EDITOR: Jongyun Bae
Yonsei University (South Korea)

MANAGING EDITOR:
Lonnie Edge
Hankuk University of Foreign Studies (South Korea)

BOOK REVIEW EDITOR: Alexander Hynd

EDITORIAL BOARD

Pablo Ferrara
Universidad del Salvador (Argentina)

Johan Galtung
Transcend International (Norway)

Yong-Chool Ha
University of Washington (USA)

Doo-young Kim
Korea University (Korea)

Marcelo Kohen
Graduate Institute Geneva (Switzerland)

Byongtaek Lee
Northeast Asian History Foundation (Korea)

Sung-Yoon Lee
Tufts University (USA)

James Lewis
Oxford University (UK)

Martin Pratt
Bordermap Consulting (Canada)

Edgardo Sobenes
ESILA (Netherlands)

Harvey Starr
University of South Carolina (USA)

Kazuhiko Togo
Kyoto Sangyo University (Japan)

Krista Wiegand
University of Tennessee (USA)

Xuetong Yan
Tsinghua Univerisity (China)

Keyuan Zou
University of Central Lancashire (UK)

PUBLISHER: Rhonda Herman
McFarland & Company, Inc., Publishers

STAFF: Adam Phillips (Business Manager); Layla Milholen (Editorial); Jessica Wilcox (Production)

Journal of Territorial and Maritime Studies is co-edited by Yonsei Institute for North Korean Studies and the Northeast Asian History Foundation. It is published twice a year—Winter/Spring and Summer/Fall—by McFarland & Company, Inc., Publishers, Box 611, Jefferson, North Carolina 28640 U.S.A., 336-246-4460. ISSN 2288-6834. Rhonda Herman, president. Robert Franklin, founder and editor-in-chief. Steve Wilson, vice president and editorial director. Karl-Heinz Roseman, vice president, sales and marketing. Lisa Camp, executive editor. Kathi Price, finance officer. Kim Hadley, director of operations.

Annual subscription rates are $125 for institutions and $50 for individuals. Subscribers outside the United States add $20 for additional postage. Subscription inquiries and back issue requests to McFarland by mail at Box 611, Jefferson NC 28640, by phone at 800-253-2187, by fax at 336-246-5018, or online at www.journalofterritorialandmaritimestudies.net.

Editorial Correspondence should be addressed to Jongyun Bae, Department of Political Science, Yonsei University, Seoul, South Korea 46056 or emailed to jtms@yonsei.ac.kr. For additional information, visit www.journalofterritorialandmaritimeaffairs.net.

Indexed and abstracted in Proquest, JSTOR Security Studies database, Current Geographical Publications, Searchworks, the Digital Library of Korean Studies, SUNCAT and Researchgate.

Published by McFarland & Company, Inc., Publishers, December 31, 2020

Entire contents © Yonsei University

Journal of Territorial and Maritime Studies

Volume 8, No. 1
WINTER/SPRING 2021

The Potential Impact of Piracy on the ACFTA

Implementation of "Due Regard" Obligation Under the LOSC

Liability of Flag States in Case of Vessel-Based Pollution

Large Powers' Small Island Strategies in the Indo-Pacific

Cross-Border Exchanges and Identity in Kyé-Ossi, Cameroon

Journal of Territorial and Maritime Studies Vol. 8, No. 1 **Winter/Spring 2021**

ISSN 2288-6834 (Print)

Contents

Editor's Comments (*Jongyun Bae*) 3

Articles

The Potential Impact of Piracy on the ACFTA: A Nigerian Perspective
(Kalu Kingsley Anele) 5

The Role of the International Seabed Authority in the Implementation of "Due Regard" Obligation Under the LOSC: Addressing Conflicting Activities
(Yu Long) 27

The Possibility of Litigation Regarding Liability of Flag States in the Case of Vessel-Based Pollution: Where We Stand in the Law of the Sea
(Julia Cirne Lima Weston) 47

Small Island Strategies in the Indo-Pacific by Large Powers
(David Scott) 66

Cross-Border Exchanges and Political Identity Cleavages in Kyé-Ossi, Cameroon
(Fred Jérémie Medou Ngoa) 86

Book Reviews 107

Call for Papers and Style Guide 113

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Editor’s Comments

Dear *JTMS* Readers,

With the world still fighting the COVID-19 pandemic, we are pleased to present the Winter/Spring 2021 issue of *JTMS* to provide some reading material we are sure our readers will enjoy. With a wide range of topics spanning the globe, we hope that the issue is able to provide some perspective and convey that while in some ways COVID seems to have stopped the world, the reality is that there are still many complex issues to solve and we cannot just bury our heads in the sand and ignore them until the pandemic is over. We simply do not know what the new normal will be post–COVID but we can be certain that, even if the methods we use to collaborate might change, the need for us to continue to work to address territorial and maritime issues will stay the same. On that note I am pleased to offer the following articles.

First, Kalu Kingsley Anele addresses the impact of piracy on the implementation of the African Continental Free Trade Area (ACFTA) by Nigeria. Using primary and secondary materials, the history and economic importance of the ACFTA, the nature and legal regime of piracy in Nigeria, and the potential impacts of piracy on the country’s implementation of the ACFTA were dialectically analyzed. Anele reveals that the effective implementation of the ACFTA by Nigeria requires the suppression of piracy of its waters. Consequently, the article argues for the adoption of a regional cooperation mechanism to curb the crime.

Second, Yu Long aims to discuss the role and potential of the International Seabed Authority (ISA) in filling the gap resulting from the lack of a framework for implementing the “due regard” obligation which impedes the effectiveness of the coordination of deep seabed mining and submarine cable activities in practice. Yu introduces an analytical perspective on the role of international organization concerning the implementation of the “due regard” obligation. In the context of the conflict between submarine cable activities and deep seabed mining, the article discusses what the ISA can learn from other international organizations’ experience. Yu proposes that the ISA, which is the competent international organization over deep seabed mining, can develop a coordinating framework for the implementation of “due regard” obligation through the exercise of its rule-making function.

Third, Julia Cirne Lima Weston examines whether the current International Law of the Sea framework allows for litigation on flag state liability on the grounds of lack of compliance with pollution prevention provisions in the Law of the Sea Convention’s Part XII. Her article analyzes the issue according to the current legal

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

and jurisprudential background, taking into consideration the international law of state responsibility and due diligence obligations. The aim is to establish whether there the possibility for this liability in international law. Weston finds that the existing framework would allow for litigation regarding flag State liability for oil spills pursuant to the provisions of Part XII of the Law of the Sea Convention.

Fourth, David Scott's offering delineates, explains and evaluates large powers' use of small islands in the Indo-Pacific. To this end, island studies, the dual land-sea features of islands, relevant balancing theory, and the geopolitical and geo-economic nature of islands in the Indo-Pacific are explained in the introduction. This is followed by main sections which pinpoint island strategies pursued by its leading powers China, India, Japan, the U.S. and France. Finally, the article concludes with puzzles and paradoxes arising from the preceding evaluation, and the continuity and change concerning the strategic value and place of islands for the U.S., France, India, China and Japan in the Indo-Pacific. Scott finds that China's success in island strategy has generated greater use of island resources by other states and mutual strategic cooperation over their island assets. Secondly, he finds that Alfred Mahan's concepts of *seapower* value in islands are still valid but have been supplemented by various changes.

Fifth, Fred Jérémie Medou Ngoa explores the potential and dynamics of politics among heterogeneous populations of cross-border territories. Kyé-Ossi is at the crossroad of trade between Cameroon (host), Gabon and Equatorial Guinea. For that reason, it has attracted people from different ethnic and national backgrounds. However, political cleavage is strong between Ntoumou (indigenes) and Bamoun (settlers or non-indigenes). Using data obtained from participant observation and semi-structured interviews, Medou Ngoa indicates that while the voting behavior of the indigenous Ntoumou is determined by ethno-regional identification with the Cameroon Peoples' Democratic Movement (CPDM) party, some Bamoun settlers have also decided to support the same party as a means to survive outside their home constituency. Medou Ngoa finds that some indigenous people living in cross-border territories do not always take a positive view of a political behavior against their chosen political leader or party in their "own" constituency.

I would like to thank our editorial board and staff for their dedication to promoting *JTMS* and improving the quality of the journal in spite of the difficult conditions of 2020. I would also like to thank our authors and readers for their continued support. The year of 2020 was not an easy year and I think I can speak for all of us that I am glad to see it go. On that note, I would like to wish everyone involved in *JTMS* in any capacity a Happy New Year and a safe and healthy 2021.

Jongyun Bae
Editor

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

The Potential Impact of Piracy on the ACFTA: A Nigerian Perspective

Kalu Kingsley Anele

Structured Abstract

Article Type: Research Paper

Purpose—While the literature on free trade agreement and piracy abound, there are no insights on the implications of the crime on such agreements. This paper aims at filling this lacuna by addressing the impact of piracy on the implementation of the African Continental Free Trade Area (ACFTA) by Nigeria.

Design, Methodology, Approach—In this paper, primary and secondary materials were deployed. Thus, the history and economic importance of the ACFTA, the nature and legal regime of piracy in Nigeria, and the potential impacts of piracy on the country's implementation of the ACFTA were dialectically analyzed using both primary and secondary materials.

Findings—The results provided significant support to the author's thesis that piracy would adversely implicate on Nigeria's implementation of the ACFTA.

Practical Implications—The study revealed that the effective implementation of the ACFTA by Nigeria requires the suppression of piracy off its waters. Consequently, the study advocated for the adoption of a regional cooperation mechanism to curb the crime.

Originality, Value—The originality of this paper is strengthened by the dearth of scholarly papers linking piracy to the ACFTA and the fact that the result of the thesis reveals that though piracy off the Nigerian waters threatens the implementation of the ACFTA by Nigeria, the use of regional cooperation platform provides a veritable anti-piracy model to curb the crime.

Keywords: ACFTA, LOSC, Nigeria, piracy, SPOMO Act

No. 103, 120, Geumgang-ro 321beon-gil, Geumjeong-gu, Busan (Jangjeon-dong, Gyerim Apt.), phone: 01064670232, email: kkanele@gmail.com

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 5–26 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.5 © 2021 Yonsei University

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

I. Introduction

The attainment of economic integration declared by African countries under the aegis of the African Union (AU) post-colonial control of the continent has continued to dominate the continent's political space for more than half a century. Ultimately, the germane goal of AU "is full political and economic integration leading to the United Africa."[1] A slew of studies has suggested that the realization of this ultimate goal is feasible,[2] which implies that there is a need to engage in the establishment of structures toward that end. Ultimately, the African Continental Free Trade Area (ACFTA) is the vehicle through which AU intends to achieve sustainable economic development.[3] The ACFTA will be comprehensive in its attempt to eliminate tariff and non-tariff barriers to trade in goods and services in Africa; thereby establishing "a stepping stone to an African customs union and, later, a fully-fledged African economic community."[4]

Aside from being a member of the Economic Community of West African States (ECOWAS) and having established domestic economic programs, such as the Economic Recovery and Growth Plan (ERGP), Nigeria could utilize the ACFTA as a conduit for fast-tracking its economic development. Consequently, a combined implementation of ERGP and the ACFTA would increase the import and export potential of Nigeria.[5] Besides, the ACFTA—which emphasizes intra–African trade—requires an increased investment in transport infrastructure, especially ports, in Africa.[6] Shipping, as part of logistics, is critical in the realization of the objectives of the ACFTA. Nonetheless, insecurity in the waters surrounding Africa may limit the attainment of the goals of the ACFTA. For example, the Gulf of Aden (GOA) and the Gulf of Guinea (GOG)—which are critical navigational routes for regional and international trade and shipping—are prone to piracy attacks (see Table 1). These attacks have both economic and humanitarian consequences on these African countries.[7]

Research has shown that GOG is currently the most dangerous navigational route in the world.[8] More pointedly, the perpetrators of these attacks against vessels are Nigerian pirates and most of the piratical acts occur off the coast of Nigeria.[9] Further, Kiourktsoglou and Coutroubis argue that pirates attack all kinds of vessels, *to wit*, general cargo, bulk carriers, tankers, ro-ro, and yachts[10]; which implies that vessels engaging in economic activities in Nigeria under the ACFTA (export and import of goods and services) may be hijacked by pirates. Also, the occurrence of piracy in the waters of Nigeria would lead to high costs of shipping in the country because of the increase in insurance premiums and rerouting of vessels. More pointedly, some shipping lines may avoid calling at Nigerian ports or traversing through the country's waters.

Against this backdrop, this study attempts to fill the lacuna in the effect of piracy on the implementation of the ACFTA by Nigeria. The study uses primary materials—legal instruments and case laws—and secondary materials, like scholarly publications, to dialectically analyze the effect of piracy in Nigeria's implementation of the ACFTA. The adoption of this methodology is significant because the research essentially requires the interpretation of extant legal instruments, case laws and a critical assessment of scholarly publications and data to analyze the likely impacts

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

of piracy on the implementation of the ACFTA by Nigeria. Thus, the study dialectically analyzes the development of the ACFTA and its potential economic benefits to Nigeria, the history, nature and legal framework of piracy in Nigeria, the potential threats posed by piracy to Nigeria's implementation of the ACFTA, and measures to curb the crime. The study observes that piracy off the Nigerian waters has economic, political, and sociocultural effects on the implementation of the ACFTA by Nigeria. And in line with the ACFTA protocols that suggest that the Member States should take action for their security interests[11]; this study recommends regional cooperation mechanisms to combat the crime.

II. Overview of the Development of the ACFTA

2.1 The Historical Development of the ACFTA

According to Nanga, the ideation toward a single African Economic Community (African market) has been linked to the pan–Africanism that was formally deliberated by post-independent African countries in the early 1960s; which indicates that such an economic masterplan for Africa is not new.[12] During the process of establishing the Organization of African Unity (OAU), the importance of African economic unity was muted. Nkrumah reiterated the significance of establishing such a market that would significantly promote "the true requirements of the African states. Such an African Market presupposes a common policy for overseas trade as well as for inter–African trade and must preserve our right to trade freely everywhere."[13] Though it was envisaged that such an economic union would require, *inter alia,* a single African currency, an African central bank, and an African confederal political structure[14]; the reality is that only African coordination and consultation have been achieved.

In the absence of any visible changes in the economic trajectory of most African countries, there were many attempts to establish a regional economic pact that will trigger the much-anticipated economic development in Africa, like the 1970s Lagos Plan.[15] The Lagos Plan was subsequently replaced by the African Economic Community (AEC) signed in Abuja by 51 OAU states. As AU replaced OAU, the AEC was substituted by the New Partnership for Africa's Development (NEPAD). Nanga submitted that the combination of the AEC and the NEPAD became the foundation that culminated in the formation of AU's new Pan-Africanist project, "Agenda 2063: The African We Want," which has the ACFTA at its critical stage.[16]

According to Berahab and Dadush, the ACFTA exists to curb the rising winds of protectionism, promote "the welfare of the world's poorest and least integrated continent … aims to liberalize goods and service trade, facilitate investment, and in a second phase, address issues such as intellectual property rights and dispute settlement."[17] The ACFTA will oversee "a market of 1.2 billion people and a Gross Domestic Product (GDP) of 2.2 trillion dollars."[18] Lastly, the need to improve the transport infrastructure in Africa to facilitate the ACFTA suggests that the security

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

of such infrastructure (like ports) and the promotion of the security interest of Member States,[19] is a very significant aspect of the agreement.[20]

2.2 A Dialectical Analysis of the ACFTA

Regional cooperation and regional integration are suggested to be key to tackle development challenges that cannot be solved at the national level. It has long been on the agenda of African countries, regions, and regional organizations to address the issue of "human security and mobility to rural livelihoods, trade, infrastructure, food security, environment, and climate change."[21] Regional integration in terms of economic development is deemed to—*inter alia*—"improve efficiency as a result of competitive pressures among rival firms."[22] In contemporary Africa, regional economic and political integration remains a priority in the landscape of the continent. Consequently, it is argued that the ACFTA exists not only to significantly facilitate the growth of the economies of Member States but also to create "a single market for goods and services, facilitated by the movement of persons"[23] within the continent.

The ACFTA coverage spans over a market of 1.2 billion people and a GDP of about US$2.5 trillion that extends to all 55 Member States of the AU.[24] Comparatively, the population—including GDP—of Africa is approximately that of India, but it is divided into 55 AU Member States.[25] Many of the African countries are too small to contribute to "the economies of scale and investments necessary for industrial growth: 21 have a GDP less than $10 billion."[26] The ACFTA attempts to integrate and consolidate Africa into a US$2.5 trillion market and expurgate the average tariffs of 6.9 percent that businesses encounter when they trade across Africa's 107 unique land borders.[27] Also, the ACFTA seeks to eliminate "substantial non-tariff barriers, regulatory differences, and divergent sanitary, phytosanitary and technical standards that raise costs by an estimated 14.3 percent"[28] in Africa.

In addition to the above review, it is imperative to understudy the regional economic communities (RECs)—SADC, EAC, COMESA, ECOWAS, ECCAS, IGAD, AMU, and CENSAD[29]—that are the drivers of the ACFTA. The establishment of these RECs was to advance the process of regional integration. The existence of the RECs has culminated in support programs, like the infrastructure development of the regions and the facilitation of compensation. For example, the ECOWAS Regional Development Fund (ERDF) has been instrumental in lending support to regional infrastructure projects, including fiscal compensation.[30] The "ACFTA not only ensures the continuation of the benefits accrued from the deeper integration in the RECs but also provides for alignment of RECs' laws and regulations."[31] Furthermore, the ACFTA facilitates the RECs to realize the goals of integration in "market size and large-scale investment from Africa and outside the continent."[32] In all, where there is an inconsistency between the ACFTA and any regional agreement—like the RECs—the former "shall prevail to the extent of the specific inconsistency, except as otherwise provided in the Agreement."[33] It is submitted that the existence of these RECs is pivotal in the implementation and actualization of the goals of the ACFTA.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Further, the success of the ACFTA depends on the availability of infrastructure, peaceful coexistence among African countries, the existence of democratic governance, the observance of the rule of law, and the introduction of productive fiscal, monetary, and exchange rate policies.[34] Nonetheless, Africa's ability to effectively implement the ACFTA is stifled by the continent's contribution of only 3 percent of the world's GDP, the fact that one-third of the documented global conflicts are in Africa, the "median Doing Business Ranking of African countries is 150 out of 190 countries covered and that on the WEF Competitiveness Ranking is 117 out of 137 countries covered."[35] Despite the above limitations, Massimiliano Cali et al. submit that the increasing quest for regional integration, like the ACFTA, is triggered by the "limited progress of the multilateral trade agenda in the last two decades."[36]

After the epochal signing of the ACFTA on May 21, 2018, it entered into force on May 30, 2019, having obtained the 22 ratifications by Parliament as contained in the Agreement.[37] More importantly, after signing the Agreement, Nigeria has ratified the ACFTA,[38] which is a step in the right direction. The ratification of the ACFTA by Nigeria implies that the country should secure its waters to properly and effectively implement the ACFTA. In a nutshell, Akuo opines that the purpose of the Agreement is to establish a progressive liberalization of trade among the Member States through sequential negotiations that would culminate in the establishment of a customs union.[39] Hence, the Protocol on Trade in Goods (PTGs), the Protocol on Trade Services, and the Protocol on the Rules, and Procedure for Dispute Settlement aspects of the AFCTA have been successfully negotiated. Given the nature of this study, the PTGs are the focal point of this research.

2.3 The Protocol on Trade in Goods

The objectives of the PTGs include the progressive elimination of tariffs and non-tariff barriers to trade, the enhancement of the efficiency of customs procedures and trade facilitation, the improvement of cooperation on technical barriers to trade and sanitary and phytosanitary measures, the promotion and encouragement of regional and continental value chains, and fostering socio-economic development, diversification, and industrialization.[40] A cursory look at this provision reveals that goods can move from one Member State to another or to the other Member States. For example, Nigeria can import or export goods to South Africa, on the one hand, or to South Africa, Ghana, Egypt, and Cameroon, on the other hand. To that end, effective maritime domain awareness, secured and safe ports, and secured navigational routes are pivotal in achieving these transactions.

The PTGs, in Articles 4 and 5, contain the non-discrimination provisions of Most-Favored-Nations (MFN) and the national treatment, respectively. Given the MFN doctrine, State Parties are expected to accord each other—on a reciprocal basis—preferences that are similar to those given to Third Parties in the implementation of the Protocol. As Akuo observed, it is without affecting the "arrangements which do not impede the Protocol and are extended *erga omnes* to State Parties; or arrangements between Parties to the Agreement that further the objectives of the

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Agreement and are extended reciprocally to other Parties,"[41] including other arrangements made before the coming into force of the ACFTA.[42] It is instructive to note that the PTGs provisions on MFN and the national treatment only expanded the opportunities to engage in regional trade, as Nigeria can, in addition to the trade windows opened by the ACFTA, continue with other existing trade agreements it entered with other countries, as long as they do not impede the application of the ACFTA. Consequently, it potentially increases the volume of trade by Nigeria, which implies heavy vessel traffic in Nigerian waters.

Article 7, under Part III titled "Liberalization of Trade," the PTGs provides for the elimination of tariffs, which is significant in the attainment of the objectives of the ACFTA. Paragraph 1 of Article 7 of the PTGs stipulates that State Parties shall steadily expurgate import duties or charges that have similar "effect on goods originating from the territory of any other State Party following their Schedules of Tariff Concessions contained in Annex 1 to this Protocol." Additionally, Parties to the Agreement shall not impose any new import duties or charges having a similar effect on goods originating from the territory of any other State Party, except following the Protocol.[43] The import of these provisions, simpliciter, is to encourage the transportation of goods from one African country to another since barriers have been expurgated. Accordingly, the removal of tariffs, import duties, and other charges would culminate in an unprecedented increase in the number of vessels in the waters of Nigeria.

2.4 The Potential Impact of the ACFTA on Nigeria's Economic Development

There are significant objectives contained in the ACFTA. They include the progressive elimination of tariffs and non-tariff barriers, the enhancement of efficiency of customs, trade facilitation and transit, the facilitation of socio-economic devel-

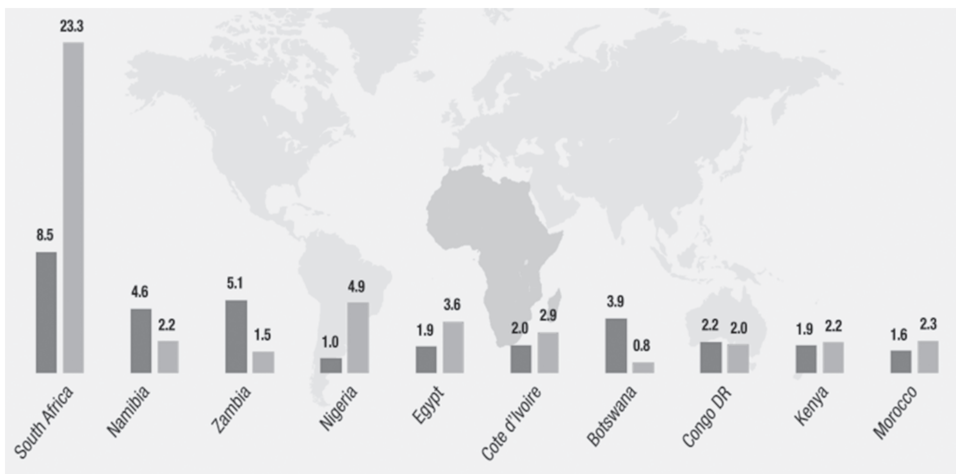


Figure 1. Top 10 intra–African trade contributors (US$ billion). Source: "AFCFTA: Thriving in New Africa," PricewaterhouseCoopers (PWC), https://www.pwc.com/ng/en/assets/pdf/afcfta-2019.pdf, p. 2.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Major export trading partners and percentage share in Q1, 2020 export trade

Country	Share
India	15.61%
Spain	9.87%
Netherlands	9.72%
South Africa	7.82%
Cameroon	7.39%

Major import trading partners and percentage share in Q1, 2020 import trade

Country	Share
China	26.28%
Netherlands	11.14%
United States	10.45%
India	7.92%
Belgium	6.11%

Figure 2. Major import and export partners in 2020. Source: "Foreign Trade in Goods Statistics (Q1 2020)," NBS, June 2020, https://www.nigerianstat.gov.ng/, p. 2.

opment, the development, diversification, and industrialization across Africa, and the development and promotion of regional and continental value chains.[44] It is significant to note that the signing and subsequent ratification of the ACFTA by Nigeria is an acceptance of the obligations of the Agreement.[45] Piracy adversely implicates on the objectives of the Agreement in terms of Nigeria's exportation of petroleum products and raw materials, which account for about 88 to 95 percent of all the exports and 94 percent of export earnings of the country.[46]

Moreover, as the seventh most populous country in the world and the largest economy in Sub-Saharan Africa,[47] Nigeria is a significant market for "many economies and companies looking to make inroads with their products and services."[48] In terms of intra–African trade, Figure 1 suggests that as of 2017, Nigeria was the 4th contributor to trade among African countries. Aside from its robust market for African goods and services, Nigeria stands to gain from the ACFTA as there is an opportunity to increase its volume of exportation to other African countries. Therefore, Nigeria plays a significant role in regional trade in Africa and will contribute immensely to trade relationships with other African countries under the ACFTA.

Jibrilla suggests that the ACFTA can be beneficial to Nigeria if the country develops its industrial and agricultural sectors.[49] Consequently, the ACFTA would boost employment opportunities, increase food security through reduction to barriers on trade in agricultural products, enhance the competitiveness of Nigerian industrial

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

products through harnessing the economies of scale of a continental-wide market, and increase the rate of diversification of the Nigerian economy and the country's ability to supply its import needs from its resources.[50] Besides, the Agreement would facilitate the allocation of resources, enhance competition and reduced-price differentials, instill the growth of intra-industry trade through the regional value chain, and the development of geographically based specialization.[51] Thus, the ACFTA would encourage the diversification of the economy of Nigeria from extractive commodities, like oil and gas, "towards a more balanced and sustainable export base."[52]

Similarly, Nigerian small and medium-sized enterprises (SMEs) would benefit from the ACFTA. As an illustration, the Agreement creates an enabling environment where the SMEs in Nigeria would easily supply inputs to larger regional companies, who would subsequently export the goods to the final consumers.[53] From the standpoint of agriculture, since the SMEs play a significant role in the agricultural development in Nigeria, the existence of the ACFTA would be a veritable mechanism to strengthen the export potential of the agricultural SMEs in Nigeria. This is significant for cash crops that Nigeria has a comparative advantage in their cultivation and exportation.[54] Again, in terms of non-agricultural goods, the ACFTA will benefit Nigeria since the country is the largest petroleum exporter with a share of 45 percent of intra–African exports.[55]

In terms of expected impact on businesses in Nigeria, 65 percent of businesses anticipate that the ACFTA could assist them in overcoming their major challenges "while 22 percent accentuate them."[56] In the same vein, 34 percent of large companies presume that the ACFTA could highlight their difficulties, in contrast to 25 percent of medium companies and 18 percent of small companies.[57] It has been suggested that the majority of the companies who expect the ACFTA to ease their business obstacles reached this conclusion because of the improved ease of doing business (32%), due to infrastructure improvement (24%), and the enlargement of markets for Nigerian producers (17%) as a result of the Agreement.[58]

Overall, it is imperative to expand trade between Nigeria and other African countries given the availability of natural resources in Nigeria. Presently, only South Africa and Cameroon were listed as major export trading partners with Nigeria in the first quarter (Q1) of 2020 (see Figure 2). On the other hand, according to Figure 2, there was no African country among the major trading partners with Nigeria in the Q1 of 2020. The import of the data and the previous analysis is that trading between Nigeria and other African countries needs to be broadened due to the ACFTA. The realization of this objective may be derailed due to piratical acts in Nigerian waters.

III. The History and Nature of Piracy in Nigeria

3.1 Historical Development of Piracy in Nigeria

Globally, the history of piracy depicts that the crime is an antiquated phenomenon that dates back hundreds of years,[59] which has political, humanitarian, and economic ramifications. Winkel observes that the politics of piracy, including its

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

countermeasures, is a theme that resonates with historians, scholars of international politics[60] and trade, and shipping and ocean governance experts. While piracy has become widespread and a major threat to the "booming global seafaring,"[61] attacks occurring off the GOG and "the Horn of Africa are severely disrupting international trading"[62]; with a propensity to derail the ACFTA and other regional economic activities. Due to the global nature of the effects of piracy, regional antipiracy measures—among others—are essential in curbing the crime.[63]

Historically, piracy in Nigeria has its origin in colonial legislation.[64] The Slave Trade Act of 1825—which was introduced by the British colonial government—provided that any British subject who conveyed a person with the intent of bringing him or her as a slave to any place would be guilty of piracy.[65] Nevertheless, modern piracy in Nigeria is an amalgam of many socioeconomic activities along the coast of Nigeria, which are summarized thus: from palm oil trade to fishing, attractive cargo imported through the waters of Nigeria, and the exploitation and exportation of crude oil, including chemicals.[66] Despite the contributions of smuggling and trafficking of persons, arms, and drugs in the heightened piratical acts in Nigerian waters, the activities of crude and refined oil thieves, resource control agitators, and political tugs in the oil-producing communities in the Niger Delta region of the country sustained piracy.[67]

Generally, poverty, unemployment, the neglect and exploitation of people, and the absence of rule of law and democratic governance are some of the factors that contribute to the emergence and sustenance of piracy in the global community.[68] Panjabi succinctly captures some of these factors as "virtual islands of prosperity surrounded by a sea of poverty, hunger, and misery."[69] Moreover, contemporary piracy involves using the global positioning system to track potential vessels targeted for attack, deploying small arms and rocket-propelled grenades to intimidate ships to reduce speed or stop to allow the pirates to board the vessels, obtaining information about the vessels' manifests and schedule, and supporting the use of mother ships (like large merchant vessels and fishing boats).[70] From the foregoing, piracy in Nigerian waters poses a threat to the implementation of the ACFTA by the country.

3.2 Assessment of Nigeria's Piracy Legal Regime

In light of the foregoing, it is apposite to briefly review the legal regime and institutional framework for piracy suppression in Nigeria. This is significant because the implementation of measures to combat piracy in Nigerian waters requires extant anti-piracy legislation and maritime regulatory and security agencies. In 2019, Nigerian government enacted the Suppression of Piracy and Other Maritime Offences Act (the SPOMO Act) to combat piracy off the country's waters. The importance of the SPOMO Act is that it incorporated the definition of piracy under international law,[71] which states that piracy involves an act of violence against a ship for private ends on the high seas involving two vessels.[72] Given the inherent limitations in the definition, like the high seas principle, the SPOMO Act, in section 4, includes other maritime offenses, like armed robbery against a ship, which could occur in territorial waters.[73] So, Nigeria has a robust legal regime to combat piracy.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Notwithstanding, Bueger observed that the existence of piracy legislation may not lead to proper enforcement.[74] Consequently, the sentencing of three pirates delivered by Justice I.M. Sani of the Federal High Court sitting in Port Harcourt, River State, in the first piracy case in Nigeria buttresses the argument that the existence of anti-piracy legislation does not lead to its proper enforcement.[75] These pirates were fined the sum of 20 million naira (US$52,000) each for the crime, contrary to section 12 (1) of the SPOMO Act that provides life imprisonment and a fine of not more than 50 million naira for convicted pirates. This author observes that though the conviction of the pirates is a laudable development in the suppression of piracy in Nigeria, the lenient sentencing will not deter other pirates from engaging in piratical acts in the future.

Additionally, the Nigerian Maritime Administration and Safety Agency (NIMASA)[76] was established to enforce all maritime security conventions, regulations, and guidelines.[77] In cooperation with the Nigerian Navy, NIMASA is saddled with the responsibility of monitoring the coastline of Nigeria. To prevent vulnerable vessels, like ships that are not seaworthy, have untrained seafarers or are non-compliant to International Maritime Organization's (IMO) guidelines for the safety and security of vessels from navigating through Nigerian waters; officials of NIMASA board vessels that call at Nigerian ports for inspection.[78] Given the broad functions of NIMASA, it becomes imperative to adequately train and equip the agency's officials. Notwithstanding its counter-piracy role, the agency lacks modern surveillance facilities, regular training, and adequate funding.[79] Moreover, corruption and embezzlement of funds also limit the capacity of NIMASA, including the navy, to curb piracy in Nigeria.[80]

3.3 The Nature of Piracy in Nigeria

Table 1: The number of actual and attempted piracy attacks off the coasts of selected African countries

Country	2015	2016	2017	2018	2019	2020 (Q1)
Nigeria	**14**	**36**	**33**	**48**	**35**	**11**
Somalia	—	**1**	**5**	**2**	—	—
Benin	—	**1**	—	**5**	**3**	**3**
Cameroon	**1**	—	—	**7**	**6**	—
Kenya	**2**	**2**	**1**	—	**1**	—
Angola	—	**2**	**1**	—	—	**3**
South Africa	—	**1**	—	—	—	—
Morocco	—	**1**	—	—	**2**	—
Egypt	**1**	—	—	—	—	—

Source: created by the author from the ICC/IMB Piracy Report for 2019, 2020, p. 5, and the ICC/IMB Piracy Report for Q1 of 2020, p. 6.

Before delving into the nature of piracy in Nigeria, it is imperative to comparatively analyze the number of actual and attempted piracy attacks that occur off the coast of Nigeria. It is important to note that the above data may not be comprehen-

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

sive as many incidents may not have been reported, which distorts the level of risk in Nigerian waters.[81] A glance at Table 1 clearly shows that acts of piracy abound in the waters surrounding Africa. However, according to Table 1, since 2015, the number of pirate attacks in Nigerian waters is more than the number of attacks in the waters of the rest of the African countries combined. Using the IMB data for the first quarter (Q1) of 2020 (January to March) captured in Table 1 as a case study, while 11 attacks have taken place in the waters of Nigeria, the rest of the countries in the table have 6 attacks off their coasts. The implication is that piracy is rife in the waters of Nigeria. Hence, piracy would implicate on the country's implementation of the ACFTA.

One of the striking features of piracy in Nigeria is the profiles of the pirates in terms of what led them to the crime. It is common knowledge that most Nigerian pirates are former militants that participated in resource control agitation. Ajibola observes that after the introduction of the amnesty program by the government of Nigeria, most of the militants decided to extend their violence to the sea.[82] Additionally, some of the Nigerian pirates are remnants of armed thugs used during elections in the Niger Delta region. The Niger Delta politicians—in a bid to win elections—mobilize and arm gangs against their opponents.[83] In the absence of any form of disarmament after the elections, these armed gangs keep their weapons and use the arms to perpetrate other crimes, including piracy.[84]

Aside from being very violent,[85] Nigerian pirates specifically target tankers carrying crude oil, refined petroleum products, and chemicals.[86] Illustratively, pirates attacked a tanker sailing under the Liberian flag off the Nigerian coast.[87] Again, Nigerian pirates attack fishing trawlers and extend their attacks to other GOG countries' waters.[88] More importantly, the absence of maritime domain awareness in Nigeria contributes to the nature of piracy off its coast as there is inadequate monitoring of the country's coastline by NIMASA and the Nigerian Navy.[89] It is submitted that due to the nature of piracy in the waters of Nigeria, particularly the absence of maritime domain awareness, the import and export of goods from Nigeria to other African countries under the ACFTA would be threatened.

3.4 The Economic Cost of Piracy in Nigeria

Beyond the humanitarian effect of Nigerian piracy as seafarers and security personnel are killed,[90] there are many economic consequences linked to piracy off the Nigerian coast. Using the two globally known piracy infested waters in Africa as case studies, the economic cost of piracy of the GOA from 2015 to 2017 was US$1.3 billion (2015), US$1.7 billion (2016), US$1.4 billion (2017), while that of the GOG was US$719.6 million (2015), US$793.7 million (2016), and US$818.1 million (2017).[91] In 2018, it was estimated that Nigeria lost about US$2.74 billion in the past four years, which was for the payment of "insurance charges and other sundry surcharges imposed on Nigerian shipments because the country's territorial waters are not safe for navigation."[92] This implies that insurance charges and other surcharges will be levied on shipments involved in the ACFTA transactions, which will invariably implicate the effective implementation of the agreement by Nigeria.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Specifically, according to Nigerian National Petroleum Corporation (NNPC), piratical acts and theft of crude oil off Nigerian waters have culminated in the loss of US$750 million by the country.[93] Similarly, in the fishing industry in Nigeria, many fishing trawlers are idle because the owners of the boats are afraid to sail, thereby threatening about 50,000 jobs.[94] Further, “Nigeria stands to lose up to US$600 million in export earnings due to piracy threats to its fisheries.”[95] A glean at the data shows that piracy off the Nigerian coast potentially threatens economic activities that could emerge as a result of the introduction of the ACFTA. Put differently, the attempt by companies in other African countries to exploit the Nigerian market to sell their goods or purchase raw materials from Nigeria and the exportation of Nigerian goods to other African countries will be adversely affected by piracy.

