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Managing Editor's Comments

Dear *JTMS* Readers,

Greetings again from *JTMS*. The warm spring weather in Seoul is turning the city green and flowers are in bloom. Walking to the editorial office along the park that once was the Gyeong-gi railway line, I took some moments to reflect on the year so far. Far from my relaxing walk to work, the wars in Ukraine and Gaza drag on and there doesn't seem to be an end in sight. I was struck that I was lucky to be in a country free from conflict, even though many in my extended family in Canada think I'm crazy for living under the threat of North Korea. It is simply a matter of perspective. Indeed, how one views the protests and encampments across universities in North America and beyond, and the larger conflict that sparked them, is also simply a matter of perspective. With all the potential for conflict over territory both terrestrial and maritime, and the violence and death such conflicts may engender, we need to understand the perspectives of both sides in order to find common ground or, at the very least, compromise.

I am proud to announce yet another issue of *JTMS* that adds to our perspectives on terrestrial and maritime territorial issues. First, Pierandrea Leucci discusses and questions some of the maritime diplomacy models employed in the South China Sea so far, while exploring alternative ways to revive and strengthen regional dialogue. This includes entrusting the International Court of Justice (ICJ) with the task of conducting a judicial review of the 2016 award. Leucci argues that the use of cooperative, persuasive and coercive diplomacy models in the regional context of the South China Sea may not be successful for several reasons. This includes the different views of the Parties on the legitimacy of the 2016 award, which China has been using as a reason to reject compliance with the outcome of the arbitral decision. A possible "way forward" explored by the author may actually be "looking back," namely asking the ICJ to review the 2016 award to determine if the jurisdictional objections raised by China are well-founded or not, and if so, to put an end to the discussion. He also explores a different way forward, namely a possible ICJ judicial review of the 2016 award, to deal with the issue at hand. This is possible, the article suggests, by the possibility and opportunity of requesting a judicial review of the 2016 award by the ICJ. Leucci concludes that without a clear strategy and understanding of the emotional implications of the dispute, diplomacy alone may not be enough. This is why a judicial review of the 2016 award may be useful in further legitimizing certain legal and diplomatic positions.

Second, Sidhyendra Sisodia explores and gives a brief overview of the geopolitical strategy and evolving dynamics of the Indo-Pacific region's three major players: the United States, India, and China. Furthermore, because the Indo-Pacific area is a "confluence of two seas," it aims to delve into these players' maritime dynamics. While the article uses content

analysis and is not a theory article, there is an implicit realist lens employed in which the state is the principal actor, and the article explores how power distribution impacts nations' conduct in international politics, in terms of how it can establish alliances and produce conflict. Sisodia finds that China's growing economic, military, and naval might is guiding both India's and the United States' objectives in the Indo-Pacific region and, to some extent, promoting strategic collaboration between them. Sisodia concludes that China's exponential economic rise, along with rising power asymmetry between India and China, makes it critical for India to strengthen its strategic partnership in the region, while the U.S. must also strengthen its strategic partnerships with India to counter China's aggressive stance.

Third, Anne-Marie Dedene highlights new aspects of the economic dimension of maritime power through an analysis of China's maritime economy development based on Global Value Chains Theory. Her article employs discourse analysis of *Qiushi* and *Renmin Ribao* articles to identify elite signals on the role of China's maritime economy within its maritime power build-up, combined with a qualitative, deductive thematic analysis of Chinese policy documents. Additionally, descriptive statistical analyses based on data retrieved from the Orbis and UNCTAD databases and the China Marine Statistical Yearbooks were used. Dedene finds the Chinese government has been actively signaling the importance of global value chains for the PRC's maritime economy and has accordingly designed policy measures targeted at upgrading those global value chains. Quantitative data illustrates that, though the PRC's maritime economy has grown, there is no proof of a completed upgrading process within its maritime economy. She suggests that understanding how industrial upgrading enhances a state's maritime power—by accumulating resources and securing a central position in maritime production networks—can provide policymakers with insights to strategically leverage these dynamics for national economic and security interests.

Fourth, Marcelo G. Kohen and Lorenzo Palestini consider whether sea-level rise entails alteration of the baselines, outer limits and boundaries that define the geographical scope of maritime areas. Drawing from the principle of finality and stability of boundaries as well as the concepts of ambulatory, geographically fixed and permanent lines, they begin with boundaries and continues with baselines and outer limits defined by physically changing natural features. Kohen and Palestini find that fixing of baselines, the delineation of outer limits and the delimitation of boundaries are legal acts that occur at precise moments in time, and which must be assessed based on coastal configurations existing at those times. Once established and given publicity, these lines are fixed and permanent. Unless coastal States have intended otherwise, baselines, outer limits and boundaries do not adjust automatically to recession and can only be moved if it is later decided to move them. With regard to anthropogenic change, there are additional reasons supporting the preservation of these lines. The authors suggest that the law of the sea does not make climate change worse and that the legal problem can be resolved through interpretation of UNCLOS.

Fifth, Constantinos Yiallourides offers some reflections on the interplay between energy and environmental protection under the framework of UNCLOS. He sheds light on recent developments regarding the provisions of UNCLOS and relevant legal instruments and case law. The essay discusses the energy characteristics of UNCLOS; how UNCLOS seeks to balance access to energy and environmental protection; and the role UNCLOS

is likely to play in this field in the coming years. Yiallourides asserts that the adoption of UNCLOS in 1982 marked the culmination of global efforts to achieve, among others, two crucial goals: First, legal certainty for coastal states to access marine energy resources of the continental shelf and the exclusive economic zone. Second, guarantees that energy activities within national jurisdiction or control would not cause damage to the environment of other states or the global commons. However, the relevance of UNCLOS in balancing energy and environmental objectives in the 21st century depends on UNCLOS' ability to facilitate transformative normative change. His essay presents a less-discussed aspect of UNCLOS, namely the nexus between energy and marine environmental protection. It shares some perspectives on how UNCLOS can be used to evaluate the legality of energy activities, both domestically and internationally, against environmental standards already agreed to by states. UNCLOS could encourage further efforts to address the impacts of climate change, in line with the general obligation to protect the marine environment.

Once again, I would like to thank our readers, our authors, and our editorial board and staff for their continued support.

Lonnie Edge
Managing Editor

Maritime Diplomacy Challenges in the South China Sea and Possible Judicial Review of the 2016 Award

Pierandrea Leucci

Structured Abstract

Article type: Research Paper

Purpose—This paper aims to discuss and question some of the maritime diplomacy models employed in the South China Sea so far, while exploring alternative ways to revive and strengthen regional dialogue. This includes entrusting the International Court of Justice (ICJ) with the task of conducting a judicial review of the 2016 award.

Findings—The paper briefly examines and discusses the role of cooperative, persuasive and coercive diplomacy models in dealing with the technical and political disagreements between China, the Philippines, and other States after the 2016 award. The paper argues that the use of such models in the regional context of the South China Sea may not be successful for several reasons. This includes the different views of the Parties on the legitimacy of the 2016 award, which China has been using as a reason to reject compliance with the outcome of the arbitral decision. A possible "way forward" explored by the author may actually be "looking back," namely asking the ICJ to review the 2016 award to determine if China's jurisdictional objections raised by China are well-founded or not, and if so, to put an end to the discussion.

Practical implications—We should also ask ourselves what the prospects are for settling the South China Sea dispute with the diplomatic strategies and means that have been used so far. Nothing would prevent States and commentators from continuing to look at maritime diplomacy models, in their traditional and non-traditional conceptualization, as the main practical means to find a solution to the problem. However, the reality is that without a clear strategy and understanding of the emotional implications of the dispute, diplomacy alone may not be enough. This is why a judicial review of the 2016 award may be useful in further legitimizing certain legal and diplomatic positions.

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Originality / Value—The paper examines the South China Sea dispute from a different perspective than other similar research-works. It addresses the psychological complexity of the problem vis-à-vis maritime diplomacy means, particularly by assessing their strategic contribution in facilitating a fair compromise solution to the dispute. The paper also explores a different way forward, namely a possible ICJ judicial review of the 2016 award, to deal with the issue at hand. To the author's knowledge, this is the first article exploring the possibility and opportunity of requesting a judicial review of the 2016 award by the ICJ.

Keywords: ICJ; judicial review; maritime diplomacy;
South China Sea; UNCLOS

I. Introduction

Seven years have passed since the Arbitral Tribunal delivered its award on the merits of the South China Sea arbitration (*The Philippines v. China*), in 2016.[1] A "landmark decision"[2] in the history of the law of the sea touching upon, among other things, the status of natural features and artificial islands, the regulatory regime governing historic waters, the duty to protect and preserve the marine environment, military activities and maritime safety.

China did not participate in the arbitration proceedings and never recognized the legitimacy of the award, arguing that the Tribunal acted *ultra vires*.[3] The Philippines and other States,[4] by contrast, defended the outcome of the 2016 award, in particular by rejecting the argument of overlapping entitlements between the Philippines and China, based on historic titles or rights claimed by the latter within a U-shaped (nine-dashed) line in the South China Sea.[5]

Several diplomatic efforts have been made, thereafter, to address the maritime security threats posed by the dispute between China and its neighboring States, especially the Philippines and Vietnam, in the South China Sea.[6] Maritime diplomacy, intended as the "spectrum of activities that range from the co-operative to the coercive" to achieve a diplomatic outcome of maritime importance,[7] became the new paradigm of confrontation in the region, with a number of initiatives put in place by regional and non-regional actors, including the U.S. and some Member States of the European Union, to reinforce their respective foreign policy objectives.[8] Are those diplomacy models the most effective means to deal with the complexity of the issue at stake? It is hard to say. One thing is clear, however: after the 2016 award, limited progress has been made, through the use of such models, to smooth communications with China and achieve maritime peace and security in the Southeast Asian region. On the contrary, a number of incidents at sea arguably deteriorated inter-State relations in the region.[9] Further, they contributed to stalling negotiations between the Association of Southeast Asian Nations (ASEAN) and China on the conclusion of a Code of Conduct (CoC) on the South China Sea, initially due by 2022.[10]

This paper aims to discuss and question some of the maritime diplomacy models employed so far in the South China Sea, particularly those involving the threat or use of limited force to intimidate or coerce another State. Additionally, the paper looks at the possibility of reviving and strengthening regional dialogue by entrusting the International Court of Justice (ICJ) with the task of conducting a judicial review of the 2016 award. This

paper builds on lectures delivered by the author at the Philippine International Law of the Sea Academy Ateneo Society of International Law 2023, and at the First High-Level Training on the Law of the Sea and Palestine-Israel.[11]

II. The Psychology of Maritime Confrontation

Every standoff or confrontation, whether it is for reasons of convenience or driven by political motives, contains a psychological element that influences the actions and risks that each Party is willing to take.[12] This element is practically justified by the emotional dimension of States, which can be defined as the non-intellectual interpretation of reality (or subjective reality)[13] based mainly on three teleological pillars: i.e., the power,[14] the people,[15] and the past.[16] In that sense, States operate through a self-reinforcing vision and perception of reality, which is influenced by the individual and collective needs and emotions of people and communities (e.g., fear, belonging, resentment, compassion, pride, and sorrow). "Emotions are part of social life,"[17] which serves as the catalyst for law and politics in general. Social realities and expectations are deeply ingrained in the decision-making process of States and regional bodies, as well as in the empirical understanding, construction and application of law. The evolution of international law, as a reflection of social life, is to some extent influenced by this emotional compass,[18] as are the instruments developed by States to address the challenges and breaks of modern society, including climate change, loss of marine biodiversity and other security challenges with a strong transnational nature, which therefore require external and coordinated action.[19]

Whereas foreign policy objectives are usually (and cynically) oriented by the political agenda of nations, the interest of States to normalize or reinforce their diplomatic relations to better achieve those policy objectives is, in itself, an expression of the sentiment behind the composition of such an agenda.[20] Cultural similarities or differences (e.g., language, religion and customs), socio-economic factors, and territorial attachment are examples of emotional drivers that could potentially affect the foreign policy objectives of States while also making disputes, including maritime ones, more likely to escalate. This is especially true when a dispute between two or more States blasts into nationalist sentiments, as seen in the case of the Temple of Preah Vihear's confrontation between Cambodia and Thailand.[21] For reasons of space, this article will not delve into the psychological complexity of maritime confrontation. Yet, it is worth emphasizing the importance of appraising the opportunity of actions in disputed areas vis-à-vis their emotional ramifications and outcomes.

Being able to understand the emotional needs of the Parties becomes essential to prevent the escalation of hostilities and facilitate the reaching of a sound compromise-solution that is acceptable to all.[22] How does that work in practice? First, by training what mediators call "emotional intelligence,"[23] meaning the capacity to identify and strategically address the sentiments of the Parties. Emotional intelligence is not a synonym for compassion. Yet, the former shall entail a certain level of empathy or understanding for the position of the other Parties, which affects the type of action to be taken and its expected outcome.[24] Strongly disagreeing on a matter of fact or law should not preclude States from

understanding each other's point of view, while recognizing the practical or political implications of possibly departing from a certain position, no matter how reasonable or unreasonable the latter might appear. Second, as obvious as it sounds, by making the effort to improve, or at least preserve good relations with the other Parties to a dispute, rather than damaging or deteriorating them. The second aspect configures a form of reactionary pragmatism, which is important to maintain an open line of communication between the Parties and promote constructive engagement. Against this backdrop, the role of diplomacy, intended as a means to promote inter–State communication and constructive engagement, is key.

III. Maritime Diplomacy Models and Considerations

When diplomacy addresses the maritime implications of conduct carried out or authorized by a State to achieve a certain foreign policy objective, commentators often refer to it with a powerful expression, i.e., "maritime diplomacy."[25] Already in 1978, this term was used by Safford to indicate the role played by the merchant fleet under U.S. President Wilson's administration (1913–1921) to promote diplomacy.[26] In its modern conceptualization, maritime diplomacy embraces three fundamental aspects of legal and practical importance: the intentional active or passive ("silence may also speak")[27] conduct of one or more States or someone acting on their behalf[28]; the public objective that such conduct aims at achieving[29]; and the maritime dimension of the conduct and/or the practical or political implications related to it. In that sense, maritime diplomacy can be considered as a tool to manage inter–State relations through the use of maritime spaces and resources.[30]

Maritime diplomacy is not synonymous with "defense," "naval" or "gunboat" diplomacy. These activities are actually subsets of maritime diplomacy, as they all preserve and strengthen a State's foreign and security interests. Yet, they employ different means, models and strategies. In the case of defense diplomacy, this mainly involves the "peaceful (non-confrontational) use of armed forces and related infrastructure […] as a foreign policy and security tool."[31] On the other hand, naval (or gunboat) diplomacy refers to "the use or threat of use of limited naval force in order to secure advantage or to avert loss."[32] Differentiating between these categories can be challenging, especially when the activities are carried out or supported by a State's naval forces (or other governmental agencies) and involve a certain level of coercion or at least demonstrate the capability to do so.

In the South China Sea, the term maritime diplomacy has frequently been associated with the use of naval and other assets, including paramilitary agencies, by States to elicit a specific diplomatic response.[33] This is supported by several diplomacy models regularly employed by regional and non-regional actors in the area. These models by and large consist of individual or joint naval operations aimed at coordinating maritime security efforts (cooperative diplomacy), reinforcing a particular political position through maritime presence and persuasive actions (persuasive diplomacy), or employing threats or limited force to halt, reverse or rectify an opponent's behavior (coercive diplomacy).[34]

Examples of similar activities carried out in the South China Sea are as follows[35]:

(a) Cooperative diplomatic mechanisms consisting in joint military exercises conducted by the U.S. and the EU on 23–24 March 2023, involving the USS *Paul Hamilton* (DDG-60) U.S. navy vessel, and the *Reina Sofia* and *Carlo Bergamini*, flying the flag of Spain and Italy, respectively.[36] Bilateral military exercises (Trident23), including tactical anti-surface and anti-air warfare operations conducted by Australian and Japanese forces together with a Vietnamese naval frigate on 24–25 June 2023.[37]

(b) The freedom of navigation operations (FONOPs)[38] carried out, inter alia, by the USS *Decatur* (DDG-73) around the Paracel Islands on 21 October 2016,[39] by the USS *Chancellorsville* (CG-62) around the Spratly Islands on 29 November 2022,[40] and by the USS *Milius* around the Paracel Islands on 24 March 2023.[41]

(c) China's dispatchment of 95 ships, including Navy and Coast Guard vessels, near Subi Reef, on 20 December 2019.[42]

These naval operations are characterized by a certain level of intrusiveness, whether actual or perceived, regardless of their antagonistic nature.[43] For instance, peacefully crossing disputed waters for the purpose of navigation is a universally recognized right under both UNCLOS and customary international law.[44] Yet, when the same right is exercised to reinforce a political posture or to "challenge" a maritime claim, such as in the context of FONOPs,[45] it may be argued that the end is different from that for which the right was originally fashioned. The same happens when other legitimate uses of the sea are made in disputed areas where the self-restraint obligation of States applies.[46] This is likely to trigger a diplomatic—and emotional—response ranging from reciprocation to escalation. Additionally, this may raise questions about the practical application of the principle of good faith and the prohibition of abuse of right under international law,[47] especially when the different purpose for which the right is exercised has been explicitly stated.

Maritime diplomacy, in its modern conceptualization and regional application, may constitute a paradigm of confrontation between States in the South China Sea, which deserves further attention and examination.[48] Especially when the line between non-coercive and coercive diplomatic means is rather fuzzy. In fact, as Le Mière fairly noted:

> [i]t is not always clear where the line between co-operative/persuasive maritime diplomacy and coercive maritime diplomacy lies. Regular military exercises between allies may just be a form of co-operative maritime diplomacy, but when they are deliberately located in disputed waters or use capabilities that are directed at a third party, they become coercive.[49]

Different opinions exist as to whether the above diplomacy models could qualify as preventive diplomacy,[50] especially when they entail the use of a certain degree of force. Yet, this is not the opinion of the author, who believes that the risk of an escalation of hostilities, which is inherent to certain forms of coercion, would practically defeat, in full or in part, the main objective of preventive diplomacy, being it, by contrast, the reasonable deflection of such a risk.[51]

Besides, a more general question, which is relevant for the purposes of this paper, arises in respect of the aforementioned diplomacy models: to what extent do they contribute to improving or at least preserving the state-of-play in the South China Sea, taking into consideration the emotional dimension of the States concerned? To answer this question, an examination of the major technical and political issues related to the South China Sea dispute is necessary.

IV. South China Sea: The Anatomy of the Dispute

Fully understanding the South China Sea dispute requires, among other things, a solid legal, historical and political knowledge of the region, its main (regional and external) actors, and the international regulatory framework in place, including the UN Convention on the Law of the Sea (UNCLOS) and related instruments.[52]

Deepening into the anatomy of the dispute is a complex exercise entailing extensive research on multiple sources of information, including press releases, public statements, regional reports, academic literature, national and international case-law, domestic legislation, and diplomatic communications. Even the announcement date of a big Warner Brothers movie can be the opportunity for a revamping of diplomatic clashes, as recently showcased by Vietnam.[53] Everything is in motion, with news breaking out daily on, for instance, military drilling planned or carried out by regional and non-regional actors at sea, discussions between China and ASEAN States, or diplomatic incidents connected with dangerous naval maneuvers, the use of water cannons or land-reclamation in and around some of the maritime features of the South China Sea.[54]

Deconstructing the dispute, however, is not an impossible task. At least insofar as the essential elements of the disagreement are separated from the non-essential ones. In that respect, the 27 diplomatic notes sent, between 2019 and 2022, by China, the Philippines and other States[55] in the context of the 2019 submission of information made by Malaysia to the Commission on the Limits of the Continental Shelf (CLCS),[56] are of great importance to frame the key technical issues of the dispute after the 2016 award.[57] These issues can be summarized as follows:

(a) Problems concerning the legal status of the natural features in the South China Sea. Notably, their possible qualification as fully entitled islands, in accordance with Article 121(3) of UNCLOS, as claimed by China, despite the opposite conclusions reached by the Arbitral Tribunal in the 2016 award.[58]

(b) Problems concerning the possibility to use archipelagic baselines outside of the narrow scope of application of Part IV of UNCLOS, as claimed by China, despite the opposite conclusions reached by the Arbitral Tribunal in the 2016 award.[59]

(c) Problems concerning the possibility to restrict access to maritime spaces and resources, including the exploration and exploitation of natural resources and navigational rights and freedoms, to protect national security interests, as claimed by China, despite the opposite conclusions reached by the Arbitral Tribunal in the 2016 award.[60]

(d) Problems concerning historic rights (e.g., in respect of resources-related activities), based on alleged long and continuous usage, as claimed by China, despite the opposite conclusions reached by the Arbitral Tribunal in the 2016 award.[61]

These technical issues have a deep and functional relation with the outcome of the 2016 award, which China never recognized or implemented,[62] as instead required under Article 296(1) of UNCLOS.[63] What China puts into question, in particular, is the validity of the award, which according to the same State was delivered *ultra vires* by the Arbitral Tribunal.[64] Notably, China contends that the Tribunal disregarded the territorial nature of the

dispute and the existence of overlapping entitlements in the South China Sea, which should have triggered the jurisdictional exemption set in Article 298(1)(a)(i) of UNCLOS.[65]

Without delving into the specifics of the technical disagreement between China and the other concerned States, the question that needs to be asked is how the relevant maritime diplomacy models, as applied in the South China Sea today, effectively contribute to addressing, smoothing and resolving such a disagreement. According to the author, not much. The main reason is that diplomacy models, especially when they involve the threat or use of limited force in disputed areas, are inherently self-centered and conservative means of intervention,[66] often deployed for the purpose of "signalling to allies and rivals of one's intents and capabilities."[67] They primarily lean towards reinforcing and defending a certain political posture and/or weakening the operational capability of the opponent, rather than building trust or facilitating constructive dialogue between the Parties to a dispute. Occasionally, these models may persuade one Party to reconsider its policy objectives. However, for that to work in practice, there would need to be a significant disparity in power (e.g., military or economic) and a lack of strong emotional barriers between the Parties.[68] Currently, this is not the case in the South China Sea, where a coalition of small and middle powers/States, backed by non-regional players, particularly the U.S., actually prevents China from fully leveraging its superpower status in the region.

By and large, maritime diplomacy has its own language. To be effective, the diplomatic message needs to be credible, suitable for its intended purpose, and, most importantly, well-understood (which does not necessarily mean clear). The opposite is likely to transform maritime diplomacy efforts into a catalyst for popular dissatisfaction,[69] which in turn has a further emotional impact on the dispute. This is especially true when the threat associated with a particular maritime diplomacy model lacks credibility due to frequent use without the expected diplomatic output or advantage.[70] The South China Sea region is peppered with similar examples.

The different interpretation of the relevant UNCLOS provisions, which is at the core of the technical disagreement between China and other States, is unlikely to change due to certain cooperative, persuasive, or coercive diplomacy mechanisms being carried out in the region. This different interpretation, along with the reluctance of regional and non-regional players to deviate from it in a meaningful way, is rather linked to political problems such as superpower competition, domestic and regional security and stability, international credibility and geopolitical supremacy.[71] Not to mention the emotional aspect of the dispute, which is already fueled by historical grudges and nationalist sentiments.[72]

The point is that, even if all the technical problems between China and the other States are solved, and assuming that the diplomatic models used in the South China Sea so far are the most effective means to achieve that objective (*quod non*), there would still be several major political obstacles that would prevent any compromise solution that could be acceptable to all. Why? Because pushing the elephant out of the room would require either China or the other States, particularly the Philippines, to step back and reconsider their position on the 2016 award, which would have significant political, economic and credibility implications. This does not seem like a realistic scenario, at least in the short to medium term. Especially considering the statements made by China and other States on the 7th anniversary of the 2016 award, on July 12, 2023,[73] which further reinforced their respective (and opposing) positions on the legal status of the award.

V. Looking Back to Move Forward?

If the prospect of a U-turn by China or the other States concerned is rather unlikely, and if the relevant diplomacy models employed so far in the South China Sea are to some extent emotionally blind, and, in any case, not fully designed to smooth/clear the technical and political disagreement between the Parties, then what are the main options on the table?

The first option is to insist on the CoC negotiations between China and ASEAN, as well as on the conclusion of certain functional arrangements (e.g., concerning fisheries or naval operations in the South China Sea) that would promote constructive engagement.[74] This option has the practical advantage of building confidence between the Parties, reducing the risk of an escalation of hostilities and positively orienting the emotional compass of the dispute. Yet, in the author's view that would not solve the major technical and political problems stressed above, many of which would still be linked, either directly or indirectly, to the different positions of the Parties on the findings of the 2016 award and the implementation of its outcome.[75] In that respect, "the absence of the appropriate level of consent between the parties," due to technical or political disagreement, would most likely not bring the dispute to an end even in the event of a deal—in the form of a CoC or other functional arrangement.[76]

A second and, to date, unexplored option may consist of submitting a request for a judicial review of the 2016 award to the ICJ, in accordance with Annex VII ("Arbitration") to UNCLOS and the ICJ Statute. The ICJ already exercised a similar review power in the *Honduras/Nicaragua* (1960) case[77] and in the *Guinea-Bissau/Senegal* (1991) case.[78] How does that work in practice? The proceedings that led to the 2016 award were instituted by the Philippines in 2013 under Annex VII to UNCLOS.[79] The Parties to a dispute settled under the same Annex are provided with the power to refer any controversy on the interpretation or implementation of the relevant award to (a) the tribunal that made the award[80]; or (b) by agreement, to other courts or tribunals under Article 287 of UNCLOS, namely the International Tribunal for the Law of the Sea (ITLOS) or the ICJ.[81]

Whereas it is hard to believe that China would ever agree to submit a similar review-question to the same Arbitral Tribunal that delivered the 2016 award,[82] the prospect of China submitting (or accepting) a request to ITLOS or to the ICJ, with a view to reverting the outcome of the 2016 award, is not foolish. Some of the reasons supporting that argument are discussed below. Yet, the practical opportunity of relying on a similar third-party solution should, in any case, be gauged against the backdrop of other factors that, for reasons of space, will not be discussed here.

There, considering that the jurisdiction of ITLOS is limited to the interpretation and application of UNCLOS,[83] submitting the request for a judicial review to the ICJ might be preferable vis-à-vis the broader jurisdictional power of the latter. In particular, Article 36(1) of the ICJ Statute provides that "[t]he jurisdiction of the Court comprises *all cases which the parties refer to it* and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force" (emphasis added). Hence, the jurisdictional scope of the ICJ powers could potentially include aspects of the dispute related to international law at large, including those not covered by UNCLOS and/or ancillary to the jurisdictional issue at stake.[84] This scenario is just one of those backed by the regulatory

framework in place. Meaning that the practical opportunity of broadening the scope of any request for a judicial review, de facto turning the ICJ into an appellate body, might not be desirable or even appropriate in practical terms.[85] It would be up to the Philippines and China, in case, to decide on the content and scope of the request—i.e., whether to limit it to a strict examination of the validity of the 2016 award or to go beyond that, for instance, through a declaration made pursuant to Article 36(2) of the ICJ Statute.[86] Depending on the jurisdictional scope of the request, third Parties to the case may also ask, where appropriate, to intervene and make observations, in accordance with the relevant provisions of the ICJ Statute and the Rules of the Court.[87] Those observations could have a strong political and diplomatic impact, let alone the legal implications of intervening States under Article 63(2) of the ICJ Statute.[88]

Having said that, how does the option of judicial review fit within the regional reality of the dispute? It is no secret that China, in line with its long-standing practice, history, and regional strategy, has largely ruled out the possibility of relying on arbitration or litigation to settle disputes in the region.[89] China's preferred option remains working with ASEAN countries to expedite the conclusion of the CoC and address legal or political disagreements through bilateral diplomacy and joint-initiatives. Some may consider it wishful, to say the least, for China to engage with the ICJ to request a judicial review of the 2016 award. Yet, China is a contracting Party to UNCLOS, which, incidentally, the same country has been invoking (in a rather odd way) as a reason for rejecting the 2016 award.[90] This consideration is relevant for the following reasons: first, China may need support from an influential and independent body to legitimize its interpretation of UNCLOS, among other things, in a regional and diplomatic context. Without such support, China will continue to be portrayed as a bullying force that does not play by the rules, by many and for many years to come. This condition could have negative effects on negotiations with ASEAN and neighboring States, with economic and security repercussions for China. Second, easing confrontations with regional and non-regional actors may reduce the risk of other UNCLOS Parties initiating new proceedings against China for alleged non-compliance with certain non-territorial duties and provisions of UNCLOS (e.g., environmental protection and maritime safety). For them, China would not be able to invoke Article 298 of UNCLOS or other jurisdictional arguments used to delegitimize the 2016 award.

A judicial review of the 2016 award would also give China and the Philippines the chance to revive a constructive dialogue on the topic. Importantly, if the validity of the 2016 award is confirmed, China would have to change the conversation's paradigm, including its stance on the content and outcome of the award. It would be very difficult, if not impossible, for China to argue that the award is not applicable and that its conduct aligns with international law if (also) the principal judicial organ of the UN thinks otherwise. On the other hand, if the ICJ recognizes the invalidity of the 2016 award, it could create new negotiation opportunities and allow the Philippines and other States to distance themselves, either fully or partially, from the findings of the award, if necessary. In the worst-case scenario, the concerned States could use the review request as leverage in the CoC (or other) negotiations, exploiting the counterpart's reluctance to potentially re-examine the case.

Finally, any decision taken by the ICJ in the context of a review request would be relevant for the purposes of Article 94 of the UN Charter, which demands UN Members to comply with the decisions of the Court,[91] while also establishing a recourse mechanism

before the UN Security Council (UNSC) in case of non-compliance with those decisions.[92] A similar act of non-compliance would arguably fall under the scope of Chapter VI ("Pacific Settlement of Disputes") of the UN Charter, with the consequence that UN Members (with or without veto power)[93] failing to perform their obligations under the relevant ICJ decision would be obliged to abstain from any voting procedures before the UNSC,[94] including those resulting from the application of the aforementioned Article 94 of the Charter. This mechanism could contribute to positively affecting the enforceability of any relevant ICJ decision outcome.

