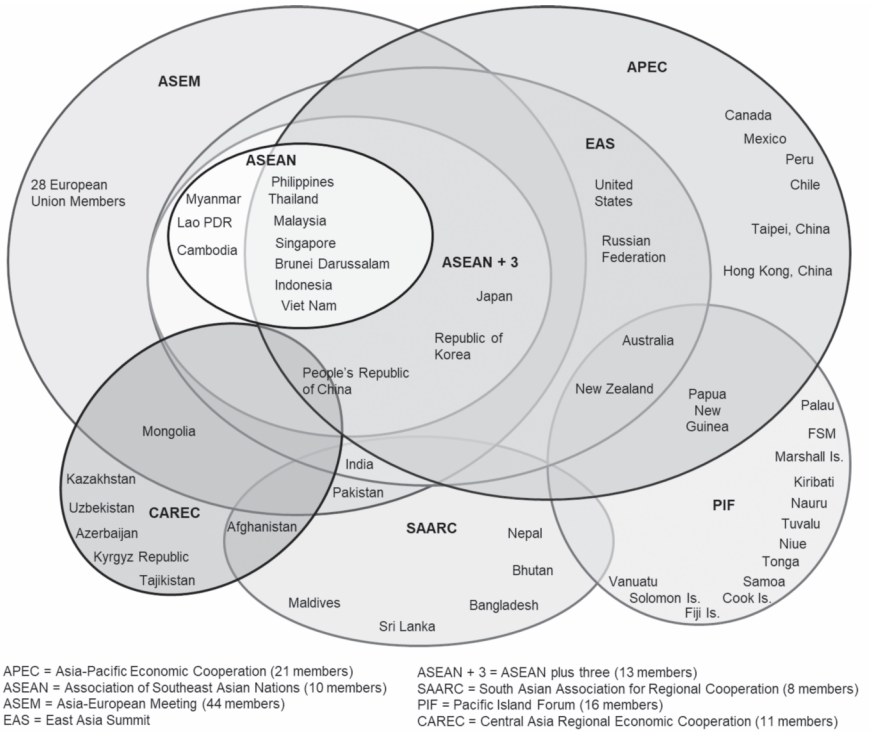


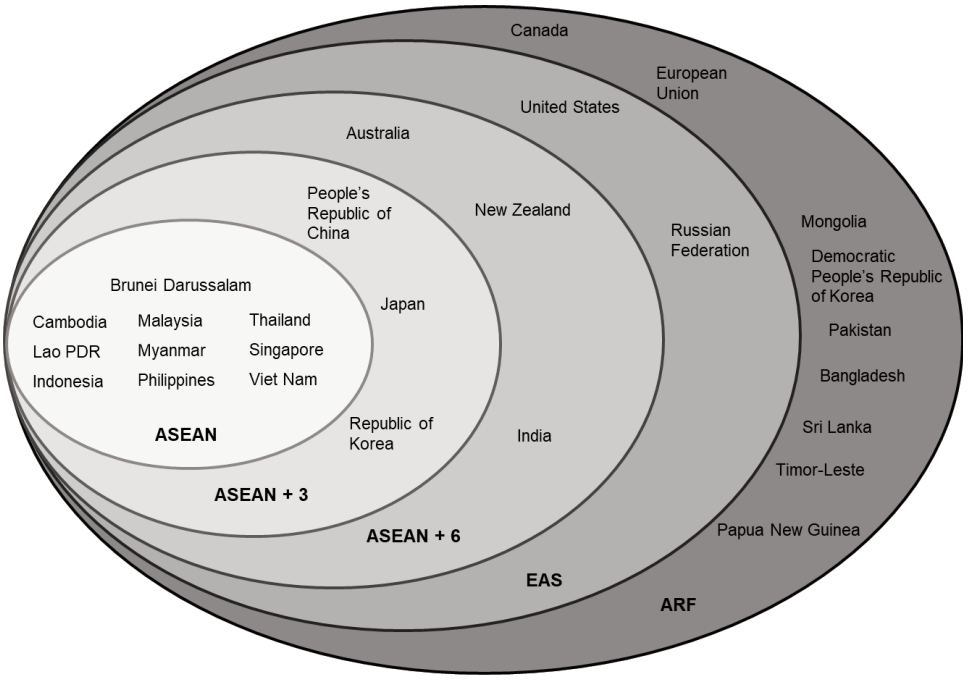
Fig. 3. Main regional and trans-regional economic integration initiatives in Asia. Source: ADB, 2010.[41]

of Bengal, despite the challenges faced, have seen substantial economic and social achievements much beyond the expectations of most people. This is largely attributable to ASEAN which has helped establish a high degree of political unity through regional cooperation. This in return has allowed trade and investment to flourish in the region and provide leverage for trade negotiations at the international level. Over the years, ASEAN has become a successful model for the developing world through openness and gradualism. On the other hand, since the motivation for the creation of SAARC was a common fear of domination of smaller countries by India, the grouping has not been able to show comparable results.[42]

Though there has been skepticism about the region achieving regional integration with a "noodle bowl" arrangement of institutions,[43] it is ASEAN that stands out to provide the required hope and direction. It is because of this that one notices that ASEAN maintains centrality to both trans-regional and inter-regional groupings (see Fig. 4). It must be noted that the ASEAN's centrality is not a result of a preconceived plan but due to its increasingly central role in Asia-wide cooperation.

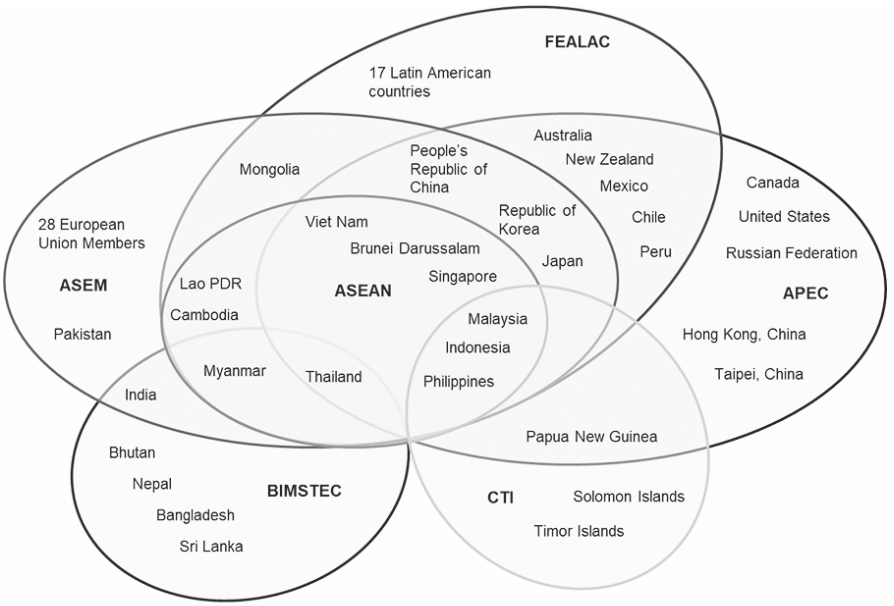
In spite of the downside of the "noodle bowl" arrangement, several countries

***Opposite:* Fig. 4. Centrality of ASEAN in groupings. Source: ADB, 2015.**[44] ***Top:* Inter-regional grouping. *Bottom:* Trans-regional grouping.**



ASEAN = Association of Southeast Asian Nations
ASEAN + 3 = ASEAN plus three nations
ASEAN + 6 = ASEAN plus six nations

ARF = ASEAN Regional Forum
EAS = East Asia Summit



APEC = Asia-Pacific Economic Cooperation (21 members)
ASEAN = Association of Southeast Asian Nations (10 members)
ASEM = Asia-European Meeting (44 members)
BIMSTEC = Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (7 members)
CTI = Coral Triangle Initiative (6 members)
FEALAC = Forum for East Asia-Latin America Cooperation (36 members)

have stayed on with these agreements for reasons of simplification of trade negotiations or simply "peer pressure." It is with this understanding that it is opined that BIMSTEC can play a crucial role to ensure socio-economic development of the littorals of the Bay of Bengal as it connects nations of South Asia and Southeast Asia to remove the existing divide between these two sub-regions while maintaining the centrality of ASEAN, a near necessity for the stability and prosperity of this region as seen in Fig. 4. Such an effort would eventually help in the possible re-emergence of the Bay of Bengal as the "center of activities" in this region once again.

Influence of Partnerships on the Bay of Bengal

It is clear by now that the intention of regional partnership is to bring business, government, education and community leadership together in order to strengthen the economy of the region by retaining, expanding and diversifying existing business and industry while attracting new businesses to the region.[45] This has resulted in fast-paced development and growth of Asia in general and Southeast Asia in particular.

With development, has come unprecedented pollution of the land, air and the sea. This has resulted in 99 of the 100 most polluted cities of the world in 2018 to be in Asia[46] thereby exposing 92 percent of the population of this region to significant health risks.[47] According to the 2017 Ocean Conservancy report,[48] China, Indonesia, the Philippines, Thailand, and Vietnam are dumping more plastic in the oceans than the rest of the world combined. This is resulting in the blatant pollution of the oceans and is directly responsible for climate change and loss of habitat for the fishes. It is essential to mention that the fishing industry plays a vital role in the lives of millions of people in this region, with ASEAN being a major producer of fish and other fisheries products. As the effects of climate change increase, natural disasters and sea rise have become frequent and common events for the region. This has also had an effect on the monsoon pattern on which the region depends largely for its agriculture, and which was once a determining factor for movement of trading ships in this region. Today, no part of the world is likely to be affected more by climate change than the littorals of South Asia due to low lying and crowded cities close to the coast.[49]

As for the unity of the region, while Southeast Asia has displayed a close-knit integration South Asia has not. Furthermore, with no effort made to integrate South Asia and Southeast Asia, the integration of the Bay of Bengal has remained a distinct dream for the last 70 years. However, with the magnitude of world trade moving through the Malacca Strait that accounts for nearly half of the global trade[50] and one-third of the total global petroleum and other liquids production,[51] the Bay of Bengal has started to attract extra-regional powers. With political conflict and piracy being rife in this region, extra-regional powers such as the U.S., China, Japan, South Korea, India, Vietnam, Australia and many more have been forced to involve themselves in issues of trade, defense and diplomacy, sale of military equipment, and military exercises with the littorals of this region. This in return has affected the security

of the littorals of the Bay of Bengal forcing them to expend their limited finances in developing a military of their own.

IV. Understanding BIMSTEC

If we observe closely the sub-regional partnerships mentioned above, we realize that most of them maintain the broad division of inward-oriented South Asia and outward-oriented Southeast Asia and there is very little participation of nations on an intra-regional basis, barring BIMSTEC. Loosely, BIMSTEC can be called an initiative to bring together the two sub-regions so that the Bay of Bengal and Asia as a whole regains its long-lost glory. It is with this understanding that we will look at BIMSTEC in detail and see what efforts it is making to bring the two sub-regions together and whether it has/is succeeding in its efforts.

The Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation (BIMST-EC) was formed in 1997 as BIST-EC and was renamed as BIMST-EC after Myanmar joined this intra-regional grouping. With Nepal and Bhutan joining it in 2004, it was renamed as BIMSTEC (Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation). Unlike other sub-regional groupings, BIMSTEC is a sector-driven cooperation organization. Though it began with six economic-related priority objectives, over the years more were added to eventually address 14 sectors. Each of these sectors has a member nation as a lead country to coordinate the activities in that sector. These sectors include those of Trade and Investment (Bangladesh), Technology (Sri Lanka), Energy (Myanmar), Transport and Communication (India), Tourism (India), Fisheries (Thailand), Agriculture (Myanmar), Cultural Cooperation (Bhutan), Environment and Disaster Management (India), Public Health (Thailand), Poverty Alleviation (Nepal), Counter-Terrorism and Transnational Crime (Sri Lanka) and Climate Change (Bangladesh). Additionally, two specialized centers, the Energy Centre and the Centre on Weather and Climate have been created to support sectoral cooperation and for a concerted energy policy. Today, 23 years later, BIMSTEC has created its own identity as an intra-regional organization, rather than being just a bridge between South and Southeast Asia. However, with achievements, new challenges have surfaced that need to be continually resolved.

Progress Made

BIMSTEC as a sub-regional organization maintained a low profile till the 2016 BRICS-BIMSTEC Outreach Submit. Since then, progress in various areas has been made with various agreements being inked by the member states. To improve working a secretariat has been established in Bangladesh. The progress made in the various priority sectors is varied with the major focus being on Trade and Investment, Connectivity and Energy with some basic effort focused toward other priority areas.

Intra-regional trade and investment have been one of the key priority sectors

to achieve socio-economic development for BIMSTEC. Accordingly, the Trade Negotiating Committee has established the Agreements/Protocols on Trade in Goods, Trade in Services, on Investment, on Cooperation and Mutual Assistance in Customs Matters, Rules of Origin and Operational Certification Procedures, Trade Facilitation, and Protocol to amend the Framework Agreement to conduct negotiations. In addition, the BIMSTEC Free Trade Area Framework Agreement (BFTAFA) to stimulate trade and investment among member states and to attract trade in goods, trade in services, and investment with outsiders has been inked.

To achieve better transport connectivity, BIMSTEC member states have prepared a BIMSTEC Transport Connectivity Master Plan with Asian Development Bank and identified 167 projects (35 roads, 12 railways, 9 airports and 109 ports) at an estimated cost of US$45–50 billion. Some of these include rail and road corridors such as the SAARC Corridor 4,[52] the SAARC Corridor 8,[53] the Asian Highway 2,[54] the linking up of existing national highways at Dalu (Meghalaya, India)–Nakugaon (Mymensingh, Bangladesh), to create a North-South corridor for Bhutan, Meghalaya and Assam,[55] a 4,430-kilometer long Kolkata-Ho Chi Minh City railway corridor that remains mainly on the drawing board at present, the Kaladan multi-modal transit transport project that aims to reduce the travel distance between Kolkata to Sittwe by approximately 1,328 kilometers and avoid the Chicken's neck in Siliguri by connecting the port of Kolkata with Sittwe (Myanmar) by sea route (539 kilometers), Sittwe to Paletwa (western Myanmar) by Kaladan riverboat route (158 kilometers), and Paletwa to Mizoram (India) by road (62 kilometers). The Kaladan project is supported by several associated projects such as the Bairabi-Sairang-Hmawngbuchhuah railway, Sittwe Special Economic Zone, Sittwe-Gaya gas pipeline, Tha Htay Chaung Hydropower project, India-Myanmar-Thailand highway, Agartala-Feni-Chittagong highway, India-Myanmar Zokhawthar-Rihkwadar-Kalemyo highway, Paletwa-Chika-India highway project and the four-laning of Aizawl-Tuipang national highway.[56]

The Motor Vehicles Agreement for road traffic and Agreement on Coastal Shipping between BIMSTEC member countries has been inked. Under this the BIMSTEC Coastal Shipping Agreement (draft discussed on December 1, 2017) aims to facilitate coastal shipping within 20 nautical miles of the coastline in the region to boost trade between the member countries while the Unified Motor Vehicle Act (MVA) aims to provide easier and smoother movement of goods and vehicles between Bangladesh, Bhutan, India and Nepal, was inked in 2015. The work on establishing mechanisms and procedures for acceptance of custom transit documents, coordination between border authorities and physical clearance of goods remains to be addressed and is being developed while the BIMSTEC Agreement on Mutual Assistance on Customs Matters has been signed.

In order for one member nation to use surplus from by another member, due to different time zones, and hence enhance energy cooperation, a memorandum of understanding to develop a Master Plan for the BIMSTEC Grid Interconnection[57] was signed during the 4th BIMSTEC Summit.[58] The project aims to create a sub-regional power grid by connecting the Northeast to Muzaffarnagar via Bangladesh.[59] Additionally, petroleum product pipeline from Numaligarh refinery (Assam, India)

to Parbatipur (Bangladesh),[60] and a three-nation gas pipeline project between Myanmar, Bangladesh and India, that was aborted in the mid–'90s, are being studied for revival.[61]

To ensure availability of technology and safe transfer of technology for development, the BIMSTEC Technology Transfer Facility (TTF) is being established and is in the final stages. Furthermore, an IT corridor to share the excess internet bandwidth available with Bangladesh has been created. In doing so, Tripura in India is connected to Cox's Bazaar through Akhaura, both in Bangladesh, for the internet.[62]

Tourism that has a huge potential in this region and can attract tourists from both within and beyond the region has also been given priority. With this in mind, a BIMSTEC Tourism Information Centre has been established in New Delhi, India. Furthermore, the Network of Tour Operators and a common marketing strategy to promote tourism are being developed.[63]

To focus on sharing of cultures, various events such as film festivals and a festival of Buddhist Heritage have been organized.

To advance cooperation in the Fisheries sector, a draft concept paper on cooperation in combating IUU fishing, joint activities in fisheries, combating climate change effects to fisheries, research in inland/coastal aquaculture and capacity building is under consideration. Additionally, many collaborative activities have also been conducted.

Intensified cooperative efforts to increase agricultural productivity and to encourage sustainable agriculture and food security have been conducted, along with workshops.

To fight the effects of climate change and to enhance cooperation in the field of Environment and Natural Disaster Management, the BIMSTEC Centre on Weather and Climate has been established in India. In addition, a Concept Paper has been drafted to establish a framework of cooperation on climate change at a sub-regional level.

To ensure public health through traditional medicine, the BIMSTEC Task Force on Traditional Medicine has been set up. Priority Areas for Technical and Research Collaboration in Traditional Medicine are under consideration by the Member States. Similarly, the Protection of Genetic Resources and Intellectual Property Rights are under consideration.

In order to combat terrorism and transnational crimes, concrete measures have been undertaken to step up cooperation and coordination among law enforcement, intelligence and security organizations against non-traditional threats. In addition, BIMSTEC security agencies have begun to cooperate and combat transnational security threats. To create a more conducive atmosphere of trust, the land boundary issues between India and Bangladesh and the maritime boundary issue between Bangladesh and Myanmar have been resolved.

To encourage people-to-people contact, a Networks of Policy Think Tank (BNPTT) has been established as a Track-II BIMSTEC initiative with RIS so as to foster and enhance cooperation and interactions among the Member States.[64]

V. BIMSTEC as a Bridge

In a world that is developing fast, no one nation can have all the resources, both natural and man-made, at its disposal for the well-being of its people. This has caused the world to realize the importance of regional and sub-regional groupings for developing synergy, stability, growth and socio-economic development of the nations. It is with this realization that Bangladesh, India, Sri Lanka and Thailand joined hands to form BIST-EC. With another three more geographically collocated countries joining the grouping, BIMSTEC, as we know it today was formed. Now that the grouping has been formalized, it is essential that this grouping is nurtured enough to keep it alive and kicking, or it would experience a death due to dysfunction. In order to evaluate if BIMSTEC can be the required bridge between South Asia and Southeast Asia let us look at the grouping more closely.

