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Managing Editor's Comments

Dear *JTMS* Readers,

Over a year into the COVID19 pandemic, we all are still waiting for a happy ending that seems so close yet so far away for some. COVID fatigue seems to be creeping into the hearts of many who are tired of social distancing, masks, and limitations to movement. This focus on our individual situations has seemingly resulted in a lack of attention to international issues that previously would have received a great deal of attention and/or outrage from international society. Around the world we see a deepening of state coercion, territorial grabs, oppression of minorities, and even alleged genocide. I would argue that the pandemic and the resulting domestic political tunnel vision has made the international system more realist in nature. Competing groups with competing claims to territory that wish to exert their rights in that territory are at the heart of these issues. In such times, quality scholarship that peels away the layers of the international system's onion to get to the core of issues is at a premium. This is why the editorial board and staff at *JTMS* are pleased to present the Summer/Fall 2021 issue of *JTMS* to provide some insights which we are sure our readers will enjoy. On that note I am pleased to offer the following articles.

First, Alex P. Dela Cruz examines some implications of the Chinese Coast Guard law for the Philippines and other claimants in the South China Sea, using description and narrative as techniques to critically engage with the law and draw out its limitations as a source of remedy for rival claimants in the South China Sea. He argues that the Coast Guard Law makes it difficult for rival claimants in the South China Sea to overcome China's military activities reservation in respect of future LOSC dispute-settlement proceedings.

Second, Clive Schofield examines options to overcome and manage overlapping claims to maritime space. His article outlines global progress in the delimitation of maritime spaces between coastal states, including clarifications in the approaches to international maritime delimitation and options to overcome disputes, before exploring pertinent international jurisprudence providing insights into the meaning of the obligations of coastal states where overlapping maritime claims persist. Schofield concludes that while approaches to maritime delimitation have become clearer over time, broad areas of overlapping maritime claims persist, as only a little over half of potential maritime boundaries have an agreement in force. Negotiated solutions for the delimitation of equidistance-based maritime boundaries have proved to be the most popular means of overcoming overlapping maritime claims. In the absence of such resolution, coastal states are subject to obligations under the international law of the sea which constrain what activities they can undertake in areas subject to overlapping maritime claims.

Third, Christine Elizabeth Macaraig and Adam James Fenton discuss how the South China Sea dispute illustrates the confluence of competing interests on an international scale.

The first half of the article examines the role of natural resources in driving the dispute. The second half of the article presents a legal analysis of the dispute, using the United Nations Convention on the Law of the Sea as a benchmark against which to examine China's academic maneuvering. They find that, while natural resources are an important driver, equally important are the military, geo-strategic aspects of the near-total military dominance of China in the South China Sea, despite reports that the country would refrain from activities that would aggravate the dispute.

Fourth, Nuno Morgado's offering examines how, since 1974, Portugal was put through a double process of (a) diminishing its relative potential and (b) changing its geopolitical design from the sea to the land. This radical transformation in the direction of a small power to being land-oriented was, however, unable to modify the geography of Portugal and the identity of the Portuguese (sea-oriented). This paper aims to investigate the research puzzle of the non-interaction between the Portuguese geographical and identity aspects as independent variables and the EU membership as a dependent variable. Morgado argues that Portuguese geopolitical agent can be identified as the key variable to explain the Portuguese commitment to the EU set of land-oriented policies, the consequent decay of Portuguese fishing activities, and the status of its navy today, as fundamental sectors related to the sea affairs.

Fifth, Nitin Agarwala explores how the mid-eighties economic reform program of Vietnam, the "Doi Moi" (renovation), helped it to transition from having a centrally planned economy to being the fastest-growing economy in Asia and removing poverty from the country. Using desk-based qualitative research, Agarwala analyzes Vietnam's maritime sector as an "engine of economic growth" and examines the areas developed. He shows how with a coastline of more than 3,260 km, it was natural for them to exploit the "maritime sector" for socio-economic development. As a result, the economic contribution from the sea and coastal areas rose to nearly half of the total GDP in 2010–15. In order to emulate this economic growth from the maritime sector elsewhere, Agarwala contends that Vietnam needs to be studied to draw out lessons for other maritime nations.

Sixth, Kyu-hyun Jo examines whether Japan can utilize the San Francisco Peace Treaty as "historical evidence" to prove Japan's claims on Dokdo and the Diaoyu Islands. He utilizes journal articles and monographs and conducts a textual analysis of the SFPT to examine whether there is reliable evidence in the treaty supporting Japan's claim of territorial sovereignty over Dokdo/Takeshima and the Diaoyu/Senkaku Islands. He finds that the SFPT's fundamental purpose was to formulate a Cold War alliance between the U.S. and Japan and enable Japan's transformation from an aggressor to a pro–U. S. and anti-communist ally. Given the importance of realizing this objective and the urgency behind it, territorial issues were auxiliary and peripheral. Therefore, Japan's intention to use the SFPT as historical evidence to prove territorial sovereignty is unjustified and irrelevant because it misunderstands the treaty's historical and real purpose.

I would like to thank our editorial board and staff for their dedication over this past year in spite of the challenges of the pandemic. I would also like to thank our authors and readers for their continued support. I hope we all can return to some sense of normalcy in our lives soon and wish you all continued health.

Lonnie Edge
Managing Editor

Marching Towards Exception: The Chinese Coast Guard Law and the Military Activities Exception Clause of the *Law of the Sea Convention*

Alex P. Dela Cruz

Structured Abstract

Article Type: Research Paper

Purpose—Recent Chinese legislation reconfigures the institutional framework of the China Coast Guard (CCG) to give it an unequivocally military character. This paper examine some implications of this law for the Philippines and other claimants in the South China Sea.

Design, Methodology, Approach—This article uses description and narrative as techniques to critically engage with the law and draw out its limitations as a source of remedy for rival claimants in the South China Sea.

Findings—This analysis suggests that China's militarization of the CCG seeks to prevent future adverse interpretations of its military activities exception under Article 298(1)(b) of the Law of the Sea Convention (LOSC). In 2016, the *South China Sea* Tribunal applied Article 298(1)(b) in refusing to consider the legality of China's activities on Second Thomas Shoal.

Practical Implications—This contribution argues that the Coast Guard Law makes it difficult for rival claimants in the South China Sea to overcome China's military activities exception in respect of future LOSC dispute-settlement proceedings.

Originality, Value—This contribution offers a timely analysis of the Coast Guard Law and the ways in which the military activities exception clause facilitates unilateralism and aggression in disputed waters.

Keywords: Coast Guard Law, military activities exception, South China Sea

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I. Introduction

In May 2013, Rear Admiral Zhang Zhaozong of the Chinese Navy stated in a television interview that China was using a "cabbage strategy" at Second Thomas Shoal to take over South China Sea features that had been under the jurisdiction of the Philippines: Mischief Reef and Second Thomas Shoal.[1] The cabbage strategy involves China's surrounding a maritime feature with fishing administration vessels, marine surveillance ships, and navy warships "until the feature is wrapped layer by layer like a cabbage."[2]

Nearly eight years later, on February 1, 2021, the Coast Guard Law of the People's Republic of China (Coast Guard Law) came into force.[3] The Coast Guard Law purports "to regulate and ensure the performance of maritime police agencies, safeguard national sovereignty, security and maritime rights and interests, and protect the legitimate rights and interests of citizens, legal persons and other organizations."[4] Three salient features of this law are found in Articles 22, 82, and 83. Article 22 authorizes the China Coast Guard (CCG) and other maritime police agencies to take "all measures necessary," including using weapons, to stop foreign organizations and individuals from illegally infringing China's national sovereignty, sovereign rights, and jurisdiction at sea.[5] Article 82 directs the CCG to formulate rules and regulations on "maritime rights protection and law enforcement matters" in accordance with laws, administrative regulations, and "decisions of the State Council and the Central Military Commission." Then, Article 83 mandates the CCG and other Chinese maritime police agencies to perform "defense operations" in accordance with "military regulations and orders of the Central Military Commission."[6] The Central Military Commission is China's "leading military organ and commander of its armed forces."[7] These provisions are significant in that they clearly signal a departure from Beijing's previous representations that Chinese activities in the South China Sea were civilian in purpose.[8]

The Coast Guard Law reinforces China's exclusion of military activities from the purview of dispute settlement under the law of the sea. In 2006, China declared under Article 298 of the Law of the Sea Convention (LOSC; the Convention)[9] that it does not accept the jurisdiction of any of the Convention's dispute-settlement mechanisms over "all the categories of disputes referred to in paragraph 1(a), (b) and (c) of Article 298 of the Convention." Article 298(1)(b) in particular refers to a class of disputes that involve military or law enforcement activities and is thus more commonly known as the military activities exception clause. Military, law enforcement, and other activities and disputes referred in Article 298 are optional exceptions to the jurisdiction of LOSC dispute-settlement mechanisms such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), or arbitration tribunals convened under Annex VII of the LOSC. This means that states may, upon ratifying the Convention or at any time thereafter, choose which disputes to exclude from their consent to accept the jurisdiction of dispute-settlement bodies.

This article describes some of the implications of the Coast Guard Law for the interests of the Philippines and other rival claimants in the South China Sea. It argues that China's Coast Guard Law reinforces legal hurdles to the jurisdiction of compulsory dispute-settlement bodies under the LOSC. Combined with China's 2006 declaration under Article 298 of the LOSC, the Coast Guard Law in effect places current and future Chinese

activities in the South China Sea outside the jurisdiction of LOSC dispute-settlement bodies. The move to militarize the CCG has significant ramifications (a) for rival claimants, like the Philippines, who have less robust military capability to assert sovereignty, sovereign rights, and jurisdiction over contested waters and (b) in terms of the ability to seek remedies against potential Chinese violations of the LOSC.

The second and third sections give a brief historical background of the military activities exception to the jurisdiction of dispute-settlement bodies under Article 298(1)(b) of the Convention. The account offered in these sections attends to China's activities in the South China Sea, particularly on Mischief Reef, from the late 1990s. The fourth section outlines some provisions of the Coast Guard Law and describes their potential impact on the rival claims of other states over the South China Sea. It then situates the Coast Guard Law in light of the interpretations of the military activities exception clause from the ITLOS in the *Three Ukrainian Naval Vessels* case of 2019 and the *Coast State Rights* Arbitral Tribunal in its preliminary objections award of 2020. The fifth section revisits the 2016 *South China Sea* (Philippines v China) Arbitral Tribunal's interpretation of the military activities exception clause with respect to China's activities on Mischief Reef and Second Thomas Shoal. The sixth and final section revisits the 'cabbage strategy' mentioned at the start of this article and concludes by suggesting that China's militarization of the CCG and its operations seeks to prevent future adverse interpretations of its optional military activities exception under Article 298(1)(b) of the Convention. It then gestures towards the limitations of the Convention as a source of legal protection and remedies for coastal states with considerably smaller naval fleets.

II. Sovereign Immunity and Military Exceptions in the Law of the Sea

The claim that the state should not be made to account for acts of a military nature is said to follow from the traditional doctrine of sovereign immunity of states under international law. In 1961, Colombos articulated one way in which this doctrine has been understood in terms of warships:

> [A] warship remains under the exclusive jurisdiction of her flag–State during her entry and stay in foreign ports. No legal proceedings can be taken against her … for any … cause, and no official of the territorial State is permitted to board the vessel against the wishes of her commander.[10]

Examples of how treaty law embodied the above principle are found in Articles 32, 95, 96, and 236 of the LOSC. Article 236 in particular is titled "Sovereign immunity." It states that the Convention's provisions on the protection and preservation of the marine environment do not apply to warships, naval auxiliaries, and other state-owned or operated vessels used in "government non-commercial service." This immunity is subject only to the rather broad limitation that such vessels "act in a manner consistent, so far as is reasonable and practicable," with other parts of the Convention. It is important to note that Article 236 does not cover military activities that do not involve warships or other vessels in

government non-commercial service, whose immunities are preserved under Articles 32, 95, and 96.

The LOSC follows a number of earlier treaties that contain some form of immunity in favor of military vessels. To illustrate, the 1910 Brussels Convention on Collisions at Sea "does not apply to ships of war or to Government ships appropriated to a public service."[11] The 1926 Brussels Convention on the Immunity of State-owned Vessels recognizes that state-owned sea-going vessels and cargo are subject to the same rules of liability that govern private vessels and cargo,[12] but this liability does not extend

> to ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries and other vessels owned or operated by a State and employed exclusively … on Government and non-commercial service, and such ships shall not be subject to seizure, arrest, or detention by any legal process, nor to any proceedings *in rem*.[13]

The 1973 International Convention for the Prevention of Pollution from Ships (MARPOL 73/38) and the 1974 Helsinki Convention on the Protection of the Baltic Sea Marine Environment both use language that is identical to what would later become Article 236 of the LOSC in 1982, i.e., that those conventions do not apply "to any warship, naval auxiliary or other vessel owned or operated by a State and used … only on government non-commercial service."[14] The counterpart provisions of LOSC Article 236 in those conventions also impose the limitation that such ships "act in a manner consistent, so far as is reasonable and practicable" with those latter conventions' other provisions.[15]

Yet one of the important considerations for the drafters of the Convention was for a great number of states to ratify the rights and obligations that it established as one package, including the provisions on compulsory dispute-settlement mechanisms. The United States remains a prominent holdout from this single-package concept, claiming that it infringes upon its sovereign immunity and freedoms in the deep seabed and the high seas.[16] But even taking the Convention as a single package, some of its drafters felt that certain matters were simply too sensitive to be subject to compulsory dispute settlement under the LOSC.[17] They agreed that states should retain the discretion to exclude certain types of disputes from the jurisdiction of LOSC dispute-settlement bodies. These disputes included those that concerned the exercise of a state's regulatory or enforcement jurisdiction, sea boundary delimitations, historic bays, vessels and aircraft entitled to sovereign immunity under international law, and military activities.[18] Within the Convention, Article 298(1)(b) embodies another form of protection for military vessels, and military activities more broadly, in the law of the sea. This provision gives states parties to the Convention the discretion to exclude "disputes concerning military activities by government vessels and aircraft engaged in non-commercial service" from the jurisdiction of the Convention's dispute-settlement bodies.

Janis has argued that military exceptions to the law of the sea have sometimes favored naval powers and coastal states.[19] Writing in 1977, before the adoption of the Convention, he suggested that the inclusion of what is now Article 298(1)(b) would benefit coastal states more than naval powers that command large military fleets.[20] Following his argument, coastal state A, which activated the military activities exception clause, could interfere with naval power B's military activities within A's maritime zones without fear that B would bring A to compulsory dispute settlement under the Convention.[21] Janis's premise, however, was

that the general benefit of a military activities exception clause to a coastal state depends on "[i]f the naval power is generally satisfied with the provisions of the Law-of-the-Sea Convention."[22] Janis's argument was perhaps prescient of the United States' refusal to ratify the Convention as concluded in 1982. At present, however, the 24 states party to the LOSC that elected the military activities exception clause reflect a diversity of naval resources and capabilities, and even include one landlocked state.[23] This indicates that the perceived benefits of Article 298(1)(b) cut across the simple binary of naval power vs. coastal state to which Janis alluded in 1977. The next section suggests that military exceptions in the law of the sea actually unsettle, rather than protect, purportedly stabilized notions of sovereign immunity. It takes "sovereignty" as "an historically specific collection of practice through which authority is exercised"[24] rather than a doctrine with a stable meaning and describes some of the practices that Article 298(1)(b) has facilitated since the adoption of the Convention, i.e., China's construction activities in the South China Sea.

III. From Mischief (Reef) to Exception

China is among the states that activated the military activities exception clause of the Convention through a declaration. China ratified the LOSC in 1996.[25] This ratification took place over a year after China built four octagonal structures at Mischief Reef, an oval-shaped reef situated in the South China Sea, 125.4 nautical miles west of the archipelagic baseline of the Philippine island of Palawan.[26] At the conclusion of the *South China Sea* arbitration between the Philippines and China in 2016, the Arbitral Tribunal determined that Mischief Reef is a low-tide elevation that lies within the exclusive economic zone of the Philippines as defined under the Convention.[27]

The structures on Mischief Reef hosted a large military presence that included eleven Chinese vessels and about 1,000 uniformed personnel.[28] China sought to prevent Filipino fishermen from approaching Mischief Reef without its consent.[29] These structures came to the attention of the Philippines after a group of Filipino fishermen reported to the Philippine Coast Guard in February 1995 that they were held captive by Chinese soldiers on Mischief Reef for a week.[30] Following this incident, former Chinese president Jiang Zemin assured his Filipino counterpart Fidel Ramos that the structures were not military installations and were intended for use as a shelter for Chinese fishermen.[31]

It was not until 2006, or ten years after ratifying the Convention, that China declared under Article 298(1)(b) that it does not accept any of the compulsory dispute-settlement procedures of the Convention in respect of military activities.[32] Satellite images contemporaneous to the 2006 declaration reveal that China had begun construction activities on South China Sea features other than Mischief Reef.[33] As proceedings in the *South China Sea* arbitration ran their course between 2013 and 2016, China transformed the 1995 "fishermen's shelter" on Mischief Reef into a full-scale military fortress complete with a deep-water harbor, runway, and several covered structures that may now contain anti-aircraft guns and close-in weapons systems.[34] The astonishing scale at which China's construction of artificial islands proceeded during this period is at odds with President Xi Jinping's statement during a state visit to the United States in 2015 that "China does not intend to pursue militarization" in the South China Sea.[35]

The recent enactment of the Coast Guard Law removes any lingering doubt that, moving forward, the "defense operations" of the CCG are military in character. While the Chinese Embassy in Manila continues to maintain that the CCG is an "administrative law enforcement agency,"[36] a careful reading of the provisions of the Coast Guard Law reveals otherwise. This new legislation complements China's 2006 declaration electing the military activities exception clause in that it creates higher hurdles to the jurisdiction of compulsory dispute-settlement mechanisms established under the Convention. This concrete situation contrasts with Janis's 1977 hypothesis that the military activities exception clause would more likely favor the interests of coastal states over naval or maritime powers. The rapid construction of militarized, artificial islands in the South China Sea, as proceedings in the *South China Sea* arbitration were underway, demonstrates that maritime states with strong naval capabilities are likely to benefit more from the Convention's military activities exception clause. In practice, what the protection afforded by Article 298(1)(b) has done is to provide emergent naval powers such as China with the vocabulary to exclude from mechanisms of international accountability those practices that cause marine environmental damage and raise great potential for conflict. The next section outlines some of the provisions of the Coast Guard Law and how they might impact the Philippines and other rival claimants in the South China Sea.

IV. From Exception to Unilateral Action in Contested Waters

The Coast Guard Law contains provisions that authorize the CCG to perform controversial acts in contested waters. Some of these are acts that are not necessarily performed or associated with military organs of the state and appear to fall within the class of law enforcement activities. As China had effectively placed the CCG under the command of the Central Military Commission, it is unclear whether any of the acts of the CCG could still be considered "law enforcement" exclusively. Article 298(1)(b) of the Convention covers both military and law enforcement activities as distinct classes of disputes that state parties may choose to exclude from the jurisdiction of LOSC dispute-settlement bodies. As the language of Article 298(1)(b) maintains a distinction between these two types of activities, moves to "militarize" acts that are exclusively "law enforcement" in character, or those which are neither military nor law enforcement activities, strongly indicate that militarization via national legislation is a necessary step towards bolstering flimsy claims over hotly contested waters such as the South China Sea. This pushes against the observation by the ITLOS in the ongoing *Three Ukrainian Naval Vessels* dispute between Ukraine and Russia that "the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred."[37] What is happening, in the case of China's Coast Guard Law, is not an obliteration of the military vs. law enforcement activities binary, but rather that Chinese law now explicitly gives military institutional support and authorization to a diverse range of activities in order to allow China to continually advance claims already determined to be excessive and unlawful in *South China Sea*.

This section describes how China's militarization of law enforcement activities might affect the interests of other claimants in the South China Sea, particularly in terms of the

legislation's geographical scope, the immunity of the CCG under Chinese domestic law, and the acts that the CCG may perform against other users of the South China Sea. It will also situate the Coast Guard Law in the context of the *Three Ukrainian Naval Vessels* and *Coastal State Rights* disputes between Ukraine and Russia.

4.1 Geographical Scope

Article 3 of the Coast Guard Law applies the legislation to "maritime rights enforcement" activities in "sea areas under the jurisdiction of the People's Republic of China."[38] This language is sufficiently broad to encompass China's sovereignty claims over the Spratly Islands and other maritime features across the South China Sea. Article 12(2) of the law directs the CCG to protect "key islands and reefs, as well as *artificial islands*, facilities, and structures in the exclusive economic zone and the continental shelf."[39]

The mention of artificial islands in Article 12(2) of the Coast Guard Law is significant for the Philippines because China constructed many artificial islands situated within what is the Philippines' exclusive economic zone—and well beyond 200 nautical miles from any Chinese baseline—following the provisions of the LOSC. Article 12(2), in effect, suggests an extension of Chinese claims to maritime entitlements that far exceed those that the Convention prescribes, and well into the exclusive economic zones of the Philippines and other claimants in the South China Sea. These excessive claims are based on what China calls the "nine-dash line." The nine-dash line is a series of a series of nine (originally eleven)[40] line segments depicting the spatial extent of the Chinese claim to about 90 percent of the South China Sea in the *Locations Map of Islands in the South China Sea*, first published by Republican China in 1948.[41] In 2016, the *South China Sea* Arbitral Tribunal declared China's claims over the South China Sea based on the nine-dash line to be excessive and unlawful.[42]

Another problematic provision of the Coast Guard Law is Article 12(5), which empowers the CCG to use sea areas, protect and develop uninhabited islands, explore and develop marine mineral resources, and "investigate and deal with illegal acts."[43] On their own, these acts do not necessarily involve military operations or law enforcement activities. Yet by authorizing a military organ to perform these acts, China could easily argue that these acts are "military activities" within meaning of LOSC Article 298(1)(b) and so covered by its 2006 declaration. When Articles 3, 12(2), and 12(5) of the Coast Guard Law are read together, they appear to enable the CCG to annex to Chinese territory large swathes of the South China Sea in which sovereignty, sovereign rights, or jurisdiction are being disputed by other states. Annexation refers to the "forcible acquisition of territory by one State at the expense of another State."[44] Following the prohibition on the threat or use of force against the territorial integrity or political independence of any state,[45] annexation is no longer considered a legally admissible mode of territorial acquisition.[46]

4.2 Domestic Immunity

Article 6 of the Coast Guard Law states that coastal police agencies and their staff "are protected by law" and that no organization or individual may "interfere, refuse, or obstruct" CCG operations.[47] Under Article 11 of the law, not even the local administrative divisions of China may restrict or interfere with CCG operations. Within the Chinese legal system,

Article 6 immunizes the CCG from suit for possible wrongful acts committed in the performance of its duties. This means that an individual (regardless of nationality), such as a fisherman, who may have suffered injury or damage as a consequence of CCG operations will have no remedy for the harm done from within the Chinese justice system. As Article 6 appears to completely preclude all legal claims against the CCG, an aggrieved Filipino fisherman may be exempt from the requirement to exhaust local remedies in China before the Philippines is able to take up that individual's claims before an international adjudicatory body. The principle of exhaustion of local remedies in international law means that a person injured by the acts of a state should first seek redress before the judicial or administrative courts or bodies of that state before the injured person's state of nationality is able to bring an international claim against the injuring state.[48]

4.3 Powers of the CCG

Article 12 of the Coast Guard Law empowers the CCG to perform a broad range of acts that may potentially violate Philippine sovereignty and jurisdiction and endanger the lives of Filipino fishermen. These include

> (a) implementing maritime security management, including investigation and punishment of entry and exit violations (Article 12[3]);
>
> (b) inspecting vehicles, goods, and persons suspected of smuggling at sea (Article 12[4]);
>
> (c) supervising and inspecting marine engineering construction projects (Article 12[6]); and
>
> (d) supervising and inspecting motorized boat fishing and bottom trawling activities (Article 12[7]).[49]

To reiterate, some of the activities mentioned above, particularly those relating to marine engineering construction projects, fishing, and bottom trawling, are neither inherently military nor law enforcement activities. When considered with Articles 20 and 22 of the Coast Guard Law, Article 12 effectively arrogates not only policing and law enforcement but also natural resource extraction, construction, and broad economic development prerogatives in the South China Sea into the hands of a Chinese military organ.

Article 20 is alarming as it empowers the CCG to demolish buildings, structures, and other fixed or floating devices installed by other claimant states in the South China Sea. This provision directly poses danger to Philippine civilian communities in the Spratly Islands as well as existing Philippine installations in the South China Sea. Article 22, as mentioned earlier, authorizes the CCG to "use all necessary measures, including weapons," to stop foreign organizations and individuals at sea from illegally infringing national sovereignty, sovereign rights, and jurisdiction.[50] Batongbacal suggests that any act of the CCG under this provision might actually be considered an act of aggression that is contrary to the UN Charter "and tantamount to an act of war if [China tries] to use it on the waters of another country" to enforce its claims.[51] Considering the extensive geographical scope in which the Coast Guard Law is intended to apply, Articles 12, 20, and 22 leave the door wide open for the CCG to harass, injure, and endanger fishermen of various nationalities as well as local communities in the Spratly Islands.[52]

4.4 The Coast Guard Law in the Context of the Ukraine-Russia Disputes

The *Three Ukrainian Naval Vessels* and *Coastal State Rights* cases are two disputes between Ukraine and Russia, both of which involve an interpretation of the Convention's military activities exception clause. The *Three Ukrainian Naval Vessels* dispute arose from a request presented by Ukraine to the ITLOS for provisional measures for the immunity of three Ukrainian naval vessels seized by Russia in late 2018.[53] On the other hand, the *Coastal State Rights* arbitration (in its preliminary objections phase at the time of this writing) was considered by an arbitral tribunal convened under Annex VII of the Convention to determine, among other questions, whether a number of actions taken by Russia in the Black Sea, the Sea of Azov, and the Kerch Strait opposite Ukraine are military activities and therefore excluded from that tribunal's jurisdiction by virtue of Russia's military activities exception declaration under Article 298(1)(b) of the Convention.[54] These disputes are significant to Chinese moves to militarize its activities in the South China Sea because they provide recent interpretations of Article 298(1)(b).

In *Three Ukrainian Naval Vessels*, the ITLOS observed that the distinction between military and law enforcement activities cannot be based "solely on the characterization of the activities in question by the by the parties to a dispute."[55] The distinction between military activities and law enforcement, according to the ITLOS, should be based on "an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case."[56] The ITLOS, however, did not elaborate on what it meant by "objective evaluation," and neither did it give any guidance as to what constitutes military activity within meaning of Article 298(1)(b). These findings suggest that the classification of certain activities as "military" in national legislation is not dispositive of the question of whether those activities are military activities that preclude the jurisdiction of LOSC dispute-settlement bodies. Yet in recognizing that the distinction between naval and law enforcement vessels "has become considerably blurred,"[57] the ITLOS in effect gave strong naval states an indirect incentive to use national legislation in consolidating claims, no matter how tenuous, that their vessels or activities are "military" in character.

Russia's arguments in *Coastal State Rights* are indicative of this tendency of naval powers—old or new—to make sweeping claims that an activity in dispute is military in character. There, Russia claimed that ordinarily, "military activities are simply any activity conducted by the armed forces of a State or paramilitary forces" and contended that "issues concerning military activities must not be interpreted restrictively."[58] Russia also stated that the "minimal substantive regulations under [the Convention], along with the optional exclusion covering military activities, are indicative of an intention 'to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives.'"[59] A key point in the Russian argument was that since Ukraine alleged that Russia had unlawfully used force to usurp living and non-living marine resources along the Ukrainian coast, such "use of force" meant that the "specific conduct complained of by Ukraine is military in nature" and so excluded from the *Coastal State Rights* Arbitral Tribunal's jurisdiction.[60] Russia sought to distinguish *Coastal State Rights* from *South China Sea*, arguing that unlike China, Russia was present in the proceedings to actually invoke its Article 298(1)(b) declaration before the *Coastal State Rights* Arbitral Tribunal.[61]

Citing *Three Ukrainian Naval Vessels*, the *Coastal State Rights* Arbitral Tribunal held that law enforcement forces "are generally authorized to use physical force without their activities being considered being military for that reason."[62] The tribunal considered that Russia's activities in the Black Sea, the Sea of Azov, and the Kerch Strait included the grant of hydrocarbon licenses to civilian commercial companies and the regulation of the exploitation of fisheries under a civilian legal framework. This meant, in the tribunal's view, that Ukraine's allegations that Russia had unlawfully used force did not, as such, turn the *Coastal State Rights* dispute into one that concerned military activities excluded from its jurisdiction.

Further, the *Coastal State Rights* Arbitral Tribunal observed that it was unclear whether the forces involved in the activities in dispute belonged to the Russian armed forces and thus could not "objectively classified as military in nature."[63] It found that the mere fact that some of the vessels impeded by Russian activities belonged to the Ukrainian navy was not enough to characterize the entire dispute as one concerning military activities.[64]

In both *Three Ukrainian Naval Vessels* and *Coastal State Rights*, neither the Ukrainian nor Russian Article 298(1)(b) declaration operated to deprive the ITLOS and the Arbitral Tribunal, respectively, of their jurisdiction over the activities in dispute. Neither dispute-settlement body elucidated what Article 298(1)(b) means by "military activities." It can be argued that defining "military activities" remains within the prerogative of states. The next section reveals the limits of the Convention as a source of legal remedy for smaller states in instances when naval powers shore up military exceptions to the law of the sea through national legislation.

V. A Tale of Two Coral Reefs

One way to understand the militarization of the CCG under Chinese law is to revisit how the *South China Sea* Arbitral Tribunal considered military activities in the disputes concerning Chinese activities in Mischief Reef and Second Thomas Shoal. As mentioned earlier, the *South China Sea* Arbitral Tribunal determined Mischief Reef to be a low-tide elevation lying within the exclusive economic zone of the Philippines.[65]

Second Thomas Shoal, like Mischief Reef, is a coral reef that is located 104 nautical miles west of the archipelagic baseline of the Philippine island of Palawan.[66] Mischief Reef and Second Thomas Shoal are roughly 21 nautical miles apart. The *South China Sea* Arbitral Tribunal likewise found Second Thomas Shoal to be a low-tide elevation[67] within the exclusive economic zone and continental shelf of the Philippines.[68] It also concluded that both Mischief Reef and Second Thomas Shoal are located in a portion of the South China Sea that is not overlapped by the zone entitlements that might be generated by any of the features claimed by China.[69]

In its memorial, the Philippines argued that China's 2006 declaration electing the Convention's military activities exception did not apply to any of the disputes in *South China Sea*.[70] At the time of the submission of the memorial, the artificial island construction and other activities being challenged by the Philippines were performed by law enforcement vessels of the CCG, China Marine Surveillance, and the Fisheries and Law Enforcement Command.[71] Prior to the passage of the Coast Guard Law, the CCG was under the command of the now-defunct State Oceanic Administration, a civilian bureau under the Chinese Ministry of Land and Resources.

5.1 Mischief Reef

As mentioned above, China in 1995 assured the Philippines that the structure on Mischief Reef was intended as a wind shelter for Chinese fishermen. China maintained through 1998 and 1999 that the facilities there would "remain for civilian purposes."[72] Yet at present, Mischief Reef forms the south-eastern vertex of what is now known as the Big Three—a triangle of militarized Chinese-occupied artificial islands that include Subi and Fiery Cross reefs—in the southern South China Sea.[73]

In the case of Mischief Reef, the tribunal declared that it would not consider activities to be military in character "when China itself has consistently and officially resisted such classification and affirmed the opposite at the highest levels."[74] Having classified the construction of an artificial island as a civilian activity, the tribunal refused to apply Article 298(1)(b) and concluded that it had jurisdiction to consider the dispute concerning Mischief Reef. In this regard, the tribunal concluded that China breached several of its obligations to protect and preserve the marine environment of the South China Sea by constructing an artificial island on Mischief Reef and several other features.[75]

5.2 Second Thomas Shoal

On the other hand, the dispute concerning Second Thomas Shoal arose *after* the Philippines commenced the *South China Sea* arbitration in 2013. Just three weeks before the Philippines submitted its memorial in 2014, two CCG vessels barred two Philippine vessels from conducting a routine rotation and resupply mission to Second Thomas Shoal.[76] Following China's construction at Mischief Reef in 1995, the Philippines had maintained a small detachment of sailors and marines on the BRP *Sierra Madre*, an old naval vessel which it ran aground on nearby Second Thomas Shoal in 1999.[77] In 2013, China warned the Philippine ambassador to Beijing that if the Philippines did not remove its presence at Second Thomas Shoal, China would forcibly remove it.[78]

The Philippines claimed further that two CCG vessels chased away two Philippine Navy chartered vessels that were on their way to Second Thomas Shoal to deliver food, water, and essential supplies to Philippine marines stationed there and to conduct a rotation of personnel.[79] The CCG vessels used sirens, megaphones, and a digital signboard and warned the Philippine vessels to leave Second Thomas Shoal or "bear full responsibility of the consequences."[80] This caused the Philippine vessels to retreat and abandon their mission. The Philippines did provide essential food and water to its personnel on the BRP *Sierra Madre* through an airdrop several days later, but this was at best a temporary solution as it was still unable to rotate its personnel there.[81] The Philippine claim was that the acts of the CCG aggravated or extended the dispute between the Philippines and China, contrary to the right of the Philippines to have the dispute settled peacefully.[82]

5.3 Interpreting the Military Activities Exception Clause

The tribunal distinguished its interpretation and application of Article 298(1)(b) in the disputes concerning Mischief Reef and Second Thomas Shoal. For the tribunal, the military activities exception clause applies to "'*disputes concerning* military activities' and not to 'military activities' as such."[83] In its view, what matters is the question of "whether

the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute."[84] This may suggest that if the Philippines initiates another LOSC proceeding against China that does not involve a dispute over military activities, China's military activities exception would not apply even if China were to begin using military tactics in relation to the dispute over the course of proceedings. Yet through the enactment of the Coast Guard Law, it seems difficult to imagine a scenario in which a resulting future dispute involving the CCG or some other Chinese coastal police agency would not already be a military activity coming within the 2006 Chinese declaration.