VI. Conclusion

The paper looked at the South China Sea dispute from a different perspective compared to other similar research works. It addressed the psychological complexity of the issue in relation to maritime diplomacy, specifically by gauging its strategic contribution in facilitating a fair compromise to the dispute.

The paper briefly analyzed and discussed the role of maritime diplomacy models in addressing the technical and political disagreements between China, the Philippines, and other States following the 2016 award. In this regard, the paper argued that the use of such models in the regional context of the South China Sea may not lead to success due to various reasons, including the differing views of the Parties regarding the legitimacy of the 2016 award, which China has been using as a reason to reject compliance with the arbitral decision.

The author explored a possible way forward by suggesting a review of the 2016 award by the ICJ (or ITLOS) to determine the validity of China's jurisdictional objections from a legal standpoint, thereby putting an end to the discussion. Is this legally possible? Yes, according to Annex VII of UNCLOS and the ICJ Statute and case-law. Is it fair and ethically appropriate? Perhaps not. States should not utilize their political, military, or economic power to challenge a decision made by a duly established judicial body, in accordance with the legally binding rules and procedures under UNCLOS. Yet, we should try to understand the psychology of the dispute and question whether there is any possibility of China genuinely believing in and being compelled by its arguments. A positive answer cannot be completely ruled out, especially when considering the emotional aspect of the dispute.[95]

Further, we should ask ourselves what the prospect is of settling the dispute with the diplomatic strategy and models that have been used so far. The Indonesian chairmanship of ASEAN had the merit of reviving talks between China and ASEAN on the way to reaching a regional agreement on the South China Sea. Yet, there are many different opinions within ASEAN, with some not being comfortable with China's position and policy objectives in the region.[96] It is difficult to imagine how a future CoC or similar arrangement could resolve all the technical and political issues between China and other regional and non-regional players without compromising someone's interests. This is especially true considering that the outcome of the 2016 award supports the rights and claims of one side, while being perceived as biased, unfair, and invalid by the other side.

Nothing prevents States and commentators from continuing to look at models of maritime diplomacy, in its traditional and non-traditional categorization, as an effective means

to facilitate a solution to the problem. However, the reality is that without a clear strategy and understanding of the emotional implications of the dispute, diplomacy alone may not be enough, especially when it involves any threat or use of force by military and paramilitary actors.[97] This is why judicial diplomacy, in the form of a review of the 2016 award, could be the way forward. There is no win-win situation with this approach, clearly. Either the award is valid or it is not. Yet, the outcome of a possible ICJ review could delegitimize the legal and political stance of one or both Parties, compelling them to adhere to international law, among other things, in order to avoid expressing a strong and public sentiment of mistrust towards the UN judicial system at large.

Notes

1. *South China Sea Arbitration* (Philippines v. China), Final Award, PCA Case No. 2013-19, ICGJ 495 (PCA 2016), 12 July 2016.

2. Clive Schofield, "A Landmark Decision in the South China Sea: The Scope and Implications of the Arbitral Tribunal's Award" (2016) *CSEA*, Vol. 38, No. 3, 339–348.

3. Ministry of Foreign Affairs of the People's Republic of China, "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines," Ministry of Foreign Affairs of the People's Republic of China, July 12 2016, https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160712_679470.html, accessed May 4, 2024.

4. E.g., Vietnam, India, USA, Australia, Malaysia, UK, France, Germany, Japan, and New Zealand. See (n 38).

5. Padraig Lysaght, "The South China Sea Conflict: Ten Thousand Stones and a Nine-Dash-Line—Rethinking Maritime Space Concepts," in *Unresolved Border, Land and Maritime Disputes in Southeast Asia: Bi-and Multilateral Conflict Resolution Approaches and ASEAN's Centrality*, ed. Alfred Gerstl and Mária Straŝaková (Brill, 2017), https://doi.org/10.1163/9789004312180_008.

6. Shicun Wu, "Preventing Confrontation and Conflict in the South China Sea," *China International Strategy Review* 2 (2020), pp. 38–40, https://doi.org/10.1007/s42533-020-00043-x.

7. Christian Le Mière, *Maritime Diplomacy in the 21st Century: Drivers and Challenges* (Routledge, 2014), p. 27, https://doi.org/10.4324/9780203555590.

8. Wu, 2020, p. 40; Keyouan Zou, Qiang Ye, "The U-Shaped Line and Its Legal Implications," *Routledge Handbook of the South China Sea*, ed. in Keyuan Zou (Routledge, 2021), pp. 131–133.

9. Mary George, "Maritime Security and Demilitarisation of the South China Sea," 68–71, and Ted L. McDorman, "The Territorial Sovereignty Disputes in the South China Sea," 91, in Zou, 2021; James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers, 2013), p. 45, 290–291, 313–315 and 321–325, https://doi.org/10.1163/9789004233577_012; Wu, 2020, 37; and Maria Siow, "South China Sea: As Philippines Hosts U.S.-Japan-Australia Drills, Will External Players' Presence Escalate Tensions?," *South China Morning Post*, August 23, 2023, https://www.scmp.com/week-asia/politics/article/3231960/south-china-sea-philippines-hosts-us-japan-australia-drills-will-external-players-presence-escalate, accessed May 4, 2024.

10. Although, under the Indonesian chairmanship of ASEAN (1 January–31 December 2023) several initiatives were held to revamp and accelerate the negotiations. For instance, on July 13, an agreement was reached with China on guidelines to accelerate negotiations for the CoC, with the aim of finalizing the negotiations by 2027. Kiki Siregar, "ASEAN–China Agree on Guidelines to Accelerate Negotiations for the Code of Conduct in the South China Sea," *Ministry of Foreign Affairs of the Republic of Indonesia,* July 13, 2023, https://www.channelnewsasia.com/asia/asean-china-south-china-sea-code-conduct-wang-yi-3626306, accessed May 4, 2024; "Indonesia's Initiative Accelerates South China Sea Code of Conduct Negotiations," *Ministry of Foreign Affairs of the Republic of Indonesia*, September 1, 2023, https://en.tempo.co/read/1767566/asean-indonesias-initiative-accelerates-south-china-sea-code-of-conduct-negotiations, accessed May 4, 2024.

11. The event was co-organized by the Ankara University National Center for the Sea and Maritime Law, Law for Palestine, and ASCOMARE in July–August 2023.

12. Kariuki Muigua, "Achieving Lasting Outcomes: Addressing the Psychological Aspects of

Conflict Through Mediation" (2018) KMCO, 1–18, 8. http://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf, accessed on May 2, 2024.

13. Karen A. Jehn, "A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups," *Administrative Science Quarterly*, 42 (1997), p 532. Not to be confused with the "subjective dimension" of international law, inter alia, characterized by the active role of individual experts and academia in interpreting law and State practice (see Andrea Carcano, "Uses and Possible Misuses of a Comparative International Law Approach," 54 [2018] QIL, Zoom-in, pp. 35–36.)

14. I.e., the personality of the leaders and the political agenda of those in a position of power; the nationalist sentiments of the population; and the historical sympathy or grudges of States. See also academic literature on political psychology, including: Margaret G. Hermann, "Explaining Foreign Policy Behavior Using the Personal Characteristics of Political Leaders," *International Studies Quarterly* 24(1) (1980), https://doi.org/10.2307/2600126; Juliet Kaarbo, "Personality and International Politics. Insights from Existing Research and Directions for the Future," *European Review of International Studies* 4(2) (2017), https://doi.org/10.3224/eris.v4i2-3.02; Aabid Majeed Sheikh, Saban Halis Calis, "Political Psychology: Contribution to the Discipline of International Relations," *World Affairs: The Journal of International Issues*, 23(3) (2019), https://doi.org/10.2307/2600126.

15. Nationalist sentiments of the population.

16. The historical sympathy or grudges held by the parties.

17. Anne Saab, "Emotions in International Law," *ESIL Reflections*, 10(3) (2021), p. 2.

18. *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9th April 1949, International Court of Justice (ICJ); Separate Opinion Alvarez, 41.

19. Pierandrea Leucci, Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 2: Fisheries and the Law of the Sea in the Anthropocene Era* (Luglio Editore, 2022), pp. 337–339.

20. Emilie M. Hafner-Burton, Stephan Haggard, David A. Lake, David G. Victor, "The Behavioral Revolution and International Relations," *International Organization*, 71(S1) (2017), pp. 12–13, https://doi.org/10.1017/S0020818316000400; and Emily Kidd White, "Images of Reach, Range, and Recognition: Thinking About Emotions in the Study of International Law," in *Research Handbook on Law and Emotion* eds. Susan A. Bandes, Jody Lynee Madeira, Kathryn Temple and Emily Kidd White (Edward Elgar Publishing, 2021), https://doi.org/10.4337/9781788119085.00049.

21. Richard Q. Turcsányi, Zdeněk Kříž, "ASEAN and the Thai-Cambodian Conflict," pp. 85–95, in Alfred Gerstl, Mária Straŝaková, 2017. See also, Shane Strate, "A Pile of Stones? Preah Vihear as a Thai Symbol of National Humiliation," *South East Asia Research*, 21(1) (2013), https://doi.org/10.5367/sear.2013.0139; and Kimly Ngoun, "From a Pile of Stone to a National Symbol: Preah Vihear Temple and Norodom Sihanouk's Politics of Post-Colonial Nation-Building," *South East Asia Research*, 26(S2) (2018), https://doi.org/10.1177/0967828X18775557.

22. Patrick Balsano, "UNCLOS and Unfortunate Oversight of Cartography," in *ASCOMARE Yearbook on the Law of the Sea. Volume 1: Law of the Sea, Interpretation and Definitions,* eds. Pierandrea Leucci and Ilaria Vianello (Luglio Editore, 2021), pp. 271–272.

23. James Duffy, "Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein," *QUT Law Review*, 10(1) (2010), p. 45, https://doi.org/10.5204/qutlr.v10i1.9.

24. *Ibid*., p. 46–47.

25. Le Mière, 2014, pp. 2–3; Bama Andika Putra, "The Golden Age of White Hulls: Deciphering the Philippines Maritime Diplomatic Strategies in the South China Sea," *Social Sciences* 12(6) (2023), p. 3, https://doi.org/10.3390/socsci12060337; Agus Sugiharto, Poetry Shafwatullah, "Maritime Diplomacy in Building Maritime National Security in Indonesia," *Jurnal Maritim Indonesia* 9(2) (2021), pp. 123–124; and Zaeem Hassan Mehmood, Ramla Khan, "Maritime Diplomacy in the Indian Ocean: A Way Forward for Pakistan," *Austral: Brazilian Journal of Strategy and International Relations*, 11(22) (2022), pp. 162–166, https://doi.org/10.22456/2238-6912.122914.

26. Jeffrey J. Safford, *Wilsonian Maritime Diplomacy. 1913–1921* (Rutgers University Press, 1978).

27. *Sovereignty Over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), Judgment, Merits, ICJ Reports 2008, p. 12, 51, para. 122.

28. For instance, non–State actors and civil assets (e. g., fishing vessels). La Mière, 2014, pp. 16–17.

29. It is reasonable to believe, that if the policy results are just incidental, and not pre-determined, then we should not talk about maritime diplomacy *stricto sensu*. La Mière, 2014, pp. 24–25.

30. La Mière, 2014, p. 7.

31. See, Andrew Cottey and Anthony Forster, *Reshaping Defence Diplomacy: New Roles for Military*

Co-operation and Assistance (Routledge, 2004), p. 6; and Lech Drab, "Defence Diplomacy—An Important Tool for the Implementation of Foreign Policy and Security of the State," *Security & Defence Quarterly* 20(3) (2018), p. 61, https://doi.org/10.5604/01.3001.0012.5152.

32. James Cable, *Gunboat Diplomacy, 1919–1991: Political Applications of Limited Naval Force* (Springer, 2016), p. 14. See also, Kevin Rowlands, "Defining Naval Diplomacy," in *Naval Diplomacy in the 21st Century. a Model for the Post–Cold War Global Order,* ed. Kevin Rowlands (Routledge, 2018). It should be noted, in any case, the differentiation drawn by Le Mière between "gunboat" and "naval" diplomacy, mostly based on the element of inter-State collaboration, which appears to be missing in the former. Le Mière, 2014, p. 22.

33. In this regard, Pattiradjawane and Soebajgo noted that "Maritime Diplomacy in Asia Is Different and Unprecedented Compared to Other Regions of the World." René L. Pattiradjawane and Natalia Soebajgo, "Establishing Maritime Diplomacy in Southeast Asia: Balancing ASEAN Regional Interest in the Rise of Competing Great Power Rivalry," *Global Journal of Human-Social Science* 16(4) (2016), p. 2.

34. Le Mière, 2014, pp. 7–15; Pattiradjawane and Soebajgo, 2016, p. 5. See also, Lan Anh Nguyen Dang, "China's Maritime Coercive Diplomacy in the South China Sea Since 2011," *Staats- und Universitätsbibliothek Hamburg Carl von Ossietzky (*2022).

35. For a more detailed (and structural) examination of some of the co-operative, persuasive and coercive diplomacy models employed in East Asia/South China Sea, including their underlying reasons and practical implications, see La Mière, 2014, pp. 127–137.

36. Peter Stano, "First Ever Joint Naval Exercise Conducted Between the EU and U.S.," *European Union External Action Service (EEAS)*, March 24, 2023, https://www.eeas.europa.eu/eeas/us-first-ever-joint-naval-exercise-conducted-between-eu-and-us_en, accessed May 4, 2024; and Bochen Han, "Eyeing China, U.S. and EU Conclude First-Ever Joint Naval Exercise Touting High Seas Freedom of Navigation," *South China Morning Post,* March 25, 2023, https://www.scmp.com/news/china/article/3214815/eyeing-china-us-and-eu-conclude-first-ever-joint-naval-exercise-touting-high-seas-freedom-navigation, accessed May 4 2024.

37. Japan Maritime Self-Defense Force, "The Indo-Pacific Deployment 2023 (IPD23) Units Conducted a Bilateral Exercise (Trident23) with the Royal Australian Navy and the Royal Australian Air Force," *Ministry of Defense of Japan* (June 2023), https://www.mod.go.jp/msdf/en/exercises/IPD23.html, accessed May 4, 2024.

38. See also Huiyun Feng, Kai He, "Battlefield or Playground? The Rising Tensions Between the U.S. and China in the South China Sea," in *US–China Competition and the South China Sea Disputes* eds. Huiyun Feng and Kai He (Routledge, 2018); and Kraska and Pedrozo, 2013, pp. 245–246.

39. Eleanor Freund, *Freedom of Navigation in the South China Sea—A Practical Guide* (Harvard Kennedy School—Belfer Center for Science and International Affairs, 2017), p. 35.

40. Jim Garamone, "Navy Conducts Freedom of Navigation Op, as DOD Releases China Military Report," *U.S. Department of Defense* (November 29, 2022), https://www.defense.gov/News/News-Stories/Article/Article/3231196/navy-conducts-freedom-of-navigation-op-as-dod-releases-china-military-report/, accessed May 4, 2024.

41. Sruthi Sadhasivam, Sejal Mehta and Varshini S, "An Analysis of the U.S. FONOP Exercises & China's Responses in the South China Sea (2020–2023)," *Chennai Centre for China Studies* (October 3, 2023), https://www.c3sindia.org/post/an-analysis-of-the-us-fonop-exercises-china-s-responses-in-the-south-china-sea-2020-23, accessed May 4, 2024.

42. Haetami, "China Coercive Diplomacy Through South China Sea Conflict and Belt and Road Initiatives," *Jurnal Pertahanan*, 5(2) (2019), p. 54, https://doi.org/10.33172/jp.v5i2.522; and "Under Pressure: Philippine Construction Provokes a Paramilitary Response," *Asia Maritime Transparency Initiative*, February 6, 2019 https://amti.csis.org/under-pressure-philippine-construction-paramilitary-response/, accessed May 4, 2024.

43. This aspect has been intensified by the growing use of new technology in the region, including unmanned vehicles and AI-driven systems. See Emilie van den Hoven, "Datafication and Artificial Intelligence in the South China Sea," in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 3: Maritime Security, New Technology and Ethics* (Luglio Editore, 2024).

44. Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (Manchester University Press, 2022), p. 142, https://doi.org/10.7765/9781526159038.

45. "Freedom of Navigation Report Annual Release," *U. S. Department of State,* March 16, 2021, https://www.state.gov/freedom-of-navigation-report-annual-release/, accessed May 4, 2024.

46. E.g., under Articles 74(3) and 83(3) of UNCLOS, in a way consistent with the Declaration on

Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970; UNGA A/RES/2625).

47. E.g., Article 300 of UNCLOS. See Michael Byers, "Abuse of Rights: An Old Principle, a New Age" (2002) *McGill Law Journal*, Vol. 47, 390–431.

48. Hasjim Djalal, "Border Diplomacy," in *Maritime Border Diplomacy* eds. Myron H. Nordquist and John Norton Moore (Martinus Nijhoff Publishers, 2012), pp. 26–27, https://doi.org/10.1163/9789004230941_004.

49. Le Mière, 2014, p. 23.

50. Guan-Jiun Jeff Jang, "Conflict Prevention and Confidence Building Measures in the South China Sea," *U. S. Army War College Strategy Research Project* (2013), pp. 13–15; Ian Townsend-Gault, "Preventive Diplomacy and Pro-Activity in the South China Sea," *Contemporary Southeast Asia* 20(2) (1998), p. 183, https://doi.org/10.1355/CS20_2D; Timothy R. Heath, "Winning Friends and Influencing People: Naval Diplomacy with Chinese Characteristics," (2020) China Maritime Report No. 8, U. S. Naval War College; Hasjim Djalal and Ian Townsend-Gault, "Preventive Diplomacy: Managing Potential Conflicts in the South China Sea," in *Herding Cats: Multiparty Mediation in a Complex World* eds. Chester Crocker, Fen Osler Hampson, Pamela Aall (United States Institute of Peace Press, 1999); and Oriana Skylar Mastro, "Military Confrontation in the South China Sea," *Council on Foreign Relations*, May 21, 2020, https://www.cfr.org/report/military-confrontation-south-china-sea, accessed May 4, 2024.

51. Niklas Swanström, *Conflict Prevention and Conflict Management in Northeast Asia* (Central Asia-Caucasus Institute Silk Road Studies Program, 2005), p. 12.

52. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force, 16 November 1994) 1833 UNTS 397. All the ASEAN Members except Cambodia have either ratified or accessed the Convention.

53. On 3 July 2023, the National Film Appraisal and Classification Board of Vietnam banned the release of the movie *Barbie* in Vietnam, because of the inclusion of a map, in one of the scenes, allegedly depicting a U-shaped line resembling the one claimed by China in the South China Sea. Jin Yu Young, "How Barbie Landed in Hot Water in Vietnam," *The New York Times*, July 4, 2023, https://www.nytimes.com/2023/07/04/world/asia/barbie-vietnam-south-china-sea.html, accessed May 4, 2024.

54. The Center for International Law (CIL) of the National University of Singapore (NUS) manages a well assorted and up-to-date repository of South China Sea news which can be consulted at this link: https://cil.nus.edu.sg/research/ocean-law-policy/south-china-sea/south-china-sea-news-updates/, accessed May 4, 2024.

55. The full list of States who sent diplomatic notes in the context of the 2019 Malaysian submission includes (in order) China, the Philippines, Vietnam, India, USA, Australia, Malaysia, UK, France, Germany, Japan, and New Zealand.

56. Commission on the Limits of the Continental Shelf, Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Partial submission by Malaysia in the South China Sea (12 December 2019), and Communications received with regard to the submission. Available at: https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html, accessed May 4, 2024. See also, Kesuan Zou, Qiang Ye, "The U-Shaped Line and Its Legal Implications," pp. 133–136, in Keyuan Zou, 2021.

57. According to the Asia Maritime Transparency Initiative, as of July 2023, at least 24 Governments have publicly supported the 2016 award, while 8 have publicly rejected it. Arbitration Support Tracker, available at https://amti.csis.org/arbitration-support-tracker/, accessed on May 4, 2024.

58. *South China Sea Arbitration* (n 1), 174, paras. 382–384, 259–260, paras. 643–648.

59. *Ibid*., 236–237, paras. 573–576, and 473–474, para. 1203.

60. *Ibid*., 282, para. 708, 284, para. 712, 318, para. 814, and 474–475, para. 1203.

61. *Ibid*., 116–117, paras. 276–278, and 473, para. 1203.

62. Mincai Yu, "The South China Sea Dispute and the Philippines Arbitration Tribunal: China's Policy Options," *Australian Journal of International Affairs* 70(3) (2016), https://doi.org/10.1080/10357718.2015.1135869. See also, Feng Zhu, Lingqun Li, "China's South China Sea Policies," in Zou, 2021, p. 172.

63. UNCLOS, Article 296(1): "Any Decision Rendered by a Court or Tribunal Having Jurisdiction Under This Section Shall Be Final and Shall Be Complied with by All the Parties to the Dispute." See also, Robert Beckman, Vu Hai Dang, "ASEAN and Peaceful Management of Disputes in the South China Sea," in *Peaceful Maritime Engagement in East Asia and the Pacific Region* eds. James Kraska, Ronan Long and Myron H. Nordquist (Brill, 2023), pp. 346–347.

64. "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of

12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines," *Ministry of Foreign Affairs of the People's Republic of China,* July 12, 2023, https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160712_679470.html, accessed May 4, 2024. See also, National Institute for South China Sea Studies, "A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration," *Asian Yearbook of International Law 23* (2018), pp. 161–162; and Keyouan Zou, Qiang Ye, "The U-Shaped Line and Its Legal Implications," in Keyuan Zou, 2021, pp. 135–136.

65. On 25 August 2006, China made a declaration pursuant to Article 298(1) of UNCLOS to exclude compulsory jurisdiction under Part XV, Section 2 of the same Convention, in respect of all the disputes concerning, inter alia, "the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles" (Article 298(1)(a)(i) of UNCLOS).

66. Edward Luttwak, *The Political Uses of Sea Power* (Johns Hopkins University Press, 1974), p. 7; Geoffrey Till, *Seapower: A Guide for the Twenty-first Century* (Routledge, 2018), p. 20; Sheldon W. Simon, "Conflict and Diplomacy in the South China Sea" *Asian Survey*, 52(6) (2012), p. 999, https://doi.org/10.1525/as.2012.52.6.995.

67. Le Mière, 2014, p. 28.

68. Pattiradjawane and Soebajgo, 2016, p. 5; and Le Mière, 2014, p. 58–59.

69. Le Mière, 2014, p. 69.

70. *Ibid*., p. 79.

71. For an overview of the different strategic and political drivers of the dispute, see Huiyun Feng, Kai He, *US–China Competition and the South China Sea Disputes* (Routledge, 2018). See also, Pattiradjawane and Soebajgo, 2016, pp. 3–5 and pp. 7–9; Shicun Wu, 2020, pp. 40–41; James Kraska, Raul Pedrozo, 2013, p. 318 and pp. 334–340; and Jay L. Batongbacal, "Deciphering Duterte's Foreign Policy on the South China Sea," pp. 209–210, https://doi.org/10.4324/9780367822217-15, "China's South China Sea Policies," pp. 172, and Mingjiang Li, Archana Atmakuri, "U.S.–China Rivalry in the South China Sea," in Zou, 2021.

72. Huiyun Feng and Kai He, "Battlefield or Playground? the Rising Tensions Between the U.S. and China in the South China Sea," in *US–China Competition and the South China Sea Disputes* eds. Huiyun Feng and Kai He (Routledge, 2018), p. 5; Alfred Gerstl and Mária Strašáková, "The South China Sea Dispute: A Shift to a More Proactive Role in ASEAN's Discourse and Policies Since 2012," in *Unresolved Border, Land and Maritime Disputes in Southeast Asia* eds. Alfred Gerstl and Mária Strašaková (Brill, 2017), pp. 206–211, https://doi.org/10.1163/9789004312180_009; Maximilian Ernst, "Control Through Cooperation? Assessing China's Economic and Military-Strategic Interests in the South China Sea," *Journal of Territorial and Maritime Studies* 9(2) (2022), p. 13; and Saidatul Nadia Abd Aziz, Salawati Mat Basir, "South China Sea: ASEAN Mechanism on Maritime Disputes and the Rise of Indo Pacific Region, " *Journal of Territorial and Maritime Studies* 9(2) (2022), p. 69.

73. E.g., "Remarks of the Spokesperson of the Chinese Embassy in the Philippines on the Seventh Anniversary of the So-called Award on the South China Sea Arbitration," *Embassy of the People's Republic of China in the Republic of the Philippines,* July 12, 2023, http://ph.china-embassy.gov.cn/eng/sgdt/202307/t20230712_11112236.htm, accessed May 4, 2024; "Statement of Secretary for Foreign Affairs Enrique A. Manalo on the 7th Anniversary of the Award on the South China Sea Arbitration," *Department of Foreign Affairs, Republic of the Philippines,* July 12, 2023, https://philembassy.org.au/latest/news/statement-of-secretary-for-foreign-affairs-enrique-a-manalo-on-the-7th-anniversary-of-the-award-on-the-south-china-sea-arbitration-12-july-2023, accessed May 4, 2024.

74. For an examination of some of the major efforts made by ASEAN to deal with the South China Sea dispute, see Robert Beckman, Vu Hai Dang, 2023, and Robert Beckman, Vu Hai Dang, "ASEAN and the South China Sea," and Ramses Amer, Li Janwei, "From DOC to COC: A Regional Rules-Based Order," in Zou, 2021. For bilateral and cooperative efforts made by China and other States, see Zhu and Li, 2021, pp. 174–177, and Dustin Kuan-Hsiung Wang, "Fisheries Management in the South China Sea," pp. 256, in Zou, 2021.

75. It is also worth mentioning what the U.S. Ambassador Cherith Norman Chalet stressed on 30 January 2020 before the UN Security Council, namely: "If a code of conduct is used by some to legitimize egregious behaviour and unlawful maritime claims, or is inconsistent with international law, it will prove harmful to the region and to all who value the freedom of the seas." Cherith Norman Chalet, "Remarks at the UN Security Council Briefing on UN Cooperation with ASEAN," *United States Mission to the UN*, January 20, 2020, https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-un-cooperation-with-asean/, accessed May 4, 2024.

76. Stormont and Towsend-Gault quoted in Clive Schofield, "No Panacea? Challenges in the Application of Provisional Arrangements of a Practical Nature," in Myron H. Nordquist, John Norton Moore, *Maritime Border Diplomacy* (Martinus Nijhoff Publishers, 2012), p. 159.

77. *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), Judgment of 18 November 1960, ICJ Reports 1960, 192.

78. *Case Concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports 1991, 53.

79. See UNCLOS, Article 287(5): "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree."

80. UNCLOS, Annex VII, Article 12(1).

81. *Ibid*., Article 12(2).

82. Yet, it should be noted that, in accordance with Annex VII, Article 12(1) of UNCLOS, the Tribunal's composition would slightly change due to the sad demise of Judge Mensah in 2020. Judge Thomas A. Mensah was the President of the Arbitral Tribunal which delivered the 2016 award. In that respect, Annex VII, Article 12(1), inter alia, indicates that: "any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal."

83. UNCLOS, Article 288(1).

84. Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, 90, para. 220.

85. *Case Concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Reports 1991, 53, Separate Opinion of Judge Manfred Lachs, 92, and Declaration of Judge Kéba Mbaye, 1. See also (n 62).

86. ICJ Statute, Article 36(2): "the states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation ; d. the nature or extent of the reparation to be made for the breach of an international obligation."

87. In particular, Articles 62 and 63 of the ICJ Statute, and Articles 43, 82, 83, 85 and 86 of the ICJ Rules.

88. ICJ Statute, Article 63(2): "Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

89. See George, 2021, Zhu, 2021 and Gerstl and Straŝaková, 2017; and inter alia, Feng Liu and Kai He, "China's Bilateral Relations, Order Transition, and the Indo-Pacific Dynamics," *The China Review* 23(1) (2023); Nalanda Roy, "The Dragon's Charm Diplomacy in the South China Sea," *Indian Journal of Asian Affairs* 30(1–2), pp. 15–28, pp. 20–24; Carlyle A. Thayer, "ASEAN, China and the Code of Conduct in the South China Sea," *The SAIS Review of International Affairs* 33(2) (2013), https://doi.org/10.1353/sais.2013.0022.

90. In particular, by claiming that the lack of implementation of the 2016 award would be justified by the invalidity of the award itself, which China contends was delivered *ultra vires*. Recently (July 12, 2023), the Foreign Ministry Spokesperson (Mr. Wang Wenbin), for instance, publicly stated that "The Arbitral Tribunal Violated the Principle of State Consent, Exercised Its Jurisdiction Ultra Vires and Rendered an Award in Disregard of the Law. This Is a Grave Violation of UNCLOS and General International Law." Available at https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2511_665403/202307/t20230712_11112244.html accessed on May 4, 2024.

91. UN Charter, Article 94(1).

92. *Ibid*., Article 94(2).

93. According to Article 23(1) of the UN Charter, to be read in conjunction with Article 27(3) of the same Charter, permanent members of the UNSC holding veto powers are China, France, Russia, the UK and the USA.

94. For an examination of the practical application of the duty to abstain under Article 27(3) of the UN Charter, see Enrico Milano, "Russia's Veto in the Security Council: Whiter the Duty to Abstain Under Art. 27(3) of the UN Charter?," *ZaöRV* 75 (2015); Myres S. McDougal, Richard N. Gardner, "The Veto and the Charter: An Interpretation for Survival," *The Yale Law Journal* 60(2) (1951) p. 258, https://doi.org/10.2307/793413; and Stephen E. Smith, "Reviving the Obligatory Abstention Rule in the UN Security Council: Reform from the Inside Out," *New Zealand Yearbook of International Law* 12 (2014).