An Analysis

The greatest advantage of this grouping is "geographical contiguity" and "economic complementarities" of the member states that have similar problems and people who think and work alike making understanding better and making the grouping a union of like-minded people with the same set of issues. However, this grouping has remained a mere "talk shop" in the 23 years of its existence with very little to showcase as its achievements. Though the lack of achievement can be attributed to lack of political will, one needs to realize that BIMSTEC is not just another sub-regional grouping but represents an already existing and a much larger recognized identity—the Bay of Bengal—that has existed even before humanity set foot on Earth.

Due to the commonality of issues, the grouping has identified 14 sectors and has assigned each sector to a member state as the "lead country." Since some countries are handling multiple sectors, it is felt that the focus for spearheading multiple sectors is disallowing the adequate addressing of a single sector itself. Though all the sectors identified are critical for the region, it is essential that BIMSTEC identifies some core sectors as priority areas to be addressed first and allow the remaining to be addressed over the years. Some core sectors that need to be addressed before others are *trade*, *investment*, *connectivity* and *energy*. However, care needs to be taken that the focus from the other sectors is not diluted. Sectors such as education and tourism, that are essential but not critical, to begin with, can continue to progress in tandem but not at the expense of the core sectors. It is hence essential that BIMSTEC finalize and implement socio-economic development projects that are more critical to member states and implement them. Since funding will remain an issue, a separate bank or a PPP model to address such a development may be considered as an option.

Another area of concern in this region is security against both traditional and non-traditional threats including terrorism and climate change.

Individually, all member states have been handling the threat of terrorism

through their domestic laws. To address cross border terrorists, several bilateral treaties have been put into place and joint military exercises by the Army, Navy, Air Force and Coast Guard between countries such as Surya Kiran (between India and Nepal), Mitra Shakti (between India and Sri Lanka) and many more are conducted regularly. The need of the hour is to move from bilateral to joint exercises involving all the members of BIMSTEC and share real-time intelligence of all the three domains to ensure a safe Bay of Bengal. In this regard, the creation of the International Fusion Centre–Indian Ocean Region (IFC–IOR) at Gurugram, India, is considered a positive step to address maritime issues.

On the threat of climate change, it is a well-known fact that this region is possibly the worst-hit region due to drought, floods, sea-level rise, and increasing temperature leading to ice melts, forest fires, hurricanes, storms and climate shift, thereby affecting human health, biodiversity, water, food, economy, infrastructure and holistic and maritime security of the countries of the region. It is essential that BIMSTEC as an organization create joint studies and implement them to create adaptive and resilience mechanisms for the people of this region for disaster preparedness due to climate change. In this regard, a think-tank under the aegis of BIMSTEC itself should be established which could provide scholarly research writings on adaptive and resilience mechanisms against climate change relevant to this region and for other programs of BIMSTEC.

While in some priority sectors work needs to be done from scratch, there are many sectors wherein the cobwebs of time need to be removed to establish the once prevailing systems. Sectors such as information technology, customs, and renewable energy may need to be established from scratch, while others such as road and rail links need to be revitalized to their earlier glory with repairs at some places and reconstruction at others. It is pertinent to mention that each member nation has a center of excellence in one or more fields. Some of these are: India in renewable energy, Bangladesh in cyclone preparedness, Thailand in IUU fishing, the last mile connectivity of tsunami early warning system of Thailand for improved preparedness in coastal areas, to name a few. By tapping into this expertise, the entire region can benefit substantially.

In doing all this, it is essential to keep BIMSTEC outside the political arena. The basic thrust of BIMSTEC should be the development of the region with ample opportunity for discussion to avoid mistrust and differences. Political concerns of nations with other nations must be kept out of the gambit of BIMSTEC as is done by ASEAN to keep it apolitical.

In trying to achieve these goals, BIMSTEC should strive to become a thriving partnership among governments, business and industry, civil society, other stakeholders and people working together for ensuring security, preserving peace and expanding the reach and impact of development. Furthermore, there is a need to look not only at the development of hard connectivity (transportation and industrial corridors) but also soft connectivity such as skill development, person-to-person connections and building technological capacity.

Route to Chart

BIMSTEC as a sub-regional grouping has been a slow starter. After inception it was planned that summits would be held every alternate year, ministerial meetings every year and senior officials' meetings biannually. However, in the last two decades, only four summits have happened with no ministerial meetings and the senior officials' meeting postponed seven times.

With changing geopolitics in the Bay of Bengal resulting in increasing traditional and non-traditional threats including those due to climate change, nations here find themselves creating bilateral and multilateral groupings thereby garnering greater world attention for the Bay of Bengal. With an Indian foreign policy focusing on "Look East" (1991), modified as "Act East" (November 2014); that of Bangladesh focusing on "Look East" (2002); that of Myanmar focusing on "Look West" (1996); a failing SAARC due to strained relations between India and Pakistan; and with BIMSTEC having a mix of nations of both South Asia and Southeast Asia, BIMSTEC has started to emerge as a possible solution for the countries of the Bay of Bengal. Such a sub-regional grouping can eventually help bridge these two long-lost blocs that would provide the necessary security and socio-economic growth and allow the realization of the re-emergence of the Bay of Bengal to its original glory. However, in order to achieve this, the following are considered essential:

(a) *Creating greater trust*. There is an increasing necessity to create trust among the member nations. Mistrust restricts trade and connectivity, both of which are essential for greater socio-economic development. A visa on arrival for citizens of BIMSTEC could be an option, to begin with, before a more open visa such as a *Schengen* visa is evolved.

(b) *Creating greater connectivity*. There is an increasing requirement of air, land, sea and telecommunication connectivity between the nations of this region to ensure the creation of trust and to encourage the seamless spread of trade and religion.

(c) *Creating a better environment for Free Trade Agreements*. FTAs, if used irresponsibly, can create a negative economy and decimate the economy and industries of a host nation. It is essential that, to ensure better trade and socio-economic development of the countries of the region, the right environment for FTA through transparency, intra-regional investments, addressing tariff and non-tariff barriers, transportation, supply capabilities and information gaps as a minimum to encourage FTA and allow free trade are developed.

(d) *Big brother approach*. Though India is a big brother in the region and most of the initiatives of BIMSTEC can be manipulated to be India-centric, India as a member nation of BIMSTEC needs to be wary that such an approach may create mistrust and may be counter-productive. It is essential that India adopts an approach of "growth for all." Such an approach would allow BIMSTEC to realize its goal of socio-economic development and act as a bridge for the region.

(e) *Developing infrastructure*. Nations of this region require funds for developing their infrastructure. For this, they should try and tap the resources of the

ADB, the development partner of BIMSTEC, rather than on a bilateral basis. Such an approach will permit the nation to avoid a condition like debt diplomacy while ensuring that their requirement of infrastructure development goals are achieved.

(f) *Need for coordination*. In order to ensure that different groupings, but with common member states work on the same goals, coordination between these groupings is essential. A strong secretariat of BIMSTEC may help provide this coordination. This can be achieved by providing the secretariat with the requisite manpower and autonomy needed to function.

(g) *Need for guidance*. There is an urgent need for guidance in BIMSTEC. With a strong secretariat, this guidance can be ensured to speak to each other and drive the grouping to its desired goals.

(h) *Minimize the involvement of China in the region*. Though such minimization may not be feasible, nations of the region need to see beyond their own interest and try and create options for cooperation within themselves and allow extra-regional powers to get a foothold only when essential.

(j) *Competition between India and China*. Competition between the two major powers is natural. However, in order to shape the future of the Bay of Bengal, it is essential that India revisits the terms of engagement to pursue cooperation where it can and competition where it must.

(k) *Creating a common interest*. Since no two countries may have a common agenda for growth it is essential to evolve common interest areas that will help regional development.

(l) *Create a greater image*. Currently, BIMSTEC lacks a media image. For an organization to gain greater traction through public awareness in society, it needs to be a household name. Such an image needs to be created for BIMSTEC.

(m) *Lack of closure of projects*. Though BIMSTEC has done some good work over the years, the projects that have not been closed in full give the organization a negative image of sorts. It is essential that the projects once completed are closed, allowing the grouping to focus on more economically feasible and result-driven projects.

(n) *Working as one*. Currently, BIMSTEC is working with national goals in mind with each nation looking to achieve their own goals rather than the overall prosperity of the region. It is necessary to remember that if the region prospers, the nations in the region would prosper automatically. It is hence essential that the member nations build synergies so as to utilize available resources in an optimal manner and allow the achieving of the greater goal for the region.

(p) *Key checkpoints*. While progressing with development, security and political stability; the impact of development on macroeconomic policies; increasing market access and capacity building; supporting governance to maintain financial stability; and improving aid effectiveness need to be monitored as key checkpoints.

(q) *Funding*. In order to ensure smooth and regular functioning of the secretariat, member nations need to boost funding for the secretariat's budget. This funding is considered essential in order to invest in outreach and agenda-setting initiatives.[65]

(r) *Sustainability*. Development and pollution have become synonymous in recent years. If BIMSTEC is to help the Bay of Bengal re-emerge, it needs to set standards in achieving growth and development sustainably to ensure that the environment is protected and the negative impacts of climate change do not end up destroying the region.

(s) *Making the grouping stronger*. Indonesia is geographically at the fringes of the Bay of Bengal and enjoys a strong position in ASEAN. Inviting Indonesia to join BIMSTEC would make the grouping stronger.

VI. Conclusion

The Bay of Bengal has remained fractured due to fear of re-colonization, lack of trust, historical baggage or simply inward-orientation. It is time that these fractured elements are put together and allowed to heal as a single entity, as it was a decade ago. One such effort is the realization of the Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation (BIMSTEC) as an engine for socio-economic development in this region. Though BIMSTEC has maintained a low profile for the last 23 years, it is time that this organization becomes a bridge between South Asia and Southeast Asia and helps the Bay of Bengal to re-emerge to its original glory of yesteryears.

In order to allow this to happen, the member states have to allow bilateralism to develop into multilateralism. Currently, while there are 14 priority sectors for BIMSTEC, each led by a member nation, it is essential that to give impetus to the socio-development of this region, the focus should be more on trade, investment, connectivity and energy as the main sectors while progress on the other sectors continue at a lower priority. When all this is achieved, and since BIMSTEC is not a grouping but a defined region of the Bay of Bengal, success of BIMSTEC would directly mean the re-emergence of the Bay of Bengal. With the strong political will being displayed by the member states toward the success of BIMSTEC, it is only a matter of time that the re-emergence of the Bay of Bengal will become a reality.

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Regulating the Carriage of Firearms by Private Maritime Security Actors: An Empirical Investigation

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Structured Abstract

Article type: Research Paper

Purpose—The basis for this article stems from growing concerns about the impact of private sector entities on the sovereignty of states, especially in handling commonly shared challenges.

Design—The article discusses the findings of the study, which involve an empirical investigation using multi-methods to analyze the reasons and linked outcomes of applying Nigeria's gun control to foreign vessels in the Gulf of Guinea. Key informant interviews (n = 11) were conducted with subject matter experts, while the views of seafarers were elicited through questionnaires (n = 44).

Findings—The study confirms that the domestic legal system remains significant and can alter the level of influence of a transnational phenomenon (such as the PMSC industry) by constraining their methods of operation. The study highlights the reframing of PMSC services to fit within the characteristics of the region.

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Relevance—These findings are relevant to understanding international maritime security governance as a complex adaptive system which may require changes or responses.

Keywords: armed robbery against ships, carriage of firearms,
Gulf of Guinea, maritime piracy, maritime security,
Nigerian firearms legislation and policies,
private maritime security companies (PMSCs)

I. Introduction

The notion that states are typically solely responsible for governance within their territory has been progressively challenged by the growing consciousness that actors other than the state can and do respond to specific situations, especially those that are transnational.[1] So much so that their involvement is recognized by international legal scholars, not necessarily as occupying formal ascertainment within international legal rules but as holding valuable participant status.[2] Some scholars point out that state authority witnesses transformation to accommodate these changes in a spirit of global cooperation. They argue that globalization ironically ultimately undermines the state that brought about its existence in the first place.[3] The interplay between this "globalization" and the state, especially concerning non-state participants, is far more complex. Nigeria's enforcement of firearms legislation amid maritime security challenges in the Gulf of Guinea provides an apt scenario to discuss the contemporary international system and the complexities for state and non-state actor's relationships.

This study examines, using a multi-method approach, the rationale and linked outcomes of the application of Nigeria's gun control laws. The contribution of this article is two-fold. First, it demonstrates how domestic law influences transnational actors. It reveals that Nigeria's gun control laws and their enforcement, are relevant to the existing global governance structure in international maritime security because they can determine how it develops. Participants in the international norm-making process are likely to transform domestic law. However, local laws can also constrain the actions of transnational actors. Secondly, the study demonstrates that the international maritime security system is a non-linear dynamic system that possesses the ability to generate adapting effects. The trend of engaging PMSCs in anti-piracy activities introduced an international (imperfect) framework before the shift of attention to the Gulf of Guinea. However, the state laws of Nigeria are giving the participation of PMSCs in anti-piracy efforts a different outlook. These marked differences contribute to re-shaping and redirecting PMSC development, as well as creating changes in the international maritime security framework.

Section 2 of this article sets the foundation for the study. It briefly explores the global threat of piracy and armed robbery against ships and the role that PMSCs have played in curtailing the risks. The section also discusses the current state of

Nigeria's gun control laws and how it applies in the maritime domain. Section 3 recounts the methods and processes engaged in the study. Section 4 discusses the findings and is followed by a conclusion.

II. Background

Flowing from the inherently transnational nature of shipping and its economic significance to all states, stakeholders require that unhindered trade occur globally. Unfortunately, in recent decades, piracy and other maritime crimes such as armed robbery against ships continue to interfere with secure shipping. Private maritime security companies (PMSCs) have been involved in providing additional security services to that offered by the states to address maritime security concerns.[4] Their involvement first around Southeast Asia and in the Gulf of Aden using privately contracted armed security personnel (PCASP) is well documented.[5]

Several scholars, in discussing the role of PMSCs in the context of the challenge their control creates as well as the impact of their use especially off the coast of Somalia, acknowledge their contribution in triggering global changes concerning piracy-related threats and the use of arms on vessels in two significant ways.[6] First, there was an implicit shift in the long-standing international practice that discouraged the arming of merchant vessels.[7] Their presence off the coast of Somalia coinciding with the dramatic reduction in attacks in the Gulf of Aden is usually identified as the game-changer, compared to their use in piracy prone areas off the Strait of Malacca.[8] In addition to the implicit shift, a global consensus developed on how to deal with armed private security through soft law instruments and standards.[9]

The formal declaration of the Gulf of Guinea as a piracy hotspot occurred in 2011.[10] Table 1 shows the statistics of attempted and actual attacks in the region between 2011 and 2019.[11] During this period, the International Maritime Organization (IMO) statistics reveal that at least 692 seafarers were taken hostage and actual violence to the crew of vessels was recorded in 122 out of the 527 incidents.[12]

Year/Source	2011	2012	2013	2014	2015	2016	2017	2018	2019	
IMO	65	68	55	45	35	62	49	81	67	527
IMB	53	62	51	41	34	55	45	82	64	487

Table 1. Summary of piracy and armed robbery (actual and attempted) attacks that occurred in the Gulf of Guinea (2011–2019).

Several authors acknowledge that the location and patterns of attacks present characteristics, including petro-piracy, which are unique to the sub-region.[13] The intent of the criminal activities occurring in the sub-region are classified as cargo theft, armed robbery and kidnapping.[14] Experts believe that the majority of the attacks—actual and attempted—are perpetuated by criminals of Nigerian origin.[15] Maritime criminals operate in the port area, territorial sea and the exclusive economic zone. They are known to work with sophisticated weapons and are violent.[16]

The existence and persistence of attacks in the Gulf of Guinea created an atmosphere for the potential engagement of PMSC services to improve maritime security. Despite the apparent change in perspective and the resultant framework on the use of arms and ammunition by private guards within the maritime domain, Nigeria continues to insist on the implementation of gun control laws[17] and policies within its maritime domain in a manner that restricts the use of arms-related services by private security entities. Scholars assert that the regional differences in piracy attacks and state response affects the reaction of the global community.[18] Hence, it is crucial to investigate further why Nigeria insists on restricting the use of armed personnel as a potential anti-piracy measure.

The legal framework for regulating the use of firearms in Nigeria is made up primarily of the Firearms Act[19] as well as subsidiary legislation arising from the principal Act.[20] Several other national laws refer to some as aspects of the control of the use of firearms. These include the Armed Robbery and Firearms Act[21] and Private Guards Act.[22] The UN *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*[23] and ECOWAS *Convention on Small and Light Weapons*[24] are international agreements to which Nigeria is a signatory. They are relevant to Nigeria's firearms framework since they create obligations on Nigeria to regulate the ownership, possession and transfer of weapons among the civilian population.[25] The state's domestic laws on the regulation of firearms reflect these international obligations.

The extant Firearms Act as the dominant aspect of gun control in Nigeria defines firearms in section 2 as

> any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and includes a prohibited firearm, a personal firearm and a muzzle-loading firearm of any of the categories referred to in Parts I, II and III respectively of the Schedule hereto, and any component part of any such firearm.

The schedules referred to in section 2 consists of categories of weapons as well as the manner (if ownership is not prohibited), in which they can be obtained. Existing literature and analysis of the law reveals that ownership and possession of arms within Nigeria's territory is highly regulated.[26] It requires obtaining a license from the appropriate authority as designated by the Act, after fulfilling specific criteria as stipulated by law.[27] The grant of the license is not as of right.[28] Approvals may be refused, without prejudice to considerations such as the age, mental capacity, sight quality, temperate habits, and criminal records of the applicant.[29]

An equally stringent procedure with discretionary powers applies to the movement of arms across national borders.[30] Sections 18, 19 and 21 of the Firearms Act collectively provide specific procedures under which the movement of weapons across national borders are permitted. The Firearms Act allows the president or his designate by proclamation to prohibit or restrict (based on conditions), the ownership or possession of firearms as he deems fit.[31] According to section 35, Firearms Act,

> (1) The President, if he thinks fit, may at any time by proclamation prohibit the possession of or dealing in any firearms or ammunition, either throughout the Federation or in any part thereof, and either absolutely or except subject to such restrictions or conditions as may be specified.

The existence of discretionary powers is significant because if exercised, it may effectively create an outright ban on the movement of firearms across national borders. The Nigerian government currently uses these discretionary powers, in a manner that restricts the possession and movement of weapons within the Nigerian space.[32]

Scholars generally examine issues of complexities arising from the use of PMSC services that require the use of firearms and how these complexities affect maritime security for other jurisdictions.[33] This study examines the rationale behind the application of said laws and policies by Nigeria, as well as the consequences on the PMSC industry and maritime security in general.

III. Research Methods

This section discusses the methods engaged in the empirical investigation. The study based on a pragmatic approach[34] utilizes both expert interviews and questionnaires to elicit a better understanding of the focus of the research.

a. Expert Interviews

Expert interviews were conducted with five stakeholder groups within the maritime sector ($P_n = 11$) between 2016 and 2018. The groups were made up of private security provider interests; Nigerian government agencies involved in maritime law enforcement, Nigerian lawmakers, global shipping company interests, and an independent foreign security expert.