What the tribunal did in relation to Second Thomas Shoal was to consider the Philippine claim of aggravation and extension of the dispute as itself constituting an independent and substantive claim rather than a mere allegation connected with a request for provisional measures.[85] The tribunal thus determined the Second Thomas Shoal dispute to be one such dispute concerning military activities and that accordingly, it has no jurisdiction to consider it.[86]

The tribunal offered some useful guidance on the finer points between military activities and disputes involving such activities. Yet this distinction appears rather artificial. An interpretation that distinguishes between "disputes concerning military activities" and "military activities" raises questions as to whether the Convention realizes the stated goals of promoting the "peaceful uses of the seas and oceans" and the "protection and preservation of the marine environment."[87] Instead, what has happened, following the *South China Sea* arbitration, is that China has been emboldened by its own 2006 LOSC declaration to raise stakes in the South China Sea through domestic legislation that empowers its military organs to carry out various activities in contested waters in complete disregard of the interests of other states. Whether the tribunal's interpretation of Article 298(1)(b) complies with the obligation to interpret the Convention in good faith and in accordance with the ordinary meaning of its terms, context, and object and purpose remains an open legal question.[88]

As the Philippines raised in its memorial, Chinese fishermen were not known to frequent the waters surrounding Second Thomas Shoal prior to the commencement of the *South China Sea* arbitration.[89] On this basis it is difficult to see the acts of the CCG around the time of the submission of the Philippine memorial as anything other than a situation in which "a party has employed its military in some manner in relation to the dispute." It was a maneuver by which China had sought to undermine dispute-settlement proceedings already in progress. The weakness of the Philippine argument, as the tribunal pointed out, was that the Philippines had "never clearly identified the dispute that it considers to have been aggravated by China's actions at Second Thomas Shoal."[90] It is important to note that the tribunal applied the military activities exception clause to the incident at Second Thomas Shoal at a time before Chinese law reclassified the CCG as a military organ of the state.

One practical import of the tribunal's interpretation of Article 298(1)(b) is that the Philippines should be cautious that however it chooses to respond to potential Chinese military aggression in the South China Sea, such response should not be construed or characterized as a military activity itself. The perverse logic that arises is that any Philippine response to increasingly aggressive Chinese militarism in the South China Sea needs to be sufficiently tempered in order to prevent escalation into a full-blown dispute that would place such a response outside the context of ongoing practices that destroy the marine

environment and endanger fishermen and local communities in the South China Sea. In addition, future Philippine military and other responses to the practices of the CCG should be connected to some other dispute that is not military in nature in order to exclude the 2006 Chinese declaration.

Yet the enactment of the Coast Guard Law has facilitated unilateral acts by maritime powers like China and the invocation of military exceptions to jurisdiction for a broad range of activities in disputed sea areas. In contrast, the Philippines and other claimant states in the South China Sea with modest naval capabilities are held hostages to fortune—never really knowing whether the most calculated responses to Chinese militarism at sea would provoke a military dispute excluded from the jurisdiction of LOSC dispute-settlement bodies.

VI. Conclusion

Recalling Rear Admiral Zhang's televised remarks describing China's "cabbage strategy," the recent passage of the Coast Guard Law can be seen as the latest in a series of well calculated steps, spanning decades, in the Chinese bid to exclude its activities from mechanisms for international accountability within the Law of the Sea Convention. Taken together with an account of Chinese activities in disputed waters of the South China Sea from the late 1990s, in the contemporary moment it seems that there are fewer cabbage layers to peel in order to see that these acts serve military objectives aligned with long-term territorial ambitions.

In *Three Ukrainian Naval Vessels*, the ITLOS observed that an objective evaluation of the "nature of the activities" should be the basis for distinguishing between military and law enforcement activities, noting the specific circumstances that might be relevant to a particular case.[91] A case-by-case approach, however, might be unsuitable in the South China Sea, where China's actions have been demonstrably and progressively escalatory, aggressive, and confrontational over time. These acts are arguably steps within a coherent, deliberate, and logical program geared towards consolidating sovereign and jurisdictional claims already determined to be unlawful and excessive. These alarming practices seem well placed to unravel the safeguards of one exceptional clause of the Convention—and turn it into license for unbridled unilateralism, the destruction of the marine environment, and violence against local communities in the South China Sea.

Notes

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2. *Ibid.*

3. Full text is available in Chinese through the universal resource locator (URL) published at https://npcobserver.com/legislation/coast-guard-law/. I disclose that I have no skills in the Chinese language and that all references to the Coast Guard Law in this article are browser translations to English from the Chinese text. See the link to the current text at NPC Observer, "Coast Guard Law of the People's Republic of China," *NPC Observer*, 2021, https://npcobserver.com/legislation/coast-guard-law/, accessed February 18, 2021.

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15. *Ibid.*

16. For an account of the tension between those who claimed that the Convention offers a single package of rights and obligations and those who sought to protect and recognise only a particular bundle of rights and obligations, see Jon M. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (Honolulu: Law of the Sea Institute, University of Hawaii, 1985).

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18. *Ibid.*

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22. *Ibid.*

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39. *Ibid.*, emphasis added.

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61. *Ibid.*, p. 91, at para. 313.
62. *Ibid.*, p. 97, at para. 336.
63. *Ibid.*, p. 98, at para. 338.
64. *Ibid.*
65. *South China Sea Award*, 2016, p. 412, at para. 1025.
66. *Ibid.*, p. 122, at para. 290.
67. *Ibid.*, p. 174, at para. 381.
68. *Ibid.*, p. 260, at para. 647.
69. *Ibid.*
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79. *Ibid.*, p. 62, at para. 3.62.
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Biographical Statement

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Options for Overcoming Overlapping Maritime Claims: Developments in Maritime Boundary Dispute Resolution and Managing Disputed Waters

Clive Schofield

Structured Abstract

Article Type: Research Paper

Purpose—The purpose of the article is to examine options to overcome and manage overlapping claims to maritime space.

Design, Methodology and Approach—The article outlines global progress in the delimitation of maritime spaces between coastal states, including clarifications in the approaches to international maritime delimitation and options to overcome disputes before exploring pertinent international jurisprudence providing insights into the meaning of the obligations of coastal states where overlapping maritime claims persist.

Findings—It is concluded that while approaches to maritime delimitation have become clearer over time, broad areas of overlapping maritime claims persist, as only a little over half of potential maritime boundaries have an agreement in force. Negotiated solutions for the delimitation of equidistance-based maritime boundaries have proved to be the most popular means of overcoming overlapping maritime claims. In the absence of such resolution, coastal states are subject to obligations under the international law of the sea which constrain what activities they can undertake in areas subject to overlapping maritime claims.

Practical Implications—The article will be of interest to policy-makers and practitioners involved in resolving and managing maritime spaces subject to competing jurisdictional claims. It explores the global scope and importance of overlapping maritime claims and unresolved maritime boundaries and indicates how approaches to maritime boundary-dispute resolution have evolved. Moreover, the article demonstrates that coastal

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states have multiple options to peacefully resolve maritime disputes and underscores that where overlapping maritime claims persist, claimant states need to be wary of undertaking maritime activities and enforcement actions in disputed waters that runs counter to their obligations under international law.

Originality/Value—The paper offers legal and policy guidance with a view to enhancing good ocean governance and the peaceful resolution of international maritime disputes.

Keywords: dispute resolution, joint development, maritime delimitation, maritime disputes, overlapping maritime claims

I. Introduction

The extension of maritime claims seaward, especially following the drafting and widespread adoption of the LOSC, and coupled with the proximity of coastal states to one another, has led to a proliferation of overlapping maritime claims, many of which have yet to be resolved. The objective of this article is to examine options to overcome overlapping claims to maritime space, notably through the delimitation of maritime boundaries and through provisional arrangements of a practical nature such as provisional lines or, more commonly, maritime joint development zones.

The article first outlines the state of play in terms of the delimitation of maritime boundaries globally, as this necessarily determines the number of undelimited maritime boundaries that exist, which, in turn, indicates the scope of competing claims to maritime space. Dispute resolution options under international law are then outlined and critiqued. Provisional arrangements of a practical nature where a maritime boundary has yet to be delimited are then discussed. This leads to consideration of the obligations on states with respect to maritime areas subject to overlapping claims.

II. The Law of the Sea and Maritime Claims

The guiding framework governing claims to maritime jurisdiction is provided by the United Nations Convention on the Law of the Sea (LOSC),[1] which has achieved near universal acceptance with, at the time of writing, 168 parties to it, comprising 167 states plus the European Union. This is especially impressive when it is recalled that only 152 of the 193 United Nations member states are coastal states. Accordingly, the LOSC can be viewed as representative of customary international law applicable to baselines, the delineation of maritime zones and limits, and the delimitation of maritime boundaries between coastal states. On this point, it is pertinent to note that the United States, which is not a party to the LOSC, has taken the view that "the general practice of States reflects acceptance as international law of the non-seabed parts of the LOS Convention."[2]

A key achievement of LOSC was the realization of a clear spatial framework for the limits to national claims to maritime jurisdiction. The Convention provides for a series of national zones of maritime jurisdiction, each with distinct functional components to them, measured offshore from baselines along the coast. These zones include a territorial sea, with consensus being reached on a maximum limit of 12 nautical miles (M) measured from

baselines (something not previously achieved). A particularly significant development was the general acceptance of maritime claims out to 200 M from baselines through the introduction of the exclusive economic zone (EEZ)—something that has resulted in an enormous extension of maritime claims offshore (fig. 1).

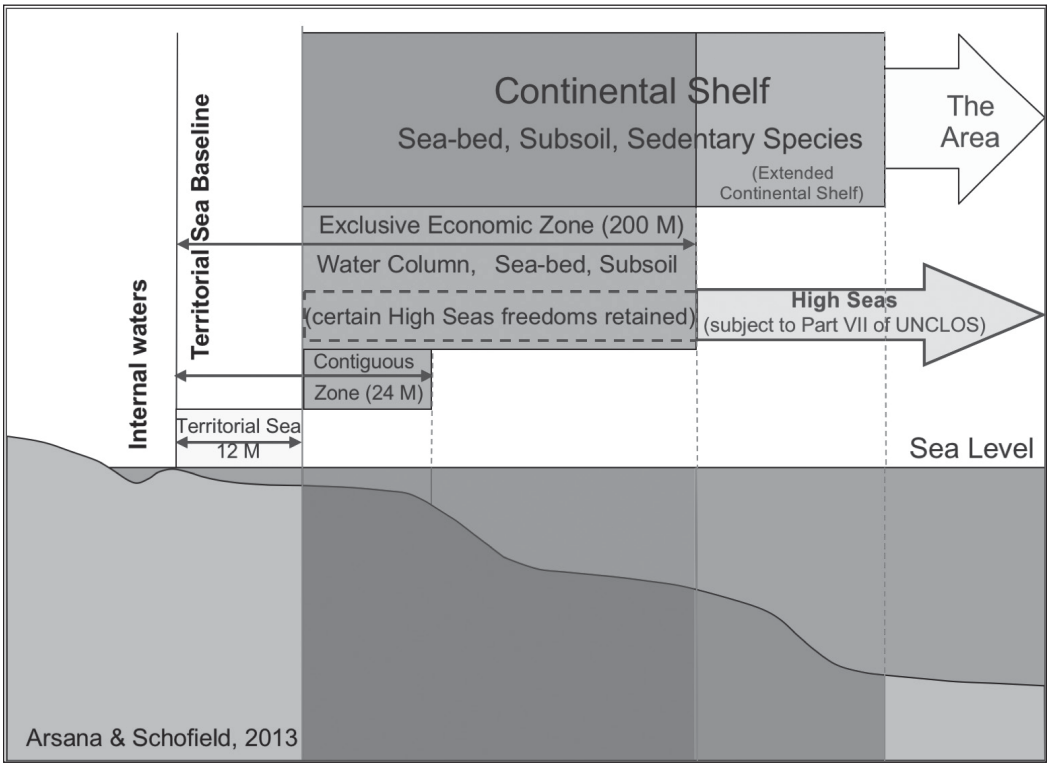

Figure 1: Schematic of Baselines and Maritime Claims of a Coastal State. Source: Clive Schofield and I Made Andi Arsana[3]

III. Progress in Maritime Delimitation

As noted above, the vast majority of coastal states are parties to the LOSC, which is representative of the international law applicable to the delineation of maritime claims and delimitation of maritime boundaries between states where such claims overlap with one another. Thus, if there is a distance of less than 24 M between opposing coastlines, a potential territorial sea boundary will exist, while if coastal states' coastlines are within 400 M of one another, a potential EEZ boundary will arise. In relation to the delimitation of the territorial sea, Article 15 of LOSC applies and offers a clear preference for the use of an equidistant or median line. This does not apply, however, if the states concerned agree to the contrary or there exists an "historic title or other special circumstances" in the area to be delimited which justifies a departure from the equidistant line.

Under the 1958 Convention on the Continental Shelf, delimitation was also to be effected by the use of median lines unless, similarly, an agreement to the contrary or "special

circumstances" existed that justified an alternative approach.[4] However, the relevant provisions of LOSC Articles 74 and 83, dealing with delimitation of the continental shelf and EEZ respectively, merely provide, in identical general terms, that agreements should be reached on the basis of international law in order to achieve "an equitable solution," with no preferred method of delimitation indicated. While this provides for substantial flexibility in ocean boundary-making, the lack of guidance offered by the provisions of the LOSC dealing with EEZ and continental shelf boundary delimitation also affords great scope for conflicting interpretation and dispute. Here it can be observed that the delimitation provisions of the LOSC were among the last elements of the package deal to be agreed on, and the general wording used was a means to overcome disagreement on a contentious issue. Indeed, as the arbitral tribunal in the Eritrea-Yemen Arbitration observed in reference to the drafting of Article 83, this was "a last-minute endeavor … to get agreement on a very controversial matter," and therefore "consciously designed to decide as little as possible."[5]

In order to achieve delimitation of the continental shelf and/or EEZ in accordance with LOSC, a theoretically limitless list of potentially relevant circumstances needs to be taken into consideration in the delimitation equation in order to reach the goal of an equitable result. Nonetheless, it has become abundantly clear from the practice of coastal states, allied to the rulings of international courts and tribunals, that geography, and particularly coastal geography, has a critical role in the delimitation of maritime boundaries. Aspects of coastal geography that have proved especially influential include the configuration of the coasts under consideration, the relative coastal length and the potential impact of outstanding geographical features, notably islands.[6]

The salient role of coastal geography in maritime boundary delimitation is linked to the widespread use of equidistant lines. While, as noted, there has been a shift away from equidistance as a preferred method of delimitation over time in the law of the sea, not least because in certain circumstances the application of strict equidistance can lead to clearly inequitable results, equidistance has nonetheless proved extremely popular as a basis for maritime boundary delimitation in practice.

This is understandable in that equidistance lines offer considerable advantages: if there is agreement on the baselines to be used, there is only one strict equidistant line, and this provides the appeal of mathematical certainty and objectivity as well as affording coastal states the not-inconsiderable attraction of jurisdiction over those maritime areas closest to them. Equidistant lines can also be flexibly applied and may be simplified, adjusted or modified to take specific geographical circumstances into account.[7]

Despite, as noted above, the lack of clear guidance for the delimitation of, particularly, continental shelf and EEZ boundaries under LOSC, it is notable that equidistance has found enduring popularity as a method of delimitation in state practice.[8] Further, there has been a distinct shift in recent jurisprudence towards the application of a three-stage approach, the first stage of which involves the construction of an equidistant line as a provisional delimitation line.

This approach was clearly articulated in the 2009 judgment in the *Black Sea* case[9] between Romania and Ukraine, which stated that at the first stage, a provisional delimitation line should be established using geometrically objective methods "*unless there are compelling reasons that make this unfeasible* in the particular case";[10] at the second stage, assessment is to be made as to "whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result";[11] and at the third stage,

verification of the resulting potential delimitation line is to be undertaken through what the court termed a "disproportionality test."[12]

All subsequent international cases involving maritime boundary delimitation have similarly applied this three-stage approach to maritime delimitation. These have included cases before the ICJ, the International Tribunal on the Law of the Sea (ITLOS), and international arbitral tribunals.[13] Efforts towards the settlement of overlapping claims to maritime space through the delimitation of maritime boundaries before an international arbitral tribunal, ITLOS or the ICJ are therefore highly likely to involve the three-stage approach to ocean boundary-making.

While the three-stage process provides the broad outlines of how an international judicial body is likely to approach a maritime boundary delimitation case before it, substantial uncertainties remain. First, it can be observed that in none of these cases have international courts or tribunals opted to begin with a strictly equidistant line at the crucial first stage of the three-stage process. Instead, judicial discretion has been exercised such that, as articulated in the *Black Sea* case, the court will take into account "the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to be delimited" when choosing its own base points, rather than relying on those selected by the parties to the case.[14] As strictly equidistant lines are not used at the first stage of the three-stage process, this arguably undermines the objectivity and impartiality as well as the clarity and consistency of the three-stage process. An alternative, and arguably more rigorous and methodologically systematic approach, would be to construct strictly equidistant lines including all potential basepoints at the first stage and then to adjust or modify the provisional delimitation line at the second stage of the three-stage process.

Second, it is clear that the key factors considered at the second stage that may yield an adjustment of the delimitation line away from the equidistant line defined at the first stage of the process are often related to coastal geography. These include the existence of distinct concavities and convexities in the configuration of the coasts involved, marked disparities in relevant coastal lengths and the presence of islands. Examples of this type of factor include the marked concavities in the Bay of Bengal cases,[15] the disparities in relevant coastal lengths in both the Libya-Malta[16] and Jan Mayen[17] cases and the presence of islands, for instance, in the Eritrea-Yemen arbitration,[18] all of which justified departures from equidistance. However, the degree to which such factors will actually influence the course of a particular maritime boundary line remains obscure.

Third, the disproportionality test at the third stage appears to be illusory in character, as in every case that has employed the three-stage process, the court or tribunal in question has found that no disproportion between the ratios of relevant coasts and areas falling to each party exists, and so there is no call for a readjustment of the maritime boundary line under consideration. It seems likely that, in fact, judges consider disproportionality issues as essentially part of the second stage of the process.

Finally, the phrasing in the *Black Sea* case—"unless there are compelling reasons that make this unfeasible in the particular case"[19]—provides scope for the three-stage process not to be applied, if the circumstances warrant it. This option to circumvent the three-stage process where the circumstances warrant it, aside from affording judges leeway to depart from a set method, likely arises from the then-relatively-recent case between Nicaragua and Honduras, in which, because of the convexity of the coastlines of the two states, only a tiny proportion of each state's coast, and an unstable coastline at that, would have contributed to the

construction of an equidistant line, rendering the application of such a line at the first stage of the three-stage process problematic.[20]

These uncertainties are essentially tied to judicial discretion. While this seemingly undermines the clarity and consistency of the three-stage process, this can also be regarded as a "prerogative essential to judges" in reaching their assessment of the facts peculiar to a particular case in order to allow international courts and tribunals the flexibility necessary to achieve equitable outcomes.[21] Consequently, while the advent of the three-stage process in maritime delimitation provides welcome clarity in international approaches to maritime delimitation, predicting the final course of an undelimited maritime boundary remains fraught with uncertainty.

IV. An Incomplete Maritime Political Map of the World

The practical consequence of the significant expansion of maritime zones seawards has resulted in a proliferation of overlapping maritime claims and, inevitably, disputes. Wherever the maritime claims of (now) neighboring states overlap, a potential maritime boundary situation exists. Thus, countries whose coastlines are up to 400 M apart from one another may now require an EEZ boundary to be delimited between them (fig. 2). Further, with respect to extended continental shelf rights, states sharing a potential boundary may be even further distant from each other. Where each inter-state maritime boundary relationship is as one potential maritime boundary, even if it may be composed of multiple distinct segments, the number of potential maritime boundaries within 200 M limits has been calculated to be 454 of which 277 (61 percent) have been at least partially agreed, with 240 of these agreements ratified and in force (52.8 percent of the number of potential maritime boundaries).[22]

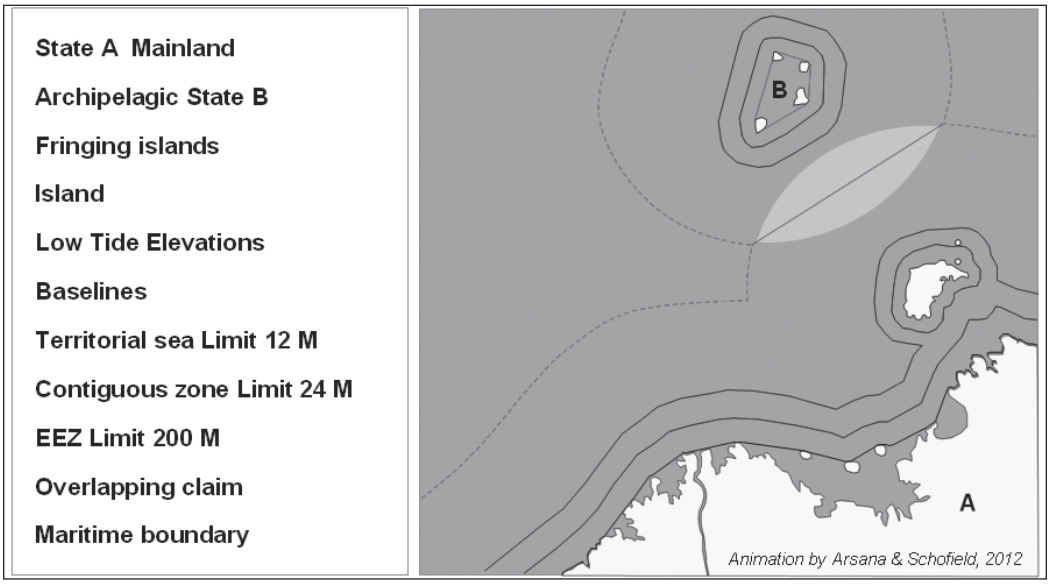

Figure 2: Key Elements in the Delimitation of Maritime Boundaries. Source: Clive Schofield and I Made Andi Arsana[23]

There are, however, important caveats related to these figures. For example, many of these existing delimitation lines are partial either in terms of their length or because they predate the advent of the EEZ; or the delimitation line has been agreed in a piecemeal fashion and resolved one sector or step at a time.

For the first scenario, the maritime delimitation situation of Indonesia with its neighbors Malaysia and Vietnam provides a good example. Although Indonesia reached continental shelf boundary agreements with Malaysia and Vietnam in 1969[24] and 2003[25] respectively, Indonesia does not accept this seabed boundary line as a basis to delimit the water column in the area. Indeed, Indonesia has claimed water column jurisdiction beyond the agreed continental shelf boundary lines, resulting in an area of overlapping claims to water column jurisdiction in both the central Malacca Strait and the southwestern part of the South China Sea. Indonesia is clearly of the view that seabed and water column boundaries need not coincide, as illustrated by its national mapping.[26] While such practice runs counter to the general preference in state practice and jurisprudence towards the use of "single," all-purpose maritime boundaries coincident for both the continental shelf and EEZ, it illustrates that even where a maritime boundary of some type is agreed, overlapping maritime claims and disputes can persist.

A good example of the second scenario is provided by Indonesia and Singapore. Having reached agreement on a short portion of their territorial sea boundary in the central part of the strait lying between their coasts in 1973,[27] an extension to the west was agreed in 2009[28] and a further extension to the east in 2014.[29] Further negotiations will be necessary between the two states with respect to a tripoint with Malaysia to the west. Additionally, further potentially complex trilateral delimitation issues arise between Indonesia, Malaysia and Singapore in the eastern part of the Singapore Strait and into the extreme southwest of the South China Sea following resolution of the sovereignty dispute between Malaysia and Singapore over certain insular features by the International Court of Justice (ICJ),[30] as the ICJ determined that Singapore has sovereignty over Pedra Branca (a.k.a. Pulau Batu Puteh), while sovereignty over Middle Rocks rests with Malaysia.[31] This results in a delimitation scenario involving a small and uninhabited (save for government personnel) island belonging to one state (Singapore) that is located between the coasts of two other states (Indonesia and Malaysia) within their overlapping 12-M territorial sea claims.[32] It seems likely that Indonesia and Malaysia will argue that the role of Pedra Branca constitutes a "special circumstance" under Article 15 of the Convention, justifying a departure from the median line, while Singapore is likely to be resistant to any such departure entailing a reduction in the scope of its maritime claims around Pedra Branca.[33] While this type of step-by-step approach reduces or eliminates the opportunities for trade-offs between different parts of the boundary line where the interests of the states concerned may differ, it can serve to narrow differences and build trust and was arguably appropriate to Indonesia and Singapore, given the close proximity of their coasts to one another and thus the limited scope of overlapping claims and maritime space at stake.

Further, these figures do not include boundaries in the Caspian Sea or potential maritime delimitations with respect to extended continental shelf rights. Submissions to the relevant UN scientific and technical body, the Commission on the Limits of the Continental Shelf (CLCS), regarding delineation of outer continental shelf limits seawards of 200-M EEZ areas, are estimated to encompass vast areas of continental shelf, of the order of 37 million km^2,[34] of which an area of around 3.3 million km^2 is subject to overlapping submissions and therefore encompasses large overlapping claims areas located seawards of 200-M limits.[35]

V. Options for the Resolution of Competing Claims to Maritime Space

Coastal states, in common with other members of the international community, are bound to settle disputes, including those with respect to competing maritime claims, through peaceful means. Article 2, paragraph 3 of the United Nations Charter states, "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[36]

The primary means of dispute settlement are set out in Chapter VI of the UN Charter sets out means at Article 33(1) as being "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement," although this list is not exclusive. Among these options, by far the most popular method of achieving maritime boundary delimitations is through negotiations.[37] Negotiations also represent an essential precursor to the application of any other form of peaceful dispute resolution and must be conducted in good faith.[38]

Where negotiations between the parties to an international dispute fail to yield a settlement, the intervention of a third party may prevent a further deterioration in relations, breaking the deadlock and providing a way forward towards the peaceful resolution of the dispute. Such involvement by a third party—be it an individual, another state or an organization—may be termed an offer of its "good offices" or mediation. The "good offices" of the UN Secretary-General or their Special Representative have frequently taken on the role of mediator with a view to de-escalating and ideally assisting in the resolution of contentious disputes. Alternatively, a trusted third party to a dispute may play this role. In the maritime (and territorial) context, France served as mediator in the dispute between Eritrea and Yemen concerning sovereignty over islands in the southern Red Sea and their related maritime entitlements, which ultimately led to an arbitration case.[39]

A further means of dispute settlement, which may be binding or non-binding, is conciliation, although it has been only rarely used in a maritime context. Non-binding conciliation was used to resolve a maritime delimitation dispute between Iceland and Norway in the early 1980s. Agreement was reached to appoint a conciliation commission in August 1980 to make unanimous recommendations on the question of the continental shelf boundary between Iceland and the Norwegian island of Jan Mayen. On the basis of the commission's recommendations, a coincident continental shelf boundary and EEZ boundary was agreed in 1981, in conjunction with a 45,470-km² joint zone that unevenly straddles the maritime boundary line, with 61 percent on the Norwegian side and 39 percent on the Icelandic side.[40]

Compulsory conciliation under the LOSC has only been used in maritime dispute resolution on one occasion to date, between Australia and Timor-Leste.[41] Conciliation proceedings were initiated by Timor-Leste on April 11, 2016.[42] Although Australia initially challenged the competence of the conciliation commission, once the commission concluded that it had competence,[43] the conciliation process proceeded in good faith. The positive engagement of the parties in the process was a critical factor in the success of the conciliation process. This is because while the conciliation process was compulsory, the conciliation commission could only facilitate and seek to enable negotiations coupled with providing non-binding recommendations. The conciliation process was assisted through an integrated package of

confidence-building mechanisms.[44] Ultimately, the conciliation process led, on March 6, 2018, to Australia and Timor-Leste's signing a treaty establishing their maritime boundaries in the Timor Sea.[45]

While the delimitation of the EEZ boundary in the central part of the Timor Sea is relatively straightforward in that it broadly reflects the median line between opposite coasts (Australia-Timor-Leste, 2018, Article 4), the lateral continental shelf boundary lines are more favorable to Timor-Leste (Australia-Timor-Leste, 2018, Article 2). These boundary segments depart significantly from the limits of the JPDA that they replace in the western, mature oil and gas fields such as the Buffalo field fall on the Timor-Leste side of the line. Of greater potential economic significance, the eastern lateral departs significantly from equidistance in a distinct "dog-leg" configuration, placing around 70 percent of the Greater Sunrise complex of fields on Timor-Leste's side of the line (fig. 3).

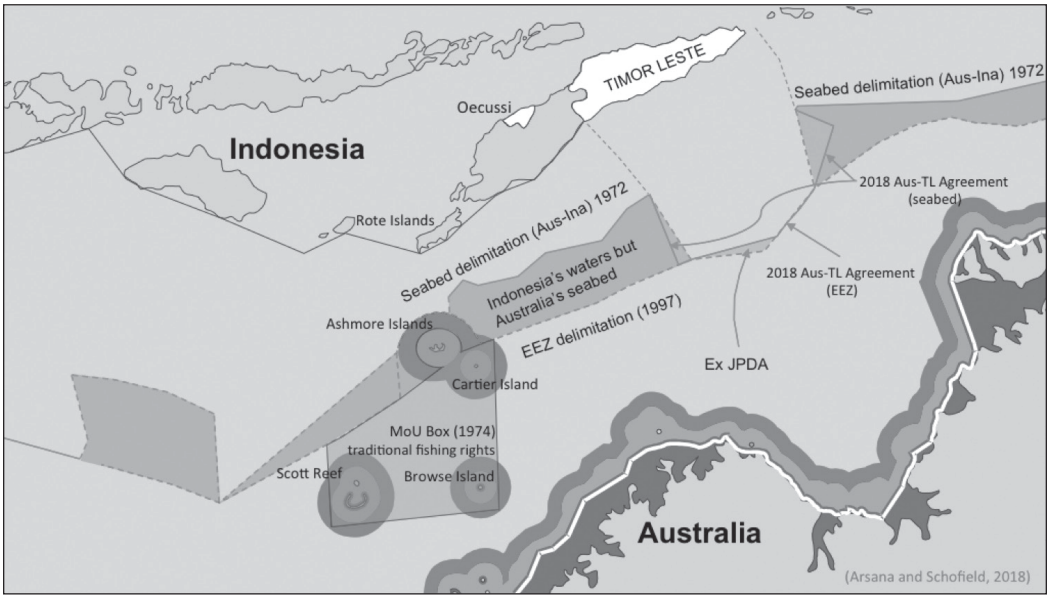

Figure 3: Timor Sea Maritime Arrangements. Source: Author[46]

It is important to note, however, that the final part of the boundary line defined by the 2018 treaty that divides Greater Sunrise is only effective once the seabed resources involved are depleted or Indonesia and Timor-Leste conclude a continental shelf boundary agreement, whichever event comes later.[47] Realizing the potential benefits of Greater Sunrise also depends on agreement over the split in revenues between Australia and Timor-Leste and the linked, the destination for the pipeline taking the resources to shore. The Australia-Timor-Leste treaty deals with this by establishing the Greater Sunrise Special Regime,[48] under which two "development concepts" are provided for. Should the pipeline go to Australia, Timor-Leste would receive 80 percent of the government revenues arising from the development. Alternatively, if the pipeline is directed to Timor-Leste, 70 percent of such revenues would go to Timor-Leste.[49] This adjustment in the revenue sharing split is designed to recognize the downstream processing benefits that would be associated with

the pipeline coming on shore in either country. At the time of writing, the ultimate destination of the pipeline and thus the location of the downstream processing remained unclear.[50]

International maritime boundary delimitation disputes can also be settled through international arbitration or judicial decisions of the International Tribunal for the Law of the Sea (ITLOS) or the International Court of Justice (ICJ). While less than 1 percent of settled international maritime boundaries have been achieved through judicial decisions, the international jurisprudence on maritime boundary delimitation has proved to be influential in shaping approaches to maritime delimitation, as demonstrated, for instance, by the ICJ's introduction of the three-stage process, noted above. It can be anticipated that such approaches will also be applied in the context of maritime boundary delimitation negotiations.

VI. Maritime Spaces Subject to Competing Claims

It is clear from the foregoing that while considerable progress has been achieved, nonetheless the maritime political map of the world remains profoundly incomplete. Indeed, the number and scope of overlapping claims to maritime space has proliferated in recent decades. Further, given the relatively slow progress in dividing such areas of maritime claims through maritime boundary delimitation, competing claims to maritime jurisdiction have persisted. Problematically, while such overlapping claims areas are known to be large, they are ill-defined both in terms of their spatial extent and with regard to the rights and responsibilities of claimant and other states within them.