IV. The Potential Effects of Piracy on the Implementation of the ACFTA by Nigeria

In light of the foregoing, the maritime industry is pivotal in both regional and global trade engagements and other economic activities. Therefore, 80 percent of global trade by volume as well as more than 70 percent of its value is carried through the sea.[96] Furthermore, Jariod categorically states that aside from being the most cost-effective means of moving goods and services around the world, maritime industry is an important economic sector that directly and indirectly implicates “on the prosperity of a region providing a source of income and employment for many developing countries.”[97] Consequently, a secured navigational route is crucial in the implementation of the ACFTA by Nigeria as the absence of a secured sea would impede the transportation of raw materials, regional and global trade, and energy supply.[98]

Statistically, the intra–African trade was about US$135 billion, with a growth of 9 percent year-on-year from US$124 billion in 2016.[99] While South Africa, Namibia, Zambia, and Nigeria contributed over 37 percent of the intra–African trade in 2017, Nigeria remains one of the key drivers of intra–African trade, “with its total intra–African trade growing by 8% in 2017, from a contraction of 27% in 2016.”[100] The import of these data depicts that Nigeria plays a significant role in the attainment of the objectives of the Agreement, which inform the need to address piracy off the country’s waters. There will be an increase in the cost of vessel and cargo insurance, and other surcharges will be imposed on Nigerian cargo.[101] Also, the cost of rerouting vessels due to the insecurity in the waters of Nigeria implies a high cost of exported or imported goods in Nigeria.[102]

As mentioned earlier, the Nigerian ERGP and the ACFTA have some commonalities, which will be implicated by piracy. As an illustration, both the ERGP and the ACFTA provide opportunities for the exploitation of new frontiers and expansion to larger markets for “Nigerian exports of manufactured goods and services”[103] and importation of raw materials. Hence, piracy off the Nigerian coast threatens the

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

implementation of the ACFTA and other similar agreements and programs by the country. Using the Dangote group as a case study:

> The Dangote group employs a combination of exports and FDI across Africa. It presently operates in 10 African countries including 8 where production takes place and 2 where presence is maintained by bulk exports. Plans are underway to extend production to those two countries and expand to many more countries. With AFCTA, Dangote group will expand its market share significantly across Africa, contribute significantly to job creation, and grow its net worth. Over the next 10 years, the group is projected to hold 59.4% share of the Sub-Saharan African cement market, with sales reaching 140 Mt and assets reaching N20 trillion.[104]

Another possible implication of piracy on the implementation of the ACFTA by Nigeria is that most single ship operators in Nigeria may be forced to close their business, as witnessed in the fishing subsector,[105] due to the cost implication of operating in piracy infested waters like the GOG. As many bulk carriers, container vessels, oil, and chemical tankers, among others, suspend their operations in the GOG, the effective implementation of the ACFTA by Nigeria in terms of exportation and importation of goods between Nigeria and other African countries would be jeopardized. Moreover, Jin et al. aver that most pirates target the cargo, for example, crude oil, which they sell on the black market.[106] It is observed that vessels transporting raw materials and natural resources, like crude oil, from Nigeria to other African countries are potential targets for piracy attacks in Nigerian waters.

The impact of piracy on Nigeria's implementation of the ACFTA can be addressed from its effects on trade. In linking piracy to trade, the economic impact of piracy on trade emerges as ship operators decide to change their main navigational and trading routes to avoid the threat of piratical attack.[107] Additionally, the impact of piracy on trade has been interrogated and Morabito and Sergi argue that "maritime piracy affects international trade through an increased insecurity concerning the delivery of goods."[108] The effect of ship operators changing their trade and navigational routes, increasing insecurity regarding the delivery of goods, and shipping companies going out of business or suspending operation in the GOG is that Nigeria may not be able to fulfill its obligations as specified in the ACFTA agreement.

This study argues that piracy implicates the creative economy, the art-craft industry, and the tourism sector—which are critical aspects of the socio-cultural and economic development of Africa—in terms of the implementation of the socioeconomic aspect of the ACFTA by Nigeria.[109] Though there is limited scholarship on the impact of piracy on the art-craft industry, the tourism sector, and the creative economy, Anele has argued elsewhere that piracy threatens coastal tourism and import and export of art-craft items, which adversely implicate on the art-craft industry, the tourism sector, and the creative industry.[110] Hence, the sale of the art-craft items or raw materials for producing art-craft items may be hampered as vessels transporting these items are hijacked, whereas African tourists visiting Nigerian tourist locations through the sea are exposed to kidnapping and torture due to piracy in Nigerian waters.[111]

Summarily, it is irrefutable that piracy adversely implicates on the implemen-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

tation of the ACFTA by Nigeria in terms of actualizing the socio-economic benefits of the Agreement. Illustratively, the combined reading of the piracy acts that occur in the waters of Nigeria contained in Table 1 and Figures 1 and 2 that highlighted Nigeria's trade contributions to Africa and Nigeria's major trading partners in the Q1 of 2020 clearly shows that piracy will reduce such trading activities between Nigeria and other African countries. Examples of the effects of piracy on the implementation of the ACFTA by Nigeria include, but are not limited to, the cost of hiring private security personnel (PSP) onboard the vessels, high cost in rerouting vessels, increased insurance cost, reduction in fishing, and a limited number of foreign tourists visiting Nigeria.[112] To obviate the consequences of piracy on the implementation of the ACFTA by Nigeria, this paper recommends measures that will facilitate the suppression of piracy off the country's coast.

V. Measures to Suppress Piracy Off the Coast of Nigeria

Piracy implicates the economic development of Nigeria and the implementation of the ACFTA. Nevertheless, the success recorded in reducing the impact of Somali and Asian piracy[113] means that with appropriate anti-piracy measures, the impact of piracy on the implementation of the ACFTA by Nigeria will be minimized. Though the ACFTA does not mention piracy as a security threat to the realization of its objectives, its protocols enjoin the Member States to take action for their security interests.[114] Thus, given the impact of international and regional cooperation in combating piracy and the fact that the implementation of the ACFTA by Nigeria will benefit African countries, this paper suggests the use of regional cooperation as a mechanism to implement counter-piracy measures in Nigerian waters. The study argues that beyond the domestic anti-piracy efforts by Nigeria,[115] suppressing piracy under a regional cooperation platform is a matter of strategic importance to Nigeria and other African countries, particularly in the era of the ACFTA. This contributes significantly to the domestic counter-piracy efforts put in place by the Nigerian government, which include, *inter alia,* the existence of sub-regional efforts: Yaounde Code of Conduct,[116] the enactment of the SPOMO Act 2019, the establishment of NIMASA, and the prosecution of pirates in a Nigerian court.

5.1 Enactment of a Regional Anti-Piracy Instrument

Similar to ReCAAP,[117] the enactment of an anti-piracy agreement specifying the code of conduct[118] for the entire African continent—which would define piracy and armed robbery at sea and could subsequently be made legally binding at the behest of the African countries—would go a long way toward introducing a uniform anti-piracy legal framework in Africa. Further, the agreement could provide for the establishment of a joint naval patrol team (with many patrol vessels) that would monitor piracy infested waters in Africa. It is important to point out that ReCAAP has contributed

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

to the reduction of piratical acts in Asia due to the creation of an information-sharing center (ISC), financial contributions by the Member States, joint naval exercises, and coordinated efforts by the contracting States to curb piracy in the region.

5.2 Regional Cooperation as a Gangway for the Implementation of Maritime Security Instruments

It is argued that maritime security instruments[119] can be effectively implemented under the purview of regional cooperation. For example, the instrumentality of port state control (PSC) can be utilized effectively to ensure the implementation of existing maritime security instruments. This aligns with the regional cooperation platform envisaged by this study. This is important since pirates target vulnerable vessels for an attack.[120] The effective application of the PSC, especially regional cooperation in implementing the PSC, could lead to the reduction of vulnerable vessels navigating piracy infested waters, like the GOG. More importantly, effective regional cooperation aligns with the provisions of some maritime security instruments in light of the extradition of arrested pirates by the arresting country for prosecution by another country.[121] This will encourage the arrest and prosecution of pirates where the arresting country may not be able to prosecute for lack of an anti-piracy legal regime, among other reasons.

5.3 Establishment of a Regional Maritime Security Agency

The creation of a regional maritime security agency will not only facilitate the enforcement of maritime security instruments but also the monitoring of waters surrounding Africa. It is argued that the existence of maritime domain awareness in Africa because of regular surveillance of the continent's waters will go a long way toward preventing the occurrence of piracy. Moreover, the existence of such a regional maritime security agency would engender joint naval exercises among the navies of African countries, including regional cooperation to assist with capacity building and development of the navies of the countries whose waters are prone to piracy attacks, like Nigeria. Besides, the issue of hot pursuit[122] will be better executed if the vessel of the joint naval team is in pursuit of a pirate ship that entered any African country's territorial waters.

5.4 Creation of a Regional Court

In the wake of a regional maritime security agency, the prevention of piracy through capturing and prosecution of pirates is possible. In cases where pirates are arrested, it is imperative to formally charge them with the crime of piracy in court immediately to avoid violating their rights. Therefore, in line with the suggestion of Piquet, this study recommends the creation of a regional court saddled with the singular responsibility of hearing piracy cases,[123] which could be located in Nigeria[124] or any other African country.[125] The creation of this regional piracy court will reduce the burden of national

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

courts in adjudicating piracy cases and lead to a uniform application of the extant anti-piracy legal instruments. Alternatively, the existing African Court of Human Rights should be given the responsibility of hearing piracy cases. It is instructive to note that the expansion of the jurisdiction of the court can be done by introducing an amended protocol to that effect. Because of the significance of prosecuting pirates in domestic courts, it is imperative to rigorously implement the provisions of the law to deter pirates from engaging in piratical acts. Thus, the sentencing in the case of *Binaebi Johnson* should not be used as a precedent in the prosecution of pirates in Nigeria.

VI. Conclusion

The emergence of the ACFTA brings good tidings to African countries, particularly those whose economy depends on the importation of finished goods and the exportation of raw materials: Nigeria. The removal of tariffs and non-tariff barriers under the ACFTA is to bolster trade among African countries. Nonetheless, the objectives of the agreement seem to be threatened by piracy off the waters of Nigeria. Because of the significant role Nigeria plays in intra–African trade and as the biggest economy in the continent, piracy off the Nigerian coast will adversely implicate on the country's implementation of the agreement. Specifically, this paper argues that the implementation of the ACFTA in Nigeria would be adversely affected because of the unique methods of piracy in Nigeria. This would, in turn, have severe economic and humanitarian implications for the country. For instance, ship owners would avoid sailing through Nigerian waters, stop calling at Nigerian ports, reroute their vessels or employ PSPs. This would increase the cost of shipping with its attendant effect on the prices of goods imported into Nigeria from other African countries, including goods exported from Nigeria to other African countries, under the ACFTA. Since Nigeria has signed and ratified the agreement, it becomes imperative to address the threat posed by piracy in the country's waters. This is because piracy threatens the fulfilment of the ACFTA obligations by Nigeria and there is a legitimate expectation from the Member States that Nigeria should secure vessels engaged in ACFTA activities off the Nigerian waters. Given the fact that Nigerian piracy affects other African countries, particularly West African countries, it becomes imperative to utilize the regional cooperation mechanism to curb piracy in Nigeria. Among other measures, the study suggested the enactment of a regional code of conduct similar to ReCAAP, which would criminalize and outline punishment for pirates as a counter-piracy effort. In closing, by effectively implementing the above counter-piracy measures, piracy will be reduced and the implementation of the provisions of the ACFTA by Nigeria may not be affected.

Acknowledgments

I am grateful to Wiseman Ubochioma, Ph.D., and Suzzie Oyakhire, Ph.D., for their inspiration, encouragement, and support given to me before and during the

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

time I wrote this paper. I also appreciate the insightful comments of the anonymous reviewers. Above all, I give God the glory for this publication.

Notes

1. African Union, Assembly/AU/Dec.90(V) 2005, art. 3, https://au.int/sites/default/files/decisions/9552-assembly_en_4_5_july_2005_auc_fifth_ordinary_session_decisions_declarations_and_resolution.pdf, accessed June 3, 2020.

2. See generally UNCTAD, *Economic Development of in Africa Report 2019* (Geneva: United Nations, 2019) p. 197; "Supporting Africa's Transformation: Regional Integration and Cooperation Assistance Strategy," Document of The World Bank Group, Report No. 121912-AFR, 7 May 2018, http://documents.worldbank.org/curated/en/700111528428661825/pdf/REGIONAL-INTEGRATION-CAS-AFRICA-05112018.pdf, accessed June 3, 2020; Jan Vanheukelom et al., "Political Economy of Regional Integration in Africa: What Drives and Constraints Regional Organisations?," Synthesis Report, ECDPM, January 2016.

3. UNCTAD, *African Continental Free Trade Area: Advancing Pan-African Integration, Some Considerations* (Geneva: United Nations 2016), p. 1.

4. UNCTAD 2016, p. 8.

5. For instance, the congruence between both economic platforms is reflected on industrialization, export orientation and improved economic competitiveness. "An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AFCTA) on Nigeria," Study Report for the Nigerian Office for Trade Negotiations, May 2018, p. 4, https://www.tralac.org/documents/resources/by-country/nigeria/2029-an-independent-study-on-the-potential-benefits-of-the-afcfta-on-nigeria-study-report-may-2018/file.html, accessed June 5, 2020.

6. UNCTAD 2019, p. 197.

7. Using West Africa as a case study, the economic cost of piracy in 2017 was estimated to be US$818.1 million. "The Economic Cost of Piracy Through 2017," *Safety4Sea,* 30 May 2018, https://safety4sea.com/the-economic-cost-of-piracy-through-2017/, accessed June 6, 2020.

8. See Kalu K. Anele (a), "Addressing the Issue of Piracy Off Indonesia and Nigeria: The Need for a Paradigm Change," *The Indonesian Journal of International & Comparative Law* VII (2020), p. 248; Kalu K. Anele (b), "Harvest of Arrests but No Prosecution: Ideation Toward Strengthening the Legal Regime for Prosecuting Pirates in Nigeria," *Commonwealth Law Bulletin* (2020), https://doi.org/10.1080/03050718.2020.1774402, pp. 1–29; Chijioke J. Nwalozie, "Exploring Contemporary Sea Piracy in Nigeria, the Niger Delta and the Gulf of Guinea," *Journal of Transportation Security* (2020), https://doi.org/10.1007/s12198-020-00218-y; Osatohanmwen A. Eruaga & Maximo Q. Mejia Jr., "Piracy and Armed Robbery Against Ships: Revisiting International Law Definitions and Requirements in the Context of the Gulf of Guinea," in Aldo Chircop et al. (eds.), *Ocean Yearbook 333* (Leiden, Brill, 2019) pp. 421–454; Ginger L. Denton and Jonathan R. Harris, "Maritime Piracy, Military Capacity, and Institutions in the Gulf of Guinea," *Terrorism and Political Violence* (2019), pp. 2–4 https://doi.org/10.1080/09546553.2019.1659783; "Priority Paper for the Danish Efforts to Combat Piracy and Other Types of Maritime Crime 2019–2022," Ministry of Foreign Affairs of Denmark, pp. 6–8.

9. Anele (a) 2020, pp. 256–257, accessed November 6, 2020.

10. Geroge Kiourktsoglou & Alec D. Coutroubis, "Is Somali Piracy a Random Phenomenon?," *WMU J. Marit. Affairs*, 10(1) (2011), https://doi.org/10.1007/s13437–012-0023–4.

11. See generally, the Protocol on Trade in Goods (PTGs), art. 27; the Protocol on Trade in Services, art. 16.

12. Jean Nanga, "The African Continental Free Trade Area: What Kind of Africanism?," Committee for the Abolition of Illegitimate Debt (CADTM), 6 April 2020, https://www.cadtm.org/spip.php?page=imprimer&id_article=18341, accessed June 4, 2020.

13. Nanga 2020, quoting former Ghanaian President, Kwame Nkrumah.

14. *Ibid.*

15. Lagos Plan of Action for the Economic Development of Africa, adopted by the second

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

extraordinary session of the OAU Conference of Heads of State and Government, 28–29 April 1980, Lagos. See *ibid.*

16. *Ibid.*

17. Rim Berahab and Uri Dadush, “Will the African Free Trade Agreement Succeed?,” OCP Policy Center, Policy Brief: 18/10, April 2018, p. 1.

18. Berahab & Dadush 2018.

19. See the PTGs, art. 27.

20. See Berahab & Dadush 2018.

21. Vanheukelom et al., 2016, p. 1.

22. In Africa, monopolistic and oligopolistic market structures stifle efficient production. “Assessing Regional Integration in Africa (ARIA V): Towards an African Continent Free Trade Area,” United Nations Economic Commission for Africa, 2012, p. 3.

23. Theophile Albert, “The African Continental Free Trade Agreement: Opportunities and Challenges,” CUTS International, Geneva, 2019, p. 10.

24. “African Continental Free Trade Area: Questions & Answers,” African Trade Policy Centre, United Nations Economic Commission for Africa, https://www.uneca.org/sites/default/files/PublicationFiles/qa_cfta_en_230418.pdf, accessed September 30, 2020.

25. “African Continental Free Trade Area: Questions & Answers,” African Trade Policy Centre, United Nations Economic Commission for Africa (ECA) and the Department of Trade and Industry (DTI) of the African Union Commission (AUC), January 2020, p. 1.

26. “African Continental Free Trade Area: Questions & Answers” 2020.

27. *Ibid.*

28. *Ibid.*

29. The Southern African Development Community (SADC), composed of 16 countries; the Eastern African Community (EAC), comprised of 5 countries; Common Market East and South Africa (COMESA), composed of 21 countries; ECOWAS, made up of 15 countries; the Economic Community of Central African States (ECCAS), comprised of 11 countries; the Intergovernmental Authority on Development (IGAD), made up of 7 countries; the Arab Maghreb Union (AMU), composed of 5 countries; and Community of Sahel-Saharan States (CENSAD), comprised of 6 countries. See Albert 2019, pp. 4–5.

30. Peter Lunenborg, “‘Phase 1B’ of the African Continental Free Trade Area (AfCFTA) Negotiations,” South Centre, Policy Brief No. 63, 2019, p. 4.

31. “A Business Guide to the African Continental Free Trade Agreement,” International Trade Centre, Geneva, September 2018, p. 9.

32. *Ibid.*

33. The ACFTA, art. 19 (1).

34. Berahab & Dadush 2018.

35. *Ibid.*, p. 2.

36. Massimiliano Cali et al., “Economic and Distributional Impacts of Free Trade Agreements,” World Bank Group, Policy Research Working Paper 9021, September 2019, p. 2.

37. Jacob Akuo, “The African Continental Free Trade Agreement: A New Thrust with Endless Potentials for Intra-African and International Trade,” *Soulier Advocats*, August 2019, https://www.soulier-avocats.com/wp-content/uploads/2019/08/The-African-Continental-Free-Trade-Agreement.pdf, accessed June 5, 2020.

38. Nigeria ratified the Agreement on November 11, 2020, ahead of the AFCTA’s December 5, 2020, deadline for membership. William Ukpe, “AFCFTA: Nigeria Agrees to Ratify Agreement,” *Nairametrics*, November 12, 2020, https://nairametrics.com/2020/11/12/afcfta-nigeria-agrees-to-ratify-agreement/, accessed November 17, 2020. Note that the ratification of a legal instrument requires its domestication. Accordingly, section 12 of the Constitution of the Federal Republic of Nigeria 1999 stipulates that treaties signed by the government must be enacted into law by the country’s legislature (National Assembly) before they will be legally binding.

39. Akuo 2019.

40. The PTGs, art. 2 (a-f).

41. Akuo 2019.

42. The PTGs, art. 4.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

43. *Ibid.*, art. 7, para. 2.

44. "African Continental Free Trade Area (AfCFTA)," *Tralac FAQs,* No. 1, 2018, https://www.tralac.org/documents/resources/faqs/2377-african-continental-free-trade-area-faqs-june-2018-update/file.html, accessed June 5, 2020.

45. See Ukepe 2020. See also "Status of AfCFTA Ratification," Tralac, 6 May 2020, https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html, accessed October 5, 2020.

46. Odilile P. Okebie, "An Analysis of the African Continental Free Trade Area: A Case Study on Nigeria's Manufacturing Sector" (MSC Diss., Erasmus University Rotterdam, 2017/2018), p. 9.

47. "Nigeria: Convalescent," Economic Research Department, BNP Paribas, July 2019, pp. 1–2, https://economic-research.bnpparibas.com/Views/DisplayPublication.aspx?type=document&IdPdf=34205, accessed June 10, 2020.

48. "AFCTA: Thriving in a New Africa," Part 1, PWC, 2019, p. 1, https://www.pwc.com/ng/en/assets/pdf/afcfta-2019.pdf, accessed June 5, 2020.

49. Adamu Jibrilla, "African Continental Free Trade Area (CFTA) and Its Implications for Nigeria: A Policy Perspective," *International Journal of Research and Innovation in Social Science*, II(XII) (2018), p. 165.

50. Jibrilla 2018.

51. *Ibid.*

52. "African Continental Free Trade Area: Questions and Answers," African Trade Policy Centre, United Nations Economic Commission for Africa, Ethiopia, p. 1, https://www.uneca.org/sites/default/files/PublicationFiles/qa_cfta_en_230418.pdf, accessed June 5, 2020.

53. "African Continental Free Trade Area: Questions and Answers."

54. See generally, Uche M. Nzeka, "Nigeria's Imports of Wheat and Rice to Rise," GAIN Report No: NG-19002, 5 June 2019, https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Grain%20and%20Feed%20Annual_Lagos_Nigeria_5–6-2019.pdf, accessed June 6, 2020.

55. "The African Continental Free Trade Area: A Tralac Guide," Tralac, Trade Law Centre, 5th ed., June 2019, p. 14, http://www.thedtic.gov.za/wp-content/uploads/Booklet_5th_edition.pdf, accessed June 10, 2020.

56. "An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AFCTA) on Nigeria" 2018, p. 6.

57. *Ibid.*

58. *Ibid.*

59. Mazyar Ahmed, "Maritime Piracy Operations: Some Legal Issues," *Journal of International Maritime Safety, Environment Affairs, and Shipping* (2020), p. 1, https://doi.org/10.1080/25725084.2020.1788200.

60. Camel Winkel, "In the Name of the Battle Against Piracy. Ideas and Practices in State Monopoly of Maritime Violence in Europe and Asia in the Period of Transition," in Ota Atsushi (ed.), *In the Name of the Battle Against Piracy* (Leiden: Brill, 2019) p. 201.

61. Winkel 2019.

62. La'Nita M. Johnson, "The Consequences of Somali Piracy on International Trade," *Global Tides,* 8(5) (2014), p. 5.

63. Ahmed 2020.

64. Anele (a) 2020, p. 250.

65. *Ibid.*

66. *Ibid.*, p. 251.

67. *Ibid.*

68. *Ibid.*

69. Kanee K.I. Panjabi, "The Pirates of Somalia: Opportunistic Predators or Environmental Prey," *Wm. & Mary Envt'l L. & Pol'y Rev.* 34 (2010), p. 378.

70. Anele (a) 2020, pp. 246.

71. *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, UNTS, Vol. 1833 No. 31363 (LOSC), art. 101.

72. The SPOMO Act, s. 3.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

73. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, New York, 10 March 1988, UNTS Vol. 221 No. 1678 (SUA Convention).

74. See C. Bueger, "Learning from Piracy: Future Challenges of Maritime Security Governance," *Global Affairs,* 1 (2015), p. 40, https://doi.org/10.1080/23340460.2015.960170.

75. Pirates hijacked a vessel, *MV Elobey VI,* off the coast of Equatorial Guinea in March and secured a ransom of US$200,000 for the release of its crew. See the case of the *Federal Republic of Nigeria v. Binaebi Johnson & Co,* Suit No.FHC/PH/62c/2020 (Unreported).

76. See NIMASA Act, 2007, s. 3(1).

77. *Ibid.*, s. 22 (1) (p-q) and (2).

78. *Ibid.*, s. 23 (5) (b-c).

79. Anele(a) 2020, p. 262.

80. *Ibid.*, pp. 262–263; Udensi L. Okoronkwo et al., "National Security and Maritime Piracy in Nigeria: A Sociological Discourse," *Humanities and Social Sciences Letters,* 2(1) (2014), pp. 66–67.

81. See "Piracy and Armed Robbery Against Ships," ICC International Maritime Bureau (IMB), Report for the Period 1 January–31 March 2020, April 2020, p. 20 and "Piracy and Armed Robbery Against Ships," ICC/IMB, Report for the Period 1 January–31 December 2019, January 2020, p. 21.

82. See Iyabobola O. Ajibola, "Nigeria's Amnesty Program: The Role of Empowerment in Achieving Peace and Development in Post-conflict Niger Delta," *Sage Open* (2015), pp. 9–10, https://doi.org/10.1177/2158244015589996, where it was suggested that the militants who did not benefit from the amnesty program introduced by the Nigerian government went back to the creek in continuation of their violent activities.

83. Tarila M. Ebiebe, *Instability in Nigeria's Niger Delta: The Post Amnesty Programme and Sustainable Peace-building* (Dakar-Fann: Friedrich-Ebert-Stiftung, 2017), p. 17.

84. Ebiebe 2017.

85. Lydelle Joubert, *The State of Maritime Piracy 2018* (USA: One Earth Future, Broomfield, 2018), p. 10.

86. Anele (a) 2020, p. 254.

87. "Pirates Attack Tanker Off Nigeria's Shore, Kidnap 10 Crew Members—Reports," *Hellenic Shipping News,* 21 February 2020, https://www.hellenicshippingnews.com/pirates-attack-tanker-off-nigerias-shore-kidnap-10-crew-members-reports/, accessed October 5, 2020. See also Marcus Hand, "Three Seafarers Kidnapped, Four Security Personnel Killed, in Nigerian Pirate Attack," *Seatrade Maritime News,* 6 January 2020, https://www.seatrade-maritime.com/ship-operations/three-seafarers-kidnapped-four-security-personnel-killed-nigerian-pirate-attack, accessed June 7, 2020.

88. Joubert 2018, p. 11.

89. Anele (a) 2020, pp. 254–255.

90. See Hand 2020.

91. "The State of Piracy 2017," Oceans Beyond Piracy, http://oceansbeyondpiracy.org/sites/default/files/executive-summary-sop-2017.pdf, accessed June 7, 2020.

92. "Maritime Piracy: Nigeria Losses US$2.74bn in Four Years," *Hellenic Shipping News,* 26 November 2018, https://www.hellenicshippingnews.com/maritime-piracy-nigeria-loses-us2–74bn-in-four-years/, accessed June 7, 2020.

93. Michael Eboh, "Nigeria: Oil Theft, Piracy, Cost Nigeria US$750m in 2019—NNPC," *Vanguard,* 18 February 2020, https://allafrica.com/stories/202002190050.html, accessed June 7, 2020.

94. Abdullahi S. Usman et al., "Impact of Piracy and Sea Robberies on Fishing Business in Nigeria: A Focus on Lagos Coastal Area," *Review of International Comparative Management*, 20(4) (2019), p. 401

95. Usman et al. 2019; Toakodi Adongoi et al., "The Impact of Sea Robbery on Artisanal Fishing in Rural Settlements in Niger Delta Region of Nigeria," *International Journal of Innovation and Sustainability* 1 (2017), pp. 34–40; Blessing S. Essien and Toakodi Adongoi, "Sea Piracy and Security Challenges of Maritime Business Operation in Bayelsa State, Nigeria: An Empirical Study," *International Journal of Humanities and Social Science* 5(2) (2015), p. 215.

96. Renato Molina and Gavin McDonald, "The Economic and Environmental Impact of Modern Piracy on Global Shipping," 19 November 2019, p. 2, https://renatomolinah.com/assets/docs/piracy.pdf, accessed June 8, 2020.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

97. Elisenda V. Jariod, "Prospection and Analysis of New Maritime Trade Nets of Asia in the Malacca Strait" (Project, Universitat Politecnica de Catalunya, Barcelona, 9 July 2019), p. 1.

98. See Susan T.S. Chin and Rosman Md Yusoff, "The Issues of Maritime Security on International Trade Activities Among Sea Countries," *International Journal of Advanced Research in Education and Society,* 1(2) (2019), p. 57.

99. "AFCTA: Thriving in a New Africa" 2019, p. 2.

100. *Ibid.*

101. "Maritime Piracy: Nigeria Losses US$2.74bn in Four Years" 2018.

102. La'Nita M. Johnson, "The Consequences of Somali Piracy on International Trade," *Global Tides,* 8(5) (2014), pp. 5–6.

103. "An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AFCFTA) on Nigeria," 2018, p. 4.

104. *Ibid.*, p. 7.

105. Usman et al. 2019.

106. Mengjie Jin et al., "Marine Piracy Prediction and Prevention: Policy Implications," *Marine Policy* (2019), p. 1, https://doi.org/10.1016/j.marpol.2019.103528, accessed November 6, 2020.

107. Inmaculada Martinez-Zarzoso and Sami Bensassi, "The Price of Modern Piracy," IAI Discussion Papers, No. 213, Ibero-America Institute for Economic Research, University of Goettingen, 2011, p. 4.

108. Giacomo Morabito and Bruno S. Sergi, "How Did Maritime Piracy Affect Trade in Southeast Asia?," *Journal of East Asian Studies,* 18 (2018), p. 257, https://doi.org/10.1017/jea.2018.5.

109. For the analysis of the impact of tourism to the economy of African countries, see "Travel & Tourism: Economic Impact 2019," World Travel Tourism Council, March 2019, https://www.slovenia.info/uploads/dokumenti/raziskave/raziskave/world2019.pdf, accessed June 9, 2020. For detailed analysis of the impacts of the art-craft industry and the creative economy in Nigeria, see generally, Kizito O. Alakwe, "Defining the Cultural and Creative Industry: An Exploration of the Nigerian Cultural and Creative Ecosystem," *Journal of Creative Industries and Cultural Studies,* 3 (2018), pp. 14–31, http://eprints.rclis.org/34225/, accessed November 10, 2020.

110. This author has addressed the issue of piracy and its potential effects on the art-craft industry in Indonesia. See generally Kalu K. Anele (c), "Piracy Off the Coast of Indonesia: Potential Implications on the Craft Industry," *Brawijaya Law Journal,* 7(1) (2020), pp. 1–26, https://lawjournal.ub.ac.id/index.php/law/article/view/253/pdf, accessed November 10, 2020, https://doi.org/10.21776/ub.blj.2020.007.01.01; See also Toakodi Adongoi et al., "Sea Robbery and Its Implication on Tourism Development in Niger Delta Region of Nigeria," *International Journal of Social & Management Science, Maiden Edition,* 2(1) (2019), pp. 1–13. https://www.zeetarz.com/ijsms/wp-content/uploads/2018/12/Sea-Robbery-and-its-implication-Tourism-Development-in-Niger-Delta-Region-of-Nigeria_2_-_1_.pdf, accessed November 10, 2020.

111. In line with the provision of article 26 (f) of the PTGs, member States have the authority to protect its national treasures of artistic, historic or archaeological value, which are crucial in the tourism sector and the art-craft industry in Nigeria. Since piracy may threaten the tourism sector and the art-craft industry in Nigeria, it becomes imperative for the government of Nigeria to curb the crime.

112. For further analysis detailing the possible effects of piracy on the implementation of the ACFTA by Nigeria, see Anele (b) 2020; Sami Bensassi and Immaculada Martinez-Zarzoso, "How Costly Is Modern Maritime Piracy to the International Community?," *Review of International Economics,* 20(5) (2012), https://doi.org/10.1111/roie.12000, 869–883; Kennedy K. Mbekeani & Mthuli Ncube, "Economic Impact of Maritime Piracy," *African Economic Brief*, Vol. 2, Iss. 10, 14 July 2011, 1. For the use of private security personnel onboard a vessel, see Ladan Affi et al., "Countering Piracy Through Private Security in the Horn of Africa: Prospects and Pitfalls," *Third World Quarterly* (2016), pp. 1–17, https://doi.org/10.1080/01436597.2015.1114882.

113. J.V. Hastings, "The Return of Sophisticated Maritime Piracy to Southeast Asia," *Pacific Affairs*, 93 (1) 2020, DOI: 10.5509/20209315, p. 6; Ilan Fuchs, "Piracy in the 21st Century: A Proposed Model of International Governance," *Journal of Maritime Law & Commerce*, 51(1) (2020), p. 17; A.K. Karawita, "Piracy in Somalia: An Analysis of the Challenges Faced by the International Community," *Jurnal Hubungan Internasional*, 23 (1), 2019, p. 115; and J.V. Hastings & S.G. Philips

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

"Order Beyond the State: Explaining Somaliland's Avoidance of Maritime Piracy," *J. of Modern African Studies*, 56 (1) (2018), doi:10.1017/S0022278X17000519, pp. 5–30.

114. See the PTGs, art. 27.

115. For detailed analysis of some of the suggested counterpiracy measures in Nigeria, see generally Anele (b) 2020, 18–21.

116. The Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa, Yaounde, 25 June 2013.

117. Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), entered into force on 4 September 2006.

118. The agreement (Code) envisaged here has been in existence at the sub-regional level. See the Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Resolution 1, Adopted on 29 January 2009 (the Djibouti Code of Conduct).

119. See the SUA Convention; *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, adopted 7 July 1978; and *International Ship and Port Facility Security Code*, adopted 12 December 2002.

120. See Jin et al. 2019, p. 2, where it was suggested that pirates target vulnerable ships.

121. See SUA Convention, art. 10.

122. See the LOSC, art. 111.

123. Jessica Piquet, "Changing Tides: An Adaptable Prosecution Approach to Piracy's Shifting Problem," *Columbia Journal of Transnational Law* 52 (2013), p. 257.

124. Like Kenya (The Merchant Shipping Act No. 4 of 2009, ss. 369–371), Mauritius (The Piracy and Maritime Violence Act No. 39 of 2011, Government Gazette of Mauritius No. 112 of December 2011) and Seychelles (Penal Code, Chapter 158, Laws of Seychelles, 2016, s. 65), Nigeria has enacted an antipiracy legislation and has prosecuted pirates in Nigeria's local court. See the SPOMO Act and case of *Binaebi Johnson*, respectively. See also Anele (b) 2020, p. 11.

125. The establishment of the regional court in Nigeria seems to be advantageous considering the country's proximity to where the piracy incidents occur and the existing piracy legal framework.

Biographical Statement

Kalu Kingsley Anele is a research fellow at the Cultural Heritage Preservation Research Institute, Pusan National University, Busan, South Korea. He was a research fellow at the Nigerian Institute of Advanced Legal Studies (NIALS), Lagos, Nigeria, where he co-authored *Restatement of Customary in Nigeria* in 2013 and co-edited *Class Action: Practice and Procedure Essays in Honour of Professor Epiphany Azinge, Ph.D., SAN, OON*, in 2017. He was a member of the Oyo State Law Review Committee in 2009. He obtained a Bachelor of Laws (BL) degree from Imo State University, Owerri, Nigeria, a Master of Laws (LLM) (Legislative Drafting) degree at NIALS, a second LLM degree at the University of Lagos, Akoka, Lagos State, Nigeria, and a Doctor of Laws degree at the Korean Maritime and Ocean University, Busan, South Korea.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

The Role of the International Seabed Authority in the Implementation of "Due Regard" Obligation Under the LOSC: Addressing Conflicting Activities

Yu Long

Structured Abstract

Article Type: Research Paper

Purpose—Under the *United Nations Convention of the Law of the Sea (LOSC)*, the "due regard" obligation provides a normative basis for the coordination of competing uses of the Area, including deep seabed mining and submarine cable activities. Nevertheless, the lack of a framework for implementing the "due regard" obligation impedes the effectiveness of the coordination of these activities in practice. This paper aims to discuss the role and potential of the International Seabed Authority (ISA) in filling the gap.

Design, Methodology, Approach—This paper introduces an analytical perspective on the role of international organization concerning the implementation of the "due regard" obligation. In the context of the conflict between submarine cable activities and deep seabed mining, this paper discusses what the ISA can learn from other international organizations' experience.

Findings—This paper proposes that the ISA, which is the competent international organization over deep seabed mining, can develop a coordinating framework

Koguan Law School, Shanghai Jiao Tong University (SJTU), Shanghai, China, phone: +86 16621600301, email: yulongsjtu@gmail.com

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 27–46 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.27 © 2021 Yonsei University

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

for the implementation of "due regard" obligation through the exercise of its rule-making function. Such a function enables the ISA to make a model that affects the relationships among mining operators, cable operators, and the ISA.

Practical Implications—This paper provides an innovative approach in addressing the conflict between deep seabed mining and submarine cable activities.

Originality, Value—This paper examines what the ISA can contribute to the implementation of "due regard" obligation in the context of the conflict between deep seabed mining and submarine cable activities.