95. For an analysis of the jurisdictional claims and positions, see Sreenivasa Rao Pemmaraju, "The South China Sea Arbitration (The Philippines V. China): Assessment of the Award on Jurisdiction and Admissibility," *Chinese Journal of International Law* 15(2) (2016).

96. Saidatul Nadia Abd Aziz, 2022, pp. 67–68, and p. 75.

97. Pattiradjawane and Soebajgo, 2016, p. 6.

Biographical Statement

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Navigating the Rise of China and the U.S.–India Response in the Indo-Pacific

Sidhyendra Sisodia

Structured Abstract

Article Type: Research Paper

Purpose—The article explores and gives a brief overview of the geopolitical strategy and evolving dynamics of the Indo-Pacific region's three major players: the United States, India, and China. Furthermore, because the Indo-Pacific area is a "confluence of two seas," it aims to delve into these players' maritime dynamics.

Methodology/Approach—Although the article is not a theory application, there is an implicit realist lens employed in which the state is the principal actor. The article examines how power distribution impacts nations' conduct in international politics, can establish alliances, and produce conflict. The content analysis method is used in this paper.

Findings—The article finds that China's growing economic, military, and naval might is guiding both India's and the United States' objectives in the Indo-Pacific region and, to some extent, promoting strategic collaboration between them.

Practical implications—China's exponential economic rise, along with rising power asymmetry between India and China, makes it critical for India to strengthen its strategic partnership in the region, while the U.S. must also strengthen its strategic partnerships with India to counter China's aggressive stance.

Keywords: China–India rivalry; Indo-Pacific; maritime strategy; United States

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I. Introduction

Over the previous two decades, there has been a considerable shift in foreign policymakers' terminology from "Asia-Pacific" to "Indo-Pacific." On the one hand, the term Asia-Pacific arose as a post–Cold War phenomenon fueled by two factors: economic integration and stronger security connections. Whereas the term Indo-Pacific represents a mammoth region, encapsulating both the Indian and Pacific Oceans as a "singular maritime unit," it also includes littoral states, a veritable necessity for maintaining rule-based order in the region. As the notion of the Indo-Pacific grows in popularity, there is rising worry over the region's security implications, as observed by Jeffrey Wilson, the Indo-Pacific represents a shift from an "economic to the security-driven" process. For him, two types of rescaling are important in understating and comprehending Indo-Pacific region—*institutional rescaling*, representing reconfiguration of regional institutions and frameworks to address the evolving dynamics and challenges in the Indo-Pacific region, and *functional rescaling*, representing reconfiguration of the scope of issues to be addressed through regional governance schemes. Historically, for instance, Asia-Pacific regional governance focuses on economic cooperation through the Asia Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN), while security cooperation remains underdeveloped in comparison to the Indo-Pacific, which is driven by the security-led approach.[1] Thus, under this new security framework, there is increasing concern over China's rise as a prominent regional force. As a result, this article examines the geopolitical strategies and shifting dynamics of three main players in the region: the United States, India, and China. Furthermore, because the Indo-Pacific region is a "confluence of two seas," it attempts to dive into the maritime dynamics of these actors. This article finds that China's expanding economic, military, and naval strength is navigating both India's and the United States' strategies in the Indo-Pacific area and, to some extent, fostering a strategic cooperation between them, as noted by Gurpreet S. Khurrana, and that the increasing Chinese presence in both the Indian and Pacific Oceans is a crucial factor for this security convergence.[2] This article begins by discussing China's ascent and its impact on the Indo-Pacific area, then moves on to discuss U.S. strategy and regional challenges. Further, the paper delves into India's strategy in the Indo-Pacific, its challenges, reactions, and finally, in the conclusion, it analyzes the growing U.S.–India partnership, which is driven by the China factor.

II. Analysis of China's Rising Influence and Its Impact on the Indo-Pacific

2.1 China's Ascent and Shifting Dynamics

Rory Medcalf asserts that following decades of growth since China embarked on its "reform and opening" process, the People's Republic of China could be legitimately acknowledged as a significant global power.[3] This could be confirmed by some empirical facts. From a geopolitical standpoint, China has significantly altered the regional power balance. It would be justifiable to argue that China's rise is the primary catalyst

for the emergence of the Indo-Pacific (IP) concept. The following examples reflect Chinese assertiveness, which are crucial for the U.S. and India. The "Scarborough Shoal standoff" between the Philippines and the People Republic of China (PRC) occurred in 2012, when Chinese law enforcement ships remained on the scene to protect their fishermen from attempted apprehension by the Philippine Navy. The situation was eventually resolved through mediation by the U.S. as the Philippines is a strategic partner for them. In 2023, both parties again collided when the PRC Coast Guard obstructed a Philippine resupply mission to "Second Thomas Shoal," which lies within Manila's Exclusive Economic Zone (EEZ). China claims the Shoal on its new national map, which has created consternation among Southeast Asian countries such as Vietnam, Malaysia, and the Philippines. This map also surprisingly claimed the whole "Bolshoi Ussuriysky Island," which both China and Russia resolved disputes over in 2005 and partitioned in 2008. Another instance includes protests in China erupting over the Japanese acquisition of the Senkaku Islands, leading to increased Chinese ships in disputed waters. Likewise, in 2017, a clash between Chinese and Indian forces occurred over the strategic and significant Doklam plateau, which serves as a crucial triangular junction for India, China and Bhutan. Here, China's construction of a border road in the region was interpreted by India as an attempt to extend its reach into Indian territory, particularly New Delhi. Following that, other border skirmishes occurred in the Galwan Valley in 2020 and the Tawang sector in 2022. All of these incidents, particularly those that occurred after 2012, have alarmed various countries in the Indo-Pacific region, prompting them to recalibrate their foreign policies accordingly.

Rising Chinese assertiveness in the region is the result of two significant factors: economic and military. Economically, in 2000, China's GDP was $1.21 trillion, India's GDP was $468.39 billion, and the U.S. GDP was $10.25 trillion. By 2022, China's GDP reached $17.96 trillion, India's GDP stood at $3.39 trillion, and the U.S. GDP amounted to $25.46 trillion.[4] These statistics reveal that all three nations have had significant growth over the years, though China has grown exceptionally, India has grown steadily, and the U.S. has continued to maintain its economic hegemony with considerably less significant growth than both China and India. Consequently, China has emerged as a "lender of last resort," or what has been called "Chinese economic hegemony."

Several incidents can be cited here. Sri Lanka is one notable example of a country that has become overly reliant on China's ambitious "Belt and Road Initiative" (BRI). China has made significant investments in projects such as the Hambantota Port and Colombo Port City, raising concerns in Sri Lanka about its sovereignty and debt sustainability. Sri Lanka handed over the Hambantota Port to a state-owned Chinese company on a 99-year lease in 2017. Another example would be the "China-Pakistan Economic Corridor" (CPEC), in which China has invested significantly. This corridor passes through the disputed territory of "Pakistan Occupied Kashmir" (POK), which has caused alarm in India over perceived Chinese intentions. In Southeast Asia, China has invested in infrastructure projects such as hydropower dams, roads, construction, and a special economic zone (SEZ) in Cambodia. It has also harmed ASEAN's unity, which is built on consensus-based decision-making, so that even one member's dissent is enough to prevent any proposal from moving forward. Consequently, China has leveraged the absence of domestic resistance to strengthen and expand its political and economic dominance over smaller ASEAN members such as Cambodia, Laos, and Brunei, posing a challenge to ASEAN unity by engaging with them

at bilateral level. This was apparent in 2012, when the ASEAN foreign ministers' meeting failed to publish a common communiqué for the first time in ASEAN's 45-year history. This gives China a strategic advantage over the U.S. by ensuring a favorable outcome from the Southeast Asian bloc.[5]

From a military perspective, China is the second-largest spender on its military, with an estimated budget of $296 billion, with the United States ranked first, at an estimated $916 billion, and India's military spending at $83.6 billion in 2023.[6] This rising military expenditure does not necessarily amount to using force in real time, but it can lead to the "threat of using force," or what has been called "diplomacy of violence." China has sufficient military resources in the region to coerce other regional players to adhere to its will. This figure reflects the importance of the military as a tool of national power, particularly for China, which has a growing ambition in the region. Obviously, this military spending is backed by China's tremendous economic growth over the past decades. Consequently, China's robust economic, political, and military presence in the oceanic expanse of the region holds significant influence and serves as a catalyst for the reimagining and widespread adoption of the Indo-Pacific framework.[7] Along with this, China's historical perspectives, or "inside-view," are a significant impetus directing its aspirations in the region.

2.2 Cultural Rejuvenation

China's perspective can be grasped by knowing what stories it tells about itself in order to better articulate its external behavior. Admiral "Zheng He" commanded cruises into the Indian Ocean, the Gulf, and East Africa during the Ming dynasty. Similarly, the Malabar, Quilon, and Calicut served as the final stop for Chinese warships. Ma Huan's account of Zheng He's voyages states that the "voyages [were] to assert Ming overlordship … over the various countries across the oceans with which China maintained significant trade relation[s]."[8] Likewise, Xi Jinping introduced the Belt and Road Initiative (BRI) during speeches at Nazarbayev University in Kazakhstan and the Indonesian Parliament in Jakarta in September 2013.[9] The initiative aimed to establish the 21st-century Maritime Silk Road (MSR) and the current view is that China's amicable relations seem to conceal a hidden motive of asserting hegemony in the region, as was described in Ma Huan's historical account. This is further exemplified by the frequent deployment of China's *Liaoning* aircraft carrier in the South China Sea, which serves as evidence of China's intention to assert its dominance in naval power. However, Chinese officials' take on the MSR initiative is different, as according to them, it represents the spirit of the Silk Road—peace, openness, mutual learning, and cooperation—entailing mutual benefit for every state and not a monopoly benefiting only one nation. Hence, it is depicted as "no longer just a concept in history books," but "a story of modern logistics and Sino-European cooperation."[10] For China, the MSR is the amalgamation of "self-interest" and "altruism" benefiting all parties. Nevertheless, the road has become a significant aspect of China's strategic vision, seeking to revive the country's historical greatness and national rejuvenation through the ambitious Belt and Road Initiative (BRI) in a contemporary context. This has a tremendous impact on growing Chinese naval efforts to revive its age-old glory of the supremacy of maritime power seen during the Song dynasty. Thus, tremendous economic and military growth, supported by

historical narrative, has made China ambitious and assertive in the region, leading to the securitization of the Indo-Pacific region. As a result, China is trying to become a regionally relevant naval force.

2.3 China's Rising Naval Power and Implications for the Indo-Pacific Region

As opined by Alfred Thayer Mahan, an American naval strategist, controlling certain key points on a map is imperative to having an "entrée" to sea power.[11] Consequently, China is actively expanding its naval capabilities. There is no official account as to the real capabilities of the People's Liberation Army Navy (PLAN). However, according to the U.S. *Congressional Research Service Report* (2022), China's navy is by far the largest in East Asia, and sometime between 2015 to 2020, it surpassed the U.S. Navy (USN) in the number of navy force ships. According to a U.S. Department of Defense report, China's navy "is the largest navy in the world with a battle force of approximately 340 platforms, including major surface combatants, submarines, ocean-going amphibious ships, mine warfare ships, aircraft carriers, and fleet auxiliaries…. This figure does not include approximately 85 patrol combatants and craft that carry anti-ship cruise missiles (ASCM). The … overall battle force [of China's navy] is expected to grow to 400 ships by 2025 and 440 ships by 2030."[12] However, comparing the total number of USN ships to those of PLAN is highly problematic, as mere comparing may not reflect the true picture, given the more sophisticated technologies involved.[13]

Similarly, the *Congressional Research Service Report 2023* observes that within China's near-seas region, the navy is a powerful military force, and it is undertaking an increasing number of operations in the larger waterways of the Indian Ocean, Western Pacific, and the waters around Europe. While acknowledging China's naval limitations and weaknesses, the report emphasized that its modernization effort includes a wide range of ship, aircraft, weapon, and C4ISR (command and control, communications, computers, intelligence, surveillance, and reconnaissance) acquisition programs, all of which are aimed at addressing the situation in Taiwan, achieving a greater degree of domination in its near-seas region, particularly the South China Sea, while simultaneously replacing U.S. influence in the Western Pacific region.[14] It seems quite inevitable that PLAN is going to continue to increase its presence in the Indo-Pacific region to secure its economic, geopolitical and maritime interests. Consequently, China's sixth national defense strategy introduced the new concept of "frontier defense," which involves a forward naval presence and development of long-range power-projection capabilities to sustain such a presence. It also includes a far seas projection, which refers to having capabilities from Western Africa through the Indian Ocean.[15]

However, the far seas projection of Chinese naval capabilities is bound by certain structural blockages, such as the Taiwan Strait, Diaoyu/Senkaku Island, and the South China Sea. The region also includes certain chokepoints such as the Strait of Hormuz, the Strait of Malacca, and the Bab el-Mandeb. China's other options to bypass the chokepoints are the Sunda Strait and the Lombok Strait, neither of which are efficient. The Sunda Strait is unsuited for big, modern ships due to a variety of navigation problems including high tidal flows, sand bank development, and the presence of several oil drilling platforms. The Lombok Strait, which runs through the Indonesian archipelago, is

significantly deeper and can accommodate all ship sizes, but the route is much longer. If the Malacca Strait is blocked, China will bear the brunt of the consequences due to its bigger investment in the region.[16] Therefore, controlling and having influence in the Malacca Straight is of primary importance for China. As Hu Jintao stated, "certain powers have all along encroached on and tried to control navigation through the strait."[17] This region is also important in two senses: firstly, a significant amount of China's trade and energy imports pass through these waterways and any disruption will lead to serious blockage and major consequences for Chinese economy. Secondly, geopolitically having presence in the region will allow China to project its power and influence in the region while opening a gateway to the Indian Ocean. Moreover, China can leverage its investment in its infrastructure projects, such as BRI. All these structural blockages have forced China to actively engage in the "near seas." Consequently, Chinese naval strategy has undergone two changes—from "near coast" defense prior to the mid–1980s to "near seas active defense" after the mid–1980s[18]—while simultaneously only extending its "benign influence" in "far seas" because asserting its naval projection power in both regions could make China vulnerable to "fighting at two fronts." Presumably, China is asserting power in the South China Sea over the scattered Paracel and Spratly Islands along with the disputed "tenth-dash line," and in "far seas" it is projecting its "economic hegemony" through infrastructural projects like CPEC, MSR, and BRI.

It has been stated that China's interest in the Indian Ocean cannot be separated from its need for energy security, on which most of its population depends.[19] Consequently, China is concerned with securing its International Shipping Lanes (ISLs) and Sea Lanes of Communication (SLOCs) in the Indian Ocean, as affirmed by 2019 Defense White Paper.[20] As a result, China's increasing presence in the Indian Ocean region has raised concerns for India. To foster prosperous relations with Oman, Aden, and particularly Djibouti, China has undertaken anti-piracy operations in the Gulf of Aden. Moreover, during its anti-piracy deployments, China has engaged with nearly all nations bordering the Western Pacific, the Indian Ocean Region (IOR), and the Mediterranean.[21] This extensive engagement underscores China's growing strategic interest and influence in these crucial maritime regions. This can be seen as the "hub and spoke" strategy of the Chinese for influence building.[22] Chinese engagement in the Indian Ocean can be broadly summarized as follows: the Indian Ocean represents a vital pathway for oil imports to China, so the security of energy passage is a vital element for China's growing influence in the region. Around 80% of China's oil imports come through this vital region.[23] Furthermore, China is enhancing its economic collaboration with countries in the region to capitalize on potential economic gains. Given that ASEAN is projected to become the world's fourth-largest economy,[24] both the U.S. and China factor this into their calculations, as do other nations. As a result, China is keen on strengthening ties and partnerships with ASEAN countries to harness the economic opportunities arising from their collective growth and development. Lastly, the Indo-Pacific region is an important opportunity for China to broaden its influence in a wider spectrum—the Indian Ocean could be seen as a gateway through which China can connect with major economies of the world. Hence, China's economic and military rise is a major determinant in navigating U.S. and Indian strategies and policies in the Indo-Pacific region, and both nations are proceeding accordingly.

III. The U.S. Indo-Pacific Strategy: Navigating China's Rise with Geopolitical Shifts

3.1 A Strategic Shift in U.S. Foreign Policy

For the U.S., the term Indo-Pacific began with a more normative connotation than one of strategic importance.[25] The Indo-Pacific was considered a matter of security and strategic importance when the narrative shifted to constraining the rise of China. Moreover, this shift is also accompanied by many determinants. The Indian Ocean is a bustling hub for international trade, emphasizing the critical value of its sea lanes for communication and transportation. Second, India is the world's most populated country and a neighbor of China with a long-disputed border, thus making it the most strategic country for the U.S. to partner with to curb China's ascent. Finally, the Indo-Pacific is the junction point of two seas, uniting diverse topography and therefore becoming the fundamental arena of calculative strategic importance for the U.S. to retain its control and hegemony. As a result, "maintaining an open Indian Ocean highway, defending chokepoints at either end of the Indian Ocean, and sanitizing the Indian Ocean as a secondary front in broader Asian regional competition"[26] is critical for the U.S. Moreover, during the Cold War, the U.S.–led "hub and spoke" system established security alliances throughout the region in order to protect the U.S. presence and influence and defined Asia-Pacific security arrangements. Following the end of the Cold War and the emergence of the Indo-Pacific as a new geostrategic zone, several multi-alignment mechanisms such as the Quadrilateral Security Dialogue (QUAD) and the Australia, United Kingdom, United States (AUKUS) treaty represent a network of alliances, or a "complex patchwork," that has become a defining system of alignment for Asia.[27] QUAD is an informal alliance but its influence is growing every year. For now, it focuses on non-traditional security challenges and aims to preserve normative order in the region. AUKUS is an alliance centered on military technology exchange and close collaboration in the fields of artificial intelligence, information technology, long and mid-range missile technology, and quantum technologies. One of its initial notions was to assist Australia in increasing military capabilities in the face of rising Chinese assertiveness in the region, indicating plainly that the U.S. would strengthen its alliance with its partners in the face of rising Chinese competition.

A dramatic shift has occurred in U.S. foreign policy levels after 2011–2012, when the Obama administration evoked what was called a "Rebalance," or "Pivot to Asia." At the leadership level, when Trump came into power, he was more pragmatic in his approach to foreign policy than his predecessor Obama. Trump's speech at the APEC summit in 2017 marked his intention for the Indo-Pacific when he stated, "I will make bilateral trade agreements with any Indo-Pacific nation that wants to be our partner and that will abide by the principles of fair and reciprocal trade."[28] The earlier G.W. Bush Administration recognized China as a strategic competitor, however, Bush's cry for the "war on terror" hindered it. Later on, when Obama assumed office, he recognized this shortcoming, but instead of taking an extreme approach against China he welcomed the rise of it, believing that it was indispensable for world prosperity. Current President Joe Biden, in his first press conference, stated, "This is a battle between the utility of democracies in the 21st century and autocracies." By considering both Russia and China he further stated that "We have got

to prove democracy works."[29] The three-pillar approach of Secretary of State Antony J. Blinken, "invest, align, compete," further defines the U.S. policy against China. The first is to invest in the economy, innovation, and a democratic political system; the second is to align with and reinforce partners on common objectives; and the third is to compete with China to protect the United States' core interests.[30]

A close scrutiny of numerous documents reflects certain shift in U.S. foreign policy. As articulated in the 2018 *National Defense Strategy* document, the advent of a "long-term strategic competition" between powers has arisen as the preeminent menace to the national security of the United States.[31] According to the 2017 *National Security Strategy* document, both China and Russia threaten the "American power, influence, and interests, attempting to erode American security and prosperity."[32] In short, China unequivocally warrants classification as a "strategic competitor" and a "revisionist power," as it actively promotes a paradigm that diametrically opposes the values and interests integral to the United States.[33] The U.S. Indo-Pacific Strategy (IPS) is also outlined in the *White House's Indo-Pacific Strategy 2022*; in this it is apparent that the U.S. intends to mold the environment of the region to limit China's aggressiveness while simultaneously cooperating on certain areas such as climate change and non-proliferation, establishing a "balance of power" that is most favorable to them. "The United States is committed to an Indo-Pacific that is free and open, connected, prosperous, secure, and resilient."[34] Echoing the same sentiment, the 2022 *National Security Strategy* prioritizes China and asserts that "the PRC presents America's most consequential geopolitical challenge" it is the "only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to advance that objective."[35] The document highlights the United States' three-pronged approach to China, similar to Blinken's three pillar approach: first, the U.S. seeks to strengthen and invest in domestic affairs, including strengthening innovation, democracy, and resilience; second, it seeks to expand its strategic partnership with a network of regional allies working toward a common goal; and finally, it wants to compete with China responsibly to defend its national interests.[36]

3.2 Oceans as Double-Edged Swords

The U.S. Indo-Pacific strategy relies heavily on its theoretical grasp of Heartland theory, Rimland theory, and, most importantly, Mahan's Sea Power theory in the Indo-Pacific context. However, it has been argued that it can be replaced by an emerging paradigm of seeking "dominant access and influence" through a new geographical contextualization of "Nareland" (commonly known as Natural Resource Lands).[37] Natural resources such as oil, minerals, gas, and water are critical determinants of economic development and national interest for countries, and gaining control of these has become a source of competition and conflict, and has also resulted in a "resource curse" in some countries. Consequently, possessing access to these resources is critical for the U.S. and China. However, for the U.S. in the Indo-Pacific, the two oceans constitute key geographical variables that influence it strategically. Historically, the Pacific War (1941–1945) against Japan established the U.S. as the hegemon of the Pacific. In relation to World Wars I and II, the Atlantic Ocean provided the U.S. with a strategic advantage, by distancing it from war-torn Europe and giving it a

comparatively isolationist stance crucial for becoming a significant power in the post-war period. As Robert D. Kaplan argues,

> It wasn't only two oceans that gave Americans the luxury of their idealism, it was also that these two oceans gave America direct access to the two principal arteries … Europe across the Atlantic and East Asia across the Pacific…. And yet these same oceans … have given America a virulent strain of isolationism that has persisted to this day.[38]

However, as the geopolitical landscape changes with the emergence of a new strategic region—the Indo-Pacific—this line of thought is changing. The two vast oceans that once provided the U.S. with a strategic advantage, offering a sense of isolationism, now present a formidable challenge in maintaining its hegemonic status. Today, deploying troops and naval forces in distant waters, notably the expansive Indian Ocean, entails substantial financial and logistical burdens for the U.S. Such endeavors may result in a pronounced strain on the American military, pushing it towards a state of hyperextension.[39] Moreover, the recent Covid-19 impact, fiscal concerns, and low ship construction rates, combined with declining industrial capacity, have made it difficult for the U.S. to invest in naval projects in the Indo-Pacific region, far distant from the Western hemisphere, and this may also lead to a "progressive contraction of the US Navy."[40] However, some have argued that it is not about quantity, but rather a strategic maneuver that is important. Instead of dominance over the sea, as envisaged by Alfred Thayer Mahan, British historian Julian Corbett emphasized the cooperation of a naval fleet which can deter the enemy more quickly with less cost. For example, mere policing of choke points can inflict a considerable challenge to the enemy.[41] Thus, the ocean plays a decisive role for the U.S., and it is certain that without a credible strategic partner in the Indo-Pacific region, the U.S. will struggle to maintain its dominant position, enabling China to ascend as the regional hegemon.

3.3 Key Objectives of the U.S. Indo-Pacific Strategy (IPS)

The primary objectives of the U.S. IPS are characterized by several key considerations. Foremost among these is the distinctive approach employed by the U.S. in containing China, diverging from the historical contours of the Soviet Containment policy. The strategy is carefully tailored to effectively restrict China's expanding influence within specific regions where the U.S. possesses critical strategic interests.[42] The U.S. recognizes that the Indo-Pacific region is of such a vast scale and significance that it cannot be monopolized by any single power. Additionally, the formation of the QUAD holds the potential to serve as a strategic instrument for the U.S. in countering and deterring the influence exerted by China. Similarly, while the U.S. has historically been a dominant naval and military power, China's rise in the past decade has altered regional power dynamics, to which the U.S. is responding by using catchphrases such as "pivot to Asia," "trade war," and, more recently, the "Indo-Pacific Strategy." It is hence evident that the U.S. objective in the region is to provide a strategic alternative to Chinese grouping. The expanding prominence of the Indo-Pacific region has pushed India into the calculation of major players, and India is attempting to adapt to changing dynamics on its own merit.

IV. India's Strategic Approach to the Indo-Pacific Region

4.1 India's Strategic Approach: Domestic Growth, Security, and Stability

From India's perspective, Japan's Prime Minister Shinzo Abe's speech to the Indian Parliament in 2007 figuratively stressed the significance of the "confluence of two seas" as a symbol of connectivity between the Indian and Pacific Oceans. His statement was influenced by two major factors. First, India as a growing power with the ability to project capabilities in the Indian Ocean region. Second, India's significant economic growth converged with Japan's interests in securing the increasingly interconnected extent of the Indian and Pacific Oceans. During Manmohan Singh's second term, due to the increased pace of capital flows, investment, and the formation of regional production networks, "Indo-Pacific" had a "geoeconomic" connotation, however under Prime Minister Modi's tenure, it has a more pronounced "geopolitics" interpretation. This shift is the outcome of India's changing attitude toward China, notably in the aftermath of the Doklam (2017) and Galvan (2020) incidents. During Prime Minister Modi visit at the Shangri-La Dialogue in June 2018, the Indo-Pacific concept took on new significance, and his speech can be summarized into a twofold message: firstly and most importantly, India considers the Indo-Pacific region as a free, open, transparent, rules-based, peaceful, prosperous and inclusive Indo-Pacific; secondly, it does not see the Indo-Pacific region as a strategy or as a club of limited members that seek to dominate any other country.[43] India's position regarding the Indo-Pacific region can be evaluated through an analysis of the prime minister's speech and the country's diplomatic realignment with major global powers. Modi's vision for the Indo-Pacific region revolves around three key pillars: promoting a rule-based order, emphasizing the significance of ASEAN's role, and prioritizing inclusivity as a fundamental principle. The notion of inclusivity implies that India's approach entails sustaining engagement with China while concurrently upholding its relationship with a significant global power like the U.S. However, to comprehend Modi's stance adequately, one must consider a broader spectrum that encompasses the Doklam standoff in 2017, as well as the present-day reality of China being India's foremost trading partner.[44] The inclusivity and security orientation has resulted in a fresh strategic approach towards island nations that were previously marginalized by major global powers, positioning them at the periphery. India, being aware of this, is trying to exploit the opportunity in its favor. This was visible from the meeting of leaders of the Pacific Islands Developing States (PSIDS) "on the sidelines of the United Nations General Assembly" where "the Indian PM announced a $12 million grant ($1 million to each PSIDS) towards implementation of high impact developmental project in the area of their choice."[45]

Summing up, India's approach to the Indo-Pacific region can be delineated into four overarching strategic pillars. Firstly, on the domestic front, India aims to ensure the sustained economic growth that is essential for successfully alleviating poverty among its populace. Secondly, it seeks to deter potential threats and safeguard its territorial integrity, primarily from its neighbors Pakistan and China. Consequently, India has procured a substantial arsenal of military equipment to bolster its defensive capabilities. Thirdly, in order

to accomplish its primary objectives of economic prosperity and territorial security, India is committed to promoting and preserving peace and stability on the Asian continent.[46] Peace and stability demands manageable harmony with opposing poles; therefore, India is adopting a more "functional-transactional approach" rather than the Cold War–era's non-alignment approach. And finally, Modi's vision for India to become a "leading power" whose weight and choices would influence global results demands an active engagement in the Indo-Pacific region. Consequently, India has been making a deliberate effort to cooperate with several regional institutions such as the East Asian Summit (EAS) and the ASEAN Defence Ministers' Meeting Plus (ADMM-Plus). In the maritime domain, India has also become an observer of the West Pacific Naval Symposium (WPNS) and a key participant of the Indian Ocean Naval Symposium (IONS).

4.2 India's Response to China's Belt and Road Initiative

India faces formidable challenge in the Indo-Pacific region, emanating from China's ambitious Belt and Road Initiative. This expansive endeavor encompasses a wide array of geographical dynamics, engaging significant nations, including India's neighboring countries such as Pakistan, Sri Lanka, the Maldives, and Nepal. Moreover, the presence of China in the Indian Ocean has led to the validation of the theory of the "string of pearls" proposed in 2004 by a Pentagon-sponsored study on Energy Futures in Asia. However, Chinese scholars have denied that this as an aim to encircle India.[47] Consequently, India is trying to extend its relations with other key players in the region, under the Extended Neighborhood and Act East Asia policies, which includes Africa, Indonesia, Oman, and Singapore and also, organizations like the European Union and the ASEAN.[48] India and Japan are aware of China's assertiveness in the two-ocean region. To counter China's ambitious One Belt One Road (OBOR) Initiative, which lacks transparency and is currently considered a tool of "debt diplomacy,"[49] India has envisaged the Asia-Africa Growth Corridor (AAGC) as an alternative. It promises to be a transparent, sustainable alternative to the BRI for integrating the economies of South, Southeast, and East Asia with Oceania and Africa with the aim of connecting the Indo-Pacific.[50] Moreover, Japan and India have also signed many agreements to develop the northeastern part of India (such as the Japan-India Act East Forum), as this part of the country contains some of the bordering states with China. To counter China's ambitions, several multilateral frameworks has become a tool for India, which are discussed below.