Expert interviews involve participants that possess knowledge about a particular subject, which is ordinarily not accessible to everyone. They possess acquired knowledge on the subject matter of the research through carrying out activities either of a professional or functional nature.[35] The experts in this investigation consisted of persons who gained knowledge either from being involved in the Nigerian maritime setting or as maritime security stakeholders at the international scene. From a methodological viewpoint, the researcher identified expert interviews as the most appropriate method to conduct the investigation. The interviews are useful in gaining insights into decision making processes and shedding light on elements of the inquiry through information sometimes not documented. The experts were identified purposively, based on their "know-how" and "know why" status with respect to the subject matter of inquiry.

The method employed a semi-structured interview approach. Though conducted with an interview guide, the interviews were designed to give the participants room to unfold their views.[36] The result presented in this article forms part of a more extensive study on private protection of foreign vessels in the Gulf of Guinea.

All participants were informed of the average time expected for the interview and also told of their general rights, including the prerogative not to provide an answer to questions asked. The interviews were audio-recorded, except in three instances where participants did not consent to audio recordings, and a handwritten record of the interview was employed instead.

To maintain confidentiality and because of the sensitive position of some of the interviewees, Table 2 below provides uniform information that could be shared relating to the demographics. The research applied the sociological method of assigning a serial number to participants after each interview.[37] This was to enable explicit reference to the interview data while at the same time preserving confidentiality with respect to the identity of the participants.

Participant	Organization
P1	Nigeria Security and Civil Defence Corps (NSCDC)
P2	The Baltic and International Maritime Council (BIMCO)
P3	International Association of Marine and Shipping Professionals (IAMSP)
P4	SAA/PG West Africa (private maritime security company)
P5	Individual maritime expert
P6	Nigerian Maritime Administration and Safety Agency (NIMASA)
P7	Nigerian Maritime Guard Command (MGC)
P8	ACSS (private maritime security company)
P9	Nigerian Navy
P10	Nigerian Navy
P11	Legislator

Table 2. Demographics of participants in the expert interviews.

b. Self-Administered Questionnaires

As part of the methods for the investigation, the researcher collected data from questionnaires administered to seafarers. Seafarers represent a group of maritime stakeholders directly threatened by pirate attacks. (Qn = 44). The survey aimed to provide through closed and open-ended questions, the perceptions of this group of stakeholders on the application of gun control measures in Nigeria and the outcome on the security situation between 2011 and 2018. The time frame coincided with the period that the region was formally declared a piracy hotspot and until the end of 2018 when piracy was still adjudged as persistent in the region.[38] The enforcement of gun control measures by Nigeria took place within said period.

Administration of the instrument occurred using a random selection of seafarers arriving onboard foreign-flagged vessels at four out of six major ports in Nigeria between the period of November and December 2018. Table 3 provides a summary of the demographics of the participants.

The choice of surveys for this particular group was connected to the need to collect information efficiently within the shortest possible time available while they disembarked from vessels. The convenience of respondents, quick administration and absence of interviewer effect are critical advantages of utilizing questionnaires.[39] On the flip side, the self-administered questionnaires deny the researcher the oppor-

s/n	Nationality of seafarer-participant	Port of call				Total
		Apapa	Calabar	Onne	Port Harcourt	
1	British	2	0	0	0	**2**
2	Danish	1	0	0	0	**1**
3	Filipino	1	2	1	0	**4**
4	French	0	0	1	0	**1**
5	Indian	1	7	3	4	**15**
6	Montenegrin	1	0	0	0	**1**
7	Nigerian	0	2	7	0	**9**
8	Romanian	0	2	0	0	**2**
9	Russian	1	0	0	0	**1**
10	Singaporean	1	0	0	0	**1**
11	Sri Lankan	1	0	0	0	**1**
12	Turkish	1	0	0	0	**1**
13	Ukrainian	1	0	3	1	**5**
	Total	**11**	**13**	**15**	**5**	**44**

Table 3. Demographics of participants in the questionnaires.

tunity to prompt or probe further to improve the research.[40] There is also a tendency of lower response rate for several reasons such as questionnaire respondents becoming tired of answering questions they perceive are not salient to them.[41] A pilot test was conducted with a convenient sample size (n = 10) to test the time involved to reduce the disadvantages of engaging self-administered questionnaires. The pilot was also used to test the time required in answering the questions as well as if the questions were relevant and could be easily interpreted.

c. Analysis

Expert interviews. All audio-recordings were transcribed verbatim. The collected qualitative data were entered into a qualitative data analysis software (Qurikos) to assist in coding and template analysis. Template analysis as a form of thematic analysis enables extensive development of themes from the rich textual data.[42] It also enables a comparison between the different groups within the specific context of the subject matter of the research. Template analysis creates room for a priori codes which are modifiable and updated through the iterative process of in vivo coding during the analysis. Pre-defined categories were derived from previous literature. The a priori codes were discussed with a top officer from the Nigerian Navy and a security expert. These codes were later refined during the coding process. Table 4 below shows the codes a priori and revised (2*nd* and 3*rd*) coding relevant to the aspect of the research discussed in this article.

Questionnaires. Data from closed questions were coded into an excel spreadsheet and assigned appropriate measurements. The essence of the data was not necessarily to generalize for application to a more significant population but obtain the perception of this group of stakeholders to contribute to achieving a holistic picture

	1st level (a priori)	2nd level Code	Revised 3rd level Code
1.	Background	N/A	
2.	The relevance of distinguishing the threat to maritime security	N/A	N/A
3.	International involvement	N/A	N/A
4.	PMSC participation	N/A	N/A
5.	Application of gun control	Reasons for nation/local jurisdiction legislation	Sovereignty principles Peculiarities Historical antecedents
6.	Impact of gun control	Effect on PMSCs	Restriction of services Adaptation of services
		Effect on government services	Changes in maritime security provision model Maritime domain awareness
		Effect on security	Level of threat Adequacy of security services
7.	Challenges to maritime security	N/A	N/A

Table 4. Extract of template for expert interviews.

of the inquiry. Data of this nature allow links to be formed with findings in the area of research.[43] Hence, the study engaged simple descriptive statistics to compare the variables in the instrument. The analysis was not particular about the statistical significance of the result based on the sample size. The responses to the open-ended questions were analyzed by manual coding.

IV. Results and Discussions

The following section provides the results and discussions of this study, which explores the reasons why Nigeria applies strict gun control measures and the impact of such stance on the PMSC industry and security in the region. The scope of this article does not include other clusters of themes relating to "maritime security threat distinction," "facilitators of maritime security threat" and "PMSC characteristics" derived from the expert interviews. However, some nested themes under these clusters, which are linked to the focus of this research are referred to where necessary. Similarly, aspects of the administered questionnaires not relevant to this article are also not included.

The use of the template in qualitative analysis helps to highlight, based on the frequency participant reference, particular themes that reflect their perception of the subject matter. Table 5 below provides a summary of the frequencies of specific themes discussed by participants. The numbers at the extreme right of each row reflect the total number of times all the participants referred to a particular topic. Table 5 does not reflect other nested themes which may be relevant and discussed in the analysis, in connection to the main ideas.

		Government agency					Ship. Interest	Security expert	Private sec. interest			Law makers	Total
		P1	P6	P7	P9	P10	P2	P5	P3	P4	P8	P11	
SN	Rationale	0	0	0	0	0	0	0	0	0	0	0	0
1	Sovereignty	0	2	2	1	2	5	3	5	6	1	0	27
	Historical antecedents	0	0	0	0	0	2	2	3	8	0	0	15
	Jurisdiction	1	7	6	5	1	5	5	5	4	3	0	42
	Peculiarities	1	11	1	3	0	10	9	8	38	2	2	85
2	Linked outcomes	0	0	0	0	0	0	0	0	0	0	0	0
	PMSC adaptations	0	1	3	0	0	10	2	10	1	3	0	30
	Public-private partnership	0	8	3	8	0	2	14	1	22	5	3	66
	Arrest	0	3	0	0	0	0	0	0	0	0	0	3
	Domain awareness	0	3	0	0	0	0	1	0	0	0	0	4
Total		2	35	15	17	3	34	36	32	79	14	5	

Table 5. Extract of Template Analysis showing themes on the rationale for the application of gun control and linked outcomes.

The study employs the results of the questionnaires in discussing the relationship between the existence of gun control and the PMSC business models as well as the perception as to the state of the threat and the adequacy of security services flowing from the efforts of the government to improve security. Tables 6 and 7 show a summary of the perception of the seafarers on the current state of threat in the region as well as the adequacy of the services currently existing. These themes are pertinent in discussing together with the relevant aspects of the findings from the qualitative interviews, the perceptions of the impact of Nigeria's gun control.

State of Threat

	HTT	Improved	Not Improved	Grand Total
British	1		1	2
Danish	1			1
Filipino	2	1	1	4
French		1		1
Indian	9	5	1	15
Romanian		2		2
Russian		1		1
Singaporean			1	1
Srilankan			1	1
Turkish	1			1
Ukrainian	1	2	2	5
Nigerian	2	5	2	9
Montenegrin		1		1
Grand Total	17	18	9	44

Table 6. Summary of perception of seafarers on the state of threat.

Adequacy of Security Services

	Adequate	Inadequate	Grand Total
British		1	1
Danish		1	1
Filipino	3	1	4
French	1		1
Indian	12	3	15
Romanian	2		2
Russian	1		1
Singaporean	1		1
Srilankan		1	1
Turkish		1	1
Ukranian	2	3	5
Nigerian	6	3	9
Montenegrin	1		1
Grand Total	29	14	43

Table 7. Summary of the perception of seafarers on the adequacy of security services.

a. The Rationale for the Application of Gun Control

The question of whether and to what extent coastal states should control PMSCs has been an issue since their activities began as a market response to curbing piracy. Following the heightened attention that surrounded their involvement off the coast of Somalia, the IMO's Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area (MSC.1/Circ.1408/Rev.1) through its guideline, encouraged balancing the rights of coastal states in the application of its national legislation on the one hand and concerns of the owners as well operators of ships navigating in or through a high-risk area to provide means for enhancing the security of their ships on the other hand. Notably, Nigerian gun control laws and policies existed before the escalation of maritime security threats in the region. Additionally, since *MSC.1/Circ.1408/Rev.1* are merely guidelines, there is no obligation on the state to follow them.

When asked their perception as to the reason for the strict application of gun control measures by Nigeria within the maritime domain, participants in the expert interviews identify four themes—sovereignty, jurisdiction, historical antecedents and peculiarities.[44]

Sovereignty. Participants display the understanding that Nigeria occupies the status of an entity having no other authority over it. They similarly indicate knowledge that this sovereign status gives it the power to enact and enforce laws within its territory, including the territorial sea the state claims. This status gives it the power to enact and enforce laws within its territory, including the territorial sea the state claims.[45] Domestic laws provide the framework for governing a state.[46] These local laws serve as an integrative force to manage interactions within while at the same time, protecting the state from undue external interference. As a feature of sovereign status which her Constitution affirms, Nigeria has laws that regulate affairs of juristic and natural persons within its territory.[47] The laws include the Firearms Act[48] and other national legislation and policies that regulate the carriage and movement of weapons, which are particularly relevant to the use of private armed guards. The exercise of Nigeria's sovereign power over her territorial space allows the triggering of criminal liability in Nigeria even if the flag state of the vessel permits the use of such firearms. All participants in the expert interviews indicate awareness of the existence and application of the gun control laws. Similarly, a high percentage of seafarers (77 percent) also indicate awareness of the application of gun control laws within Nigeria's territory.

States are responsible for policing their sovereign space. Unlike PMSCs that are financially motivated, the state is not driven to protect out of the need to make a profit. They remain accountable for controlling violence. Expert interview participants, particularly those from government agencies, frequently spoke of the responsibility of the state to ensure security within her territorial jurisdiction. Given the political, economic, social and military significance of the sea domain that Nigeria controls, they perceived the provision of maritime security as inherently a function of government.

The main issue is the absence of adequate security within and around the Nigerian coast. The experts recognized some level of incapacity on the part of government agencies to provide the necessary maritime security owners and operators of ships need. The perceived inadequacies highlighted include insufficient patrol boats and poor coordination of information sharing in the region. The participants further identified that the state (until June 2019), lacked an appropriate legislative framework to tackle the enforcement of piracy and other unlawful acts at sea. Additionally, poor budgetary allocation causes a disadvantage to the security of the Nigerian maritime environment. Several authors highlight these incapacities in discussing the problem of maritime insecurity in the Gulf of Guinea.[49] Notably, the state in 2019 enacted the Suppression of Piracy and Other Maritime Offences Act to address the legislative lacuna. The state is yet to institute any trial or secure any conviction based on it.

How sovereignty is conceptualized has significant ramifications for maritime security. Sovereignty as a social construct is flexible in meaning. As the dissent among academic scholars shows, the responsibility for protection as an indicator of sovereign status does necessarily imply direct provision by government agencies of a particular service.[50] Thomson argues that sovereignty is conceptualized best as authority rather than state control or responsibility.[51] This is because state control continues to wax and wane, but this does not diminish the authority of the state.[52] States have the authority to delegate activities, as long as the state's ability to make political decisions remains intact. From this perspective, the involvement of non-state actors in engaging in the business of security is potentially advantageous to the state, bearing in mind the incapacities highlighted earlier. On the other hand, scholars like Avant acknowledge that although changes do not erode the state's power, states that open themselves to these changes are likely to experience trade-offs that affect their political process of controlling violence.[53] She cites two different examples—one of the U.S. advantageously engaging market mechanisms such that private security companies who generally follow U.S. regulatory regimes and private security providers in South Africa that honor the regulations more in a breach. Yet, the reduction of state control in both instances is not done out of coercion but exist based on the decision of the state. This means that sovereignty as a concept allows the state to consider, in the interest of maritime security, whether to choose to uphold or relax its gun control laws in ways that affect the active participation of PMSC services that require them.

Jurisdiction. The legal competence of a state to exercise control over a particular space within the world's waters is quite complicated. Unlike the terrestrial domain, the law of the sea which reflects the fragmentation of prescriptive (legislative) and enforcement jurisdiction of states across the multi-jurisdictional sphere is the basis for addressing state rights.[54] The experts display the understanding that the existence and enforcement of gun control laws in the territorial sea and internal waters tie with the prescriptive jurisdiction of the state.[55] The jurisdiction connects with the right to enact laws for and apply them to all persons, objects and activities within

its territory. Participants exhibited knowledge of the legal implication of the jurisdiction of a coastal state concerning crimes committed within territorial waters.

Two critical issues exist concerning the jurisdiction of the coastal state and the application of its gun control laws. The first issue relates to the compatibility or otherwise of Nigeria's prescriptive jurisdiction in this context with the right of innocent passage which exists under international law.[56] The other issue has to do with the effect that enforcing gun control laws against foreign vessels has on their protection in other maritime jurisdictions. The extent of the participants' knowledge on the issues of jurisdiction and the application of gun control laws in Nigeria are especially important since some of the participants are involved in policy making in their various sectors.

The interpretation of what innocent passage means is relevant to determining when Nigeria as a coastal state is permitted by international law to enforce its local rules against foreign vessels.[57] UNCLOS art.18 (1) defines innocent passage as navigating through "the territorial sea without entering internal waters or calling at a port outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility."[58] Based on wordings of this provision, a vessel though intending to call at port, may still be engaged in innocent passage while in territorial sea. Notably, state practices are usually not in consonance with the second leg of the definition of UNCLOS art 18 (1) as they appear only to recognize a vessel neither coming out of port or internal waters nor heading to port or internal waters as engaged in innocent passage. Passage whether in line with state practice or strict interpretation of UNCLOS art 18 (1)(b) can only be innocent according to UNCLOS art 19(1) if it is not prejudicial to peace, good order or security of the coastal state. Prejudicial activities are mentioned in UNCLOS 19(2). Debates exist as to the interpretation of UNCLOS, article 19.[59] These debates exist with respect to whether the provisions of (1) and (2) are independent provisions such that the objectivity introduced by (2) are distinct from (1) which is subjective.[60] Similarly debates also exists as to whether the presence of arms onboard constitutes non-innocent activity under (2).[61] These debates make it difficult to state conclusively whether a foreign vessel with armed private personnel on board is prejudicial to good order, peace or security of the coastal state for the purpose of determining enforcement powers of the coastal state in this regard.

Stakeholders such as the IMO and flag states issue several advisories, warning ship-owners and operators as well as PMSCs that countries in the Gulf of Guinea, by application of relevant gun control legislation, do not allow the arming of vessels. These advisories are arguably an indication of at least an acceptance of the position of subjecting passage of ships to coastal state law with respect to the private arming of vessels against pirates. But as Yang argues, the mere fact that a state enforces its legislation within its jurisdictional zones successfully does not necessarily mean that the enforcement of the legislation is legal.[62]

Experts in the category of government agencies are adamant that the principle of innocent passage cannot be interpreted to negate the application of its gun control law within the maritime domain where it has jurisdiction. P9 explains that "(a)ll

Nigerian legislation are applicable within the jurisdiction ascribed to her by the law of the sea. Even with issues of innocent passage, the laws of the coastal state are still applicable." Similarly, P6 in discussing the issue of jurisdiction and national security explains that

> the provision of UNCLOS on innocent passage is obvious. It is an expeditious movement which does not undermine national security. What amounts to undermining security? contravening the law in such a situation undermines security.

P7 adds further that within its jurisdiction, there is no "move to intercept any vessel except where there is intelligence information that shows that a vessel is carrying toxic waste or bearing arms, which is a contravention of the law." The opinion of these experts does not reflect the legal uncertainty and surrounding debates of whether or not the presence of vessels on board may be considered as innocent passage. They represent a simple interpretation of responsibility for territorial waters as implying jurisdiction to enforce applicable laws.

In spite of the division into different jurisdictions, the maritime domain remains physically continuous. Hence, the applicability of the state's enforcement powers in these other maritime jurisdictions is relevant. The contiguous zone (if claimed by the state) is adjacent to the territorial sea of a coastal state.[63] UNCLOS art. 33 allows the state to punish infringement of customs, fiscal, immigration or sanitary laws applicable in its territory. The right to punish the violations as highlighted by UNCLOS in this area is an indication that states may have rights to apply their gun control laws within this zone.[64] Within the exclusive economic zone (EEZ), as the next maritime zone, coastal state laws are enforceable with respect to the specific explorative and exploitative rights.[65] UNCLOS, art. 58 provides that the EEZ forms part of the high sea where the coastal state does not exercise any of the restricted rights. The law of the sea generally ascribes exclusive jurisdiction to the flag state in the high seas.[66] P3 opines that while Nigeria may assume the competence to apply its gun control laws in territorial waters, the application of the gun control law does not extend to contiguous zones. Other experts participating in this study do not express views as to the competence of the application of Nigeria's gun control measures in areas outside the territorial waters, perhaps because of the focus on the idea that most of the attacks in the region occur within territorial waters. But it is an important issue nonetheless because, as pointed out by P5, attacks are happening farther away from the territorial sea into the EEZ which is considered generally as part of the high sea.