Key words: deep seabed mining, due regard obligation, rule-making functions of international organizations, submarine cable activities

1. Introduction

The *United Nations Convention of the Law of the Sea (LOSC)*[1] establishes a legal regime for deep seabed mining in the "Area." The "Area" refers to the deep seabed outside areas of national jurisdiction as defined by the LOSC (Article 1[1]). Deep seabed mining includes all activities of prospecting, exploration and exploitation for mineral resources in the Area. At the same time, the establishment of the deep seabed mining regime does not exclude other legitimate uses of the Area, such as the laying and maintenance of submarine cables. Against this background, this regime envisages that some coordination of the competing uses of the Area may be achieved through implementing the "due regard," which means an awareness of mutual respect, obligation in the context of how the freedom of the high seas and rights related to deep seabed mining are exercised (Articles 87[2] and 147 [1, 3]). Nevertheless, with the growing interest in deep seabed mining in recent years,[2] the lack of any framework for coordinating the implementation of the "due regard" obligation gives rise to concerns among stakeholders in relation to the existing deep seabed regime.[3]

Besides, the LOSC stipulates that the ISA is the competent international organization over deep seabed mining (Articles 136 and 157). The terms "competent international organization" or "competent international organizations" mean that one or more intergovernmental bodies or institutions are assigned "with the relevant expertise and mandate to deal with specific areas of the seas or particular maritime activities."[4] This paper assumes that "the relevant expertise and mandate" of the ISA enables it to not only deal with deep seabed mining but also with associated issues, such as the relationship between deep seabed mining and submarine cable activities.

Therefore, this paper focuses on the role and potential of the ISA in developing a framework for coordinating the implementation of the "due regard" obligation in the context of the conflict between submarine cable activities and deep seabed mining.

Section 2 introduces an analytical perspective on the role of international organizations concerning the implementation of the "due regard" obligation. This paper

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

argues that while there are already sufficient discussions among scholars regarding the contribution of various international courts and tribunals, the role of competent international organizations has not yet received enough attention. So, it briefly explores reasons why scholars tend to underestimate the latter, and then discusses what others like the ISA can learn from the IMO's experience in developing a coordinating framework.

As the subjects that owe and are owed the "due regard" obligation are states rather than the ISA, there needs to be a discussion of the incentives for the ISA to act as a coordinator before discussing how it can fulfill this role. This is explored in Section 3.

Section 4 discusses how the ISA can develop such a coordinating framework. This article argues that it can be attributed to the ISA's rule-making function, which is one of the key functions of the ISA assigned by the LOSC. This function enables the ISA to develop the deep seabed mining regime gradually in response to meet new challenges.[5] To be specific, this article examines the legal basis for the ISA to develop the coordinating framework, as well as the limitations of the ISA in exercising its rule-making functions.

Moreover, the on-going negotiation of the Draft Exploitation Code[6] is expected to be able to put such a coordinating framework into practice. Section 5 elaborates and analyzes what the ISA has done to develop this coordinating framework until now, and finally Section 6 discusses how the Draft Exploitation Code could be further improved.

2. The Implementation of the "Due Regard" Obligation: An Analytical Perspective on the Role of International Organizations

In customary international law of the sea, the obligation of "due regard" has a historical basis as a rule of self-restraint. Professor Bernard Oxman points out that this rule is significant in two intersecting contexts: in the first context, states exercise freedom of action with self-restraint so that others will respect their freedom; as for the second context, states exercise jurisdiction with self-restraint, which is a guarantee that others respect *quid pro quo* jurisdiction.[7] Without a "supreme" government in the international community, these rules of self-restraint play a significant role in coordinating competing activities by different states. Professor Oxman stresses that the customary high sea regime has two characteristics that illustrate this intersection: (i) each state enjoys the freedom to use the high seas; and (ii) each state enjoys the authority to confer its nationality on ships to make use of the freedom of the high seas.[8] Such characteristics of the customary high sea regime protect common areas like the high sea from anarchy.[9]

With the codification of the law of the sea, treaties like the LOSC broaden the applicable circumstances of the "due regard" obligations, which reflect on diverse

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

provisions, such as "reasonable regard" and the avoidance of "unjustifiable interference." A number of new regimes, such as the Exclusive Economic Zone, the continental shelf, and the Area, were gradually introduced into relevant treaties. These new regimes affect the traditional freedoms of the high seas to different extents. To strike a delicate balance between new interests or needs and traditional freedoms, the rules of "due regard" have been embedded throughout these regimes.

More significantly, some international organizations can facilitate the implementation of "due regard" obligation by virtue of their responsibilities assigned by these treaties. In the LOSC, these international organizations can be divided according to their responsibilities. The first group includes various international courts and tribunals, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA). These international courts and tribunals are conferred with responsibilities, such as the interpretation of the LOSC provisions, to guide the application of the LOSC. Such responsibilities enable them to make "a notable, although preliminary, contribution"[10] for facilitating the implementation of the "due regard" obligation. For example, they can elaborate on the contents of the "due regard" obligation. In the *Chagos Protected Area Arbitration* case, the Arbitral Tribunal set out that consultations are essential to the assessment of the implementation of the "due regard" obligation.[11] Such a role has already been wide discussed by scholars.[12]

As for the implementation of the "due regard" obligation, the role of the other group of international organizations which are referred as competent international organizations by the LOSC is often ignored or underestimated. This group includes the International Maritime Organization (IMO), Regional Fisheries Management Organizations (RFMOs) and the ISA.

Compared to the members of the first group, little attention has been paid to their roles regarding the implementation of the "due regard" obligation. The main reason may be that decisions of such international organizations are only directly applicable to one of the parties for the competing uses of the oceans or seabed. For example, the ISA has jurisdiction over deep seabed mining, and its decisions are binding on applicants and contractors. However, in conflicts regarding deep seabed mining and submarine cables, the ISA cannot regulate entities who conduct submarine cable activities. Moreover, the obligation of "due regard" is reciprocal, which means no one has priority over any of the competing rights.[13] Finally, member parties' willingness plays a significant impact on the final effect of decisions concerning submarine cable activities.[14] Therefore, these factors limit the room available to these international organizations to adopt binding measures for facilitating the implementation the "due regard" obligations.

Nevertheless, this does not mean that the second group of international organizations cannot play any role regarding the implementation of the "due regard" obligation. In 2010, in response to requests from three littoral states in the Straits of Malacca and Singapore (Malaysia, Indonesia and Singapore), the IMO published a circular that proposed the establishment of a regional submarine cable protection regime. The circular includes a proposal to designate non-anchoring areas in the

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Straits of Malacca and Singapore and to require the prompt sharing of information among relevant stakeholders when submarine cable damage occurs.[15]

Although the content of the circular was brief (only two pages), its referential significance for members of the second group of international organizations regarding how to facilitate the implementation of the "due regard" obligation cannot be underestimated. The first reason for this is that a decision distributed in the form of a circular constitutes the exercise of the rule-making function of the IMO. Through the exercise of such functions, the IMO can develop a framework to coordinate the implementation of the "due regard" obligation in the context of international shipping and submarine cable activities. Such a framework involves a tripartite relationship between the IMO, parties who conduct international shipping, and cable owners or operators. The IMO, which has already acted as a coordinator, can develop this framework progressively and flexibly. The other significance of this circular is that although some of the measures adopted under the framework are non-compulsory, they can be practical for facilitating the implementation of the "due regard" obligation. These measures include procedures for notifying and exchanging information.

Therefore, the IMO's experience can inspire other international organizations like the ISA to explore their role regarding the implementation of "due regard" obligations. However, before discussing what the ISA could do in this regard, it is necessary to discuss why the ISA needs to take into consideration the very existence of the competing uses of the Area, namely deep seabed mining and submarine cable activities. This is because the subjects that owe and are owed the "due regard" obligation in the context of the conflict between deep seabed mining and submarine cable activities are states rather than the ISA itself.[16]

3. Why Should the ISA Play the Role of Coordinator in Conflicts Between Deep Seabed Mining and Submarine Cable Activities?

According to provisions of the LOSC (e.g., Articles 136, 137 and 157), the main tasks of the ISA is to govern deep seabed mining in the Area. The process of the ISA's governance consists of two phases: (i) approval and (ii) post-approval. In the first phase, the ISA needs to confirm each notification of prospecting or approve the proposed written plan of work for exploration and exploitation. Applicants can conduct prospecting only after the ISA has received a satisfactory written undertaking to comply with the convention and the relevant regulations (Article 2 of Annex III), while proposed contractors can conduct exploration or exploitation only after the ISA approves their plans of work (Articles 4 and 6 of Annex III). In the second phase, the ISA has the responsibility to ensure the performance of the undertaking of the written plan of work.

Against this background, this article argues that there are two main reasons

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

why the ISA should play the role as a coordinator in the context of the conflict between the deep seabed mining and submarine cable activities.

First, the ISA's role as a coordinator is essential to enhance investors' confidence and encourage them to engage in investment activities in the Area. Potential conflicts between the two competing activities may affect the willingness of investors to engage in the exploitation operation in the Area. In the second workshop regarding deep seabed mining and submarine cable activities hosted by the ISA on October 29–30, 2018, in Bangkok,[17] several representatives expressed their concerns regarding commercial certainties:

> I think that the greatest risk is not a rupture of a cable and it is not the liability of a mining operator, it is the postponement of investment in both activities. If all of a sudden I know that investing in seabed mining is going to create conflict with cable operators and reduce my profit margin or create problems for me, I would not invest in that area. At the same time, if I had a person that was willing to invest in cable operations and I begin to see the liability of the rupture of a cable, I would think twice before I made that investment as well.[18]

Thus, it can be argued that the coordination between two competing activities through the ISA is necessary to safeguard investors' interests in the Area.

Secondly, such conflicts may make the ISA unable to guarantee "security for tenure" for contractors with existing exploration or exploitation contracts with the ISA. After the approval of a plan of work, the ISA will sign a contract with the applicant, and the applicant will then become a contractor. Within this contract is embedded the mutual commitments of the ISA and the contractor.[19] On the one hand, the contractor accepts the direct jurisdiction of the ISA, and one the other, the ISA guarantees the contractor's "security of tenure."

In the LOSC, "security of tenure," in the context in question, is a fundamental principle regarding exploration and exploitation contracts.[20] Such a principle implies two types of duties: negative and positive. Negative duties prohibit the ISA from modifying contracts unilaterally except in certain circumstances (Articles 18 and 19 of Annex III). As for positive duties, they require the ISA to endeavor to ensure the continuous operation of exploration and exploitation. The LOSC states that contractors enjoy the exclusive exploration and exploitation rights, which requires the ISA to protect them from any interference from other entities operating in the same area for another category of resources (Article 16 of Annex III). Further, this article argues that the positive duties of the ISA do not limit the coordination between different operations in relation to deep seabed mining. It is illustrated that the guarantee of both "security of tenure," as well as the right to undertake marine scientific research, is essential for "[the ISA's] good governance and administration of the [mineral] resources of the Area."[21]

Therefore, in light of the influence of potential conflicts on the ISA's governance over deep seabed mining in the Area, the ISA should play a proactive role in facilitating the implementation of "due regard" obligations. In this regard, the ISA's rule-making function enables it to take up the same role of coordinating between conflicting activities as IMO has held.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

4. The ISA's Rule-Making Function and the Implementation of the "Due Regard" Obligation

The LOSC confers the ISA with a rule-making function to develop a legal regime for deep seabed mining in the Area. The ISA exercises its rule-making function by detailed rules, regulations, and procedures, among which the development of three sets of regulations regarding different types of mineral resources is central. These regulations are: *Nodules Exploration Regulations*,[22] *Sulphides Exploration Regulations*,[23] and *Crusts Exploration Regulations*.[24] These three sets of regulations related to prospecting and exploration are supposed to "consolidate the provision on the mining system contained in the Convention and where appropriate elaborate upon the practical application of those provisions."[25]

When the ISA exercises its rule-making function, one of the criteria that it should take into consideration is the "prevention of interference with other activities in the marine environment" (Article 17 [1, b, ix] of Annex III). This provides a legal basis for the ISA to develop a framework for coordinating the implementation of the "due regard" obligation. This is illustrated by three situations envisaged by the three sets of regulations. Firstly, prospectors shall minimize or eliminate actual or potential conflicts with existing or planned marine scientific research activities.[26] Secondly, prospective contractors shall ensure that installations are not established where interference may be caused to "the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity."[27] Thirdly, upon finding archaeological or historical objects, contractors have the duty to notify the ISA and suspend their operations.[28]

Such a framework developed by the ISA through the exercise of its rule-making function would consist of two parts. In the first part of the framework, the ISA would take the implementation of the "due regard" obligation into consideration at the approval phase. In this regard, there is a precedent regarding this implementation in the development of the three sets of regulations relating to prospecting and exploration. The LOSC stipulates that when deciding whether or not to approve a plan of work, the Legal and Technical Commission of the ISA should make its decision on the basis of the requirements of applicants (Article 4 of Annex III) and the criteria in the plan of work (Article 6 of Annex III). The scope of these considerations is further expanded by the regulations relating to prospecting and exploration. For example, as mentioned above, the ISA shall determine whether the proposed plan of work for exploration ensures that installations for deep seabed mining are not established where interference may be caused to certain international navigation and fisheries. However, it should be noted that the method of adding a new consideration is conditional rather than arbitrary. Judge Tullio Treves points out that, as an exemption to the general reciprocal "due regard" obligation, the conditions for adding a new consideration must be narrowly described, for example, "not [as] fishing in general but 'intense fishing activity,' not navigation in general but navigation through 'recognized sea lanes essential for international navigation.'"[29]

Another part of the suggested framework envisages that the ISA would develop procedural mechanisms for consultation and notification at the post-approval phase.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

To give an example of such a mechanism: when encountering any archaeological and historical objects, contractors would immediately notify the secretary-general and then the ISA would transmit such information to the director-general of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and any other competent international organization.[30] Under the LOSC, cooperation between the ISA and UNESCO would mainly be driven by the ISA's duty to preserve "all objects of an archaeological and historical nature found in the Area" (Article 149). Although the ISA would not have such a duty in other circumstances, the cooperation model regarding the exchange of information could be invoked when the ISA cooperates with other international organizations.

Furthermore, the framework developed by the ISA through the exercise of its rule-making function could be applied to the coordination of the implementation of the "due regard" obligation in the context of deep seabed mining and submarine cable activities. There is a consensus among both parties to the competing uses, which stressed that engagement between the cable industry and applicants should be done as early as possible.[31] As for the ISA, it means that it should take the implementation of "due regard" obligations by applicants into consideration at the approval phase. Besides, notifications and consultations are essential to the implementation of the "due regard" obligation. However, there lacks any procedural mechanism for conducting notifications and consultations. In this regard, the ISA could provide relevant procedural mechanisms to enhance this implementation. For example, considering the need for practical cooperation between deep seabed mining and submarine cable activities, the ISA and the International Cable Protection Committee (ICPC) have signed Memorandums of Understanding (MOU) to this effect.[32] The MOU stresses that these two international organizations should have mutual cooperation obligations regarding the exchange of information:

> To exchange where practicable, or to facilitate by direct liaison with the owners of international cable systems, information on cable routings and prospecting and exploration areas, subject to confidentiality provisions.[33]

In this regard, several useful measures adopted by the ICPC and others would be used for reference, such as the exchange of information between the Sargasso Sea Commission, which is an intergovernmental body with a mandate for the protection of the Sargasso Sea,[34] and the ICPC.[35]

Nevertheless, it should be noted that the ISA has limitations in exercising its rule-making function. On the one hand, international organizations decide the scope of their competence by themselves, as nobody does this for them.[36] So the ISA enjoys a certain extent of discretionary power to exercise its functions. On the other hand, it would be impractical to expect that the ISA, which mainly consists of mining stakeholders, would be willing to take protective measures for other economic activities at the expense of their own economic interests.

To be specific, in the exercises of its rule-making function, the ISA may face two types of challenges. One challenge is the ISA's "consensus-based" decision-making procedure.[37] "Consensus-based" means that whether a decision will be taken

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

mainly depends on achieving consensus between state parties to the ISA. Although such a decision-making rule does not exclude the use of the majority rules, scholars point out that "the more important a decision is for seabed mining interests, the more it is insulated from simple majority decision-making within the Authority."[38] Another one is that contractors' compliance depends on the cooperation between the ISA and state parties (Article 139[1]). Although the ISA has overall management powers regarding deep seabed mining, the extent to which decisions are implemented relies on the assistance of state parties, especially sponsoring states.[39] In this regard, the final effect of a decision is still subject to the acceptance of state parties.

Therefore, the ISA's functions for rule-making enable it to develop a coordinating framework for the implementation of "due regard" obligations. However, if the ISA developed a framework through the exercise of its rule-making function, it should consider the balance between the interests of deep seabed mining and submarine cable activities. The next section discusses how such a balance could be achieved when developing the framework for facilitating the "due regard" obligation in the Draft Exploitation Code.

5. Development of a Coordinating Framework for Implementing the "Due Regard" Obligation in the Draft Exploitation Code

This section discusses how the ISA could put such a framework into practice through the exercise of its rule-making function, using a window to draft an exploitation code. It should be noted that, although provisions of the Draft Exploitation Code have used a set of terms similar to "due regard," such as "reasonable regard" and "due diligence," this article uses them interchangeably. There are two main reasons. First, there exists a close historical relationship between some terms, especially "due regard" and "reasonable regard."[40] Second, as for other terms like "due diligence," it is still uncertain whether they would be accepted in the later stages of the negotiation.

5.1 The Approval Phase

In order to encourage applicants for exploitation rights to coordinate with cable owners or operators at an early stage of their project planning, the negotiators of the Draft Exploitation Code have discussed how they might perform the "due regard" obligation. To be specific, this includes the criteria for approving a proposed plan of work and the qualifications of applicants.

5.1.1 The Criteria for Approving a Proposed Plan of Work

The latest version of the Draft Exploitation Code[41] stipulates that the Commission should ensure the proposed plan of work gives due regard to the laying of submarine cables:

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Draft Regulations ("DR") 13 Assessment of Applicants

The Commission shall determine if the proposed plan of work: … (d) Provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, including navigation, the laying of submarine cables and pipelines, fishing and marine scientific research, as referred to in article 87 of the Convention.[42]

This provision requires applicants to give due regard to other legitimate uses within the freedom of the high seas, including the laying of submarine cables. It adds a number of new considerations for determination by the ISA at the approval phase. As mentioned in Section 4, adding a new consideration for determination by the ISA must be in keeping with the LOSC. In this regard, adding these new considerations may be attributed to the ISA's responsibility regarding the "prevention of interference with other activities in the marine environment" (Article 17 [1, b, ix] of Annex III).

Furthermore, some stakeholders suggest further elaborating this provision in two ways. The first suggestion is that, excluding Article 87 of the LOSC, sources to be considered by the ISA should also include guidelines pertaining to the "due regard" obligations issued by the ISA.[43] These guidelines form part of the rules, regulations and procedures adopted by the ISA.[44] They will enable the ISA to make determinations according to a changing environment. Moreover, DR 31(1), which refers to the general requirements of the "due regard" obligation at the post-approval phase, contains the expression: "consistent with the relevant Guidelines." To be consistent with DR 31(1), one stakeholder claims that the relevant guidelines should also be taken into account during the phase of determining whether or not to approve a plan of work.[45]

Another suggestion regarding the provision is that the scope of due regard given by applicants should be expanded to cover the maintenance and repair of submarine cables. These activities are considered to be associated with the operation of submarine cables, which in turn is one of the freedoms of the high seas under Article 87 of the LOSC.[46]

5.2 The Qualifications of Applicants

Currently, as for the qualifications of applicants, the Draft Exploitation Code does not include requirements that involve submarine cable activities. Some stakeholders, such as Australia, who have submitted the proposal of having the qualification requirement added into the provisions:

DR 13(1) in Australia's Proposal

The Commission shall determine … if the applicant: …

(g) has demonstrated, in relation to the accommodation of other activities in the marine environment, due diligence to:

(i) identify in-service and planned submarine cables and pipelines in, or adjacent to, the area under application using the publicly available data and resources as listed in the Guidelines;

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

(ii) where such submarine cables and pipelines are identified, consult with the operators of the cables and pipelines to agree measures the Contractor will take to reduce the risk of damage to the in-service and planned submarine cables and pipelines (i.e., such as an easement, or a mining exclusion zone within a reasonable radius).[47]

The provision aims to elaborate upon the "due regard" obligation of applicants. Firstly, applicants should demonstrate that they have given "due regard" to identifying whether there exists any in-service or planned submarine cables in a proposed contract area, on the basis of "publicly-available data and resources as listed in the Guidelines." As for these types of information sources, the ISA can cooperate with the ICPC to exchange information regarding submarine cable activities in the Area and then make public this information in the form of Guidelines. Besides, "planned submarine cables" should be covered because the period of an exploitation contract is shorter than the lifespan of submarine cables. According to the Draft Exploitation Code, the initial period of an exploitation contract is 30 years (DR 20), while the lifespan of almost all submarine cables is shorter than this period. Consequently, some cable companies emphasize that the ISA should still consider submarine cable protection after the adoption of a plan of work.[48]

When there exists any submarine cable in a proposed contract area, the applicant in question should consult with the owner or operator of the submarine cables to agree on protective measures. Such a requirement may be helpful for the implementation of the "due regard" obligation by applicants. However, it is doubtful to what extent the negotiators of the Draft Exploitation Code will accept the measures. For example, the draft text proposes that applicants "should consult with cable owners to agree measures … such as an easement or a mining exclusion zone within a reasonable radius." Such requirements imply some advanced requirements of the "due regard" obligation compared with its basic ones, i.e., notice and consultation.[49] Although it does not deny the meaning of these advanced requirements for the implementation of the "due regard" obligation, this article argues that it would not be inappropriate to require them in a manner that relies on the ISA's compulsory power.

5.3 The Post-Approval Phase

At the post-approval phase of the plan of work, the Draft Exploitation Code sets out both the general and specific requirements regarding the implementation of the "due regard" obligation.

5.3.1 General Requirements for Implementation of "Due Regard" Obligations

The Draft Exploitation Code sets out the general requirements of the implementation of the "due regard" obligation from the perspectives of contractors and other users respectively:

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

DR 31 Reasonable Regard for Other Activities in the Marine Environment

1. Contractors shall carry out Exploitation under an exploitation contract with reasonable regard for other activities in the Marine Environment in accordance with article 147 of the Convention and the approved Environmental Management and Monitoring Plan and Closure Plan and any applicable international rules and standards established by competent international organizations. In particular, each Contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables or pipelines in the Contract Area.

2. The Authority, in conjunction with member States, shall take measures to ensure that other activities in the Marine Environment shall be conducted with reasonable regard for the activities of Contractors in the Area.[50]

Paragraph 1 requires that when carrying out an exploitation contract, contractors shall give attention to their "due regard" obligations with respect to other activities in the marine environment. Contractors in particular are required to ensure that their operations do not damage submarine cables in the contract area. However, as there is no competent international organization that has jurisdiction over all submarine cable activities, there is a lack of any "relevant international rules and standards" in this field. To fill this gap, a stakeholder proposes to add a reference to "relevant national laws and regulations of sponsoring States and flag States." In this regard, there exists some domestic legislation regarding the legal relationships between sponsoring states and their sponsored parties. For example, Fiji, Kiribati, Nauru, Tonga and Tuvalu require that "the sponsored party shall not proceed or continue with the activities if they are likely to cause significant adverse impact to other existing or planned legitimate sea uses including submarine cables."[51] It should be noted that a possible shortcoming of this approach is that such national laws and regulations only apply to contractors who are sponsored by corresponding states, and the ISA does have the power to force all state parties to issue such national laws and regulations.

Paragraph 2 indicates the "due regard" obligation of states that conduct other activities in the Area. It should be noted that the ISA does not have jurisdiction over these other users, and so cannot impose mandatory measures on them. However, according to some stakeholders, "it is expected that the Authority plays a role as mediator and facilitates between Contractors and other activities in the Marine Environment through information sharing at least at the initial stage."[52] Therefore, it is possible that this paragraph may consider how to contribute to the ISA's role as a coordinator, such as through the establishment of crossing agreements.[53]

5.4 Specific Requirements for Implementation of "Due Regard" Obligations

Schedule 1 includes "damage to a submarine cable" in the definition of "incident," and the main body sets out measures to address such incidents in DR 32 "[reducing] risks of incident" and DR 33 "preventing and responding to incidents."

DR 32 Risk of Incidents

A Contractor shall reduce the risk of Incidents as much as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction, taking into account the relevant

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Guidelines. The reasonable practicability of risk reduction measures shall be kept under review in the light of new knowledge and technology developments and Good Industry Practice, Best Available Techniques and Best Environmental Practices. In assessing whether the time, cost and effort would be grossly disproportionate to the benefits of further reducing the risk, consideration shall be given to best practice risk levels compatible with the operating being conducted.

DR 33 Preventing and responding to Incident

(1) The Contractor shall not proceed or continue with Exploitation if it is reasonably foreseeable that proceeding or continuing would cause or contribute to an Incident or prevent the effective management of such Incident.

(2) The Contractor shall, upon becoming aware of an Incident:

(a) Notify its sponsoring State or States and the Secretary-General immediately, but no later than 24 hours from the incident occurring;

(b) Immediately implement, where applicable, the Emergency Response and Contingency Plan approved by the Authority for responding to the Incident;

(c) Undertake promptly, and within such time frame as stipulated, any instructions received from the Secretary-General in consultation with the sponsoring State or States, flag State, coastal State or relevant international organizations, as the case may be;

(d) Take any other measures necessary in the circumstances to limit the adverse effects of the Incident; and

(e) Record the Incident in the Incidents Register, which is a register to be maintained by the Contractor on board a mining vessel or Installation to record any Incidents or notifiable events under regulation 34.

(3) The Secretary-General shall report any Contractor that fails to comply with this regulation to its sponsoring State or States and the flag State of any vessel involved in the Incident for consideration of the institution of legal proceedings under national law.[54]

Appendix I likewise includes "contact with submarine cables" in the definition of "notifiable event," and DR 34 lists the actions to be taken by contractors in case of "notifiable events."

DR 34 Notifiable events

1. A Contractor shall immediately notify its sponsoring State or States and the Secretary-General of the happening of any of the events listed in appendix I to these regulations.

2. The Contractor shall, as soon as reasonably practicable, but no later than 24 hours after the Contractor becomes aware of any such event, provide written notification to the Secretary-General of the event, including a description of the event, the immediate response action taken (including, if appropriate, a statement regarding the implementation of an Emergency Response and Contingency Plan) and any planned action to be taken.

3. The Secretary-General shall consult with the sponsoring State or States and other regulatory authorities as necessary.

4. The Contractor shall ensure that all regulatory authorities are notified and consulted, as appropriate.

5. Where a complaint is made of a Contractor concerning a matter covered by

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

> these regulations, the Contractor shall record the complaint and shall report it to the Secretary-General within seven Days of the complaint being received.[55]

Taking these provisions together, they elaborate on the specific requirements of the "due regard" obligations of contractors in case of interruption of submarine cable operations. The contents of these requirements mainly focus on the process for notification and consultation between the contractors in question and the ISA. In this regard, from the perspective of cable industries, two aspects are still possible to improve.

First, the obligation of contractors to notify is limited to "providing written notification to the Secretary-General [of the ISA]" and "all regulatory authorities." As mentioned above, there is no competent international organization which has jurisdiction over all submarine cable activities. Consequently, only requiring contractors to notify the Secretary-General or relevant national authorities may be insufficient in the event of a cable fault. In order to ensure the speedy repair of submarine cables, some cable companies propose that contractors should be required to notify the owners or operators of the submarine cable in question as soon as they become aware of any direct contact with a submarine cable in their contract areas.[56] This article agrees that this proposal is reasonable. At the same time, in order to avoid overburdening contractors, the subjects that must notify should be qualified, such as by limiting them to those cable owners or operators who already exchange information with the ISA, both directly or through the ICPC.

Furthermore, some stakeholders claim that contractors should be required to consider notification that may be received from cable owners or operators.[57] Such a claim is supported by the reasonable argument that cable owners or operators are more knowledgeable and professional than contractors. Nevertheless, there is a lack of a reciprocal guarantee from these cable owners or operators in the event of faults during mining operation due to submarine cable activities. In this situation, it may be expected that both parties sign a crossing agreement for mutual notification.

5.5 Summary

In summary, the current version of the Draft Exploitation Code provides a coordinating framework for the implementation of the "due regard" obligation in the context of the conflicts between deep seabed mining and submarine cable activities. It covers both the approval and post-approval phases of the ISA's governance over deep seabed mining. On the one hand, when addressing the potential conflicts between deep seabed mining and submarine cable activities, this framework indicates that the Draft Exploitation Code is expected to make up for the insufficiency of the existing deep seabed mining regime. On the other hand, this framework could be further improved if the ISA would consider some flexible economic incentives like the reduction of fees, as well as encouragement of both parties of competing uses to advance their mutual cooperation by entering into a crossing agreement.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

6. Further Suggestions Regarding Improving the Coordinating Framework of the Draft Exploitation Code

This section proposes that it is possible to further improve the framework developed in the Draft Exploitation Code by the incorporation of economic measures. Two types of economic measures could be applied according to different circumstances:

i) At the approval phase, the ISA could encourage applicants to identify whether there are any in-service or planned submarine cables in a contract area under application by reducing fees in comparison to a later period;

ii) During the whole process of the ISA's governance, contractors and cable owners or operators could negotiate practicable protective measures like cable protection zones. These measures should be accompanied with a crossing agreement for sharing corresponding costs.

6.1 The Economic Measures Adopted by the ISA

There is a certain amount of cost for applicants who want to identify whether there are any in-service or planned cables in a contract area under application. In response, the ISA can encourage applicants to identify by cutting application or administrative fees. Such economic measures have been considered in addressing the issues regarding prospecting operations and maritime scientific research.

The boundary between prospecting operations and maritime scientific research is vague. It appears that many activities may be carried out on the basis of marine scientific research which is pursuant to Article 87 of the LOSC.[58] Consequently, there is very little incentive for prospectors to submit notification to the ISA of their activities, most of which may be carried out under the cover of marine scientific research. There have been merely two cases of prospecting on record.[59] In response, some scholars propose that one incentive for would-be prospectors to notify the ISA of their activities is found in regulation 5(2), which would allow prospectors who declare their financial expenditure to the ISA to set off such expenditure as part of the development costs incurred prior to commercial production.[60]

Similarly, economic measures could be taken into account by the ISA as applicants may need to bear extra costs when there exists any submarine cable in their proposed area. The development of the Draft Exploitation Code needs to fully consider sufficient incentives for companies to engage in deep seabed exploitation in light of the technical and economic difficulties they face.[61] When a proposed area overlaps with one or more submarine cable routes, the contractors in question will suffer potential economic and logistical competitive disadvantages vis-à-vis contractors whose contract areas do not contain any cables.[62] In this situation, if an area is merely supposed to have any submarine cable route, it will discourage an applicant to consider such an area, let alone identifying them.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Therefore, if the ISA could adopt measures to reduce the fees for the operation of a contract area that has a cable, applicants would have more incentives to identify whether any cables exist.[63] For example, economic measures could be incorporated into Appendix II, "Schedule of annual, administrative and other applicable fees," and elaborated in corresponding regulations for its implementation.

6.2 Crossing Agreements

Another type of economic measure is one in which contractors and cable owners or operators can negotiate certain protective measures such as cable protection zones, accompanied with a crossing arrangement to share corresponding expenditure.

DR 35 of the Draft Exploitation Code stipulates that when finding any archeological or historical remains, contractors shall suspend exploration or exploitation within a reasonable radius to avoid disturbing such remains. In other words, the contractors are obligated to establish a protection zone for these remains. If the council of the ISA decides to discontinue the exploration or exploration, the contractor will suffer certain economic loss. In this situation, some stakeholders comment that the ISA should consider compensating the contractor, including through providing another exploitation area with the same size or value as that of the affected area, or reducing the contractor's payments.[64] Therefore, the ISA's economic support can contribute to the establishment of a cable protection zone.

A zoning approach would also be applicable to address the conflicts between deep seabed mining and submarine cable activities. Some cable companies point out that the establishment of cable protection zones is more economical than rerouting cables.[65] Nevertheless, an obstacle for the establishment of cable protection zones is that it may cause losses to contractors. These include the direct loss of resources as well as the operational cost of maintaining and moving equipment carefully from one area to another at those depths.[66] As opposed to the protection of archeological or historical remains, the protection of submarine cables with economic support is beyond the responsibility of the ISA. In this situation, a more practical countermeasure is to encourage cable owners or operators to negotiate with applicants or contractors on cable protection zones. These measures should be accompanied with a crossing arrangement for sharing corresponding costs. To be specific, when identifying submarine cables in an area under application or contract area, the applicant or contractor can draft a tailored crossing arrangement that aims to reduce the risk of inadvertent damage to such cables. At the same time, the cable owners or operators provide a certain amount of compensations to the applicant or the contractor.[67] In this manner, this arrangement permits the superposition of submarine cables with deep seabed mining when necessary, and the loss of deep seabed mining would be mitigated by compensation.

Such a crossing arrangement could be incorporated into the Draft Exploitation Code. For example, as for other users' "due regard" obligation in DR 31(2), it can encourage both parties to negotiate a crossing arrangement. Moreover, when dealing

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

with specific requirements at both the approval and post-approval phases, especially procedural mechanisms in DRs 32, 33, and 34, this kind of arrangement will provide a means to incorporate them on a goodwill basis.

Nevertheless, it should be stressed that both economic measures are significant for the implementation of "due regard" obligations. That is not to say that any economic measures will be workable. For example, when deep seabed mining causes damage to submarine cables, cable companies cannot access the Special Chamber of the ITLOS. In response, some cable companies suggest adding financial guarantee provisions, which they could cancel when damage to cables occurs.[68] In theory, these measures would indeed be beneficial in protecting submarine cables. However, due to a lack of reciprocal enforcement by a competent authority, it would be difficult for contractors to the ISA to accept them.

Conclusion

Although the LOSC has incorporated the "due regard" obligation as a normative basis for the coordination of competing uses of the Area, including deep seabed mining and submarine cable activities, the lack of any framework for implementing this obligation impedes its effectiveness in practice. In response, this article has discussed the role of ISA in filling the gap.

The ISA is the competent international organization over deep seabed mining. It is argued that the role of competent international organizations concerning the implementation of "due regard" obligation has not yet received enough attention. However, the IMO's experience indicates the potential of other competent international organizations to act as coordinators. Besides, in light of the influence of potential conflicts on the ISA's governance over deep seabed mining, it is necessary that the ISA should bear such a responsibility.

Furthermore, this article has analyzed that the ISA can do this by exercising its rule-making function, and the on-going negotiation of the Draft Exploitation Code provides a precious opportunity. Through analyzing the latest version of the Draft Exploitation Code, it can be argued that the ISA has already formulated a basic coordinating framework for the implementation of the "due regard" obligation. Such a coordinating framework is expected to make up for the insufficiency of the existing deep seabed mining regime. Furthermore, this article proposes two types of economic measures to further improve this framework: one is a reduction in the application or administrative fees, another is using a crossing-agreement for sharing costs.

Notes

1. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

2. The Authority has entered into 15-year contracts for exploration for three types of mineral resources in the Area with thirty contractors, available at: "Exploration Contracts," *International Seabed Authority*, https://www.isa.org.jm/deep-seabed-minerals-contractors?qt-contractors_tabs_alt=0#qt-contractors_tabs_alt, accessed November 6, 2020.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

3. For example, a French Polynesia's telecommunications company (OPT French Polynesia) had expressed its concerns regarding the potential conflicts between its submarine cable routes and a contractor's plan of work for exploration. See Kent Bressie, "Stakeholder Submission by OPT French Polynesia," *Harris, Wiltshire & Grannis,* May 15, 2015, https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/optfrenchpoly.pdf, accessed November 6, 2020.; Jean-Francois Martin, "Comments of OPT French Polynesia on Draft Exploitation Regulations," *OPT French Polynesia*, December 19, 2017, https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/2017/Other/OPT.pdf, accessed November 6, 2020.

4. Thomas A. Mensah, "The Competent International Organizations: Internal and External Changes," in Peter B. Payoyo (ed.), *Ocean Governance: Sustainable Development of the Seas* (United Nations University Press, 1994), p. 278.

5. James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011), p. 116.

6. Ongoing development of regulations on exploitation of mineral resources in the Area, available at: "Draft Exploitation Regulations," *International Seabed Authority,* https://isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area, accessed November 6, 2020.

7. Bernard Oxman, "The Principle of 'Due Regard,'" in *International Tribunal for the Law of the Sea: The Contraction of the International Tribunal for the Law of the Sea to the Rule of Law* (*1996–2016*) (Brill Nijhoff Publisher, 2018), p. 108, https://doi.org/10.1163/9789004356832_013.

8. *Ibid.*

9. *Ibid.*

10. ISA Technical Study No. 24, p. 12.

11. *Chagos Protected Area Arbitration, Mauritius v. United Kingdom*, Award of 18 March 2015, para. 540.

12. For examples, in the book, *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016,* Tullio Scovazzi and Bernard Oxman have discussed the role of ITLOS in developing international law, including the "due regard" obligation.