4.3 SAGAR to QUAD

In 2015, India announced an ambitious plan called "Security and Growth for All in the Region" (SAGAR), which is aimed at enhancing maritime cooperation under the framework of security and foreign policy.[51] Being mindful of energy security in the Indian Ocean, which is prone to being vulnerable to various choke points, India is trying to boost infrastructure and capacity at all major ports under the Sagarmala Programme, and also asserting itself as a "net security provider" in the Indian Ocean.[52] Additionally, as part of SAGAR's mission, Prime Minister Narendra Modi proposed the Indo-Pacific Oceans Initiative (IPOI) at the 14th East Asian Summit in 2019. IPOI contains seven pillars, the most

essential of which are related to maritime security, the marine environment, and maritime resources.[53] It calls for efforts to create a safe, secure and stable maritime domain maintaining rule-based order in the region that respects the liberal values, sovereignty, territorial integrity and international law (UNCLOS) in the Indo-Pacific. It recognizes ASEAN's centrality in the region and shares similarity with the ASEAN Outlook on Indo-Pacific (AOIP). The U.S. has also joined the initiative, making it as crucial for addressing rule-based order in the East and South China Seas. The initiative can be seen as an alternative to China's MSR initiative. At the 18th East Asian Summit in 2023, PM Modi reaffirmed his commitment to the region's rule-based system stating, "The need of the hour is an Indo-Pacific where international law, including the UN Convention on the Law of the Sea, applies equally to all countries; where there is freedom of navigation and overflight; and where there is unimpeded lawful commerce for the benefit of all."[54]

Another recent significant development occurred that resulted in the establishment of a coalition among four prominent democratic nations—the United States, Japan, Australia, and India, commonly referred to as "QUAD." Originally, the idea of the QUAD was proposed by Shinzo Abe in 2006 as an "Arc of Freedom and Prosperity." The first meeting of the initial QUAD was held in May 2007 as officials gathered for the ASEAN Regional Forum (ARF) meeting in Manila.[55] However, China instigated India and Australia to roll back their assurances, and the initiative was frozen after George W. Bush and Shinzo Abe subsequently left office. Post–2015, China's assertiveness and coercive behavior crystallized the alignment of interest underpinning QUAD, leading to a revival of QUAD in 2017 under the initiative of the Japanese government.[56] The formation of QUAD has instigated a response from Chinese Foreign Minister, Wang Yi who said that "it will dissipate like sea foam."[57] There is no uniform line of thinking among member states, and India's role here is more like a "swing state," which led to the critique that India is the "weakest link in quad hampering its overall effectiveness."[58] However, India's strategy is clear in terms of the Indo-Pacific region: manage the rise of China, maintain a healthy relationship with major power for security providers, assert the national interest in their own terms, and create a space that will increase India's diplomatic operation.

V. U.S.-India Maritime Cooperation: Countering China's Expansion in the Indo-Pacific

Since 1962, the Sino-India rivalry has been territorially based, but post–1990, as the PLAN grew in numbers and power, it raised concerns for India. C. Raja Mohan, in his book *Samudra Manthan: Sino-Indian Rivalry in Indo-Pacific*, pens that the future rivalry and prospects between India and China can be summarized in two important points. Firstly, the India-China rivalry which has been fought in the tough terrain of the Himalayan foothills will spill over into the sea. Secondly, the Indo-Pacific has become a new strategic geographical space where competition, cooperation, and conflict will take place. He further added that India is attempting to improve its relationship with smaller states when it comes to controlling and monitoring the IOR by providing assistance that will improve maritime security.[59] On one hand, the United States' Indo-Pacific strategy is driven by dual

considerations of geoeconomics and geopolitics. On the other, while energy resources serve geoeconomic intentions of the U.S., geopolitically, it is the democratic structure of India that distinguishes it from authoritarian China. Here, India's ascent could be more peaceful compared to that of China, as stated by the former Secretary of State Rex Tillerson: "China, while rising alongside India, has done so less responsibly, at times undermining the international, rules-based order even as countries like India operate within a framework that protects other nations' sovereignty."[60] As a result, India has broadened its maritime vision in the Indo-Pacific, supporting the potential of rule-based order.

5.1 Maritime Dynamics

The *Indian Maritime Doctrine 2009* asserts the 4,000-year history of India's maritime tradition, utilizing that historical undertone as a method to propose that the Indian Ocean has been imbued in the "psyche" of the coastal population. This doctrine embraces the Pacific Ocean and South and East China Seas as important for Indian maritime interests.[61] Another document titled *Ensuring Secure Seas: Indian Maritime Security Strategy* states that India has both primary and secondary areas of maritime interest. Primary areas begin at the Indian coastal region and extend to the Gulf of Oman, Gulf of Aden, and Red Sea and includes choke points such as Six-degree Channel, Eight/Nine-degree Channels, Straits of Hormuz, Bab-el Mandeb, Malacca, Singapore, Sunda and Lombok, the Mozambique Channel, and the Cape of Good Hope. Whereas, secondary areas include the South-East Indian Ocean, including sea routes to the Pacific Ocean, South, and the East China Seas, Western Pacific Ocean. It also includes the Southern Indian Ocean Region, including Antarctica, the Mediterranean Sea, and the West Coast of Africa.[62] Indian maritime interest stretches far, from the Indian Ocean to the Pacific in the east and Africa to the west, it also includes the South China Sea which can act like an "antechamber of the Indian Ocean."[63] A close examination of these documents reveals that India's security concerns have grown in recent years, as reflected in the January 2015 *U.S.–India Joint Strategic Vision for the Asia-Pacific and Indian Ocean*, which expressed concern about Chinese expansionism in the South China Sea, breaking India's long silence on the issue.[64] This is one instance of India aligning with the U.S.

5.2 U.S. Engagement and Challenges

The *United States Indo-Pacific Strategy Document 2022* stresses the growing importance of partnership with India, and it states that the U.S. "will continue to build a strategic partnership in which the United States and India work together and through regional groupings to promote stability in South Asia."[65] Furthermore, the U.S. recognizes India as "a like-minded partner and leader in South Asia and the Indian Ocean"[66] with whom it will steadily advance the "Major Defense Partnership" and will support India's role as a "net security provider."[67] The document also gave insight into the India-China conflict in border skirmishes along the Line of Actual Control. It can be stated that a future conflict between India and China in the ocean region is highly unlikely, but territorial border disputes between the two giants may have spillover effects over maritime confrontation. However, U.S. presence in the Indo-Pacific is contingent upon various variables at play. Toshi

Yoshihara argues that if a Sino-Indian war like that of 1962 erupts it may horizontally escalate into the Indo-Pacific opening up the new military front in the region where the U.S. will become a third party, it is highly unlikely that the U.S. will remain idle to such conflicts.[68] There are two important points to consider here. Firstly, there is a strong argument for the establishment of a formal and binding code of conduct, which carries a normative connotation. Secondly, the escalating Chinese contested claims in the region necessitate enhanced coordination in naval diplomacy.

Furthermore, the U.S. presence in the Indo-Pacific is historically dominant. Guam, in the North Pacific Ocean, serves as an important factor here. In 2014, Deputy Defense Secretary Bob Work said that "Guam has always been a central part of our plans. Certainly, a central part of the Navy's plans but now a central part of the entire Department of Defense's plans."[69] Recently, the Malabar exercise held on November 2022 marked the 30th anniversary and was joined by QUAD members—Australia, Japan, India, and the U.S. Hence, it becomes apparent that the growing importance of strategic partnership between the U.S. and India to counter China in the region is going to increase in the future. Additionally, the U.S. Navy concluded the 28th Rim of the Pacific (RIMPAC) 2022 exercise where it reiterated the importance of Indo-Pacific, as U.S. Navy Vice-Admiral Michael Boyle said: "By coming together as 'Capable, Adaptive Partners,' and in the scale that we are, we are making a statement about our commitment to work together, to foster and sustain those relationships that are critical to ensuring the safety of the sea lanes and the security of the world's interconnected oceans."[70] The presence of the U.S. Navy in the Indian Ocean does have a balancing mechanism necessary to secure its ocean highway; in addition, the U.S. is also trying to align with the maritime democracy of the region where they can to counter Chinese expansion. Hence, U.S. and India become natural strategic partners in the Indian Ocean region. This would also be beneficial for India as China's naval power tries to assert itself in the Indian Ocean region, given that India currently lacks the capabilities despite increasing its naval power in recent years. However, there are other concerns for India such as "its insecurity regarding losing its 'strategic autonomy,'" strong U.S.–Pakistan defense ties, and the difference in the interpretation of the United Nations Convention on the Law of the Sea (UNCLOS).[71] These variables may create a hindrance in the mounting naval entente of strategic cooperation between the U.S. and India. Moreover, the "tyranny of geography" might create another hindrance for the U.S. in the far Indian Ocean.[72] However, it is in the interest of both India and the U.S. to cooperate in the maritime domain. India's concern as a "net security provider" and that of the U.S. for "freedom of navigation" will bring the two powers together to rebalance Chinese expansionism, which has sought to create an extensive grid through its "Maritime Silk Road" initiative.[73]

VI. Conclusion

There is no doubt that the Indo-Pacific region is poised to become a stage for future conflicts, cooperation, and competition among major powers—a veritable "theater of the great game." The term "Indo-Pacific" has transformed into one that carries strategic connotations that are different for various nations. For the United States, it signifies a new arena for rebalancing and necessitates the application of fresh postures and strategies. Similarly, for India, it represents a natural progression beyond its Act East Asia policy, an

opportunity to extend its influence beyond South Asia and the region for its security concerns. For China, the Indo-Pacific provides a gateway to broader geographical domains, allowing the expansion of its sphere of influence and the realization of its dream of national rejuvenation. Furthermore, given the altered geographical landscape and India and China's ambitions in the Indo-Pacific, there are geoeconomic and diplomatic implications at play. As noted by Toshi Yoshihara, "China's energy insecurity will draw its attention towards the South China Sea and Indian Ocean, through which the majority of the nation's oil must pass, while India's 'Look East' policy and blue-water ambitions will propel it into the western Pacific."[74] The growing rivalry between India and China, coupled with their negative perceptions of each other, creates a classic security dilemma between the two Asian giants.[75] These two great civilizations find themselves at a crossroads, and mismanagement of their bilateral relations could have catastrophic consequences. Consequently, border skirmishes and the geopolitical imperatives of the region may naturally necessitate third-party attention. Despite India's commitment to "strategic autonomy," the U.S. has emerged as an important strategic partner for the country.

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The Significance of Global Value Chains in Shaping China's Maritime Power

Anne-Marie Dedene

Structured Abstract

Article Type: Research Paper

Purpose—To highlight new aspects of the economic dimension of maritime power through an analysis of China's maritime economy development based on Global Value Chains Theory.

Design, Methodology, Approach—A discourse analysis of *Qiushi* and *Renmin Ribao* articles to identify elite signals on the role of China's maritime economy within its maritime power build-up was combined with a qualitative, deductive thematic analysis of Chinese policy documents. Additionally, descriptive statistical analyses based on data retrieved from the Orbis and UNCTAD databases and the China Marine Statistical Yearbooks were used.

Findings—The Chinese government has been actively signaling the importance of global value chains for the PRC's maritime economy and has accordingly designed policy measures targeted at upgrading those global value chains. Quantitative data illustrates that, though the PRC's maritime economy has grown, there is no proof of a completed upgrading process within its maritime economy.

Practical Implications—Understanding how industrial upgrading enhances a state's maritime power by accumulating resources and securing a central position in maritime production networks can provide policymakers with insights to strategically leverage these dynamics for national economic and security interests.

Originality—This analysis of China's maritime economy policies demonstrates the applicability and value of the Global Value Chain theory to empirically research maritime power.

Keywords: China; economic upgrading;
global value chains; maritime power

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I. Introduction

Maritime power is becoming an increasingly important aspect of national power. States are therefore steadily and increasingly moving towards the pursuit of maritime power to help advance their national interests.[1] One aspect of this pursuit of maritime power is the exponential growth in states' attention to economic actions linked to the sea: the maritime economy.[2] About 90% of traded goods are transported by ocean shipping.[3] Considering the increased importance of seaborne trade to a nation's creation of wealth, it comes as no surprise that states increasingly reflect on how control of the oceans can serve strategic goals, especially as ocean trade volumes have rapidly increased from the 18th century onwards.[4] At the same time, academic attention on maritime power has equally grown. An increasing number of studies focus on the increase of Chinese influence in the maritime economic domain, for example by examining its investments in overseas ports as well as its maritime shipping policies.[5] Though these studies are very valuable as empirical case-studies, the authors refrain from reflecting on what China's maritime economic development means for the evolution of the concept of maritime power. This paper therefore aims to conceptually explore this lacuna, by proposing the Global Value Chain (GVC) theory as a valuable tool to understand maritime power in the economic domain for both scholars and practitioners. It takes 2013 as its starting point, as one of the collective study sessions of the eighteenth Politburo of the CCP Central Committee on July 30 that year focused on "Maritime Strategy and Building China as a Maritime Power," indicating the national priority given to the topic. This paper first gives a brief overview of existing literature on maritime power, while arguing the importance of the economic aspect of maritime power. Secondly, it offers an explanation of GVC theory and the role of the state in global value chains. Then, the chosen data and methods are reviewed. Finally, the paper discusses China's pursuit of maritime economic power in three regards: discourse, policy and progress, and reflects on what the Chinese case can add to the contemporary understanding of maritime power in the economic domain.

II. Maritime Power in the Economic Domain

The literature on maritime power can be categorized in several different manners. First, there is the semantic debate on the terms "sea power" and "maritime power." Since the introduction of the term "sea power" in the global lexicon, the exact definitions of both "maritime power" and "sea power" have been blurred, hence the two terms are often applied interchangeably.[6] Whereas most scholars do not make a distinction between the two terms, some see sea power as a military concept and maritime power as a broader concept encompassing several domains.[7] Secondly, there is a distinction between the potential and consequential (how much power a state develops versus what the impact of this power is) view on maritime power, with some scholars looking at maritime power through both lenses.[8] Till (2018) for example, argues that sea power has both an input and an output side. The input side includes navies, coast guards and marine industries, whereas the output refers to the influence these maritime activities have on the behavior of other people or things. Likewise,

Tangredi (2004) defines the concept as "the combination of a nation-state's capacity for international maritime commerce and utilization of oceanic resources, with its ability to project military power into the sea, for the purpose of sea and area control over commerce and conflict, and from the sea, in order to influence events on land by means of naval forces."[9] Finally, of those scholars discussing maritime power as an input, some focus on the identification of elements that strengthen maritime power, while others focus on a (qualitative or quantitative) evaluation of maritime power.[10] This paper utilizes maritime power throughout to refer to this broader concept, and naval power when referring to the military domain. Viewing maritime power in both a consequential and potential manner, it adopts the definition of maritime power as "military, political, and economic power or influence exerted through an ability to use the sea."[11]

Despite these divisions in the literature on maritime power, definitions of maritime power commonly include multiple elements, such as the military, politics, the economy and technology.[12] Importantly, as these elements are not isolated from each other, change in one of these domains invokes changes in others.[13] One commonly recurring element is the linkage between maritime power and the economic domain.[14] This linkage is not a novelty, as European expansion in the maritime space from the 1500s onwards was already centered on the close-knit relationship between the military and economic aspects of maritime power. More maritime power usually allows a nation to not only obtain more benefits from the sea, but to promote its maritime trade as well. In return, both can aid the economy of the state in question, and provide resources that may then be employed to strengthen naval capacities and technological developments.[15] Maritime power could thus be seen as a facilitator of trade while, vice-versa, the pursuit of trade can be seen as a motivating factor for the development of maritime power.[16] This is reflected in early-20th-century sea power scholar Alfred Thayer Mahan's work, which states that "not only the military strength afloat, that rules the sea or any part of it by force of arms, but also the peaceful commerce and shipping from which alone a military fleet naturally and healthfully springs, and on which it securely rests" was important for sea power development.[17] He was not alone in making this argument, as the complex interrelationship between nations and their merchant fleet came to play a key role in the literature on maritime strategic thought.[18]

In the highly globalized trading system of the twenty-first century, in which some of the most productive and consumptive economies in the world are highly dependent on maritime supply routes and trade, the economic side of maritime power remains relevant as ever.[19] Yet it is no longer only based on a nation's merchant fleet and shipbuilding capacity. Elements that strengthen economic maritime power are dynamic and continually evolve because of advances in information technology, digitalization and globalization.[20] This is what the global value chain theory as a theoretical lens adds to the debate. It argues that maritime power is not just based on trade, but also on what enables this trade to run smoothly: a strong maritime economy, and all of its inputs. Maritime power thus not only depends on connectivity and trade, but also on a state's position within global value chains in the maritime domain. Being overly dependent on another state, in just one link of a value chain, can diminish a state's maritime power vis-à-vis this other state. Looking at maritime power in the economic domain through the lens of global value chains allows policy makers to identify and pay attention to elements of maritime power that may otherwise be overlooked. For example, though shipbuilding is presently an important and

strategic sector, virtual maritime economic power could in the future have equally growing security implications. This for instance, in the shape of the advanced software that shipping companies rely on to track the position of ships and containers and, hence, allows for the just-in-time-deliveries that propel modern supply chains. Likewise, the relevance of maritime insurance as a contributing element to maritime power in the economic domain has been illustrated by international conflicts such as the Russian war on Ukraine of 2022. Legal issues might for example arise regarding to what extent a ship trapped in the Black Sea can make insurance claims, and under which kind of insurance these claims should be made. In this way, insurance issues added to the logjam congestions of the maritime shipping industry and ultimately had severe economic consequences.[21] The relevance of the GVC theory to the concept of maritime power, will be further demonstrated through a case study of how the PRC develops its maritime economy to heighten maritime power in the economic domain.

III. The State and Global Value Chains

The idea of imperfect global trade, where one country gains more from the trade than another, is not a novelty. "Throughout history each successive hegemonic power has organized economic space in terms of its own interests and purposes."[22] Free trade has often been supported by those states that stand to gain the most from the openness of the global system.[23] Take, for example, Great Britain. During the Pax Britannica period, it became the industrial and financial heart of a highly interdependent international economy by exchanging manufactured goods for other nations' food and natural resources. Hence, the historical pattern of international exchanges echoes the global balance of economic and military power.[24] Though states can strive for the ideal of free trade, they are obliged to protect their citizens' interests and ensure that partnerships within this free trade system benefit national interests. A zero-sum view on international economic exchanges, which historically took the form of economic nationalism and protectionism and upheld the idea that states have to avoid trade deficits at any cost, has re-emerged in the 21st century.[25] The rapidly changing nature of the global economy, with growing interdependence due to globalization, has heightened the importance of economics in international relations.[26] Despite the advantages brought by globalization, however, the global system has not changed. It is still a highly competitive and anarchic arena based on power politics.[27] As economic competition and confrontation return to the forefront of great power rivalry, economic power once again gains importance "in determining the primacy or subordination of states."[28]

What has changed, however, is the context in which economic power is built up, as it is nowadays characterized by the rise of global value chains (GVCs) that connect companies, producers, employees, and consumers globally.[29] Conventionally, foreign trade was horizontally based, with states specializing in producing specific goods or services entirely within their own country and then exporting them. With the strengthening of economic globalization, trade can now be seen as a highly complex trade structure in which aspects of the global value chain are carried out across multiple countries.[30] These aspects consist of value-adding activities conducted by firms during the progress of a product from concept

to creation. There are six categories: research, design, manufacturing, distribution, marketing and sales, and services.[31] There are two types of GVCs to distinguish: vertical specialization value chains (VSVCs) and additive value chains (AVCs). While the distinction between the two is not always watertight, VSVCs generally refer to the creation of goods manufactured using various subcomponents and services. AVCs, in comparison, tend to characterize the commodity sectors. Their production process consists of a combination of segments that sequentially add value.[32] Involvement in GVCs, both AVCs and VSVCs, is a vital condition for development for many states, as it allows them to capture economic gains and build productive capacity without having to host a fully integrated chain.[33] Firms can, for example, join the value chain as an upstream supplier of inputs materials to other firms or as a downstream producer by utilizing inputs from other firms in their production and sales, respectively referred to as forward and backward linkages. These linkages allow for more significant economies of scale and the more optimal use of cross-border complementarities, thus leading to productivity gains for GVC-participating firms.[34]

However, relationships within GVCs are rarely symmetric. GVCs typically can be divided into lead firms and suppliers. The first focuses on product design and brand development, marketing, etc., while the latter focuses on manufacturing and selling products. The logic of GVCs is that lead firms will reserve those activities where entry barriers and profits are the highest, by controlling the key dimensions of the value chain, they capture the most significant share of the gains. Meanwhile, suppliers operate on thin profit margins and consequently have little revenue to invest in upgrading capabilities. In a world increasingly based on dependencies, lead firms are keen to keep this asymmetrical relationship going.[35] Due to their dominance in the GVC, these firms control who can participate in the chains in which part of the process.[36] Translating this to the state level, developed states with more advanced economies often conduct high-value activities in GVCs, such as R&D and marketing, and subsequently trade high-value-added goods and services for low-value-goods and services from lesser developed states.[37] Additionally, as companies from a growing amount of states aim to connect to the global market, competition to join GVCs has become increasingly intense.[38] Thus, even though participating in GVCs lets developing states capture productivity gains in the global market, some states may, in the long run, experience a slowing down of these gains, also known as the middle-income trap.[39] They become essentially trapped in a particular part of the GVC.[40] This asymmetric interdependence could prove risky if, for example, disruptions to GVCs or asymmetric vulnerabilities were to be deployed as strategic leverage.[41] Furthermore, whereas in normal circumstances, states will focus on the absolute gains from a GVC, these asymmetries in times of tension cause political leaders to resort to zero-sum thinking.[42] When a state's key industries depend more on a rival within a shared GVC, these leaders are more prone to conflict escalation.[43]

Unsurprisingly, economic actors increasingly reflect on mitigating these dependencies and successfully moving from low-value to relatively high-value activities or "upgrade" within GVCs. There are several types of upgrading: product upgrading by venturing into production lines with a higher value per unit, process upgrading that optimizes the efficiency of a production line through reorganization or better technology, functional upgrading by attaining a superior function in a GVC and thus increasing the skill content within the GVC and finally, intersectoral (or chain) upgrading, through which one

uses skills acquired in a particular GVC to move into another chain.[44] Successful upgrading should include all these different types.[45] However, it must be said that upgrading does not necessarily lead to a better position in the value chain or more value capture, nor is the upgrading trajectory the same for every sector.[46] Furthermore, the ideal trajectory also depends on the type of GVC. For VSVCs, what matters is how lead firms, platform companies, and suppliers are balanced regarding value-added potential and profitability.[47] In order to upgrade, companies need to focus on a niche activity within the GVC, referred to as "thinning," to gain a globally competitive advantage. Only after that can they start "stretching" to higher-rent niches.[48] As value is added sequentially in each stage in the process of natural resources to higher-value intermediate goods within AVCs, it is important how much value-adding occurs in which location.[49] To heighten the domestic value added in a sector, upgrading in AVCs accordingly involves building linkages across a particular sector, referred to as "thickening."[50] Although lead firms may support product and process upgrading of their suppliers, functional upgrading is often more contested, as this form of upgrading might affect the lead firm's core competitiveness.[51]

This is where the state comes into play. Though GVCs are recognized to be linkages between firms, there now exists the understanding that these GVCs "do not operate in an institutional vacuum."[52] Hence, development as a result of GVC participation is partly shaped by the institutional context of a state and the role it takes on in GVC participation.[53] Whereas early state behavior in GVC theory was rather passive and focused on promoting an attractive environment for global firms to conduct business in, recent academic literature increasingly suggests a more interventionist role of states with regard to GVCs.[54] Yet, this new approach is not the same as previous industrialization policies, in which the state aimed to build complete domestic supply chains.[55] Instead, states can play a role in GVC upgrading both by supporting domestic firms in being a supplier within GVCs controlled by global lead firms, or by aiding domestic companies to become lead firms themselves.[56] To do this, they should yield a comprehensive and aligned strategy. It should strategically connect value chains on the domestic, regional and global scale, to reduce dependencies and upgrade value capture, and should involve both manufacturing industries, commodity production and procession of primary resources.[57] State policies thus have to include both policies aimed at GVC entrance and at upgrading to higher knowledge-intensive stages of the GVC to grow in VSVCs. In addition, policies aimed at capturing value-capturing activities by focusing on backward, forward and horizontal linkages aimed to improve domestic firms' standing in AVCs are also necessary.[58] This approach will be analyzed in this paper by a combined focus on six domains on which the state can focus in order to upgrade and four roles that the state can adopt in these domains.

Ravenhill (2014) proposed three areas of particular importance for a state that strives to upgrade: education, infrastructure, and industry-specific institutes.[59] It is not enough to extensively develop one category. Providing infrastructure to ramp up the scale of production of suppliers in GVCs, for example would do little to heighten the upgrading capabilities of one's own firms. Another example, heavily protecting a domestic firm, will not necessarily be successful if there are no supportive institutions that nurture it to upgrade, as this means that the domestic firm would remain too dependent on imported technology and capabilities. Building a strong local brand and the associated supply infrastructure cluster, may in contrast generate upgrading and thus gains.[60]

Gereffi and Stark similarly argue that a country's competitiveness in GVCs is affected by its productive capacity (which includes human capital), infrastructure and services, and its business environment.[61] More broadly, Bamber and Fernandez-stark (2019) mention six policy domains that are essential to upgrade, which will be utilized for this paper's analytical framework: human capital, standards, investment strategies, local firm development, trade and infrastructure.

Stage-specific human capital requirements exist at every level of the GVC. Low-value segments depend on skill-specific training for "unskilled" entry-level workers. Similarly, mid-value chain workers require more specific technical and vocational training. The highest value chain segments require workers to acquire specific skills through tertiary education.[62] Second, standard compliance has become a prerequisite for participation in GVCs serving markets with increasingly strict standards. State policies could thus help domestic firms meet these requirements.[63] Third, investment strategies tailored to specific industries and stages in the GVCs can help attract foreign investment. Foreign investment alone does not necessarily result in backward linkages, however, so additional policies are needed. Developing local firms is a fourth domain, and can be done by aiding firms in meeting cost and scale requirements by lead firms, in heightening their visibility in the foreign procurement system, and in obtaining necessary technologies.[64] As trade facilitation can increase the efficiency of the trade flow across national boundaries, it heightens a country's GVC competitiveness and is thus a fifth domain of importance.[65] Finally, infrastructure can aid this efficiency, and should thus be a target depending on the specific GVCs a country seeks to grow in.[66]

The state can develop these six domains by adopting different roles within the GVC. This paper's analytical framework thus also builds on Horner's (2017) framework on the four possible roles of the state as a facilitator, regulator, producer, and buyer. As a facilitator, the state by use of supportive policies aims to aid firms in their upgrade attempts.[67] These policies can be tailored to different end markets, which sometimes have different participation requirements.[68] The state as regulator in contrast aims to constrain activities of global lead firms or suppliers by establishing a certain domestic regulatory framework.[69] This role is said to depend on the level of state capacity and institutional legitimacy and is suggested to be gaining prominence in times of growing backlash against economic globalization.[70] By directly conducting state-owned production activities in competition with other private forms within GVCs, the state acts a producer.[71] This does not necessarily have to be in the form of state-owned enterprises (SOEs), but could instead also be through state investment in private firms or hybrid SOEs.[72] Finally, the state can also act as buyer, a role that has so far received the least attention in the academic field. This by public procurement of products and services, in which the state may discriminate in terms of which foreign suppliers to buy from.[73] This framework does have some limitations. First, the separation between different roles is not always straightforward, as for example the facilitator and regular roles can be closely related. Second, actions related to a certain role, such as subsidies to facilitate, may only be applicable to certain target group (for example, domestic firms). Finally, these actions are dependent on cohesion within the state on policy formulation.[74] Yet, despite these limitations, this paper's framework, combining the six domains and four roles approach, as visualized in Table 1, offers a suitable theoretical lens to examine the role of the Chinese state in strengthening its maritime economic power.

Table 1: Analytical Framework

ROLE OF THE STATE	DOMAIN					
	Human Capital	Standards and implementation	Investment strategies	Local firm development	Trade	Infrastructure
Facilitator	• Invest in techincal and vocational educaiton and training systems (TVETs) • Establish linkages between universities and firms	• Financial and technical support	• Special Economic Zones (SEZs) • Specialized industrial parks • Tax incentives	• Public services to support local firms (ex: information sharing platforms) • Subsidies • R&D incentives Tax incentives	• Trade agreements • Export promotion activities	• Strengthen industry-specific infrastructure capacity
Regulator	• Labor regulation	• Quality controls	• Restriction on foreign investment	• Local content requirement	• Lowering of Import tariffs • Rationalization of regulatory procedures • State marketing boards • Price control mechanisms	• Placing customs authorities in Export Processing Zones (EPZs)
Producer				• State-owned enterprises (SOEs) • Development of clusters • State investment in private firms		
Buyer				• Public procurement		• Public procurement

Based on: Horner & Alford, 2019; Bamber & Frederick, 2019; Morris & Staritz, 2019, De Marchi & Alford, 2022; Horner, 2017.

IV. Methods and Data

This paper explores China's development of its maritime economy in three ways: a discourse analysis conducted on Chinese-language articles from influential Chinese newspapers, a thematic analysis conducted on relevant Chinese-language policy documents, and descriptive statistical analyses to examine the actual progress in China's maritime economy. In this manner, the trustworthiness of the research is attempted to be heightened via method and data triangulation, as utilizing different methods and data sets allows the researcher to minimize the impact of potential biases, such as selection bias.[75]

First, to explore the Chinese conceptualization of the maritime economy in the broader context of China's haiyang qiangguo 海洋强国 (strong maritime power) strategy, a discourse analysis is conducted on newspaper articles published in *Qiushi* and *Renmin Ribao* between 2013 and April 2024. *Renmin Ribao* is a Chinese-language newspaper possessed by the Communist Party of China. *Qiushi*, likewise, is an official publication of the Central Committee of the Communist Party of China. Accordingly, both are suited to discover the guiding ideas and opinions of the Party.[76] Because of its prominence of political ideology, seen in the Chinese context as "a body of ideas linked to power, language, social practices, and institutions" which allows for political forces to legitimize their strategies through fitting narratives, China is a particularly suitable case to study state discourse. It must be mentioned, however, that there is a difference between discourse and practice.[77] Though discourse can shed light on elite signals, it is up to governmental institutions to translate these signals into specific policies.[78] Because of this, the research design takes a three-pronged to look beyond discourse, which is detailed in the following sections. As the aim of this aspect of the paper was to research the maritime economy specifically in the context of haiyang qiangguo to see how important the Chinese government estimates the development of the maritime economy to be for the development of maritime power, the search for articles started with the search term haiyang qiangguo on both the website of *Qiushi* and the databank of *Renmin Ribao* articles. This resulted in 138 and 649 articles published in *Qiushi* and *Renmin Ribao*, respectively. After data selection, manually removing duplicates and articles that did not discuss the maritime economy, 32 *Qiushi* and 36 *Renmin Ribao* articles remained available for the discourse analysis.