Given the already established incapacities, it may be difficult for the state to provide security within the EEZ and beyond. At the same time, the protection of vessels outside the territorial sea using PCASPs becomes logistically more complicated if not impossible, since flag state laws which allow them may conflict with coastal state gun control laws.

Peculiarities. Experts identify specific characteristics that necessitate the application of gun control measures to prohibit the arming of foreign vessels. Interrogating peculiarities in this context are essential because of the discussion aids in

determining the most appropriate security measures for particular threats. The appropriateness and subsequent success in the use of armed guards on vessels off the coast of Somalia do not automatically apply to the Gulf of Guinea region and the threat posed by attacks in Nigeria. Regional differences in such attacks cannot be ignored because they affect plausible solutions.[67] The experts identify the peculiarities as the nature of attacks, the proliferation of weapons in the region and the location of the attacks.

The Nature of Attacks. Participants identify that attacks in the Gulf of Guinea region involve more personnel than attacks experienced in Southeast Asia and off the coast of Somalia. Additionally, the attacks are characterized as very violent, with resilient pirates using sophisticated weapons, including firearms to conduct their attacks. All the experts (except P3) agree that these characteristics make it necessary to impose the application of laws to prevent the escalation of violence at sea. According to P4, "(n)o matter how good the former United Kingdom or United States Marines are, they simply cannot defend a vessel against attackers that outnumber them and outrange them in terms of weapons." The IMO indicates the threat of escalation of violence at sea exists with the use of private armed personnel.[68]

P3 expresses a contrary opinion concerning the application of gun control due to the nature of the attacks. He opines that the kind of attacks should be the reason why the state should regulate its gun control laws such that foreign vessels can conduct their trade across the maritime zones with appropriate protection using private armed guards. For this particular expert, the application of the gun control laws should not be in a manner that would effectively deprive the foreign vessel and persons on board, the right to use firearms for self-defense in the respective maritime zones. The expert believes that violence of the attackers should be matched with appropriate protection from private armed guards. A plausible explanation for P3 contrary views is that unlike P4 and P8, he is currently not engaged in the provision of security solutions in the region or Nigeria. P4 opines that the threat in the Gulf of Guinea presents a new orientation process for several stakeholders in the maritime domain, especially the foreign PMSCs who want to use a "wrong model to tackle the same problem with different characteristics."

Location of Attacks. Statistics of attacks in the Gulf of Guinea reveal that they occur within the territorial waters of Nigeria as well as the EEZ.[69] As mentioned earlier, expert participants acknowledge that the territorial sea is within the state's national space. The issue as it relates to the question of innocent passage discussed concerning Jurisdiction is also applicable in this context.

Arms Proliferation in the Region. Another feature which the experts identify as a reason for the strict application of gun control laws in Nigeria is the problem of the proliferation of arms. The illegal presence and misuse of arms is a pressing global security threat, evidenced by the widespread deployment of illicit weapons in conflict situations and criminal attacks. In Nigeria, studies reveal that the demand for illicit weapons remains high, fueled by socio-economic factors such as governance failures, political tension during elections, crime and insecurity.[70] The gravity of the problem of arms proliferation led states, including Nigeria, to make commitments at the

global and regional level to control and regulate the movement of arms and prevent their diversion into illegal circuit. Experts agree that the government imposes gun control laws as part of the efforts to keep illegal arms within the Nigerian territory under control. As to the proliferation of illicit arms, P3 argues that even with the need to regulate the movement of weapons strictly, proper regulation for storage of arms would suffice. This would enable foreign PMSCs to utilize firearms for protection, especially in maritime zones where Nigeria has no prescriptive jurisdiction.

Notably, even with the seemingly strict gun control laws, the country struggles with a perceived inability to effectively control the movement of weapons into the country through her land and sea borders. In 2017, illegal arms numbering over 2,000 were discovered to have arrived through the seaports on several occasions.[71] Scholars tie the persistence in the proliferation of illicit firearms to poor implementation of the existing legal regime, and the socio-economic environment which currently fosters a culture of violence and the need to self-protect.[72]

Historical Antecedent. Some participants (P2, P3, P4, and P5) connect historical antecedents in Nigeria to its decision to apply gun control legislation to PMSCs providing security for foreign vessels. Nigeria's political history, like most of the West African states, is colored by some elements of outsider influence, particularly colonialism, and contributions in intrastate wars.[73] The formation of Nigeria is a direct result of the era of new imperialism which saw the occupation, division, and colonization of African territories by European powers. Tensions over the legacy of European colonization generally still (sub)consciously affect trust and confidence that the African continent has for the security interests of extra–African powers.[74] Furthermore, there are records of the involvement of foreign states and even mercenaries alike during the Nigerian Civil War.[75] These participants who speak of historical antecedents perceive that they affect the trust level with which state view options that involve the introduction of external forces into its territory. For instance, P3 opines that

> Though, this is a history of not just your country (Nigeria) but most if not all Africa, I think the fear of what happened in the past and perhaps what still happens in certain countries in Africa, make Nigeria insist on applying her gun control laws in this context even though there is a possibility that armed private guards from PMSCs could actually help….

Similarly, P4 expresses the view that Nigeria being in

> a region that has a history although not recent but certainly a history of civil wars, state-on-state wars where expatriate/foreigners have been involved to some degree with the use of arms, states will not ordinarily allow PCASPs operate within their territorial waters which is where most of the attacks take place.

P4 buttresses the rationale of historical antecedent by comparing Nigeria with Cape Verde. Notably, Cape Verde like Nigeria was under colonial rule before becoming an independent state. But P4 explains that the absence of intrastate conflicts or military coup d'état in Cape Verde has limited negative foreign influence, which

might have played a significant role in the country's decision to relax her gun control legislation and allow the regulated use of armed foreign personnel on vessels in its territory.

b. Linked Outcomes

This section discusses the opinions of the various experts on the outcome of the application of gun control. It is not the intention of this study to determine the type of relationship that exists between the application of gun laws and these identified outcomes. It suffices for the research that the participants perceive the identified issues that occur as a response to the State's insistence on the application of its gun control laws and the need to improve maritime security threat of piracy and armed robbery

The Arrest of Foreign Private Security Personnel Onboard Vessels. Participants noted that the Nigerian government, through its law enforcement agencies at sea, had made several arrests of vessels and PMSC personnel suspected to violate her gun control measures. In 2012, the Nigerian Navy arrested a Dutch-flagged PMSC escort vessel *Myre Seadiver Aviatu* at the Lagos roadstead for possession of firearms and ammunition in violation of the gun control laws.[76] Similarly, in 2015, the MV *Lilac Victoria*, UACC *Eagle*, and UACC *Morgane* were detained on the suspicion that the vessels had firearms and ammunition on-board.[77] Participants from the government agencies highlight that the arrests and detention of the various vessels changed the narrative as to displaying the seriousness with which the state was handling the issue of the presence of PCASP as a security alternative within its territorial waters. A majority of the seafarers (80.9 percent) involved in this investigation were aware of the application of gun control laws in Nigeria.

The arrest of vessels has ramifications. Apart from the effect on state relationships due to the potential diversity of nationalities of members of the crew, there are also liability issues arising from delays to the vessel. As a response, several advisories were released, cautioning ship owners and PMSCs about the gun control application in Nigeria.

Adaptations in the PMSC Industry Model for Nigeria and the Gulf of Guinea. With the possession of firearms being illegal in Nigerian waters (and most of the other Gulf of Guinea states) PMSCs continue to modify how they provide services to foreign vessels in that region. P8 affirms "that the PMSCs offer solutions that can work within the current restrictions that exist in the Gulf of Guinea region." These modified services include acting as a liaison on behalf of the merchant vessel to arrange, either with a local PMSC company or the Nigerian Navy, for local security personnel to embark on the vessel when in territorial waters[78]; entering into a security arrangement for the purpose of secure anchorage and; entering into a security arrangement for dedicated security/escort of the foreign merchant vessel. Mostly, these modifications do not remain static but continue to experience re-modification, depending on the need to provide services that are both acceptable and profitable.[79]

For instance, in response to prior enforcement of gun control laws, the Standard Contract for the Employment of Security Guards on Vessels (GUARDCON) was explicitly modified for West Africa to accommodate the non-provision of private armed personnel on the vessel. The provision of firearms necessary for the protection of foreign ships is left to local security personnel (LSPs).[80]

Following the arrest of unarmed security personnel on vessels in Nigeria, as discussed earlier, the government expressed the position of detaining any foreign vessels coming into Nigeria with foreign guards whether armed or unarmed. Presently, the status of unarmed security personnel is still unclear, based on the arrests of persons identified as such. PMSCs "hide" under cover of other descriptions on the crew manifest to be able to provide this service. Observation reveals that crew manifests may contain names of security advisors tagged under different terminology such as "cargo welfare officer" or technicians. Interestingly, of the 28 seafarers who indicated that their vessels had engaged PMSC services within the period, 6 specify that the services included the use of unarmed security advisers.

While not commenting on the legality or otherwise of the current practice, it goes to show as P8 asserts, the ability of the companies to change and operate within restrictions. Finding ways to work around the stringent application to provide security alternatives that are also profitable highlights the adaptive features of the PMSC industry. At the same time, it reveals in the context of the interplay between globalization and the state, that changes can and do occur as a result of the actions of the state.

State Evolving Security Model. While insisting on the application of gun control laws, Nigeria still struggles to control her maritime space due to limited capacity for surveillance, response, and enforcement. In place of foreign PMSC services involving the use of armed personnel, the maritime security landscape witnessed the evolution of security models providing extra protection for commercial vessels. Participants identify mainly the establishment and use of secure anchorages and state-affiliated escort services.

Secure Anchorages. The secure anchorage area is a restricted space close to Lagos port. P6 and P7 explain that the area was established by the Nigerian Navy and Nigerian Maritime and Safety Administration (NIMASA), the government institution saddled with the responsibility of ensuring safety and security within the maritime domain. The secure area was established in active collaboration with a local PMSC company, Ocean Marine Solutions (OMS). In this restricted area, vessels obtain protection from attacks, while waiting to perform ship-to-ship transfers. Also, escort vessels provided by the Navy are available for commercial ships who wish to transit through the areas of elevated risk outside Nigeria's territorial waters. The use of the secure anchorage area is chargeable. According to one of the seafarers, "it is expensive, but it is worth it if you can get security."

State-Affiliated Escort Services. Several experts and seafarers highlighted that the naval efficiency was previously severely hampered due to a lack of patrol boats. The state tries to remedy this using locally established PMSCs. These companies

enter into individual Memoranda of Understanding (MoUs) to provide patrol vessels that augment the patrol capacity of the Nigerian Navy. The Nigerian Navy equips the vessels with personnel and military weapons for maritime security duties. As P4 explains,

> Under the terms of the MOU, the PMSC has to sustain and maintain that vessel logistically…. The crew on board is 50% PMSC crew while the balance is left to the Nigerian Navy. These naval officers operate the weapon systems, do the watches and employ the use of force if required…. The arrangement has effectively helped secure installations and vessels transiting the Nigerian waters.

About 30 MoUs were in force as at the end of 2018. Several participants in the expert interview identify this model as very useful because it provides the Nigerian Navy with the requisite infrastructure for it to provide security within the maritime domain. However, P4 and P5 reveal that the local PMSCs sometimes violate terms of the MoU, primarily when they use the MoU as grounds for embarking private security personnel on board a commercial vessel.

Use of Embarked Security Personnel. Another identified model that arose as a means of improving maritime security is the use of state embarked security personnel (SESP) onboard vessels. This model is, at least on paper, no longer applicable in Nigeria as the Nigerian Navy through several warnings, insists that SESPs on board civilian ships are prohibited. However, reports of attacks within Nigerian territorial sea and EEZ such as the attempted attacks on MV *Luhai*,[81] the product tanker *Ebunola*,[82] and the bulk carrier MV *Thor Infinity*,[83] reveals the absence of strict enforcement of the prohibition. P4 connects the existence of this model to the misuse of the Nigerian Navy's MoU mentioned earlier. Some of the experts perceive that the ineffectiveness in the use of SESPs is a reflection of what would occur if PCASPs provides armed services on board vessels, although P3 thinks that the inefficiency of this model ties to a lack of adequate training.

Notably, the evolving security landscape features a developing relationship between local PMSCs and the maritime law enforcement agencies, particularly the Navy and Nigerian Maritime Administration and Safety Agency. These models typify a public-private partnership that is tightly controlled by the government, although experts from the government category prefer to describe it as merely a means to an end. The goal for Nigeria is building up the necessary capacity to ensure that the state can adequately provide security within her maritime domain. The relationship currently aids the growth of the local rather than foreign PMSC, relevant to fulfill the capacity needs arising from shortages experienced by the state. But room for the involvement of international PMSCs still exists. P2, P4 and P7 identify that these foreign PMSCs interface with the local PMSCs or the government agencies directly to arrange security for the merchant vessels within the region.

Conspicuously, these evolving security models generate some legal and operational concerns. For instance, the nature of the operation involving the state-affiliated vessel as to whether it is defensive or enforcement at sea operation is unclear. Commercial vessels approach the threats of violence at sea from a defensive position

whereas the state and state security personnel are ordinarily responsible for fighting criminals at sea. There is no guarantee that in the event of an attack at sea, such state security personnel would heed the opinion of the Master. Furthermore, a state, unlike PMSCs, is responsible for security within its territory but these security models come at an extra cost to commercial vessels. Apart from specialized treatment for vessels that can afford these services, obtaining some form of economic benefit for carrying out such functions may ultimately serve as a disincentive to improving the general security level.[84] These concerns create the need for further clarification under domestic and even international law.

In spite of the potential legal and operational challenges arising from these adaptations, most of the expert participants (except P3) perceive the models could create the balance (if properly utilized) of satisfying Nigeria's desire as a coastal state to control the possession or carriage of firearms at sea in a manner that that does not infringe on sovereignty while creating room for the PMSC industry to thrive.

Improved Interagency Collaboration. Experts in the interview highlight that in trying to handle the changes connected to enforcing existing firearms law and policies, Nigeria has greatly improved on the knowledge of her maritime environment and the threats experienced. This is indicative of obtaining maritime domain awareness. Maritime domain awareness refers to an actual understanding of activities that could impact the security, safety, economy or environment.[85] The core of maritime domain awareness is accurate information, intelligence, surveillance, as far from state shore as possible. Boraz argues that "no single entity or agency can be responsible for or can coordinate, all MDA-related activity." That fact, coupled with modern network-centric information capabilities, leads to a strong argument that "nodes" generating maritime situational awareness must be linked.[86] Expert participants view information sharing as necessary in developing appropriate response within and outside the state. P6 and P7 explained that to foster domain awareness, the state has invested in technologies to improve information collection and understanding among agencies with a shared vision of accomplishing maritime security at sea functions. Sharing of information derived from achieving MDA has led to improved inter-agency collaboration. The regional awareness capability system (RMAC) system, is a recently established satellite surveillance facility that provides "round-the-clock" surveillance of the maritime environment up to 35 nautical miles from the coast.[87] The Navy's Falcon Eye system is another surveillance system that compliments the RMAC.[88] It covers blind patches in territorial waters not accessible to the RMAC system.[89] These surveillance systems enable the Nigerian Navy to monitor activities within the maritime domain and share information with the relevant agencies.

Furthermore, Nigeria adopted a Harmonized Standard Operating Procedure on Arrest Detention and Prosecution of Vessels and Persons in its maritime environ - ment. (HSOP-AD&P) in 2017. The HSOP-AD& P is a set of guidelines designed to control the operations of maritime law enforcement agencies to solve the problem of overlapping functions, inter-agency rivalry, and to promote interagency cooperation.

Noticeably, the HSOP-AD& P suffers from several shortfalls. For instance, the document is at best a tool for administrative convenience, with no legal basis for its existence. The Guideline is not linked with a specific legislation but rather to "the statutory powers of all Ministries, Departments and Agencies (MDAs) charged with maritime law enforcement activities." The statutory powers of the relevant MDAs are derived from several independent statues which differ in content. Hence the primary legislation against which the congruence of the specific procedural direction contained in the HOSP-AD&P should be measured is lacking. The absence of a legal basis calls into question the lawfulness of actions undertaken pursuant to the guidelines. Additionally, the Guidelines highlights 26 occasions in which vessels will be liable to arrest but did not specify which organization from the relevant MDAs may arrest in respect of particular offences. This leaves room for the interpretation that any agency to which the Guideline applies may make an arrest for any of the offenses listed, thereby negating the concept of interagency collaboration.

The Adequacy of Security Arrangements and the State of the Threats. Curtailing security threats requires the existence of appropriate security arrangements derived after due consideration of the peculiarities of the threat environment. This position was often highlighted by several of the experts during the interview study. Hence, in spite of not having a unified perception on the state of the threat, participants in the expert interview (except P3) view the current security arrangements in the region as adequate to deliver security in the area if properly implemented. The majority view of seafarers interviewed, as shown in Figure 1, aligned with the experts' opinions on the adequacy of the current security arrangement.

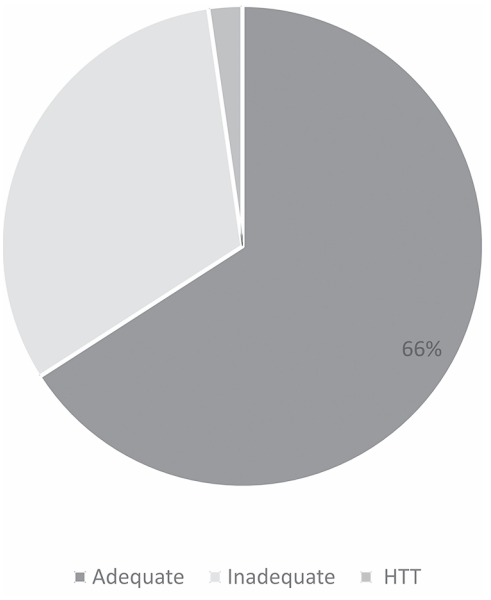

Fig. 1. Perception of interviewed seafarers as to the adequacy of Nigeria's current security arrangements.

More than half (66 percent) of the seafarers opined that the current security arrangements were adequate to provide security in the region if effectively implemented. However, for seafarers who had experienced attacks in the area, only 40 percent believed that the security arrangements were adequate. Notably, the 11 seafarers who provided additional comments all identified inadequate patrol boats and reduced response time as affecting the efficiency of the security arrangement in the region.

Generally, participants in the expert interviews acknowledged that waters off the coast of Nigeria were still faced with insecurities. Expert partici-

pants other than those from the government agency category opined that the level of security threat had not improved due to an inability of the governments in Nigeria and across the region to sustain efforts of ensuring that crimes are reduced at sea. The participants connect the state of the threat in Nigeria to the unaddressed problems of criminality on land, internal conflict, and corruption.