Maritime areas subject to competing claims provoke multiple concerns. Their existence, often coupled with the maritime disputes associated with them, serve to undermine good ocean governance and compromise maritime security. Overlapping maritime claims can lead to effectively unpoliced zones of overlapping claims, allowing illegal activities at sea to flourish. For example, the so-called "Triborder sea area," located in the Sulawesi (or Celebes) Sea between the intersecting maritime claims of Indonesia, Malaysia and the Philippes, has been characterized as an "ungoverned space" and thus a "haven for transnational criminals, including terrorists."[51]

More alarmingly, disputes over maritime areas subject to competing claims can serve as a point of friction and tension between states with the potential for incidents and confrontation on the water to turn into outright conflict. While this represents an extreme scenario, it is one that cannot be dismissed lightly. For example, the myriad incidents in the East China Sea and South China Sea where overlapping maritime claims are a salient feature of the maritime disputes in those waters provide ample evidence of such tensions which appear to possess significant potential to escalate.

It is also apparent that lack of maritime jurisdictional clarity is anathema to the proper development and management of marine resources. With regard to potentially valuable seabed energy resources, for instance, extensive areas of overlapping maritime claims forestall access to these valuable resources. Indeed, disputed waters tend to represent no-go areas for the international oil and gas industry because of the absence of fiscal and legal certainty that is fundamental to their decision to commit the hundreds of millions of dollars necessary to undertake offshore exploration and development projects. Numerous examples exist where

the issuing of overlapping petroleum exploration acreages on the part of rival neighboring states has led to diplomatic (and not so diplomatic) tensions.

Analogously, with respect to marine living resources, rational exploitation and preservation of important living resources is similarly undermined by failure to address jurisdictional issues comprehensively and cooperatively. Uncertainty over maritime limits and the scope of overlapping maritime claims tends to lead to uncoordinated policies which, in turn, can result in destructive competition for vulnerable fisheries resources, serious degradation of the marine environment, attendant threats to marine biodiversity and ultimately to serious geopolitical tensions between neighboring coastal states. With world fish stocks facing increasing pressure and more stocks being overfished or under stress, addressing unmanaged areas subject to competing maritime claims is of increasingly critical importance.

The South China Sea again provides numerous examples, with efforts to access or manage marine resources being a recurring source of confrontations and tension. In the latter part of 2020 alone, the South China Sea featured fisheries-related confrontations between China and Indonesia off the Natuna Islands[52] as well as oil and gas exploration-related incidents between China and other South China Sea coastal states in waters proximate to Brunei Darussalam and Malaysia[53] as well as Vietnam.[54]

It can also be observed that coastal states may not only make efforts to assert their claimed jurisdiction over disputed maritime spaces through the more traditional means of marine resource exploitation and management and related maritime surveillance and enforcement efforts. China's unilateral naming of 80 geographical features, including 55 submerged ones, located in the South China Sea in April 2020, apparently in order to assert its "sovereignty and sovereign rights," can be viewed in this light.[55] The designation of marine protected areas (MPAs) is also an act of administration on the part of the designating state. The creation of multiple large-scale MPAs around remote external territories of France, the United Kingdom and the United States is, in principle, to be welcomed as the marine spaces subject to these conservation measures are often pristine and biodiversity rich. However, this has led to concerns that the MPAs may also have a more sinister, geopolitical character, underscoring the sovereignty claims of these states over possessions acquired in colonial times as well as their often broad maritime claims associated with them.[56]

There are, however, means to overcome these issues through maritime delimitation and dispute settlement via an array of avenues or, alternatively, through provisional arrangements of a practical nature. Additionally, international jurisprudence has provided some guidance as to what activities and enforcement actions are permissible in maritime spaces that are subject to overlapping jurisdictional claims.

VII. Alternatives to Delimitation: Provisional Arrangements of a Practical Nature

As an alternative to maritime boundary delimitation, or to use during periods when delimitation negotiations are ongoing or, indeed, deadlocked, a number of coastal states that

assert overlapping maritime claims have agreed to establish frameworks to manage the relevant area of overlapping maritime claims on a provisional and joint basis. The international legal basis for this is provided by Articles 74(3) and 83(3) dealing with the delimitation of the exclusive economic zone and continental shelf, respectively. These articles state, in identical terms:

> Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[57]

Such provisional arrangements could take the form of a provisional maritime boundary line, although these are relatively rare, as states are often concerned that a provisional line has the potential to take on more permanent characteristics. Instead, the majority of provisional arrangements of a practical nature take the form of maritime joint development zones (as they tend to be referred to) oriented towards cooperative resource, and particularly seabed energy resource, development and management.[58] However, such arrangements can involve other marine resources such as fisheries,[59] and can also involve agreements *not* to develop resources or undertake certain activities. For example, the Torres Strait agreement between Australia and Papua New Guinea defines a protection zone within which there is a moratorium on the development of seabed hydrocarbon resources (fig. 4).

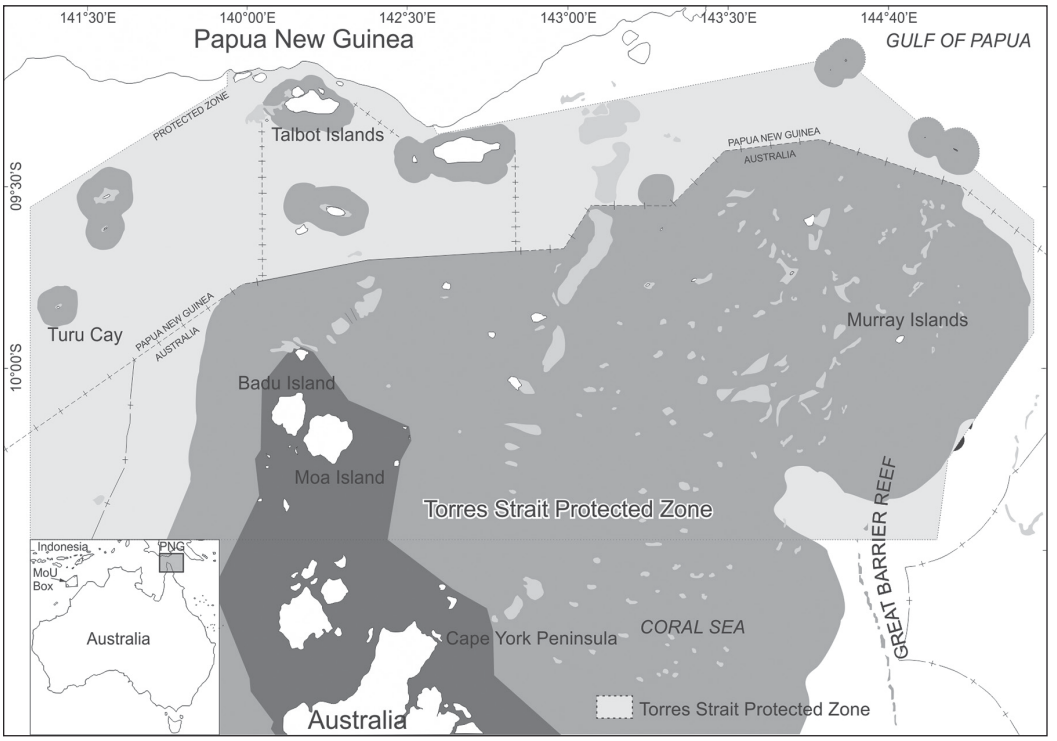

Figure 4: Maritime Delimitation and Joint Zone Between Australia and Papua New Guinea. Source: Author

It is also worth noting that such provisional joint arrangements can also be applied to non-resource issues, including maritime security. Examples include the 2001 treaty between Nigeria and Sao Tomé and Príncipe establishing a joint zone between them,[60] and the 2003 EEZ Cooperation Treaty between Barbados and Guyana.[61] Agreements on cooperative arrangements regarding maritime law enforcement have also been reached regarding areas of overlapping maritime claims between Indonesia and the Philippines in the Sulu Sea.[62]

Maritime joint development or other cooperative mechanisms undoubtedly have major attractions. In particular, when states are faced with a seemingly intractable dispute, provisional cooperative arrangements that provide an alternative management option, enabling the pragmatic development or management of the resources or environment in the area of overlapping claims, can proceed without delay. That said, such arrangements are not without potential drawbacks, for instance in terms of the inevitable challenge to existing maritime claims—generally robust non-prejudice clauses notwithstanding—and the potential that they have of, in a sense, rewarding coastal states for advancing excessive maritime claims. It is also worth observing that ensuring the success of a joint maritime development and management endeavor demands close bilateral relations and ongoing investment in both resources and political will to realize and, crucially, sustain over the long term. Here it can be observed that these arrangements often require political, institutional and financial commitments over substantial time periods, even decades, for example where a seabed oil and gas field is subject to joint development. It is also unfortunately the case that the mere existence of a joint development agreement does not dictate the discovery of valuable marine resources.[63]

VIII. Obligations Pending Delimitation of the EEZ and Continental Shelf

The final wording that was eventually incorporated into LOSC Article 74(3) establishes a general framework for the provisional management of maritime spaces subject to overlapping EEZ claims. It was drafted in an attempt to fulfill two aims: the first to encourage efforts aimed at the management of areas of overlapping maritime claims on an interim basis; and the second to limit activity within an area of overlapping maritime claims to avoid a detrimental impact on negotiation of a final delimitation agreement.[64] Thus, in accordance with Articles 74(3) and 83(3) of the LOSC, pending agreement on a continental shelf or EEZ boundary respectively, the states concerned

> shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of a final agreement.

While there is a clear obligation to "make every effort" to seek such provisional arrangements of a practical nature, there is no obligation to actually reach agreement on them, making this an obligation regarding the *conduct* of states rather than one of *result*. These provisions do not prescribe what form of provisional arrangement of a practical nature might be involved. While the word "provisional" indicates that the arrangement in question is not final in character, nonetheless, no particular timeframe is imposed, nor, indeed, is any restriction created on the arrangement's level of formality or binding nature.

The provision contained in Articles 74(3) and 83(3) of the LOSC "not to jeopardize or hamper the reaching of a final agreement" can be viewed as an obligation of restraint and applies to areas of overlapping maritime claims. Two international cases are of particular interest with respect to discerning both the meaning of this phrase and its implications for activities taking place within maritime areas subject to overlapping claims. These are the cases between Guyana and Suriname[65] and between Ghana and Côte d'Ivoire.[66]

In the former example, the catalyst for the arbitration case was competition over suspected seabed oil and gas resources and, particularly, a June 2000 incident, the "CGX incident," in the area of overlapping maritime claims where a mobile drilling rig operated by an oil company licensed by Guyana was confronted by Suriname naval vessels and ordered to leave the disputed area.[67] With respect to the "every effort not to jeopardize or hamper the reaching of a final agreement" contained in Articles 74(3) and 83(3) of the LOSC, the tribunal observed that this "imposes on the Parties a duty to negotiate in good faith" and that the phrase "in a spirit of understanding and cooperation" indicated "the drafters' intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement."[68]

Consequently, the tribunal found that both Guyana and Suriname had breached their respective obligations to negotiate in good faith concerning the establishment of provisional arrangements of a practical nature. Suriname for failing to negotiate in good faith with regard to the overlapping claim area and Guyana's planned exploratory activities, as well as by failing to engage in a last-minute dialogue proposed by Guyana prior the CGX incident.[69] Guyana was likewise found to have breached its obligation by failing to directly inform and notify Suriname directly of the planned exploratory drilling in the area of overlapping maritime claims, by failing to seek Suriname's cooperation in undertaking these activities, and by failing to offer a share the results of the exploration activities or the financial benefits resulting from them.[70]

Concerning the second obligation set out in LOSC Articles 74(3) and 83(3), concerning actions that may jeopardize or hamper the reaching of the final agreement, it is notable that the tribunal sought to distinguish between unilateral acts likely to cause permanent damage and those that did not, in order to strike a balance between the desirability of enabling economic development and the preservation of states' rights. Thus, seismic surveys were viewed as potentially permissible, whereas drilling was not.[71] The tribunal likewise concluded that Suriname violated its obligation not to jeopardize or hamper the reaching of a final delimitation agreement when it expelled the concession holder from the disputed area, which constituted an unlawful threat of force.[72]

In the subsequent Ghana and Côte d'Ivoire case, which was settled through the Award of a Special Chamber of the ITLOS of September 23, 2017, oil and gas operations were already underway on Ghana's side of the theoretically equidistant line between the parties, and substantial discoveries had been made. Ghana argued that there was a tacit agreement between the parties on the use of equidistance to delimit the EEZ and continental shelf boundary.[73] In contrast, Côte d'Ivoire sought provisional measures to stop ongoing activities and alleges a breach of both obligations reflected in Article 83(3).

The Special Chamber found that, with respect to the first obligation reflected in Article 83(3), Côte d'Ivoire's failure to request provisional arrangements of a practical nature "bars [it] from claiming that Ghana has violated its obligation to negotiate on such

arrangements."[74] This is particularly true because Ghana's activities had been ongoing for a number of years.[75]

In the Special Chamber's view, the "transitional period" referred to in Article 83(3) "means the period after the maritime delimitation dispute has been established until the final delimitation by agreement or adjudication has been achieved."[76] The obligation not to jeopardize or hamper was viewed as applying in this transitional period whether provisional arrangements had been agreed on or not.[77]

Concerning Ghana's activities to develop seabed hydrocarbons, the Special Chamber found that Ghana had not breached its obligation to make every effort not to jeopardize or hamper the reaching of the final agreement for two reasons. Firstly, Ghana suspended all new drilling activities in accordance with the Special Chamber's provisional measures order.[78] Secondly, the area in which the drilling occurred ultimately fell on Ghana's side of the maritime boundary as determined by the Special Chamber.[79]

IX. Conclusions

The extension of claims to maritime jurisdiction seaward has created numerous "new" international maritime boundaries, only a little over half of which have been even partially settled. Consequently, there are numerous undelimited maritime boundaries and a proliferation of overlapping claims to maritime space. The geographic scope of these overlapping claims, while understood to be broad, are often by no means well defined. The existence of substantial portions of the global ocean being subject to competing jurisdictional claims can be considered to be inimical to good ocean governance.

Substantial progress has, however, been made in terms of approaches to maritime delimitation, especially through the advent of the three-stage approach to maritime delimitation. The emphasis on equidistance-based provisional delimitation lines at the first stage of this process means that coastal geography plays a fundamental role in maritime delimitation. That said, judicial discretion in the choice of base points injects uncertainty at this first stage of the process. Aspects of coastal geography have the potential to play a significant role in the adjustment of the provisional delimitation line in order to deliver an equitable result. Additionally, it is clear that coastal states involved in competing claims to maritime space have an array of dispute resolution options and mechanisms under general international law, and in particular under the international law of the sea. It is also evident that negotiations provide the primary means of resolving overlapping claims to maritime space. Additionally, there are dispute management options available when a definitive resolution of such competing claims to maritime areas cannot be reached through maritime delimitation.

In particular, provisional arrangements of a practical nature, as provided for under Articles 74(3) and 83(3) of the LOSC, offer a path towards cooperative mechanisms to manage and exploit resources, protect the marine environment or to address maritime security concerns. Such maritime joint development mechanisms inevitably carry with them both opportunities and potential drawbacks and should not be entered into lightly. These provisions also have implications for the activities coastal states may undertake in maritime spaces subject to overlapping claims. From the foregoing discussion it is clear that states party to the LOSC have an obligation to negotiate provisional arrangements in good faith,

though not one to reach agreement. Moreover, as noted above, as there is often uncertainty as to the exact geographic scope of areas of overlapping claims, so also there may be uncertainty as to the scope of this obligation as well as to exactly where provisional arrangements of a practical nature should apply.

It can be observed here that in the cases between Guyana and Suriname and between Ghana and Côte d'Ivoire discussed above, the coastal states involved clearly articulated the extent of their respective maritime claims so that the maritime area in dispute was clear. This is certainly not always the case with respect to other undelimited maritime boundary situations, giving rise to overlapping maritime claims. These cases have also made it clear that certain activities, including resource, environmental protection and maritime security-related ones, can occur in maritime areas subject to overlapping maritime claims in keeping with such provisional arrangements. Further, certain activities, such as seismic exploration, can also occur unilaterally in an undelimited area if it does not cause permanent physical change to the marine environment. However, other activities, such as exploratory drilling, may breach the obligation to "make every effort … not to jeopardize or hamper the reaching of the final agreement." A significant caveat here is that, pursuant to the Ghana–Cote d'Ivoire case, ongoing drilling in an area that is ultimately allocated to the party carrying out that activity does not *necessarily* constitute a breach. A key difficulty here, of course, is that it is difficult for a coastal state to be certain whether a given maritime area subject to completing claims will ultimately end up on its side of the line. Additionally, each case or situation needs to be assessed in light of its unique set of facts.

With respect to enforcement activities in maritime areas subject to competing claims, caution is highly advisable. In addition to the obligation to "make every effort … not to jeopardize or hamper the reaching of the final agreement" under Articles 74(3) and 83(3) of the LOSC, states also have obligations under general international law not to aggravate or extend a dispute. There is, therefore, risk that overly assertive enforcement actions, analogous for example to those of Suriname maritime enforcement forces in the CGX incident, would lead to a finding that the enforcing state would have violated its obligation not to jeopardize or hamper the reaching of a final delimitation agreement.

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Notes

1. United Nations Convention on the Law of the Sea, Montego Bay, Jamaica, December 10, 1982 (in force, November 16, 1994), 1833 UNTS 396 [hereinafter LOSC].

2. J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims* (3rd ed., Leiden/Boston: Martinus Nijhoff Publishers, 2012), p. 15.

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9. *Case Concerning Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of February 3, 2009, [2009] ICJ Rep 61 [hereinafter the Black Sea case].

10. *Ibid.*, para.116 (emphasis added).

11. *Ibid.*, para.120. At this point the Court cited its earlier Judgment in the *Cameroon/Nigeria Case* in support of its ruling. See *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening, [2002]) *ICJ Reports* 303, at para. 288.

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16. *Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta)*, Judgment of June 3, 1985, [1985] ICJ Reports, 13, available at www.icj-cij.org.

17. *Dispute Concerning Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh V Myanmar)* (Judgment), International Tribunal for the Law of the Sea (ITLOS), Case no. 16, March 14, 2012, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf; *In the Matter of the Bay of Bengal Maritime Boundary Arbitration Between the People's Republic of Bangladesh and the Republic of India*, Award, July 7, 2014, available at https://pca-cpa.org/en/cases/18/.

18. Notably concerning treatment of the features Jabal al-Tayr and the Zubayr group. See *Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, Award of December 17, 1999, available at http://www.pca-cpa.org/showpage.asp?pag_id=1160.

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21. Y. Lyons, L.Q. Hung and P. Tkalich, "Determining High-Tide Features (or Islands) in the South China Sea Under Article 121(1): A Legal and Oceanography Perspective," in *The South China Sea Arbitration: The Legal Dimension*, ed. S. Jayakumar, T. Koh, R. Beckman, T. Davenport and H.D. Phan (Cheltenham: Edward Elgar, 2018), pp. 128–153, at p. 132, https://doi.org/10.4337/9781788116275.00015.

22. Adapted from a dataset kindly provided by Andreas Østhagen. See also Andreas Østhagen, "Troubled Seas: The Changing Politics of Maritime Boundary Disputes," *Ocean and Coastal Management* 205 (2021), p. 105535, https://doi.org/10.1016/j.ocecoaman.2021.105535.

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27. *Agreement Stipulating the Territorial Sea Boundary Lines Between Indonesia and the Republic of Singapore in the Strait of Singapore*, March 25, 1973 (entry into force August 29, 1974).

28. Treaty Between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Seas of the Two Countries in the Western Part of the Strait of Singapore, signed March 10, 2009, in force August 30, 2010.

29. Treaty Between the Republic of Singapore and the Republic of Indonesia relating to the Delimitation of the Territorial Seas of the Two Countries in the Eastern Part of the Strait of Singapore, signed September 3, 2014.

30. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment of May 23, 2008, ICJ GL No 130, available at www.icj-cij.org/docket/files/130/14492.pdf.

31. *Ibid.*, para. 300. Sovereignty over South Ledge, a low-tide elevation located to the south of Middle Rocks, was not specifically determined by the Court, which found that South Ledge "belongs to the State in the Territorial Waters of Which It Is Located." The Court pointed out that international law is not clear on whether low-tide elevations can be considered territory from the viewpoint of acquisition of sovereignty.

32. Pedra Branca is located 7.7 m from the Malaysian coast, 7.6 m from the Indonesia island of Bintan and 0.6 m from Middle Rocks. See R. Beckman and C.H. Schofield, "Moving Beyond Disputes over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait," *Ocean Development and International Law*, 40 (2009), no. 1, pp. 1, 19, https://doi.org/10.1080/00908320802631551.

33. *Ibid.*, p. 21.

34. Comprising both areas covered by full submissions to the CLCS and subject to submissions of preliminary information. It should be noted that four submissions of preliminary information to the CLCS give no indication as to the area beyond 200 m that they relate to and so are not included in this estimate. See Clive H. Schofield and Leonardo Bernard, "Disputes Concerning the Delimitation of the Continental Shelf Beyond 200 M," in *New Knowledge and Changing Circumstances in the Law of the Sea*, ed. Tomas Heidar (Leiden/Boston: Brill, 2020), pp. 157–182, at p. 162, https://doi.org/10.1163/9789004437753_010.

35. *Ibid.*, at p. 163.

36. Charter of the United Nations, available at https://www.un.org/en/charter-united-nations/. See also LOSC, Article 279.

37. This is in keeping with Article 283(1) of the LOSC, which states, "When a Dispute Arises Between States Parties Concerning the Interpretation or Application of This Convention, the Parties to the Dispute Shall Proceed Expeditiously to an Exchange of Views Regarding Its Settlement by Negotiation or Other Peaceful Means."

38. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (1967–1969)*, Judgment of February 20, 1969, [1969] ICJ Reports, 3, at para. 85.

39. *Arbitration Between Eritrea and Yemen*, *Award of the Arbitral Tribunal in the First Stage (Territorial Sovereignty and Scope of Dispute)* of October 9, 1988 and *Award of the Arbitral Tribunal in the Second*

Stage of the Proceedings (Maritime Delimitation), Award of December 17, 1999, both awards available at http://www.pca-cpa.org/showpage.asp?pag_id=1160.

40. Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen, June 1981 (1981) ILM, pp. 797–842, at pp. 803–804. *Agreement on the Continental Shelf Between Iceland and Jan Mayen, October 22, 1981* (entered into force June 2, 1982). Treaty text available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/ISL-NOR1981CS.PDF. Under this arrangement each State is entitled to 25 percent of revenues deriving from the exploitation of oil and gas on the other side of boundary. Moreover, hydrocarbon fields straddling the joint zone and Icelandic waters are considered wholly Icelandic. See Agreement on the Continental Shelf between Iceland and Jan Mayen, Articles 5–6 and 8.

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47. Australia-Timor-Leste, 2018, Article 3(4).

48. Australia-Timor-Leste, Article 7 and Annex B.

49. *Ibid.*, Annex B, Article 2.

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asia/southeast-asia/article/3080510/south-china-sea-chinese-ship-haiyang-dizhi-8-seen-near; "5-Nation Face-Off in High-Seas Energy Tussle Off Malaysia," *The Straits Times*, April 25, 2020, available at https://www.straitstimes.com/asia/se-asia/5-nation-face-off-in-high-seas-energy-tussle-off-malaysia.

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57. LOSC, Articles 74(3) and 83(3).

58. See, for example, David Ong, "Joint Exploitation Areas," entry in *Max Planck Encyclopaedia of Public International Law* (MEPIL), vol. 6, chief ed., Rudiger Wolfrum, Oxford: OUP (2011) 463–470; David Ong, "Joint Development of International Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?," *American Journal of International Law*, 93(4) (1999), pp. 771–804. See also Clive H. Schofield, "Blurring the Lines: Maritime Joint Development and the Cooperative Management of Ocean Resources," *Issues in Legal Scholarship*, Berkeley Electronic Press, vol. 8, no. 1 (Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea, 2009), Article 3, https://doi.org/10.2307/2555344.

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61. Barbados-Guyana, *Treaty Between the Republic of Guyana and the State of Barbados Concerning the Exercise of Jurisdiction in Their Exclusive Economic Zones in the Area of Bilateral Overlap Within Each of Their Outer Limits and Beyond the Outer Limits of the Exclusive Economic Zones of Other States*, signed December 2, 2003 (entered into force May 5, 2004); United Nations, *Law of the Sea Bulletin* 55(2–4), pp. 36–39; see also Colson and Smith, *ibid.*, pp. 3578–3597.

62. See 2011 Joint Declaration Concerning Maritime Boundary Delimitation Between Indonesia and Philippines. This document includes commitments to exercise mutual restraint in the area to be delimited between the parties without prejudice to that delimitation and to encourage their maritime enforcement agencies to formulate standard operating procedures and rules of engagement and enhance communications between them with a view to avoiding bilateral incidents.

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64. For discussion see Myron Nordquist, Neal Grandy, Satya Nandan and Shabti Rosenne (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (Virginia Commentaries), vol. 2 (1993), at p. 815.

65. See Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration Between Guyana and Suriname, Award of September 17, 2007 (*Guyana–Suriname* Award), available at the website of the Permanent Court of Arbitration at www.pca-cpa.org (hereinafter, Guyana-Suriname case).

66. *Case Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Case No. 23, Judgment of September 23, 2017, available at https://www.itlos.org/en/cases/list-of-cases/case-no-23/ (hereinafter Ghana–Côte d'Ivoire case).

67. The so-called "CGX Incident" involved the mobile drilling rig *C.E. Thornton*, operated by CGX Resources Inc. (CGX), a Canadian company operating in an oil exploration concession issued by Guyana in the area of overlapping claims and two Suriname navy vessels, which on June 3, 2000, approached the *C.E.*

Thornton and ordered the rig and its service vessels to leave "Suriname Waters" within twelve hours. The C.E. Thornton duly did so. *Ibid.*, paras. 137–156.

68. *Ibid.*, para. 461 (footnotes omitted).
69. *Ibid.*, para. 475–476.
70. *Ibid.*, para. 477.
71. *Ibid.*, paras. 479–481.
72. *Ibid.*, paras. 483–484.
73. Ghana-Côte d'Ivoire case., para. 102.
74. *Ibid.*, para. 628.
75. *Ibid.*
76. *Ibid.*, para. 630.
77. *Ibid.*
78. *Ibid.*, para. 632.
79. *Ibid.*, para. 633.

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Analyzing the Causes and Effects of the South China Sea Dispute: Natural Resources and Freedom of Navigation

Christine Elizabeth Macaraig and *Adam James Fenton*

Structured Abstract

Article Type: General Review

Purpose—The South China Sea dispute illustrates the confluence of competing interests on an international scale. The first half of the article examines the role of natural resources in driving the dispute. The second half of the article presents a legal analysis of the dispute using the United Nations Convention on the Law of the Sea as a benchmark against which to examine China's academic maneuvering.

Design/Methodology/Approach—The paper presents an original analysis and assessment of the driving factors and legal ramifications of the dispute using secondary data.

Findings—While natural resources are an important driver, equally important are the military, geo-strategic aspects of the near total military dominance of China in the South China Sea, despite reports that the country would refrain from activities that would aggravate the dispute.

Practical Implications—Both access to natural resources and the strategic gains of controlling access through the South China Sea are driving the Chinese Communist Party to continue to pursue its claims in the South China Sea.

Originality/Value—The paper considers both the exclusive access to natural resources as a driving factor as well as the efforts of the Chinese Communist Party to challenge established concepts of international law in order to legitimize the claim to large swathes of territory in the SCS.

Keywords: freedom of navigation, natural resources, South China Sea

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I. Introduction

The South China Sea (SCS) continues to gain media traction due to the steady increase in tensions in recent years.[1] The overlapping claims of the countries involved, including Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam, are said to have led to a stalemate, and it is feared that the absence of a resolution will only lead to increased tensions in the area.[2]

The SCS is already considered a dangerous maritime flashpoint.[3] In the ongoing narrative of the conflict, China has been depicted in some media reports as the primary antagonizer, as it seeks to claim large territories of the SCS and continues to increase military activities in the area.[4]

In the face of these growing threats, it becomes imperative to examine the causes and effects of the SCS dispute, which can be attributed to two prominent factors: the presence of natural resources in the SCS, and the concept of freedom of navigation.

II. Natural Resources

The future of the world is dependent on access to and availability of natural resources. Asia in particular, as the world's most resource-poor continent, considering its size and population, has an insatiable appetite for natural resources.[5] Whether this will lead to long-term regional conflict or cooperation over natural resources in the region remains to be seen.

The relationship between natural resources and disputes has been a matter of great interest to scholars.[6] Is having an abundance of resources an invitation for dispute? Do diminishing resources in one country intensify the incentives for dispute? These are questions that scholars have sought to explore in their research linking natural resources with dispute. Historically, it is said that access to resources has been a critical factor in war and peace.[7] In the case of the SCS, is it valid to say that natural resources are the main driver of the ongoing dispute? Or are other geopolitical, military, nationalistic and strategic concerns the main driver of the dispute? Or is it indeed a combination of all of these?

The Organization for Economic Cooperation and Development defines natural resources as naturally occurring raw materials that can be used for economic production or consumption.[8] Natural resources are typically categorized into mineral and energy resources, soil resources, water resources, and biological resources. That natural resources are subject to depletion through continued human use magnifies their importance and creates the rationale for competition and conflict among individuals and societies.

When it comes to natural resources, the SCS encompasses rich fishing grounds which would be beneficial to both national and local economies.[9] With estimated numbers of 11 billion barrels of oil, 190 trillion cubic feet of natural gas, 16.6 million tons of fish for a yearly catch, and 3,365 known species of fish, the SCS is of critical economic, military, and environmental significance.[10] The SCS dispute is complicated by the assumption that the claimant would be entitled to the natural resources from the SCS.[11] However, is this competition enough to drive the ongoing dispute?

To address this question, the first part of the paper provides a background on the

competing claims made by the countries involved and the attempts made to secure natural resources in the SCS. The second part explores another compelling factor driving the maritime dispute, which is the significance of the SCS as a trade route. The third section discusses the international legal regime as set down by the United Nations Convention on the Law of the Sea (UNCLOS), to assess the legality of China's claims in the SCS. This is especially important in light of certain foundational principles of UNCLOS such as the right of "innocent passage." The fourth section will draw attention to China's attempts to expand the meaning of another key concept in the UNCLOS, that of the Exclusive Economic Zone (EEZ), and its relevance to the discussion of the SCS dispute. Finally, the conclusion will seek to evaluate the role of natural resources and freedom of navigation in this long-standing international dispute.

III. Competing Claims Over Natural Resources

Most of the countries involved in the maritime dispute assert their claims on the basis of the UNCLOS, which provides a common legal framework for maritime holdings and jurisdictions.[12] The UNCLOS states that a country's EEZ shall not extend more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[13] However, it is in these very zones of extension where the claims overlap. Some of these conflicting claims are described by Buszynki as follows:

> Chinese and Vietnamese claims loop around the Spratly and the Paracel Islands and overlap with the specific claims raised by the Philippines, Malaysia and Brunei. These countries have specific claims to areas contiguous to their own territory which also overlap. The Philippine claim to Kalayaan (Freedomland) as an extension of the island of Palawan overlaps with the Malaysian claim which extends from Sarawak/Sabah; Brunei's claim which extends from its own territory overlaps with that of both Malaysia and the Philippines.[14]

Beyond the EEZ jurisdictions set forth by UNCLOS, China, the Philippines, Taiwan, and Vietnam are all said to have made historical claims in the conflicting boundaries, although the latter three have shifted from arguing about historical claims to aligning with the UNCLOS jurisdiction.[15] But despite what UNCLOS states, China has continuously pushed for the recognition of its historical nine-dash-line claim, which is thought to originate from a cartographic document from Chiang Kai-shek's nationalist government.[16] However, if this line of argument is to be followed, then the historical claims of China can be considered just as valid as those of other kingdoms and empires in Southeast and South Asia.[17]

Brunei has been described as a silent claimant in the dispute,[18] and this might be attributed to the notion that the oil-rich country does not need to compete against others for natural resources. However, Brunei was hit hard by the drop in global oil prices in 2015 and had to turn to outside investors, notably China, for economic sustainability.[19] Since then it has been reported that Brunei and China are planning a joint exploration of oil and natural gas in the SCS.[20] Brunei is said to be not actively staking its claim as it would rather focus on cooperation, rather than conflict, with China instead.