Second, China's maritime economic policies since 2013 are then examined utilizing a qualitative thematic analysis, which allows for the identification of underlying themes within a dataset.[79] In this paper, the analysis is conducted deductively. Specifically, the predetermined codes are taken from the theoretic framework on state actions for upgrading in GVCs as detailed in the previous section (Table 1). Qualitative thematic analysis is an attractive methodology for scholars in the field of international political economy (IPE) because of its middle-range interpretation, contextualization, and validity capabilities and its aptness to datasets that are both too large for discourse analysis and too small for quantitative content analysis.[80] There are, however, also disadvantages to the methodology, such as the risk that its flexible approach may result in inconsistencies and a lack of coherence in the findings.[81] Throughout the thematic analysis, this risk was mitigated using a Computer Assisted Qualitative Data Analysis (CAQDAS) program: N-Vivo. This kind of software program does not replace the researcher's manual coding, but aids the recording, storing and indexing of the dataset. In this way, it contributes to the transparency and reproducibility

of the analysis.[82] The data chosen for the qualitative thematic analysis are policy documents concerning China's maritime economy since 2013. More specifically, China's 12th, 13th and 14th Five-Year-Plans (FYPs) on the Maritime Economy are examined. The FYPs are in a top-down manner issued by the central, provincial, and local governments. As they act as the driver of further development of China's economy over periods of five years, they are one of the essential aspects of China's policy system.[83] Important to note is that the nationally issued 14th FYP on the maritime economy is not yet publicly available. To circumvent this limitation, the decision was made to analyze the 14th Five-Year-Plans on the ocean economy of China's official coastal provinces: Fujian, Guangdong, Guangxi, Hainan, Hebei, Jiangsu, Liaoning, Shandong, Shanghai, Tianjin, Zhejiang. These plans, 11 in total, were collected on the websites of the relevant provinces. Thus, a total of 13 Five-Year-Plans were examined.

Third, the examination of the PRC's maritime economy development since 2013 will be further enriched through descriptive statistical analyses to show the actual progress of this development. For this, additional primary sources were used: the Orbis and UNCTAD databases and the China Marine Statistical Yearbooks (2013–2022). These yearbooks, initially compiled by the State Oceanic Administration, are now composed by the Department of Marine Strategic Planning and Economy of the Ministry of Natural Resources.

V. China's Pursuit of Maritime Economic Power: The Discourse Level

Examining *Qiushi* and *Renmin Ribao* articles demonstrates that authoritative discourse on the development of the Chinese maritime economy pays attention to the importance of GVCs and thus adds insight on the relevance of this theory for the concept of maritime economic power. China attaches great importance to the maritime economy, as it is seen an important engine or "blue artery" of the national economy.[84] Xi Jinping stressed the rise of the sea in international political, economic, military and scientific and technological competition and its linkage to the state of national survival and development.[85] Noticeable is also the comparison with how Western powers in the past developed maritime power and how China is not to follow this path.[86] Since the Era of Global Navigation, over 500 years ago, the ocean has played an important role in the competition among global powers, and has allowed both the UK and the U.S. to become leaders.[87] Consequently, as China started later in the development of maritime technological innovation, China is lagging behind the UK and the U.S.[88] Because of this, it is facing technological dependencies in the maritime domain, forcing China "to be a permanent consumer who cannot escape" of foreign technological maritime products, according to Li Naisheng, director of the Qingdao National Maritime Science Research Center.[89] Maritime technology is seen as the modern weapon of the country, "it must not be bought or retrieved by begging, only by relying on ourselves."[90] To this regard, Lei Fanpei, Chairman of the China Shipbuilding Industry Group said that "only having the key core technologies firmly in our own hands will allow us to protect our national security." Maritime technology should be created in China, instead of made in China.[91]

As a result, China needs to industrially upgrade in GVCs. Independent innovation

must cultivate and grow strategic industries in the maritime economy and cultivate more high-end brands with global influence.[92] As China now has the historical opportunity to technologically catch up, it should strengthen its technological innovations to extend its GVCs and internationalize its maritime economy.[93] To this regard, the importance of connectivity is also mentioned, specifically in the context of the B&R initiative.[94] The extension of maritime industrial chains should be accelerated, and a supervision system that manages the entire chain ought to be established.[95] This discourse does not only apply to VSVCs and high-end technology, but also to AVCs. The importance of extending the aquatic products and fishery value chains is for example stressed, and occasionally linked to China's food security.[96]

Finally, what is noticeable, though not surprising in the context of the state's role as producer in GVC theory, is the alignment of SOEs with the Communist Party on the ideas behind China's maritime economy build-up. The China Shipbuilding Industry Corporation (CSIC) for example, stated in 2015 that it should be brave enough to undertake the historical mission of leading the maritime equipment development and building a maritime power. It will strive to be a front-runner of a strong maritime nation and accelerate the "going out" of maritime equipment.[97] In 2019, then chairman of SCIC, Lei Fanpei, added that CSIC will continue to adhere to the road of independent control by developing standards and thus will try to enhance influence in the global maritime community.[98] Similarly, China National Offshore Oil Corporation (CNOOC) stated that it has mastered key core technologies with independent intellectual property rights, and formed a full set of technological capabilities. Fundamental to SOEs, according to CNOOC, is adherence to the leadership of the Party.[99] Finally, China Ocean Shipping Company (COSCO) as well seems to adhere to authoritative opinions on Chinese maritime economic power. It states that the future competition of shipping will be on the whole industrial chain, and that COSCO, by providing end-to-end GVCs has ensured the safety and stability of foreign trade, and consequently has increased its industry-leading capacity. It has built a global network transportation system, in which it sees itself as a lead firm, compared with history playing now a greater role in the maintenance of the stability of GVCs.[100]

VI. China's Pursuit of Maritime Economic Power: Policy

Of course, this discourse analysis only illustrates elite signals and the intention to develop the Chinese maritime economy through industrial upgrading. The analysis of policy documents is necessary to confirm whether the Chinese government actually utilizes upgrading aimed measures. Not all state roles as stipulated in the analytical framework could be confirmed through the policy analysis (see Table 2). Nevertheless, as all of the six domains for upgrading mentioned in this paper's framework were present in the analysis of the documents, with most domains illustrating at least two governmental approaches, the analysis demonstrates the applicability of GVCs theory. In addition, these domains do not solely exist in the most recent FYPs, but instead throughout the whole time period from 2013 until now, which shows that the relevance of GVCs for the state development of Chinese maritime economic power is not a novelty.

Table 2: Confirmed State Roles in Policy Analysis

Domain	Facilitator	Regulator	Producer	Buyer
Human capital	X	X		
Standards	X	X		
Investment strategies	X			
Local firm development	X	X	X	
Trade	X	X		
Infrastructure	X	X		

Source: Author's analysis of FYPs.

6.1 Human Capital

All FYPs emphasize the importance of cultivating maritime talent. For this aim, both faciliatory and regulatory measures are present. A first faciliatory measure is to strengthen maritime education, both quantitatively and qualitatively.[101] Second, the promotion of connections between educational institutions and the ocean industries.[102] Third, the flow of maritime talent throughout the state should be stimulated. This could for example be done by creating an information service platform or directory guide that highlights certain labor shortages in key ocean economy industries.[103] Strengthening international cooperation is the fourth and last faciliatory measure for this policy domain.[104] In addition, there are also planned regulatory measures such as the improvement of labor regulations or the provision of certain incentives for maritime talent.[105] Some of these measures are not new policies, but the result of loosening of existing regulatory measures, such as the relaxation of restrictions on the conditions for foreign maritime talent to come to China, or the lowering of the tax burden on the personal income tax by more than 15% for certain employees in the ocean economy.[106] The policy measures found within the FYPs for this domain confirm the state's faciliatory and regulatory role. A more concrete overview of the detailed policy actions connected to these roles can be found in Table 3 (Appendix).

6.2 Standards

Standards are mentioned throughout all FYPs, in two different ways. One the one hand, they are connected to the qualitative development of China's ocean economy. This entails policy goals such as the standardization of ocean equipment.[107] Another policy goal is the adaptation of aquatic products, shipbuilding, etc., to global standards and norms.[108] To realize these goals, the state acts as both a facilitator and a regulator. It supports companies in reaching the required international norms and quality controls on products. On the other hand, the FYPs link standards to the importance attached to China's development of international standards.[109] In this, the state again takes on a faciliatory role. Three specific policy measures are mentioned in this regard. First, incentivizing or funding ocean research institutions and companies' standardization research.[110] Second, encouraging these firms and research centers to participate in the formulation and revision of international standards in ocean-related international organizations.[111] Finally, a third policy

measure is strengthening the mutual recognition of standards through international cooperation platforms or regional trade.[112] Similar to the human capital policy domain, the state's faciliatory and regulatory role are confirmed.

6.3 Investment Strategies

Investment is likewise addressed in every FYP. Different investment strategies are present. One strategy focuses on the attraction of foreign investment in China's ocean economy.[113] The state can advance this goal through several faciliatory actions. It could achieve this by creating more free trade zones. Likewise, it could establish special economic zones (SEZs) and specialized industrial parks.[114] It could also increase investment promotion activities and international economic cooperation (e.g., the maritime Belt and Road Initiative).[115] Finally, the government can promote foreign direct investment (FDI) by making China's investment environment more transparent and investor-friendly. A concrete example of how to achieve this, is the establishment of a complaint mechanism for FDI.[116] A second strategy is increasing the amount of Chinese investment in the ocean economy. This entails both inward and outward investments. The outward investments link to the "going out" strategy of Chinese firms.[117] They can materialize as the acquisition of shares in overseas ocean-related firms. Equally, these investments could go into the construction of overseas ocean-related industrial or logistics parks and coastal ports.[118] Again, the state can take up a facilitator role via a range of measures. It could, for instance, enhance information on overseas investment environments or encourage the development of overseas investment risk insurance.[119] Inward investments, namely Chinese investment in Chinese ocean-related companies, are covered in the next paragraph due to the overlap with the domain of local firm development.

6.4 Local Firm Development

To support Chinese ocean-related firms in their development, the state takes up the role of facilitator, regulator and producer. Various measures can advance this goal, such as tax incentives, supporting public services, and incentives for the development of R&D capacity.[120] Table 4 (Appendix) summarizes more details regarding these measures. Less common policy actions include subsidies and increased international technical cooperation.[121] Besides these facilitatory measures, some FYPs also mention regulatory policy measures. They mostly center around the reduction of "red tape." The simplification of financial support approval processes and the reduction of administrative barriers to the construction of interprovincial development zones are two examples.[122] Finally, the state as a producer, invests in Chinese ocean-related firms. It also supports the development of marine industry clusters. This happens, for example, through annual budget funds, or the establishment of provincial ocean investment companies.[123] Hence, for this domain, three state roles can be confirmed.

6.5 Trade

This domain is mostly linked with facilitatory and regulatory policy measures. The facilitatory measures indicate much similarity with those aimed at attracting foreign

investment. Facilitating trade is for example done through trade agreements such as the Regional Comprehensive Economic Partnership (RCEP) or the Belt & Road Initiative, or through the promotion of export activities. Examples of these activities are trade fairs like the China–CNEE trade fair and the China–ASEAN business and investment summit, or exhibitions such as the 21st-century maritime silk road expo or the Hainan yacht exhibition.[124] Trade can also be facilitated by creating free trade zones and international shipping centers or integrated sea-related trade services centers.[125] Regulatory measures, in comparison, take the shape of certain price control mechanisms or rationalizations of procedures.[126] More details regarding these regulatory measures can be found in Table 5 (Appendix).

6.6 Infrastructure

Though for this policy domain no detailed policy measures were listed, the importance of infrastructure is nonetheless stressed in all FYPs. Notably, the focus is on three specific categories: logistics, knowledge and industry-specific infrastructure. First, ocean logistics infrastructure are mainly ports. They can be enhanced through the construction of automated intelligent terminals or large, specialized terminals, suited for coal, oil, liquefied natural gas (LNG), etc.[127] Integrated with other infrastructure such as coastal airports, highways and railway stations, ports may form international logistics hubs.[128] Deep water channels (created by dredging), dykes and integration with custom clearance services could further strengthen this first category. Second, knowledge infrastructure represents for instance high-tech industrial parks (e.g., the Blue Silicon Valley in Qingdao), ocean science and technology innovation zones and ocean information communication networks.[129] Third, industry-specific infrastructure is mostly linked to industries with AVCs.[130] A frequent example is the fishery and aquaculture industry, which should in the future include entire processing belts, connected to logistic centers as a sort of "cold chain."[131] Though the notable linkage with AVCs, there are also mentions of industry-specific infrastructure needs for VGVCs, such as the shipbuilding industry.[132]

The policy analysis demonstrates that the Chinese government, not only on a discursive level, shows clear ambition to upgrade its maritime economy within GVCs, but also seems to design policies that strive toward this upgrading. Measures targeted at human capital, standards, investment strategies, local firm development, trade and infrastructure are put forward to build linkages in AVCs, more often linked to industries based on resources, such as fishery, the energy sectors and deep-sea mining, and to upgrade VGVCs like the shipbuilding sector.

VII. China's Pursuit of Maritime Economic Power: Progress

Available quantitative data gives some insights about to what extent the PRC's ambitions to upgrade its maritime economy within GVCs mirrors actual progress. The Port Liner Shipping Connectivity Index reflects "a port's position in the global liner shipping

network."[133] The higher the value, the better connected. Based on the data of all Chinese ports that had no missing data between 2012 and 2022, an average of these indexes was calculated to look at the aggregated evolution over time. Figure 1 shows the obvious growing connectivity of Chinese ports. The Liner Shipping Connectivity Index then indicates a country's integration level into global liner shipping networks. It is calculated based on the number of scheduled ship calls per week in the country, the deployed annual capacity in Twenty-Foot-Equivalent Units (TEU): total deployed capacity offered at the country, the number of regular liner shipping services from and to the country, The average size in TEU (Twenty-Foot-Equivalent Units) of the ships deployed by the scheduled service with the largest average vessel size and the number of other countries that are connected to the country through direct liner shipping services.[134] Showing China's Index within the time period 2013–2022 in comparison with other international actors (Figure 2), again shows that China has been successfully growing its connectivity, both over time as in comparison with other states or international actors. Integration within GVCs is in part reflected in how well a country is connected in global shipping networks.[135] This data shows that the PRC's maritime economy is successfully growing its share in the global maritime connectivity. It does however not demonstrate that the Chinese maritime economy successfully upgraded its GVCs to the higher added value segments within the ocean economy.

Other economic data tells a similar story. The evolution of China's ocean GDP, an economic measurement created the Chinese government and published annually in the maritime statistical yearbook, show that the GDP of China's maritime economy is growing (Figure 3). This would suggest that China's build-up of its maritime economy is successful. Another evolution that would confirm this thought is China's strong growth of

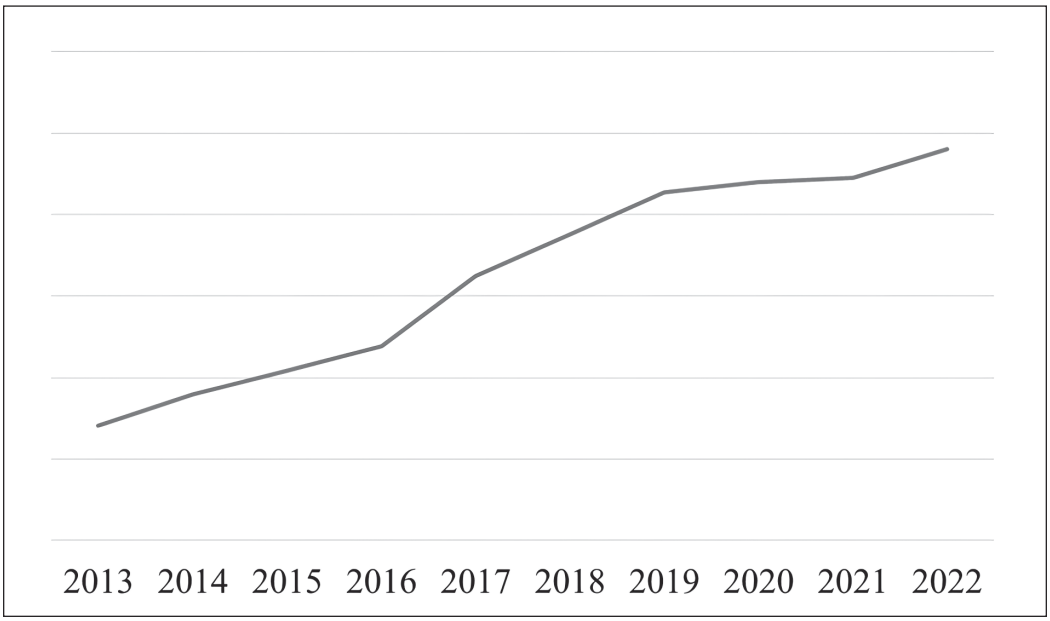

Figure 1. Chinese Port Liner Shipping Connectivity Index (40 Chinese Ports) (author's calculations based on data retrieved from UNCTADstat).

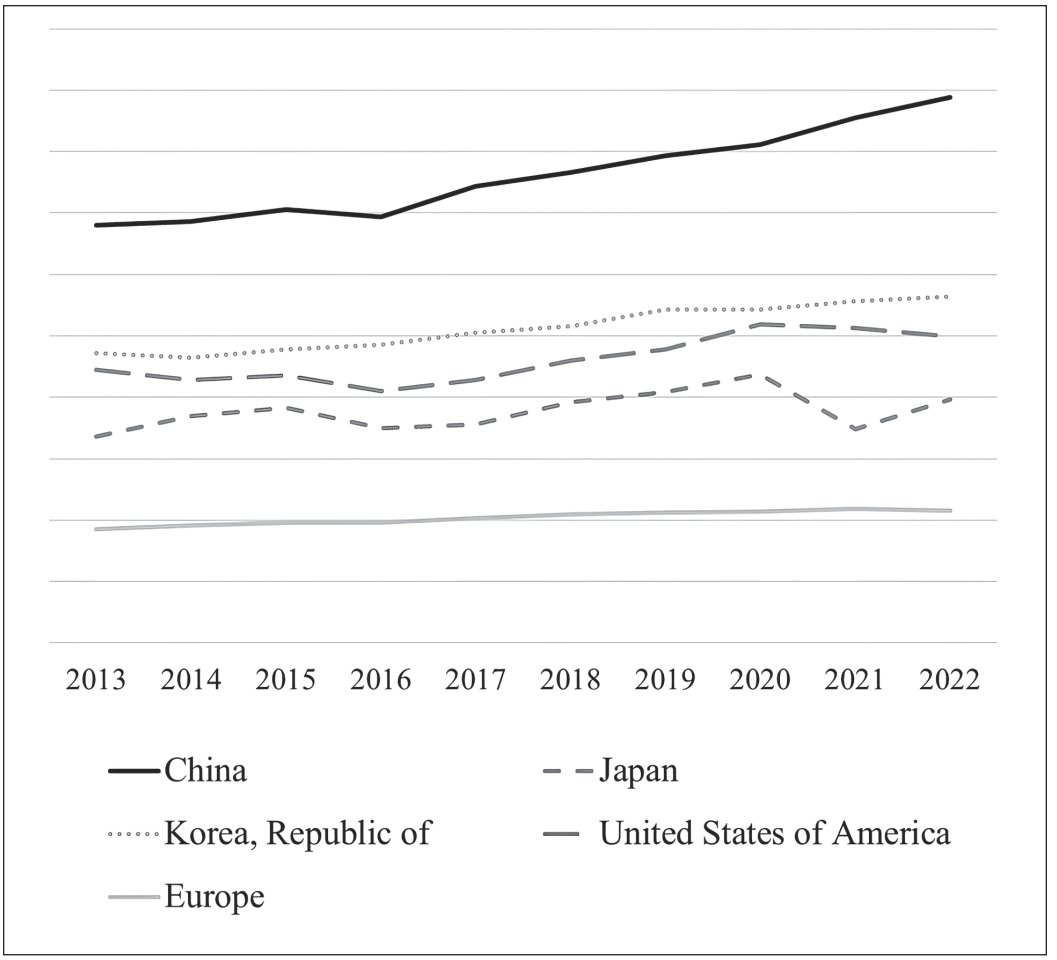

Figure 2. Liner Shipping Connectivity Index (UNCTAD).

its percentage of ships built annually compared with other international actors, as China's percentage is rising while that of other actors such as the Republic of Korea and Japan are diminishing, and Europe and the U.S. are way below (Figure 4, see Appendix). Finally, looking at Orbis data shows that the number of Chinese companies in the top 100 companies (based on operating revenue in USD) increased in several maritime sectors (Figure 5). This data shows China's quantitative growth in its maritime economy and confirms the progress in establishing internationally leading firms. Yet, Table 6 (Appendix) shows the growth rate of China's added value per maritime industry between 2013 and 2021 being negative for two of China's twelve maritime industries: the offshore oil and gas industry and the marine salt industry. Besides these four sectors, the shipbuilding sector shows a low growth rate of 4.19% since 2013. These numbers confirm that the Chinese maritime economy is growing and becoming more integrated in the global market. Nevertheless, more optimization and qualitative growth and upgrading is necessary, with China's maritime economy still having a lower technology contribution rate than those of developed.[136]

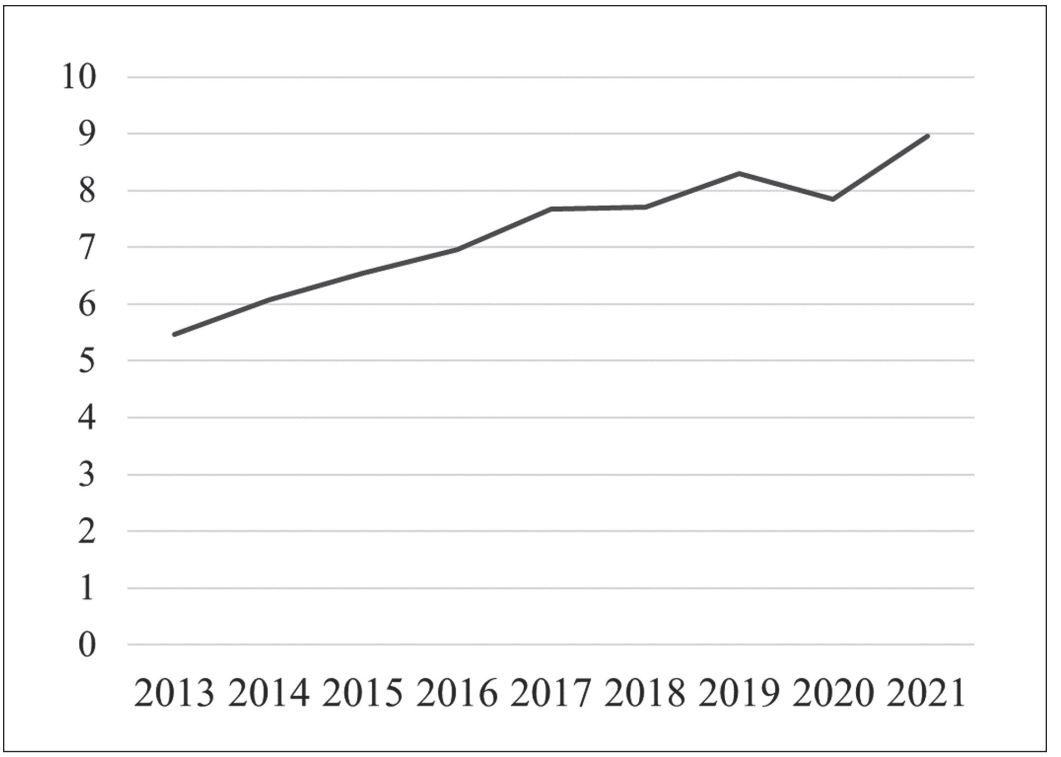

Figure 3. Ocean GDP (in trillion RMB) (China Marine Statistical Yearbooks [2013–2022]).

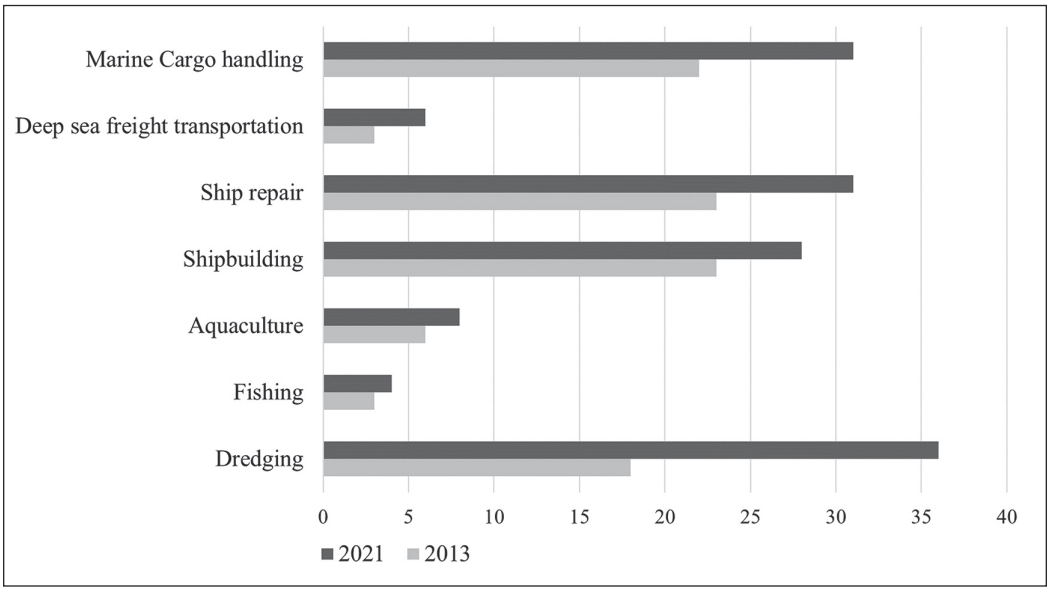

Figure 5. Number of Chinese Companies in Top 100 per Maritime Industry (author's calculations, based on data retrieved from the Orbis database).

VIII. Conclusion

This article uses the development of China's maritime economy since 2013 as a case study to add to the current understanding of maritime power in the economic domain. The discourse analysis illustrated the authoritative importance attached to GVCs for the development of Chinese maritime economy and Chinese economic maritime power. The analysis of the FYPs then confirmed that the Chinese government, not only on a discursive level, demonstrates clear intent to upgrade its maritime economy within GVCs, but also seems to design policies that strive toward this upgrading. It, for example, takes on a faciliatory and regulatory role in multiple policy domains such as human capital, standards, local firm development, trade, etc. This is true for both AVCs, in sectors such as fishery, the energy sectors and deep-sea mining, and for VGVCs like the shipbuilding or maritime equipment sector. Finally, two key findings emerged from the descriptive statistics mentioned in this article. First, Chinese growth in certain maritime global markets (such as shipbuilding), in the amount of value added captured in its industries and in strong domestic ocean-related firms indicates a stronger position in several maritime GVCs. Second, the increasing Chinese Port Liner Shipping Connectivity Index and Liner Shipping Connectivity Index signify an increasingly connected Chinese position within these GVCs. Thus, the Chinese case does indeed illustrate that maritime power depends on both connectivity and where a state is positioned within maritime GVCs.

This finding emphasizes the relevance of Global Value Chains in discussing a state's maritime power in the economic domain. Industrial upgrading of a state's domestic maritime firms might strengthen a state's maritime economic power resources in two ways. First, it may help these maritime firms in gaining market shares, and thus generate more welfare for the state, which then in response can utilize these economic resources to strengthen other maritime power sources such as technological power or naval power.[137] Second, industrial upgrading may cultivate leading domestic firms that as lead firms can then internationally take up a central position in GVCs. The centrality of these firms within the GVCs is thus a second resource of maritime economic power, as it is a possible way of making other nations dependent on those firms. This because the state with the asymmetrical structural benefit in the GVC could deny third parties' access to the maritime GVCs, if this party does not act in its interest.

Hence, economic maritime power is all about mitigating one own's structural dependencies in the maritime economy. Simultaneously, it is about dominating connectivity, or the power to network, through shipping companies, ports, companies that exploit natural resources at sea, and so forth. In this way, companies that focus on maritime shipping, seaport operations, fisheries, undersea resources and other forms of maritime commerce can all be seen as contributing to a nation's maritime power.[138] The limited number of ports that can receive the biggest portion of world trade, for example, all own expensive unloading facilities necessary to unload the majority of modern cargo ships. A state that lacks the maritime economic power to develop this kind of hub ports, will involuntarily be more dependent on states that do have this power. Hence, the oceans, though relatively free to use for all, can be seen as a concentrated network of asymmetric structural interdependencies. In short, "the largest power does not always win, the most connected one does."[139]

Appendix of Tables

Table 3: More Concrete Policy Measures Connected to "Human Capital"

State role	Policy goal	Examples of concrete policy measures
Facilitator	Strengthen maritime education	• Increase in quantity of ocean-related educational institutions • Increase in quality of educational programs
Facilitator	Strengthen link educational institutions and industry	• Increase in internships opportunities
Facilitator	Increase flow of maritime talent within country	• Creation of information service platform/ directory guide • Increased use of diversified investment mechanisms for talent development
Facilitator	Strengthen international cooperation	• Organization of maritime educational training courses with foreign partners • Increase in cooperation between maritime educational institutes • Creation of collective ocean-related think tank platform with foreign partners
Regulator	Improvement of labor regulations	• Improvement of selection, appointment, skills recognition, evaluation and promotion-policies

Source: Author's analysis of FYPs.