The experts from the government agency category tend to view the state of security in Nigeria to have improved tremendously, although a lot still had to be done as a region. Forty-one percent of the entire number of seafarers participating in the self-administered questionnaire exercise thought that the state of security within and off the coast of Nigeria had improved. As shown in Figure 2, 39 percent of the seafarers interviewed replied that the situation had not improved while 20 percent said it was hard to tell if there had been any improvement.

Notably, only 10 out of the 44 seafarers had been involved in an attack in the region, during the period in question. Twenty percent of the seafarers who had been involved in an attack in the region felt that the security had improved. The remaining 80 percent was split evenly between hard to tell whether it had improved and that the situation has not improved.

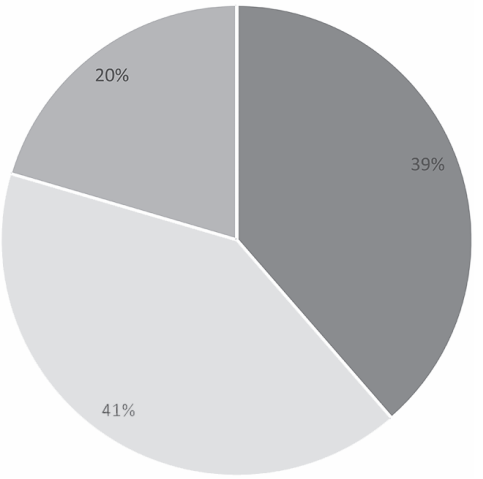

Fig. 2. Perception of seafarers on the state of the threat of piracy and armed robbery against ships off the coast of Nigeria.

The statistics on the number of attacks in recent years reveal that apart from a slight dip in the numbers between 2014 and 2015, the threat still remains persistently potent.[90] The statistics are an indication that, in spite of the arrangement currently in place, the security situation in still far from optimal. This inference tallies with the opinion of the experts who suggest that more needs to be done to improve security; and that of the seafarers that opine that the situation has not improved. The question of why the security situation remains far from optimal in spite of the changes is beyond the scope of this article but it suffices to state that there is need for the state to re-strategize in other to find a more effective arrangement.

c. Quality of the Research

To ensure the quality of the research undertaken, the analysis employs triangulation. Bryman describes triangulation as involving the use of more than one method or source data in the study of a single problem.[91] The investigation employs multi-qualitative methods aimed at revealing the truth of the phenomena investigated in this study. The research also engaged the means of heuristics (analysis of

both legal and nonlegal documents) to confirm the findings provided by the experts during the interview. Triangulation is acceptable because no single approach ever really solves, delineates or validates a particular problem. Engaging different investigative approaches and employing triangulations yields more complete data and results in more credible findings.[92]

d. Limitations and Future Perspectives

This article focused primarily on the reasons why Nigeria applies its gun control laws in the maritime domain and the linked outcomes. It does not address or discuss other areas explored in the interviews.

Concerning the linked outcomes identified, the study does not determine that the consequences are a direct result of the application of gun control laws only. Instead, the study establishes that the existence and application of gun control laws in Nigeria create emerging patterns which have contributed as alternatives to improving security; hence the outcomes highlighted.

The use of questionnaires rather than semi-structured interviews for obtaining the opinion of the seafarers was a deliberate change in research strategy. It was not possible to conduct in-depth interviews with this critical stakeholder group because most of the seafarers approached were unwilling to take out time to participate in lengthy in-depth interviews. This affected the sample size and the ability to generalize. Future studies would have to involve a sufficient sample size to enable generalizability.

The study acknowledges that, as with other types of interviews, mutual perception of the participants creates biases that can affect the result of expert interviews. Particularly, Menser and Nugel highlights that gender and status relation play a role in expert interviews.[93] The authors were able to neutralize these biases as much as possible by displaying knowledge in the field of inquiry in conversations before the interview.

Additionally, it was perceived that some of the participants might have refrained from expressing strong opinions and statements due to their status in their respective organizations. As a suggestion for future studies, the involvement of other subject related experts such as representatives from the insurance industry, flag state policymakers would enrich the research.

V. Conclusion

By investigating the perception of critical maritime stakeholders on the response of Nigeria to the problem of insecurity arising from piracy and armed robbery against ships in the Gulf of Guinea, this study has confirmed the general proposition that state laws can constrain transnational norms. In the context of this investigation, how Nigeria chooses to apply her gun control laws has a constraining effect on the use of PMSC as an anti-piracy measure in the Gulf of Guinea.

This article brought to attention how PMSCs, as a consequence of this constraint on their operational model which was trending due to the success off the coast of Somalia, have had to adapt in the Gulf of Guinea to remain relevant. The state has also experienced changes in how it provides security within the maritime domain, as reflected in the state evolving security models. In the theoretical context of the globalization-sovereignty debate, the investigation articulated in this paper supports the argument that globalization is not a homogenous process. On the one hand, there is the level of influence at the global and national planes where the presence of PMSCs creates a norm making process. At the same time, domestic laws such as the Nigerian highly restrictive gun control has caused them to re-strategize and adapt them to the sub-regional maritime governance framework. These changes have also reflected on the development of several guiding instruments with practical effect at the very least and growing relevance for the legal considerations relating to the regulation of the carriage of firearms within and off the coast of Nigeria for private vessel protection.

The changes witnessed so far in the implementation of Nigeria's firearms regulation in a manner that affects PMSC utilizations have shown that it is possible to obtain arrangements that fit the peculiarities of the threat in the region. The success of such arrangements as shown from the statistics that reveal that the threat still persists, however, is a different issue.

Notes

1. Eric C. Ip, "Globalization and the Future of the Law of the Sovereign State," *International Journal of Constitutional Law* 8(3) (2010), p. 63, https://doi.org/10.1093/icon/moq033; Carolin Liss, "The Privatisation of Maritime Security in Southeast Asia: The Impact of Regional Security Cooperation," *Australian Journal of International Affairs* 68(2) (2014), p. 195, https://doi.org/10.1080/10357718.2013.831810; Carolin Liss, "Challenging Sovereignty and State Control of Violence at Sea? The Operations of Private Anti-Piracy Security Providers," in *Resistance and Change in World Politics: International Dissidence*, eds. Svenja Gertheiss et al. (London: Palgrave Macmillan 2017), p. 85.

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31. Firearms Act, Section 35.

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within a state's defined territory. It is a status recognized by other states which characterize the state as the final authority in its designated area. Jurisdiction, on the other hand, is a subordinate concept to sovereignty. It is an aspect of the general competence of the state that accommodates the exercise of rights, liberties, and powers as the latter embody various categories of the former. Participants refer to the status which enables Nigeria to establish rules of conduct for her territory (sovereignty) and exercise her powers to enforce the laws (jurisdiction). For discussion on distinguishing the two concepts, see Haijiang Yang, *Jurisdiction of the Coastal State Over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (New York: Springer 2005), https://doi.org/10.1007/3–540-33192–1.

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Boundaries and Natural Resources in the Sea: Oil, Boundary Disputes and the Militarization of the Gulf of Guinea

Chris O. Ikporukpo

Structured Abstract

Article Type: Research Paper

Purpose—In spite of the globally accepted principle of *uti possidetis juris*, which defines the inviolability of international boundaries, boundary disputes continue to be. Marine boundary disputes are particularly complex and are usually exacerbated by the presence of economically viable natural resources, especially oil. Such disputes in many cases result in military buildup and in some cases international wars. This paper analyzes the interaction between the presence of oil and the emergence of boundary disputes as a driver of militarization in the Gulf of Guinea (GoG).

Design, Methodology and Approach—The design is analytically descriptive, depending essentially on descriptive statistics. Secondary sources, especially the publications of GoG countries and OPEC, including many other works which are cited, provided the required data. In order to provide a contextual background, three paradigms on maritime boundaries are analyzed. These are *mare liberum, mare clauseum*, and regulated sea.

Findings—All maritime boundary disputes in GoG have been driven by the presence of oil and gas. Those between Ghana and Ivory Coast, São Tomé and Príncipe and Nigeria, and Equatorial Guinea and Nigeria are typical. The determi-

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nation of the various countries to protect their marine oil resources has resulted in an arms race in the GoG. In a few cases, such as the Cameroon-Nigeria dispute, armed conflict has resulted. Be this as it may, the countries often cooperate to fight criminal activities, such as robbery and kidnapping, in the GoG. The intervention by the U.S.A., the EU and China in protecting the oil resources of the area has complicated militarization.

Practical Implications—The paper articulates the threat of marine boundary/dispute-driven militarization in GoG and the need for regional bodies, such as Gulf of Guinea Commission, to intervene to avert disaster.

Originality/Value—Studies on maritime boundary disputes, particularly in the GoG, have neglected the generation of militarization and its consequences. This paper addresses this gap through an analysis of the interplay of oil, boundary disputes and militarization.

Keywords: boundary disputes, Gulf of Guinea,
marine security, militarization, oil

I. Introduction

Uti Possidetis Juris, a principle which connotes the inviolability of international boundaries,[1] has emerged as a globally accepted ideal[2] and is embedded in the Charter of the United Nations. This principle guided the determination of post-colonial boundaries of Africa, Asia and Latin America[3] and has continued to be emphasized by the International Court of Justice in its adjudication in international boundary disputes.

Be this as it may, inter-empire and international boundary disputes have characterized international relations since ancient times.[4] Marine boundary disputes are much more complex than onshore ones. This complexity is largely because marine boundary markers, particularly hydrographic baselines, could readily change due to coastal processes of deposition and erosion which have been heightened by climate change. All over the world, marine boundary disputes pose tremendous challenge to the existing order. No continent has been free of such disputes.[5] From the perspective of the number of countries involved and the interest shown by the major world powers, the disputes in the South China and East China seas have emerged as the most significant. Understandably, these disputes have received considerable research attention.[6]

Experience has shown that the existence of natural resources, particularly oil, aggravates such disputes.[7] The South China and East China Seas disputes are good examples.[8] The race for oil in the South China Sea, which complicated the situation, emerged in 1969/1970 when an international report revealed the oil potential of the area.[9] The dispute over the Spratly Islands, a group of more than 100 widely scattered islands in the South China Sea, provides one of the best examples of the role of natural resources in marine boundary disputes.[10] These were largely ignored islands

until the discovery of oil in their marine territories. They were ignored because they were largely barren, uninhabitable and had little land resources. Indeed, for a long time they were called "Dangerous Ground" by navigators due to their dangerous seas. China, Taiwan, and Vietnam, each now claims the entire island group while others, such as Malaysia and the Philippines, each claim some of the islands.

Such international boundary disputes in most cases lead to an arms race and often degenerate into armed conflict. For example, all parties involved in the South China and East China Seas disputes have pursued an aggressive policy of armament. Indeed, China, Taiwan, Philippines, Vietnam and Malaysia have not only occupied some of the islands but have also installed military facilities on them.[11]

The possibility of war emerging from boundary disputes has been conclusively established. Studies[12] have shown that a boundary dispute is one of the common, if not the most common, drivers of international wars. Indeed, 79 percent of all wars between 1648 and 1989 were consequent on boundary disputes.[13] Similarly, every South American country was involved in at least one war with one or more of its neighbors during the 19th century because of the same reason.[14] Between 2000 and 2003, 10 of the 19 independent countries in South and Central America were involved in such wars.[15]

This paper analyzes oil and boundary disputes as drivers of militarization in the Gulf of Guinea (GoG). The following issues are addressed:

i. What is the pattern of militarization in the GoG?;
ii. What is the role of oil vis-à-vis boundary disputes in the militarization?; and
iii. How are criminal activities in the GoG a factor in the militarization?

Diverse types and sources of data are required to address the issues. Data on the pattern of militarization, oil resources of the various countries, the character of marine boundary disputes, and crime in the GoG are needed. Time series data on each of these variables are needed. If primary data are to be employed, this will require fieldwork in each of the GoG countries and even beyond, given the interest in the region by such countries as the U.S.A., China and European Union countries. This would involve prohibitively large sums of money and a very long period of time. Given this scenario, as in similar circumstances, there must be a resort to secondary data sources, where these are available. Thus, the data for this paper were obtained from secondary sources. These sources include publications of various GoG countries, the U.S.A., the EU, the Organization of Petroleum Exporting Countries and several other works which are duly cited. The next section, a contextual analysis, provides a framework for this paper.

II. Oil, Maritime Boundaries and Militarization: A Contextual Underpinning

Three paradigms on marine boundaries, with implications for militarization, have emerged over time. These are the principles of a "Free Sea," of an "Owned Sea"

and of a "Regulated Sea." The principles of a "Free Sea"/"Open Sea" or *Mare Liberum*, as it is commonly christened, and that of an "Owned Sea"/"Closed Sea" or *Mare Clausum* are the earliest counterpoints of the debate and the operationalization of maritime boundaries.[16] The principle of *Mare Liberum* has its origins in Roman law which emphasized justice. The sea was seen as a *commune omnium***,** that is, the common property of all, and therefore a *usus publicus*, that is, a public utility which can not belong exclusively to any one or any group.[17]

The philosophical foundation of "Free Sea" was explicitly defined in 1609 by Grotius. He asserted, in his *Mare Liberum*, "the open sea cannot be subject to the sovereignty of any State, access to all nations is open to all, not merely by the permission but by the command of the Law of Nations."[18] The treatise of Grotius, though influenced by the policies of some countries, such as Great Britain, subsequently guided the attitude of several countries. The position of Great Britain was obvious from the several treaties it had with its neighbors, particularly France in the 14th and 15th centuries, allowing the freedom to fish in the seas around it. This policy of free seas for fishing and navigation was particularly emphasized in a proclamation by Queen Elizabeth I (1558–1603) of Britain. The proclamation declared, "The use of the sea and air is common to all; neither can any title to the ocean belong to any people or private persons forasmuch as neither nature nor regard of the public use and custom permit any possession thereof."[19]

It is this philosophy of a free sea that informed the Berlin Conference of 1884 in its enunciation of a policy to guide the use of the maritime territory of the GoG. The conference included twelve European countries, the U.S.A., Russia and Turkey, and formalized the "scramble for Africa" in its "General Act of the Conference," signed at Berlin on February 26, 1885, defined in addition to others, two broad related policies of navigation and of trade, which were clearly based on the principle of a free sea.[20] Indeed, as indicated in the preamble to the "General Act," the need for free navigation and unhindered commerce was one of the reasons for the conference.

The "General Act" did not directly refer to the GoG but through its definition of the territory as rivers Congo and Niger, their tributaries and their marine spaces. Several "Articles" of the "General Act" emphasized that there must be unhindered movement of merchandise through the free passage of ships and smaller crafts in the GoG. The significance of marine transportation and of commerce at the time was responsible for this emphasis. Given the fact that there cannot be free trade unless the navigation routes are free, there was more emphasis on the latter. The need for a free sea was asserted in Article 2 thus: "All flags, without distinction of nationality, shall have free access to all the littoral of the territories…. They may undertake every kind of transport and exercise the coastwise navigation by sea and river as also small boat transportation."

The conviction of no discrimination in the use of the GoG was further emphasized in Article 3 that "all differential treatment is prohibited in respect of ships as well as merchandise." This determination was also reflected in the banning of all monetary measures that impeded free transportation and free commerce. For

instance, Article 14 declared that "There shall not be established any maritime or river transit tax based upon the simple fact of navigation, nor any dues upon the merchandise which is found on board the ships. Only taxes or dues can be collected which shall have the character of compensation for services rendered to navigation itself…." It is remarkable that Article 24 stipulated that the freedom of navigation in the GoG shall not be affected even in times of war, while the freedom of the movement of merchandise even during war was enshrined in Article 25.

In spite of the fact that Hugo Grotius' apparently convincing treatise that "[e]very nation is free to travel to every other nation, and to trade with it"[21] guided the actions of many nations (e.g., Denmark and Sweden), the notion of *Mare Clausum* (closed sea) was much more attractive to many nations in the Middle Ages. It is remarkable that it was Great Britain, which at a time championed the principle of a free sea, that promoted the counter-principle of *Mare Clausum*. The real interest of Great Britain had always been to be "the lords of the seas." It was King James I (of Britain) that sponsored the writing of the book *Mare Clausum* by John Selden to counter Grotius' treatise of a free sea. The book, presented to the king in 1618 but published in 1635,[22] declared:

> It is certainly true, according to the mass of evidence…, that the very shores or ports of the neighboring sovereigns on the other side of the sea are bounds of the maritime dominion of Britain, to the southward and the eastward, but in the open and vast ocean to the north and west they are to be placed at the farthest extent of the most spacious seas which are possessed by the English, Scots and Irish.[23]

The policy change by Great Britain from *Mare Liberum* during the reign of Queen Elizabeth I to the propagation of *Mare Clausum* by King James I not only reflected the king's push to ensure that the country really became "the Lords of the Seas" but also the king's confidence that the country's navy was strong enough to defend its seas. The popularity of the *Mare Clausum* principle was such that it was not only promoted by the pope but also by several countries. Although Selden's principle of a closed sea provided a rationale for Britain's actions, most of the very fundamental claims based on *Mare Clausum* predated the publication of the book. For instance, during the Middle Ages, the "Papal Sea" in the Mediterranean, extending from Monte Argentino to Terracina, was one where only people in the Church State and those in Rome were allowed to fish. Much more fundamental was a bull by Pope Alexander VI which divided the Atlantic Ocean between Portugal and Spain. The boundary was drawn from the North Pole to the South Pole and passed to the west of Cape Verde and the Azores Islands. All parts of the ocean, including the islands, to the west of the boundary were given to Spain and all to the east to Portugal. The bull also specified that no nation could fish or trade in these respective areas without the permission of the kings of Spain and Portugal. Trespassers were punished by death and the confiscation of goods.[24]

The closed sea principle was so attractive that virtually all nations appropriated the seas around them and in some cases even those not around them. For instance,

the North Sea was claimed by Norway, Venice had sovereignty over the Adriatic, the Republic of Genoa over the Ligurian Sea and Britain had sovereignty over all the seas around it. Such sovereignty was usually enforced through the use of force.[25] The appropriation of the seas by various nations and its enforcement, usually through the sinking of ships and the seizure of goods, resulted in considerable resistance. This resistance was often characterized by skirmishes and, in some cases, by full-scale war between countries. Thus, the clash between the principle of *Mare Liberum* and that of *Mare Clauseum* resulted in disorder in the seas.

The attempts to impose order on maritime boundaries ultimately resulted in the "Law of the Sea." The "Law of the Sea" emerged through an evolutionary process. The antecedents included actions taken by individual countries and those by the United Nations. For instance, U.S. President Harry Truman's proclamation of 1945 on the continental shelf is a noteworthy action by an individual country,[26] while The Hague Codification Conference of 1930 and the 1958 Convention on the Territorial Sea and the Contiguous Zone are significant United Nation's actions.[27] The Truman Proclamation argued that it was just and equitable for a coastal nation to take possession of its continental shelf, particularly, where the shelf has mineral resources, such as oil. Truman declared: "Having concern for the urgency of conserving and prudently utilizing its natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, as appertaining to the United States, subject to its jurisdiction and control."[28] This action by the president of the U.S generated a reaction that culminated in several other countries taking the same action.