China itself recognizes the importance of the SCS in terms of its natural resources, as stated by Jawli:

> The South China Sea is dubbed by China as the "second Persian Sea" for its oil reserves. It has 1,367,000 barrels of oil production a day. The Chinese have calculated that the South China Sea will ultimately yield 130 billion barrels of oil. If these calculations are correct then it contains more oil than any area of the globe except Saudi Arabia.[21]

It seems that China is desperate to find new energy resources, as "Chinese oil reserves account for only 1.1 percent of the world total, while it consumes over 10 percent of world oil production and over 20 percent of all the energy consumed on the planet."[22] The Chinese National Offshore Oil Corporation has invested $20 billion in the region with the belief that there are vast reserves of oil in the area, in addition to abundant fishing opportunities.[23] In addition, China continued to extend its claims in the spring of 2020 by creating new administrative districts in the islands, naming additional reefs, sponsoring illegal fishing operations, and intimidating foreign vessels.[24]

Maritime territorial dispute in the region is not necessarily limited to the SCS itself but also extends to its adjacent territories. For instance, Indonesia is particularly intent on securing the Natuna Islands, located at the southern part of the SCS, from Chinese vessels and fishing boats encroaching in the territory.[25] As part of its efforts in this regard, in 2017 Indonesia renamed the water around the Natuna Islands, calling it the North Natuna Sea. The declaration, which only affects the relatively small part of Indonesia's EEZ that overlaps with the nine-dash line, was met with disapproval by China and is not yet recognized in the International Hydrographic Organization (IHO) publication on the Limits of Oceans and Seas (3rd edition of S-23). A submission developed during the 1980s shows the Natuna Sea as separate from SCS. It was submitted to IHO Member States in 1986 but never received their approval. In addition to being the source of livelihood for Indonesian fishermen, the islands are critical to the future of energy of Indonesia, as they are home to the country's largest untapped natural gas field, with some 46 trillion cubic feet of recoverable gas resources.[26] Indonesia has admitted to lacking fishing vessels to operate in the islands, as well as facilities on land to process catches.[27] However, the Indonesian government still believes that despite these limitations, it is their right to utilize the resources in their EEZ.[28]

Malaysia asserts that the entire Spratly Islands area of the SCS is within the continental shelf limits of the country.[29] The country derives a significant part of its oil and gas resources from the SCS.[30] However, several of its fields and platforms that are used to exploit hydrocarbons are within China's nine-dash line.[31] Hence, it should not come as a surprise that Malaysia sought to formalize its claim with the United Nations Secretary General, even though it may go against China, which has massive ongoing investments with the country.[32]

Meanwhile, the Philippines is turning to the SCS for natural gas in order to phase out its coal-fired power plants.[33] Unfortunately, the country is undergoing security risks on offshore blocks as these come within China's self-proclaimed nine-dash line in the SCS.[34] Such lost economic opportunity may be one of the reasons why the Philippines maintains its claim to the SCS. The Philippines is described as not fully realizing its maritime potential, as it only accounts for 2.62 percent of the total gross domestic product.[35]

For Taiwan, the Spratly Islands not only serve as traditional fishing grounds for its small vessels but are recognized as potentially rich in oil and gas deposits.[36] Taiwan has quietly retreated from being an active claimant, which has something to do with Taiwan's complicated relationship with China.[37] At present the country is advocating its East China Sea

Peace Initiative, which calls on parties to shelve disputes and promote joint exploration and development.[38]

Vietnam is an active claimant in the maritime dispute, and its objectives include being able to exclusively control natural resources on and under Vietnam's continental shelf and to secure fish stocks for future generations.[39] The country has already made attempts to extract natural resources in the disputed areas, in the form of hydrocarbon drilling and seabed exploration, although these were largely contested by China.[40]

These reports so far indicate how the claimants involved in the SCS dispute possess vested interests in the natural resources to be extracted from the maritime territory. The next part of the paper features another equally compelling factor that is also known to drive to the maritime dispute.

IV. Vital Trade Route

Trade routes are areas of passage by land or sea for economic purposes. Whether these routes involve small or vast regions, they are vital to the economic progress of countries. A number of reports cite that it is the trade routes within the SCS per se, and not the natural resources alone, that make it of critical significance to its claimants.[41]

As a matter of fact, almost a third of the world's shipping—an estimated $11.3 billion worth of trade—annually passes through the SCS.[42] Spreading over more than three million square kilometers, the SCS is also a major trade route for crude oil, and more than 30 percent of global maritime crude oil trade (or about 15 million barrels per day) passes through the SCS.[43] As one of the busiest shipping routes in the world, the SCS route carries more than half of the world's annual merchant fleet traffic, making the traffic three times greater than that passing through the Suez Canal and fifteen times more than the Panama Canal.[44]

According to the China Power Project of the Center for Strategic and International Studies, the SCS trading route is particularly important to China, Taiwan, and South Korea, as these countries are dependent on the Strait of Malacca, which connects to the SCS.[45] China specifically had over 60 percent of its trade travelling by sea in 2016, to the extent that the SCS trading route has been dubbed China's Maritime Silk Road. Also passing through the SCS are around two-thirds of the energy supplies of South Korea, 60 percent of the energy supplies of Taiwan, and 80 percent of China's crude oil imports.[46]

Indonesia and Vietnam are also very much dependent on the SCS trade route, as more than 80 percent of trade to and from these countries passes through the sea.[47] Other countries that move their exports through the SCS with considerable economic impact are Singapore, Thailand, Vietnam, Hong Kong, and Malaysia.[48]

Furthermore, nearly 42 percent of Japan's maritime trade passes through the SCS, including all of the vital energy resources that Japan imports from the Middle East.[49] While Japan is not one of the SCS claimants, the country considers the route extremely important to its national security and has sought to support efforts that oppose the establishment of Chinese hegemony in the maritime area.[50] Another non-claimant that benefits greatly from the SCS is the global superpower United States, with $1.2 trillion of its trade transiting through the SCS annually.[51]

The given examples show the significance of the SCS trade route for both claimants as

well as non-claimants of the maritime territory. It might be interesting to explore how the SCS trade route can potentially unite these countries into resolving the dispute, with multinational organizations such as the Asia-Pacific Economic Cooperation (APEC) leading the way.

V. Legality, UNCLOS and the Arbitral Tribunal's Decision

Guilfoyle notes, "While the effectiveness of international law in the South China Sea dispute may be contested, its relevance cannot."[52] The legitimacy conferred on a state's actions by "legality" is important for consolidating political gains. Scott argues that international law is best understood as an ideology which is embedded into international relations, and that compliance with it confirms membership in the group of international states.[53] The question of whether China's actions in the SCS are legal is therefore extremely important. And further, if China's claim to large swathes of the SCS were to be internationally recognized, what would be the legal and real consequences of that for the international community? Would it, for example, mean that China could unilaterally restrict or control all sea-borne trade moving through that region (recalling that a third of the global sea-borne trade passes through the SCS)? Answering these questions requires careful consideration of specific articles of the UNCLOS, "a comprehensive treaty designed to 'settle all issues relating to the law of the sea,' commonly called the 'constitution of the oceans.'"[54] It also requires careful consideration of the foundations of China's claims that pre-date UNCLOS.

Legal legitimization is clearly of importance to China, and in particular the Chinese Communist Party (CCP). The CCP has invested a great deal of effort in researching and presenting the legal and historical foundations of its SCS claims to the world. This process of leveraging existing legal regimes to constrain enemies, confuse legal precedent and maximize claims has been dubbed legal warfare or "lawfare."[55] The furthest extent of China's claims in the SCS is represented by the "nine-dash line."

A simple Google search for "maps of China's nine-dash line claim" or similar search terms will reveal countless diagrammatic representations of the claim. The extraordinary breadth of China's claim is immediately apparent, encompassing the disputed island groups, its overlap with the claims of other states (made under the ordinary rules of UNCLOS), and the proximity to the coastlines of other states; in particular the Philippines, Brunei and Eastern Malaysia.

It may be stated at the outset that China's nine-dash line claim has no legal basis in the articles of UNCLOS. The Permanent Court of Arbitration—after a thorough consideration of all aspects of the competing claims between the Philippines and China, set out in a 500-page decision—clearly stated, "There is no legal basis for any Chinese historic rights, or sovereign rights and jurisdiction beyond those provided for in the Convention, in the waters of the South China Sea encompassed by the 'nine-dash line.'"[56]

UNCLOS, which codified customary international law, clearly sets out at Articles 3 and 57 that the breadth of the territorial sea and the EEZ "shall not extend beyond" 12 NM and 200 NM respectively, measured from the coastline of the state in question ("the baseline"). The combination of the SCS arbitration decision and the clarity of the articles of UNCLOS suggest that the matter should be settled; however, this is far from being the case.

It would be seductively easy to dismiss China's nine-dash line as an unreasonable, baseless ambit claim by a belligerent, rising superpower consolidating its position in the Asia Pacific. However, the reality of China's position is far more nuanced and considered. China's position is that the nine-dash line is not contrary to international law; "rather, by virtue of the wider scope of the rules of customary international law, the line supplements what is provided for under UNCLOS." It must be noted that questions regarding the historical sovereign title over land or islands are outside the jurisdiction of UNCLOS. The core of China's legal argument, therefore, has been that UNCLOS cannot determine the sovereign title over island groups situated within the nine-dash line. It was on this basis that China refused to participate directly in the SCS arbitration and refused to recognize the tribunal's decision.

In a "Critical Study," a group of Chinese academics acting under the direction of the CCP presented the argument that Nansha Qundao (the Spratly Islands) and, indeed, each of the other island groups comprise "outlying archipelagos."[57] Employing the archipelago doctrine which applies to island nations such as Indonesia and the Philippines would allow straight lines to be drawn around the groups. In turn, this would allow large sections of the SCS to be claimed as archipelagic waters and, additionally, 200-NM EEZs extending from those straight lines. This claim has some semblance of normality under UNCLOS (unlike the nine-dash line claim); however, it fails for two important reasons. One is that UNCLOS is clear that "archipelago states" are states that are "constituted wholly by one or more archipelagos" (Article 46). A state may not be an archipelago state in part. Secondly, the "island groups" commonly referred to as such by the media, governments and academia alike, are not, in law, islands; they are "rocks," as discussed further below. This is a crucial and often overlooked fact that was enunciated by the tribunal in the SCS arbitration.

Given China's reliance on history for the nine-dash-line claim, giving some historical context to the UNCLOS negotiations is warranted. First, China proposed the concept of outlying archipelagos in the negotiations, but later abandoned it. Second, during the UNCLOS III negotiations, China was firmly on the side of "developing" nations and opposed to the "hegemonic" superpowers, which it saw as manipulating global structures and institutions to their economic advantage. Third, China actively participated in the drafting of UNCLOS, voted for it, and agreed to be bound by its conditions, including the dispute resolution mechanisms. Fourth, upon ratification of UNCLOS, any "historical" claims are extinguished to the extent that they are incompatible with it. All of these points, in combination with the decision of the arbitral tribunal, indicate that China is on very shaky ground with regard to the legality of its claims. It also displays an ethical inconsistency to criticize "hegemonic" powers yet pursue an ambitious claim which limits the economic prosperity of its developing neighbors. However, this legal and ethical ambiguity has not, and will not, deter the CCP from pursuing the claims which it sees as essential in a three-pronged strategy of legal, psychological and public relations war to build and consolidate its position as a major maritime power.[58]

One strategy which has been developed in the wake of the arbitral tribunal's decision is to revive the previously abandoned concept of "outlying archipelagos," claiming that "Continental States' outlying archipelagos fall within 'matters not regulated by this Convention' and 'continue to be governed by the rules and principles of general international law,' as stated in paragraph 8 of the preamble to the Convention."[59]

The CCP position, therefore, is that negotiations surrounding the status of continental

states' claims to outlying archipelagos were not concluded and that UNCLOS is silent on this point, and it should be governed by general international law. Further, they point to other outlying archipelagos, such as the Faroe and Galapagos island groups, which use straight baselines. However, those island groups are significantly larger, with significant human inhabitation, and are clearly capable of sustaining life and economic activity. The very small features in the SCS—even Itu Aba, the largest of the Spratlys—are at best "rocks which cannot sustain human habitation or economic life of their own."[60]

If the so-called islands of the SCS are in fact no more than rocks, then the question of whether they generate an EEZ should be considered settled, in the negative. However, China has embarked on an ambitious program of reclamation and development of the islands into military bases, airstrips and harbors. Now that some of these features are capable of supporting human activity, are they to be considered islands, with EEZs? Under UNCLOS's Part VIII Regime of Islands, an island is defined as "a naturally formed area of land, surrounded by water, which is above water at high tide," and further, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

A simple Google search for China's land reclamation in the South China Sea, or similar search terms, will reveal numerous images from multiple sources illustrating how China has reclaimed reefs and submerged rocks and created artificial islands complete with landing strips and harbors. Crucially, none of the "island groups" within the SCS qualify as islands under this article of UNCLOS. Many of the contested features are not permanently above water, and those that are, are not capable of sustaining human habitation or economic life of their own. Those that *are* now capable of supporting human habitation are the result of China's land reclamation activities; however, these are not "naturally formed" and cannot therefore be considered *islands* under UNCLOS.

China refused to participate in the tribunal proceedings on the basis that they concerned a question which is outside the jurisdiction of UNCLOS—that is, of sovereignty over land territory. As the Convention for the Law of the Seas, UNCLOS is silent on land-based political matters and takes as a starting point the "sovereignty of all states":

> There are no provisions in UNCLOS on how to determine which State has the better claim to sovereignty over a disputed territory. UNCLOS only sets out what maritime zones can be claimed from land territory (including islands), as well as the rights and jurisdiction of States in such maritime zones…. UNCLOS assumes that it is known who has sovereignty over land territory, including offshore islands.[61]

China's rejection of the tribunal's decision is based on the argument that it makes a *de facto* determination of sovereignty over land territory, and that this goes beyond the intended scope of UNCLOS. China also pointed out in its position paper that it had filed a declaration in 2006 under Article 298(1), which it claimed exempts it from compulsory arbitration (Article 287[3]).[62] When the tribunal ruling was given in favor of the Philippines, China publicly stated its position that it would refuse to acknowledge or abide by the decision.[63] The Philippines in fact framed its claim clearly as one which determined only the *status* of the features—that is, as rocks, not islands—not the issue of their sovereign ownership. Implicit in this position is that, if the Philippines conceded ownership of the rocks (some of which have now been developed into bases), China would gain the military and

geopolitical advantage from these features, but not the economic advantages of an EEZ. In that case, as Gau points out, having "unlawfully claimed maritime entitlements beyond 12 nautical miles (NM) from these features, China should refrain from preventing Philippine vessels from exploiting the living resources in waters adjacent to Scarborough Shoal and Johnson Reef."[64]

Whether China's rejection of the tribunal's decision is legitimate is a serious point of debate. A fundamental principle of international law is that a dispute may not be brought to an international court without the consent of both parties to the dispute.[65] When a state becomes a party to UNCLOS, it consents to the dispute-settlement procedure contained in UNCLOS Part XV. In particular, Article 286 allows a state to unilaterally bring a dispute to an international court and be awarded a binding decision.

The Philippines' claim against China was initiated in an arbitral tribunal under Annex VII in accordance with the provisions of UNCLOS. Thus, the tribunal is able to make a decision which is in theory binding on both parties. However, as pointed out above, China consistently denied that the tribunal had jurisdiction over the dispute and refused to participate in the proceedings on that basis.

VI. Freedom of Navigation, Mare Liberum and China's Attempts to "Stretch" the Definition of EEZ

The legal regime set out in UNCLOS—with territorial seas, exclusive economic zones and right of innocent passage—balances two broadly opposing concepts: *mare liberum* and *mare clausum*. First, *mare liberum*: that the oceans cannot be possessed by any nation; that they should remain open and free to facilitate international trade between all nations. And second, *mare clausum*: that seas *can* be demarcated, owned and reserved for the exclusive use and exploitation by states. UNCLOS balanced those two competing ideas by overlaying a mix of exclusive possession (12 NM of territorial sea and 200 NM of EEZ) with the ideas of innocent passage and freedom of navigation, respectively—that is, the right for foreign ships, both military and commercial, to traverse those exclusive zones. While the concepts of innocent passage and freedom of navigation are expressions of *mare liberum*, they have different bases in UNCLOS and different outcomes in some circumstances. Innocent passage applies to waters subject to the sovereignty of the coastal state, primarily the territorial sea (UNCLOS Article 17) but also internal waters (UNCLOS Article 8) and archipelagic waters (UNCLOS Article 52) in some cases. Importantly, a ship which traverses sovereign waters using innocent passage acknowledges the sovereignty of the coastal state over those waters. Freedom of navigation, on the other hand, only occurs in international waters, particularly the EEZ (UNCLOS Article 58). And states may conduct Freedom of Navigation Operations (FONOPS), by overflight or by sea, to directly challenge the claims over those waters by another state, as the U.S. has done in the SCS since 2013 and continues to do.[66]

The Preamble to UNCLOS outlines the important motives for creating "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans."[67] The sentiments expressed here echo those of

mare liberum as enunciated by Hugo Grotius in the 17th century, that the oceans should be free and open to be used by all states, to promote international trade and prosperity.[68] Grotius argued from one unimpeachable axiom that "every nation is free to travel to every other nation, and to trade with it."[69] To that end he argued for a *right* of innocent passage over the seas for all states; and that the seas are the common property of all and *cannot* be possessed by any state.

When UNCLOS codified customary international law in the mid–20th century, it set out the exact limits that states may claim for their exclusive jurisdiction, but in balancing these rights it also included Section 3 on the Right of Innocent Passage. UNCLOS strikes a balance between the desire of states to possess the oceans and all the resources within them, and the opposing Grotian ideal of the freedom of the seas.

To fully understand the implications of China's actions, both physical and academic, in the SCS, we must first understand the rationale of UNCLOS in creating the territorial sea and the EEZ. The territorial sea is, in a legal sense, an extension of the land of the sovereign state. If you commit a crime on a vessel at sea within 12 NM of the coast of a state, the laws of that state will apply to you in the same way as if you had committed the crime on land. In contrast, the EEZ was created purely to give economic benefit from the oceans to the adjacent state. The resources of this zone may be exploited solely by the adjacent state; however, there is no further special status granted to the coastal state. A crime committed in this zone will be governed by the laws of the flag state of the vessel.

States have no right to restrict the flight over or navigation through their EEZs by military or any other types of vessel or aircraft, unless they are infringing on the resource rights of the coastal state (illegal fishing vessels for example can be apprehended in the EEZ if they are conducting illegal fishing activities). Under this understanding of the international law, therefore, China's possession of the various rocks in the SCS may generate a 12-NM territorial sea around each of the rocks, but it does not create an archipelago with straight baselines; it does not create an EEZ with a 200-NM zone from each "island" as discussed above. But this interpretation of the law does not fulfil China's objectives; therefore, it is seeking to change the perception and application of the law to match its interests. What China is seeking to do, as discussed throughout this paper, is to revive the concept of outlying archipelagos, which would generate EEZs from straight baselines which would then lay claim to large parts of the SCS—albeit not as extensively as would be possible under the nine-dash line claim (this claim has not been abandoned, but it is much more difficult to establish and defend under any reasonable construction of international law). Re-establishing the concept of outlying archipelagos at least has some basis, albeit abandoned, in the negotiations of UNCLOS III. If it can do this, and if it can extend the meaning of EEZ to something more like that of territorial seas, China will be able to achieve, by other means, a near equivalent of the nine-dash-line claim.

A key plank in this strategy is therefore for China to extend or stretch the notion of the EEZ beyond one which is merely focused on resource exploitation, to something more akin to territorial seas. It should be noted here that during the UNCLOS III negotiations, China opposed the right to innocent passage for warships through the territorial sea.[70] However, this was abandoned, along with the argument for outlying archipelagos.

Kraska noted that China has led the charge of a number of states that seek to stretch the conventional understanding of EEZ from areas of resource rights into something more like

territorial seas, which would potentially restrict foreign military operations in more than one-third of the world's ocean area through assertions of sovereignty.[71] Beijing has been the "most powerful and vociferous advocate for changing traditional notions of freedom of navigation and overflight to deny access to coastal zones by foreign warships and aircraft."[72]

If it were successful in this strategy, such near-total dominance of the SCS would be a major boost for China's national pride and ambitions to rise as a major maritime nation and would form a major component of its ability to conduct asymmetric warfare in this maritime space.

Through a carefully coordinated program of academic articles and seminars, the CCP seeks to evolve the opinions of academics and governments away from interpretations of the law of the sea that favor Grotian ideals of freedom of the oceans toward something much more restrictive, transforming the EEZ into something closer to a quasi-sovereign space where transit and overflight could be limited at the direction of the CCP; particularly with regard to foreign military assets, which would be required to obtain governmental approval prior to entering the space.

If China were to be successful in this strategy, it would achieve near-total military dominance of the SCS. The "right" of innocent passage, unlike transit passage, can be suspended by states. The CCP would therefore have the option to restrict foreign military activities over large portions of the SCS covered by the EEZs of its outlying archipelagos. However, this would not be as expansive as the nine-dash line claim and would leave space for ships to transit through the gaps, although it would involve significant inconvenience and convoluted passages for ships navigating through the SCS. In the event of outright conflict between the U.S. and China, and their respective allies, China could also seek to restrict access for commercial shipping through the SCS, to its strategic advantage. This move would be considerably aided by its establishment of bases and harbors in the disputed islands and rocks.

One potential ray of light in this protracted dispute has been discussions about a Code of Conduct (COC) between China and the Association of Southeast Asian Nations (ASEAN). In August 2020, "foreign ministers from the 10 members of ASEAN once again called for an expedited negotiation of the Code of Conduct for the South China Sea"[73] China has indicated that it seeks to finalize the COC as part of efforts to calm its ASEAN neighbors. While the COC ostensibly seeks laudable outcomes, such as a duty to cooperate and dispute resolution mechanisms, it is a long way away from being finalized. The parties are deadlocked on several key aspects of the code, such as its geographical scope, whether it will be legally binding, and what dispute resolution mechanisms it will apply.[74] According to Hoang, "fundamentally, the situation is simple: ASEAN countries want to curb China's behavior, but China does not want its actions to be constrained."[75] China is seeking significant constraints on the actions of third parties in the SCS, such as military movements and resource exploitation, without the consent of the parties to the Code. This is something that will clearly be opposed by some ASEAN members such as Singapore, which has always supported U.S. presence as a stabilizing influence in the region.[76]

It is essential that the U.S. and its allies continue to curtail China's campaign to seek dominance over the SCS in the realms of law and realpolitik. China has declared it would refrain from activities that would escalate or complicate the dispute; however, it is clearly playing the long game, seeking to drive a wedge between the U.S. and its regional allies, while strengthening its own strategic position. This strategy would give China as much

military and geopolitical advantage as the economic benefits that would come from claiming the lion's share of the SCS.

VII. Conclusion

This paper has sought to evaluate whether natural resources are the main driver of the ongoing SCS dispute. There is much evidence that the countries are motivated primarily by natural resources, and as reflected by the statement that "tensions surrounding the SCS have always been largely about oil and natural gas."[77] In the discussion on competing claims, aside from oil and natural gas, the other natural resources mentioned include hydrocarbons as well as fish stocks. Both the national and local economies of the countries concerned stand to gain immensely from being able to exclusively exploit these resources.

The significance of the SCS as a strategic trade route should also be recognized. The SCS claimants, and even non-claimants such as the United States, Japan, and South Korea, all depend on the trade route for the passage of energy supplies, crude oil imports, and raw materials.

China in particular seems to be the country with the most to gain from the natural resources of the SCS because of its meager oil reserves, partnered with massive consumption needs because of its immense population. While it seems insistent on asserting its historical claim in the territory, this reason by itself pales in comparison with what China stands to attain when it can have exclusive control of the natural resources in the disputed territory. That China always figures into the discussion of other claimant countries' attempts to secure natural resources in the SCS shows China's wide-scale attempt to make its intentions known, whether through cooperation like in the case of Brunei, or through activities that seem to stir up conflict, as with the rest of the claimants.

A consequence of the maritime dispute over the natural resources and the trade route would be the rising tensions in the SCS which have led to a massive increase in defense spending and power projection.[78] China in particular is reported to have doubled its defense budget in the last ten years and is expected to hit US$233 billion by 2020.[79] The Foreign Ministry of China claims that its military procurements are not meant for the militarization of its SCS outposts per se, but for maritime safety and natural disaster support.[80] Other countries involved, except for Brunei, have placed troops or military installations, although it is said that the objective is not particularly to achieve military superiority but to make potential aggressors think twice.[81] The intense power projection of China, with its aspirations to be a global superpower, is also believed to be a form of challenge to the influence of the United States military in East Asia.

It can be said that to a large extent, natural resources are a significant driver of the SCS dispute, and this is reinforced by the significance of the SCS trade route to the economies of both claimant and non-claimant states in the transport of energy resources, oil imports, and raw materials. China's power projection has also shaped how the other claimants are projecting their own intentions to claim their territories, even though these are of varying levels of intensity. The claims made through UNCLOS signify the willingness of most states involved to follow the jurisdiction of a legal framework, but the non-willingness of China has challenged the legitimacy of UNCLOS to fulfil its primary objective of serving as a legal

framework. It is quite unfortunate that the lack of resolution has actually led to continued illegal, unreported, and unregulated or IUU fishing, marine environment degradation, and reef destruction.[82] Whereas natural resources are posited to have led to the dispute, now it can also be asserted that the same dispute is harming and endangering the natural resources that are being contested in the first place.

In the race for natural resources, there will come a time when exploring new terrains and depths, such as the SCS, will no longer be an option. This reality highlights the need for Asian countries to practice sustainable management of natural resources within and beyond their zones of jurisdiction, as well as to implement a cooperative framework to protect the natural resources in question.

The COVID-19 pandemic makes multilateral cooperation to address the SCS dispute all the more necessary. A prolonged pandemic would result in the restriction of regional and global value chains on national borders, as well as greater protectionism and isolationism, most notably with respect to migration flows.[83] Furthermore, the COVID-19 crisis has brought up surface discussions on the socio-economic impact and resilience of ports as essential to national and regional communities.[84]

Considering these implications, an evolved international relations system is needed, one which takes into account the risks and uncertainties that continue to emerge from the crisis. Policy makers at the regional level have an urgent task of "forming an inter-regional circuit arrangement which in turn forms a new international relations system."[85] China in particular must play a prominent role in such a system. Having earned international ignominy for being the source of the pandemic, and at the same time showing continued belligerence in the SCS dispute,[86] China's next moves will continue to be on the radar of governments, media, and academicians, among many other interest groups.

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Portugal as an Old Sea Power: Exploring the EU Membership as Geopolitical Design

Nuno Morgado[1]

Structured Abstract

Article Type: Research Paper

Purpose—Since 1974, Portugal has been put through a double process of (a) diminishing its relative potential and (b) changing its geopolitical design from sea to land. This radical transformation in the direction of a small, land-oriented power did not, however, modify the geography of Portugal or the identity of the Portuguese (sea-oriented). This paper aims to investigate the research puzzle of the non-interaction between Portuguese geography and self-identity as independent variables and its EU membership as dependent variable.

Design, Methodology, Approach—The main objective is to test whether the Portuguese geopolitical agent can be identified as the key variable to explain the Portuguese commitment to the EU set of land-oriented policies, and the consequent decay of Portuguese fishing activities and navy status today, as fundamental sectors related to the sea affairs.

Findings—The paper provides evidence to sustain the argument that Portuguese domestic policy-making, in security terms, takes place first at the EU supranational level and that, therefore, conventional national aspirations and traditional narratives do not impact through the national institutions that formulate foreign policy.

Practical implications—The paper contributes to the research agenda of small powers and geopolitical studies.

Originality/value—The paper applies a model of neoclassical geopolitics to an under-researched topic.

Keywords: fishing, geography, geopolitics, identity, navy, Portugal, sea power

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I. Introduction

After the dismantling of the Portuguese pluricontinental state from 1974 to 1999, Portugal was reduced to its mainland area in Europe and to two archipelagos in the Atlantic Ocean. Portugal became a smaller power not only in geographical extent but also in terms of other elements of the state's potential—namely demography, resources, and military and political influence in the international arena. In this context, since 1974, Portugal has radically altered its national security policy (or geopolitical design) from a sea-power orientation (*thalassopolitics* and the pluricontinental state) to one centered on the land (*telluropolitics* and the European Union). Despite that radical shift, the geography of Portugal and the self-identity of the Portuguese remain largely unchanged.

In this context, the observable empirical problem and, consequently, the research puzzle of this paper is why the core factors of Portugal's geographical settings' incentives and self-identity reality do not shape the country's geopolitical design.[2] Hence, the paper argues that there is an incongruity between the independent variables of geography and identity and the dependent variable of EU membership in the making of Portugal's national security policy. The paper's working hypothesis—and the main argument—is that this incongruity can be explained by an intervening domestic variable: "the perceptions of the Portuguese geopolitical agent." (Geopolitical agents are heads of state or heads of government, ministers of foreign affairs, ministers of national defense, and other specific ministers who constitute the foreign policy cabinet.[3]) It is argued that these perceptions—being shaped by EU principles and norms—are determinant in shaping the geopolitical design. In this way, it seems that that intervening variable can explain why a certain national security policy is adopted, disregarding the incentives of geographical setting and contradicting the preferences of the majority of a nation. It is certain that international organizations influence the policy making and policy choices of states. In the case of Portugal, with regard to Europeanization—and in line with the main argument of the paper—it appears that the crucial reality is "downloading,"[4] through which the EU international structure shapes the fundamental security policy outcomes of the state. This "downloading" determines either what type of geostrategic power is projected on the international arena (and, consequently, the alteration of preferable areas of interest and action) or neutralizes any individual geostrategic projection of power.

Neoclassical geopolitics provides the theoretical background for the research. Chauprade and Thual's geopolitical principle number one, the existence of "an identity reality based objectively in space—geography—and time—history,"[5] is operationalized by the model of neoclassical geopolitics developed by the author.[6] The model holds that foreign policy outcomes depend on systemic stimuli and the state's potential (the independent variable), and also on the geopolitical agent's perceptions and capacities (an intervening variable). The structure of the paper follows these ideas. Section I is devoted to defining sea power and explaining the reasons Portugal is considered a traditional sea power, covering a succinct description of the geography, identity, and the core elements of the foreign policy pattern of Portugal. Section II addresses the alignment of Portugal, as a small power, with the EU tellurocracy, describing the Portuguese foreign policy shift after 1974 and providing data on the fishing sector and the navy sector as case studies. These empirical tests in two policy areas—(1) economy, with an examination of how

the Common Fisheries Policy has impacted Portuguese fishing activity, and (2) military, with an assessment of the progressive decay of the Portuguese navy—are logically related to fundamental matters of sea affairs, providing evidence regarding the set of explanations of the consequences of the process of Portugal's re-orienting from sea to land. The selection of cases responds to core elements of material power (economy and military), according to the Realist theoretical school of international relations. Finally, Section III ties up the research while identifying and characterizing the Portuguese geopolitical agent's perceptions as causal variable, achieving explanatory power for the research problem.

The main objective of the article is to investigate the causes of the research puzzle. The paper is a single case study operationalized by content analysis, discourse analysis, and process tracing. The body of examined documents includes EU legislation; Portuguese government programs and plans; speeches and interviews of the Portuguese minister of foreign affairs; and academic literature on the topics at stake.

II. Geography, Identity, and Foreign Policy Pattern of Portugal as a Traditional Sea Power

Portugal is, at the same time, a small power and a traditional sea power. Defining a sea power appears to be the initial task in understanding how Portugal became a smaller power compared to its size at the beginning of the 1970s.

The works of Father Fernando Oliveira[7] and Admiral A.T. Mahan[8]—or a resumé of their ideas at least (such as in Morgado[9])—in addition to the definition of the French term *maritimité* by Chauprade and Thual[10] suffice to get acquainted with the concept of "sea power." In the most concise terms, a sea-power country means the geostrategic type in which the sea is the generatrix of the state's power; i.e., the state's capacity to project power on the international arena is based on structures connected to the ocean (e.g., control over choke points, islands, ports, and consequently sea lanes; a relevant navy as instrument in that strategy; and dynamic fishing activity). Therefore, for such a country, the maritime arena is where the power dispute takes place.[11]

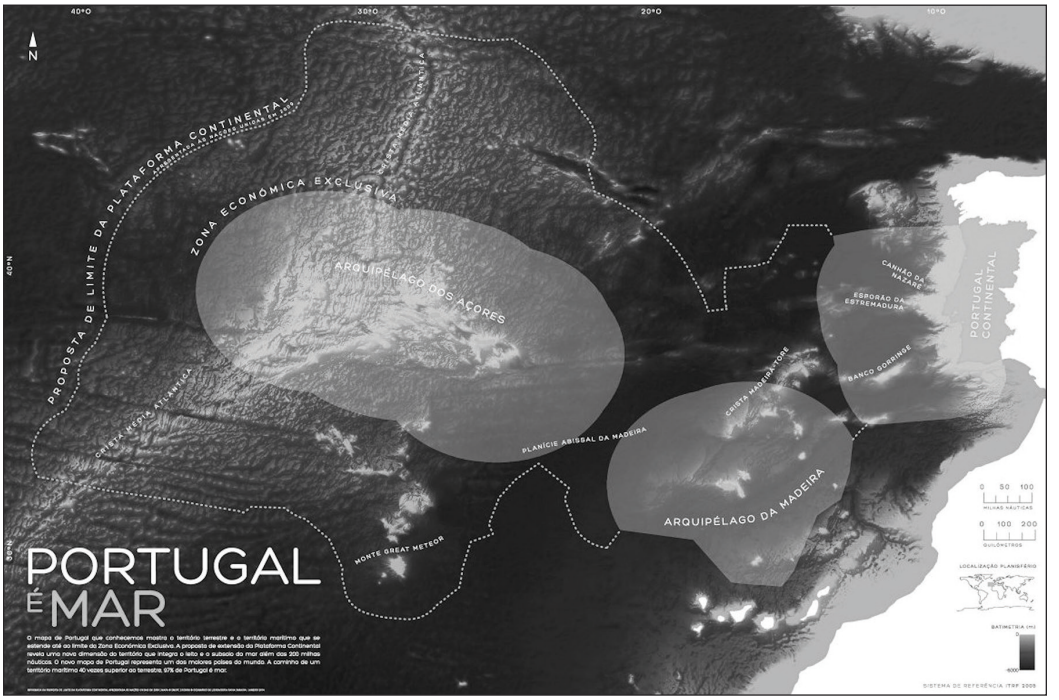
The classification of "sea power" remained an appropriate label for Portugal from the 15th century until 1974. Portugal, which was the first world-scale thalassocratic empire (emerging in 1415), transmuted itself into a pluricontinental state in 1951. That pluricontinental state was dismantled after 1974. This section and the next one shed light on the historical path of Portugal through the geopolitical approach.