Table 4: Detailed Faciliatory Policy Measures Connected to "Local Firm Development"

State role	Policy goal	Examples of concrete policy measures
Facilitator	Develop tax incentives	• Improved tax rebate policies at ports of departure • Reductions or exemptions of corporate income taxes for certain maritime industries
Facilitator	Increase supportive public services	• Support firms in listing in domestic and foreign capital markets • Support firms in forming sea-related industry associations or chambers of commerce • Develop consulting and market research services • Improve legal advice capacity • Create information platforms
Facilitator	Increase R&D capacity	• Increase in influential R&D centers in China • Support firms in forming ocean industry alliances with other firms, scientific research institutes and universities

Source: Author's analysis of FYPs.

Table 5: Detailed Regulated Policy Measures Connected to "Trade"

State role	Policy goal	Examples of concrete policy measures
Regulator	Establish price control mechanisms	• Establish a globally influential aquatic products distribution and price formation centre • Construct state marketing boards or trading platforms (for aquatic products or common bulk commodity products like coal, iron ore, steel, oil etc)
Regulator	Increase the rationalization of procedures	• Optimization of licensing procedures • Open up international ship registration and inspection system • Increase construction of ship registration offices • Develop a transparent list of port operation and terminal service charges and price lists • Lower the threshold of entry for certain ships • Promote online approval of import and export licenses

Source: Author's analysis of FYPs.

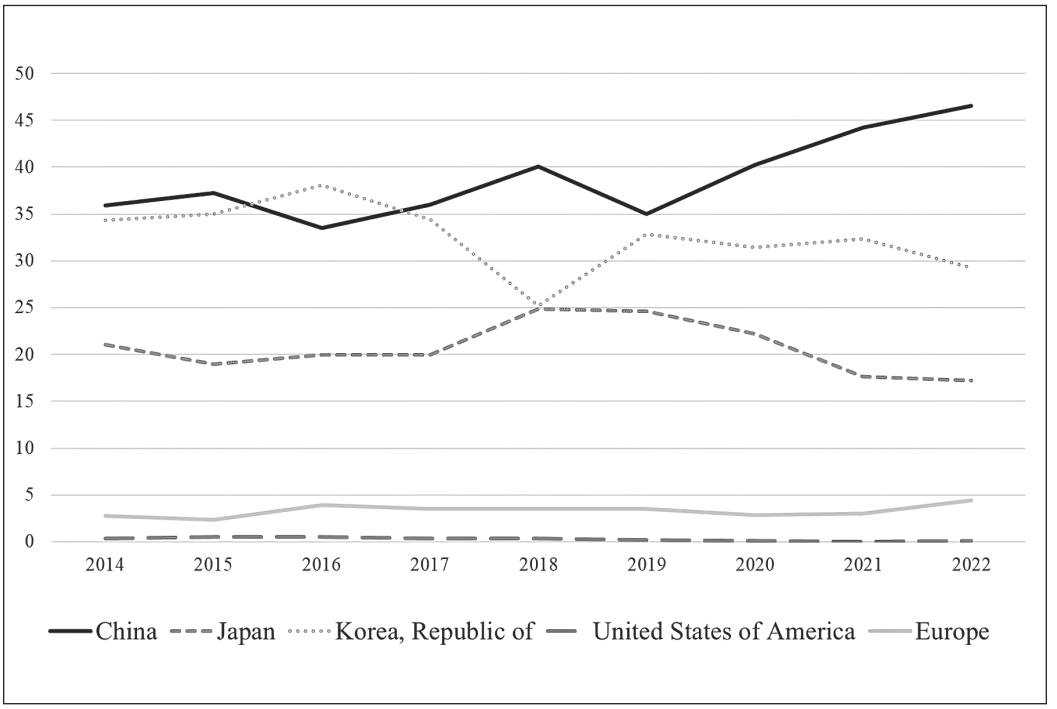

Figure 4. Percentage of Ships Built Annually per International Actor. Source: UNCTAD.

Table 6: Statistics on Chinese Added Value in…

	2013	2021	Growth
	(Unit: 亿元/100 million RMB)		
Marine Mining Industry (海洋矿业)	54.00	186.00	244.44%
Marine Electric Power Industry (海洋电力业)	91.50	327.20	257.60%
Marine Biomedicine Industry (洋生物医药业)	238.70	694.80	191.08%
Coastal/Marine Tourism (滨海旅游业)	7839.70	14161.70	80.64%
Seawater Utilization Industry (海水利用业)	11.90	313.10	2531.09%
Maritime Communications and Transportation Industry (海洋交通运输业)	4876.50	6979.60	43.13%
Marine Fishery Industry (海洋渔业)	3997.60	5027.00	25.75%
Marine Shipbuilding Industry (海洋船舶工业)	1213.20	1613.00	32.95%
Marine Engineering Architecture Industry (海洋工程建筑业)	1595.50	1892.70	18.63%
Offshore Oil and Natural Gas Industry (海洋油气业)	1666.60	1617.90	-2.92%
Marine Chemical Industry (海洋化工业)	813.90	3905.50	379.85%
Marine Salt Industry (海洋盐业)	63.20	40.60	-35.76%

Source: China Marine Statistical Yearbooks (2013–2022).

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The Stability and Finality of Baselines, Outer Limits and Maritime Boundaries in the Context of Anthropogenic Sea-Level Rise

Marcelo G. Kohen and *Lorenzo Palestini*

Structured Abstract

Article Type: Research Paper

Purpose—To consider whether sea-level rise entails the alteration of the baselines, outer limits and boundaries that define the geographical scope of maritime areas.

Approach—Drawing from the principle of finality and stability of boundaries and the concepts of ambulatory, geographically fixed and permanent lines, the paper begins with boundaries and continues with baselines and outer limits defined by physically changing natural features.

Findings—The *fixing* of baselines, the *delineation* of outer limits and the *delimitation* of boundaries are legal acts that occur at precise moments in time, and which must be assessed based on the coastal configurations existing at those times. Once established and given publicity to, these lines are *fixed* and *permanent*. Unless coastal States have intended otherwise, baselines, outer limits and boundaries do not adjust automatically to recession and can only be moved if it is later decided to move them. With regard to anthropogenic change, there are additional reasons supporting the preservation of these lines.

Practical Implications—The paper demonstrates that the law of the sea does not make climate change worse. The legal problem can be resolved through interpretation of UNCLOS.

Keywords: baselines; climate change; international law of the sea; maritime boundaries; outer limits; sea-level rise

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I. Introduction

Greenhouse gas emissions have caused the *rise* of the average atmospheric temperature, as well as the *rise* of the mean sea level because of the melting of the land-based cryosphere and thermal expansion of our warming oceans. While Earth's climate has undergone *natural* changes recorded in geologic history, our geological epoch, the late Holocene, was characterized by climate and sea level stabilization until the industrial revolution of the nineteenth century. The present time, informally referred to as the *Anthropocene*, is defined by the impact of human beings on the environment. Climate change is no longer solely the consequence of natural phenomena, such as fluctuations in solar radiation, tectonic shifts, orbital changes and volcanic activity. Climate change has become *anthropogenic*. It is largely the outcome of human activities, such as the burning of fossil fuels and deforestation, which have caused carbon dioxide levels in the atmosphere to peak. With scientific predictions indicating that, by 2100, the mean sea level may rise up to 101 cm above 1995–2014 levels,[1] the continued existence of small island States, whose territories could fully disappear, is threatened by anthropogenic sea-level rise. More generally, low-lying coastal States are bound to suffer from coastal *recession* due to inundation or erosion by the sea.

This article does not address physical problems caused by sea-level rise, such as the displacement of populations, salinization of freshwater resources and agricultural soil, or increased intensity of storm surges and flooding. Instead, it considers alleged problems caused by the law of the sea because of sea-level rise. The question is whether, in addition to the loss of land territory, sea-level rise entails the loss of maritime areas, or the alteration of the lines that define the geographical scope of maritime areas, namely, baselines, outer limits and boundaries. After all, according to the principle of *appurtenance*, maritime entitlements flow from sovereignty over coastal land territory, as alluded to by the maxim *the land dominates the sea*.[2] Furthermore, most outer limits of maritime areas are based on distance from the baselines situated along coastlines.[3] According to some scholars,[4] it thus follows that if coastlines recede, baselines and outer limits of maritime areas *too* will recede. And if land territories fully disappear, their appurtenant maritime areas *too* will fully disappear. However, while the loss of land territory is a *physical* problem that ultimately requires confronting global warming, loss of maritime areas is merely a *legal* problem that can be resolved through interpretation or law making. Unlike land and sea, which *will* recede and advance because of climate change, maritime areas, such as the territorial sea, the contiguous zone, archipelagic waters, the exclusive economic zone and *even* the continental shelf,[5] are *not* natural features in and of themselves. They are legal constructs that, once delineated or delimited, need *not* be affected by subsequent physical change caused, for example, by sea-level rise or sediment deposition on the seabed of the continental slope and rise.

To suggest that baselines and outer limits change together with physical change affecting coastlines is to say, not only that certain lines at sea shift in time, but also that entire maritime areas continuously move to adapt to new coastal configurations. In other words, what is at stake is not just a line, but a set of lines that define the perimeters of various maritime areas. Those who believe that maritime areas *move* by themselves, or *must be moved* to reflect the reality of coastlines, are referred to as the proponents of the "ambulatory thesis."[6] Their view essentially rests on an interpretation of Article 5 of the United Nations

Convention on the Law of Sea (hereinafter the Convention or UNCLOS), which leads to what, by their own admission, is an inconvenient outcome. The problem, according to these scholars, is that the normal baseline relates to an alleged natural feature, the *low-water line*, which, by definition, is vulnerable to sea-level rise. Straight and archipelagic baselines may be more resilient to sea-level rise, but they too, eventually, would succumb, since the terminal points of these sea segments are likewise set on receding coastlines.[7]

While this view mainly concerns the advancement or recession of baselines and its alleged *knock-on* effect on outer limits,[8] it also touches upon the distinct but related matter of *status* of maritime features in time. From this perspective, sea-level rise may entail that an island be *downgraded* to the status of rock, or even to that of low-tide elevation, thus losing its entitlements to an exclusive economic zone and continental shelf, and possibly, its entitlement to a territorial sea.[9] Similarly, an archipelagic State might lose its status and, consequently, its archipelagic waters, if it no longer fulfills the requirements for drawing archipelagic baselines.[10] Conversely, accretion might lead to *upgrading* the status of maritime features in time. Both cases raise concerns in terms of stable allocation of maritime jurisdictions. Change of status would have more drastic consequences than mere recession. With regard to downgrading, what is at stake is not just the precise location of an outer limit or boundary, but the very existence of the maritime area it seeks to delineate or delimit. With regard to upgrading, the question that arises is whether a coastal State can invoke its newly generated entitlements vis-à-vis its neighbors, or to encroach upon the high seas and the Area, common heritage of mankind. This view suggests that entitlements are *never* acquired, but always subject to the vicissitudes of physical change. The inherent fatality would almost be appealing, were it not for the fact that sea-level rise often affects States that have barely contributed to climate change, and the fact that this view has prompted the *artificialization* of coastlines by those with the means to resist coastal recession.

The article will provide a critique of the moving maritime areas thesis. It will show that the *fixing* of baselines and the *delineation* of outer limits, like the *delimitation* of boundaries between two coastal States, are legal acts that occur at precise moments in time, in accordance with the perceived physical realities of those times. In this respect, the article will draw a distinction between lines that are *geographically fixed* and lines that are *ambulatory*. It will demonstrate that the *fundamental principle of stability and finality* applies both to lines that separate the maritime areas of a coastal State from those situated *beyond* national jurisdiction and to lines that separate the maritime areas of *two* distinct coastal States. This means that, contrary to what has been suggested,[11] there is no reason to distinguish between outer limits and maritime boundaries. While *pacta sunt servanda* and *res judicata* apply solely to boundaries, the principle of finality and stability applies to both types of lines. Thus, outer limits and boundaries, but also baselines, have in common the attribute of *permanence*, which means that they are not subject to *compulsory* review when physical change affects the natural features that were relied upon to establish them. The article concludes with the problem of sea-level rise from the viewpoint of the distinction between *natural* and *anthropogenic* change. The object and purpose of UNCLOS and, more generally, climate justice and equity, make it even more difficult to maintain that coastal States, and notably developing island States, should suffer the consequences of *human* activities that originated primarily in *other* States.

II. Maritime Boundaries

For both land and maritime boundaries, *natural features* may have played a role in the establishment of the line that defines the spatial extent of two national jurisdictions. To be precise, with regard to land boundaries, and contrary to what an outdated doctrine suggests, there is no legal rule that requires these lines to follow so-called *natural boundaries*.[12] States often do rely on natural features such as rivers or mountain ridges, but that is a choice, which they are free to make or not.[13] Even when these supposedly natural boundaries are chosen, it is necessary to specify them. It can be through the identification of precise coordinates of longitude and latitude or through the designation of a more precise feature within the natural formation, such as the *thalweg*,[14] a defined bank of a river or a line linking the most elevated crests of a mountain chain. As for maritime boundaries, the law of the sea gives ample value to coastlines, that is, natural features that mark the divide between land and sea. Coastlines are the necessary "intermediary" or medium that allows sovereignty over land territory to generate maritime entitlements.[15] It is along coastlines that basepoints for establishing lines of equidistance are placed. Based on their shapes and lengths, coastlines also provide the special or relevant circumstances that may justify departing from equidistance.[16] The question that arises is what happens to land and maritime boundaries when subsequent change affects the natural features relied upon to establish them.

To respond, one should begin by defining the concepts of *geographically fixed*, *ambulatory* and *permanent* lines. As explained in the relevant jurisprudence, the fundamental principle of stability and finality does not suggest that boundaries are set once and for all.[17] States are always free, if they agree to do so, to modify or terminate them[18]; what States cannot do is to modify or terminate them unilaterally.[19] Thus, boundaries are *permanent*, not because they cannot be changed, but because they can only be changed with the consent of both neighbors.[20] What is crucial, however, is to examine the nature of these permanent lines agreed between two neighbors or decided by adjudicative bodies. These lines can be of a fixed or of an ambulatory nature. Typically, a *geographically fixed* boundary is designated with coordinates of longitude and latitude. Physical change will have no impact on its course, even if a natural feature, which was relied upon to establish it, may have since shifted to another location. An *ambulatory boundary*, on the other hand, is not only defined by a natural feature, but is also meant to adapt to physical change affecting that feature. This is classically the case of boundaries concerning watercourses, such as rivers and lakes, when States intended the boundary to adjust to the changes affecting a navigational channel or both riverbanks, if what is at stake is a median line. Ambulatory boundaries will move on their own, automatically, without the need for parties to reach a new agreement. They do so because from the outset it was agreed that they would synchronously adjust to the changes affecting the natural features that define them. Conversely, *geographically fixed* boundaries will never move on their own. They can be moved, but only when and if States agree to move them. As notably ascertained in the *Laguna del Desierto* arbitral award, the principle of stability and finality of boundaries applies *both* to geographically fixed and ambulatory lines.[21] This means that legal stability, or permanence, does not always presuppose geographical fixity.[22]

Maritime boundaries are *generally* geographically fixed lines, usually defined by precise coordinates referred to in an agreement or in an adjudicative decision. When that is the

case, they are *neither* affected by recession or advancement of existing coastlines, *nor* influenced by the disappearance or appearance of maritime features belonging to the parties, such as islands, rocks and low-tide elevations.[23] Parties may agree otherwise, but if they have not done so, the maritime boundary will remain as defined at the time of its delimitation. Thus, the fact that a party may since have modified its baselines and published new charts will have no automatic effect on the maritime boundary. Moreover, one party alone cannot compel the other to modify the line. There is no point discussing whether shifting natural features may give rise to a *fundamental change of circumstances*.[24] According to Article 62(2)(a) of the Vienna Convention on the Law of Treaties, this ground for terminating a treaty does not apply to agreements establishing boundaries. This is in line with the principle of stability and finality, that is, the permanent character of boundaries. The jurisprudence rightly emphasized that the principle applies to both land and maritime boundaries, without drawing distinctions based on whether they allocate sovereignty or more limited functional rights.[25] Stability and finality are important when defining the spatial organization of maritime areas regardless of whether one is dealing with the territorial sea, or the exclusive economic zone and continental shelf. This is confirmed in the field of *State succession* to boundaries[26] and by the fact that adjudicators have recognized the applicability of the *uti possidetis juris* principle to maritime delimitations.[27]

A question, which may be left open, is what happens with regard to maritime boundary agreements that refer to the equidistance methodology, without including a set of geographical coordinates. For some, this may indicate that the boundary will "potentially" change together with changes affecting the relevant coastlines.[28] What is clear is that, notwithstanding its *abstract* nature, the parties have agreed to establish a *permanent* boundary based on equidistance. Whether the boundary should reflect the perceived reality of a given moment in time or, conversely, adapt to ever-changing coastal configurations, is a matter that would require careful interpretation of the agreement.

There are reasons explaining why, in some circumstances, it is convenient to establish ambulatory boundaries at sea. On land, the advantage of an ambulatory line following the *thalweg* of a river is understandable from the viewpoint of equal access of all riparian States to navigational uses. The *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean case (Costa Rica v. Nicaragua)* demonstrates that, sometimes, ambulatory lines do serve an important purpose in the context of maritime delimitations.[29] This is notably the situation in delimitations involving *adjacent* States whose territories are separated by *ambulatory* land frontiers, as may be the case with regard to river boundaries in particular. The determination of the starting point of the maritime boundary, which will influence the entire delimitation, requires certainty that the physically changing situation on land does not allow. In this situation, it may be convenient to opt for an ambulatory boundary at sea or, to be more precise, a boundary that is *in part* ambulatory and *in part* geographically fixed. The ambulatory part will link the terminal point of the land frontier to the first fixed point of the geographically fixed part of the maritime boundary. Because the starting point of the maritime boundary is nothing other than the terminal point of the land boundary that is bound to change, the first nautical miles of the maritime delimitation should follow and adjust to the changes to the land boundary. Were it otherwise, the terminal point on land and the starting point at sea may end up being dissociated, with problematic consequences such as the possibility that in time the maritime area of one neighbor may wash upon the coastal territory of the other. A

partly ambulatory maritime boundary allows avoiding such situations, which would otherwise require the parties to agree to modify, whenever the situation on the ground necessitates it, their geographically fixed and somewhat cumbersome line.

The principle remains that, unless parties have agreed otherwise, maritime boundaries are impervious to change to the coastlines that served to establish them. Two points are worth highlighting. The *first* is that delimitation occurs at a precise moment in time and should be effected based on the coastal geography of that time. The *second* is that, unless the parties have asked adjudicators to do otherwise, the latter can only draw geographically fixed lines in order to provide the parties with an *exact* delimitation. Both propositions flow from necessity. The law of maritime delimitation essentially requires reaching an equitable result based on coastal configurations. Adjudicators are *not* in a position to decide what would be equitable if the delimitation were to occur at a later moment in time, or if it has to occur at the time of the decision but has to be assessed in light of future circumstances.[30] It is not just a question of whether coastlines would recede or advance after the decision. It is a question about what their precise configurations would be. What is more, if the contrary were to be true, a question, impossible to answer, would then arise: how far they should look into the future. Any future date, selected with a view to appreciating the equitableness of the boundary, would inevitably seem arbitrary, regardless of whether there was evidence allowing for some predictions to be made. The alternative option would be to decide on an *abstract* delimitation. However, such lines do not sit well with the proper exercise of the judicial function and the principle of stability of boundaries. Moreover, they provide no guarantee as to the future equitableness of the boundary.

In the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, the Arbitral Tribunal explained that it had to choose "base points that are appropriate in reference to the time of the delimitation."[31] It aligned itself to the jurisprudence of the Court in which mention was made of the "physical reality at the time of delimitation."[32] More importantly, the Tribunal also clarified that whether the coastlines would recede in the future was of no concern since "neither the prospect of climate change nor its possible effects can jeopardize the large number of settled maritime boundaries throughout the world."[33] The reasoning of the Tribunal thus gives preeminence to stability, suggesting that, unless neighbors have agreed otherwise, legal stability will entail geographical fixity. This means that, with regard to maritime boundaries, there would even be a *presumption* of geographical fixity, which could only be rebutted if there is sufficient evidence of the intent to establish an ambulatory line.

Some have argued that the *Territorial and Maritime Dispute between Nicaragua and Honduras* case stands for a different understanding of the implications of coastal instability on maritime boundaries.[34] However, the first point that must be stressed is in conformity with the *Bay of Bengal* arbitral award. The Court established a geographically-fixed maritime boundary starting at three nautical miles from the mouth of the River Coco, which is where the land boundary between the two States ends, leaving the parties to agree on a line that links the terminal point of the land boundary to the starting point of the maritime one.

The second point relates to whether coastal instability and future changes had a bearing on the choice of bisector lines as maritime delimitation methodology. Indeed, the Court stressed that a line of equidistance constructed today would appear "arbitrary and unreasonable in the near future."[35] However, a closer reading of the decision shows that costal

instability *alone* did not justify reliance on the angle bisector method. In reality, there were several reasons. The first had to do with the general configuration of the relevant coastlines, as perceived *at the time* of the delimitation. It entailed that if the Court were to draw a line of equidistance, two points only, on the respective sides of the convex cape, would end up controlling most, if not all, of the maritime boundary, on account of the generally concave coastlines of the two parties.[36] The second reason related to the fact that the parties were neither ready for a decision on the location of the land boundary terminus, nor ready for a decision on sovereignty over the small islets that had formed at the mouth of the River Coco.[37] One could also say that, like in the case later brought by Costa Rica, the Court was confronted *not* just to instability, but to instability that entailed changes to an *ambulatory* land boundary. From this perspective, the problem was not the physical instability itself, but the fact that this instability entailed that the land frontier along the *thalweg* of the River Coco would change too, and so would the terminal point at the mouth, where the maritime delimitation would start.[38] Thus, this case does not stand for a general proposition according to which unstable coastlines cannot provide basepoints. Instead, it stands for the proposition that, when the land frontier is ambulatory, or instability gives rise to a dispute over the location of the land boundary terminus, it is not reasonable to select basepoints near the land frontier.

To conclude, maritime boundaries are drawn based on the coastal configurations existing at the time of delimitation. The fact that parties or adjudicators may have relied on equidistance, with a view to giving equal weight to the coastlines of two neighbors, does not mean that the maritime boundary should adapt to physical change caused by sea-level rise. While maritime boundaries are not immutable, in the sense that they can never be modified, they are permanent and generally geographically fixed. This means that, unless otherwise intended in the relevant agreements or decisions, maritime boundaries are not meant to automatically adjust to changing coastlines. It is only by way of subsequent agreements that they can be modified.

III. Baselines and Outer Limits

The discussion on sea-level rise includes its consequences on baselines and outer limits of maritime areas. The proponents of what they call the "ambulatory thesis" believe that because the provision on *normal baselines* refers to the *low-water line*, it follows that physical change of the latter inevitably entails that the former should change too.[39] At the outset, one must stress that the proponents of this thesis do not consider what coastal States aimed to achieve when fixing baselines or delineating outer limits. Instead, they treat all baselines and outer limits, regardless of whether they are defined by geographical coordinates or depicted on charts, as though they are susceptible of moving on their own. Yet, one of the conclusions of the previous section is that reliance on natural features to establish maritime and land boundaries does *not* necessarily entail that these boundaries will change together with physical change affecting the relevant features. The question is why it should be different for baselines and outer limits, considering that the Convention contains *no* express wording suggesting that a change to the low-water line automatically entails the moving of baselines and outer limits.

In the *First issues paper* on sea-level rise of 2020, the Study Group of the International Law Commission mentioned an *a contrario* reading, which is often repeated by those who believe that maritime areas move on their own, or that baselines and outer limits must be moved to reflect changes to the low-water line.[40] This negative reading leads to an extraordinary result, for it entails drawing a distinction between the outer limits of different maritime areas, even though there are no rational explanations for doing so. Put simply, the argument rests on the fact that the Convention *only* emphasizes *permanence* in relation to the outer limits of the continental shelf. It thus follows that the outer limits of other maritime areas are *not* permanently established.[41] This would mean that, according to the description in the *First issues paper*, the outer limits of these other maritime areas must change to reflect changes to the baselines.[42] This conclusion is achieved by comparing Article 76(8) and (9) of the Convention, which concerns the outer limits of the continental shelf, with similar provisions relating to the territorial sea, archipelagic waters and the exclusive economic zone, which contain no reference to permanence.[43] This *a contrario* reasoning does not find justification. Permanence is a defining feature of all baselines, outer limits and boundaries. There are reasonable explanations as to why this shared attribute was only mentioned expressly in relation to the outer limits of the continental shelf.

With regard to Article 76(8) of the Convention, which concerns the continental shelf beyond 200 nautical miles, the provision indicates that outer limits established "on the basis" of the recommendations of the Commission on the Limits of the Continental Shelf (CLCS) "shall be final and binding." This provision does *not* suggest that the *only* outer limits that can be final and binding are those of continental shelves based on natural prolongation. The explicit reference is merely the outcome of the fact that coastal States must make submissions to the CLCS and abide by its recommendations. This means that, with regard to these outer limits, finality and stability require respecting the CLCS recommendations. The absence of similar wording in provisions relating to other maritime areas requires no intricate explanation. The absence flows from the fact that the maximum breadth of these other maritime areas is pre-determined and based on distance. Moreover, there are no technical bodies tasked with reviewing the relevant outer limits, or the baselines from which they are measured. This suffices to dispose of the negative reading.

As for Article 76(9) of the Convention, this provision, which applies to both distance-based and natural prolongation-based continental shelves, states that, once deposited with the UN Secretary-General, "charts and relevant information" are to describe the outer limits of this maritime area "permanently." There is nothing in the Convention or in its preparatory works which suggests that the provision aimed to set an exception to what would otherwise be a general rule of ambulation of baselines and outer limits. In fact, the reference to permanence can be understood in light of past problems that arose from the vague and variable outer limit contained in the Geneva Convention on the Continental Shelf.[44] An explicit reference makes sense, if one considers the appearance of the Area, common heritage of mankind, as well as the earlier controversy over the outer limits of the continental shelf, when States could *extend* their claims seaward, and do so *indefinitely*, in response to technological developments allowing for exploitation at greater depths.[45]

There are *two* fundamental contradictions in the contention according to which outer limits of continental shelves are permanent, while those of other maritime areas are not.

First, it does not make sense to suggest that recession should affect the outer limits of all distance-based maritime areas, except for those of continental shelves that extend up to 200 nautical miles from the *supposedly* moving baselines.[46] In fact, even with regard to natural prolongation-based continental shelves, the distinction makes little sense, considering that the relevant outer limits can be defined by lines of constraint situated at a distance of 350 nautical miles, a distance that is likewise to be measured from the *supposedly* moving baselines.[47] Moreover, the real question is why, if physical change does not affect the outer limits of the continental shelf, an identical conclusion cannot be reached for the lines that set the perimeters of territorial seas, archipelagic waters and exclusive economic zones. The seabed of continental shelves, like the low-water line, may change in time. If physical change to the morphology of the seabed does not affect outer limits based on the sediment thickness formula, or the distance from the foot of the slope formula,[48] why should it be different for outer limits measured from the low-water line?

According to Article 5 of the Convention, the normal baseline is *not* simply the low-water line. The normal baseline is "the low-water line along the coast *as marked* on large-scale charts officially recognized by the Coastal State."[49] The provision clarifies what is sometimes misunderstood. The low-water line is first and foremost a *tidal datum*, which requires a high "degree of abstraction from and generalization of measurements based on past records."[50] The reason is very simple. No representation of the low-water line can ever faithfully represent an idealized low-water line observable on the ground. In fact, the low-water line changes *constantly*, depending on astronomical and meteorological circumstances. This is why Article 5 requires the low-water line to be charted. Likewise, this is the reason why, according to Article 16, straight baselines "shall be shown on charts" or specified through "a list of geographical coordinates" and then given "publicity to" by way of deposit of the relevant information to the UN Secretary-General.

Proponents of the moving maritime areas thesis nevertheless suggest that there is an obligation to *update* baselines, which in turn results in an obligation to update outer limits. By referring to an obligation, they no longer say that baselines *move* on their own, but rather that they are *movable* and that they *must be moved*, when cartographical representations or lists of coordinates no longer accurately represent the low-water line.[51] In other words, the question is whether baselines must be updated with a view to reflecting the evolution of the low-water line.

Some have argued, in order to avoid the consequences of the moving maritime areas thesis, that an obligation to update charts does not exist and that, consequently, it suffices to keep the charts first employed for the determination of the baseline to preserve the maritime areas as originally established. According to the *First issues paper*, "nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding the baselines and outer limits of maritime zones measured from the baselines and, after the negative effects of sea-level rise occur, to stop updating these notifications in order to preserve their entitlements."[52] This position is what probably led the Pacific Islands Forum to "*[a]ffirm* that the Convention imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations" and to "*[p]roclaim* that [their] maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements

that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise."[53]

In reality, there is no need to link the question of whether there is an obligation to update large-scale charts with the question of the preservation of baselines and outer limits depicted in the past. Like the delimitation of maritime boundaries, the establishment of baselines is a legal act that takes place at a *precise* moment in time. Simply put, each legal act has to be appreciated in conformity with the situation of its time. The conformity of normal baselines to the low-water line must be appreciated in light of the physical situation at the time of their original depiction on a large-scale chart. The same is true of straight and archipelagic baselines, whose conformity with the relevant legal requirements should be assessed in light of the situation at the time they are enacted and publicized. Whether there is an obligation to update charts or geographical coordinates is not in itself an issue. It is obvious that it is in the general interest of both the coastal State and the international community to keep the geographical depiction of coastlines updated. Furthermore, if the coastal State does not update that data, the existing technology allows others to do it. The crucial point is that, regardless of whether these charts are updated or not, the existing maritime areas remain within their established limits, in accordance with the preexisting baselines and outer limits. There is no wording in the Convention that suggests that the publication of new charts entails an obligation to update baselines and outer limits with a view to adjusting them to the new physical realities depicted on these charts.