Whereas such individual action may have catalyzed the action by the international community through the United Nations, there is no doubt that the Hague Codification, which specified a three-mile territorial zone for coastal states, was a significant beginning. Be this as it may, it was the Convention of 1958 that provided a foundation for the United Nations Law of the Sea of 1982. The convention, signed in Geneva on April 29, 1958, and made up of 32 Articles, provided in Article 1 that "the 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." Although the width of the belt was not explicitly indicated, Article 5, dealing with the peculiarity of bays, suggested a distance of 24 nautical miles. In order to address the issue of natural resources in the sea, Article 4 provided that "account may be taken in determining particular baselines of economic interests…."

In spite of the fact that the 1958 Convention provided a basis for international boundaries, it was the United Nations Convention on the Law of the Sea (UNCLOS), that provided a much more comprehensive basis for determining such boundaries. UNCLOS,[29] apart from identifying the territorial sea of a coastal state, recognized three marine zones over which a state has jurisdiction. These are, from the coast outwards, the Contiguous Zone, Exclusive Economic Zone and the Continental Shelf. The 1982 UNCLOS, which came into effect in 1994, defined the territorial sea of a coastal State, over which a country has sovereignty, as the coastal waters extending 12 nautical miles from the coastline. The Contiguous Zone, Exclusive Economic

Zone and the Continental Shelf, over which a coastal country has varying rights, extends 24 nautical miles, 200 nautical miles and 350 nautical miles respectively.

In the context of this paper, the most significant provision is that of Article 15 on "delimitation of the territorial sea between States with opposite or adjacent coasts." It provides:

> Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them, to the contrary, to extend its territorial; sea beyond the median line every point of which is equidistant from the barest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historical title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance therewith.[30]

In spite of the determined efforts by the United Nations to delimit the maritime boundaries of States, disputes continue to occur. As mentioned earlier, the East China and South China Seas disputes indicate that the presence of, or even a perceived possibility of, abundant natural resources, especially oil and gas in the seas, could drive and escalate disputes. Such disputes could be between a militarily weak country and a strong one. For instance, in the Spratly Islands (South China Sea) dispute, weaker countries, such as Malaysia, Philippines, Taiwan and Vietnam, in challenge to China, an emergent world power, have established garrisons and military installations in the islands they claim. It could be argued that such actions by relatively weaker countries may be informed by a realization that they may benefit rather than lose in such disputes. It is a situation where the cost is perceived to be less than the benefit. In other words, the opportunity cost of pursuing the conflict is perceived as being less than that of non-involvement in the dispute. Given this contextual framework, the next two sections analyze the setting in the GoG.

III. The Struggle for Oil and Militarization

The GoG, extending from Senegal to Angola, has been the scene of several maritime boundary disputes.[31] Table 1 shows the pattern of maritime boundary disputes. All parts of the region (northern, central and southern sections) have had one or more disputes. There are many more disputes in the central area from Nigeria to Gabon. Sixty percent of the disputes emerged in the 1970s, while two, that is 20 percent, are as recent as the 2000s.

It is evident that natural resources, and particularly oil, have been at the center of these disputes. For instance, the dispute between Ghana and Ivory Coast has been over the oil fields off the coast of western Ghana while that between Cameroon and Nigeria has been the oil fields off the coast of the Bakassi Peninsula. Similarly, the dispute between Equatorial Guinea and Nigeria was over the Zafiro and Ekanga oil fields. The significance of the oil factor was succinctly described by Ghana's Lands and Natural Resources Minister: "All of a sudden, with the oil find (in Ghana), Ivory

Coast is making a claim that is disrespecting this median line we have all respected. In which case, we would be affected, or the oil find will be affected."[32]

Table 1: Marine Boundary Disputes in Gulf of Guinea

Country–Pair	Year of Emergence	Driver of Dispute	Status of Dispute
Senegal and Guinea Bissau	Late 1970s. Filed in ICJ. March 1991	Biological and mineral resources (oil).	Joint Exploitation and Management Agreement, October 1993. Catalyzed by ICJ
Guinea and Guinea Bissau	Late 1970s	Biological and mineral resources (oil).	1985 Judgment of arbitration accepted by both parties
Ghana and Ivory Coast	2007. Filed before ITLOS in September 2014	Oil resources	2017 Judgment by ITLOS accepted by both parties
Cameroon and Nigeria	Early 1970s. Filed in ICJ in March 1994	Oil resources	2002 Ruling of ICJ accepted by both parties
Nigeria and Equatorial Guinea	Early 1980s	Oil resources	Treaty in 2000. Joint Development Zone Created
Nigeria and São Tomé and Príncipe	Late 1970s	Oil resources	Exploitation Arrangement Joint Development Zone signed Feb. 2001. Came into force 2003
Cameroon and Equatorial Guinea	Early 1980s	Oil resources	MOU in August 1993 establishing a Median Line
Gabon and Equatorial Guinea	Early 1970s Filed in ICJ 2017	Oil resources	Signed Agreement in 2016 to Refer to ICJ. Before then agreed to joint exploitation
Gabon and São Tomé and Príncipe	Late 1970s	Oil resources	Settle through treaty of April 2001 delimiting boundary
Angola and Dr. Congo	Early 2000s	Oil resources	Joint Exploitation Zone established in January 2015

Note: ICJ: International Court of Justice; ITLOS: The International Tribunal of the Law of the Sea.

Source: Compiled by the author.

The struggle for oil-space has been encouraged by a number of factors. One of these is the fact that most marine boundaries were not precisely delimited before the emergence of offshore oil. The marine space was perceived as not as significant as the land areas. It is noteworthy that some of the boundaries remain undelimited. In some cases, as in the "Golden Rectangle" area of Nigeria, Cameroon, São Tomé and Príncipe, Equatorial Guinea and Gabon (Figure 1), because of the closeness of the countries, the Exclusive Economic Zones overlap.

This state of affairs informed Equatorial Guinea's intervention in the Cameroon-Nigeria dispute before the International Court of Justice. Equatorial Guinea appealed thus: "it is the purpose of Equatorial Guinea's intervention to inform the Court of Equatorial Guinea's legal rights and interests, so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria."[33] Equatorial Guinea also indicated "that the claim presented by Cameroon in its Memorial which ignores the median line, was never notified to Equatorial Guinea."

Even if the boundaries were precise, the fact that oil fields could cut across international boundaries complicates the situation. In such a setting conflicting claims could emerge. There are such trans-boundary oil fields in the "Golden Rectangle." For instance, the Zafiro and the Ekanga oil fields are adjacent and were claimed by Equatorial Guinea and Nigeria. The concentration of oil and natural gas fields around boundary areas, as shown in Figure 1, is also a complicating factor. Although, this is particularly obvious in the case of the "Golden Rectangle," the location of Ghana's oil fields near its border with Côte d' Ivoire is also an example.

Given the contribution of oil to the economies of the countries and the overwhelming dependence on offshore oil in most of them, the producing countries understandably resist attempts by their neighbors to take over their resources. The contending neighboring countries are usually influenced by the effects the riches oil had bestowed on the producing countries and therefore struggle to take over the oil spaces of their neighbors. Table 2 indicates that oil accounts for a significant proportion of government revenue in most of the countries. For instance, the governments of Equatorial Guinea, the Republic of the Congo and Angola depend so much on revenue from oil. Indeed, Equatorial Guinea is almost entirely dependent on oil; this mineral accounts for about 98 percent of the revenue. Equatorial Guinea, which depended largely on its forestry resources, and having one of the lowest per capita GDPs, emerged as one of high per capita income when it became an oil exporting country. It now has one of the highest per capita oil production rates globally.[34]

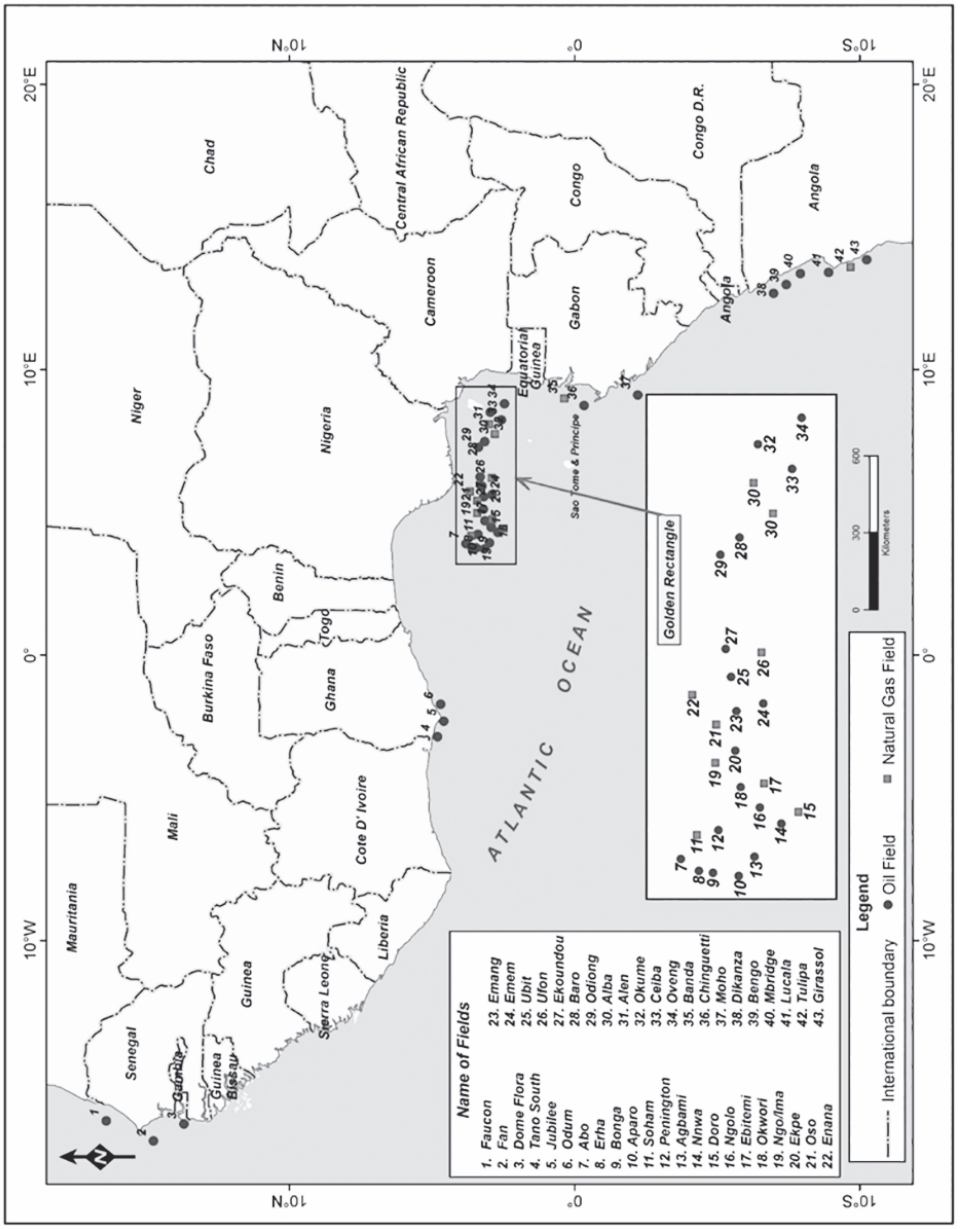

Fig. 1. Major oil and gas fields in the Gulf of Guinea (author's creation).

Table 2: Contribution of Oil to GDP and Government Revenue in Gulf of Guinea Countries, 2017

Country	Percentage GDP	Contribution to Government Revenue
Angola	50	80
Cameroon	6.0	40
Democratic Republic of the Congo	0.4*	N/A
Republic of the Congo	65	85
Equatorial Guinea	54	98
Gabon	45	60
Ghana	5.6	10
Nigeria	9.1	53

***2016 data; N/A= Not Available**

Source: Compiled by the author.

The driving force of oil in maritime boundary disputes is particularly remarkable because in most of the countries, the offshore oil fields are the most significant. All of Ghana's, Equatorial Guinea's and São Tomé and Príncipe's oil production is from offshore. About 90 percent of the production in Cameroon is offshore. A dominance of offshore oil fields in Angola is obvious from Figure 2. Since 1970, the offshore fields have dominated. Indeed, since 1994 virtually all the production has been from offshore. It is only in Nigeria that onshore production is significant.

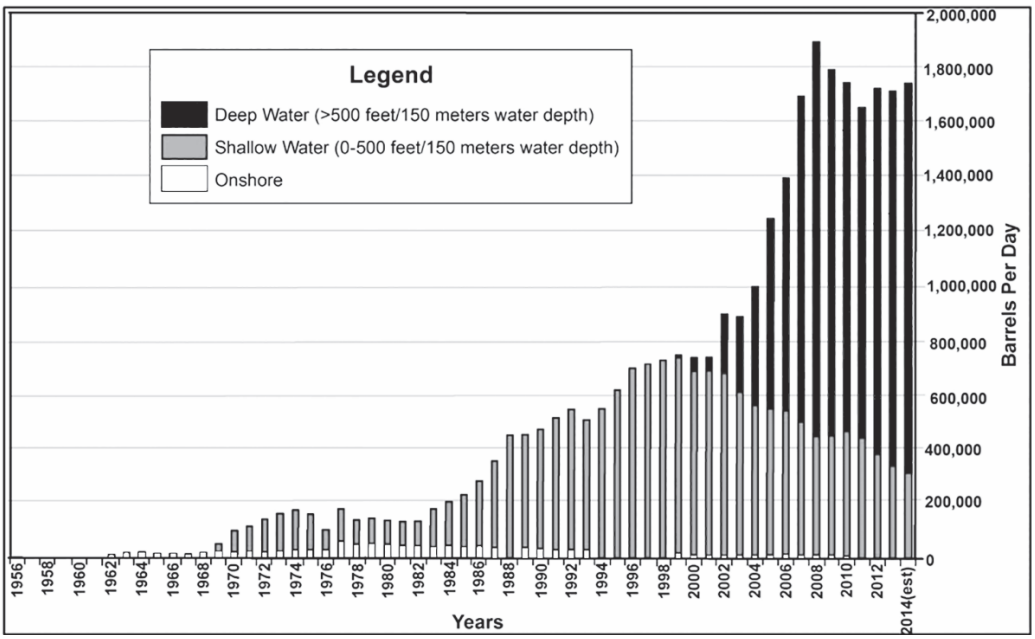

Fig. 2. The significance of offshore oil fields in Angola. Source: Koning, 2014.

Given the significance of offshore oil fields, the producing countries have been determined in ensuring that they continue to have exclusive rights over them. This is apparent not only from their policy statements but also from their attempts to develop their armed forces, particularly the navy. For instance, in Item 3 of its 1996 constitution, Equatorial Guinea defined its territory, and declared: "The State shall fully exercise its sovereignty and shall be vested with the exclusive right to explore and exploit all mineral resources and hydrocarbons. The national territory shall be inalienable and invincible."

Similarly, Ghana in revising its defense policy, asserted: "The revision became necessary as a result of the changing face of security through … the discovery of oil and gas in commercial quantities…. The Ghana Navy has made a lot of progress in its quest toward achieving total surveillance coverage of the maritime domain in the country…."[35] In the same vein, the minister of defense stated elsewhere that "work is underway to upgrade equipment needed by the Ghana Navy to improve the security of Tullow Ghana Limited oil and gas fields…. I think the Navy will have to be equipped to be able to do their protection (of oil installations)."[36]

The Minister of Defense of Nigeria made the same point about the defense of oil installations when a naval reinforcement was being sent to the Bakassi Peninsula in December 1999. He urged, "You must endeavor to provide security to all oil companies prospecting for oil and gas in the area."[37] More recently, in September 2018, while inaugurating 16 patrol vessels to protect oil installations, the Minister of Defense of Nigeria asserted: "For a littoral State with a huge dependence on her offshore resources, maritime security is vital to the nation wellbeing. Against this background of threat, the entire nation would invariably be at a risky situation if we do not insist on a motivated and virile navy like ours."[38]

One consequence of this determination by the various countries to protect their marine oil resources is that there is an arms race in the GoG. An American financial and business news website, Business Insider, in a post from April 2, 2010 dramatically described the setting in the headline: "In Battle for Resources, There is a New Gulf War." A similar website (Oil Price.com) put it differently: "Tension Builds in the GoG as Competition for Economic Resources Increases." The Equatorial Guinea's 250-million-dollar "Marine Security Programme," announced on February 24, 2010, is meant to build up an integrated naval and air force capability. The various countries have acquired several types of equipment and facilities for their naval forces over the years.

The militarization consequent on marine boundary disputes has the potential of encouraging war. The Cameroon-Nigeria maritime boundary dispute[39] over the Bakassi Peninsula is a good example. Table 3 shows that the dispute was characterized by several skirmishes resulting in loss of lives. The 1990s marked the peak of the skirmishes. Indeed, in 1994, the escalation was such that Cameroon requested for assistance from France, based on a defense agreement between the two countries at Cameroon's independence. On February 27, 1994, France sent 2 helicopters and 30 soldiers to assist Cameroon.[40]

Table 3: Cameroon-Nigeria Skirmishes Over Boundary Dispute in Gulf of Guinea

Serial Number	Date	Immediate Trigger
1	May 1981	Attempt by Cameroon to occupy disputed area
2	October 1989	Attempt by Cameroon to occupy disputed area
3	December 1993	Attempt by Nigeria to occupy disputed area
4	January 1994	Attempt by Nigeria to occupy disputed area. Occupies Islands of Diamond and Djabane
5	February 1994	Attempt by Cameroon and Nigeria to occupy disputed area
6	September 1994	Attempt by Cameroon and Nigeria to occupy disputed area
7	December 1994	Movement of Nigerian military to occupy disputed area
8	February 1996	Attempt by Cameroon to occupy disputed area
9	February/March 1996	Attempt by Cameroon to occupy disputed area
10	April/May 1996	Attempt by Cameroon to push Nigerian military out of disputed area, particularly from Abana and Atabong West
11	June 2005	Nigerian soldiers attacked Cameroonian positions

Source: Compiled by the author.

Most of the disputes, as indicated in Table 1, have apparently been settled; many of them through agreements based on Joint Development Zones (JDZ). The JDZ approach is a commonly used strategy globally; such as in the cases of Japan/South Korea, Bahrain/Saudi Arabia, France/Spain, Iceland/Norway, Libya/Tunisia, Colombia/Jamaica and Barbados/Guyana.[41] However, it is only an interim arrangement, usually employed where parties have difficulty in arriving at a permanent boundary delimitation.[42] The implication is that as the countries continue to develop their armed forces, especially the navy, conflicts may emerge.