2.1 Geography

In the geopolitical approach, a scholarly inquiry into a country's geographical setting requires studying the basic aspects of space and position.

Regarding the geographical space of Portugal, one can observe that the shape of the Portuguese territory is a compact rectangle with very low territorial strategic depth. It is a coastal country with 1.793 km of coastline, comprising several inhospitable cliffs and many sandy beaches, open to the Atlantic Ocean (Mackinder's *Midland Ocean*). The main ports

are Leixões, Aveiro, Lisboa, Setúbal, and Sines. Sines has the greater potential for becoming one of the largest ports in Europe—a topic to be developed in future research. The Exclusive Economic Zone of Portugal and its islands measures about 1.727.408 square km, one of the largest in the world. In contrast to its lack of depth on land, at sea (maneuver east-west), Portugal enjoys significant strategic depth.



Map 1: Portuguese EEZ. Source: https://fotos.web.sapo.io/i/oa00258ed/16628576_63lmZ.jpeg. The text of the map in the lower left-hand corner reads in translation as: "Portugal and the Sea. The map of Portugal as we know it shows the land territory and the maritime territory that spreads to the limit of the Exclusive Economic Zone. The proposal for the extension of the Continental Shelf reveals a new dimension of the territory that integrates the seabed and the subsoil of the sea beyond 200 nautical miles. The new map of Portugal represents one of the largest countries in the world. On the way to a maritime territory 40 times larger than on land. 97% of Portugal is sea." The scale on the lower right-hand corner of the map depicts Nautical Miles, Kilometers, location in the world map, an bathymetry."

The land relief of the interior north of Portugal is mountainous. The north-central region comprises the highest of the continental mountains, *Serra da Estrela*. In the south, the landscape is mainly constituted by plains with few exceptions (such as the mountain of Monchique). Most of the more important navigable rivers (e.g., Minho, Douro, Mondego, Tagus) flow from east to west with their mouths on the open Atlantic. The orientation of these rivers constitutes a natural predisposition of geography orienting the country to the ocean, contributing to the existence of a maritime culture, too.

The geographical position of Portugal was also crucial to making the country a maritime one and shaping the maritime culture of the Portuguese nation. The continuous visits of maritime peoples (from the 10th century BCE onwards) such as the Phoenicians (from today's Lebanon and Syria), Greeks (ancient Greek city-states), and Carthaginians,

with the purpose of trading, enriched the proto–Portuguese with shipbuilding and sailing techniques.

From the American perspective, i.e., that of the current main center of world power, Portugal is in the position of a gateway to Europe, and its islands on the Atlantic (Madeira and Azores) can be seen as choke points for maritime and air navigation. The Azores—located halfway between the U.S. and Europe—host a NATO airbase. The south of Portugal, Algarve, is oriented towards one of the most important choke points in Europe: the Strait of Gibraltar, which enjoys control over the entrance to the Mediterranean Sea (and is the sea's only natural entrance to the open oceans).

2.2 Identity

Describing the collective identity of a people is always a delicate endeavor. Some pieces of literature can help crystallize a few notions about the Portuguese identity, providing the rationalization of some feelings, thoughts, and impressions.[12] For the purposes of this paper, (1) a very heart-felt connection to the past and (2) an ambition of returning to the status of sea power—or at least politically, to make use of the maritime tradition in the conduct of foreign policy—are considered the most important of those notions.

In terms of the past, the crucial aspect is certainly the Portuguese sense of pride in their navigators and heroes, who created Portugal, explored and navigated the world, and created the *Ultramar* (the overseas provinces and states).[13] The sea-power tradition is so deeply ingrained in Portugal because it has persisted for so long.[14] Consequently, it is a tradition that remains very hard to erase, and that would be a task of many decades or centuries if undertaken.[15] The sea-power tradition is also rooted in the creative integration of different peoples and different races, merged from different parts of the planet. It led to the creation of a multiracial nation and a pluricontinental state, within the Portuguese cultural milieu—Portugal as a Euro-Afro-Asian-American country.[16] Perhaps the main symbol of this Portuguese sea power tradition is the armillary sphere (*esfera armilar*), which is still present in the Portuguese national flag.

As for the second notion, Portugal's aspiration to increase its maritime power is at the core. In the four last decades (i.e., after the dismantling of the Portuguese territory) a great number of works about the Portuguese national interest have still reflected upon Portugal's interest on the sea. Examples of these works are Carvalho,[17] Valente de Almeida,[18] Cardoso,[19] Sequeira,[20] and Dias.[21] Such studies involve connecting the territories where Portuguese is spoken—and in which a common history and common cultural elements (religion, habits, traditions, myths) endure—with Portuguese *grand* strategy-making. At a different level, Pires de Lima,[22] Pitta e Cunha,[23] and Moreira de Sá[24] are authors and scholars who have questioned the pertinence of associating the sea only with the past, thereby ignoring the leverage that Portugal can gain—in negotiations in Brussels and elsewhere—by investing in a geopolitical sea-power design.

2.3 Foreign Policy Pattern

Severiano Teixeira[25] systematized the reality of the "classic model" of Portuguese foreign policy, which lasted for five centuries and comprises four "historical invariants":

(1) "an opposing perception of continental Europe and the Atlantic Ocean"; (2) "strategic distancing from Europe and preference for the sea"; and in the preference for the sea, two crucial aspects: (3) "a privileged alliance with the sea power (England, USA/NATO) and the imperial project"[26] and (4) "diversification of alliances out of the Iberian Peninsula."[27] These invariants, related to foreign policy outcomes, were the result of (a) well-managed incentives provided by geography and well-conformed identity cores and (b) the action of a transhistorical class of geopolitical agents oriented to sea affairs (perception of space).

Examining the historical path to the extent possible, the Treaty of Windsor, signed between Portugal and England in 1386, constitutes the oldest political-diplomatic alliance that still binds its signatories. The Portuguese–U.S. alliance and Portugal's membership in NATO, forged in the first half of the 20th century, are coupled with the Anglo–Portuguese alliance. The former Portuguese overseas territories, provinces and states (*Ultramar*) stood as the guarantor of the Portuguese national sovereignty, which allowed Portugal to turn its face to the sea and stay relatively isolated from European continental politics. This empirical evidence supports invariants number one, two, and three. As for invariant number four, the words of Valente de Almeida[28] characterize the geopolitical setting: "Portugal [is] geoblocked by Spain and, therefore, Portugal oriented its political action to other possible directions, all of them almost exclusively maritime ones," and "Portugal transformed the sea into the principal support of its culture and its politics."[29] These explanations largely replicated conclusions by Borges de Macedo[30] and Martínez.[31]

A product of its geography and identity, Portugal has pursued, for centuries, not only domestic state-building based on the sea that connected its widespread overseas territories, but also a foreign policy heavily oriented towards the sea and other maritime countries. The "historical invariants" of the "classic model" correspond to both the identity of the Portuguese as described above and their subsequent aspiration to project power on the seas. In spite of all this, in 1974 the geostrategic orientation of Portugal—and, consequently, Portuguese foreign policy—was radically changed.

III. The Alignment of a Small Power with the EU Tellurocracy: the Portuguese Foreign Policy Shift and the Modification of the Geopolitical Design from the Sea to the Land (Two Case Studies)

3.1 The Drastic 1974 Foreign Policy Shift

The most drastic transformation in Portuguese foreign policy happened in 1974, when the geopolitical agents of the regime *Estado Novo* were removed from power and replaced by radically different geopolitical agents. As a result, a far-reaching shift of the geopolitical agents' perceptions—or an identity reversal—took place. This phenomenon represented a break in the continuity of Portugal's geopolitical design, which had been oriented entirely towards the sea since the Middle Ages, as explained in the previous section. The new geopolitical agents substituted, for the traditional geopolitical design, one exclusively engaged with

European continental politics. As said in section I, this primary orientation towards continental Europe was something totally new to the Portuguese traditions of security policy.

The years 1974–76 were a period of revolution, indefiniteness, and uncertainty in Portuguese domestic and foreign policies. The Portuguese Communist Party, a strong and well-organized force, assaulted the power structure and, assisted by other radical leftist movements, made sure that foreign policy contacts—above all with the Soviet Union—were stimulated in side-lines to the state policy, when not driving state policy itself.

In 1976, the new constitution was approved, and the political system stabilized. Although praising socialism and aiming to create a socialist state, the constitution defined Portugal as a "western country," both "European" and "Atlantic."[32] Whereas the "Atlantic choice" represents a limited continuity in Portuguese foreign policy (at least keeping the alliance with the leading sea power), the "European choice" for economic and political integration created a drastic shift. In 1977, Portugal asked to join the EEC, and did so in 1986.

Hence, it seems that the reasoning of the former Portuguese prime minister António de O. Salazar was accurate when he claimed that without its overseas provinces and states, Portugal could not guarantee its national sovereignty on the international chessboard. In fact, it took less than three years (1974–1977) for the socialist prime minister Mário Soares to ask the EEC to accept Portugal as a member-state; i.e., less than three years from 1974—when the maneuver for dismantling the Portuguese territory started—to 1977—when the request for adhesion was made. In that brief and transitory three-year period, the new-to-the-job geopolitical agents managed to dismantle the territorial integrity of the country and align the residual territory and political structure with the European bloc (the latter to assure the survival of the country in the international system).

Consequently, Portugal faced two historical phases. In the first phase, with a seat at the EEC table, the country managed to maintain its independence and not become, for example, a Soviet vassal. Yet, throughout the decades, that seat came at the cost of turning Portugal away from its traditional activities connected to the sea and of a rejection of, or lack of attention to, a great deal of Portuguese foreign policy tradition. This cost will be measured by analyzing the cases of fishing activities and the status of the navy.

3.2 The Modification of the Geopolitical Design from the Sea to the Land. Case Study 1—Fishing Activity in Portugal (1970–2019)

References to the ocean have been persistent in Portuguese political discourse for the last decade.[33] Despite that, empirical data shows an extensive and cumulative failure of policies of the Portuguese geopolitical agents with respect to the sea and their lack of understanding of the importance, for Portugal, of a sea-oriented geopolitical design.[34] In this sense, the Portuguese Strategic Concept of National Defense sheds light on the matter: "Europe is the main geographic area of national strategic interest"[35]—and adds, furthermore, that the North Atlantic comes in second place. It is noteworthy how that document places political and economic integration (ie., in the EU) before military and political cooperation (i.e., in NATO, the bilateral alliances with the U.S. and the UK) or cooperation within CPLP (the Community of Portuguese Language Countries). The consequences of "turning the back to the oceans"—or what Palmeira accurately described as "the image of a country that now turned its back to the Sea, seduced by the mirage of Brussels"[36]—can be measured

in the decline of the fishing activity and the disinvestment in the navy, mainly during the 1980s and 90s and ongoing until the present.

Fishing—one of humankind's most ancient activities—is ruled by the Common Fisheries Policy in the space of the European Union. The Common Fisheries Policy covers four main domains[37]: (1) "fisheries management," which includes rules on access to waters, fishing effort controls, technical measures, limiting the amount of fish from a particular fishery; (2) "international policy," which relates to fishing outside the EU and its implications; (3) "market and trade policy," related to "managing the market in fishery and aquaculture products"; and (4) "funding of the policy." Being this broad in scope and resonance, the Common Fisheries Policy has a huge impact on any EU country with a relevant sector. Portugal is no exception.

As stated, Portugal has a relatively long coastline and one of the largest EEZs in the world. Notwithstanding, the country suffers from an enormous dependence on landed fish. In 2018, Portugal imported more than 300,000 tons of fish,[38] corresponding to 1.3 billion EUR.[39] The data in table 1 help understand the diminishing fishing activity in Portugal.

Table 1. The decrease of fishing activity in Portugal, 1970–2019

	1970[40]	2019
Total number of fishermen	33,594	14,617
Total number in the fishing fleet (vessels)	17,583	7,768
Total amount of landed fish (tons)	365,423	137,669[41]

Source: PORDATA (2020)

Summing up, Portugal captures only 25 percent of its total consumed fish.[42] In other words, a country that enjoys all the mentioned geographical incentives imports 75 percent of its total consumed fish.

The Common Fisheries Policy certainly provided advantages to Portugal, such as EU financial support (for technological modernization, improvement of human resources, aquaculture, renewal of infrastructures), the ability to export fish from Portugal to other EU countries within the common market, and the ability to fish in the waters of other EU member states, or even in other waters included in the agreements between the EU and non-member countries.

Nevertheless, for Portugal, the negative impact of the Common Fisheries Policy was much more extensive than those advantages. Even if measures such as the imposition of quotas for TAC (total allowable catches), the prohibition of capture in specific locals and specific periods of year, and the regulation of the minimum fish size for capture could be accepted in the name of environmental protection—in the meantime, creating terrible problems for fishermen, disturbing their income and their daily operations—the Common Fisheries Policy has had additional negative consequences. The ability of vessels from other EU countries to fish in the Portuguese EEZ, after decades of EU funding for the destruction of Portuguese fishing vessels[43]—which means limiting the country's capacity to compete on sea in that activity—was certainly among the most severe consequences. Furthermore, since the Treaty of Lisbon of 2007, the EU reinforced the Common Fisheries Policy, holding the exclusive competence regarding "the conservation of marine biological resources." That seems to make it impossible for small countries to find individual solutions for their problems connected to the sector.

3.3 The Modification of the Geopolitical Design from the Sea to the Land. Case Study 2—The Portuguese Navy (1972–2019)

Leaving aside the decay of the Portuguese merchant navy—which numbers only 624 ships[44]—the disinvestment of the Portuguese government in the navy, which occurred mainly during the 1980s and 1990s, is case study number two, examining selected policy modifications involved in the change from a sea to a land orientation.

Table 2. Decay of the Portuguese Navy, 1972–2019

	1972	2019
Total manpower (navy)	19,000[45]	7,500[46]
Budget of the military (% of GDP)	4.3[47]	1.4[48]
Total number of war vessels	116[49]	41[50]

Currently, the Portuguese naval forces include a total of 41 assets, among which can be counted five frigates, two submarines, one logistic vessel, two corvettes, and 17 patrol vessels.[51] Portugal has no aircraft carrier and no destroyer. The country is ranked number 57 worldwide in naval fleet strength.[52]

Although the Portuguese government announced the construction of seven new vessels,[53] they have limited military relevance because six of them are patrol vessels and the seventh is to be used in logistic support. In addition, the measure is in no way sufficient to revert the structural disinvestment of the state in the navy, as expressed in table 2.

IV. The Portuguese Geopolitical Agents' Geomisguided Perception of Space: Causal Variable?

According to the theoretical framework of neoclassical geopolitics', which this research is based upon, foreign policy choices depend on geopolitical agents' perceptions, especially in the medium-to-longer-term, which comprises the crucial policymaking of the geostrategic alignments of the countries. For the purposes of this paper, the analysis is limited to the Portuguese minister of foreign affairs as the relevant geopolitical agent. Once the geopolitical agent is identified and delimited, it is important to clarify that, within the category of "perceptions," the "perception of space" is what counts the most for geopolitical studies. *Geomisguidance*—a concept developed by the author[54]—is a type within the classification of the perception of space by the geopolitical agents, designating their ignorance or misunderstanding of the geographical setting's incentives (and possibly other aspects of systemic stimuli as well). The comprehensive methodological task, at this point, is to study the "consciousness horizon."[55]

Having formulated these necessary theoretical considerations, the main point of this section is to tie the research up, referring to the tellurocratic aspect of the EU, explaining

that the Portuguese geopolitical agent *downloads* tellurocratic policies from Brussels—therefore, assuming its geomisguidance—and, finally, suggesting that the compliance of the Portuguese geopolitical agent with the tellurocratic aspect of the EU can explain the deterioration in the activities of the two case studies of the previous section.

There should be little doubt that the EU is a tellurocratic organization, i.e., inland-oriented. For example, the topic of the "European army" is often on the table for discussion, but not often the topic of a "European navy"—which should be much different from the associated national maritime forces participating on the European Maritime Force (EUROMARFOR). In addition, although the EU has an "Integrated Maritime Policy," its vision is not concerned with any military aspect, not even remotely.[56] Finally, the EU is eminently focused on neighboring seas[57] rather than global sea lines of communication, as in the case of any prototypical global sea power.

While describing the "European policy of the government," the Portuguese minister of foreign affairs, Santos Silva, clarified that the Portuguese government has no policy beyond the agenda settled by Brussels: "coherent defenders of the European unity and values, humanitarian approach to refugees and migrants, energetic reconversion, EU relations with Africa and Latin America, agenda of multilateral relations … and cautious management of Brexit."[58] Therefore, there exists an overlap of objectives between Portugal and the EU.

However, evidence is required to confirm that Portugal is a "norms-taker" and, in general terms, does not seem to formulate an autonomous foreign policy within the EU. A piece of evidence in that direction was given when the minister was asked by an interviewer about the possibility of strengthening the bilateral U.S.–Portugal relations—taking advantage of the opportunity of the "less collective inclination of Trump's administration." The minister replied, "No.… In the agenda of the relationship between the EU and the USA, we are with the EU."[59] In other words, to this geopolitical agent, there is no alternative to the EU directives and the common foreign and security policy of the EU—and the same applies to the whole government.[60] A similar position was adopted concerning Brexit.[61] These pieces of evidence attest that, while having an opportunity to bring back or to reinforce Portuguese traditional strategic sea culture—which reacts to the incentives of the geographical setting and corresponds to the current national aspiration for maritime projection of power, as mentioned in section I—in the bilateral alliances with the U.S. and the UK, the Portuguese geopolitical agent chooses to *download* policies from Brussels. Even in the unlikely event that Portugal could assertively shape the EU's position in its favor—for example, in relations with the U.S.—it would be certainly easier for Portugal to negotiate bilaterally with the U.S. than to go through the complex EU decision-making process, in which the individual interests of the countries tend to be melded in the name of the EU collective interest (which is inland oriented, as mentioned). Or, in the words of the minister in his address to a diplomatic seminar in January 2019, "Portugal has never vetoed any decision-process in the EU—and will never do it, at least, while I am the minister of foreign affairs."[62] This strong statement means that, for the Portuguese minister, should the (maritime) interests of Portugal clash with inland EU interests, the latter would prevail.

These choices not only are at the core of the idea of something that could be called a decision-*accommodating* process in Portugal, but also reveal *geomisguidance*, due to the existence of an acritical fascination, or compliance, with the EU. In this way, it seems reasonable to infer that what ultimately matters for the Portuguese geopolitical agent is not

Portugal's conventional national aspirations and traditional narratives, but European common foreign and security policy instead—*accommodated* in Portugal as a "national interest," determined as such by the geopolitical agent. This reality is nothing new in the literature. For example, in his masterpiece about foreign policy, Bessa[63] noted that the national interest is always an ultimate prisoner of the political class (i.e., the geopolitical agent).

It follows that the causal hypothesis of the influence of the geopolitical agent's perceptions (the intervening domestic variable) on foreign policy outcomes is confirmed. It seems justifiable to infer that both the deterioration of fishing activities in Portugal and the decay of the Portuguese navy can be explained as results of the orientation of the country to land politics and the subsequent decades-long loss of interest in sea affairs, and that that land orientation can be explained by the mentioned far-reaching shift of the geopolitical agents' perceptions, or an identity reversal, which occurred from 1974 onwards.

Hence it is observable that in the policy-making process, there is little or no interaction between the geographical setting and the identity reality of Portugal on the one hand, and the system of ideas and representations of the decision makers—or the geopolitical agent's perceptions—on the other. The incentives provided by the geographical setting and the national aspirations of the Portuguese for maritime power projection, based on the Portuguese identity reality, have been ignored or dismissed by the Portuguese geopolitical agent. It seems reasonable, consequently, to insist in the conclusion that the Portuguese geopolitical agents have been *geomisguided*.

The alternative explanation is that the European Union's principles and norms shape the Portuguese geopolitical agent's perceptions and, accordingly, shape the purposes and the conduct of the state's geopolitical design. This is a case that illustrates decision-makers being ready to adjust their policy preferences for the sake of the common policy. According to the research results, it seems to be the case with the current Portuguese geopolitical agent.

As the Portuguese ambassador Marcello Duarte Mathias declared, the Portuguese acquired an "inferiority complex."[64] That psychological characteristic has become even stronger in the political class—or the geopolitical agent, as the actor who matters for this research. One of the consequences of that is not only accepting what foreign authorities establish as policy but going beyond them. This is the case of the instructions and policy formulated by Brussels, which have then been imported to Portugal through a murky "decision-making" process. In these terms, it seems to be more accurate to label the process as "decision-*accommodating*."

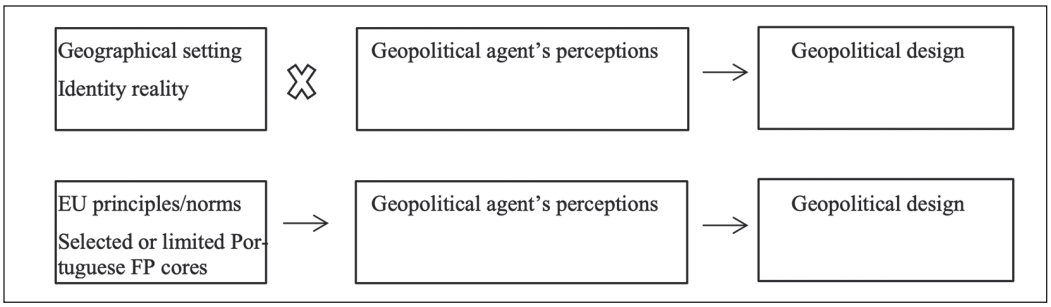


Fig.1—Conflicting hypotheses

V. Conclusion

This paper's central objective was to explain the decades-long irrelevance of the incentives provided by Portugal's geographical setting and Portuguese national sea-power aspirations—as systemic opportunity, traditional narrative, and strategic culture (independent variables)—in the shaping of Portuguese national security policy or geopolitical design (dependent variable). This mismatch was measured through fishing and navy-related policies—as crucial economic and military aspects of sea affairs—which have been neglected since 1974, and especially in the 1980s and 1990s. Portugal captures only 25 percent of its total consumed fish, and the Portuguese navy is today largely irrelevant in the sea-power competition. The hypothesis of a causal mechanism between the Portuguese geopolitical agent's perceptions (intervening variable), which are determined largely by EU principles, norms, and decisions—and to a much lesser extent by selected Portuguese foreign policy cores, such as the alliance with the major sea power—on the geopolitical design was confirmed. Therefore, the Portuguese geopolitical agent was also characterized as *geomisguided*.

Thus, this paper provides evidence to sustain the argument that Portuguese domestic policy-making, in security terms, takes place at the EU supranational level. Then it is imported to the country. The research designated these dynamics as "policy-*accommodating*." Thus, Portugal has been a classic example of a norms-taker; in other words, in Portugal we see a case of "downloading," through which the EU international structure shapes the fundamental security policy outcomes of the state.

Hence, dualism and contradiction are to be emphasized. If the ocean, transatlantic relations and the alliance with the U.S., the alliance with the UK, and the Lusosphere did not vanish from Portuguese political discourse—as confirmed by analysis of the documents—the Portuguese geopolitical design has been (and, all things being equal, will continue to be) ultimately determined by its membership in the EU, i.e., by the interests of EU foreign and security policy.

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Notes

1. An earlier version of this article was presented in the workshop *Small States and Security in Europe: Between National and International Policy-Making*, at the University of Cambridge, in June 2019.

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27. Severiano Teixeira (2010), Author's translation.

28. Políbio Valente de Almeida [1989] 2012, pp. 402, 403.

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Maritime Sector as a Growth Engine for Vietnam: A Case Study

Nitin Agarwala

Structured Abstract

Article Type: Research Paper

Purpose—The "Doi Moi" (renovation), or economic reform program, of the mid-eighties helped Vietnam to transition from a centrally planned economy to the fastest-growing economy in Asia and to remove poverty from the country. With a coastline of more than 3,260 km, it was natural for Vietnam to exploit the "maritime sector" for socio-economic development. As a result, the economic contribution from the sea and coastal areas rose to nearly half of the total GDP in 2010–15. In order to emulate this economic growth from the maritime sector elsewhere, Vietnam needs to be studied to draw out lessons for other maritime nations.

Design, Methodology, Approach—Using desk-based qualitative research, the author analyzes Vietnam's maritime sector as an "engine of economic growth" and the areas developed. Eventually, lessons are drawn out for other maritime nations who wish to use the maritime sector as an "engine for growth" for their own economies.

Findings—Vietnam made substantial land-based economic advances as a result of "Doi Moi." To sustain and enhance the development curve, the government began focusing on the maritime sector. While growth has been stupendous, in many cases it has not met its planned targets. The model used, however, provides lessons for others to emulate and adapt for their own growth.

Practical Implications—The contribution explains how the maritime sector can be used for the economic development of a nation and the pitfalls that loom large in this effort. It also provides some lessons for other maritime nations who wish to encourage their own economic development through this sector.

Originality, Value—This contribution examines how the maritime sector has helped economic development in Vietnam and how this model can be used successfully by other maritime nations.

Keywords: Doi Moi, economic growth, maritime-sector, Vietnam

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Table of Acronyms

b/d	barrels per day
dwt	deadweight
ha	hectares (~ 0.01 sq km)
km	kilometers
ASEAN	Association of Southeast Asian Nations
GDP	gross domestic product
EEZ	Exclusive Economic Zone
ESRT	Environmentally and Socially Responsible Tourism (EU-funded)
EU	European Union
FDI	foreign direct investment
ILO	International Labor Organization
IUU	illegal, unreported and unregulated
NM	nautical mile (~1.15 miles)
MNC	multinational corporation
MOLISA	Ministry of Labor Invalids and Social Affairs
SBIC	Shipbuilding Industry Corporation
SCS	South China Sea
SEZ	Special Economic Zone
SME	small and medium enterprises
SOE	state owned enterprise
VIMA	Vietnam Inland Waterways Administration
VIMC	Vietnam Maritime Corporation
VINALINES	Vietnam National Shipping Lines
VINAMARINE	Vietnam National Maritime Bureau
VINASHIN	Vietnam Shipbuilding Industry Corporation
VNAT	Vietnam National Administration of Tourism
U.S.	United States
USSR	Union of Soviet Socialist Republics

I. Introduction

In 1980, with inflation soaring to over 700 percent, slow economic growth, import spending greater than the export revenues, a reduction in Soviet aid and increasing international isolation, the sixth National Congress of the Communist Party of Vietnam brought about major changes in Vietnam's planning system and in 1986, introduced the "Đổi Mới" (hereafter Doi Moi) by launching free-market reforms. These reforms aimed to decentralize the government, devalue the dong, end price control, encourage private businesses, encourage free markets, disband collective farming while giving land titles to farmers, encourage foreign investors, streamline bureaucracy, close inefficient government monopolies, and open farming and small service industries to individuals and

families.[1] The reforms to follow in the agricultural sector, policies, programs and priorities that included partial privatization (equitization)[2] of state-owned enterprises, liberalization of the trade and investment regimes, and modernization of the financial sector growth were possible only due to the development of small and medium enterprises (SMEs). These reforms helped Vietnam become a major agricultural exporter and an important destination for foreign investment in this part of the world. It helped Vietnam join the World Trade Organization in 2007 and to achieve the highest economic growth rate in the world continuously since 2000. In 2011, Vietnam was identified as the nation with the highest growth potential and most profitable investment opportunities among 11 major economies shortlisted and studied by Citigroup.[3] In the first half of 2018, Vietnam's economy grew at 7.1 percent year over year and manufacturing boomed at 12.9 percent. The construction sector grew at 9.1 percent, while agriculture and services grew at 3.9 and 6.9 percent, respectively.[4]

As history has revealed, countries that have developed a maritime economy have shown even greater economic prosperity and created millions of jobs. The U.S., China, South Korea, Japan, Russia, and Europe have all relied extensively on the oceans to develop their economies.[5] This has made the maritime sector a key investment area for countries wishing to enhance their economic development. In this regard, Vietnam is no different. Having developed a healthy internal economy, Vietnam began to look outwards and realized that the maritime sector had a great potential for impacting their economy. With an aim to enhance their sea-based economy and protect national sovereignty over islands and seas, the 10th Party Central Committee in 2007 adopted "Vietnam's Maritime Strategy Towards 2020."[6] A myriad of guidelines, policies, and generous investments for sectors reliant on the sea helped turbo-charge Vietnam's coastal economic growth.

In order to examine this growth, this article first looks at the geographical location of Vietnam before studying the contribution of the maritime sector as a "growth engine" of the economy of Vietnam and how the government policies have supported this growth. It analyzes the downside of this growth and the weaknesses that inhibit this sector from realizing its full potential. Finally, it concludes by providing some lessons for other maritime nations who wish to use the maritime sector for their own economic growth.

II. Background

Vietnam occupies the easternmost location in the Indochina peninsula. It is a Southeast Asian country that is S-shaped, as seen in figure 1. It spans a north-south distance of 1,650 km and has an east-west width of 50 km at the narrowest point. Its coastline, which stretches over 3,260 km, oversees the linking of the Pacific Ocean and the Indian Ocean. The seas of Vietnam are rich in natural resources, both living and non-living. The Gulf of Tonkin (Bắc Bộ Gulf) and the South China Sea (referred to as the Eastern Sea in Vietnam), which wash the eastern shores of Vietnam, are the world's second busiest in shipping, accounting for nearly a quarter of global ship traffic,[7] while the Gulf of Thailand in the southwest provides economical fishing grounds and water-based adventure activities such as diving and snorkeling (at Phú Quốc) due to shallow and clear waters.

Figure 1: **Geographical location of Vietnam (Source: NgaViet[8])**

Vietnam's terrestrial topology is fairly diverse, including green mountains, fertile deltas, and tropical rainforests. The north has plateaus and the Red River Delta; the central region has coastal lowland and highlands, and the south has the Mekong River Delta, of which only 17 percent is arable land.

For many years, historians of Vietnam disregarded oceans as a possible source of economic growth and hence paid little attention to the linkages between maritime activity and

the economy of the country.[9] Their history has shown that since the age of sail, Central Vietnam has played a strategic role, as ships transiting the South China Sea had to hug the central coast to avoid the dangerous shoals of the Paracel (Hoàng Sa) and Spratly (Trường Sa) islands. This importance led to various clans' and rulers' vying for control over the central region. There was a time when this region provided seafarers and pirates alike to the world of shipping.[10] Things changed in the 15th century due to Chinese isolationist policies that led to the stoppage of movement to and from China. This reduced the movement of ships in the South China Sea and hence the influence of Vietnam. Later, with availability of modern navigation techniques that allowed for safer navigation, the need to visit central Vietnam was lost. As a result, the maritime history of Vietnam and its importance in the global maritime economy was forgotten. This led historians to regard Vietnam as a land-based country for many years. In 2006, this land-based gaze was challenged by various historians[11] who showed that commerce and interaction with people from the sea were common sights in Vietnam's past. Such commerce and interaction greatly contributed to the overall economic development of the nation.

III. Maritime Sector

From 1986 to nearly 2000, Vietnam's economy stabilized due to changing policies that were primarily inward-looking. With a stable internal economy, the country began to look outward, and it became essential to reconsider the sea-based economy. To ensure that the sea-based sector contributed to the national economy and ensured national defense and security, Vietnam's "Maritime Strategy Towards 2020"[12] was adopted in 2007. This strategy focused on prioritizing the sustainable development of a sea-based economy.[13] Subsequently, realizing that the committed targets of development had not been achieved and to incorporate sustainability in the growth targets in line with the UN Sustainable Development Goals (SDG) 2030 (adopted by the UN in 2015), the 12th Party Central Committee reviewed the strategy to adopt the "Maritime Strategy Until 2030, with Vision Until 2045," in 2018.[14]

The 2007 strategy set out two goals to be achieved by 2020. One of raising the ocean-based economy to 53–55 percent of the country's GDP and the second, to double the per capita income of the coastal communities as compared with the average of the entire country. The strategy of 2018, which followed, targeted the maritime sector to contribute 10 percent of the GDP and the 28 coastal cities and provinces to contribute 65–70 percent of the nation's GDP by 2030. With such policy-based focus and support from the government for maritime development, this sector saw growth and has contributed considerably to Vietnam's economy over the last 20 years, making it a growth engine for the economy of Vietnam.