13. ISA Technical Study No. 24, pp. 16–17.

14. Zoe Scanlon, "Addressing the Pitfalls of Exclusive Flag State Jurisdiction: Improving the Legal Regime for the Protection of Submarine Cables," 48 *J. Mar. L. & Com*. 295, pp. 311–312.

15. IMO Circular 282, November 27, 2009. However, it should be noted that, in the context of IMO, the necessity of establishing a non-anchoring area is dependent on to what extent anchoring may damage the marine environment. Consequently, it seems that protecting submarine cable is viewed as a part of the protection of the marine environment. See IMO Circular 215 (January 19, 2001).

16. ISA Technical Study No. 24, p. 19.

17. To find practical solutions for the peaceful coexistence of both uses in the Area, the International Cable Protection Committee (ICPC) and the ISA had already held two workshops in 2015 and 2018, respectively. As the output of these workshops, the ISA have issued two technical studies: ISA Technical Study No. 14 and ISA Technical Study No. 24.

18. ISA Technical Study No. 24, p. 76.

19. Neil Craik, "Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining," *ISA Discussion Article No. 4,* June 2016, p. 7.

20. Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume VI* (Martinus Nijhoff Publisher, 2002), p. 297.

21. ISA, ISBA/22/C/3 (12 May 2016).

22. *Regulations on Prospecting and Exploration for Polymetallic Nodule in the Area*, ISBA/6/A/18(2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014) (hereinafter "Nodules Exploration Regulations").

23. *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014) (hereinafter "Sulphides Exploration Regulations").

24. *Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area*, ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013), regulation 1(3)(a)-(b) (hereinafter "Crusts Exploration Regulations").

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

25. Satya Nandan, "Administering the Mineral Resources of the Deep Seabed," *The British Institute of International and Comparative Law, Law of the Sea Symposium*, London, March 22 & 23, 2005.

26. *Nodules Exploration Regulations*, Regulation 5(1b); *Sulphides Exploration Regulations*, Regulation 5(1b); *Crusts Exploration Regulations*, 5(1b).

27. *Nodules Exploration Regulations*, Regulation 21(4c); *Sulphides Exploration Regulations*, Regulation 23(4c); *Crusts Exploration Regulations*, 23(4c).

28. *Nodules Exploration Regulations*, Regulation 35; *Sulphides Exploration Regulations*, Regulation 37; *Crusts Exploration Regulations*, 37.

29. ISA Technical Study No. 24, p. 18.

30. *Nodules Exploration Regulations*, Regulation 35; *Sulphides Exploration Regulations*, Regulation 37; *Crusts Exploration Regulations*, 37.

31. ISA Technical Study No. 24, p. 83.

32. "Memorandum of Understanding Between the International Cable Protection Committee and the International Seabed Authority," February 25, 2010, https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/MOU-ICPC.pdf, accessed November 6, 2020.

33. *Ibid.*

34. "About the Commission," *Sargasso Sea Commission*, http://www.sargassoseacommission.org/about-the-commission, accessed November 6, 2020.

35. For example, it was suggested that the Sargasso Sea Commission could:

a. Identify areas in the Sargasso Sea that are environmentally sensitive in a database or otherwise and this information could be fed into the desktop survey for future cable installation;

b. If any navigational recommendations or requirements for vessel traffic in the Sargasso Sea were developed then these would be communicated as appropriate to the ICPC. The ICPC, in turn, might consider reflecting these measures in an ICPC recommendation, which are non-binding but experience a high level of compliance from the cable industry.

See: "Submarine Cables in the Sargasso Sea: Final Workshop Report," *Sargasso Sea Commission,* January 1, 2015, pp. 23–24.

36. "The organ must determine the limits of its own competence, because no other organ can do so; but its decisions will be illegal if it assumes powers that it does not have." See Henry G. Schermers and Niels M. Blokker, *International Institutional Law*(6th) (Brill Nijhoff Publisher, 2018), p. 531.

37. Section 3, paragraph 2 of the Annex, 1994 Implementation Agreement of the LOSC.

38. Robin Churchill and Vaughan Lowe, *The Law of the Sea* (*3rd*) (Juris Publishing, 1999), p. 245.

39. Rüdiger Wolfrum, "Identifying Community Interest in International Law," in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (Oxford University Press, 2018), p. 25, https://doi.org/10.1093/oso/9780198825210.003.0002.

40. Oxman, 2018, pp. 109–111.

41. ISBA/25/C/WP.1 (22 March 2019).

42. *Ibid.*

43. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) Submitted by the Government of Japan, October 2019.

44. Costa Rica's submission in accordance with paragraph 7 of ISBA/25/C/CRP.5, October 2019.

45. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1), Submitted by the Government of Japan, October 2019.

46. Douglas Burnett, Tara Davenport and Robert Beckman, "Overview of the International Legal Regime Governing Submarine Cables," in Douglas Burnet (ed.), *Submarine Cables: The Handbook of Law of the Policy* (Martinus Nijhoff Publisher, 2013), p. 79.

47. "Submission from Australia on Draft Regulations on Exploitation of Mineral Resources in the Area," October 2019, https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/australia-a.pdf, accessed November 6, 2020.

48. ISA Consultation 2015/1, Stakeholder Submission by OPT French Polynesia.

49. "A number of further observations about the 'due regard' obligation can be made…" (a)

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

it implies certain conduct is expected but it does not articulate any specific details about the type of conduct expected; (b) its basic elements would be ascertaining and sharing information about activities (notice), and discussing options to resolve conflicts (consultation). See ISA Technical Study No. 24, p. 73.

50. ISBA/25/C/WP.1 (March 22, 2019).

51. "Comparative Study of the Existing National Legislation on Deep Seabed Mining," *ISA*, https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/compstudy-nld.pdf, accessed November 6, 2020, para 79.

52. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) Submitted by the Government of Japan, October 2019.

53. Crossing-agreements have already been used by cable industries in areas under national jurisdiction, See Lars Olav Askheim, "Commercial Arrangements and Liability for Crossing Pipelines, Power Cables and Telecom Cables (Connectors) on the Seabed," in Catherine Banet (ed.), *The Law of the Seabed: Access, Uses, the Protection of Seabed Resources* (Brill Nijhoff, 2020), pp. 553–571, https://doi.org/10.1163/9789004391567_025.

54. ISBA/25/C/WP.1 (March 22, 2019).

55. *Ibid.*

56. Comments on the "Draft Regulations on Exploitation of Mineral Resources in the Area," submitted by the ICPC on August 25, 2017.

57. *Ibid.*

58. Michael Lodge, "International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," *Journal of Energy & Natural Resources Law* 20(3) (2002), p. 283, https://doi.org/10.1080/02646811.2002.11433299.

59. Personal communication.

60. Lodge, 2002, p. 283.

61. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) Submitted by the Government of Japan, October 2019.

62. ISA Technical Study No. 24, p. 72.

63. *Ibid.*, p. 82.

64. Comments by the Government of the PRC on the Draft Regulations on Exploitation of Mineral Resources in the Area, October 15, 2019, pp. 15–16.

65. ISA Technical Study No 24, p. 76.

66. *Ibid.*, p. 81.

67. Response to ISA stakeholder survey questionnaire: "Developing a Regulatory Framework for Mineral Exploitation in the Area," *ISA*, February 2014, https://isa.org.jm/files/documents/EN/Survey/ISA-SSurvey.pdf, accessed November 6, 2020.

68. Tara Davenport, "Responsibility and Liability for Damage Arising Out of Activities in the Area: Potential Claimants and Possible Fora," *Centre for International Governance Innovation,* February 7, 2019, pp. 16–17.

Biographical Statement

Yu Long is an adjunct researcher at the Koguan Law School, Shanghai Jiao Tong University (SJTU). He obtained a Master of Laws in public international law at Shanghai Jiao Tong University. He is also an alumnus of the Yeosu Academy of the Law of the Sea. His research interests include the law of the sea and international organization law.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

The Possibility of Litigation Regarding Liability of Flag States in the Case of Vessel-Based Pollution: Where We Stand in the Law of the Sea

Julia Cirne Lima Weston

Structured Abstract

Article Type: Research Paper

Purpose—Examining whether the current International Law of the Sea framework allows for litigation on flag state liability on the grounds of lack of compliance with pollution prevention provisions in the Law of the Sea Convention's Part XII.

Design, Methodology, Approach—Analyzing the issue according to the current legal and jurisprudential background, taking into consideration the international law of state responsibility and due diligence obligations. The aim is to establish whether there would be the possibility for this liability in international law.

Findings—The existing framework would allow for litigation regarding flag State liability for oil spills pursuant to the provisions of Part XII of the Law of the Sea Convention.

Practical Implications—This article could be used as a suggestion for improving marine pollution prevention mechanisms in terms of oil spills and other environmental regulations in the Law of the Sea.

Keywords: flag States, ITLOS, LOSC, oil spills, Part XII

Av. Tancredo Neves, no 620, Caminho das Arvores Condominio Mundo Plaza, Torre Empresarial 19 andar, sala 1924, CEP: 41.820-020, Salvador, Brazil, phone: +5551999640709, email: j.clweston@gmail.com

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 47–65 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.47 © 2021 Yonsei University

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

I. Introduction

Among all forms of marine pollution, oil spills attract the most attention, and have thus mobilized the international community the most in terms of codifying preventive legislation.[1] As a result of major oil spills at sea, the United Nations Convention on the Law of the Sea of 1982 ("LOSC") establishes comprehensive regimes for the prevention of maritime pollution, with a particular emphasis on vessel-based pollution.[2] Some oil spills at sea, mainly those caused by oil tankers, occur due to a lack of maintenance and control of seaworthiness. Control of the seaworthiness and maintenance of vessels is a responsibility which exclusively pertains to the flag State, according to the LOSC's provisions on the protection of the marine environment.[3]

The LOSC establishes a duty for flag states to exercise jurisdiction over their registered vessels, extending from administrative issues to those regarding maritime safety and seaworthiness.[4] It also contains an extensive set of provisions for environmental protection and pollution prevention, including pollution resulting from oil spills.[5] Flag states are called upon to adopt adequate legislation in order to prevent, reduce, and control pollution from ships flying their flag, establishing a standard to be followed in compliance with these duties.[6]

Flag state jurisdiction remains exclusive in the high seas and thus, is an obstacle to the proper enforcement of regulations against marine pollution.[7] After all, this exclusivity means only these states can take preventative measures, and no other states can intervene. An attempt to strengthen this control has been seen in the form of initiatives such as the Paris Memorandum of Understanding, which establishes forms of port state control and monitoring over issues such as the seaworthiness of vessels.[8] However, there is not worldwide coverage of these initiatives, and proper enforcement is ultimately debilitated since a large percentage of the world's maritime tonnage is subject to what are called "flags of convenience."[9] These are states that provide for open registry of ships, with benefits such as lower taxes.[10] These states usually make it easier for individuals to establish companies within their territories, resulting in weaker links between vessel owners and the state itself, making actual flag state enforcement a distant reality from the one aimed for during international conferences.[11] Many of the world's famous pollution incidents, such as the *Erika* case, were caused by defective vessels flying such flags.[12]

The issue becomes even more complex due to the lack of a clear concept of "genuine link" between flag states and vessels, required by the LOSC for the registry of vessels.[13] The concept was presented in the LOSC as an attempt to achieve a wider enforcement of norms through a stricter linkage between vessels and flag states, but remains undefined in the Law of the Sea. While the exclusivity of flag state jurisdiction is still regarded as a major obstacle in the enforcement of maritime pollution prevention legislation, some obligations and a certain degree of liability have been recognized.[14] This article argues that public international law and Law of the Sea rules make it possible to litigate the issue of flag state liability when there is a lack of enforcement of pollution prevention provisions outlined in Part XII of the LOSC. Consequently, it also argues that this should be used as a way of elevating the stan-

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

dards to be applied by all flag states. In order to argue this, an overview of the applicable law on flag state jurisdiction is provided; the issue of "genuine link" and flags of convenience is analyzed; the attribution of responsibility for internationally wrongful acts in international law is conceptualized, with a specific focus on private actors; the issue of due diligence obligations is analyzed according to the current paradigm and, finally, the specific issue of flag state liability is discussed in light of current jurisprudence and legislation.

II. Flag State Jurisdiction and Oil Spills—An Overview of the Applicable Law

Although the advent of the LOSC signified many steps forward toward marine environmental protection, the regime of the high seas is still based on the premise of freedom of navigation.[15] The LOSC, when regulating activities on the high seas, states freedoms in a non-exhaustive list, including the freedom of navigation.[16] This is complemented by the logic presented immediately afterwards in the text, which establishes flag state jurisdiction as exclusive in the high seas, and concurrent in other states' maritime zones.[17]

Besides the flag states' primacy of jurisdiction over vessels, the LOSC also appears to give them discretion within their domestic laws regarding the registration of vessels, declaring that conditions to fix nationality are to be established within states' own domestic laws.[18] This was emphasized by the International Tribunal for the Law of the Sea ("ITLOS") in the *M/V Saiga* case. Here, ITLOS stated that article 91 of the LOSC allows each state exclusive jurisdiction over issues of granting of nationality, with the freedom to fix their own conditions, seeing it as a codification of customary international law.[19] This ends up leaving plenty of autonomy for flag states to establish their means of registering ships, and potentially to establish fewer ship registration requirements, which could arguably result in more legitimacy for so-called "flags of convenience."

While conferring jurisdiction primarily on flag states, the LOSC establishes corresponding duties that should be performed.[20] There is a duty for the flag state to "[…] effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[21] These duties are seen as complementary to guaranteeing freedom of navigation.[22] Measures regarding, *inter alia*, the assessment of vessels' seaworthiness are also imposed by the LOSC.[23]

Along with the duty to exercise jurisdiction over vessels flying its flag, a state is also bound by environmental standards established in the LOSC. One of the LOSC's major innovations was to provide for a general duty to preserve the marine environment.[24] This is seen by some as having passed into customary international law as a duty, while others, such as the authors of the Virginia Commentary, argue that it is a mere general provision which is always subject to other LOSC rights and duties.[25]

Moreover, States are required to take measures to avoid incidents happening

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

under their jurisdiction and put controls in place to prevent cross border damage or pollution to other states.[26] Seeing the aforementioned issues regarding flag state jurisdiction, the logical conclusion is that this is yet another duty of flag states imposed by article 194 and subsequently by the LOSC.[27] The provisions of article 194 and its following articles, are defined by Czybulka as "[…] where the rather general principles of Arts. 192 and 193 are concretized and transformed into specific obligations of States."[28] The understanding of the international jurisprudence in the *Trail Smelter*, *Corfu Channel* and *Pulp Mills* cases, in this sense, is that there is an obligation on states not to use their territories to cause harm to others.[29] This was echoed within the LOSC's article 194, and is called the "no-harm principle."[30] It is suggested that the wording in the article would make it applicable not only to states party to the LOSC, but also toward other states, which is important for a uniform approach to environmental protection if recognized as a part of customary international law.[31]

In order to establish the obligations of preservation of the marine environment and prevention of pollution, legislative standards are suggested in the LOSC's article 211. The article is the result of a balance between the interests of the states involved, and presents a framework for dividing rights and duties between the LOSC's main parties (coastal, flag and port states).[32] As a result of this provision, flag states need to adopt regulations to prevent, reduce and control pollution, and said regulations must not be less effective than the international standards. Coastal states can adopt such regulations without hampering inherent rights of navigation, and port states can establish such measures before allowing entry into their internal waters, as long as they are duly publicized.[33]

As pointed out by Treves, enforcement jurisdiction to be exercised by flag states under the LOSC is not only a right, but an obligation, due to the articles' wording.[34] These enforcement obligations complement the general obligations on the previous articles. They should be performed "effectively" and independently of where the issues occur.[35] These obligations were brought as an answer to the criticism of lack of enforceability of the concept.[36] They impose specific duties on flag states in order to ensure better enforcement subject to internationally accepted rules and standards.[37] These enforcement obligations are comprehensive: enforcing measures to preventing ships from sailing should they not be compliant with the necessary standards, ensuring their due certification is maintained, and most importantly (with the chosen wording "shall"), initiating investigations should there be incidents at sea.[38]

At the end of Part XII, the LOSC establishes states' liability for fulfilling international environmental responsibilities, as well as for ensuring recourse within their domestic systems to provide for adequate compensation regarding environmental damages happening under their jurisdiction.[39] "Liability in terms of international law," as is worded in paragraph 1 of article 235, refers to the principle of liability within the ILC Articles on State Responsibility for Internationally Wrongful Acts ("ASR").[40] Such was the understanding of the ITLOS in its "Advisory Opinion on the Responsibilities of Sponsoring States in the Area."[41] Article 235 of the LOSC

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

establishes a responsibility for flag states over their registered vessels to be settled in accordance with the principles set out in the ASR.

Therefore, the LOSC has a framework establishing both rights and duties of flag states. This allocation of rights and duties, including those of enforcing international regulations and standards is evidently flag state centered. This becomes a significant problem when there is little to no true linkage between the flag state and the vessel flying its flag, which is examined in the following section.

III. The Problem of Flags of Convenience and "Genuine Link"

As established in the previous section, customarily flag states have the primacy of jurisdiction and enforcement over their registered vessels throughout all maritime zones. However, this primacy of enforcement of flag states has been criticized due to the fact that most of the world's maritime tonnage today is composed of ships flying "flags of convenience." These states allow for the registration of foreign owned ships, offering as advantages lower taxes, as well as more lax labor, environmental and safety requirements.[42] As summarized by Boczek, flags of convenience "[…] refer to the flags of states which grant nationality to ships with which they have no genuine connection: the relation between them is merely the formality of the grant of certificate of registry."[43] Another worrisome issue is that usually states offering these kinds of advantages also allow for easy incorporation of companies, which permits ships to be registered under shell companies.[44] Consequently, the actual linkage between the real owner of the vessel and the state of registry is either less strict or barely existent. "Flags of convenience" are thus not only an unavoidable topic when discussing marine pollution and flag state jurisdiction, but are also seen as a major obstacle toward the proper enforcement of flag state duties.[45] According to UNCTAD's "Maritime Transport Report" released in 2019, the top three countries of shipping tonnage, which corresponds to over 40 percent of the world's tonnage, are known flags of convenience: Panama, Liberia and the Marshall Islands.[46] Hence, this remains a reality today as ever.

The issue of "genuine link," has been approached in both international conferences and international jurisprudence alike. The topic came up in United Nations conferences preceding the current LOSC as an attempt to strengthen the control of flag states over their registered ships, thus avoiding flags of convenience.[47] Despite all efforts, the article adopted had a similar wording to the article already present in the High Seas Convention, relying on the concept of "genuine link" without any specific definition given to the term.[48] The concept still lacks a clear definition in the several treaties dealing with the issue.

The first case in which ITLOS had the chance to assess "genuine link" was that of the *M/V Saiga*. When questioned about the issue and the necessity of there being a "genuine link" between a flag state and a vessel in order for other states to recognize a vessel's nationality, the tribunal affirmed that the purpose of the "genuine link" requirement was to secure a more effective implementation of duties, and not to

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

establish a framework for other states to question the registration of ships.[49] It also stated that the evidence provided by the flag state, St. Vincent and the Grenadines, did not allow for questioning the fulfilment of its functions as flag state.[50] The tribunal's approach has been criticized as having established a very low threshold of evidence to establish a vessel's link with the state, and, thus, favoring the increasing usage and spreading of "flags of convenience."[51]

ITLOS' reasoning was, nonetheless, echoed in the more recent case of the *M/V Virginia G.* According to the tribunal, if the evidence presented was enough to sustain that upon registration a flag state was performing its duties under article 94, there would be a fulfillment of this requirement.[52] Arguably, by the tribunal's jurisprudence, the mere fact of a ship having been registered by a state would mean the existence of a "genuine link."[53] Seen in a more positive light, ITLOS' reasoning in these cases could also mean that responsibility is acquired once a state accepts the registration of a vessel, due to the obligations it acquires when it decides to become a party to the LOSC.[54]

Considering this apparent lack of an exact definition of what constitutes a "genuine link," it is arguable that it is easier to base a case of flag state liability on the flag state duties listed under article 94 than on the basis of the existence of a "genuine link."[55] Arguably, presenting a case on the issue of flag state duties under article 94 could also entail another opportunity to discuss the concept in more detail. The obligations that article 94 sets out regarding the exercise of jurisdiction over ships, when questioned, such as after an investigation, could have implications on the existence or absence of a "genuine link."[56]

As there is still no exact definition of what constitutes a "genuine link," there is a convenient way of registering vessels which do not hold any true links to states, and, as a consequence, incidents resulting from lack of enforcement remain.[57] A study by researchers at the University of British Columbia shows that, since the 1960s, such flags are still responsible for over 40 percent of oil spills worldwide.[58] Although the LOSC has introduced many provisions on the enforcement of regulations and rules by flag states, those are still dependent on the existence of a true link between vessels and flag states.[59] While there is no concept or guidance, one is forced to accept the fact that there will still be vessels registered in order to circumvent stricter controls, arguably presenting more environmental risks to maritime transportation.[60] This circumvention not only appears to be allowed by the current jurisprudence and legislation, but also comes as a natural consequence of competition in the shipping industry.[61] Thus "genuine link" does not appear to present the most feasible alternative to attribute responsibility to flag States regarding enforcement of marine pollution measures.

IV. Attribution of Responsibility Under International Law

Before addressing the specific issue of liability in the case of flag states, it is important to understand how public international law rules govern attribution of

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

responsibility for wrongful acts of states. The current system is guided by the ASR. Although the ASR are not binding *per se* in international law, they are used as a reference due to being recognized by the United Nations General Assembly.[62] The articles aim to establish the consequences of internationally wrongful acts occurring as a result of either actions or omissions of a state.[63] For instance, if a state violates an international obligation and harms another state, this would constitute an international wrongful act. In the view of this article, the existence of a general obligation to protect the marine environment and to prevent pollution is contained in the text of the LOSC's Part XII.[64] A breach of these obligations will amount to an internationally wrongful act of a state if the act in question is attributable to the state. In order for responsibility for a breach of an international obligation to be attributed to states, the acts or omissions in question must have been performed by the state directly or through its organs, or, if by private actors, when performed in a sovereign capacity or under the instructions of the state.[65]

It is common for states to rely upon private entities to carry out ship verification. This is the case with most flags, mostly "flags of convenience," and was the reality in the *Erika* case. In that case, the company which gave out licenses in the name of the Maltese State was Malta Maritime Authority ("MMA"), a private contractor.[66] It is, thus, important to verify how attribution of responsibility for acts or omissions of private actors works in the international plane.

Article 5 of the ASR presents the first possibility of attributing responsibility to entities which are not organs of the State:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[67]

This suggests the possibility of attributing the acts or omissions of private entities to the state, as long as they act in governmental authority. There are, of course, limitations to which kinds of acts can be considered as possessing the characteristics of governmental acts; these are listed in the article's commentary.[68] The commentary to the articles also limits acts performed by States to acts of entities specifically authorized to act in governmental authority by internal law.[69] This seems to be a narrower possibility of attributing responsibility only when the authorization is specifically granted by internal law.

When that is not the case, there is still the possibility of using article 8 of the ASR, which states that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[70] This would be an easier way of establishing attribution, and would require authorization of conduct, such as through a contract or administrative arrangements, thus favoring a wider scope of ways for that authorization to be granted.[71]

Thus, after analyzing both possibilities, there are two options which could be

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

applied in practice when there is the delegation by the state to private entities of its duty to monitor its own flagged vessels. This attribution would make it possible to hold States accountable, for instance, in the case of a negligent certification performed by a private agent.

Since this article focuses on international litigation as an alternative to raising the standards to be followed by flag states, an important issue to determine is who could bring an international claim against a flag state for not fulfilling its duties. Under the ASR, the denominated "injured states" are entitled to the responsibility of others. Since Law of the Sea obligations are owed to the international community as a whole, sometimes it is hard to determine whether there is a directly injured state.[72] Sometimes there will be a clearly affected state, such as a coastal state affected by breaches of norms of marine pollution that has had its coastline polluted directly as a result of oil spills.[73] In such a case, one can argue an oil spill affecting a particular state would make it an "injured" state under article 42 of the ASR.[74] Moreover, it is important to argue that Law of the Sea obligations toward flag states when it comes to environmental protection and other standards, are owed to a collective international community, and hence could be invoked by states other than the "injured," according to article 48 of the ASR.[75] The main difference between both proceedings would be that while the injured state could ask for compensation for damages, ones other than the directly injured would only be able to ask for the cessation of the offending act or omission.[76]

There are international obligations, and the act of violating or by omission failing to uphold these standards by states would constitute internationally wrongful acts. This could indeed occur in the case of an oil spill if a non-seaworthy vessel is granted a license, even if through a private party, because it does not ascribe to the duties established in article 94 of the LOSC. The possibility of flag state liability arising directly from an oil spill is unlikely, as it would imply that the state would be directly liable for what happens on a ship, even if it remains a private actor and not its agent.[77] Considering the LOSC's rules on flag state duties, however, this attribution would be more easily applicable in the scenario of ship monitoring and certification. For that, some states delegate those functions to private actors, and the possibility for attributing responsibility for its acts and omissions would still stand as a feasible alternative, if proven that those actors are exercising sovereign acts or acting under a state's directions. Therefore, if one applies the ASR in the case of private contractors, this raises the question of whether the act could be considered of a sovereign nature, in order to make attribution of such acts or omissions to states more or less likely. This is discussed in the following section.

V. Attribution and Flag State Liability in International Law—The Issue of Private Actors

Attribution of acts or omissions of states requires that the act or omission be performed either by the state through its organs, or by private actors acting under

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

governmental authority or under instructions of the state. Some states do not license and authorize certifications to vessels themselves. Rather, they delegate that function to private agents. This section analyzes how liability could still be attributed under the ASR, considering the current jurisprudence. Importantly, according to instruments which are also encompassed by the LOSC such as MARPOL (International Convention for the Prevention of Pollution from Ships), relying on private agents, such as classification societies, does not remove the state's burden to control those entities.[78]

One of the most emblematic cases in the issue of oil pollution was that of the *Erika*. In that case, an oil tanker, flying the flag of Malta, carrying crude oil, broke in half and sank near the French coast, in its exclusive economic zone (EEZ), spilling its contents onto the coast of Brittany.[79] After French investigations, it was verified that the ship should not have been authorized to navigate as it was not seaworthy.[80]

The French court, when judging the *Erika* case, based its approach on state immunity, saying that it could not judge the Malta Maritime Authority, the company which issued the *Erika*'s right to navigate, as it was, in fact, performing acts on behalf of the Maltese state.[81] It stated that although it was a private institution, it was performing duties under the exercise of public authority and referred to French rules about the issue as well as international custom. Following the French position in this case, it would be possible to argue that omissions of control or acts of negligence performed by these private agents could still be connected to the state, as they are acting in a sovereign capacity and, thus, could mean that the state is still responsible for these acts. This rationale also makes it harder for states to avoid their international duties under the LOSC by hiring private contractors to perform the duties they assumed when signing the LOSC.

A more current issue, which has not yet been solved, has been posed by the *LG v Rina SpA and Ente Registro Italiano Navale* dispute heard before the European Court of Justice (ECJ). The case originated from a shipwreck near the Italian coast, and the families of the victims sought to sue the classification societies which allowed for the ship to sail.[82] In it, both companies alleged to have fulfilled their functions as delegates of the Panamanian state, and, thus, would hold immunity from proceedings.[83] The advocate-general's opinion based itself on the issue of immunity not being an absolute concept and that functions delegated by a state to comply with international obligations would not necessarily mean public authority had been exercised.[84] This line of reasoning ended up being accepted by the ECJ, which concluded that immunity would not preclude the Genovese Courts to analyze the case and then conclude whether the activities were performed under public authority.[85] This was done referring to an European Union Law directive which could place the actions of private entities, such as classification societies, under the civil and commercial acts' exception from sovereign immunity.[86] Thus, this remains to be addressed by the referring court regarding the exercise of public functions in the acts of private parties when they are delegated.

Even after analyzing both these perspectives, there is still a lack of consensus. If one is to argue that those acts are still sovereign, as there is a duty of the flag state to ensure that vessels are seaworthy and up to international standards, then it would

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

not harm the possibility of liability on an international litigation level. If one is to argue to the contrary, that those private agents' actions would not make the state liable, it could make attributing liability harder. However, even if the second possibility is later confirmed, it can still be argued that the state still had the obligation to make its best efforts to preserve the environment according to the provisions in the LOSC. This is examined in the following sections.

VI. "Due Diligence" in Configuring Flag State Liability for Oil Pollution

Arguably, the concept of "due diligence" obligations is relevant when interpreting the obligations of states in relation to oil spills at sea. The notion of "due diligence" obligations under the LOSC has been developed by ITLOS in its two advisory opinions regarding the activities of private agents in the Area and activities of Illegal, Unregulated and Unreported (IUU) fishing.[87] It is consequently imperative to understand what those obligations are, how they have been applied by international tribunals and how they affect flag state liability.

Due diligence obligations are not exclusive to the Law of the Sea, being present in other public international law fields.[88] They are also seen as key elements in environmental law.[89] These are, according to ITLOS jurisprudence, obligations "[…] 'of conduct' and not 'of result.'"[90] Thus, what matters is not the result itself, such as a maritime casualty, but the conduct taken by the state in order to avoid it. This makes it somewhat harder to establish a state's liability, even if something harmful to other states, such as an oil spill, occurs. This is due to the fact that, since due diligence comprises a state's conduct to avoid harming another, it will only be enforceable if confirmed that a state did not do all it could do to prevent said harm from taking place.[91] Such measures within an environmental context would be adopting and enforcing legislation on the issue, and providing recourse for affected parties within domestic systems.[92]

Attributing liability to states for issues only if their conduct was not appropriate was seen as a way to encourage a wider participation in international treaties, as more autonomy is given to states when the focus is on their conduct, thus making it more easily conciliated with concepts of sovereignty and non-interference.[93] Although evidently not easy to apply, due diligence can still be evaluated and found as not having been complied with, still making it possible for states to bring to an international litigation the others' lack of due diligence in abiding to their international environmental obligations. Thus, while flag states are unlikely to be held strictly liable for an oil spill, they can still be held liable if their conduct goes against the international obligations that they are subject to.

The most emblematic practical application of due diligence was that of the International Court of Justice (ICJ) in the *Pulp Mills on the River Uruguay* case. The ICJ concluded that due diligence consisted both of enforcing measures and being vigilant of the activities performed by the controlled parties.[94] The ICJ stated that a

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

party's liability would be triggered when it was "[…] shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction."[95]

The ICJ's position was later echoed by ITLOS on different occasions in which it clarified issues on state liability in its two advisory opinions. This is particularly important, as ITLOS would be a relevant institution should a dispute arise regarding vessel-based pollution. The first case to use this rationale was the advisory opinion regarding the "Responsibility of States in the Sponsoring of Activities in the Area." ITLOS concluded, through article 139's wording, that there was a responsibility "to ensure," and that was related to a "due diligence" obligation, which could not make a state liable for all conduct but that they would not be completely excused from liability.[96] This resulted in saying that there was an obligation regarding employing the best means to prevent a result, and not to achieve a certain result, focusing on the state's conduct and, thus, an obligation of "due diligence."[97] The tribunal's reasoning on the opinion in the Area was adopted in its second opinion, on IUU Fishing. Something to note about this decision, however, is that while the part on the Area especially refers to an "obligation to ensure" in article 139, there is no specific wording on that respect regarding IUU fishing, as is the case with marine pollution. In order to make said rationale "fit" within the analyzed articles of the LOSC for IUU fishing, ITLOS applied the wording of the articles on flag state jurisdiction regarding the EEZs of other states, as well as of general flag state duties under article 94 in order to apply the same reasoning as the previous advisory opinion, of the "responsibility to ensure."[98] The tribunal called for special attention to the text of article 194 which says that states shall take necessary measures to ensure that activities under their jurisdiction and control are conducted as to not cause damage by pollution. In both cases, liability for wrongful acts of the sponsored entities or vessels would not be directly attributable to the state, which could only be liable for not having taken adequate measures to fulfill its due diligence obligations.[99]

We are thus faced with two analyses made by ITLOS on different occasions, but none directly regarding the issue of oil spills. Considering ITLOS' relevance, should a case or an advisory opinion be proposed on the issue, it is interesting to reflect on the applicable reasoning. It is, thus, interesting to look at which of the LOSC's norms could be applied to the issue. Regarding oil spills, Part XII of the LOSC has major relevance, as it contains the norms on marine pollution prevention. Arguably, should an oil spill case arise involving a state's lack of compliance with general requirements, this would closely resemble the "responsibility to ensure" in the articles on the Area. That is because article 217 of the LOSC, when discussing enforcement by flag states, explicitly says "States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards […]." Although there is not a literal "responsibility to ensure" as the one brought forward by article 139, that did not prevent ITLOS from applying the same line of reasoning in the IUU Fishing Advisory Opinion, where the articles analyzed did not have a similar wording regarding enforcement. In this sense, a likely approach by ITLOS to this subject would be in the same sense as the IUU Fishing opinion, where

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

more general obligations which do not literally contain the term "responsibility to ensure" were used in order to state such obligations, regarding the analysis done by the tribunal on the duties of the flag state under article 94. In the view of this author, the most probable articles to be used in the case of an oil spill would be the flag state duties under article 94 such as in the IUU Fishing opinion, along with the general obligation to preserve the marine environment in articles 192 and subsequent of the LOSC, with a possible emphasis on article 194, as it specifically states the obligation of states to take measures so that activities under their jurisdiction or control do not cause damage to other states through pollution. Another likely emphasis would be on the language of article 217 on the enforcement by flag states, as it establishes their need to ensure compliance by their flagged vessels. Finally, article 235 should be relevant, as it does entail responsibility of states for fulfilling their obligations over preserving the marine environment and makes them liable according to international law. Article 211 could be relevant as a standard to be followed regarding the need for the due diligence obligation to be met, as it focuses on the regulations' content regarding vessel-based pollution and the need for vessels to be up to international standards.

Considering that on both occasions, albeit in different contexts, ITLOS has used due diligence, focusing on conduct, arguably this would be the same in the case of litigation against flag states for oil spills at sea. In such a case, it appears impossible that states would be liable for the specific casualty of a single oil spill, but would be, generally, should they be seen as not being compliant with pollution prevention standards. If one is to consider the alternatives presented throughout this exposition, some ways of holding flag states liable could be envisioned. These are critically analyzed in the following section.

VII. Attributing Responsibility to Flag States in Practice—Considering the Possibilities

The previous sections of this article present the possibilities of attributing responsibility to flag states regarding their compliance with their duties under the LOSC. What remains is to analyze more deeply which ones would be more likely to thrive in practice in the case of an eventual future international litigation on the theme. Before heading into this specific analysis, it is important to clarify that it only applies to oil spills, which happen due to a flag state's failure to apply its standards, not those which are solely based on human failure or other *force majeure* reasons.

Firstly, it is important to see whether the single event of an oil spill could be attributable to a flag state. In this author's view, there are two trains of thought that could be followed. If one considers the reasoning contained in both *Corfu Channel* and *Trail Smelter*, as well as the LOSC's dispositions on jurisdiction, a possible rationale would be that casualties that occur under a state's jurisdiction should not cause harm to another state. There is, however, a major obstacle toward this appli-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

cation, which would be the notion of jurisdiction as territorial or extraterritorial jurisdiction. Both cases use the term jurisdiction in a sense of territorial jurisdiction, as both issues happened within the states' territories, which is not the case should something happen inside a ship. Although there is the use of extraterritorial jurisdiction in some areas of law, such as international human rights law, it is still seen as controversial and exceptional by doctrine and jurisprudence alike.[100] To assume every ship is under a state's full jurisdiction after registration seems to stretch the concept in a way that it was perhaps not intended when negotiating the LOSC. That can also be seen concerning the specific areas listed within article 94 over which the flag State should have jurisdiction.

The most important counterpoint to consider, however, is that actions or omissions by ships themselves are hard to be considered as *per se* attributable directly to a state, as ships are private actors, although primarily under the jurisdiction of flag states.[101] The nature of maritime transport is, in itself, a complex one, involving an entangled network of different private providers. However, it does not mean that, in case that the state fails its duties of inspecting ships and verifying their seaworthiness, among other duties in enforcing marine environment protection regulations, it cannot be held liable for not disposing of its duties as would be required by the LOSC. Hence, a more solid argument would be that liability could be attributed for not pursuing LOSC duties accordingly, rather than the casualty caused by a ship.

Assuming flag state liability for oil spills due to lack of control over flagged vessels as a possibility, could it be triggered merely by a state's lack of compliance with its duties assumed under the LOSC? Former ITLOS Registrar Philippe Gautier argues in a sense that "[…] once it has accepted to register a vessel, the flag state is required to carry out the tasks and responsibilities entrusted to it by the 1982 Convention."[102] That being said, it seems like a logical conclusion that a state could be seen as being in breach of these obligations if it does not comply with the enforcement of these standards when it comes to its flagged vessels. After all, the flag states' duties are mostly focused on prevention of casualties, by monitoring and certifying its vessels. If proven that it did all it could to monitor these vessels and yet something happened, it would be hard to argue that the state did not, in fact, fulfill its duties under the LOSC.