IV. Militarizing in the Name of Fighting Crime

The significance of oil in the generation and sustenance of maritime boundary disputes and the consequent propensity for militarization were analyzed in the preceding sections. This section examines a related dimension of militarization which compounds and blurs the boundary dispute dimension. The GoG, given its petroleum and fishery resources, together with its geographical location as an important trade route, has attracted a lot of criminal activity.[43] The consequent militarization, meant to check criminality, is analyzed in this section. However, in order to provide an appropriate background for the analysis, it is necessary to examine various dimensions of the criminality challenge.

The GoG has emerged as one of the maritime areas with the highest rates of criminal activity. For instance, in 2016 there were 53 piracy attacks, 28 percent of

the global figure. Similarly, of the 62 maritime kidnapping cases worldwide, the GoG accounted for more than 50 percent.[44] According to the Annual Reports of the International Maritime Bureau, in 2017 the area recorded 45 of the 180 global pirate attacks—25 percent. Of the 107 incidents in the first half of 2018, 46 (about 43 percent) occurred in the GoG. Figure 3 displays the pattern of the different types of crimes over the years. Generally speaking, there has been a gradual decline over the years. There was a sharp decline from 2008 to 2012 and a gradual increase thereafter; although the trend was more or less stable after 2012. Table 4, showing the crime rate in the various countries, indicates that Nigeria is overwhelmingly the leading country, accounting for about 54 percent of all incidents in the 15-year period; its contribution is more than 60 percent in 5 of the years examined. Indeed, its contribution in 2007 and 2008 was about 81 percent and about 77 percent, respectively. There is also a lot of illegal fishing by companies from other countries and thefts of oil.

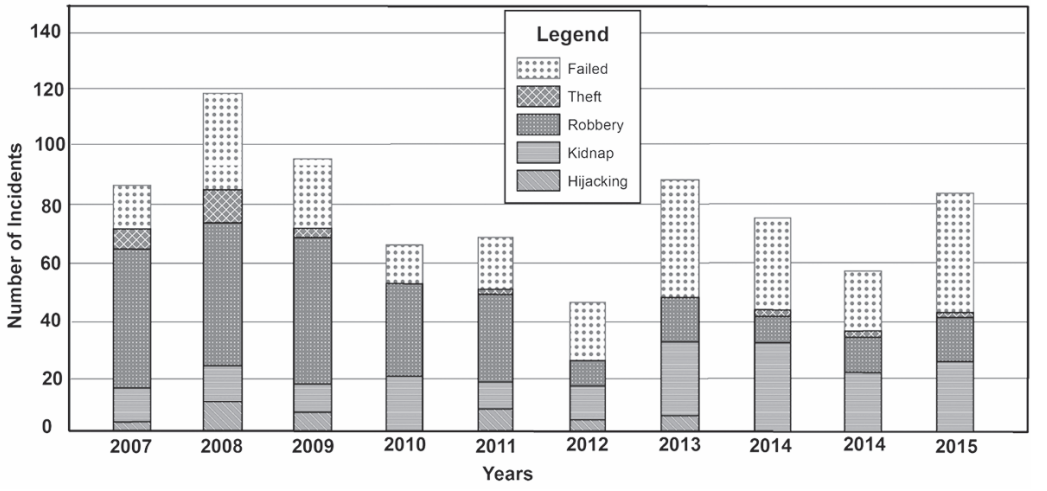

Fig. 3. Pattern of security threats in the Gulf of Guinea. Source: Steffen, 2017.

The emergent tripartite driving forces of militarization in the GoG, namely, oil, security (fighting crime), and free navigation, are intertwined and intricately related. Thus, it is sometimes difficult to clearly decipher the fundamental interest of players in the GoG scene. For instance, most of the external players place an emphasis on security; more or less de-emphasizing the fact that security is simply a means to an end. In some cases, the impression is created that altruism is a fundamental driving force. These security and altruism considerations are very prominent in the objectives of the U.S. Africa Command (AFRICOM), a military intervention outfit that operates in Africa including in the GoG.

This orientation has also been evident in statements by AFRICOM. For instance, even in a rather explicit statement about the interest of the U.S. by the commander of AFRICOM, General Thomas Waldhauser, to the Senate Committee on Armed

Table 4: The Pattern of Piracy in the Gulf of Guinea Countries, 2002–2015

States	Percentage of Incidents Each Year														Total Incidents
	2001	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	
Angola		4.7			12.5	1.9	3.2			1.9			3.1		12
Benin Republic		2.0						16.3		38.4	4.0				32
Cameroon	13.2	3.1	7.1	8	3.1		3.2	5.4	13.2		2.0		3.1		26
Democratic Republic of the Congo					12.5	5.7	6.4	1.8	5.3	5.7	4.0		3.1	8.7	22
Equatorial Guinea							1.9								1
Ghana	13.2	4.7	8.9	12	9.4	1.9	13.4	5.4		3.8	4.0		12.5	8.7	40
Guinea	5.3	6.2	8.9	4	12.5	3.8		9.0	15.7	10.0	4.0	2.2		13.0	40
Guinea Bissau	5.3							1.8							3
Ivory Coast	13.2	3.1	7.1	12	3.1		5.7	3.6	10.5	1.9	6.1	9.0	6.3	4.3	35
Liberia			3.5			1.9	1.9		2.6				3.1	4.3	8
Nigeria	37.0	61.0	50	64	37.5	80.7	76.9	52.7	50	19.2	42.8	66.0	41.0	52.1	324
Senegal	7.8	12.5	8.9												16
Sierra Leone	2.6		5.3		6.2	3.8				1.9	2.0	2.2	3.1		12
Republic of the Congo							1.9		2.6	5.7	8.1	4.5	19.1	8.7	19
Togo	2.6	2.0			3.1		1.9	3.6		11.5	22.4	16.0	6.3		32
Total Incidents	38	64	56	25	32	52	62	55	38	52	49	44	32	23	622

Source: Modification of Nnadi et al. 2016, p. 279.

Services on February 7, 2019, the altruistic perspective was emphasized. The General stated in part:

> In the Gulf of Guinea, maritime security remains a strategic priority due to its role in global oil markets, trade routes, and the residence of approximately 75,000 U.S. citizens. *Piracy and other illicit maritime activities threaten development efforts, weaken State security, and rob States of precious resources required for greater economic growth and effective* governance [emphasis mine].

The perspective that a fundamental driver is altruism is much more glaring in China's position. For instance, China's permanent representative in the U.N., Ambassador Liu Jieyi, stated at a Security Council Debate on Piracy and Armed Robbery at Sea on April 25, 2016, that

> China and Africa make up a community of common destiny and interest…. China has taken an active part in Africa's effort to strengthen capacity building for the maintenance of peace and security. China has actively participated in international cooperation against piracy in the Gulf of Guinea and has provided assistance to the coastal States for capacity-building in the areas of infrastructure. China's naval escort fleet has been invited to participate in joint counter-piracy

> drills with the navies of Nigeria and Cameroon respectively. China has provided the coastal States with material and equipment for counter-piracy purposes.

Be this altruism and security orientation as it may, there is overwhelming evidence that the oil factor is much more fundamental than any other.[45] Until the GoG became a major source of oil, it was of little or no interest to the current major players in the region. The GoG assumed more significance when there was increased concern about the security of the Gulf of Persia oil sources. Oil, as earlier analysis has shown, is of fundamental interest to the GoG States themselves.

Given the drivers of militarization, what has been the militarization pattern? The next section addresses this issue.

V. The Pattern of Militarization

The consequent militarization may be broadly divided into two dimensions. These are:

i. Internally generated militarization; and
ii. Externally generated militarization

5.1 Internally Generated Militarization

Internally generated militarization involves the action of individual countries and that of the GoG countries as a group. The increasing awareness of the significance of the sea and its living and non-living resources has led to actions by various countries to enforce sovereignty over their maritime territories largely through the development and modernization of their naval forces. Ghana is one good example of this link between oil and sovereignty on the one hand and militarization on the other. The situation is aptly expressed by a naval officer of the U.S.:

> The discovery of oil and gas reserves in Ghana's Exclusive Economic Zone (EEZ) has raised concern that increased criminal activity might trail the expected surge in maritime traffic…. The late Ghanaian president John Atta Mills' determination to protect his nation's diverse marine natural resources-especially fisheries, crude oil and natural gas reserves … led to the purchase of four new navy fast patrol vessels for the first time in 32 years. The Snake-class vessels procured from China, were … named after various snakes to portray their lethal capacity.[46]

In addition to these patrol boats, other naval vessels were procured from Germany.

A similar trend has also been evident in Angola, Nigeria, Cameroon, Gabon and Equatorial Guinea. For instance, Angola has a "Naval Power Development Programme" involving major investments in warships and a "National Maritime Surveillance System."[47] Similarly, in a press conference in mid–May 2018 to mark the 62nd anniversary of the Nigerian Navy, it was revealed that 173 patrol boats in addition to some warships, apart from the refitting locally of defective ships, were commissioned in the last one year. There were also naval exercises, such as operation

"Tsare Teku V." Six more specialized vessels were also acquired from France. Forty-two vessels were arrested for criminal activities. The Nigerian Navy, it was indicated, has nine Regional Maritime Awareness Capability sites with a plan to increase this to twelve as soon as possible.

Appreciating the limitation of the navies of the various GoG countries and the non-existence of precise maritime boundaries, joint effort has also characterized the attempt to police the maritime domain. The bases of such joint action are the provisions of the Maritime Organization for West Africa and Central Africa, Economic Community of West African States, Economic Community of Central African States, Gulf of Guinea Commission and the June 2013 Yaounde Summit of Heads of State and Government of West and Central Africa.[48] The arrangement involves the sharing and communication of information, intercepting and arresting criminals, and prosecuting offenders. Thus, although it does not involve the joint development of military infrastructure, there have been cases where the sharing and communication of information by various countries have resulted in the successful arrest of offenders.

5.2 Externally Generated Militarization

External intervention adds another dimension to militarization. The GoG has attracted a lot of attention, particularly from developed economies, consequent on its geostrategic significance. Among the developed countries, China, the European Union (EU) and the United States of America (U.S.A.) are outstanding. The GoG countries account for a significant proportion of the oil imports of these economies. In 2013, for instance, they accounted for about 18.5 percent of China's imports, with Angola contributing 14 percent of that total. In the case of the EU, the percentage was 10 for oil and 4 for natural gas. As Table 5 indicates, the percentage for the U.S.A. is also very significant. The amount increased from less than 9 percent in 2012 to 18.6 percent and 18.3 percent in 2016 and 2017, respectively. This oil factor largely underlies the policies and activities of these major economies.[49]

Table 5: Percentage Contributions of Gulf of Guinea Countries to U.S. Imports of Oil, 2012–2017

Country	2012	2013	2014	2015	2016	2017
Angola	2.6	2.6	2.0	1.8	2.2	1.9
Cameroon	0.3	0.0	0.0	0.0	0.0	0.0
Congo DR	0.0	0.0	0.0	0.0	0.0	0.0
Congo Republic	0.3	0.2	5.7	0.1	4.1	5.8
Equatorial Guinea	0.4	0.2	5.7	7.2	8.2	0.1
Gabon	0.5	0.3	0.2	0.1	1.3	5.8
Ghana	0.0	4.0	0.0	0.0	0.0	0.2
Nigeria	4.7	3.1	0.8	0.7	2.8	4.5
Total	8.8	10.4	14.4	9.9	18.6	18.3

Source: Computed by the author from U.S. Energy Information Administration Data.

An analysis of the policies and activities of China, the EU and the U.S.A. suggests that, whereas the first two encourage militarization, the last is directly involved in the militarization process. The activities of China and the EU primarily involve the training of personnel of GoG countries' naval forces and the provision of equipment. China has, over the years, expressed its anxiety over the increasing presence of the U.S.A. and the EU in the GoG and other parts of Africa.[50] It subsequently pursued a policy of military influence in the GoG and other parts of Africa. In 2000, for instance, its military trainers spent three months training the Equatorial Guinea armed forces on the use of heavy weapons. Many observers argued then that China was likely to sell heavy weapons to Equatorial Guinea since the latter did not have such weapons.[51] Similarly, as part of an agreement in early 2000s, twelve Nigerian pilots were trained in China.[52] As part of the training, China has been involved in naval exercises in the region. In May and June 2014, China's navy made port-calls at Angola, Cameroon, Côte d'Ivoire and Nigeria for the first time, and had joint anti-piracy drills with the navies of Cameroon and Nigeria.[53] Also in May/June 2018, China was involved in a naval exercise code-named "Exercise EKU KUGBE." It involved 12 Nigerian Navy combat ships and one each from Cameroon, Ghana, Togo, France, Portugal and China. Furthermore, China has been very active in the supply of military equipment to GoG countries since the 1990s. It has donated or sold patrol vessels to several countries. For example, of the 20 countries in Africa that received China's vessels between 2000 and 2013, 5 (Cameroon, Equatorial Guinea, Ghana, Nigeria and Sierra Leone) were GoG countries.[54] The provision of grants and soft-loans has characterized China's arms-supply strategy. In 2001, it granted 1 million dollars to Nigeria to upgrade its military facilities and in 2007, a 1.7-million-dollar grant was given to Ghana for the same purpose. Similarly, a 3.8-million-dollar interest-free loan was given to Ghana to develop barracks while a 251-million-dollar contract for the supply of military aircraft to Nigeria was also concluded.[55]

The EU has a more defined policy and programs. The basic objectives of the EU[56] include:

i. Building a common understanding of the threat (in GoG) and the need to address it;
ii. Helping the GoG countries to put in place institutions and capacities for security and good governance;
iii. Supporting the development of prosperous economies in the countries; and
iv. Strengthening cooperation among the countries for effective action.

The perspective of the EU is that the issue of security in the GoG cannot be addressed in isolation. The related issues of development and good governance are fundamental.

The EU's Critical Maritime Routes program, established in 2009, is meant to ensure security in some major maritime routes in the world,[57] with a GoG component. The GoG version, Critical Maritime Routes in the Gulf of Guinea (CRIMGO) emphasizes capacity building. This program has organized a number of capacity-

building trainings for both the military and the civilian population of GoG countries. In addition to such capacity-building, EU countries have participated in several naval exercises. The annual "Exercise Obangame Express" is a good example. Although, the EU is usually reluctant to employ approaches, such as naval operations, this cannot be said of individual countries, especially Britain and France. Furthermore, given the political links between Britain and France on the one hand and their former colonies on the other hand, the former continue to be major suppliers of arms to many GoG countries.

Among the external actors, it is only the U.S.A. that has a standing armed force devoted to the security of the GoG. The U.S. Africa Command (AFRICOM) operates in all parts of Africa, including the GoG. The main focus of AFRICOM[58] includes:

i. Counter terrorism and violent extremist organizations;
ii. Partner in order to strengthen the defense capacities of African countries;
iii. Counter piracy and illicit trafficking; and
iv. Prepare for, and respond to, a stable and secure Africa.

The central concern, according to a commander of AFRICOM, General William Ward, is building African Security capability, and capacity.[59]

In spite of the argument of a former commander of AFRICOM, General Ward, that it is not meant to militarize Africa,[60] its activities, (even if altruistic) have encouraged the militarization of the GoG and other parts of Africa. The U.S. has been actively involved in the training of the military of several countries. As General Ward indicated in his testimony before the U.S. Senate in 2017, AFRICOM had at the time trained not less than 68,000 African soldiers.[61]

One of the U.S.A.'s channels for training the continent's solders/naval personnel is the organization of military/naval exercises. In the GoG, "Exercise Obangame Express," which it sponsors, is a good example. Several African and non–African countries participate in this training exercise. In the 2018 exercise, 17 GoG countries were involved. Each year, this exercise, which commenced in 2011, emphasizes aspects of naval training. The 2018 exercise focused on training in boarding techniques, search and rescue operations, radio communication, information management techniques and medical/casualty response.[62] Apart from such training, AFRICOM maintains naval patrols in the GoG, while the U.S. also supplies arms to a number of GoG countries, although China is a much more significant supplier.

VI. Conclusion

The GoG has emerged as a major center of the oil and gas industry. Apart from the attention it is receiving from multinational oil companies and major oil importing countries, the governments of the region have faced the dilemma of being good neighbors, a principle enshrined in the various intergovernmental treaties and agreements, such as those of the African Union, Economic Community of West African

States, Economic Community of Central African States and the Gulf of Guinea Commission, while at the same time protecting their economic sovereignty—a sovereignty threatened by marine boundary disputes.

Indeed, it is such a contradiction that has informed and guided the provisions of the GoG Commission Treaty. This is why there is so much emphasis on cooperation, consultation, security, inviolability of borders and non-aggression (Articles 3, 4 and 5) in the exploitation of the natural resources of the region. Be this, as it may, before and even after the creation of the commission, marine boundary disputes, which have been difficult to resolve, have characterized the geopolitics of oil in the region. Although, not explicitly stated, such disputes have encouraged arms-buildup in the region. The emergence of various acts of criminality, particularly piracy, has encouraged the militarization of the Gulf which has tended to conceal the militarization generated by boundary disputes. The need to protect the trade routes and natural resources of the region has resulted in a spate of militarization by both the GoG countries and external actors, particularly the U.S., EU and China.

In spite of the boundary disputes, all actors, in their resolve to protect the GoG trade routes, have supported and pursued a policy of a free sea in line with the paradigm discussed earlier. The position of Denmark, an EU country, typifies the setting. The policy of Denmark in the GoG is centered around the protection of the shipping routes. This orientation was succinctly put by the country's Institute of International Studies: "The Danish Shipping Line Maersk alone pays between 600–700 port calls annually to Nigerian ports. It is therefore critical to large parts of the world that the waters in the Gulf of Guinea are safe for passage."[63] Apart from its oil resources, this militarization has given credence to the emergent epithet of the GoG as the "New Persian Gulf." A determined action to address the yet-to-be-resolved boundary disputes is necessary.

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Maritime Legacies and the Law: Effective Legal Governance of WW I Wrecks

Forrest, Craig. (2019). Cheltenham, UK: Edward Elgar Publishing. The eBook version is priced from £22/$31 on Google Play, ebooks.com and other eBook vendors, while the print edition can be ordered from the Edward Elgar Publishing website.

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The governance of state-owned shipwrecks is a complex area of law. There are active debates as to whether states retain sovereign immunity over these wrecks, whether warships can be classed as maritime war graves, whether they should come within the remit of underwater cultural heritage law, or if, actually, they fall in the center of this figurative Venn diagram. These debates are of particular importance in respect to World War I wrecks, given the multifaceted legal issues and overlapping interests involved. The subject is also highly emotive, considering that from the Royal Navy alone, over 89,000 sons and daughters did not come home. Against this background, and especially in light of the 2018 centenary, *Maritime Legacies and the Law* is both timely and essential. The author, Craig Forrest, a professor of law and the director of the Marine and Shipping Law Unit at the University of Queensland, is a renowned and respected name in the field of cultural heritage law, and this monograph reflects the scholarship one has come to expect from such an expert.