Proponents of the moving maritime areas thesis often rely on a second *a contrario* reading, this time based on Article 7(2) of the Convention. According to this provision, "[w]here because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines *shall remain effective* until changed by the coastal State in accordance with this Convention." For some, this provision inevitably entails that other baselines, normal or straight, are affected by recession.[54]

Yet, contrary to what has been suggested, Article 7(2) of the Convention does not negatively imply that *other* baselines move by themselves, with recession or accretion. Nor does it suggest that, *eventually*, the coastal State is *obliged* to change its straight deltaic baselines.[55] The provision simply says that "the baselines shall remain effective *until changed* by the coastal State in accordance with this Convention." Far from entailing an obligation, this provision confirms the usual understanding, common to baselines, outer limits and boundaries, according to which these lines are *permanent*, but not *immutable*. States have a *right* to modify them, not an *obligation* to do so. But if they exercise that right, the provision stresses that the new baselines must be adopted "in accordance with the Convention." This confirms another usual understanding, again common to baselines, outer limits and boundaries, namely that what matters is the physical situation of the time at which they are adopted. It is submitted that this provision stands for what it expressly says. Even high coastal instability, caused by the presence of a delta, has no effect on straight baselines. There is no reason to negatively infer that other phenomena, such as sea-level rise, would lead to different outcomes.

What is true for baselines is likewise true for the *status* of maritime features and their entitlements. This is not equivalent to saying that a rock will *always* be a rock, but it does

mean that its entitlement to a territorial sea is *acquired*, once the relevant outer limit has been fixed.[56] After all, with regard to boundaries, the jurisprudence has clarified that the status of features, such as Qit'at Jaradah or Quitasueño,[57] is to be assessed at the time of delimitation. The *First issues paper* rightly concludes in favor of permanence of maritime boundaries.[58] Remarkably, it draws *no* distinction between normal cases of recession and cases of substantial recession, downgrading or full submergence, in which a boundary ends up being located where there are no longer overlapping entitlements. If sea-level rise does *not* affect maritime boundaries in such a scenario, sea-level rise need not affect outer limits that end up being located beyond the maximum breadth of the delineated maritime area. The Convention does not discriminate between States that have neighbors, and can therefore conclude *permanent* boundaries, and States that do not, but can nevertheless establish *permanent* outer limits.[59] There is neither a need to speak of *freezing* of notifications or of entitlements, nor a need to suggest that, because baselines end up being located offshore, the land no longer dominates the sea. In reality, the land does dominate the sea, but it does so in accordance with the situation existing at precise moments in time, when certain *geographically fixed* lines, based on lists of coordinates or cartographical representations, are *permanently* established, namely, baselines, outer limits and maritime boundaries.

IV. Conclusion

Contrary to what has been argued by the proponents of the moving maritime areas thesis, the law of the sea does *not* make climate change worse. What makes it worse are *interpretations* based on *a contrario* readings that lead to unreasonable results, as well as the failure to understand that, just like for *delimiting* boundaries, the *fixing* of baselines and *delineation* of outer limits are legal acts that occur at precise moments in time. Notwithstanding its relative popularity in scholarship, the majority of States are critical of the so-called "ambulatory thesis." This is altogether obvious in the statements made by the Pacific Island Forum and Pacific island States.[60] But what emerges from submissions to the International Law Commission and discussions in the General Assembly Sixth Committee is that criticisms are not limited to the Pacific region. The majority of States support legal stability, as understood to entail the preservation of baselines and outer limits of maritime areas. For them, contrary to what the International Law Association suggested,[61] it is not a question of changing the law, but rather of reaching a proper interpretation of the Convention based on the geographically fixed character of these lines and the absence of an obligation to update them.[62] The Alliance of Small Island States, which includes island States and low-lying coastal States from all around the world, has adopted a declaration that vindicates the position of the Pacific Island Forum.[63] Aside from subsequent practice,[64] the object and purpose of the Convention also largely supports the geographically fixed and permanent character of baselines and outer limits.[65] The moving maritime areas thesis does not contribute to "the strengthening of peace, security, cooperation and friendly relations among all nations."[66] More importantly, it threatens the "realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries."[67]

One need not worry about *subsequent* discrepancies, that is, the lack of correlation

between updated depictions of the low-water line on large-scale charts and pre-established baselines and outer limits.[68] To state that baselines and outer limits are geographically fixed and permanent lines is not equivalent to saying that maritime entitlements eventually flow from charts. To say that maritime entitlements flow from charts is to ignore the *temporal* dimension.[69] In reality, baselines and outer limits remain opposable, notwithstanding *subsequent* physical change, simply because their conformity to international law must be appreciated in relation to the situation existing at the time at which they were enacted. There is nothing unreasonable with such an interpretation, which better aligns with the text and the object and purpose of the Convention and with the fundamental principle of finality and stability of boundaries, which applies to all limits that define the spatial allocation of jurisdictions.

What is true with regard to subsequent physical change is even more justified in the case of territorial loss caused by anthropogenic sea-level rise. Basic principles of equity, fairness and justice in the interpretation of the law command that those particularly affected by climate change that originates primarily in human activities abroad should not suffer its consequences. With regard to developing states, particularly small island States, the right to development, the obligation to respect their territorial integrity and the right of peoples to self-determination in its socio-economic dimension are of particular relevance. Permanent sovereignty over their natural resources is intimately connected to the exercise of sovereign rights over maritime areas.

Notes

1. Climate Change 2023, Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 81: "Relative to 1995–2014, the likely global mean sea level rise by 2050 is between 0.15 to 0.23 m in the very low GHG emissions scenario (SSP1–1.9) and 0.20 to 0.29 m in the very high GHG emissions scenario (SSP5–8.5); by 2100 between 0.28 to 0.55 m under SSP1–1.9 and 0.63 to 1.01 m under SSP5–8.5."

2. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 51, para. 96.

3. This is the case for the territorial sea, contiguous zone and exclusive economic zone (articles 3, 4, 33(2) and 57 UNCLOS), as well as for the continental shelf, when the outer edge of the continental margin does not extend beyond 200 nautical miles from the baselines (article 76(1) UNCLOS). It is worth noting that, *even* with regard to a natural prolongation-based continental shelf, distance from the baselines may define the outer limit, when the coastal State has relied on the *350-nautical-mile constraint* to set the maximum extent of its maritime area (article 76(5) and (6) UNCLOS). Conversely, if the coastal State has relied on the *depth constraint*, namely, a line situated 100 nautical miles from the 2500-meter isobath (article 76(5) UNCLOS), coastal recession would have no bearing on the outer limit of the continental shelf. While sea-level rise would affect the depth of the sea, a "one-meter rise" would be within "the error range" of the relevant charts and could be "offset" by the simplified straight lines that define the outer limit (article 76(7) UNCLOS). On this last point, see, Stuart B. Kaye, "The Law of the Sea Convention and Sea Level Rise in the light of the South China Sea Arbitration," *International Law Studies* 93 (2017), pp. 427–428. If the coastal State defined the outer limit based on the sediment thickness formula, or the distance from the foot of the slope formula (article 76(4) UNCLOS), sea-level rise would have no impact, unless it were to be sufficiently substantial to make it impossible to respect one of the aforementioned constraint lines.

4. Clive Schofield refers to a "triumvirate" of scholars (David Caron, Alfred H. A. Soons and David Freestone), who were among the firsts to suggest that baselines and outer limits would move as a consequence of sea-level rise. Clive Schofield, "A New Frontier in the Law of the Sea? Responding to the Implications of Sea Level Rise for Baselines, Limits and Boundaries," in Richard Barnes and Ronán Long (eds.), *Frontiers in International Environmental Law: Oceans and Climate Challenges—Essays in Honour of David Freestone* (Leiden: Brill, 2021), pp. 172–173, https://doi.org/10.1163/9789004372887_007. See: David D. Caron, "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of

a Rising Sea Level," *Ecological Law Quarterly* 17 (1990), p. 621; Alfred H. A. Soons, "The Effects of a Rising Sea Level on Maritime Limits and Boundaries," *Netherlands International Law Review* 37 (1990), p. 207, https://doi.org/10.1017/S0165070X00006513; David Freestone, "International Law and Sea Level Rise," in Robin Churchill and David Freestone (eds.), *International Law and Global Climate Change* (Graham and Trotman, 1991), p. 109.

5. With regard to the continental shelf, the *legal* concept transpires but is different from the *physical* concept. This is obvious when dealing with a *distance-based* continental shelf, which extends up to 200 nautical miles from the baselines, regardless of the geomorphological and geological characteristics of the seabed and subsoil. As for a *natural prolongation-based* continental shelf, the law relies on natural features to define the outer limit of this maritime area, which in fact encompasses not only the physical continental shelf, but also its slope and rise. In this respect too, however, the law sets constraints, discussed in the previous footnote, which entail that the outer limit of this maritime area will not necessarily correspond to the outer edge of the continental margin. See, in particular, Xuexia Liao, *The Continental Shelf Delimitation Beyond 200 Nautical Miles—Towards a Common Approach to Maritime Boundary-Making* (Cambridge: Cambridge University Press, 2022), pp. 15–22.

6. For a critique of the thesis, see, Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford: Oxford University Press, 2019), https://doi.org/10.1093/oso/9780198743644.001.0001.

7. Thus, while intermediate points are not affected, straight and archipelagic baselines may eventually be affected since these lines must be "connected to, or anchored to, points on or above the low-water line." See, for example, Leonardo Bernard, Michael Petterson, Clive Schofield and Stuart Kaye, "Securing the Limits of Large Ocean States in the Pacific: Defining Baselines Limits and Boundaries Amidst Changing Coastlines and Sea Level Rise," *Geosciences* 11 (2021), p. 394, https://doi.org/10.3390/geosciences11090394.

8. With regard to *knock-on* effects, one should not understand this to mean that outer limits precisely replicate the shapes of receding baselines. If that were the case, recession at any point of the coastline would have implications on outer limits, which in this scenario would *mirror* the low-water line. However, States generally rely on the *envelope of arcs* method, not the *tracé parallèle* technique. This means that, in respect of outer limits, coastal recession is a concern when it affects the "outermost points" of baselines, that is, those points from which the intersecting arcs of circles are drawn to determine the maximum breadth of maritime areas. See, for example, Clive Schofield, David Freestone, "Islands Awash Amidst Rising Seas: Sea Level Rise and Insular Status under the Law of the Sea," (2019) *International Journal of Marine and Coastal Law* 34 (2019), p. 400, https://doi.org/10.1163/15718085-13431098.

9. According to this view, an island, which no longer can sustain "human habitation" or an "economic life of (its) own," would become a rock that only generates entitlements to a territorial sea and contiguous zone (article 121 UNCLOS). An island, or a rock, that is no longer "above water at high tide," would become a low-tide elevation that generates no entitlements whatsoever, and cannot be used as a baseline, if it is wholly situated at a distance "exceeding the breadth of the territorial sea" of a mainland, island or rock (article 13 UNCLOS). Conversely, the fact that an island is *demoted* to the status of low-tide elevation has no practical consequences if it remains within the territorial sea of a mainland or island. In these circumstances, the demoted low-tide elevation can be used as the baseline for measuring the breadth of the maritime areas generated by those other features. There are other situations, involving notably straight and archipelagic baselines in which downgrading would have no consequences either (articles 7(4) and 47(4) UNCLOS). For a description of all possible situations of "reclassification," see, Christine Pichel, *Le régime des îles, rochers et hauts-fonds découvrants en droit international* (Bruxelles: Bruylant, 2022), pp. 223–226.

10. This would follow from the fact that the conditions for drawing archipelagic baselines are no longer met, in terms of water to land "ratio," in terms of "length" of the baselines, or due to the baselines "appreciable" departure from "the general configuration of the archipelago" (article 47 UNCLOS). See, in particular, Lucius Caflisch, "Les îles englouties—essai de prospection juridique," in Société française pour le droit international, *Iles et droit international: journée d'études de Paris* (Paris: Pedone, 2020), pp. 38–41. The same can be said with regard to straight baselines. Sea-level rise may entail that new straight baselines have to be drawn, but also that the requirements for drawing such baselines can no longer be met. In this case, the coastal State would have to rely on normal baselines. This may be the case, for example, if sea-level rise were to affect the indentation of a coastline, the "entrance" of a bay, or the configuration of a "fringe of islands" (articles 7 and 10 UNCLOS). See, for example, Vincent P. Cogliati-Bantz, "Sea-Level Rise and Coastal States' Maritime Entitlements: A Cautious Approach," *The Journal of Territorial and Maritime Studies* 7(1) (2020), p. 91.

11. See, for example, Soons (n 4), p. 215 and Julia Lisztwan, "Stability of Maritime Boundary Agreements," *Yale Journal of International Law* 37 (2012), pp. 156–157.

12. In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua [Intervening])*, the Chamber explained that, if it considered "topographical features" when resolving the dispute, it is not because it was appealing "to any concept of natural frontiers," but because "in cases otherwise dubious," it may be presumed that "local features" have been selected "to provide an identifiable and convenient boundary." *Judgment, I.C.J. Reports 1992,* p. 390, para. 46.

13. Marcelo G. Kohen, *Possession contestée et souveraineté territoriale* (Paris: Presses Universitaires de France, 1997), pp. 155–156.

14. The *thalweg* is the line connecting the succeeding deepest soundings of the main navigable channel.

15. Prosper Weil, *The Law of Maritime Delimitation—Reflections* (Cambridge: Cambridge University Press, 1989), pp. 50–56.

16. For recent examples in the jurisprudence, one can consider the adjustment made because of the generally concave configuration of the coastlines of Somalia, Kenya and Tanzania, as well as those made on account of the disproportionate effects of the Corn Islands and the Santa Elena Peninsula. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 196, para. 154 and p. 218, paras. 192–194; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, pp. 265–270, paras. 162–174.

17. Kohen (n 13), p. 164: "Qui dit caractère définitif ne dit pas immutabilité des frontières. Il serait inconcevable d'interpréter ce principe comme signifiant qu'une frontière, une fois établie, resterait ainsi fixée une fois pour toutes. En revanche, ce que le principe veut exprimer est le fait que, lorsque les Etats déterminent une frontière, celle-ci ne pourra subir aucune modification si ce n'est par les moyens autorisés par le droit international, notamment l'accord des parties destiné à modifier le tracé de la frontière jusqu'alors existante. "; Daniel Bardonnet, "Les frontières terrestres et la relativité de leur tracé (problèmes juridiques choisis)," *Recueil des Cours de l'Académie de Droit international* 153 (1976), pp. 68–70.

18. *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, para. 73.

19. *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962*, p. 34.

20. See, for example, the Helsinki Final Act of the Conference on Security and Co-operation in Europe of 1975, in which it was stated that the participating States "consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement" (https://www.osce.org/files/f/documents/5/c/39501.pdf).

21. *Decision of the Tribunal with Respect to the Application for Revision and Subsidiary Interpretation of the Award of 21 October 1994, Submitted by Chile, 13 October 1995, RIAA, Vol. XXII*, pp. 24–26, paras. 54 and 58: "However, as a legal concept the stability of frontiers does not depend on possible changes which may occur in the ground across which the frontiers run, changes which constitute a strictly physical phenomenon… In fact, once the frontier has been determined on a moving glacier or along a river whose *thalweg* shifts its course, it can happen that the frontier follows the changes in the ice-field or the *thalweg* of the river or that it remains fixed. The option is open for the parties to agree that the frontier shall follow the shifts of the glacier or *thalweg* or to 'fix' the frontier at the moment when it is delineated. This is done by indicating the geographical coordinates of the points which make up the frontier line."

22. Kohen (n 13), p. 167; Purcell (n 6), p. 148.

23. On the matter of sovereignty over newly emerged islands, rocks and low-tide elevations, see, in particular, Pichel (n 9), 2022, pp. 325–331 and Haritini Dipla, Danae Azaria, "Islands, New," *Max Planck Encyclopedia of Public International Law* (2021) (https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1182?prd=OPIL). With regard to features that have emerged in the territorial sea, they belong to the State in whose maritime area they have formed since States have sovereignty over all physical layers of the territorial sea, namely, the seabed and subsoil, the water column and the airspace. As for islands and rocks that have emerged outside the territorial sea, the argument can be made that they are *terrae nullius* subject to occupation. For our purposes, what matters is that a State cannot rely on a new feature that has emerged in one of its maritime areas to compel its neighbor to change an agreed or decided maritime boundary. Likewise, that neighbor cannot rely on the disappearance of a feature belonging to the former with a view to unilaterally challenging the maritime boundary.

24. In practice, even assuming that the *clausula rebus sic stantibus* were to be applicable to maritime boundaries, it would almost be impossible to meet the relevant requirements. The party that wishes to terminate the boundary agreement would have to demonstrate that the geographical circumstances of the time of delimitation "constituted an essential basis of the consent of the parties" and that the parties had "not foreseen" the changes to the coastlines (62(1)(a) VCLT). In reality, as discussed below, the law of maritime delimitation rests on the assessment of the situation at the time of the delimitation, an approach that by definition suggests that what may happen later has no bearing on the choice of boundary.

25. *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 35–36, para. 85; *The Bay of Bengal Maritime Boundary Arbitration Between the People's Republic of Bangladesh and the Republic of India, Award of 7 July 2014, RIAA, Vol. XXXII*, p. 74, para. 216.

26. Article 11(a) of the Vienna Convention on Succession of States in respect of Treaties (*UNTS* 1946 (1996), p. 3). As an example, one can mention the continental shelf boundary concluded between Italy and the Socialist Federal Republic of Yugoslavia (SFRY), which has remained binding on the successors following the dissolution of the SFRY (*UNTS* 1466 (1987), p. 25).

27. See, in particular, *Case Concerning the Delimitation of Maritime Boundary Between Guinea-Bissau and Senegal, Award 31 July 1989, RIAA, Vol. XX,* p. 274, para. 88. In this case, the Arbitral Tribunal found that a maritime boundary concluded by France and Portugal remained binding on Senegal and Guinea-Bissau, with regard to the maritime areas it delimited, namely, the territorial sea, the contiguous zone and the continental shelf. Judge Bedjaoui dissented (*ibid*., pp. 167–168, paras. 34–35), but the applicability of the *uti possidetis juris* with regard to maritime areas and boundaries appears to be well established, regardless of whether one is dealing with internal administrative divisions or boundaries. See, in particular, Giuseppe Nesi, "*Uti possidetis juris* e delimitazioni marittime," *Rivista di diritto internazionale* 74 (1991), p. 534; Marcelo Kohen, "*L'uti possidetis juris* et les espaces maritimes," in *Liber amicorum Jean-Pierre Cot: le procès international* (Bruxelles: Bruylant, 2009), p. 155.

28. Soons (n 10), pp. 226–227.

29. With regard to the delimitation in the Caribbean Sea, the ambulatory part of the maritime boundary adapts to the frequent physical changes occurring at the mouth of the San Juan River. The river boundary between Costa Rica and Nicaragua is an ambulatory line following the right bank of the river. In other words, the maritime boundary has to adapt to the changes to the right bank, and especially to those that affect the unstable sand spit on the right side of the mouth of the river, where the terminal point of the frontier is located. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, pp. 171–173, paras. 80–85.

30. See, in particular, Massimo Lando, "Stability of Maritime Boundaries and the Challenge of Geographical Change: A Reply to Snjólaug Árnadóttir," *Leiden Journal of International Law* 35 (2022), pp. 388–389, https://doi.org/10.1017/S0922156522000061.

31. *The Bay of Bengal Maritime Boundary Arbitration Between the People's Republic of Bangladesh and the Republic of India, Award of 7 July 2014, RIAA, Vol. XXXII*, p. 62, para. 212.

32. *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 106, para. 131.

33. *The Bay of Bengal Maritime Boundary Arbitration* (n 31), p. 63, para. 217.

34. Snjólaug Árnadóttir, "Fluctuating Boundaries in a Changing Marine Environment," *Leiden Journal of International Law* 34 (2021), pp. 479–480, https://doi.org/10.1017/S0922156521000145.

35. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 742, para. 277.

36. *Ibid*.

37. *Ibid*., p. 743, para. 279.

38. Nicaragua, which understood the river boundary to be ambulatory according to the 1906 Award of the King of Spain, had asked the Court to clarify that the starting point of the maritime boundary should be "the *thalweg* of the main mouth of the River Coco such as it may be *at any given moment*" (emphasis added). Conversely, Honduras had asked the Court to start the maritime delimitation at sea. It is not altogether clear whether Honduras believed that, in 1962, a mixed commission had fixed the terminal point of the land boundary at a precise location. In general, the judgment could have been more precise on this matter, but overall it suggests that the real problem was not instability, but the impact of instability on the land boundary terminus and the related controversy concerning the islands that had formed in the mouth. *Ibid*., pp. 692–693, paras. 99–101 and pp. 755–756, paras. 307–311.

39. See, for example, the publications listed in endnote 4.

40. International Law Commission, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, 28 February 2020, A/CN. 4/740, pp. 26–27, paras. 72–75.

41. See, for example, Caron (n 4), pp. 634–635.

42. With regard to the outer limits of the exclusive economic zone, see, International Law Commission, First issues paper (n 40), p. 27, para. 75.

43. See Articles 16, 47(8) and (9) and 75 of UNCLOS.

44. According to Article 1 of the Geneva Convention on the Continental Shelf of 1958, this maritime area could extend "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (*UNTS* 499 [1965], p. 311).

45. For a detailed review of the criticisms of the criterion of exploitability at a time of decolonization, when developing countries sought to establish a new international economic order, see, Virginie J. M. Tassin, *Les défis de l'extension du plateau continental—la consécration d'un nouveau rapport de l'Etat à son territoire* (Paris: Pedone, 2011), pp. 56–63.

46. The only argument that is sometimes invoked to justify treating the outer limits of the continental shelf differently rests on the expensive investments that are required in the field of exploration and exploitation of the seabed and subsoil. This argument is ultimately unpersuasive since the aforementioned activities also occur within the territorial sea and exclusive economic zone.

47. Article 76(5) of UNCLOS.

48. Article 76(4) of UNCLOS.

49. According to Article 6 of UNCLOS, the same is true for "reefs" of "islands situated on atolls or of islands with fringing reefs."

50. See, in particular, Purcell (n 6), pp. 162–173. The author explains that the low-water line is by definition a "cartographical construct," not a "physical tide line on the coast."

51. Far from suggesting that baselines and outer limits are truly ambulatory, in the sense that they automatically adjust to physical change, many proponents of the "ambulatory thesis" rather suggest that there is an obligation to update them to follow such change. See, for example, Moritaka Hayashi, "Sea Level Rise and the Law of the Sea: How Can the Affected States Be Better Protected?," in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds.), *The Limits of Maritime Jurisdiction* (Leiden: Brill, 2014), pp. 608–610, https://doi.org/10.1163/9789004262591_030.

52. International Law Commission, First issues paper (n 39), p. 41, para. 104(f).

53. *Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise*, adopted by the Pacific Islands Forum, 6 August 2021 (https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/).

54. What is remarkable is that, according to some scholars, Article 7(2) of the Convention is *both* the source of the problem and the solution to it. They say it is the problem because of the negative inferences they unnecessarily draw from the provision. They say it is the solution because they believe this provision could be interpreted broadly so as to encompass all coastlines rendered unstable due to sea-level rise, regardless of the presence of deltas. Their interpretation is unconvincing and unnecessarily complicated. The main problem is that they seek to find a solution to a problem, the moving maritime areas thesis, which need not be assumed to exist. For an exposition of this view, which suggests that States should draw straight baselines to resist coastal recession, even if their coastlines are neither indented, nor fringed with islands, see Signe Veierud Busch, "Sea Level Rise and Shifting Maritime Limits: Stable Baselines as a Response to Unstable Coastlines," *Arctic Review on Law and Politics* 9 (2018), pp. 180–185, https://doi.org/10.23865/arctic.v9.1162. More generally, for expositions of the *a contrario* reading, see: Caron (n 4), pp. 634–636; Soons (n 4), p. 220.

55. The proponents of the moving maritime areas thesis sometimes suggest that Article 7(2) of UNCLOS only provides for a *provisional* exception to the rule which they negatively infer. See, for example, Soons (n 4), p. 220.

56. The same is true for islands, low-tide elevations and archipelagic States.

57. *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 195; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, pp. 644–645, paras. 35–38.

58. International Law Commission, First issues paper (n 40), p. 54, para. 141.

59. See, for example, Rolf Einar Fife, "Sea-Level Rise in Relation to International Law: How

to Protect Coastal State Rights by Operationalizing Legal Analysis," in Jorge Viñuales, Andrew Clapham, Laurence Boisson de Chazournes and Mamadou Hébié (eds.), *The International Legal Order in the XXIst Century—Essays in Honour of Professor Marcelo Gustavo Kohen* (Leiden: Brill, 2023), p. 786.

60. Aside from the Declaration on Preserving Maritime Zones of the Pacific Island Forum (n 52), one can mention the Taputapuātea Declaration on Climate Change, 16 July 2015 (https://www.samoagovt.ws/wp-content/uploads/2015/07/The-Polynesian-P.A.C.T.pdf) and the Delap Commitment on Securing our Common Wealth of Oceans, 2 March 2018 (https://www.pnatuna.com/sites/default/files/Delap%20Commitment_2nd%20PNA%20Leaders%20Summit.pdf).

61. The Committee on International Law and Sea-Level Rise of the International Law Association adopted a *de lege ferenda* approach, premised on the assumption that the "ambulatory thesis" was established. See, in particular, International Law Association, Committee on International Law and Sea-Level Rise, Minutes of the Inter-sessional Meeting, Lopud, 15–16 September 2017, pp. 5–6; International Law Association, International Law and Sea-Level Rise, Report of 2018, pp. 9–12. Interestingly, the Chair of the Committee and one of the Co-Rapporteurs recently suggested that, in reality, "the 'ambulatory' nature of baselines and of the outer limits … was *more accurately* seen as an interpretation of the relevant rule of the LOSC, rather than as a description of the rule itself" (emphasis added). Davor Vidas, David Freestone, "Legal Certainty and Stability in the Face of Sea Level Rise: Trends in the Development of State Practice and International Law Scholarship on Maritime Limits and Boundaries," *The International Journal of Marine and Coastal Law* 37 (2022), p. 693, https://doi.org/10.1163/15718085-bja10106.

62. Samoa on behalf of the *PSIDS* group (AC/C. 6/76/SR. 19, p. 11, para. 69 and AC/C. 6/77/SR. 28, p. 5, para. 20); Fiji on behalf of the *PIF* (AC/C. 6/76/SR. 19, p. 11, para. 75 and ILC 2021, https://legal.un.org/ilc/sessions/72/pdfs/english/slr_pif.pdf); *Antigua and Barbuda* (ILC 2021, https://legal.un.org/ilc/sessions/72/pdfs/english/slr_antigua_barbuda.pdf); Antigua and Barbuda on behalf of *AOSIS* (AC/C. 6/76/SR. 19, p. 13, para. 78 and AC/C. 6/77/SR. 28, p. 2, para. 2); *Egypt* (AC/C. 6/76/SR. 20, p. 11, para. 58); *Chile* (AC/C. 6/76/SR. 21, p. 8, para. 56); *Estonia* (*ibid.,* p. 16, para. 120); *Maldives* (*ibid*., p. 19, para. 141 and ILC 2021, https://legal.un.org/ilc/sessions/72/pdfs/english/slr_maldives.pdf); *Micronesia* (AC/C. 6/76/SR. 21, p. 20, para. 149 and ILC 2021, https://legal.un.org/ilc/sessions/72/pdfs/english/slr_micronesia.pdf); *Malaysia* (AC/C. 6/76/SR. 21, p. 20, para. 154); *Argentina* (AC/C. 6/76/SR. 22, p. 6, para. 32); *Papua New Guinea* (*ibid*., para. 35); *Solomon Islands* (*ibid*., p. 11, para. 78); *Indonesia* (*ibid.,* p. 12, para. 84); *Algeria* (*ibid.,* p. 14, paras. 99–100); *Cyprus* (*ibid.,* pp. 14–5, paras. 103–4 and AC/C. 6/77/SR. 28, p. 19, para. 120–1); *Tonga* (AC/C. 6/76/SR. 22, pp. 16–7, paras. 118–9); *Greece* (*ibid.,* p. 18, paras. 129–30); *Philippines* (AC/C. 6/76/SR. 23, p. 4, paras. 19–20); *Cuba* (AC/C. 6/77/SR. 27, p. 18, para. 83); *Bulgaria* (AC/C. 6/77/SR. 29, p. 10, para. 66); *New Zealand* (ILC 2022, https://legal.un.org/ilc/sessions/74/pdfs/english/slr_newzealand.pdf). Interestingly, other States, which likewise support preservation of baselines, have emphasized that while there is no obligation, there is a right to update baselines. See *Italy* (*AC/C. 6/76/SR. 20, P. 15, Para. 87*) and, in particular, *Germany* (AC/C. 6/77/SR. 27, pp. 9–10, para. 40 and ILC 2022, https://legal.un.org/ilc/sessions/74/pdfs/english/slr_germany.pdf) and the *Philippines* (ILC 2022, https://legal.un.org/ilc/sessions/74/pdfs/english/slr_philippines.pdf). Among the few that appeared to support the opposite view, *Romania* has changed its position to favor the preservation of baselines (AC/C. 6/77/SR. 27, p. 4, para. 12) and the *USA* have declared that they "would not challenge baselines and limits that were not updated despite the sea-level rise" (*ibid*., p. 3, para. 6).

63. Alliance of Small Island States, Leaders' Declaration, 22 September 2021 (https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/).

64. On subsequent practice, see, in particular, Vidas, Freestone (n 61), pp. 701–723 and Valérie Boré Eveno, "Les impacts de l'élévation du niveau de la mer sur les limites maritimes: du flou juridique aux éclairages de la pratique," *Annuaire du droit de la mer* 24 (2020), pp. 77–83.