In order to appreciate the economic development achieved by Vietnam due to the maritime sector, we need to look at the priority areas laid out by Vietnam's "Maritime Strategy Towards 2020." These include:

(a) Oil and gas (as ocean mineral resource)
(b) Fisheries/aquaculture (as living resources to include sea plants)
(c) Shipping (for transportation and shipbuilding)

(d) Marine tourism (as leisure services)
(e) Economic zones (as per the Law of the Sea of Vietnam)
(f) Marine education (for preparing future generations)
(g) Inland and coastal waterways (for internal transportation of cargo and people)

3.1 Oil and Gas Sector

Offshore oil production has helped the overall economy of Vietnam. In 1989, Vietnam bought petroleum products valued at 387 million rubles from the USSR, and its overall trade deficit with Moscow was at about 871 million rubles. In 1990, with major help from sales of offshore oil produced in Vietnam, the trade deficit fell to slightly more than 400 million rubles. By the mid–1990s, Vietnam attained a favorable trade balance with the USSR. Since then, with more than 30 years of construction and development, Vietnam's oil and gas industry has achieved remarkable progress. Vietnam's crude oil reserves, primarily located in the south, are the second largest in East Asia. Vietnam is also rich in natural gas. It has proven gas reserves of almost 7 trillion cubic feet in several fields, while many newly discovered gas fields are leading to a rapidly increasing overall oil and gas output.[15] The total investments in this industry are about US$7 billion, with over a dozen Vietnamese oil companies producing nearly 5 percent of global oil and gas.

Vietnam as a nation is a net exporter of crude oil but is a net importer of oil products. These imports are on the rise, with oil demand increasing from 250,000 barrels/day (b/d) to an estimated 445,000 b/d between 2006 and 2016.[16] To reduce imports, Vietnam has built two refineries. Dung Quất has been operating since 2009 and has a capacity of 130,000 b/d, which by 2022 will increase by 40,000 b/d. After achieving this increase, the refinery would be able to provide fuel to Euro IV standards and handle a broader range of crude grades. The Nghi Sơn Refinery began refining in 2017 and has a capacity of 200,000 b/d.[17]

While other refinery projects are being planned, they lack financial resources for execution. Other challenges experienced by the industry include bureaucratic systems, approval procedures that are long and invariably lead to project delays, incompetence of both the design and the project teams, and insufficient tendering.[18] However, vast resources, a well-educated workforce, and changes in government policies to address systemic shortcomings and allow foreign ownership and significant investment in infrastructure have attracted foreign investors in the oil and gas industry. This has made the oil and gas sector Vietnam's biggest foreign currency earner and one of the main importers of technology. Currently, this industry contributes US$1 billion to the state budget every year. The number of employees in this industry has increased steadily from 2,000 in 1975 to 21,000 in 2005, 35,000 in 2009, 44,000 in 2010, and 60,000 in 2011.[19]

3.2 Fisheries Sector

Vietnam has a coastline of over 3,260 km. It has more than 3,000 islands and islets and up to 2,860 rivers and estuaries. These features provide Vietnam with ideal conditions for the fisheries sector to be successful. It has water bodies of 1,700,000 hectares (ha) (freshwater, 811,700 ha; brackish, 635,400 ha; coves, 125,700 ha; and wetlands, 300,000–400,000 ha)

that can be used by this sector.[20] Traditional fishing in Vietnam is comprised of *in-shore* (in rivers, lagoons and up to 4–5 NM from the coast) and *coastal* (up to the edge of the continental shelf) fishing.

It was only in 2007 that *offshore* fishing, under the "Program on Offshore Fishing of 1997," driven by the country's political aspirations to elevate itself to a status of "regional maritime power,"[21] was developed. At the beginning of the millennium, in-shore fisheries represented about 70 percent of the catch, but by the end of 2007, offshore fisheries had caught up, representing half of all catches. These changes came about due to an increase in vessel size and the growing professionalism of fishermen.[22] Today, Vietnam is the third-largest seafood exporter worldwide.[23] At an annual growth rate of 12.6 percent, the export value has risen from US$2,444 billion in 2004 to US$8,029 billion in 2014.[24] By 2012, more than 5 million people were directly employed by this sector, and around 8 million, or about 10 percent of the country's population, derived their main income from fisheries.[25]

Much of the growth in the fishery sector can be attributed to the growth of aquaculture (freshwater, approximately 65–70 percent; brackish water [mainly shrimp], more than 40 percent of the overall value of production; crab, marine fish, and mollusc, the remainder). The overall production of the fishing sector grew at an average rate of 7.05 percent from 1991 to 2000, and 10.25 percent from 2001 to 2010, while that of aquaculture increased from 30 percent in 1990 to 52 percent in 2010. This growth is attributed to a growing domestic market and a strong export market. With 500 processing centers qualified to export products to markets in Japan, the EU and the U.S., this sector is one of the fastest-growing of all sea-based sectors. Aquaculture has seen an increase in the total output from 2.07 million metric tons in 2007 to 3.19 million metric tons in 2017.[26]

According to the "Master Plan" issued on August 16, 2013,[27] the total fisheries production is to reach 7 million tons by 2020 and 9 million tons by 2030, of which aquaculture production will account for 65 and 70 percent, respectively. The value of seafood export will be around US$11 billion by 2020, with average growth rates of 7–8 percent, and then, by 2030, this value will reach US$20 billion, with slower growth rates of 6–7 percent. Moreover, this sector is to provide training to 50 percent of fishery laborers by 2020 and 80 percent by 2030.[28]

The current advancement of the fisheries sector has faced a number of constraints and deficiencies. These were primarily due to natural hazards, lack of awareness or knowledge (in what to catch and the available biologic resources), lack of fishing vessels (to handle various types of fish), underdeveloped shore facilities (such as storage, depuration facilities, "cold chain" facilities, and marketing facilities), lack of access to credit (to help fishermen purchase boats and equipment), low hygienic standards among farmers and processors (making the processing industry unacceptable to foreign markets), and lack of quality tools and chemical monitoring (thereby reducing output), to name a few. While most of these difficulties have been overcome, some are recurring, and there are some, like overcoming the mindset of people to "exploit" rather than "sustainably exploit,"[29] which remain to be addressed.

To assist in the development of this sector, the Vietnamese government has introduced several policies. These include generous credit lines for fishermen to build ships capable of offshore fishing, ensuring that all fishing vessels have information-communication devices to monitor and ward off illegal, unreported, and unregulated (IUU) fishing, building

support infrastructure including ports and shelters, and providing financial support to compensate for post-harvest losses. Further, various government policies have helped increase the number of iron-clad and wood-clad fishing vessels for offshore fishing. For entrepreneurs, government support and the possibility to diversify into clams, oysters, and mussels are big incentives. Furthermore, since the government plans to invest in developing ports and to integrate and modernize logistics services for fishing, the offshore fishing sector is likely to attract further investment.[30]

3.3 Shipping Sector

The main components encompassing the shipping sector include *ships, ports,* and *shipbuilding*. For the comprehensive industrialization and modernization of a nation, a functional and developed shipping sector is considered essential. Such a developed shipping system lays the foundation for better integration of the country into the global economy and helps to provide a competitive edge in sea transport over regional and global players. Of these components, seaports are the interface between the world and the country for moving cargo and people. Ships are required to ensure the movement of this cargo and passengers to and from these ports, and shipbuilding ensures the availability of ships for domestic use and for foreign buyers.

In one of the main thrusts of the maritime strategy, the aim of the government is to restructure the shipping industry and expand the deadweight (dwt) capacity of the fleet to 6.8–7.5 million dwt. In addition, they plan to increase the seagoing cargo carried to 21–25 percent and passengers to 0.07 percent by 2020. This increase has helped the marine economy to expand in the fields of transportation, port services, and shipbuilding by 22 percent each year from 2007 to 2010 and by 13 percent from 2011 to 2015.[31]

With approximately 80 percent of global commodities being transported by sea,[32] *ships* are considered the key mode of transportation. This has allowed them to become a major driver for the development of nations and globalization. With this in mind, Vietnam has paid due attention to the development of its maritime transport. According to the Vietnam Maritime Administration, the country had, by the end of 2018, a fleet of nearly 1,600 ships (dwt ~7.8 million metric tons) consisting of only 42 container ships, which put its fleet in fourth place among ASEAN countries and 30th in the world.[33] These ships can handle 144.5 million metric tons or 55.6 percent of total cargo handled in a year. They are mainly used for domestic trade,[34] with only 10–12 percent of total bulk cargo being carried on bulk carriers to Europe. Since the country lacks seagoing ships, the available ships are used for short hauls only.

To support larger ships, *ports* that can accommodate ships of 100,000 metric tons and modern container ships have been built, and existing ports have been upgraded to handle ships of 10,000 metric tons. Similarly, many international passenger ports and specialized ports for industrial parks have been built to attract investment and bolster the economy of coastal localities. Today, Vietnam has a total of 44 seaports, including 166 terminals through which cargo moves, accounting for 90 percent of its imports and exports by volume.[35] This has allowed the sea cargo throughput to increase from 172.97 million metric tons in 2012 to 293.14 million metric tons in 2018.[36] As for the available port infrastructure, the World Economic Forum ranks Vietnam's port infrastructure at 3.8 on a scale of 7, indicating that improvements need to be made.[37]

Shipbuilding is considered to be one of the major industries in the economic development strategy of Vietnam. Accordingly, ambitious plans were adopted to improve competitiveness in the international market for shipbuilding and maritime transportation industries. The government decided to support the shipbuilding sector to make Vietnam one of the major shipbuilding nations to attract enterprises specializing in maritime facilities as well as in the production of high-grade components and materials.[38] From 2006 to 2010, the shipbuilding industry hired foreign experts to help Vietnamese shipbuilding to build big ships for export. This helped them build containers and bulk carriers of capacity 30,000 to 50,000 dwt and oil tankers of 100,000 dwt capacity.[39] Today, countries including the Netherlands (at Song Cam shipyard),[40] Poland (at Ha Long shipyard),[41] Finland (at Pha Rung shipyard), Korea (through Hyundai-Vinashin)[42] and Australia[43] build ships in Vietnam through active collaboration. Similarly, Vietnamese shipbuilding has been supported by various foreign design institutes such as Hitachi Zosen (Japan), Carl Bro (Denmark), Kitada Ship Design Co. (Japan) and CTO (Poland) and active marine equipment manufacturers such as Denmark's MAN B&W Diesel A/S, Mitsubishi Heavy Industries, Ltd. (MHI), Wartsila Switzerland, Ltd., the German firm Thyssen-Krupp AG, Finland's Macgregor Group, and the Danish Aalborg Industries.[44]

3.4 Maritime Tourism Sector

The world over, the tourism industry is witnessing a boom. For Vietnam, from 1960 to 1975, tourism was developed for political reasons. It was only between 1976 and 1990 that its economic potential was realized. Since the 1990s, tourism has been supported as a tool of economic growth, a major source of job creation, and a means of poverty alleviation to help the country move from its focus on small-holding agriculture to a service-oriented economy that includes logistics, transport, trade, communication, services, and banking.[45] It has been estimated that in the core tourism industry, for every one job nearly 1.5 additional jobs are created in a related field.[46] In order to link the hinterland community with the coastal community for a holistic development of the nation, a number of initiatives are being made by the International Labor Organization (ILO). These initiatives are aimed at ensuring that poor and isolated communities can connect with the tourism industry and sell their handicrafts. However, as of today, the 28 coastal cities and provinces are the ones generating 70 percent of the overall revenue.[47] Currently, the growth of tourism in Vietnam is mainly a result of urban transformations that have allowed FDI in the hotel industry.

Since Vietnam has 125 tourist beaches that boast the greatest sea and island potential among the Southeast Asian nations, in August 2013, the Ministry of Culture, Sports, and Tourism signed on to the project for "Development of Vietnam's Islands, Sea, and Coastal Region Tourism by 2020." This project has drawn a large number of foreign and domestic investors that account for 70 percent of the sector's total investment. Similarly, another area set for development by 2030 is cruise tourism. This sector in Vietnam is still in its nascent stages of development, as it has reported annual growth of only 2 to 3 percent, a contrast to the significantly higher rates of other Asian countries.[48]

The challenges that the industry faces include the failure of local authorities to maintain pristine attractions, an increase in pollution and traffic, lack of personal safety due to robberies, thefts, and mugging, an increase of visa fees, and the high cost of accommodation and general travel. To address these challenges, the Vietnam National Administration

of Tourism (VNAT) initiated a capacity-development program with the EU-funded Environmentally and Socially Responsible Tourism (ESRT) in 2012.[49] This effort helped develop an action-oriented and practical strategic marketing plan to provide direction, priority, and finer detail to Vietnam's tourism marketing activities over the medium to long term. The objectives of this program as given in the "Vietnam Tourism Marketing Strategy to 2020 and Action Plan 2013–2015"[50] are as follows:

> (a) *Economic*—To attract 10–10.5 million international visitors by 2020 (7.6 percent annual increase) and serve 48 million domestic tourists (5.3 percent annual increase) so as to increase tourism revenue to US$18–19 billion by 2020 (at a 12 percent annual increment). This would contribute 6.5–7 percent of GDP, attract an investment of US$42.5 billion and increase room supply to 580,000 rooms by 2020.
>
> (b) *Social*—To increase employment in tourism to over 3 million jobs, of which 870,000 are to be direct jobs so as to improve the lives of the people.
>
> (c) *Environmental*—Develop green tourism activities so as to preserve and promote the value of natural resources and environmental protection to comply with environmental laws.

3.5 Economic Zones

By the end of 2017, 18 *coastal economic zones* (where foreign investors are willing to locate production bases while exporting 100 percent of their production) had been established on a total area of 845,000 ha, with an investment of around US$78.6 billion. These were in addition to the 58 centralized *coastal industrial zones* (to accommodate foreign and local companies to cater to domestic and export markets) spread over 13,600 ha, 27 border economic zones, and 325 state-supported industrial parks. The coastal economic zones generated US$14.3 billion in 2017, as compared to USD$8 billion in 2016, and brought in USD$1.3 billion in tax. Along with the industrial zones, new settlements were created to cater to the workers' accommodations and facilities. Modern resorts and residential areas were built for professionals and managers. These all created at least 130,000 jobs.[51]

Even though there is public resentment in Vietnam regarding Special Economic Zones (SEZs), the Vietnamese government sees these SEZs as an important source of momentum for future economic growth and institutional reforms. This is due to the outstanding developments of other SEZs in China, the UAE, and Singapore. In addition, developments such as the need for fresh initiatives for maintaining domestic economic growth amid global changes due to the Fourth Industrial Revolution and new-generation trade agreements have forced the Vietnamese government to support these SEZs. Furthermore, this support has become essential, as the government has already offered favorable incentives for establishing SEZs but has failed to attract high-end manufacturers, new technologies, or modern management know-how.[52] Retreating now is not an acceptable option.

3.6 Marine Education

Before 2006, Vietnamese human resources were widely regarded as inadequate, both in terms of quality and quantity, to address the growth of the maritime economy. The

management-level officials lacked professional skills, the sailors were considered fit for only coastal waters and the researchers and scientists were insufficient in number. In order to make corrections, the government issued several policies. The Ministry of Education and Training introduced incentives and support for college students or researchers coming from economically challenged coastal areas and islands. This allowed them to expand the list of majors related to "sea and islands" to a total of 20 at the undergraduate and graduate levels. Similarly, the Ministry of Labor Invalids and Social Affairs added 15 occupations to the existing list to support training. By 2016, training was provided to nearly 30 percent of eligible offshore fishermen (nearly 20,000 in total). With time, the number of vocational institutes increased to 90 colleges, 133 high schools and 454 centers. Many universities have added sea economy and management majors to their curriculums and some medical schools have started programs dedicated to training marine medicine professionals and doctors. Additionally, to provide technical assistance and technology transfer in the field of marine ecology and natural resources, the Vietnamese government has signed agreements with Japan.[53]

3.7 Inland and Coastal Waterways

Vietnam has many inland waterways. Waterways have been used for the transportation of goods since the early civilization, and they continue to be used by nearly all countries to meet their domestic transportation requirements of goods and people. However, in most countries, due to continual neglect, the waterways have become constrained due to inadequate depth and width and unprotected banks. The same is the case with inland waterways in Vietnam. It is due to this degradation of waterways that expanding and preserving the road network uses close to 80 percent of public spending.[54] Understanding the potential of the inland waterways and the benefits they can provide to the nation and the environment, the Vietnamese government wants to develop the inland and coastal waterways.

Vietnam has 80,000 km of rivers of which 41,900 km are navigable. Of this, only 6,230 km are managed by the Vietnam Inland Waterways Administration (VIWA) and the rest by local governments. Though these waterways carry close to 17.8 percent of the total cargo of Vietnam and the government wants them to be developed, a lack of funding prevents their getting adequate attention.[55] While the target was to increase cargo-carrying by these waterways to 32 percent by 2020, this has yet to be achieved. In order to ensure better progress, the inland and coastal waterways are being privatized for both development and use.

IV. Impact of Policies on the Maritime Economy

In the foregoing discussion, the major policies of Vietnam to achieve economic growth by focusing on the maritime sector have been discussed. While the "Maritime Strategy Towards 2020," adopted in 2007, and the "Maritime Strategy Until 2030, with Vision Until 2045," adopted in 2018, are the two main guiding policies, they have been supported by numerous decrees, resolutions, and specialized laws to manage and implement the policies, strategies, schemes, and programs for the overall socio-economic development and security of Vietnam. Some of these are the "Law of the Sea of Vietnam" (2012), the "Law on

Sea and Island Natural Resources and Environment" (2015), the "Maritime Code of Vietnam" (1980 and amended in 2005 and 2015), the "Law on Fisheries" (2003 and amended in 2017),[56] the "Petroleum Law" (1993 and revised in 2000, 2008 and 2014), the "Law on Environmental Protection" (1993 and amended in 2014), the "Criminal Code" (2015), the "Law on the Vietnam Coast Guard" (1998 and amended in 2008 and 2018), and the "Law on Militia and Self-Defense Forces" (2009)[57] along with numerous other regulations related to the seas and islands. While the 2007 strategy aimed to make Vietnam a powerful and prosperous maritime nation by firmly ensuring national sovereignty and sovereign rights on the sea and islands, the 2018 strategy aimed to achieve the same goals as those of the 2007 strategy, by incorporating the concept of sustainability in line with those promulgated by the UN as part of SDG 2030.

Though the strategies laid out by Vietnam for growth using the maritime sector have been successful to a large extent, they have failed to achieve their full potential due to conflicts in the South China Sea (SCS) caused by a lack of resource-sharing treaties and delimitation of maritime boundaries. It is important to understand that these disputes have a "historical connect," as is explained in the succeeding paragraphs. Such disputes have forced Vietnam to redirect a major portion of its available resources and efforts towards maritime security and dispute management rather than the realization of the maritime economy.

4.1 The Law of the Sea of Vietnam

Former South Vietnam was involved in developing UNCLOS until the unification of Vietnam in 1975. Subsequently, unified Vietnam continued the negotiations and was one of the initial signatories in 1982. Being one of the primary negotiators, Vietnam claimed the whole range of maritime zones, viz. a 12-nautical mile territorial sea, a 12-mile contiguous zone, and a 200-mile EEZ including a major part of the Gulf of Thailand and the Tonkin Gulf, as "historical waters"[58] and ratified UNCLOS well before any other country.

Under UNCLOS, coastal states can either bend the rules to maximize national interests or can justifiably interpret UNCLOS. Accordingly, initially, Vietnam followed the first approach and considered the Paracel and Spratly archipelagos as two distinct territories and stretched the "Law of the Sea" when defining its own coastline. It drew straight baselines along its coast using its islands, thereby subsuming huge areas of sea as internal waters where ships of other nations did not have a right of innocent passage. On a similar note, the waters of the Gulf of Thailand and the Tonkin Gulf were considered shared internal waters between two countries, while the strait of the Tonkin Gulf was considered internal "Chinese" waters. This radical interpretation of the "Law of the Sea" by Vietnam actually proved counterproductive, as it contributed to legitimizing the claims of countries like China by bending international law and giving rise to the maritime territorial disputes in the SCS.

Finally, the danger of stretching international law to benefit individual national interest was understood by Vietnamese legal experts in the early 1990s and this forced them to take the provisions of UNCLOS more seriously. This has forced them to accept and maintain that the islets of the Spratly Islands have only a 12-mile territorial zone. This realization has helped Vietnam to resolve differences with Malaysia and Thailand, and to complete negotiations with China concerning the delimitation of the Tonkin Gulf.[59]

4.2 Regional Conflicts

Vietnam has a long coastline in the SCS and claims 29 islands[60] in this ocean space, the largest number of the many claimants in the region. However, with no formal delimitation or treaties for resource sharing with other claimant nations, conflict in the exploitation of resources of the SCS is natural. This has put Vietnam on a confrontational path with its neighbors, primarily China, on more than one occasion, due to overlapping claims creating a dispute for maritime territory, fisheries and hydrocarbons in the resource rich SCS. The naval bases in northern, central, south central and southern Vietnam are insufficient to address the existing maritime vulnerabilities of protecting its huge Exclusive Economic Zone (EEZ). To add to this, Vietnam has been involved in two major maritime disputes: overlapping sovereignty claims over the whole or parts of the Spratly Islands with China, Brunei, Malaysia, the Philippines and Taiwan and the dispute in the Gulf of Thailand with Malaysia and Thailand. These have thus forced Vietnam to focus on "marine economy" and "strategic utility" as a part of its maritime doctrine. Even though Vietnam follows a policy of dispute resolution through dialogue in the ambit of the international rules and regulation, in order to achieve recognition of its autonomy, Vietnam has stood up to China's assertiveness in the SCS, as seen in the maritime crises of 2014, 2011–12, 2005 and 1994.[61] While Vietnam has been assertive, it has maintained China to be its "comprehensive strategic cooperative partner" and conducted annual joint coast guard patrols in the Gulf of Tonkin, even though the territorial delimitation in the gulf was mutually resolved in 2000.[62]

It is, however, essential to mention that if these disputes are not resolved at an early date, defending the citizens from natural disasters, protecting mangroves and corals, ensuring sustainable fishing, preventing pollution and climate change, and ensuring the development of a maritime economy for the prosperity of the people will be difficult.

4.3 Maritime Security

Since China has strengthened its maritime forces, Vietnam too has modernized and strengthened its navy and maritime law enforcement capabilities. With a belief in public participation in national security, the fisheries surveillance force, the marine militia, and the self-defense forces have been restored. These forces, along with the strengthened coast guard, defend the country's maritime sovereignty, rights and jurisdiction, prevent illegal activities in the waters of Vietnam, and enforce the law in the EEZ and the Continental shelf so as to address non-traditional maritime security concerns such as piracy, IUU fishing, smuggling and the impact of climate change, while ensuring protection of the oil fields and oil extraction activities in the SCS.

In addition, to strengthen Vietnam's maritime defense capabilities and increase its military credibility, a number of defense cooperation agreements with countries including the U.S., India, Russia, Japan, France, United Kingdom, Germany, and Italy have been put in place. This cooperation includes military exercises, purchases of military hardware, and cooperation in the construction of ships and submarines and is aimed at protecting Vietnam's economic and strategic interests in the region to counterbalance the growth of China.

Knowing China's growing might in the maritime domain, and to ensure that it does not offend China, Vietnam refrains from being part of any military alliance and has stopped

granting permanent access to its ports and facilities for foreign navies.[63] Furthermore, to tackle the issue with China, Vietnam has followed a multi-pronged strategy that includes (a) involving other affected countries for a joint response (Philippines, Malaysia), (b) creating an influence of effective negotiators (Indonesia and Singapore), (c) creating joint development zones (Malaysia, Cambodia), (d) creating a consensus of the regional states for a common front against China,[64] and (e) developing strategic partnerships with nations of the world so as to internationalize the conflict.

4.4 Reduced Sustainability

Maritime territorial disputes of the likes discussed in the preceding sections have created competition and standoffs between China, Vietnam, and the Philippines. The only cooperative mechanism among the three was from 2005 to 2008 and was allowed to expire due to political controversies. Since then, various discussions have happened, but none were conclusive. The task is even more complicated, as there is no provision for territorial disputes in UNCLOS like that for fisheries. Inability to resolve the impasse will hamper the economic growth and energy security of Vietnam since the oil and gas industry is largely responsible for a debt-free Vietnam, as discussed earlier.[65]

Yet another area of impact of this maritime dispute is fisheries. With the SCS being the most productive fishing zone, seeing more than half of the world's fishing vessels, the region is prone to IUU, overfishing, clam harvesting, dredging for island construction, and other unsustainable means of resource harvesting. To add to these, oil and gas extraction in this region has increased the potential for environmental damage. These unsustainable means have destroyed coral reefs and depleted regional fish stocks. This is compounded by attacks, robberies, detainment, shooting, and sinking of fishing vessels due to the unresolved maritime territorial disputes in this region.[66] The entire SCS, including Vietnam, is thus in serious danger of an economic collapse due to prospective loss of livelihood for millions who depend on fishing for food and employment. There is hence a need for Vietnam and the other players in the SCS to address and stem this urgent decline.[67]

4.5 Becoming a Regional Maritime Power

Due to its long coastline along the SCS and with the SCS being critical for both local and global maritime trade,[68] Vietnam's "Maritime Strategy 2007" gave a vision for Vietnam to become a "regional maritime power." Accordingly, Vietnam needs to exert control over its coast and influence maritime neighbors both near and far. The geographical location of Vietnam in the SCS is such that it can monitor and control the SCS. Accordingly, while its strategic location creates maritime security issues, it also offers a great opportunity for Vietnam to create bridges of maritime friendship with maritime powers such as the U.S., China, Japan, India, Russia, and Australia.

Furthermore, Vietnam realizes the importance of its location on the maritime trade route connecting the Pacific and Indian Oceans, and linking Europe, the Middle East, Africa, and Asia, and the need to ensure peace, stability, security, and freedom of maritime trade in SCS for the benefit of all. Hence, it is committed to a safe, secure, and peaceful SCS. Having been the chair of ASEAN (till November 2020) and also a non-permanent member of

the UN Security Council (2008-09 and 2020-21), Vietnam is a responsible nation and aims to ensure that conflict is avoided in the SCS with greater cooperation between the ASEAN nations.[69]

Though Vietnam has been provoked by China on numerous occasions, its response has typically been calculated while at times being assertive and standing up to China's behavior. Realizing the importance, potential, and recent economic growth of Vietnam, the Trump-Kim summit of 2019 was hosted successfully in Vietnam.

4.6 Developing the Maritime Industry through Equitization

Vietnam began its effort towards equitization in 1990 but found the progress slow due to the economic, political, and social interests of various concerned parties regarding state-owned enterprises (SOEs). The equitization effort for Vietnam was implemented in phases. The first one was from 1990 to 1996, wherein only five small SOEs that dealt in the shoes, machines, food processing, and transportation industries were equitized. The next phase began in 1996, aimed at small and medium enterprises (SMEs), and succeeded in equitizing another 10 SOEs by 1997. In 1998, the government provided clearer and comprehensive legal regulations but kept strategic industries out of the equitization process. After 2004, another 856 SOEs were equitized with yet another set of rules. The SOEs that remained in 2013 were difficult to equitize, of which the maritime industry under the Ministry of Transport and Communication was one.[70]

The equitization process for the maritime industries too began in 1996. Prior to 1996, the VINAMARINE (Vietnam National Maritime Bureau) was responsible for both regulation of and operations related to the maritime industry. However, as part of the restructuring, the operations related to all ships and ports were moved to VINALINES (Vietnam National Shipping Lines) and the shipbuilding industries were shifted to VINASHIN (Vietnam Shipbuilding Industry Corporation).[71] This was done primarily to improve their performance. However, both VINALINES and VINASHIN continued to register losses.[72] Finally, the prime minister approved the equitization plan to sell a part of the existing state shares of VINALINES on June 20, 2018. The new company would be called VIMC (Vietnam Maritime Corporation).[73] The government planned to expand VIMC's shipping business and brand name in the region by 2030. On the other hand, the government tried to make VINASHIN globally competitive by connecting it to R&D in 2006. Due to bankruptcy in 2010, VINASHIN was divided into three parts. The mechanical engineering going to Petro Vietnam, marine transportation to VINALINES and shipbuilding and auxiliary industries remaining with VINASHIN. This too did not help, and the government was forced to take over direct management. By 2013, of the total 234 businesses, eight subsidiaries gave birth to Shipbuilding Industry Corporation (SBIC), 69 businesses were equitized or sold, and the remaining 165 were sold, dissolved, or became bankrupt.[74] In 2017, SBIC reported their shipbuilding value at VND 3.071 billion, ship repair at VND 488.3 billion, and supporting industry at VND 264.5 billion, indicating that SBIC had been revived greatly by the efforts of the government in ensuring that businesses not related to shipbuilding are delinked from the industry.[75]

Although SOE reforms are essential to restructure the Vietnamese economy for sustained economic development and to be internationally competitive, reforming SOEs is a

sensitive matter. This essentially requires government ownership in some sectors, such as shipbuilding, maritime transportation, tobacco production, and petroleum product distribution and production, as seen in Vietnam.[76]

V. Discussion and Analysis

In the preceding sections, we have seen how Vietnam as a nation first addressed its internal economic policies to achieve economic growth. Due to these concerted efforts, it was able to transition from a low-income nation to a lower-middle-income nation by 2012. However, to sustain this transition and remain in the lower-middle-income group, a continuous effort on the part of policymakers was considered essential and required that they create new, sustainable sources of future growth. However, such sustainable sources were feasible only if the maritime sector was tapped for exploitation. This led policymakers to begin looking outward and at the maritime sector for larger economic growth and globalization.

While Vietnam has been a maritime nation in the past, over the years, due to inward-looking policies and technological advances, the nation did not exploit the maritime sector for economic benefits. It was only in 2006 that the land-based gaze was challenged, and necessary corrections through the "Maritime Strategy Towards 2020" (adopted in 2007), followed by the "Maritime Strategy Until 2030, with Vision Until 2045" (adopted in 2018) were put in place.

The need for creating greater opportunity for its people through the maritime sector has been adequately supported by the Vietnamese government through policies and both direct and indirect investment since 2006. These efforts allowed the maritime sector to become an engine of economic growth for the nation from 2007 to 2015. Realizing that the growth was unsustainable in the long run, the policy was revised in 2018, as the planned growth till 2020 was not likely to be achieved. Some anticipated and achieved growth rate figures that have forced a course correction are as follows:

> (a) Before the maritime strategy was announced in 2007, sea-based activities contributed 48 percent to the national GDP. However, this share reduced to 40.73 percent in 2010 and 30.19 percent in 2017.
>
> (b) The per capita income in the coastal localities expanded from US$627 in 2006 to US$3,035 in 2016. However, these figures are slightly below the national averages of US$637 and US$3,049, respectively. This resulted in the number of poor communes from the coast and island doubling from 157 in 2004 to 320 in 2014.
>
> (c) The contribution of the fisheries sector to the GDP has reduced to below 2 percent.
>
> (d) The contribution of the oil and gas sector to the GDP has reduced from 10.83 percent in 2007–2010 to 2.76 percent in 2017.

Though these figures are worrying, they can be and have been addressed. According to Professor Nguyen Chu Hoi, former deputy head of the Vietnam Administration of Seas and Islands, nine weaknesses in the implementation of the national marine strategy exist. These include[77]:

(a) Insufficient awareness among the people of the need for sustainability.

(b) Small-scale sea-based economy.

(c) Unsustainable exploitation of sea resources using outdated technology.

(d) A mindset that is geared more towards hoarding and destruction than sustainability.

(e) Increasing scarcity of marine ecology and biodiversity due to overexploitation.

(f) Military issues in the South China Sea that force the nation and financial resources to be focused on marine defense and security rather than on the economy.

(g) Late commencement of exploitation of coastal areas in 2007 as compared to terrestrial areas that have been exploited for many years.

(h) Misguided investments of the state wherein funds are being spent for infrastructure in place of social welfare.

(i) The limited investment capacity of foreign investors.

While these weaknesses need to be addressed, there are some areas of concern that inhibit the all-out growth of the maritime sector in Vietnam. It is hence essential that the concepts of "blue economy" and "sustainable" growth are made integral to the maritime development policy of Vietnam. The areas of concern are as follows[78]:

(a) Exploitation of marine natural resources has led to rapid degradation of the natural environment and exhausted available resources faster than it should have. Even the country's key resources of oil and gas and fisheries have faced this issue.

(b) The ongoing maritime sector development lacks coordination in both policymaking and implementation among the various stakeholders that include local areas, regions, and industries. This has resulted in the development plans being ineffective even after concerted efforts and all-out support from the government.

(c) Inadequate infrastructure for a high population does not permit sustainable development and is threatening the marine ecology, leading to irreparable damage.

(d) Outdated maritime assets, old ships, and limited funding to encourage digitilization[79] are slowing the Vietnamese ports' future industry compliance.[80]

(e) The merchant fleet of Vietnam consists of ships of more than 15 years of age. This has led their numbers to decrease from 1,600 in 2018 to 1,568 in 2019. The fleet is likely to shrink further if induction of new ships is not undertaken.[81]

(f) Inadequate dredging and low depths discourage inland and coastal water transportation and prevent bigger ships from entering their ports.

VI. Lessons for Other Nations

Today it is an accepted fact that the maritime sector is an engine of growth that has the potential to contribute both directly and as a facilitator for the economic growth of a nation. While we have seen how Vietnam used this sector to bring about economic growth in their nation, there are lessons for other maritime countries who strive for economic growth by exploiting the maritime sector. These are some of the lessons:

(a) The maritime shipping sector holds great promise as a result of globalization and increasing trade between nations. However, the U.S.–China trade war and the

IMO 2020 regulations for clean fuel have created a certain amount of uncertainty for this sector. This notwithstanding, shipping remains a promising sector for ensuring economic growth through infrastructure development, job creation, and an increase in both domestic and international trade.