Even if one considers the possibility of attributing responsibility for oil spills to states which have not properly pursued their duties under the LOSC, it is still hard to argue that they would be liable for the direct event of oil spills. Not only because the ship is a private party which is not usually performing activities under the name of the state, but also because it is not compatible with the current jurisprudence regarding liability of states for activities performed by private parties. The current jurisprudence, as presented, is more focused on the concept of due diligence than on the result of the lack of compliance with those obligations.

In both of its Advisory Opinions, the response of ITLOS has been primarily focused on the concept of due diligence and obligations of conduct. This could mean that, in the case of litigation of a maritime casualty, the event itself would not be considered individually as a source of liability. The liability in this case would derive

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

from the proven lack of compliance of the state with the regulations it should have enforced over private parties under its jurisdiction in order to prevent maritime pollution established in Part XII. This would include the legislation of preventive measures as well as providing a system of recourse inside their own domestic systems. Thus, no liability would arise should necessary precautions have been taken to prevent the casualty from happening and if adequate recourse and compensation were made available.

This paper still maintains that international litigation is a valuable solution, due to its capacity to form precedent and, consequently, lift the general standards for ships. Although this would mean specific casualties would not be addressed individually in a Law of the Sea setting. This is because these kinds of disputes could help prevent similar events from happening in the future, as they could work to establish general minimum standards to be followed by states independently of them being "flags of convenience." These kinds of cases could also arise even if there is no damage, should states not be fulfilling their duties of properly monitoring vessels. Those could be due to a lack of effective regulation, or lack of enforcement, as well as lack of compliance with the required standards.[103] It is still important that these kinds of judicial avenues are pursued in a manner of trying to generally raise the applicable standards.

Thus, states would most likely not be held liable for specific circumstances of oil spills. The mere fact of an international litigation, however, would set an important precedent that should not be disregarded. As previously mentioned, most of the world's marine tonnage is under the jurisdiction of so-called "flags of convenience." This not only makes controlling them harder, due to lack of identification of owners, but also threatens environmental protection if not duly enforced by those flag states.[104] Eventual litigation over this specific matter would help improve the general standards of flag states, once a ruling on the matter of what would constitute diligent conduct when it comes to preventing vessel-based oil pollution has been made.

VIII. Conclusion

This paper examines the possibility of attributing liability to flag states in respect of their lack of compliance with vessel-based oil pollution regulations under the international law of the sea. The attribution of responsibility to flag states is based on the fact that the flag state, besides having the primacy of jurisdiction over its registered vessels throughout maritime zones, has duties to fulfill according to the LOSC regarding prevention of maritime pollution. The LOSC makes these duties subject to the ASR and requires that the states' own domestic systems provide for adequate recourse. These provisions create obligations for flag states and flag states will be internationally responsible for breaching such obligations according to the general rules on attribution of wrongful conduct of the law of state responsibility. To this end, either article 5 or 8 of the ASR could be used depending on

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

whether and how a state has delegated power to private entities to certify its flagged vessels.

An analysis of the relevant international jurisprudence indicates that it would be unlikely for a flag state to be held liable for the specific event of an oil spill. That is because international jurisprudence relating to similar types of obligations has considered obligations to prevent certain conducts to constitute "due diligence" obligations, in which a larger focus is placed on the conduct undertaken by states to prevent damage, rather than on the result. Such was the approach taken by ITLOS in both of its advisory opinions, and, as detailed here, a similar reasoning to the opinion on IUU fishing could apply should there be a case regarding an oil spill before the ITLOS. The tribunal could derive a "responsibility to ensure" from the applicable provisions of Part XII in order to state that there was an obligation of conduct, of employing the best means possible in order to avoid pollution. This would mean that, should a state prove it took all necessary measures when licensing a vessel, even if an oil spill causing damage happened, the flag state would not be liable for the specific damage of an oil spill, or not even be held liable at all should damage occur. If proven that measures were not taken or were not effectively enforced, there would be responsibility from the part of flag states, due to their lack of compliance with LOSC standards. It is important to highlight that oil spills are circumstances that not only depend on a state's conduct or lack of certification, but also on human error. These circumstances would certainly not be attributable to the state should it be proven that it did comply with and enforce international regulations on the prevention of marine pollution.

Considering the current global situation, in which there is still significant ownership of the world's tonnage of cargo ships by so-called "flags of convenience," a solution for increasing or clarifying the internationally accepted standards is to litigate the issue before international courts. Such a course of action could be pursued either by those states directly affected by oil spills, or by others in the international community, as LOSC obligations are collectively owed. Although there would not necessarily be direct compensation for the specific event of the oil spill, litigating the issue would contribute to a clarification of the requirements toward a wider abidance by flag states regarding the applicable international rules on the prevention of maritime pollution. This could be a way of elevating standards, making it harder for states with less regulations to maintain them as such. It could also contribute to the clarification of other important concepts, such as that of a "genuine link," which still remains indeterminate.

Notes

1. Guido Fernando Silva Soares, "A proteção do meio ambiente marinho, na perspectiva do direito internacional," in Georgette Nacarato Nazo (ed.), *As águas no limiar do século XXI* (São Paulo: Lilivros, 1999), p. 62–63.

2. Karen Bartenstein, "Pollution from Vessels," in Alexander Proelß, *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Nomos, 2017), p. 1426.

3. Carmen Casado, "Vessels on the High Seas: Using a Model Flag State Compliance Agree-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

ment to Control Marine Pollution," *California Western International Law Journal* 35 (2005), p. 227.

4. *United Nations Convention on the Law of the Sea of 1982*, signed December 10, 1982, 1833 UNTS (entered into force November 16, 1994), art. 94.

5. *Ibid.*, Part XII.

6. *Ibid.*, art. 211(3).

7. *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion), 2 April 2015, *ITLOS Reports 2015*, p. 4; A.T.K. Jin, "The Regulation of Vessel-Source Marine Pollution: Reconciling the Maritime and Coastal State Interests," *Singapore Journal of International and Comparative Law* 1 (1997); Joanna Mossop, "Can We Make the Oceans Greener: The Successes and Failures of UNCLOS as an Environmental Treaty," *Victoria U Wellington L Rev* 49 (2018), p. 573, https://doi.org/10.26686/vuwlr.v49i4.5341.

8. Paris Memorandum of Understanding, "History," *Paris Memorandum of Understanding*, n.d., https://www.parismou.org/about-us/history, accessed November 6, 2020.

9. Mossop, 2018, p. 573.

10. Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (London: Bloomsbury, 2016), p. 377.

11. *Ibid.*

12. Robin Churchill, "From Port State to Court State? International Litigation as a Possible Weapon to Combat Sub-standard Ships," in Tafsir Malik Ndiaye, Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff, 2007), p. 901; Arrêt n 3439 du 25 septembre 2012 (10–82.938) de la Chambre criminelle, *L'affaire de l'erika*.

13. *United Nations Convention on the Law of the Sea* (*n*4), art. 91; Myron H. Nordquist, Satya Nandan, Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea Commentary, Vol III* (Leiden: Brill Nijhoff, 2013), p. 242.

14. Refer to *Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10; and *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*.

15. Jin, 1997.

16. *United Nations Convention on the Law of the Sea*, art. 87.

17. *United Nations Convention on the Law of the Sea*, arts. 20, 56, 87, and 92. Refer also to Myron H. Nordquist et al., 2013.

18. *United Nations Convention on the Law of the Sea,* art. 91.

19. *M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines v. Guinea*), *Judgment, ITLOS Reports 1999*, p. 10.

20. *United Nations Convention on the Law of the Sea*, art. 94.

21. *Ibid.*

22. Douglas Guilfoyle, "Duties of the Flag State" in Alexander Proelß, *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Nomos, 2017), p. 710.

23. *United Nations Convention on the Law of the Sea*, art. 94.

24. *United Nations Convention on the Law of the Sea*, art. 192.

25. Amber Rose Maggio, "Regional Cooperation and Marine Environmental Protection in Southeast Asia: Governance Models and Regional Particularities," *Asia-Pacific Journal of Ocean Law and Policy* 4 (2019), p. 203–204, https://doi.org/10.1163/24519391–00402006; see *MOX Plant* (*Ireland v. United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95; Permanent Court of Arbitration, *The South China Sea Arbitration* (*The Republic of Philippines v. the People's Republic of China*) (case No. 2013–19, 12 July 2016); *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment, ICJ Reports 2010, p. 14; Myron H. Nordquist, Satya Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea Commentary, Vol IV* (Leiden: Brill Nijhoff, 2013), pp. 36, 43.

26. *United Nations Convention on the Law of the Sea*, art. 194.

27. *Ibid.*

28. Detlef Czybulka, "Measures to Prevent, Reduce and Control Pollution of the Marine Environment" in Alexander Proelß, *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Nomos, 2017), p. 129; *United Nations Convention on the Law of the Sea*, arts. 192, 193.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

29. *Ibid.,* 1305; Trail Smelter Arbitration (*United States v. Canada*) *Arbitral Trib, 3 UN Rep Int'l Arb Awards* 1905 (1941); *Corfu Channel Case*, Judgment of April 9th, 1949: ICJ Reports 1949, p 4.

30. Detlef Czybulka, 2017, p. 1305.

31. Myron H. Nordquist et al., 2013, p. 64.

32. Karen Bartenstein, 2017, p. 1423; Myron H. Nordquist et al., 2013.

33. *United Nations Convention on the Law of the Sea*, art. 211.

34. Tulio Treves, "Jurisdiction Over Vessels in the Areas of Pollution and Fisheries: General Report" in Erik Franckx; P. Gautier (eds.), *The Exercise of Jurisdiction Over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (Brussels: Bruylant, 2010), p. 7; *United Nations Convention on the Law of the Sea*, arts. 94 and 211.

35. Karen Bartenstein, 2017, p. 1483.

36. *Ibid.*

37. Myron H. Nordquist et al., 2013, p. 242.

38. *United Nations Convention on the Law of the* Sea, art. 217.

39. *United Nations Convention on the Law of the Sea*, art. 235.

40. *Ibid.*

41. Tim Stephens, "Responsibility and Liability" in Alexander Proelß (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Nomos, 2017), p. 1586; *Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion,* https://doi.org/10.5771/9783845258874-1586.

42. Peter L'Esperance, "In the Wake of the Erika: Flag State Responsibility for the International Obligations Under the Law of the Sea," *30 Ocean Yearbook* (2016), p. 506, https://doi.org/10.1163/22116001-03001019.

43. Boleslaw Adam Boczek, *Flags of Convenience: An International Legal Study* (Cambridge: Harvard University Press, 1962), p. 3.

44. Awni Behnam and Peter Faust, "Twilight of Flag State Control" *17 Ocean Yearbook* (2003), p. 169, https://doi.org/10.1163/221160003X00096.

45. Joanna Mossop, 2018, p. 581.

46. "Review of Maritime Transport 2019," *United Nations Conference on Trade and Development,* January 20, 2020, https://unctad.org/en/PublicationsLibrary/rmt2019_en.pdf, accessed February 6, 2020.

47. Karen Bartenstein, 2017, p. 1482; Boleslaw Adam Boczek, 1962.

48. Myron H. Nordquist et al., 2013; Karen Bartenstein, 2017.

49. *M/V "SAIGA"* (*No. 2*) (*n*17), par. 83.

50. *Ibid.*

51. Tulio Scovazzi, "ITLOS and Jurisdiction Over Ships," in Henrik Ringbom, *Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill Nijhoff 2015), pp. 388, 404.

52. *M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014*, p. 4.

53. Donald Rothwell and Tim Stephens, 2016, p. 377.

54. Philippe Gautier, "Comments on Flag State's Responsibility, Enforcement Measures Against IUU Fishing Activities, and the Settlement of Disputes," in Erik Franckx and Philippe Gautier (eds.), *The Exercise of Jurisdiction Over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction* (Brussels: Bruylant 2010), p. 83–84.

55. Robin Churchill, 2007, p. 908.

56. Myron H. Nordquist et al., 2013.

57. Awni Behnam and Peter Faust, 2003, p. 170.

58. Dana Miller, Kathryn Tooley and U. Rashid Sumaila, "Large-Scale Oil Spills and Flag-Use Within the Global Tanker Fleet," *Environmental Conservation* (2014), https://doi.org/10.1017/S0376892914000289.

59. Nordquist et al., 2013, p. 257.

60. Peter L'Esperance, 2016.

61. Boleslaw Adam Boczek, 2003; *M/V Saiga* (*n*19); *M/V Virginia G* (*n*52).

62. United Nations, A/RES/56/83, *United Nations General Assembly*, January 28, 2002, https://undocs.org/en/A/RES/56/83, accessed November 6, 2020.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

63. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), ch. IV E1, art. 1.

64. *United Nations Convention on the Law of the* Sea Part XII.

65. International Law Commission, 2001, art. 5.

66. *L'Affaire De L'Erika* (*n*11).

67. United Nations, 2002, art. 5.

68. International Law Commission, 2001.

69. *Ibid.*

70. United Nations, 2002, art. 8.

71. Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge: CUP 2011), p. 205.

72. Yoshinobu Takei, "International Legal Responses to the Flag State in Breach of Its Duties: Possibilities for Other States to Take Action Against the Flag State," *Nordic Journal of International Law,* 82 (2013), p. 283, https://doi.org/10.1163/15718107-08202004.

73. *Ibid.*

74. United Nations, 2002, art. 42.

75. Robin Churchill, 2007, p. 909.

76. *Ibid.*

77. Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Leiden: Brill Nijhoff 2007), p. 34, https://doi.org/10.1163/ej.9789004163454.i-286.

78. Agustin Blanco-Bazan, "Implementation of IMO Conventions by Flag and Port States," in Alastair Couper; Edhar Gold (eds.), *The Marine Environment and Sustainable Development: Law, Policy and Science* (Berkeley: Sea Grant Publication 1991).

79. L'Affaire de L'Erika (*n*11).

80. Peter L'Esperance, 2016, p. 505.

81. *Ibid.*

82. "Audience Publique Du Mardi 23 Novembre 2004," *LEGIFRANCE,* https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069902, accessed February 18, 2020.

83. *Ibid.*

84. *Ibid.*

85. *Ibid.*

86. *Ibid.*

87. *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*; *Responsibilities and Obligations of States with Respect to Activities in the Area*.

88. Duncan French and Tim Stephens, "ILA Study Group on Due Diligence in International Law First Report," *International Law Association*, 2014, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f, accessed February 18, 2020.

89. *Ibid.*

90. *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*.

91. James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press 2013), p. 227, https://doi.org/10.1017/CBO9781139033060.

92. *Responsibilities and Obligations of States with Respect to Activities in the Area*.

93. Tim Stephens and Duncan French, "ILA Study Group on Due Diligence in International Law: Second Report," *International Law Association*, 2016, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f, accessed February 18, 2020.

94. *Pulp Mills on the River Uruguay*, 2010.

95. *Ibid.*

96. *Responsibilities and Obligations of States with Respect to Activities in the Area*.

97. *Ibid.*

98. *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, 2015.

99. *Ibid.*; *Responsibilities and Obligations of States with Respect to Activities in the Area*, 2004.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

100. Marko Milanović, *Extraterritorial Application of HR Treaties: Law, Principles and Policy* (Oxford: Oxford University Press 2011), https://doi.org/10.1093/acprof:oso/9780199696208.001.0001.

101. Maria Gavouneli, 2007, p. 34.

102. Philippe Gautier, 2010, p. 81–96.

103. Robert Charles Beckman, "Responsibility of Flag States for Pollution of the Marine Environment: The Relevance of the UNCLOS Dispute Settlement Regime," in Myron H. Nordquist et al. (eds.), *Freedom of Navigation and Globalization* (Leiden: Brill Nijhoff, 2015), p. 273–274.

104. A.T.K. Jin, 1997.

Biographical Statement

Julia Cirne Lima Weston holds an LL.M in international law from University College London and is a columnist on Law of the Sea issues at the Brazilian Institute for the International Law of the Sea. She has also served as a legal office intern at the International Tribunal for the Law of the Sea in 2020.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Small Island Strategies in the Indo-Pacific by Large Powers

David Scott

Structured Abstract

Article Type: Research Paper

Purpose—The article delineates, explains and evaluates large powers' use of small islands in the Indo-Pacific.

Design—Island studies, the dual land-sea features of islands, relevant balancing theory, and the geopolitical and geo-economic nature of islands in the Indo-Pacific are explained in the Introduction. This is followed by main sections which pinpoint island strategies pursued by its leading powers—China, India, Japan, the U.S. and France. Finally, the article concludes with puzzles and paradoxes arising from the preceding evaluation, and the continuity and change concerning the strategic value and place of islands for the U.S., France, India, China and Japan in the Indo-Pacific. The concluding paragraphs sum up the puzzles and paradoxes in their island strategies, and continuity and change in the strategic role of islands.

Findings—Firstly, the article finds that China's success in island strategy has generated greater use of island resources by other states and mutual strategic cooperation over their island assets. Secondly, it finds that Alfred Mahan's concepts of *seapower* value in islands are still valid but have been supplemented by various changes. These changes are three-fold. Some are military: the move from coal power to oil and nuclear power, the arrival of aircraft carriers and submarines, the advent of missiles and airpower. Some are technological: the ability of states to physically shape and create new island formation in the Indo-Pacific. Some are legal: in particular the United Nations Convention (UNCLOS) generating exclusive economic zones' rising significance in the Indo-Pacific.

39 Dunheved Road, Launceston, Cornwall PL15 9JF, United Kingdom (UK),
email: davidscott366@outlook.com

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 66–85 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.66 © 2021 Yonsei University

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Originality, Value—Firstly, a new application of island studies (nissology) onto great power strategy. Secondly, a new application of inter-state balancing theories onto Indo-Pacific islands. Thirdly, the intertwining of geopolitics and geo-economics. Fourthly, the application of continuity and change onto islands' role.

Keywords: China, France, India, Indo-Pacific, islands, Japan, U.S.

I. Introduction

In recent years the "Indo-Pacific," the waters of the Pacific and Indian Oceans as connected by the South China Sea, has emerged as an increasingly important strategic concept. Within these waters, there are a myriad of small islands: a "cloud of islands" (Ellis), a "sea of islands" (Hau'ofa).[1] As President Franklin Roosevelt once said, across the Pacific, "islands, hundreds of them, appear only as small dots on most maps. But they cover a large strategic area."[2] Some of these small islands are independent, perhaps facing the general challenge of being "pawns in the game of international interests and territorial powers."[3] Such Indo-Pacific islands are the source of inter-state competition[4]—in the Indian Ocean between China and India[5]; and in the Pacific between China and the U.S., and between China and Japan.[6] Some of these islands are possessions of large rimland (China, India, Japan, U.S.) and metropolitan (France) states.[7] Despite their size, small islands have been called "game changers" with "enduring significance" in the region.[8]

The article first invokes relevant theory applications. It then analyzes and evaluates the island strategies pursued in the Indo-Pacific by its leading powers—China, India, Japan, the U.S. and France. Finally, the article concludes with puzzles and paradoxes arising from the preceding evaluation, and continuity and change concerning the strategic value and place of islands.

II. Theory Considerations

This is a study of islands, *nissology*. Whereas most nissology is bottom up, with subaltern studies and post-colonial studies analytically dominant, this study is distinctive by being top down, analyzing large powers' use of small islands in the Indo-Pacific.[9] Bottom-up nissology underplays or obscures the increasing military and economic value of islands to powerful large states; illustrated here in the Indo-Pacific by China, France, India, Japan and the U.S. Pressure for decolonization of their island holdings and basing facilities remains an ongoing challenge for France (New Caledonia and Polynesia), and for the United States (Diego Garcia). However, Indo-Pacific islands remain subject to a post-colonial counter "island logic" of being too small to sustain meaningful independence, with meaningful agency an issue for them in their relations with such larger powers.[10]

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Relevant theory drivers for Japan, India, France and the U.S.' island strategies are *realism*-derived; in theoretical terms reflecting *balancing* to counteract China's growing Indo-Pacific presence. The building up of military capabilities on island possessions exemplifies *internal balancing*. Mutual use of island possessions between major powers exemplifies *external balancing*. There is also a deliberate competitive use of naval soft power, aimed at the island states between China on the one hand, and France, India, Japan, the U.S., as well as Australia, on the other.[11] Pushing for closer relations and privileges with Indo-Pacific island states has an element of getting small island states *bandwagoning* with them.[12]

Stephen Walt's *balance of threat* theory's criteria of "geographic proximity," reflecting "proximate power" is applicable in the role that islands have for forward power projection (China, India, France, Japan, U.S.) and in generating perceptions of being hemmed in (China, India, Japan).[13] Walt's threat criteria of "perceived offensive intentions" is apparent as states respond to China's island activities, and indeed as China perceives external *first island chain* restrictions. Mutual fears of island activities spark *security dilemma* spirals of mistrust and further island military reinforcement by China and other states.[14] Paradoxically, as illustrated with Guam, the closer *proximate power* an island has vis-à-vis a perceived threat, the more that island may then become under threat.

Historically, the locational advantages accruing from islands had "undeniable attraction" for large powers, drawing them in a "small islands suction effect" (SISE).[15] Islands continue to serve as logistical staging points.[16] Old classical geopolitics remains in play from 1924 with Ernst Haushofer's "offshore island arcs" still operating as "protective veils" around China and India.[17] Islands in the Indo-Pacific also serve for forward power projection; though the tyranny of distance involved in defending distant islands, the Loss of Strength Gradient (LSG), remains a countervailing consideration.[18] Edward Luttwak may have argued that geo-economics is now replacing geopolitics in the "logic of conflict," but the two are entwined, as in reality the location of islands, territorial and maritime, generates geopolitical and geo-economic advantages as well as frictions for states.[19] Geo-culture, national prestige, is also apparent in inter-state island frictions.[20]

The geo-economics of islands has been profoundly affected by the 1982 United Nations Convention on the Law of the Seas (UNCLOS), whereby "islands" meeting article 121(3) criteria of sustaining either "human habitation" or "economic life" generate 12-nautical mile (nm) territorial waters and 200 nm exclusive economic zones (EEZs). Consequently, "islands, in particular, had the potential to generate maritime zones that would greatly surpass the extension of the land territory of the island itself."[21] Island-generated EEZs are economic assets for states, involving fisheries, energy and mineral resources on the seabed. Such assets make islands a source of inter-state "resource rivalry."[22] Disputed islands are also sources of litigation and the application of international law. Consequently, islands have moved from being geographical descriptors to legal judgements; with *juridical islands* at the heart of the Permanent Court of Arbitration ruling in 2016 on the South China Sea.[23]

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

III. China

Looking west, China seeks control over the uninhabited Diaoyu islands, administered by Japan as the Senkaku islands since 1895. Their surrounding waters are rich in fishing and also potential oil and gas fields. Chinese strategy has been to successfully increase the frequency of its own coast guard, navy and air force appearances around the Senkaku islands—but probably counter-productive as the U.S. has responded by extending security guarantees to Japan over these islands.

Further westward, China seeks to break the "first island chain" (*Di yi dao lian*), namely Japan's Ryukyu chain and Taiwan.[24] China's growing pressure on the Ryukyu chain is manifested in increasing naval and aircraft deployments, particularly through the Miyako Straits, an international waterway which cuts through the chain.[25] Beijing's increasing economic, political and military pressure on Taiwan, a door to the Western Pacific, has been heightened since 2016 and the arrival of the pro-independence administration of Tsai Ing-wen.[26] However, this rising pressure from China has been counterproductive in the light of closer American security support to Taiwan, and Tsai's presidential re-election victory in 2020.

China's missile technology has gone from deploying short range missiles threatening Taiwan to successfully developing the intermediate range Dongfeng-26, commissioned in April 2019 with an estimated range up to 2,485 miles. Chinese strategists noted that its "radius of fire should reach to the second island chain" (*Di er dao lian*), including the American stronghold of Guam.[27]

Further westward, China is pursuing the Pacific island states.[28] In part, this is to establish diplomatic recognition at the expense of Taiwan, currently standing 10–4 in Beijing's favor among the Pacific islands. In part, the drive reflects the geo-economics around the rich fisheries and sea-bed mineral resources found in these states' EEZs.[29] Here, one successful Chinese avenue has been the *China-Pacific Island Countries Economic Development and Cooperation* (CPICEDC) mechanism, operating since 2015, though criticisms remain that China's assistance program binds Pacific Island recipients.[30] China's Pacific drive also involves the potential for these island states to host future bases, though this has yet to materialize.[31]

Looking south, islands are central to China's thrust toward the South China Sea. Its *9-dash line*, enclosing most of the South China Sea, includes all of the Paracels (Xisha) and Spratleys (Nansha). In an example of *lawfare*, Sansha (Woody Island) was announced as a prefecture-level city within Hainan Island province in 2012, with a notional population of around 1,000. Further separate district levels were announced for the Paracels and for the Spratleys in April 2020, the latter located on Fiery Cross Reef. Geo-economics is a factor. The South China Sea has rich fisheries stocks, where Chinese fishing boats are an active presence, while significant potential reserves of undiscovered oil and gas are thought to be present in the South China Sea. However, China's development of energy fields has so far mainly focused on northeast areas by Hainan Island, rather than in disputed waters deeper in the South China Sea.

China expelled South Vietnamese forces from the Paracels (Xisha) in 1974. Viet-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

nam still maintains claims, but to little effect. The largest Paracels formation is Woody Island (Yongxing Dao), with a land area of just over one square mile. China has successfully conducted substantial land reclamation since 2014 to expand Woody Islands' military capabilities, increasing harbor, airstrip and surface to air missile capacity. Sand to earth conversion, soil creation, has also been introduced on Woody Island, with the Chinese state media specifically arguing that "the breakthrough also counters international theories, including those in a 2016 arbitration, that [South China Sea] islands could not support communities of their own."[32] Elsewhere in the Paracels, harbors and helipads have been built up from 2014 to 2018 at Drummond Island, Money Island, North Island, Palm and Duncan Islands, North Island, Pattle Island, Tree Island, and Triton Island.

Similarly in the Spratleys, from 2014 to 2018 China created around 3,200 acres of new land through sand dredging and concrete pouring, thereby enlarging existing islands and creating new artificial islands.[33] Harbors have been developed and air-power significantly extended through the construction of long runways at the high tide elevation of Fiery Cross Reef (9,841 feet), and the low tide, i.e., artificial, elevations of Subi Reef (10,663 feet) and Mischief Reef (8,675 feet). Air defense, anti-ship missiles, signal-jamming installations, weapons and fuel bunkers, have also been placed in the Spratleys. The largest artificial island, Subi Reef, now has over 400 buildings on it, and is available for forward troop deployment. This all represents a military success.

Admittedly, some discomfort was faced in the Permanent Court of Arbitration (PCA) ruling in *The Republic of the Philippines v. The People's Republic of China* made in July 2016. Of particular island note, the PCA found that none of China's existing Spratley land outcrops were "islands" under UNCLOS (121.3) criteria of being able to "sustain human habitation or economic life of their own," and thus none had 200 nm EEZs. While the PCA ruled that Gaven Reef, McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef were high tide features entitled to a 12 nm territorial waters; Subi Reef, Mischief Reef, and Second Thomas Shoal were deemed as low tide features, with no territorial waters generated from them (UNCLOS 60.5), but merely 500-meter, i.e., 0.27 nm, "safety zones" around them (UNCLOS 60.8).[34] China's drawing of territorial waters from far points around the Paracels was also rejected (point 573), on the grounds that China, unlike say Indonesia, was not an "archipelagic" state.

However, China has been successful in not just refusing to participate or comply with the PCA ruling and instead carrying on with its program of island creation and island militarization, but also in using its geopolitical and geo-economic muscle to get the Philippines and ASEAN to not pursue the verdict.[35] Nevertheless, China has not been able to stop increased Freedom of Navigation operations around the Paracels and Spratleys from being undertaken, not just vigorously by the U.S., but also circumspectly by the UK and France.

As Chinese scholars have noted, "there are an awful lot of islands and archipelagos within the ancient maritime Silk Road and the 21st century Maritime Silk Road (MSR)."[36] China has successfully sought to involve Pacific Island states like Fiji and

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

the Pacific Islands Forum (PIF) into the MSR.[37] In the Indian Ocean, participation in China's Maritime Silk Road (MSR) initiative has been aimed at island states like Sri Lanka, the Maldives, the Seychelles and Mauritius. This was on show with the 21st Century Maritime Silk Road Indian Ocean Islands Conference held in Mauritius in December 2016. However, although China's push brought with it a 99-year operating control of Hambantota (Sri Lanka) to the state-owned company China Merchants Port Holdings (CMPH) in 2017, this was a success that paradoxically has generated regional concerns over Chinese *debt diplomacy*.

IV. India

The most obvious part of India's island policy concerns the Andaman and Nicobar Islands, a union territory of over 570 islands, approximately 3,190 nm^2 in area, of which 37 are inhabited. Long neglected in colonial and post-colonial times, with some uncontacted tribes like the Sentinelese, the island chain is increasingly prominent in Indian strategic thinking.[38]

Geopolitically, imperatives were clear for the Minister for External Affairs, Subrahmanyam Jaishankar, for India "to strengthen its maritime influence, the development of the Andaman and Nicobar Islands rank foremost," since they are "such a well located asset."[39] The then Chief of Naval Staff Nirmal Verma argued in 2012 that "the geographic disposition of the archipelago offers a vital geo-strategic advantage to India," for "they provide the nation with a commanding presence in the Bay of Bengal."[40] Their location at the head of the Strait of Malacca also enables Indian access to this important choke point in and out of the Indian Ocean. Motives are clear for some Indian strategists; the Andaman and Nicobar Islands are "where India can build an 'Iron Chain' to deter China."[41] They enable easier Indian naval deployments into the South China Sea and Western Pacific; which underpinned comments in 2014 by the then President Pranab Mukherjee about their "strategic position" and "potential to be a spring board for India with South East Asia and the Pacific region."[42]

India is successfully, albeit gradually, strengthening its military presence on the Andaman and Nicobar Islands, with a ten-year military infrastructure plan approved in 2019. At the northern end, on North Andaman Island, the commissioning in January 2019 of INS Kohassa, was explained by the navy as being due to the "wide expanse of Indian exclusive economic zone (EEZ) mak[ing] the base a very vital asset."[43] The present airstrip of 3,281 feet is being extended to 12,000 feet. At South Andaman Island, Port Blair houses the major naval base of INS Jarawa, the naval air station INS Utkrosh, and is slated for expansion as a deep water transhipment terminal able to handle container traffic but also aircraft carriers. Port Blair has frequently hosted the MILAN exercises with other Indian Ocean and South-East Asian navies, with China conspicuously not invited. At the top of the Nicobar Islands, the Indian Airforce (IAF) operates out of Car Nicobar Island, complete with 3,000-foot long runway. At the bottom of the Nicobar Islands, INS Baaz was opened on Great

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Nicobar Island in 2012, with a runway of 3,500 feet currently being extended to 4,500 feet and ultimately to 11,000 feet. All this echoes the remarks made in 1945 by India's *seapower* advocate Kavalam Pannikar about the potential for future bases on the Andaman and Nicobar islands, "which if fully utilised in coordination with air power can convert the Bay of Bengal into a secure area" for India.[44]

Geo-economically, the Andaman and Nicobar Islands' significance lies in their exclusive economic zone (EEZ) of around 256,228 nm^2. However, the economic potential of this EEZ remains under-developed. There remains a potential connectivity role for the islands in the Bay of Bengal.[45] In May 2018, India and Indonesia's leaders announced in their *Shared Vision of India-Indonesia Maritime Cooperation in the Indo-Pacific* specific island-to-island linkages between India's Andaman and Nicobar Islands and Indonesia's adjacent island of Sumatra. Prime Minister Modi was clear in August 2020 that "under the Act-east policy, Andaman and Nicobar have a very high role to play in India's strong relations with East Asian countries and other countries associated with the sea and is going to grow steadily."[46]

Off the west coast, "the Lakshadweep Islands can be called the nation's window to the Indian Ocean" according to the then Indian President Pratibha Patil.[47] The smallest union territory of India, its 36 coral islands and reefs have a total surface area of just 12 mi^2, but territorial waters of around 7,700 nm^2 and an exclusive economic zone of around 150,000 nm^2. Military facilities for a long time consisted of only two small naval detachments on Kavaratti and Minicoy Islands. However, they are now being reinforced, as the islands "grow in strategic importance."[48] The naval detachment on Kavaratti was upgraded and commissioned as INS Dweeprakshak in 2012, providing logistics and maintenance support. Further naval detachments, forward operating bases, were established in 2016 at Bitra Island and Androth Island, with radar facilities set up at Androth in 2018. The naval logic was clear: "Lakshadweep occupies a strategic location in the Arabian Sea. A number of shipping lanes pass close to these islands," so that "setting up of a naval detachment at Androth Island will enhance the Navy's reach and surveillance."[49] However, their smaller spread and land mass give the Lakshadweep Islands less power projection potential compared to the Andaman and Nicobar Islands. Moreover, India's utilization of the Lakshadweep's EEZ has lagged.

India is now actively seeking out the Indian Ocean island states.[50] This has been sharpened by the Ministry of External Affairs decision in December 2019 to set up a new Indian Ocean Region Division to handle relations with the Comoros, Madagascar, Maldives, Mauritius, (French) Reunion, the Seychelles, and Sri Lanka. In the Maldives, the Indian navy has set up radar facilities at Gan Island airstrip. Deeper in the southwest Indian Ocean, a naval radar tracking station has been set up on northern Madagascar. More recently, moves have been made to establish naval/air presence in Mauritius (Agalega Atoll) and the Seychelles (Assumption Island), alongside an already established coastal radar facility. The Indian Navy conducts joint exclusive economic zone separate surveillance exercises with the Maldives, Seychelles and Mauritius. Trilateral national security advisor discussions were held in 2014 with the Maldives and Sri Lanka (previously held in 2011 and 2013), with Mau-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

ritius and the Seychelles as observers. Disrupted by the temporary pro–Beijing turn of Sri Lanka under Mahinda Rajapaksa and by the Maldives under Abdulla Yammen, this format was revived in 2019 with their change of governments.

In the Indian Ocean, the Logistics Support Agreement (LSA) signed with France in March 2018 opened the way for Indian use of the French island of Reunion. VARUNA naval exercises with France were held off Reunion in May 2018, as were Coordinated Patrols (CORPAT) in March 2020. Indian officials attended the "*Unis dans l'espace Indo-Pacifique*" ("United in the Indo-Pacific Space") conference hosted by France in Reunion in October 2019, where they joined other officials from the "Vanilla Islands" of the Comoros, Madagascar, Mauritius and Seychelles. Similarly, the LSA signed with Australia in June 2020 now opens up Christmas Island and Cocos Island airstrips and harbors to India.[51] However, India's political support for Mauritian claims over Diego Garcia complicates any Indian use of U.S. facilities on Diego Garcia, despite the Acquisition and Cross-Servicing Agreement (ACSA) signed with the U.S. in 2016.[52]

Further eastward, India's 2018 Logistics Cooperation Agreement (LCA) with the island city-state of Singapore facilitates easier Indian naval presence in the South China Sea and Western Pacific. India has made veiled criticisms of China militarization of artificial island possessions in the South China Sea, though this has had little effect on China. With regard to the Pacific micro-states, the Forum for India-Pacific Islands Cooperation (FIPIC), established by India in 2014, enables further modest economic cooperation and potential access for India to their EEZs, and provides some modest competition to China's Pacific Islands outreach.[53]

V. Japan

Japan is itself an "island nation," with the four main islands of Hokkaido, Honshu, Kyushu, and Shikoku forming the metropolitan center.[54] A myriad of smaller islands surround the four home islands, with perceived "vital" geopolitical and geo-economic significance.[55]

Island disputes affect Japan's relations with its neighbors Russia, South Korea and China. Japan claims four of the southernmost Kurile Islands, administered by Russia since 1945, as its "Northern Territories."[56] A potential compromise would be that Japan regain two of the smaller flanking islands (Shikotan and the Habomai) leaving the two larger islands (Etorofu and Kunashiri) with Russia. Friction remains with South Korea's continuing administration of Dokdo "Solitary Islands," but claimed by Japan as Takeshima "Bamboo Islands," with the issue continuing to hamper their wider relationship.[57] Japan faces increasing pressure from China over the uninhabited Senkaku Islands, claimed and administered by Japan since 1895, but claimed by China as the Diaoyu Islands since the 1970s.[58] The biggest island, Uotsuri, is roughly 1.67 mi^2. Japan has the option of either stationing limited troops or missiles on these outcrops but has so far resisted. Perhaps the biggest success here is getting the U.S. to include these islands within the U.S.-Japan Security alliance provisions.