The book is comprised of an introduction and nine substantive chapters on the subject of "legacy wrecks," a term of art used to "neatly capture" World War I wrecks and reflect the presumption that they are a legacy of the war (p. 3). The aim of the first chapter is to demonstrate that these wrecks have value, however it is impossible to take stock of their vast number without feeling a heavy sense of loss. This initial, necessary discussion sets the book in its context and evaluates how important naval power was in the Great War. Particular attention is paid to naval battles, e.g., Falklands and Jutland, and this is especially poignant now that we know several wreck sites have since been "salvaged" for scrap metal in the North Sea, later examined by Forrest in Chapter 4.

The book subsequently builds upon this foundation and examines the legacy of these wrecks, reflecting upon the different values they possess today. These values include being seen as economic commodities, hazards, historical and archaeological objects, memorials and maritime graves, and even as social and community resources. The chapter's analysis on the conflicts between these "non-mutually exclusive values" (p. 70) is refreshingly pragmatic, particularly in recognizing that there may be value in disturbance for archaeological investigations or excavations.

An appraisal of the legal framework applicable to legacy wrecks completes this trio of necessary scene-setting chapters. The framework is recognized as an exceptionally "complex matrix of private law, national public law and international law" (p. 74), and so given the broadness of this interconnected legal regime, it is understandably challenging to grasp. However, Forrest should be commended here, as the chapter is equally as comprehensive as it is analytical and is sufficiently accessible to non-lawyers despite broaching complicated issues such as sovereign immunity, ownership and abandonment. This sets the groundwork for the succeeding four chapters to provide a thorough analysis of the key values possessed by legacy wrecks, meaning that legal challenges are also further considered in light of these values' specific contexts.

The incompatibility of historic wrecks and salvage law has been well versed in legal academic discourse, and in fully considering legacy wrecks as objects of salvage. Forrest examines the application of salvage law as historic wrecks' greatest threat in Chapter 4. The moral arguments against the illegal and unregulated salvage of legacy wrecks are especially well presented here. By using several examples of looted World War I wrecks, including a particularly upsetting incident where a lost sailor's wallet had been "salvaged," most likely from his remains, Forrest successfully illustrates the magnitude of this problem to highlight the need for a "more protective regime" (p. 165). This kind of analysis goes beyond the level of typical, sterile legal arguments and adds a greater human element to the debate; a welcome theme throughout the book.

Legacy wrecks can also pose navigational or environmental hazards, and in some cases, state intervention may be necessary. Chapter 5 places a spotlight on wreck removal legislation both in the United Kingdom and internationally, while acknowledging that international law fails to address some challenges; namely reconciling values and threats where such a wreck belongs to another state and also has historical value or is a war grave. Forrest implicitly suggests there is work to be done here, should the issue arise again in the future. Chapter 6

provides a useful, updated analysis of the UK's 1973 Protection of Wrecks Act, before going on to a careful examination of the 2001 UNESCO Convention and how it relates to legacy wrecks in particular. This is especially interesting, as the bulk of the literature on the Convention tends to analyze it in the context of underwater heritage more generally. The section on the relationship between the UNESCO Convention and the 1989 Salvage Convention is also particularly important given a perceived incompatibility between them. Further analysis on whether they are indeed incompatible would have been interesting here, however several pragmatic solutions to the issue are suggested.

The final value-focused chapter starts with an initial discussion on war memorials and graves. This is another example of how successful Forrest has been in bringing key issues relating to legacy wrecks together; such a depth of analysis on war memorials more generally has rarely been included in the legal discourse and it is an incredibly valuable addition. It allows the reader to compare the recognition of maritime war graves, analyzed later in the chapter, to terrestrial war graves, highlighting the fact that "much more is needed to be parity to the treatment of sailors with soldiers" (p. 271). Although the concept of maritime war graves does not exist in international law, and the development of normative agreements to recognize them is unlikely, the chapter considers that soft law instruments could be the answer.

Chapter 8 shifts to a specific focus on the UK and its relationship with the UNESCO Convention. Thus far, the UK has declined to ratify this important convention, despite evidence that its objections do not hold water. In light of the government's 2017 announcement that it would not reconsider ratification due to more "immediate priorities," and so forgoing the opportunity to provide legacy wrecks with a significantly improved regime for protection, the arguments put forth in this chapter are incredibly welcomed. Beyond discussion of the 2015 IDI Resolution and the 2014 Impact Review and also debunking the UK's legal objections, the analysis of the UK's capacity to give effect to the UNESCO Convention demonstrates that the treaty is indeed reconcilable with UK policies, albeit with some legislative amendment. Further discussion of post-devolution developments would have been welcomed in this chapter, but perhaps this is largely beyond the scope of this particular book.

A succinct final chapter considers challenges going forward, and, as previously noted, these are live issues. Questions remain as to establishing ownership and/or abandonment of title, precisely locating all wrecks, whether any wrecks pose a hazard (and who has responsibility if so), and of course, how best to protect these wrecks' archaeological integrity and/or recognize them as war graves. Forrest notes that any balancing of interest "requires a starting point" (p. 306) that all World War I wrecks should be presumed to be of archaeological and historical value. This reflects the overriding message of the book that the place of these wrecks, and more importantly, the men and women who died on them, should be properly recognized in history—and that this can only be truly achieved with a suitable legal framework.

Maritime Legacies and the Law is an immensely enjoyable publication. Craig Forrest has taken a legally complex and multifaceted topic, and has successfully produced a very accessible and comprehensive volume, and making it a necessity for the bookshelves of lawyers, archaeologists, policymakers, heritage organizations, or, in fact, anyone with a general interest in the Great War. The analysis presented is well evidenced by reference to significant and recent publications by underwater heritage law "heavyweights," such as Professor Sarah Dromgoole, Ole Varmer, and Professor Mariano Aznar, in addition to drawing upon the vast experience of esteemed marine archaeologists with particular experience in legacy wrecks, such as Dr. Innes McCartney. Above all, this book brings together all key legal issues relating to World War I legacy wrecks for the first time, allowing this important heritage to be considered in the round, and making this book one of the first reference points for anyone researching in this area.

—Hayley Roberts, Senior Lecturer in Public International Law,
Bangor University, Wales

The South China Sea Arbitration: Legal Dimension

S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport and Hao Duy Phan (eds.) (2018) Cheltenham, Northampton: Edward Elgar Publishing. The eBook version is priced from £22/$31 on Google Play, ebooks.com and other eBook vendors, while the print edition can be ordered from the Edward Elgar Publishing website.

This edited volume on the South China Sea arbitration between the Philippines and China brings together world-leading experts on the law of the sea who provide a comprehensive and deep academic discussion on major issues, including jurisdiction and procedures, long-standing merit issues in the South China Sea (SCS) disputes (i.e., historic rights, "rock" and "island," marine environment protection, and implications of the case for the South China Sea disputes) and the development of the law of sea.

In addition to the comprehensiveness and depth of analysis, what makes this volume stand out is also the seniority and professionalism of its editors and contributors. S. Jayakumar, as Singapore's former deputy prime minister, was a member of Singapore's delegation to the Third Law of the Sea Conference. The president of this Conference, Ambassador-at-Large Tommy Koh, acted as Singapore's agent in the case concerning Pedra Branca before the International Court of Justice (ICJ) as well as in the Land Reclamation case before the International Tribunal for the Law of the Sea. Robert Beckman has written extensively on issues of the law of sea and the South China Sea. Chapter contributors are undoubtedly top experts on the respective subjects in their chapters. For example, Clive Symmons published a book in 2008 on historic concepts including historic waters, historic rights and historic titles while Myron Nordquist has authored or edited more than 60 books, including the eight-volume *United Nations Convention the Law of the Sea, 1982: A Commentary*.

This volume was published in a very timely manner—one and a half years after the Final Award of the South China Sea Arbitration was rendered in July 2016—and serves as a critical reading for scholars and students of public international law, the law of the sea, international dispute settlement and international relations. Policy makers and governmental officials, among others who have been following the study on the South China Sea disputes for decades, will also find it critically important to read.

My deepest impression on this volume is that the shared perspective of many contributors seems to focus on the contribution of the Arbitral Tribunal. For example, Erik Francky, after commenting on the ICJ's reluctancy to interpret Article 121 in the five case it headed, praised the Arbitral Tribunal for clarifying this puzzling provision in a detailed manner and, how "for the first time, [it was] given its interpretation on the correct reading of this enigmatic provision" (p. 175). Niluefer Oral spoke highly of the tribunal because "the final award sets a precedent on a number of fronts, including the Arbitral Tribunals' clear pronouncements on the nature of the obligation of states to protect and preserve the marine environment under Part XII" (p. 224). Tara Davenport considers the Final Award as a landmark ruling, "not only because of its contribution to our understanding on the substantives aspects of the law of the sea, but also in the way the Arbitral Tribunal conducted the proceedings in the face of the non-appearance of one party" (p. 98). One of the very few differing views on the ruling is reflected in Myron Nordquist's chapter, which criticized the Arbitral Tribunal for redefining conference-negotiated political determinations "when it ought to have confined itself to the imperfect compromise text as adopted and written in UNCLOS" (p. 202).

Bearing in mind the necessity of maintaining the balance of "keeping original text" and "breaking ground by judicial practice," instead of commenting on the respective topics in this volume, my following observation will address issues embedded therein. Examples include the weight of treaty law and customary international law, the impact of the Final Award on the development of the law of the sea and legal order, the future trend of "expanded" jurisdiction of legal intuitions under UNCLOS, and the effectiveness of UNCLOS implementation.

The Weight of Treaty Law and Customary International Law

The interplay between "treaty" and "custom" is a topic of great importance in both practice and theory. One of the debatable questions is the preference between sources of international law. Some argue that rules established by treaty will take precedence. It is also argued, however, that international treaties and international customs are equally valid sources of international law. The question on whether the ratification of UNCLOS will deprive a coastal state's claimed "historic right," one of the major issues addressed by the Tribunal, is a typical example of the weight given to treaty law and customary international law. However comprehensive a treaty UNCLOS may be, and however significant its status, it cannot—and does not—extinguish or supersede all historical maritime rights existing under general international law. The preamble of UNCLOS "affirms that matters not regulated by this Convention continue to be governed by the rules and principles of general international law." The *alfa et omega* of the international law of the sea is comprised by more than just UNCLOS. Rather, the concept of "historic rights" is one which is long supported by state practice and international jurisprudence, both before and since UNCLOS. As such, historic rights to and within maritime areas continue to be part and parcel of general international law. Contrary to what the Tribunal appears to suggest, UNCLOS does not mark the end of history or extinguish historic rights that may exist in a variety of guises around the world.

Impact on the Development of the Law of the Sea

The South China Sea arbitration also raises a question on breaking the balance of the two famous doctrines in the marine system: *mare clausum* ("closed sea") and *mare librium* ("free sea"). These two doctrines generated two major principles of the law of the sea—the principle of domination ("land dominates the sea") and the principle of freedom of the high seas. UNCLOS is a package of deal after decades of hard negotiation, aiming to maintain a delicate balance of different interest groups. UNCLOS, the combination and compromise of the two principles, not only absorbed the coastal states' diversified claims on maritime rights, but also maintained the principle of freedom on the high seas, limiting the rights of coastal states in the exclusive economic zone (EEZ) to economic activities. The existing practice of litigation or arbitration shows that the manner and approach concerning the interpretation and application of some provisions of UNCLOS laces prudence's and needs to be carefully reviewed. One example is the interpretation and applicability of Article 121 and Article 298 in the SCS arbitration case.

Impact on Legal Order

So far, this case is the first attempt by a claimant state in the SCS to refer the dispute to a third-party forum. However, it does not make a desired contribution to resolving the real dispute between the two parties. The disputes on territory and maritime delimitation remain unsolved. The implication on the political front, however, is far more significant than its legal counterpart. The ruling has incentivized ASEAN and China to accelerate negotiations for finalizing a code of conduct (COC) for the SCS. The ruling has also created an opportunity for the Philippines and China to restart bilateral talks on the dispute. Following the example of China and the Philippines, China and Vietnam agreed to make good use of the border negotiation mechanism between the two governments and seek a fundamental and long-term solution to the maritime disputes in the SCS.

In the short term, the Arbitration Case has increased tensions in the South China Sea and delayed both cooperation and progress toward an agreed code of conduct. In the longer term, it might clarify some legal issues, but this is at the risk of undermining the international dispute settlement process. Article 298 of UNCLOS allows states to opt out of the compulsory settlement mechanism in disputes related to sovereignty, maritime delimitation, and military

activities, among others. This article was achieved through a lengthy negotiation as a compromise to meet the demands of some states that did not wish to address certain disputes through a third party. The utilization of Article 287 in such a case as the South China Sea Arbitration, which obviously involves sovereignty and maritime delimitation, in my view, could set precedence that undermines the true spirit of the dispute settlement.

Tendency of "Expanded" Jurisdiction?

The South China Sea arbitration case has thrown to the forefront a number of additional issue areas where the two sides have competing interpretations. These range from the applicability of the tribunal's award to the outstanding SCS maritime entitlement disputes to the role of enforcement rights regarding implementing the award's provisions. More broadly, the arbitration case also shone the spotlight on the abuse of the sensitive issue of "judicial law making." As a general practice, when adjudicating a dispute, international judicial institutions must identify, elaborate, and apply relevant international laws and rules to eliminate the source of the dispute. Judicial interpretations should hew to the letter and spirit of the relevant laws and rules and, ideally in contested interpretive areas, pay due regard to prevailing state practices. Disputing parties resort to international judicial institutions on the basis of their natural trust in international law and their expectation of fair redressal.

Of late, however, the principle of "judicial law making" in the international maritime jurisprudential space has been damaged by some UNCLOS-constituted arbitral body to fashion fresh legal rules that depart from the intent of the legal texts as well as prevailing state practices. Additionally, in the process of doing so, this trend has disturbed the regularity and legal stability that state parties have come to expect when they signed up to submit to the dispute settlement chapter of UNCLOS. Tony Carty criticizes the Arbitration Tribunal for overstepping in making new legal policy governing disputed islands. Some analysts raise the concern that the role of the judiciary in any legal order has to be limited to the interpretation of norms about whose meaning there is a broad social consensus.

Effectiveness of UNCLOS Implementation

UNCLOS was not intended to be comprehensive to the extent that there would be no need to create further law. This means that, although UNCLOS made use of vagueness, ambiguity, and silence at certain points and in respect of certain controversial matters, it could be regarded as legally effective to the extent that it clearly provides for a system within which to address substantive issues as they arise. The goal of UNCLOS is to provide for a system of governance rather than to deal with all substantive matters. In almost seventy of its provisions, UNCLOS refers to the possibility that the subject in question may be governed by another international instrument; bilateral or multilateral, anterior or posterior.

Rather than the UNCLOS regime itself, coastal States assume a large share of the responsibility for responding to the most pressing problems of ocean governance confronting us at this time. Because the most severe problems involve issues centered in areas under the jurisdiction of coastal States and because UNCLOS regime grants far-reaching authority to coastal States to handle matters arising within their EEZs, there is no escaping the conclusion that the burden of confronting many problems of ocean governance rests squarely with the relevant coastal States. After all, the UNCLOS regime encompasses legal arrangements that feature the devolution of authority from the center to the individual coastal States with regard to events occurring in their EEZs. It is the states' responsibility to follow up with the implementation and improvement of UNCLOS in its various forms, such as national marine legislation, ocean governance system, and state practice in ocean dispute settlement.

—Nong Hong, Executive Director & Senior Fellow,
Institute for China-America Studies

Call for Papers

JTMS Winter/Spring 2021 Issue

The *Journal Territorial and Maritime Studies* (*JTMS*) is soliciting submissions for its Winter/Spring 2021 issue. In the interest of increasing submissions for this recently launched publication, *JTMS* is offering authors of articles successfully passing peer review and selected for publication in the Winter/Spring 2020 issue an honorarium of $1,000. *JTMS* is an interdisciplinary journal of research dealing with territorial and maritime issues and is sponsored by the Northeast Asia History Foundation with editorial offices hosted by Yonsei University in South Korea. The Journal provides an academic medium for the announcement and dissemination of research results in the fields of history, international law, international relations, geography, peace studies, and any other relevant discipline. The journal covers all continental areas across the world, and it discusses any territorial and maritime subjects through the various research methods from different perspectives; moreover, practical studies as well as theoretical works, which contribute to a better understanding of territorial and maritime issues, are encouraged.

For consideration in the Winter/Spring 2021 issue, manuscripts should be submitted electronically to jtms@yonsei.ac.kr by September 1, 2020. Submitted papers should include four major sections: the title page, structured abstract, main body, and references. The title page should contain the title of the paper, the author's name, the institutional affiliation, and keywords. To be considered, manuscripts must follow the *JTMS* style guide available on our website. A length of maximum 9,000 words is preferred for an article, including endnotes, and approximately 2,000 words for a review. Inquiries may be sent via the email address provided above.

Our style guide and other journal information may be found on our website at:
http://www.journalofterritorialandmaritimestudies.net/.

JTMS Call for Blog Entries

The blog of the *Journal of Territorial and Maritime Studies* welcomes submissions for blog entries. This forum is intended to discuss topics related to recent territorial and maritime news, research, and policy. It is hoped that this blog will help

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bring a fresh perspective on how to deal with territorial and maritime issues and the complexities these issues present.

Those wishing to submit a blog post can send their post to jtms@yonsei.ac.kr along with the author's contact info, bio, and a recent photo.

Style Guide

General Guidelines

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

Length: Research articles should be no more than 9,000 words, commentary essays no more than 4,000 words and Book Reviews no more than 1,500 words.

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

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

Biography: Author's biographical statement (75 words or less) must be underneath his/her contact information. This will be edited and published in the *Journal of Territorial and Maritime Studies*.

Headings: *JTMS* uses three levels of headings. Major headings (heading level 1) is left justified in bold with the first sentence following the heading indented. Secondary heading (heading level 2) is left justified in italic with the first sentence after the heading indented. Tertiary heading (heading level 3) is left justified in italic with the first sentence after the heading beginning on the same line.

Tables & Figures: Insert each table or figure on a separate page at the end of the text. Indicate the position of the table or figure in the text (e.g., Insert Table 2 here). The page containing the table or figure should be placed after the page that first references the table/figure in the text. Authors have the responsibility of providing high quality figures and other kinds of illustrative materials. Supporting materials may be submitted as hard copies for scanning or through e-mail submission. Please forward all materials to the editor.

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.

One File: Submit the paper as one file in the following order: Title, Structured Abstract, Text, Endnotes, Tables and Figures, and Biographical Statement.

Structured Abstract

Article Classification: JTMS categorizes articles into 6 of the following classifications: Research Paper, Viewpoint, Technical Paper, Conceptual Paper, Case Study,

and General Review. Please write *one* of the categories in which your paper belongs on the article title page.

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

Structured Abstract Samples

Sample 1

Article Type: Research Paper

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.

Sample 2

Article Type: Research Paper

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.