(b) Ocean renewable energy is an area of high potential for creating jobs and opportunities for a nation's economic growth, especially keeping in mind the agreed-upon UN-SDG 2030.

(c) Developing a sustainable and controlled fishing sector has the potential of creating not only jobs but also foreign revenue through exports. The ancillary industries of food processing, packaging, and export houses are some areas wherein economic growth can be targeted.

(d) Tourism is a major area that has the potential to attract foreign investment and foreign exchange around the year. However, care is to be taken that the development of tourism should not be *ad hoc* but planned. This is to ensure that the development to follow is sustainable, or else it may not be long-lasting due to pollution that has the potential to drive away tourists.

(e) Shipbuilding is another industry that can bring about major economic growth for a nation. This is possible through the development of various support industries for shipbuilding. These support industries could be a result of foreign direct investment (FDI), collaborations with multi-national corporations (MNCs), or domestic industry involvement. The success of the shipbuilding industry in a nation is highly dependent on support from internal demand for ships that are primarily dependent on internal trade. The larger the spread of the country, the greater is the expected internal trade and the commensurate need for strengthening maritime routes.

(f) There is a need for government support to encourage, develop and support maritime industries both through economic stimulus and policy recommendations.[82] If the requisite support is not there, the suitable impetus for development would not exist, and the maritime domain would not act as a growth engine.

(g) Port development is another area that needs to be targeted. One needs to remember that with Shipping 4.0 and Port 4.0 gaining a foothold in the maritime industry, growth in port infrastructure and facilities would attract cargo movement. However, while investing in ports, it is essential that a detailed study of the prevailing market and the capacity of existing ports is undertaken, or else competition with already established hubs could lead to overcapacity and, eventually, economic loss in the venture.

(h) In all these sectoral developments, the involvement and development of the population in the hinterland must not be forgotten. After all, the hinterland population provides the actual bread through crops, industries, fruits, and vegetables for the sustenance of the country's population. If the hinterland people are forgotten, they too will move to the coastline to be a part of the economic growth through the maritime industry, thereby starving the nation for food and increasing the import spending of the nation to import the much required food grains.

(i) The models of growth and infrastructure followed in terrestrial regions cannot be followed blindly for similar growth in the coastal zones. The coastal

zones, being ecologically fragile, have to be handled with care while ensuring that coastal facilities are independent, complete, and self-sufficient.

(j) Inland and coastal waterways are essential for a nation to ensure economic and environmentally friendly movement of both cargo and people. Developing these waterways can be costly and hence may require the participation of private players.

(k) Last but not least, since no economic model is foolproof or able to bear the fruits of growth forever, the maritime sector too must be considered an "engine for economic growth" that cannot be taken for granted and is not self-sustaining. Simply put, the maritime domain can infuse life in the economy of the nation but cannot ensure that the economic growth to follow will continue forever.

VII. Conclusion

The economic growth of Vietnam since the time Doi Moi was implemented has been astounding and has brought economic prosperity to the nation. This economic growth allowed the country to look outward, wherein maritime growth became essential. Realizing the potential of the maritime sector, the government implemented the maritime strategy in 2007 and supported it with numerous other policies to use the sector as an engine of economic growth. Since then, the maritime sector has provided the necessary impetus and growth.

However, since the targeted growth was not achieved as planned due to certain weaknesses in the implementation of the strategy, as well as economic and political concerns, a revised strategy was promulgated to continue using the maritime sector as the economic growth engine for the nation. This article has discussed the developments made and the downsides of this growth. It has also discussed a way ahead for ensuring sustainable growth for Vietnam and for countries interested in using the maritime sector as an engine of growth for the economic growth of their country.

Vietnam as a nation has a huge dependence on the maritime domain due to its long coastline. This dependence is from both economic and security points of view, neither of which can be ignored. While the nation puts in serious effort towards developing and implementing strategies for sustainable economic development for its economic prosperity, it needs to ensure that it does not lose focus on the threats emerging in and from the maritime domain. Though Vietnam has preferred to follow the policy of the "three nos" (refrain from being part of any military alliance; refrain from entering alliances with foreign powers to balance another country; and refrain from granting permanent access to ports or facilities for use by foreign nations), it still needs the support of the world community to address the overtures of its strong neighbor China and thereby ensure harmonious relationships with countries including Russia, the U.S., the EU, India, Japan, South Korea, and Australia.

On the technology front, on many occasions Vietnam has accepted the support of the international community for a way ahead in establishing a strong maritime economy through joint ventures, transfers of technology, financial support, higher education, etc. This approach needs to be continued to solve problems related to improvements in science and technology, human resources, and the application of international laws. However, to realize the full potential of sustainable marine development along with the support of the

international community, awareness of the people and a change in their mindset towards the marine environment and marine industries is essential. Such a change needs to be initiated from within the nation.

On a similar note, while some lessons learnt from the Vietnamese experience have been discussed in the article for other aspiring nations to emulate, they are not "copy-paste" solutions but will have to be tweaked to meet the aspirations and limitations of the nation and its people prior to implementation.

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The Shadow of Cold War Politics Over Territorial Sovereignty: The San Francisco Peace Treaty and Its Implications for Japan's Territorial Disputes with Korea and China

Kyu-hyun Jo

Structured Abstract

Article Type: Research Article

Purpose—This article examines whether Japan can utilize the San Francisco Peace Treaty as historical evidence proving Japan's claims on Dokdo and the Diaoyu Islands.

Methodology and Approach—This article utilizes journal articles and monographs and conducts a textual analysis of the SFPT to examine whether there is reliable evidence in the treaty supporting Japan's claim of territorial sovereignty over Dokdo and the Diaoyu Islands.

Findings—The SFPT's fundamental purpose was to formulate a Cold War alliance between the U.S. and Japan and enable Japan's transformation from an aggressor to a pro–U.S. and anti-communist ally. Given the importance and urgency behind realizing this objective, territorial issues were auxiliary and peripheral. Therefore, Japan's intention to use the SFPT as historical evidence to prove territorial sovereignty is unjustified and irrelevant because it misunderstands the treaty's historical and real purpose.

Originality, Value—This article presents an original textual analysis of the SFPT and demonstrates that the SFPT provides insufficient evidence for a nation to claim territorial sovereignty, because determining territorial ownership was peripheral compared with the SFPT's chief objective of securing an anti-communist alliance between the U.S. and Japan.

Keywords: Diaoyu/Senkaku, Dokdo/Takeshima, San Francisco Peace Treaty, SCAPIN No. 677, SCAPIN No.1033

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I. Introduction

No other treaty has shaped the contours of East Asia's post–World War II security and international relations more than the San Francisco Peace Treaty (noted as SFPT hereafter). The SFPT not only authorized the United States' decision to install its military government in Japan and assure that Japan would be a pacifist nation but also confirmed that Japan would remain a staunchly pro–U.S. nation and act as a primary anti-communist bulwark in the Pacific against potential Chinese, North Korean, or Soviet aggression. The SFPT not only helped the U.S. contain China and the Soviet Union in East Asia with Japanese assistance but also affirmed that an anti-communist, non-militaristic Japan would be the essential political identity for a nation which once joined the Nazis and sought to destroy the foundations of the global economy and democracy. The SFPT also ultimately laid the foundation for Japan's transformation from a recipient of American financial aid to a major donor to Southeast Asian countries and a member of the OECD.[1]

Yet, insofar as politics remains as a human activity, it cannot escape being colored by the passions and interests, moral or immoral, of a particular nation, which the nation may pursue even at the expense of ignoring or offending other nations' nationalisms and historical pride stemming from a coveted possession or a territory, and this pursuit may reflect competing visions of sovereignty. As historian Frank Costigliola observes from his analysis of George Kennan's writings during the Cold War, historical analysis cannot neatly be synonymous with scientific analysis, for such an assumption leads to a search for "single, clear, and unequivocal causes"; policies can become products of personal desire and emotions, and a concern for domestic politics can become "intertwined" with foreign policy. Furthermore, the pursuit of a common interest or objective whose negligence might negatively impact the security of two allied nations might often be considered to be superior to nationalism, leading nationalism to be ignored in the pursuit if the common interest.[2]

While all of the conditions mentioned can possibly be actualized in the name of national interest, no hierarchy among various interests can be so stable enough to be impervious to the changing demands of diverse eras. The SFPT, as a document expressing a joint interest between the United States and Japan to realize a peaceful Pacific or, specifically, an anti-communist one, cannot be an exception. After the end of the Cold War, nationalist passions quickly replaced ideological ones in shaping Japan's relations with Korea and China over territorial sovereignty.[3] The core problem lies in Japan's decision to claim ownership over Dokdo/Takeshima and the Diaoyu/Senkaku Islands solely based on Japan's insistence that the SFPT "granted" Japan sovereignty over these territories. Japan believes that as a document sanctioned by international law, the SFPT gives Japan an irrevocable right to own the territories because the treaty does not explicitly identify the true owners of the islands.[4] With regard to Dokdo and the Diaoyu Islands, Japan officially argues that these islands were not part of the territories which the treaty forced Japan to renounce.[5] Japan believes that this fact alone "proves" that Japan could still claim Dokdo as Japanese territory, because Japan believes that when Dean Rusk told South Korea's ambassador to the United States that the United States deemed that Dokdo "[did] not appear to ever before to have been claimed by Korea," the Rusk-Yang correspondence proves that "in the San Francisco Peace Treaty, Takeshima was affirmed as a territory of Japan." With regard to the Diaoyu Islands, Japan argues that they were first administered by the United States per Article 3 of the SFPT and reverted

back to Japanese control through the Agreement Concerning the Ryukyu Islands and Daito Islands in 1972.[6]

II. A Review of the Scholarly Literature

However, Japan's insistence that the SFPT had an official stature as a document confirming territorial sovereignty is misleading because the real purpose behind drafting the SFPT was not primarily to make a historical judgment on Japan's ownership of Dokdo or the Diaoyu Islands based on pre–20th-century history, but to politically confirm that Japan would remain the United States' ally during the Cold War. As historian Michael Schaller demonstrates, the SFPT's primary aim was to nurture Japan into being a faithful ally of the United States by mitigating the weight of Japan's crimes during World War II by declaring the contested islands as no-man's-lands so the U.S. could solely concentrate on utilizing Japan's resources to counter communist aggression in East Asia. The United States was not truly interested in ascertaining Japan's sovereignty over Dokdo and Diaoyu Islands *per se* but, rather, wanted to quickly direct Japan's attention to authorizing American use of Japan's military bases in anti-communist operations and make Japan the starting point of Dean Acheson's "anti-communist crescent" across the Pacific and South Asia.[7]

The idea of the SFPT as a cornerstone for post–World War II U.S.–Japan alliance has been a popular and an important theme in historical analysis ever since the SFPT's origination. Robert Butow concentrated on the American domestic politics leading to the peace treaty, while Bernard Cohen wrote about Japan's domestic politics in the process behind the peace settlement.[8] Frederick Dunn first provided original analyses of the negotiations surrounding the SFPT as an international process involving 48 nations, and Michael Yoshitsu provided another classic analysis, which, unlike Dunn's, focused more on Japan's negotiating behavior, evaluating Japan's diplomatic success and failures by highlighting events such as the Dulles-Yoshida talks during 1950 and 1951 and the Okazaki-Rusk talks, which settled the stationing of American forces in Japan.[9] Michael Schaller provided perhaps the most comprehensive analysis on the geopolitical significance of the SFPT, arguing that the SFPT laid the foundations of Dean Acheson's plan for an "anti-communist crescent" stretching from Japan to India against possible Chinese or Soviet aggression in the Pacific.[10]

Recent scholarship on post-war Japan and the SFPT has moved away from understanding the SFPT's historical value as the originator of the U.S.–Japan alliance and has instead closely examined the alliance's implications for the global Cold War order and the 21st century. Scholars such as John Dower and Jennifer Miller laid particular emphasis on the treaty as a cornerstone for building democracy in Japan and East Asia as a preventative measure against America's fear of a spread of communism and Washington's belief in the "Domino Theory." In contrast to the classic accounts, Dower specifically focused on the impact on post-war Japanese society of the American decision to "reconstruct" Japan as a pacifist nation. Using a wide array of American and Japanese diplomatic papers, memoirs, private and public collections, Dower showed that a social history of the treaty necessarily has to examine the turbulent and often violent Japanese public responses to American efforts to impose democracy. Embracing defeat in Japanese eyes was by no means smooth or a matter of fact. Rather, there was a tenuous balance between Japanese nationalism and the American

vision for a pro–American and anti-communist Japan, and examining the Japanese public's struggle to maintain that balance provides a more accurate and vibrant historical account of post-war Japan—a history which words in a treaty cannot describe.[11] Jennifer Miller has shown that American officials sought to reach a compromise for the tenuous balance described in Dower's book by assuring that Japan could establish a "psychological democracy" by emphasizing the need for rapid capitalist growth.[12]

By contrast, Leszek Buszynski has suggested that a "San Francisco system" must not be rendered synonymous with the origination of a U.S.–Japan alliance, because it is a more collective term which encompasses the U.S.'s alliance with South Korea, the Philippines, Australia, and New Zealand and must therefore be limitedly applied to mean the U.S.'s support of Japan's readjustment to East Asia and the Pacific by divesting Japan of formerly conquered territories while leaving ownership over Dokdo and the Diaoyu Islands ambiguous.[13] Kimie Hara and others (2007; 2015) have analyzed territorial disputes between Japan and its East Asian neighbors and showed that the San Francisco Peace Treaty not only served as a landmark treaty initiating the post–World War II international order centered around the U.S.'s formation of alliances with East Asia during the early years of the Cold War, but also that territorial disputes inherited the shadow of the Cold War by igniting a sharp debate about how to accurately interpret the SFPT.[14]

Although both the classic and recent literature on the SFPT's history pays a great deal of attention to the SFPT's implied value as a cornerstone of America's post–World War II foreign policy towards East Asia, the extent to which the SFPT could be used as historical evidence for territorial sovereignty remains unclear, which leads the Japanese Ministry of Foreign Affairs and scholars such as Hara (2007) to oscillate between (a) framing discussion of the dispute strictly as a 20th-century problem because it links territories such as Dokdo primarily with the SFPT while ignoring Korea's pre–20th-century historical evidence and (b) invoking pre–20th-century history during their discussion of the Kurile Islands to dispute the treaty's requirement that Japan must forfeit the Kuriles. Both the Japanese Ministry of Foreign Affairs and Hara provide no rationale for why such oscillation about invoking only the SFPT for Dokdo and invoking pre–20th-century history on the Kuriles is justified.[15]

III. Research Question, Main Thesis, and Methodology

This paper will address the question, "What does the SFPT support about Japan's territorial claims?" The main thesis, especially with regard to Hara's invocation of the SFPT on Dokdo, is that Japan cannot invoke the SFPT as "historical evidence" to assert Japanese sovereignty over Dokdo and the Diaoyu Islands as if the SFPT is a "witness" or "guarantee" of Japan's historical nationalism and sovereignty over the islands it covets. If Japan is truly eager to claim the disputed islands as its own, Japan must legitimately show the basis of its territorial sovereignty over them without depending on the SFPT's rhetoric. If Korea and China's claims to Dokdo and the Diaoyu Islands are based on a longer period of historical and national consciousness over these territories than the SFPT, then Japan must acknowledge that it is the depth and longevity of historical nationalism, not merely words written on

a treaty whose original purpose was not to be a substitute for historical nationalism, which must be the true and single yardstick to determine territorial sovereignty.

With regard to territorial sovereignty, Japan must fully adhere to the SFPT's terms because those terms were also meant to place a significant constraint on the boundaries of Japan's territory and assure that the territories of an ally or a former colony of Japan be respected as those of sovereign nations. Moreover, because earlier documents such as SCAPIN No. 677 already clarified that Japan ought to return Dokdo, Jejudo, and Ulleungdo to Korea, the SFPT only briefly mentioned *examples* of islands which Japan had to return to Korea, for the SFPT's ultimate goal was to ensure that Japan would become a peaceful and pro–American nation, a measure which was crucial for the U.S. to ascertain that Japan would be the core of an anti-communist Pacific. The SFPT was only relevant insofar as Japan could become an anti-communist ally of the U.S. in the Pacific after World War II without posing any military threats to any other nation, or, as Victor Cha puts it, part of an American design to realize the logic of "powerplay," or the construction of an asymmetric alliance to monitor a weaker Japan.[16]

Therefore, Japan cannot use the SFPT as a justification for claiming sovereignty over territories whose history of national consciousness far outstretches the historical purpose and function of the SFPT, which was to restrict Japan from launching or preparing another global war and to limit Japan's potential to become an imperialist and militarist nation. Conversely, Japan must not make claims on territories about which the treaty makes no explicit claim implying that they must be under Japanese jurisdiction. If Japan truly believes that Dokdo and the Diaoyu Islands belong to it, then it must, as do Korea and China, invoke believable and legitimate evidence dating from before the rise of an imperialist Japan to morally and historically prove that these territories are undoubtedly and unquestionably under Japan's jurisdiction. Since the SFPT's purpose was not to "prove" any claims or evidence relating to historical nationalism, it is an oxymoron for Japan to invoke the SFPT as "historical evidence" when Korea and China do not consider the SFPT to be very important and instead primarily present ancient historical records to prove their territorial sovereignty.[17]

This paper will analyze the SFPT's important articles which show that the Allies primarily wished to mold Japan into a pacifist state, and for the United States, a faithful follower of American Cold War policy and demonstrate that Japan has no basis on which to claim the SFPT as historical evidence of Japanese sovereignty over Dokdo or the Diaoyu Islands. The analysis will specifically engage with Articles 2, 3, 4, 5, 6, 9, 10, 12(a), 14(a)2, 19, and 21 in numerical order, with the common aim of proving that the treaty's foremost objective was to transform Japan into a sufficiently industrialized anti-communist buffer state in the Pacific, not to provide historical evidence directly proving Japan's ownership over Dokdo or the Diaoyu Islands.

The paper will argue that the treaty is exclusively Clausewitzian—using the policies determined by the SFPT to force Japan to fulfill the Allies' will and administer the terms of justice and peace to facilitate Japan's observance of victors' justice. The SFPT could afford to be Clausewitzian by focusing only on such terms because SCAPIN No. 677 had already concluded the issue of territorial sovereignty by limiting Japan's territories to its four main islands and some thousand small islands. The SFPT was first and foremost an alliance treaty between the U.S. and Japan. Its specific and primary aim was to reconstruct Japan as an anti-communist bastion in the Pacific—a goal whose importance is clearly emphasized by

the fact that only Article 2 explicitly mentions that Japan is entitled to have the four main islands which originally formed its national territory and nothing further.[18] If Japan wishes to fairly contend with its disputants, then Japan must look elsewhere for its disputes with Korea and China, preferably to pre–19th-century documentation, to stake Japanese territorial claims based on historical nationalism. Only then will there be some hope for an earnest dialogue between Japan and its East Asian neighbors.

IV. An Analysis of the SFPT as a Clausewitzian Document

The SFPT begins with a declaration that relations between the Allies and Japan will be "those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security." The maintenance of such peace and security can only be possible when "questions still outstanding as a result of the existence of a state of war" are settled—the key objective behind signing the SFPT. In short, as Emma Rothschild has argued, if the purposes of security are to "provide some sort of guidance to policies made by governments and influence the distribution of power," the SFPT had an exclusive objective of assuring that Japan could be guided by the Allies in transitioning to a "normal" sovereign state which will be less powerful than the United States, Britain or the Soviet Union, but still be able to commit itself to preserving global peace.[19]

To meet this objective, all problems which existed either before, during, or after World War II between the Allies and Japan had to be conclusively settled through this treaty. Therefore, territorial sovereignty over lands that Japan had possessed by force as an imperial power naturally fall within the scope of "questions outstanding as a result of the existence of a state of war," since Japan's identity prior to and during the war was an empire rather than a nation-state. Due to the deep connection between Japan's identity during the war and the problems induced from that very identity, Article 2 minces no words in pointing out that a redistribution of lands which Japan illegally seized as an imperial power is necessary. Hence, Japan was required to "renounce all right, title, and claim to Korea, including the islands of Quelpart (Jeju), Port Hamilton (Geoje), and Dagelet (Ulleungdo)."[20] In addition, Japan was required to forfeit "all right, title, and claim to Formosa (Taiwan) and Pescadores," as well as the "Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired as a consequence of the Treaty of Portsmouth."[21]

Three points can be noted about Article 2. First, for all of the territories which Japan is required to relinquish, Japan does not merely forfeit its claim on particular islands, but as it can be seen in the case of Korea and Taiwan, *territories* which were formerly and historically part of entire *nations*. Therefore, the specific islands mentioned in relation to Korea are examples of islands which Japan must forfeit because Japan is required to give up its imperial control of Korea, not because they were also contested by Korea as foreign territories. Likewise, with regard to Taiwan, Japan is not only required to forfeit its claim on Formosa, or Taiwan, but also the Pescadores, which currently comprises Taiwan's Penghu County. In short, the Allies' intention behind their demand that Japan forfeit "all right, title, and claim" is to suggest that when Japan is obliged to forgo the aforementioned islands, Japan is relinquishing control over a specific country's national territory, not merely individual islands

which had no owner prior to the rise of Japanese imperialism. Second, because Japan's relinquishment of control over such territories serves as an effective solution to "outstanding questions" of a state of war, Japan has the responsibility to end the continuation of such an undesirable situation by returning the territories of Japan's former colonies to the colonies themselves, since the rise of Japanese imperialism was a major cause behind the outbreak of World War II.[22]

Finally, because the SFPT desired the termination of the Treaty of Portsmouth as a legally binding document, and dismissed Japan's occupation of the Kurile Islands as a "legal action," it is clear that the SFPT wished to not only put a definitive end to imperialism as a legitimate political practice, but also assure that the Soviet Union was able to reclaim control over the Kurile Islands not only because it participated as an Ally, but because the Soviet Union was no longer a "defeated power" due to the Russo-Japanese War. In other words, Article 2's main objective was to territorially limit Japan by forcing Japan to return illegally seized territories to nations Japan had once colonized and by nullifying a major treaty which originally catapulted Japan as an imperial power. Article 2 thereby does not mention anything about territories which Japan can keep after the end of World War II but aims to identify imperialism as the core cause behind the outbreak of World War II and encourage Japan to liberate itself from that ominous identity, which is essential to securing international peace.

Articles 3 and 4 affirm that the U.S. will maintain administrative control over Japan, and as a consequence of this decision, properties and debts of Japanese civilians will be discussed between Japan and the Allies such that in the case of properties which were not returned to citizens of Allied nations or the nations themselves, it will be arranged for Japan to promptly return them. Articles 5 and 6 are complementary, for they collectively suggest an exchange between the Allies' respect for Japan's national sovereignty and Japan's pledge to transform into a pacifist nation, "settling international disputes by peaceful means" such that "international peace and security, and justice are not endangered," and "ensuring that Japan does not resort of force which can harm the territorial integrity or political independence of any state."[23] In short, international security is the essential pivot which maintains both Japanese national sovereignty and the independence of nations which had directly experienced the violence ensuing from Japan's pursuit of imperialism. Any Japanese intention to cause an imbalance between Japan's national sovereignty and that of other nations by force will cause the entire scale to collapse, jeopardizing both the sovereignty of nations which Japan invades and that of Japan itself as a punishment for repeating its past crimes.

Article 6 assures that the U.S. will serve as a main watchtower to maintain and police Japan's orderly diplomatic conduct and the possibility of Japan's deviance, which would cause grave harm to international peace. Furthermore, in assuring that Japan does not feel too restricted in exercising its national sovereignty, the Article requires all foreign forces to leave Japan within 90 days after the SFPT goes into effect.[24] Articles 3 to 6 are designed to maintain a delicate balance between respecting Japan's national sovereignty and its duty to become a pacifist nation while assuring that the maintenance of that balance falls primarily on the United States as an Allied nation and a nation which produced the general framework for the SFPT. In addition, Article 6 reinforces the idea that respect for national sovereignty is a universal value which must be adhered to regardless of a particular nation's status in relation to those of other nations as a consequence of a major war. In conjunction with the

requirements from Article 2, it is clear that Article 6 implicitly shows why Japan's relinquishment of control over its colonial possessions is necessary: because it constitutes a respect for other nations' sovereignty.

Articles 9 and 10 reinforce the message of Article 6 by suggesting that Japan has an obligation to enter negotiations with the Allies concerning the restriction of fishing rights or the conservation and development of fishing rights and that Japan cannot have any imperialist designs toward China, for the objective of policing Japan in accordance with Article 6 extends to the purpose of monitoring Japan's actions that might be aimed at restoring and protecting Japanese economic interests in China by using force.[25] Moreover, per Article 12(a), Japan must be prepared to negotiate with the Allies towards the goal of trading and conducting "maritime and other commercial relations on a stable and friendly basis."[26] Article 14(a) clarifies the nature and purpose behind the "preparedness" mentioned in Article 12(a) by stating that Japan must be ready to "pay reparations to the Allies for the damage and suffering caused by it during the war."[27] Furthermore, since China is entitled to Article 14(a)2, which states that Allied Powers have the right to "seize and retain all property, rights and interests of Japan and Japanese nationals," China as an Ally is entitled by the SFPT to declare the Diaoyu Islands as its national territory, since Japan had illegally occupied the islands in 1895 and is, via Article 14(a)2, obliged to let China decide the ownership of the Diaoyu Islands.[28]

Japan has the obligation to return territories which Japan illegally occupied as an imperial power to Korea and China, since the nature and essence of "reparations" is not just temporary or monetary but is connected to all actions undertaken during wartime. Article 19(a) reinforces this point by stating that Japan must "waive all claims of Japan and its nationals against Allied Powers and their nationals arising out of actions taken because of the existence of a state of war."[29] Finally, Article 21 clearly states that the Articles considered so far are essential to Korea and China despite the fact that both nations were not officially part of the Allied forces, meaning that Korea and China earn the right to keep islands under their national jurisdiction, win reparations from Japan, and also the right to deny any Japanese claims to properties which Japan stole as a result not just of World War II but also of the outbreak of any state of war.[30]

If Article 21's meaning is considered more closely, and if Articles 9, 10, 12(a), 14(a) and 19(a) are applied to Korea and China, it becomes clear that Japan not only must negotiate fishing rights off Dokdo and the Diaoyu Islands but also must frame the negotiation not towards winning particular territories or waters, but towards maintaining a balanced and sustainable bilateral relationship with Korea and China which respects Korea and China's maritime sovereignty over their respective territories, including Dokdo and the Diaoyu Islands.

Even if the SFPT implies in principle that Japan's obligation to observe Korean and Chinese sovereignty over these territories does not stem from a historical recognition of such sovereignty, there is no justification for Japan to assume that the obligation is also nullified. Japan is obliged as a former Axis power to acknowledge that all claims to territories which it seized as a result of war must be forfeited and the territories ought to be returned to their former owners. Article 19(a)'s key feature is that Japan's acknowledgment of its crime is not limited to World War II alone but applies to any state of war Japan had created prior to World War II through which it conducted illegal seizures of foreign territories. A common

feature of all the articles to which Article 21's principle applies is that contrary to Japan's claim that the SFPT addresses legal issues concerning territorial sovereignty, Japan's obligation to observe Korea and China's territorial sovereignty arises not as an independent issue, but as an issue directly dependent on the SFPT's general objective of encouraging Japan to end its connections with its imperialist past by forcing Japan to forfeit territorial claims over territories which it had seized without Korea or China's consent because both countries were victims of Japanese imperial aggression.

In addition, as Article 12(a) states, Japan only has the right to negotiate with other Allied nations toward forming stable and friendly commercial relations, not necessarily towards forming relations which are favorable to Japan alone. Article 12(a)'s implication, considered in conjunction with Japan's history of imperialism, helps explain the rationale behind Articles 10 and 19(a). World War II ended not merely Japanese aggression during the 20th century but Japan's entire history of imperial aggression, which began in the late 19th century.[31] Therefore, even if Japan still contests sovereignty over the Diaoyu Islands, per Article 12(a), Japan is not allowed to negotiate its claim to territorial sovereignty, but only conditions concerning maritime and commercial trade. If we also incorporate Article 2's logic to understand Article 12(a)'s intention, since China is entitled to regain control over the Spratly and Paracel islands as examples of territories which formerly were under Chinese jurisdiction but were annexed by the Japanese, it follows under the same logic that Japan must also recognize Chinese sovereignty over the Diaoyu Islands. Moreover, because Article 10 specifically expresses concern over the possibility of Japan reasserting imperialist designs on China and Article 19(a) applies to any state of war, which includes Japan's annexation of the Diaoyu Islands in 1895, the SFPT does not display any possibility for Japan to legally claim that the Diaoyu Islands are naturally part of Japan's territory.

The more general and important point is that even articles which seem to exclusively focus on territorial sovereignty are auxiliary to the Allies' need to monitor Japan's transformation from a World War II aggressor to a pacifist nation. The need to define the territorial parameters of Japan are not definitive because that need is not central to the task of compelling Japan to accept the Allies' management of the country out of a post-war need to restrict Japan's military capacity to wage another world war. In addition, the SFPT understands the administration of justice to specifically concern Allied governance of Japan towards nurturing Japan into a pacifist and "normal state" which will be divested of the ability to display belligerence while settling disputes through the installment of foreign occupational forces to guide and direct Japan towards maintaining international peace. The SFPT is Clausewitzian in its pursuit of *realpolitik*, for as analysis of an earlier draft for Article 10 shows, the SFPT was also interested in preventing Japan from becoming too intimate and close to China. This intent is succinctly expressed in Article 10's demand that Japan forfeit all claims to interest in the Chinese market in the guise of forcing Japan to relinquish all claims to China which Japan made after the end of the Boxer Rebellion. Considering the articles considered in the earlier section's analysis, it is clear that the SFPT's prime and sole objective was to transform Japan's political identity from a belligerent nation in World War II to a pacifist nation.

Therefore, the specific function of Article 2, which mentions every territory Japan had to forfeit as a consequence of its former status as an imperialist and an Axis power, is to relieve Japan of its obligations as a former aggressor and quickly transform it into a Cold War ally of the U.S. Regarding Japan's claim that it possesses the right to own Dokdo because

it was not mentioned as a territory which Japan had to cede, it is an unconvincing argument that fundamentally rests on an absence of stated facts and negative reasoning. It does not positively demonstrate the existence of any concrete evidence based on a reading of what Article 2 explicitly and directly states. Although the article does not explicitly mention Dokdo, it does mention Ulleungdo as an *example* of a Korean territory which Japan must forfeit because the treaty deemed it impractical to mention every single Korean island, for it would mean that the treaty would also have to mention every Chinese island formerly under Japanese occupation in addition to the Spratly Islands, which would needlessly take up too much space. Finally, given this particular function of the article, Japan cannot use Article 2 as evidence for the historicity of its claim of sovereignty over Dokdo because Japan annexed it without Korea's consent while Korea remained as Japan's colony. Given the illegal nature of the circumstances surrounding Japan's occupation of Dokdo, and considering that Japan occupied all the islands mentioned in the article as an imperial power, it follows that Dokdo is implicitly part of the territories which Japan must forfeit.

Moreover, from a more concrete and historical perspective, another fundamental reason behind the SFPT's brief consideration of territorial issues with a single article is that the issue had already been sufficiently addressed six years earlier through SCAPIN No. 677 and No. 1033. The General Headquarters of the Supreme Command of the Allied Powers had stated unequivocally in Article 3 of SCAPIN No. 677 that Japan is defined to include the four main islands of Japan (Hokkaido, Honshu, Kyushu, and Shikoku) and exclude Utsuryo, Liancourt Rocks, and Quelpart Island. Moreover, according to Article 6, "nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration."[32] Since Article 8 of the Potsdam Declaration had already identified Japan's four main islands and left "other minor islands" to the judgment of the Allied powers, and because SCAPIN No. 1033 clearly stated in Article 3(b) that Japanese vessels "would not approach closer than 12 miles to Takeshima nor have any contact with said island," it is clear that these stipulations were aimed at identifying the exact non–Japanese nationalities of the "other minor islands."[33] In short, as John Allison, the U.S. assistant secretary of state, had argued, the SFPT "embodied" Article 8 of the Potsdam Declaration by not merely "delimiting Japanese sovereignty, but specifying precisely the ultimate disposition of *each of the former* Japanese territories," suggesting that none of the "minor islands" are *actually* of Japanese origin other than the four main islands which comprise Japanese national territory proper.[34]

Fundamentally, the specific meaning of "minor" is not provided in the Potsdam Declaration, and because Korea has numerous "minor islands" around the main peninsula, it is unclear whether that phrase can be stretched to only mean whether *only Dokdo* is a contested territory. Although Japan's Ministry of Foreign Affairs still continues to assert that the SFPT abolished the MacArthur line and "nullified the directive to cease Japan's political and administrative power in the aforementioned areas," it follows that in accordance with such nullification, Japan would also contest Korean sovereignty over Ulleungdo and Jejudo because these islands can also be considered "minor islands" in terms of geographical size.[35]

However, Japan returned these islands upon Korea's liberation without any protest because it was already aware that when it colonized Korea, it was colonizing not only the peninsula proper but also islands adjacent to the peninsula, which included Ulleungdo, Jejudo and Dokdo. Therefore, if Japan's claim about the directive's nullification is to be valid,

Ulleungdo and Jejudo would also have to still be contested between Korea and Japan, as well as countless other small islands such as Hongdo, Hwado, Yeongsando, Goodo, and Yeoseodo, which are indisputably and undeniably Korean islands but were omitted because the islands already mentioned in the SFPT were representative examples of Korean islands, not their entire essence. Finally, because SCAPIN No. 677 and No. 1033 specifically identified which islands were outside Japan's jurisdiction, the SFPT's Article 2 did not necessarily have to repeat the same list of islands verbatim because the central message would remain identical to the SCAPIN documents.