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

This rising friction with China in the East China Sea is driving Japan to focus southward, to successfully build an *island wall* against China along the Ryukyu chain.[59] At the top of the Ryukyu chain, the purchase of Mageshima Island in December 2019 aims to buttress Japanese (and U.S.) airpower projection on Japan's southern flank. With the sensitive Miyako and Tokara Straits in mind through which China has been increasingly deploying; Japan's Ground Self-Defense Force opened new bases in March 2019 on the islands of Miyako and Amami Oshima to accommodate 700 to 800 troops, anti-ship and surface-to-air missile batteries, and radar and intelligence-gathering facilities. At the end of the chain, the military positions placed on the island of Yonaguni in 2016 was immediately denounced in China.[60] Similar reinforcement is planned for the island of Ishigaki by 2021. Concerning the main island Okinawa, local self-determination remains a muted issue, exacerbated by island discontent over U.S. bases.[61]

In contrast, the Ogasawara (Bonin) archipelago of more than 30 islets over 600 miles south of Tokyo, though part of the *second island chain* that runs further down through the Northern Marianas and Guam, has a low security profile. Since reverting to Japanese control in 1968, they have slumbered as a remote tourist destination, though a naval air base is maintained on the southernmost island of Iwo To (Iwo Jima), with an airstrip 8,700 feet long.

Japan's easternmost possession Minamitori-shima (Marcus Island), around 1,148 miles southeast of Tokyo, is of strategic importance, as it enables Japan to successfully claim an exclusive economic zone of around 165,590 nm² in the surrounding waters, as well as rare earth minerals.[62] Uninhabited, it nevertheless has regular Japanese Coast Guard deployments, plus a medium-sized (4,300 feet long) airstrip.

At nine square meters, Japan's southernmost "possession" Okinotori, around 1,056 miles south of Tokyo, is a coral reef with small rocks (Higashi-Kojima, and Kita-Kojima) jutting out barely 3 inches and 7 inches at high tide. Even as ocean levels rise, Japan is desperately trying to safeguard and artificially enlarge the area through coral seeding, concrete encasing of the two surviving rocks, and creation of a new concrete platform (Minami-Kojima).[63] It contains a three-level observatory able to scan for ships, and a helicopter landing pad. Geo-economics underpins Japanese activity, since a 200 nm EEZ around Okinotori would largely fill the gap between Japan's EEZ around the Ryukyu Islands (*first island chain*) and the EEZ around the Ogasawara Islands (*second island chain*).[64] China (as well as Taiwan and South Korea) denounced Japan's island creation program at Okinotori, on the grounds that "artificial land features cannot generate any legal rights" under UNCLOS.[65] In this vein, Chinese research vessels dispatched to the Okinotori waters in December 2018, "high seas" in China's view, attracted Japanese protests.[66] National inconsistencies were in play, as China's own artificial concrete island making was taking place in the South China Sea, which had attracted denunciations from Japan.[67]

Farther afield, Japan has pursued a vigorous, and successful outreach policy to the Pacific island microstates.[68] This builds upon Japan's development assistance, now extended into security issues, and is institutionalized around Japan's Pacific Island Leaders Meeting (PALM) thrice-yearly mechanism initiated in 1997.[69] The

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

2018 PALM Summit Leaders Declaration specifically "welcomed" Japan's Free and Open Indo-Pacific (FOIP) concept, and the need to uphold "freedom of navigation."[70] PALM explicitly reflects Japan's own sense of itself as a fellow Pacific *island* state.[71] It is also a quite successful implicit counter to China's diplomatic-economic push in the Pacific basin.[72]

In the South China Sea, Japan has denounced China's creation of artificial islands and their militarization, but this has had little effect on China, and Japan has so far has not conducted any Freedom of Navigation exercises around China's island holdings. However, Japan has successfully launched infrastructure support for Indonesia's Natuna Islands, its waters a bone of contention between Indonesia and China. In the Indian Ocean, the Logistics Support Agreement (LSA) signed with India in September 2020 opens up India's Andaman and Nicobar Islands to Japanese use, and dovetails with Japan's growing infrastructure investment in these islands. This in turn dovetails with the joint development by Japan and India of Trincomalee port on Sri Lanka, as a counterweight to China's position in Sri Lanka at Hambantota.

VI. United States

This section starts with the United States' sovereign holdings, Hawaii (State status), Guam (unincorporated Territory status) and the Northern Marianas (Commonwealth status); which enables useful U.S. participation in the regional island institutions. American Samoa, Guam, Hawaii and the Northern Mariana Islands are members of the Pacific Islands Conference of Leaders (PICL), running since 1980. American Samoa, Guam and the Northern Marianas are members of the Pacific Community (PC) and have enjoyed observer status at Pacific Islands Forum since September 2011. American Samoa is also a member of the Polynesian Leaders Group (PLG). However, the U.S.–Pacific Island Nations Joint Commercial Commission set up in 1993 is increasingly challenged by China's economic penetration of Pacific island states. The *Pacific Pledge* made to the Pacific Island states in September 2019, of an extra US$65 billion assistance, marked a belated U.S. attempt to counter Beijing's advance.[73]

In the central Pacific, Hawaii is a long chain of around 137 islands. Its total area of land is 6,423 mi², along with a much bigger EEZ of 609,863 nm². Hawaii's annexation in 1898 was welcomed by Mahan since these "islands with their geographical and military importance, unrivalled by that of any other position in the North Pacific" would bring "a great extension of our naval power."[74] Oahu houses Pearl Harbor, the Pacific's biggest natural deep water harbor, the U.S. Indo-Pacific Command (INDOPACOM), and the U.S. Marine Corps Forces, Pacific. Kauai houses the Pacific Missile Range Facility.

Over in the Western Pacific, Guam at the south end of the *second island chain*[75] is an unincorporated territory of the U.S. With an area of 210 mi², Guam's population was recorded as 159,358 in the 2010 census, with indigenous Chamorros making up

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

37 percent of the population. Over 30 percent of the island is taken up by military bases.[76] Some local discontent is apparent but has been contained.[77]

Annexed in 1898, Mahan reckoned that "no situation in our possession equals Guam to protect every [U.S.] interest in the Pacific."[78] Guam is currently being built up militarily, as the so-called "tip of the spear" of military power reaching across from Hawaii.[79] Guam's deep water port of Apra harbor has been further deepened, handling periodic aircraft carrier deployments, with fast attack nuclear-powered submarines deployed there since 2002. Andersen Air Force Base is home to the Pacific Air Forces' 13th Air Force. Its Bomber Forward Operating Location (BFOL) status involves regular B-1, B-2 and B-52 bomber deployments, including overflights over China's artificial islands in the South China Sea. Guam also hosts *Exercise Cope North Guam* involving the air forces of Australia, Japan and the U.S., as was seen in February 2020.

The island is slated to receive around 5,000 troops relocated from Okinawa by 2024, to be housed at a new military base being constructed at Camp Blaz for 2026. The deployment in 2013 of Terminal High Altitude Area Defense (THAAD) systems to Guam seeks to counter China's "Guam Express" missile capabilities.[80] However, there remain delays in project completion and base hardening, together with the Trump administration diverting funding in 2019 from Guam to domestic projects like the Mexican border wall.[81]

Above Guam, the Northern Marianas voted to accept Commonwealth status in 1986 within the U.S., leaving Washington in charge of defense and foreign policy. Within the Marianas, on the island of Tinian, the Department of Defense controls 15,353 acres for marine training and live fire ranges. The air force has operated out from Tinian since 2014, with a divert airfield agreement signed in May 2019, while the army runs the Ballistic Missile Defense test site at Kwajalein Atoll. However, plans to turn Pagan Island into a firing range encountered strong local resistance.[82]

In the Western Pacific and with China in mind, U.S. strategy is based on early renewal, due by 2023/2024 at the latest, of the existing Compacts of Free Association (COFA) with the Federated States of Micronesia, the Marshall Islands, and Palau—under which the U.S. handles their defense.[83] The U.S. pace has quickened. Trump's meeting with these states' three leaders in 2019, a first-ever event, brought a formal declaration that they all "jointly reaffirm our interest in a free, open, and prosperous Indo-Pacific region."[84] In September 2020, Palau offered the U.S. new basing facilities.

U.S. control in the *first island chain*, running from Japan down to Taiwan is increasingly challenged by China's maritime expansion. The significant U.S. presence maintained at Okinawa has been hampered by poor military-civilian relations, involving murders and rape by U.S. service men. Such factors, as well as Okinawa's uncomfortable closeness to Chinese missile attacks, is leading to moves to relocate some U.S. forces on Okinawa to Guam.[85] U.S. policy has delicately moved to give more security support to Taiwan as a partner within its own Free and Open Indo-Pacific (FOIP) framework.

In the South China Sea, the U.S. has denounced Chinese militarization of arti-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

ficial islands, and archipelago boundary lines drawing around the Paracels, and has consequently increased Freedom of Navigation (FoN) operations around the Paracels and Spratleys since 2017. These operations have stopped such island waters being turned into no-go zones by China but have not been able to stop the construction of artificial islands, nor to roll back China's militarization of islands.

The U.S. presence at Changi Naval base in the island city state of Singapore smooths U.S. deployments from the Western Pacific into the Indian Ocean. This arrangement from 1990 was successfully renewed again in September 2019, to run until 2035. Littoral Combat Ships (LCS) have been specifically earmarked to Singapore since 2013, and U.S. aircraft carriers regularly berth at Singapore. With China implicitly in mind, LCS *Gabrielle Giffords* carried out bilateral exercises with Singapore's stealth frigate RSS *Steadfast* in the South China Sea in June 2020.[86]

In the Bay of Bengal, the Acquisition and Cross-Servicing Agreement (ACSA) signed in 2016 enables U.S. use of Indian facilities on the Andaman and Nicobar Islands, an "INDOPACOM gateway" for the U.S.[87] This was demonstrated for the first time in October 2020 with U.S. P-8 Poseidon aircraft landing at Port Blair for logistics and refueling support.

U.S. power in the Indo-Pacific is underpinned by its basing facilities at Diego Garcia, in the middle of the Indian Ocean. With a deep-water pier and sheltered atoll anchorage, the Naval Support Facility Diego Garcia (part of INDOPACOM) is able to handle aircraft carriers, with nuclear submarines deployed there from time to time. Like Guam, the long airstrip at Diego Garcia is designated as a Bomber Forward Operating Location (BFOL), from which B-52 and B-2 stealth bombers were regularly deployed in 2020.[88] This is UK sovereign territory, in which the original 1966 agreement for a U.S. base was successfully renewed for another 20 years in 2016. However, the U.S. was unable to stop the UN General Assembly and the International Court of Justice calls in 2019 for decolonization of Diego Garcia (and the wider Chagos Islands) and their handing back/over to Mauritius.

VII. France

France defines itself as an "Indo-Pacific power" (*puissance Indo-Pacifique*) through its possessions of key islands across the Indian and Pacific Oceans, and embedded population. Through these Indo-Pacific island possessions, France has the second largest EEZ in the world, after the U.S.

Reunion is the key French island in the Indian Ocean, with an area of 970 mi^2, a population of around 866,500, and an EEZ of 120,242 nm^2. Politically, Reunion is an integrated *département* (like Mayotte) with little apparent local sentiment for political self-determination.[89] French naval forces are permanently present and forward deployed from Reunion. Thus, FS *Latouche-Tréville*, stationed at Reunion, joined the French aircraft carrier group dispatched to the northern Indian Ocean in *Operation Clemenceau* in 2019. Reunion has become the site for strategic cooperation with India. The third phase of the 2018 VARUNA exercises with India were

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

held in May 2018 at Reunion, while joint patrolling with India were carried out at Reunion in March 2020. Amid Covid-19 disruption, the Indian Ocean Naval Symposium (IONS) summit was due to be hosted by France at Reunion in November 2020, as chair of the IONS for 2020–2022.

Southeast of Reunion are the uninhabited *Terres australes et antarctiques françaises* (TAAF), which include (1) the Crozet Islands; (2) the Saint Paul & Amsterdam Islands; and (3) the Kerguelen Islands. France's most significant TAAF possession is the Kerguelen Islands, an archipelago of around 300 islands and isles.[90] The main island, Grande Terre's area of 2,577 mi² is more than triple the size of Mauritius; while its capital settlement Port-aux-Français has harbor facilities and houses rotational groups of scientists, a satellite tracking station run by the French Space Agency, and rumors of weapons stockpiles. Kerguelen has an EEZ of 209,549 nm²; while under Decree 2015-1183 France successfully defined its continental shelf around Kerguelen in September 2015, and with it rights to seabed extraction up to 350 nautical miles. However, fishing has declined, and mineral extraction remains to be developed.

In the northeast Indian Ocean, the Logistics Support Agreement (LSA) signed with India in March 2018 opens the way for French use of Indian harbors and airstrips on the Andaman and Nicobar Islands, while the LSA with Australia signed in May 2018 opens the way for French use of Australian harbors and airstrips on Christmas and Cocos Islands.

France has its own successful outreach to the Indian Ocean island states. The Indian Ocean, the Indian Ocean Commission (IOC), established in 1982, brings together the French department of Reunion with other independent island states of Comoros, Madagascar, Mauritius and the Seychelles. The *Unis dans l'espace Indo-Pacifique* ("United in the Indo-Pacific Space") conference was held in October 2019 between French officials and counterparts from the island states of Comoros, Madagascar, Mauritius and the Seychelles, as well as India.

In the southwest Pacific, the main French possession of New Caledonia is an archipelago with a total land area of 7,172 mi². Its population of around 263,000 is split, according to the 2014 census, between a 40 percent indigenous Kanak share and a 29 percent European share. New Caledonia has geo-economic and geopolitical significance. The former is illustrated by the fact that New Caledonia holds around 20–25 percent of the world's nickel reserves, and a good-sized exclusive economic zone of 770,873 nm². The latter is shown by how New Caledonia is a midway point between French possessions in the Indian Ocean further west and French Polynesia further east. France sees New Caledonia in geopolitical terms as its "forward base" for French presence in the Pacific.[91] This includes an interception unit at the naval airbase at Tontouta. French Caledonia is the headquarters for French naval vessels; for example, FNS *Vendiamaire* is regularly dispatched in the South China Sea, Taiwan Straits and Western Pacific. The biennial *Croix du sud* ("Southern Cross") organized by French forces at New Caledonia since 2006, now involves France, Australia, New Zealand, Japan, the U.S. and smaller Pacific island states in humanitarian assistance and disaster relief exercises.

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

Politically, New Caledonia has faced deep division over independence or retaining the French link under which Paris controls defense and foreign policy. France has been successful insofar as two referendums have rejected the independence option, though by a gradually smaller margin. In November 2018 it was 56.67 percent (staying with France) versus 43.33 percent (independence), although on a higher turnout in October 2020 the gap had shrunk, at 53.26 percent versus 46.74 percent. Nearby Wallis and Futuna has a much smaller area of about 55 mi² and a population of 11,558 according to the 2018 census, with little political unrest. Most of the southeast quadrant of the Pacific is occupied by French Polynesia, with a population of around 272,000. This includes 118 islands such as Tahiti, with an extremely large total EEZ of 2,819,615 nm². French Polynesia was strategically important as the site for 193 nuclear tests from 1962 to 1996 in the Moruroa and Fangataufa atolls. France has been able to successfully mute political sentiment for self-determination through generous economic support packages.

Finally, France's successful outreach to the island micro-states of the Pacific, has successfully solidified its legitimacy in the region. In the Pacific, the France-Oceanic Summit (FOS) met in 2003, 2006, 2009 and 2015. Headquartered in New Caledonia, the Pacific Community (PC) has French Polynesia, New Caledonia, and Wallis and Futuna as members sitting alongside the independent Pacific island nations and U.S. territories. French Polynesia and New Caledonia have also been members (and hosts) of the tri-annual Pacific Islands Conference of Leaders (PICL) running since 1980. French Polynesia and New Caledonia attended Japan's Pacific Islands Leaders Meeting (PALM) in May 2018. French Polynesia and New Caledonia and French Polynesia were also admitted as full members of the Pacific Islands Forum (PIF) in September 2016, with Wallis and Futuna given associate membership in September 2018.[92] In addition, France remains a separate dialogue partner of the PIF.

VIII. Conclusions

This article has sought to evaluate Great Powers' island strategies by the leading Indo-Pacific powers China, France, India, Japan and the U.S. As demonstrated, these powers have successfully built up their military position on various island possessions. All these powers have conducted quite effective outreach to the independent island states. However, some puzzles and paradoxes emerge with regard to this evaluation.

One puzzle, or perhaps paradox, is that China's successful military build up in the South China Sea has been counterproductive to some extent since it has generated pushback by the other leading powers, and indeed by other South China Sea littoral states. Another puzzle is that all these leading powers have not made particularly effective use of the EEZs, associated under UNCLOS with their island possessions. This is a result of inertia, problems of bureaucracy, and the more evident drive for military security usage. The final paradox is that given the power competition

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

between China on one side and France/India/Japan/the U.S. on the other side, independent Indo-Pacific island states have some bargaining strength despite the otherwise enormous power imbalance. Davis, Munger and Legacy, applying *assemblage theory*, argue that islands in the Pacific simultaneously engage with multiple powers and their associated political, economic and social influences, and thereby demonstrate effective agency.[93] A similar dynamics may be seen among Indian Ocean island states. The implications for this are that neither the U.S. (Free and Open Indo-Pacific) nor China (Maritime Silk Road) will be able to swing independent island states behind their particular Indo-Pacific initiative at the exclusive expense of the other initiative.

With regard to change and continuity, there are elements of both in the strategic role of islands. Their old role for potential naval bases, refueling stations (coal now giving way to oil) and potential control of commerce routes, stressed by Mahan in the late 19th century is still relevant. Such island positions enable naval power projection, but also the need to be defended necessitates strong defense. As Mahan, the advocate of seapower and the setting up of coal stations at Hawaii, Samoa and Guam, noted over a century ago "it is vain to look for energetic naval operations distant from coal stations," but "it is equally vain to acquire distant coaling stations without maintaining a powerful navy; they will but fall into the hands of the enemy."[94] Geopolitically, the advent of airpower gives islands a new dimension, forward power projection in which seapower is now complemented by airpower. Island-based airpower generates the assertion of such islands being "unsinkable aircraft carriers." Paradoxically, missile technology affects islands in two ways. Firstly, presenting vulnerability to island fixed basing. Secondly, high-mobility artillery rocket systems (HIMAR) placed on islands, for example in the *first island chain* or in the South China Sea, can serve as anti-ship missiles. Geo-economically, the significance of islands has been transformed by the concept and framework of exclusive economic zones generated by "islands," as defined in the UN Convention on the Laws of the Sea.

Finally, in this so-called "age of islands," islands can paradoxically appear and disappear.[95] Their *appearing* reflects how islands are now able to be physically and literally made by the state.[96] Not only can reefs be built up for airstrips, but the waters inside reefs can be deepened for bigger harbors, in a way almost impossible in Mahan's days. Their *disappearing* reflects how rising sea levels, reflecting global warming, threaten the very existence of island micro-states and of states' island possessions across the Indo-Pacific.[97]

Notes

1. Earl Ellis, *Advanced Base Operations in Micronesia* (1921; rep. Washington: Department of the Navy, 1992), p. 31; Epeli Hauʻofa, "Our Sea of Islands," in Eric Waddell (ed.), *A New Oceania: Rediscovering Our Sea of Islands* (Suva: University of the South Pacific, 1993), pp. 2–16.

2. Franklin Roosevelt, "Radio Address," February 23, 1942, *Department of State Bulletin*, 6(140), 1942, p. 185. Also Geoffrey Till, "The Growing Strategic Significance of Islands," *RSIS Commentary* (Singapore), 220, November 4, 2019.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

3. Beate Ratter, "Geopolitics of Small Islands," in *Geography of Small Islands* (Cham: Springer, 2018), p. 93, https://doi.org/10.1007/978-3-319-63869-0_4.

4. Bertil Lintner, "Island States Targeted in Great Power Competition," *Asia Times*, June 16, 2017.

5. Derek McDougall and Pradeep Taneja, "Sino-Indian Competition in the Indian Ocean Island Countries," *Journal of the Indian Ocean Region*, 16(2), 2020, pp. 124–145, https://doi.org/10.1080/19480881.2020.1704987.

6. Kathrin Hille, "Pacific Islands: A New Arena of Rivalry Between China and the U.S.," *Straits Time*, April 11, 2019; Denghua Zhang and Miwa Hirono, "Japan and China's Competition in the Pacific Islands," *The Diplomat*, April 30, 2020.

7. Darshana Baruah, "Realizing the Potential of Island Territories," Asian Maritime Transparency Initiative (AMTI), December 17, 2019, https://amti.csis.org/realizing-the-potential-of-island-territories-a-perspective-from-delhi/, accessed November 5, 2020.

8. Baruah, "Islands as Game Changers in the Indian Ocean," AMTI, April 20, 2018, https://amti.csis.org/islands-game-changers-indian-ocean/, accessed November 5, 2020; Andrew Erickson and Joel Wuthnow, "Why Islands Still Matter in Asia. the Enduring Significance of the Pacific 'Island Chains,'" *National Interest*, February 5, 2016, https://nationalinterest.org/feature/why-islands-still-matter-asia-15121, accessed November 5, 2020.

9. Godfrey Baldacchino, "Studying Islands: On Whose Terms?," *Island Studies Journal*, 3(1), 2008, pp. 37–56.

10. Otto Heim, "Island Logic and the Decolonization of the Pacific," *Interventions*, 19(7), 2017, pp. 914–929, https://doi.org/10.1080/1369801X.2017.1401945.

11. For example, Claude Zanardi, "China's Soft Power with Chinese Characteristics: The Cases of Confucius Institutes and Chinese Naval Diplomacy," *Journal of Political Power*, 9(3), 2016, pp. 431–447, https://doi.org/10.1080/2158379X.2016.1232289; Larissa Forster, "The Soft Power Currencies of U.S. Navy Hospital Ship Missions," *International Studies Perspectives*, 16(4), 2015, pp. 367–387, https://doi.org/10.5771/9783845299150-281.

12. Sandya Gunasekara, "Bandwagoning, Balancing, and Small States," *Asian Social Science*, 11(28), 2015, pp. 212–220, https://doi.org/10.5539/ass.v11n28p212.

13. Stephen Walt, "Alliance Formation and the Balance of World Power," *International Security*, 9(4), 1985, p. 10https://doi.org/10.2307/2538540.

14. Robert Jervis, *Perception and Misperception in International Politics* (Princeton, NJ: Princeton University Press, 1978), pp. 62–76.

15. Jordan Walker, "Undeniable Attraction: The Geopolitical Relationship Between the Great Powers and Small Islands, 1660–2009," Thesis, University of Prince Edward Island, 2009.

16. Pierre Belanger and Alexander Arrayo, "Logistics Islands: The Global Supply Archipelago and the Topologics of Defense," *Prism*, 3(4), 2012, pp. 54–75.

17. Ernst Haushoffer, *Geopolitics of the Pacific Ocean* (1924), translated Lewis Tambs and Ernst Brehm (Lampeter: Edward Mellen Press, 2002), p. 141.

18. Daisaku Sakaguchi, "Distance and Military Operations: Theoretical Background Toward Strengthening the Defense of Offshore Islands," *NIDS Journal of Defense and Security*, 2011, pp. 83–105.

19. Edward Luttwak, "From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce," *National Interest*, 20 (Summer), 1990, pp. 17–23. Anna Costa, "The Islands' Economic and Strategic Value," in *The China-Japan Conflict Over the Senkaku/Diaoyu Islands* (London: Routledge, 2017), pp. 60–105 contradicts Luttwak's juxtaposition.

20. Alexander Bukh, *These Islands Are Ours: The Social Construction of Territorial Disputes in Northeast Asia* (Stanford: Stanford University Press, 2020).

21. Irani Papanicolopu, "The Land Dominates the Sea (Dominates the Land Dominates the Sea)," *Questions of International Law*, 47, 2018, p. 40.

22. Richard Schofield, *The Geopolitics of Islands: Sovereignty Disputes and Resource Rivalry* (London: I.B. Taurus, 2020).

23. Warwick Gullett, "The South China Sea Arbitration's Contribution to the Concept of Juridical Islands," *Questions of International Law*, 47, 2018, pp. 5–38.

24. Toshi Yoshihara, "China's Vision of Its Seascape: The First Island Chain and Chinese Seapower," *Asian Politics & Policy*, 4(3), 2012, pp. 293–314, https://doi.org/10.1111/j.1943-0787.2012.01349.x.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

25. James Holmes and Yoshihara, "Ryukyu Chain in China's Island Strategy," *China Brief*, 10(19), 2010, pp. 11–14.

26. David Gitter, "How Chinese Analysts Understand Taiwan's Geostrategic Significance," *The Diplomat*, March 11, 2016.

27. Chinese Academy of Military Science, *The Science of Military Strategy* (2013), translated Luis Ayala (Seattle: CreateSpace Independent Publishing Platform, 2018), p. 224.

28. Jian Wang, *The Pacific Islands in China's Grand Strategy* (New York: Palgrave Macmillan, 2011); Joanna Wallis, "China and the Geopolitics of the Pacific Islands," *The Strategist* (ASPI), June 28, 2019.

29. Fabrizio Bozzato, "Pursuing Indo-Pacific Centrality: China's Geo-economic Strategy in the Pacific Islands," Centro Studi di Geopolitica e Relazioni Internazionali, December 12, 2018, https://www.geopolitica.info/indo-pacific-centrality-china/, accessed November 5, 2020.

30. Bozzato, "Gifts That Bind: China's Aid to the Pacific Island Nations," *Asia Japan Journal*, 12 (2017), pp. 17–35.

31. Jonathan Manthorpe, "China Targeting Pacific Isles for Strategic Bases," *Asia Times*, June 8, 2019.

32. Shan Jie, "Harvesting Vegetables with 'Sand-to-Earth' Tech on S. China Sea Island Beach," *Global Times*, May 19, 2020.

33. Wilson Vorndick, "Terriclaims: The New Geopolitical Reality in the South China Sea," AMTI, April 8, 2015, https://amti.csis.org/terriclaims-the-new-geopolitical-reality-in-the-south-china-sea/, accessed November 5, 2020.

34. Tara Davenport, "Island-Building in the South China Sea: Legality and Limits," *Asian Journal of International Law*, 8(1), 2018, pp. 76–90, https://doi.org/10.1017/S2044251317000145.

35. Swaran Singh and Lilian Yamamoto, "China's Artificial Islands in the South China Sea: Geopolitics Versus Rule of Law," *Revista de direito economico e socioambiental*, 8(1), 2017, pp. 4–23, https://doi.org/10.1017/S2044251317000145.

36. Baoxia Xie, Xianlong Zhu and Adam Grydehoj, "Preserving the Silk Road Archipelago: Archipelagic Relations Within the Ancient and 21st-century Maritime Silk Road," *Island Studies Journal*, 15(2), 2020, 18 pages, https://doi.org/10.24043/isj.118.

37. Adrien Rodd, "A Road to Island Sovereignty and Empowerment Within the Belt and Road Initiative," *Island Studies Journal*, 15(2), 2020, pp. 1–25, https://doi.org/10.24043/isj.128.

38. Aarti Betigeri, "The Growing Attention on the Andaman and Nicobar Islands," *The Interpreter* (Lowy Institute), November 21, 2018.

39. Subrahmanyam Jaishankar, "Speech" (Indian Ocean Conference), September 3, 2019, https://www.mea.gov.in/Speeches-Statements.htm?dtl/31915/, accessed November 5, 2020.

40. "New Naval Air Station 'INS Baaz' Commissioned by CNS," *Press Release* (Indian Navy), July 31, 2012, https://www.indiannavy.nic.in/content/new-naval-air-station-ins-baaz-commissioned-cns, accessed November 5, 2020.

41. Vikram Chandra, *Tweet*, August 30, 2017, https://twitter.com/vikramchandra/statU.S./902899810143019008, accessed November 5, 2020.

42. Pranab Mukherjee, "Speech" (Port Blair), January 11, 2014, https://presidentofindia.nic.in/speeches-detail.htm?37. Also Dhan Singh, "Andaman and Nicobar Islands—A Strategic Springboard for India," *Andaman Chronicle*, April 27, 2016.

43. "INS Kohassa—A New Bird's Nest in the Andamans," *Press Release* (Indian Navy), January 24, 2019, https://www.indiannavy.nic.in/content/ins-kohassa-%E2%80%93-new-bird%E2%80%99s-nest-andamans, accessed November 5, 2020.

44. Kavalam Pannikar, *India and the Indian Ocean: An Essay on the Influence of Sea Power on Indian History* (London: George Allen and Unwin, 1945), p. 20.

45. Pratnashree Basu, "Andaman and Nicobar Islands: Facilitating India's Connectivity in the Bay of Bengal," *Journal of the Indian Ocean Region*, 15(3), 2019, pp. 297–316, https://doi.org/10.1080/19480881.2019.1637553.

46. Narendra Modi, "Submarine OFC Project Connecting Andaman-Nicobar to the Rest of the World," August 10, 2020, https://www.narendramodi.in/text-of-prime-minister-narendra-modi-s-address-at-the-inauguration-of-submarine-cable-connectivity-to-andaman-nicobar-islands-550903.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

47. Pratibha Patil, "Speech" (Kavaratti), December 24, 2009, http://pratibhapatil.nic.in/sp241209.html, accessed November 5, 2020.

48. Balaji Chandramohan, "India's Lakshadweep Islands to Grow in Strategic Importance," *Strategic Analysis Paper* (Future Directions), August 30, 2018.

49. Vice Admiral Girish Luthra cited in "Naval Attachment Set Up in Lakshadweep," *Economic Times*, July 11, 2018.

50. Arunima Gupta, "India's Island Diplomacy: Building an Indian Ocean Security Architecture," *The Diplomat*, August 30, 2018.

51. Baruah, "Islands of Opportunity. Where India and Australia Can Work Together," *The Interpreter* (Lowy Institute), May 22, 2020.

52. Abhijit Singh, "India's Diego Garcia Conundrum," *The Interpreter* (Lowy Institute), June 16, 2020. Also Darshana Baruah and Yogesh Joshi, "India's Policy on Diego Garcia and Its Quest for Security in the Indian Ocean," *Australian Journal of International Affairs*, https://doi.org/10.1080/10357718.2020.1769550.

53. Balaji Chandramohan, "India's Strategic Expansion in the Pacific Islands," *The Diplomat*, June 13, 2018.

54. Alessio Patalano, "Japan's Maritime Strategy. the Island Nation Model," *RU.S.I Journal*, 156(2), 2011, pp. 82–89, https://doi.org/10.1080/03071847.2011.576479

55. *The Vital Functions of Japan's Remote Islands* (Tokyo: National Institute for Japanese Islands, 2009). Also Takai Susuma, "Debates Concerning the Incorporation of Peripheral Islands Into the Territory of Japan," *Japan Review*, 3(2), 2019, pp. 20–27.

56. K.D. Kapur, "Russia-Japan Relations: Politico-Strategic Importance of the Disputed Southern Kurile Islands/Northern Territories," *India Quarterly*, 68(4), 2013, pp. 385–405, https://doi.org/10.1177/0974928412467250.

57. Michael Hart, "Dokdo-Takeshima Islands: South Korea and Japan's Intractable Maritime Dispute," *Eurasia Review*, July 21, 2017.

58. Masihiro Akiyama, "Geopolitical Considerations of the Senkaku Islands," *Review of Island Studies*, August 7, 2013, pp. 1–14.

59. Eric Sayers, "The 'Consequent Interest' of Japan's Southwestern Islands: A Mahanian Appraisal of the Ryukyu Archipelago," *Naval War College Review*, 66(2), 2018, pp. 45–61.

60. "Yonaguni Militarization Exposes Tokyo's Aggression Against China," *Global Times*, March 29, 2016.

61. Mason Ra, "Nationalism in Okinawa: Futenma and the Future of Base Politics," *International Review of Ryukyuan and Okinawan Studies*, 5, 2016, pp. 15–44.

62. Ada Carre, "Massive Stash of Rare Earth Minerals Found Near Japanese Island," Weather Company, April 16, 2018, https://weather.com/news/news/2018-04-16-japan-minerals-rare-earth-discovery-minamitorishima-island, accessed November 5, 2020.

63. June Dreyer, "The Curious. Case of Okinotori: Reef, Rock, or Island?," *Article* (Foreign Policy Research Institute), July 18, 2016.

64. "Preserve Remote Islands and Develop EEZ," in *The Basic Plan on Ocean Policy* (Tokyo: Cabinet Office, 2018), p. 99.

65. Wang Yi, "Wang Yi on the South China Sea Issue at the ASEAN Regional Forum," August 11, 2015, http://mn.china-embassy.org/eng/zmgx/t1287892.htm, accessed January 8, 2020.

66. Thisanka Siripala, "Japan Slams China for Unauthorized Research Around Okinotori Island," *The Diplomat*, January 8, 2019.

67. Ankit Panda, "China's Okinotori Position Reveals an UNCLOS Double Standard," *The Diplomat*, May 3, 2016.

68. Grant Wyeth, "Japan Keen to Bolster Ties with Pacific Island States," *The Diplomat*, August 12, 2019.

69. Izumi Kobayashi, "Japan's Diplomacy Towards Member Countries of Pacific Islands Forum: Significance of Pacific Islands Leaders Meeting (PALM)," *Asia-Pacific Review*, 25(2), 2018, pp 89–103, https://doi.org/10.1080/13439006.2018.1545491.

70. *The Eighth Pacific Islands Leaders Meeting* (*PALM8*) *Leaders Declaration*, May 19, 2018, https://www.mofa.go.jp/a_o/ocn/page4e_000825.html, accessed November 5, 2020.

71. Claire Huitt, "They Are Islanders: Japan in Oceania," *Strategic Interests* (Climate Security in Oceania) November 30, 2019.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

72. Jenny Hayward-Jones and Philippa Brant, "Japan's Pacific Islands Strategy Counters a Rising China," *The Interpreter* (Lowy Institute), May 26, 2015.

73. "U.S. Engagement in the Pacific Islands," Department of State, October 3, 2019, https://au.usembassy.gov/u-s-engagement-in-the-pacific-islands-un-general-assembly-update/, accessed November 5, 2020.

74. Alfred Mahan, "Hawaii and Our Future Sea Power" (1893), in Mahan, *The Interest of America in Seapower, Present and Future* (Boston: Little, Brown and Company, 1898), p. 31.

75. Andrew Rhodes, "The Second Island Cloud. a Deeper and Broader Concept for American Presence in the Pacific Islands," *Joint Forces Quarterly*, 95(4), 2019, pp. 46–53.

76. Andrew Erickson and Justin Mikolay, "A Place *and* a Base: Guam and the American Presence in East Asia," in *Reposturing the Force: U.S. Overseas Presence in the Twenty-first Century* (Newport: Naval War College, 2006), pp. 65–93.

77. Leevin Camacho, "Resisting the Proposed Military Buildup on Guam," in Daniel Broudy (ed.), *Under Occupation: Resistance and Struggle in a Militarised Asia-Pacific* (Newcastle: Cambridge Scholars Publishing, 2013), pp. 183–190.

78. Mahan, "Testimony," in *Hearings Before the Committee on Expenditures in the Navy Department of the House of Representatives* (Washington: Government Printing Office, 1910), p. 56.

79. Chloe Babauta, "Guam's Strategic Importance: From Coaling Station to Tip of the Spear," *Guampedia*, September 5, 2018.

80. James Johnson, "China's 'Guam Express' and 'Carrier Killers,'" *Comparative Strategy*, 36(4), 2017, pp. 319–322, https://doi.org/10.1080/01495933.2017.1361204.

81. "Military Buildup on Guam May Face Downsizing," *Pacific Island Times*, September 4, 2019.

82. Chris Gerlardi and Sophia Perez, "'This Isn't Your Island': Why Northern Mariana Islanders Are Facing Down the U.S. Military," *The Nation*, June 12, 2019.

83. Derek Grossman, *America's Pacific Island Allies. the Freely Associated States and Chinese Influence* (Washington: RAND, 2019), https://doi.org/10.7249/RR2973.

84. *Joint Statement from the President of the United States and the Presidents of the Freely Associated States*, May 21, 2019, https://www.whitehouse.gov/briefings-statements/joint-statement-president-united-states-presidents-freely-associated-states/, accessed November 5, 2020.

85. Kensei Yoshida, "Okinawa and Guam: In the Shadow of U.S. and Japanese Global Defense Posture," *Asia-Pacific Journal*, 8(26–2), 2010, pp. 1–15.

86. "China Shocked: U.S. Navy Joins Singapore to Conduct Massive Exercise to Fight China in South China Sea," *U.S. Military Post*, June 1, 2020 https://www.youtube.com/watch?v=ok7XZaJ0BLo, accessed November 5, 2020.

87. Pradeep Raja, "The Great Wall of Andaman and Nicobar Islands—U.S. INDOPACOM Gateway to IOR," *Report*, Naval War College, May 10, 2019.

88. Andrew Banfield, "Can This Small Indian Ocean Island Be the Key to Stopping Chinese Hegemony?," *National Interest*, August 23, 2020.

89. Sophie Moreau and Aurélian Marszek, "Géopolitiques mahoraise et reunionnaise: De la crise actuelle a un etat des lieux regional," *Hérodote*, 145 (2012), pp. 150–160, https://doi.org/10.3917/her.145.0150.