65. On the object and purpose of UNCLOS, see, in particular, José Luis Jesus, "Rocks, New-Born Islands, Sea Level Rise and Maritime Space," in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann, Rüdiger Wolfrum (eds.), *Negotiating for Peace—Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), pp. 593–594 and Boré Eveno (n 64), pp. 69–70.

66. Preamble of UNCLOS.

67. *Ibid*.

68. Thus, Rosemary Rayfuse states that "the ability to stipulate geographic coordinates indicates that baselines and charts may be disaggregated" and that, "once declared and publicized," baselines and outer limits "remain fixed" and "attract a presumption of permanence." Rosemary Rayfuse, "Sea Level

Rise and Maritime Zones—Preserving the Maritime Entitlements of Disappearing States," in Michael B. Gerrard and Gregory E. Wannier (eds.), *Threatened Island Nations—Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013), p. 183, https://doi.org/10.1017/CBO9781139198776.010.

69. Purcell (n 6), pp. 214–215.

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Access to Energy and Environmental Protection Under UNCLOS

Constantinos Yiallourides

Structured Abstract

Article Type: Essay

Purpose—This essay offers some reflections on the interplay between energy and environmental protection under the framework of UNCLOS.

Design, Methodology, Approach—In light of recent developments, the provisions of UNCLOS, relevant legal instruments and case law, this essay discusses the energy characteristics of UNCLOS; how UNCLOS seeks to balance access to energy and environmental protection; and the role UNCLOS is likely to play in this field in the coming years.

Findings—The adoption of UNCLOS in 1982 marked the culmination of global efforts to achieve, among others, two crucial goals: First, legal certainty for coastal states to access marine energy resources of the continental shelf and the exclusive economic zone. Second, guarantees that energy activities within national jurisdiction or control would not cause damage to the environment of other states or the global commons. However, the relevance of UNCLOS in balancing energy and environmental objectives in the 21st century depends on UNCLOS' ability to facilitate transformative normative change.

Practical Implications—When balancing access to energy with environmental protection, due diligence duties under UNCLOS require the introduction of robust environmental energy policies, legislation, and administrative controls applicable to the activities of both public and private actors. Such controls are necessary to prevent or mitigate the risk of transboundary harm to other states or the global commons.

Originality, Value—This essay presents a less discussed aspect of UNCLOS, namely the nexus between energy and marine environmental protection. It shares some perspectives on how UNCLOS can be used to evaluate the legality of energy activities, both domestically and internationally, against environmental standards states have already agreed to. UNCLOS could encourage further efforts to address the impacts of climate change, in line with the

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general obligation to protect the marine environment. However, it depends on states themselves utilizing UNCLOS, including through recourse to international courts and tribunals.

Keywords: due diligence; energy; environmental protection; UNCLOS

I. Energy and Environmental Protection

In the heart of the North Sea, about 130 km (70 nautical miles) off the coasts of the United Kingdom, fields of wind turbines stretch across an area almost as large as Greater London and nearly twice the size of New York City.[1] The Dogger Bank Wind Farm harnesses the North Sea's gusts to generate clean, renewable, energy which could power up to six million homes annually.[2] In the Straits of Johor, Singapore's massive floating solar farms span an area equivalent to 45 football fields and produce enough clean energy to power the country's water treatment plants.[3] Across the Pacific rim, countries like Australia, Japan, South Korea, Indonesia, and Malaysia are actively pursuing plans for offshore carbon dioxide (CO_2) capture and storage hubs. These would involve capturing CO_2 emissions at power generation stations which use either fossil fuels or biomass and transporting CO_2 across borders to be securely sequestered beneath the ocean floor—a collaborative effort to mitigate climate change impacts through carbon abatement.[4] Meanwhile, in the Arctic Circle, rapidly shrinking ice caps remain a stark reminder of the environmental toll of States' continued energy dependence on fossil fuels.[5] Global energy demand is forecast to increase by 66% by 2030, with fossil fuels accounting for a staggering 80% of the energy mix in 2022.[6] The energy sector is currently the primary cause of the polluted air that over 90% of the world's population is forced to breathe, which in turn is linked to over six million premature deaths a year, according to International Energy Agency data.[7] These interconnected landscapes are only a fraction of the complex relationship between energy and environmental protection. The international law of the sea is at the heart of this relationship.

Over four decades ago, on 30 April 1982, the Third United Nations Conference on the Law of the Sea adopted the world's first comprehensive treaty dealing with all aspects of the seas and their resources: the United Nations Convention on the Law of the Sea (UNCLOS).[8] UNCLOS came into force on 16 November 1994. Today, UNCLOS remains one of the most widely ratified treaties, with 169 parties, including the European Union (EU).[9] A key objective of UNCLOS was establishing a legal order for the oceans and seas, including by promoting the equitable, efficient, and environmentally sound use of marine energy resources.[10] Indeed, UNCLOS encompasses the international legal framework governing all types of maritime activities across oceans and seas. This includes, among others, the exploration and exploitation of natural resources; the preservation of marine ecosystems; the installation of offshore cables and pipelines; and marine scientific research, including research for exploring and exploiting seabed energy resources. Despite being a "Law of the Sea" Convention, the geographical scope of UNCLOS extends well beyond the maritime domain. It also applies to land-based energy activities which may adversely impact the marine environment. For example, UNCLOS would apply to the operations of a nuclear waste reprocessing plant which discharges treated wastewater into the ocean. This is due to the waste's potential harmful effects on the marine environment.[11]

UNCLOS is often referred to as a "constitution for the oceans," but the relevance of UNCLOS in balancing energy and environmental objectives in the 21st century is

dependent on the Convention's ability to transform, adapt, and "mediate change."[12] This essay offers some reflections on the interplay between energy and environmental protection within the framework of UNCLOS. It discusses, in turn, the "energy" origins of UNCLOS; second, how UNCLOS seeks to balance access to energy and environmental protection; and third, the role UNCLOS will likely play in this field in the years ahead.[13]

II. The "Energy" Origins of UNCLOS

If we start with the origins of UNCLOS, UNCLOS was born out of dynamic international law-making processes prompted by radical technological developments in offshore drilling, which had revealed vast oil and gas resources beneath the seabed.[14] The discovery of offshore petroleum resources and new technological advancements to exploit such resources triggered both, first, a growing demand for jurisdiction and control over offshore areas and seabed resources and, second, an impetus for transforming the legal architecture of the oceans and the seas.

In the late 1930s, interest in offshore oil and gas resources beyond the limits of the territorial sea had already increased in California, Texas, and Louisiana.[15] However, the private sector found the high seas legal regime too risky to justify investing in the recovery of offshore resources. During World War II, this interest intensified as States sought to prepare for the post-war era. Many States, including the United States, turned their attention to offshore economic opportunities. Legal uncertainties abounded on the legal ownership of the continental shelf and its resources and whether the right to access, develop, and use such resources would rest with the coastal States concerned.[16]

The Secretary of the Interior for the United States, Harold Ickes, wrote to President Roosevelt in 1943, highlighting some of these concerns:

> My dear Mr President: The war has impressed us with the necessity for an augmented supply of natural resources. In this connection, I draw your attention to the importance of the Continental Shelf not only to the defence of our country, but more particularly as a storehouse of natural resources…. I suggest the advisability of laying the ground work now for availing ourselves fully on these riches in this submerged land and in the waters over them.[17]

In a follow-up exchange, Ickes envisaged the possibility of a shortage of crude oil by the end of 1944 to meet the requirements of the armed services and essential industrial and civilian needs. It was, therefore, imperative for the United States to take "immediate action to acquire a proprietary and managerial interest in foreign petroleum reserves."[18]

On 28 September 1945, United States President Truman stated that the continental shelf was an extension of the landmass of the coastal State and, thus, naturally appurtenant to it. He proclaimed that "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."[19] This novel assertion of offshore jurisdiction and control over the seabed not only modified the generally accepted "freedom of the seas" doctrine, but also triggered a new era of extended maritime zones. Just as President Truman claimed "jurisdiction and control" over the continental shelf and its resources in 1945, many States, particularly developing coastal States, made similar jurisdictional claims over the adjacent sea, to a distance of 200 nautical miles or

more. By 1958, 40% of all coastal States had made proclamations extending their territorial sea beyond the then 3-mile customary limit.[20] These States sought to change the established customary rule of *mare liberum* (freedom of seas) to take advantage of the seabed energy resources adjacent to their coasts.

Such claims had a "very quick impact on the evolution of the law" and led to the emergence of a new resource-focused regime: the continental shelf.[21] As early as 1950, only five years after Truman's proclamation, eminent publicists like Hersch Lauterpacht already asserted that sovereign rights to the mineral resources of the continental shelf were customary.[22] However, the contents of these continental shelf claims varied considerably, both in terms of their breadth and the legal rights asserted within the proclaimed maritime zones.

The four Geneva Conventions on the Law of the Sea of 1958 marked a first step in addressing some of these issues, but they were "unsuccessful in dealing with maritime zones."[23] UNCLOS was an opportunity to rectify these shortcomings and bring an end to the "chaotic situation in the post-war period."[24] Indeed, a renewed "law making necessity for a more equitable legal order" was required by the rapid technological advances, which opened the oceans to unprecedented seabed exploitation, and a growing number of newly independent States, which had often not taken part in the previous United Nations Conferences on the Law of the Sea.[25]

UNCLOS was further strengthened by the growing environmental consciousness of the 1960s; the momentum generated by the Stockholm Conference; and the adoption of global and regional environmental treaties in the 1970s.[26] UNCLOS scrapped the exploitability criterion for continental shelf entitlements and strongly emphasised the protection of the marine environment.[27]

Thus, UNCLOS' adoption in 1982 reflected the culmination of global efforts to achieve, among others, two crucial goals. First, legal certainty for coastal States to access marine energy resources of the continental shelf and the EEZ. Second, guarantees that energy activities within national jurisdiction or control would not cause damage to the environment of other States or the global commons.

III. Balancing Access to Energy and Environmental Protection

Under UNCLOS, the sovereignty of a coastal State extends to the territorial sea: a zone extending up to 12 nautical miles from the coast. The exclusive economic zone (EEZ) extends out to a maximum of 200 nautical miles from the coastal baselines. The EEZ is not sovereign territory, but the coastal State has exclusive sovereign rights in the EEZ for exploring, exploiting, and managing the "natural resources of the seabed and its subsoil" as well as "the waters superjacent to the seabed."[28] The coastal State's sovereign rights over seabed resources in the EEZ must be exercised in accordance with Part VI of UNCLOS, which governs the continental shelf regime and applies to all seabed resources. Part VI was included to harmonise the EEZ and the continental shelf regime.[29] Coastal States' sovereign rights in their EEZ encompass all "activities for the economic exploitation of the zone."[30] In particular, Articles 80 and 60(1)(b) of UNCLOS give coastal States the exclusive right to construct installations for any economic purpose, as well as to authorise and regulate the

construction, operation, and use of such installations. Under Article 81 of UNCLOS, the coastal State has the exclusive right to authorise and regulate drilling on the continental shelf "for all purposes." Article 85 of UNCLOS emphasises coastal States' right to exploit the subsoil by means of tunnelling.

UNCLOS' focus on environmental protection appears in multiple provisions. For instance, Article 311 states that UNCLOS prevails over any inconsistent pre-existing treaties; yet, Article 237 specifies that UNCLOS co-exists with international environmental treaties and specific obligations to prevent, reduce, and control pollution of the marine environment, including from energy-related activities.[31] As another example, Articles 145 and 194 articulate a general obligation to protect the marine environment from all sources of pollution. This includes adopting measures to protect and preserve the "ecological balance"; "marine flora and fauna"; "rare and fragile ecosystems"; and the "habitat of depleted, threatened or endangered species and other forms of marine life." The definition of pollution in Article 1(4) includes introducing substances "which results *or is likely to result to harm to living resources and marine life*" (emphasis added). Thus, it incorporates an element of precaution.

UNCLOS aims to settle "all issues relating to the law of the sea."[32] However, it does not provide detailed provisions on every issue. This is not a criticism. A single treaty cannot realistically address all issues comprehensively. Otherwise, it would be excessively long, prescriptive, and become—sooner or later—outdated. Rather, UNCLOS sets out the basic framework for States to exercise jurisdiction over activities at sea. It does not detail the rules governing those activities. This is UNCLOS' particular strength. UNCLOS delegates the development of specific regulations to competent international organisations.[33] In doing so, international law can develop over time without UNCLOS needing to be amended. That is why UNCLOS has sometimes been referred to as a "living treaty."[34]

A major "living" strength of UNCLOS is that it compels coastal States to balance their rights to access energy at sea in light of the rights of their coastal neighbours and the protection of the global commons. UNCLOS does so in three ways.

First, Article 56 specifies that the coastal State in the EEZ has, first, sovereign rights to explore, exploit, conserve, and manage all natural resources and, second, sovereign rights over other "activities for the economic exploitation and exploration of the zone."[35] Such activities include "the production of energy from water, currents and winds." Of note, no offshore wind energy projects existed when UNCLOS was being negotiated and drafted. However, the drafters had an eye to the future. They considered what "might happen" and this is precisely what happened. Article 56, which has been recognised as customary, makes clear that the rights of the coastal State in the EEZ extend to all energy activities, including those not necessarily anticipated at the time of UNCLOS' negotiation and drafting. Many different marine renewable energy technologies can produce energy directly from the ocean. Further research explores large offshore floating wind turbines for deep-sea installation,[36] and large solar panels on offshore platforms to produce solar energy.[37]

As mentioned earlier, another relevant technology is offshore carbon capture and storage (CCS). This method aims at permanently removing CO_2 from the burning of fossil fuels and burying it deep below the seabed into suitable geological formations. Such geological formations could include depleted offshore hydrocarbon reservoirs.[38] These fields have proven to be effective hydrocarbon storage reservoirs for millions of years. The injected

CO_2 would—in essence—return to the space it came from.[39] Under UNCLOS, "natural resources of the seabed and its subsoil" arguably include any sub-seabed geological formations used for CO_2 storage in the EEZ.[40] Widespread forms of CO_2 injection and storage in the sub-seabed already take place in enhanced oil recovery operations to enhance extracting residual hydrocarbons from mature wells with declining oil and gas production.[41] As Bankes writes,

> While CCS projects involve the injection of new substances into the subsoil rather than production from the subsoil, the pore space of the subsoil is itself as much a resource as are the hydrocarbon or other contents of pore space.[42]

Thus, offshore CCS projects are regulated under UNCLOS, even though these projects were not anticipated when UNCLOS was concluded.

Second, UNCLOS makes coastal State's sovereign rights over energy activities conditional upon environmental law requirements.[43] UNCLOS does not oblige States to conserve energy resources. However, sovereign rights in relation to offshore energy activities must be exercised in accordance with States' duty to protect and preserve the marine environment.[44] For instance, Article 60(3) of UNCLOS requires that any abandoned or disused installations or structures shall be removed to ensure safety of navigation with "due regard" to the protection of the marine environment. This duty of "due regard" goes "beyond mere courtesy"; its "breach may entail state responsibility under international law."[45] State sovereignty and sovereign rights over energy resources cannot be invoked to justify departing from environmental law obligations. Article 210(1) of UNCLOS mandates contracting parties to "adopt laws and regulations to prevent, reduce, and control pollution of the marine environment by dumping." Article 210(6) of UNCLOS emphasizes that these national laws, regulations, and measures must be as effective as global rules and standards in preventing, reducing, and controlling such pollution.

Third, UNCLOS makes sovereign rights over energy activities contingent on important due diligence duties. Due diligence entails an evolving and dynamic standard of control and regulation of technology. Thus, UNCLOS includes requirements to adopt "best available techniques," "best practicable means," or "best environmental practices," and to follow "generally accepted international standards." Article 194(1) of UNCLOS is an example:

> States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the *best practicable means* at their disposal and *in accordance with their capabilities*, and they shall endeavour to harmonize their policies in this connection [emphasis added].

This approach allows the standard of diligence to change as technology and operating techniques develop. Indeed, as the Seabed Chamber of the International Tribunal for the Law of the Sea (ITLOS) has noted, due diligence is a "variable concept" which:

> may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.[46]

It also noted "direct" environmental obligations of States which form "relevant factors" in meeting the due diligence requirement.[47] Some of these include the obligations to apply a precautionary approach; to follow best environmental practices; and to conduct an

environmental impact assessment (EIA). Importantly, the ITLOS Seabed Chamber noted that States may be obliged to legislate on these elements domestically as this forms part of the "necessary measures" to be taken by States to meet their due diligence obligations.[48] Thus, new industry best practices can offer better environmental solutions than existing ones. The EU Directive on the Safety of Offshore Oil and Gas Operations is a good example here. It was the first comprehensive EU regulation on the safety of offshore oil and gas operations. It is also a transnational legal standard on the operation of offshore platforms worldwide.[49]

When balancing access to energy and environmental production, "due diligence" requires introducing environmentally robust energy policies, legislation, and administrative controls applicable to the conduct of both public and private sectors. Such controls are necessary to prevent or mitigate the risk of transboundary harm to other States or the global commons. This is the minimum conduct expected from any government pursuing energy production: *you must not permit serious or significant harm to other States or the common spaces*. This is not simply responsibility for *injury ex post facto*. States must diligently prevent and control foreseeable risks.

For instance, Article 206 of UNCLOS requires conducting an EIA when "States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment."[50] This reflects UNCLOS' "precautionary approach."[51] The requirement to undertake an EIA has been incorporated into many international, regional, and national legal instruments and is now "a general obligation under customary international law."[52] Article 206 has been raised in several cases brought under the dispute settlement procedures of Part XV of UNCLOS.[53] In the *MOX Plant* case, Ireland sought provisional measures in relation to its claims concerning, inter alia, the United Kingdom's alleged failure to have "properly and fully … assessed" the "potential effects of the operation of the MOX plant on the marine environment of the Irish Sea," as well as the possible effects of "international movements of radioactive materials to be transported to and from the MOX Plant."[54] Similarly, in *Land Reclamation*, ITLOS was called upon to address EIA in the context of a request for provisional measures by Malaysia that Singapore had failed to properly assess environmental impacts of a land reclamation project.[55] Malaysia requested among others an order that Singapore suspend its land reclamation projects until it had conducted and published an assessment of the potential effects on the environment.[56] In the *South China Sea* arbitration, China's alleged failure to carry out an EIA for artificial islands that it has built on submerged coral reefs in the South China Sea was one claim asserted by the Philippines. The Tribunal found that the obligation to communicate the results of the EIA is "absolute," even if States maintain discretion as to the content and process of the EIA.[57]

Importantly, UNCLOS also provides a general obligation to pursue meaningful cooperation over environmental matters—notably to prevent marine pollution. The obligation to cooperate is an obligation of substance and a crucial element of environmental protection. ITLOS noted that this "a fundamental principle under UNCLOS and general international law."[58] In *MOX Plant*, *Land Reclamation*, and *Ghana/Côte d'Ivoire*, ITLOS ordered the parties to improve their cooperation and to consult, exchange information, and monitor or assess the risks and effects of their activities. These cooperation orders were made even though there was no finding that irreparable environmental harm was either imminent or likely.

IV. Looking Ahead

We can now consider whether UNCLOS, and the way it balances access to energy and environmental protection, will remain relevant in the years ahead. For a start, much more international law now supports UNCLOS compared to a few decades ago. The conclusion of UNCLOS was "only the beginning of a continuous 'law-building' process."[59] New international legal instruments prescribing best practice for environmental risk frequently come to life. One case study is the global legal regime on the decommissioning of disused or abandoned offshore energy installations and converting them into artificial reefs. This regime has been significantly developed through soft law instruments connected to UNCLOS.[60] Examples include the International Maritime Organization (IMO) Guidelines on Offshore Decommissioning,[61] the United Nations Environment Programme (UNEP) Guidelines on Artificial Reefs,[62] and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) Guidelines.[63] About 60 artificial reefs are now in the OSPAR maritime area alone. Turning disused offshore energy platforms into vibrant biodiversity hotspots was not necessarily anticipated when UNCLOS was being negotiated. Once again, however, this is regulated under UNCLOS.

Deliberate or constructive ambiguities exist in UNCLOS, but UNCLOS incorporates a robust dispute settlement system.[64] Environmental disputes have formed a significant proportion of the work of the International Court of Justice (ICJ), ITLOS, and arbitral tribunals.[65] Such disputes are likely to grow in the future because of climate change, environmental degradation, and access to energy sources—phenomena which often go hand in hand. Some of these decisions have developed and clarified UNCLOS. Others have created controversies. For instance, in *Ghana/Côte d'Ivoire,* ITLOS allowed Ghana to keep producing oil and gas in an undelimited maritime area which was also claimed by Côte d'Ivoire. ITLOS did so seemingly on precautionary environmental grounds. It said that suspending ongoing energy activities by Ghana "could pose a serious danger to the marine environment resulting, in particular, from the deterioration of equipment."[66] However, ITLOS was not convinced by Côte d'Ivoire's evidence that Ghana's petroleum activities would result in imminent environmental harm. Such evidence of harm included satellite images showing traces of pollution in the relevant area and increasing reports of whales washing up on the eastern shores of Ghana.[67] Ghana had countered that an EIA had been carried out. It argued that its petroleum licensing regulations were of the highest standards to rebut all allegations that the marine environment was at risk.[68]

Moving forward, ensuring large CO_2 emission reductions, to prevent global temperature rise from exceeding 2°C in the next decades, requires a fundamental shift in how we generate, transport, and use energy. Energy-hungry States must meet their commitments under the Paris Agreement to reduce substantially CO_2 emissions while also safeguarding their energy security, namely the "uninterrupted availability of energy sources at an affordable price."[69] States will likely seek more access to energy from a diverse range of energy sources. There will be "a lot more of everything": a lot more marine renewable energy, a lot more natural gas, and a lot more offshore carbon capture and storage.[70]

Challenges over ocean space and resources will undoubtedly arise. Sometimes, these challenges should be welcomed as they highlight areas which should be supplemented through the progressive development of the law. States have a shared interest and shared

responsibilities in responding to these issues. The 2009 EU Directive on the geological storage of carbon dioxide is a good example. It establishes a novel legal framework for the environmentally safe geological storage of CO_2. It covers all CO_2 storage in geological formations in the EU and the entire lifetime of storage sites.[71]

In conclusion, UNCLOS will remain crucial to, first, equitably and efficiently utilize marine energy resources and, second, protect and preserve the marine environment from all sources of pollution. Yet, it depends on States themselves using UNCLOS, including through recourse to international courts and tribunals. When international courts and tribunals are confronted with difficult questions of law, they do not confine them to some list of "too hard to deal with" cases. Instead, courts proceed to give the text meaning. This is what the International Law Association's study group on the Rules of Interpretation concluded in its final report in 2020.[72] Courts and tribunals notably respond to perceived novel risks, which requires turning to the interaction of law, science, and technology as these risks evolve.

Changes in the context create significant demands for change in the law. One recent development, which has gathered significant attention, is the turn to international courts and tribunals to address the legal obligations of States in respect of climate change, including in respect of its effects on the oceans.

At the international level, Vanuatu has led an initiative to obtain an advisory opinion on climate change from the ICJ. In March 2023, 132 States co-sponsored a resolution from the United Nations General Assembly referring the question to the ICJ. The request focuses notably on legal consequences in relation to States which are particularly vulnerable to climate change.[73]

A similar effort is also underway before ITLOS. In December 2022, the Commission of Small Island States on Climate Change and International Law, composed of six States from the Caribbean and Pacific, requested that ITLOS provide an advisory opinion on the obligations of States to protect and preserve the marine environment in relation to climate change under UNCLOS.[74] The request specifically cites Part XII of UNCLOS. Although Part XII of UNCLOS aims at preventing harm to the marine environment, it includes obligations on parties to prevent pollution from both ocean-based and land-based sources of energy production. The land-based obligations are found in Articles 194, 207, and 213 of UNCLOS. As such, the advisory opinion's scope could include State obligations to reduce land-based pollution to prevent harm to the marine environment. How ITLOS will respond to this request remains to be seen. More than 30 States and intergovernmental organizations have made written and oral submissions to ITLOS to voice their views on these issues.[75] Many States have asked ITLOS to adopt an evolutionary approach to interpreting the law of the sea in response to new and complex changing maritime circumstances, such as ocean acidification and ocean warming.[76] Indeed, UNCLOS already governs climate change-related impacts on the marine environment, including issues relevant to energy production and the carbon footprint on the ocean. As Holst writes,

> there is no convincing reason why a dispute concerning climate change-related impacts on the marine environment would not be a "dispute concerning the interpretation and application" of the UNCLOS, in particular when it concerns the "necessary measures" under Articles 192 and 194.[77]

Thus, the law of the sea can serve to evaluate State actions, both domestically and internationally, against the standards they have already agreed to. The law of the sea could

encourage further efforts to address the impacts of climate change, in line with the general obligation to protect the marine environment. The compulsory jurisdiction mechanisms under UNCLOS "makes judicial interpretation a potentially important mode of change of UNCLOS."[78] However, international courts and tribunals must be willing and prepared to, first, comprehensively review the effectiveness of preventive and risk-mitigating mechanisms governing such energy activities and, second, determine legal responsibility and liability for environmental harm caused by energy-related operations where States fail to meet their obligations under UNCLOS. After all, as the ICJ has held, any damage which impedes the environment's ability to provide goods and services is "compensable under international law."[79]

Notes

1. "Dogger Bank Wind Farm Project," https://doggerbank.com/, accessed March 3, 2024.
2. *Ibid*.
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7. International Energy Agency, "World Energy Outlook 2023," www.iea.org/reports/world-energy-outlook-2023/executive-summary, accessed March 3, 2024.
8. For a complete background, see Tommy T.B. Koh, "The Origins of the 1982 Convention on the Law of the Sea," *Malaya Law Review,* 29(1) (1987), pp. 1–17.
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10. Preamble, UNCLOS.
11. Article 194(3)(a), UNCLOS; see T.A. Mensah, "The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-Based Sources of Pollution," in *International Law and Sustainable Development*, eds. A. Boyle and D. Freestone (Oxford University Press, 1999), pp. 297–324, https://doi.org/10.1093/acprof:oso/9780198298076.003.0013.
12. Constantinos Yiallourides, "Change in the Law of the Sea: Context, Mechanisms and Practice, Written by Rozemarijn J. Roland Holst," *The International Journal of Marine and Coastal Law* 38(1) (2023), pp. 1–6, https://doi.org/10.2139/ssrn.4417708.
13. For the present purposes, "energy" encompasses all energy derived from the ocean's natural resources, including renewable energy from waves, tides, currents, thermal gradients, as well as energy produced from the combustion of seabed energy resources such as hydrocarbons.
14. Constantinos Yiallourides, *Maritime Disputes and International Law: Disputed Waters and Seabed Resources in Asia and Europe* (Routledge, 2019), pp. 8–9, https://doi.org/10.4324/9781351240536.
15. Ann L. Hollick, *U.S. Foreign Policy and the Law of the Sea* (Princeton University Press, 1981), pp. 28–31, 109–10, https://doi.org/10.1515/9781400886159.

16. *Ibid*.

17. Harry S. Truman, *Memoirs by Harry S. Truman: Year of Decisions* (Hodder and Stoughton, 1955) reproduced in Donald C. Watt, "First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945," *Marine Policy* 3(3) (1979), pp. 211–3.

18. *Ibid*.

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20. J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims, 3d ed.* (Brill, 2012) 136; Tullio Treves, "Historical Development of the Law of the Sea," in *The Oxford Handbook of the Law of the Sea*, eds. Donald R. Rothwell et al. (Oxford University Press, 2015) pp. 12–13.

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22. *Ibid*., pp. 2–79.

23. Tullio Treves, "Introductory Note: 1958 Geneva Conventions on the Law of the Sea, Geneva, 29 April 1958," *Audiovisual Library of International Law*, April 29, 1958, https://legal.un.org/avl/ha/gclos/gclos.html, accessed March 3, 2024; Robin Churchill, "UNCLOS: Fit for Purpose in the 21st Century?," *House of Lords: Select Committee on International Relations and Defence*, November 10, 2021, https://committees.parliament.uk/writtenevidence/40805/html/, accessed March 3, 2024.

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25. Jens Evensen, "UNCLOS: Origin and Process of Negotiation," in *Toward a New International Marine Order*, ed. Finn Laursen (Martinus Nijhoff, 1982) p. 3, https://doi.org/10.1163/9789004639423_004.

26. E. g., Principle 21 of the 1972 Stockholm Declaration on the Human Environment; Declaration and Action Plan adopted at the Stockholm Conference; London Dumping Convention (1972); International Convention for the Prevention of Pollution from Ships (1973); Regional marine environmental treaties concluded pursuant to UNEP's Regional Seas Programme (adopted in 1976); Convention on International Trade in Endangered Species (1973); Convention on Migratory Species (1979).

27. "The Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time," John R. Stevenson and Bernard H. Oxman, "The Future of the United Nations Convention on the Law of the Sea" (1994) 88 *AJIL* 488, 496, https://doi.org/10.2307/2203716; Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment, 3d ed.* (Oxford University Press, 2009) p. 3.

28. Article 56(1)(b), UNCLOS; Article 60(1)(b) and (2), UNCLOS.

29. Robert Beckman and Tara Davenport, "The EEZ Regime: Reflections After 30 Years" *LOSI Conference Papers*, May 2012, www.law.berkeley.edu/files/Beckman-Davenport-final.pdf accessed March 3, 2024; see also Camille Goodman, "Harnessing the Wind Down Under: Applying the UNCLOS Framework to the Regulation of Offshore Wind by Australia and New Zealand," *Ocean Development & International Law* 54(3) (2023), pp. 253–276, https://doi.org/10.1080/00908320.2023.2247327.

30. Articles 56, 61(2), 64, 65, 66, 117, 118, 123, 194, 197–201, UNCLOS.

31. Article 237, UNCLOS.

32. Preamble, UNCLOS.

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Biographical Statement

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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

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Journal

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Footnote

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

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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.