The main point is that when the SFPT's specific purpose and its Clausewitzian character are simultaneously considered, territorial sovereignty is peripheral compared with the larger aim of administering victor's justice and clarifying the limits of Japan's reconstruction. Although the spirit of the document does lend itself to drawing conclusions about the return of Imperial Japan's acquisitions to their proper owners, providing proof of such a spirit is not the treaty's main purpose. Aside from Article 2, there is no specific mention of Dokdo, and the function of Article 2 is not to confirm Japan's sovereignty over Dokdo but affirm that Japan would be relinquishing its past as an imperial power by relinquishing territorial sovereignty over foreign territories it had illegally occupied before 1945. Since the objective of Article 2 and the SFPT as a whole is to recover Japan's status as a "normal state" and help Japan completely sever ties with its imperial past, neither Article 2 nor the entire SFPT can be subject to international law which Korea, China, or Russia must abide by, but instead, both Article 2 and the entire SFPT describe the obligations which Japan must fulfill if it wishes to eternally part with its imperial past. Furthermore, because the SFPT's general objective of transforming Japan into an American ally was already achieved in the course of the Cold War, the specific requirement stemming from Article 2 is not subject to international law but is merely a remaining obligation which Japan still has yet to fulfill as a condition to become an American ally and a "normal state" because it continues to believe that an illegal occupation of a foreign territory is still valid after its past as an imperial nation has become history.

V. The SFPT as a Cornerstone for the U.S.–Japan Alliance and America's Information on Dokdo

With the shadow of the Cold War imminent in global affairs during the years following World War II, the most pressing issue for the U.S. was securing as many reliable anti-communist partners as possible in the Pacific to maintain the ocean as an "American lake."[36] The absence of territorial sovereignty was a natural outcome, for the United States clearly understood that the SFPT was specifically targeted towards devising an international alliance against the spread of communism. The SFPT's implicit but most important objective was to secure an anti-communist security alliance between the U.S. and Japan for the sake of containing China and the Soviet Union. Auxiliary and inessential matters, including the settlement of Japan's territorial jurisdiction, were consequences of Japan's surrender to the Allies rather than issues which America genuinely cared about for their historical significance or context. Issues such as territorial sovereignty were relatively insignificant compared

with the formation of a security alliance, and it was only due to Japan's status as a former imperialist power that Article 2 particularly mattered.

America gained most from the SFPT, for the treaty's intention was to nurture Japan into a staunch pro–U.S. ally by clearing Japan of its imperialist past as much as possible and render Japan into a major anti-communist bulwark in the Pacific. Although making Japan become the core of an anti-communist crescent during the early 1950s was, as Roger Buckley argues, the beginning of a "rope in the sand," the inclusion of Japan within this "Pan-Pacific" consortium of anti-communist alliance was nevertheless a necessary step for the U.S. to counter potential Chinese and Soviet aggression in East Asia.[37] John Foster Dulles, the chief architect of the SFPT, had stated unequivocally during the early stages of the Korean War that seeking Japan's assistance, albeit with some territorial restrictions for Japan, was necessary because a "Communist offensive was probably aimed at getting control over Japan," for if Korea had fallen quickly into communist control Japan would have fallen without a struggle.[38] In addition, Dulles stressed that the SFPT had "two great purposes." The treaty sought first to "close an old war on terms which will not provoke another war" and second to "break the vicious cycle of war, victory, peace, and war"; this would enable nations in the Pacific to "resist aggression from without and to resist attack by Japan if she should again become aggressive."[39]

In other words, the SFPT was, in the larger scheme of preventing East Asia from falling to communism, an essential step to ensure that Japan would be rapidly transformed from a vulnerable victim to communism to a most formidable fortress against communism as soon as possible. Furthermore, the SFPT sought to make World War II the war which the First World War had aspired but failed to be, namely, a war to end all wars. Hence, the installation of American security in Japan, and to thereby ensure that Japan would never dream of becoming or actually become a major belligerent which would cause a war that would produce death at a global scale, was an utmost priority for the U.S. over any other issue discussed in the SFPT.

Therefore, Article 2 of the SFPT must be understood as a measure to quickly and definitively conclude the redistribution of Japan's former imperial possessions so Japan could focus on becoming an ideal model-nation to stabilize East Asia against potential communist encroachment. Due to the importance of this seemingly generic aim, Japan's belief in the sacrosanct nature of Article 2 as an "official" American endorsement of Japan's sovereignty over Dokdo cannot be verified, because the aim was and still is—albeit to a lesser degree than during the Cold War—more important than affirming the official boundaries of Japan's national territory. Put differently, because the United States was more concerned with making Japan become an anti-communist hub, it not only did not have time to carefully examine South Korea's official documents and arguments about Dokdo but also, on August 26, 1954, conceded that the main reason behind the omission of Dokdo in the SFPT's final version was due to "our [the United States'] information that Dokdo was never treated as part of Korea, and left the door open for Korea" to show that Dokdo was a part of Korea prior to 1905.[40]

In addition, the "information" which the United States used to judge Dokdo as Japan's territory in the so-called "Rusk Note" came mostly from Japanese research materials and encyclopedias that the Japanese government used to lobby the United States to create favorable terms for Japan in the SFPT. The United States had belatedly, albeit secretly and unbeknownst to the South Korean government, admitted that its judgment came from a complete

disregard for Korean sources; Dokdo could not be definitively declared as Japanese territory nor Korean territory, which is why Dokdo was not mentioned in the SFPT.[41] Hence, as a document titled "Koreans on Liancourt Rocks" suggests, the Japanese could only assume, not confirm, that Dokdo was Japanese territory, and that Koreans, "for obvious reasons," have "disputed this assumption."[42] Article 2's omission of Dokdo as a territory which Japan had to forfeit was not because Dokdo was decisively proven through a thorough consideration of both Korean and Japanese evidence to be Japan's territory, but because the U.S. was just a member of the Allies, not their official spokesperson to hand out an "official" decision, and because America knew that it had insufficient knowledge and information to affirm Dokdo's national identity with much certainty. Therefore, there is no clear evidence stemming from the "omission" in Article 2 for Japan to believe that Dokdo must be its territory, because the omission is America's confession that it is not an adequate judge on this matter.

Moreover, because there is no further explicit discussion of territorial issues *besides* Article 2, which can be seen as a testament to the United States' concession of its imperfect knowledge on specific issues related to Korean and Japanese territories, Japan cannot use the SFPT as a meaningful piece of evidence in its debates with its East Asian neighbors over the disputed territories. The SFPT is especially incapable of confirming or refuting Korea and China's historical claims to first observing the existence of Dokdo and Diaoyu Islands long before the 20th century. The SFPT's most critical weakness is that it is in no position to hand down an objective judgment on territorial issues whose historicity must be proven largely through the presentation of pre–19th-century documentation, about which the SFPT is not sufficiently aware or qualified to hand down a final verdict. Hence, while the SFPT's authority as a post-war document on specifying terms for the Allies' occupation of Japan might be historically valid, America's prime interest in transforming Japan into an anti-communist hub and a Cold War ally and the use of incomplete information to judge Dokdo's national identity markedly compromises the SFPT's value as a reliable piece of evidence for territorial sovereignty.

VI. Conclusion

The SFPT was the most seminal document to shape the future of the Pacific region in its relations with the United States. For Japan, it meant the rapid transformation of a former Axis power into one of the U.S.'s most trusted allies in East Asia throughout the Cold War, and in general, the SFPT became a model for understanding the United States' emphasis on formulating a pan–Pacific international alliance against communism. As for the SFPT itself, the formation of a security pact, first between the United States and Japan, and later with other major nations in the Pacific, was the sole goal which describes the SFPT's chief purpose. In other words, this paper's main argument is that because the SFPT was very conscious of the imminent Cold War for which it wished to be an effective panacea, the function of the treaty was exclusively devoted to rendering Japan into a trustworthy and dependable anti-communist ally for the United States. The continuing significance and relevance of the treaty to understanding U.S.–East Asia and U.S.–Pacific relations lies not so much in what the treaty actually mentions, but more in what it clearly does not mention: territorial sovereignty. From its initiation, the SFPT was faithfully wedded to its ultimate objective

of securing alliances between the United States and the Pacific and was careful to minimize or be disinterested in expressing American participation or involvement in sensitive issues such as territorial sovereignty. The U.S.'s decision to unilaterally pursue anti-communist security alliances was a matter of *realpolitik* in the face of a deeply encroaching Cold War with China and the Soviet Union, and this crisis informed the U.S.'s urgency to transform Japan into an anti-communist ally.

Therefore, the SFPT was a document of its own time whose purpose was to specifically address the most pressing issue of international security at the time of its composition. The document's historicity is also a testament to its apparent limitation of being a treaty and nothing further. Although Japan regularly cites the SFPT's Article 2 to assert its sovereignty over Dokdo, the SFPT bears no responsibility or connection to problems of territorial sovereignty in East Asia as a whole, because the business of proving the historicity of territorial sovereignty is a far more complex problem which cannot be solved by merely presenting a document which has hardly any relation to "proving" the possession of a particular territory. Rather, if any articles examined here have any meaning with regard to territorial sovereignty, they all clearly state or imply islands and territories which Japan must forfeit. Yet, as shown especially through the discussion of Dokdo, Japan's refusal to abide by Article 2's demands or at least cooperate in clarifying the article's true intentions renders territorial disputes into a serious cause of diplomatic tensions between Japan and its East Asian neighbors.

If the SFPT is still a reminder of the Cold War and history for Japan, it is because the document preserves the origins of the U.S.'s will to ally with an anti-communist Japan and is a reminder of the unfulfilled obligations Japan had to undertake prior to assuming that new political identity, among which the return of Dokdo and the Diaoyu Islands to Korea and China was implicitly included. Regardless of whether this means that Japan cannot use Article 2 as historical evidence to prove territorial sovereignty or that Article 2 truly wished to leave Dokdo and the Diaoyu Islands without specified owners, the SFPT is not a sufficient arbiter of historical claims to territorial sovereignty because it was fundamentally aimed at disarming Japan and molding it into a faithful American ally to usher the making of an anti-communist Pacific regional order. As an alliance treaty designed to prepare Japan for the Cold War, the SFPT was originally in no position to judge the possession of territorial sovereignty over territories whose histories are much older than what the SFPT alone could fathom.

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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:

Frettingham, Edmund, and Hwang, Yih-Jye (eds.) (2021). *Maritime and Territorial Disputes in the South China Sea: Faces of Power and Law in the Age of China's Rise,* Routledge.

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.

Moore, Cameron (2021). *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force,* Routledge.

Natoli, Tommaso, and Riccardi, Alice (eds.) (2019). *Borders, Legal Spaces and Territories in Contemporary International Law*, Springer.

Otto, Lisa (ed.) (2020). *Global Challenges in Maritime Security: An Introduction*, Springer.

Contesting Territorial Sovereignty: Grassroots Perspectives from Northeast Asia

Alexander Bukh. *These Islands Are Ours: The Social Construction of Territorial Disputes in Northeast Asia*, xii + 209 pp. Stanford, CA: Stanford University Press, 2020. ISBN: 978-1-5036-1189-4. US$70.00.

At a time when sovereignty disputes over territories and waters have become intensified in global diplomacy, *These Islands Are Ours* is a welcome addition to the debate about territorial identity and belonging in diverse Asian contexts. Bukh delves deeply into the history of three campaigns over disputed territories in Japan, South Korea and Taiwan and

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contextualizes these campaigns as microcosms of internal political contests between grassroots activists and national leaders. Focusing on the social meaning of disputed territories and, more broadly, of national identities, he highlights comparative trends in the study of social-movement mobilization, especially the ways in which non-state actors from the peripheries interact with core elites in the centers and have an impact on policy implementation. He calls those guardians of disputed territories "national identity entrepreneurs," mostly non-state actors from outside of the political establishment who have encapsulated an innovative way of proclaiming, "These islands are ours."

Methodologically, Bukh balances a micro-level analysis of protest strategies with a macro-level study of state behaviors, giving due attention to temporal variations and critical junctures (when political actors are capable of shaping new agendas, making decisions about institutional design, and forming coalitions). He argues that nationalism, both real and imagined, serves as *a reservoir of social meaning built over time and as such constitutes an ideal condition* for the national identity entrepreneurs to reframe the issue of disputed territories. These actors exploit the dispute as "a rhetorical resource aimed at positioning themselves as champions of the state," mobilizing support for their independent agendas and promoting alternative visions of patriotism against a perceived failure of the elites (5).

Arranged thematically, the book has four in-depth, lucid and well-written chapters to go along with an introduction and conclusion. Bukh sets the stage by theorizing the social construction of territories, nationalism and collective memories. By consulting official documents, media reports and interviews with non-state actors, he employs the methodology of "studying up" to construct the diverse temporal and spatial settings in which the activists responded to the frequent outbreaks of sovereignty disputes over islets and maritime rights in Northeast Asia.

Chapter 1 explores the evolution of Japan's dispute with Russia over the ownership of Northern Territories after World War II. Initially driven by economic deprivation among fishing communities in Hokkaido, the local actors launched the Nemuro Area Peace Reservation and Revival Alliance in 1953 to fight for the residents whose wellbeing was affected by the Soviet occupation of four islands north of Hokkaido. Without any formal diplomatic relations, the Revival Alliance operated as an agent of public diplomacy and met with senior officials in Moscow in 1954. When Japan started normalization with the Soviet Union in 1955, the organizers suspended the Revival Alliance. At the same time, the Hokkaido prefectural authorities led by the socialist governor Tanaka Toshifumi took over the issue to criticize the lack of aid from Tokyo. Despite this political rivalry, the central government in Tokyo co-opted the territorial cause and paid attention to the economic plight of those who suffered in the 1970s. There has emerged a semblance of synergy among Tokyo, Hokkaido and civic groups behind "the return of the islands" movement. Since the 1990s, both national and prefectural politicians have adopted a nationalistic stance on the disputed territories in order to win electoral support. This development shifted the initial concern for economic security among islanders to the quest for national unity and security.

The next two chapters look at the Japanese–Korean disputes over remote islets in the East Sea. Chapter 2 examines the Takeshima campaign in Shimane Prefecture and the passage of the Takeshima Day ordinance in 2005. Partly because of the growing tensions with South Korea and partly because of the change in the fisheries of both nations, fishermen and politicians in Shimane felt marginalized and petitioned Tokyo for help. As with the

last example, domestic power competition came into play. Seeking more autonomy from Tokyo, Shimane's prefectural authorities exploited the issue to resist the then-prime minister Junichiro Koizumi's administrative reforms. They ignored Koizumi's call for calm and passed the Takeshima Day ordinance.

Shifting the focus of attention to South Korea, chapter 3 characterizes the "Protect Dokdo" movement as part of the wider efforts to redefine Korean national identity amidst the process of democratization. Pro-democracy activists who opposed the military dictatorship in the 1960s–1980s played a decisive role in the "Protect Dokdo" movement, because they saw democratization as complementary to the pursuit of an independent foreign policy. When military rule ended in 1987, the relatively liberal environment challenged elected officials to confront the ideological divide within South Korea, the North/South division, and subordinate relations with the United States (109). Worse, the Asian financial crisis in 1997–1998 and the escalating North Korean nuclear crisis in the 2000s compelled the South Korean government to come to grips with the "Protect Dokdo" movement. One enduring institutional response was the Northeast Asia History Foundation, founded in 2006, with the mandate to offer scholarly and policy responses against both China and Japan's sovereignty claims over disputed territories, produce print and online materials on Dokdo, and reach out to sympathetic international scholars, the Korean diaspora and foreign tourists. Through these interventions, the Korean state transformed the nature of the Dokdo movement from the leftist discourse of *minjung* (commoners) struggling against hegemony into a nationalistic rhetoric that juxtaposes Korea and Japan: the former as a victim and the latter as an aggressor. In this connection, it is worth mentioning the book's cover photo, capturing the broad daylight view of Dokdo's West Islet from the peak of the East Islet. On the lower left corner is the house of the islets' sole residents, Kim Seong Do, who died in 2018, and his wife Kim Shin Yeol. A former Vietnam War veteran, Kim Seong Do presented himself as the guardian of the islets. The image invokes intense emotion in Korean viewers, inspiring them to protect the islets.

Chapter 4 refers to the Taiwanese Baodiao (Protect Diaoyu/Diaoyutai) movement that arose as a series of demonstrations organized by Taiwanese students in the United States in 1970–1972, after the discovery of seashore oil deposits near the Senkaku/Diaoyu/Diaoyutai Islands and Washington's decision to return the islets to Japan. The overseas protests radicalized college students in Taiwan and Hong Kong, inspiring the youths to organize similar rallies at home. Yet divisive Chinese politics manifested in the movement from the beginning. The Communist state in Beijing co-opted Taiwanese American activists as informal agents to project an appealing image of the People's Republic in the West, and the Nationalist (Kuomintang, KMT) regime in Taipei perceived the campus activism as a threat to its autocratic rule. The overlapping leadership between the Baodiao campaign and Taiwan's democratization was remarkable. Democratic transition expanded the scope of the Baodiao agenda, attracting fishing communities to defend their rights to access oceanic resources. Bukh brings the story up to date and includes an analysis of Diaoyutai-related protests during the 1990s. In Hong Kong, human rights lawyer Albert Ho Chun-Yan repurposed the campaign to criticize Beijing's authoritarianism, and the pro–Beijing camp organized patriotic rallies to gain support for China's resumption of the city's sovereignty.

The conclusion brings together several threads from previous chapters and reassesses "the strategies implemented by the state with the aim of co-opting the national identity entrepreneurs and their narratives and stabilizing nation-state symbiosis" (271). One major

lesson concerns the convergence of non-state actors and ruling elites over policies related to disputed areas. Irrespective of the objectives, nature and period, the grassroots activists coalesced old and new modes of organizing their respective campaigns and produced actionable templates for the followers. When the elites intervened, they strove to legitimize the state's standing as the sole representative of the nation. Thus, the ambiguity of their national elites, who consistently adhered to the longstanding diplomatic status quo, has kept the activists on their toes.

Another important lesson concerns the effective use of new communicative technologies by non-state actors to reach out to more audiences. New ideas for framing the collective identity and advertising networks allowed them to reimagine the nation. The petitions and protests manifested the resilience of horizontal leadership in popular mobilization. Mastering the campaigning skills and forging coalitions with likeminded individuals, the activists utilized the discussion of territorial disputes to pursue what Stefano Harney calls "a habitable text of identity" during uncertain times.[1] Their stories resonate with the globalization of comfort women activism. According to Yuki Terazawa and Eika Tai, many Japanese legal experts and feminists have collaborated with international civic groups to claim justice for Asian victims of military sexual violence and for the Korean forced workers.[2]

In short, Bukh should be praised for producing a fresh, original and balanced analysis of the social construction of disputed territories in Northeast Asia. This excellent book should be on the shelves of political scientists, sociologists, historians, international relations experts, diplomats and journalists who are interested in geopolitics, socio-political mobilization, and state-society engagement in modern Asia.

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The Environment, Governance and Contentious Adjudication in the Law of the Sea

Angela Del Vecchio and Roberto Virzo (eds). *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, ix + 444 pp. Springer Nature Switzerland AG, 2019, ISBN-13: 978-3-0301-0772-7, Hardcover US$173.

Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henriksen (eds), *Global Challenges and the Law of the Sea*, xxiii + 467 pp. Springer Nature Switzerland AG, 2020. ISBN-13: 978-3-0304-2670-5, Hardcover US$220.

Victor Alencar Mayer Feitosa Ventura, *Environmental Jurisdiction in the Law of the Sea: The Brazilian Blue Amazon*, xiv + 371 pp. Springer Nature Switzerland AG, 2020, ISBN-13: 978-3-0305-0542-4, Hardcover US$170.

The law of the sea as an area of scientific research has seen a surge in interest in the past few years, with more and more books and research articles shedding new discussions or engaging in material that offers different perspectives on developments in the field. In some of the recent developments in the literature, the approaches are, on the one hand, traditional assessments of the law of the sea regime based on the United Nations Convention on

the Law of the Sea (UNCLOS),[3] and, on the other, novel insights on aspects such as a state's environmental regime, delegated powers and governance by international institutions or contentious adjudication on the law of the sea. Naturally, discussions of the environment for example, or more specifically, the marine environment in relation to activities in the sea or on the seabed, involve states that exercise jurisdiction over those activities, in so much as the activities are within their maritime jurisdictional competence. The strict legal question, however, of what entails "marine environment" and how the UNCLOS addresses "pollution from seabed activities under national jurisdiction" is an indication of the importance of the marine environment in relation to the international legal capacity of the law of the sea and to other rules on the protection of the marine environment. The UNCLOS, in Article 145, tells us that the maritime environment should be protected "from harmful effects" and that states therefore should act by taking measures to implement the "control of pollution and other hazards to the marine environment" (UNCLOS, Art. 145[a]). A relevant question however, that must be considered is to what extent the marine environment as set out in UNCLOS relates to the jurisdictional capacity of states to address harmful effects and or other activities on the seabed beyond, for example, two hundred nautical miles. And relatedly, to what extent is the UNCLOS regime preventing or facilitating the jurisdiction of state in relation to the environment in the law of the sea? These questions put into focus the interactions of two legal regimes: the law of the sea as set out in UNCLOS, and the protection of the environment in the law of the sea. In some ways, these books under review attempt to shed light on some of these questions.[4] A particular question that *Environmental Jurisdiction* raises is whether "isolated approaches within the law of the sea" can offer some insights into the environmental jurisdiction (11). *Environmental Jurisdiction* uses the state of Brazil as an example of one such isolated approach, specifically, the Brazilian Blue Amazon (4), that is, the exclusive economic zone (EEZ) of Brazil. This single-authored monograph, which derived from a dissertation, contributes to a new understanding of how jurisdiction on environmental matters intersects with the law of the sea. Of course, it is no small puzzle to address jurisdiction or claims to jurisdiction in relation to EEZ, especially if overlapping coastal claims exists. It is these jurisdictional tensions that *Environmental Jurisdiction* confronts, and the author delivers a powerful and authoritative analysis. Ventura's account of these jurisdictional tensions is set out in questions relating to the continental shelf and jurisdiction under the law of the sea. From an organizational perspective, one gets the sense that the work has not departed much from the dissertation, as the usual polemics of "research questions," "methodology" and "terminologies," designed more or less for the exam committee, are still visible. Ventura also follows well-established approaches and diligently guides the reader on the international legal developments and legalities relating to the continental shelf, the law of the sea, case law, and jurisdictional questions, before addressing in chapters 9–10 the "Brazilian Blue Amazon." These two last chapters respectively address legal (and geopolitical) questions on environmental rights and duties as per the continental shelf, and Brazilian law applicable to the seabed. In terms of the first issue, one notable highlight is that Ventura argues that the Brazilian Blue Amazon is a political concept with legal implications (276). According to Ventura, the emergence of the term allows the Brazilian navy—which also coined the term—"as an actor to be heard in the domestic political debate" (278). If one were to invoke arguments on network theory, then the Brazilian navy is an example forming a niche conversation in the law of the sea. Nonetheless, for Ventura, the Brazilian Blue

Amazon presents legal challenges due to its enlargement. It is in this chapter and argument that we see Ventura put on both his legal and policy hats (implicitly representing Brazil) to argue that the international legal regime allows for "claiming jurisdiction over artificial structures and installations within its EEZ," (323). However, Ventura is also a rationalist, and he notes that often times Brazilian law is incompatible with "core UNCLOS provisions on marine research" (344). In short, Ventura delivers a balanced set of arguments relating to jurisdictional tension on the Brazilian Blue Amazon. Like most lawyers, he believes that tension, especially in matters relating to "environmental jurisdiction of coastal states on the continental shelf" (355) is a matter for international tribunals such as the International Tribunal for the Law of the Sea (ITLOS). Ventura's work will come in handy for practitioners and policy experts on the law of the sea. Moreover, if Brazil were to expand beyond what is legally permissible under the UNCLOS to claim parts of the seabed, it will also come in handy to judges and lawyers alike. It is argumentative, has a comprehensive analysis of Brazil's Blue Amazon legal status, and offers a glimpse of what may come at an ITLOS tribunal.

Interpretations is a welcome addition to the literature as it spells out, over several chapters by different contributors, what the editors refer to as "interpretative criteria" and "current jurisprudential trends" (v). It is a bilingual book in that it accommodates contributions also written in French. This makes this book appealing to researchers who require non–English material. The contributors examined how the International Court of Justice (ICJ), the ITLOS, general arbitral tribunals, and other international tribunals interpreted the UNCLOS. There is also a section that covers specific issues regarding the interpretation of UNCLOS. From the perspective of interpretative criteria, that tone was set by Roberto Virzo in an early chapter that discusses the "general rule of interpretation" (15–38). Most readers will find that this chapter resonates with the title of the book, and that some of the parameters of treaty interpretation as set out in the Vienna Convention on the Law of Treaties (VCLT), under Articles 31–33, were handled in a constructive manner. As Virzo notes, "International courts and tribunals take into account the progressive development of international law and tend to seek overall coherence in the international legal system to which UNCLOS belongs, harmonizing the Convention with the other rules that apply" (32). This assessment is also in line with how courts have approached questions relating to applicable law and interpreting a treaty. Two contributions are particularly illuminating as they both address two complex arenas in which the law of the sea exists: *legality* and *politics*. Legality here means the interaction of the law of the sea convention in hard legal arenas such as the World Trade Organization (WTO) dispute-settlement body (DSB). In this regard, a contribution by Maria Papa on the law of the sea and the WTO (321–345) sheds some light on "normative conflicts" (334) between the ITLOS and the dispute-settlement system of the WTO. Another illuminating contribution that deals with what can be called "political obligations" is that of Loris Marotti, on state consent (383–406). For Larotti, power or incidental jurisdiction is best determined by the *Chagos* test,[5] and even then it is only a "matter for speculation" (399). Another notable contribution, relating to questions of governance at the ITLOS (81–92), is developed by Niels Blokker, who argues that the governance mechanism of ITLOS, or the meeting of "States Parties to the Law of the Sea Convention, SPLOS," is akin to "specialized mini-general assembly" (85). The brief discussion by Blokker also suggests that he was merely introducing a broader research program, the international judicial governance of institutions (INJUGOVINIS). The ITLOS was merely a testing ground of some of the ideas

and also demonstrated how in fact INJUGOVINIS has been operating. Thus, in a sense, as Blokker argues, the governance mechanism of ITLOS—SPLOS—does not necessarily measure up to other tribunals with similar governance structures. Nonetheless, despite the relative success of SPLOS, it is still difficult to mask the background politics of such institution given the "diverging views and interests" (90) of sovereign states.

The several contentious cases that different tribunals such as the ICJ and ITLOS had to deal with suggest that the geopolitics of the ITLOS will remain an institutional feature for some time to come. Not all the diagnoses in *Interpretations* are the correct ones. However, they do give us some insights into how the issues that comes before tribunals relating to the law of the sea are being interpreted. Thus, we can gather—with some inclination, and depending on the issue—where a tribunal will rule. In *Interpretations*, part 5 concludes with five papers addressing "specific issues," and in a way, the second edited book, *Global Challenges*, confronts some of those specific issues. This book is a fascinating piece of work, as is evident in its foreword, written by Vladimir Golitsyn—a renowned maritime scholar in his own right and former president of ITLOS. The book addresses three thematic challenges: how regional organizations contribute to and implement the law of the sea, superpowers and dispute settlement, and areas beyond national jurisdiction. Despite the almost two dozen excellent contributions, four contributions, in relation to each theme, are of particular interest. The first two contributions are found under the theme concerning regional organizations. Patricia Galvao Teles identifies what she thinks is a pressing problem that warrants the International Law Commission (ILC) to look into sea level rise (145–158). This proposal will undoubtedly be pertinent to the actual development of international law and the law of the sea. Another contribution, however, contains a more fascinating discussion. According to Anastasia Telesetsky, the Food and Agricultural Organization (FAO) has some questions to answer. Is the FAO, for example, although not a part to the UNCLOS, exercising legal personality to implement the UNCLOS? Based on the arguments set out in this chapter, the answer is yes, and thus the FAO can exercise "delegated powers" in relation to international ocean governance (205). For Telesetsky, the issue is simple: "The combination of delegated and derivative powers forming an organization's legal personality explains in part how the FAO has been a relatively innovative actor in the field of fisheries governance" (206). This powerful argument is the kind of contribution that requires a full book on its own. In relation to the theme of dispute settlement and superpowers, Natalie Klein highlights how non-state actors have to some extent different "degrees of influence" (244) over certain matters and identifies the stakeholder's theory as a way of addressing UNCLOS dispute settlement (246). In terms of the theme on areas beyond national jurisdiction, the contentious challenge of "biodiversity" was addressed jointly by Catherine Blanchard, Otto Spijkers and Wen Duan, who argue that an international legally binding instrument could serve as a "bridging element between the law of the sea and biodiversity" (372). They develop three structural aspects that, theoretically, could co-exist with the law of the sea and provide "effective implementation of the UNCLOS" (355). Although the two edited volumes are state-of-the-art work and address numerous and complex areas on the law of the sea, their deficiency lies in the length of chapters. In other words, most of the chapters are too short as they touched upon policy and legal issues that could not be expanded upon.

The three books covered in this short essay are important for the law of the sea as this field reclaims prominence in international legal discourse and practice. They give evidence

and full of legal analyses of specific and often complex issues present and/or developing on the law of the sea. Because the law of the sea, by its very nature, is both political and legal, the increasing number of disputes at international tribunals suggest that the law of the sea has developed from the 1958 Convention through to the 1982 Convention. From that perspective, contemporary and isolated issues, such as environmental jurisdictions, delegated powers and governance, or contentious adjudication require modern international legal analyses. These works made that clear.

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Notes

1. Stefano Harney, *Nationalism and Identity: Culture and the Imagination in a Caribbean Diaspora* (Kingston, Jamaica: University of the West Indies Press, 2006).

2. Yuki Terazawa, "The Transnational Redress Campaign for Chinese Survivors of Wartime Sexual Violence in Shanxi Province," in *Marginalization in China: Recasting Minority Politics*, ed. Siu-Keung Cheung, Joseph Tse-Hei Lee, and Lida V. Nedilsky (New York: Palgrave Macmillan, 2009), pp. 67–94, https://doi.org/10.1057/9780230622418_5; Eika Tai, *Comfort Women Activism: Critical Voices from the Perpetrator State* (Hong Kong: Hong Kong University Press, 2020), https://doi.org/10.1057/9780230622418_5.

3. United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397 (entered into force November 16, 1994) (hereinafter "UNCLOS").

4. But see Donald R. Rothwell and David Letts (eds.), *Law of the Sea in South East Asia: Environmental, Navigational and Security Challenges* (Routledge, 2020); Rosemary Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (Edward Elgar, 2017).

5. Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), Award, March 18, 2015.

Call for Papers

JTMS Winter/Spring 2022 Issue

The *Journal Territorial and Maritime Studies* (*JTMS*) is soliciting submissions for its Winter/Spring 2022 issue. *JTMS* is a SCOPUS indexed interdisciplinary journal of research dealing with the political, security, legal, and historical dimensions of terrestrial and maritime territorial disputes. The journal is sponsored by the Northeast Asia History Foundation with editorial offices hosted by Yonsei University in South Korea. The journal provides an academic medium for the announcement and dissemination of research results in the fields of history, international law, international relations, geography, peace studies, and any other relevant discipline. The journal covers all continental areas across the world, and it discusses any territorial and maritime subjects through the various research methods from different perspectives; moreover, practical studies as well as theoretical works, which contribute to a better understanding of territorial and maritime issues, are encouraged.

For consideration in the Winter/Spring 2022 issue, manuscripts should be submitted electronically to *jtms@yonsei.ac.kr* by September 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.

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.

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JTMS Style Guide

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 are underlined or italicized as appropriate. Carefully honed style that is in a mellifluous prose is as important as substantive content. *JTMS* recommends authors ask colleagues whose writing style they respect for help with 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 2,000 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) are center justified in bold with no indentation of the first sentence following the heading. 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 images in tiff format and with a resolution of 800 dpi or higher. 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 superscript Arabic numbers. Please convert all footnotes to endnotes.

Book

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

2nd Non-Consecutive Endnote

2. Jervis 1989, p. 160.

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.

Legal Case Citations

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, pp. 101102, para. 205.

Non-consecutive citations:

ICJ Reports 1978, supra note 18, p. 50, para. 102.

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

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

Structured Abstract Samples

Sample 1

Article Type: Research Paper

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

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

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

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

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

Sample 2

Article Type: Research Paper

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

Design, Methodology, Approach—Using country governance quality to proxy quality of regulatory institutions, this study attempts to reveal how regulatory institutions at home

facilitate a multinational enterprise's (MNE's) international expansion and why the influence differs in different country clusters. Using hierarchical linear modeling and cluster analysis, proposed hypotheses were tested with a three-year panel 511 firms from 38 countries.

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

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

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