90. Robert Genty, "Le role strategique de l'Île Kerguelen," *Revue Défense Nationale*, 128 (August–September 1955), pp. 166–175.

91. "La Nouvelle-Calédonie base avancee de la France dans le pacifique," May 4, 2018, https://gouv.nc/actualites/04-05-2018/la-nouvelle-caledonie-base-avancee-de-la-france-dans-le-pacifique, accessed November 5, 2020.

92. Paul Soyez, "French Presence in the Pacific Reinforced by the Pacific Islands Forum," *The Strategist* (ASPI), September 28, 2016.

93. Sasha Davis, Lexi Munger and Hannah Legacy, "Someone Else's Chain, Someone Else's Road: U.S. Military Strategy, China's Belt and Road Initiative, and Island Agency in the Pacific," *Island Studies Journal*, 15(2), 2020, 23 pages, https://doi.org/10.24043/isj.104. Also Steven Ratuva, "Pacific Island Agency in the Global Game of Competitive Geo-political Bidding," *Australian Outlook* (AIIA), June 6, 2019.

94. Mahan, *The Influence of Sea Power Upon History* (London: Sampson Low, Marston, Searle, & Rivington, 1889), p. 329*fn*1.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

95. Alastair Bonnett, *The Age of Islands: In Search of New and Disappearing Islands* (London: Atlantic Books, 2020).

96. David Chandler and Jonathan Pugh, "Islands of Relationality and Resilience: The Shifting Stakes of the Anthropocene," *Area*, 52(1), 2020, pp. 65–72, https://doi.org/10.1111/area.12459.

97. Bozzato, "Dryland: Artificial Islands as New Oceanscapes," *Journal of Futures Studies*, 17(4), 2013, pp. 1–16; Clive Schofield and David Freestone, "Islands Awash Amidst Rising Seas," *International Journal of Maritime and Coastal Law*, 34(3), 2019, pp. 391–414, https://doi.org/10.1163/15718085-13431098.

Biographical Statement

David Scott is a prolific author (www.d-scott.com/publications), having written extensively on maritime affairs and on the Indo-Pacific. He is member of the Center for International Maritime Security (CIMSEC), and an associate member of the Corbett Centre for Maritime Policy Studies.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Cross-Border Exchanges and Political Identity Cleavages in Kyé-Ossi, Cameroon

Fred Jérémie Medou Ngoa

Structured Abstract

Article Type: Research Paper

Purpose—The purpose of this study is to explore the potential and dynamics of politics among heterogeneous populations of cross-border territories. Kyé-Ossi is at the crossroad of trade between Cameroon (host), Gabon and Equatorial Guinea. For that reason, it has attracted people from different ethnic and national backgrounds. However, political cleavage is strong between Ntoumou (indigenes) and Bamoun (settlers or non-indigenes).

Design, Methodology, Approach—Data obtained from participant observation and semi-structured interviews indicate that while the voting behavior of the indigenous Ntoumou is determined by ethno-regional identification with the Cameroon Peoples' Democratic Movement (CPDM) party, some Bamoun settlers have also decided to support the same party as a means to survive outside their home constituency.

Findings—Some indigenous people living in cross-border territories do not always take a positive view of a political behavior against their chosen political leader or party in their "own" constituency.

Practical implications—In cross-border territories, deeply held ethnic attachment to a party is not a political behavior observed among non-indigenous people or settlers. Beyond the correlation between ethnicity and voting behavior (observed among the host population), settlers are compelled to support a locally based party.

University of Douala, P.O. Box 4982, Douala, Cameroon, phone: +237 677 04 57 94, email: medjermi@yahoo.fr

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 86–106 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.86 © 2021 Yonsei University

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

Originality, value—The study explores how patterns of geographical and ethnic partisanship influence political dynamics in border territories.

Keywords: Cameroon, cross-border, Kyé-Ossi,
margins, political identity *cleavages*

I. Introduction

Studies in border zones are necessarily multidisciplinary. They are not only historical, but also geographic, demographic, legal, military and, obviously, and above all, political.[1] It is from this last angle that the present study is focused although other perspectives are explored. Moreover, it is not so much the border itself in the physical sense of the term that constitutes an object of scientific investigation in the present case. It is also about the representations that individuals make of it and in particular, the ability of political actors to take advantage of the political opportunities it offers. Cross-border constituencies are particularly interesting when investigated to determine the factors responsible for the political behavior of multi-ethnic and diverse groups therein. Posner, for example, explores how cultural differences can become politically salient in border territories and concludes that beyond such differences, the size of the population has a fundamental role to play in voting behavior.[2] On his part, McCauley argues that distinctiveness in geographic "boundedness" of identity types inspires differences in the goods that different members seek under ethnic and religious contexts and that changes in political behavior are a consequence not necessarily of the size of the group but most especially the policy preference at an individual level.[3] Much of the literature on ethnicity and politics in Africa also concludes that incumbents will use the power of the state to reward their core constituency, thereby reinforcing patterns of ethnic partisanship in politics.[4] It is clear from these studies that ethnic identification appears to be the major determinant of political behavior and that other determinants are more or less intervening variables. To say the least, individuals who self-identify most strongly as members of the local ethnic group, as opposed to their religious or other groups are more likely to support a political party with a local base, owing to a longstanding pattern of patronage distribution that has made the political party salient there.[5]

Kyé-Ossi is a multi-ethnic geographical entity that contains more than one dimension of cleavage. Its inhabitants, both the indigenous population and settlers, are divided by religion, ethnic and tribal belonging, and most importantly, cleavages based on region of origin, country of origin, language of communication and socioeconomic and political activity. However, it appears that while the voting behavior of the indigenous Ntoumou population is predominantly determined by ethnic considerations, some Bamoun settlers have not always been able to overtly express support for the Cameroon Democratic Union (CDU)—their home-based party in Kyé-Ossi (foreign) constituency. The Ntoumous's support for the Cameroon People's Democratic Movement (CPDM) might be a way of expressing an ethnic identity

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

given that the party's leader is of that constituency—but it might not be the case with Bamoun support for the CPDM, which is more or less perceived as a means to survive in a "foreign land." People can view supporting a regional champion as a way of expressing an ethnic identity.[6] Settlers can express support for the same regional champion as a way to survive in a "foreign land/constituency." These considerations lead to some questions: What could be the nature of the relationship between the indigenous people and several other settlers or immigrant groups? How does ethnic diversity in border constituencies affect the political attitudes and behavior of the various groups? Which of the groups between the indigenous ethnic group (Ntoumou) and the settler group (Bamoun) can claim political domination and why? Why are these two groups more engaged politically than others? From another perspective, what makes the cross-border trade in Kyé-Ossi so special, and how can it be viewed through the prism of economic and diplomatic cost and benefits? In an attempt to discover answers to these questions, semi-structured interviews and participant observations, as well as documentary analysis, were used as instruments to collect data. This study reveals evidence of links between ethnic identification and party support and non-ethnic/geographical identification and party support. The need for socioeconomic survival influenced non-ethnic identification among Bamoun settler population.

The paper explores the conditions under which forms of ethnic, socioeconomic and geographical cleavages become politically salient in border territories. It focuses on the political instrumentalism of cleavages linked to indigenous people and settlers and argues that the large size of settler population represents a political resource for home-based politicians in border territories. The paper begins with a description of the location and composition of Kyé-Ossi, with a focus on what makes it attractive; and then a description of the political identity cleavages with a focus on indigenous Ntoumou and Bamoun settlers as they struggle for political power.

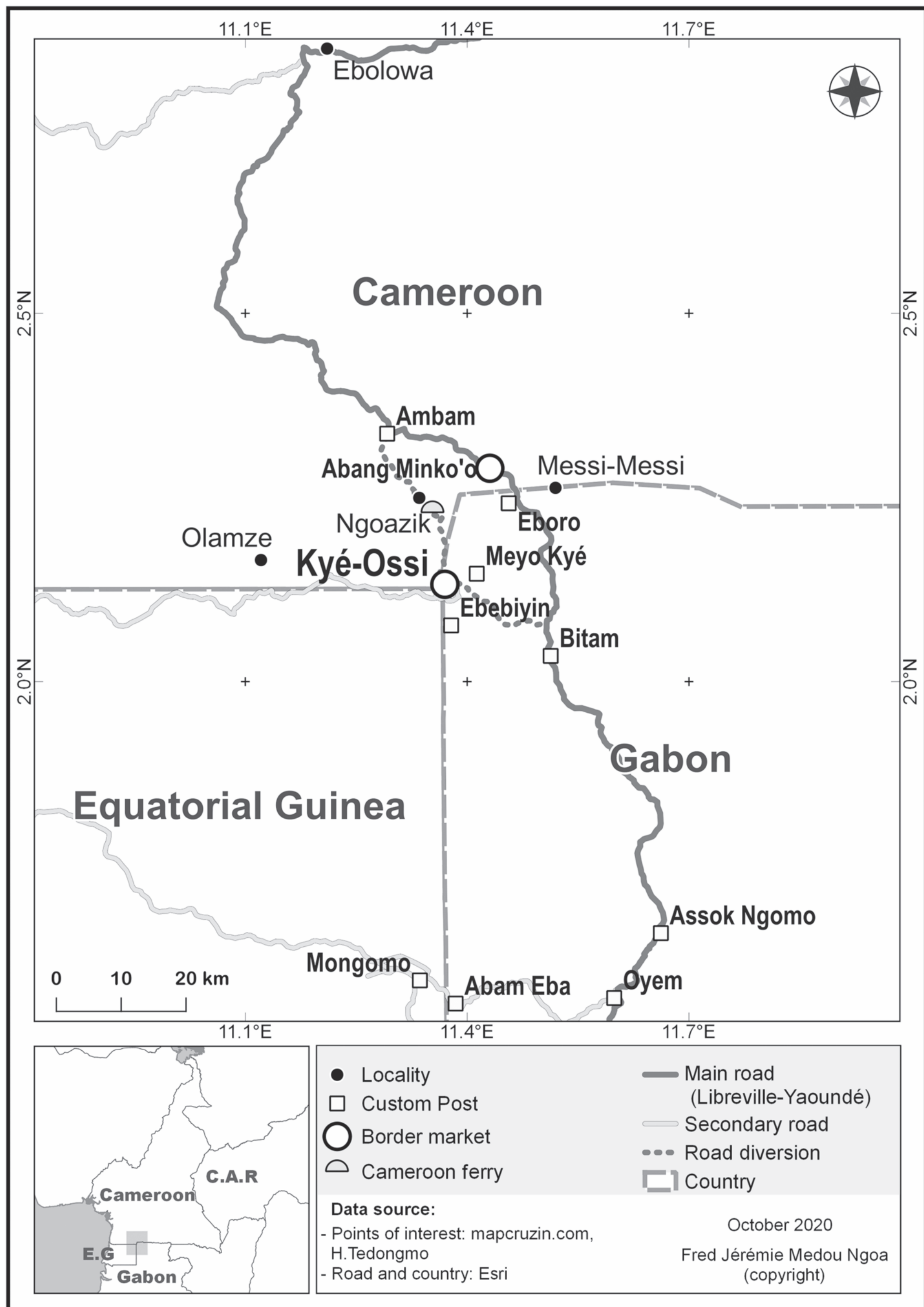
II. Kyé-Ossi: Between Attractiveness, Diversity and Issues of Cross-Border Exchanges

To understand Kyé-Ossi it is imperative to locate the area and describe how it stands alone as hub of trade and commerce and source of attraction with diplomatic cost and benefits. Particular attention is given to the heterogeneous character of the inhabitants.

2.1 The Territorial and Socio-Political Constitution of Kyé-Ossi

Kyé-Ossi covers a surface area of 710 km^2 and is made up of 21 villages, 21 3rd class chiefdoms and two 2nd class chiefdoms found in Ebengon and Meyo-Nkoulou. Kyé-Ossi is bounded to the north by Ambam, a locality in Cameroon, to the south by Equatorial Guinea, to the east by Gabon and to the west by the Olamze local council area,[7] also in Cameroon.

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION



동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Located around the east coast of the Gulf of Guinea in Africa, Kyé-Ossi was once considered part of Equatorial Guinea and then Gabon before it was returned to Cameroon in 1972. It takes its name from the Kyé River which in the local language is called "Si" and literally translates into "Bas-Kyé" (lower Kyé) and was given the administrative status of a district on April 24, 2007.[8]

As earlier mentioned, Kyé-Ossi is located in Cameroon, a country in a strategic position within the Central African sub-region and beyond. This strategic position has attracted a range of cross-border activities and in particular cross-border trade. However, the most important border localities in terms of number of exchanges are those of Mbaiboum, Ndélélé and Bogdibo in the North Region and those of Kyé-Ossi, Campo Beach, Menguikon and Abang Minko'o in the South Region.[9]

The markets in the border areas of Mbaiboum and Kyé-Ossi have always stood out for their role as a platform for cross-border trade. However, it has a competitive advantage over other cross-border localities in the sense that it is located at the intersection between three countries namely: Cameroon, Equatorial Guinea and Gabon.[10] From this perspective, the ethnic composition of Kyé-Ossi is multiple and diverse.

Kyé-Ossi has an estimated population of 45,000 inhabitants according to official statistics.[11] The population is essentially heterogeneous. It is representative of most Cameroonian ethnic groups. However, in terms of numbers, the most important ones are the Bamoun, the Bamiléké, the Boulu, and the Ntoumou.[12] Among these four dominant ethnic groups, the Ntoumou make up the indigenous population. Ethnic groups from other neighboring countries also make up part of the people living and doing business in Kyé-Ossi. Ethnic diversity is also reflected in the numerous local and official languages used as medium of communication. French is the dominant language in the midst of several other local languages. These considerations represent significant cultural and linguistic diversity upon which politics have to be played out.

On a religious note, Islam is dominant in the town of Kyé-Ossi due to the demographic size of the Bamoun, who are largely Muslim. Alongside this religious denomination, we also note the presence of Catholics and Protestants who are for the most part the Ntoumou and Boulou.

According to some informants, Kyé-Ossi is very much like a state within a state. Unlike Ambam, a neighboring city, it is a mixture of three countries (Gabon, Equatorial Guinea, and Cameroon). It is obvious from this consideration to think of Kyé-Ossi as a hub of ethnic cleavage and diversity. Although the dominant local language is Fang, Cameroonians speak French, a language introduced by the "colonial State," and Equatorial Guineans speak Spanish, another linguistic legacy from Spain. Thus, to know the basis of the ethnic identity of the populations in Kyé-Ossi, one should pay attention to the fact that the individual speaks Fang added either to French for Cameroonians, or to French with a different accent for Gabonese, or in Spanish for Equatorial Guineans. This state of affairs reinforces the hybrid nature of identity although it provides the basis for people to learn other languages and be able to use them to integrate the socio-political fabric of Kyé-Ossi. Thus, one can observe that

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

some Bamoun speak Fang and have the Gabonese accent, which facilitates business transactions with the Gabonese and Equato-Guineans counterparts.

As mentioned earlier, the Bamoun represent a significant settler population in Kyé-Ossi along with the Ntoumou, who are indigenes, yet, some Bamoun people have been able to impose themselves as the dominant group. The questions now become: what could have pushed and still pushes the Bamoun to occupy a dominant position in such ethno-demographic condition of diversity and what can be the impact of such a presence for politics? Why have the Bamoun been able to secure a strong political base in Kyé-Ossi despite the fact that they are perceived as strangers in that land? A potential response to some of these questions is rooted in the trading capability of the Bamoun people as well as the history of migration and settlement. An informant on the issue had this to say:

> Kyé-Ossi is a city of exchanges, of commerce. It is the second city of the Bamoun after Foumban [the home city]. All the Bamoun seek to come to Kyé-Ossi, thinking that this is their El Dorado. His brother who is leaving Kyé-Ossi praises the said city once in the Noun.[13] These are the first [immigrant] inhabitants to have come to this territory. The Bamoun were the first people to settler here. They worked with the indigenes and bought land. They were mostly farmers.[14] In order to see the size of the Bamoun population you have to look around the city by 7 a.m. when they go about their daily business and at 5 p.m. when they return.[15]

Testimonies on Bamoun people as pioneer settlers in Kyé-Ossi abound. What follows has the particularity not only to focus attention on the utilitarian dimension of the border, but also to highlight the dynamics of the process by which the Bamoun people settled in the area. Below is another testimony:

> I would have learned when I got here that the part called Kyé-Ossi might still be unoccupied. One of the political leaders, a Bamoun sultan, is said to have asked former President Ahidjo if he could bring his brothers to settle in this part of the territory with the indigenous Fang. When they got to Kyé-Ossi, they saw that the city was strategic, that exchanges with neighbouring countries were done in a fluid manner, and this is how they developed a taste for business and decided to make out a life here.[16]

It should be noted that the Bamoun people arrived in Kyé-Ossi and discovered that it was sparsely occupied. This can partly be explained by the fact that some indigenous people had migrated to Gabon and Equatorial Guinea in search of better living conditions. At the heart of this decision to migrate was the oil boom in these two countries. According to another informant:

> The majority of Bamoun now see Kyé-Ossi as their hometown. They have acquired land property and others have built houses.[17] The Bamoun ancestors first settled with us in Ebengon. Nowadays, if there are ten people in Kyé-Ossi, two or three would be indigenes, seven or eight would be non-indigenes, mostly Bamoun.[18]

One of the indicators of the strong presence of the Bamoun in the border town of Kyé-Ossi or of the attractiveness of this population from the West of the country to

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

this town in the South is the opportunity to convert this demographic advantage into a political resource. Among others:

> The 3rd class chief of Akombang village is a Bamoun. The Bamoun are the first foreigners to have occupied Kyé-Ossi.[19] It is since 1984 that Pouefoma Amadou, born around 1938 in Fentain, became 3rd class chief of Akombang village, replacing his uncle Njiawouo Isaac, who died in November 1983. The latter thus became village chief following consultations, customary practice and elections organized for this purpose by the then chief of Olamze. The election was won with an overwhelming majority by Pouenfoma Amadou, non-indigene (Bamoun), against Zue Nkoulou Laurent (Ntoumou, indigene). From then on, he assumed office as head of the community, albeit unofficially until 2004, when his Majesty the Sultan Ibrahim Mbombo Njoya, King of the Bamoun, on the inauguration of the central mosque of Akombang, built by the Bamoun, officially designated him as his representative in Kyé-Ossi.[20]

Kyé-Ossi, therefore, has a historical attraction for the Bamoun and particularly for all the populations who migrate there because of the socioeconomic and political opportunities it offers as a border town. It should be remembered, however, that "border entrepreneurs" have multiple faces.[21] Border towns have potential for profitability and, as such, attract individuals with various profiles and skills who come to bet or try their luck. Game, risk and profitability are the lot of border margins.[22] The foregoing considerations show that in Kyé-Ossi too, cosmopolitanism is linked to ethnic diversity and to the phenomena of cultural and economic hybridization that occur there.[23] Karine Bennafla notes more widely that in Central Africa, a host of economic actors, men and women interact to exploit border town opportunities. Many of them are traders, transporters, freight forwarders, couriers, currency changers, guides, interpreters, handlers in addition to a floating population of restaurateurs, hairdressers and other service providers present in the marketplaces, and sometimes, some, such as shoemakers, prostitutes, etc., come from distant countries.[24]

2.2 Economic and Diplomatic Costs and Benefits in Cross-Border Exchanges in Kyé-Ossi

The emergence of commercial centers on the borders of national territories reflects a type of informal business dynamism that seems to have taken modern States aback. They are finding it difficult to control and manage the emergence of cross-border spaces.[25] Cross-border trade is therefore not considered only in terms of the benefits that it can procure, but also in terms of the cost, as States have to deploy time, energy and money for effective control. That is why States are sometimes compelled to shut down borders, even though this decision might be a unilateral one. At the very least, there is no consensus or joint agreement among border States over the management of borders—such as when it can be closed and opened. This unilateral action toward the management of borders has often been a source of strained diplomatic relations between Cameroon and its neighbors. According to an informant:

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

> There are not enough border closures on the Gabon side. It was not until 1998 that the border was closed for the last time. But Equatorial Guineans are capricious. They spontaneously close the borders without any reasonable explanation. Even now as I speak it is hardly accessible. Prior to their Independence Day which is every October 12, Equatorial Guinea closes its borders for a week or two. However, it is possible that their President is not always aware of these arbitrary closures and most of the time; it does not come from the authorities given that no official statement has been released to that effect.[26]

Although it is often for security reasons[27] that borders are closed, it is important to note that the closure too represents significant economic and diplomatic challenges. When the border is shut down for two weeks or more, economic activities come to a standstill, and clandestine and criminal activities take over.

Moreover, complexes linked to the clash of culture are also a phenomenon observed when borders are shutdown. For example, claims of different colonial identities often exacerbate diplomatic tension and make it hard for a consensus to be reached over the management of the border. The fact that Gabon is a former French colony, Equatorial Guinea a former Spanish colony and Cameroon a former Franco-British mandated/trusteeship territory is a source of discord among these three countries. For one interviewee: "It was the French who colonized the Gabonese, we have almost the same cultures [with Cameroon]. However, the Guineans were colonized by the Spanish."[28] This differentiated colonial legacy has created a feeling among the inhabitants from these countries that they have different cultural backgrounds, thereby making living together challenging. There is a feeling of mutual suspicion between Cameroonians and Equatorial Guineans. Equatorial Guineans sometimes suspect Cameroonians of coming to their country to take their resources. That is why Cameroonians have often been rejected and in extreme cases, were deported back to their country. However, to survive the situation, some Cameroonians without papers (relevant identification requirements) have bought their way through. Others try to speak Fang (the native language of people of Equatorial Guinea), as way to deceive border officers and to get through into Equatorial Guinea. And this state of affairs weakens the relation between the two countries so that Equatorial Guineans now prefer Gabonese to Cameroonians to enter Guinea.[29]

Pick-pocketing[30] is another informal activity resulting from the closure of borders and from which lots of benefits are derived. However, apart from illegal and illicit activities, there is regulated trade based on import and export between the Cameroon and Equatorial Guinea that generates some benefits for both countries.

Cameroon exports fresh food, household furniture (such as beds, wardrobes, tables and benches), household appliances (TV sets, fridges, irons, and cell phones), etc., to Equatorial Guinea. What enters Cameroon from Guinea are drinks and beverages. There are four dominant varieties: 1—liqueurs (whiskeys); 2—table wine (red wine); 3—beer; 4—sweet drinks (juice). Cameroon also imports canned food (sardines, hams, sausages); vegetable oils, building materials; cosmetics (body lotions, toilet milks, deodorants, perfumes); and used cars. The importation of used cars into Cameroon was easier when oil prices dropped in the world market.[31] The auto-

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

mobile sector was affected so that the sale of used vehicles to Cameroon became a parallel activity.

It should also be noted that economic downturn upsets the use of labor as well. Petty trades are being carried out by the Guineans themselves (household workers), which was not so in the past. They now learn mechanics and enter the bush themselves to look for wood, a situation that was not done during the heyday of the oil boom. Now, the quest for money and the need to survive under economic hardship has gained precedence over pride and they are now compelled to do some of the odd jobs reserved for people of other nationalities. This has somewhat balanced the nature of the relationship between Equatorial Guineans and Cameroonians and Gabonese since complexities have reduced. This recession could also explain why free movement across the border of member States of the Economic Community of Central African States (ECCAS) became operational only in 2017 while the text was adopted in 2013. However, one thing remains certain; the fall in fuel prices has weakened the economy of the two countries in relation to the decrease in imports and exports.

Cameroon also exports fresh food, plantains, sweet bananas, cassava, potatoes, maize, and beans to Gabon, from Kyé-Ossi and Abang Minko'o. Cameroon also exports livestock to Gabon. These include oxen and sheep, mostly in high demand by the Muslim community. However, producers from northern Cameroon and not from Kyé-Ossi control livestock sectors. On the other hand, Cameroon imports from Gabon include pasta, dry fish (herring), milk, poultry, smuggled frozen foods, table oil, sardines, and rice.

Border security agents are a little more careful of goods and persons entering Gabon. In spite of attempts to find a common migration policy among the countries of ECCAS, and in spite of the joint decision to lessen borders for the movement of goods and persons from member countries, evidence on the ground shows that each country still defines its migration policy. That is why Gabon has developed a stricter migration policy in addition to the fact that they do not want "foreign" domination. In extreme cases, they have repatriated some foreigners *en masse* particularly those who have irregular or incomplete residence papers, or those that are not up to date. The Cameroon government has also had to denounce, on one or two occasions, the arbitrary repatriation of some Cameroonians by Gabon. Contrary to what some people may think; if the free movement of goods and persons is allowed, the control is likely to intensify.

Many people think that during the days of President Omar Bongo Odimba, second President of the Republic of Gabon, the Gabonese people became lazy. Most of them were not seen to be involved in agriculture and related activities. In Meyo-Kyé and Bitam, for example, you could not find a cultivated field in the strictest sense of the term. This situation could have also fostered the feeling of suspicion and wariness about "hardworking" foreigners who desire to live and work in Gabon, hence the strict migration policy.

Whatever the case, in this context, it is important to note that in general, Cameroon exports more than the other two countries. This is the case with food

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

crops, market gardens and even products such as fertilizers and pesticides. Imports to Kyé-Ossi are primarily from Equatorial Guinea (drinks). The Guineans obtain much more from Kyé-Ossi, while the Gabonese do so not only from Kyé-Ossi, but especially from Abang Minko'o.

Sometimes, to overturn and escape payment of regular custom dues, traders are compelled to identify and use bush roads where there is little or no control. In the border area with Guinea, there are bush markets, such as Medikoum, Ebengoan, Meyo Biboulou, Olamze. Toward Gabon it is a bit difficult, except at a place called Mefoup, where there is a bush road. Smuggling of goods with the use of bush paths suggests that States of those border areas are losing a lot of money from custom dues. It is only on periodic market days that some income can be generated via custom service. Unfortunately, too, the periodic nature of the market operation (though certainly for security reasons), reduces the ability of States to generate revenue from customs activities. Toward Gabon, there is only one market day, Wednesday. Market days with Guineans are Monday, Wednesday and Friday. The Kyé-Ossi market is therefore periodic and it is on market days that there are lively exchanges of goods and services between Cameroonians, Equatorial Guineans and Gabonese.

As major economic operators in the locality, Bamoun traders get supplies from Douala, the economic capital of Cameroon, but also from Santa in the northwest, and their hometowns of Foumbot and Foumban. Cameroon can export at least 15 to 20 tonnes of plantains from Kyé-Ossi to neighboring countries per week.

Sometimes the difficulty associated with becoming a regular businessman has caused many to resort to clandestine trading activities. Administrative and police bottlenecks are part of a hallmark to regular business. According to information from the field, many think life is difficult in Kyé-Ossi because of the difficulties that foreign traders encounter at the border.

The abuses of the police in business transactions along the border have indirectly led to the emergence of transnational organized crime. In an attempt to circumvent the police, traders and other city dwellers tend to become involved in illegal and illicit activities such as contraband, smuggling, drug trafficking and other forms of black-market activities including organized crime. According to Mr. Youmo, vice-president of the CPDM sub-section of Kyé-Ossi, two cases of crime-related business transactions that led to death have been reported on the bush market roads.[32] According to an informant on the field:

> In Cameroon there are too many controls compared to neighbouring countries who also imitate what we are doing. For example, when the governor raids the field, he prohibits or reduces the number of checkpoints, but after two weeks everything is back in place. There are at least eight controls namely: customs, border police, phytosanitary, town hall, gendarmerie, and territorial security, transport office (BGFT), trade. It does not facilitate the entry of Guineans and Gabonese. When they come to buy, on their way back, they have to "settle" customs and pay all the taxes in the various checkpoints. All this makes cross-border trade difficult. But on the Gabon side, the controls are few, with at most three checkpoints. So the foreigner who comes to Cameroon must pay customs first in Cameroon before doing so again in Guinea although the product had already

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

> been cleared in Douala. If a Guinean comes to pay a basket of tomato at 8000 F CFA [12.5 USD] in Kyé-Ossi, before arriving in Ebebiyin, the first town in Guinea, two kilometres from, he finds himself in the expenses of 13,000 F CFA a basket. So, he would have added an extra 5,000 FCFA [7.5 USD] for a basket that initially cost 8,000 F CFA. This makes life expensive in Guinea, even more so in Bata, the economic capital. Other buyers even prefer not to come to Cameroon to buy because of the cost, which makes life harder in Kyé-Ossi as well. But free movement can make things easier if they respect it, but in the field it is up to the men in uniform.[33]

Kyé-Ossi is a melting pot of businesses and businessmen from various backgrounds and identities. The Bamoun people are the major traders in that border locality. However, to survive economically may not be enough—partisan engagement in politics adds to the conditions of survival in border territory of Kyé-Ossi.

III. Political Identity Cleavages in Kye-Ossi

To talk about political identity cleavages in Kyé-Ossi is to investigate how power is conquered and kept at the local but also at the central levels. At the heart of the quest for power and identity also lies the challenge of "living together," a concept introduced by politicians to promote social harmony and minimize the effects of the political instrumentalization of ethnic differences in multi-ethnic and diversified Cameroon.

3.1 Kyé-Ossi as a Stronghold of Political Power Struggles and "Living Together"

The origin of the modern State in Africa is recent, with poorly rooted notions of nation and citizenship.[34] Democratic transitions in Central Africa have been marked by ethno-identity cleavages,[35] even if such ethnicity politics followed different trajectories.[36] The conquest of political power in Kyé-Ossi constituency is played out between two predominantly influential parties, the ruling Cameroon People's Democratic Movement (CPDM) and the opposition CDU.[37] The leaders of both parties are respectively from Bulu and Bamoun origins of the South and West Regions of Cameroon. Politics cannot be understood in this border constituency without reference to these two parties. However:

> [Although] with the multiparty system in Cameroon, everyone can become a member of any political party, it might not be the same freedom in rural constituencies, such as Kyé-Ossi. When you are with people, you have to accept to dance to their tune lest in the end it will create problems for you. This understanding looks as an assumption, but it is the reality. When you are foreigner or stranger, you are vulnerable, and this makes you an eventual loser in everything. Living together cannot be achieved without challenges though. Linguistic differences, differences in custom and habits and above all the heterogeneous nature of the people living there are not always considered as asset or facilitators of "living

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

together." In such a context, it is impossible to avoid problems related to coexistence.[38]

If the significant presence of the Bamoun people in Kyé-Ossi explains the existence of the opposition CDU party in this constituency of Cameroon, it does not mean that all Bamoun people are militants and sympathizers of that party whose leader, Adamu Ndam Njoya[39] is of their ethnic background, nor does it mean that all Ntoumou indigenes support and sympathize with the ruling CPDM, whose chairman, Paul Biya, who also doubles as President of the Republic, and of the same ethnic background. What matters in such a context is not necessarily the expression of partisan support based on ethnic feelings and sympathies. Rather, people will go for the party that stands the greatest chance of winning irrespective of the ethnic origin of the party's leader. There are indeed Bamoun who are members of the CPDM, as there are in Foumban and elsewhere, and Ntoumou who are members of the CDU, Social Democratic Front (SDF), etc. Although the idea of political stronghold is still very strong, which means that a party's leader origin is considered acquired to that party and consequently dominant, people are interested in supporting the party that can best protect and enhance their interests. This can explain why we find Bamoun people supporting the CPDM, the ruling party or "government party," in spite of the presence of the CDU and other opposition parties more or less closer to their ethnic origin. In any case, how can we understand that in spite of the presence of the CDU and CPDM, the ethno-demographic variable has hardly ever been mobilized as a political instrument, let alone used efficiently? These parties have the social capital potential to mobilize political support along ethnic lines: with CDU mobilizing support from among the Bamoun people and CPDM mobilizing the same among Ntoumou. Let us follow the explanation of the Section president of the CDU party of the Ntem Valley Division:

> It was during Minister Adamou Ndam Njoya's time at the Ministry of National Education that everything happened. It's as if the Bamoun have come to corrupt people! When you join the CDU you are drawn by the party's ideology. With the advent of the multiparty system, there is a man named Ela Mbo who went as far as Foumban to seek the CDU, because of Ndam Njoya's brilliant record at the Ministry of Education. His passage in these places left a positive image because he raised the level of the students. How else would we get to know him from here? After Ela Mbo's death, Master Ebo Essono, former civil servant, teacher and former secretary general of the section presidency of the CPDM in the Ntem Valley took up from there. Before his recent disappearance, he was head of the 2013 municipal election list. I, who speak to you, Mvondo Alexandre, was then an advisor on his list. Once his post became vacant, the party comrades made me to replace him by heading not only the list in Kyé-Ossi but also those of Ma'an, Ambam and Olamzé, who accepted to host me at the departmental coordination of the CDU in the Ntem Valley.[40]

In terms of the conquest and preservation of central political power, it is not advisable to lose sight of the fact that Kyé-Ossi is part of the territories that Zambo Belinga (2005)[41] described as "so-called acquired localities" to the CPDM. This can

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

be explained by at least two reasons. The first is geographic, natural and cultural. Indeed, for the indigenous populations, Kyé-Ossi is located in the southern region to which the head of state belongs, and in turn belongs to the large Pahouin group,[42] like his neighbors in Equatorial Guinea, Gabon and Congo. Therefore, losing presidential elections, in particular in Kyé-Ossi, means opening up this geopolitical and economic-cultural flank to the opposition, largely made of the populations of western Cameroon, majority of who are Bamoun.

The second reason why Kyé-Ossi is considered acquired by the CPDM is related to the elites of the southern regions and their determination to keep Kyé-Ossi as a stronghold of the national ruling party. They will not accept that another party might win elections in Kyé-Ossi and are capable of going the extra mile to ensure that the CPDM continues to dominate in politics. They believe that to maintain their elective, nominative and governmental positions, the CPDM *must* win in all elections in the South Region, including Kyé-Ossi. If an opposition party is to win elections in Kyé-Ossi, then, they would have failed in their political mission and the consequence would be that they would lose their central power position and the advantages that come with it. That is why they act as campaign specialists and overseers of the electoral framework to the point that, in some cases, they engage in the abuse of power to safeguard the CPDM. One of their political and electoral strategies has been to offer power generators to the people of Kyé-Ossi particularly during election time. It should be noted that since Cameroon became independent in 1960, this border territory has not been electrified. According to an informant:

> There is political dictatorship. Example: when you want to sympathize with a party that is not the ruling CPDM, you are intimidated by internal and external elites who are party officials of the CPDM. So in reality there is one party system in Kyé-Ossi and to which even foreigners are compelled to adhere. This party is the CPDM that is also the national ruling party. These elite do not want another party.[43]
>
> Here people behave as if we were still in the days of the one party. They do not want to realize that we are in a multiparty system in which people are free to belong to a party of their choice. Once they dare to join a party different from the CPDM, the CPDM elites who are also decision makers in central government will threaten those parents by promising hard times for their children seeking jobs and education.[44]

Living together in Kyé-Ossi is another important determinant of the political dynamics of border territories. Living together is determined by anthropological, cultural and political factors. Overall, living together is circumstantial. At one moment, the people speak in one voice and at others there are conflicts linked to cultural, political and anthropological differences. A summary is provided in the excerpt below:

> Natives and non-natives have very good relations. However, sometimes tensions arise between them. There is theft. At the Equatorial Guinea front, some rob the Guineans and when you arrive in Guinea if they know you are Cameroonian, the Equatorial Guineans take revenge. They all take you for Cameroonians. Even

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

though they ask to move the goods, they ask for more. Others pass through bush paths. Faced with this banditry, locals sometimes worry and sometimes even start talking because locals and Equatorial Guineans are the same family. It is as if we are just stealing someone who speaks the same dialect as you in front of you, it makes you think. Yet when you arrive in Foumban they are considered good people, but when they arrive in Kyé-Ossi it is a total change.[45]

The Bamoun are traders. When traders go on strike, the Bamouns are accused, whereas it is caused by a problem affecting all traders irrespective of where they come from. The strike derives from an old grudge between the traders and border authorities. In the border posts located on the Guinean side, numerous controls prevent Guinean and Gabonese buyers from getting supplies at Kyé-Ossi. That was the cause of the strike! There was a protest march to win over the attention and appeal of the state; on what is happening in Kyé-Ossi and caused by challenges linked to doing business. We live here thanks to business. When the strike took place, the authorities changed the story and reported something else because they knew they were to blame for it. In spite of the efforts the matter was not settled. Instead, the Bamoun was blamed for the strike. They were accused of organising to protest the stolen victory of the CDU in municipal and parliamentary elections. What is it that is killing the Kyé-Ossi market and causing this strike? It is the fact that traders from Kyé-Ossi leave the city and travel long distances to go into the bush in Olamze, to the market of Mendikoum and to the market of Meyo Biboulou all in the district of Olamze. In addition, the excess transaction charges we pay increases our expenses and reduces our purchasing power.[46]

Again,

During the strike, uniform men of the Mobile Intervention Unit (GMI) of Ebolowa arrested and whipped the municipal councillors. They whipped them thinking that they were CDU protesters whereas they were CPDM councillors. In fact, they were two CPDM Bamoun advisers. So far, they are not happy.[47]

These facts undermine the guarantee of the interests that political activism in favor of the ruling party can procure, even if it should be recognized that the narratives of the informant may not be reflecting the true story of what happened.

At first and still within the context of living together in Kyé-Ossi, the cleavage between Ntoumou and Bamoun has left sad memories among the populations. Indeed:

There was a gendarme called Ibrahim. He was a warrant officer and had taken on a Bamoun mechanic after an accident. He thought he was a “moto taximan” and began beating him up. People intervened and moto taxi drivers barricaded the road at the level of the central mosque number 1. Mintsa Ndong Hyacinthe, a Ntoumou native came to remove the barricade and clashes ensued with Bamoun boys. Clearly there was a fight between the Ntoumou and the Bamoun boys. The Ntoumou decided that the Bamoun should no longer live here and that they should go back to their hometown [Foumban]. The Governor of the South Region, Bernard Wongolo came to Kyé-Ossi in the company of the general delegate for national security Edgar Alain Mebe Ngo. The latter gave money to the two communities so that they could sit down and make peace. The Bamoun

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

> decided to give the Ntoumou ¾ of this money and took just ¼. The Bamoun boys used the money to buy a new motorcycle for Ndam Mama to replace the one burnt by Ntoumou. All the money was received by the village chief.[48]

There is another version of this story thus:

> There was a fight here in Kyé-Ossi. When the major road of the city was tarred, many motorcycle taxis arrived, more than two hundred of them. This opened the door to many accidents. For example, more than 25 cases of accidents could be recorded per week, from Akonagui village to border areas. Entrance to these areas has been declared as dangerous, or accident prone. So the Ntoumou got angry. Ambam's State prosecutor joined us in support of the Ntoumou. The Bamoun went to the State prosecutor of the Ntem Valley Division and insulted him. So there was a fight between the Ntoumou and the Bamoun. The Bamoun were motorcycle taximen and after this fight the number of accidents reduced.[49]

"Living together" in Kyé-Ossi is often punctuated with spontaneous incidents of clashes between the indigenes and non-indigenes. In the political field however, non-indigenes seem to follow a partisan pattern systematically defined by the indigenous politicians.

3.2 The Kyé-Ossi Council as a Sociologically Conditioned Political Trophy

The political field is one of competition for power between social actors and once power is conquered, the right to speak and act on behalf of a party or of all is achieved.[50] But, everywhere in Africa, democratization seems to unleash a real obsession with local identities, expressed in terms of indigenes and the exclusion of "aliens."[51] In this vein, the town hall of Kyé-Ossi is an issue of political struggles. As a rule, the people of Kyé-Ossi believe that they are entitled to control the town hall. This belief has led some politicians to make remarks:

> The Bamoun are nothing in the council.[52]A Bamoun mayor is a bit difficult. If you see the Bamoun here, it is for business. They are always behind the natives. Even in the list of Kyé-Ossi municipal councillors, you will only find two Bamoun appearing there. If the CDU has to take the council, an indigenous person will always be at the top of the list. The Bamoun are behind them. Being mayor here is not easy now, maybe in the future. It is like at home in Foumbot, Foumban, there is no alien at the top of the list, unless the Bamoun decide otherwise. Here we cannot decide unless they decide.[53]

The council of Kyé-Ossi therefore stands as a major political trophy, but sociologically conditioned by at least autochthony (being an indigene). This state of affairs is at odds with democratic standards according to which political competition should be without discrimination as to one's place of origin. In the words of Mr. Bikoro Eneme Alain Didier, then CPDM mayor of Kyé-Ossi:

> This is our town hall. Those who have come have come for business and nothing else. In spite of the populations found here, the town belongs to the Ntoumou, who welcome everyone. Unfortunately, no one can leave his home to come and be mayor in Kyé-Ossi. Have you seen a Beti take control of a town hall out of

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

> his/her hometown? There are town halls everywhere; anyone who wants to be mayor can become one in his/her home constituency.[54]

Generally, such statements are not unknown to the CDU, the main opposition party in Kyé-Ossi, let alone its leader. For the president of the CDU of the Ntem Valley, "if the CDU wins an election, it prefers that an indigenous person be put forward. His problem is the party."[55] Thus, to make sense in this local political market, he felt that participation in the political game is effective when an indigene remains at the helm of any electoral framework, and in particular municipal elections in Kyé-Ossi. This practice is common among the people of Noun where the Bamoun come from in West Cameroon. This tradition seems to have been imported. Taking into account these local realities, the sociological composition of the CDU list in the 2013 municipal elections in Kyé-Ossi is indicative of the need to play realistic politics. Although the Bamoun constitute the majority in Kyé-Ossi, the native Ntoumou are the ones who mostly apply to control the council. Usually, the ratio is 17:8 as indicated in Table 1.

Table 1: The CDU list of candidates for the 2013 municipal elections in Kye-ossi (compiled by the author, 2019)

Indigenes	Aliens	Christians	Muslims
17	08	17	08
Total number of candidates: 25			

The political elite of the South Region are, in fact, not ready to accept any list of candidates for elections in which indigenes of the area are not overwhelmingly represented no matter the political party, as the table indicates. Many have seen this as political corruption and intimidation. According to Mr. Ndo, a phytosanitary agent at the police station, "during the electoral contests, one can wonder if it is really clean, better still transparent. That the ballot boxes should speak for themselves is what we cannot expect to see here."[56] This is a way to say that the ballot boxes speak to the extent that the political elite of the South want.[57] According to another informant:

> There is a problem that arises here in Kyé-Ossi, it is always the Bikoro Antoine family who take over the council. This Bikoro was mayor in Olamze and is mayor in Kyé-Ossi. When the decentralization was instaured, because he cannot accumulate functions, he left the post of mayor to his uncle in Kyé-Ossi. After all the latter is his nephew. Here I do not see any party that can win the election apart from the CDU. When there is an election there is an arrangement to determine the winner. The votes of the voters do not work, only fraud![58]

For the president of the CDU of Ntem Valley:

> The 2013 election campaign was funded. But if we organize a transparent election in Kyé-Ossi the CPDM cannot have 30%. After the municipal elections, the

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

CPDM was at 35% while the CDU was at 65%. If we did not succeed to complain to the Constitutional Council, it was because our hands were tied. The fault at one point was ours. The people who were sent to the municipal commission to represent us took money there. Our representative signed the minutes. They betrayed us. In 2018, the CDU will fight like a wounded lion. We will watch, the CDU has people who are ready to sacrifice themselves. We are not always going to leave things like this. If we are really in the Republic, whoever wins an election should be in power. People have to change their mentality.[59]

Figures provided by the president of the CDU of Ntem Valley, however, do not correspond to the official figures giving the CPDM the winner at the end of this electoral competition. This is a significant indicator of the CPDM/CDU partisan divide in Kyé-Ossi. The said figures are presented in Table 2.

Table 2: Summary of municipal election results of 2013 In Kyé-Ossi (compiled by the author, 2019)

Polling Stations	Registered Voters	Actual Voters	Abstentions	Empty ballots	Valid Votes cast	CPDM	CDU	CPDM	CDU	Decision
42	9882	6968	2914	150	6819	4252	2567	62.36	37.64	CPDM

On these electoral issues, local public opinion remains equally divided. Thus, for Mr. Evina Gaston, phytosanitary agent in Kyé-Ossi cited elsewhere:

If the higher political authorities did not hit the hand on the table, the Bamoun would have taken control of the council of Kyé-Ossi. We often tell them that you are at home we do not refuse, but for the management of the council, leave it to the indigenes. If we left the elections free, honestly the Bamoun would have taken the council. A Bamoun would have been mayor here. And this is one aspect of politics that compels them to retract, to accept what they are told in spite of themselves. These are very difficult situations during elections. However, there is a link between the council and the market, it is the market that makes the council work and vice versa, whereas, people complain about the mayor.[60]

The freedom in the electoral process referred to by this informant may initially refer to transparency in the conduct of elections. Secondly, this freedom is indirectly part of the right to compete politically in all places without discrimination based on regional or even parochial origin. The fact is that the council of Kyé-Ossi is a political trophy conditioned by ethnic belonging. According to the leader of the Bamoun community in Kyé-Ossi, Mr. Mbemoun Dayirou:

Of course, people said to the Bamoun: you have the trade, the cars, leave us the politics, but the CDU has no reason to complain about the 2013 election for the simple reason that since we have been organizing elections in Kyé-Ossi, that of 2013 was the most transparent. CDU representative Mahamat Tawat, a member of the council commission, sat with us on the commission and signed the minutes. There were 42 polling stations in Kyé-Ossi constituency, we did the count together.[61]

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Despite these remarks made by the leader of the Bamoun community of Kyé-Ossi and a member of ELECAM,[62] local public opinion considers that the significant demographic presence of the Bamoun in Kyé-Ossi is almost a relevant indicator of the strength of the CDU during electoral competition.

Three factors can help to explain this hypothesis: first, the two-sided militancy which consists of duplicating political identity; second, the strong mobilization of the militants of CDU; third, the non-indifference of the political elite of the CPDM to the dynamism of the CDU in Kyé-Ossi. These three factors are clarified in the following remarks:

> People are looking for their interests. You can see someone in CPDM outfit, but is that proof enough that they are genuine CPDM activists? They protect their interests. During the CDU rally of 2013 elections, we could see that thousands of people had gathered. Ndam Njoya (the party's chair) was in Kyé-Ossi, the mobilization was general. And when we see that how can we think that the people will not win elections and take control of the council? The Fame Ndongo were there! During the CPDM meeting, trucks were sent to the bush to bring people from other areas such as Abang Minko'o to come and animate the gallery. It is really a very delicate problem here.[63]

IV. Conclusion

This study showed that cross-border territories are veritable agents of sociopolitical mobilization. They are melting pots of individuals from various backgrounds (indigenes, and non-indigenes, foreigners and nationals). If man is a political animal in Aristotle's sense, from an interactionist perspective, it appears that in a context of political competition the issues turn out to be focused primarily from an identity perspective, especially in cross-border localities with a high sense of ethnic diversity. The indigenous people (urban, local political elites, populations) support the national ruling CPDM, not only because the party's chairman who is also the President of the Republic is of their ethnic background but also because the party is seen as the best able to preserve their political interests. They do so by making sure that this party wins in all elections (presidential, legislative and municipal), in spite of the political threats from the presence of Bamoun non-indigenes who are numerically dominant. The Bamoun non-indigenes are also poised to give support to the CPDM, in spite of the presence of the CDU whose leader is drawn from their ethnic background, because they too want to protect their business interests. Politics in Kyé-Ossi reveals therefore a strong tendency of partisan support driven by rational calculations on potential gains by political actors rather than feelings of ethnic attachment in the anthropological sense of the term.[64] Non-indigenous people will prefer to support a locally based party for the sake of survival in spite of the presence of other parties. For the case of the Bamoun, identity motivation is playing no significant role in determining their support for a party. Rather, constraints linked to socioeconomic survival and "living together" typically explains why they have not

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

been able to support as a bloc their own home-based CDU party. This implies that deeply held ethnic attachment to a party is seemingly not a political behavior observed among non-indigenous people in the border constituency of Kyé-Ossi. The study observes that voting behavior is not only determined by ethno-regional identification but also by the place where you live particularly among non-indigenes. Thus, patterns of geographical partisanship are sensitive to political dynamics in border territories in the sense that where a voter lives can significantly predict how he/she votes. This pattern was also discovered in Malawi following Malawi's first three elections under democracy of 1994, 1999 and 2004.[65]

Notes

1. Catherine Coquery-Vidrovitch, "Frontières Africaines et mondialisation," *Histoire@Politique* 2(17) (2012), p. 151, https://doi.org/10.3917/hp.017.0149.
2. Daniel Posner, "The Political Salience of Cultural Difference: Why Chewas and Tumbakas Are Allies in Zambia and Adversaries in Malawi," *American Political Science Review* 98(4) (2004), pp. 529–545, https://doi.org/10.1017/S0003055404041334.
3. John McCauley, "The Political Mobilization of Ethnic and Religious Identities in Africa," *The American Political Science Review* 108(4) (2014), pp. 801–816, https://doi.org/10.1017/S0003055414000410.
4. Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (Indiana University Press, 1999), p. 15; Daniel Posner, *Institutions and Ethnic Politics in Africa* (New York: Cambridge University Press, 2005), p. 3, https://doi.org/10.1017/CBO9780511808661.
5. Karen Ferree and Jeremy Horowitz, "Ties That Bind? the Rise and Decline of Ethno-Regional Partisanship in Malawi, 1994–2009," *Democratization* 17(3) (2010), pp. 534–563, https://doi.org/10.1080/13510341003700394.
6. *Ibid.*
7. Promouvoir Compétences, "Citie: by Kyé-Ossi (Vallee du Ntem-Sud)" March 24, 2019. https://promouvoircompetences.com/ville-286-kye-ossi-fr.html, accessed 12 September 2020.
8. *Ibid.*
9. Cameroon National Institute of Statistics, "Enquête sur les échanges transfrontaliers de marchandises au Cameroun: Bilan méthodologique et résultats," September 2014, p. 19.
10. *Ibid.*
11. Promouvoir Compétences, "Citie: Kyé-Ossi (Vallee du Ntem-Sud)," *op. cit.*
12. Idelette Dugast, *Inventaire ethnique du Sud-Cameroun, memoires de L'Institut Français D'Afrique Noire* (Centre du Cameroun). Série: Populations no. 1 (1949), pp. 76–79.
13. Noun here is the administrative Division of the Bamoun people and the headquarters is Foumban.
14. Interview with M.X. in Kyé-Ossi, November 2017.
15. Interview with M.Y., phytosanitary engineer from Gabon. Kyé-Ossi, November 2017.
16. Interview with in Kyé-Ossi with M.N., an agricultural engineer from Gabon, about 30 years, November 2017.
17. Interview with M. Jafarou, security guard at Elecam Kyé-Ossi, Bamoun, about 30 years, November 2017.
18. Interview with M.X., about 50 years, Kyé-Ossi, November 2017.
19. Interview with M. Youmo, CPDM sub-section vice-president of Kyé-Ossi, November 2017.
20. Mbemoun Dayirou Epara, "La communaute Bamoun de Kye-Ossi perd son chef Mbemoun Dayirou Epara," *Royaumbemoun*, September 19, 2012, http://www.royaumebamoun.com/fr/bnnews.php?nid=8850, accessed 5 February 2018.
21. Karine Bennafla, *Pour une géographie des bordures à l'heure globale: Frontières et espaces d'activités informelles* (Université of Paris Ouest-Nanterre la Défense, 2012), p. 64.
22. *Ibid.*, p. 64.

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

23. *Ibid.,* p. 64.

24. *Ibid.,* p. 64.

25. Karine Bennafla, “La fin des territoires nationaux? État et commerce frontalier en Afrique Centrale,” *Politique Africaine*, 73 (1999), p. 31, https://doi.org/10.3917/polaf.073.0025.

26. Interview with M.Y., Kyé-Ossi, November 2017.

27. The attempted coup d’état perpetrated on the night of December 27 to 28, 2017, against Equatorial Guinean President Obiang Nguema, could have been used to justify the closure of borders.

28. Interview with M.X., Kyé-Ossi, November 2017.

29. Interview with M. N, phytosanitary controller, November 2017.

30. This is a form of thievery found to be common in business-charged border towns and cities by which (un)armed robbers and other thieves identify, track, follow, aggress and seize the money or booty of people who have come to purchase goods at the border.

31. Equatorial Guinea is an oil producing country. It produces 244,000,000 barrels per day of oil, as of 2016 ranking 34th in the world. Every year, it produces an amount equivalent to 8.1% of its total proven reserve.

32. Interview, Kyé-Ossi, November 2017.

33. Interview, Kyé-Ossi, November 2017.

34. Karie Bennafla, “Les Frontières Africaines: Nouvelles significations, nouveaux enjeux,” *Bulletin de l’Association de Géographes Français*, 79(2) (2002), p. 140. See also Karine Bennafla, “La fin des territoires nationaux? État et commerce frontalier en Afrique Centrale,” *Politique Africaine* 73 (1999), pp. 25–49, https://doi.org/10.3917/polaf.073.0025.

35. Jean Didier Boukongou, “Préface,” “Ethnicité, identité et citoyenneté en Afrique Centrale,” *Cahier Africain des droits de l’homme*, no. 6–7 (2002), p. 14.

36. Antoine Socpa, *Démocratisation et autochtonie au Cameroun. Trajectoires régionales divergentes* (Munster: LIT VERLAG, 2003), pp. 1–135.

37. Cameroon Democratic Union.

38. Interview with M.N., phytosanitary controller, in his thirties, Kyé-Ossi, Gabon front, November 2017.

39. Of late memory since 2020.

40. Interview, Kyé-Ossi, November 2017.

41. Joseph-Marie Zambo Belinga, *Les élections au Cameroun, contribution à l’explication du vote dans les localités dites “acquises” au Rassemblement Démocratique du Peuple Camerounais* (*RDPC*) *et au Social Democratic Front* (*SDF*) (University of Yaoundé I, 2005), pp. 1–623.

42. Pierre Alexandre and Jacques Binet, *Le groupe dit pahouin* (*fang-boulu-beti*) (Paris: L’Harmattan, 2005), pp. 1–152.

43. Interview with M.X., Kyé-Ossi, November 2017.

44. Interview with the president of the CDU of Ntem Valley, Kyé-Ossi, *op. cit.*

45. Interview with M. N, *op. cit.*

46. Interview in Kyé-Ossi, November 2017 with Mr. X, trader, Bamoun, in his forties.

47. Interview with the president of the UDC of the Valée Du Ntem, Kyé-Ossi, November 2017.

48. Interview with the head of the Bamoun community in Kyé- Ossi, November 2017.

49. Interview with Mr. X., in his fifties, Kyé-Ossi, November 2017.

50. See Pierre Bourdieu, “La representation politique: Elément pour une theorie du champ politique,” *Actes de la recherche en sciences sociales*, 36(37) (1981), p. 13, https://doi.org/10.3406/arss.1981.2105; *Propos sur le champ politique* (Lyon: Presses Universitaires de Lyon, 2000), p. 16.

51. See Antoine Socpa, *Démocratisation et autochtonie au Cameroun. Trajectoires régionales divergentes* (Munster: LIT VERLAG, 2003), pp. 1–315.

52. Interview with Mr. X, trader, Bamoun, quarantine, Kyé-Ossi, November 2017.

53. Interview with Mr. Jafarou, guard at ELECAM Kyé-Ossi, November 2017, Bamoun, in his thirties.

54. Interview, Kyé-Ossi, November 2017.

55. Interview, Kyé-Ossi, November 2017.

56. Interview, Kyé-Ossi, November 2017.

57. Hélène-Laure Menthong, “Vote et communautarisme au Cameroun: Un vote de cœur, de sang et de raison,” *Politique Africaine* 69 (1998), pp. 40–52.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

58. Interview in Kyé-Ossi, November 2017 with Mr. X, trader, Bamoun, in his forties.

59. Interview, Kyé-Ossi, November 2017 with the president of the CDU of Ntem Valley.

60. Interview, Kyé-Ossi, November 2017.

61. Interview, Kyé-Ossi, November 2017.

62. Elections Cameroon.

63. Interview with Mr. Evina Gaston, officer at the Kyé-Ossi phytosanitary police station, in his fifties, November 2017.

64. See Fred Jérémie Medou Ngoa, "Transformations socio-politiques et citoyenneté au Cameroun: La relation à l'autre ethno-regional, à l'Etat et au pouvoir," *Échanges: Revue de philosophie, litterature et sciences humaines* (Ethnicité et citoyenneté en Afrique), 012 (2019), pp. 171–175.

65. See Ferree and Horowitz, *op. cit.*

Biographical Statement

Fred Jérémie Medou Ngoa is an associate professor in the Department of Political Science of the Faculty of Laws and Political Science of the University of Douala in Cameroon. He is author of several publications and a member of many scientific associations.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Book Reviews

JTMS publishes short summaries of all books received and complete reviews of selected books. Parties interested in reviewing books not listed here should contact the book review editor. Authors and/or publishers interested in having a summary or review of a maritime and territorial studies related book appear in our journal should send a complimentary copy to the book review editor. All reviews should be sent to the book review editor, Alexander M. Hynd (jtmsbookreviews@gmail.com) and cc'd to the managing editor, Dr. Lonnie Edge (jtms@yonsei.ac.kr).

Books currently available for review are:

Bukh, Alexander (2020). *These Islands Are Ours: The Social Construction of Territorial Disputes in Northeast Asia*. Stanford University Press.

Heritage, Anisa, and Lee, Pak K. (2020). *Order, Contestation and Ontological Security-Seeking in the South China Sea: Governance, Security and Development*. Palgrave Macmillan.

Laursen, Finn (2020) *The Development of the EU as a Sea-Policy Actor*. Edward Elgar Publishing.

Otto, Lisa (Ed.) (2020). *Global Challenges in Maritime Security: An Introduction.* Springer.

Natoli, Tommaso, and Riccardi, Alice (Eds.) (2019). *Borders, Legal Spaces and Territories in Contemporary International Law*. Springer.

China's Troubled Waters: Maritime Disputes in Theoretical Perspective

Chan, Steve (2016). Cambridge: Cambridge University Press; ISBN 978-1-1075-7329-1, hardcover, $110; softcover, $34.99. ISBN 978-1-1071-3056-2, ebook, $28.00.

China's unsettled maritime conflicts in the ocean space of the East China Sea, South China Sea and Taiwan Strait have remained contentious crises that have been refusing to die down. These disputes occasionally cause confrontations that threaten to destabilize relations among China and other states. Hence, maritime disputes have an outsized significance for China. Besides which, the persistence of such disputes frequently ignites popular emotions and nationalism. Such confrontations are also brewing with the potential of involving the USA in a military skirmish with China (6). Therefore, it has become a practical concern to understand China's foreign policy efforts to mitigate such maritime disputes.

This book examines China's conduct in its contentious maritime disputes. Author of the book, Steve Chan, is a professor of political science at the University of Colorado. In the

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 107–112 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.107 © 2021 Yonsei University

동북아역사재단 NORTHEAST ASIAN HISTORY FOUNDATION

book, what motivates the author is to appraise China's foreign policy intentions regarding China's management of unsettled maritime conflicts; the prospects of U.S. intervention in the Taiwan Strait; and the risk of China's resort to armed forces to settle maritime conflicts. Such puzzles motivate the author to establish the conditions that affect the persistence, escalation and settlement of China's unsettled maritime disputes. To do this, the author endeavors to delve into more detail by using historical parallels, cross national patterns of behavior in tandem with recent theoretical and empirical insights from international relations research (3). All these insights and thoughts are contained within the seven chapters of *China's Troubled Waters: Maritime Disputes in Theoretical Perspective*.

Much of the existing literature on China's maritime disputes utilizes the idiographic approach which mainly concentrates on a narrower subject of study. As a result, broader comparative analysis of similar situations and past maritime disputes of other regions has remained pending. There is a paucity of research that would take advantage of existing literature and emphasize comparative and cross-national patterns of events. From that perspective, the book plugs a gap in the literature and offers an opportunity to learn from historical parallels offered by other countries' experiences. This book defies the traditional idiographic approach, which readers of international relations and security studies will deem a remarkable feat. Chan's analytic investigation is skewed from the existing literature on China's policy to various maritime disputes. He refrains from making any sweeping generalization that tends to be too pessimistic and even alarmist regarding China's foreign policy toward maritime disputes.

Chan does not dwell upon any descriptive narrative; rather, the author adopts a nomothetic approach. This approach to the analysis enables the book to emphasize empirical generalization of policy inferences and theoretical issues more than just China's maritime dispute matters. The nomothetic approach of the book enumerates insightful considerations about two issues. First, how haw China addressed other cases of contested territorial issues in the preceding decades? Secondly, how can China's behavior regarding territorial disputes be compared with that of other major powers?

The empirical proposition of the book under review reiterates that a stronger and more confident China is likely to be less inclined to use force. Chan believes that distrust among China and other states about maritime disputes stems from their respective bargaining relationships. Therefore, interactions relating to China's maritime conflicts can be viewed as an example of "two-level" games (14).

China's Troubled Waters is structured into seven chapters. In the introductory chapter, Chan offers three considerations behind such a rationale. In the first chapter of the book, elaborate discussions about these considerations helps the reader to comprehend a well-structured mapping of the author's main arguments and logics. First, contrary to offensive realism, China is deemed to conform to defensive and reactive policy. The author views China as patient and inclined to maintain the status quo regarding maritime disputes (p. 27). Secondly, the author observes that, historically, China is less disposed to use military force when it feels itself secured and militarily powerful. Chan's observations about China's resort to force contradicts power-transition theory. Thirdly, there have been increasing economic exchange and social interactions across the disputed maritime realms of the Taiwan Strait, East China Sea and South China Sea. Against this backdrop, China's interest perceptions are evolving; and, due to this, it comes as no surprise that China's foreign policy tends to restrain the danger of military escalation.

Offering a persistent empirical pattern of the author's nomothetic approach to arguments about China's foreign policy on maritime conflicts, Chapter Two provides a comparative discussion of quantitative analysis of international relations research regarding theories of democratic peace, economic interdependence, militarized interstate disputes, polarity and polarization. Chapter Three focuses on the impasse prevailing across the Taiwan Strait where the disputing parties have shared interests. This chapter reveals how disputing states try to reassure each other through sincerity and reliability. The discussion of Chapter Four brings

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

the dynamics of alliance politics. This chapter throws immense focus on Sino-American confrontation over the blue water of the Taiwan Strait in the context of extended deterrence and pivotal deterrence. Chan takes on the logic of states' deterrence efforts to demonstrate how a country reacts to its counterpart's conduct by signaling that their respective rights are genuine and will be practiced if other states disregard such claimed sovereign rights.

The reader will find Chapter Five a fitting sequel to the preceding chapters. In this chapter, the author weaves together a discussion of the evolving distribution of interests, views and influences on the Taiwan side of cross–Strait relations. The chapter provides insight on how China's foreign policy is designed to influence political and economic groups in target states (e.g., Taiwan) with the aim that these political as well as economic groups would in turn influence their state mechanisms to adopt more accommodative policies toward China (101). Through implementing such "second face" policy, China weaves strategies to alter the target country's national politics, policy institutions and eventually the identities of a target country's inhabitants. Chapter Six is devoted to a discussion of China's efforts to forestall any multilateral efforts and coalitions formed by Southeast Asian countries against China's contesting claims of sovereignty. The chapter introduces the historical context of China's maritime disputes in the East China Sea and South China Sea. The concluding chapter of the book summarizes extensively the arguments of previous chapters outlining the historical patterns of China's foreign conduct.

China's Troubled Waters is one among the very few books of its kind that endeavors to shed light on issues including but not limited to: situations affecting maritime dispute settlement mechanisms; escalation of conflicts; and the nexus between national politics and international affairs. The book contributes to the existing understanding of China's maritime disputes through the empirical prism of international relations theories, quantitative analysis of international relations, cross-national patterns of behavior and historical traits. It can also be a jumping off point for readers who want to develop a basic understanding about China's foreign policy challenges toward maritime disputes in the South China Sea and East China Sea. No doubt, under the rubric of Chinese foreign policy on maritime conflict management, Chan's work presented here would prove useful to scholars and students of strategic studies and conflict management.

—Dr Mohammad Rubaiyat Rahman, assistant professor of law, BSMR Science and Technology University, Gopalganj, Bangladesh; Member, Center for International Maritime Security (CIMSEC)

The Outlaw Ocean: Journeys Across the Last Untamed Frontier

Urbina, Ian (2019). New York: Alfred A. Knopf; 560 pages; ISBN 978-0-4514-9294-4, hardcover, $30; ISBN 978-0-4514-9295-1, ebook.

This collection of 15 essays (and optimistic appendix) provide first-hand accounts and interviews (xiii, methodology) with persons who have found themselves within, or combatting, the maritime underworld of forced labor, illegal fishing, marine pollution, abandonment and a catalogue of disregard for basic human rights. Written in engaging and direct prose, this book provides a glimpse of life aboard said vessels and helps illuminate the land-based structures that, for profit, perpetuate this human suffering. The Outlaw Ocean has understandably been well received. This review approaches the text from an international lawyer's perspective.

At the outset, for teachers developing a law of the sea course, this—and not an academic text or the United Nations Convention for the Law of the Sea (UNCLOS)—should be students' summer reading. Urbina's 40-month investigative report highlights complex transnational challenges for which law and politics are (currently) ill-equipped to address—an inspiration for students far greater than any purely legal discussion. Indeed, in this author's experience, it was the infamous whale wars (chapter 15) that first inspired a career in this field.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

This review divides the book into four cross-cutting themes, before discussing continued Outlaw Ocean collaborations. Each chapter contains further details which challenge maritime scholars to offer realistic solutions.

I. Forgotten Fishers

Chapter 2 addresses fisheries from an environmental and practical perspective, namely how a small island state like Palau, with vast maritime zones and few enforcement resources, can adequately monitor and enforce its fisheries law. Significant attention is placed on technology's role in both fisheries MCS and capture, as well as the evolution of Palau's measures in light of the pressures of illegal fishing and a changing environment.

The human element of fisheries is at the forefront of Chapter 4 involving the tale of South Korean flagged and operated vessels illegally fishing in New Zealand, the Bering Sea, and disputed waters near the Falkland Islands. Notwithstanding their environmental impact, the focus is upon the horrendous use of forced labor, violence and sexual assaults under the authority of poorly qualified officers, with deadly results. Urbina visits Indonesia to investigate the tactics of debt bondage and nondisclosure agreements, as well as the long-term impacts for families losing their breadwinners. Adequate legislation is rare, effective enforcement even less so. New Zealand's crackdown is effective, but without wider multilateralism, may leak abusive practices to other jurisdictions.

Throughout this book many of the worst atrocities occur in Southeast Asia. Chapter 8 investigates the role of manning agencies, including in the death of Eril Andrade, a Filipino "employed" on a Taiwanese vessel. Singapore-based "Step Up Maritime" takes center stage. Detailed facts and first-hand accounts are followed by reviewing measures taken by the Philippines, Taiwan and Singapore. All failed to adequate investigate, let alone prosecute (190–201).

Chapter 10 reiterates the scale of abuse, focusing on slavery and lethal violence in the South China Sea and Thai fisheries, including the overlapping trafficking and bondage of women and children. Urbina argues that Thailand's reforms have been comparatively better than other (inactive) regional actors, but implementation remains challenging. Post-publication, South China Sea tensions have increased with a continuous flurry of diplomatic protests. Continued lack of governance and non-cooperation will perpetuate inhumane abuses.

Finally, Chapter 14 began as "good news" coverage, namely increased maritime governance in Somali around the semiautonomous Puntland region. Internal political disputes effectively undermined that report, pushing Urbina and his team to investigate the Somali 7, a Thai-owned fishing fleet with Puntland fishing licenses. Following Thailand's fisheries reform, the owners, already facing forced labor and trafficking allegations, dropped Thailand's flag and moved operations to the Djibouti flag and Somali waters. Detailed abuses once again highlight the transnational nature of the problem. Operators exploit gaps and weaknesses in governance wherever found, while proactive governmental efforts are stonewalled by other uncooperative governments.

II. Mistreated Merchants

Merchants can be victims and perpetrators of crimes at-sea (chapter 6). As the Dona Liberta incident demonstrates (130–136, 145–146), the crew may "raft" stowaways, essentially setting persons adrift at-sea to fend for themselves. Curiously, both positive obligations for port states to investigate assaults (137) and restrictive denials on disembarkation (131) frustrate the resolution of stowaways. In other cases, naval crew are complicit in high seas detention and interrogation of terrorist suspects (138–141), or seafarers left stranded, or abandoned

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

(146–149). Legal progress has been made, but Urbina's damning conclusion is that "the law protects a ship's cargo better than its crew" (149).

Chapter 13 on violence at sea covers both fishing and merchant vessels. Urbina's "snapshot" database reportedly includes 6,000 crimes (324). We can assume there are many more unreported cases. One takeaway is that most stakeholders' interests—other than the victim—is not to track, nor really investigate, violence at sea. The resulting increase in private security and floating armories are accidents waiting to happen (327–335), with incidents possibly escalating into diplomatic disputes. Despite tireless investigating, the likely ringleader in the central narrative of murder at sea remains uncharged (344).

III. Blurred Boundaries

Undefined or undelimited boundaries are detrimental to most users. A few actors exploit uncertainties to their advantage. Chapter 3 is a detailed historical account and visit of the infamous Principality/Duchy of "Sealand" (HM Fort Roughs), a platform 8 miles off the UK coast. Sealand's failed claims to statehood are most interesting, including successful evasion of British law by (then) being located outside the UK's territorial sea, and unsuccessful evasion of German law because neither Sealand's granting of nationality, nor diplomatic immunity, were recognized.

The impact of unclear boundaries is no more apparent than in Chapter 12, where Urbina joins an Indonesian fisheries patrol. A routine patrol quickly dissolves into a major maritime standoff between Indonesia and Vietnam following the arrest of several Vietnamese vessels in Indonesian/Vietnamese waters. Similar incidents are foreseeable as states continue to dispute resource control, including near Natuna.

IV. Non-State Necessities

In spite of these nefarious actors, one shining light throughout is the non-state actors balancing the scales toward environmental and social protection and away from maximizing profits. This includes Sea Shepherd Conservation society's attempts to unilaterally (Chapter 15), or cooperatively (Chapter 1), enforce its interpretation of the laws governing marine resources. Chapter 1 details Sea Shepherd's instrumental role in a 110-day pursuit of F/V Thunder, an illegal fishing vessel (7), including Sea Shepherd's evidence collection and eventual rescue of Thunder's crew as she sunk (41). Such public-private partnerships are increasingly witnessed, including, once again, Sea Shepherd in the 2018 pursuit of F/V STS-50. Chapter 15 reports on Sea Shepherd's older, less-cooperative, direct action campaign against ICR's "scientific" Southern Ocean whaling. Interesting side departures include the work of remote whale researchers (392) and Greenpeace's efforts to assist in establishing a Weddell Sea MPA (394–397; designation remains on-going).

Chapter 9 further details Greenpeace's contributions to realizing the law of the sea's ideals. Industry had an obligation to conduct an environmental impact assessment prior to drilling in the Brazilian continental shelf, but little mention was made of a locally known Amazon reef. Research by Greenpeace and its partners resulted in revocation of the applicable drilling license (225). Other Greenpeace campaigns (212–217) have, for example, resulted in recognition of the right to peaceful protest within the law of the sea.

Chapter 11 is a collection of reports addressing marine pollution, with individuals offering both the cause and solution. This includes the courageous role of a whistle-blower identifying intentional discharges from a cruise vessel (271–274, 286–289), the question of dumping or transforming retiring offshore platforms (277–282) and a private actor conducting unsanctioned ocean fertilization research on the high seas (283–285).

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Non-state maritime actors as a force for social change is not limited to environmental protection. Chapter 5 discusses the history and practices of Women on Waves—an NGO providing abortions just beyond the territorial sea of states which criminalize abortion. Women on Waves has catalyzed public debate and legalization (Portugal, 126). The UNCLOS divisions of jurisdiction runs throughout, including selection of a flag state where abortions are legal, the inapplicability of coastal state jurisdiction, and the potential port state jurisdiction response of socially conservative states.

Finally, non-state actors are employed for personal redress, with debtors employing individuals to "remove" a vessel from port and transfer it to a jurisdiction more favorable to their claim (Chapter 7). The numerous perspectives, including the facts and characters therein, make for great storytelling, but the long-term destabilizing effect of corruption and phantom fleets (171–174) leaves the reader with little sympathy for this business to continue as usual.

V. Continuous Collaboration

To conclude, this collection is essential reading—and soon Netflix viewing—for anyone interested in the maritime sphere. For international lawyers, this volume may be shared with family members to entertain (and shape consumer habits), without fear of their understandably lackluster response to comparably drier, detailed and inaccessible legal scholarship.

Finally, interested readers should follow the Outlaw Ocean Project, where journalistic and artistic collaborations are ongoing. An undoubted highlight includes the powerful reporting on Chinese vessels illegally fishing within North Korea's maritime zones, in breach of UN Security Council Chapter VII measures. Equally, the innovative Outlaw Ocean Music Project currently involves over 250 global artists reflecting on the Outlaw Ocean through electronic, ambient, classical and hip-hop music, incorporating field recordings, video samples and recorded passages into their tracks.

—Dr. Arron N. Honniball, Centre for International Law (CIL), National University of Singapore

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Call for Papers

JTMS Summer/Fall 2021 Issue

The Journal Territorial and Maritime Studies (*JTMS*) is soliciting submissions for its Summer/Fall 2021 issue. *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 Summer/Fall 2021 issue, Manuscripts should be submitted electronically to jtms@yonsei.ac.kr by February 1, 2021. 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 *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 bring a fresh perspective on how to deal with territorial and maritime issues and the complexities these issues present.

Journal of Territorial and Maritime Studies / Volume 8, Number 1 / Winter/Spring 2021 / pp. 113–117 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.8.1.113 © 2021 Yonsei University

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

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.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

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,

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

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

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

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.

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION